

REMOVING BAD APPLES: ENDING GRIEVANCE ARBITRATION OVER PENNSYLVANIA STATE POLICE TROOPER DISCIPLINE*

I. INTRODUCTION

Despite assurances that the only problem with American policing is that there are “a few bad apples,”¹ police departments nationwide seem less capable than ever of plucking “bad apple” officers from their ranks.² Scholars attribute this inability to remove officers to many sources,³ including shoddy internal investigations;⁴ police union collective bargaining agreement provisions;⁵ and unique civil service protections, known as the Law Enforcement Officer Bill of Rights.⁶ One protection, in particular,

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1. Sarah Westwood, *National Security Adviser says “I Don’t Think There’s Systemic Racism” in America’s Police Forces*, CNN, at 00:28 (Mar. 31, 2020, 3:35 PM), https://edition.cnn.com/us/live-news/george-floyd-protests-05-31-20/h_05273aab4a4e21762f3614185413f352 [https://perma.cc/PYG6-JN6T] (“There are some bad apples in there. And there—there are some bad cops that are racist. And there are cops that are—maybe don’t have the right training. And there are some that are just bad cops. And they need to be rooted out, because there’s a few bad apples that are giving law enforcement a terrible name.” (statement of White House national security adviser Robert O’Brien)).

2. See Hassan Kanu, *Fired Cops Routinely Rehired, from D.C. to California*, REUTERS (Nov. 7, 2022, 1:22 PM), <https://www.reuters.com/legal/government/fired-cops-routinely-rehired-dc-california-2022-11-07/> [https://perma.cc/J2VD-K4Z8].

3. For a comprehensive collection of scholarly work on this issue, see Jamein Cunningham, Donna Feir & Rob Gillezeau, *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights* (Dec. 3, 2020) (unpublished manuscript), http://craftmediabucket.s3.amazonaws.com/uploads/LEOBR_Cunningham_12_3_20.pdf [https://perma.cc/6GRD-TKEA].

4. See generally JOANNA SCHWARTZ, *SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE*, at xii (2023).

5. See generally Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2016) [hereinafter Rushin, *Police Union Contracts*].

6. See generally Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights*, 14 B.U. PUB. INT. L.J. 185 (2005); STEPHEN RUSHIN, JUST. COLLABORATIVE INST., *REFORMING POLICE UNION CONTRACTS AND LAW ENFORCEMENT OFFICER BILLS OF RIGHTS* (2020), https://theappeal.org/wp-content/uploads/2020/12/20.08_Reforming-Police-Union-Contracts-and-Law-Enforcement-Officer-Bill-of-Rights-1.pdf [https://perma.cc/FD7S-9XFD].

continues to spark controversy for returning fired officers back to the force—third-party arbitration.⁷

Take, for example, the case of Officer Elizabeth Montoya.⁸ In January of 2019, Officer Montoya, a San Antonio Police Department officer, handcuffed a pregnant woman, punched her in the head seven times, and left her in the rain for half an hour before finally taking the woman to jail.⁹ Although the San Antonio Police Department subsequently fired Officer Montoya, an arbitrator returned her to the force with roughly three years of back pay.¹⁰ The arbitrator found that Officer Montoya's treatment of the pregnant woman was inhumane, but believed that firing her was excessive compared to seventeen other cases of in-custody abuses where officers received only suspensions.¹¹ Guided by this reasoning, the arbitrator reduced Officer Montoya's termination to a forty-five-day suspension and instructed her to participate in remedial training.¹²

Officer Montoya's arbitration outcome is not unusual.¹³ Research from the late 1990s to the early 2000s found that arbitrators continually reduced or reversed both suspensions and firings in the Chicago and Houston police departments.¹⁴ Recent studies of hundreds of arbitrator decisions have repeatedly found that arbitrators reduce or reverse roughly half of all officer-discipline cases.¹⁵ Many of these decisions are also unreviewable by courts.¹⁶ One recent study found that the vast majority of

7. See generally Stephen Rushin, *Police Arbitration*, 74 VAND. L. REV. 1023, 1059 (2021) [hereinafter Rushin, *Police Arbitration*]; Jenny Gathright, *D.C. Police Were Forced To Rehire More than Three Dozen Officers Accused of Misconduct, Auditor Finds*, DCIST (Oct. 6, 2022, 12:09 PM), <https://dcist.com/story/22/10/06/dc-police-auditor-report-hiring-firing-misconduct> [https://perma.cc/KQ23-DZ3E]; Kimbriell Kelly, Wesley Lowery & Steven Rich, *Fired/Rehired: Police Chiefs Are Often Forced To Put Officers Fired for Misconduct Back on the Streets*, WASH. POST (Aug. 3, 2017), <https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired> [https://perma.cc/6H55-5FST]; 'Broken Blue': Investigative Special Digs into Police Discipline at SAPD, KSAT (Apr. 9, 2021), <https://www.ksat.com/news/defenders/2020/01/13/watch-broken-blue-investigative-special-digs-into-police-discipline-at-sapd> [https://perma.cc/6ATA-42NW].

8. See Dillon Collier, *SAPD Officer Fired for Repeatedly Punching Handcuffed Pregnant Woman Wins Back Her Job*, KSAT (Aug. 24, 2022, 2:31 PM), <https://www.ksat.com/news/ksat-investigates/2022/08/24/sapd-officer-fired-for-repeatedly-punching-handcuffed-pregnant-woman-wins-back-her-job> [https://perma.cc/RR2K-VAYD].

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. See *infra* Part II.A for a discussion of the findings of recent police arbitration research.

14. Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary?*, 89 J. CRIM. L. & CRIMINOLOGY 215, 235–38 (1998) [hereinafter Iris, *Police Discipline in Chicago*]; Mark Iris, *Police Discipline in Houston: The Arbitration Experience*, 5 POLICE Q. 132, 141–42 (2002) [hereinafter Iris, *Police Discipline in Houston*].

