REFORMING POLICE UNION CONTRACTS AND LAW ENFORCEMENT OFFICER BILLS OF RIGHTS

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EXECUTIVE SUMMARY

In October of 2018, an arbitrator ordered Florida’s Opa-locka Police Department to rehire Sergeant German Bosque. This was the sixth time that the city had attempted to fire Sergeant Bosque, and the sixth time an arbitrator ordered the city to rehire Bosque on appeal. There were good reasons to fire Bosque. Over the years, Opa-locka’s internal affairs office had investigated Bosque 40 times, including 16 times for battery as well as accusations of using excessive force, stealing from suspects, misusing firearms, defying direct orders, and lying and falsifying police reports. In 2012, he engaged in an unauthorized police chase that left four civilians dead. The department alleged that, while off duty, Bosque engaged in domestic violence and stalking. And at one point, the department discovered “a baggie of cocaine, a crack pipe, an empty vodka bottle, a counterfeit $20 bill and a stash of confiscated driver’s licenses in Bosque’s squad car.” Yet somehow, through all of this, Sergeant Bosque not only stayed out of jail, but also kept his job.

How could an officer who engaged in such a pattern of serious wrongdoing stay on the force? The answer, according to the South Florida Sun Sentinel, was that despite his dubious distinction of having the most disciplinary actions in the State of Florida, Bosque’s “police union has always provided Bosque lawyers with formidable expertise in exploiting arbitration clauses written into union contracts.” Put simply, Bosque was protected from even the most basic accountability for his wrongdoing, in part, by the terms of his collective bargaining agreement, which allowed him to challenge his terminations in arbitration. As numerous media reports and some scholarly examinations have shown, arbitration procedures are common in police union contracts and frequently result in reductions or reversals of terminations. Contracts commonly give third-party arbitrators expansive authority to conduct new hearings to re-evaluate the facts of the case against the officer; the proportionality of the punishment, and the sufficiency of the procedural protections the officer received pre-termination.

Bosque and officers like him are able to evade accountability because of contract provisions police unions negotiate with communities, contracts that can make it unreasonably difficult to discipline officers. These arbitration clauses are just one of many ways that collective bargaining agreements can impact police accountability efforts.

Police unions (like any union) serve an important role in negotiating fair wages and benefits for their members. But too often—as civil rights activists, scholars, and the press have shown—police embed disciplinary procedures in collective bargaining agreements that impede community oversight as well as internal agency reform. In some places, police unions have effectively leveraged their political power to obtain unreasonable protections from accountability, including guaranteed delays and access to evidence before interrogations related to misconduct, limits on civilian oversight authority, and the destruction of disciplinary records. Police unions have also used their political power to lobby for so-called “law enforcement officer bills of rights” (LEOBR) in at least twenty states, which impose some of these same restrictions on police accountability statewide.
In light of emerging evidence, states and localities should consider three possible reforms. First, where permissible, communities should increase transparency in police union contract negotiations. This would discourage communities from caving in to police unions behind closed doors. And it would encourage elected local officials to take police union contracts seriously, rather than allowing unions to dictate so much of what constitutes public safety. Second, states should consider legislatively removing disciplinary procedures from the list of topics appropriate for collective bargaining. Third, states should repeal or roll back some of the unreasonably restrictive portions of their law enforcement officer bills of rights that stand in the way of reform. All of these measures could provide an important check on the power of police unions and force officers to be more accountable to the communities that they serve.

BACKGROUND

Around two-thirds of American police officers are part of police unions. Even as some states like Wisconsin have chipped away at the power of other public sector unions, police unions have remained strong. States generally give these unions the power to collectively bargain about salaries, wages, benefits, and other terms and conditions of employment.

While some states, like Georgia, North Carolina, South Carolina, and Virginia, statutorily prohibit police officers from collective bargaining, in most states, police officers have the ability to negotiate matters affecting wages, hours, and terms and conditions of employment. This has often been interpreted to give police unions the right to negotiate not just salaries and benefits, but also the terms of internal disciplinary procedures. Thus, in many states, city leaders negotiate with police unions about salaries and benefits alongside disciplinary procedures behind closed doors, outside the view of the public. On one side of the negotiating table is a team representing the municipality, typically a chief negotiator from the city, a budget or finance director, legal counsel from the city, a representative of human resources, and the police chief or some other representative of police supervisors. On the other side of the table is a team from the police union, often including a union negotiator, a union representative, and in some instances, a group of rank-and-file officers.

Through this bargaining process, the two sides will often reach a compromise. Where police unions are able to negotiate disciplinary concessions alongside wages and salaries, trade-offs happen. A city that cannot meet the financial demands of the politically powerful union—a union that, in some case, may have played a pivotal role in helping the current mayor win elected office—may feel significant pressure to offer disciplinary concessions instead. Reporters have documented such trade-offs happening in major American cities like Chicago and San Antonio. Unfortunately, given the political power of police unions and the secrecy of the negotiation process, the results can often look more like a “division of the spoils” than a good-faith negotiation.

Numerous civil rights leaders, media outlets, and academics have expressed concern over the ways that disciplinary procedures established via the collective bargaining process may impede accountability. Campaign Zero conducted a detailed analysis of 81 of the largest unionized municipal police departments in 2016, finding that most of these agencies, in their judgment, gave officers unreasonable protections. Similarly, Reuters conducted an independent examination of 82 of the largest jurisdictions in 2017, reaching similar conclusions. A number of academic studies have built on these findings by
examining hundreds of labor agreements and law enforcement officer bills of rights, generally concluding that they unreasonably impede internal investigations.

