

Factors in Police Misconduct Arbitration Outcomes:

What Does It Take to Fire a Bad Cop?

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Introduction

“Anecdotal evidence can easily be generated from many . . . jurisdictions to illustrate the fact that disciplinary actions, grounded in conduct which chiefs of police and presumably the public at large would find simply unacceptable, are often overturned by arbitrators.”¹

Disciplinary procedures for police officers across the country have been a source of significant frustration for mayors, city officials, police chiefs, and others with an interest in the outcome of these proceedings.² At the core of this frustration is the perception that labor arbitrators frequently overturn decisions of police executives.³

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1. Mark Iris, *Unbinding Binding Arbitration of Police Discipline: The Public Policy Exception*, 1 *VA. J. CRIM. L.* 540, 544 (2013).

2. See Darrel W. Stephens, *Police Discipline: A Case for Change*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE (June 2011), <https://www.ncjrs.gov/pdffiles1/nij/234052.pdf>.

3. *Id.*; see also Iris, *supra* note 1, at 544.

Public concern over the effectiveness and adequacy of police discipline has spiked in recent years.⁴ This has brought increased media attention to alleged police misconduct.⁵ One obvious example is the shooting of Michael Brown, an unarmed black teenager, in Ferguson, Missouri, on August 9, 2014.⁶ The shooting caused intense public outcry⁷ about law

4. In 2015, one court went so far as to order an investigation into the adequacy of police discipline. *The Arbitration of Police Discipline: An Intensive Court Ordered Study in Oakland, California*, NATIONAL ACADEMY OF ARBITRATORS (Sept. 22, 2015), <http://law.missouri.edu/arbitrationinfo/2015/09/22/the-arbitration-of-police-discipline-an-intensive-court-ordered-study-in-oakland-california/>.

5. See *Last Week Tonight with John Oliver: Police Accountability* (HBO Broadcast Oct. 2, 2016), available at <https://www.youtube.com/watch?v=zaD84DTGULo>.

6. For an in-depth description of the Michael Brown shooting, see *What Happened in Ferguson?*, NEW YORK TIMES (Aug. 10, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

7. Because of the politically divisive nature of the Ferguson incident, reactions to the shooting differed between those critical of law enforcement practices and those supportive of swift action to secure the safety of police officers and the public. For an example of a critical perspective of the aftermath of the Ferguson shooting, see, for example, Jim Salter & Eric Tucker, *Ferguson Aftermath: U.S. Finds Racist, Profit-driven Practices in St. Louis Suburb*, WASHINGTON TIMES (Mar. 5, 2015), <http://www.washingtontimes.com/news/2015/mar/5/ferguson-aftermath-us-finds-racist-profit-driven-p/?page=all>. For an example of a more supportive perspective toward police accounts of the shooting, see, for example, Chris Nuelle, *8 Months Later: The True Aftermath of*

enforcement's treatment of racial minorities and led to heightened scrutiny of alleged police misconduct, particularly in instances in which officers used deadly force.⁸ The Ferguson controversy led many to harbor strong sentiments of distrust towards police, an issue exacerbated by the death of Freddie Gray while in police custody in Baltimore, Maryland, which led to

Ferguson, THE COLLEGE CONSERVATIVE (Apr. 22, 2015),

<http://thecollegeconservative.com/2015/04/22/8-months-later-the-true-aftermath-of-ferguson/>.

8. Some speculate that the racial element of controversies concerning law enforcement and lethal force necessitate an entirely new approach to police training. See Jameca Falconer, *Deadly Force: Post-Ferguson Policing*, SOCIETY OF COUNSELING PSYCHOLOGY (Oct. 9, 2015), <http://counspychracialjustice.org/deadly-force-post-ferguson-policing/>.

widespread rioting across the city.⁹ Some responded with deadly violence towards police officers after the shooting deaths of Philando Castile¹⁰ and Alton Sterling¹¹ in 2016.

These events renewed longstanding perceptions that labor arbitrators who fail to uphold appropriate discipline for abusive police officers render useless measures intended to discipline

9. *Timeline: Freddie Gray's Arrest, Death and the Aftermath*, THE BALTIMORE SUN (Apr. 12, 2015), <http://data.baltimoresun.com/news/freddie-gray/>. Further controversy ensued when none of the police officers involved in the incident were convicted of a crime. See Kim Bellware, *How the Fight to Convict Baltimore Cops in Freddie Gray's Death Fell Apart*, HUFFINGTON POST (July 31, 2016), http://www.huffingtonpost.com/entry/freddie-gray-trial-problems_us_5798feb1e4b02d5d5ed3ed67; Kevin Rector & Michael Dresser, *Officers' Selection of Judge Trials Shaped Outcome in Freddie Gray Case—Spurring Debate*, BALTIMORE SUN (Aug. 1, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci--pivotal-nero-bench-decision-20160731-story.html>.

10. Elliot C. McLaughlin, *Woman Streams Aftermath of Fatal Officer-Involved Shooting*, CNN (July 8, 2016), <http://www.cnn.com/2016/07/07/us/falcon-heights-shooting-minnesota/>.

11. Steve Visser, *Baton Rouge Shooting: 3 Officers Dead, Shooter Was Missouri Man, Sources Say*, CNN (July 18, 2016), <http://www.cnn.com/2016/07/17/us/baton-route-police-shooting/> (“Louisiana State Police announced last week that they had received threats of plots against Baton Rouge police.”). Violence against police also erupted in Dallas soon after the Baton Rouge incident. See Manny Fernandez, Richard Pérez-Peña & Jonah Engel Bromwich, *Five Dallas Officers Were Killed as Payback, Police Chief Says*, NY TIMES (July 8, 2016), http://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html?_r=0.

police officers accused of misconduct. This perception manifests itself in media portrayals of police discipline arbitration proceedings.¹² There is a growing sentiment that it is difficult or even impossible to fire a bad cop. Unfortunately, due to the media's propensity for circulating sensational headlines, they rarely provide complete and accurate accounts of the details of police misconduct arbitration decisions.¹³ Most importantly, the media fail to capture what factors arbitrators actually consider when deciding whether to uphold police discipline. This Note explores those details and examines what factors are most important to arbitrators in adjudicating cases of alleged police misconduct.

Part I of this Note provides background on police unions and their collective bargaining agreements, as well as prior research on arbitration outcomes in police discipline cases. Part II outlines this Note's methodology for reaching its own findings. Finally, Part III identifies the

12. See, e.g., Henry K. Lee, *Oakland Police Discipline Blasted Again*, SFGATE (May 4, 2015), <http://www.sfgate.com/crime/article/Oakland-police-discipline-blasted-again-6241820.php> (criticizing arbitration process that “failed to properly discipline” a police officer accused of alcohol-related misconduct); Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street*, THE ATLANTIC (Dec. 2, 2014), <http://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/> (highlighting cases across the country in which arbitrators overturned police discipline).

13. See Sean Gormley, *Counterpoint: Cop Disciplinary System is Not Broken*, STARTRIBUNE (Jan. 7, 2016), <http://www.startribune.com/counterpoint-cop-disciplinary-system-is-not-broken/364582971/> (addressing a previous commentator's argument that police discipline through arbitration is inadequate to “weed out” bad cops).

factors most significant in arbitrators' decisions overturning police discharges, and notes the particular salience of officers' good character in decisions reversing discharges.

I. Background

A. Police Unions and Collective Bargaining Agreements

Most police officers are represented by unions¹⁴ and are covered by collective bargaining agreements.¹⁵ In 2013, the majority were covered by a collective bargaining agreement or were operating under a collective bargaining agreement that had technically expired.¹⁶ The likelihood of police officers being covered by a collective bargaining agreement increases with the size of the city in which the department is located. In 2013, 92% of police officers serving a population

14. See Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2206 (2014) (discussing the emergence and practice of police unionization). Many police unions do not use the word “union” to describe it as an entity, opting instead for terms like “association” or “order.” *Id.*

15. *Id.* Because police officers are public employees, their right to bargain collectively depends on state law. Six states—Arizona, Georgia, North Carolina, Mississippi, South Carolina, and Virginia—prohibit police unions from collectively bargaining. *Id.* at 2207 (citing Richard B. Freeman & Eunice S. Han, *Public Sector Unionism Without Collective Bargaining*, 54 J. OF INDUS. REL. 386 (2012)).

