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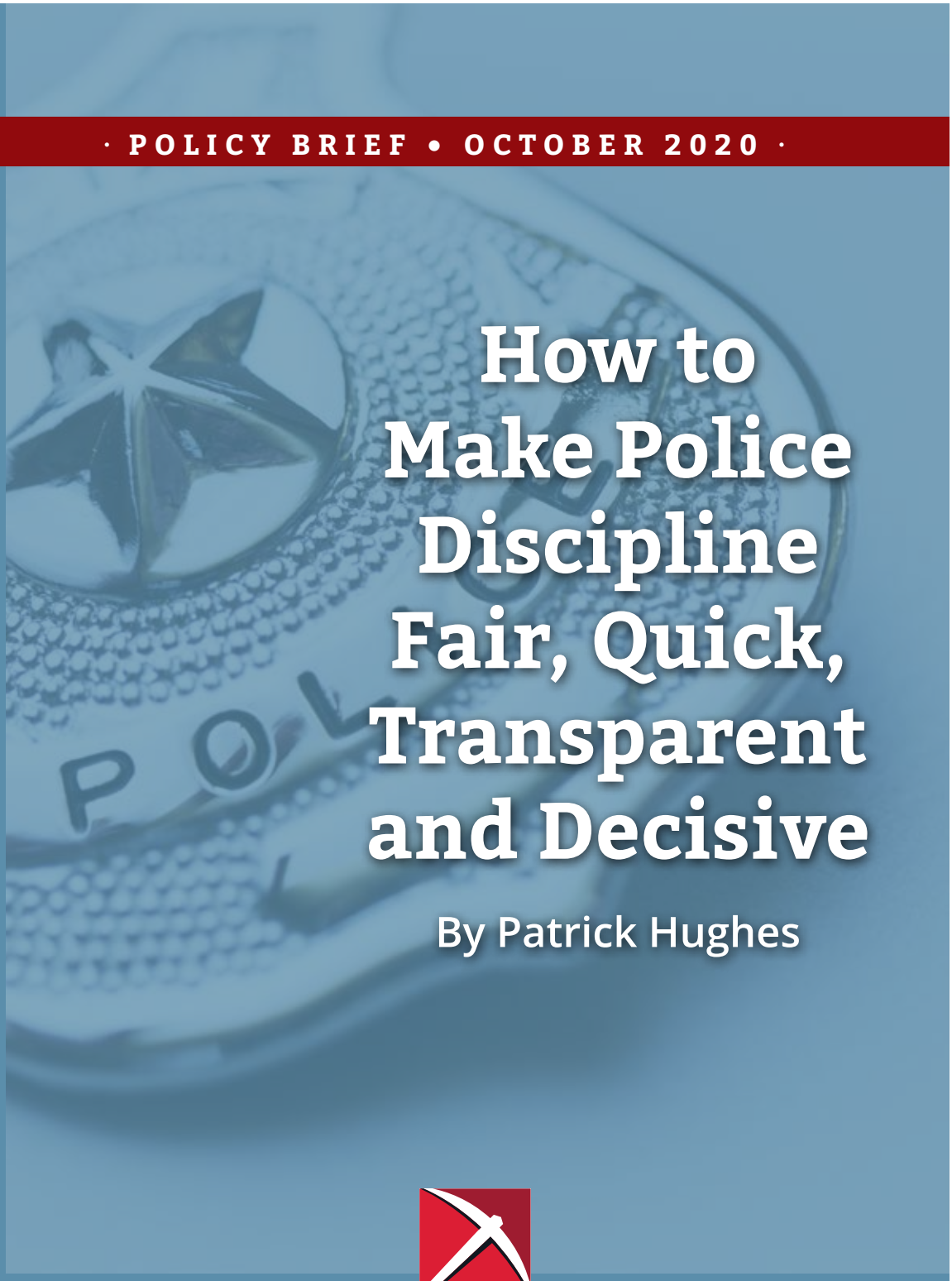

How to Make Police Discipline Fair, Quick, Transparent and Decisive

By Patrick Hughes

BADGER INSTITUTE

Executive Summary

Disciplinary actions against police officers in Wisconsin's largest cities, whether for use of force or anything else, are rare. In 2017, for instance, there were 61 disciplinary actions filed against 2,470 Milwaukee Police Department staff members, approximately one-fourth of whom were civilians — a rate of 2.5%.

