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Should the Call for Systemic Change Start with Police Grievance Arbitration?

Kate Fredrickson

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SHOULD THE CALL FOR SYSTEMIC CHANGE START WITH
POLICE GRIEVANCE ARBITRATION?

Kate Fredrickson

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I. INTRODUCTION

Police grievance arbitrations play a major role in whether police officers keep or lose their jobs following discipline imposed by the police department they work for.¹ In May 2020, Minneapolis, Minnesota and the rest of the nation erupted after watching one Minneapolis Police Department (“MPD”) officer with numerous prior misconduct complaints murder George Floyd, which drew attention to the police discipline process.² Cell phone footage showed one officer murdering Mr. Floyd with three other MPD officers standing by watching.³ The video footage sparked large protests against police brutality and systemic racism across the country.⁴ This Article focuses on the statutes and statutory changes governing police grievance arbitrations in Minnesota, which is relevant to jurisdictions around the country.⁵

Police grievance arbitrations were at the forefront of conversations on social media and in the Minnesota Legislature in 2020.⁶ Police union labor contracts with cities, specifically the disciplinary grievance appeals process that is required in police contracts, have come under intense public scrutiny.⁷ The grievance procedure gives police officers the right to appeal any disciplinary action, including written reprimand, suspension, transfer, demotion, or discharge if the employee has completed the required probationary period.⁸ This practice is commonplace across the country.⁹

¹ See Shaila Dewan & Serge F. Kovalski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html> [https://perma.cc/477G-HWHB] (citing Mara H. Gottfried & Sarah Horner, *How Often Do Arbitrators Reinstate Fired Cops? Just Under Half the Time*, ST. PAUL PIONEER PRESS (Minn.) (June 23, 2019), <https://www.twincities.com/2019/06/23/how-often-do-arbitrators-reinstate-fired-cops-just-under-half-the-time/> [https://perma.cc/P646-L876]).

² *Id.*

³ *How George Floyd Died, and What Happened Next*, N.Y. TIMES (May 25, 2021), <https://www.nytimes.com/article/george-floyd.html> [https://perma.cc/2FBT-MD2Z].

⁴ *Id.*

⁵ See *infra* Part IV.

⁶ See *infra* Part II.

⁷ See *League Calls on Legislature to Keep Working on Police Arbitration Reform*, LEAGUE OF MINN. CITIES (Aug. 3, 2020), <https://www.lmc.org/news-publications/news/all/police-arbitration-reform/> [https://perma.cc/E46Z-V3XC]; MINN. STAT. § 179A.20, subdiv. 4 (2021).

⁸ MINN. STAT. § 179A.20, subdiv. 4.

⁹ Jon Collins, *Half of Fired Minnesota Police Officers Get Their Jobs Back Through Arbitration*, MPR NEWS (July 9, 2020, 5:00 PM), <https://www.mprnews.org/story/2020/07/09/half-of-fired-minnesota-police-officers-get-their-jobs-back-through-arbitration> [https://perma.cc/G7ZJ-9W6S].

Grievance arbitrations created an “immunity” culture within police departments and made it difficult for police chiefs to change police department cultures across the state.¹⁰ There is a clear conflict between the motivation and interests held by a city’s mayor and police chief, and those held by the police union leaders.¹¹ This Article will explore police grievance arbitration practices in Minnesota and whether the Police Accountability Act¹² (“PAA”) will likely make a difference in arbitrations going forward.¹³

II. HISTORY

A. Grievance Arbitration

Police officers are public employees covered under the Minnesota Public Employment Labor Relations Act (“MNPELRA”), which governs public-sector collective bargaining in Minnesota.¹⁴ The police union negotiates with the public employer, usually the city, to establish the collective bargaining agreement that will govern that department’s police officers.¹⁵ Disciplinary procedures and grievance procedures are some mandatory topics of such negotiations.¹⁶ Under MNPELRA, all contracts must include a grievance procedure providing compulsory binding arbitration for grievances arising from written discipline.¹⁷ If parties do not agree on the collective bargaining agreement’s terms, the parties proceed to

¹⁰ See *infra* notes 238–245 and accompanying text.

¹¹ See *infra* Part IV.

¹² The PAA was passed by the Minnesota Legislature in June 2020 to try and remedy the police grievance arbitration procedure and will be discussed more in depth later in this article. See *infra* Part IV.

¹³ See *infra* Part IV.

¹⁴ MINN. STAT. § 179A.03 (2021). MNPERLA, the primary law governing public sector collective bargaining in Minnesota, promotes orderly and constructive relationships between all public employers and their employees. MINN. STAT. § 179A.01 (2021). The importance or necessity of some services to the public can create imbalances in the relative bargaining power between public employees and employers. *Id.* As a result, unique approaches to negotiations and resolutions of disputes between public employees and employers are necessary. *Id.*

¹⁵ See MINN. STAT. § 179A.01.

¹⁶ LEAGUE OF MINN. CITIES, HUMAN RESOURCES REFERENCE MANUAL, CH. 6 LABOR RELATIONS 54 (Sept. 7, 2021), <https://www.lmc.org/wp-content/uploads/documents/HRRM-Labor-Relations.pdf> [https://perma.cc/3AD8-V7HK]. The League of Minnesota Cities put together a chapter on Labor Relations for Minnesota Cities, and it included a chapter about Human Resources discussing collective bargaining agreement negotiations and disciplinary and grievance procedures. See *id.*

¹⁷ MINN. STAT. § 179A.20, subdiv. 4.

mediation.¹⁸ If, after mediation, the parties still do not have an agreement, the parties proceed to binding interest arbitration.¹⁹

Whether, and how, the city is able to discipline employees is a key provision in a collective bargaining agreement.²⁰ Cities may not negotiate a provision into a collective bargaining agreement that exempts certain forms of written discipline from the grievance procedure for non-probationary employees.²¹ However, the collective bargaining agreement typically includes a provision that prohibits probationary employees from contesting written discipline or discharge through the grievance procedure.²² “The primary focus in discipline policies relates to when discipline may be imposed and what process should surround investigations that may lead to discipline, communicating the discipline decision, and appealing the discipline decision.”²³ Arbitrators look to the exact language of the provision during the grievance arbitration.²⁴ Additionally, the arbitrator decides whether the city consistently applies the policy.²⁵ Disciplinary provisions include language that state an employer may only discipline or discharge an employee for “just cause.”²⁶ However, collective bargaining agreements usually do not define “just cause.”²⁷

B. What Is Just Cause?

The definition of “just cause” is typically the main discussion of discipline grievance arbitrations.²⁸ Not every potential offense an employee

¹⁸ *Id.*

¹⁹ MINN. STAT. § 179A.15 (2021); MINN. STAT. § 179A.16, subd. 2 (2021). “Binding interest arbitration resolves disputes over terms and conditions of employment that have not been resolved by substantial, good faith bargaining efforts.” See LEAGUE OF MINN. CITIES, *supra* note 16.

²⁰ LEAGUE OF MINN. CITIES, *supra* note 16, at 97.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 97–98. Arbitration is a “creature of contract.” See Hiro N. Aragaki, *Arbitration: Creature of Contract, Pillar of Procedure*, 8 Y.B. ON ARB. & MEDIATION 2 (2016).

²⁵ LEAGUE OF MINN. CITIES, *supra* note 16, at 96–97.

²⁶ *Id.* at 97–98.

²⁷ Mario F. Bognanno, Jonathan E. Booth, Thomas J. Norman, Laura J. Cooper & Stephen F. Befort, *The Conventional Wisdom of Discharge Arbitration Outcomes and Remedies: Fact or Fiction*, 16 CARDOZO J. CONFLICT RESOL. 153, 157 (2014) (citing *Enterprise Wheel Co.*, 46 LA 359 (1966) (Daugherty, Arb.)); see also LEAGUE OF MINN. CITIES, *supra* note 16, at 97.

²⁸ LEAGUE OF MINN. CITIES, *supra* note 16, at 97–98. Grievance procedures most often deal with two primary areas: (1) disputes or disagreements about whether a city violated the union

may commit can be listed in the collective bargaining agreement.²⁹ The provisions within the collective bargaining agreement include a broad definition for when an employee may be disciplined or discharged.³⁰ “Cause” or just cause is commonly used language in collective bargaining agreements to describe circumstances where an employee may be disciplined or discharged.³¹ When just cause is not explicitly defined, the arbitrator has the authority to determine what is, or is not, “just cause.”³²

In 1966, Carroll Daugherty created a commonly known definition of just cause: The Seven Tests of Just Cause (“Seven Tests”).³³ Daugherty’s Seven Tests are posed as seven questions where answering “no” to any one question usually signifies that just and proper cause does not exist.³⁴ Daugherty’s seven questions are:

1. Was the grievant forewarned of the consequences for violating the rule/order?
2. Was the rule/order germane to the orderly, efficient, and safe operation of the business?
3. Was the alleged rule/order violation investigated prior to issuing discipline?
4. Was the employer’s investigation conducted fairly and objectively?
5. Did the investigating “judge” find substantial evidence of employee guilt, as charged?
6. Does the employer apply its rule/penalties evenhandedly and without discrimination?
7. Was the level of meted out discipline reasonably related to the seriousness of the employee’s proven offense and to the record of the employee’s service?³⁵

contract that involves contract interpretation, or (2) whether a city violated the union contract when it disciplined an employee that involves both the application of fact and the discipline standard. *See id.* at 105. The second type of grievance is commonly referred to as a discipline grievance. *See id.* at 106.

²⁹ *See id.* at 97.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Bognanno, et al., *supra* note 27.

³⁴ *Id.* at 157-58 (citing Grief Bros. Cooperage Corp., 42 LA 555, 557-59 (1964) (Daugherty, Arb.)).

