Making Discipline Stick in Law Enforcement©

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Some individuals in government have suggested that grievance arbitrators' handling of law enforcement officer discipline cases tends to be biased in favor of the employees and against management. Cleveland Mayor Frank Jackson, for example, has criticized the grievance arbitration process after being required to rehire a number of police officers that had been terminated from the Cleveland Police Department. Mayor Jackson argued that the arbitration process "keeps bad cops on the force."[1]

Former Police Chief Cathy Lanier of the Washington Metropolitan Police Department in Washington, DC faced similar issues, being forced to reinstate officers her department had terminated for significant acts of misconduct. In a December 24, 2013 letter to the editor published in the *Washington Post*, Chief Lanier wrote the following:

> "One of my greatest frustrations is an arbitration process for employee terminations that, on multiple occasions, has required the department to rehire officers who had been fired for misconduct. In fact, we've had several instances in which an officer was fired for misbehavior, the case went to arbitration and the arbitrator ruled that we had to rehire the individual, who was subsequently arrested for additional misconduct. As a result of arbitration, we are regularly required to rehire individuals who simply have no business being on this police force. Often, arbitrators in these cases don't appear to have the best interests of D.C. residents in mind."[2]

[1] Staff (February 27, 2015). Cleveland Mayor Frank Jackson says arbitration process keeps bad cops on police force. Cleveland.com (Retrieved from: http://www.cleveland.com/metro/index.ssf/2015/02/cleveland_mayor_frank_jackson_22.html)

[2] Lanier, C. L. (December 24, 2013). Letters to the editor: The biggest obstacle in building a better D.C. police department. *The Washington Post* (Retrieved at: https://www.washingtonpost.com/opinions/the-big-obstacle-in-building-a-better-dc-police-department/2013/12/24/42df1772-68e3-11e3-997b-9213b17dac97_story.html)

Situations such as these have caused some to question the legitimacy of the workplace grievance arbitration process with regard to law enforcement officers. In 2002, Chicago Police Board member Mark Iris, for example, wrote, "Given that disciplinary suspensions went through multiple stages of internal scrutiny before any discipline was imposed, it seemed reasonable to expect that arbitrators would have upheld management's actions at a much higher proportion."[3] Iris went on to argue that the police grievance arbitration process was simply "arbitrary," seeking to negotiate down the severity of punishments rather than looking at the evidence.

Prior research on grievance arbitration cases involving public employees, however, does not reveal that arbitrators either ignore the evidence or simply seek to mediate a "middle ground" punishment between the employer and the union. A 1995 study examined arbitration decisions from 994 public sector employee discipline cases. It found that arbitrators upheld the employer's discipline in its entirety in about 50% of these public sector cases, but did reduce or completely overturn the employee's discipline in the other half of the cases.[4] A 2007 study reviewed 806 arbitration cases of public sector employee discipline and, again, found that the arbitrators sided with the employer in about half of the cases.[5]

Dolan Consulting Group (DCG) analyzed a nationwide sample of 377 cases of serious law enforcement officer discipline (demotions, suspensions, and terminations) that went to arbitration review between January 1, 2006 and December 31, 2015. In these law enforcement-specific cases, the arbitrator sided with the employer and upheld the discipline 55% of the time. However, in 45% of the cases, the arbitrator did reduce or completely overturned the employee's discipline. **In the overwhelming majority of cases, arbitrators cited specific management investigative, procedural and consistency failures that led to the decision to overturn or reduce discipline.**

Why is Discipline Reduced or Overturned?

It appears that almost half of the time a law enforcement agency seeks to apply significant corrective action in response to an employee's acts of misconduct, this discipline is not upheld by an arbitrator almost half of the time. This clearly hampers leadership's ability to hold employees accountable for reckless, negligent, or criminal behavior. This situation makes it difficult for law enforcement agencies to rid themselves of "bad apples," lowering agency-wide morale, damaging the legitimacy of the police in the eyes of the public, and increasing legal liability for the department. It is extremely important, therefore, that law enforcement agency leaders learn what errors have led to discipline reversals in the past, so they can avoid those errors in the future.

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[3] Iris, M. (2002). Police discipline in Houston: the arbitration experience. *Police Quarterly, 5(2)*, 132-151.
[4] Mesch, D. J. (1995). Grievance arbitration in the public sector. *Review of Public Personnel Administration, 14(4)*, 22-36.; Mesch, D. J., & Shamayeva, O. (1996). Arbitration in practice: a profile of public sector arbitration cases. *Public Personnel Management, 25(1)*, 119-132.
[5] LaVan, H. (2007). Public sector employee discipline: comparing police to other public sector employees. *Employee Responsibilities and Rights Journal, 19(1)*, 17-30.

