HOW TO IMPROVE POLICING THROUGH COLLECTIVE BARGAINING REFORMS

A REVIEW OF 25 POLICE UNION CONTRACTS

STEVE DELIE

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By Steve Delie

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Midland, Michigan

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Introduction

George Floyd's death in 2020 sparked significant debate regarding police reform in America, which continues today. The investigation of Derek Chauvin, the police officer responsible for Floyd's death, discovered that he had previously faced at least 18 misconduct complaints, but he received only two written reprimands.[1]

While this fact did not go unnoticed, insufficient attention was paid to the collective bargaining agreement that enabled this apparent lack of accountability.[2] Debates on police reform have largely focused on banning certain law enforcement techniques and restructuring police departments. But union contracts are an often-overlooked source of improving policing and discouraging poor policework. Reforming union contracts is necessary to improve transparency, encourage high-quality policing and remove officers who fail to meet expectations.

Collective bargaining agreements are contracts between a union and an employer that establish the terms and conditions of employment for a group of workers. Police departments, like other public employers, are often unionized, with patrol and command officers regularly classified as separate bargaining units with their own union contracts. While these agreements cover similar issues, the terms can vary, even within the same department.

Many police collective bargaining agreements contain restrictions on how, when and if a police officer can face discipline for misconduct. Almost all union contracts make the issue of discipline subject to arbitration, which creates an opportunity for disciplinary decisions to be reviewed and potentially overturned.[3] Some curb the period in which discipline can be investigated or issued. Contracts can also limit how long records of disciplinary action remain in an employee's personnel file. Some contracts forbid previous discipline from factoring into promotion or retention decisions.

These provisions appear designed to protect police officers from wrongful disciplinary action. But in practice, they can create barriers to holding officers accountable for their actions on the job. As a result, problematic employees are often permitted to remain in positions for which they are unsuited, posing a potential risk to the public and undermining the overall effectiveness of a police department. This is also harmful to the upstanding police officers who must work in an environment that includes unfit colleagues.

Academic studies have found that collective bargaining agreements can be correlated with increased misconduct and abuse of power. A 2018 University of Oxford study found that the scope of protections offered to police officers by their collective bargaining agreements had a direct correlation to police violence against citizens.[4] Similarly, a 2019 University of Chicago study found that the expansion of collective bargaining rights to sheriff deputies in Florida gave rise to a 40% increase in cases of violent misconduct.[*] A 2021 paper suggested that providing

[*] It should be noted that these violent incidents are rare. The 40% increase represents an increase of just one additional incident every five years. Dhammika Dharmapala, Richard H. McAdams and John Rappaport, "Collective Bargaining Rights and Police Misconduct: Evidence From Florida" (University of Chicago, August 2019), 4, https://perma.cc/N3F6-4GUD.

collective bargaining rights to law enforcement was accountable for roughly 10% of "the total non-white civilian deaths at the hands of law enforcement between 1959 and 1988."[5] It also found that granting bargaining privileges to police offered "no meaningful impact on the numbers of officers killed in the line of duty," suggesting that union-negotiated protections for officers failed to offer an offsetting benefit to their costs.[6]

Considering the correlation between union contracts and police misconduct, one relevant question is whether collective bargaining reforms could improve police accountability. To gain a better understanding of what areas could be improved through legislation, the Mackinac Center obtained 25 police collective bargaining agreements from municipalities throughout Michigan. These contracts come from a broad geographic cross-section of the state. We reviewed them for policies that impact municipalities' ability to discipline officers who have regularly engaged in misconduct.

Our review suggests that most collective bargaining agreements in Michigan contain terms that are problematic for transparency, adequate discipline and stewardship of taxpayer dollars. In our sample set, we found:

- 48% of contracts require at least some disciplinary records to be removed after a set period.
- 60% of contracts limit the use of disciplinary records in performance evaluations and discipline decisions. Half of these explicitly prohibit disciplinary records from informing evaluations and disciplinary decisions. The other half requires these records be removed from personnel files after a fixed period, effectively preventing their use for evaluation and discipline purposes.
- 16% of contracts limit the time permitted for misconduct investigations.
- All contracts require binding arbitration for at least some discipline. Only 12% restrict the use of arbitration to the most serious discipline, while the remainder either allow officers to challenge discipline of any severity or are unclear about the scope of what discipline can be arbitrated.
- 56% of contracts provide officers preferential treatment during an investigation, such as access to documents in advance of interrogation.
- 96% of contracts require taxpayers to bear costs associated with disciplining officers. Of these, 72% required municipalities to bear half the costs of arbitration, while 28% required only the losing party to pay.
- 24% of contracts require the municipality to indemnify officers for any lawsuits brought against them for acts taken within the scope of their employment, regardless of the outcome of that suit.