³⁵ *Id.* at 158. This study examined the arbitration community’s commonly accepted beliefs about arbitration outcomes and remedies in employee discharge cases. *Id.* at 185. The findings revealed some beliefs are likely fact, while others are fiction. *Id.* The data in this study was from 1,432 Minnesota discharge awards and seventy-four arbitrators who decided them. *Id.* at 153.

Daugherty's definition is widely used in materials designed for training arbitrators and labor advocates.³⁶ However, a study reviewing published arbitration awards in Minnesota found that Daugherty's test may not be as widely used by arbitrators as people once thought.³⁷ The study found that, in Minnesota, Daugherty's Seven Tests are not as "undeniably influential" or as widely accepted in arbitral just cause decision-making as the literature has indicated.³⁸ The findings revealed that only 7.5% of the discharge awards issued per arbitrator explicitly utilized Daugherty's criteria.³⁹ The study's finding was surprising because Daugherty's Seven Tests are widely known and included in arbitration trainings; however, arbitrators may not explicitly state they are using Daugherty's Seven Tests in their awards.⁴⁰ Because arbitrator training discusses Daugherty's tests so thoroughly, arbitrators may habitually apply the tests without walking through the exact analysis to get to their conclusion.⁴¹

The Minnesota Supreme Court has weighed in on the definition of just cause.⁴² The court said "cause" must specifically relate to and affect the administration of the office, and it must be restricted to something of a substantial nature directly affecting the rights and interests of the public.⁴³ An attempt to remove an officer for any cause not affecting their competency or fitness would be an excess of power and equivalent to an arbitrary removal.⁴⁴ Without statutory specification, the sufficiency of the cause should be determined with reference to the character of the office, and the qualifications necessary to fill it.⁴⁵ The cause or reason for dismissal must relate to the way the employee performs their duties, and the evidence

³⁶ *Id.* at 157 (citing JOHN E. DUNSFORD, *ARBITRAL DECISIONS: THE TESTS OF JUST CAUSE, IN ARBITRATION 1989: THE ARBITRATOR'S DISCRETION DURING AND AFTER THE HEARING, PROCEEDINGS OF THE FORTY-SECOND ANNUAL MEETINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 23-50* (G. W. Gruenberg, ed., 1990)).

³⁷ *Id.* at 174.

³⁸ *Id.* at 181.

³⁹ *Id.*

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *Hagen v. Civ. Serv. Bd.*, 282 Minn. 296, 164 N.W.2d 629 (1969).

⁴³ *Id.* at 299, 164 N.W.2d at 631-32 (citation omitted). The court decided whether there was just cause for dismissal where the employee, who was a psychiatric technician at a state hospital, was dismissed for sleeping while on duty. *Id.* at 299, 164 N.W.2d at 632. The employee had been suspended on two previous occasions for sleeping while on duty. *Id.* at 297, 164 N.W.2d at 631. The court found that under the definition of "just cause," the evidence substantially showed that the dismissal related to the way the employee performed their duties. *Id.* at 299, 164 N.W.2d at 632.

⁴⁴ *Id.* at 299, 164 N.W.2d at 632.

⁴⁵ *Id.*

showing the existence of reasons for dismissal must be substantial.⁴⁶

Where the collective bargaining agreement does not specifically define just cause or limit the available remedies, the arbitrator is free to adopt a reasonable definition and craft a remedy that does not conflict with the terms of the agreement.⁴⁷ What may be considered just cause to discipline an employee might not be just cause to discharge an employee.⁴⁸ The Minnesota Supreme Court held, “[T]he power to fashion a remedy is a necessary part of the arbitrator’s jurisdiction unless withdrawn from [them] by specific contractual language between the parties or by a written submission of issues which precludes the fashioning of a remedy.”⁴⁹

C. *Minnesota Arbitration Awards*

In Minnesota arbitration proceedings arising under collective bargaining agreements, a final disposition occurs at the conclusion of the arbitration proceedings, or upon the failure of the employee to elect arbitration within the time provided by the collective bargaining agreement.⁵⁰ A disciplinary action does not become public data if an arbitrator sustains a grievance and reverses all aspects of any disciplinary action.⁵¹ Arbitration awards are issued by arbitrators on the Bureau of Mediation Services’ (“BMS”) Arbitration Roster and are available to download for free on the BMS website.⁵²

1. *City of Duluth and Duluth Police Union, Local No. 807*⁵³

This arbitration arose from the termination of Duluth police officer, Adam Huot, by the City of Duluth Police Department.⁵⁴ Huot was a police

⁴⁶ *Id.*

⁴⁷ *State Off. of State Auditor v. Minn. Ass’n of Pro. Emps.*, 504 N.W.2d 751, 755 (Minn. 1993).

⁴⁸ *See City of Bloomington v. Local 2828 of Am. Fed’n of State, Cnty. & Mun. Emps.*, 290 N.W.2d 598, 602 (Minn. 1980); *State Auditor*, 504 N.W.2d at 757–58 (recognizing that while employee’s conduct would have been sufficient grounds for discharge, the arbitrator, in the absence of any language to the contrary, was free to determine that such conduct was only grounds for disciplining the employee).

⁴⁹ *City of Bloomington*, 290 N.W.2d at 603.

⁵⁰ MINN. STAT. § 13.43, subdiv. 2(b) (2021); MINN. STAT. § 179A.04, subdiv. 3 (2021).

⁵¹ MINN. STAT. § 13.43, subdiv. 2(b).

⁵² *Arbitration Awards*, BUREAU OF MEDIATION SERVS., <https://mn.gov/bms/arbitration/awards/> [https://perma.cc/8ENT-FD3E].

⁵³ *City of Duluth v. Duluth Police Union, Local No. 807, BMS #18-PA-0250* (2018) (Bognanno, Arb.), <https://mn.gov/bms/documents/BMS/134813-20180622-Duluth.pdf> [https://perma.cc/SB8X-BVAE].

⁵⁴ *Id.* at 1.

officer in Duluth for nine years and was terminated in June 2017.⁵⁵ Because the incident that led to Huot's termination was recorded by several body cameras, the facts were largely not contested.⁵⁶ Huot and two other officers, including a rookie in training, responded to a welfare check call concerning two individuals who were known alcoholics.⁵⁷ The officers awakened the individuals who were either "sleeping" or "passed out," then directed them to move along and, without incident, the two individuals left the scene.⁵⁸ Later that same evening, the officers were sent on another call where they found those same individuals trespassing on private property.⁵⁹

At the second call, Huot and the two other officers encountered the individuals in a parking ramp and advised the individuals they would receive trespassing citations in the mail.⁶⁰ One of the individuals became provocative and, after a verbal exchange, stated he wanted "to go to jail right . . . now!"⁶¹ The individual was handcuffed with his hands behind his back.⁶² The handcuffed individual walked with the officers until he fell to the ground and said, "I ain't gonna to make it easy for you guys."⁶³ Then, Huot grabbed the individual by the handcuffs and dragged the individual one-hundred feet down the corridor.⁶⁴ Huot disregarded comments from the other officers to pick up the individual.⁶⁵ As Huot walked through a doorway while dragging the individual, the individual's head hit the metal door frame.⁶⁶ The individual was brought to the hospital to be examined.⁶⁷ The individual sustained no major injuries.⁶⁸

Following this incident, the Chief of Police terminated Huot, citing a use of force violation.⁶⁹ The collective bargaining agreement provided that any employee who has completed their initial probationary period may be suspended without pay, discharged, or disciplined only for just cause.⁷⁰ Additionally, it said discipline shall be corrective and progressive, except for cases of serious offense, any suspensions, demotions, or removal action

⁵⁵ *Id.*

⁵⁶ *Id.* at 1-2.

⁵⁷ *Id.* at 2.

⁵⁸ *Id.* at 2-3.

⁵⁹ *Id.* at 3.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 4.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 5.

⁷⁰ *Id.*

shall be preceded by a written warning.⁷¹ Huot initiated a grievance according to the collective bargaining agreement, which ended up in arbitration.⁷²

The arbitrator used Daugherty's Seven Tests to decide whether the City of Duluth had just cause to discharge Huot.⁷³ The arbitrator found Huot's termination was not for just cause and reinstated Huot without back pay and benefits.⁷⁴ The arbitrator stated the unreasonable use of force was serious "even though the amount of the needless discomfort inflicted on [the individual] was nominal."⁷⁵ Additionally, the arbitrator decided the use of force was "minor compared to relatively major misuses of force."⁷⁶ The arbitrator then said, "In this day and age, such conduct can evoke public tumult, which is a major concern to the public employer and rightly so."⁷⁷ However, the arbitrator concluded that termination was too harsh for a long-serving police officer who was otherwise considered a "good" police officer.⁷⁸

Even though the arbitrator considered Huot a "good" officer, Huot was coached previously for incidents that ultimately did not rise to the level of discipline.⁷⁹ The arbitrator decided the collective bargaining agreement's progressive discipline provision warranted a loss of back pay but did not yet warrant termination.⁸⁰ Because Huot was reinstated without back pay, if Huot offended again, termination would be the appropriate next level of discipline.⁸¹

This award is an example of arbitrators' broad use of authority. Duluth Mayor Emily Larson supported the decision to fire Huot, saying that "the power and authority of [Duluth] officers . . . comes from a foundation of

⁷¹ *Id.*

⁷² *Id.* at 5-6.

⁷³ *Id.* at 42. See *Enter. Wire Co. v. Enter. Indep. Union*, 46 Lab. Arb. Rep. (BNA) 359 (1966) (Daugherty, Arb.) (establishing a seven-pronged test to determine whether just cause exists where no contractual definition for just cause was given). In *City of Duluth*, the arbitrator addressed (1) notice, (2) reasonableness, (3) complete and (4) fair investigation, (5) proof, (6) equal treatment, and (7) penalty—each individually. BMS #18-PA-0250, at 42-51.

⁷⁴ *City of Duluth*, BMS #18-PA-0250, at 53.

