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### Cover Story: Arbitrations of Philadelphia Police Discipline A Realistic Appraisal

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by Peter F. Vaira and John C. Gregory Jr. *Spring 2002, Vol. 65, No. 1*

The Philadelphia Police arbitration system has been the subject of criticism for nearly ten years. In the 1990s, Mayor Edward G. Rendell created two commissions regarding police administration: a 1992 committee to select a new police commissioner and the 1998 Police Corruption Task Force. Each panel was presented with evidence of a need for change in the police arbitration system, but no substantive changes were made.

The police department's own Office of Integrity and Accountability issued a report on the police disciplinary system in March 2001 (IA Report). More recently, Mayor John F. Street formed a Task Force on Police Discipline, which issued a report in November 2001 (Task Force Report). Both reports suggested substantial changes. The mayor's office has both reports under consideration. So far no changes have been made.

#### The Process

Before discussing problems with the police disciplinary process, it is helpful to briefly describe it. The arbitration procedure is the result of Legislative Act 111 (Act of June 24, 1968, No. 111. P.L. 237, as amended, 43 P.S. §§217.1 - 217.10). The process usually starts with a

complaint reporting an act of misconduct by a police officer, filed by a civilian or a police officer. The Internal Affairs Division (IAD) of the police department investigates the complaint, and if there is evidence to support it, charges are drafted and served upon the officer. There is a hearing on the charges before the Police Board of Inquiry (PBI).

The PBI consists of police officers sitting as a panel with the case presented by a police officer called the police advocate. The charged officer is entitled to counsel, who is retained by the Fraternal Order of Police (FOP) and paid by the legal defense fund provided by the city to the union pursuant to the collective bargaining agreement. (The police department is the only city union that utilizes its legal defense fund to pay for counsel for disciplinary matters.)

The police advocate presents evidence, including the complaining witnesses. The officer's counsel has the opportunity to cross-examine the witnesses and present evidence on the officer's behalf. If the panel finds the charges are proved, it issues findings and recommends a punishment to the commissioner. Thereafter, the commissioner is free to accept or reject the findings and punishment and impose his own. In either case, the officer may file a grievance of the punishment. In the process that follows, the police department and the officer's representative may negotiate the findings and discipline before the case reaches the arbitration stage and, if they agree, settle the case. The negotiation process is seldom used, and the cases proceed in the arbitration process.

The grievance case is then listed for arbitration before a neutral civilian arbitrator selected by both sides from an American Arbitration Association list. The police department is represented by assistant city solicitors, and on certain occasions by private outside counsel. An attorney furnished by the FOP represents the officer.

The arbitration hearing on a grievance is intended to determine, based upon the record of proceedings, whether there was just cause for punishment. Just cause is defined as that proof which a reasonable man would find as sufficient justification to warrant a discharge of the officer or to award other penalties, *RCA Communications*, 29 L.A. 567-571 (1957); and the award of penalties which a reasonable man would not find arbitrary or disproportionate to the offense, *Iowa Beef Packers, Inc.*, 66-2 ARB p. 8527 (1966).

However, in most instances the case is heard de novo, including presentation of evidence heard previously by the PBI. The arbitrator is free to make new findings regarding the facts, reject the punishment and assess a different punishment, even if the facts as charged have been proven, on the grounds that the original punishment was arbitrary.

### **Lacking Efficiency**

The Task Force Report states that nearly fifty percent of the disciplinary measures issued by the police commissioner are modified in some manner. Fraternal Order of Police attorneys

estimate the percentage is much higher. The IA Report states that in the cases it reviewed at least thirty-eight percent of the officers dismissed were returned to duty by the arbitrators.

And the disciplinary process is not efficient. The Task Force Report states that the total time from initial complaint to arbitration decision averages 519 days, and it can take as long as three years.

For purposes of this article, the authors conducted interviews with police officials, attorneys for the police department and the FOP, and the city solicitor to determine what problems exist, and to suggest what changes can be made in the real world of politics and government.

### **Military Discipline v. Union Contract Rights**

One of the basic problems with the disciplinary procedure stems from an ideological position of the police department. As a paramilitary organization, the police department depends upon adherence to command and the power to punish violators of its regulations. The military services of the United States operate on the same principle.