15. Rushin, *Police Arbitration*, *supra* note 7, at 1059 (finding that arbitrators reduced or reversed terminations in 46.2% of cases, suspensions in 61.1% of cases, and "other discipline"—demotions, written reprimands, or oral reprimands—in 47.2% of cases, and sided with police officers or police unions, at least in part, in 52.4% of cases); Tyler Adams, Note, *Factors in Police Misconduct Arbitration Outcomes: What Does It Take To Fire a Bad Cop?*, 32 A.B.A. J. LAB. & EMP. L. 133, 140 (2016) (finding that arbitrators reduced discharges 46.7% of the time).

16. See Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 576–78 (2019) [hereinafter Rushin, *Police Disciplinary Appeals*] (finding that most arbitration provisions within collective bargaining agreements provide for de novo review).

collective bargaining agreements between police unions and their city employers deprive cities of the opportunity to appeal arbitration decisions.¹⁷ As such, the study concluded that third-party arbitrators, not police departments, mayors, city councils, or civilian oversight boards, are often the “true adjudicators” of police discipline.¹⁸

Delegating disciplinary power to arbitrators is particularly problematic when it comes to police discipline. Police officers perform unique tasks, including using nonlethal and lethal force, collecting evidence at crime scenes, and testifying in court.¹⁹ The International Association of Chiefs of Police recognizes that “[l]aw enforcement officers have accepted a position of visible authority within their communities and are held to a tremendously high standard of honesty, integrity, equity, and professionalism.”²⁰ Rather than take into consideration these unique responsibilities and standards, however, arbitrators often reduce or reverse discipline based on their own judgment that a penalty was too severe.²¹ An additional problem with delegating disciplinary power to arbitrators is that most police departments utilize a paramilitary administrative model that prioritizes top-down hierarchies, promotes discipline as a tool for increasing effectiveness, and encourages obedience to higher-ranking members.²² Arbitration undermines the paramilitary model by stripping police leadership of its ability to ensure proper discipline of subordinate members.²³

Pennsylvania is one of the states where arbitrators wield the most discretion to affirm, reduce, or reverse police discipline. In 1983, the Pennsylvania Supreme Court extended the Collective Bargaining by Policemen or Firemen Act of 1968, commonly known as Act 111, to include grievance arbitration.²⁴ In 1990, the court permitted the substitution of grievance arbitration for the statutorily mandated court-martial disciplinary system of the Pennsylvania State Police troopers.²⁵ The court would later narrow the scope of judicial review of grievance arbitration decisions so significantly

17. *Id.* at 571 (finding that, out of 656 police union contracts reviewed, approximately 69% of contracts allowed for an arbitrator or comparable third party to make the final disciplinary decision).

18. *Id.* at 552.

19. See Rushin, *Police Arbitration*, *supra* note 7, at 1058–59. Unlike other public sector employees, law enforcement must maintain evidence of officer misconduct and turn it over to defendants arrested by that officer who may use it to impeach the officer’s credibility at trial. See generally Rachel Moran, Brady Lists, 107 MINN. L. REV. 657, 658–59 (2022) (“[E]vidence that a police officer involved in a criminal case has, for example, previously written a false police report, lied in court, or used racial slurs during an arrest may be exculpatory because it casts doubt on the officer’s truthfulness, credibility, and impartiality.”).

20. INT’L ASS’N OF CHIEFS OF POLICE, BUILDING TRUST BETWEEN THE POLICE AND THE CITIZENS THEY SERVE: AN INTERNAL AFFAIRS PROMISING PRACTICES GUIDE FOR LOCAL LAW ENFORCEMENT 5 (2009).

21. Rushin, *Police Arbitration*, *supra* note 7, at 1062–63.

22. See *infra* Part II.B for a discussion of the paramilitary administrative model of police departments.

23. See Mark Iris, *Unbinding Arbitration of Police Discipline: The Public Policy Exception*, 1 VA. J. CRIM. L. 540, 546 (2013) [hereinafter Iris, *Unbinding Arbitration*] (“Such arbitration decisions are heartily disliked by police chiefs. They are widely perceived as undermining, compromising the chief’s ability to manage the agency and ensure proper discipline.”).

24. See *infra* Part II.C.2.a for a discussion of the Pennsylvania Supreme Court’s decision to extend Act 111 to grievance arbitration.

25. See *infra* Part II.C.2.b for a discussion of the Pennsylvania Supreme Court’s decision to allow state troopers to seek arbitration for disciplinary disputes.

as to make it virtually impossible for courts to reverse arbitrators.²⁶ Although this decision has faced criticism by Pennsylvania court judges, the Pennsylvania Supreme Court refuses to overturn its precedent, instead delegating the responsibility of modifying grievance arbitration over police discipline to the Pennsylvania General Assembly.²⁷ Although the Pennsylvania General Assembly has amended statutes to preclude arbitration over certain aspects of employment, it has never done so for police discipline.²⁸

Serious consequences flowed from the Pennsylvania Supreme Court's decision to provide unrestrained discretion to grievance arbitrators. From 1988 to 2004, arbitrators reversed or reduced roughly half of all Pennsylvania State Police trooper terminations.²⁹ In 2004, the Pennsylvania Office of State Inspector General (OIG) found that "sustained sexual harassment and sexual misconduct cases" against Pennsylvania State Police troopers often received "minimal, disparate, or diminished" discipline.³⁰ The OIG found that one factor contributing to lax discipline was Pennsylvania State Police leadership anticipating that arbitrators would reduce misconduct decisions on appeal.³¹ Both the OIG³² and an independent monitor tasked with implementing the OIG's recommendations³³ found arbitration to be a significant barrier to officer discipline.³⁴

This Comment argues that the Pennsylvania General Assembly should adopt legislation preventing Pennsylvania State Police troopers from using grievance arbitration to resolve disputes over discipline. To accomplish this, Pennsylvania should emulate New Jersey. Around the same time that the Pennsylvania Supreme Court was providing Pennsylvania State Police troopers with unreviewable grievance arbitration, the New Jersey Legislature and the New Jersey Supreme Court determined that New Jersey State Police troopers should be precluded from using grievance arbitration in

26. See *infra* Part II.C.2.c for a discussion of the Pennsylvania Supreme Court's decision to limit judicial review of grievance arbitration.

