



The Arbitration of Police Misconduct Cases

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Arbitration

- A type of adjudication in which a third party resolves a dispute by determining the rights of parties following an evidentiary hearing
- Unlike court-based litigation in that
 - Parties select the decisionmaker
 - More informal process
 - Outcome generally final and binding



Areas of Common Use

- Labor Contracts
- Commercial Contracts
- Securities
- Real Estate
- Credit card disputes
- International Contracts



Labor Context

- Contracts establish grievance procedure culminating in arbitration
- Typical definition of grievance: “any dispute concerning the interpretation or application of this agreement.”
- Typically involves either:
 - Interpretation of contract rights, or
 - Imposition of discipline



Arbitrator Selection

- Parties obtain list of names from a government roster (i.e., FMCS)
- Parties alternatively strike names with last remaining selected
- Alternatively, parties can agree on permanent panel of arbitrators



Hearing

- Usually 1 or 2 days
- Presentation of witnesses and argument
- Rules of evidence not strictly applied
- Post-hearing briefs filed in 2/3 of cases
- Written decision with reasoning



Typical Hearing Format

- Opening statements
- Plaintiff witnesses
 - Direct examination
 - Cross examination
- Defendant witnesses
 - Direct examination
 - Cross examination
- Closing arguments



Washington Post (2017)

- “Police chiefs have booted hundreds of officers they have deemed unfit to be in their ranks only to be compelled [by arbitrators] to take them back.”
- “Officers know all they have to do is grieve it, arbitrate it, and get their jobs back.”



New York Times (2020)

- “Police officers are not like other workers.”
- “While police officers deserve due process and protection from arbitrary disciplinary action, it is far more important that abusive or dishonored officers be removed than that they receive equal treatment.”
- **“To hold police officers accountable, not the arbitrators.”**



Questions

- Are these criticisms accurate?
- Is it virtually impossible to fire bad cops?
- Does arbitration privilege white police officers over citizens of color?



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More Than We Have Ever Known
About Discipline and Discharge in
Labor Arbitration: An Empirical Study



CBB Study

- Our study includes 2,055 published and unpublished awards
- Involving discipline and discharge
- Involving Minnesota public and private sector workplaces
- Over a 24-year period

CCB Study: Case Outcomes

(n-size and row percentage are the top and bottom value, respectively)

Outcome	All Cases	Discharge Cases
Management Win	1,022 49.73	751 52.44
Union Win	441 21.46	283 19.76
Split	592 28.81	398 27.79
TOTAL	2,055 100.00	1,432 100.00



Adams Study of Police Misconduct Cases

- Study included 92 published arbitration awards
- Involving police officers discharged for misconduct
- From 2011 to 2015

Police Misconduct Outcomes:

(n-size and row percentage are the top and bottom value, respectively)

Outcome	Discharge Cases
Management Win	49 53.3%
Union Win	21 22.8%
Split	22 23.9%
TOTAL	92 100.00

Mistreatment of Citizens: Case Outcomes

Outcome	# of Cases	% of Cases
Discharge Upheld	17	47.2%
Discharge Overturned	19	52.8%
TOTAL	36	100%

Rationale for Reinstatement

Rationale	Number of Cases	Percent of Cases
Mitigating Factors	29	67.4%
Failure to Prove Misconduct	21	48.9%
Inadequate Investigation	16	37.2%
Procedural Defects	9	20.9%
Total Reinstatements	43	> 100%



Empirical Conclusions

- It is not impossible to fire bad cops; arbitrators uphold discharge decisions in about half of excessive force cases
- But, social policy question remains: Is a 50% reinstatement rate for police officers too high?
 - Is the removal of alleged bad cops more socially desirable than providing due process?

If arbitration is “axed,” consider these alternatives?

- Give police chiefs unfettered discretion;
- Officers can challenge termination in court;
- Create an administrative tribunal to consider police cases;
- Modify just cause standard to give more deference to police chiefs' decisions?
- Potential for labor unrest?



Minnesota Legislation

- Replace traditional arbitration selection process with a rotating panel for police cases
- Arbitrators on panel prohibited from hearing non-police arbitration cases
- Retain just cause standard