In Madison in 2019, there were only seven disciplinary actions in a department with a head count of 650, more than 480 of whom were sworn and the rest civilian — a rate of 1.1%.

But when allegations of inappropriate force do occur or there is any other misconduct, police officers must be held accountable as fairly, quickly, transparently and definitively as possible in order to retain both the trust of the community and the confidence of all officers who serve within the ranks.

The Badger Institute surveyed an array of Wisconsin police departments to understand the processes used to discipline officers and ensure due process, then looked more extensively at Madison and Milwaukee. Many departments in the state are not transparent regarding discipline — a significant issue.

What we found in Madison and Milwaukee is a tale of two departments — one (Madison) that is laudably transparent regarding instances of discipline and one (Milwaukee) that is not. Lack of transparency leads to community distrust, especially since most departments have disciplinary processes that are redundant or do not encourage swift and decisive action.

We recommend several changes that legislators can make to assure Wisconsin communities that all officers are committed to protecting their fellow citizens, including better transparency, extension of Act 10 to police, elimination of arbitration and extension of probationary periods.

Police officers who are disciplined have due process and appeal rights that are guaranteed by police department policy and various state statutes, including the right to appeal to police and fire commissions. Those guarantees must remain or, in some instances, be expanded if other avenues of appeal are eliminated.

Frequency of Discipline

There are no readily available, regularly published disciplinary reports for law enforcement agencies (or any other public employees) in many cities in Wisconsin, and there is no statewide process for tracking police misconduct or discipline.

The Milwaukee Police Department does make some limited information on discipline available, though not nearly as much as the comprehensive, up-to-date information made available by the Madison Police Department.

Throughout Wisconsin — including Milwaukee — discipline can be handed down both by department leaders and by the police and fire commissions.

Neither is transparent. In fact, a summary of Milwaukee Police Department employee discipline has not been made public since the Fire and Police Commission published its last annual report in 2017, and even then, it did not include descriptions of misconduct — only the discipline imposed.

That year, there were 61 disciplinary actions in the department with 2,470 total positions (1,853 sworn positions, 617 civilian) — a rate of roughly 2.5%.

Fifty-two department employees received suspensions ranging from one day to 45 days. There were eight reprimands[1] and one demotion of a police lieutenant.

The Madison Police Department issues quarterly reports that contain the most detailed and up-to-date information available on police department employee discipline that we were able to find in Wisconsin. Madison reports include a brief summary of the behavior that prompted the discipline — a good model for other departments in the state.

In 2019, there were seven disciplinary actions in the department that had a head count of 650 (486 sworn, 184 civilian) — a 1.1% rate. Incidents included:

- Two attendance issues: A civilian and a police officer receiving a written warning for failing to show up for work as scheduled
- Two officers receiving letters of reprimand for failing to properly investigate or document cases

- Two accidental firearm discharges
    - ◊ One by an officer who received a letter of reprimand for an accidental discharge of a weapon in a squad car
    - ◊ Another by a probationary officer who accidentally discharged a personal firearm, which he did not have proper documentation to carry. He received a three-day suspension.
- An officer resigning, instead of being demoted, during an investigation for insubordination

There have been another seven disciplinary actions taken so far in 2020. Four of the incidents involved officers failing to follow policy in vehicle pursuits; the remaining three involved staff making inappropriate comments to other department employees.

It is notable that despite the nationwide controversy regarding police use of force, none of the Madison disciplinary actions were the result of misconduct related to force. Milwaukee's low level of detail in its reporting makes it impossible to know if this holds true for that department as well.

