HOW HARD IS IT TO FIRE A POLICE OFFICER?: A LOOK AT ONE LOCAL GOVERNMENT'S EXPERIENCE AND SOME POSSIBILITIES FOR REFORM

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I. INTRODUCTION: PERCEPTIONS OF THE DIFFICULTY OF DISCHARGING POLICE OFFICERS

Every few weeks the media publishes a story lamenting the difficulty of discharging public employees.[1] The stories usually

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1. *See, e.g.*, Kim Barker et al., *How Cities Lost Control of Police Discipline*, N.Y. TIMES, https://www.nytimes.com/2020/12/22/us/police-misconduct-discipline.html (updated Mar. 10, 2021); Marc A. Thiessen, *Purging Police of Bad Cops Will Require Doing Something Democrats Have Long Opposed*, WASH. POST, June 11, 2020, https://www.washingtonpost.com/opinions/2020/06/11/want-purge-bad-cops-fix-collective-bargaining/ ("[P]olice unions make it **nearly impossible to fire bad cops.**" (emphasis added)); *Editorial: Start Police Reforms with Union Contracts*, THE DETROIT NEWS, June 17, 2020, https://www.detroitnews.com/story/opinion/editorials/2020/06/17/editorial-start-police-reforms-union-contracts/3199780001/ ("Reform of police departments must start with stripping union contracts of provisions that make it **almost impossible to fire officers**, even when their conduct suggests a propensity for violence." (emphasis added)); Haven Orecchio-Egresitz, *Police Department Mismanagement Makes Firing Bad Officers Impossible*, BUS. INSIDER (Sept. 11, 2020), https://www.businessinsider.com/police-department-mismanagement-union-arbitration-firing-bad-officers-2020-6; John Teufel, *How to Fire a Cop in NYC: It Ain't Easy*, N.Y. DAILY NEWS (Jun. 6, 2020), https://www.nydailynews.com/opinion/ny-oped-how-to-fire-a-cop-in-nyc-20200606-7ws7mnrzqjg7lhgq5iwyjdczca-story.html ("It is **almost impossible to fire bad cops** in New York City." (emphasis added)); Michael Shedlock, *Why It's Impossible to Get Rid of Bad Cops*, THE STREET (June 6, 2020), https://www.thestreet.com/mishtalk/economics/why-its-impossible-to-get-rid-of-bad-cops; Shaila Dewan & Serge F. Kovaleski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES (May 30, 2020), https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html ("[I]t remains **notoriously difficult** in the United States to hold officers accountable, in part because of the political clout of police unions, the reluctance of investigators, prosecutors and juries to second-guess an officer's split-second decision and the wide latitude the law gives police officers to use force" (emphasis added)); Mike Riggs, *Why Firing a Bad Cop Is Damn Near Impossible*, REASON (Oct. 19, 2012), https://reason.com/2012/10/19/how-special-rights-for-law-enforcement-m/; *How Fired Police Officers Often End up Back on the Job*, CBS NEWS (Mar. 6, 2013), https://www.cbsnews.com/news/how-fired-police-officers-often-end-up-back-on-the-job/

follow dramatic incidents such as police shootings of civilians, prison guards beating inmates, or teachers abusing students. The stories include examples of employees who engaged in serious misconduct, were fired as a result, challenged their discharges, and were reinstated. They then assert the public sector has lost the ability to remove incompetent —even dangerous—employees. The articles have become so common, repeating the same phrase, "it's almost impossible to fire" a police officer, teacher, or other public employee, often enough to become cliché.[2]

The articles typically place the blame on "powerful unions," "weak politicians," and "lenient arbitrators" for allowing employees to engage in grossly inappropriate, even illegal, acts, with near impunity. The more complicated truth—that balancing public employees' rights to fair discharge procedures against public officials' responsibility to manage the government workforce in the public interest is not always easy—is lost in the process of exposing a relative handful of shocking cases.[3]

("[P]olice chiefs are finding it **nearly impossible to fire** some of their own officers, in part because of arbitration and union rules." (emphasis added)); Milton Friedman, *It's Almost Impossible to Fire a Civil Servant* (Nov. 1, 2009), https://www.youtube.com/watch?v=QhdT_EpAv0A&ab_channel=moogrogue.

2. *See supra* note 1 (providing a list of articles using this phrase). The "impossible to fire" trope is by no means limited to police officers; it has frequently been applied to teachers, postal workers, and the public sector as a whole. *See, e.g.*, Tom Schatz, *Firing Bad Federal Government Workers Should Not Be Difficult*, THE HILL (Feb. 22, 2019), https://thehill.com/opinion/finance/431187-firing-bad-federal-government-workers-should-not-be-difficult ("A significant hurdle to getting rid of bad federal employees is the Merit Systems Protection Board. The agency was originally created to ensure the effectiveness of human capital in the federal government, but it has since metastasized into a[n] institutional nightmare that **makes it almost impossible to fire** any worker for any reason."); Tristin Hopper, *Why Is It So Impossible to Fire a Government Employee?*, NAT'L POST (May 1, 2018), https://nationalpost.com/news/canada/why-is-it-so-impossible-to-fire-a-government-employee (The problem is not limited to just American public employees.); Brianna Ehley, *It's Nearly Impossible to Fire Bad Federal Workers*, THE FISCAL TIMES (Mar. 10, 2015), https://www.thefiscaltimes.com/2015/03/10/It-s-Nearly-Impossible-Fire-Bad-Federal-Workers; Susan Edelman & Michael Gartland, *It's Nearly Impossible to Fire Tenured Teachers*, N.Y. POST (June 14, 2014), https://nypost.com/2014/06/14/tenured-teachers-they-cheat-they-loaf-they-cant-be-fired/; Haley Sweetland Edwards, *Rotten Apples: It's Nearly Impossible to Fire a Bad Teacher*, TIME, Nov. 2014.

3. There are several notable exceptions to the media's "impossible to fire" cliche. *See, e.g.*, Kimbriell Kelly, Wesley Lowery & Steven Rich, *Fired/Rehired, Police Chiefs Are Often Forced to Put Officers Fired for Misconduct Back on the Streets*, WASH. POST (Aug. 3, 2017), https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/. In discussing the furor among educators over *Time's Rotten Apples* story cited above, see *supra* note 2, one reporter was careful to note that the title was provocative but the story more nuanced. Valerie Strauss, *What It Really Means to Be a Public School Educator Today*, WASH. POST (Nov. 12, 2014), https://www.washingtonpost.com/news/answer-sheet/wp/2014/11/12/what-it-really-means-to-be-a-public-school-educator-today/. The same reporter later published articles questioning the assertion that it is "impossible to fire a teacher." *See, e.g.*, Valerie Strauss, *Think Teachers Can't Be Fired Because of Unions? Surprising Results from New Study*, WASH. POST (July 7, 2016), https://www.washingtonpost.com/news/answer-sheet/wp/2016/07/21/think-teachers-cant-be-fired-because-of-unions-surprising-results-from-new-study/.

A recent article in *The Miami Herald*, "Critics Want Powerful Police Unions Reined In. Miami History Shows It Won't Be Easy", is typical of such stories.[4] The article describes instances in which local police officers escaped discipline for misconduct, notes that police department leaders express concern over how difficult it is to sustain agency decisions to discharge, and adds a quote repeating the common refrain: "Unions combined with state laws make it difficult to punish and ***make it almost impossible*** to fire police."[5]

The Miami Herald article, like similar ones from other leading news sources, attributes the "daunting challenge"[6] police departments face when discharging police officers to three factors:

- Collective bargaining agreements between public employers and police unions that "allow outside [arbitrators] to rule on suspensions and firings;"
- State statutes, such as the Florida Law Enforcement Bill of Rights, that "permit officers under investigation to view information gathered by detectives" before they are interviewed, impose tight deadlines to take disciplinary action, and otherwise protect police in ways inapplicable to other groups of employees; and
- "Perhaps most important, there is the United States Supreme Court judicially created doctrine called 'qualified immunity' that relieves police from most financial liabilities resulting from an on-duty incident."[7]

It is certainly more difficult to fire police officers, who are protected by longstanding civil service rules, collective bargaining agreements, and other legal restrictions, than it is to fire private, at-will employees with no comparable protections. The assertion that it is "almost impossible" to fire police officers, however, ignores empirical data to the contrary, misleads the public about how unsatisfactory public employees can be removed from the

4. Charles Rabin, *Critics Want Powerful Police Unions Reined In. Miami History Shows It Won't Be Easy*, MIAMI HERALD (Sept. 2, 2020), https://www.miamiherald.com/news/local/community/miami-dade/article244850807.html. There is nothing unique about the *Herald* article, except that it cites examples of South Florida police officers. Because this Article also relies largely on experience from South Florida, to avoid repetition and to simplify the narrative, this Article uses the *Herald* story to represent the numerous similar stories cited previously.

5. *Id.* (emphasis added).

6. *Id.*

7. *Id.*

workforce, and amounts to little more than hyperbole. Some might even call it a losing team whining about bad calls from the refs. By exaggerating the problem, such complaints have the insidious effect of discouraging cautious public employers from taking needed disciplinary action for fear that discharging employees is too "daunting" a task to even try. Focusing purely on the success rate in arbitration also distracts from other obstacles to disciplining police, including weak or outdated use-of-force policies; police officer reluctance to testify against other officers; the multitude of procedures that must be followed before discipline can be imposed; and the actual reasons arbitrators reverse disciplines. It is worth exploring whether the obstacles to discharging police officers are as difficult to surmount as these articles suggest and how police agencies that have difficulty sustaining discipline in arbitration can improve their chances of success.

II. POLICE PROTECTIONS FROM DISCIPLINE

Like most public employees, police officers have civil service and collective bargaining agreement protections from discharge except for "good" or "just" cause. In many states, they are also protected by more recently enacted statutes that afford police additional rights in disciplinary matters.[8]

Private sector employees who work in unionized environments are similarly protected by just-cause provisions in their collective bargaining agreements.[9] But most private sector employees are not unionized and are employed "at-will."[10] Accordingly, in most states, private sector, non-unionized employees may be fired with or without cause, unless they can show the firing violated a specific

8. Such statutes are commonly called "law enforcement officer bills of rights" (LEOBR). *See, e.g.*, 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, 185 (2005); Rebecca Tan, *There's A Reason It's Hard to Discipline Police. It Starts with a Bill of Rights 47 Years Ago*, WASH. POST (Aug. 29, 2020), https://www.washingtonpost.com/history/2020/08/29/police-bill-of-rights-officers-discipline-maryland/; Mike Riggs, *Why Firing a Bad Cop Is Damn Near Impossible*, REASON (Oct. 19, 2012), https://reason.com/2012/10/19/how-special-rights-for-law-enforcement-m/.

9. *See* Keenan & Walker, *supra* note 8, at 185.

10. *See, e.g.*, *At-Will Employment Overview*, NCSL (Apr. 15, 2008), https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx; Christopher Raines, *Private Sector vs. Public Sector Employee Rights*, HOUSTON CHRONICLE, https://smallbusiness.chron.com/private-sector-vs-public-sector-employee-rights-47957.html (last updated Mar. 06, 2019).

law. At-will employees are protected by laws prohibiting discrimination on the basis of race, sex, age, sexual orientation, or disability.[11] They are also protected from retaliation for filing discrimination claims and claims under other labor laws, such as the Fair Labor Standards Act and the Family and Medical Leave Act.[12]

Civil service protections for public employees date back to the late 1800s.[13] Collective bargaining for state employees, including police, dates to the 1960s.[14] Given these longstanding job protections, it is unrealistic (if not "almost impossible") to argue that police officers should now suddenly be subject to firing without cause. The question then becomes: Who gets to decide whether sufficient cause for discharge exists, the employer or a third-party neutral? Leaving the decision solely to the employer eviscerates the protection civil service rules and collective bargaining agreement provisions provide, so a neutral decisionmaker is traditionally considered necessary. As soon as a third-party neutral enters the equation, it is possible for an employer's decision to be reversed, and for management to be disappointed or frustrated that it must reinstate an employee it believes does not belong in the workplace. Disputes over discipline could be resolved through civil trials, with all the trappings of such proceedings, including pleading and motion practice, pretrial discovery with document production and depositions of witnesses, jury trials and appeals—but it has long been accepted that submitting all employment disputes to the courts is too costly and time-consuming to be practical.[15] As a result, public employers have traditionally submitted employee discipline disputes to either civil service hearing officers or independent labor arbitrators.[16]

11. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et. seq. (2018); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2018); Americans With Disabilities Act, 42 U.S.C. 12101–12213 (2018).

12. *See* Family and Medical Leave Act, 29 U.S.C. § 2615(a)(1) (2018); Fair Labor Standards Act, 29 U.S.C. § 215 (2018); *see also At-Will Employment Overview*, *supra* note 10.

13. *See* Lance A. Compa, *An Overview of Collective Bargaining in the United States*, CORNELL UNIV. ECOMMONS 91, 91 (2014), available at https://hdl.handle.net/1813/75276.

14. *Id.* at 97.

15. *See, e.g.*, ELKOURI & ELKOURI, HOW ARBITRATION WORKS 1-1, n.1 (Kenneth May, Patrick M. Sanders & Michelle T. Sullivan eds., 8th ed. 2016) [hereinafter HOW ARBITRATION WORKS, 8th ed.].

16. *See, e.g.*, *id.*

III. PREVIOUSLY PUBLISHED EMPIRICAL STUDIES

Before considering the specific obstacles to discharging police officers, the scope of the problem needs to be described accurately. How many police officers are charged with misconduct, how many of those charged are fired, and how many of those fired are later reinstated?[17] Each of these questions has been the subject of empirical studies. The studies refute the notion that it is "almost impossible to fire police officers."

Empirical studies uniformly show that the number of police officers charged with misconduct is small in comparison to the number of officers employed.[18] For example, a study of 165 police

17. One other obvious, related question is: How many officers are accused of misconduct but never charged or disciplined? The question is an important one, but beyond the scope of this Article considering the police discipline review process. A recent study by *USA Today* offers some clues. John Kelly & Mark Nichols, *We Found 85,000 Cops Who've Been Investigated for Misconduct. Now You Can Read Their Records.*, USA TODAY (Apr. 24, 2019), https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/. The paper obtained records

> from thousands of state agencies, prosecutors, police departments and sheriffs, [which] detail at least 200,000 incidents of alleged misconduct, much of it previously unreported. The records obtained include more than 110,000 internal affairs investigations by hundreds of individual departments and more than 30,000 officers who were decertified by 44 state oversight agencies.

Id. The reporters "found 85,000 cops who've been investigated for misconduct." *Id.* As will be seen, however, numbers alone do not tell the whole story. As the *USA Today* article notes, "most misconduct involves routine infractions," not police use of excessive force, which generates the primary concern. *Id.* Allegations of "misconduct" include everything from tardiness and failure to complete paperwork to domestic abuse and felony charges. Moreover, only a small percentage of excessive force allegations are sustained. A Department of Justice study of large police agencies found 26,000 excessive force complaints in a single year, but only "about 8% were sustained, meaning there was sufficient evidence of the allegation to justify disciplinary action against the subject officer(s)." Matthew J. Hickman, *Citizen Complaints About Police Use of Force*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. (June 2006), https://www.bjs.gov/content/pub/pdf/ccpuf.pdf. A more recent study of "nearly 250,000 individual complaints from 1988 to 2020 . . . found that only 3 percent of civilian complaints alleging improper use of force resulted in officer discipline." Bocar Abdoulaye Ba & Roman Rivera, *Police Think They Can Get Away with Anything. That's Because They Usually Do.*, WASH. POST (June 8, 2020), https://www.washingtonpost.com/outlook/2020/06/08/complaints-force-police-ignore-black-citizens/.

18. The relatively small number of charges raises another issue that is beyond the scope of this Article: whether all misconduct is reported. The literature is filled with discussions and empirical studies of the so-called police "code of silence" or "thin blue line" that discourages officers from reporting misconduct by other officers. *See, e.g.*, Michael A. Long et al., *The Normative Order of Reporting Police Misconduct: Examining the Roles of Offense Seriousness, Legitimacy, and Fairness*, 76 SOCIAL PSYCH. Q. 242, 242–43 (2013); Jean-Pierre Benoît & Juan Dubra, *Why Do Good Cops Defend Bad Cops?*, 45 INT'L ECONOMIC REV. 783, 783 (2004); Neal Trautman, *Police Code of Silence Facts Revealed*, AELE, https://www.aele.org/loscode2000.html (last visited Apr. 12, 2021) (paper for the International Association of Chiefs of Police Conference in 2000). The existence of such a police "code of silence" has been "borne out by empirical data, public opinion, and popular culture." Ann C. Hodges & Justin Pugh, *Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle*, 52 U.C. DAVIS L.R. 1, 8 (2018). The "blue line" has been called "'[p]erhaps the greatest single barrier to the effective investigation and adjudication of complaints'" against officers. *Id.* (quoting WARREN CHRISTOPHER, REPORT

agencies in Washington state found that less than 5% of police officers were responsible for 100% of the citizen complaints sustained.[19] Another study of 5,500 citizen complaints against officers in eight mid-sized cities found that 79% of officers had no sustained complaints during the study period, another 16% had only one sustained complaint, and 5% had multiple sustained complaints, with just 2% (47 officers) accounting for almost half of all sustained complaints.[20]

A 1995 study of arbitrations involving the discharges of public employees (not limited to police) concluded that about half of all disciplines were upheld, somewhat higher than the rate for private-sector-unionized employees.[21] The study found that of 2,055 arbitration awards in Minnesota between 1982 and 2005, "public-sector employers prevailed in full in 56.17% of cases, while private-sector employers prevailed in 48.83% of their cases."[22] The researchers concluded that the data "refute the assertion by critics of public-sector unions that public-sector managers have particular difficulty prevailing in arbitration cases, or that they are less successful than their counterparts in the private sector."[23]

Empirical studies limited to police agencies show that arbitrators sustain the discipline of police at about the same rate as, if not higher than, they sustain the discipline of other public employees. A study of arbitrations of Chicago police discipline between 1990 and 1993 found that arbitrators upheld about half the number of days of suspensions.[24] A similar study of Houston police disciplines found that arbitrators upheld just over half of all suspension days.[25] Most recently, the *New York Times* similarly

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OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT i, xx (1991), available at https://archive.org/details/ChristopherCommissionLAPD).

19. John R. Dugan & Daniel R. Breda, *Complaints About Police Officers: A Comparison Among Types and Agencies*, 19 J. CRIM. JUST. 165–71 (1991).

20. William Terrill & Jason R. Ingram, *Citizen Complaints Against the Police: An Eight City Examination*, 19 POLICE Q. 150, 166 (2016).

21. Debra J. Mesch, *Grievance Arbitration in the Public Sector*, 14 REV. OF PUB. PERSONNEL ADMIN. 22, 30 (1995); Debra J. Mesch & Olga Shamayeva, *Arbitration in Practice: A Profile of Public Sector Arbitration Cases*, 25 PUB. PERSONNEL MGMT. 119, 124 (1996).