27. See *infra* Part II.C.2.d for a discussion of Pennsylvania judiciary discontent with limited grievance arbitration review.

28. See *infra* Part II.C.3 for a discussion of instances where the Pennsylvania General Assembly overruled the Pennsylvania Supreme Court and precluded arbitration of employment topics the court had ruled arbitrable.

29. *Buck Stops with Arbitrators in Trooper Discipline*, POCONO REC. (Jan. 7, 2011, 2:42 AM), <https://www.poconorecord.com/story/news/2003/11/01/buck-stops-with-arbitrators-in/51064408007> [<https://perma.cc/2FQV-KTJQ>].

30. PA. OFF. OF INSPECTOR GEN., INVESTIGATIVE REPORT ON SEXUAL HARASSMENT AND SEXUAL MISCONDUCT AT THE PENNSYLVANIA STATE POLICE, at vi (2003), http://www.yardbirdbooks.com/luna_downloads/PSP_Final_Report.pdf [<https://perma.cc/28CZ-2ER4>].

31. *Id.* at 35–36.

32. *Id.* at vii–viii.

33. See KROLL, REPORT OF THE INDEPENDENT MONITOR OF THE PENNSYLVANIA STATE POLICE 13–15, 23 (2004), <https://www.kroll.com/-/media/kroll/pdfs/publications/monitorships/psp-q1-2004.pdf> [<https://perma.cc/29H4-QKMJ>].

34. See *id.* at 16; PA. OFF. OF INSPECTOR GEN., *supra* note 30, at vi.

cases of officer discipline.³⁵ Modeled after New Jersey legislation,³⁶ the legislative proposal offered by this Comment ensures an adequate and unbiased disciplinary process for Pennsylvania State Police troopers, reaffirms the power of Pennsylvania State Police leadership to discipline troopers, and promotes public safety.

Section II of this Comment provides a general background of the use of arbitration in police discipline and the development of the paramilitary administrative model in police departments. This Section also includes an analysis of the disciplinary process for both the Pennsylvania State Police troopers and the New Jersey State Police troopers and the ways that arbitration either does or does not play a role in their respective disciplinary processes. Section III argues that Pennsylvania law regarding state trooper discipline should be changed to resemble New Jersey legislation that prevents troopers from seeking grievance arbitration, thus allowing the Pennsylvania State Police to remove “bad apple” troopers spoiling the barrel.

II. OVERVIEW

This Section proceeds in four parts. Part II.A provides a general overview of the use of arbitration in disciplining police officers. Part II.B discusses the paramilitary administrative model used by many law enforcement agencies nationwide, including the Pennsylvania State Police and the New Jersey State Police. Part II.C discusses the internal disciplinary process for Pennsylvania State Police troopers and the constitutionality of the statutory court-martial procedure. This Part also tracks the Pennsylvania Supreme Court’s transference of disciplinary power from Pennsylvania State Police leadership to arbitrators, the discontent that arose within the judiciary around those decisions, and moments where the Pennsylvania General Assembly precluded arbitration over specific employment issues. Part II.D discusses the New Jersey State Police internal disciplinary process and the decision by the New Jersey Legislature and the New Jersey Supreme Court to prevent New Jersey State Police troopers from appealing disciplinary decisions to arbitration.

A. *Disciplining Police Through Arbitration*

In the United States, arbitration plays a critical role in disciplining police officers.³⁷ When police administrators take adverse action against police officers (i.e., suspensions, demotions, terminations), an officer may appeal their case to an arbitrator.³⁸ The source of an officer’s right to arbitration may be a state law³⁹ or a

35. See *infra* Part II.D.2.a for a discussion of New Jersey legislation prohibiting arbitration for New Jersey State Police troopers and *infra* Part II.D.2.b for a discussion of New Jersey court precedent prohibiting arbitration for New Jersey State Police troopers.

36. N.J. STAT. ANN. § 34:13A-5.3 (West 2024).

37. Rushin, *Police Disciplinary Appeals*, *supra* note 16, at 571 (finding that, out of 656 police union contracts reviewed, “[a]pproximately seventy-three percent of the police departments use a disciplinary appeals process that involves some sort of outside arbitration.”).

38. Rushin, *Police Arbitration*, *supra* note 7, at 1043.

39. Rushin, *Police Disciplinary Appeals*, *supra* note 16, at 548 n.14 (“Texas Local Government Code Section 143.053 deals with appeals of disciplinary suspensions for communities with a population under 1.5

collective bargaining agreement negotiated between their union and employer.⁴⁰ Advocates for arbitration argue that, in employer-employee grievance appeals, arbitration is faster and cheaper than civil litigation and takes the burden off of courts to litigate every employment dispute.⁴¹ Additionally, courts are often “reluctant [to engage in] post-arbitration litigation,” for fear of undermining these perceived benefits.⁴²

Unlike the American justice system, which limits the scope of issues that can be reviewed on appeal,⁴³ collective bargaining agreements often allow arbitrators to “re-adjudicate” entire discipline cases.⁴⁴ Once the arbitrator satisfies their adjudicatory duties, which usually includes reviewing evidence and conducting a hearing with witnesses, they may affirm, reduce, or reverse an officer’s discipline for a myriad of reasons.⁴⁵ In a 2021 study of 624 disciplinary decisions against police officers, Professor Stephen Rushin, one of the foremost legal scholars on police disciplinary appeals and arbitration,⁴⁶ organized arbitrators’ reasons for reversals and revisions of disciplinary decisions into three categories: procedural justifications,⁴⁷ evidentiary

million, providing officers with the ability to appeal suspensions to the civil service commission. But under Texas Local Government Code Section 143.057, police officers have the option to waive the right to appeal to the civil service commission, and instead appeal to an ‘independent third party hearing examiner’ defined as a ‘qualified neutral arbitrator.’” (quoting TEX. LOC. GOV’T CODE ANN. § 143.057(a), (d) (West 2024))).