16. BRIAN A. REAVES, LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES 15 app. tbl.3 (May 2015).

of 1,000,000 people or more had collective bargaining agreements, compared to slightly less than 60% of officers serving populations of fewer than 2,500 people.¹⁷

The terms and structure of these collective bargaining agreements vary widely among states, and even within municipalities.¹⁸ However, collective bargaining agreements between police officers and law enforcement agencies¹⁹ almost always permit grievances to challenge disciplinary actions.²⁰ Often, these grievances are initially appealed to an officer's immediate superior in the chain of command; meaning, for example, that a sergeant would appeal a disciplinary decision to a lieutenant.²¹ Once this process is finished, if the union still wishes to

17. *Id.*

18. Stoughton, *supra* note 14, at 2208–09. This variance is at least in part due to differences in how police unions negotiate with local law enforcement agencies. In larger cities, departments may have to negotiate with several different unions representing different portions of the police force. *Id.*

19. The Labor Relations Information System maintains a “contract database” of police collective bargaining agreements. *LRIS Public Safety Contract Database*, LABOR RELATIONS INFORMATION SYSTEM, <https://www.lris.com/contracts/>.

20. Stoughton, *supra* note 14, at 2209.

21. *Id.* at 2210.

dispute the disciplinary decision, most collective bargaining agreements permit the matter to be heard by a neutral arbitrator.²²

B. Prior Research on Arbitration Outcomes and Police Discipline

Previous studies have analyzed arbitration decisions to determine what factors arbitrators most frequently take into account in sustaining or denying labor grievances.²³ A study analyzing 2,055 Minnesota arbitration awards between 1982 and 2005 found that public sector employers are significantly more likely than private sector employers to win cases that go to arbitration.²⁴ Management is more likely to be upheld if the employee was discharged, rather than suspended or reprimanded.²⁵ The same study also found that when arbitrators reduce discipline, they most frequently cite an employee's good work record, a lack of progressive discipline by the employer, or the excessive severity of the punishment as mitigating factors.²⁶

22. *Id.* Grievance procedures may have more steps before reaching arbitration. *See generally id.*; Jerome Lefkowitz, *Arbitration of Disputes Involving Police and Firefighters*, in LABOR AND EMPLOYMENT ARBITRATION § 2-51 (Matthew Bender ed., 2nd ed. 2016).

23. *See, e.g.*, LAURA J. COOPER, MARIO F. BOGNANNO & STEPHEN F. BEFORT, MORE THAN WE HAVE EVER KNOWN ABOUT DISCIPLINE AND DISCHARGE IN LABOR ARBITRATION: AN EMPIRICAL STUDY (2015); George W. Bohlander & Donna Blanchero, *A Study of Reversal Determinants in Discipline and Discharge Arbitration Awards: The Impact of Just Cause Standards*, 21 LAB. STUD. J. 3 (1996).

24. COOPER ET AL., *supra* note 23, at 7, 305.

25. *Id.*

26. *Id.* at 308.

Some research has focused exclusively on police discipline arbitration. Studies of the frequency with which arbitrators overturn police discipline have been limited in scope, confined only to large cities, and covering only short timeframes.²⁷ Nevertheless, the available studies suggest that neutral arbitrators regularly overturn police discipline.²⁸ One study of Chicago police discipline arbitration decisions from 1990 and 1993 found that arbitrators overturned about half of the total days of disciplinary suspension imposed by police executives.²⁹ A similar study of Houston police discipline arbitration awards from 1994 to 1998 found that arbitrators upheld slightly more than half of all suspension days.³⁰

While the suspension of police officers is certainly a significant aspect of police discipline, perhaps the more controversial issue is how often discharged police officers are reinstated through arbitration. Studies suggest that the frequency of overturned discharges varies

27. See Iris, *supra* note 1, at 543–44 (examining two studies of police misconduct arbitration: one in Chicago over a four-year period, and another in Houston over a five-year period); EDWARD SWANSON, REPORT OF THE COURT-APPOINTED INVESTIGATOR IN *DELPHINE ALLEN V. CITY OF OAKLAND* (2015) (researching police discipline arbitration in Oakland over a five-year period).

28. Iris, *supra* note 1, at 543 (“Empirical findings confirm the reality that from a police chief’s perspective, the results of the arbitration process are not pretty.”).

29. Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary?*, 89 J. CRIM. L. & Criminology 215, 235 tbl.1 (1998).

30. Mark Iris, *Police Discipline in Houston: The Arbitration Experience*, 5 POLICE Q. 132, 141 tbl.1 (2002).

by city. A 2001 study of police discharge grievances in Cincinnati, for example, observed how high standards for terminating police officers resulted in many officers being reinstated.³¹ In recent years, Philadelphia and Oklahoma City have seen nearly every discharged police officer reinstated through arbitration.³² A study of police discipline in Oakland between 2010 and 2014 characterized the arbitration system as “broken” because police officials were upheld only about a quarter of the time.³³

31. See Robert Anglen & Dan Horn, *Police Discipline Inconsistent: Sanctions Most Likely to be Reduced*, CINCINNATI ENQUIRER (Oct. 21, 2001), http://enquirer.com/editions/2001/10/21/loc_police_discipline.html. This trend may have been attributable to a de facto requirement that Cincinnati police officers be convicted of a felony in a separate criminal proceeding before discharge became a possibility. Iris, *supra* note 1, at 544.

32. Dan Stamm, *Police Commish Angry That 90 Percent of Fired Officers Get Jobs Back*, NBC PHILADELPHIA (Feb. 28, 2013), <http://www.nbcphiladelphia.com/news/local/Police-Officers-Get-Jobs-Back-194100131.html> (about ninety percent of fired officers were reinstated; three-fourths with full pay and benefits); Will Aitchison, *10 Years of OKC Police Discipline*, LABOR RELATIONS INFORMATION SYSTEM (Aug. 11, 2015), <https://www.lris.com/2015/08/11/10-years-of-okc-police-discipline/> (Oklahoma City Police Department rehired six officers fired between 2005 and March 2015; all six had a favorable arbitration award).

33. EDWARD SWANSON, REPORT OF THE COURT-APPOINTED INVESTIGATOR IN *DELPHINE ALLEN V. CITY OF OAKLAND* 1 (2015) (“For years, Oakland’s police discipline process has failed to deliver fair, consistent, and effective discipline.”).

Departments throughout Texas at about the same time as the Cincinnati study, however, saw closer to half of police discharges overturned, and about half of overturned discharges reduced to a lesser penalty, such as a suspension.³⁴ More recently, police departments in Portland have also seen about half of officer discharges overturned.³⁵

These studies provide important statistical background and support the assertion that arbitrators regularly, but not always, overturn police discipline. However, they do not offer insight into the reasoning or important factors arbitrators considered in police discharge cases.³⁶ This Note seeks to fill this gap by identifying the most important factors to arbitrators in deciding whether to overturn police discipline.

II. Methodology

Finding and analyzing every arbitration decision involving police officers is beyond the capabilities of just one researcher. Major metropolitan areas alone can produce hundreds of arbitration decisions in only a few years.³⁷ This makes a nationwide survey of the factors that

34. Iris, *supra* note 1, at 544.

35. Maxine Bernstein, *Disciplining Portland Police Proves Challenging Task*, THE OREGONIAN (July 14, 2012), http://www.oregonlive.com/portland/index.ssf/2012/07/disciplining_portland_police_p.html.