22. Laura J. Cooper, *Discipline and Discharge of Public-Sector Employees: An Empirical Study of Arbitration Awards*, 27 ABA. J. LAB. & EMP. L. 195, 198 (2012), available at https://scholarship.law.umn.edu/faculty_articles/304.

23. *Id.*

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

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

concluded that arbitrators sustain discharges in about half of the cases they consider.[26]

A study of ninety-two arbitration awards published between 2011 and 2015 involving police officer discharges found that arbitrators upheld the employer's action in forty-nine cases (53.3%) and reversed in forty-three (46.7%).[27] The article that reported these results noted that previous studies of specific police departments had found different rates of success.[28] One particularly disturbing study, reviewing police officer discharges in Philadelphia, reported that nearly 90% of discharged police officers were reinstated, 75% with full pay and benefits.[29]

In one of the largest reported studies of the issue to date, *The Washington Post* looked at 37 of the nation's largest police departments with a total of 91,000 officers and found that between 2006 and 2017, 1,881 officers were terminated, 451 (24%) of whom were reinstated.[30] *The Post* article noted "how rare it is for departments to fire officers."[31] On average, about 190 (188.1) officers were terminated each year of the 10-year study.[32] In a workforce of 91,000, that amounts to just over 2 out of every 1,000 officers per year (1,881 terminations /91,000 officers/10 years= approx. 2.067). If 451 were reinstated in ten years, it would amount to 45.1 in 91,000 officers per year, or one for every 2,000 officers (.05%) per year.

IV. THE MIAMI-DADE COUNTY POLICE DEPARTMENT EXPERIENCE

The Miami-Dade County Police Department (MDPD) has over 4,000 employees, including more than 3,000 police officers, "making it the largest police department in the Southeast and the

26. Barker et al., *supra* note 1 ("Arbitrators reinstate about half of the fired officers whose appeals they consider, according to separate reviews of samplings of cases by The Times and a law professor.").

27. Tyler Adams, *Factors in Police Misconduct Arbitration Outcomes: What Does It Take to Fire a Bad Cop?*, 32 ABA J. LAB. & EMP. L. 133, 139–40 (2016). The article includes a helpful summary of other studies. *Id.* at 136–38.

28. *Id.* at 137.

29. Dan Stamm, *Police Commish Angry That 90 Percent of Fired Officers Get Jobs Back*, NBC PHILADELPHIA (Feb. 28, 2013), https://www.nbcphiladelphia.com/news/local/police-officers-get-jobs-back/2110725/.

30. Kelly et al., *supra* note 3.

31. *Id.*

32. *Id.*

8th largest in the United States."[33] MDPD officers are represented by the Dade County Police Benevolent Association (PBA).[34] The collective bargaining agreement between Miami-Dade County and the PBA provides two procedures for reviewing employee discipline: (1) appeal through the County's Hearing Examiner (civil service) System; or (2) arbitration.[35] The Hearing Examiner System provides for an evidentiary hearing before a neutral decisionmaker[36] with review by the County Mayor.[37] The Mayor is bound by the hearing examiner's factual findings so long as they are supported by substantial competent evidence,[38] but retains the authority to make decisions of policy[39] and to determine the appropriate level of discipline.[40] The Mayor's decision is subject to appellate review in state court.[41] Arbitration decisions are final

33. *Miami-Dade Police Department*, MIAMI-DADE PUB. SAFETY TRAINING INST., https://www.miamidade.gov/mdpsti/about_mdpd.asp (last visited Apr. 12, 2021).

34. *Collective Bargaining Agreement Between Miami-Dade County and the Dade County Police benevolent Association Rank and File Unit: Oct. 1, 2017–Sept. 30, 2020*, MIAMI-DADE COUNTY (2020), https://www.miamidade.gov/humanresources/library/labor-relations-pba-rank-file.pdf [hereinafter Collective Bargaining Agreement].

35. *Id.* arts. 3, 9.

36. The hearing examiners are usually arbitrators, chosen at random from a list provided by the American Arbitration Association. *Id.* art. 3.

37. MIAMI-DADE COUNTY CODE § 2–47.

38. *See, e.g.*, Town of Surfside v. Higgenbotham, 733 So. 2d 1040, 1045 (Fla. Dist. Ct. App. 1999) (holding that a "Town Manager's authority is limited to: (a) a review of whether the findings of the Hearing Examiner are supported by competent substantial evidence, and (b) a review of the recommended discipline of the officers which he may sustain, reverse or modify" (quotations omitted)), *receding in part from*, Metro. Dade County v. Bannister, 683 So. 2d 130, 132 (Fla. Dist. Ct. App. 1996) (holding that "the county manager has the authority to reweigh the evidence . . . and disagree with the hearing examiner's conclusion"). A 2006 amendment to the County Charter transferred responsibility over the management of County departments from the county manager to the mayor, including the authority to review hearing examiner decisions. MIAMI-DADE COUNTY, THE HOME RULE AMENDMENT AND CHARTER (AS AMENDED THROUGH NOV. 6, 2018) § 2.02 (outlining the responsibilities of the mayor), https://www.miamidade.gov/charter/library/2018-11-06-home-rule-charter.pdf. *See* Citizens for Reform v. Citizens for Open Gov't, Inc., 931 So. 2d 977, 991 (Fla. Dist. Ct. App. 2006) (approving election to consider question of amending County charter to expand the mayor's powers).

39. *See, e.g.*, Raghunandan v. Miami-Dade County, 777 So. 2d 1009, 1010 (Fla. Dist. Ct. App. 2000), *rev. denied* 794 So. 2d 605 (Fla. 2001) (The county manager "properly rejected the hearing officer's interpretation of facts regarding [the employee's] behavior and actions, concluding that the issue of whether his actions constituted misconduct or incompetence sufficient to warrant discharge was a matter of opinion infused by policy considerations for which the agency has special responsibility." (quotations omitted)).

40. Kee v. Miami-Dade County, 760 So. 2d 1094, 1094 (Fla. Dist. Ct. App. 2000) (holding that the manager (now the mayor) has "the complete discretion to determine the appropriate penalty where the hearing officer has decided that an offense requiring discipline was committed" by the employee).

41. *Id.*; Miami-Dade County v. Jones, 778 So. 2d 409, 410 (Fla. Dist. Ct. App. 2001); *see* City of Miami v. Jean-Phillipe, 232 So. 3d 1138, 1145 (Fla. Dist. Ct. App. 2017) (quoting De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) ("'[T]he reviewing court will not undertake to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination. The appellate court merely examines the record below to determine whether the lower tribunal had before it competent substantial evidence to support its findings and judgment which also must accord with the essential requirements of the law.'").

and binding.[42] The PBA has the option to decide which form of review to pursue.[43]

I served as a Miami-Dade County Attorney between 1982 and 2014, specializing in labor and employment law and litigating hundreds of disciplinary matters, including many on behalf of MDPD. I did not keep contemporaneous statistics on the rate of discharges sustained through the arbitrations and hearing examiner hearings my colleagues and I litigated. But, from personal experience, I knew the rate was higher than

50% and that it certainly was not "nearly impossible" to fire a County employee in general or an MDPD officer in particular. To test my subjective belief, I requested the public records of all decisions involving police department discharges for the last ten years. I received records for thirty-four cases appealed and resolved between 2010 and August 2020, including five that were settled without a hearing. The County records are summarized in the following chart:

42. COLLECTIVE BARGAINING AGREEMENT, *supra* note 34, at art. 3, sec. G, step 5.
43. *Id.* art. 9, sec. B, step 6. The County bears the cost of hearing examiner cases, the parties split the cost of arbitration. *See id.* art. 3, sec. G, step 5, Witnesses and Expenses; art. 10, sec. B.

CHART 1: SUMMARY OF MDPD TERMINATIONS APPEALED		
Terminations Appealed to Decision	29	100.00%
Sustained	21	72.41%
Substantially sustained*	1	3.45%
Combined	22	75.86%
Modified to lesser penalty	5	17.24%
Reversed	2	6.89%
Terminations Appealed then Settled	5	100.00%
Resigned	2	40%
Removed as Police officer**	1	20%
Reduced to lesser penalty	2	40%
TOTAL Terminations, Appealed and Decided or Settled Combined	34	100.00%
Appeals to decision	29	85.29%
Sustained on appeal	22	64.71%
Reversed/Reinstated	2	5.88%
Reduced to Lesser Penalty	5	14.71%
Settlements on appeal	5	14.71%
Settled/Resigned or removed as officer	3	8.82%
Settled/Reduced to Lesser Penalty	2	5.88%
TOTAL Terminated and Reinstated	9	26.47%
TOTAL Terminated and Sustained by Decision or Settlement	25	73.53%
*Termination sustained, but arbitrator ruled that employee should be allowed to apply for County positions other than police officer. **Removed as police officer but offered civilian position.		

As the chart illustrates, the vast majority (75.86%) of the discharges appealed by MDPD police officers were sustained on review by independent decisionmakers. Only two (6.89%) in ten

years were fully reinstated with no discipline at all. In five cases (17.24%), the discharges were reduced to suspensions ranging from ten days to over eight months.[44] The numbers confirm it is not "almost impossible" to fire an MDPD officer.

These numbers do not include terminations that were *not* appealed, which must also be considered to have a complete picture of how many MDPD officers have been removed for cause. Adding uncontested terminations shows the following:

CHART 2: SUMMARY OF ALL TERMINATIONS, (Including uncontested terminations)		
Total Terminations	63	100.00%
Uncontested (Not Appealed)	29	46.03%
Contested, Appealed to decision	29	46.03%
Sustained	22	34.92%
Reversed	2	3.17%
Modified	5	7.94%
Contested and Appealed but Settled without hearing	5	7.94%
Resigned from police force	3	4.76%
Reinstated and suspended as settlement	2	3.17%
TOTAL of all TERMINATIONS SUSTAINED (Not Appealed + Sustained on Appeal + Settlements with Resignation)	56	88.89%

Adding the number of uncontested terminations to the number of contested terminations shows a total of sixty-three MDPD officers terminated for the period under review.[45] When all

44. Miami-Dade was one of the local governments included in *The Washington Post* study. Kelly et al., *supra* note 3. *The Post* reported that MDPD provided public records of 101 police terminations over a different ten-year period (2006-2017), which showed 38 reinstatements. *Id.* The reinstatement rate of 38% is higher than what I found for 2010-2020 (approx. 25%), but the disparity is not great given the sample sizes and may depend at least in part on how cases were categorized. For instance, two of the officers fired in the cases I reviewed were allowed to apply for employment in the Department but not as a police officer (one through appeal, the other through settlement). It is not clear from *The Post*'s raw numbers if these individuals were counted as "rehired." Changing how just these two officers' terminations are counted would increase the 25% reversal rate in this study to 32.53%, bringing it closer to *The Post*'s percentage.

45. Sixty-three terminations in a workforce of 3,000 (2.1%) may seem low, but it is consistent with the low numbers found by *The Washington Post*'s study of over 37 large

terminations are combined, the percentage of sustained terminations rises to nearly 90% (56/63 for 88.89%), and the percentage of terminated officers reinstated without any discipline falls to just 3.17% (2/63). Most of the empirical studies discussed above do not consider terminations that were not contested, only terminations that were appealed to arbitrators or other decisionmakers.[46] There is nothing wrong with focusing on the rates of success in challenges to discharges if what is being studied is success on review, but it misses the larger question of how successful police agencies are at terminating employees. An employee who is discharged and chooses not to contest the decision is just as terminated as an employee whose discharge is sustained on appeal. The analogy to the impact of guilty pleas on conviction rates is apt: a defendant who pleads guilty and waives trial is just as much convicted as a defendant found guilty after a trial.[47]

There are several possible explanations for why the MDPD success rate is higher than that reported in studies that found

police agencies with some 90,000 officers over a similar length of time. *Id.*; *see supra* text accompanying notes 30–32.

46. With the possible exception of *The Washington Post* study, which may explain why it found a lower termination reversal rate (451/1881= 24%) than the other studies, which found reversal rates closer to 50%. If so, however, the disparity between *The Post*'s findings regarding MDPD and this study's findings increases beyond what is described *supra* note 44.

47. The analogy may be extended further to include a comparison of the rates of success in police discipline to the rates of success in criminal prosecution. The success rate in criminal trials varies from jurisdiction to jurisdiction, from a high of 93% in federal cases to a low of 59% in Florida. *FISCAL YEAR 2012: UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT*, U.S. DEP'T OF JUST 1, 8 (2012), https://www.justice.gov/sites/default/files/usao/legacy/2013/10/28/12statrpt.pdf; Peter J. Coughlan, *In Defense of Unanimous Jury Verdicts: Mistrials, Communication, and Strategic Voting*, 94 AM. POL. SCI. REV. 375, 376 (2000)). The Bureau of Justice Statistics reports that in the United States as a whole,

> [a]mong felony defendants whose cases were adjudicated within the one-year tracking period (89% of cases), 68% were convicted. This includes a 59% felony conviction rate with the remainder receiving misdemeanor convictions. Felony conviction rates were highest for defendants originally charged with motor vehicle theft (74%), a driving-related offense (73%), murder (70%), burglary (69%), or drug trafficking (67%). They were lowest for defendants originally charged with assault (45%).

What is The Probability of Conviction for Felony Defendants?, BUREAU OF JUST. STAT., https://www.bjs.gov/index.cfm?ty=qa&iid=403 (last visited Mar. 28, 2021). Note that these rates are based on guilty pleas and trials combined. The prosecution success rate for trials is lower. Even in federal court where conviction rates are 93%, the success rate at trial is only 83%. *Trials Are Rare in the Federal Criminal Justice System, and When They Happen, Most End in Convictions*, PEW RES. CENTER (June 10, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ft_19-06-11_trialsandguiltypleas-pie-2/. It is likely no more than a coincidence, but the federal conviction rate including pleas (93%) and the federal trial success rate (83%) are strikingly similar to MDPD's overall termination success rate (88.9%) and its rate of success in arbitration (75.86%). Despite the similarity in success rates for discharging police and convicting criminals, no headlines are screaming "it's impossible to convict" criminals.

reinstatement rates closer to 50%. On the positive side, it could be attributable to a better-managed workforce, with appropriate hiring standards, training, good supervision, and a disciplinary system that discourages misconduct. On the negative side, it could mean that MDPD is not firing all the officers it should. Or perhaps, the Department has competent managers and advocates to present its cases and the knowledge and experience required to select impartial arbitrators.[48] The union representing MDPD officers, the PBA, may also be due a measure of credit because it shares the Department's desire to maintain an honorable workforce and prudently advises officers plainly guilty of wrongdoing to resign rather than appeal.

There is room to debate the reasons for MDPD's discharge success rate, but there is no obvious empirical or even anecdotal data to suggest that MDPD is deliberately ignoring police officer misconduct. Anecdotally, in describing the difficulty of discharging police officers in South Florida, *The Miami Herald* article does not cite any examples of MDPD officers, even though MDPD is by far the largest police department in the State.[49]

The most likely explanation for the discharge success rate is that MDPD generally conducts adequate investigations, complies with applicable procedural requirements, and presents convincing cases backed by evidence to carefully selected arbitrators. A review of the twenty-two decisions sustaining discharges supports this explanation. In each of the sustained cases, the decisionmaker found MDPD conducted an appropriate investigation, provided the employee with timely notice and an opportunity to respond, and presented evidence sufficient to prove the facts alleged.

The following excerpts from a sample of the decisions rendered in MDPD discharge cases are representative of the reasoning arbitrators have applied in reaching their conclusions. The cases are divided into those involving discipline for reasons other than the use of force and those involving the alleged use of force.

48. As a former supervisor and colleague of those advocates, the author can personally attest to the quality of their legal training and skills. They all have several years of experience, as much as thirty years, and are widely respected as experts in public sector labor and employment law.

49. Of the two officers described in the article as having been reinstated despite serious misconduct, one was employed by the City of Miami and the other by the City of Opa-Locka. Rabin, *supra* note 4.

A. Disciplines for Reasons Other Than the Use of Force

1. Sample Discharges Upheld

CASE 1. Officer was discharged for poor performance, including failure to conduct timely investigations, complete reports, and close cases of child abuse.[50] In sustaining the discharge, the arbitrator explained:

> [The Grievant] has been shown to have failed to exercise . . . diligence, and the Arbitrator finds that the County did not unreasonably conclude that he had demonstrated himself to be unfit to serve as an officer. [The Grievant] . . . was aware of the duties he was failing to perform during the time he was failing to perform them. . . . [T]he Arbitrator finds that his actions were intentional. But if they were not, if [his] *nonperformance* was due to an obliviousness to what should have been obvious, then the County would still have had good reason to conclude that he should not continue to serve as an officer. In either event, given the magnitude of [the Grievant's] *nonperformance*, the County had just cause to terminate his employment.[51]

CASE 2. Officer was discharged for using the N-word while arresting a suspect.[52] The officer testified that he used the street slang "nigga," not the N-word.[53] The arrest was recorded on the officer's bodycam.[54] In sustaining the discharge, the arbitrator explained:

> This Arbitrator reviewed the recording at the evidentiary hearing several times and acknowledges that the two racial terms, when used in an emotional setting, may sound almost the same. However, this Arbitrator is convinced that the Grievant said the word "nigger". Common sense dictates that a law enforcement officer's use of the "N-word", or its derivative ending in "a", in the performance of his/her official duties would be viewed as a racist statement against those the officer has sworn to protect. Furthermore, all the officer witnesses testified

50. In re Dade County PBA & Miami-Dade County, 01-14-0001-7526 AAA 1, 2–3 (Oct. 28, 2015) (Lurie, Arb.).
51. *Id.* at 8–9 (emphasis in original).
52. In re Miami-Dade County Police Dep't & Dade County PBA, 01-17-0000-8407 AAA 1, 2 (Sept. 22, 2018) (Milinski, Arb.).
53. *Id.* at 6–7.
54. *Id.* at 2.

> that either term is unacceptable in a professional setting. Finally, the Grievant admitted "*If the public was to see this video and did not know who Alexis is, then 100 percent yeah, this guy seems racist.*"
>
> . . .
>
> Police officers hold a special position in our society. . . . The public also expects a high degree of respect and confidence in its law enforcement personnel. There is a great deal of dependence on police officers to provide protection and safety, especially in these current times. Any conduct that undermines this perception tends to destroy this important sense of confidence the public places in its law enforcement personnel.
>
> Lastly, was the penalty reasonable and just in light of any mitigating factors and/or extenuating circumstances? . . . The Grievant is remorseful and admits that his use of language was unprofessional for a police officer; but he is not a racist. However, the Grievant's intent is not at issue. His actions and words are. Moreover, his actions are further aggravated by the fact that he was pointing his firearm at the suspect and had said, "*I am going to kill you*".
>
> Such conduct violated departmental policies and brought discredit upon the department's integrity.[55]

CASE 3. Officer was discharged for physically abusing his ex-wife.[56] He was acquitted of criminal charges based on the same allegations.[57] In sustaining the discharge, the arbitrator found:

> The record discloses that . . . the Grievant had indeed entered his former wife's residence without her permission, confronted her about personal matters, intimidated her and addressed her in a vulgar manner. . . . [O]n the same day, the Grievant used

55. *Id.* at 13–14 (emphasis in original) (citation omitted). It is hard to overlook the arbitrator's understatement in saying that the officer's actions were "aggravated" by pointing a gun at the suspect and saying, "I'm going to kill you." But the officer was fired for his unacceptable racist language, not for drawing his weapon or threatening to shoot the suspect.