The Philadelphia Police Department is essentially a labor force subject to a collective bargaining agreement with a union, the FOP. Unlike the military, however, the command relationship in the Philadelphia Police Department is subject to a collective bargaining agreement that gives police officers rights and protections similar to civilian workers. A military commander can mete out final "non-judicial" punishment for minor infractions, with more serious charges referred to a court-martial, whose findings and punishment are reviewed within the military system. In contrast, the police commissioner's disciplinary actions can be modified, if not completely set aside, by a civilian arbitrator. The police department has been unable to come to grips with the differences in the systems. The police department fears that negotiating a punishment is inherently contrary to good order and discipline. For example, former Commissioner John Timoney believed as a matter of principle that when he imposed a ten-day suspension, it was meant to send a message, and he felt that reducing it to a five-day suspension diminished that message.

An additional problem with this labor-management relationship is that the entire police department belongs to the same labor union. The sergeants, lieutenants, captains, and inspectors-generally regarded as management-are in the same union as the rank and file, who generally would otherwise be regarded as the labor force in a pure civilian setting. Thus, the managers are disciplining their fellow union members.

The police union is even further distinguished from other city unions to the extent that police officers are the only city employees who are subject to disciplinary action for off-duty conduct, according to Tom Jennings, counsel for the FOP. Jennings argues that such high

scrutiny of police personnel should comparably afford a higher degree of procedural due process.

Although there must be a strong command structure, there must be a realistic appraisal of how that command structure can co-exist with the labor union and still function. That has not occurred, and until it does, the very first step of the process will remain flawed.

The second phase of the operation is equally flawed. The investigation and charging process is not efficient and, in the past, often has not reflected the conduct under investigation. The FOP contends a great many of the disciplinary cases are mischarged or overcharged by layering charge upon charge. The police have attempted to change this practice, but the results do not reflect it. The arbitrators tend to construe the charges narrowly. And if misconduct is not correctly alleged, the arbitrator will dismiss the charges, even though the facts clearly indicate the officer committed an act warranting discipline. This has been a common occurrence in the past.

### **PBI Findings Ignored**

The PBI hearing has been the subject of criticism by the lawyers on both sides. The FOP attorneys contend the PBI has no independence—that it is simply a tool of the commissioner—and as a result has no credibility. The assistant city solicitors handling the arbitrations state that the arbitrators generally ignore the findings of the PBI. The record of proceedings of the PBI hearings are incomplete or in some cases, nonexistent. In general, the police rank and file believe that they do not get their day in court in the PBI hearing. Both the Task Force Report and the IA Report are critical of the PBI process.

In contrast, a military court-martial is a court of record with a full hearing and the power to make findings and assess punishment. Upon review, the commanding general officer can only approve or reduce the punishment. The PBI is more akin to an informal board of inquiry whose only function is to make findings and recommendations that the commissioner is free to accept or reject. He may increase the punishment as well as reduce it.

### **Negotiation Opportunity Lost**

Following the disciplinary action by the commissioner, the collective bargaining agreement provides for an opportunity for the FOP and the police department to negotiate the findings or the punishment. This should be an opportunity to weed out the problem cases or deal with other difficulties so that some cases may be concluded short of arbitration. This process seldom occurs in disciplinary matters.

FOP President Richard Costello believes that both sides miss this opportunity to negotiate realistic results. Under Police Commissioner Timoney, the police department supported the commissioner's decision regarding punishment, believing his decision should be final. There

was no need to negotiate it. Realistically, this process provides the opportunity to deal with the problems of proof such as locating civilian witnesses, and to permit some quantum of discipline to be noted in the officer's file, which might be otherwise lost if the case were to proceed to arbitration.

Failure to withdraw grievances in a timely fashion creates a noticeable burden on the system. The FOP supports a large number of grievances. According to the Task Force Report, the FOP exercises its discretion to withdraw the grievance about a quarter of the time; however this is done very late in the process. By that time the assistant city solicitor representing the police department has prepared the case, interviewed witnesses and spent time that could have been spent on cases actually going to arbitration. The police department ascribes this delay to be a deliberate tactic on the part of the FOP. There is no overwhelming evidence that it is; nonetheless, the delay wastes valuable time and effort, and it affects the system.