⁷⁵ *Id.* at 51.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 51-52. Huot received departmental coaching for the two prior incidents. *Id.* The arbitrator referred to the coaching as a "heads up" for Huot, which Huot missed because it was not long after a previous incident that the present incident occurred. *Id.* at 52.

⁸⁰ *Id.*

⁸¹ *Id.*

strong community relationships.”⁸² Common sense dictates that dragging an intoxicated individual does not support a foundation of community relationship with police officers.⁸³

Because the collective bargaining agreement has a progressive discipline provision and the broad just cause provision, the arbitrator had the authority to reinstate Huot.⁸⁴ However, a police officer, no matter how long they have been on the force, should not be given their job back if they have a severe lapse in judgment.⁸⁵ Here, Huot made the choice to give in to his emotions and drag an individual by the handcuffs, which showed a complete disregard for the individual’s physical safety and human dignity.⁸⁶ However, the award could have been harsher had the arbitrator chosen to reinstate with back pay; there is still a level of discipline here because the arbitrator is acknowledging Huot’s improper conduct.⁸⁷ Reinstating without back pay created an unpaid suspension for the duration of the grievance procedure, which ended up being over a year.⁸⁸

⁸² Chris Graves, *Duluth Police Chief: Cop Who Dragged Handcuffed Man Should Be Fired*, MPR NEWS (June 29, 2018, 6:30 PM), <https://www.mprnews.org/story/2018/06/29/duluth-police-officer-fired-for-dragging-handcuffed-man-through-skywalk-last-year> [https://perma.cc/5Z4B-KP4A]. Due to the prevalence of social media, the video of Huot dragging the intoxicated individual through the corridor of the Duluth Skywalk spread widely. *Id.*

⁸³ *See id.*

⁸⁴ *See* Lee Kraftchick, *How Hard Is It to Fire a Police Officer?: A Look at One Local Government’s Experience and Some Possibilities for Reform*, 50 STETSON L. REV. 491, 493–94 (2021) (noting how collective bargaining power, just cause provisions, and other facets result in arbitrators ruling on suspensions and firings).

⁸⁵ *See, e.g.*, Haven Orecchio-Egresitz, *The Houston Police Chief Called It ‘Inexplicable’ that 4 of His Officers Fired 21 Shots at an Incapacitated Man During a Mental Health Call. They’ve Been Fired*, INSIDER (Sept. 11, 2020, 1:03 PM), <https://www.insider.com/houston-police-department-fired-4-officers-who-shot-nicolas-chavez-2020-9> [https://perma.cc/7ZMK-F85R]. Here, four Houston police officers were terminated because they shot twenty-seven-year-old Nicholas Chavez (now deceased) twenty-one times while Chavez was on the ground and twenty-eight other police officers were on the scene. *Id.*

⁸⁶ *See* Graves, *supra* note 82.

⁸⁷ *See* City of Duluth v. Duluth Police Union, Local No. 807, BMS #18-PA-0250 (2018) (Bognanno, Arb.), <https://mn.gov/bms/documents/BMS/134813-20180622-Duluth.pdf> [https://perma.cc/SB8X-BVAE].

⁸⁸ The award is dated June 22, 2018, and Huot was discharged on June 5, 2017. *Id.* at 1.

2. *City of Sauk Rapids, Minnesota and Law Enforcement Labor Services, Inc.*⁸⁹

This arbitration arose from the termination of police officer Eric Norsten by the City of Sauk Rapids, Minnesota Police Department in December 2016.⁹⁰ Norsten was an officer with the City of Sauk Rapids since 2000, and a police officer for approximately twenty-five years.⁹¹ The City of Sauk Rapids provided three bases for terminating Norsten: (1) citizen complaint of unnecessary tasing by Norsten at a grocery store; (2) six different dates on which Norsten admittedly left the city limits for home in his squad car without department permission; and (3) a charge of improper use of force in which Norsten tased a female whom he had taken into custody after responding to a mental health call.⁹² The arbitrator's analysis and decision primarily focused on the latter incident—a charge of improper use of force.⁹³

The tasing incident from the mental health call occurred around 10:00 p.m. when Norsten and his supervisor, Sergeant Bukowski, reported to a call about an intoxicated, disturbed female.⁹⁴ When the officers arrived at the scene, they found the caller (the woman's husband) and an older woman "trying to verbally control the [w]oman, who was physically lashing out, running around in the grass, and making guttural noises along with using profanity."⁹⁵ The woman struck the officers as they were trying to get her into the squad car.⁹⁶ Once the officers were able to corral her, the officers handcuffed her hands behind her back.⁹⁷ She was seat-belted in the back of the squad car, despite her almost non-stop kicking and screaming.⁹⁸

Norsten transported the woman in his squad car to the hospital located in St. Cloud, Minnesota.⁹⁹ During the ride, the woman disengaged the seat belt and began moving around the back seat, kicking the squad car windows as well as the cage behind Norsten; she kicked so forcefully that the cage

⁸⁹ *City of Sauk Rapids, Minn. v. Law Enf't Labor Servs., Inc.*, BMS Case #17-PA-0475 (June 2, 2017) (Tidwell, Arb.), <https://mn.gov/bms/documents/BMS/130647-20170602-SaukRapids.pdf> [<https://perma.cc/Q9ZX-LA67>].

⁹⁰ *Id.* at 2-3.

⁹¹ *Id.* at 3.

⁹² *Id.*

⁹³ *Id.* at 7.

⁹⁴ *Id.* at 8.

⁹⁵ *Id.*

⁹⁶ *Id.* at 9.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

and the back of the front seat could be seen moving in the squad camera recording.¹⁰⁰ Once Norsten arrived at the hospital with the woman, multiple hospital staff got the woman onto a bed where her legs and arms were in restraints.¹⁰¹ The woman remained agitated and was spitting at hospital staff.¹⁰² It was at this point that Norsten tased the woman to get her to comply with hospital staff while the doctor ordered medication to calm the woman down.¹⁰³

Norsten testified that “he believed the woman to be a danger to herself or others.”¹⁰⁴ The arbitrator acknowledged that Norsten feared for the woman’s ability to inflict bodily harm to herself or another person.¹⁰⁵ However, the arbitrator concluded this fear was not reasonable given the number of hospital staff in the room and the fact that they were clustered near the woman’s upper body.¹⁰⁶ Moreover, her ability to move was restricted due to the restraints.¹⁰⁷

The arbitrator noted that others in the room recalled Norsten and the woman yelling at each other, both using profanity, and concluded that Norsten’s tasing may have been motivated by “a predictable albeit problematic frustration given the totality of his interaction” with the woman.¹⁰⁸ The arbitrator also noted that on the night of the incident, there was no testimony from hospital staff expressing concern about Norsten’s actions.¹⁰⁹ Only one staff member indicated concern, days later, when questioned in the course of the St. Cloud police investigation.¹¹⁰ The arbitrator found Norsten violated the policy on tasing a person in restraints but also determined it was a “close call.”¹¹¹

The discipline provision of the collective bargaining agreement states that the City of Sauk Rapids “will discipline employees for just cause only.”¹¹² Discharge will be preceded by a five-day suspension without pay.¹¹³ The arbitrator reinstated Norsten with back pay and reduced discipline to a two-

¹⁰⁰ *Id.* at 9-10.

¹⁰¹ *Id.* at 10.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 13.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 13-14. The policy regarding the use of a taser on restrained individuals at issue states, “The taser shall not be used on restrained individuals unless the actions of the subject pose a potential threat of bodily harm to themselves or to any other person.” *Id.* at 7 n.13.

¹¹² *Id.* at 4.

¹¹³ *Id.*

day suspension without pay.¹¹⁴ Additionally, the discipline for Norsten leaving the city while on duty without permission was converted to a written reprimand.¹¹⁵

This award was alarming because Norsten tased an already restrained, mentally ill woman, and Norsten was reinstated because the arbitrator thought it was “a close call.”¹¹⁶ A police officer is trained to perform in an abundance of “close call” situations.¹¹⁷ A trained, seasoned police officer should not give in to frustration while standing around with a group of clinicians that are trying to care for someone.¹¹⁸ A police officer is supposed to protect individuals in the community during, what is likely, their worst hour. Sometimes police officers use a taser; however, because the woman was already in four-point restraints and there were other people in the room to support the officers, using a taser was inappropriate in this situation—no matter how close the call.¹¹⁹

For Norsten, who had been on the force for a long time, the number of years on the force should be a mitigating factor as a matter of law for determining appropriate discipline.¹²⁰ A seasoned police officer should be held to a higher standard. Senior partners in a law firm are held to a higher standard than the associates below them,¹²¹ just as a surgical resident is held to a higher standard than a surgical intern;¹²² a higher level of care and

¹¹⁴ *Id.* at 18.

¹¹⁵ *Id.*

¹¹⁶ *See id.* at 14.

¹¹⁷ *See* MINN. STAT. § 626.8469 (2021); *see also* MINN. STAT. § 626.8455 (2021).

¹¹⁸ *See* City of Sauk Rapids, Minn. v. Law Enf't Labor Servs., Inc., BMS Case #17-PA-0475, 4 (2017) (Tidwell, Arb.), <https://mn.gov/bms/documents/BMS/130647-20170602-SaukRapids.pdf> [<https://perma.cc/Q9ZX-L467>] (noting relevant contract, policy, and procedure provisions, specifically Policy P-06, regarding restricted taser uses).

¹¹⁹ *See id.* Additionally, active full-time and part-time peace officers in Minnesota are statutorily required to complete a minimum of forty-eight hours of continuing education training in four topics every three-year license renewal cycle. MINN. STAT. § 626.8469. Officers with a renewal date after June 30, 2022, must include a minimum of six hours for Crisis Intervention and Mental Illness Crisis. *Id.* The course must include scenario-based instruction and cover techniques for relating to individuals with mental illnesses. *Id.* Active officers are mandated to train annually in use of force. MINN. STAT. § 626.8452 (2021).