56. In re Dade County PBA & Miami-Dade County, 32 390 00761 11 AAA 1, 6 (Sept. 26, 2013) (Humphries, Arb.).

57. *Id.* at 3.

> physical force against her, grabbing her and forcing her into a bedroom . . .
>
> . . .
>
> The record reveals that the Grievant has committed acts which by law enforcement workforce standards are contrary to behavior that the Department should have to tolerate from an employee, especially one who is sworn to protect and serve the community and is to be capable of offering credible testimony in judicial proceedings as a person of integrity if so called upon. While the judicial system's reasonable doubt standard of proof was not met in the most serious criminal charges against the Grievant, an abundance of clear and convincing evidence in the instant case arbitration reveals a compelling degree of wrongdoing on his part.[58]

2. Discharges Reversed

CASE 4. Officer was discharged for driving under the influence.[59] In reversing the discharge and reducing the discipline to a reprimand, the arbitrator explained:

> The Department's investigation showed that [a comparator officer] and [the Grievant] had committed the same infraction [DUI]. If [the Grievant] was to be discharged, then [the comparator] should have been discharged. And if [the comparator] was issued a letter of reprimand, then [the Grievant] should have been issued the same. The disparity in the discipline issued to [the Grievant] as compared to [the comparator] violated the requirement of Administrative Order 7-3, that the County adhere to "reasonable consistency in applying similar penalties."[60]

CASE 5. Police Major was fired for accepting two checks for a total of $22,724.23 from the Miami Dolphins.[61] The Major said he thought the checks were a contribution to a departmental football

58. *Id.* at 14.
59. In re Dade County PBA Rank and File Unit & Miami-Dade County, 32 390 00354 13 AAA 1, 2 (Mar. 3, 2014) (Lurie, Arb.).
60. *Id.* at 12.
61. In re Miami-Dade County & The Dade County PBA, 32 390 000445-13 AAA 1, 4–5 (Aug. 8, 2014) (Hoffman, Arb.).

league he coached.[62] The checks were in fact intended as reimbursement to the County for overtime compensation paid to officers for working at Dolphins events.[63] The arbitrator reversed the discharge in a detailed, thirty-six-page opinion, replete with supporting citations and footnotes.[64] The opinion lists the following factors, among others, for the decision:

> • First, any claim made that this [G]rievant lacked ethics must initially consider the person and whether his history suggests one who showed any indicia of a lack of morals, beliefs or dedication to this Department. . . . [H]is 29 years with the Department that included promotions all the way to Major, shows the Department's consistent and long term trust in him. . . . [H]is outstanding evaluations, his array of glowing commendations and witness testimony suggesting a person devoted to the Department and to protecting his community.
>
> • Neither of the two check stubs contained any narrative information describing the pay for the specific services rendered.
>
> • The [G]rievant's depositing the two checks into a non-personal account, believing they were contributions, thanking those who he believed [were] the donors, receiving no denials from them, and then disbursing the money for police-related athletic events and charities hardly rises to the level of serious misconduct, or any misconduct to justify termination or any discipline.
>
> • [The Grievant] had enough assurances [from inquiries of the Dolphins] to form a reasonable expectation that the checks were made for him and his football team. Second guessing his judgment two years later and calling it unbecoming fails to convince that sufficient cause exists for this harsh penalty. The arbitrator is convinced that his actions were honorable and meant in good faith to accept the money and use it to help the football team and any of the other charities the team and the [G]rievant supported.

62. *Id.* at 6.
63. *Id.* at 7–8.
64. *Id.* at 35.

> • But one other factor needs to be considered. And it is perhaps the one, as stated at the outset of the decision, that understandably concerned the Director the most in approving the discharge – the repayment of the money from the checks to the Department, which the [G]rievant has refused to do. . . . There are several considerations. First, it is clear from this record that the [G]rievant and his team have benefited from this $22,000 windfall, one that they did not earn by services or by donation. It would be an unjust enrichment for him or the team to have the benefit of money that came to them by error. . . . Thus, the money must be paid back.[65]

When charges against officers are sustained, as they were in **CASES 1** through **3**, they do not typically make news. Even the two cases that reversed discharges generated no adverse reporting. Judged on their individual merits, none of the results are particularly surprising and certainly not shocking.

As even this small sampling of cases shows, arbitration decisions depend on a wide variety of factors, including the evidence available, existing standards and expectations of conduct, procedural rules, and individual employment records. Bare statistical analyses of police departments' rates of success in sustaining discharges through arbitration cannot help but overlook such factors. When viewed more closely, it becomes plain that police discharge decisions do not turn primarily on whether the decisionmaker is strict or lenient but on the facts before him or her.[66]

Any adversarial process will have winners and losers, and percentages cannot tell the whole story. Parties seldom win or lose cases based solely on the biases of randomly assigned judges. Any attorney who has tried more than a handful of cases will readily admit he or she would prefer favorable facts and favorable law over a favorable judge.[67] It is no more accurate to blame high police

65. *Id.* at 23–24, 30–32.

66. In this regard, it is worth noting that the same arbitrator decided **CASE 1**, sustaining an officer's discharge, and **CASE 4**, reversing another officer's discharge. In re Dade County PBA & Miami-Dade County, 01-14-0001-7526 AAA 1, 9 (Oct. 28, 2015) (Lurie, Arb.); In re Dade County PBA Rank and File Unit & Miami-Dade County, 32 390 00354 13 AAA 1, 12 (Mar. 3, 2014) (Lurie, Arb.). There is nothing in either decision to suggest a bias toward or against police officers. Instead, it appears the arbitrator decided each case on the facts and rules the parties presented to him.

67. Within limits, of course. If there were no difference between one qualified judge and another, we would not have, for example, such strong disagreements over appointments to the Supreme Court. More to the point, parties select arbitrators from lists supplied by such

discharge reversal rates solely on lenient arbitrators than it is to blame low conviction rates solely on lenient juries or judges. The labels do nothing to help understand or improve either system.

B. Disciplines for Alleged Use of Excessive Force

The cases just described are much more common than excessive-force cases. This is not a result of anything unusual about MDPD, but of the simple fact that officers are discharged much more often for conduct that is common to any other group of employees—poor work habits, tardiness, poor attendance, domestic abuse, DUI, or other substance abuse issues, etc. — than they are for using excessive force.[68] Although discipline for the use of force is less frequent, it is what deservedly attracts the media's and public's attention as the most troubling.

Only two of the twenty-nine appealed MDPD cases arose from an allegation of excessive force.[69] In one, the officer was terminated for firing "warning shots" contrary to MDPD policy.[70] The termination was sustained in arbitration.[71] The other is the one MDPD case that lends direct support to the assertion that it is difficult to discharge a police officer for excessive force.[72]

CASE 6. Officer was accused of excessive force, discourtesy, and failure to document the use of force in connection with an

agencies as the American Arbitration Association and the Federal Mediation and Conciliation Service. Experienced practitioners learn quickly which arbitrators seem inclined to rule for management and which for unions and select those that tend to rule more frequently in their favor. In this Author's experience, the most respected and successful arbitrators are those whose opinions, even when adverse, are professionally written, fact-based, and convincing. Those who lean in one direction or the other without regard to the facts or law tend to be culled out by one or both parties. Experienced union advocates with whom I have discussed the issue agree. For a more detailed look at labor arbitrator selection, see Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 929–31 (1979).

68. *See, e.g.*, Kelly & Nichols, *supra* note 17 (discussing review of tens of thousands of police discipline records and concluding that "[m]ost misconduct involves routine infractions"); Adams, *supra* note 27, at 138, 138 n.38 (noting that "[p]olice officers can be discharged for a variety of reasons" and that "studies that compile[] arbitration decisions for strictly statistical purposes," do not typically consider "the merits of each individual decision . . . "). Of the twenty-nine MDPD cases that went to hearing, six were for poor performance, including failure to respond to calls, conduct investigations or complete paperwork, three involved poor attendance or tardiness, three were for DUI (one reversed), three were for domestic abuse, three were for theft or other misappropriation of property, and one each for misconduct ranging from carrying a concealed weapon while relieved of duty to an officer exposing himself during a call with a vendor. *See supra* Chart 1.

69. In re Miami-Dade Police Dep't & Daniel Llano, 01-18-0003-2758 AAA 1, 4 (Oct. 9, 2019) (Paci, Arb.); In re Anthony Pomar & Miami-Dade Police Dep't, 01-14-0000-8347 AAA 1, 2 (Oct. 6, 2014) (Spero, Arb.).

70. *Llano,* 01-18-0003-2758 AAA at 4.

71. *Id.* at 10.

72. *Pomar*, 01-14-0000-8347 AAA at 6–7.

otherwise lawful arrest.[73] An MDPD Internal Affairs Panel found that the officer had applied a choke hold with his arm (an "Applied Carotid Triangle Restraint" or "ACTR") but determined that the use of force was justified and that the officer was not discourteous.[74] The Panel sustained the allegation that the officer failed to report the use of the ACTR as MDPD policy requires.[75] The officer's lieutenant supervisor initially recommended a reprimand, but changed the recommendation to termination after reviewing the officer's disciplinary history, which included a three-day suspension for chasing a speeding vehicle outside his assigned patrol area without authorization; a twenty-day suspension for an improper strip search; and another twenty-day suspension for failure to report damage to his vehicle, conducting a consensual search without supervisory approval, and failing to report another officer's use of a carotid restraint during an arrest in which he participated.[76] The hearing examiner concluded that the discharge should be reduced to a 90-day suspension:

> The testimony of [the supervisor] demonstrates that [the Grievant] would have received relatively mild discipline for his actions . . . when considered alone. The prescribed procedure following the application of ACTR is a well founded mandate. The required two hour observation of the person restrained can be vital to the individual's health and safety. Civil suits by detainees are a fact with which police departments must be prepared to deal with proper documentation. Transparency to the public is also a significant practice.
>
> However in assessing a discharge, which has been described as the capital punishment of the work place, due attention should be given the fact that [the Grievant] demonstrated his ability to function as a police officer over a period of his nine years of employment. Weight should be given to the fact that the last incident for which he was disciplined took place four years before the [latest] incident. The distance between the written reprimand he would otherwise have received and dismissal is too great to be traversed by an incident that would otherwise be treated far less harshly. Past discipline is undoubtedly an

73. *Id.* at 2, 4.
74. *Id.* at 4.
75. *Id.*
76. *Id.* at 5–6.

> important consideration but at some point it should be allowed to repose.
>
> In consideration of the four years elapsed since his prior discipline the Hearing Examiner recommends [the Grievant's] discipline be reduced to a 90 day unpaid suspension. Such a suspension would be anticipated to apprise him of the importance of following prescribed reporting procedures.
>
> [The Grievant] made the mistake of believing he had not applied ATCR because [the arrestee] remained conscious. Although [the Grievant], like his counterparts, received frequent retraining on the subject he should be further instructed in the fundamentals of ATCR.[77]

It is safe to say another decisionmaker might well have reached a different conclusion, if for no other reason than, once cause for some discipline is established, most arbitrators agree that the level of discipline to impose should ordinarily be left to the discretion of the employer.[78]

Decisions of this kind are what cause police agencies and the public legitimate concern about the ability to discipline officers. The decision did not turn on a factual finding that the agency failed to prove the allegations of misconduct. Nor did it turn on proof of a first offense in an otherwise long, distinguished career. To the contrary, the officer had a disciplinary history that included three suspensions, two quite lengthy, one of which was based on a similar failure to report the use of an ACTR.[79] While the decision may be an outlier for MDPD, it is not unique from the broader

77. *Id.* at 6–7.

78. *See, e.g.*, HOW ARBITRATION WORKS, 8th ed., *supra* note 15, at 15-38 to 15-40; In re Enterprise Wire Co. & Enterprise Indep. Union, 46 LA 359, at *7 (Mar. 28, 1966) (Daugherty, Arb.) ("[L]eniency is the prerogative of the employer rather than of the arbitrator."); In re Whirlpool Corp. & Int'l Union of Elec., Radio and Machine Workers, Local 808, 58 BNA LA 421, 430 (Mar. 11, 1972) (Daugherty, Arb.) (An arbitrator "is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though the arbitrator, if he had been the original 'trial judge,' might have imposed a lesser penalty."); Miami-Dade County & Dade County PBA, 45 LAIS 82, 2016 WL 5349695, at *7 (Aug. 21, 2016) (Hoffman, Arb.) (quoting Arbitrator Daugherty). The courts have similarly held that once just cause is established, the employer has the discretion to decide the level of discipline. *See, e.g.*, Collins v. Fla. Dep't of Offender Rehab., 355 So. 2d 131, 132 (Fla. Dist. Ct. App. 1978) (It is "the prerogative of the agency . . . , . . . [not] the hearing officer . . . to determine the disciplinary action to be taken."); *accord* Kee v. Miami-Dade County, 760 So. 2d 1094, 1094 (Fla. Dist. Ct. App. 2000); Metro. Dade County v. Bannister, 683 So. 2d 130, 133 (Fla. Dist. Ct. App. 1996).

79. *Pomar*, 01-14-0000-8347 AAA at 6.

perspective of all police agencies. Indeed, while such reversals are not as common as some of the more hyperbolic headlines suggest, it is not difficult to find other examples of arbitrators reinstating discharged officers for questionable, if not dubious, reasons.[80]

One obvious way of avoiding such troubling outcomes is for the police agency to change its use-of-force policies. If MDPD policy had flatly prohibited carotid chokeholds and the officer used one despite the rule, the Department could have fired him for violating the clear and unambiguous rule. Most arbitrators would readily uphold the discharge.[81] In fact, as a result of serious injuries and deaths attributed to the use of ACTR,[82] many police agencies have recently reconsidered the technique and concluded it is too dangerous to employ.[83] MDPD has banned the technique since June 2020.[84]

With this improved understanding of how often arbitrators and other decisionmakers reverse police discharges, it is possible

80. The cases cited in *The Miami Herald* article are as good examples as any. Rabin, *supra* note 4*; see also* Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 547–50 (2019) (describing additional examples of terminations reversed for questionable reasons); Coulter Jones & Louise Radnofsky, *Many Minnesota Police Officers Remain on the Force Despite Misconduct*, WALL ST. J. June 25, 2020, https://www.wsj.com/articles/many-minnesota-police-officers-remain-on-the-force-despite-misconduct-11593097308; Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street*, THE ATLANTIC, Dec. 2, 2014, https://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/; *supra* note 1 (citing other news articles).

81. *See, e.g.*, In re [Respondent-1] (Miscellaneous Manufacturing Industries), Radford, Va. & [Grievant-1, Labor Union] (Miscellaneous Manufacturing Industries), 1995 WL 18009721 (AAA), at *4 (Mar. 20, 1995) (Nolan et al., Arbs.) (Arbitrator sustained discharge because "the Company had a clear rule, enforceable by discharge, against bringing alcohol into the plant."); In re Lutheran Senior City & United Industrial Service, Transp., Prof'l and Gov't Workers of N. Am., 1994 WL 16918253, at *5 (Feb. 4, 1994) (Millious, Arb.) (Arbitrator found that he was "constrained to conclude" that he could not modify an employer's decision to discharge an employee for violating an "unambiguous" rule prohibiting abuse of residents in a senior care facility.); Republic Engineered Steels, Inc. & United Steelworkers of Am. Production and Maintenance Emps., Local No. 1033, 1992 WL 12742178, at *3 (Mar. 29, 1992) (Feldman, Arb.) (Arbitrator sustained discharge where "rule in clear and unambiguous language stated that an episode of collecting unemployment for the same period that the person works at the company shall be grounds for discharge.").

82. *See, e.g.*, Tim Elfrink, *NYPD Suspends Officer After Video Apparently Shows 'Disturbing' Chokehold on Black Man*, WASH. POST (June 22, 2020), https://www.washingtonpost.com/nation/2020/06/22/nypd-chokehold-video-suspended/; Joel Shannon, '*A Crime Against Humanity': Officers Fired Over Photo Reenacting Elijah McClain Chokehold*, USA TODAY (July 3, 2020, 6:11 PM ET), https://www.usatoday.com/story/news/nation/2020/07/03/elijah-mcclain-death-officers-fired-over-photo-reenacting-chokehold/5373748002/; Neil MacFarquhar, *In George Floyd's Death, a Police Technique Results in a Too-Familiar Tragedy*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/us/knee-neck-george-floyd-death.html.

83. *E.g.*, Kimberly Kindy, Kevin Schaul & Ted Mellnik, *Half of the Nation's Largest Police Departments Have Banned or Limited Neck Restraints Since June*, WASH. POST (July 16, 2020), https://www.washingtonpost.com/graphics/2020/national/police-use-of-force-chokehold-carotid-ban/; Harmeet Kaur & Janine Mack, *The Cities, States and Countries Finally Putting an End to Police Neck Restraints*, CNN, https://www.cnn.com/2020/06/10/world/police-policies-neck-restraints-trnd/index.html (last updated June 16, 2020).

84. Kindy et al., *supra* note 83.

to turn to the questions of why they are reversed, and what steps police agencies can take to minimize reversals. The next section discusses some of the more commonly cited obstacles to sustaining discipline. The last section discusses some possible reforms that can help reduce the number of troubling outcomes.

V. COMMONLY CITED OBSTACLES TO DISCIPLINING POLICE OFFICERS

In addition to complaining generally of "lenient arbitrators," criticisms of existing police discipline procedures commonly point to a number of legal obstacles that individually, or in combination, make it "almost impossible" to fire police officers. The legal obstacles typically cited include: (1) constitutional due process and collectively bargained procedural protections; (2) law enforcement officer bills of rights; (3) the Fifth Amendment privilege against self-incrimination; (4) complications from related criminal proceedings; and (5) qualified immunity. Some of these obstacles undoubtedly make disciplining police officers more difficult than disciplining at-will employees, but they are by no means insurmountable.

