STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

Fraternal Order of Police, Lodge 7,	)	
	)	
Charging Party,	)	
	)	Case No. L-CA-20-019
and	)	
	)	
City of Chicago (Department of Police,	)	
	)	
Respondent.	)	

ORDER

On August 4, 2021, Administrative Law Judge Donald Anderson, on behalf of the Illinois Labor Relations Board, issued an Amended Recommended Decision and Order in the above-captioned matter. No party filed exceptions to the Administrative Law Judge's Recommendation during the time allotted, and at its October 21, 2021 public meeting, the Board, having reviewed the matter, declined to take it up on its own motion.

THEREFORE, pursuant to Section 1200.135(b)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b)(5), the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.

Issued in Chicago, Illinois, on October 21, 2021.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

/s/ Helen J. Kim
Helen J. Kim
General Counsel

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ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On September 25, 2019, the Charging Party, Fraternal Order of Police, Lodge No. 7 (the "Charging Party", the "Union", "the Lodge", or the 'FOP") filed an unfair labor practice charge (the "Charge") with the Illinois Labor Relations Board (the "Board"), alleging that the Respondent City of Chicago (Department of Police) (the "Respondent", the "Employer", the "City" or the component unit of the City referred to as the "CPD" or the "Department") violated the Illinois Public Labor Relations Act ("the Act"), 5 ILCS 315/1 *et seq., as amended.* After an investigation conducted in accordance with Section 11 of the Act and the Rules and Regulations of the Board, 80 Ill. Adm. Code §§ 1200-1300, the Board's Executive Director determined that the charge involved dispositive issues of fact or law and thereafter, on July 1, 2020, issued a Complaint for Hearing (the "Complaint"). The case was submitted to the undersigned on the basis of a Stipulated Record filed on February 5, 2021, and briefs were submitted by counsel for both parties on March 12, 2021. Both parties were given full opportunity to submit evidence and file written briefs, and both parties stipulated to the submission of the Stipulated Record in lieu of a hearing. After full consideration of the Stipulated Record and the briefs of the parties, and upon the entire record of the case, I recommend the following:

I. ISSUES AND CONTENTIONS

The dispute in this case revolves around the CPD's decision to implement a new automated timekeeping system, called the Chicago Automated Time and Attendance ("CATA") system, to replace multiple automated and paper-based timekeeping processes in order to track and record time worked by or otherwise compensated on behalf of Department members, including police officers represented by the Charging Party. The Charging Party contends that, despite its objections and demands to bargain, the Respondent unilaterally implemented a change in a mandatory subject of bargaining without bargaining with the Union over the change and that, by doing so, it failed to maintain the *status quo* as required by Section 14(l) of the Act.

The Charging Party also contends that the Respondent violated the Act by failing to bargain with the Union over the effects of the implementation of the new CATA system by means of the Respondent's "Time and Attendance Swiping Program" or "Swiping Program," also referred to as the "Swipe Policy." Specifically, the Charging Party asserts that issues have arisen with respect to the administration of discipline and exemptions from the Swiping Program and that the Respondent has failed or refused to bargain with the Charging Party concerning those issues. The Charging Party thus contends that the Respondent violated Sections 10(a)(4) and (1) of the Act.

The Respondent contends, first, that the Charge was untimely under Section 11(a) of the Act, in that "[t]he alleged unlawful conduct that the Lodge complained of against the City was known to the Lodge as early as October 2017 or at the latest, in March 2018." Even if the Charge was timely filed, however, the Respondent contends that it did not violate the Act in any way, asserting that the implementation of the CATA system and its attendant Swiping Program was not a mandatory subject of bargaining. The Respondent asserts that the obligation to keep

accurate time and attendance records is a matter of inherent managerial authority under Section 4 of the Act and a management right under Article 4 of the parties' Collective Bargaining Agreement ("CBA"). The Respondent further asserts that the issue of discipline is one that is covered by Article 7 (Summary Punishment) and 9 (Grievance Procedure) of the CBA.

II. STIPULATED FACTS

1. The City of Chicago (the "City") is a municipal corporation organized under the laws of the State of Illinois.

2. The City is a public employer within the meaning of Section 3(o) of the Act.

3. The City is a unit of local government under the jurisdiction of the Local Panel of the Board, pursuant to Section 5(b) of the Act.

4. CPD is an executive department of the municipal government of the City. Its duties and responsibilities are established by ordinance at Chapter 2-84 of the Municipal Code of the City of Chicago, Chapter 2-84.

5. The FOP is the bargaining representative of a bargaining unit ("Unit") consisting of all non-probationary police officers employed by the CPD below the rank of sergeant.

6. The Unit consists of "peace officers" within the meaning of Section 3(k) of the Act.

7. The FOP is and has been a labor organization within the meaning of Section 3(i) of the Act.

8. The FOP and the City are parties to a collective bargaining agreement ("CBA") covering the Unit, which was effective from July 1, 2012 through June 30, 2017 and a copy of

which was introduced into evidence as Joint Exhibit 1. By its terms, the CBA remains in force and effect past its expiration date.

9. Collective bargaining between the parties commenced after the expiration date and the parties currently remain engaged in negotiations for a successor Agreement. On November 22, 2017, the FOP filed a request for a mediation panel with the Board.

10. Although there has been some discussion on disciplinary issues during negotiations, no bargaining has taken place over the new Time and Attendance Swiping Program or the impact of the new Time and Attendance Swiping Program has on the Unit.

11. During the time relevant to the Charge (and continuing to date), CPD published various Department Notices and Employee Resource materials which remain currently in effect, namely the following:

- Employee Resource E02-02, captioned "Payroll and Timekeeping-Attendance," with an effective date of 07 January, 2019, a copy of which was introduced into evidence as Joint Exhibit 2.
- Employee Resource E02-02-02, captioned "Payroll and Timekeeping—Overtime/Compensatory Time/Working," with an effective date of 10 April, 2019, a copy of which was introduced into evidence as Joint Exhibit 3.
- Employee Resource E-02-03-03, captioned "Automated Daily Attendance and Assignment Record," with an effective date of 31 October, 2017, a copy of which was introduced into evidence as Joint Exhibit 4.
- Employee Resource E02-03, captioned "Time and Attendance Record," with an Effective Date of 29 June, 2016, a copy of which was introduced into evidence as Joint Exhibit 5.

- Employee Resource E-02-03-01, captioned "Sworn Time and Attendance Record," with an effective date of 29 June, 2016, a copy of which was introduced into evidence as Joint Exhibit 6.
- Department Notice D18-07, captioned "Electronic Overtime/Compensatory Time Report Pilot Program," with an effective date of 09 April, 2019, a copy of which was introduced into evidence as Joint Exhibit 7.

12. The Management and Labor Affairs Section ("MLAS"), since renamed Labor Relations Division ("LRD"), of the CPD is responsible for addressing and solving labor relations issues arising in the CPD.

13. On or about October 12, 2017, then-MLAS Director Wynter Jackson sent then-FOP President Kevin Graham a letter informing him of a "Chicago Automated Time and Attendance Pilot Program" ("Pilot Program") involving a new time clock which would be "used to track time and attendance," in which all personnel assigned to Police Headquarters only would be required to follow commencing November 1, 2017, a copy of which was introduced into evidence as Joint Exhibit 8.

