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RESEARCH BRIEF

Making Discipline Stick in the Fire Service©

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Some individuals in government have suggested that grievance arbitrators' handling of employee discipline cases in the fire service tends to be biased in favor of the employees and against the fire department. The mayor of Cleveland, Ohio, for example, criticized the grievance arbitration process after being required to rehire a number of city employee that had been terminated from various city departments. He argued that the arbitration process keeps bad employees on the job.[1] The mayor of Plattsburgh, New York, when dealing with firefighter employee grievance cases, publicly stated his belief that the decisions of arbitrators "defy logic."[2] The mayor of New York City, when an arbitration decision required the re-hiring of several city employees who had been terminated for serious acts of misconduct, stated that arbitrators "would give an axe murderer a slap on the wrist."[3] Leaders in many other cities dealing with orders to rehire firefighters who were terminated for serious acts of misconduct have suggested that the grievance arbitration process is broken.[4]

Prior social science research on grievance arbitration cases involving public employees also reveals that arbitrators frequently find in favor of the employee by reducing, or completely overturning, public employee discipline. A 1995 study examined arbitration decisions from 994 public sector employee discipline cases. It found that arbitrators only upheld the employer's

[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] Lotempleo, J. (December 8, 2012). Plattsburgh mayor blasts fire union over arbitrator's decision. *Plattsburgh Press-Republican* (Retrieved from: https://www.pressrepublican.com/news/local_news/plattsburgh-mayor-blasts-fire-union-over-arbitrator-s-decision/article_2b374a7b-797e-50ac-9c64-6aa52028fa25.html)

[3] Colvin, J. (April 6, 2012). Mayor says arbitrators would give ax murderer "slap on the wrist." *New York Public Radio*. (Retrieved from: https://www.dnainfo.com/new-york/)

[4] Cromwell, A. (December 21, 2017). Saint John Mayor critical of firefighter arbitration decision. *Global Views*. (Retrieved from: https://globalnews.ca/news/3930252/saint-john-mayor-critical-firefighter-arbitration/)

discipline in its entirety in about 50% of these public sector cases.[5] Another study in 2007 reviewed 806 arbitration cases of public sector employee discipline and, again, found that the arbitrators sided with the employer in only about half of the cases.[6]

If fire departments cannot discipline their employees when corrective action is warranted, several negative outcomes result. First, the employees of the agency will have difficulty determining where the boundaries lie between appropriate and inappropriate behavior—possibly leading to behavior that is not only inappropriate but that results in serious criminal charges. Second, **toxic and dysfunctional employees will believe they are untouchable and, as a result, will be emboldened to engage in further misconduct**. Third, **the morale of the good employees will suffer as they have to continue to work alongside (and entrust their safety to) toxic and dysfunctional individuals**. Fourth, the image of the agency and the profession will decline in the eyes of the public and local politicians—politicians and a public that votes on such things as raises, contracts, or tax increases for fire services. Finally, members of management can begin to feel that they have no control over the organization.

Why Employee Discipline is Reduced or Overturned

Why are the corrective actions applied to firefighters and EMTs overturned so often? Are the arbitrators acting so irrationally that fire departments are powerless? The evidence suggests that this is actually *not* the case. Dolan Consulting Group (DCG) recently studied 661 cases of employee misconduct handled by 276 fire agencies and ambulance services across 44 states. These cases primarily represented situations that resulted in serious discipline, such as suspensions without pay or employment termination. This study examined what factors were associated with whether or not the employees accepted or challenged their discipline and examined how the discipline challenges were handled by grievance arbitrators or the civil courts. **This analysis revealed that there are clear and consistent reasons that employee employee discipline by fire rescue agencies is overturned almost half of the time.**

Grievance Arbitration

Approximately 61% of the disciplined fire rescue personnel in this study appealed their discipline to a grievance arbitrator. In this research study, "grievance arbitrator" was defined very broadly to include the grievance arbitration processes as part of collective bargaining agreements between employers and labor unions, as well as other types of arbitration mechanisms such as civil service boards, employee relations boards, workplace standards boards, or equal employment opportunity boards. **These arbitrators ruled in favor of the employee in 54% of the cases by reducing or overturning the employee's discipline**.

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[5] 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.

[6] LaVan, H. (2007). Public sector employee discipline: comparing police to other public sector employees. *Employee Responsibilities and Rights Journal, 19(1)*, 17-30.