Methodology

We selected 25 contracts from municipalities throughout Michigan for our review.[*] These contracts were selected from a broad cross section of municipalities, primarily based on geographic diversity and population size. Three of the contracts reviewed were for cities with a population over 100,000 people, 10 were for cities with populations between 50,000 and 100,000, and 12 were for cities with populations under 50,000. Contracts were obtained through the Freedom of Information Act or downloaded directly from a city's website, if available.

Given the differences and ambiguities in contractual language, there were some terms that were difficult to classify in a binary way. Thus, rather than limit our analysis to whether a contract definitively contained a term, we added a category for when it was unclear whether the relevant language fell within one of the examined categories or when the language only partially matched the categories being reviewed.

We reviewed contracts for seven problematic policies commonly found in police collective bargaining agreements:

1. Time limits on the retention of disciplinary records.
2. Restrictions on using disciplinary records in promotion, retention and future discipline.
3. Time limits on misconduct investigations.
4. The use of binding arbitration in discipline.
5. Taxpayer-funded disciplinary procedures.
6. Taxpayer-funded indemnity of officers sued for actions on duty.
7. Preferential treatment for officers during an investigation.

Retention of disciplinary records

A common concern in union contracts is limits on the retention period of disciplinary records. According to our review, 48% of contracts contained some type of restriction on the retention of disciplinary records beyond a certain length of time. Of these contracts, 58% require such records be removed automatically after a fixed period, while 42% require it if requested by the officer.

Record retention policies vary jurisdiction to jurisdiction. Some require the removal of all disciplinary records within a fixed amount of time, commonly two years, absent additional

* The agreements reviewed were from: Bay City, Clinton Township, Dearborn Heights (officers and command), Eastpointe (officers and command), Grand Rapids, Jackson (officers and command), Kalamazoo, Madison Heights, Marquette, Midland, Novi (officers and command), Portage, Royal Oak, Saginaw, Taylor, Traverse City (patrol and sergeants), Troy (officers and command), West Bloomfield and Wyoming. Copies of these contracts can be found at https://www.mackinac.org/30978.

disciplinary action during that period.[*] Others adapt the time records must be retained based on the severity of the discipline involved.[†] Some require records to be removed after a fixed period but only on request.[‡] One contract demands disciplinary records be removed from personnel files after a length of time regardless of whether there is subsequent discipline.[§]

The deletion of disciplinary records from personnel files makes it difficult to properly discipline officers with a history of misconduct. Most union contacts require discipline to be levied only for just cause. An employee facing discipline can challenge it as inappropriate. For the discipline to be upheld, it typically must meet the seven tests established in a 1966 legal decision called In re Enterprise Wire Co and Enterprise Independent Union.[7] Those tests include:

1. Did the employee know their conduct could lead to discipline?
2. Was the employer's rule reasonably related to the orderly, efficient and safe operation of the employer's business, and what can reasonably be expected of the employee?
3. Did the employer conduct a proper investigation before issuing discipline?
4. Was the employer's investigation fair?
5. Did the investigation result in substantial proof of wrongdoing?
6. Is the employer applying its rules in a non-discriminatory manner amongst employees?
7. Was the discipline reasonably related to the seriousness of the offense and the employee's record of service?[**]

Retention of records directly impacts the seventh test, which aims to judge whether the discipline imposed is proportional to the misconduct. In evaluating discipline, an arbitrator will consider the employee's disciplinary history to determine whether a particular punishment is warranted. This is specifically true in union contracts where an employer has agreed to use progressive discipline.

Progressive discipline is a system under which an employee is disciplined in a series of escalating punishments. Although the precise requirements differ from contract to contract, a progression of discipline might look something like this:

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* These included contracts in Clinton Township (two years with no additional discipline), Eastpointe (two years with no additional discipline, maximum of four years with additional discipline), Novi (two years, absent "substantial reason" otherwise, for both command and officer contracts) and Wyoming (two years without additional discipline).

† These include contracts in Midland (a range of one to four years with no additional discipline, depending on the severity of the discipline involved) and Royal Oak (range of one year to six years, depending on the severity of the discipline).