14. The Department held a voluntary, informal meeting with the Department Headquarters staff on October 13, 2017, to which the FOP was invited and at which the Department presented various informational slides (Overview and Frequently Asked Questions) to explain the new Pilot Chicago Automated Time and Attendance ("CATA") Pilot Program, a copy of which was admitted into evidence as Joint Exhibit 9.

15. On October 30, 2017, Research and Development Director Karen Conway sent Chief Barbara West a To/From captioned "Request for Approval," a copy of which was introduced into evidence as Joint Exhibit 10.

16. On October 31, 2017, Sgt. Michael Kapustianyk, on behalf of Director Conway, sent a General Message to "All Units," re Reference #234495, Chicago Automated Time and Attendance (CATA) Pilot Program, in which he announced Phase I of the CATA system would became operational on 01 November 2017, a copy of which was introduced into evidence as Joint Exhibit 11.

17. On November 1, 2017, Phase I of the Pilot Program began and required all CPD employees, sworn officers and civilians, assigned to Headquarters to swipe in at the beginning of their tour of duty and swipe out at the end of their assigned tour of duty.

18. A copy of Department Notice D17-06, captioned "Chicago Automated Time and Attendance (CATA) System Pilot Program – Phase I," with an effective date of 01 November 2017 and an issue date of 31 October 2017 was introduced into evidence as Joint Exhibit 12.

19. The "General Information" portion of Department Notice D17-06, Section II(D), *inter alia*, states:

> Until further notice, all current manual or automated timekeeping procedures will continue in conjunction with the new CATA system, including the completion of the Attendance and Assignment Sheets, Time and Attendance Records, CLEAR Overtime applications, and Overtime/Compensatory Time Reports.

20. On February 23, 2018, the Bureau of Patrol Chief Fred Waller sent the 19th District Commander a To/From, introduced into evidence as Joint Exhibit 13, advising him of the upcoming requirement that all sworn and civilian members assigned to the 19th District would be required to swipe in at the beginning of their tour of duty and swipe out at the end of their tour of duty. In the To/From, Chief Waller also reiterated that "all current manual or automated timekeeping procedures will continue in conjunction with the new CATA system."

21. On or about March 1, 2018, the Department issued a revised Department Notice D17-06, captioned "Chicago Automated Time and Attendance (CATA) System Pilot Program—

Phase II, with an effective date of 4 March 2018 and an issue date of 1 March, a copy of which was admitted into evidence as Joint Exhibit 15.

22. On March 2, 2018, Officer Kerry Tierney, on behalf of Director Karen Conway, sent a General Message to "All Units", titled "Reference #236771, Chicago Automate Time and Attendance (CATA) System Pilot Program—Phase II," a copy of which was introduced into evidence as Joint Exhibit 14.

23. The new Department Notice D17-06 (Joint Exhibit 15) specifically provided, in part:

> The CATA system will not be used to produce payroll, record overtime, or manage the accumulation/deduction of contractual time off. Paychecks or the management of a members contractual time will not be determined by information derived from the CTA system.

24. Further, Section IV(B) ("Procedures") of Department Notice D17-06 stated: "all Department members identified as participating in the pilot program will: (1) swipe in no earlier than 7 minutes before and no later than 7 minutes after their scheduled starting time," [and] (2) "swipe out no earlier than 7 minutes before the end of their scheduled tour of duty and no later than 7 minutes after the end of their scheduled tour of duty.

25. On or about February 28, 2018, one of the attorneys for the FOP, Laura Finnegan, sent a letter to then-MLAS Director Jackson, a copy of which was introduced into evidence as Joint Exhibit 16.

26. On or about March 9, 2018, then-MLAS Director Jackson sent a response to FOP attorney Laura Finnegan, a copy of which was introduced into evidence as Joint Exhibit 17,

27. The City maintains that at no time have any of the readers used for CPD employees captured any biometric data or fingerprints. No biometric information from civilian

or sworn employees has been collected, tested or recorded by CPD or the City during the relevant time period.

28. On July 18, 2018, then-MLAS Director Jackson sent then-FOP President Kevin Graham a letter stating: "The Department is expanding the CATA system Department-wide starting on or around July 22, 2018," and enclosed a "Draft" Department Notice D17-06 captioned "Chicago Automated Time and Attendance (CATA) System Pilot Program – Phase III," with an effective date of 22 July 2018 and an issue date of 19 June 2018. Copies of the letter and the Draft Department Notice were introduced into evidence as Joint Exhibit 19.

29. On July 19, 2018, Bureau of Organizational Development Chief Barbara West approved revisions in a To/From dated 19 July 2018 re: "Request for Approval – D17-06 Chicago Automated Time and Attendance Pilot Program," a copy of which was introduced into evidence as Joint Exhibit 18.

30. A copy of Department Notice D17-06, with an effective date of 22 July 2018 and an issue date of 20 July 2018 was introduced into evidence as Joint Exhibit 20.

31. A revised Department Notice D17-06, with an effective date of 22 July 2018 and an issue date of 20 July 2018 contains items which were revised or added, as indicated by *italics/double underline* in Joint Exhibit 20.

32. On July 20, 2018, for the Phase III rollout, Lt. Eric Winstrom, on behalf of Director Karen Conway, sent a General Message to "All Units" re: Reference #241459, Department Notice D17-06 CATA Swiping Program, in which he announced that Phase III of the CATA System Pilot Program would become effective on 22 July 2018 for all Department members, a copy of which was introduced into evidence as Joint Exhibit 21.

33. In April 2018, the City also distributed to all Units and Districts a document titled "CATA SWIPING PROCEDURES," which outlined the procedures for swiping in and out and a copy of which was introduced into evidence as Joint Exhibit 22.

34. On July 24, 2018, FOP Field Representative Rich Aguilar sent Kevin O'Bryan at MLAS an email message, a copy of which was introduced into evidence as Joint Exhibit 23.

35. On July 26, 2018, then-MLAS Director Jackson sent FOP Field Representative Rich Aguilar a response via email, a copy of which was introduced into evidence as Joint Exhibit 24.

36. On or about July 19, 2018, the City also issued the "CPD Automated Timekeeping and Attendance FAQs—Phase III Pilot Implementation," a copy of which was introduced into evidence as Joint Exhibit 25.

37. On September 4, 2019, Chicago Police Department Research and Development Division Officer Kerry Tierny sent to the FOP by email a copy of Employee Resource E02-03-04, entitled "Time and Attendance Swiping Program," marked "DRAFT," with an effective date and issue date of 03 September 2019, a copy of which was introduced into evidence as Joint Exhibit 26.

38. On September 5, 2019, another FOP attorney, Pasquale Fioretto, sent then-MLAS Director Jackson a letter objecting to the Time and Attendance Swiping Program (Employee Resource E-02-04), a copy of which was introduced into evidence as Joint Exhibit 27.

39. On September 5, 2019, the FOP issued a notice captioned "Time and Attendance Swiping Program" via email blast to all of its members, a copy of which was introduced into evidence as Joint Exhibit 28.