Although some provisions fall into a gray area between reasonable due process protections and unreasonable barriers to accountability, many scholars and civil rights advocates agree on at least three principal recurring provisions in police contracts and law enforcement officer bills of rights that impede accountability and reform.

First, many contracts and law enforcement officer bills of rights unreasonably—and hypocritically—limit the ability of investigators to question officers after allegations of misconduct. Some give officers a rigid waiting period before interrogations, or as one group of scholars referred to it, an “interrogation buffer,” that far exceeds anything civilians receive. As another group of scholars bluntly put it, these rigid waiting periods are “intolerable,” as they prevent investigators from getting to the truth and allow officers to coordinate stories to deflect blame. One examination of 657 jurisdictions found that nearly 1 in 5 police departments guarantee officers such rigid waiting periods, with a median time of 48 hours. Moreover, that same examination found that over 1 in 4 agencies provide officers with access to information being used against them before they are questioned, including copies of the complaint, witness statements, GPS evidence, video evidence, and audio evidence.

Second, contracts and law enforcement officer bills of rights protect officers by limiting access to disciplinary records. Many agreements require police departments to remove evidence of prior wrongdoing from an officer’s personnel file after a set length of time. Others prevent departments from using evidence of prior wrongdoing in making future decisions about an officer’s fitness to serve. This can impede the use of computerized warning systems and further limit the ability of supervisors to engage in progressive discipline. It can also threaten the constitutional rights of people charged with crimes, who are entitled to know if an officer testifying against them has a record of dishonesty or other misconduct that might undermine their testimony. If records are removed or destroyed, they cannot be turned over as the law requires.

Third, police union contracts commonly provide officers with extensive procedures to appeal discipline, often ending in binding arbitration before an arbitrator selected in part by the police union. Communities also frequently give these arbitrators expansive authority to re-review all determinations made by the department in issuing discipline. And this arbitration process yields a substantial number of disciplinary sentences against officers reversed or reduced, often resulting in a department being forced to rehire officers deemed unfit for duty.

Other common and potentially objectionable provisions include bars on the investigation of anonymous complaints, limitations on the use of civilian oversight, and statutes of limitations on complaints.

The consequences of these contracts can be serious. A study by Dhammika Dharmapala, Richard H. McAdams, and John Rappaport found that the introduction of collective bargaining to sheriff’s departments in Florida was associated with an increase in violent incidents of misconduct among sheriff’s deputies relative to other police departments. This is roughly consistent with new research from Rob Gillezeau, co-founder of the Racial Uprisings Lab, who collected historical data that specifically linked states that allowed collective bargaining by police unions with an increase in civilians killed by police. Work by Ayesha Hardaway Bell and others
has found that these provisions also impede U.S. Department of Justice consent decree efforts—federal court-approved agreements between the DOJ and jurisdictions—to reform local police departments. And other ongoing research has claimed to even find a correlation between police union contract provisions and rates of police violence.

REFORM COLLECTIVE BARGAINING FOR POLICE UNIONS

First, communities should consider increasing the transparency of police collective bargaining negotiations, which is the place where contracts between police and communities are debated. Where permitted by state law, local governments should welcome community involvement in crafting the terms of these agreements, rather than negotiating them behind closed doors. There have been a few successful moments where communities and local activists were able to become more involved in police contracts negotiations. In 2019, activists, along with Chief Defender Keir Bradford-Grey and District Attorney Larry Krasner, urged the Philadelphia mayor to use the police contract negotiation process as a way to reform the department and instill more accountability. (The police union contract was extended by a year and will face renegotiation in 2020.) And in Austin, grassroots advocates worked for 18 months to urge the City Council to use the contract negotiation process to create real reform as well as a civilian oversight office.

Second, states can legislatively remove discipline from the list of topics that can be negotiated in police contracts. The D.C. Council recently voted to do just this in June, when it amended their local ordinance on collective bargaining to clarify that, “the discipline of sworn law enforcement officers shall be retained by management,” rather than handled through the collective bargaining process. Such changes to collective bargaining statutes may be effective at reducing barriers to accountability. Notable labor law experts like Benjamin Sachs have endorsed similar amendments to state law. Emerging evidence suggests that when communities develop internal disciplinary procedures outside the scope of the collective bargaining process, they are less likely to give officers rigid waiting periods, erase misconduct records, limit civilian oversight, or disqualify civilian complaints.

Third, states with law enforcement officer bills of rights should roll back the components that exceed reasonable due process. State leaders should carefully re-examine state laws that insulate officers from normal interrogation procedures, bar the investigation of certain types of complaints, strip disciplinary histories from officers’ personnel files, or unreasonably limit civilian oversight of police departments.

Admittedly, this kind of change won’t be easy. Police unions have been known to seek political action against local leaders, like mayors, city council members, and prosecutors, who oppose their agenda. Last year in Los Angeles, the police union contributed $1 million to a political PAC that was campaigning against the pro-reform District Attorney candidate, George Gascon. Similarly, in San Francisco, the local police union spent $700,000 against the pro-reform District Attorney candidate, Chesa Boudin. When two Santa Ana city council members voted against a pay raise for police, the local police union spent $220,000 on efforts to recall one of them. In advance of union contract negotiations with Memphis in 2017, the local police union took out billboards advertising the homicide.

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rate in hopes of pressuring the city council to increase benefits. And when state legislators have attempted to alter law enforcement officer bills of rights, they have faced stiff and organized opposition from police unions.

Elected officials can facilitate change by taking police union contract negotiations seriously. Failure to do so can create preventable unreasonable hurdles to holding officers accountable and restrict the ability of police chiefs, civilian review boards, and city leaders to reform departments.