In each arbitration decision, the arbitrator provided a detailed explanation of his or her rationale for altering the discipline that had been issued by the employer. ***In all of the cases favorable to the employee, arbitrators found as least one error---and in some cases, three or four errors--on the part of the employer that justified reducing or overturning the disciplinary action.*** **In 72% of the cases in which the employee discipline was reduced or overturned, the arbitrator noted inconsistent discipline on the part of the employer**. Inconsistent discipline can include instances in which the employer issued less severe punishments in the past to other employees who had committed similar offenses. **In about 60% of the cases,** the employer failed to reach the legal standard of clear and convincing evidence that is required when suspending or terminating employees. In these cases, the **employers had relied upon hearsay and weak evidence, while the disciplined employee had stronger evidence refuting their guilt**.

In 59% of the cases the employers were found to have issued disproportionate discipline, meaning that the penalty issued by the employer was disproportionately severe when compared to the seriousness of the misconduct, or was disproportionately severe when compared to the employee's past record of good performance. **In 47% of the cases, the employer was found to have violated the collective bargaining agreement** by failing to exercise progressive discipline. Finally, **in 40% of the cases, the employer was found to have violated the employee's due process rights or collective bargaining contract requirements**, such as by not providing an impartial hearing, not allowing the employee to present counter evidence, not providing an impartial determiner of guilt, or failing to meet required deadlines.

These cases reveal a consistent pattern. Fire rescue departments often see their employee discipline reduced or overturned at arbitration, but primarily for legitimate reasons. The disciplinary process must be legal, fair, and follow proper procedure. These cases were overturned because they each lacked fairness, legality, or they violated proper procedure in multiple ways.

Civil Lawsuits

While grievance arbitration process is frequently criticized, not nearly as much hostility is directed at the civil courts. The civil courts, however, generally come to the same conclusions as the grievance arbitrators. In our study, 17% of the disciplined fire rescue employees chose to contest their discipline through a lawsuit instead of through grievance arbitration. **The courts sided with the employer as frequently as did the arbitrators. Only 59% of these lawsuit cases were decided in favor of the employer, with the courts reducing or overturning the employee's discipline in 41% of the cases. This suggests that grievance arbitrators and the civil courts resolve cases in a similar manner.**

When examining the civil court judges' justifications for reducing or overturning the fire rescue agency's discipline, the judges cited the same reasons as the arbitrators. All of the lawsuits that were decided in favor of the employees cited multiple employer errors that warranted altering the employee's discipline. **These employer errors included violation of the employee's due process rights or collective bargaining agreement requirements (79%), lack of clear and**

convincing evidence of guilt (60%), disproportionate discipline (29%), inconsistent discipline (24%), and failure to exercise progressive discipline (9%).

Getting a Second Opinion

It appears that there is nothing unique about the way grievance arbitrators reach decisions in discipline cases. Grievance arbitrators side with the employer at a similar rate as do the civil courts, and reduce or overturn employee discipline for the exact same reasons as do the civil courts. It should not be surprising, therefore, that trying to appeal the outcome of binding arbitration in court rarely changes the result. In our study, 45% of the cases that went to arbitration were later taken to civil court by the losing party to overturn the arbitrator's decision. In these cases the civil court judges upheld the arbitrator's decision the vast majority of the time.

In situations where the employee lost at arbitration (remaining terminated or suspended), but then filed a lawsuit against the department in court, the court upheld the arbitrator's decision 95% of the time. In situations where the employer sued to block the arbitrator's order to reduce or remove the employee's discipline, the court still upheld the arbitrator's decision 70% of the time. Even in the 30% of cases in which the court sided with the employer, the majority of these cases involved adjusting the arbitrator's order because the conditions or the ruling could not be fulfilled. For example, several of these cases involved an order to fully reinstate an EMT or paramedic, but the state had revoked the employee's EMT credentials, making reinstatement as an EMT impossible. In such cases the judges simply modified the arbitrator's ruling so that the employee was reinstated as a firefighter rather than as an EMT. The judges only completely overturned the arbitrator's ruling in a couple of cases, and this was only when it could be proven that the arbitrator had grossly exceeded his or her authority.

Five Reasons Discipline was Overturned

Fire agencies can implement effective discipline that won't get overturned by addressing common mistakes that they may or may not be making.

#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".[7] 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

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

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

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 fire rescue employee discipline cases and developed an **evidence-based course to not only educate fire rescue leaders about the 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 the Fire Service©*, this course is designed to assist supervisors, human resources professionals, city attorneys, agency executives, and union leaders in the fire rescue profession by increasing their knowledge about the most frequent causes of discipline reversals. When arbitrators and judges give written justifications for their decisions, 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 and judges to help fire rescue agencies improve the fairness of their disciplinary processes and increase the likelihood the employee discipline they hand down will remain in place after external review**.