40. On September 18, 2019, CPD Research and Development Division Analyst Kerry Tierney sent Research and Development Director Karen Conway a document entitled "Summary of Staffing: Time and Attendance Swiping Program," which contained notes from various CPD Command Staff members regarding the Time and Attendance Swiping Program and a copy of which was introduced into evidence as Joint Exhibit 29.

41. On September 19, 2019, then-MLAS Director Jackson sent then-FOP President Graham a letter enclosing a draft copy of Employee Resource E-02-03-04, marked "Draft" and captioned "Time and Attendance Swiping Program," copies of which were introduced into evidence as Joint Exhibit 30.

42. On September 19, 2019, then-President Kevin Graham sent Director Jackson a reply letter, a copy of which was introduced into evidence as Joint Exhibit 31.

43. On September 24, 2019, Research and Development Division Director Karen Conway sent Chief Barbara West a memorandum captioned "Request for Approval," a copy of which was introduced into evidence as Joint Exhibit 32.

44. On September 24, 2019, Officer Tierney, on behalf of Director Karen Conway, sent a General Message to "All Units," re: Reference #250636, Employee Resource E02-03-04, Time and Attendance Swiping Program, which announced the updated Directive requiring the swiping out at the end of the tour of duty, to become effective on 30 September 2019 for all Department members, a copy of which was introduced into evidence as Joint Exhibit 33.

45. On or about September 24, 2019, the Department issued and posted on the Wire a document captioned "Time and Attendance Swiping Program, Frequently Asked Questions," a copy of which was introduced into evidence as Joint Exhibit 34. The Wire is the Department's internal website accessible only by employees of the Department. The Wire is used to post

announcements, updates, and information, including all Administrative Message Center messages.

46. The Department issued a revised version of Employee Resource E-02-03-04 (Time and Attendance Swiping Program), with issue and effective dates of 11 October 2019 and a copy of which was introduced into evidence as Joint Exhibit 35.

47. Exemptions from the Swipe Policy must be submitted through officers' command staff. Approvals for exempting any CPD officer from the requirements of Employee Resource E02-03-04 will be processed through the chain of command, with final approval resting with the Superintendent. To date, no formal, written guidelines exist for whether or not to approve such requests.

48. Pursuant to a validly issued subpoena, dated November 12, 2020, the FOP, *inter alia,* requested the City to produce "[a]ny and all quarterly reports from Commanders detailing the justification of any member exempted from CATA swiping." In response, the City produced requests submitted by various Commanders seeking exemptions from the Swipe Policy pursuant to Employee Resource E02-03-04, introduced into evidence as Joint Exhibit 36, none of which have been approved by a Superintendent.

49. A copy of the most current Chicago Police Department Rules of Procedure was introduced into evidence as Joint Exhibit 37.

50. Pursuant to a validly issued subpoena, dated November 12, 2020, the FOP, *inter alia,* requested the City to produce "[a]ny and all documents regarding any discipline that the Police Department has issued against sworn Police Officers who have not complied with the City's CATA System (Chicago Automated Time and Attendance System)." Certain discipline imposed by the City during the time period the Swipe Policy was in effect, that was responsive to

the subpoena request, and that was included in the documents produced by the City in response to the above subpoena request, was introduced into evidence as Joint Exhibit 38.

51. Throughout the implementation period for the CATA System Pilot Program, the CPD Research and Development Division maintained various Task Records, detailing actions taken and/or notes, which are provided as Group Joint Exhibit 39.

52. During the time relevant to the Charge (and continuing to the date of the submission of the Stipulated Record), CPD published various Department Notices and Employee Resource materials which remained in effect at the time of submission of the Stipulated Record, namely the following:

- "Complaint and Disciplinary Procedures" – General Order G08-01, Effective Date 04 May 2018, issue date 04 May 2018, a copy of which was introduced into evidence as Joint Exhibit 40.

- "Summary Punishment" – Special Order S-08-01-05, effective date 07 January 2019, issue date 07 January 2019, a copy of which was introduced into evidence as Joint Exhibit 41.

53. CPD published various Department Notices and Employee Resource materials, which have since been rescinded, including the following:

- "Summary Punishment" – Special Order S08-01-05, effective date 04 May 2018, issued date 04 May 2018, a copy of which was introduced into evidence as Joint Exhibit 42.

- "Summary Punishment" – Special Order S08-01-05, effective date 30 November 2016, issue date 30 November 2016, a copy of which was introduced into evidence as Joint Exhibit 43.

III. SUPPLEMENTARY OR EXPLANATORY FACTS

CATA is a City-wide system that has been used by other City departments since the 1990's to track time and attendance by electronically tracking employee hours worked, including

overtime, as well as by providing a mechanism for the computation of payroll. An identification card reader is integrated into the system, permitting employees to use the reader to record time in and out for their assigned work hours. An employee activates the reader by swiping his or her employee identification card or by manually entering his or her employee identification number on the reader's keypad. After activating the reader, the employee verifies his or her identity by placing his or her hand on the reader's palm platform. In this manner, the employee performs the "swipe in" process to begin the workday and, by repeating the process, to "swipe out" at the end of the workday.

Prior to the events giving rise to the Charge of unfair labor practices in this case, CPD used multiple automated and paper-based timekeeping processes. District law enforcement unit supervisors and unit timekeepers recorded police office time and attendance as part of roll call proceedings, an automated daily attendance and assignment record, and a sworn time and attendance record. Procedural requirements for timekeeping were established by means of various Department directives.

Sworn police officers typically work one of three work schedules – an 8.5 hour workday ("tour of duty"), a 9.0 hour tour of duty, and a 10.5 hour tour of duty. Each schedule allows for a one-half hour uncompensated lunch period.

Within the Bureau of Patrol, each District operates three shifts or "watches." Each watch involves an 8.5 hour tour of duty. Officers are required to report to their assigned units and physically to appear for roll call before a watch operations lieutenant, or Watch Commander. The Watch Commander takes attendance, makes work assignments, and distributes beat numbers and car assignment numbers. Prior to the events giving rise to the Charge, each officer's attendance status was recorded at roll call as "present" or "absent" and forwarded to a unit

timekeeper for posting on attendance and assignment and time and attendance records. At the end of a tour of duty, a check out of officers was performed by a supervisor on the outgoing or oncoming shift. Further documentation was required for an extension of tour (overtime) or for compensatory time or a furlough day taken.

On October 3, 2017, the City's Office of Inspector General ("OIG") announced audit results relating to CPD's timekeeping process, including monitoring of overtime. http://chicagoinspectorgeneral.org.publications-and-press/cpd-overtime-controls-audit/, In its audit report, the OIG concluded that:

> CPD's costly, inefficient, and lacks operational controls that would curb unnecessary overtime expenditures and ensure accurate recordkeeping… OIG found CPD does not have controls adequate to prevent the payment of unnecessary overtime, deter abuse of minimum time provisions, or ensure overtime is paid accurately and in compliance with existing overtime policies and procedures…. Many of these weaknesses are due to CPD's reliance on manual, paper-based timekeeping and overtime approval processes.

I take administrative notice of the OG audit and its findings.