Process: Police and Fire Commissions and Arbitration

An officer facing discipline has several options. The officer can choose to accept the discipline; the officer in most departments can file an appeal with the police and fire commission; in some departments, the officer can also — as an alternative — dispute the discipline through arbitration.

The process described in this brief would be followed in most departments with minor differences based on how the department is organized and what policies are in place.

Police and Fire Commissions

Wisconsin statute[2] requires all cities with a population greater than 4,000 to have a police and fire commission. Cities with fewer than 4,000 residents may form a commission if the city council votes to do so.

In every police department except the City of Milwaukee, the officer can appeal any discipline to the police and fire commission if there is one.

If an officer appeals, the commission schedules a hearing before at least three members, during which both the officer and the police department argue their case. Both sides may be represented by an attorney and call witnesses under subpoena. The commission then decides whether the discipline was justified and has the option to uphold the discipline or reduce it. These hearings and records are open to the public. If the officer loses, he or she may then appeal the ruling to the circuit court.

These hearings are essentially a form of trial conducted by the commission or on their behalf by a hearing examiner. The Wisconsin Supreme Court held in 2003 that it was within the authority of police and fire commissions to adopt rules to conduct trials with a hearing examiner in place of commission members.[3] Both Milwaukee and Madison rules give the commission the option of using hearing examiners. Later in this brief, we examine this process in more detail.

Police and fire commissions throughout the state also have the authority to discipline officers without the involvement of the chief of police. This can be initiated by the commission when it learns of misconduct or when charges have been filed by a citizen against an officer.

This is uncommon and most often occurs in response to media attention or public protests over a high-profile incident.

Police and fire commission involvement in disciplinary issues in most of Wisconsin is relatively rare. In Madison, none of the discipline imposed in 2019 or 2020 was appealed to Madison's Police and Fire Commission. Milwaukee's Fire and Police Commission also has not been as busy in recent years as it once was.

The role of the Fire and Police Commission in Milwaukee, Wisconsin's only first-class city, is unique.

Only the most serious disciplinary actions — suspensions of five days or greater or demotions or terminations — can be appealed to the Milwaukee Fire and Police Commission, something that occurred only once in 2017. In that instance, the commission upheld 15-day suspensions of two police officers for failing to follow department policy during a field interview.

The Badger Institute was able to secure a summary of cases appealed to the Milwaukee FPC in 2018 and 2019 after filing an open records request. But we were unable to acquire information on discipline imposed by the MPD after 2017 that was not appealed to the FPC.

In response to a public records request for annual reports or summaries of police discipline from 2018 and 2019, the Milwaukee FPC stated that it did not have any records and directed the Institute to the Milwaukee Police Department. An open records request to the MPD for discipline records received no response, and the Institute has opted thus far to push for mandated transparency rather than pursue prolonged legal action.

Public knowledge, in other words, is currently limited to cases appealed to the Fire and Police Commission. It does not include discipline that is not appealed or is appealed through a different process, i.e., arbitration.

In 2018, there were three cases in which the chief of police ordered discharges of police officers that were appealed to the FPC. In two cases, the FPC upheld the discharges, and, in the third case, the officer withdrew the appeal and accepted the discharge. In 2019, the FPC held three hearings to completion. In one instance, the commission reduced a discharge to a 15-day suspension without pay; in a second case, it upheld a demotion in rank and a 10-day suspension. In the third instance, a 10-day suspension was upheld. There were several other cases dropped at the request of the officer, and others were pushed to 2020 for scheduling purposes.

Milwaukee FPC involvement in disciplinary issues has been relatively rare in recent years — a reflection perhaps of the dysfunction or composition of the commission. But in years past, it was more common for Milwaukee officers suspended for more than five days, reduced in rank or fired to exercise their right to appeal to the FPC.