40. See Rushin, *Police Disciplinary Appeals*, *supra* note 16, at 583 n.204; PROVISIONS FROM BOARDS OF ARBITRATION AWARDS AND COLLECTIVE BARGAINING AGREEMENTS BETWEEN COMMONWEALTH OF PENNSYLVANIA AND THE PENNSYLVANIA STATE TROOPERS ASSOCIATION EFFECTIVE JULY 1, 2021 TO JUNE 30, 2024, art. 28, § 2, at 22 (2021) [hereinafter PA. STATE TROOPER ASS’N 2021 CONT.], <https://www.hrm.oa.pa.gov/employee-relations/cba-md/Documents/cba-psta-2021-2024.pdf> [<https://perma.cc/B7EU-7BX5>] (“If the grievance is not satisfactorily resolved by the grievance committee at STEP 2, the grievance may be scheduled for arbitration by the PSTA Grievance Board Chairman by serving upon the Bureau of Labor Relations’ representative notice, within 10 calendar days of the grievance committee meeting, of its intent to proceed to arbitration.”).

41. Iris, *Unbinding Arbitration*, *supra* note 23, at 547.

42. *Id.* at 548.

43. See Rushin, *Police Arbitration*, *supra* note 7, at 1042 (citing Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993 (1986)).

44. *Id.* at 1043; Rushin, *Police Disciplinary Appeals*, *supra* note 16, at 576–78 (explaining the de novo review process under arbitration).

45. Iris, *Unbinding Arbitration*, *supra* note 23, at 550 (“[I]n a typical police disciplinary arbitration, an arbitrator . . . would be within the scope of authority to reverse the officer’s discharge, order reinstatement to employment, and award back pay and benefits retroactive to the date of the officer’s discharge.”).

46. See, e.g., Rushin, *Police Union Contracts*, *supra* note 5; Rushin, *Police Disciplinary Appeals*, *supra* note 16; Rushin, *Police Arbitration*, *supra* note 7.

47. Rushin, *Police Arbitration*, *supra* note 7, at 1061–62 (“[A]rbitrators concluded that the discipline was time limited, either because the employer took too long to complete its investigation or the complainant made their allegation too long after the alleged wrongdoing. In other cases, arbitrators cited lack of notice, improper consideration of prior disciplinary history in violation of a collective bargaining agreement or state law, or other more complicated procedural objections.” (footnotes omitted)).

justifications,⁴⁸ and proportionality justifications.⁴⁹ Of the three, arbitrators relied on proportionality justification in the vast majority of cases.⁵⁰

In proportionality cases, arbitrators have agreed that officer misconduct occurred but nevertheless reduced or reversed discipline because they found that the entity disciplining the officer did not “consider mitigating factors” like an excellent work record or length of service, that the punishment was more than what other officers had received for similar misconduct, or that the punishment was excessive given the type of misconduct.⁵¹ One example of an arbitrator using a proportionality justification is the 1999 case of Pennsylvania State Police Trooper Rodney Smith. In that case, the Pennsylvania State Police terminated Trooper Smith after he “put his loaded, state-issued weapon into [his ex-girlfriend’s] mouth and threatened to kill her,” and subsequently pled guilty to drunk driving and other charges.⁵² Even with Trooper Smith’s plea, the arbitrator found that termination was much more severe in comparison with the punishment that other troopers received after committing much more significant misconduct.⁵³ Trooper Smith’s case, coupled with Professor Rushin’s finding on arbitrators’ propensity to use proportionality justifications, demonstrates that arbitrators “substitute[] the judgment of police chiefs, sheriffs, and city leaders with their own” in a majority of officer discipline cases.⁵⁴

Another aspect of many arbitration decisions is that they cannot be appealed except in limited circumstances.⁵⁵ This is known as *binding arbitration*.⁵⁶ In a 2019 study, Professor Rushin uncovered that, out of 656 police union contracts from police departments nationwide, approximately sixty-nine percent allowed for binding arbitration.⁵⁷ The current collective bargaining agreement between the Commonwealth of Pennsylvania and the Pennsylvania State Troopers Association also contains a binding arbitration provision, stating, “The decision of the arbitrator shall be final and

48. *Id.* at 1062 (“[A]rbitrators cited a disagreement with the strength of the evidence presented at the hearing. Often, these cases involved the arbitrator simply disagreeing with the employer’s determination that sufficient evidence existed to prove a case by a preponderance of the evidence or by clear and convincing evidence.”).

49. *Id.* at 1062–63 (noting that arbitrators have found punishment was disproportionate when “it failed to properly consider mitigating factors in an officer’s record,” or it differed from “the punishments given to other similarly situated officers in the same department who committed the same type of misconduct in the past” or it was unreasonable “relative to the offense committed”).

50. *Id.* at 1061 (finding that procedural justifications were used in 29.7% of cases, proportionality justifications were used in 64.5% of cases, and evidentiary justifications were used in 38.5% of cases).

51. *Id.* at 1062–63.

52. PA. OFF. OF INSPECTOR GEN., *supra* note 30, at 40; *see also* Pa. State Police v. Pa. State Troopers Ass’n (*Smith II*), 741 A.2d 1248, 1250 (Pa. 1999).