‡ These include contracts in Bay City (three years, on request, if there is no present or future need for the record), Grand Rapids (two years with not additional discipline upon request), Taylor (one to two years depending on the severity of the discipline, with no additional discipline, to be removed on request) and Troy (15 to 30 months depending on the severity of the discipline, with no additional discipline, to be removed upon request, for both command and officer contracts).

§ This is a contract in Marquette that requires records be removed two years after the city knew or should have known of the incident.

** These are paraphrases of the seven tests. For the original wording, see "In re Enterprise Wire Co and Enterprise Independent Union," 46 LA 359 (March 28, 1966), https://perma.cc/UE8S-R6PT.

- First offense: Mandatory counseling (may or may not be considered formal discipline)
- Second offense: Verbal warning
- Third offense: Written warning
- Fourth offense: Suspension
- Fifth offense: Termination

It is common for certain misconduct to bypass stages of this process. As an example, a police officer who has a positive drug test while on duty often triggers a suspension, followed by termination for a second offense. Similarly, officers who violate a collective bargaining agreement's no-strike policy may be subject to termination without the application of progressive discipline.* Nevertheless, progressive discipline remains the most common approach for all but the most significant disciplinary violations.

This poses a problem when coupled with the mandatory removal of disciplinary records. An officer with a history of absenteeism, excessive force complaints or even insubordination, for example, could avoid more severe discipline simply because records of his prior conduct have been removed from his personnel file. This weakens a police department's ability to impose the most appropriate discipline for repeat offenders, which in turn makes it harder to eventually terminate those officers.

That is not to say that there is no merit to restricting the use of prior disciplinary records. Some limitation is reasonable — an officer with 25 years of admirable service should not be placed at a higher level of progressive discipline due to minor misconduct in his or her first year of service, for instance. But this interest must be balanced, particularly in the context of public safety, with an officer's duty to protect and serve the public.

An officer's disciplinary history can be a helpful tool in holding officers accountable and ensuring the highest quality policing. Contract terms that hide this history hinder a department's ability to deal with officer misconduct in a thorough and fair way. It increases the number of officers with troubled histories who remain employed and authorized to use legal force in public. Although minor infractions should not unduly influence future disciplinary decisions, prior serious misconduct should be considered when disciplining troublesome officers.

Misconduct that management should always consider in making disciplinary and termination decisions could include dishonesty in past investigations, perjury, excessive use of force, drug or alcohol use on duty, improper use of a firearm and other similarly serious matters. These behaviors bear directly on an officer's ability to perform their duties in a responsible manner and are of unique concern for police departments. Discipline related to inappropriate or illegal behavior that

* Participating in a labor strike is illegal under state law for public employees in Michigan. MCL § 423.206.

threatened the safety of the public or lessened the credibility of the police force should be treated differently than more mundane violations of departmental rules.

Municipalities could also do away with progressive discipline entirely, empowering management to issue discipline commensurate with the offense. An arbitrator could then view an officer's entire disciplinary record, regardless of the severity of past acts, to determine whether it aggravates or mitigates the conduct at issue and adjust discipline accordingly. Either approach eliminates the bulk of the issues with restrictions on the use of disciplinary records, while still providing officers facing unjust discipline the ability to formally challenge that discipline.

Use of disciplinary records for employee retention and promotion

An issue closely linked with the destruction of disciplinary records are contract terms that forbid their use in promotion or retention decisions. Twenty-eight percent of the contracts examined expressly limit the use of disciplinary records for these purposes.[*] Taking into account the contracts that require or permit removing disciplinary records from an employee's file after a fixed period, this means that 60% of contracts restrict the use of disciplinary records for promotion and retention decisions.[†] Only 12% of the contracts examined explicitly permit at least some disciplinary records to be considered in promotion or retention decisions.[‡]

Regardless of how long records are kept, contracts that explicitly forbid the consideration of past discipline when making promotion or retention decisions can distort the true record of an officer's performance. This could result in officers being promoted despite significant and even recent discipline. Such systems weaken the integrity of police departments and prevent those departments from maintaining a command structure determined by the merit and performance of its officers.

There is some justification for limiting the use of disciplinary records in promotion and retention decisions. It would be unreasonable for very old and minor rule violations to bar the advancement of an otherwise upstanding officer. That said, blanket bans on the use of disciplinary records in these decisions increase the chance that problematic officers will be promoted. An appropriate balance would protect officers from unreasonable or unfair treatment but avoid helping troubled officers advance their careers in a way that damages the integrity of a department or its service to the public.