The letter from MLAS Director Wynter Jackson ("Jackson") to FOP President Kevin Graham ("Graham"), referenced in Stipulated Facts paragraph 13, followed on October 12, 2017. In that letter, Jackson stated that "[t]he Department plans to implement the Chicago Automated Time and Attendance (CATA) system initially as a pilot program. The CATA system will then be implemented throughout the entire Department on an incremental basis….. This system will be used by the Department to maintain accurate employee time and attendance records through a single automated system rather than multiple automated and paper-based systems."

The letter went on to state that the pilot program would begin on November 1, 2017 and would be limited to units located within Police Headquarters only. The letter then said:

> At this time, the CATA system will not be used to produce payroll information, record overtime, or manage the accumulation of compensatory time. The pilot program will 'stress test' the CATA system, ensure that the system can properly record attendance, and acclimate employees to the process of swiping in and out. However, it is

> expected that further expansions of that CATA system pilot program will eventually extend to all units of the Department and be used to produce payroll, record overtime, and manage the accumulation of compensatory time and contractual paid time off.

On February 28, 2018, FOP attorney Laura Finnegan ("Finnegan") wrote a letter to Jackson in which the FOP demanded to bargain over the implementation and effects of the "new biometric attendance policy." In that letter, the FOP contended that the policy was subject to the provisions of the Illinois Personal Information Protection Act, 815 ILCS 530/1, *et seq*., and said that the City had the obligation to "implement and maintain reasonable security measures to protect [the records generated by use of the CATA system] [from] unauthorized access, acquisition, destruction, use, modification, or disclosures." Although attorney Finnegan acknowledged in the letter that the City was not subject to the Illinois Biometric Information Privacy Act, 74 ILCS 14/1, *et seq.* (which by its terms applies to "private entities" and excludes State and local governments from its reach), the Union nonetheless asserted that "the City should provide notice and obtain consent from the employees on the use of the data" obtained from use of the CATA system. The letter went on to request documents and information from the City regarding "the City's biometric attendance policy."

On March 9, 2108, Wynter Jackson responded to attorney Finnegan's letter, contesting Finnegan's contention that the CATA system was a process by which police officers would provide biometric data. "While the Department acknowledges that the CATA system has the capability to collect biometric information, such as the size of an individual's hand, upon information and belief, no biometric data is being tested or recorded at this time for CPD." Jackson's letter went on to note that the CATA system pilot program was expanded to Phase II, adding the 19th District (Belmont and Western) to Headquarters as facilities subject to the program.

Jackson's response then stated that "there is no generalized duty under the Illinois Personal Information Protection Act to provide information to employees or their collective bargaining representatives." As to the request for information under the Illinois Public Labor Relations Act, Jackson's response stated that "[u]pon information and belief no biometric data is tested or recorded when any employee swipes in or out. Therefore, your request for information is denied as there is no information to tender."

On July 18, 2018, Jackson sent a letter to Union President Graham informing him that the CATA pilot program was moving to Phase III and would be expanded to a Department-wide scale on or about July 22, 2018. Jackson stated that "[t]he CATA system will be used by all identified sworn and civilian Department members to swipe in at the beginning of their assigned tours of duty. Members will be required to swipe out ONLY if accruing authorized overtime."

On July 26, 2018, Jackson responded to an e-mail inquiry from Union representative Rich Aguilar that had been directed to Department attorney Kevin O'Bryan and that concerned the rules or procedures regarding specialty units (SWAT, Canine, Detail Unit, and Court Section). The record contains no further communications between the City and the Union regarding CATA between July of 2018 and September of 2019,

On September 4, 2019, the Department's Research and Development Division sent an email message to Union President Kevin Graham attaching a draft document entitled "Time and Attendance Swiping Program." The draft policy ("Swiping Program") provided that all identified Department members would be required to swipe in at the end, as well as the beginning, of their shifts. When using a card reader located at a Department facility, City of Chicago facility, or a Cook County facility where assigned, detailed, or deployed, Department members were required to swipe in no earlier than seven minutes prior to their scheduled starting

times and no later than seven minutes after their scheduled starting times, and to swipe out no earlier than seven minutes prior to the end of their tour of duty and no later than seven minutes after the end of their tour of duty.[1] If assigned or detailed to a facility without a CPD card reader, the swipe requirement is waived.

The Swiping Program provided that regular discipline procedures would apply for failure to comply with policy provisions. In this regard, Sections IV and V of the draft policy provided that Department members would be subject to discipline, under the rubric of disobedience of an order or directive, for swiping in or out for another member or entering another member's identification card information into the card reader. Such a violation of Department Rules and Regulations, the draft policy noted, could result in the offending member's being subject to administrative charges leading to discipline up to and including discharge.

On September 5, 2019, Pasquale Fioretto ("Fioretto"), attorney for the FOP, wrote to Jackson acknowledging receipt of the draft Swiping Program. In the letter, Fioretto stated:

> This Program is now being implemented Department-wide and will impact how bargaining unit members are disciplined. The Lodge assumed the Department would raise this with the Lodge in one of the many current bargaining sessions over a successor Collective Bargaining Agreement. The Lodge remains prepared to discuss and bargain over the implementation of the Time and Attendance Swiping Program at the bargaining table.
>
> Specifically, as you are aware, how the Department disciplines the Lodge's members is a mandatory subject of bargaining. The Department cannot unilaterally make changes to a system that has been in place for many years without first bargaining with the Lodge.
>
> Accordingly, please be aware that the Lodge is placing the Department on notice that it objects to the implementation of requiring members to swipe in at the beginning of their assigned tour of duty and swipe out at the end of their tour of duty. Any unilateral changes will be met with the Lodge pursuing any and all legal remedies available, including but not limited to filing an unfair labor practice charge with the State Labor

[1] An exception, eliminated in an updated version of the Swiping Program issued October 11, 2019, provided that members could swipe in earlier than seven minutes prior to the starting time of their assignments but would not be granted overtime for the additional time without supervisory approval.

> Relations Board, as well as file and pursue a grievance under the parties' Collective Bargaining Agreement.

On September 19, 2019, Jackson wrote to Graham in which she acknowledged receipt of Fioretto's letter and stated:

> As you are aware, the Department has required officers to swipe in at the start of their tour since the programs implementation in 2017. The Department has required officers (and civilian personnel, for that matter) assigned to Headquarters and to the 019th District to swipe out at the end of their tour since March of 2018 and for all members to swipe out when working overtime since July of 2018. The Lodge was informed of these requirements prior to their implementation, but never objected.

The letter went on to state the City's position that it did not have to negotiate the disciplinary aspects of the Swipe Program because the City had already bargained over the subject of discipline, as contained in Section 8.1 of the Collective Bargaining Agreement ("CBA") between the City and the FOP (prohibiting discipline except for just cause), and because of the waiver of further bargaining contained in the Complete Agreement provision of Article 32 of the CBA. The letter also noted that the City has the right under Article 7 of the CBA (governing summary punishment, consisting of reprimands and disciplinary suspensions of one to three days) and Special Order S08-01-05 (dealing with the scope of summary punishment) to discipline officers for tardiness, absence without permission, leaving work without authorization prior to the end of the tour of duty. Further, the letter noted that the Department consistently has disciplined officers for failure to follow written orders.