53. *Id.*

54. Rushin, *Police Arbitration*, *supra* note 7, at 1063–64.

55. Iris, *Unbinding Arbitration*, *supra* note 23, at 542 (“A presumably neutral, independent third party will convene an arbitration hearing (or in certain instances simply review the relevant investigative file) and issue a decision: a decision which may uphold, modify or overturn in full the disciplinary action. And a core precept is that such arbitral decisions are *binding*; the parties agree in advance to accept the decision as final. Unlike most civil or criminal litigation, there is no appellate recourse.”).

56. *Id.*

57. Rushin, *Police Disciplinary Appeals*, *supra* note 16, at 573.

binding on both parties.”⁵⁸ As a result of binding arbitration, Professor Rushin found that arbitrators, not chiefs of police, mayors, or civilian review boards, are often “the true adjudicators of internal discipline in many police departments.”⁵⁹

Arbitration decisions regarding police discipline have sparked controversy throughout recent decades.⁶⁰ In the wake of outcries for reform of police disciplinary policies, researchers attempted to determine whether arbitration hinders departmental efforts to terminate officers.⁶¹ Several recent studies have found a consistent trend—arbitrators reduce or reverse roughly half of all disciplinary penalties.⁶² In the 2021 study, Professor Rushin argued that these findings were particularly significant given the job responsibilities unique to law enforcement officers, which include using nonlethal and lethal force, carrying weapons, collecting evidence at crime scenes, and testifying in court.⁶³ Of the disciplinary decisions reviewed, Professor Rushin found that a quarter of discipline “cases involved officers using or threatening to use physical force,”⁶⁴ and another quarter involved cases of officer dishonesty.⁶⁵ Professor Rushin noted that the “stakes are high” in these cases, “particularly if we believe these behaviors are suggestive of the risk that officer[s] pose[] to the community in the future.”⁶⁶ In an internal affairs investigations guide, the International Association of Chiefs of Police even recognized the unique responsibilities officers have to their communities, stating that “[l]aw enforcement officers have accepted a position of visible authority within their communities and are held to a tremendously high standard

58. PA. STATE TROOPER ASS’N 2021 CONT., *supra* note 40, art. 28, § 7, at 22.

59. Rushin, *Police Disciplinary Appeals*, *supra* note 16, at 582; *see also* Iris, *Police Discipline in Chicago*, *supra* note 14, at 215.

60. *See, e.g.*, Iris, *Police Discipline in Chicago*, *supra* note 14, at 225 (citing Conrad deFiebre, *Ruling on Convicted Cop’s Job Explained: Work Record and Treatment Cited*, MINNEAPOLIS/ST. PAUL STAR TRIB., Aug. 17, 1993, at 1B) (“In St. Paul, Minnesota, an officer pled guilty to misdemeanor charges stemming from an off-duty sexual assault. He had exposed himself to a fourteen-year-old babysitter at his home and fondled her. The police department fired the officer, who then was restored to duty by an arbitrator. The arbitrator found the department’s penalty of discharge too harsh, citing the officer’s past job performance, remorseful attitude, and a positive report from a therapist the officer subsequently saw for counseling.”); Dan Stamm, *Police Commish Angry that 90 Percent of Fired Officers Get Jobs Back*, NBC10 PHILA. (Mar. 1, 2013, 11:02 AM), <https://www.nbcphiladelphia.com/news/local/police-officers-get-jobs-back/2110725/> [<https://perma.cc/AHD2-CL8E>]; Kim Barker, Michael H. Keller & Steve Eder, *How Cities Lost Control of Police Discipline*, N.Y. TIMES (Mar. 10, 2021), <https://www.nytimes.com/2020/12/22/us/police-misconduct-discipline.html> [<https://perma.cc/V4P4-JC2T>].

61. *See, e.g.*, Iris, *Police Discipline in Chicago*, *supra* note 14, at 235–39; Helen LaVan, *Public Sector Employee Discipline: Comparing Police to Other Public Sector Employees*, 19 EMP. RESPS. RTS. J. 17 (2007); Adams, *supra* note 15, at 140; Rushin, *Police Disciplinary Appeals*, *supra* note 16; Rushin, *Police Arbitration*, *supra* note 7, at 1059.

62. *See supra* note 15 and accompanying text; *see also, e.g.*, Iris, *Police Discipline in Chicago*, *supra* note 14, at 235–38 (finding that arbitrators reversed nearly half the suspension days handed down by the Chicago Police Department); Iris, *Police Discipline in Houston*, *supra* note 14, at 141–42 (finding that arbitrators reversed nearly half of suspension days handed down by the Houston Police Department).

63. Rushin, *Police Arbitration*, *supra* note 7, at 1058–59.

64. *Id.* at 1054.

65. *Id.* at 1055.

66. *Id.* at 1059.

of honesty, integrity, equity, and professionalism.”⁶⁷ Given the unique responsibilities and authority that police officers wield,⁶⁸ it is concerning that arbitrators put communities at risk by reinstating officers with a record of adjudicated acts of severe misconduct.

B. *The Paramilitary Administrative Model of Policing*

Another critical aspect of police discipline is the administrative model adopted by police departments nationwide, often referred to as a paramilitary administrative model.⁶⁹ From the 1920s to the 1960s, police departments underwent a substantial administrative transformation focused on “professionalizing” police work.⁷⁰ To create a professionalized police force, law enforcement scholars advocated for an administrative model that would utilize militaristic, authoritarian management.⁷¹ This paramilitary model embraced classical principles of organization that prioritized top-down management structures, promoted discipline, and required obedience to higher-ranking department members.⁷²

A characteristic aspect of the paramilitary model is the rank structure, evident in the top-down chain of command within police forces.⁷³ Under this structure, lower-ranked members receive orders from the next layer of hierarchy, then that layer receives orders from the next, and so on.⁷⁴ The Pennsylvania State Police utilize a rank structure, referring to members by military rank, such as “colonel,” “lieutenant colonel,” “sergeant,” and “trooper.”⁷⁵ In 2020, the Pennsylvania General Assembly’s Legislative Budget and Finance Committee stated, “The [Pennsylvania State Police]

67. See INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 20, at 5.

68. See Rushin, *Police Arbitration*, *supra* note 7, at 1058–59; INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 20, at 5.