¹²⁰ *See City of Sauk Rapids, Minn.*, BMS Case #17-PA-0475 at 3 (“Grievant had been a police officer for a total of approximately 25 years and an employee of the City in that capacity for approximately 16 years.”). *But see id.* at 7-14 (mitigating factors did not include Grievant’s time as a police officer).

¹²¹ *See* MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS’N 2019).

¹²² *See e.g.*, Keith A. Braswell, *Residents and Interns Subject Medical Malpractice Liability*, 67 OHIO JUR. 3D MALPRACTICE § 46 (Aug. 2021) (stating that under some authorities, the standard of care for a resident is that of a similarly situated and educated resident, rather than that of a practicing physician).

responsibilities come with time in any role.¹²³ A police officer who has been on the force for upwards of twenty-five years should know better than to give in to his personal frustration and use unnecessary force because someone may be mentally unwell.¹²⁴

D. Public Policy Exception

The courts created the public policy exception as a narrow exception to the contracts doctrine, allowing courts to abrogate private contracts that are contrary to public policy.¹²⁵ In limited circumstances, a public policy exception may provide a basis for courts to vacate an arbitration award.¹²⁶ Minnesota appellate courts addressed the public policy exception in *State, Office of State Auditor v. Minnesota Association of Professional Employees*.¹²⁷

Courts may set aside an arbitration award on public policy grounds “only if: (1) the collective bargaining agreement contains terms which violate public policy, or (2) the arbitration award creates an explicit conflict with other ‘laws and legal precedents.’”¹²⁸ In deciding whether an arbitration award violates public policy, the court does not look to the grievant’s conduct, but to whether enforcement of the arbitration award violates some well-defined and dominant public policy.¹²⁹

¹²³ See *supra* text accompanying notes 121–22.

¹²⁴ See e.g., Eugene A. Paoline, III & William Terrill, *Police Education, Experience, and the Use of Force*, 34 CRIM. JUST. & BEHAV. 179, 187–88 (2007) (finding that use of force is used least frequently in encounters involving officers with the most experience); see also MINN. ADMIN. R. § 6700.0900 (continuing education requirements indicative of a police officer’s trained better judgment).

¹²⁵ *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 42–43 (1987).

¹²⁶ *State Off. of State Auditor v. Minn. Ass’n of Pro. Emps.*, 504 N.W.2d 751, 756 (Minn. 1993).

¹²⁷ *State Off. of State Auditor v. Minn. Ass’n of Pro. Emps.*, 493 N.W.2d 591 (Minn. Ct. App. 1992); *State Auditor*, 504 N.W.2d 751. This case arose out of a grievance filed by the Minnesota Association of Professional Employees on behalf of a local government auditor who had been discharged by the State Auditor “for falsifying expense reports and for being untruthful during an investigation into that misconduct.” *State Auditor*, 504 N.W.2d at 752. The arbitrator ordered the auditor to be reinstated with back pay and the State moved to vacate the award under the public policy exception. *Id.* at 754. The district court granted the State’s motion, vacating the award because the award either violated the public policy contained in the agreement or explicitly conflicted with a well-defined and dominant public policy. *Id.* The court of appeals reversed the district court and held that the arbitrator’s award did not conflict with public policy. *Id.* The Minnesota Supreme Court found that the arbitrator’s award did not violate any well-defined and dominant public policy. *Id.*

¹²⁸ *Id.* at 756.

¹²⁹ *Id.*

The courts use a two-step process to evaluate whether an arbitrator's award violates public policy. First, courts determine whether the party challenging the award identified a public policy that is “well-defined and dominant” based on “laws and legal precedents.”¹³⁰ Second, if the party identified a policy that meets those standards, the court examines whether the award itself is contrary to the policy.¹³¹

In evaluating whether a public policy is well-defined and dominant, a court must look to “existing laws and legal precedents” and cannot rely on “‘general considerations of supposed public interests’ . . . to overturn the arbitrator’s award.”¹³² “Although the public employee’s *conduct* may have violated a well-defined and dominant public policy, it is another matter to ‘conclude that the arbitrator’s *award* reinstating [the employee] violates’ a well-defined and dominant public policy.”¹³³ Although a court may have a “strong disagreement” with an arbitrator’s award, this is not “sufficient grounds for vacating the arbitrator’s award.”¹³⁴

The public policy may be very well-defined and dominant, but if the arbitrator’s award does not violate the public policy, then the courts will not vacate the award.¹³⁵ One issue is the provisions within the collective bargaining agreement.¹³⁶ Broadly written provisions give the arbitrator authority to define just cause for termination and to determine the appropriate discipline for violating department policies.¹³⁷ This broad authority for the arbitrator limits the court’s ability to vacate the arbitrator’s award.¹³⁸

E. Minnesota Supreme Court

Generally, vacating an arbitration award is rare, and police grievance arbitrations are no different.¹³⁹ Cities may move to vacate arbitration awards

¹³⁰ See *Misco, Inc.*, 484 U.S. at 43–44 (quotation omitted) (refusing to vacate an arbitrator’s award because the public policy advanced by the challenger failed to meet that standard).

¹³¹ *State Auditor*, 504 N.W.2d at 758 (refusing to vacate an arbitrator’s award because the award was not contrary to the well-defined and dominant public policy that was identified).

¹³² *City of Richfield v. Law Enf’t Labor Servs.*, 923 N.W.2d 36, 41 (Minn. 2019) (citing *State Auditor*, 504 N.W.2d at 756).

¹³³ *Id.* (quoting *State Auditor*, 504 N.W.2d at 757).

¹³⁴ *Id.* at 42 (quoting *State Auditor*, 504 N.W.2d at 758).

¹³⁵ *Id.*

¹³⁶ Jim Hilbert, *Improving Police Officer Accountability in Minnesota: Three Proposed Legislative Reforms*, 47 MITCHELL HAMLINE L. REV. 222, 267 n.253 (2021).

¹³⁷ Stephen Rushin, *Police Arbitration*, 74 VAND. L. REV. 1023, 1042 (2021).

¹³⁸ *Id.*

¹³⁹ See Joseph L. Daly, *Vacating Arbitration Awards*, MINN. CLE, https://www.minncle.org/eaccess/1213491701/0721_315pm_Daly.pdf [<https://perma.cc/7BVY-VPE8>].

based on an argument that the award violates public policy.¹⁴⁰ The Minnesota Supreme Court has yet to vacate an arbitration award from labor arbitration based on the very narrow public policy exception.¹⁴¹ This limitation has created a nearly impossible environment for cities and the state to ensure their disciplinary decisions are upheld.¹⁴²

The Minnesota Uniform Arbitration Act lays out the narrow rules for judicial vacation of arbitration awards; however, public policy is not one of the enumerated rules.¹⁴³ The statute states in part, upon application of a party, the court shall vacate an award where:

- “The award was procured by corruption, fraud or other undue means;”¹⁴⁴
- There was “evident partiality by an arbitrator appointed as a neutral,”¹⁴⁵ corruption by any of the arbitrators,¹⁴⁶ or misconduct prejudicing any party’s rights;¹⁴⁷
- The arbitrators exceeded their powers;¹⁴⁸
- The arbitrators refused to postpone the hearing after showing sufficient cause, “refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 572B.15”¹⁴⁹, thereby substantially prejudicing the party’s rights;¹⁵⁰
- There was no arbitration agreement;¹⁵¹ or
- The arbitration was conducted without proper notice, thereby substantially prejudicing the party’s rights.¹⁵²

¹⁴⁰ See *City of Richfield v. Law Enf’t Labor Servs.*, 923 N.W.2d 36, 40 (Minn. 2019).

¹⁴¹ See *id.* at 41 (reversing the lower court’s decision to vacate an arbitration award under the public policy exception; citing *State Off. of State Auditor v. Minn. Ass’n of Pro. Emps.*, 504 N.W.2d 751, 758 (Minn. 1993), the only other case where the Minnesota Supreme Court was asked, and similarly declined, to vacate an arbitration award under the public policy exception).

¹⁴² *Id.* (stating that even though the “public employee’s conduct may have violated a well-defined and dominant public policy, it is another matter to conclude that the arbitrator’s award reinstating [the employee] violates a well-defined and dominant public policy”) (internal quotations omitted).

¹⁴³ MINN. STAT. § 572B.23(a) (2021).

¹⁴⁴ MINN. STAT. § 572B.23(a)(1).

¹⁴⁵ MINN. STAT. § 572B.23(a)(2)(A).

¹⁴⁶ MINN. STAT. § 572B.23(a)(2)(B).

¹⁴⁷ MINN. STAT. § 572B.23(a)(2)(C).

¹⁴⁸ MINN. STAT. § 572B.23(a)(4).

¹⁴⁹ This section articulates the arbitration process in Minnesota. MINN. STAT. § 572B.15 (2021).

¹⁵⁰ MINN. STAT. § 572B.23(a)(3).

¹⁵¹ MINN. STAT. § 572B.23(a)(5).

¹⁵² MINN. STAT. § 572B.23 (a)(6).

The U.S. Supreme Court identified an exception to the general principle against substantive review of an arbitrator's decision: the public policy exception.¹⁵³ The public policy exception is based on the principle that, “[a]s with any contract, . . . a court may not enforce a collective bargaining agreement that is contrary to public policy.”¹⁵⁴ But the public policy “must be 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.’”¹⁵⁵ Further, the award itself must create an “explicit conflict” with that public policy to justify application of the exception.¹⁵⁶

The most recent case heard by the Minnesota Supreme Court arising from a police grievance arbitration was *City of Richfield v. Law Enforcement Labor Services, Inc.*¹⁵⁷ In this case, a City of Richfield police officer, Nathan Kinsey, was discharged for failing to report use of force and violating other policies.¹⁵⁸ Kinsey, through his union, Law Enforcement Labor Services Inc., filed a grievance resulting in arbitration.¹⁵⁹ The arbitrator found that because Kinsey did not use excessive force and his decision not to report the use of force was a “lapse in judgement,” the city did not have just cause to discharge Kinsey.¹⁶⁰ The arbitrator ordered reinstatement with back pay and imposed a three-shift unpaid suspension as discipline.¹⁶¹ The city moved for the district court to vacate the award on public policy grounds.¹⁶² The district court denied the city’s motion and upheld the arbitration award.¹⁶³ The district court concluded that no public policy would be violated if Kinsey were reinstated.¹⁶⁴ The city appealed the district court’s decision.¹⁶⁵

The Minnesota Court of Appeals reversed the district court’s ruling.¹⁶⁶ The appellate court held that the enforcement of the arbitration award would violate well-defined and dominant public policies against excessive

¹⁵³ *W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

¹⁵⁶ *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987).