A. Due Process and Collectively Bargained Procedural Protections

Procedural protections arise from a variety of sources including the Due Process Clause of the Constitution and the Fourteenth Amendment, federal and state statutes governing public employment, local civil service rules, and collective bargaining agreements.[85] In the context of terminating a police officer's employment, it suffices to say that the constitutional guarantee of due process requires public employers to give civil service employees oral or written notice of the charges against them, an explanation of the employer's evidence, a meaningful chance to respond before a decision is made, and a post-discipline

85. For a more detailed discussion of these protections, see, for example, HOW ARBITRATION WORKS, 8th ed., *supra* note 15, at 19-6 to 19-17; NORMAN BRAND & MELISSA H. BIREN, DISCIPLINE AND DISCHARGE IN ARBITRATION 2-9 to 2-37 (3d ed. 2015); or Dennis Te-Chung Tang, *On the Legal Protection of Civil Service Employees from Arbitrary Dismissal*, 37 ADMIN. L. REV. 37, 66–84 (1985).

evidentiary hearing.[86] Statutes and collective bargaining agreements add to these basic requirements by mandating protections such as union representation in interviews, advance disclosure of the employer's evidence, and pre-hearing discovery.[87] They also frequently include specific deadlines for completing investigations and imposing discipline.[88]

Arbitrators have enforced these requirements in a variety of ways. Most arbitration cases hold that a procedural error does not prevent discipline unless the employee's ability to defend against the discipline is substantially prejudiced; in other words, procedural violations are subject to a "harmless error" rule.[89] In a smaller number of cases, arbitrators have reversed discipline for procedural errors even where no prejudice was demonstrated.[90] Still, other decisionmakers enforce procedural rules by mitigating

86. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545–46 (1985).

87. *See, e.g.*, Florida's Law Enforcement Officer's Bill of Rights, FLA. STAT. § 112.532 (2019). This article cites primarily Florida law, but the issues raised are equally applicable to many other states.

88. *See id.* § 112.532(6)(a).

89. *See, e.g.*, Fla. Dep't of Corr. & IBT, Local 2011, 44 LAIS 82, 2015 WL 6473091, at *5 (Sept. 8, 2015) (Abrams, Arb.). As one arbitrator explained:

> In order to sustain a grievance on the basis of a due process violation, the alleged infirmity must be material. Due process requirements should be assessed pragmatically: the question must always be asked whether any failures by the employer in this regard made a difference in the action it likely would have taken in the first instance.
>
> Where an employer complies with the spirit of a procedural requirement, and the union does not prove the [G]rievant was affected by management's failure to comply, the employer's action should be deemed sufficient. Indeed, arbitrators have refused to disturb management's decision even when the company failed to comply with even the spirit of a procedural requirement.

Waste Mgmt. of Tucson, Ariz. & UFCW, Local 99, 2009 WL 8160947, at *17–18 (Dec. 31, 2009) (Oberstein, Arb.) (citations omitted); *accord* In re Claimant & Transportation by Air, 2014 WL 4545693 (AAA), at *6 (July 23, 2014) (Adler, Arb.) ("Grievant has failed to show any prejudice from the [Employer] conduct of which he complains. In the absence of such prejudice, there is no basis for affording Grievant relief because of these alleged deficiencies.").

90. In re U.S. Dep't of Veterans Affairs, Richard L. Roudebush VA Med. Ctr., Indianapolis, Ind. & Service Emps. Int'l Union (SEIU), Local 551, 139 BNA LA 244, 283 (Apr. 3, 2018) (Kininmonth, Arb.) (The union is not required to show that a violation of a procedural requirement caused "harm or prejudice to the Grievant. The Agency's violation of the CBA . . . definitely violates the parties' understanding of just cause. The Grievant does not have to prove 'Harmful Procedural Error' to show a lack of due process."); Miami-Dade County & Dade County PBA, 45 LAIS 82, 2016 WL 5349695, at *13 (Aug. 21, 2016) (Hoffman, Arb.) (holding that a delay of 19 months between the alleged rule violation and the decision to terminate required reversal even without proof of prejudice to the employee's ability to respond to the charges).

discipline,[91] requiring employers to pay backpay as a penalty,[92] or ordering the employer to redo its investigation following the proper procedure.[93]

The courts take a more uniform approach, consistently holding that due process violations are subject to a harmless error rule and alone are not sufficient to require the reversal of discipline. To successfully challenge discipline for procedural error in judicially reviewable proceedings, employees must show that the error materially prejudiced their ability to respond to the charges. As the Supreme Court explained in *Cornelius v. Nutt*, construing the statute[94] governing the discipline of federal employees, "the harmful-error[95] rule [is] intended to give agencies greater ability to remove or discipline expeditiously employees who engage in misconduct, or whose work performance is unacceptable."[96] When employees commit "improper acts that justif[y] their removal from the federal service . . . [and] procedural . . . errors do not cast doubt upon the reliability of the agency's factfinding or decision," a federal agency is not required to reinstate them "solely in order to 'penalize the agency' for nonprejudicial procedural mistakes it

91. *See, e.g.*, *Fla. Dep't of Corr.*, 2015 WL 6473091, at *6 (holding that agency "did not have just cause to terminate [the Grievant]" because it violated his due process rights and imposing the remedy of converting his discharge into a disciplinary suspension).

92. *See, e.g.*, Marine Corps Air Station, Miramar & Am. Fed'n of Gov't Emps. (AFGE), District 12, 48 LAIS 143, 2019 WL 7946372, at *13–14 (June 23, 2019) (Stiglitz, Arb.) (upholding agency's suspension of employee but sustaining the grievance to the extent the employee suffered a financial penalty "because of the Agency's unexcused delay and failure to interview" all witnesses).

93. In re Headquarters Space and Missile Sys. Ctr. & Am. Fed'n of Gov't Emps. (AFGE), Local 2429, 1995 WL 18037341, at *5 (As a remedy for the employer's failure to notify the employee of his right to union representation, the arbitrator gave "back to both Union and Grievant that which they were denied—the right to represent and be represented—and to require Employer to reconsider its action." The arbitrator emphasized that "[t]he remedy is intended, in keeping with standard contract principles, to correct the breach rather than to punish the breaching party.").

94. Civil Service Reform Act of 1978, 5 U.S.C. § 7701(c) (2018). The statute currently provides:

> (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—
> (A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or
> (B) in any other case, is supported by a preponderance of the evidence.
>
> (2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—
> (A) shows harmful error in the application of the agency's procedures in arriving at such decision; . . .

Id.

95. The federal statute uses the term "harmful error" rather than the more common "harmless error." The effect is the same regardless of the label.

96. 472 U.S. 648, 662–63 (1985) (citations omitted).

committed while attempting to carry out the congressional purpose of maintaining an effective and efficient" workforce.[97] The Court added that, under the harmful error rule,

> unions are free to bargain for procedures to govern agency action . . . and agencies are obligated to follow the agreed-upon procedures. If the agency violates those procedures with prejudice to the individual employee's rights, any resulting agency disciplinary decision will be reversed by the [Merit Systems Protection] Board or by an arbitrator.[98]

The Court noted that

> [e]ven if the violation is not prejudicial to the individual employee, the union is not without remedy . . . [because it can] file a grievance alleging a violation of the procedural requirements established in the collective-bargaining agreement . . . [which an] . . . arbitrator can remedy . . . by ordering the agency to 'cease and desist' from any further such violation . . . [or] file an unfair labor practice charge.[99]

The Court concluded that "the means of compelling compliance [with procedural requirements] do not include forcing the agency to retain an employee who is reliably determined to be unfit for federal service."[100] Arbitrators in federal employment matters must follow the holding in *Cornelius*, even if they might prefer to do otherwise.[101]

Even without a statute like the one applicable to the federal civil service, the courts have held that a public employer's procedural errors do not foreclose the imposition of employee discipline absent proof of prejudice.[102] Even the denial of *any* pre-

97. *Id.* at 663.
98. *Id.*
99. *Id.* at 663–64 (quotations and citations omitted).
100. *Id.* at 665.
101. *See, e.g.*, U.S. Border Patrol, U.S. Customs and Border Protection & Am. Fed'n of Gov't Emps. (AFGE), National Border Patrol Council, Local 3307, 44 LAIS 143, 2015 WL 10382317, at *11–12 (Dec. 15, 2015) (Frockt, Arb.) ("the Undersigned is aghast and ashamed that it took his government nearly eighteen (18) months to complete its investigation and formally determine what adverse action, if any, was required for [the Grievant's] alleged violations," but, the union failed to show prejudice and "the harmless error standard remains the law of the land, as decided by the Supreme Court, and . . . trumps all others relating to the subject.").
102. *See, e.g.*, Diorio v. Heckler, 721 F.2d 726, 728 (11th Cir. 1983) (applying the harmless error where an administrative law judge made "erroneous statements of fact"); County of Monroe, Fla. v. U.S. Dep't of Labor, 690 F.2d 1359, 1363 (11th Cir. 1982); Matar v. Fla. Int'l Univ., 944 So. 2d 1153, 1155 (Fla. Dist. Ct. App. 2006); Boone v. Office of Provost,

disciplinary procedure has been deemed harmless error because a post-termination hearing can cure the violation.[103] As one court colorfully phrased it, reversing an employee's discipline because of an error in pre-disciplinary procedures would "allow the procedural tail to wag the substantive dog."[104]

Arbitrators are not generally required to follow judicial precedent or even precedent established by other arbitrators construing the same contract.[105] Absent a specific rule, such as in the federal Merit System, some arbitrators have reversed disciplines without proof of prejudice to the employee, even though a court, or another arbitrator, would likely find harmless error and uphold the discipline.[106]

Fla. Int'l Univ., 920 So. 2d 702, 702 (Fla. Dist. Ct. App. 2006) (affirming order of student's dismissal because "any arguable defect in the underlying academic grievance process did not adversely affect her substantial rights to due process or otherwise"); Krischer v. Sch. Bd. of Dade Cty., 555 So. 2d 436, 437 (Fla. Dist. Ct. App. 1990) (a technical violation of state pre-termination procedures did not require reversal of an order terminating an employee).

103. *See, e.g.*, Best v. Boswell, 696 F.2d 1282, 1289 (11th Cir. 1983) (Although the public employer's failure to provide a pre-termination hearing violated the employee's procedural due process rights, subsequent due process hearing was sufficient to cure the defect.); Glenn v. Newman, 614 F.2d 467, 472 (5th Cir. 1980) (Even though employee was discharged without a proper pretermination hearing, the termination had to be sustained because "any error involved was cured in a subsequent public hearing."); Moreland v. Miami-Dade County, 255 F. Supp. 2d 1304, 1316 (S.D. Fla. 2002) (citation omitted) (Violation of a public employee's procedural due process rights can be remedied in a post-termination review by a state court.); Simmons v. Dep't of Nat. Res., 513 So. 2d 723, 724 (Fla. Dist. Ct. App. 1987) (While an employee may be entitled to a pre-termination hearing, the failure to provide one does not require that his termination be rescinded if it has been upheld in a post-termination hearing.); Russo v. Dep't of Health and Rehab. Serv., 451 So. 2d 979, 980 (Fla. Dist. Ct. App. 1984) (Because the employee was afforded a *de novo* evidentiary hearing, any possible prejudice that could have resulted from pre-hearing procedural errors was cured.).

104. *County of Monroe*, 690 F.2d at 1362–63.

105. *E.g.*, Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 259 (1987) (stating that "arbitrators are not bound by precedent"); Kraft Foods, Inc. v. Office & Prof'l Emps. Int'l Union, AFL-CIO, CLC, Local 1295, 203 F.3d 98, 102 (1st Cir. 2000) ("Arbitrators are not required to follow principles of contract law or judicial precedent." (quotations omitted)); Sheet Metal Workers' Int'l Ass'n Local Union No. 359 v. Madison Indus., 84 F.3d 1186, 1190 (9th Cir. 1996) ("In interpreting the contract, the arbitrator is not bound by precedent or by the record before him; rather, the industrial common law-the practices of the industry and the shop-is equally a part of the collective bargaining agreement although not expressed in it." (quotations omitted); Cal. Saw and Knife Works and Podchernikoff & Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO, 320 NLRB 224, 238 (Dec. 20, 1995) ("[A]rbitrators, unlike courts, are not bound by stare decisis and may, in some cases, even ignore other arbitral decisions under the same agreement").

106. *See, e.g.*, First Student, Inc. & IBT, Local 959, 2010 WL 6772601, at *8 (Apr. 16, 2010) (Landau, Arb.) ("Arbitrators have expressed divergent views about the effect of an employer's violation of . . . procedural due process rights. Some arbitrators have held that an employer's failure to comply with procedural due process requirements will nullify the discharge or disciplinary action in its entirety and hence require the employee's reinstatement. Other arbitrators have taken the position that an employer's failure to comply with procedural due process requirements is of significance only where the employee can demonstrate prejudice and if so, may modify or reduce the penalty imposed." (citations omitted)).

B. Law Enforcement Officer Bills of Rights

In addition to constitutional and contractual protections, many jurisdictions have passed statutes entitled "Law Enforcement Officer Bills of Rights" (LEOBR) or the like. The Florida LEOBR[107] is typical. Among other things, it requires investigations of police officers to be completed within six months (180 days), subject to specified exceptions.[108] But, contrary to some media reports, the Florida LEOBR does *not* say "an officer can't be punished if an investigation takes longer than six months."[109] The time requirement is a purely procedural one that can be enforced by a court injunction compelling timely action, but a violation of the time limits does not foreclose discipline. If, as *The Miami Herald* article reports, a police officer "was cleared because it took investigators 192 days to reach a conclusion,"[110] it was not because the state law mandated the result.

The original remedy for an alleged violation of the Florida LEOBR was to petition the circuit court for "an injunction to restrain and enjoin [the] violation of the provisions of this part and to compel the performance of the duties imposed."[111] This judicial remedy was replaced in 2009,[112] "with a multi-step process culminating in a 'compliance review hearing' before an administrative panel with the authority to award only limited relief: removal of the investigator from further involvement with the investigation of the officer."[113] The Florida courts have held that the original LEOBR remedy did not create a right to "relief in the form of reinstatement after discharge."[114] It was "no more than a vehicle for enforcing the procedures established in the preceding sections of . . . the statute; it [was] not a vehicle for the restoration of substantive rights."[115] The 2009 amendment similarly does not

107. 2005 Fla. Laws 1. (The LEOBR is also known as "the Weaver Act" after Deputy James M. Weaver).
108. *Id.* at 2.
109. Rabin, *supra* note 4.
110. *Id.*
111. FLA. STAT. § 112.534(1) (2008).
112. *See* 2009 Fla. Laws 1, 5–6. (amending section 112.534).
113. Fraternal Order of Police (FOP), Gator Lodge 67 v. City of Gainesville, 148 So. 3d 798, 802 (Fla. Dist. Ct. App. 2014); *see also* City of Miami v. Santos, 278 So. 3d 822, 823 (Fla. Dist. Ct. App. 2019).
114. Migliore v. City of Lauderhill, 415 So. 2d 62, 65 (Fla. Dist. Ct. App. 1982), *approved and adopted*, 431 So. 2d 986 (Fla. 1983); *see Fraternal Order of Police (FOP), Gator Lodge*, 148 So. 3d at 803.
115. City of Miami v. Cosgrove, 516 So. 2d 1125, 1128 (Fla. Dist. Ct. App. 1987).

create a vehicle for restoration of employment, only a procedural remedy.[116]

This reading of the LEOBR is consistent with the general rule that an administrative agency's failure to comply with a statutory time limit does not require reversal of the agency's substantive action.[117] Reversal of discipline is not required even where an agency clearly and repeatedly violates a statutory time limit without justification because such violations are subject to the harmless error rule.[118] A delay is not presumed to cause prejudice and does not automatically require reversal of otherwise appropriate discipline.[119]

For example, in a case predating Florida's adoption of the LEOBR, a law enforcement officer argued that his discipline should be overturned because it was not imposed within the time limits set forth in his employer's own rules and regulations.[120] The court held that even though the delay clearly violated the rules, it did not require reversal of the discipline:

> [Littleford] contends that he should be relieved of any disciplinary action because the FHP failed to follow its own rules and procedures in disciplining [him]. . . . FHP policy calls for such investigations to be completed within thirty days, or with a thirty-day extension, but Littleford's investigation dragged on several months. Florida law has long been clear, however, that an agency's failure to meet such procedural benchmarks as investigation deadlines will not prevent disciplinary action unless the delay has prejudiced the employee . . . [T]here has been no prejudice to Littleford. His claim of mental distress due to the duration of the proceedings and loss of confidence in the fairness of the FHP are not the substantive prejudice contemplated.[121]

116. 2009 Fla. Laws 1, at 5–6.

117. *See, e.g.*, Villareal v. Bureau of Prisons, 901 F.3d 1361, 1366 (Fed. Cir. 2018) ("For delay to vitiate an agency decision, the employee must show that the delay was harmful to his or her defense."); Carter v. Dep't of Prof'l Regulation, 633 So. 2d 3, 7 (Fla. 1994) (rejecting doctor's attempt to overturn an agency's suspension of his medical license because the agency failed to comply with the applicable statutory time limits for imposing discipline).

118. *Carter*, 633 So. 2d at 5.

119. *Id.*

120. Littleford v. Dep't of Highway Safety and Motor Vehicles, 814 So. 2d 1258, 1259 (Fla. Dist. Ct. App. 2002).

121. *Id.* (citations omitted).

Cases considering other time limits on the imposition of employee discipline have reached the same conclusion: absent a showing of actual prejudice to an employee's ability to respond to the charges, the violation of time limits does not foreclose discipline.[122]

Despite this case law and the language of the LEOBR itself, some arbitrators have reversed discipline because it was not imposed within the LEOBR 180-day limit for investigation.[123] When they have, it may be because they were unaware of the law's limited remedy or found the delay to independently violate the applicable collective bargaining agreement.[124] It was not because the LEOBR mandated reversal.[125]

C. Acquittal of Related Criminal Charges

Another frequently cited obstacle to "getting rid of bad cops" is the criminal justice system, specifically the high bar prosecutors must hurdle to obtain the conviction of an officer charged with the unlawful use of excessive force. In fact, the law is quite clear: A public employee's acquittal of criminal charges does not preclude an employer from taking disciplinary action on the same

122. *See, e.g.*, Metro. Dade County v. Caputi, 466 So. 2d 1087, 1088 (Fla. Dist. Ct. App. 1985) (holding failure to provide hearing within sixty-day time-limit did not require reversal of police officers' suspension absent proof of actual prejudice); Metro. Dade County v. Sokolowski, 439 So. 2d 932, 935 (Fla. Dist. Ct. App. 1983), *pet. for rev. denied*, 450 So. 2d 488 (Fla. 1984) (same holding as *Caputi*).

123. *See* Devoun Cetoute, *Another BSO Deputy Fired for Response to Parkland Shooting Will Be Rehired, Arbitrator Rules*, MIAMI HERALD (Sept. 16, 2020), https://www.miamiherald.com/news/local/community/broward/article245792070.html (The arbitrator's "decision was based on a technicality." The arbitrator found that the officer "was terminated 13 days past the deadline Florida law allows law enforcement officers to be punished."); Rabin, *supra* note 4; *see also* In re Pub. Admin.—Justice, Pub. Order and Safety & Labor Union and Corr. Lieutenant, 2013 WL 4648377 (AAA), at *5, 7 (June 2, 2013) (Hoffman, Arb.) (reversing discipline of correctional officer in part because the employer took 200 days to complete its investigation in violation of the LEOBR's time limit).

124. *See, e.g.*, *Pub. Admin.*, 2013 WL 4648377. *Cf.* Horizon Lines of Alaska & IBT, Local 959, 36 LAIS 477, 477 (Oct. 1, 2008) (Landau, Arb.) (holding that a CBA's 10-day limit on imposing discipline constituted a "bright line" standard that required the rescission of discipline without a showing of prejudice).