36. Cooper, Bognanno, and Befort did not control for occupation beyond distinguishing between public and private sector employees. *See* COOPER ET AL., *supra* note 23 *passim*.

37. *See, e.g.*, Iris, *supra* note 29, at 216 (328 arbitration decisions involving police grievances in Chicago in four years).

influence arbitrators' decision-making impracticable. This Note, therefore, recognizes some reasonable limitations on the scope of the decisions analyzed.

First, this Note only examines cases challenging a police officer's discharge.³⁸ Limiting analysis to officer discharges narrows the number of decisions studied and allows focus on cases involving the most serious allegations of police misconduct, the area of greatest public and media concern.

Second, this Note only examines cases in which police departments discharged officers for misconduct. Police officers can be discharged for a variety of reasons.³⁹ Because the controversy about police arbitration centers on misconduct,⁴⁰ this Note looks at why police officers discharged for misconduct are reinstated by arbitrators.

Third, this Note is limited in the time period studied. Although police misconduct arbitration has been controversial for many years,⁴¹ it is more useful to provide a contemporary, rather than historic, perspective on police misconduct arbitration. This Note, therefore, examines decisions published in the five years between 2011 and 2015.

38. Some studies that compiled arbitration decisions for strictly statistical purposes, without going into the merits of each individual decision, have included cases involving officer suspensions. *See, e.g., id.*

39. *See, e.g.,* City of Rockford, 133 BNA LA 587 (2013) (Simon, Arb.) (officer discharged for psychological problems associated with lawful shooting of a suspect); City of Marengo, 131 BNA LA 1729 (2013) (Kravit, Arb.) (officer discharged for injuries sustained while on duty).

40. *See supra* notes 1–13 and accompanying text.

41. *See supra* notes 1–13 and accompanying text.

Finally, this Note does not address all police department employees covered by a collective bargaining agreement. Many law enforcement arbitration decisions involve employees who are not police officers. These include, for example, administrative assistants, dispatchers, or city inspectors.⁴² This Note limits analysis to police officers, who are directly responsible for law enforcement and are the subject of media scrutiny.

With these limiting factors in mind, this analysis includes ninety-two arbitration awards published between 2011 and 2015 regarding police officers discharged for misconduct.⁴³ Nearly all of these decisions came from Bloomberg Law's Labor and Employment Law Resource Center.⁴⁴

42. One example is a recent case involving a city inspector who allegedly misused the city's ticketing system by entering information about her own property. *City of St. Paul*, 135 BNA LA 456 (2015) (Jacobs, Arb.).

43. This Note only examines arbitration decisions. It is important to recognize that courts may overturn some arbitration decisions in rare circumstances. Because police cases depend on state law, this may occur, for example, under state-law public policy exceptions to the finality of arbitration awards. *See generally* Henry Drummonds, *The Public Policy Exception to Arbitration Award Enforcement: A Path Through the Bramble Bush*, 49 WILLAMETTE L. REV. 105 (2012).

44. Four decisions came from the AAA service on LexisAdvance.

Using the Bloomberg BNA Labor Arbitration Decisions search engine and the search terms “police & discharge OR terminate!” and “police officer & discharge OR terminate!” yielded thirty-eight decisions between 2011 and 2015.⁴⁵

Using the Arbitration Award Navigator, applying “Law Enforcement” under the “Industry” tab, and “discharge of employee” under the “Topic” tab yielded 125 results between January 1, 2011 and December 31, 2015. This yielded an additional fifty-four decisions within the study’s scope.

The decisions were organized in a spread sheet documenting information about each decision, including its citation and date. Codes were assigned to the arbitrators’ decisions and rationales, including reliance on due process (procedural reasons) and mitigating circumstances for overturning discharge. The study also recorded other factual aspects of each case, such as whether the officer was formally charged with a crime or whether the alleged misconduct involved civilian mistreatment.

III. Findings

As seen in Table 1, of the ninety-two awards examined, arbitrators upheld discharges in forty-nine cases (53.3%) and overturned discharges in the remaining forty-three (46.7%). The arbitrators’ rationale for overturning discharges fell into two categories: procedural factors related to due process and mitigating factors concerning the discharge’s factual context.

45. Other searches included “police & discharge,” “police & terminate,” “police officer & discharge,” “police officer & terminate,” and “police & just cause to discharge OR terminate!” These searches did not produce any additional awards.

Table 1. Outcomes of Police Discharge Arbitrations

Category	Number	Percentage of Total Cases
Discharge Upheld	49	53.3%
Discharge Overturned	43	46.7%
Total Cases	92	--

A. *Due Process Factors: The “Just Cause” Standard in Police Discharge Arbitration*

Due process in a discharge case relates to two issues: whether the department proved that it had just cause for discharge, and whether the pre-discharge procedure satisfied the collective bargaining agreement.

1. Proof of Just Cause

“The central concept permeating discipline and discharge arbitration is ‘just cause.’”⁴⁶ A principal reason why arbitrators overturn police discharges is a department’s failure to prove just cause. The meaning of just cause is derived from principles of fundamental fairness that naturally developed over time through the decisions of arbitrators.⁴⁷ Hence, it is rarely defined in collective bargaining agreements or arbitral decisions. While prior decisions and arbitral literature offer a structure for just cause analysis and highlight its critical elements, the application of the standard necessarily retains some subjectivity.⁴⁸

46. DISCIPLINE AND DISCHARGE IN ARBITRATION 2-2 (Norman Brand et al. eds., 3rd ed. 2015).

47. *Id.* at 2-3 (“[A]rbitrators did not sit down together in the dim past and agree upon the principles of just cause. Rather, arbitrators build upon what other arbitrators said in their opinions, developing principles of just cause by accretion.”).

48. *Id.* at 2-2 (“[J]ust cause can be shorthand for what an arbitrator thinks is fair.”)

Most collective bargaining agreements contain a just cause provision.⁴⁹ Agreements between police departments and police unions place the burden of persuasion on the department to prove just cause.⁵⁰ Some contracts articulate elements of just cause analysis, but they vary in content.⁵¹ Many do not specify a quantum of proof necessary to prove just cause.

Each decision in the database was coded for the quantum of proof used by the arbitrator. Table 2 shows that, of the ninety-two decisions, fourteen (15.2%) explicitly used a “preponderance of the evidence” standard, nineteen (20.7%) explicitly used a “clear and convincing evidence” standard, and two (2.2%) explicitly used a “beyond a reasonable doubt” standard. In the remaining fifty-seven decisions (62%), there was no clear standard articulated by the arbitrator.⁵²

49. HOW ARBITRATION WORKS 15-4 (Kenneth May et al. eds., 7th ed. 2014). At least one arbitrator has held that even in the absence of a just cause provision, a just cause limitation is implied by the very existence of a collective bargaining agreement. *Herlitz, Inc.*, 89 BNA LA 436 (1987) (Allen Jr., Arb.) (“[A] ‘just cause’ limitation on discharge is ‘implied’ in any labor agreement.”).

50. *See, e.g.*, *City of Mountlake Terrace*, 134 BNA LA 1736 (2015) (Pederson, Arb.).

51. *Compare id.* (requiring a “heightened standard of civil proof” beyond preponderance of the evidence), *with City of Youngstown*, 134 BNA LA 1644 (2015) (Bell, Arb.) (requiring a showing that the officer committed a dischargeable offense).