"In short," the letter said, "the Department already has negotiated the right to issue discipline for an officer who fails to work during his or her assigned tour of duty. The updated Order simply makes clear that, just like every other order, disciplinary procedures will apply for failing to comply." Attached to the letter was an updated draft of the Time and Attendance

Swiping Program, with an issue date of September 18, 2019 and an effective date of September 30, 2019.

On September 24, 2019, Karen Conway, Director of the Department's Research and Development Division, sent a General Message to all units stating that "Employee Resource E02-03-04 'Time and Attendance Swiping Program' has been issued and is available online via the Department Directives System (DDS)." The General Message noted that it was updating the prior version of the Swiping Program to include swiping out at the end of the tour of duty.

On September 25, 2019, the Union filed an unfair labor practice charge against the City and the Department, alleging that the Employer made unilateral changes to mandatory subjects of bargaining by enacting the Swiping Program and requesting that the Board order the Employer "to cease and desist from unilaterally implementing any changes to how bargaining unit members must swipe in at the start of their tour and swipe out at the end of their tour without first bargaining with the Charging Party over the impact or effect such changes will have on bargaining unit employees' terms and conditions of employment."

On July 1, 2020, following an investigation, the Board's Executive Director issued a Complaint for Hearing in which it is alleged, in paragraph 11 of the Complaint, that "[o]n September 4, 2019, Respondent notified Charging Party of its plan to convert the pilot program to a permanent program titled the Swipe Policy (Swipe Policy) and in paragraph 14 of the Complaint, that "[o]n September 30, 2019, Respondent enacted the Swipe Policy. In paragraph 15 of the Complaint, it is alleged that "Respondent made unilateral changes to a mandatory subject of bargaining without first bargaining its decision or impact of its decision to impasse or agreement with Charging Party and thereby has failed to maintain existing terms and conditions of employment pursuant to Section 14(1) of the Act." Therefore, the Complaint alleged, "[b]y its

acts and conduct as described in paragraphs 11 and 14, Respondent has failed to bargain its decision or the impact of its decision with Charging Party, in violation of Sections 10(a)(4) and (1) of the Act."

Respondent thereafter filed an Answer to the Complaint, denying all substantive allegations and asserting that "[t]he Complaint for Hearing must be dismissed because Charging Party cannot establish a prima facie case of a violation of Section 10(a)(1), Section 10(a)(2), or any other section of the Act."

IV. DISCUSSION AND ANALYSIS

Despite the Respondent's contentions to the contrary, the Union's unfair labor practice charge was timely filed under Section 11 of the Act. As to the merits, the Respondent did not violate Sections 10(a)(4) and (1) of the Act when it adopted the Swiping Program without first bargaining over the decision to do so, because the decision to implement the Swiping Program Policy is not a mandatory subject of bargaining. The Respondent, however, did violate Sections 10(a)(4) and (1) of the Act by failing to bargain with the Charging Party over the impact of the decision to implement the Swiping Program on employees' wages, hours, and terms and conditions of employment.

A. Legal Standards

1. The Limitations Period

Section 11(a) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filling of a charge with the Board… unless the person aggrieved thereby did not reasonably have knowledge of the alleged unfair labor practice." 5 ILCS 315/11(a). The six-month limitations period is jurisdictional and is thus

a limitation on the statutory power of the Board to hear and decide a case. *Charleston Community Unit School District No. 1 v. Illinois Educational Labor Relations Board,* 203 Ill. App. 3d 619, 622 (1990), citing *Fredman Brothers Furniture Co. v. Department of Revenue,* 109 Ill.2d 202 (1985). The limitations period in Section 11(a) begins to run when the charging party has knowledge of the alleged unlawful conduct or reasonably should have known of the conduct. *Moore v. Illinois State Labor Relations Board,* 206 Ill. App. 3d 327, 335 (1990); *County of Cook (Department of Central Management Services),* 17 PERI ¶ 3009 (IL LRB-LP 2001); *Village of Dolton,* 17 PERI ¶ 2017 (ILRB-SP 2001); *Chicago Transit Authority,* 16 PERI ¶ 3013 (IL LRB 2000). In the case of a personnel policy change that is alleged to be an unfair labor practice, the time for filing an unfair labor practice charge begins to run when "the aggrieved party becomes aware, or should become aware, of a change in personnel policy that is 'unambiguously announced'." *Amalgamated Transit Union, Local 241 v. Illinois Labor Relations Board, Local Panel,* 2017 IL App (1st) 160999 ¶38, quoting *Water Pipe Extension v. City of Chicago,* 206 Ill.App.3d 63, 68 (1st Dist. 1990), quoting in turn *Wapella Education Ass'n, IEA-NEA v. Illinois Educational Labor Relations Board,* 177 Ill.App.3d 153 (4th Dist. 1988),

2. The Duty to Bargain: The *Central City* Test

Section 7 of the Act requires that a public employer and the exclusive representative of an appropriate unit of public employees have the duty to bargain collectively over mandatory subjects of bargaining, generally described by the term "wages, hours, and terms and conditions of employment." *City of Decatur v. American Federation of State, County and Municipal Employees, Local 268,* 122 Ill.2d 353, 362 (1988). A public employer violates that duty, and therefore Sections 10(a)(4) and (1) of the Act, if it makes a unilateral change to a mandatory subject of bargaining without giving prior notice to and an opportunity to bargain with the

exclusive representative. *County of Cook v. Licensed Practical Nurses Association of Illinois,* 284 Ill.App.3d 145, 155 (1st Dist. 1996).

In order to determine whether an employer's action or decision constitutes a mandatory subject of bargaining, the Illinois Supreme Court has established a three-part test. *Central City Education Association v. Illinois Educational Labor Relations Board,* 149 Ill.2d 496 (1992) ("*Central City*"). The first part of the *Central City* test asks whether the matter concerns wages, hours, or terms and conditions of employment. *Id.,* at 523. If the answer to that is in the negative, the inquiry ends and the employer has no duty to bargain over the subject. If the answer is in the affirmative, the second part of the test asks whether the matter also is one of inherent managerial authority. *Id.* If the answer to this second question is in the negative, then the inquiry ends, and the matter is a mandatory subject of bargaining. *Id.* If the answer to the second question is in the affirmative, then the Board must weigh the benefits that bargaining would have on the decision-making process against the burdens that bargaining would impose on the employer's management authority. *Id.* If the benefits of bargaining outweigh its burdens, then the matter is a mandatory subject of bargaining; otherwise, the matter is not a mandatory subject of bargaining. *Id.*

3. Effects Bargaining

A finding that the burden imposed on the employer outweighs the benefits of bargaining, however, does not end the inquiry, for the employer may still be required to bargain over the *impact* of the employer's decision on the employees affected by that decision. *Chicago Transit Authority v. Amalgamated Transit Union, Local 241,* 299 Ill.App.3d 934, 943 (1st Dist. 1998) ("*Chicago Transit Authority"*); *American Federation of State, County and Municipal Employees v. Illinois State Labor Relations Board,* 190 Ill.App.3d 259, 268 (1st Dist. 1989). Thus, even if

the employer is free, by application of the *Central City* test, to implement its decision unilaterally, it may still be required to bargain with the union over the *effects* of its decision on the bargaining unit. *Chicago Transit Authority*, at 943.