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* These labor agreements include Eastpointe (for nonfelonies, discipline cannot be considered after two years), Grand Rapids (two-year limit on discipline and lying on an employment application cannot be considered after two years), Jackson (cannot be considered after two years, absent additional discipline) and Madison Heights (no written discipline can be provided to promotional boards).

† These contracts include Bay City (record retention), Clinton Township (record retention), Novi (command) (record retention), Novi (officers) (performance evaluations cannot be used in disciplinary process, discipline cannot be considered after two years, absent good reason), Portage (record retention), Royal Oak (record retention), Taylor (record retention), Traverse City (record retention), Troy (record retention, for both command and officer contracts), and Wyoming (record retention for certain details).

‡ These contracts include Kalamazoo (personnel file can be examined during pass/fail review for promotion), Marquette (discipline can be considered during promotion), Midland (discipline can be considered for promotions). Six labor agreements were silent on the question. Local procedures and common practices probably influence whether these municipalities use disciplinary records for promotion and retention decisions. This suggests it would be difficult to determine the use of this practice in nearly a quarter of municipalities in Michigan.

This balance can be achieved by permitting the use of permanent disciplinary records for certain misconduct. This would allow police departments to better account for troubling behavior that more directly bears on an officer's fitness to serve, while disregarding more mundane discipline that does not significantly reflect on the officer's character and, most importantly, potential to misuse legal force on Michigan residents.

Time restrictions on misconduct investigations

Municipalities and unions can freely negotiate the amount of time a police department can spend investigating a disciplinary or criminal incident allegedly committed by one of its officers. When properly used, these terms can help ensure a timely investigation and incentivize departments to investigate allegations against officers promptly. That said, overly stringent limitations can be used to protect officers from the consequences of misconduct.

While there may be an interest in ensuring investigations are conducted efficiently and for avoiding vague and ill-defined investigations, that interest should not outweigh the need to hold officers accountable. This is particularly true in those cases where the conduct at issue is egregious and raises questions about an officer's fitness for duty.

Of all the categories we examined, this was the least common issue among the contracts reviewed. Only four of the 25 bargaining agreements specifically restrict when an investigation or disciplinary or legal action can take place, such as after a certain number of days following the triggering event.

Although only 16% of the contracts reviewed have these terms, those that do have limits on investigating and disciplining misconduct that are concerning. The city of Eastpointe, as an example, requires that a predetermination hearing be held within 30 days of a charged violation. It also includes a complete ban on discipline after 90 days from the date the department learned of the alleged violation, unless a notice of charges is filed.

The other agreements with time limitations were based on more nebulous timelines. The city of Midland requires discipline to be brought no more than 90 days after the city should have known of an alleged violation. Portage requires disciplinary investigations to be completed within 70 working days of a complaint being filed. The city of Taylor requires a disciplinary charge be brought within 10 days of an investigation being completed. It also prohibits disciplinary charges from being brought more than 90 days after the underlying incident for minor misconduct, and, for serious misconduct, more than 90 days from the date the city became aware of the incident.

As public servants who play a unique role for the safety and welfare of the public, it is essential that police officers adhere to high standards of professionalism and discipline. Restricting a police department's ability to hold officers accountable through limits on investigations and disciplinary actions undermines public trust. Although our sample did not reveal this to be a widespread problem, it is nonetheless one that policymakers should take note of when eyeing potential reforms.

Any limitation on timelines for investigations should avoid the potential harms of improperly vague or targeted investigations, as well as ensure finality. Investigatory time limits function similarly to criminal statutes of limitation and should balance the interests of employees and employers in a similar way, while still protecting the public's safety. That said, an employer should not be prevented from levelling discipline due to a nebulous date of when the employer should have known of the problematic conduct, as this is a subjective standard that could lead to inappropriately protecting bad actors. A more appropriate standard would be a limitation based on discipline after an appropriate period from the date the employer learned of the conduct. To the extent further limitations are desired, collective bargaining agreements could turn to existing statutes of limitations and follow whatever civil or criminal action best corresponds to the underlying charged conduct.

Use of binding arbitration for employee discipline

A third-party arbitrator is typically used to settle disciplinary disputes between officers and their municipal employers. These arbitrators are often lawyers, former judges or other individuals with specialized expertise in labor law. They are tasked with resolving legal and factual disputes regarding the justification and scope of the discipline levied by an employer. In the case of public safety officers in Michigan, an arbitrator's decision is binding and must be followed by the parties. Arbitrators ordinarily have the power to modify or overrule disciplinary action.