52. Awards using a “preponderance of the evidence” quantum were slightly more likely uphold a discharge decision. In nine of the fourteen cases (64.3%) in which the arbitrator used that standard, the arbitrator upheld the officer’s discharge. This is compared with eleven of nineteen

Table 2. Quantum of Proof Used by Arbitrators in Police Discharge Cases

Quantum of Proof	Number of Cases	Percentage of Cases	Discharges Upheld	Percentage Upheld
Preponderance	14	15.2%	9	64.3%
Clear and Convincing	19	20.7%	11	57.9%
Reasonable Doubt	2	2.2%	0	0%
No Standard	57	62%	29	50.9%
Total Cases	92	--	49	53.3%

A. DAUGHERTY’S SEVEN TESTS

The “Seven Tests” of just cause theory articulated by Arbitrator Carroll Daugherty and used by some arbitrators to determine just cause draws significant academic attention.⁵³

Daugherty’s Seven Tests evaluate just cause through a series of seven yes-or-no questions,⁵⁴ an

cases (57.9%) under the “clear and convincing standard” and twenty-nine of fifty-seven cases (50.9%) with no clear standard in which the discharge was upheld. In both cases where the arbitrator used the “beyond a reasonable doubt” standard, the discharge was overturned. These results differ from a recent study of Minnesota arbitration awards in which arbitrators found just cause in 47% of decisions using a “preponderance of the evidence” standard and in 51.58% of decisions using no clear standard. *See* COOPER ET AL., *supra* note 23, at 162.

53. *See* HOW ARBITRATION WORKS 2-5 (Kenneth May et al. eds., 7th ed. 2014); COOPER ET AL., *supra* note 23, at 175–78.

54. The test’s seven are:

1. Did the Company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?
2. Was the Company’s rule or managerial order reasonably related to the orderly, efficient, and safe operation of the Company’s business?

answer of “no” to any one of which “normally signifies that just and proper cause did not exist.”⁵⁵

In twelve of the ninety-two cases (13%) studied for this Note, one or both parties relied upon Daugherty’s Seven Tests. The arbitrator explicitly relied on the Seven Tests in only nine cases (9.8%). These findings suggest that lawyers use the Seven Tests analysis somewhat more frequently in police discharge disputes than in other contexts,⁵⁶ but arbitrators use it no more frequently in these cases than in other types of cases.⁵⁷ In police cases, as in other arbitrations,

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3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
 4. Was the Company’s investigation conducted fairly and objectively?
 5. At the investigation did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?
 6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
 7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the company?

Grief Bros. Cooperage Corp., 42 BNA LA 555 (1964) (Daugherty, Arb.).

55. *Id.*

56. A comprehensive study of arbitration decisions in Minnesota found “no mention of an advocate’s reliance on the Seven Tests in more than 95 percent of cases.” COOPER ET AL., *supra* note 23, at 189.

57. “More than 90 percent of the time arbitrators did not rely on the Seven Tests.” *Id.*

the Seven Tests appear to be “utilized by arbitrators much less frequently than most of the arbitration literature would suggest.”⁵⁸

B. DEPARTMENTS’ FACTUAL INVESTIGATION

An insufficient investigation is a principal reason why discharges are overturned.⁵⁹ In sixteen of the forty-three decisions (37.2%) overturning a discharge, the arbitrator cited an inadequate departmental factual investigation.

Departmental discharge decisions overturned because of inadequate investigation can lead to a perception that police officers are impossible to fire. For example, a 2013 decision overturned an officer’s discharge for “alcohol abuse,” and “drinking while on-duty.”⁶⁰ One can see how, without context, returning an alcoholic police officer to the force would cause public outrage. However, the arbitrator overturned the discharge because the officer accepted one free beer while at a bar and “it [did] not appear that City officials made any effort . . . to ascertain the extent, if any, of the Grievant’s alcohol problem.”⁶¹ This case illustrates how the department’s failure to investigate the circumstances behind a discharge decision can change one’s impression

58. *Id.* Arbitrators may to use the Seven Tests regardless of whether it was argued by one or both parties. *See, e.g.,* United City of Yorkville, 134 BNA LA 1665 (2015) (Finkin, Arb.) (refusing to use the Seven Tests despite its invocation by both parties); City of Mountlake Terrace, 134 BNA LA 1736 (2015) (Pederson, Arb.) (same).

59. *See, e.g.,* Labor Arbitration Decision, No. 148286-AAA, 2013 BNA LA Supp. 148286 (Apr. 24, 2013) (De Treux, Arb.).

60. *Id.*

61. *Id.* (alteration in original).

of the arbitration result. In many instances, an inadequate investigation can lead to an unfair discharge.

C. THE GUILT OF THE DISCHARGED OFFICER

Even if a department conducts a thorough investigation, its discharge decision may be overturned if the arbitrator concludes the evidence did not prove guilt.⁶² In many police discharge cases, guilt is not an issue; either the officer admitted wrongdoing or the evidence is too overwhelming to dispute.⁶³ However, arbitrators will not find just cause if the department cannot prove that the officer committed the alleged offense on which the discharge was based.⁶⁴ As seen in Table 3, in twenty-one of the forty-three cases (48.9%) overturning discharge, the arbitrator overturned the officer's discharge because the department failed to prove that the officer was guilty of the alleged offense that led to discharge. This includes the sixteen cases mentioned in section III(a)(i)(b) in which the arbitrator found the department's factual investigation insufficient. This means that there were only six instances (14%) in which the arbitrator overturned a discharge based on insufficiency of evidence that did not result from an inadequate factual investigation. These findings suggest that departments that conduct thorough

62. *See, e.g.*, City of Del Rio, 134 BNA LA 1285 (2014) (Jennings, Arb.).

63. *See, e.g.*, Labor Arbitration Decision, No. 148286-AAA, 2013 BNA LA Supp. 148286 (Apr. 24, 2013) (De Treux, Arb.) (officer admitted to drinking while on duty).

64. *See* Labor Arbitration Decision, No. 200551-AAA, 136 BNA LA 760 (Jennings, Arb.) (“The City failed to produce any credible evidence to sustain the allegation/accusation that the Grievant acted improperly when he delivered a compliance strike.”).

investigations and gather strong evidence showing an officer committed the alleged offense are likely to be upheld in arbitration.

Table 3. The Guilt of Discharged Officers

Category	Number of Cases	Percentage of Cases
Failed to Prove Guilt	21	48.9%
Investigation Insufficient	16	37.2%
Investigation Not Insufficient	6	14%
Overtured Discharges	43	--

The sufficiency of evidence presented by the department is necessarily a matter of arbitral judgment.⁶⁵ In a 2014 case, an officer was discharged for sexually harassing a female crime victim.⁶⁶ The officer had turned off his dash camera in violation of the department’s recording policy, leaving no video evidence to prove the officer’s misconduct.⁶⁷ To support the discharge, the city offered results of a polygraph test suggesting the officer had inappropriately touched the victim while in his squad car.⁶⁸ The arbitrator overturned the discharge because he

65. The quantum of proof may also be relevant. *See supra* section III(A)(i); City of Del Rio, 134 BNA LA 1285 (2014) (Jennings, Arb.) (using the “clear and convincing” standard in ruling for the grievant).

66. City of Del Rio, 134 BNA LA 1285.

67. *Id.*

68. *Id.*

was “not convinced” that the evidence was sufficient to infer guilt.⁶⁹ The arbitrator thought the victim lacked credibility, and that testimony supporting the discharge was “contradictory.”⁷⁰

2. The Discharge Procedure

Police discharges are often overturned on procedural grounds, such as the failure to observe a specified termination process outlined by state law or the collective bargaining agreement.⁷¹

A. LEOBORs

Along with protections granted by collective bargaining agreements, police officers often enjoy due process rights granted by a Law Enforcement Officers’ Bill of Rights (LEOBOR).⁷² LEOBORs are found in collective bargaining agreements or state statutes.⁷³ Generally,

69. *Id.*

70. *Id.*

71. *See, e.g.*, Labor Arbitration Decision, No. 148286-AAA, 2013 BNA LA Supp. 148286 (Apr. 24, 2013) (De Treux, Arb.) (overturning discharge because of the department’s failure to enroll the grievant in an alcohol treatment program per department policy and the collective bargaining agreement).