¹⁵⁷ *See City of Richfield v. Law Enf’t Labor Servs.*, 923 N.W.2d 36 (Minn. 2019).

¹⁵⁸ *Id.* at 38.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* *See City of Richfield v. Law Enf’t Labor Servs., Inc.*, 910 N.W.2d 465 (Minn. Ct. App. 2018).

¹⁶⁶ *City of Richfield*, 910 N.W.2d at 477.

force.¹⁶⁷ Additionally, the court held the award interfered with policies that favor transparency and proper reporting of the use of force and require police departments to hold police officers accountable for their conduct.¹⁶⁸ The union appealed, and the Minnesota Supreme Court granted further review.¹⁶⁹

The Minnesota Supreme Court reversed the appellate court's decision, holding that enforcing the arbitration award did not violate a well-defined and dominant public policy.¹⁷⁰ The supreme court held that arbitrators serve as the "final judge of both law and fact, including the interpretation of the terms of any contract."¹⁷¹ The court acknowledged that the public policy exception is narrow and "was created by courts as an extension of the contract doctrine allowing courts to abrogate private contracts that are contrary to public policy."¹⁷² A "public-policy exception may, in limited circumstances, provide a basis to vacate an arbitration award that violates a well-defined and dominant public policy."¹⁷³

To determine "whether a public policy is well-defined and dominant, a court must look to 'existing laws and legal precedents' and cannot rely on 'general considerations of supposed public interests . . . to overturn the arbitrator's award.'"¹⁷⁴ The court emphasized that the analysis should not focus on whether an employee's conduct was contrary to public policy, but on whether the award is contrary to public policy.¹⁷⁵ The court concluded that even though Kinsey's actions may have been disturbing, a "strong disagreement with an arbitrator's result does not provide sufficient grounds for vacating the arbitrator's award."¹⁷⁶

The Minnesota Supreme Court has made it clear that it will not vacate an arbitration award based on the public policy exception merely because the court disagrees with the arbitrator's decision.¹⁷⁷ The court has not accepted a public policy exception argument on behalf of the city or state, and the court has refused to opine on the application of the public policy

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *City of Richfield v. Law Enf't Labor Servs., Inc.*, 923 N.W.2d 36 (Minn. 2019).

¹⁷⁰ *Id.* at 39.

¹⁷¹ *Id.* at 40 (quoting *State Off. of State Auditor v. Minn. Ass'n of Pro. Emps.*, 504 N.W.2d 751, 754 (Minn. 1993)).

¹⁷² *Id.* (referencing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42-43 (1987)).

¹⁷³ *Id.* (citing *State Auditor*, 504 N.W.2d at 756).

¹⁷⁴ *Id.* at 40-41 (quoting *State Auditor*, 504 N.W.2d at 756). *See supra* text accompanying note 128 (addressing when a court may set aside an arbitration award).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (quoting *State Auditor*, 504 N.W.2d at 758).

¹⁷⁷ *See id.*

analysis to sets of facts beyond the case in front of them.¹⁷⁸

To open the door for the opportunity to succeed in court, the collective bargaining agreement provisions would need to change.¹⁷⁹ Because grievance procedures are statutorily required, cities are unable to remove the procedures completely, so cities will have to work within the provisions of the statute to effectuate change.¹⁸⁰ Many reforms have been proposed, including management improvements surrounding the agency's investigation or failure to comply with procedural requirements mandated in the collective bargaining agreement.¹⁸¹ Making management improvements alone is inadequate because it does not eliminate the arbitrator's broad authority to reverse decisions based on missteps the arbitrator deems unacceptable or unjust, but that a court or other arbitrators may find innocuous.¹⁸² The broad authority awarded to arbitrators paired with the arbitrator selection process leaves the employer without clear precedent and, depending on the arbitrator selected, without recourse against police officers.

III. THE PROBLEM

A. *Minnesota Police Departments*

Minneapolis Police Department's Chief of Police, Medaria Arradondo, was appointed to be MPD's fifty-third chief in 2017.¹⁸³ When he was a lieutenant, Chief Arradondo joined a lawsuit that portrayed the MPD as a "cauldron of racist behavior," and he has struggled to overhaul the department.¹⁸⁴ Black people account for about twenty percent of the

¹⁷⁸ *Id.* at 41 n.1 (citing *State Auditor*, 504 N.W.2d at 758 n.9).

¹⁷⁹ See Hilbert, *supra* note 136.

¹⁸⁰ See Kraftchick, *supra* note 84, at 493-95. "Civil service protections for public employees date back to the late 1800s." *Id.* "Collective bargaining for state employees, including police, dates [back] to the 1960s." *Id.* These longstanding job protections make it unrealistic, if not impossible, to make police officers suddenly subject to discipline without cause. *Id.*

¹⁸¹ *Id.* at 528. Management improvements refer to the investigations and preparation for arbitrations completed by management. *Id.*

¹⁸² *Id.* at 528-29.

¹⁸³ Matt Furber, John Eligon & Audra D.S. Burch, *Minneapolis Police, Long Accused of Racism, Face Wrath of Wounded City*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/us/minneapolis-police.html> [https://perma.cc/SH9F-JSHJ]. Police Chief Arradondo retired in mid-January. Amir Vera, Carma Hassan & Michelle Watson, *Minneapolis Police Chief Medaria Arradondo, Whose Tenure Included George Floyd's Murder, Will Retire in January*, CNN (Dec. 6, 2021, 10:02 PM), <https://www.cnn.com/2021/12/06/us/minneapolis-police-chief-retiring/index.html> [https://perma.cc/D96L-LUD3].

¹⁸⁴ Fuber, et al., *supra* note 183.

city's population, but Black people accounted for more than sixty percent of the victims in Minneapolis police shootings from late 2009 through May 2019.¹⁸⁵ Activists have been working to dismantle the MPD for several years.¹⁸⁶ The MPD is predominantly White, with some officers living in suburbs of Minneapolis and driving into the city to work, creating a rift between the police officers and the community.¹⁸⁷ Politicians and activists in Minneapolis have tried to embrace the language of racial justice but have mostly failed to put words into action.¹⁸⁸

Minnesota police departments have been reinstating police officers after termination for decades. For example, “[m]ore than 80 police officers across Minnesota were fired and fought their discharge in arbitration over the past 20 years,” with approximately half receiving their jobs back.¹⁸⁹ This number may be higher because “Minnesota’s public records laws prohibit releasing any information . . . when arbitrators overturn [a police officer termination] without imposing any type of discipline.”¹⁹⁰ After firing the four officers involved in killing George Floyd, Chief Arradondo stated, “There is nothing more debilitating to a chief . . . than when you have grounds to terminate an officer for misconduct, and you’re dealing with a third-party mechanism that allows for that employee to not only be back on your department, but to be patrolling in your communities.”¹⁹¹

Under the current system, a police department is not able to adequately control its workforce because terminating officers is not an option unless the city is prepared to fight the termination in arbitration.¹⁹² When a new chief of police is appointed and has plans that reflect the will of the community, the chief may not be able to make good on all their

¹⁸⁵ *Id.*

¹⁸⁶ Adrian Florido, *These Are the Minneapolis Activists Leading the Push to Abolish the Police*, MPR NEWS (June 26, 2020, 11:57 AM), <https://www.npr.org/2020/06/26/882001628/these-are-the-minneapolis-activists-leading-the-push-to-abolish-the-police> [https://perma.cc/2C8Z-TCZT].

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Jennifer Bjorhus, *Fired Minnesota Officers Have a Proven Career Saver: Arbitration*, STAR TRIB. (Minneapolis) (June 21, 2020, 7:41 AM), <https://www.startribune.com/minnesota-cops-fired-then-rehired/571392702/?refresh=true> [https://perma.cc/DX9N-7EC9]. There were a variety of reasons the eighty officers were terminated. One of them was fired for decorating a Christmas tree with racist items inside Minneapolis’ fourth precinct in November 2018 and then was reinstated with a 320-hour suspension. *Police Officers’ Federation of Minneapolis v. City of Minneapolis*, (2020) (Fogelberg, Arb.), <https://mn.gov/bms-stat/assets/20141108-Minneapolis.pdf> [https://perma.cc/JZ95-FQJM].

¹⁹⁰ *Id.*

¹⁹¹ *Id.* Chief Arradondo said at a different press conference on June 10, 2021, that if the Minnesota Legislature is serious about making changes, it will tackle arbitration.