In analyzing its sample of 377 law enforcement employee discipline arbitration cases, DCG was able to identify the five most common reasons given by arbitrators to justify their decisions to reverse or reduce discipline issued to law enforcement officers.

#1 – 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 discipline was distributed unevenly. **These are cases where two employees who shared similar past performance histories committed similar acts of misconduct, yet one employee was punished far more severely than the other. Employees must be treated evenly 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 record of prior misconduct**. Arbitrators overturned punishments if it appeared the severity of the punishment depended on anything else, including the employee's rank, years of experience, personal friendships, race, sex, or even attitude and lack of remorse. Only the seriousness of the offense and the employee's prior record of misconduct should matter.

Arbitrators also reduced or overturned discipline on the basis of disproportionate punishment if the punishment was far more severe than the seriousness of the act of misconduct would warrant. In other words, if the case 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, it was likely to be overturned by the arbitrator. **Some of these discipline decisions may have been, in fact, "last straw" offenses for an employee who had been exhibiting problem behavior for some time. If this prior past misconduct had not been documented and addressed, however, courts and arbitrators are unwilling to take these past problems into consideration.**

#2 – Insufficient Evidence

The second most common justification for overturning employer discipline involved insufficient proof of misconduct. While civil courts often utilize the "preponderance of the evidence" standard of proof in civil lawsuits, arbitrators generally use the higher standard of proof of "clear and convincing." The clear and convincing standard means that the information presented is substantially more probable to be true than not true. This standard of proof is a higher degree of proof than the "preponderance of the evidence, and it also the standard of proof utilized by arbitrators".[6] If the law enforcement agency only utilizes the lower preponderance of the evidence standard of proof when gathering evidence and determining whether an employee committed a particular act of misconduct, the employer risks having the discipline overturned by an outside arbitrator.

#3 – Due Process Violations

[6] *Calderon v. Thompson*, 523 U.S. 538 (1998); *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

The third most common reason arbitrators overturn a law enforcement agency'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 due process rights by the U.S. Supreme Court, and by statutes and legal precedents within each state. These rights generally include a complete and impartial investigation, notice of the charges against the employee, an opportunity to challenge the charges with rebuttal evidence, and a determination of guilt by an unbiased hearing officer. Even murderers and terrorists are afforded their due process rights by the criminal justice system when they are investigated, arrested, and prosecuted. Therefore, **no matter how serious the employee's act of 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, just as a criminal can walk free if his or her due process rights are violated in the criminal context**.

#4 – 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 a law enforcement agency 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, as this "agreement" is actually a legally binding contract. Violations of a legal contract will bring legal repercussions for the party that violates the contract. 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.

#5 – Other Mitigating Circumstances

To a much lesser extent, a collection of other mitigating circumstances were mentioned by arbitrators as additional justifications that helped sway them to overturn 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 leniency toward employees with lengthy employment histories of outstanding past performance. **Therefore, if past misconduct was not documented, it was irrelevant to the arbitrators' decision. As a popular saying goes, *if it's not in writing, it didn't happen*.**

Arbitrators usually expected employers to demonstrate some form of harm that resulted from the employee's misconduct in order to justify the punishment. Arbitrators usually have never been police officers and they do not understand your job. Employers often need to explain what repercussions specific acts of misconduct may have on the community or the department.

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. This was the standard set by the U.S. Supreme Court in *Graham v. Connor*. It requires asking the question, "Based on what the officer knew, heard, smelled, and

saw at the time, were the officer's actions reasonable?" Arbitrators expect employers to employ this standard.

Making Discipline Stick

DCG staff have taken the findings from this research study of 377 law enforcement employee discipline cases and developed an evidence-based course to not only educate law enforcement leaders about these five reasons for discipline reversals, but also provide strategies to help ensure that discipline is delivered in a fair manner that will stand up to external arbitrator review.

Called *Making Discipline Stick in Law Enforcement©*, this course is designed to assist supervisors, human resources professionals, city attorneys, agency executives, and union leaders in law enforcement by increasing their knowledge about the most frequent causes of discipline reversals. When arbitrators give a written justification for their decision, they always provide advice to the employer about how the case should have been handled. This course uses the very words and insights from these 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.