Getting Rid of Bad Apples: Winning at Arbitration

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Research has repeatedly revealed that a very few individuals commit the vast majority of the serious misconduct experienced within public agencies—from law enforcement to the fire service to public schools. For example, one study in Chicago found that only 4.5% of elementary school teachers and administrators were responsible for the falsification of the standardized test scores of more than 19,000 students.[1] Studies of sexual misconduct by grade school teachers and public university professors have estimated that between 4% and 7% of educators account for all cases of sexual misconduct against students.[2]

A study examined citizen complaints across 165 law enforcement agencies in the state of Washington, finding that less than **5% of the officers** on those agencies **were responsible for 100% of the sustained citizen complaints**.[3] Another study examined 15-years of citizen complaint and internal misconduct data within one urban police department in the state of New York. It found that about 6 percent of the officers employed by the department over those 15 years accounted for almost all of the internal and external allegations of misconduct.[4]

Finally, a third study of "bad apples" in the context of law enforcement examined more than 5,500 citizen complaints against officers on eight police departments from mid-sized cities. It found that 79 percent of the officers on these departments received no sustained complaints at all during the study period, and another 16 percent received only one sustained complaint. Approximately 5 percent of the officers, however, had multiple sustained complaints, with a small group of 47 officers accounting for almost half of all sustained complaints. This small group of 47 officers made up 2 percent of all officers on the eight departments, but generated more than 100 excessive force allegations, 200 discourtesy allegations, and numerous other misconduct complaints.[5]

These are problem-prone employees, often referred to as "bad apples," and they create havoc within their respective government agencies. They routinely damage relations with the public, bring discredit to their agencies, and place their peers at risk for danger and lawsuits. In this modern age of video cameras everywhere, and YouTube® videos capturing and broadcasting bad behavior, the antics of these problem-prone employees are increasingly on display for the world to see. While removing bad apples has clear benefits for the well-being of the community and the reputation of

the agency, many public sector leaders have argued that their ability to terminate these problem employees is being undermined and eroded by the grievance arbitration process.

Over the last few decades, there have been numerous instances of police departments, schools, fire departments, and other government agencies terminating a problem employee for serious misconduct, only to have an arbitrator later reinstate the employee. In fact, at arbitration, public agencies only prevail about 50% of the time, with the other 50% resulting in the arbitrator either vacating or reducing the severity of the punishment the employer gave the employee.[6] Situations such as these have caused some to question the legitimacy of the workplace grievance arbitration process.

But does the available research reveal a fundamentally flawed arbitration system that inevitably disrupts attempts to discipline or does it indicate a wide-spread failure by supervisors to make disciplinary decisions in a way that is defensible in the face of scrutiny? **Current research on grievance arbitration cases does *not* reveal that arbitrators either ignore the evidence or simply seek to mediate a "middle ground" punishment between the employer and the union. There are clear reasons upon which the arbitrators base their decisions to overturn or reduce punishments.** The research on grievance arbitrations has repeatedly revealed that when an arbitrator reverses an employer's termination decision, the arbitrator almost always clearly articulates a legitimate reason for the reversal, and there is often more than one reason. Most reversals involved true errors made by the employer while investigating or punishing the misconduct, and when employers attempt to appeal the arbitrator's ruling through the courts, trial and appellate court judges generally uphold the arbitrator's decision for the same valid reasons originally articulated by the arbitrator.[7]

The Reasons for Arbitration Reversals

Dolan Consulting Group research staff recently conducted an in-depth analysis of 600 cases of public sector employee suspensions and terminations that went to review by some sort of external arbitrator (i.e., union grievance arbitrator, civil service board, state human resources commission, etc.). These cases involved law enforcement agencies, prisons, schools, probation departments, fire departments, emergency medical services agencies, and public works departments. In 50% of the cases the external arbitrator reversed or reduced the employer's discipline. In analyzing these cases, the Dolan Consulting Group staff was able to identify the **five most common reasons given by arbitrators to justify their decisions to reverse or reduce discipline**.

Disproportionate Punishment

The most common reason cited for overruling the employer's discipline was that punishment was distributed unfairly. In most cases this involved situations where two employees, who shared similar past work histories, committed similar acts of misconduct, yet one employee was punished far more severely. Employees must be treated fairly when being given punishments and the only aggravating or mitigating circumstance that can justify different punishment outcomes for the same type of behavior is a recent past record of other misconduct. Arbitrators in the cases we studied overturned punishments if it appeared the severity of the punishment depended on anything else, including the employee's rank, years of experience, attitude, or lack of remorse.