The number of FPC cases has varied significantly from year to year:

- There were 68 hearings over the five years ending in 2011 (under police chiefs Nannette Hegerty and Ed Flynn), according to the *Milwaukee Journal Sentinel*.
- In 2016, seven hearings were held, four involving police and three involving firefighters.
- In 2017, the commission held just one appeal hearing, a 15-day suspension for two police officers that was upheld.

When appeals were more common, so were reversals of disciplinary actions. Of the 68 hearings over the five years ending in 2011, for example, approximately three dozen actions against police or firefighters were reduced.[4]

During the period of time that the Badger Institute sought disciplinary records, the Milwaukee FPC was mired in conflict and dysfunction.[5] The state can help restore some semblance of order and community trust by mandating the regular public disclosure of detailed disciplinary cases, including the nature of alleged misconduct and outcomes.

While it is beyond the scope of this brief to determine whether more (or less) discipline is needed in the Madison and Milwaukee police departments, the low number of disciplinary actions means that there is not a significant burden on law enforcement agencies to provide comprehensive information to the public on these incidents. Timely, detailed descriptions of what misconduct has occurred and how the department disciplined the officer will help develop trust with the community and build morale among officers who do not want the entire department's reputation besmirched by occasional rogue or lazy colleagues.

As previously noted, there is no statewide source tracking discipline for law enforcement, but other cities in Wisconsin report a fairly low level of activity by police and fire commissions.

In Green Bay, there have been three hearings before the Police and Fire Commission regarding police officer discipline since 2008 (resulting in two terminations and a retirement that resulted in the disciplinary action being dropped).

There were no hearings in Eau Claire over the past four years.

Arbitration and Collective Bargaining

Many police officers in Wisconsin have an alternative for appealing disciplinary actions: arbitration made possible by extensive collective bargaining rights.*

**Editor's note: Jim Palmer, executive director of the Wisconsin Professional Police Association, pointed out that in 2011, the Wisconsin Legislature (in Act 32) greatly reduced the ability of law enforcement officers to arbitrate disciplinary actions. We thank Mr. Palmer for bringing this error to our attention.*

Throughout much of the country's and state's history, a wide spectrum of elected officials — including liberal icon Franklin Delano Roosevelt — opposed collective bargaining for public-sector unions. Even Frank Zeidler, the last Socialist mayor of Milwaukee, opposed giving municipal employees collective bargaining rights.

Nevertheless, Wisconsin, in 1959, first gave some municipal employees the right to bargain as part of a union at the very end of Zeidler's tenure in Milwaukee. Police officers and sheriff's deputies were initially excluded, but police in municipalities with more than 2,500 residents were granted collective bargaining rights in the early 1970s.

That development was driven at least in part by fear of public-sector strikes that had become common in Wisconsin. There were at least 99 illegal public-employee strikes prior to 1978, including a 1971 Milwaukee police strike that came to be known as the "blue flu" and the famous Hortonville teachers' strike from 1973-'74.[6]

Elected officials, many of whom relied on unions for political support, responded by allowing public sector collective bargaining. Some union leaders, in turn, used their newfound bargaining powers to insist on a procedure that officers could use to challenge discipline imposed by department leaders, among other things.

Expansive collective bargaining rights in Wisconsin have made arbitration rights for even lower levels of police discipline possible.

If arbitration is included in the union contract, an officer who is disciplined may choose to exercise the right to a mutually agreed upon independent arbitrator or agree to arbitration conducted by the Wisconsin Employment Relations Commission (WERC).

Although all contracts do not include this option, its legislative history and impact on transparency is important for criminal justice reform.

The arbitration process is not open to the public, and the limited success of Badger Institute efforts to obtain information on how often it occurs revealed how little information is available to the public.

Milwaukee police have long had the right to arbitration in their union contracts. In 2007, Gov. Jim Doyle gave other departments in Wisconsin the right to bargain for arbitration in disciplinary matters.* A review of a cross section of police contracts in 10 Wisconsin cities and counties by the Badger Institute reveals that, while there is variation, many of those departments did subsequently negotiate some type of arbitration process that to this day applies to at least some disciplinary matters.