125. *Compare* City of Orlando & FOP, Orlando Lodge 25, 2010 WL 6772708, at *9 (July 24, 2010) (Taldone, Arb.) (The arbitrator found that the City violated the LEOBR, but the violation did not require reversal of discipline because the statutory remedy was "to seek 'an injunction to restrain and enjoin such violation.'" The arbitrator explained "that Grievant was not prejudiced by the City's violation of the statute. Therefore, the City's violation of the statute does not warrant sustaining the grievance."), *with* In re Grievant-1 and Grievant-2 (Labor Union) & Respondent, 2012 WL 7658352 (AAA), at *22 (Dec. 2, 2012) (Lurie, Arb.) (concluding that the arbitrator's authority extended "to only the four corners of the CBA, and not to the interpretation or application of external law, including the Weaver Act. The Arbitrator therefore renders no opinion as to whether the Weaver Act would or would not have pertained to the facts of this case or as to whether, if the Act had pertained, it had been complied with.").

underlying facts.[126] Police officers can be fired for conduct that falls far short of criminal.

The discipline of public employees is not governed by criminal standards, and employers are under no obligation to show that an employee engaged in criminal conduct to take disciplinary action. Criminal trials and employee discipline proceedings are governed by different rules of evidence and burdens of proof and serve entirely distinct purposes: The purpose of a criminal proceeding is the punishment of crime, and the purpose of a discharge proceeding is the removal of unsatisfactory employees and "the maintenance of the morale and efficiency of the [public work] force and its good repute in the community."[127] There is no relationship between the "outcome of criminal proceedings for alleged misconduct in office and discharge of [a public employee] on the same grounds as included in the criminal charges."[128] Accordingly, the courts have long "held in situations involving civil service employees that the dismissal of an indictment or the acquittal of criminal charges based upon misconduct in office does not preclude discharge of the employee on the same grounds."[129]

Arbitrators typically follow this principle. As one arbitrator has noted:

> [T]he majority of arbitrators share the view that an acquittal does not establish any facts in favor of the [G]rievant and should not have any res judicata or preclusive effect. That is because . . . there are different standards of proof operative in the respective forums. Proof in a criminal proceeding must establish guilt beyond a reasonable doubt. In an arbitration setting, an employer need not meet that high evidentiary threshold to prove its case. Therefore, the mere fact of an acquittal does not preclude an arbitrator from

126. City of Miami v. Kellum, 147 So. 2d 147, 151 (Fla. Dist. Ct. App. 1962).
127. *Id.* (quoting Kavanaugh v. Paull, 177 A. 352, 355 (R.I. 1935)).
128. *Id.*
129. *Id.* (citing H. ELIOT KAPLAN, THE LAW OF CIVIL SERVICE 262 (1958)); *accord* Taube v. Florida Keys Aqueduct Auth., 516 So. 2d 90, 91 (Fla. Dist. Ct. App. 1987) (The outcome of a criminal proceeding does not collaterally estop a state agency from relitigating the facts and circumstances surrounding an employee's misconduct.); Arnette v. Florida State Univ., 413 So. 2d 806, 806–08 (Fla. Dist. Ct. App. 1982) (same holding as *Taube*); Chastain v. Civil Service Bd. of Orlando, 327 So. 2d 230, 232 (Fla. Dist. Ct. App. 1976) (explaining that the police officer was appropriately discharged for shooting an escaping prisoner even though he was not civilly or criminally liable for his conduct); City of Miami v. Babey, 161 So. 2d 230, 232 (Fla. Dist. Ct. App. 1964) ("[I]t is immaterial to [an administrative discharge proceeding] that the [employee] was acquitted of a similar criminal charge in a court of law.").

> upholding management's action where adequate evidence is presented of the misconduct alleged.[130]

An arbitrator applied this reasoning in one of the MDPD cases described above to reject an officer's claim that the dismissal of criminal charges for domestic abuse precluded his discharge based on the same facts.[131]

The Miami Herald article cites the example of an arbitrator overturning the discharge of a City of Opa-Locka officer because he "was cleared by a court of law for his most recent charges, misdemeanor battery, tampering with evidence and false imprisonment after he allegedly handcuffed and cursed at a youth counselor who walked into the police station to file a complaint against the sergeant."[132] If the article's description of the arbitrator's reasoning were accurate, it would be contrary to judicial precedent and the majority of arbitration decisions. But the City did not in fact fire the officer based on the incidents leading to his arrest and acquittal. *The Miami Herald* conflated two different arbitration decisions—one dealing with a backpay issue,[133] and the other with the officer's termination.[134] The officer's acquittal was mentioned in the arbitration decision resolving the backpay issue,[135] not in the decision dealing with the termination. In the separate arbitration over termination, the City argued that the officer was terminated for reasons unrelated to his arrest—violating a rule requiring officers to secure city-issued firearms "in a safe manner . . . to protect them from deterioration,

130. In re Ind. Bell Tel. Co. v. Comm. Workers of Am., 99 Lab. Arb. Rep. (BNA) 756, 761 (Feb. 11, 1992) (Goldstein, Arb.) (citing Ind. Bell Tel. Co. Inc. v. Comm. Workers of Am., Lab. Arb. Rep. (BNA) 981, 987 (Oct. 20, 1989) (Goldstein, Arb.)); ITT Cont'l Baking Co v. Confectionary Workers Int'l Union of Am., 72-2 Lab. Arb. Awards (CCH) 4696 (Nov. 16, 1972) (High, Arb.); Assoc. Grocers of Ala. Inc. v. United Wholesale & Warehouse Employees, 83 LA (BNA) 261, 265 (Aug. 20, 1984) (Odom, Arb.); City of Pontiac v. Police Officer's Ass'n of Mich., Pontiac, FMCS, 77 Lab. Arb. Rep. (BNA) 765, 768 (Sept. 21, 1981) (Ott, Arb.); N.Y.C. Health & Hosp., 76 Lab. Arb. Rep. (BNA) 387, 388 (Mar. 30, 1981) (Simmons, Arb.).

131. **CASE 3**, In re Dade County PBA & Miami-Dade County, 32 390 00761 11 AAA 1, 14 (Sept. 26, 2013) (Humphries, Arb.) ("While the judicial system's reasonable doubt standard of proof was not met in the most serious criminal charges against the Grievant, an abundance of clear and convincing evidence in the instant case arbitration reveals a compelling degree of wrongdoing on his part.").

132. Rabin, *supra* note 4.

133. City of Opa Locka & Dade County PBA, 47 LAIS 120, 2018 WL 6921908, at *3 (Nov. 16, 2018) (Hoffman, Arb.).

134. PBA, Inc. & Employer, 2013 BNA LA Supp. 148572, at *2 (Oct. 22, 2013) (Wood, Arb.); In re [Grievant 1-Labor Union] and [Grievant 2] & [Respondent], 2013 WL 7389716, at *1 (Oct. 22, 2013) (Wood, Arb.).

135. *City of Opa Locka*, 2018 WL 6921908, at *3. The parties' dispute was over the amount of backpay due between the officer's acquittal and reinstatement because no disciplinary action related to the criminal charges had been taken in the interim. *Id.*

unauthorized use or theft."[136] The arbitrator found that the officer "took reasonable steps to secure [his] weapon . . . [because it] was locked inside the trunk of a vehicle that was inside a locked . . . garage" leased to the officer's fiancé's father, "a security guard . . . licensed to carry a firearm. Thus, the [officer] could be reasonably certain that the weapon would not fall into the hands of an irresponsible person."[137] The arbitrator reasoned that the City rule did

> not specify what "safe" means or provide any particulars on how police personnel must store [a] weapon (i.e. in a gun safe or locker). It is well established that a rule must clearly and unambiguously establish the scope of prohibited conduct, as well as the consequences for violations, in order to be enforceable.[138]

As can be seen, contrary to *The Miami Herald*'s reporting, the arbitrator's decision to reverse the discharge had nothing to do with the acquittal of any criminal charges.[139]

D. The Fifth Amendment Protection against Self-Incrimination

Media reports occasionally cite the Fifth Amendment privilege against self-incrimination as another obstacle arbitrators have invoked in overturning police discipline.[140] *The Miami Herald* article, for example, cites an attorney "applauding" an arbitrator decision for saying his client "should not have been fired for invoking his Fifth Amendment right, which allows him to remain mum when asked potentially incriminating questions."[141] There are other scattered media reports of officers allegedly using the

136. *PBA, Inc.*, 2013 BNA LA Supp. 148572, at *10.
137. *Id.*
138. *Id.* (citations omitted).
139. *Id.*
140. Sam Gurwitt, *Court Stalls Cop's Termination*, NEW HAVEN INDEP. (Dec. 6, 2019), https://www.newhavenindependent.org/index.php/archives/entry/eaton_termination_hearing/ (reporting on judge who enjoined police review board from questioning subject officer to protect his Fifth Amendment rights while criminal charges were being prosecuted); Charles Rabin & David Ovalle, *Miami Cop Suspected of Homicide Involvement Reinstated by Arbitrator*, MIAMI HERALD, May 30, 2017, https://www.miamiherald.com/news/local/crime/article153440889.html (An arbitrator concluded that a discharged officer was entitled to reinstatement because he "was well within his rights to invoke the Fifth, and his firing was 'improperly based' on him failing to speak about the killing. And as for not telling supervisors about his whereabouts, that 'does not merit severe discipline.'").
141. Rabin, *supra* note 4.

Fifth Amendment to avoid making incriminating statements,[142] but the courts and the vast majority of arbitrators have consistently held that the Fifth Amendment does not prevent the discipline of public employees who refuse to answer employer questions related to their duties so long as their responses are not used in criminal proceedings.

The Supreme Court addressed this issue in *Garrity v. New Jersey*[143] and *Gardner v. Broderick*.[144] The Court held that although public employees cannot be compelled to waive their Fifth Amendment privilege against the use of their statements in a criminal proceeding, they can be required, under penalty of dismissal from employment, to answer questions related to the performance of their duties.[145] As the Court explained in *Gardner*:

> If appellant, a policeman, had refused to answer questions specifically, directly and narrowly relating to the performance of his official duties without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not have been a bar to his dismissal.[146]

Subsequent cases have re-affirmed the principle that "[p]ublic employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity" against later use of statements in criminal proceedings.[147] The important thing to bear in mind is

142. *See, e.g.*, Mark Davis, *After Police Shootings, Vermont Cops Are Slow to Provide Statements*, SEVEN DAYS (Jan. 10, 2018), https://www.sevendaysvt.com/vermont/after-police-shootings-vermont-cops-are-slow-to-provide-statements/Content?oid=11770598 (quoting former head of police union as saying that police "are encouraged to submit to questioning . . . even though they have the same right as citizens to invoke Fifth Amendment protections against self-incrimination"); Mukhtar M. Ibrahim, *Everything You Need to Know about the Police Shooting of Justine Ruszczyk*, MPR NEWS (Mar. 20, 2018), https://www.mprnews.org/story/2018/03/20/justine-damond-ruszczyk-mpls-police-shooting-faq (The police officer "declined to talk with investigators, which is his right. Police officers have the same Fifth Amendment right against self-incrimination as other citizens.").

143. 385 U.S. 493, 500 (1967).

144. 392 U.S. 273, 279 (1968).

145. *Id.* at 274–75.

146. *Id.* at 278 (citation omitted). *Accord* Unif. Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation of the City of N.Y., 392 U.S. 280, 284 (1968).

147. *See, e.g.*, Chavez v. Martinez, 538 U.S. 760, 768 (2003) ("[G]overnments may penalize public employees and government contractors (with the loss of their jobs or government contracts) to induce them to respond to inquiries, so long as the answers elicited (and their fruits) are immunized from use in any criminal case against the speaker."); Erwin

that an employee cannot be required to waive their Fifth Amendment protection from the use of compelled statements in criminal proceedings.[148] Statements made in response to an employer's order under threat of discharge are considered compelled, and thus may not be used in criminal proceedings, but that does not prevent them from being used in disciplinary proceedings.[149]

Arbitrators follow the judicially established precedent.[150] Consistent with *Garrity*, *Gardner*, and their progeny, arbitrators have held that public employees may be charged with insubordination and fired if they fail to answer their employers' questions truthfully[151] and based on "'the statements they provide.'"[152]

The decision in the City of Miami case cited in *The Miami Herald* may appear at first glance to be a rare instance where an employee was able to avoid discharge by invoking the Fifth Amendment. On closer reading, however, it becomes clear that the arbitrator instead found that the City failed to assure the

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v. Price, 778 F.2d 668, 669 (11th Cir. 1985) (explaining that a public employee is not required to waive Fifth Amendment protection, but can be discharged if he refuses to answer questions relating to the performance of his official duties); Hoover v. Knight, 678 F.2d 578, 579–82 (5th Cir. 1982) (upholding dismissal of a Miami-Dade County police officer who asserted her Fifth Amendment right not to testify regarding various charges against her, even though a subsequent criminal trial resulted in her acquittal); Farmer v. City of Ft. Lauderdale, 427 So. 2d 187, 189 (Fla. 1983) (adopting the Supreme Court's holding in *Gardner* that "public employees [can] be dismissed if they refuse to answer questions specifically, directly and narrowly relating to the performance of their official duties without giving up their Fifth Amendment rights against self-incrimination"); Dep't of Highway Safety and Motor Vehicle v. Corbin, 527 So. 2d 868, 872 (Fla. Dist. Ct. App. 1988) ("If a public employee fails to answer questions specifically, directly, and narrowly relating to the performance of his official duties, he is subject to dismissal at the discretion of the agency."); M. O. Regensteiner, Annotation, *Assertion of Immunity as Ground for Removing or Discharging Public Officer or Employee*, 44 A.L.R. 2d 789, § 4(c) (1955); *see also* The Florida Bar v. Vaughn, 608 So. 2d 18, 20–21 (Fla. 1992) (noting that an attorney could be disciplined for refusing to testify and otherwise cooperate with Bar investigation of his alleged misconduct).

148. *Gardner*, 392 U.S. at 278–79. *See* Edwards v. Dep't of Highway Safety and Motor Vehicle, 470 So. 2d 9, 10 (Fla. Dist. Ct. App. 1985) ("[W]hile a public employee may not be dismissed for declining to expressly waive the privilege against self-incrimination, a refusal to answer questions specifically, directly, and narrowly relating to the performance of . . . official duties may serve as a permissible basis for dismissal." (quotations omitted)), *rev. denied*, 476 So. 2d 673 (Fla. 1985).

149. City of Hollywood v. Washington, 384 So. 2d 1315, 1317 (Fla. Dist. Ct. App. 1980) (There is "no federally protected right to suppression of the incriminating statements in a proceeding for the termination of [public] employment" because the Fifth Amendment applies only to criminal sanctions and dismissal from employment is not a criminal sanction.).

150. HOW ARBITRATION WORKS, 8th ed., *supra* note 15, at 19-19 to 19-25.

151. City of Bridgeport & IAFF, Local 834, 2013 WL 6672678, at *2 (Oct. 21, 2013) (Gnocchi, Arb.).

152. City of New Haven & AFSCME, Council 4, Local 3144, 47 LAIS 14, 2018 WL 2356374, at *10 (Mar. 27, 2018) (McMahon, Arb.) (quoting ELKOURI & ELKOURI, HOW ARBITRATION WORKS 12-61 (6th ed. 2003)).

employee, as required by *Garrity* and *Gardner*, that his statements would not be used in a subsequent criminal proceeding.[153] The City argued that the officer never invoked the Fifth Amendment, but the arbitrator found, to the contrary, that he invoked the right in an investigatory interview.[154] The arbitrator also found that the City never gave him a direct order to answer questions or specifically advised him that if he did not answer questions he would be fired.[155] As a result, the arbitrator reasoned, "[the officer] was entitled to decline to answer the City's inquiries."[156] The arbitrator explained that if the officer had been properly advised of his rights and still "declined to respond . . . he would have been subject to discipline."[157] But, the arbitrator concluded, "[t]he City in its judgment determined that it wanted to preserve the right to prosecute [the officer]. Thus by preserving its opportunity to prosecute based on his statement, it abandoned its right to inquire."[158] The arbitrator found that the City violated the *Garrity/Gardner* rule by trying to compel the officer to answer questions under threat of discharge for insubordination *and* to use those compelled statements in a criminal proceeding. The City denied this was its intent, but the arbitrator found the facts showed otherwise.[159]

E. Qualified Immunity

Another obstacle to discipline occasionally cited in the media is the judicially created doctrine of "qualified immunity."[160] Qualified immunity is plainly controversial, and reasonable minds

153. Miami Fraternal Order of Police (FOP) Lodge #20 on Behalf of Grievant Adrian Rodriguez & City of Miami, Arbitration Hearing, Grievance No: 16-05, at *3 (May 31, 2017) (Spero, Arb.).
154. *Id.*
155. *Id.* When public employees are questioned under circumstances that may give rise to criminal prosecution, public employers give a so-called "Garrity warning," advising those employees that they are required to answer questions put to them about their official duties, but that the information they provide cannot be used against them in any criminal proceeding. *See, e.g.*, Jackson v. D.C., 327 F. Supp. 3d 52, 61 (D.D.C. 2018). Simply stated, "the employee is given a choice: answer questions under immunity or remain silent and face dismissal." In re Dep't of Homeland Security & Am. Fed'n of Gov't Emps. (AFGE), Local 2595, 129 BNA LA 192, 205 (Feb. 18, 2011) (Simmelkjaer, Arb.).
156. *Rodriguez*, Grievance No: 16-05, at *7.
157. *Id.*
158. *Id.*
159. *Id.*
160. In describing the various legal obstacles to disciplining police officers, *The Miami Herald* article concludes: "Perhaps most important, there is United States Supreme Court judicially created doctrine called 'qualified immunity' that relieves police from most financial liabilities resulting from an on-duty incident." Rabin, *supra* note 4.

can differ about its continuing efficacy,[161] but it has little to do with employee discipline. Qualified immunity protects public employees from having to pay monetary damages for injuries resulting from their official actions unless those actions violate "clearly established law."[162] It does not prevent a public employer from disciplining or discharging an employee for alleged misconduct, whether or not it violates "clearly established" law or any law at all for that matter. Officers are routinely discharged for conduct such as absenteeism, tardiness, failure to file reports, and insubordination, which falls far short of the qualified immunity standard for imposing damages.

VI. SOME POSSIBILITIES FOR REFORM

Various reforms have been proposed to increase police agencies' rates of success in discharge cases, from management improvements in investigation and preparation for arbitration to the complete abolishment of police protections from discharge and the imposition of at-will employment standards.[163] Advocates of management improvement note that arbitrators often overturn police discharges because the agency's investigation was inadequate or because the agency failed to comply with the procedural requirements of a collective bargaining agreement, local civil service rule, or state law protecting employee rights—all of which can be avoided with more diligent preparation and careful attention to detail.[164] Advocates of abolishing police protections argue that the only way to ensure police accountability is to give police agencies complete discretion to make employment decisions.[165] The problem with management improvements alone is that they do not eliminate the possibility of arbitrators reversing decisions based on missteps that they deem unacceptable but that

161. *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798–1800 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 2–8 (2017).

162. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

163. William Z. Pentelovitch, *Abolish Collective Bargaining, Arbitration, Indemnity for Police Officers*, STAR TRIBUNE (June 9, 2020), https://www.startribune.com/abolish-collective-bargaining-arbitration-indemnity-for-police-officers/571144412/.

164. Similar deficiencies cause prosecuting authorities and police agencies to lose criminal cases. For an interesting analysis of the problem of dealing with errors in criminal cases, see Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARVARD L. REV. 1065, 1150 (2015).

165. Rabin, *supra* note 4.

a court or a majority of other arbitrators would likely find harmless. The problem with eliminating protections altogether is that it ignores employee rights, the difficult jobs police officers perform, the possibility of management errors, and the effect unreviewable discipline has on officer morale.

The drive to reform arbitration stems from decisions involving excessive force allegations. Even the strongest union or employee advocate agrees that officers who use excessive force, or engage in other serious misconduct, should be removed from law enforcement. Their legitimate concern is that officers receive a fair investigation and an adversarial hearing to ensure they are removed only for good cause.

Disagreements over the facts surrounding use of force and whether an officer's actions were "reasonable" under the circumstances are inevitable. Indeed, the Supreme Court has repeatedly noted that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."[166] The determination of whether use of force is reasonable "requires careful attention to the facts and circumstances of each particular case, including the severity of the [incident] at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting."[167] The reasonableness of a police officer's use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment."[168] The judgment of police officers on the scene is entitled to a measure of deference because police "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[169]

It is possible to devise balanced reforms that acknowledge these competing concerns, return a measure of authority to police agencies, and still protect police officers from unjust dismissal. The

166. Graham v. Connor, 490 U.S. 386, 396 (1989) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).
167. *Id.*
168. *Id.* at 396.
169. *Id.* at 387; *accord* Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018).

remainder of this article will discuss four possible reforms: (1) the adoption of a mandatory harmless error rule prohibiting arbitrators from reversing disciplines on the basis of procedural errors without proof of actual prejudice; (2) limiting arbitrator authority to modify the level of discipline imposed by an employer; (3) reserving policy decisions to police agencies and elected officials; and (4) expanding judicial review of arbitration awards to ensure compliance with such requirements. The first three potential reforms are consistent with existing judicial decisions and the majority of arbitration decisions. The last would require a significant change in arbitration statutes and practice.

A. Harmless Error

Much of the frustration police officials voice over adverse arbitration decisions stems from cases in which the evidence of an officer's misconduct is sufficient, even compelling, but an arbitrator reverses discipline because of a procedural error. Arbitrators have reversed police disciplines for such errors as failing to conduct a reasonable investigation or to afford an officer an adequate opportunity to respond to charges,[170] neglecting to honor an officer's request for union representation (known as *Weingarten*[171] rights),[172] and for taking too long between an incident and imposing discipline.[173]

As explained above, case law does not require the reversal of employee discipline every time an employer commits such

170. HOW ARBITRATION WORKS, 8th ed., *supra* note 15, at 15-48 to 15-50 (note cases cited therein); *see supra* text accompanying notes 90–93 (discussing arbitrator reversals of discipline due to procedural errors); In re U.S. Dep't of Veterans Affairs, Richard L. Roudebush VA Med. Ctr., Indianapolis, Ind. & Service Emps. Int'l Union (SEIU), Local 551, 139 BNA LA 244, 284 (Apr. 3, 2018) (Kininmonth, Arb.); Fla. Dep't of Corr. & IBT, Local 2011, 44 LAIS 82, 2015 WL 6473091, at *5 (Sept. 8, 2015) (Abrams, Arb.).

171. NLRB v. Weingarten, 420 U.S. 251, 267 (1975).

172. *See, e.g.*, Miami-Dade County & Dade County PBA, 45 LAIS 82, 2016 WL 5349695, at *12 (Aug. 21, 2016) (Hoffman, Arb.) ("[U]nlike the NLRB and the courts, . . . arbitrators have granted employees subjected to *Weingarten* violation substantive remedies, such as reinstatement and back pay.") (quoting ELKOURI & ELKOURI, HOW ARBITRATION WORKS 19–24 (Marlin Volz & Edward Goggin eds., 7th ed. 2012) [hereinafter HOW ARBITRATION WORKS, 7th ed.] (citing In re City of Blue Island & Ill. Fed'n of Police, 137 BNA LA 845 (Apr. 10, 2017) (Dichter, Arb.)). The more recent 8th edition of *How Arbitration Works* states at page 15-59: "A disciplinary action may not automatically be overturned if an employee has not been prejudiced by a violation of his or her *Weingarten* rights. Such a violation may, however, be a factor in determining whether to mitigate a discharge to a lesser form of discipline."

173. *See Dade County PBA*, 2016 WL 5349695, at *13; *Roudebush VA Med. Ctr.*, 139 BNA LA at 280 (reversing disciplinary suspension in part because the employer took five months to investigate before imposing discipline).

procedural errors in the discipline process,[174] and the statute governing the federal civil service prohibits the reversal of disciplinary action for procedural error unless the employee demonstrates the error was "harmful." In the federal system, the agency's action must be sustained "(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or (B) in any other case, is supported by a preponderance of the evidence,"[175] unless the employee "shows harmful error in the application of the agency's procedures in arriving at such decision."[176]

"Harmful error" is defined as an "[e]rror by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error."[177] The harmful error analysis focuses on the employing "agency and whether the agency is likely to have reached a different conclusion in the absence of procedural error."[178] The burden is on the employee to "show harmful error in an agency's procedure in order to establish reversible procedural error."[179] The "harmful error" rule for federal employee discipline challenges is much like the "harmless-error" rule governing federal judicial proceedings,[180] which "tells courts to review cases for errors of law 'without regard to errors' that do not affect the parties' 'substantial rights'"[181] and is intended "to prevent . . . courts from becoming 'impregnable citadels of technicality.'"[182]

The federal employee harmful error rule has been applied to reject challenges to discipline based on such procedural missteps as: the failure to conduct an independent fact-finding investigation as required by an agency's policies,[183] delay in interviewing

174. *See supra* text accompanying notes 94–104 (discussing the harmful error rule).
175. Civil Service Reform Act of 1978, 5 U.S.C. § 7701(c)(2) (2018).
176. *Id.* § 7701(c)(2)(A). The Act also requires reversal of discipline where the employee "shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or . . . shows that the decision was not in accordance with law." *Id.* § 7701(c)(2)(B)–(C).
177. 5 C.F.R. § 1201.4(r) (2021).
178. Ward v. U.S. Postal Serv., 634 F.3d 1274, 1282 (Fed. Cir. 2011) (emphasis omitted).
179. *Id.* at 1281; *see* Diaz v. Dep't of Air Force, 63 F.3d 1107, 1109 (Fed. Cir. 1995).
180. *See* 28 U.S.C. § 2111 (2018) (applying harmless error rule to all civil cases).
181. Shinseki v. Sanders, 556 U.S. 396, 407 (2009) (quoting 28 U.S.C. § 2111).
182. *Id.* at 407–08 (quoting Kotteakos v. U.S., 328 U.S. 750, 759 (1946)).
183. Brown v. Napolitano, 380 F. App'x 832, 835 (11th Cir. 2010).

witnesses,[184] chain-of-custody violations,[185] violation of *Weingarten* representation rights,[186] the failure to give timely notice of charges,[187] the failure to provide an employee copies of the materials it relied upon to discipline him,[188] the refusal to consider an employee's response and evidence before taking action,[189] the premature issuance of letters of termination,[190] the failure to specify the conditions of a suspension as required by regulations,[191] and improper ex parte communications.[192]

As discussed above, even without a statute, the courts[193] and many arbitrators[194] have held that the reversal of employee discipline for procedural error is not required absent proof of actual prejudice. At the same time, not all arbitrators follow this principle, and there are many examples of arbitrators overturning

184. Donoghue v. U.S. Postal Serv., 167 F. App'x 172, 174–75 (Fed. Cir. 2006).

185. Frank v. Dep't of Transp., FAA, 35 F.3d 1554, 1557–58 (Fed. Cir. 1994).

186. *See id.* (evidence obtained in violation of *Weingarten* should not be considered, but the violation does not preclude discipline predicated on other evidence) (citing NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975)); Roach v. Gates, No. CA 2:07-0136-MBS-BM, 2011 WL 7973045, at *8 (D.S.C. June 22, 2011), *report and recommendation adopted,* No. 2:07-00136-DCN, 2012 WL 1952680 (D.S.C. May 30, 2012), *aff'd,* 487 F. App'x 112 (4th Cir. 2012); Robinson v. U.S. Postal Serv., 28 M.S.P.R. 681, 686 (1985); U.S. Dep't of Labor & Am. Fed'n of Gov't Emps. (AFGE), Local 12, 2008 WL 8746236, at *4 (Sept. 17, 2008) (Alpern, Arb.).

187. Dancy v. United States, 668 F.2d 1224, 1227 (Ct. Cl. 1982) (citing Polos v. United States, 621 F.2d 385, 390 (Ct. Cl. 1980) for the proposition that the "failure of [an] agency to give [an employee] thirty days' written notice was 'harmless error,' since notice would not have enhanced [the employee's] ability to retain his civilian position").

188. Novotny v. Dep't of Transp., F.A.A., 735 F.2d 521, 523 (Fed. Cir. 1984).

189. Doe v. U.S. Postal Serv., 484 F. App'x 552, 554 (Fed. Cir. 2012).

190. Darnell v. Dep't of Transp., F.A.A., 807 F.2d 943, 946 (Fed. Cir. 1986).

191. Rawls v. U.S. Postal Serv., 179 F. App'x 693, 695–96 (Fed. Cir. 2006).

192. Pears v. Dep't of Commerce, 996 F.2d 319, 319 (Fed. Cir. 1993).

193. *See supra* text accompanying notes 94–104 (discussing the harmful error rule used by courts). *Accord* Boylan v. U.S. Postal Serv., 704 F.2d 573, 577 (11th Cir. 1983) ("[W]here a removal action is based upon substantial evidence and conforms with the law, courts have refused to hold 'that every deviation from specified procedure, no matter how technical, automatically invalidates a discharge, especially in the absence of any showing of prejudice.'") (quoting Dozier v. United States, 473 F.2d 866, 868 (5th Cir.1973)); Crimaldi v. U. S., 651 F.2d 151, 154 (2d Cir. 1981) ("[N]ot every procedural defect, no matter how trivial or harmless, will nullify what otherwise would have been a valid discharge. . . . Where the defect in no way prejudiced the plaintiff, it may be treated as harmless error.").

194. *See, e.g.*, In re MKM Machine Tool Co., Inc. & District Lodge 27 of the Int'l Ass'n of Machinists and Aerospace Workers, 2007 WL 8319170, at *8 (Feb. 13, 2007) (Hoffmeyer, Arb.) ("The due process requirement of providing a fair and objective investigation into the facts, including presenting the Grievant with the charges and seeking his responses prior to making the termination decision, is so firmly entrenched in both constitutional and contractual law that failure to so provide is viewed by arbitrators as a fatal defect mandating dismissal of charges and reinstatement of the employee. . . . , [T]he larger weight of arbitral authority supports exceptions to this general rule may occur under the harmless error principle."); In re AFSCME Local Union 1034 & Village of Romeoville, 2007 WL 8306541, at *13 (Oct. 12, 2007) (Goldstein, Arb.) ("[T]he consequences of an employer's failure to comply with time limits and other contractual procedural requirements in issuing discipline . . . depend on whether or not the [G]rievant was prejudiced."); *supra* text accompanying note 89 (discussing the harmless error rule used by arbitrators).

discipline for seemingly minor procedural missteps.[195] States that wish to avoid such rulings should consider enacting legislation modeled after the federal Merit System, which requires proof of "harmful error" before an arbitrator may modify discipline based on procedural error alone. Alternatively, employers can seek to negotiate a harmless error provision into the discipline section of their collective bargaining agreements.

B. Limiting Arbitrator Authority to Modify the Level of Discipline

If the facts show that an employee committed an offense, the appropriate level of discipline still must be decided. Employers are understandably disturbed when an arbitrator finds an employee committed the offense charged but overturns their judgment to terminate as "too harsh."

Florida courts have long recognized that once just cause for *some* discipline of a civil service employee is established, the determination of the appropriate *level* of discipline is solely within the discretion of the employing agency. As one court explained, "[t]he grounds for dismissal and suspension are the same. There is no guideline for determining whether an agency must dismiss rather than suspend. Therefore, the agency has sole discretion to determine whether to dismiss or to suspend an employee, subject only to just cause."[196]

Many arbitrators follow a similar principle, holding that employers retain the discretion to decide the appropriate level of

195. *See, e.g.*, In re U.S. Dep't of Veterans Affairs, Richard L. Roudebush VA Med. Ctr., Indianapolis, Ind. & Service Emps. Int'l Union (SEIU), Local 551, 139 BNA LA 244 (Apr. 3, 2018) (Kininmonth, Arb.); Miami-Dade County & Dade County PBA, 45 LAIS 82, 2016 WL 5349695 (Aug. 21, 2016) (Hoffman, Arb.); HOW ARBITRATION WORKS, 8th ed., *supra* note 15, at 15-48 ("[A]rbitrators will often refuse to sustain the discharge or discipline" where the employer fails to give the employee an opportunity to respond to the charges before issuing discipline.); Kelly et al., *supra* note 3.

196. Collins v. Fla. Dep't of Offender Rehab., 355 So. 2d 131, 132 (Fla. Dist. Ct. App. 1978) (quoting Fla. A&M Univ. v. Lewis, 327 So. 2d 862, 862 (Fla. Dist. Ct. App. 1976)). *Accord* Miami-Dade County v. Jones, 778 So. 2d 409, 410–11 (Fla. Dist. Ct. App. 2001) (Once the factfinder determines that the employee has committed an offense, the county manager has "the complete discretion to determine the appropriate penalty."); Kee v. Miami-Dade County, 760 So. 2d 1094, 1094–95 (Fla. Dist. Ct. App. 2000) ("[T]he manager would have the complete discretion to determine the appropriate penalty where the hearing officer decided that an offense had been committed by the employee."); Metro. Dade County v. Bannister, 683 So. 2d 130, 133 (Fla. Dist. Ct. App. 1996) ("[I]f the person or entity who hears the evidence finds that the employee has committed an offense, then the city manager has complete discretion in the determination of the penalty."), *cert. denied*, 695 So. 2d 698 (Fla. 1997); Thomas v. Brevard County Sheriff's Office, 456 So. 2d 540, 544 (Fla. Dist. Ct. App. 1984) ("Once 'just cause' is established, the [employing agency] has the absolute right to dismiss" its employee, and the "Civil Service Board is without authority to substitute its opinion for that of the [employer] as to the severity of disciplinary action imposed.").

discipline absent evidence of discrimination or arbitrariness. As explained in one frequently cited arbitration opinion:

> Where an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make originally, is no justification for changing it. . . . The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved[—]in other words where there has been an abuse of discretion.[197]

Other arbitrators take a less restrictive view of their authority to modify management's choice of discipline and, instead, apply a "reasonable" person standard. In another frequently cited decision, an arbitrator explained that because "no standards exist" to aid an arbitrator in deciding upon the appropriate level of discipline,

> perhaps the best [an arbitrator] can do is to decide what reasonable man, mindful of the habits and customs of industrial

197. In re Stockham Pipe Fittings Co. & United Steelworkers of Am. (CIO), 1 BNA LA 160, 162 (Mar. 28, 1945) (McCoy, Arb.). *Accord* In re [Grievant 1-Labor Union] & Respondent, 2013 WL 7964037 (AAA), at *7–8 (Nov. 7, 2013) (Kohler, Arb.) ("The Arbitrator cannot merely substitute his judgment for that of management. Even if the Arbitrator personally feels that discipline was excessive, he cannot disturb the employer's decision unless management has acted unreasonably or in a discriminatory manner. In other words, to reduce a penalty, there must be evidence that an employer abused its discretion. An abuse of discretion occurs if an employer had no rational basis for imposing the level of discipline."). As phrased by Arbitrator Mark Lurie more recently in an MDPD case:

> Once cause for discipline is established, an employer has latitude in determining both whether to discipline and the severity of the penalty, provided only that the severity of the penalty is not grossly disproportionate to the severity of the infraction, and provided that it is not materially disparate from the penalty that had been issued for the same infractions to employees who were similarly situated. Short of those circumstances, it is not the role of the Arbitrator to substitute his judgment for that of management in the selection of discipline, or to interject compassion where the employer has withheld it.

CASE 1, In re Dade County PBA & Miami-Dade County, 01-14-0001-7526 AAA 1, 4–5 (Oct. 28, 2015) (Lurie, Arb.); *accord* **CASE 3**, In re Dade County PBA & Miami-Dade County, 32 390 00761 11 AAA 1, 8 (Sept. 26, 2013) (Humphries, Arb.) ("Arbitrators have consistently followed the principle that management generally reserves the discretion to decide the appropriate level of discipline, absent evidence of invidious discrimination or arbitrariness.").

> life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just.[198]

With such divergent views and no reviewing authority to decide which of the two views should be followed, employers are left without binding precedent for guidance. As previously discussed, solutions through legislation or negotiation are possible. A state legislature could eliminate arbitrator authority over the level of discipline entirely, or place limits on arbitrator discretion, by, for example, prohibiting an arbitrator from modifying an employer's choice of discipline unless it amounts to an "abuse of discretion," a standard commonly used in the law to preserve public officials' authority over their agencies.[199] A small number of jurisdictions have adopted such an approach.[200] Alternatively, a

198. In re Riley Stoker Corp. & United Steel-Workers of Am., Local 1907 (CIO), 7 BNA LA 764, 767 (July 11, 1947) (Platt & Lavery, Arbs.). Both the *Stockham Pipe* and *Riley Stoker* cases are quoted and discussed in HOW ARBITRATION WORKS, 8th ed., *supra* note 15, at 15-38 to 15-39, without comment as to which is the better view. This arbitrator will follow the respected treatise's lead.

199. The federal courts use such a standard when reviewing MSRB penalty decisions. *See, e.g.*, Hicks v. Dep't of Treas., 107 F. App'x 902, 907 (Fed. Cir. 2004) ("[W]e review penalty decisions to determine whether they are 'grossly disproportionate' or constitute an 'abuse of discretion.' . . . We 'cannot and will not disturb a penalty unless it is unauthorized or exceeds the bounds of reasonableness because it is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion, or where the record is devoid of any basis demonstrating reasonableness.'" (citations omitted)); Green v. Dep't of Treas., 13 F. App'x 985, 989 (Fed. Cir. 2001) ("The determination of the proper disciplinary action to be taken to promote the efficiency of the service is a matter within the discretion of the agency. Deference is given to an agency's judgment unless the penalty exceeds the range of permissible punishment specified by statute or regulation, or unless the penalty is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." (quotations omitted)).