¹⁹² Bjorhus, *supra* note 189.

promises because any discipline or discharge is appealable and may be overturned by an arbitrator.¹⁹³

Chief Arradondo is not the only police chief who feels the impact of binding arbitration on the task of creating a culture of accountability within their department.¹⁹⁴ Brad Wise, Police Chief in Coon Rapids, Minnesota, testified at the Minnesota State Capitol that “there’s nothing worse . . . for an organization than to lose an arbitration. I think it creates distrust within the workplace . . . [and] it saps the confidence of a police leader. And it makes police leaders be reluctant to even let cases go to arbitration for fear of losing them.”¹⁹⁵

Police accountability can take different forms, but the legislature should work toward accountability appropriate for police officers that reflects what is important to the community they serve.¹⁹⁶ There have been different groups of people who advanced potential solutions to the accountability problem from dismantling arbitration completely to putting the grievance proceedings in front of administrative law judges.¹⁹⁷ Both sides want the same thing: a system that stops killing innocent people at the hands of police officers.¹⁹⁸ With this goal in mind, the Minnesota Legislature took a small step to try to make a change to the police grievance arbitration procedure with the PAA.¹⁹⁹

B. Other Police Departments Nationwide

Minnesota is not unique in having a problem between police chiefs and the officers in their departments. Nationwide, states and cities are working to try to reduce the disparity between police officers’ offenses and

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* Coon Rapids is a suburb of Minneapolis, Minnesota. Coon Rapids is roughly twenty-five minutes north of Minneapolis. *Distance from Minneapolis, MN to Coon Rapids, MN*, DISTANCE BETWEEN CITIES, <https://www.distance-cities.com/distance-minneapolis-mn-to-coon-rapids-mn> [https://perma.cc/5XQ8-BRPJ].

¹⁹⁶ See *infra* Part IV.A.

¹⁹⁷ See Rushin, *supra* note 137, at 1074 (noting various examples, including those in Memorandum of Understanding Between the City of Fountain Valley and the Fountain Valley Police Officers’ Association 36–37 (2020)), <https://www.fountainvalley.org/DocumentCenter/View/12231/Police-Officers-Association-2020-2021> [https://perma.cc/4HFW-C5NZ]; see also S. 5134, 67th Leg. (Wash. 2021) (aiming to substitute police grievance arbitration for appeals to a civil service commission or administrative law judge).

¹⁹⁸ Veteran arbitrator Laura Cooper, a retired University of Minnesota labor law professor, was cited in a Star Tribune article about the Act. See Bjorhus, *supra* note 189. Cooper said: “I want a system that stops killing people unjustly.” *Id.*

¹⁹⁹ See Police Accountability Act of 2020, H.F. 1, 91st Leg., 2d Spec. Sess. (Minn. 2020).

the discipline imposed.²⁰⁰ Police officers, and other public employees, have the opportunity to grieve discipline and termination.

Across the nation, arbitrators have ordered police departments to rehire officers deemed unfit for duty by their supervisors.²⁰¹ A study completed in 2021, which analyzed 624 police disciplinary appeals litigated between 2006 and 2020 from law enforcement agencies across the country, found that arbitrators on appeal reduced or overturned police discipline in around fifty-two percent of cases.²⁰² On average, arbitrators reduced the length of disciplinary suspensions by approximately forty-nine percent.²⁰³ An article discussing the study considered “how communities should rethink the use of arbitration on appeal in police disciplinary cases.”²⁰⁴

Similar to Minnesota, Oregon’s legislature passed a law that limits arbitrators’ authority.²⁰⁵ The Oregon law “requires all communities to develop disciplinary matrices that establish specified ranges of punishment for different types of misconduct.”²⁰⁶ Although this study merged data from cities across the country, there is a limit to any nationwide study.²⁰⁷ The terms of each individual collective bargaining agreement are different and some collective bargaining agreements make the awards confidential.²⁰⁸ In Minnesota and across the country, police officers deserve adequate due process before serious discipline, but the police departments also have a need to enforce discipline on officers who use excessive force.²⁰⁹ The current approach to police disciplinary appeals is not appropriately balanced

²⁰⁰ See Kallie Cox & William H. Freivogel, *Analysis of Police Misconduct Record Laws in All 50 States*, AP NEWS (May 12, 2021), <https://apnews.com/article/business-laws-police-reform-police-government-and-politics-d1301b789461adc582ac659c3f36c03c> [<https://perma.cc/NBP8-RCFG>].

²⁰¹ Rushin, *supra* note 137, at 1023.

²⁰² *Id.* Rushin’s article conducted an examination of police arbitration across the nation through a dataset of 624 police disciplinary appeals litigated before arbitrators between 2006 and 2020 from a diverse range of law enforcement agencies. *Id.* Specific examples within the article include: Sarasota, Florida, where an officer was “caught on camera allegedly beating a suspect in custody without justification;” San Antonio, Texas, where an officer “repeatedly used an offensive racial slur while arresting a Black man;” Broward County, Florida, where a sheriff’s deputy “allegedly hid during the Marjory Stoneman Douglas High School shooting;” and Washington, D.C., where an officer “allegedly sexually abused a teenager in his squad car.” *Id.* at 1028.

²⁰³ *Id.* at 1061.

²⁰⁴ *Id.* at 1033.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1034.

²⁰⁷ *Id.* at 1050.

²⁰⁸ *Id.* In Minnesota this type of confidentiality provision is opposed by the Minnesota Government Data Practices Act. See MINN. STAT. § 13.43.

²⁰⁹ Rushin, *supra* note 137, at 1073-74.

between the competing values.²¹⁰

The citizens across the nation have been pushing for more police accountability for many years, but 2020 was the year the voices were finally being heard and acknowledged.²¹¹ Gradual movements in the right direction will foster systemic improvement and ensure efficacy in police grievance arbitrations.²¹² The legislative process may not be the best way to make the reforms the communities are hoping for, but it is not a terrible place to start.²¹³

IV. MINNESOTA'S RECENT CHANGES

Following the killing of George Floyd, Minnesota passed legislation attempting to address the previously mentioned problems with police discipline grievance arbitrations. George Floyd, a forty-six-year-old Black man, was killed while being arrested by Minneapolis police officers on May 25, 2020, for allegedly buying cigarettes with a counterfeit twenty-dollar bill.²¹⁴ Mr. Floyd's death was captured on video and sparked protests across the country and the world.²¹⁵ One demand protestors called for was the resignation of Minneapolis Police Federation's president, Bob Kroll. Protestors gathered in June, calling for Kroll to resign because protestors know change starts at the top.²¹⁶

Kroll was responsible for protecting White police officers while Black police officers experienced discrimination, which led to the lawsuit that Chief Arradondo and four other Black police officers brought in 2007.²¹⁷

²¹⁰ *Id.* at 1074.

²¹¹ *See id.*; *see also* Kenny Lo, *Assessing the State of Police Reform*, CTR. AM. PROGRESS (July 16, 2020, 9:00 AM), <https://www.americanprogress.org/issues/criminal-justice/news/2020/07/16/487721/assessing-state-police-reform/> [<https://perma.cc/9XXK-KP2Q>]; George Floyd Justice in Policing Act of 2021, H.R.1280, 117th Cong. (2021-2022).

²¹² *See* Lo, *supra* note 211; George Floyd Justice in Policing Act of 2021, *supra* note 211.

²¹³ *See* Lo, *supra* note 211; George Floyd Justice in Policing Act of 2021, *supra* note 211.

²¹⁴ *How George Floyd Died, and What Happened Next*, *supra* note 3. *The New York Times* combined videos from bystanders and security cameras, reviewed official documents, and reconstructed in detail the minutes leading to Mr. Floyd's death. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/L27N-B88U>].

²¹⁵ *How George Floyd Died, and What Happened Next*, *supra* note 3.

²¹⁶ Brandt Williams, *'Bob Kroll Has Got to Go': Calls Grow for Minneapolis Police Union Leader's Resignation*, MPR NEWS (June 12, 2020, 9:00 AM), <https://www.mprnews.org/story/2020/06/12/calls-for-mpd-union-leaders-resignation-grow-louder> [<https://perma.cc/6TL7-CCLK>].

²¹⁷ *Id.*

Accusations of Kroll's racism predate his election to the union leadership role.²¹⁸ Kroll sent a letter to the Minneapolis Police Federation members (which retired MPD Chief Janeé Harteau posted on Twitter), trying to change the narrative by focusing on Mr. Floyd's "violent criminal history" while describing the protests as a "terrorist movement."²¹⁹ Kroll was clear in his position that the union would fight the termination of the four officers involved in the killing of Mr. Floyd.²²⁰

Police discipline grievance arbitrations fosters unfortunate results.²²¹ Following George Floyd's murder at the hands of a MPD officer, Governor Tim Walz called special sessions of the Minnesota Legislature.²²² As a result, the legislature passed the Minnesota Police Accountability Act ("PAA").²²³

²¹⁸ *Id.*

²¹⁹ Janeé Harteau (@ChiefHarteau), TWITTER (June 1, 2020, 9:19 AM), <https://twitter.com/ChiefHarteau/status/1267460683408564225/photo/1> [<https://perma.cc/C5RS-MK2P>]. Chief Harteau was the fifty-second MPD chief of police; she served as chief from 2012-2017. William Bornhoft, *Minneapolis Police Chief Janeé Harteau Resigns*, PATCH (July 21, 2017, 6:04 PM), <https://patch.com/minnesota/southwestminneapolis/minneapolis-police-chief-janee-harteau-resigns> [<https://perma.cc/VKP3-S6VT>].

²²⁰ Harteau, *supra* note 219.

²²¹ Alan A. Symonette, *Labor Arbitration and Police Discipline: Misperceptions and Reforms*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/events/labor_law/2021/midwinter/adr/materials/labor-arb-and-police-discipline.pdf [<https://perma.cc/LAVS-LD9L>].

²²² TIM WALZ, GOV. OF MINN., PROCLAMATION FOR SPECIAL SESSION 2020 (June 10, 2020), https://mn.gov/governor/assets/06.10.2020%20Special%20Session%20Proclamation%20final_tcm1055-435510.pdf [<https://perma.cc/TUQ5-5UHV>]. Governor Walz convened a total of seven special sessions in 2020. *Special Sessions of the Minnesota State Legislature and the Minnesota Territorial Legislature, 1857-Present*, MINN. LEG. REF. LIB, <https://www.lrl.mn.gov/history/spsess> [<https://perma.cc/23MA-YSRT>]. The first two sessions convened addressed the matter of policing in addition to other topics. *See id.*

²²³ H.F. 1, 91st Leg., 2d Spec. Sess. (Minn. 2020).