72. *See generally* Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights*, 14 B.U. PUB. INT. L.J. 185 (2005) (analyzing the impact of LEOBORs on police accountability); *see also Due Process Rights for Law Enforcement Officers*, FRATERNAL ORDER OF POLICE, <https://www.fop.net/CmsPage.aspx?id=97>.

73. Keenan & Walker, *supra* note 72, at 188.

LEOBORs provide police officers accused of misconduct certain protections, such as the right against self-incrimination during an allegation's investigation.⁷⁴

Two notable U.S. Supreme Court decisions, *Garrity v. New Jersey*⁷⁵ and *Gardner v. Broderick*,⁷⁶ granted due process protections to police officers under investigation for alleged misconduct. These decisions, as well as the rise of police unions in the late 1960s and early

74. Common examples of these protections include, *inter alia*, limitations on investigatory questioning, the exemption of routine interactions between officers from discovery, the requirement that an officer be informed of the names and ranks of officers in charge of the investigation, the requirement that an officer be informed of the nature of the investigation prior to questioning, and the right to have counsel present during questioning. *See id.* at 203–41 (in-depth description of protections for police officers commonly found in LEOBORs).

75. 385 U.S. 493 (1967).

76. 392 U.S. 273 (1968).

1970s, influenced the development of LEOBORs.⁷⁷ Although there was an effort to enact a federal LEOBOR,⁷⁸ LEOBORs were incorporated in various forms in state and local law.⁷⁹

State LEOBORs vary in the protections they afford. Typically, LEOBORs provide basic protections such as the right to be informed of an adverse investigation⁸⁰ and mandatory “waiting periods” to allow the accused officer time to retain legal representation.⁸¹ Many LEOBORs also guarantee the right to legal counsel throughout misconduct investigations.⁸² Some place restrictions on how police officials conduct these investigations, such as time constraints or rules regarding conduct during interviews.⁸³

77. Keenan & Walker, *supra* note 72, at 196–98. *See also Due Process Rights for Law Enforcement Officers*, FRATERNAL ORDER OF POLICE, <https://www.fop.net/CmsPage.aspx?id=97> (“We need legislation to create a uniform minimal level of procedural due process for police officers and codify the core holdings of the U.S. Supreme Court [dealing with police officers] confronted with the threat of termination.”) (alteration in original).

78. S. 1043, 102d Cong. (1991).

79. Keenan & Walker, *supra* note 72, at 197 (“[P]roponents of LEOBORs have achieved their greatest successes at the state level.”).

80. *See id.* at 211 (citing H.R. 1626, 107th Cong. § 3(e)(2) (2001)).

81. *Id.* at 212.

82. *Id.* at 215.

83. *Id.* at 217–22. For an example of a model Peace Officer’s Bill of Rights, which would apply to all public servants, see Wayne W. Schmidt, *Peace Officers Bill of Rights Guarantees*:

B. PROCEDURAL DEFICIENCIES IN POLICE DISCHARGES

Of the forty-three cases overturning discharge, the arbitrator cited failure to comply with proper procedure in nine (20.9%). Types of procedural shortcomings include lack of notice that the alleged misconduct was prohibited,⁸⁴ failure to observe a statute of limitations imposed by state law,⁸⁵ and other procedural missteps unique to the specific provisions of a collective bargaining agreement.⁸⁶

One example of how procedural issues can lead arbitrators to overturn a police discharge is a 2013 case in which a police officer was fired for excessive force after allegedly firing her weapon at a fleeing robbery suspect.⁸⁷ In deciding to discharge the officer, the department

Responding to Union Demands with a Management Sanctioned Version, ALEL LAW

ENFORCEMENT LEGAL CENTER (2004), <http://www.aele.org/pobr-iacp.pdf>.

84. *See, e.g.*, Labor Arbitration Decision, No. 148178-AAA, 2013 BNA LA Supp. 148178 (Sept. 23, 2013) (Visco, Arb.) (overturning a young officer's discharge for "immature and vulgar" social media posts because of the department's failure to "clearly inform [Grievant] of good as well as inappropriate forms of conduct") (alteration in original).

85. City of San Jose, 129 BNA LA 1313 (2011) (Reeves, Arb.) (overturning discharge for officer's investigative errors and misquoting of witnesses in sexual assault cases because "the disciplinary action against Grievant [was] time barred") (alteration in original).

86. *See, e.g.*, City of Riviera Beach, 131 BNA LA 1057 (2013) (Abrams, Arb.) (overturning discharge after officer's fourth tardy because collective bargaining agreement allowed five).

87. City of Flint, Grievance: #12.19/T_F_, 2013 BNA LA Supp. 20130725 (July 25, 2013) (McDonald, Arb.).

considered previous discipline against her more than one year prior to the incident.⁸⁸ The arbitrator overturned the discharge in part because considering discipline more than one year prior to the alleged offense violated of the collective bargaining agreement.⁸⁹

This case demonstrates that a department's failure to follow established procedures can lead to an overturned discharge. The arbitrator stated: "I can understand the frustration of the Police Chief and the Administration in this particular matter. At the same time, the City has the burden of proof in this case and it appears clear that it did not strictly follow the language of the collective bargaining contract in imposing discipline."⁹⁰ However, cases in which a procedural error is the only factor in overturning an officer's discharge are rare. Of the ninety-two examined cases, the arbitrator cited procedural error as the only factor in overturning a discharge in only two (2.2%). While arbitrators consider procedural requirements, when discipline is overturned they are almost always accompanied by other mitigating factors.

B. Mitigating Factors: When Does an Officer Deserve to be Fired?

In most cases overturning discharges, arbitrators cite mitigating factors favoring reinstatement.⁹¹ In twenty-nine of the forty-three decisions (67.4%) in which an arbitrator overturned a discharge, the arbitrator cited mitigating factors unrelated to whether the officer was

88. *Id.*

89. *Id.*

90. *Id.*

91. *See, e.g.*, Labor Arbitration Decision, No. 149300-AAA, 2011 BNA LA Supp. 149300 (Feb. 25, 2011) (Humphries, Arb.) (citing disparate treatment as a mitigating factor overturning discharge).

guilty of the alleged offense. This section discusses some of the most significant of these mitigating factors.

1. Good Work Record

One of the most important mitigating factors is an officer's prior disciplinary record. Disciplinary records were raised by one or both parties in nearly every analyzed decision.⁹² A positive work history can be helpful to persuade an arbitrator to overturn an officer's discharge.

In a 2013 case, for example, an officer was discharged for excessive force when she rammed a fleeing suspect's car, causing the suspect's death.⁹³ The arbitrator reinstated the officer, stating "[the officer] has no history of similar lapses and her overall record does not suggest to me that she is beyond redemption as a law enforcement officer."⁹⁴

92. *See, e.g.*, 2015 AAA LEXIS 215 (May 26, 2015) (Lurie, Arb.) (upholding the discharge of an officer for taking an unauthorized personal break while on duty because of a disciplinary history including eight written counselings, nine written reprimands, and two suspensions over five years); Labor Arbitration Decision, No. 149904-AAA, 2011 BNA LA Supp. 149904 (Dec. 26, 2011) (Ryan, Arb.) (finding that the Grievant's prior suspension reduced the credibility of his testimony).