Also, and to a lesser extent, disproportionate punishment referred to a punishment that was disproportionate in severity to the act of misconduct. In other words, it involved a minor act of misconduct that was given a severe punishment rather than a minor punishment or retraining in the spirit of progressive discipline.

Insufficient Evidence

The second most common justification for overturning employer discipline involved insufficient proof of misconduct. While courts usually utilize the "preponderance of the evidence" standard of proof in civil cases, including workplace grievance lawsuits, arbitrators generally use a higher standard of proof. When reviewing employer discipline involving suspensions or terminations, arbitrators tend to use the "clear and convincing" evidentiary standard, which is a higher standard of proof than a preponderance of the evidence. If an employer utilizes the lower standard of proof when determining whether an employee committed a particular act of misconduct, the employer risks having the discipline overturned by an outside arbitrator.

Due Process Violations

The third most common reason arbitrators overturn a public employer's discipline is that the employer violated the employee's due process rights when investigating the employee misconduct, determining guilt, or assigning punishment. Public employees are afforded certain rights within each state by statute and legal precedent. These rights generally include a complete and impartial investigation, notice of the charges against the employee, an opportunity to challenge the charges, and a determination of guilt by an unbiased hearing officer. No matter how serious the employee's misconduct, and no matter how much evidence there is against the employee, if the employer violates these rights, the discipline is likely to be overturned.

Procedural Errors

Procedural errors, such as failing to follow written policies or the agency's collective bargaining agreement, came next in frequency as a justification to overturn an employer's discipline. If an employer fails to follow any of its own written procedures for handling employee discipline, it risks having its discipline overturned. The same is true for violations of its collective bargaining agreement with its employee's union. If there is a time limit for filing misconduct charges, for example, then this time limit must be met. If the contract permits employees to have a union representative present during questioning, then a union representative must be contacted and be present. A failure to follow these procedural requirements can result in the overturning of otherwise reasonable discipline.

Employee's Past Record of Good Performance and Other Mitigating Circumstances

To a much lesser extent, other mitigating circumstances were mentioned by arbitrators as additional justifications for overturning an employer's discipline. **The most common of these was the employee's past record of good performance.** When issuing punishments, arbitrators expected employers to show lenience toward employees with lengthy employment histories of outstanding past performance. Arbitrators also expected employers to demonstrate some form of harm that resulted from the employee's misconduct in order to justify the punishment. Finally, arbitrators tended to review the circumstances surrounding the misconduct by what was objectively reasonable from the perspective of the employee at the time, rather than the reality of facts that were determined later.

Making Discipline Stick

Dolan Consulting Group staff have taken the findings from this research study and developed an evidence-based course to not only educate public employers about these five reasons for discipline reversals, but also provide strategies for ensuring that discipline is delivered in a fair manner that will stand up to external arbitrator review. Called *Making Discipline Stick*, this new course is designed to assist supervisors, human resources professionals, attorneys, agency executives, and union leaders in the public sector by increasing their knowledge about what most frequently causes discipline to be overturned. When arbitrators give a written justification for their decision, they often provide cautions or advice to the employer about how the case should have been handled. This course uses these very words and insights from the arbitrators to help public sector agencies improve the fairness of their disciplinary processes and increase the likelihood the employee discipline they hand down will remain in place after arbitrator review.

Conclusion

Research has firmly revealed that the vast majority of serious misconduct in public agencies is committed by a small number of "bad apple" employees, usually only about 5% of an agency's employees. Unfortunately, due to five common errors, when corrective action and discipline is employed to address the conduct of these bad apples, this discipline is overturned about half of the time. As a result, the corrective action fails in its purpose, and sometimes the problem employee becomes more emboldened, believing that he or she is impervious to discipline from the employer.

In order to prevail when faced with external review by some sort of arbitrator, employers need to ensure that employee misconduct is investigated fairly and that punishment decisions are consistent with the rules followed by the courts and arbitrators. Employers need to ensure that their punishments given are consistent, fair, and proportionate to the severity of the misconduct. They need to ensure that they gather sufficient evidence to meet the "clear and convincing" evidentiary standard when dispensing suspensions or terminations. Employers need to observe and protect all of the employee's due process, statutory, and contractual rights. They must also consider the employee's prior work performance record and the facts of the case as they appeared to the employee at the time.

By taking the time necessary to ensure that these steps are followed, public sector leaders can improve the fairness of their employee disciplinary processes, and dramatically increase the likelihood that an arbitrator will fully support the employee discipline that is given – *making discipline stick* for the sake of the agency's mission, the overwhelming majority of employees and the public they serve.

References

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