Of the 25 contracts examined, none provided an alternative to binding arbitration as the final stage of a disciplinary appeal. Nor did any contain an "at will" employment clause, which would provide employers with the discretion to discipline employees how they see fit. Three of the contracts, however, either applied binding arbitration only to certain types of disciplinary actions or were unclear about the scope of what discipline could be arbitrated.[*]

The intent of resolving disputes via arbitration is to obtain faster results than could be achieved through litigation. Studies examining the effectiveness of arbitration have concluded that this arbitration appears to meet this goal, suggesting it is about twice as fast as litigation. One study published in the Rutgers University Law Review reported that arbitration typically settles labor disputes in half the time litigation does.[8]

It also appears that arbitration is less expensive than litigation. Nine out of 10 respondents to surveys of those who have participated in arbitration said so.[9] That is not to say that arbitration is not costly. Usually, one or both of the parties in arbitration chooses to be represented by an attorney, and the legal preparation needed for arbitration is not significantly different than that required for litigation. Further, arbitrators charge an additional fee for their time, often more than $1,000 per day, plus expenses.[10] Nevertheless, when compared to the expense of trial, arbitration tends to be less costly.

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* These are Midland (Command), West Bloomfield and Wyoming.

Even assuming arbitration is meaningfully faster and less expensive than litigation, another question remains: Does arbitration produce fair results? Particularly in the context of binding arbitration for police officers, a poor decision by an arbitrator can lead to a troubled officer returning to duty. In extreme cases, that decision could pose a threat to the public's safety. To the extent there are savings inherent in arbitration, they must not be outweighed by the risks posed by unreasonable arbitration decisions.

One way to review the reliability of arbitration decisions is to examine their statistical outcomes. Some studies that evaluated these decisions have found that employees win their discipline challenges 52% of the time, suggesting only a slight pro-employee bias.[11] But the issue is highly jurisdictional. For example, in Minnesota, where Derek Chauvin worked as a police officer, unions got 46% of all terminations, the most severe disciplinary action, overturned by arbitrators.[12]

What is clearer is that binding arbitration can result in patently unreasonable decisions, many of which do not become well known. A law review article in the Journal of Criminal Law and Criminology provides several examples, including:

- A Minnesota police officer fired for exposing himself to his 14-year-old babysitter was returned to duty by an arbitrator who determined his penalty was too harsh.
- A Pennsylvania police officer charged for indecent assault while on duty was returned to duty after review by an arbitration panel.
- A Connecticut officer fired for striking a handcuffed student two times was not formally reinstated through arbitration, but the arbitrators' public suggestions that the police chief negotiate more appropriate discipline with the police union led to his reinstatement. At the time, only two officers in the same department had been fired for using excessive force in the previous 20 years. Both of those officers were also subsequently reinstated.
- Two Oregon police officers were fired after having sex with a woman in their police car while on duty. They were subsequently reinstated.

These are far from the only examples of arbitration leading to apparently unjust results. As the law review article stated, "These cases are exceptional, not because the police chiefs' decisions were overturned, but because the arbitrators' decisions became publicly known and attracted wide attention."[13]

These cases are not extreme outliers, nor are they particularly rare.* In the events following George Floyd's death, media outlets uncovered Minnesota officers who had been "fired for kicking an unarmed suspect who was already on the ground being attacked by a police dog," "for repeatedly punching a handcuffed, intoxicated man in the face," and for "failing to write up nearly four dozen

* Additional examples, and a detailed discussion of the issues involved with the discipline and discharge of public employees can be found in Laura J. Cooper, "Discipline and Discharge of Public-Sector Employees: An Empirical Study of Arbitration Awards," ABA Journal of Labor and Employment Law, vol. 95 (2012), https://perma.cc/6LPD-T4HV.

cases, copying a judge's signature onto search warrants and lying during the investigation." All were reinstated through arbitration.[14]

Although it is difficult to identify a single cause that would create these results, at least some blame can be laid at the feet of the incentive structure created by the process for selecting an arbitrator. Commonly, arbitrators are chosen from a single list from which both employers and unions can strike names.[15] Employers and unions commonly conduct background research into arbitrators in an effort to determine which arbitrator would be most favorable to their position. As a result, arbitrators have some incentive to maintain a roughly even record to ensure future business. As stated above, binding arbitration has a roughly even distribution of pro-employer and pro-employee outcomes, but whether that reflects an even-handed treatment of each case or a perverse incentive structure at work, is still an open question.[16]