B. Application of the Law to the Facts

1. The Charge was Timely Filed

The Respondent contends that the Charge of unfair labor practices, filed on September 25, 2019, was untimely under Section 11(a) of the Act. "Beginning with the City's correspondence to the Lodge on October 12, 2017," the Respondent asserts, "the City repeatedly provided notice to the Lodge the Swipe Policy would be implemented." The Respondent thus contends that, in order to be timely, the Charge should have been filed within six months of October 12, 2017 or, at the latest, within six months of March 1, 2018, when the Respondent issued Department Notice D17-06 entitled "Chicago Automated Time and Attendance (CATA) System Pilot Program – Phase II," effective March 4, 2018.

As noted above, in order to be timely, the charge must have been filed within six months of when the Charging Party knew or should have known of the unfair labor practice. The determination as to when that occurred in this case is perhaps debatable, given that the implementation of the CATA system was evolutionary, progressing from a pilot program that affected the headquarters facility only and that applied only to swiping in at the beginning of the tour of duty to a permanent program that affected all members of the Department, that applied to swiping out at the end of the tour of duty as well as swiping in at the beginning of the tour of duty, and that referenced the application of the Department's regular disciplinary procedures for failure to abide by the requirements of the system.

While it is true that the Charging Party was informed of the pilot program and the changes that occurred at various stages of its implementation, it is also true that, at least until September 4, 2019, the program was essentially a test program. As MLAS Director Wynter Jackson stated in her October 12, 2017 letter to Lodge President Kevin Graham, "[t]he pilot program will 'stress test' the CATA system, ensure that the system can properly record attendance, and acclimate employees to the process of swiping in and out." So long as the program was in a test phase, it was reasonable for the Union to wait and see how the final version of the program would affect its membership before demanding to bargain over the program. The trigger for demanding bargaining, as far as the Union was concerned, was the reference to discipline in the September 3, 2019 version of the programs, announced on September 4 2019, and made the primary subject of Kevin Graham's letter to Wynter Jackson on September 19, 2019.

Wynter Jackson's September 19, 2019 response to Kevin Graham's letter, specifically declining to bargain over the subject of discipline on the ground that the parties had already bargained over the subject and had embodied the results of that bargaining in Section 8.1 of the CBA, then made it clear, as far as the Union was concerned, that the City was refusing to bargain over a subject that the Union regarded as a mandatory subject of bargaining. The Charge then followed on September 25, 2019.

While additional modifications were made in the program following September 25, it is reasonably clear that the implementation of the Time and Attendance Swiping Program as a definitive change in personnel policy, rather than as a test program, was unambiguously announced in a series of communications beginning on September 3, 2019, and therefore was sufficiently final as of the date of the Charge to warrant the Union's reasonable belief that the

City was refusing to bargain with it about a program that represented alleged unilateral changes in terms and conditions of employment. The Charge, therefore, was timely under Section 11(a) of the Act.

2. The Duty to Bargain Over the Decision

a. Wages, Hours, and Terms and Conditions of Employment

The first step of the *Central City* test is to determine whether the Swiping Program involved a matter of wages, hours, and terms and conditions of employment. The record shows very clearly that it did.

An employer's action concerns wages, hours, and terms and conditions of employment if it (1) involves a departure from previously established operating practices, (2) effects a change in conditions of employment, or (3) results in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for bargaining unit members. *City of Belvidere v. Illinois State Labor Relations Board,* 181 Ill.2d 191, 208 (1998); *International Brotherhood of Teamsters, Local 700 v. Illinois Labor Relations Board,* 2017 IL App (1st) 152993, ¶ 33 (sheriff's order that employees may not associate with individuals who were gang members subjected employees to potential discipline and thus involved a change in terms and conditions of employment); *County of Cook v. Illinois Labor Relations Board,* 2017 IL App (1st) 153015, ¶ 46 (sheriff's order modifying secondary employment policy departed from previously established practices, implemented a material change to the existing policy which impaired an employee's ability to maintain a second job and subjected employees to discipline).

In this case, the implementation of the Swiping Program involved a departure from previously established operating practices. As the Union points out, the prior practice was for attendance to be taken, at least for patrol officers, at roll call, with the reporting of the attendance

being made by a timekeeper. With the change, the officer himself or herself became responsible for reporting his or her attendance, whether or not attendance at roll call continued to be recorded. This necessarily effected a change in terms and conditions of employment, as the officer's responsibility for adhering to the requirements of the Swiping Program not only involved new employment obligations but also involved additional risks of being disciplined for noncompliance, thus impacting officers' job security. Therefore, the Swiping Program involved wages, hours, and terms and conditions of employment.

b. Inherent Managerial Authority

The implementation of the Swiping Program also was a matter of inherent managerial policy under Section 4 of the Act, which includes "such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees." As our Supreme Court has recognized, "inherent managerial authority" consists of "those matters residing at the core of entrepreneurial control." *Board of Trustees of the University of Illinois v. Illinois Educational Labor Relations Board*, 224 Ill.2d 88, 104 (2007) (internal quotation marks omitted); *Central City*, 149 Ill.2d at 518.

It is instructive to note in this case that the City's first notice to the Union regarding the intended installation of the CATA system in the Police Department, dated October 12, 2017, closely followed in time the October 3, 2017 OIG report criticizing the Department's antiquated and inefficient timekeeping system. The OIG report, which found that the "CPD does not have controls adequate to prevent the payment of unnecessary overtime, deter abuse of minimum time provisions, or ensure overtime is paid accurately and in compliance with existing overtime policies and procedures…," goes to the heart of the concept of entrepreneurial control. Thus, the

City's interest in installing the CATA system -- already in place in other City departments -- in the Police Department not only was responsive to the OIG's criticism of the then-existing timekeeping system but was a matter that involved the City's managerial responsibility for compliance with hours and overtime laws, including the federal Fair Labor Standards Act, 29 U.S.C. §201, *et seq.* The interests and concerns giving rise to the decision to implement the CATA system in the Police Department necessarily implicated the standards governing the Employer's operation and the direction of employees in the process of meeting those standards.

c. Balancing of Benefits and Burdens

Since the implementation of the Swiping Program in the Police Department was a matter of wages, hours, and terms and conditions of employment and also a matter of inherent managerial authority, the third step of *Central City* test requires that the benefits of bargaining over the decision to implement the Swiping Program be balanced against the burdens that bargaining would place on the Employer's authority. In determining the outcome of this balancing process, I place substantial reliance on the decision of the Illinois Educational Labor Relations Board in *City Colleges of Chicago*, 32 PERI ¶ 10 (IELRB 2015), *aff'd in unpub. opin.,* 2016 IL App (1st) 152260-U (*"City Colleges"*).

The salient facts in *City Colleges* are strikingly similar to the facts of this case. There, unit employees historically recorded their time on a form called a "certificate of attendance". Sometime after the employer and the union concluded bargaining on a successor collective bargaining agreement in 2012, and without having discussed the issue in bargaining, the employer informed the union that it was considering implementation of a new timekeeping system called "CCC Works." As in this case, the employer then held several informational meetings, which union representatives attended, about the new system.