Because the arbitration process has developed into a full factual presentation, both parties are required to find witnesses and relevant documents, even though the matter was heard previously by the PBI. This requires full preparation and adds a greater burden on an understaffed city solicitor's unit that handles the arbitrations. As a consequence, there are many requests for postponement. A third of the arbitrations are continued, and delays cause obvious problems in presenting cases. Often, civilian witnesses who have testified previously cannot be found or refuse to appear. Police witnesses may be required to be in court. Witness memories are affected. Documents cannot be located. The process suffers.

In the vast majority of the cases, the police department is represented at the arbitration hearings by the City Solicitor's Office. Technically, the assistant city solicitors have an attorney-client relationship with the police department, meaning that the lawyers should be able to advise the police of the weakness or strength of the cases and suggest ones in which a compromise should be made. In reality, very rarely do the lawyers proceed over the objection of the police. Because of the paramilitary attitude that the commissioner's decision should be final and is meant to convey a message, the police tend to take a less than practical view of the cases and prefer to take them to arbitration. The result is often reduced punishment or outright dismissal. Until the city solicitor has a realistic working attorney-client relationship with the police, this practice is likely to continue.

### **The Arbitrations**

Arbitration hearings are intended to be informal proceedings with the rules of evidence relaxed. In traditional labor arbitrations, the arbitrator usually accepts reliable hearsay in the form of prior transcribed testimony, reports, written statements or secondhand witness testimony. By contrast, arbitrators in police disciplinary hearings are generally very strict on the admission of hearsay and narrowly construe the charges. They rarely accept police reports. The PBI hearing has such a bad reputation and the record of the hearing often is so

sparse or nonexistent that findings from the PBI hearing are given little or no weight. The assistant city solicitors often cannot locate the complaining civilian witnesses or the witnesses refuse to testify for personal reasons. The assistant city solicitors are required to present a formal case as if they were in state or federal court.

Although there is a disciplinary code with offense-specific penalties, the punishment in many cases is modified by the arbitrators because it appears to be arbitrary, i.e., inconsistent with prior punishment for the same offense. Moreover, in dismissal cases, the officer has been off the force for one or two years without pay by the time of the arbitration hearing. The arbitrators, borrowing from their experience in the civilian arena, may conclude that an unpaid absence for two years is the equivalent to a twenty to thirty thousand dollar fine, already a very significant penalty. In such instances, the arbitrator may reinstate the officer, giving little weight to the police argument that such reinstatements adversely affect good order and discipline.

### **Progressive Discipline**

There is little use of progressive discipline. Progressive discipline is the process of formally inserting in an officer's file notations or infractions that did not result in formal discipline but when examined as a whole, demonstrate the officer's record of conduct. Assistant city solicitors and outside attorneys involved in the disciplinary process state that arbitrators would more likely uphold a dismissal of an officer if there is a record of progressive discipline in his file. This requires applying proportionate discipline over time.

A step toward progressive discipline was made in 1999 when the police department instituted a procedure called Command Level Discipline. This permits a commander to impose direct discipline upon an officer in which the total penalty per offense cannot exceed a five-day suspension. Under this policy, the officer is given the option of pleading guilty in return for a predetermined penalty and waiver of right to arbitration. This provides for a record of punishment and cuts down the PBI caseload.

### **Limited Appeal From Arbitration**

Many of the reported arbitrator decisions that appear to be contrary to the facts are really the result of a combination of factors described above. Nonetheless, there continue to be some aberrant arbitration decisions seemingly without rational basis. Examples of such decisions, as listed in the Task Force Report and IA Report, are as follows:

- An officer was arrested for selling illegal switchblades to an undercover state police trooper. Pursuant to an agreement with the district attorney, he agreed to be placed in the Accelerated Rehabilitative Development program. The police department dismissed him from the force. The arbitrator changed the dismissal to a thirty-day suspension and returned him to duty. (Task Force Report)

- An off-duty officer who was involved in a multi-car collision was found under the influence of alcohol and cocaine. There was extensive damage to his car and the cars of two civilians. After he was dismissed from the force, he was returned to duty by the arbitrator. (IA Report)
- An arbitrator reinstated an officer who, while off duty, was involved in a multi-car crash while driving intoxicated. He fled the scene and attempted to cover up the crime by falsifying police reports claiming his car had been stolen. The officer later was dismissed again for alcohol-related conduct, but was again reinstated by an arbitrator. (IA Report) In these instances, there is no realistic appeal to the court system.