93. Lacrosse Cty., Case 225 No. 71108 MA-15092, 2013 WI ERC LEXIS 45 (June 21, 2013) (Emery, Arb.).

94. *Id.* (alteration in original)

In another 2013 case, an officer was fired for repeated on-duty sexual harassment of citizens.⁹⁵ The arbitrator reinstated the officer in light of his twelve years without prior discipline, saying: “[a] second chance is not given to many but in this instance it is warranted. The City failed to sufficiently take into account the mitigating factors of his commendable and lengthy record of service”⁹⁶

Conversely, officers with poor disciplinary histories are less likely to be reinstated under similar circumstances. In a 2013 case involving the use of excessive force, a police officer was discharged for allegedly slamming an innocent citizen’s face against a wall.⁹⁷ The arbitrator upheld the officer’s discharge, accepting the department’s argument that his previous one-day suspension for being rude and discourteous to a citizen was indicative of his incompetence.⁹⁸

95. Labor Arbitration Decision, No. 149974-AAA, 2013 BNA LA Supp. 149974 (Nov. 7, 2013) (Spring, Arb.).

96. *Id.* Arbitrators have overturned police discharges based on similar allegations because of exemplary work records. *See* Labor Arbitration Decision, No. 148141-AAA, 2013 BNA LA Supp. 148141 (Sept. 9, 2013) (Cochran, Arb.) (“I hope that this decision serves as a wakeup call to [the officer]. It was evident that he has provided valuable service . . . for many years. He nearly fatally tarnished all those years of service He has just barely retained . . . his employment as an officer He should not squander this last chance.”) (alteration in original).

97. City of Galveston, 132 BNA LA 1101 (2013) (Jennings, Arb.).

98. *Id.*

Another 2013 case involved an officer fired for improper sexual contact with former inmates.⁹⁹ The arbitrator upheld the discharge, relying in part on the officer's previous suspension for poor performance and patronizing a prostitute.¹⁰⁰

These cases demonstrate how officers discharged for similar reasons may experience different arbitral outcomes because of their disciplinary history. Arbitrators are more likely to reinstate officers with clean records prior to the action that prompted their termination.¹⁰¹

2. The Excessiveness of Discharge as a Punishment

In many cases, arbitrators reinstate police officers because they conclude discharge is too severe a punishment for the alleged offense.¹⁰² In thirteen of the forty-three decisions (30.2%) overturning discharge, the arbitrator believed discharge too severe under the circumstances.

The determination that discharge was excessive is obvious in some cases. In a 2014 case, for example, two officers were discharged for "inciting officers to strike" in violation of an anti-strike clause in the collective bargaining agreement.¹⁰³ However, on further investigation the arbitrator discovered that the officers' misconduct had not gone beyond a few discussions in the

99. United Gov't of Wyandotte Cty., 131 BNA LA 1209 (2013) (Bonney, Arb.).

100. *Id.*

101. *See* Labor Arbitration Decision, No. 149974-AAA, 2013 BNA LA Supp. 149974 (Nov. 7, 2013) (Spring, Arb.).

102. City of Memphis, 133 BNA LA 612 (2014) (Skulina, Arb.).

103. *Id.*

department's parking lot.¹⁰⁴ The arbitrator decided that, although some discipline was warranted, discharge was too severe.¹⁰⁵

Sometimes the determination of excessiveness seems to rely only on the arbitrator's subjective judgment. In one 2013 case, an officer was discharged for excessive force in subduing an intoxicated suspect by throwing the suspect face-first onto the ground.¹⁰⁶ The arbitrator overturned the discharge, despite finding no procedural faults and concluding that the officer "patently exceeded the force reasonably necessary to subdue [the suspect]."¹⁰⁷ The only ground on which the arbitrator relied in reinstating the officer was that he should "be afforded a last chance to demonstrate that he is capable of sustaining a career in law enforcement."¹⁰⁸

These cases illustrate how police discharges can be overturned based on an arbitrator's conclusion that such a penalty is excessive for the alleged offense. It is possible that arbitrators think discharge is a particularly severe consequence for police officers, since officers with a termination or suspicious resignation in their work history may never find another job in law

104. *Id.*

105. *Id.* ("[T]here was no effort to recruit officers to participate in a strike. Two officers would not shut down the police operation.").

106. Labor Arbitration Decision, No. 148131-AAA, 2013 BNA LA Supp. 148131 (Aug. 2, 2013) (Wolf, Arb.).

107. *Id.* (alteration in original).

108. *Id.* (emphasis omitted). The arbitrator cited no basis in the collective bargaining agreement to support the decision.

enforcement.¹⁰⁹ Indeed, in the context of police discipline, arbitrators consider discharge to be the “death penalty.”¹¹⁰ However, a determination that discharge was an excessive punishment is almost always made in light of other mitigating factors.¹¹¹ Of the forty-three overturned discharges analyzed for this Note, only two (4.7%) cited the excessiveness of discharge as a penalty for the alleged misconduct as the only factor supporting reinstatement.

3. Disparate Treatment

109. See, e.g., *Forced to Resign or Get Fired*, INDEED.COM (Sept. 25, 2015), <http://www.indeed.com/forum/job/police-officer/Forced-Resign-get-fired/t514398> (police officer, who resigned under investigation, struggling to find work in law enforcement). *Contra* Paula Parmeley Carter, *Fired Cops Have Little Trouble Finding New Jobs*, COPBLOCK.ORG (July 22, 2010), <http://www.copblock.org/583/fired-cops-have-little-trouble-finding-new-jobs/> (anecdotes from other cities have “not deterred other municipalities from hiring disgraced cops.”).

110. Lucas Sullivan, *7 of 13 Fired Officers, Firefighters Got Job Back in Arbitration*, THE COLUMBUS DISPATCH (Dec. 9, 2012), <http://www.dispatch.com/content/stories/local/2012/12/09/7-of-13-fired-officers-firefighters-got-job-back-in-arbitration.html>.

111. See, e.g., Labor Arbitration Decision, No. 148297-AAA, 2013 BNA LA Supp. 148297 (Apr. 22, 2013) (Humphries, Arb.) (overturning discharge of an officer fired for congregating at a night club for over an hour while on duty because the conduct did not reach “the level that mandate[s] a ‘zero tolerance’ . . . reaction” in light of the officer’s employment record and other mitigating factors).

One important mitigating factor consistently argued by police union advocates is that the discharged officer was treated differently than other officers who committed similar misconduct.¹¹² Arbitrators consider whether other officers received lesser discipline under similar circumstances.

In one 2015 case, a police officer was fired after being charged with DUI.¹¹³ The union argued that his termination was unfair because other officers who had been charged with DUI were not terminated.¹¹⁴ The arbitrator overturned the discharge, saying “other officers within [the] County had been charged with DUI over the years and . . . typically officers were not discharged for a first offense DUI.”¹¹⁵

Although disparate treatment is frequently argued and considered by arbitrators, it rarely succeeds in getting a discharge overturned. Discharges are likely to result from serious misconduct that has not previously occurred or that was previously disciplined by discharge.¹¹⁶ It

112. *See, e.g.*, City of Youngstown, 2011 BNA LA Supp. 119807 (Mar. 10, 2011) (Paolucci, Arb.) (citing disparate treatment in overturning officer discharge); Labor Arbitration Decision, No. 149300-AAA, 2011 BNA LA Supp. 149300 (Feb. 25, 2011) (Humphries, Arb.) (same).

113. 2015 AAA LEXIS 155 (Mar. 27, 2015) (Lowe, Arb.).

114. *Id.* at *17

115. *Id.* at *32 (alteration in original).

116. *See, e.g.*, Labor Arbitration Decision, No. 148019-AAA, Grievance No. 15-2012, 2013 BNA LA Supp. 148019 (Jan. 3, 2013) (Alutto, Arb.) (discussing the potential impact of other similar cases for a disparate impact argument):

If such assertions were substantiated equity concerns might argue against discharge in this case. However, in the few instances referred to by the Union

was cited as a factor in only five of the forty-three decisions (11.6%) analyzed for this Note that overturned discharge. It is possible that disparate impact is more significant in disciplinary settings that occur more frequently, but this question is beyond the scope of this Note.¹¹⁷

4. Acceptance of Responsibility

One factor that may be particularly salient in police discharge cases is the willingness of the officer to admit wrongdoing and accept personal responsibility. For example, an officer was discharged in a 2013 case for sexually harassing another officer.¹¹⁸ The arbitrator concluded that the discharged officer's conduct "was pervasive enough to create a hostile work environment and did constitute harassment."¹¹⁹ The arbitrator nonetheless overturned the discharge in light of the officer's "willingness to accept blame for his actions."¹²⁰ Of particular importance to the arbitrator was the officer's "general truthfulness about his culpability."¹²¹

during the arbitration hearing it failed to provide sufficient details (such as the setting of events, prior disciplinary actions for the individual, contributing factors, whether repeat actions were involved, etc.) to determine levels of comparability.

