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Collective Bargaining Agreements and Police Accountability: Stopping the Problem Before It Begins

Summary

7/23/2020 -- The killing of George Floyd at a police officer's hands as other officers watched was appalling. Throughout the world, people saw an American officer of the law pinning Floyd to the ground with a knee on his neck, as a human being begged to be allowed to breath.

The resultant firestorm began a nationwide march towards policing reform – but one reform has too often been ignored. Provisions of union contracts negotiated as part of collective bargaining between police unions and local governments frequently provide strong barriers to investigating, disciplining or firing officers for misconduct. This protection of "bad cops" has exacerbated tensions between good police officers and the communities they serve.

Virginia has no recent experience with Collective Bargaining Agreements (CBAs) because of a law prohibiting their use passed in 1993. However, starting in May 2021, local governments and police unions may negotiate collective bargaining agreements that can include precisely the provisions protecting police misconduct of the kind that has led to the deaths of numerous Black Americans.

Virginia should limit the scope of collective bargaining agreements to compensation and benefits and stop the problem of limits on police accountability from police union contracts before it begins.

Background

In 1993, Governor Douglas L. Wilder signed into law a bill banning collective bargaining by government employees in Virginia. The legislation enjoyed overwhelming bipartisan support passing 78-21 in a Democratic-majority House of Delegates, and 36-3 in a Democratic-run Senate. Only 20 House Democrats and one House Republican opposed the bill; in the Senate, only two Democrats and one Republican did so.

The legislation prohibited the state or localities from entering into any collective bargaining agreement with any union or employee association.

The 2020 General Assembly session overturned the collective bargaining ban. Local governments will now be able to collectively bargain with employees, and a majority of employees will be able to demand the right to do so. The bill applies to police, fire, school employees and the office workers of counties, cities, and other municipalities, although

collective bargaining by state government or employees of local treasurers, sheriffs, Commonwealth's Attorneys, clerks of court or commissioners of revenue would be prohibited.

The legislation passed on partisan votes, 21-19 in the Democrat-controlled Senate and 54-46 in the Democrat-controlled House of Delegates. It takes effect in May of 2021.

Impact of Collective Bargaining on Accountability

The purpose of public employee unions is to defend their members. Not just members who do their job well; not just members remaining on the right side of civil behavior and the law: *All* members.

They advocate raising salaries, improving benefits, and protecting the jobs of their members. That is what a union does, and it is what union members pay dues for.

Major problems, however, start when local cities or school systems engage in collective bargaining and accountability measures become part of the negotiations. When that happens, provisions are frequently written into the Collective Bargaining Agreement (CBA) protecting bad actors in the government employee community.

For years, the best-known cases were provisions in public education protecting teachers that the system could not fire because of collective bargaining agreements. For example, in New York City bad or dangerous teachers were sent to what was termed "the rubber room," paying them up to $150 million to be warehoused away from children. A 2010 agreement between the teachers' union and the city ended the practice of creating large rooms filled with reassigned teachers; instead, teachers are typically reassigned within their own schools, or to other Department of Education buildings throughout the city. Those teachers were deemed to be in the "Absent Teacher Reserve."

In practice, though, it remains the same: In 2017, The New York Times noted, "Of the 822 teachers in the reserve at the end of the last school year, 25 percent had also been in it five years earlier. Nearly half had been in it at the end of the 2014-15 school year. Close to a third of the teachers in the pool were there because they had faced legal or disciplinary charges."

The issue of discipline and accountability becomes even more significant – and dangerous – for the public when it involves policing.

A review of police contracts in 81 of the nation's largest cities demonstrates a number of ways accountability over police actions is thwarted –

- 50 cities restrict interrogations by limiting how long an officer can be interrogated, who can interrogate them, the types of questions that can be asked, and when an interrogation can take place – sometimes delaying interrogations for up to 30 days.
- 41 cities give officers under investigation access to information that civilian suspects do not get.
- 64 cities limit disciplinary consequences for officers, including preventing an officer's history of past misconduct from being considered in future cases.
- 43 cities erase records of misconduct, in some cases in as little time as six months.

Perhaps worst of all, 48 cities let officers appeal disciplinary decisions to an arbitrator who can reinstate that officer. This has led to cases like that of Chicago police officer Jason Van Dyke, who in 2014 killed 17-year-old Laquan McDonald by shooting him in the back as he was walking away. At the time, Van Dyke had been the subject of 20 complaints, ten of which alleged excessive use of force.

Another example is Oakland, California officer Hector Jimenez, who killed an unarmed man, shooting him three times in the back as he ran away – just seven months after Jimenez had shot and killed an unarmed 20-year-old. Despite killing two unarmed men and costing taxpayers $650,000 in a settlement to one of the dead men's family, he was reinstated and given back pay.

Most will surely remember Sgt. Brian Miller, a sheriff's deputy who, as a gunman murdered 17 students inside Marjory Stoneman Douglas High School, hid behind his police cruiser and waited 10 minutes before radioing for help. Fired for "neglect of duty" he was reinstated last month with full back pay – estimated at more than $138,000.

The problem is more than anecdotal.

A 2018 University of Florida study updated last year examined the "before" and "after" effects of a 2003 Florida Supreme Court decision conferring collective bargaining rights on sheriffs' deputies. It concluded that "collective bargaining rights led to a substantial increase in violent incidents of misconduct among Sheriffs' offices." Those results were echoed by a 2018 University of Chicago paper demonstrating that violent misconduct increased by 40 percent after the Supreme Court decision.