Later in 2012, the union learned that the employer was considering the use of biometrics (employee fingerprints) in the time-recording process and thereafter made a demand to bargain over the changes to the timekeeping system. The parties held at least one bargaining session and several informational meetings, but no real bargaining took place. On June 4, 2014, the employer sent a letter to union representatives informing them of the implementation schedule for the new timekeeping system. On June 19, the union demanded to bargain over the implementation of the system and asked the employer to delay the implementation until bargaining was concluded. The employer, however, implemented the new system on July 13, 2014.

In Illinois Educational Labor Relations Board ("IELRB") proceedings, the Administrative Law Judge concluded that the employer violated the Illinois Educational Labor Relations Act by failing to provide the union with a meaningful opportunity to bargain over the timekeeping system, but the IELRB reversed. Utilizing the *Central City* analysis, the IELRB determined that the new timekeeping system was a matter of wages, hours, and terms and conditions of employment and that it was also a matter of inherent managerial authority. With respect to the third step, however, the IELRB said that: "We find that the burdens of bargaining over the implementation of CCC Works would have had on the Employer's authority … outweighed the benefits that bargaining would have had for the decision-making process." Therefore, the IELRB determined, the timekeeping system issue was not a mandatory subject of bargaining, although, as will be discussed, the IELRB also determined that the employer had a duty to bargain over the *impact* of the new timekeeping system on bargaining unit members.

In determining that the burdens of bargaining over the implementation of the Swiping Program outweigh the benefits of such bargaining, I take note of the considerable discretion

granted to the Employer by the Union in the CBA, and particularly in the Management Rights clause contained in Article 4 of the Agreement. Among the rights reserved to the "sole discretion" of the Employer are the following rights:

> J. to add, delete, or alter methods of operation, equipment or facilities;
>
> K. to determine the locations, methods, means, and personnel by which the operations are to be conducted, including the right to determine whether goods or services are to be made, provided or purchased;
>
> L. to establish, implement and maintain an effective internal control program;
>
> N. to add, delete, or alter policies, procedures, rules and regulations.

In any bargaining over the *decision* to implement the Swiping Program, the Employer would not be mandated to relinquish any of the above rights, yet it is difficult to conceive of any Union proposal directed solely to the installation of the CATA system, as opposed to the effects of that installation, that would not entail relinquishment or compromise of some of these bargained-for rights. Given the significant objectives involved in instituting a timekeeping system that is at the same time more accurate, efficient, and compliant with legal obligations, it would unduly burden the process by requiring bargaining over the decision.

This conclusion is consistent not only with the *City Colleges* case but with the decision of the Appellate Court in *Fraternal Order of Police, Chicago Lodge No. 7 v. Illinois Labor Relations Board, Local Panel*, 2011 IL App (1st) 103215 ("*Lodge 7"*). In that case, the Appellate Court affirmed the decision of the Board's Local Panel that the decision of the Chicago Police Department to consolidate and realign field training districts "fell within the core of the City's right to control its operational needs regarding the most effective and efficient way to enhance and broaden the spectrum of training of new recruits." *Id.*, at ¶ 24, and that "the benefits of bargaining were outweighed by the burdens that bargaining would impose on the City's

managerial authority." Likewise, in this case, the City's right to ensure compliance with legal timekeeping requirements outweighs the benefit, if any, that would have been achieved by imposing a bargaining obligation on the City regarding the decision to implement the CATA system in its Police Department. Thus, that decision did not involve a mandatory subject of bargaining under the Act.

3. The Duty to Bargain Over the Effects of the Decision

As noted above, even if an employer is not mandated to bargain over a decision, it still may be obligated to bargain over the impact or effects of that decision. The distinction between these two different bargaining obligations was noted by the Appellate Court in the *Local 7* case. After concluding that the decision regarding consolidation and realignment of field training districts was not a mandatory subject of bargaining, the court referenced the union's concern over issues relating to the impact of the consolidation decision on field training officers (FTOs). In that regard, the court said that "[t]he subsequent reassignment or resignation of FTOs constituted an effect of the consolidation decision…," rather than a concern that would mandate bargaining over the decision itself. *Id.*, at ¶ 24. See also, *Chicago Transit Authority v. Amalgamated Transit Union, Local 241, et al.*, 299 Ill. App. 3d 934 (1st Dist. 1998) ("*Chicago Transit Authority"*) (employer was not required to bargain over the decision to reclassify the contract clerk positions, but was obligated to bargain over the effects of that reclassification).

In this case, the Union's primary concern relates to the impact of the institution of the CATA system on the imposition of discipline on officers for failing to comply with Swiping Program rules and regulations. Thus, the Union contends that "[i]t appears that the City is handing out discipline on an *ad hoc* basis. With no written guidelines, the Department has issued random discipline in an arbitrary and capricious manner, and will continue to do so."

In fact, while the evidence in the record indicates a cause for concern and a legitimate reason for seeking to bargain over the impact of the Swiping Policy, the record to date does not bear out the extremity of the Union's statement. A list of officers disciplined, a description of the infractions for which they were disciplined, and the dates of the infractions, was introduced into evidence as Joint Exhibit 38. In most cases, it is difficult to tell from the exhibit whether the infractions were related to the Swiping Program. In addition, many, if not most, of the infractions involved being late to or missing court duty, which are infractions that certainly would have incurred discipline even prior to the advent of the Swiping Program. Nevertheless, other evidence in the case reveals that, even at the time of the implementation of the Program, there were many questions being asked by commanders and administrators concerning a program that, even in September of 2019, clearly was still a work in progress.

The Union also has a related and significant interest in dealing with the issue of exceptions to the "swipe in, swipe out" requirements that have been or may be accorded to or considered for special duty units, such as the Counter-Terrorism Division and the Gang Investigation Division, or special assignment officers, such as undercover officers, as well as others who may be exempted from compliance with the requirements. The record establishes that, as of the time of the submission of the stipulated record, no formal, written guidelines existed concerning exemptions, and that there was a considerable debate among command officers as to the criteria for exemptions, including whether exemptions would be established on Department-wide basis or by commanders on a unit-by-unit basis. The Union contends in this regard that "by selecting certain groups of bargaining unit employees who will be exempt from complying with the new Swiping Program (and, thus, not subject to any discipline), the City is treating some groups differently from others – without any explanation as to the underlying

reason." Whether or not this is, or appears to be, "arbitrary and capricious", as the Union contends, it is clearly a concern well suited for the bargaining table.

As was the case with reassignment or resignation of FTOs in the *Local 7* case, and the effects of the introduction of a new timekeeping system in the *City Colleges* case, the issues of discipline and exceptions to the swiping requirements are issues for effects bargaining. Here, as in those cases, there are persuasive reasons why the Employer should be required to engage in bargaining with the Union over the effects of the Swiping Program, including but not limited to the subjects of discipline and exemptions from the "swipe in, swipe out" requirements of the Swiping Program.