In the case of *City of Philadelphia v. FOP Lodge 5 (Betancourt)*, 656 A.2d, 83 (PA. 1995), the Pennsylvania Supreme Court held that courts have a very limited review of police and firefighter disciplinary arbitrations, what the court calls "narrow certiorari." The review is limited to the jurisdiction of the arbitrator, the regularity of the proceeding, the excess of the arbitrator's powers, and the deprivation of constitutional rights. All this is based on the theory that judicial intervention could cause a breakdown in labor-management relations, which would jeopardize public safety. As a practical matter, there are virtually no grounds to appeal an arbitrator's decision, even if the arbitrator made an error of law. This is in contrast to the standard of review ordinarily employed for arbitrations of other public employees, called the "essence test," which permits the courts to determine whether the arbitrator went beyond the essence of the collective bargaining agreement.

### **Recommendations for Change**

Many aspects of the police discipline process are subject to the collective bargaining agreement, and changes only will occur as a result of give and take at the bargaining table. However, some beneficial changes may be made unilaterally by the police department.

Changes in Act 111 can only occur if the FOP, City and the Legislature voluntarily agree to a change in the Act, or if public opinion so strongly favors change that the City petitions the Legislature to amend Act 111. The legislators must then agree to do so, without concern about the loss of political support from the FOP.

Keeping in mind the current political and governmental climate, the following recommendations are offered as realistic possibilities:

- A formal system of progressive discipline should be instituted. The Command Level Discipline concept is a good start.
- The investigation and charging process should reflect the officers' conduct under scrutiny. The PBI hearing should be similar to a military court-martial, with formal charges, a credible random selection of panel members, a professionally trained prosecution staff, and a certified record of the proceeding that can be accepted by an arbitrator. The

testimony of key witnesses, especially civilian witnesses, should be videotaped. As the officer or his counsel has the right to cross-examine the witness, that videotaped transcript should be accepted by arbitrators in the event that the witness is unavailable for the arbitration hearing.

- A realistic and more restrictive schedule of punishments than is in existence at the present time should be adopted. By following express, codified guidelines, the PBI and the commissioner would be permitted to impose punishment only within the narrow confines of the schedule, and depart from the schedule only on a good showing of aggravated circumstances. This would tend to eliminate arbitrary punishment as a ground for grievance.
- The commissioner's discretionary power should be used only to approve or reduce the penalty assessed by the PBI. This would give the PBI decisions a greater degree of finality.
- The police department should actively engage in a realistic negotiation of the results of the PBI punishment if a grievance is filed. If the PBI has credibility and finality, this may not be necessary to the extent it is now. In any event, realistic negotiation would reduce the caseload.
- The FOP should more frequently exercise its discretion to withdraw a grievance in reasonable time. If the police department makes the above changes, the FOP should respond accordingly.
- More assistant city solicitors should be assigned to handle the police disciplinary arbitrations.
- The assistant city solicitors should have a more realistic attorney-client relationship with the command of the police department to enable both parties to recognize when a case should be compromised.
- An effort should be made to make the arbitration hearing what it was intended to be: a hearing on the record instead of a full hearing de novo. A labor arbitration is not intended to be a court trial. The object is to have the arbitrator determine if there is just cause to penalize the officer based upon the record. Currently, there is no credible record emerging from the PBI process. The arbitrator should be presented with a full transcript of the PBI hearing and possibly even videotaped testimony from key witnesses.
- Actively pursue legislative reform that permits the courts to apply the "essence test" of review as is now employed in arbitrations for civilian city workers. At least two justices of the Supreme Court of Pennsylvania have criticized the present standard of review as being too restrictive. The Pennsylvania League of Cities and Municipalities and the Pennsylvania State Association of Township Commissioners advocate a change in the present standard.

- Actively pursue moving police supervisors into a separate bargaining unit.

### **An Effort to Change**

All parties to this process agree that it is flawed and in need of change. However, alterations to this procedure must come from people who are operating in the practical world of Philadelphia and Pennsylvania government. A transformation won't happen overnight, but must come from a concerted effort over time. An opportunity for change may be presenting itself now, as the City and the FOP negotiate the police contract with the FOP. The contract is expected to be finalized in June.

If the system does not change, and a proper and fair procedure for discipline is not adopted, the police department's ability to operate as a professional entity will greatly diminish. Quality men and women may choose other careers, and law enforcement and public safety will suffer.

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