The specific process varies from department to department and contract to contract.

In some places, including Kenosha, Oshkosh and the Racine County Sheriff's Department, all appeals to arbitration are handled by WERC.

In places like Wausau and Madison, the two sides initially try to agree on the use of an arbitrator but, if they fail, the case is moved to WERC.

In Green Bay, disciplinary cases are not open to arbitration. All other grievance cases go to WERC.

In response to requests from the Badger Institute, WERC provided information on the number of cases involving police that it has heard over the past five years. They ranged from as few as nine in fiscal year 2018 to 28 in fiscal year 2015.

In fiscal year 2020, the commission heard 14 cases. It did not provide information about whether the cases were related to misconduct or non-disciplinary disputes over other issues.

Use of arbitration is rare in many Wisconsin police departments. In Wausau, for instance, Deputy Police Chief Matthew Barnes says in his 20 years on the force, they have never had any issue, disciplinary or otherwise, go to arbitration. The department in his tenure has also never fired an officer — although there have been resignations as the result of suspensions or investigations.

Milwaukee

Milwaukee, the state's only first-class city, is often treated separately in state statute and has a well-established, powerful police union. The collective

**Editor's note: In 2011, the Wisconsin Legislature (in Act 32) greatly reduced the ability of law enforcement officers to arbitrate disciplinary actions.*

bargaining agreement between the City of Milwaukee and the Milwaukee Police Association includes the right to seek arbitration for lesser disciplinary penalties, such as suspensions of five days or less.[7]

It's not clear how frequently arbitration occurs in Milwaukee. The Badger Institute submitted a public records request to the MPD for information on how often arbitration is used, the issues settled and the outcomes. We have received no response. Since neither the city nor the Police Association is required to report on the arbitration process, the public has no way of finding out how this process is being used.

Arbitration should be eliminated. Taxpayers don't benefit from giving public employees the option to take disputes over discipline, decisions by management or work rules to a closed-door negotiated settlement with unaccountable arbitrators. The courts or WERC can provide legal remedies if rights or civil service rules have been violated, and police and fire commissions can still hear appeals if officers so desire.

Police and fire commissions or elected officials, all accountable to voters, can also hold police and fire department leadership accountable for management of their departments.

It is important to reiterate that unlike arbitration, police and fire commission trials are open to the public.[8] The trials can be administered by the commission board itself or by a hearing examiner, who is either a member of the commission board or an attorney selected by the board. If the trial is heard by a hearing examiner, the examiner schedules and conducts the trial, records and organizes the evidence and drafts a report that includes a recommendation to the commission board. Both parties are then provided copies of all of the evidence and the examiner's report and recommendations and given 30 days to file a response.

The board is then given the trial transcript, trial recordings, evidence, testimonies, the examiner's report and recommendations and responses, if any, from the parties. The board review is conducted in closed session, and it has the right to approve in full or in part, modify or set aside as it sees fit any recommendation from the examiner to reach a final determination. The final decision authority is held solely by the commission board.

If the trial is conducted by the board, an examiner may be assigned to assist with the trial and make rulings on evidence and procedure. The main difference between trials by the board and those conducted by a hearing examiner is that in trials conducted by the board, the final decisionmakers (board members) directly hear testimony, examine evidence and listen to the arguments of the two parties, rather than simply reviewing the testimony transcripts, evidence, trial recordings and report organized and written by the hearing examiner.

Regardless of the extent to which a hearing examiner is used, police and fire commission actions are public throughout the state.

While the Milwaukee Fire and Police Commission has been largely dysfunctional recently, public accountability does exist. FPC members in Milwaukee — as elsewhere — are appointed by elected officials directly accountable to the public.

"The seven part-time civilian Commissioners and full-time Executive Director are appointed by the Mayor and must be approved by the Common Council. The Commissioners serve as the citizens' voice in police and fire matters and as a means of ensuring more responsive and effective city government," according to the FPC website. The same is not true of arbitrators.

