



## Don't Have a "Rubber Gun Squad"? *Separation Agreements in Public Safety*

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For years, the New York City Police Department has reserved a place within the department that is widely known as the "rubber gun squad". This "squad" is comprised of individual officers who cannot be put on the street to conduct normal police operations for a variety of reasons.

**Many of the officers have been reinstated by an arbitrator or judge, but the department leadership cannot put them back on the street. Agency leaders have concerns about these officers' ability and/or willingness to protect and serve in a safe manner, not to mention a potential lack of credibility in testifying in court due to past instances of dishonesty. So leaders conclude, "We can't fire them, we can't trust them on the street, so we'll put them in the corner and have them wait out the clock until they retire."**

A 2011 investigative article by the *New York Post* estimated that the annual cost to taxpayers of keeping these individuals on the payroll was approximately \$22 million.<sup>1</sup> Although a 2015 report by the *New York Daily News* indicated that these numbers were substantially reduced under Commissioner Bill Bratton down to 260 officers, the cost is still substantial.<sup>2</sup>

The NYPD is certainly not alone in this predicament, even though the nation's largest municipal law enforcement agency's rubber gun squad is probably the most famous. What often does *not* gain as much public attention is the fact that **countless public safety agencies throughout the country are essentially hiding problem officers, firefighters and other public safety professionals in positions where they are believed to be least likely to trigger liability, threaten public safety and damage the public trust.** What is particularly troubling is that many agencies hide these individuals in positions that *should* be reserved for the best of their personnel—recruiting, training and community relations. This extremely small percentage of agency personnel remain employed and persist in causing stress and strain for supervisors and often lower morale for fellow employees.

**In cases like these, agencies should consider whether separation agreements are an effective way of dealing with toxic employees in a way that allows the agency to move forward.**

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<sup>1</sup> <https://nypost.com/2011/03/20/outcast-cops-still-rake-it-in/>

<sup>2</sup> <http://www.nydailynews.com/new-york/nyc-crime/exclusive-nypd-disciplinary-process-bad-cops-revamping-article-1.2162759>

## What are Separation Agreements?

Although the terms of a particular agreement may vary, **a separation agreement is typically entered into between the agency and the employee that agency leaders consider to be a “bad apple”**. The basic terms of these agreements are simple—the employee waives his or her rights to arbitration or court claims related to their employment with the agency and in return the agency pays the employee to walk away from the agency.

**For the agency, the thinking behind the agreement is fundamentally that:**

- (1) We have failed to thoroughly document this employee’s history of misconduct, have handed him or her annual “get out of jail free” cards in the form of positive performance evaluations, and are therefore unlikely to be successful in arbitration or in a court of law if we try to terminate this employee. This is because, as the saying goes, if it’s not in writing, then it didn’t happen.*
- (2) On the other hand, we have a professional and ethical responsibility to prevent this individual from serving in a position where his or her misconduct could result in danger to co-workers and members of the public and the loss of public trust that accompanies it.*

## Are Separation Agreements Actually Being Utilized by Public Safety Agencies?

Throughout the nation, some public safety agencies *are* utilizing these agreements. They can be used immediately following a termination decision—in anticipation of a lengthy battle in arbitration or in court—or after an order of reinstatement has come from a court or arbitrator. A few recent examples include:

- In 2017, a terminated Seattle police officer agreed to accept \$100,000 to waive her right to challenge her termination before an arbitrator.<sup>3</sup>
- In 2016, an Illinois firefighter agreed to accept \$100,000 to waive his right to challenge his termination before an arbitrator.<sup>4</sup>
- In 2017, a Montana deputy accepted \$400,000 to waive his right to return to work after he was ordered to be reinstated by a judge.<sup>5</sup>
- In 2017, a Rhode Island firefighter accepted \$175,000 to waive his right to return to work after he was order to be reinstated by an arbitrator.<sup>6</sup>

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<sup>3</sup> <https://www.seattletimes.com/seattle-news/crime/city-attorney-defends-settlement-payment-to-seattle-cop-fired-over-golf-club-arrest/>

<sup>4</sup> <http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-oak-lawn-settlement-st-1131-20161202-story.html>

<sup>5</sup> [https://www.bozemandailychronicle.com/news/crime/fired-gallatin-county-deputy-settles-civil-cases-for-k/article\\_9d1f3981-df2e-5550-98a9-8425196c9221.html](https://www.bozemandailychronicle.com/news/crime/fired-gallatin-county-deputy-settles-civil-cases-for-k/article_9d1f3981-df2e-5550-98a9-8425196c9221.html)

<sup>6</sup> <http://www.newportri.com/a0da0e57-1845-5d28-ba7b-a07cff80957b.html>

**In all of the above cases, the governmental decision-makers publicly argued that it was in the agency's best interest to pay the financial price necessary to move forward without the employee in question retaining the profound responsibilities of a public safety professional.** Obviously, since all of these public safety employees were terminated, it is at least the position of their former employers that they are not fit to serve the community as first responders.

Possibly more common than opting for separation agreements are agency leaders who openly acknowledge that they wanted the employee fired but have capitulated due to the fear of reinstatement. It seems difficult to overstate how damaging it can be to the public trust for leaders to acknowledge that they believe an individual is unfit to serve but they continue to serve nonetheless.

### **Not a “Magic Bullet”**

**Separation agreements seem to be an underappreciated option at the disposal of frustrated agency leaders who feel helpless in the face of arbitrators and judges who have, or seem poised to, reinstate individuals that they feel pose some threat to the public and agency members.** Leaders are prone to protesting that they believe that arbitrators, in particular, go out of their way to reinstate officers even in the face of clearly egregious misconduct. They often feel powerless in determining the composition of the ranks that they lead.

Without either confirming nor challenging this common assertion, the fundamental question emerges: **what options to agency leaders have when they believe that they have an obligation to remove a “bad apple” from their ranks?** First, they can tolerate the behavior and seek to minimize it by “hiding” the employee to the extent possible. Second, they can terminate the employee with the knowledge that arbitrators or courts might well overturn their decision. But third, they can negotiate with the employee to separate from the agency in a way that sticks—a way that is contractual and legally binding.

**The first two options—either tolerating or terminating and “rolling the dice”—have certainly been tried by public safety leaders throughout the country.** And the third option of separation agreements generally involves the payment of substantial sums of money.

**But how expensive is it to pay the salary of a public safety professional who could cost the agency millions of dollars at any moment? It seems that agency leaders would be well served to at least consider separation agreements as a less-than-perfect but hopefully better-than-disastrous third option.**