69. See KENNETH NOVAK, GARY CORDNER, BRADLEY SMITH & ROY ROBERG, *POLICE & SOCIETY* 132–61 (Oxford Univ. Press 7th ed. 2017).

70. See *id.* at 41–42.

71. See *id.* at 136 (“Following the introduction of the bureaucratic model, a number of writers began to develop what have become known as *classical principles* of organization, which were believed to be universal. Some of Weber’s administrative principles that reflect this approach include *specialization* (division of work); *authority and responsibility* (the right to command and require obedience); *discipline* (necessary for effectiveness); *unity of command* (employees are to receive orders from only one superior); *scalar chain* (hierarchy of authority); and *centralization* (the extent to which decision making is retained by the top organizational levels).”).

72. *Id.* at 41.

73. William R. King, *Bending Granite Revisited: The Command Rank Structure of American Police Organizations*, 26 *POLICING: INT’L J. POLICE STRATEGIES & MGMT.* 208, 209 (2003).

74. *Id.* at 209.

75. LEGIS. BUDGET AND FIN. COMM., PA. GEN. ASSEMBLY, A STUDY OF THE STATUTORY CAP ON THE PENNSYLVANIA STATE POLICE COMPLEMENT S-3 (2020) (“Rank is a significant aspect within the [Pennsylvania State Police (PSP)] command structure. The PSP is headed by a State Police Commissioner, who holds the rank of colonel, and is appointed by the Governor. There are three deputy commissioners, who are also appointed by the Governor, and hold the rank of lieutenant colonel. Majors, captains, lieutenants, sergeants, and corporals, complete the supervisory ranks within the PSP; however, collectively these positions are all considered to be ‘troopers’ or enlisted members of the PSP. A trooper is any individual in active status and who has graduated from the PSP Training Academy (Academy), the PSP’s training school.”).

[are] a paramilitary organization, which means that its organizational structure and training are similar to the military, but it is not associated with the armed forces.”⁷⁶ The New Jersey State Police also employ a paramilitary administrative model “that requires strict adherence to the chain of command for all operational matters.”⁷⁷ Like the Pennsylvania State Police, the New Jersey State Police ranks its members using military terms.⁷⁸

It is beyond the scope of this Comment to determine whether the paramilitary administrative model is the most effective tool for disciplining “bad apple” officers. However, it is clear that, even after facing decades of resistance by proponents of “more flexible and democratic” managerial structures, the paramilitary model persists in many policing organizations nationwide.⁷⁹ Some scholars even describe the impossible task of reforming the model as “bending granite.”⁸⁰ This Comment assumes, given the unbendable nature of the paramilitary model in policing and its continued use by both the Pennsylvania and New Jersey State Police, that policing agencies nationwide will not abandon the model in the foreseeable future.

C. *Disciplining Pennsylvania State Police*

Part II.C.1 provides an overview of the Pennsylvania State Police disciplinary process, including the rules and regulations for discipline and court-martial. It will also discuss the constitutionality of the court-martial process under the Pennsylvania Constitution. Part II.C.2 then outlines the steps the Pennsylvania Supreme Court took to hand over Pennsylvania State Police trooper discipline to arbitrators. This Part starts with an explanation of the Pennsylvania Supreme Court’s decision to extend the Collective Bargaining by Policemen or Firemen Act of 1968, commonly known as Act 111, to grievance arbitration in *Chirico v. Board of Supervisors*.⁸¹ It then details the Pennsylvania Supreme Court’s decision in *Commonwealth v. State Conference of State Police Lodges (State Conf. II)* to allow Pennsylvania State Police troopers to use grievance arbitration as a substitute for the disciplinary court-martial process.⁸²

76. *Id.*

77. STATE POLICE REV. TEAM, N.J. OFF. OF ATT’Y GEN., FINAL REPORT 103 (1999).

78. N.J. STATE POLICE, 2021 ANNUAL REPORT 4 (2022), https://nj.gov/njsp/about/pdf/20220913_2021_ANNUAL_REPORT_FINAL.pdf [<https://perma.cc/J8NU-A9CD>] (using the rank terms “colonel,” “lieutenant colonel,” and “major.”).

79. NOVAK ET AL., *supra* note 69, at 136, 141.

80. King, *supra* note 73, at 209. For an example of how the paramilitary administrative model persists even with attempts to transition to a community policing model, see Alison T. Chappell & Lon Lanza-Kaduce, *Police Academy Socialization: Understanding the Lessons Learned in a Paramilitary Bureaucratic Organization*, 39 J. CONTEMP. ETHNOGRAPHY 187, 187 (2010) (“The authors found that despite the philosophical emphasis on community policing and its themes of decentralization and flexibility, the most salient lessons learned in police training were those that reinforced the paramilitary structure and culture.”).

81. 470 A.2d 470, 474–75 (Pa. 1983); see also Iris, *Unbinding Arbitration*, *supra* note 23, at 560 (“Despite the statute’s near-silence on the issue of individual employees’ disciplinary-related grievances, the case law history of Pennsylvania shows that courts have issued decisions which expand, rather than contract, the coverage of Act 111.”).

82. *Commonwealth v. State Conf. of State Police Lodges (State Conf. II)*, 575 A.2d 94, 100 (Pa. 1990), *superseded by statute*, 71 PA. STAT. AND CONS. STAT. ANN. § 5955 (West 2024).

Following this discussion will be an analysis of the Pennsylvania Supreme Court decision in *Pennsylvania State Police v. Pennsylvania State Troopers' Ass'n (Betancourt)*,⁸³ which significantly narrowed judicial review of arbitration decisions. The discontent that arose within the judiciary because of that decision will also be discussed in this Part. Part II.C.3 identifies moments where, in response to Pennsylvania Supreme Court decisions, the Pennsylvania General Assembly enacted legislation explicitly prohibiting arbitration of certain employment issues.