The incentive to maintain a roughly even record is particularly concerning considering the incentives applicable to employers. Employers know that questionable disciplinary action is likely to be challenged and are generally careful to only hand out discipline that is likely to be upheld. If an employer's decision to issue discipline is consistent with its incentives, it would suggest that arbitrators are regularly overturning discipline that employers believe is well-supported by evidence. This may be why it is not uncommon for arbitrator decisions to be overly lenient towards officers whose actions appear to warrant stricter discipline, such as in the examples previously mentioned. The alternative explanation is that employers are routinely wasting resources in frivolous and inappropriate attempts at disciplining their employees, which seems unlikely.

Litigation, while slower and more expensive, largely avoids these incentive problems. Judges, whether elected or appointed, are not selected by the litigants before them. Further, judges' compensation is not directly paid by the parties, and the likelihood of future cases being brought before them does not factor into a judge's decision-making process. In addition, fees are typically either paid by the parties, or by the loser of the lawsuit, thereby removing incentives for unions to bring questionable challenges, while still allowing for meritorious challenges to advance. For these reasons, if a recourse is offered after discipline is affirmed by a public employer, litigation creates a better incentive structure than arbitration.

Alternatively, jurisdictions that prefer the speed and cost effectiveness associated with arbitration could continue to arbitrate, but with greater limitations on the arbitrator's powers. The Grand Rapids Officers and Sergeants' union contract provides a limited example. It holds that if an officer has provided false information during a hearing, an arbitrator's powers are expressly limited to a determination of the facts. If the facts are validated, the arbitrator has no power to alter the discipline imposed. It reads:

> When an employee provides false information during a … hearing which pertains materially to the nature of the complaint being investigated, the parties agree that such violation shall be considered proper cause for summary discharge. In such

> cases, the arbitrator shall be limited to a determination of facts only and shall have no authority to modify the discipline imposed if the facts support the violation.

If this provision were expanded to all disciplinary matters, rather than just those involving false information, it would mitigate many of the issues currently associated with arbitration. This approach would restore greater authority to police departments to punish bad actors without having to worry that they will be later second guessed by an arbitrator without a full understanding of the officer's job and performance history.

Binding arbitration creates significantly more problems than would appear at first glance. Despite this, it is widespread to the point of being the default practice embedded in almost all collective bargaining agreements. Jurisdictions that bargain with police officers should either stop negotiating contracts requiring binding arbitration, or, at the very least, significantly limit an arbitrator's ability to review or overturn discipline.

Cost allocations for disciplinary arbitration

Another issue identified in this analysis is the widespread practice of requiring taxpayers to pay, at least in part, for arbitration costs. Of the contracts we reviewed, all but one featured terms that required this to some degree. Seventy-two percent rely on taxpayers to partially or indirectly fund an employee's legal challenge to discipline, regardless of the result. The other contracts contained language requiring the losing party to pay both party's costs, which would only put the taxpayers on the hook if the employer lost the arbitration.

On their face, these contract terms appear neutral, as they require costs to be split evenly between the employer and the union. But these terms place a disguised monetary burden on the taxpayer. If a contract allocates costs equally, police departments must pay half the costs for those arbitrations where the issued discipline is ultimately upheld by an arbitrator as proper. Practically, this gives unions an advantage, since the employer is never the party to initiate arbitration of disciplinary issues, given that it imposed the discipline in the first place. Put another way, taxpayers must subsidize all challenges, even the most questionable and frivolous ones, when a collective bargaining agreement requires the parties to evenly divide costs.

These costs are not minimal. One 2008 study found that arbitration fees for commercial and employment arbitration ranged between $1,300 and $1,800 per day, with an average of $1,700 for employment arbitration.[17] The median attorney's fees were over $6,200, with an average fee amounting to $14,500. Assuming these reflect only one party's attorney's fees, actual fees would be double the cited figures. Thus, in 2008 dollars, a reasonable estimate of the cost of arbitration would be $7,900 for each party — assuming the process takes only one day. Adjusted for inflation, each party would be responsible for more than $10,000 in 2023.

It's entirely reasonable to expect the employer to bear the cost of arbitration if an arbitrator finds that the discipline it imposed was improper. Such a term incentivizes the municipality to carefully consider the discipline it levies. Similarly, requiring the union to pay for challenges it

loses avoids forcing the taxpayer to cover costs for frivolous arbitrations. But the more prevalent arrangement in collective bargaining agreements requires each party to pay their own costs, regardless of the outcome.