The City attempts to distinguish the *City Colleges* case, as the precedent that is factually most similar to the instant case, by pointing out that, unlike the timekeeping program in the *City Colleges* case, the Swiping Program does not have a biometric element. I find this to be a distinction without a difference. In the *City Colleges* case, a fingerprint was used as an identifier to ensure that the employee swiping in or out was in fact the employee whose time record was being accessed. In this case, the identifier is a palm print. While the parties have stipulated that no biometric information from employees has been collected, tested or recorded by CPD or the City during the relevant time period, in apparent contrast to the new timekeeping system at issue in *City Colleges*, that fact does not materially affect the Union's concern over the impact of the changes in the timekeeping system on the employees' wages, hours, and terms and conditions of employment.

The City also attempts to distinguish *City Colleges* on the asserted ground that the supervisory discretion involved in that case is not present here. In fact, a review of the September 3, 2019 draft Program shows that, even for those Department members not exempted

from the swiping requirement, supervisory discretion is involved. Thus, Section V.F. of Exhibit 26 states:

> F. An affected member who is required to swipe in ***and out*** but fails to do so (e.g., reporting to a non-Department facility, lost identification card, forgot to swipe) will notify his/her immediate supervisor upon the discovery of the missed swipe. The notified supervisor will ensure the appropriate actions are taken and the manual or automated timekeeping systems reflect the member's attendance status.
>
> * * * * *
>
> 2. ***Members are reminded that regular disciplinary procedures will apply for any failure to comply with the provisions of this directive***

Certainly, were the Union afforded the opportunity to do so, it would want to question the City at the bargaining table as to the meaning of the term "appropriate actions" and how that term relates to the reminder contained in subparagraph 2. Moreover, the Union certainly would want to inquire into the bases for exemptions from the Swiping Program and the procedures, if any, that the City has in place to ensure that uniform disciplinary standards are being utilized, irrespective of whether affected officers are covered by the basic Program or are covered by an exemption to the swiping requirement.

Despite the City's efforts to distinguish *City Colleges,* I find the *City Colleges* and *Local 7* cases to be persuasive precedent. Accordingly, the rationale of those cases for finding a duty to bargain over the effects of the decision in question is equally applicable here.

4. The Respondent's Claim of Waiver by Contract

The Employer asserts that it has already bargained over the issue of discipline, and that the results of that bargaining are embodied in the collective bargaining agreement. By this assertion, the Employer contends that the Union waived its right to bargain over the disciplinary issues arising out of the decision to adopt the Swiping Program. I find that no such waiver occurred.

Both the courts and the Board have held that, in order to find that a party to a collective bargaining agreement has waived its rights to bargain under the Act, it must be determined that "the contractual language evinces an unequivocal intent to relinquish such rights." *Forest Preserve District of Cook County v. Illinois Labor Relations Board*, 369 Ill. App. 3d 733, 754 (1st Dist. 2006); *American Federation of State, County and Municipal Employees v. Illinois State Labor Relations Board*, 274 Ill.App.3d 327, 334 (1st Dist. 1995). Such a determination must be based on "evidence [that is] clear and unmistakable." *City of Aurora*, 24 PERI ¶ 25 (2008), quoting *Village of Oak Park v. Illinois State Labor Relations Board*, 168 Ill. 3d 7, 20 (1st Dist. 1988).

In this case, the language in the CBA relating to discipline and the Employer's right to discipline is extensive but does not specifically address the issue of discipline arising out of a change in timekeeping requirements or procedures. Because the disciplinary provisions "do not evince the Union's unequivocal intent to relinquish their rights to bargain over such effects." *Chicago Transit Authority*, at 944, I find that the Union did not waive its right, as determined by the facts of this case, to engage in effects bargaining with the City over the implementation of the Swiping Program and particularly those aspects of the Program relating to discipline and exemptions from the "swipe in, swipe out" requirements.

5. Conclusion

The Respondent did not violate the Act by refusing to bargain with the Union over the decision to implement the CATA System and the Swiping Program in the Chicago Police Department. The Respondent, however, did violate Section 10(a)(1) and (4) of the Act by failing or refusing to bargain with the Union over the impact of that implementation on the employees represented by the Union.

V. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the Respondent City of Chicago, Department of Police, its officers and agents, shall:

1. Cease and desist from failing and refusing to bargain collectively in good faith with the Fraternal Order of Police, Lodge No. 7 over the impact of the Time and Attendance Swiping Program on the wages, hours, and terms and conditions of employment of bargaining unit employees.

2. Upon request, bargain collectively in good faith to impasse or agreement with the Fraternal Order of Police, Lodge No. 7 over the impact of the Time and Attendance Swiping Program on the wages, hours, and terms and conditions of employment of bargaining unit employees.

3. Post, in all places where notices to bargaining unit employees are regularly posted, copies of the attached Notice to Employees. This Notice shall be signed by the Employer's authorized representative and maintained for sixty (60) calendar days during which the majority of employees are working. The Employer shall take reasonable steps to ensure that said copies of the Notice are not altered, defaced, or covered by any other materials; and

4. Notify the Executive Director in writing within thirty-five (35) calendar days after receipt of this Recommended Decision and Order of the steps taken to comply with it.

VI. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules and Regulations, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties

may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommended Decision and Order. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 N. LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and to the Board's designated e-mail address for electronic filings, at ILRB.Filing@Illinois.gov in accordance with Section 1200.5 of the Board's Rules and Regulations, 80 Ill. Admin. Code §§1200-1300. All filings must be served on all other parties.

Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued in Chicago, Illinois on August 2, 2021

Donald W Anderson

Donald W. Anderson
Administrative Law Judge

Illinois Labor Relations Board
160 N. LaSalle Street, Suite S-400
Chicago, Illinois 60601-3103
(312) 793-6400

NOTICE TO EMPLOYEES

FROM THE
ILLINOIS LABOR RELATIONS BOARD

Case No. L-CA-20-019 (Illinois Fraternal Order of Police, Lodge 7 and City of Chicago (Department of Police)

IT IS HEREBY ORDERED that the Respondent City of Chicago, Department of Police, its officers and agents, shall:

1. Cease and desist from failing and refusing to bargain collectively in good faith with the Fraternal Order of Police, Lodge No. 7 over the impact of the Time and Attendance Swiping Program on the wages, hours, and terms and conditions of employment of bargaining unit employees.

2. Upon request, bargain collectively in good faith to impasse or agreement with the Fraternal Order of Police, Lodge No. 7 over the impact of the Time and Attendance Swiping Program on the wages, hours, and terms and conditions of employment of bargaining unit employees.

3. Post, in all places where notices to bargaining unit employees are regularly posted, copies of the attached Notice to Employees. This Notice shall be signed by the Employer's authorized representative and maintained for sixty (60) calendar days during which the majority of employees are working. The Employer shall take reasonable steps to ensure that said copies of the Notice are not altered, defaced, or covered by any other materials; and

4. Notify the Executive Director in writing within thirty-five (35) calendar days after receipt of this Recommended Decision and Order of the steps taken to comply with it.

City of Chicago, Department of Police

_____

Date: (Employer)

ILLINOIS LABOR RELATIONS BOARD

801 South 7th Street, Suite 1200A
Springfield, IL 62703
(217) 785-3155

160 North LaSalle Street, Suite S-400
Chicago, Illinois 60601-3103
(312) 793-6400

THIS IS AN OFFICIAL GOVERNMENT NOTICE
AND MUST NOT BE DEFACED