A forthcoming research study out of the University of Victoria's economics department looked at the roll-out of collective bargaining rights for police at the state level over 30 years, and found the introduction of access to collective bargaining results in "a substantial increase in police killings of civilians over the medium to long run … of whom the overwhelming majority are non-white."

And a 2017 Duke Law Journal article examined 178 union contracts, showing how "these agreements can frustrate police accountability efforts" by "limiting officer interrogations after alleged misconduct, mandating the destruction of disciplinary records, indemnifying officers in the event of civil suits and limiting the length of internal investigations.

A 2018 University of Pennsylvania Law Review article examined more than 600 police union contracts and found that "The median police department in the data set offers police officers as many as four layers of appellate review in disciplinary cases," with most also offering appeal to an arbitrator often selected partially by the accused officer.

Tying the Chief's Hands

Like any leader, the local police chief has primary responsibility to have a well-trained and accountable police force. But these provisions have the effect of tying a police chief's hands. Example after example highlight police officers that chiefs of police attempted to remove from contact with the public but who returned because police union contracts prevented, circumvented, or overturned the chief's decision.

In a 2017 investigatory report, *The Washington Post* reported that "since 2006, the nation's largest police departments have fired at least 1,881 officers for misconduct that betrayed the public's trust, from cheating on overtime to unjustified shootings. But *The Washington Post* has found that departments have been forced to reinstate more than 450 officers after appeals required by union contracts."

Of the reinstated officers 151 had been fired for conduct unbecoming; 88 had been terminated for dishonesty; and at least 33 had been charged with crimes, with 17 convicted. Eight were fired and rehired more than once. Information on the remainder was not available.

Among the examples –

In Florida, police were ordered to reinstate an officer fired for fatally shooting an unarmed man. In the nation's capital, police were told to rehire an officer who allegedly forged prosecutors' signatures on court documents. In Philadelphia, police were required to reinstate an officer despite video of him striking a woman in the face. In Washington, DC, an officer convicted of sexually abusing a young woman in his patrol car was ordered returned to the force in 2015.

Former Miami Beach, FL and Aurora, CO police chief Daniel Oates notes, "As I saw in Florida, an officer accused of wrongdoing is interviewed only at the end of the investigation. State law guarantees him, and his lawyer, an opportunity to review every bit of evidence – every witness statement, any video, all the physical evidence – before he talks to internal affairs. This enables the officer to cast his actions in the best possible light – even to lie about what happened, once he knows the evidence will not disprove the lie. In subsequent arbitration, this becomes a critical tactical advantage.

While the laws did not make such guarantees in Colorado, it was still difficult to remove police officers for misconduct there: "In nearly nine years as chief in Aurora, I had 16 cops out of 650 whom I felt should be fired. Four I actually did fire. The Civil Service Commission promptly reversed me on three of them. So, with the other 12 cops, I bent over backward to negotiate their departures with creative severance packages. I succeeded in getting them out – with deals that protected the city from litigation – but those agreements also allowed the cops to get jobs elsewhere if they could."

Oates' conclusions is echoed by San Antonio, Texas Police Chief William McManus who, after George Floyd's death called for an end to collective bargaining agreements. "Collective bargaining agreements and state laws actually protect the bad officers," says McManus. He noted that current contract in San Antonio allows a terminated police officer to ask for a hearing with a third-party arbitrator, and consequences for misconduct are not certain or final it creates problems. "When that doesn't happen, we are stuck with bad police officers," said McManus.

In Virginia, Still Time to Stop the Problem Before It Begins

Virginia's collective bargaining law does not take effect until May of 2021. Before then, the General Assembly and Governor Northam should limit Collective Bargaining Agreements for police (or others) by prohibiting discipline and accountability from being a part of the collective bargaining process.

The preferable way to accomplish this is through an outright prohibition, amending Code of Virginia Section 40.1-47.2 with specific language limiting the scope of public safety officer collective bargaining to compensation and benefits.

In the alternative, the General Assembly may prohibit provisions that are among the more egregious in Collective Bargaining Agreements elsewhere. Simple language might include --

A governmental entity is prohibited from entering into an agreement with a bargaining unit representing public safety officers that includes any of the following matters:

- *Disqualification of misconduct complaints that are submitted too many days after an incident occurs or if an investigation takes too long to complete,*
- *Prevention of police officers from being interrogated immediately after being involved in an incident or otherwise restricting how, when, or where they can be interrogated,*
- *Provision to officers of access to information that civilians do not get prior to being interrogated,*
- *Limitation on disciplinary consequences for officers or limiting the capacity of civilian oversight structures and/or the media to hold police accountable, and*
- *Exclusion of information on past misconduct investigations from an officer's personnel file.*

CONCLUSION

For more than a quarter-century, Virginia has enjoyed a system of government employee accountability without negotiated collective bargaining. As a consequence, the negative consequences of provisions in police contracts nationally have been avoided, and police chiefs have been able to ensure a responsible public safety environment.

This has not been the case elsewhere in the United States, where police officers with multiple misconduct complaints have returned to the force over the objections of their chiefs of police.

Beginning next May, just a few months away, Virginia will permit local governments to negotiate collective bargaining agreements, including disciplinary and accountability provisions that frequently serve to protect police officers guilty of misconduct.

Protecting public safety officers engaged in misconduct does not serve the community and does a disservice to the vast majority of police officers who daily put their lives on the line in defense of an orderly and civil society. The General Assembly should proactively stop the problem before it begins, by limiting the scope of public safety officer collective bargaining agreements to compensation and benefits.

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