Our difficulty in even finding out how often police employees in Milwaukee use arbitration is evidence of its undemocratic and secretive nature.

Arbitration for most departments is a relatively recent development made possible by expanded collective bargaining rights for government workers. Act 10, the 2011 legislative action that reduced collective bargaining rights, was in part a remedy for these kinds of issues and should be extended to all public sector employees.

Extension of Act 10

For many years — in the late 1950s, 1960s and early 1970s — state and local government employees had collective bargaining rights, while police and firefighters did not. Today, the situation is reversed.

In 2011, under Gov. Scott Walker, Act 10 eliminated the rights of most government employees, including teachers,

to collectively bargain for anything other than wages. Citing concerns about public safety if police and fire departments joined strikes or walkouts, Walker exempted police and firefighters from the reform. As a result, they still have full collective bargaining rights and, in some places, extensive arbitration rights in union contracts.

Collective bargaining currently allows elected and appointed leaders to avoid responsibility for police conduct. Union contracts and state law prevent them from swiftly and decisively disciplining employees. Limiting collective bargaining rights would restore responsibility to department leaders and politicians and expedite removal of officers who act inappropriately.

Extending Act 10 would have multiple additional benefits. Among them:

Shift assignments: Act 10 transformed the relationship between the government and workers from a collective relationship to an individual one. This fundamental change makes it easier for government entities to make policy changes regarding, for instance, how shifts are assigned.

New rules and regulations: Police unions typically have the right to negotiate with chiefs of police regarding new rules and regulations outside those governed by statute. This means that everything from changes in officer uniforms to rules governing the use of force and body cameras are subject to negotiation with the union. Although the chief in Milwaukee does have the authority to proceed with the rule change if no agreement is reached, the process makes it difficult to quickly and efficiently impose needed policies that are unpopular with police officers.

Drug testing: The MPD conducts drug tests upon promotion, transfer to specialized units, following an incident that results in death or great bodily harm, and randomly. While a positive drug test can result in termination, the agreement prevents a positive drug test from being used as evidence in a criminal or municipal ordinance proceeding.

Body and squad car camera footage: Officers under investigation currently have the right to review body camera, squad camera video and audio footage before an interrogation during a disciplinary investigation. Permitting this review creates the risk that the officer will provide statements to match the video recording rather than independent recollection. Body camera footage is not accessible to officers in the normal course of their duties,* and this is not a right given to citizens under interrogation by the police.

Use of vacation days: Officers suspended for misconduct can use vacation days to keep getting paid — a policy that undermines the punitive aspect of discipline.

Due Process

It is important to note that extending Act 10 to police and firefighters would not eliminate appropriate due process. The Milwaukee Police Department's discipline procedure, for instance, is outlined in Standard Operating Procedure 870. Even without collective bargaining, this procedure would still govern disciplinary actions and rights. Officers would also still be allowed to appeal any discipline to WERC, and state statutes would still govern some disciplinary actions.

In addition, officers would still have rights to appeal to police and fire commissions that are appointed by elected officials and, by statute, must hold trials that are open to the public.

Recommendations

Create Transparency

The Madison Police Department publishes detailed quarterly reports of all discipline issued for sworn and civilian employees — a model that should be emulated or required for all departments in the state.

State and local government employee personnel files including disciplinary actions are subject to public records laws and may be obtained via public records requests. While it is possible to obtain records related to an employee's discipline — usually disciplinary letters, forms or employee personnel files — there is no

**Editor's note: When related to a disciplinary action.*

requirement for state agencies, local governments, police departments, WERC, or fire and police commissions to publish regular reports on employee discipline or hearings that result in reductions in discipline.

The case-by-case approach to public records requests makes it difficult to evaluate the level of employee misconduct or the effectiveness of supervision of police behavior without regular extensive public records requests.[9]

Publicizing disciplinary actions is very unpopular among employees and rarely occurs until the media covers a high-profile misconduct case and requests the relevant documents. Statutory requirements are needed to ensure regular and uniform reporting by state and local governments.