A. *Police Accountability Act of 2020*²²⁴

The legislature passed the first version of the PAA on July 23, 2020, in the second special session of 2020, called by Governor Walz.²²⁵ The PAA passed the Minnesota House by a vote of 102–29 and Minnesota Senate by a vote of 60–7.²²⁶ The PAA encompasses a variety of provisions including implementation of stress management teams and public safety peer counseling, a ban on choke holds and certain neck restraints, a reform for the Peace Officer Standards and Training (“POST”) board, and reform to the arbitration process.²²⁷

Section 24 of the PAA added an additional section to the Peace Officer chapter regarding the grievance arbitrator selection procedure.²²⁸ With the additional provision, the arbitrator selection is no longer in the hands of the parties. This additional provision applies to all peace officers for “written disciplinary action, discharge, or termination heard on or after [August 1, 2020].”²²⁹ The PAA established a roster of six persons qualified by training and experience to be arbitrators, specifically for peace officer grievance

²²⁴ *Id.* The PAA includes a variety of measures. Specific measures include: defining “public safety peer counseling” and “critical incident stress management;” establishing a use of force investigation unit within the Bureau of Criminal Apprehension (“BCA”); allowing cities to give peace officer applicants an incentive to be a resident of the city or county; restricting the use of choke holds, tying of limbs, or securing a person in a way that results in transporting the person face down in a vehicle; providing that authority to use deadly force is a critical responsibility that must be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life; limiting the use of deadly force and prohibits use of deadly force against a person based on the danger the person poses to self; requiring the chief to report each incident of use of force resulting in serious bodily injury or death to the BCA; increasing the number of Peace Officer Standard Training (“POST”) board members; prohibiting warrior style training; establishing a council under the POST board whose purpose is to assist the board in maintaining policies regulating peace officers in a manner that ensures the protection of civil and human rights; requires the POST board to develop a “duty to intercede” model policy; requiring the chief officer to report cases involving alleged police misconduct; and expanding peace officer training in cultural diversity, mental illness, crisis intervention, and autism. *See id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ H.F. 1, 91st Leg., 2d Spec. Sess. (Minn. 2020) (codified as amended at MINN. STAT. § 626.892 (2021)).

²²⁹ *Id.* § 24, subdiv. 2 (codified as amended at MINN. STAT. § 626.892, subdiv. 1(d)). It does not apply to any other public employee grievance arbitrations. *See id.*

arbitrations under the section.²³⁰ These rostered arbitrators cannot serve as an arbitrator in labor arbitration other than a grievance arbitration defined in the section.²³¹ The terms for the arbitrators will be three years following the initial appointments with staggering term expirations.²³² The appointed arbitrators will be trained in cultural competency, racism, implicit bias, cultural differences, daily experiences of peace officers (which may include ride-alongs²³³), and exposure to judgments required of officers in the field.²³⁴ The Minnesota BMS Commissioner will assign or appoint either an arbitrator or panel of arbitrators from the roster to a grievance arbitration.²³⁵

Critics have said that the arbitration reform within the PAA did not go far enough to dismantle the immunity culture established within the police force.²³⁶ Some saw the arbitration reform included in the PAA as a disappointment because it did not go far enough.²³⁷ There was a large push for an overhaul of the arbitration system, but that was not the outcome.²³⁸ Many critics claim the legislature should have gone farther to change the arbitration procedures and ensure arbitrators do not end up in a cycle of overturning disciplinary decisions made by chiefs of police.²³⁹ Because arbitrators post their awards on the BMS website, it is almost inevitable that arbitrators and attorneys for both sides use the awards to help make their

²³⁰ *Id.* § 24, subdiv. 4 (codified as amended at MINN. STAT. § 626.892, subdiv. 4).

²³¹ *Id.* (codified as amended at MINN. STAT. § 626.892, subdiv. 4).

²³² *Id.* § 24, subdiv. 6 (codified as amended at MINN. STAT. § 626.892, subdiv. 6).

²³³ Police departments allow community members to accompany a police officer in their squad car for a period of time to experience a patrol officer's daily work. *See Ride Alongs—Experience a Day in the Life of an Officer, Ride-Alongs*, ST. PAUL MINN. (Aug. 2, 2021), <https://www.stpaul.gov/departments/police/administration-office-chief/community-engagement-division/youth-outreach/ride> [<https://perma.cc/Z6Q4-HXQU>].

²³⁴ H.F. 1, 91st Leg., 2d Spec. Sess. § 24, subdiv. 10 (codified as amended at MINN. STAT. § 626.892, subdiv. 4, 10).

²³⁵ *Id.* § 24, subdiv. 11 (codified as amended at MINN. STAT. § 626.892, subdiv. 11).

²³⁶ *See* Hilbert, *supra* note 136, at 226–27. “Governor Walz acknowledged that the law was ‘only the beginning’ and that ‘[t]he work does not end today.’” *Id.*

²³⁷ *See* LEAGUE OF MINN. CITIES, *supra* note 7. Following the passage of the PAA, the League of Minnesota Cities (“League”) sent a letter to legislative leaders who worked on the arbitration reform provision and expressed frustration with the outcome and requested that the legislature continue to work on meaningful reform to the law enforcement arbitration process. *Id.* Specifically, the League asked for a new reasonable standard of review required of the arbitrator in police misconduct cases. *Id.*

²³⁸ *See* The 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?searchResultPosition=1> [<https://perma.cc/V8M6-KB8C>].

²³⁹ *See* LEAGUE OF MINN. CITIES, *supra* note 7, at 270 n.271 (citing resources establishing a common effect when arbitrations are overturned by disciplinary acts made by police chiefs); *see also* Rushin, *supra* note 137, at 1029.

choice for their arbitrator.²⁴⁰ This practice may be reduced with the new roster system added in the PAA because the parties no longer have a role in choosing which arbitrator, or arbitration panel, will be assigned for their arbitration.²⁴¹ Taking away the parties' choice will eliminate parties' ability to strike arbitrators they know will adversely impact their case and establish a separation between the parties and the arbitrator.²⁴² The arbitrator assignment process, specialized training, and term limits will hopefully create a better opportunity for arbitrators to assess all facts and write more consistent awards across the board.²⁴³

A downfall with the new arbitrator roster is the restriction imposed on the arbitrators.²⁴⁴ The statute states any arbitrator serving on the roster may only arbitrate peace officer grievance arbitrations and shall not serve as an arbitrator in any other labor arbitrations.²⁴⁵ This will likely limit the applicants and draw applicants who are not current arbitrators.²⁴⁶ The established arbitrators likely will not want to give up the rest of their arbitration practice to serve on the very specific roster.²⁴⁷ However, having a roster of new arbitrators may not end up being a downfall.²⁴⁸ New arbitrators will run their practice differently than the current arbitrators.²⁴⁹ The new arbitrators will force lawyers on both sides of the table to rework how they prepare and present their side of the matter.²⁵⁰ This will be good for the lawyers because many labor lawyers have been working on these arbitrations for many years and likely ended up in a routine for each arbitration.²⁵¹

²⁴⁰ See Irene Kao, Mike Stockstead, Gregg M. Corwin & Scott M. Lepak, Panel for Minn. State Bar Ass'n: Police Arbitration Reform CLE (Nov. 20, 2020); see also MINN. BUREAU OF MEDIATION SERV., <https://mn.gov/bms/arbitration/awards/> [https://perma.cc/5YCQ-7B34].

²⁴¹ See Kao, et al., *supra* note 240.

²⁴² See Rushin, *supra* note 137, at 1076.

²⁴³ See *id.*

²⁴⁴ See Kao, et al., *supra* note 240.

²⁴⁵ MINN. STAT. § 626.892, subdiv. 4.

²⁴⁶ See Kao, et al., *supra* note 240.

²⁴⁷ See *id.*

²⁴⁸ See *id.*

²⁴⁹ See *id.*

²⁵⁰ See *id.*

²⁵¹ See *id.*

*B. The Minneapolis Police Department Process*²⁵²

MPD's collective bargaining agreement may be slightly different than other departments, but disciplinary appeal procedure provisions are relatively the same. The Police Officers' Federation of Minneapolis labor agreement lays out the steps for the disciplinary appeals and grievance process.²⁵³ The following paragraphs outline the current process for MPD's police officers to appeal disciplinary action against them, which in some cases leads to binding arbitration.²⁵⁴ The procedure may end after any step if the employee is satisfied with the city's response to the appeal.²⁵⁵ "A suspension, written reprimand, transfer, demotion (except during the probationary period) or discharge of an employee who has completed the required probationary period may be appealed through the grievance procedure."²⁵⁶

First, the police officer's union representative initiates the grievance by notifying their commander in writing.²⁵⁷ A discussion with the commander must "take place within twenty-one (21) days after filing the grievance, unless the time is mutually extended."²⁵⁸ After the meeting, the employer must give its decision in writing with supporting reasons to the union, identified as a "Step One Decision."²⁵⁹

Second, the union may file a written appeal if the Step One Decision is not satisfactory.²⁶⁰ Then, the union may expressly request a discussion with the chief of police.²⁶¹ "The Chief may request the Director of Employee Services to serve as a mediator between the Employer and the [Union] in an attempt to resolve the grievance."²⁶² The Director of Employee Services does not have authority to compel either party to make a concession.²⁶³ Within twenty-one days after the Step Two meeting, the employer must

²⁵² THE CITY OF MINNEAPOLIS AND THE POLICE OFFICERS' FEDERATION OF MINNEAPOLIS LABOR AGREEMENT, POLICE UNIT § 11.02, <https://www2.minneapolismn.gov/media/content-assets/www2-documents/departments/wcmosp-200131.pdf> [<https://perma.cc/225B-TBJY>] [hereinafter Agreement].

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *See id.*

²⁵⁶ *Id.* at § 12.02.