200. Most recently, Oregon amended its public employee labor law to provide:

> [W]hen an arbitration proceeding involves alleged misconduct by a sworn law enforcement officer of any law enforcement agency, . . . and the arbitrator makes a finding that misconduct has occurred consistent with the law enforcement agency's finding of misconduct, the arbitration award may not order any disciplinary action that differs from the disciplinary action imposed by the agency, if the disciplinary action imposed by the agency is consistent with the provisions of a discipline guide or discipline matrix adopted by the agency as a result of collective bargaining and incorporated into the agency's disciplinary policies.

S. 1604, 80th Leg., Spec. Sess. (Or. 2020). *See* Rushin, *supra* note 80, at 592 (noting that several local governments have taken this approach, including Ocala, Florida, which has a policy stating "that an arbitrator on appeal cannot question the city's judgment on the proper amount of punishment, provided that the department has demonstrated 'good cause for discipline'" and Fullerton, California, which "bars an arbitrator from overruling or modifying punishment handed down against an officer unless the arbitrator finds the punishment to be 'arbitrary, capricious, discriminatory or otherwise unreasonable'"). Rushin's article includes a detailed discussion of this possible reform and others worth consideration, fairly presenting the arguments for and against each. *Id.*

clause could be negotiated into a collective bargaining agreement that restricts an arbitrator's authority to modify discipline unless the employee can show a clear abuse of management discretion.[201]

C. Restricting Arbitrator Discretion Over Matters of Public Policy

There is an important, but occasionally overlooked, distinction between issues of fact and issues of law or policy in employee discipline cases. Arbitrators are experienced at, and fully capable of, resolving factual disputes, such as whether an officer discharged a weapon. But the more difficult question in such cases is whether the officer's use of a weapon complied with the law and the employer's rules. A public agency must be able to retain discretion over legal and policy determinations and to set standards of acceptable performance. An arbitrator's role should be limited to determining if the proven facts meet those standards, not whether the standards themselves are reasonable. "If the legal interpretation of [an agency's] policies were left to various hearing officers, the concepts would inevitably receive different meanings before different hearing officers."[202]

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201. The NLRB has held that an employer may lawfully insist to impasse upon the inclusion in a collective bargaining agreement of a provision that prohibits an arbitrator from modifying the level of discipline unless it constituted a "clear abuse of discretion and was not supported by any rational basis." Dayton Newspapers, 26 NLRB AMR 36015, 1998 WL 35399128, at *1 (Nov. 20, 1998); *see* BRAND & BIREN, *supra* note 85, at 2-83 (noting that a "few collective bargaining agreements specifically limit the arbitrator's authority to alter the discipline imposed by the employer"). The 2020-2023 master contract between the State of Florida and AFSCME includes such a provision limiting arbitrators' authority to modify discipline:

> If the arbitrator finds that the act or omission upon which the discipline is based has taken place, the arbitrator shall affirm the decision of the agency. If the arbitrator finds that the act or omission did not take place the arbitrator shall reverse the decision of the agency and provide relief consistent with the provisions of the Contract and law. The arbitrator's discretion is limited to reversing or affirming the discipline at the level of discipline imposed. The arbitrator may not increase or reduce the penalty imposed by the agency.

2020–2023 State of Florida & AFSCME Successor Master Contract, DEP'T OF MGMT. SERVICES Art. 6 (i)(3) (Jan. 27, 2021), https://www.dms.myflorida.com/content/download/151541/1008711/AFSCME_Successor_Master_Contract_Effective_1-27-21_--_6-30-23.pdf.

202. Harloff v. City of Sarasota, 575 So. 2d 1324, 1327 (Fla. Dist. Ct. App. 1991); *accord* Raghunandan v. Miami-Dade County, 777 So. 2d 1009, 1010 (Fla. Dist. Ct. App. 2000) (quoting Schrimsher v. Sch. Bd. of Palm Beach Cty., 694 So. 2d 856, 862 (Fla. Dist. Ct. App. 1997); in turn quoting McDonald v. Dep't of Banking & Finance, 346 So. 2d 569, 579 (Fla. Dist. Ct. App. 1977)); Fortune Ins. Co. v. Dep't of Ins., 664 So. 2d 312, 314 (Fla. Dist. Ct. App. 1995) ("It is also well-settled that a hearing officer's legal conclusions, as opposed to factual determinations, are not clothed with a presumption of correctness and thus, an agency is free to substitute its own conclusions of law for those of the hearing officer.").

A Florida court explained the importance of this distinction in a case involving a school board's reversal of a hearing examiner's decision to reinstate a school teacher who had been demoted for excessive absenteeism.[203] The hearing examiner found that although the teacher had been absent excessively in the past, she was unlikely to continue to be excessively absent and therefore should be reinstated.[204] The school board rejected the hearing examiner's decision and upheld the demotion.[205] The teacher appealed, arguing that the school board had improperly substituted its findings of fact for those of the hearing examiner.[206] The court affirmed the school board's decision:

> The issue facing the board . . . was whether the facts, namely, that MacPherson had been absent excessively over the preceding years, that her attendance record was not expected to improve, and that her absences had a detrimental effect on her students, constituted 'good and sufficient reason' to downgrade her status. Although MacPherson attempts to characterize this issue as factual, it is clear that it is a conclusion of law. . . . Owing a responsibility to both students and teachers, the Board had to weigh its responsibilities and determine whether a continually absent teacher is able to provide adequate instruction for school students. . . . Accordingly, the Board was within its discretion in rejecting the hearing officer's recommended conclusions of law in deciding that 'good and sufficient reason' existed to return MacPherson to annual contract status.[207]

In another school board case, a public employee was discharged for having sex with his girlfriend in a school building.[208] The hearing examiner concluded that since the encounter occurred during evening hours when no students were on the premises and no one observed the couple's conduct, there could be no violation of the School Board's rule prohibiting such conduct on school grounds.[209] The School Board rejected the hearing officer's

203. MacPherson v. Sch. Bd. of Monroe Cty., 505 So. 2d 682, 684 (Fla. Dist. Ct. App. 1987).
204. *Id.* at 683.
205. *Id.*
206. *Id.*
207. *Id.* at 684 (citations omitted).
208. Bell v. Sch. Bd. of Dade Cty., 681 So. 2d 843, 843–44 (Fla. Dist. Ct. App. 1996).
209. *Id.* at 844.

conclusion and upheld the employee's discharge because, in its view, the employee's conduct did violate its rule.[210] On appeal, the employee argued that the "ultimate issue of whether he violated [a] School Board rule was a question of fact, and [that] the School Board impermissibly overturned the hearing officer's factual findings which were supported by competent substantial evidence."[211] The court disagreed, explaining that while the School Board was "constrained in its ability to overturn factual findings which are supported by competent substantial evidence. . . . [t]he agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order."[212] The "School Board was not bound by the hearing officer's interpretation of the School Board rule."[213] Notwithstanding the hearing officer's conclusion, the School Board was free to determine that "the conduct in question did not reflect credit on the employee or the School Board, and consequently constituted conduct unbecoming a School Board employee."[214] The court "conclude[d] that the Board acted within its authority in interpreting its own rule, and in modifying the [hearing officer's] conclusions of law."[215] Other examples of courts siding with agencies over hearing officers are cited in the notes.[216]

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210. *Id.*
211. *Id.*
212. *Id.* (citations and quotations omitted).
213. *Id.*
214. *Id.*
215. *Id.*
216. *See, e.g.*, Raghunandan v. Miami-Dade County, 777 So. 2d 1009, 1010 (Fla. Dist. Ct. App. 2000) (finding that the County acted within its authority to reject a hearing examiner's recommendation, citing the losses the County suffered while the employee was supervising a construction contract because the issue of whether an employee's actions constitute misconduct or incompetence sufficient to warrant discharge is not a matter of fact but of opinion, for resolution by the public employer); Schrimsher v. Sch. Bd. of Palm Beach Cty., 694 So. 2d 856, 862 (Fla. Dist. Ct. App. 1997) ("[T]he School Board properly rejected the hearing officer's interpretation of facts regarding [the employee's] behavior and actions. . . . [T]he issue of whether [the employee's] actions constituted misconduct or incompetence sufficient to warrant discharge is a matter of opinion infused by policy considerations for which the agency has special responsibility." (quotations omitted)); Dominguez v. Fla. Unem. App. Comm'n, 679 So. 2d 835, 836 (Fla. Dist. Ct. App. 1996) (While commission was bound by referee's findings of fact, its conclusion that the appellant's behavior "amounted to misconduct connected with work . . . " was a conclusion of law that was "within the Commission's area of expertise in the interpretation and application of its governing laws."); Bustillo v. Dep't of Prof'l Regulation, 561 So. 2d 610, 610–11 (Fla. Dist. Ct. App. 1990) (The Board acted within its discretion when it rejected hearing officer's determination that doctor had "substantially complied" with the requirements of an agreement because the determination of whether the doctor had breached the agreement was a conclusion of law, not a question of fact.); Seiss v. Dep't of Health and Rehab. Serv., 468 So. 2d 478, 478–79 (Fla. Dist. Ct. App. 1985) ("An agency may reject a hearing officer's conclusions of law" with respect to whether certain conduct amounts to "'a substantial danger to health and welfare.'"); Hernicz v. State Dep't of Prof'l Regulation, 390 So. 2d 194, 195 (Fla. Dist. Ct. App. 1980) (The state board could reject hearing examiner's conclusion that employee acted

The cases just described arose from civil service proceedings with hearing officers whose decisions were subject to agency and judicial review. Arbitration decisions are final, binding, and not subject to similar review.[217] But just as limits can be placed on arbitrators' authority to reverse discipline on procedural grounds or to change the level of discipline, so too can limits be placed on arbitrators' authority to interfere with government employers' authority to set public policy.[218] With sufficiently specific limits, the arbitrator's authority can be confined to prevent intrusion into public policy.[219]

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without authorization because finding was a conclusion of law). *Cf.* Pub. Emps. Relations Comm'n v. Dade Cty. PBA, 467 So. 2d 987, 989 (Fla. 1985) (The agency had authority to reject the hearing officer's determination that an employee was not an agent because "how the law of agency should be applied is an interpretation of law and policy and not a determination of fact.").

217. "Courts do not review findings of fact contained in an arbitration award or attempt to substitute their judgment for that of the arbitrator." Deen v. Oster, 814 So. 2d 1065, 1068 (Fla. Dist. Ct. App. 2001). The Florida courts have repeatedly held:

> In Florida, the standard of judicial review applicable to challenges of an arbitration award is very limited, with a high degree of conclusiveness attaching to an arbitration award. Under this limited review, the courts must avoid a `judicialization' of the arbitration process. Arbitration is an alternative to the court system and limited review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative. In order to preserve the integrity of the arbitration process, courts will not review the findings of facts contained in an award, and will never undertake to substitute their judgment for that of the arbitrators.

Capital Factors, Inc. v. Alba Rent-a-Car, 965 So. 2d 1178, 1183 (Fla. Dist. Ct. App. 2007) (quoting Charbonneau v. Morse Operations, Inc., 727 So. 2d 1017, 1019–20 (Fla. Dist. Ct. App. 1999)).

218. Such limits are frequently found in "Management Rights" provisions. *See, e.g.*, In re City of Chicago & Fraternal Order of Police (FOP), Lodge 7, 130 BNA LA 1438, 1445 (Apr. 12, 2012) (Goldstein, Arb.). ("[W]here the negotiated Management Rights clause in the parties' labor contract . . . is so broad and at the same time so detailed, I find, the ability of this Employer to promulgate policies and rules relating to its responsibilities to conduct criminal investigations must be recognized."); In re Court of Common Pleas of Cuyahoga County & Laborers Int'l Union of N. Am., Local 860, 2014 WL 718465 (Jan. 29, 2014) (Belkin, Arb.) (Because the CBA conferred broad rights on the employer to set policy, "to take any action it considers necessary and proper to effectuate any management policy," to take disciplinary action for "just cause," and "to determine the conduct and performance expected of employees in an emergency situation," the employer had "wide discretion in determining whether to promulgate employee disciplinary policies, and to enforce them" in "Use of Force" cases.); In re City of Boston & AFSCME, Council 93, Local 804, 116 BNA LA 906, 910 (Sept. 12, 2001) (Remmes, Arb.) (acknowledging that "arbitrators have no authority to determine what is public policy and what is not"). This should not be confused with the related topics of whether arbitrators should look to external sources, including public policy, in rendering their awards and whether arbitration awards can be set aside on public policy grounds. Those topics have been the subject of ongoing debate for as long as arbitration has existed. *See, e.g.*, HOW ARBITRATION WORKS, 8th ed., *supra* note 15, at Ch. 10; David Glanstein, *A Hail Mary Pass: Public Policy Review of Arbitration Awards* 16 OHIO ST. J. ON DISP. RESOL. 297, 299–302 (2001); Bernard D. Meltzer, *After the Labor Arbitration Award: The Public Policy Defense*, 10 INDUS. REL. L.J. 241, 241 (1988).

219. *See, e.g.*, Sch. Bd. of Seminole Cty. v. Cornelison, 406 So. 2d 484, 487 (Fla. Dist. Ct. App. 1981) ("[A] collective bargaining agreement should be broadly construed and all doubts resolved in favor of the arbitrator's authority, but an arbitrator cannot rewrite the agreement and he is bound by it. . . . This is especially true where the arbitrator's action has the effect of depriving the school board of its sole prerogative, reserved to it by law, to

D. Expanding Judicial Review of Public Sector Arbitration Decisions

An arbitration award may typically be set aside only for one of the five reasons listed in the Florida Arbitration Code,[220] including "[evident] partiality," "corruption," or where arbitrators exceed their authority.[221] Parties cannot expand the scope of judicial review by contract.[222]

Employers have attempted to vacate adverse arbitration awards on grounds not included in the statute by arguing they were "contrary to public policy."[223] For example, employers have sought to vacate arbitration awards reinstating employees who violated safety rules, arguing that it is against public policy to require an employer to retain an unsafe employee. The courts have, however, imposed strict standards for reversing arbitration decisions on this basis. The Supreme Court has held that a court may vacate an arbitration award as "contrary to public policy" only

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determine whether the contract of a non-tenured employee will be renewed." (citations omitted)), *rev. den.* 421 S.2d 67 (Fla. 1982).

220. Specifically,

> (a) The award was procured by corruption, fraud, or other undue means;
> (b) There was:
> 1. Evident partiality by an arbitrator appointed as a neutral arbitrator;
> 2. Corruption by an arbitrator; or
> 3. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
> (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to hear evidence material to the controversy, or otherwise conducted the hearing contrary to s. 682.06, so as to prejudice substantially the rights of a party to the arbitration proceeding;
> (d) An arbitrator exceeded the arbitrator's powers;
> (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under s. 682.06(3) not later than the beginning of the arbitration hearing; or
> (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in s. 682.032 so as to prejudice substantially the rights of a party to the arbitration proceeding.

FLA. STAT. § 682.13(1) (2019).

221. *See* Schnurmacher Holding, Inc. v. Noriega, 542 So. 2d 1327, 1328 (Fla. 1989); LeNeve v. Via S. Florida, LLC, 908 So. 2d 530, 534 (Fla. Dist. Ct. App. 2005).

222. Nat'l Millwork, Inc. v. ANF Grp., Inc., 253 So. 3d 1261, 1262–63 (Fla. Dist. Ct. App. 2018) (Contract language purporting to "expand the scope of judicial review is unenforceable.") (citing Hall St. Assocs., L.L.C. v. Mattel, 552 U.S. 576, 589 (2008) (parties cannot expand the scope of judicial review under the Federal Arbitration Act)).

223. *See, e.g.*, Glanstein, *supra* note 218, at 305; Meltzer, *supra* note 218, at 244. "[M]anifest disregard of the law" is another judicially-crafted basis to "vacate an [arbitration] award." Frazier v. CitiFinancial, 604 F.3d 1313, 1322 n.7 (11th Cir. 2010) (quotations omitted). The exception is narrowly limited to circumstances "where there is 'clear evidence that the arbitrator was conscious of the law and deliberately ignored it.'" *Id.* (quoting B.L. Harbert Int'l v. Hercules Steel Co., 441 F.3d 905, 910 (11th Cir. 2006)). *See also* Anderson v. Maronda Homes, 98 So. 3d 127, 132 (Fla. Dist. Ct. App. 2012).

if it "would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"[224] The Court reversed a decision vacating an arbitration award on public policy grounds where the arbitrator ordered the reinstatement of an employee for operating heavy equipment, despite evidence that he had been arrested at home for possession of marijuana and that he had used marijuana on company property.[225] Given this strict standard, police agencies have not had much success using the public policy argument to reverse decisions reinstating officers, even in use of excessive force cases where the agency considers the officer a danger to the public.[226]

As the civil service cases discussed above illustrate, however, allowing wider judicial review of public employee discipline cases could overcome this obstacle. Expanding the scope of judicial review of arbitration decisions in police discipline cases would serve several important purposes: It would restore local elected officials' authority over a matter of critical public policy, create valuable and binding precedent for subsequent decisions, increase the consistency of discipline, and ensure a larger measure of management control over the use of force.

Any change to allow such expanded judicial review of arbitration decisions would require re-evaluation of the finality of arbitration decisions and significant statutory changes. But it may be time to begin considering such changes.[227] The issue is a difficult one because it would require trading the values of efficiency and finality traditionally associated with arbitration against the values

224. United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 43 (1987) (quoting W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983)).

225. *Id.* at 34. The arbitrator found that the evidence showing that the employee had used marijuana on the employer's premises could not be considered because it was not discovered until after he was fired. *Id.*

226. Raynor v. Florida State Lodge, 987 So. 2d 152, 153 (Fla. Dist. Ct. App. 2008) (rejecting the attempt to vacate on public policy grounds the arbitration decision that found police officer used "inappropriate force" and "was guilty of the misconduct of which he had been accused, but that the job termination was an inappropriate punishment"); City of Tallahassee v. Big Bend PBA, 710 So. 2d 214, 215 (Fla. Dist. Ct. App. 1998) (rejecting city's argument that arbitrator's decision to reinstate a police officer accused of sexual misconduct was "a violation of Florida public policy that police officers have good moral character"). *See* John M. Becker, *The Role of Public Policy in Judicial Review of Massachusetts Public Sector Labor Arbitration Awards*, 100 MASS. L. REV. 29, 35–42 (2019).

227. *See* Rushin, *supra* note 80, at 590–91 (suggesting that "communities could make appellate arbitrations advisory, or at least provide an opportunity for city leaders to overturn particularly egregious decisions by arbitrators" and listing several cities that have adopted such a policy, including Burbank and Pasadena, California).

of greater consistency and enhanced local government accountability for the public workforce that wider judicial review would bring.