117. For an analysis of the impact of "inconsistent or discriminatory meting out of discipline" arbitrators' decision-making, *see* COOPER ET AL., *supra* note 23, at 268–79.

118. Labor Arbitration Decision, No. 148141-AAA, 2013 BNA LA Supp. 148141 (Sept. 9, 2013) (Cochran, Arb.).

119. *Id.*

120. *Id.*

121. *Id.*

Conversely, in a 2011 case, an officer was discharged for excessive force after dragging a suspect through the snow and striking him with his fists over a dozen times.¹²² In his testimony, the officer refused to admit to acting inappropriately.¹²³ The arbitrator referred to the officer's evasiveness in upholding the discharge, stating: "It may be significant that the Grievant's denial in his testimony was less than foursquare since he made exceptions for what he characterized as defensive strikes."¹²⁴

However, some arbitrators interpret acceptance of responsibility as an admission of guilt supporting the discharge. In a 2013 case, a police sergeant was discharged for failing adequately to supervise a group of officers who had physically beaten and abused a suspect in custody.¹²⁵ The discharged sergeant had previously received exemplary performance reviews and was considered "a leader and a multipurpose individual."¹²⁶ The arbitrator upheld the sergeant's discharge despite these mitigating factors, stating that his "discipline was appropriate for his conduct during the incident and his acceptance of responsibility for his actions."¹²⁷

These cases illustrate the conundrum police officers face in deciding whether to accept responsibility for their actions. While admitting to wrongdoing and accepting responsibility can support a police officer's case for reinstatement, it can also be used by arbitrators to uphold the

122. City of Youngstown, 2011 BNA LA Supp. 119789 (May 10, 2011) (Fullmer, Arb.).

123. *Id.*

124. *Id.*

125. City of Bartlesville, 131 BNA LA 1502 (2013) (Williams, Arb.).

126. *Id.*

127. *Id.*

department's discharge. The decisions nevertheless suggest that it normally is in an officer's best interest to admit conduct and accept responsibility when under disciplinary investigation.

5. The Honesty of the Officer

Generally, discharged police officers are more likely to be reinstated if they can present a credible narrative to the arbitrator.¹²⁸ Upholding public trust in the criminal justice system is of paramount importance to arbitrators in the context of police discipline.¹²⁹ Officers who appear evasive or dishonest undermine this trust.¹³⁰

Accordingly, an officer's candor during a disciplinary investigation can be important to arbitrators deciding whether to uphold a discharge. This is exemplified by a 2013 case in which

128. *See, e.g.*, Labor Arbitration Decision, No. 148719-AAA, 2012 BNA LA Supp. 148719 (Mar. 13, 2012) (De Treux, Arb.) (quoting an arbitrator in a previous disciplinary proceeding involving the grievant saying that “[g]rievant has lost his credibility and no longer can continue as an Officer in the police department”); City of Marengo, 131 BNA LA 1729 (2013) (Kravit, Arb.) (reinstating officer that arbitrator found credible).

129. *See, e.g.*, Labor Arbitration Decision, No. 149956-AAA, 2013 BNA LA Supp. 149956 (Nov. 12, 2013) (Langbein, Arb.) (“Sightings like these discredit the Department. They erode public confidence in the ethical standards expected of police officials and the measure of service that will be provided The Arbitrator agrees with the County that not even Grievant's long and good history with the Department can mitigate the seriousness of her acts.”).

130. *See, e.g., id.*

an officer was discharged for improperly fraternizing with inmates.¹³¹ Throughout the investigation, the officer untruthfully mischaracterized the nature and extent of his relationships with inmates before eventually admitting to misconduct.¹³² The arbitrator upheld the discharge, citing the officer's failure to cooperate in the investigation:

If the Grievant had been honest when originally queried, immediately admitted his actions, and cited . . . a basis for his actions . . . his forthrightness could be construed as a mitigating factor. However, the Grievant did not immediately disclose his [misconduct], further supporting the . . . conclusion that the Grievant was aware that he had violated the [collective bargaining agreement] and that he lied about his circumstances before eventually admitting the truth. Given . . . that the Grievant was unacceptably less than forthright in disclosing the relationship when confronted by a direct inquiry from a superior officer investigating a complaint involving the Grievant and a former inmate, there is no valid basis to overturn the Employer's conclusion that the Grievant failed to fulfill his duty of honest dealing with the employer.¹³³

Because the appearance of trustworthiness in police officers is so important to their public responsibilities, including their testimony in criminal trials, arbitrators also consider whether the offense that led to an officer's discharge involved dishonesty. Examples include offenses in which an officer misreported working hours and on-duty

131. Labor Arbitration Decision, No. 148453-AAA, 2013 BNA LA Supp. 148453 (July 29, 2013) (Brent, Arb.).

132. *Id.*

133. *Id.* See also Labor Arbitration Decision, No. 149904-AAA, 2011 BNA LA Supp. 149904 (Dec. 26, 2011) (Ryan, Arb.) (“The Department cannot be expected to tolerate an officer with repeated episodes of untruthfulness.”).

activities,¹³⁴ lied during an official investigation,¹³⁵ and feigned an injury for workers' compensation.¹³⁶

As seen in Table 4, thirty-eight of the ninety-two cases studied for this Note involved officers discharged for alleged dishonesty. Of those thirty-eight, the arbitrator upheld the discharge in twenty-three (60.5%). In twenty-six cases, the arbitrator concluded that the officer was guilty of dishonesty. The arbitrator upheld the discharge in twenty of the twenty-six decisions (76.9%).

Table 4. Officer Dishonesty in Police Discharge Arbitration

Category	Number of Cases	Percent of Cases	Number Guilty	Percent Guilty
Discharge Upheld	23	60.5%	20	76.9%
Discharge Overturned	15	39.5%	6	23.1%

134. Labor Arbitration Decision 149956-AAA, 2013 BNA LA Supp. 149956 (Nov. 12, 2013)

(Langbein, Arb.) (upholding officer discharge for shopping during patrol hours).

135. Broward Sheriff's Office, 133 BNA LA 87 (2014) (Zaiger, Arb.) (upholding officer discharge for swearing under oath that he was the victim of an armed robbery and then recanting his claim during the same interview).

136. Polk Cty, 135 BNA LA 406 (2015) (Landau, Arb.) (upholding officer discharge for exaggerating the severity of an on-duty injury).

Alleged Dishonesty	38	--	26	--
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These results suggest that the arbitrator’s perception of the officer’s credibility is one of the strongest factors determining of officer reinstatement. At a glance, the honesty factor in police misconduct arbitration appears to create a system in which an officer fired for falsifying log reports to go shopping while on duty¹³⁷ may be less likely to be reinstated than an officer whose alleged use of excessive force results in a suspect’s death.¹³⁸ With this in mind, it is easy to imagine how an observer without access to the details of arbitrators’ decision-making can conclude that police discipline is deficient.¹³⁹ This does not mean, however, that severity of police misconduct has no impact on arbitrators’ decision-making.

C. The Factual Context of the Discharge

137. Labor Arbitration Decision, No. 149956-AAA, 2013 BNA LA Supp. 149956 (Nov. 12, 2013) (Langbein, Arb.).

138. La Crosse Cty., Case 225 No. 71108 MA-15092, 2013 WI ERC LEXIS 45 (June 21, 2013) (Emery, Arb.). (reinstating officer due to good work record). *See also* City of Oakland Police Dep’t, 128 BNA LA 1217 (2011) (Gaba, Arb.) (reinstating officer where department failed to prove a violation of its use of force policy).