This practice benefits officers, including potential bad actors, much more than their tax-funded, municipal employers. Police departments will be less likely to mete out discipline knowing they'll have to bear the cost of legal challenges. Unions, on the other hand, are encouraged to file more questionable challenges than they might otherwise, since part of the tab is paid by the employer. Ultimately, this works to divert taxpayer resources away from providing public safety.

Of course, shifting to a model where the losing party pays is not sufficient. If the scope of an arbitrator's authority to overturn discipline is not also limited, a loser-pays model creates a perverse incentive for employers to not discipline employees for fear of later paying costs resulting from a poorly reasoned arbitration decision. Thus, municipalities should not change their fee model unless they also adopt limitations on an arbitrator's authority.

Indemnification for officer liability

About a quarter of the contracts examined provide specialized indemnity clauses. These clauses require municipalities to be financially responsible for defending officers who have been sued for conduct committed while on duty. They also frequently require municipalities to pay the costs of any judgment against an officer. Thus, should an officer be found to have committed wrongdoing, it is often the city, rather than the officer, that is on the hook for the associated damages.

Such damage awards can be catastrophic. From 2015 to 2018, Detroit paid $19.1 million in police misconduct settlements, including two settlements arising from unlawful shootings, which totaled approximately $1.4 million.[18] In 2020, Detroit paid another $75,000 for the wrongful shooting of a dog killed during a drug raid.[19]

Settlements of this magnitude are not limited to large cities. The city of Euclid, Ohio, settled a case involving the tasing and pepper spraying of a subject for $475,000.[20] Euclid has a population of only 47,456. Jackson, Tenn., a city with a population of roughly 67,000, paid out a settlement of more than $1 million for claims relating to a wrongful detention in 2020.[21] Even cities as small as Sitka, Alaska, which houses fewer than 9,000 people, can pay out large sums. It paid out a $515,000 settlement in 2020 for a sexual harassment complaint.[22]

These indemnity clauses, in other contexts, can be reasonable. To attract and obtain top quality candidates, it is important for municipalities to assure officers that they will not be exposed to financial ruin if sued over allegations that ultimately prove baseless. In the context of policing, however, there are already extensive legal protections an officer enjoys due to his or her special status as a member of law enforcement. As a matter of federal law, officers enjoy what is known as qualified immunity for the acts they take in their official capacity.

For an officer to be found civilly liable for his or her official acts despite their qualified immunity, that officer's actions must have violated a constitutional right that has been clearly established. This means that, at the time the officer alleged violated a citizen's constitutional rights, the law was sufficiently clear that any reasonable officer would understand that his or her actions were unconstitutional.[23] The burden for overcoming qualified immunity is high, as a plaintiff must show that "[t]he contours of the right [are] sufficiently clear that a reasonable officer [would know] that his conduct was unlawful in the situation he confronted."[24] Thus, qualified immunity protects any officer who is not plainly incompetent or chooses to "knowingly violate the law."[25]

This protection largely renders officers immune from civil lawsuits, particularly those that are of questionable merit. But an officer who is found to not enjoy qualified immunity as a matter of law will necessarily have engaged in conduct that a reasonable officer should have known was unconstitutional. It is not appropriate for taxpayers to cover the legal costs associated with these actions.

It is a matter of reasonable debate as to whether municipalities should reimburse officers for legal claims against them that are proven unfounded. What should not be a matter of debate is whether a municipality should be forced to use taxpayer dollars to pay for damages when an officer has been found to have acted in a blatantly unconstitutional manner. To protect the taxpayer, legislators should make such clauses a forbidden subject of bargaining or limit their application to only those costs an officer faces when defending against a claim that is ultimately unsuccessful.

Special privileges provided officers during disciplinary investigations

Fourteen of the contracts examined featured preferential treatment of officers that would not be afforded to a civilian. This represented 56% of the contracts reviewed. Approximately 16% of the bargaining agreements contained terms that implied special treatment but were unclear on the specifics. About a third of the contracts reviewed were silent regarding special treatment, leaving the matter to departmental policy.

The types, extent and scope of preferential treatment vary contract to contract. Common examples include:

- Providing officers with the names of complainants.
- Regulating the timing and type of questioning of an officer that can occur.
- Providing mandatory waiting periods before an officer can be questioned.
- Allowing officers to sue complainants.
- Forbidding officers from taking polygraphs.
- Forbidding issues occurring in an officer's personal life from being used in discipline.
- Limiting the time an investigation can be conducted.
- Providing officers with all the information gathered by the employer.