1. Origins of Pennsylvania State Police Leadership's Control over Trooper Discipline

a. Pennsylvania State Police Regulations and Court-Martials

The Pennsylvania Administrative Code of 1929 sets out the structure of the Pennsylvania State Police.⁸⁴ The Commissioner, who leads the Pennsylvania State Police,⁸⁵ is required under Section 711 of the Administrative Code (Section 711) to promulgate rules and regulations governing the “discipline[] and conduct of the members of the force.”⁸⁶ The Commissioner is also responsible “for the filing and hearing of charges against [troopers].”⁸⁷ The current Commissioner’s rules and regulations, the Pennsylvania State Police Field Regulations (Field Regulations),⁸⁸ include Pennsylvania State Police policies on carrying and using firearms,⁸⁹ using force,⁹⁰ and disciplining troopers for misconduct.⁹¹ The Pennsylvania State Police Administrative Regulations define the process for conducting internal investigations against troopers.⁹²

Under the Field Regulations, the receipt of a complaint, either from Pennsylvania State Police personnel or a citizen, triggers an internal affairs investigation that starts with an authentication of the complaint.⁹³ If an adjudicating officer⁹⁴ determines that the findings of the investigation should—or, under the rules, *must*—be sustained, the

83. 656 A.2d 83, 88 (Pa. 1995).

84. 71 PA. STAT. AND CONS. STAT. ANN. § 65 (West 2024).

85. *Id.* § 65(a).

86. *Id.* § 251(a).

87. *Id.*

88. PA. STATE POLICE, FIELD REGULATIONS (2023) [hereinafter FIELD REGULATIONS], <https://www.psp.pa.gov/contact/Pages/RTKL-REGULATIONS-AND-OPERATIONS-MANUALS.aspx> [https://perma.cc/KE7R-FT87].

89. 1-1 GENERAL REQUIREMENTS, *in* FIELD REGULATIONS, *supra* note 88, at 14–16 [hereinafter GENERAL REQUIREMENTS].

90. 9-1 USE OF FORCE, *in* FIELD REGULATIONS, *supra* note 88 [hereinafter USE OF FORCE].

91. 3-3 DISCIPLINE, *in* FIELD REGULATIONS, *supra* note 88, at 5, 7–9 [hereinafter DISCIPLINE REGULATIONS].

92. PA. STATE POLICE, ADMINISTRATIVE REGULATIONS: AR 4-25, INTERNAL INVESTIGATIONS 22, 30–31 (2019) [hereinafter INTERNAL INVESTIGATIONS]; FIELD REGULATIONS, *supra* note 88.

93. INTERNAL INVESTIGATIONS, *supra* note 92, at 22.

94. *Id.* at 2 (defining an adjudicating officer as “[a]n individual responsible for the adjudication of an IA investigation. In most cases, the individual will be the Troop Commander, Bureau/Office Director, Division Director, or other individual who serves as the Commander/Director of the subject(s) of the investigation.”).

officer will issue a Disciplinary Action Report (DAR).⁹⁵ A disciplinary officer appointed by the Commissioner then reviews the DAR to “determine the appropriate and consistent level of discipline.”⁹⁶ In cases where a disciplinary officer intends to suspend a trooper for more than thirty days, demote the trooper in rank, or dismiss the trooper, the disciplinary officer can impose that discipline (in cases where the trooper has chosen arbitration), or the disciplinary officer can direct that trooper to be court-martialed.⁹⁷

If a trooper chooses the court-martial process, the Commissioner must appoint a court-martial board.⁹⁸ Armed with subpoena power, court-martial boards conduct hearings “to determine whether or not such charges or complaints [issued by the Commissioner] have been sustained and whether the evidence substantiates such charges and complaints.”⁹⁹ After the hearings, the court-martial board votes to determine whether to recommend that the Commissioner discharge, demote, or refuse the reenlistment of an officer.¹⁰⁰ The recommendations of the court-martial board are nonbinding on the Commissioner, who maintains the final “obligation to determine the guilt or innocence of the accused employee and to determine the sanction to be imposed.”¹⁰¹

b. Constitutionality of Pennsylvania State Police Court-Martial Procedure

In 1975, a state trooper contested the constitutionality of Section 711, as well as the Field Regulations, in *Dussia v. Barger*.¹⁰² Lieutenant Colonel Joseph Dussia, a fired state trooper, argued that Section 711, “as implemented by [the] Pennsylvania State Police Field Regulation[s], . . . unconstitutional[ly] commingl[ed]” judicial and prosecutorial functions in the Pennsylvania State Police Commissioner.¹⁰³ The Pennsylvania Supreme Court agreed.¹⁰⁴ The court found that not only did Section 711 provide the Commissioner with the ultimate judicial determination as to the guilt or innocence of a Pennsylvania state trooper, but that the Field Regulations granted the Commissioner the authority to “institute a prosecution” through the appointment of court-martial proceedings.¹⁰⁵ Finding that the regulations unconstitutionally

95. *Id.* at 29–31. The Administrative Regulations state that administrative action can be taken in accordance with two different regulations: Field Regulation 3-3 (Discipline) or Administrative Regulation 4-9. *Id.* at 30. For the purposes of this Comment, the process will only cover Field Regulation 3-3 because Administration Regulation 4-9 was not available.

96. DISCIPLINE REGULATIONS, *supra* note 91, at 5.

97. *Id.* at 6.

98. 71 PA. STAT. AND CONS. STAT. ANN. § 251(b)(1) (West 2024).

99. *Id.* § 251(b)(2).

100. *Id.*

101. *Dussia v. Barger*, 351 A.2d 667, 672 (Pa. 1975); § 251(b)(2).

102. 351 A.2d at 669–71.

103. *Id.* at 672.