The issue has recently begun to attract thoughtful debate.[228] One possibility is to allow judicial review of arbitration decisions regarding public sector discipline limited to insuring compliance with the rules just mentioned, such as requiring proof of "harmful error" before discipline is reversed and preventing arbitrators from interfering with matters of public policy.[229] Such principles are already followed in the majority of arbitration decisions.[230] It is only a minority of cases that ignore these principles, but they are the ones that raise employers' and the public's concern and draw legitimate media attention.[231] Any loss in efficiency that may result from permitting narrow judicial review to deal with the limited number of cases that stray from the mainstream is not a high price to pay for ensuring more consistent discipline of police officers, particularly for the use of excessive force.

E. Other Proposed Reforms

The preceding discussion of potential reforms is by no means exhaustive. Similar and alternative reforms have been proposed elsewhere and many deserve serious consideration, from requiring that police discipline hearings be conducted in public, creating adverse inferences against officers who do not readily cooperate in investigations, and directing arbitrators to consider public policy independent of contractual provisions to establishing independent police review boards and restricting unions' ability to negotiate limits on the discipline of police officers.[232]

Less thoughtful pundits have simply thrown up their hands and proposed the elimination of neutral decisionmakers from the

228. *See, e.g.*, *id.*; Nico Gurian, *Rethinking Judicial Review of Arbitration,* 50 COLUM. J.L. & SOC. PROBS. 508, 510–11 (2017) (proposing a review process that would range from an "arbitrary and capricious" standard for most cases to *de novo* for cases where there are grounds for concern about an arbitrator's competence, independence or impartiality).

229. The issue of whether to enhance judicial review of arbitration decisions plainly deserves much greater discussion than this brief mention. The issue is given more detailed attention in *Rethinking Judicial Review of Arbitration*. Gurian, *supra* note 228, at 517–33.

230. *See* Rushin, *supra* note 80, at 609.

231. *See id.* at 565 n.112.

232. *See, e.g.*, Catherine Fisk et al., *Reforming Law Enforcement Labor Relations*, CALIF. L. REV. ONLINE (Aug. 2020), https://www.californialawreview.org/reforming-law-enforcement-labor-relations/; Rushin, *supra* note 80, at 588–96.

police discipline process. A recent *New York Times* Editorial Board Opinion is typical of this approach. The opinion argues that the only way to hold police accountable for misconduct is to *"Ax the Arbitrators."*[233] The opinion begins by sarcastically and misleadingly explaining to readers that arbitrators "are the men and women who routinely reinstate abusive officers who have been fired for misconduct," then asserts "the current [police discipline] system cannot be reformed," and concludes the only solution is to eliminate arbitration.[234]

The opinion is rife with myths and misconceptions about the police discipline process and arbitration. Among other errors, it exaggerates the scope of the problem,[235] misunderstands how

233. Editorial Board, *To Hold Police Accountable, Ax the Arbitrators*, N.Y. TIMES (Oct. 3, 2020), https://www.nytimes.com/2020/10/03/opinion/sunday/police-arbitration-reform-unions.html%201/4 [hereinafter *Ax the Arbitrators*].

234. *Id.*

235. The article asserts that arbitrators "routinely reinstate abusive officers who have been fired for misconduct." As explained above, this assertion has been empirically demonstrated to be false. *Id.*

arbitrators make decisions[236] and treat procedural error,[237] misconstrues how arbitrators apply "past precedent"[238] and "equal

236. The editorial attributes the reversal of police discharges by arbitrators to the application of the seven "Daugherty factors," which some arbitrators apply to assess just cause. *Id.* The Daugherty factors include consideration of such unremarkable issues as the reasonableness of the company's policy, the objectiveness of its investigation, the sufficiency of the evidence, and the consistency of discipline. In re Grief Bros. Cooperage Corp. & United Mine Workers of Am., District 50, Local No. 15277, 42 BNA LA 555, 557–59 (Apr. 16, 1964) (Daugherty, Arb.); *see, e.g.*, BRAND & BIREN, *supra* note 85, at 2-5. Contrary to the *New York Times* opinion, the factors were never meant to be applied mechanically, only as a flexible guide to help ensure employers have just cause for terminating employees. In re Rosemount Fed'n of Teachers, Local 2006, AFT, AFL-CIO & Indep. Sch. Dist. No. 196, Rosemount-Apple Valley-Eagan, Minn., 1992 BNA LA Supp. 106124, at *29 (Oct. 27, 1992) (Berquist, Arb.). *See also* In re Respondent & Grievant 1-Labor Union, 2010 WL 2998549 (AAA), at *16 (Mar. 30, 2010) (Dobry, Arb.) ("Although the seven tests articulated by Arbitrator Daugherty are useful in determining whether just cause exists in a particular disciplinary proceeding, they are not intended to be rigidly applied without regard to the employment setting in which they occur."); JOHN E. DUNSFORD, 1989 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 47 (1989). As Daugherty himself explained:

> The [seven tests] do not represent an effort to compress all the facts in a discharge case into a "formula." Labor and human relations circumstances vary widely from case to case, and no formula can be developed whereunder the facts can be fed into a "computer" that spews out the inevitably correct answer on a sheet of paper. There is no substitute for sound human judgment.

DUNSFORD, *supra* note 236, at 47 (quoting In re Whirlpool Corp. & Int'l Union of Elec., Radio and Machine Workers, Local 808, 58 BNA LA 421, 427 (Mar. 11, 1972) (Daugherty, Arb.)); *see also* ADOLPH M. KOVEN ET AL., JUST CAUSE THE SEVEN TESTS 30 (3d ed. 2006).

> Another caveat regarding the seven tests is that one or more negative answers to the questions do not necessarily mean that discharge or other discipline is not justified. This is most often the case where the arbitrator finds that the employer's investigation was deficient in some respect. If the deficiency was such that the [G]rievant was not prejudiced, the arbitrator may well see no reason to disturb the discipline imposed by the employer. Similarly, a failure to meet the literal requirements of notice, reasonable rule, equal treatment, and penalty may be excused by the arbitrator, either because there was no demonstrable injury to the [G]rievant or because the employer acted within the bounds of its reasonable discretion.

KOVEN ET AL., *supra* note 236, at 30.

237. The opinion assumes that arbitrators create procedural rules. *Ax the Arbitrators*, *supra* note 233. In fact, they enforce the ones the parties negotiate into their collective bargaining agreements or, in the case of law enforcement officer bills of right, enacted by state legislatures. If a police agency determines that existing procedural rules are interfering with its ability to discipline officers, the solution is to amend the rules. The reason disciplines are reversed due to procedural error is not that arbitrators perversely enjoy reinstating employees guilty of misconduct, but that they are bound by the rules the parties independently establish and the fundamental requirements of "industrial due process." *See, e.g.*, In re Int'l Ass'n of Firefighters, Local 521, AFL-CIO & City of Billings, Fire Dep't, 2009 WL 9412866, at *9 (Dec. 29, 2009) (Calhoun, Arb.) ("[I]ndustrial due process" is "[a]n integral part of just cause . . . [and] . . . requires employers to treat employees fairly during the disciplinary process. Unfair treatment of an employee during the disciplinary process undermines the process and may lead an arbitrator to reverse or modify a penalty."); Metro. (DC) Police Dep't & FOP, MPD Labor Committee, 34 LAIS 360, 2006 WL 6827537, at *9 (May 3, 2006) (Greenberg, Arb.) (Arbitrator concluded that the parties' contract created a time limit on the issuance of discipline, the violation of which required reversal of any discipline imposed, even without proof of prejudice); HOW ARBITRATION WORKS, 8th ed., *supra* note 15, at 15-47 to 15-50.

238. The *New York Times* article's use of the term "past precedent" is misplaced and potentially misleading. As noted above, arbitrators are not bound by precedent to follow previous arbitration decisions. In this context, however, the term "precedent" is not referring to prior arbitration decisions but to an employer's own history of disciplining employees. Arbitrators, like judges in discrimination cases, look to whether an employer treated the disciplined employee and similarly situated employees in the same manner and,

treatment,"[239] and ignores the authority local and state governments have over the disciplinary process.[240]

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if not, whether the employer had a legitimate reason for the apparent difference in treatment. *See, e.g.*, In re U.S. Dep't of Veterans Affairs, Richard L. Roudebush VA Med. Ctr., Indianapolis, Ind. & Service Emps. Int'l Union (SEIU), Local 551, 139 BNA LA 244, 271 (Apr. 3, 2018) (Kininmonth, Arb.) ("Arbitrators adhere to the basic principle that all employees who engage in the same or similar misconduct must be treated essentially the same *unless a reasonable basis exists for variation in assessing punishment*." (emphasis added) (citation omitted)); In re Homer Electric Ass'n, Inc. & IBEW, Local 1547, 135 BNA LA 1372, 1377 (Dec. 29, 2015) (Landau, Arb.) ("Similarly situated employees must be treated substantially the same for disciplinary purposes, *unless* there are legitimate reasons to treat employees differently. . . . [T]he equal treatment principle does not require perfect consistency or absolutely identical treatment of all employees[.] . . . In labor arbitration, disparate treatment is regarded as an affirmative defense which the Union must prove by a preponderance of the evidence." (emphasis added)); HOW ARBITRATION WORKS, 8th ed., *supra* note 15, at 15-83 (While discipline should be administered in a consistent manner, "[w]here a reasonable basis for variations in penalties does exist, they will be permitted notwithstanding the charge of disparate treatment."); BRAND & BIREN, *supra* note 85, at 2-80 ("Arbitrators analyze situations where employees receive different disciplinary treatment for similar penalties by examining whether the employer had a valid reason for treating employees differently.").

239. The opinion asserts that arbitrators interpret equal protection to mean "an officer can't be fired for abusive behavior or racist misconduct if other officers have committed similar offenses in the past and gotten away with them." *Ax the Arbitrators*, *supra* note 233. The editorial's assertion is not just wrong, but to use a formal legal term, "ridiculous." If this were true, an employer could never change a practice, even a plainly unlawful one, if it were ever previously applied to excuse misconduct; an agency that had a history of discriminating against women or minorities, for example, would have to continue discriminating unlawfully into perpetuity.

In fact, as might be expected, employers frequently change policies and practices prospectively, and arbitrators enforce them accordingly. By way of a simple, timely example, a police agency that has a policy of permitting carotid restraints might have difficulty discharging an officer who used the restraint in ambiguous circumstances. If the agency wished to avoid such difficulties in the future, it need only exercise its managerial right to change the policy to prohibit carotid restraints. Arbitrators would be compelled to apply the new policy to uphold the discipline of any officer who used a carotid restraint despite the new rule. *See supra* text accompanying note 81; *see, e.g.*, In re [Respondent-1] (Miscellaneous Manufacturing Industries), Radford, Va. & [Grievant-1, Labor Union] (Miscellaneous Manufacturing Industries), 1995 WL 18009721 (AAA) (Mar. 20, 1995) (Nolan et al., Arbs.); In re Lutheran Senior City & United Industrial Service, Transp., Prof'l and Gov't Workers of N. Am., 1994 WL 16918253 (Feb. 4, 1994) (Millious, Arb.); Republic Engineered Steels, Inc. & United Steelworkers of Am. Production and Maintenance Emps., Local No. 1033, 1992 WL 12742178 (Mar. 29, 1992) (Feldman, Arb.).Alternatively, a state could legislatively change use of force policies for all local police agencies under its authority at one time. The State of Maryland recently took this approach by repealing its law enforcement officers' bill of rights and imposing stricter guidelines for police use of force. *Maryland Police Accountability Act of 2021*, H.D. 670 (Md. 2021); S. 71 (Md. 2021).

240. The editorial asserts that labor arbitrators are an "entrenched barrier to reform" but disciplinary rules are created by the parties, police agencies and unions, and state and local legislatures. *Ax the Arbitrators*, *supra* note 233. Arbitrators apply the contractual terms and other rules the parties create; they have no authority to create rules or "barriers" of their own. As the Supreme Court has explained:

> [T]he arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties.
>
> . . .
>
> '(A)n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When

Arbitrators, of course, make wrong decisions. Some arbitrators may seem more prone to rule for police officers than for law enforcement agencies, just as some judges seem more prone to rule for employees than for employers in discrimination cases. But that hardly means all arbitrators (or judges) must now be "axed." There is nothing unique to arbitrators that causes them to make questionable, erroneous, or even outrageous decisions. If arbitrators are eliminated from the police discipline process, another set of decisionmakers will have to be found to take their place, and there is no guarantee their decisions will be any better. Improvement lies in reform of the rules governing the process, not a simple substitution of bodies.

Police sometimes arrest innocent people; prosecutors sometimes decline to pursue charges that others find compelling; judges and juries frequently, if not "routinely," acquit officers in excessive force cases that outside observers, even a majority, find outrageous.[241] The solution is not to "ax" all police, prosecutors, jurors, and judges because they sometimes (or even "routinely") allow police officers to escape consequences for abusive conduct. We do not expect perfection from our criminal justice system and

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> the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.'

Alexander v. Gardner-Denver Co., 415 U.S. 36, 53–54 (1974) (quoting United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)). It is no more accurate to say that arbitrators are an "entrenched barrier to reform" of police discipline procedures than it is to say that judges are an entrenched barrier to such reform because they also enforce collective bargaining agreements and statutes that protect employees. The barriers, entrenched or otherwise, are the rules others create; arbitrators and judges are responsible primarily to interpret and enforce those rules. If police agencies or state legislatures wish to reform the disciplinary process, they have plenary authority to do so. A state legislature can even eliminate public employee collective bargaining and job protections altogether. Arbitrators have no control over the rule-making process.

241. Even the august *New York Times* Editorial Board occasionally, if not routinely, makes serious mistakes. *See, e.g.*, Marc Tracy, *James Bennet Resigns as New York Times Opinion Editor*, N.Y. TIMES (June 7, 2020), https://www.nytimes.com/2020/06/07/business/media/james-bennet-resigns-nytimes-op-ed.html ("A. G. Sulzberger noted 'a significant breakdown in our editing processes' before the publication of an op-ed by a United States Senator calling for a military response to civic unrest."); Oliver Darcy, '*We're sorry': New York Times Issues Correction to Editorial After Controversy*, CNN (June 15, 2017), https://money.cnn.com/2017/06/15/media/new-york-times-editorial-palin-giffords-correction/index.html; Maxwell Tani, *New York Times Corrects Editorial that Drew Huge Backlash for Blaming Sarah Palin in Gabby Giffords' Shooting*, BUS. INSIDER (June 15, 2017), https://www.businessinsider.com/new-york-times-corrects-column-gabby-giffords-2017-6; The Public Editor, *Mistakes That Won't Go Away*, N.Y. TIMES (Mar. 3, 2012), https://www.nytimes.com/2012/03/04/opinion/sunday/mistakes-that-wont-go-away.html; Scott Morefield, *NYT Editorial Board Member Nailed Again By Critics After Blaming Bloomberg Math Mistake Backlash On 'Racist Twitter Mob*,' DAILY CALLER (Mar. 11, 2020), https://dailycaller.com/2020/03/11/mara-gay-brian-williams-racist-twitter-mob/. As a regular subscriber, I do not recall reading any editorial following up on a *New York Times* error, no matter how colossal, by calling for readers to "ax their subscriptions."

cannot reasonably expect perfection from arbitrators or the police discipline process. The best we can do is impose reasonable rules and limitations on decisionmakers to minimize the rate of error.

VII. CONCLUSION

Studies of police discharges, including this review of Miami-Dade County cases, show that most arbitration decisions, both for and against police departments, are based on factual findings supported by evidence, consideration of the police agency's compliance with applicable procedures, and reasoned opinions. It is easy for losing parties and independent critics to attribute adverse decisions to "the leniency" of arbitrators,[242] procedural "technicalities," and other "daunting" obstacles. But this does not improve the quality of arbitration decisions or police department discipline success rates—reading and understanding why adverse decisions are rendered and making changes as necessary to address and avoid the problems identified does.

Arbitrators come from a variety of backgrounds, and some are undoubtedly more lenient than others, just as some judges are more lenient than other judges. But painting arbitrators with the broad brush of "lenient" is neither accurate nor helpful to resolving the problem of public employee discipline. If arbitrators are taken out of the equation, other neutrals will have to be substituted in their place to review discipline, unless public employees are to lose all job protection. Whoever such decisionmakers may be, any who rule against an employer are sure to be labeled "too lenient." Conversely, if such decisionmakers seldom, if ever, rule in favor of employees, they will be labeled "too strict" and lose their credibility with police officers and their advocates.

242. *See, e.g.*, Rabin, *supra* note 4; Natalie Sherman, *New Bedford Officers Get Four-Day Suspensions without Pay in Aguilar Death*, SOUTH COAST TODAY (June 8, 2013), https://www.southcoasttoday.com/article/20130608/NEWS/306080323 (quoting a city mayor as saying, "The arbitrators are notoriously lenient and that's a problem in my view, but that's the system we operate in and I have to play by those rules[.]"); Kyle Spencer, *Walcott Seizes on Charges of Sexual Abuse in Harlem School*, WNYC (June 15, 2012), https://www.wnyc.org/story/301686-walcott-seizes-on-charges-of-sexual-abuse-in-harlem-school/ (reporting that a schools chancellor argued "that arbitrators have proven to be too lenient even in cases where they find a teacher guilty"); Wayne W. Schmidt, *Peace Officers Bill of Rights Guarantees: Responding to Union Demands with a Management Sanctioned Version*, LAW ENFORCEMENT EXECUTIVE FORUM (Mar. 2005) at 15, http://www.aele.org/pobr-iacp.pdf (noting that "many police chiefs complain that arbitrators are too lenient in imposing punishment for misconduct").

Most arbitrators, like most judges, try to act in good faith and do what they believe the applicable rules and facts require. Most have many years of experience in labor matters and employee discipline. If they lean one way or another, it does not make their decisions presumptively illegitimate, or even suspect, any more than the decisions of judges labeled as "Obama" or "Trump" judges are unworthy of serious consideration. To paraphrase Supreme Court Chief Justice Roberts, we do not have employee-friendly arbitrators or government-friendly arbitrators, "[w]hat we have is [a] group of dedicated [arbitrators] doing their level best to do equal right to those appearing before them."[243]

Are arbitrators sometimes wrong or too quick to rule on "technicalities"? Of course, but so are judges and other decisionmakers. And more to the point, employers' decisions to discipline employees are also occasionally wrong or at least lack evidentiary support. Rather than rail futilely against adverse rulings, government officials would do well to focus their limited resources on improving the quality of investigations, honoring the terms of their collective bargaining agreements, and developing other strategies to convince arbitrators to uphold their decisions more frequently. And, if that proves "almost impossible," they may pursue legitimate ways to restrict, rather than entirely eliminate, arbitrators' or other neutral decisionmakers' authority to overturn employee discipline. All these changes are within the capability of public employers to adopt; they just need the will to do so. [244]

243. As quoted in Robert Barnes, *Rebuking Trump's Criticism of 'Obama Judge,' Chief Justice Roberts Defends Judiciary as 'Independent*,' WASH. POST (Nov. 1, 2018), https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html.

244. Or, as the great philosopher Pogo put it, "We have met the enemy and he is us." Walt Kelly, *Pogo* (April 1970). Or am I dating myself?