- Providing a guarantee that personnel files cannot be publicly released absent consent or a court order.
- Preventing the officer's name or likeness from being released to the media.
- Closing arbitration hearings to the public.

Some contracts specifically require the disclosure of the names of complainants.[*] Others require information be given to officers before an interrogation begins, without specifying whether that information include the identity of the complainant.[†] The contracts we examined with these terms were split between these two approaches.

Regardless of the approach taken, preferential disclosure of information about a complainant is improper. In those instances where the complainant's identity is disclosed, there might be a chilling effect on the propensity for people to report police misconduct. For citizens and police alike, knowing their identity could be disclosed opens them to retribution or pressure to drop the complaint. This is particularly true for officers who wish to report their fellow officer's misconduct but fear face backlash for not being sufficiently loyal to his or her colleagues.

For those who have access to the complaint, but not the name of the complaining witness, disclosure is still problematic. This practice affords officers the opportunity to craft a more favorable narrative of events designed to mitigate discipline. This is a particularly pernicious concern for those municipalities that couple preferential access to records with a mandatory minimum waiting period before questioning. In these jurisdictions, officers facing potential discipline can work with a lawyer or their union representative to develop a version of events specifically designed to avoid the consequences of their actions. While everyone should have the right to counsel when facing criminal charges, such accommodations are neither necessary nor appropriate for an investigation into non-criminal misconduct.

Regulating the conditions of interviews conducted during an investigation also unreasonably restricts a police department's ability to discipline officers who have committed misconduct. By limiting these interviews to only certain times of day, limiting the length to a nebulous "reasonable" period and requiring rest periods, police departments are restricting their ability to respond to misconduct promptly. This disparate treatment is only magnified if an officer is being questioned about potentially criminal misconduct, as an ordinary criminal suspect is not afforded these luxuries.[‡]

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* These include Clinton Township, Dearborn Heights (officers), Jackson (command), Madison Heights (officers), Novi (officers), Portage, Royal Oak.

† These are Dearborn Heights (supervisors), Grand Rapids, Jackson (officers), Kalamazoo, Novi (command), Taylor, Wyoming.

‡ It should be noted that police officers do receive some additional protections if their discipline relates to potential criminal activity. This is due to the Fifth Amendment, which protects officers from being forced to incriminate themselves in criminal conduct. These protections are necessary as a matter of constitutional law and are not relevant for the purposes of this paper.

Recommendations and conclusions

Reforming collective bargaining agreements in law enforcement could result in significantly more accountability. These changes could better protect the public against abuses by misbehaving officers and help ensure the promotion and retention of officers who perform their duties well. Such reforms can be accomplished by amending state laws that control collective bargaining in the public sector.

The Michigan Public Employment Relations Act of 1947 sets out the right of state government employees in Michigan to organize and collectively bargain. For public school employers, the statute includes a list of 17 subjects, including employee discipline, that shall not be included in an agreement between a public school and the employees' bargaining representative.[26]

This could be a model for legislators seeking to improve the quality of local law enforcement by weeding out bad actors in the police force. They should consider prohibiting the following categories from law enforcement collective bargaining agreements:

- The time a disciplinary investigation must be completed.
- The time disciplinary records must be retained.
- The use of disciplinary records in the promotion, retention or discipline of an officer.
- The use of binding arbitration to appeal discipline imposed or upheld by a chief of police or a local citizen review panel.
- The cost of arbitration without regard for its outcome.
- Preferential treatment for officers during investigations of misconduct that are not available to a citizen suspect.

Alternatively, legislators could also add to the public employment statute specific sections setting forth what the Legislature believes represents a balance between the interests of the public, employers and employees for each of these categories. This could include requiring the losing party in an arbitration to pay both parties' costs and mandating the consideration of discipline beyond a written warning in performance evaluations. If the Legislature were to regulate uniform terms with respect to these issues, however, it should be mindful of not only of the interests of officers and police departments, but also the general public.

These reforms would better balance the public's interest in effective law enforcement while also protecting officers from unnecessary or inappropriate discipline. This balancing of interests is an important step that will protect police officers who perform their duties properly, while allowing departments to remove those who fail to uphold the high standards of a public servant. Adopting these reforms would benefit both the public and the officers who serve it.

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