Extend Act 10 to Police and Firefighters

See details above.

End Arbitration for Disciplinary Cases

Cities like Milwaukee should remove arbitration for disciplinary cases in future contracts with police unions. Although the extension of Act 10 to police and fire unions would end arbitration for discipline cases, cities already have the ability to refuse to include arbitration for discipline cases in future negotiations with police unions under current law. There is no requirement to allow arbitration, and cities should not agree to any new contracts that include this provision going forward.

A statute change would be required for first-class cities to make all discipline subject to appeal to the Fire and Police Commission. Current law does not permit police and fire department employees in first-class cities the right to appeal a discipline of less than five days to the FPC. If arbitration is removed from the contract, the statute should be changed to give officers in Milwaukee the same right of appeal as those in other cities.

Extend the Probationary Period

Grievance and arbitration protections do not apply to Milwaukee police officers in the 16-month probationary period. An alternative to removing arbitration would be to extend the probationary period. A longer probationary period would give departments more time to evaluate and remove low-performing officers. There also could be a process for returning officers with discipline issues to probationary status.

Assembly Bill 506

This bill is part of Gov. Tony Evers' and state Sen. Van Wanggaard's criminal justice reform package and would require police officers' employment files to be shared when they apply for positions with a new department. This should be expanded to cover all public employees (teachers, social workers, etc.), not just police.

Conclusion

The complicated processes used for police officer discipline, citizen complaints and reportage of use of force described in this brief are evidence of the need for reform. The public should be able to understand how police departments identify misconduct and apply discipline, what complaints are being filed and investigated and how often police are using force against citizens. It is unreasonable to expect citizens to use extensive public records requests, statutory interpretation and arcane collective bargaining agreements to understand what is going on within their local police departments.

Effective reforms — including the end of arbitration and regular reports on employee discipline, use of force and complaints — will increase public trust if the process is transparent, fair and holds law enforcement officers accountable for their actions. Arbitration rights included in some union contracts shield this from public oversight.

Ending collective bargaining for law enforcement is not the final step to improving accountability and reforming the criminal justice system, but failing to extend Act 10 will make all other reforms more difficult.

About the author

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Endnotes

[1] The Milwaukee Police Department's lowest level of discipline is a district level reprimand, while the next higher level is an "Official Reprimand"; these are documented in the personnel file of the officer but result in no suspensions or demotions. The Fire and Police Commission report does not separate out whether the reprimand was district level or official.

[2] https://docs.legis.wisconsin.gov/document/statutes/62.13(1)

[3] Conway v. Bd. of Police & Fire Comm'rs of City of Madison, 2003 WI 53

[4] "Panel holds power over jobs – after a trial-like hearing, it can overturn a firing," Gina Barton, *Milwaukee Journal Sentinel*, March 27, 2011

[5] https://www.jsonline.com/story/news/local/milwaukee/2020/10/09/milwaukee-police-chief-search-commission-considers-changes-process/5937121002/

[6] Collective bargaining rights were "generally aimed at avoiding public employee labor unrest and strikes," according to an informational paper published by the Wisconsin Legislative Fiscal Bureau in 2019, "State and Local Government Employment Relations Law."

[7] "Police contract may aid in firings – Use of arbitration could be broadened under MPD deal," *Milwaukee Journal Sentinel*, Larry Sandler, October 18, 2007, and Agreement Between City of Milwaukee and The Milwaukee Police Association, Local #21 I.U.P.A, AFL-CIO, Effective January 1, 2018 through December 31, 2019.

[8] https://city.milwaukee.gov/ImageLibrary/Public/ImageLibrary/Photos/FPCRules.pdf

[9] The public records law permits the withholding of disciplinary records until the final discipline is determined. This means that the records requests related to the discipline would be denied until all investigations and hearings are completed and the discipline is imposed.