²⁵⁷ *Id.* at § 11.02, subdiv. 1.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at § 11.02, subdiv. 2.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

send a written response to the police union.²⁶⁴

Third, within twenty-one days of the Step Two Decision, the police union has “the right to submit the matter to arbitration by informing the Director of Employee Services that the matter is to be arbitrated.”²⁶⁵ A single arbitrator is selected from a panel of mutually agreed upon arbitrators maintained in accordance with the procedure laid out in an attachment.²⁶⁶ Arbitrators are selected from a panel on a rotating basis.²⁶⁷ This section of the agreement will be the most impacted by the PAA.²⁶⁸ The new arbitration roster will make the arbitrator selection language moot.²⁶⁹ Instead of the parties choosing the arbitrator based on the agreed upon procedure, the BMS will notify the parties which arbitrator is next on the list alphabetically.²⁷⁰

The arbitrator shall render a written decision and the reasons, therefore resolving the grievance, and order any appropriate relief within thirty (30) days following the close of the hearing or the submission of briefs by the parties. The decision and award of the arbitrator shall be final and binding upon the City, the [Union] and the employee(s) affected.

The arbitrator shall have no authority to amend, modify, nullify, ignore, add to, or subtract from the provisions of [the] agreement. The arbitrator is also prohibited from making any decision that is contrary to law or to public policy.²⁷¹

In a 2020 arbitration award involving the City of Minneapolis, the arbitrator wrote that in disciplinary matters it is “nearly universal that management first establish that the accused employee is indeed guilty as charged.”²⁷² If that is accomplished, then the employer needs to “demonstrate that the discipline administered was fair and reasonable when

²⁶⁴ *Id.*

²⁶⁵ *Id.* at § 11.02, subdiv. 3.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *See id.*

²⁶⁹ *See id.*

²⁷⁰ *See id.*

²⁷¹ *Id.*

²⁷² *Police Officers’ Fed’n of Minneapolis v. City of Minneapolis*, Minneapolis Minnesota, BUREAU OF MEDIATION SERV.: ARB. AWARDS, 1, 9 (2020) (Fogelberg, Arb.), <https://mn.gov/bms/documents/BMS/243465-Award%20-%20Police%20Officers%20Federation%20of%20Minneapolis%20and%20City%20of%20Minneapolis.pdf> [https://perma.cc/7RWG-835L].

all relevant factors are considered.”²⁷³

After the PAA passed, the MPD labor agreement’s grievance appeal process will likely remain the same. The only change will be the arbitrator who presides over the grievance. The BMS website lists the six arbitrators on the Peace Officer Grievance Arbitration Roster.²⁷⁴ At a continuing legal education (“CLE”) event sponsored by the Minnesota State Bar Association Public Law Section, which was moderated by Irene Kao, two experienced labor lawyers, Scott Lepak and Gregg M. Corwin, discussed the impact of the PAA.²⁷⁵ A key part of the discussion surrounded the limited appointments to the roster. Because the arbitrators are limited in the cases they can hear while they are on the roster, the arbitrators who are currently hearing the grievance arbitrations are not applying to be on the roster, likely because they do not want to give up hearing other matters.²⁷⁶

Two of the six arbitrators currently on the roster have been arbitrators before, while the remaining four have limited to no experience being an arbitrator.²⁷⁷ However, these new arbitrators may benefit the process because the rostered arbitrators likely will not hear the arbitrations in the same way as the pre-PAA arbitrators.²⁷⁸ This change will force the lawyers on both sides of the table to adjust the way they prepare and present their side of the case.²⁷⁹

C. *Alternative Options*

There are three alternative options for police officers to grieve discipline: Veterans Preference,²⁸⁰ civil service commissions, and personnel boards. The Veterans Preference Act governs preference of a veteran under the civil service laws.²⁸¹ Minnesota Statutes section 197 defines a veteran as someone “who has been separated under honorable conditions from any branch of the armed forces of the United States after having served on active duty for 181 consecutive days” or became disabled while serving on active duty.²⁸² If the veteran is outside the probationary period for their position and receives notification of dismissal, the veteran has two options for grieving the dismissal: Veterans Preference or the grievance procedures

²⁷³ *Id.* at 9-10.

²⁷⁴ *Peace Officer Grievance Arbitration Roster*, BUREAU OF MEDIATION SERVS., <https://mn.gov/bms/arbitration/pogarbitration/> [https://perma.cc/4PGH-PGCW].

²⁷⁵ *See* Kao, et al., *supra* note 240.

²⁷⁶ *See id.*

²⁷⁷ *Peace Officer Grievance Arbitration Roster*, *supra* note 274.

²⁷⁸ *See* Kao, et al., *supra* note 240.

²⁷⁹ *See id.*

²⁸⁰ MINN. STAT. § 197.46 (2021).

²⁸¹ MINN. STAT. § 197.455, subdiv. 1 (2021).

²⁸² MINN. STAT. § 197.447 (2021).

included in the collective bargaining agreement, but not both.²⁸³ If a police officer chooses to go through the Veterans Preference grievance procedure, the arbitrator roster does not apply.²⁸⁴ A civil services board or commission, a merit authority, or an arbitrator presides over Veteran Preference Hearings.²⁸⁵

A key difference that would entice an employee to choose the Veterans Preference route rather than the collective bargaining procedure is that the employee would be paid until there is a decision under the Veterans Preference procedure, which is not the case otherwise.²⁸⁶ However, once an employee requests a Veterans Preference hearing, the right to pursue the grievance under the collective bargaining agreement is terminated.²⁸⁷

Other options may be civil service commissions or personnel boards.²⁸⁸ These options are not as appealing because the civil service commissions and personnel boards are typically selected by the city council, which is essentially the same as the employer, so the outcome likely would not be in the employee's favor.²⁸⁹

V. RECOMMENDATIONS

To effectuate meaningful change, the police grievance arbitration system, which is consistently reinstating police officers after termination and reversing discipline imposed by the police chief, should be dismantled and rebuilt because the PAA did not go far enough to achieve the desired result. The PAA made a minor change; it will bring in new people hearing arbitrations and perhaps running the arbitrations differently,²⁹⁰ but the outcomes probably will not be dramatically different. This change looks at the problem backwards. Police officers are licensed, so if an arbitrator reinstates a police officer, but then the police officer has a hearing in front of the POST²⁹¹ board, the police officer can lose their license. If the officer goes in front of the POST board before the grievance arbitration, then reinstatement may not be an option because if the police officer's license is

²⁸³ See MINN. STAT. § 197.46(b); Agreement, *supra* note 252.

²⁸⁴ See LEAGUE OF MINN. CITIES, *supra* note 16.

²⁸⁵ MINN. STAT. § 197.46(c).

²⁸⁶ See *id.*; see also LEAGUE OF MINN. CITIES, VETERANS PREFERENCE IN DISCIPLINE, DISCHARGE OR JOB ELIMINATION 4–5 (2021), <https://www.lmc.org/wp-content/uploads/documents/Veterans-Preference-in-Discipline-Discharge-or-Job-Elimination.pdf> [<https://perma.cc/X3BH-LM3S>].

²⁸⁷ MINN. STAT. § 197.455 subdiv. 1.

²⁸⁸ MINN. STAT. § 197.46; *Peace Officer Grievance Arbitration Roster*, *supra* note 274.

²⁸⁹ See MINN. STAT. § 419.02 (2021) (police civil service commission); see also MINN. STAT. § 375.65 (2021) (personnel board).

²⁹⁰ See *supra* Part IV.A.

²⁹¹ MINN. STAT. § 626.8432 (2021).

revoked by the POST board, the arbitrator may not reinstate the police officer.²⁹²

Consequently, focusing on the police grievance arbitration system is a good place to start because the longer police departments are unable to clean house and start a new culture of community policing, the more innocent Black people will be killed by police officers.²⁹³ The courts have the power to make the changes necessary to the arbitration system through the narrow public policy exception.²⁹⁴ However, they have repeatedly chosen not to use the power to make the change, even when the outcome is contrary to the public outcry.²⁹⁵ The courts cannot be relied on to vacate arbitrator's awards, especially because the public policy exception is so narrow.²⁹⁶ To make the necessary changes to ensure police chiefs have autonomy to run their departments with the culture they want to see, the state legislature must change the statutory guidelines surrounding grievance arbitrations or cities must start to negotiate differently during discussions with unions in the drafting phase.

Changing the provisions to include more specific disciplinary options and definitions of just cause may start to encourage a shift. If the legislature is not prepared or able to convince police unions to get on board with substantive changes to the police grievance arbitration procedures, then cities need to be armed with ammunition to negotiate collective bargaining agreements with the unions. The PAA likely put the foot in the door to change the process but did not do enough to overhaul the procedures as they stand right now.

VI. CONCLUSION

Police discipline grievance arbitrations are not going away because they are statutorily required. A key issue with the police discipline grievance arbitration is the number of police officers reinstated after termination. The reinstatement of a police officer after termination makes a chief of police's job more difficult because they cannot manage the culture of their department. However, because of the statutory nature of these grievance procedures, the changes need to come from the legislature or adjusting the language in the governing collective bargaining agreements. Minnesota's PAA's reform of police discipline grievance arbitrations was an attempt address this issue.

There are two sides to every situation and the passage of the PAA is no different. The PAA's changes are a start to improving policing in

²⁹² See MINN. STAT. § 626.8432.

²⁹³ See *supra* text accompanying notes 184–86.

²⁹⁴ See *supra* Part II.D.

²⁹⁵ See *supra* Part II.E.

²⁹⁶ See *supra* notes 141–42 and accompanying text.

Minnesota and adjusting the police grievance arbitration system to respond to requests for change. Whether the changes went far enough to effectuate change remains unclear. Moving forward, community members should keep this issue on the legislature floor by contacting their representatives and encouraging changes. Additionally, the community needs to continue to be vocal about the change they want to see. Keeping the conversation going will ensure police accountability remains a key topic of discussion on the floor of the legislature.