139. *See supra* notes 1–13 and accompanying text.

Arbitrators regularly consider the context of the alleged offense. This includes whether the offense occurred while the officer was on-duty or off-duty and whether the alleged misconduct involved a civilian’s mistreatment.

1. Off-duty Misconduct

The majority of cases analyzed involved on-duty misconduct. The alleged offense occurred on-duty in sixty-five of the ninety-two cases (70.7%). Of those sixty-five, the discharge was upheld in thirty-two decisions (49.2%).

The data suggest that officers discharged for off-duty misconduct are less likely to be reinstated. Of the remaining twenty-seven cases, in which the alleged offense occurred while the officer was off-duty, the discharge was upheld in seventeen decisions (63%). The data are shown below in Table 5.

Table 5. Off-Duty Misconduct in Police Discharge Arbitration

Category	Number On-Duty Cases	Percent On-Duty Cases	Number Off-Duty Cases	Percent Off-Duty Cases
Upheld	32	49.2%	17	63%
Overtured	33	50.8%	10	37%
Total Cases	65	--	27	--

Intuitively, this makes sense because police departments are unlikely to be concerned with off-duty conduct unless it is severe misconduct. Arbitrators upheld discharges for off-duty misconduct for such things as domestic violence¹⁴⁰ and DUI.¹⁴¹

2. Involvement of Civilians

The police misconduct cases that receive the most media attention involve mistreatment of citizens.¹⁴² Indeed, the manner with which police treat civilians is at the very core of the controversy concerning the adequacy of police discipline.¹⁴³ Police officers can be discharged for

140. City of Hillsboro, 135 BNA LA 654 (2015) (Lalka, Arb.) (officer discharged for assaulting his wife).

141. Labor Arbitration Decision, No. 148550-AAA, 2013 BNA LA Supp. 148550 (Oct. 22, 2013) (McNeill, Arb.) (officer discharged for off-duty DUI and lack of cooperation with ensuing investigation).

142. *See supra* notes 1–13 and accompanying text.

143. *See supra* notes 4–13 and accompanying text. *See generally* Douglas B. McKechnie, *Don't Daze, Phase, Or Lase Me, Bro! Fourth Amendment Excessive-Force Claims, Future Nonlethal Weapons, And Why Requiring an Injury Cannot Withstand a Constitutional or Practical Challenge*, 60 U. KAN. L. REV. 139 (2011).

their abuse of suspects, inmates, or even innocent bystanders. Examples include the use of excessive force¹⁴⁴ or sexual misconduct against citizens.¹⁴⁵

Of the ninety-two cases analyzed, thirty-six (39.1%) involved citizen mistreatment. This only includes cases in which citizens were abused by on-duty officers. It does not include, for example, cases involving off-duty domestic violence.

Of those thirty-six cases, the discharge was upheld in seventeen decisions (47.2%). The arbitrator concluded that the officer was guilty¹⁴⁶ of the alleged citizen mistreatment in twenty-three of those thirty-six cases. When a conclusion of guilt was made, the discharge was upheld in sixteen decisions (69.6%). The data are shown below in Table 6.

Table 6. Mistreatment of Citizens in Police Discharge Arbitration Cases

Category	Number of Cases	Percent of Cases	Number Guilty	Percent Guilty
Discharge Upheld	17	47.2%	16	69.6%
Discharge Overturned	19	52.8%	7	30.4%
Civilian Mistreatment	36	--	23	--

144. City of Tampa, 133 BNA LA 1128 (2013) (Smith, Arb.) (officer discharged for striking a suspect while making an arrest).

145. Labor Arbitration Decision, No. 149974-AAA, 2013 BNA LA Supp. 149974 (Nov. 7, 2013) (Spring, Arb.) (officer discharged for sexually harassing female citizens).

146. *See supra* part III(A)(1)(c).

These findings suggest that a mere allegation of civilian involvement does not itself significantly influence the likelihood of reinstatement. However, found guilty of mistreatment are unlikely to be reinstated.

This observation is not necessarily inconsistent with media reports and critical commentary on police discipline. Cases involving citizen abuse typically constitute severe misconduct, and understandably get the most media attention. However, if the only fact reported by the media is that many officers accused of severe misconduct are reinstated through arbitration, this may contribute to the impression that police officers can get away with anything without being fired. This impression may be misleading, however, if the insufficiency of evidence demonstrating an officer's guilt, as well as factors like the officer's integrity and work record, are largely ignored by the media.

Even though severe alleged misconduct may not decrease the odds of an officer's reinstatement, it nonetheless has a demonstrable impact on receipt of back pay.

D. Split Outcomes: Challenging the Myth of the Untouchable Officer

The media typically report police discharge arbitration outcomes as if they are binary proceedings with a clear winner and loser. The only relevant fact usually reported is that a police officer was reinstated.¹⁴⁷ Reports often fail to explain that arbitration usually does not exonerate a discharged police officer of wrongdoing. Most reinstated police officers have their punishment reduced.

147. See *supra* note 12–13 and accompanying text.

In the forty-three decisions that reinstated an officer, the arbitrator awarded full back pay in twenty-one decisions (48.8%). In the remaining twenty-two decisions (51.2%), the officer was reinstated with only partial or no back pay.¹⁴⁸

Because arbitration decisions are issued several months, or even years, after a discharge, losing back pay can mean significant wage loss. The average time between discharge and decision in the cases analyzed was 12.48 months.¹⁴⁹ This means that a discharged police officer could expect to lose an average of about one year's salary if not awarded back pay.

Arbitrators do not always give precise reasons for not awarding back pay. Of the twenty-two decisions without an award of back pay, the arbitrator offered a justification for not awarding back pay in nine (40.9%). By far, the most often-cited reason for not awarding back pay was the seriousness of the offense, cited in eight of nine decisions (88.9%) that provided a reason.¹⁵⁰

148. A recent study of discharge arbitration outcomes in Minnesota that did not control for occupation found that when arbitrators reinstated the employee, they were awarded full back pay and benefits 40.4% of the time. *See* COOPER ET AL., *supra* note 23, at 52, 196 tbl. 7.3. This suggests that the big picture in discharge arbitration outcomes for police officers does not meaningfully differ from outcomes in other contexts.

149. There were some outliers. Two cases took thirty months to decide and one only took five.

150. In one case, an arbitrator cited the officer's dishonesty and evasiveness during the disciplinary investigation as a reason for not awarding back pay. *Geauga Park Dist., FMCS 11-03249-6*, 2012 BNA LA Supp. 147416 (Jan. 5, 2012) (Goldberg, Arb.).

While nine cases are only a few, they suggest that even if a police officer is reinstated, the seriousness of misconduct affects the arbitral remedy. In cases characterized by arbitrators as severe misconduct, the odds of an officer being reinstated with full back pay and an expunged disciplinary record are diminished. The record of the disciplinary sanction is also likely to prove an important deterrent to future misconduct in light of the significance in arbitration of poor disciplinary records.¹⁵¹

Conclusion

Discharged police officers are regularly reinstated by arbitrators. They are reinstated despite allegations of excessive force, sexual harassment, and substance abuse. This contributes to a popular impression that there is no misconduct severe enough to justify firing police officers. However, police discharge cases are not adjudicated entirely on the basis of the alleged misconduct's severity.

At times, the department is to blame for an officer's reinstatement. Police departments occasionally fail to observe important procedural steps before firing officers. In other cases, they do not provide sufficient evidence to prove officers were even guilty of the offense for which they were fired.

But perhaps more importantly, arbitrators care about who the officer is. They care about whether an officer is sufficiently trustworthy to deserve a second chance. In that sense, perhaps what is more important in the context of police discipline is not whether an officer is a good cop; rather, what matters is whether that officer has good character.

151. *See supra* part III(B)(1).