104. *Id.*

105. *See id.* at 672, 674 (“Although the disciplinary board reviews the facts to determine whether or not they justify the initiation of court-martial proceedings, here again, their decision is only advisory and the Commissioner must make the ultimate decision as to whether a court-martial board should be appointed.”).

commingled prosecutorial and judicial functions, the court invalidated the Field Regulations and instituted a permanent injunction on the court-martial process.¹⁰⁶ However, the court made clear that Section 711, on its own, was not “inherently deficient” and that the unconstitutional commingling was the product of the Field Regulations.¹⁰⁷

In response to *Dussia*, the Commissioner amended the Field Regulations to eliminate their own role in instituting court-martial proceedings.¹⁰⁸ The amendment required the Commissioner to appoint a department disciplinary officer to coordinate the disciplinary system for the troopers.¹⁰⁹ The Field Regulations also required the Commissioner to appoint a department disciplinary board.¹¹⁰ Upon receiving allegations of misconduct, the disciplinary board would conduct hearings.¹¹¹ If the alleged offense required the officer to be demoted or fired, the disciplinary board, after reviewing the evidence, would decide whether to recommend that the Commissioner initiate court-martial proceedings or not.¹¹² The receipt of an “affirmative recommendation” would trigger the Commissioner’s obligation to commence the court-martial proceedings.¹¹³

In 1978, a second trooper challenged the constitutionality of the amended Field Regulations.¹¹⁴ Unlike in *Dussia*, the Pennsylvania Commonwealth Court in *Berman v. Commonwealth* determined that the Commissioner no longer played a prosecutorial role in trooper discipline.¹¹⁵ Instead, the amended Field Regulations successfully transferred the discretionary power to prosecute allegations of misconduct from the Commissioner to the disciplinary officer.¹¹⁶ As such, the commonwealth court concluded that the updated Field Regulations effectively fixed the commingling of judicial and prosecutorial functions issue present in *Dussia*.¹¹⁷ The Pennsylvania Commonwealth Court reaffirmed its findings in *Berman* in the case of *Swaydis v. Commonwealth*, holding that the Commissioner was the ultimate designating authority for the court-martial board under Section 711, but that the disciplinary officer had the sole role of initiating court-martial proceedings.¹¹⁸

106. *Id.* at 675.

107. *Id.*

108. *Swaydis v. Commonwealth*, 477 A.2d 917, 918 n.5 (Pa. Commw. Ct. 1984).

109. *Berman v. Commonwealth*, 391 A.2d 715, 717–18 (Pa. Commw. Ct. 1978).

110. *Id.* at 718.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 716–17.

115. *Id.* at 718.

116. *Id.*

117. *Id.*

118. *See Swaydis v. Commonwealth*, 477 A.2d 917, 918 n.5 (Pa. Commw. Ct. 1984) (“The State Police regulations were amended, after [*Dussia*.] to provide for the Disciplinary Officer’s role so as to remove the Commissioner from personally instituting court-martial proceedings.” (citation omitted)).

2. Arbitrators Gain Control Over Pennsylvania State Police Discipline

a. *The Pennsylvania Supreme Court Adds Grievance Arbitration to Act 111*

Police officers in Pennsylvania, including members of the Pennsylvania State Police, received the right to collectively bargain in 1968 with the passage of the Collective Bargaining by Policemen or Firemen Act of 1968, commonly known as Act 111.¹¹⁹ Act 111 also allowed Pennsylvania State Police troopers to utilize arbitration to settle disputes during collective bargaining negotiations¹²⁰ (often referred to as “interest arbitration”).¹²¹ To ensure that employer-employee disputes would be resolved quickly, the General Assembly disallowed any judicial review of interest arbitration.¹²²

The Pennsylvania Supreme Court, not the Pennsylvania General Assembly, would go on to apply Act 111 to arbitrations over employer-employee disputes regarding the interpretation of an existing collective bargaining agreement or interest arbitration award, often called “grievance arbitration.”¹²³ In the 1983 case *Chirico v. Board of Supervisors*, a board of arbitrators entered an arbitration award establishing the terms and conditions of police employment in the Newton Township Police Department.¹²⁴ A dispute soon arose over the interpretation of the phrase “vacation week” in a provision of the arbitration award.¹²⁵ The Pennsylvania Commonwealth Court reversed the court of common pleas’ decision on appeal, determining that arbitrators, not courts, have exclusive jurisdiction to interpret provisions of an interest arbitration award.¹²⁶

Taking the case on appeal, the Pennsylvania Supreme Court held that “a dispute over the interpretation of a provision in an existing [arbitration] award [fell] within the ambit of grievance arbitration.”¹²⁷ There was a problem, however—Act 111 contained no details on grievance arbitration.¹²⁸ Although the first section of Act 111 provided officers with the “right to an adjustment or settlement of their grievances or disputes”¹²⁹ the remaining sections outlined what would be better understood as interest arbitration.¹³⁰ The court believed this language created a contradiction—officers had a

119. 43 PA. STAT. AND CONS. STAT. ANN. § 217.1 (West 2024).

120. *Id.* § 217.7(a).

121. *City of Pittsburgh v. FOP, Fort Pitt Lodge No. 1*, 938 A.2d 225, 227 n.1 (Pa. 2007).

122. § 217.7(a) (“*No appeal* therefrom shall be allowed to any court.” (emphasis added)); *City of Philadelphia v. FOP Lodge No. 5*, 985 A.2d 1259, 1262 n.1 (Pa. 2009).

123. *Pittsburgh v. FOP, Lodge No. 1*, 938 A.2d at 227 n.1.

124. 470 A.2d 470, 471–72 (Pa. 1983).

125. *Id.* at 472.

126. *See id.* at 474–75.

127. *Id.* at 474 (citing *Geriot v. Council of Darby Borough*, 417 A.2d 1144 (Pa. 1980)).

128. *See id.* (“Act 111 does not set forth the specific mechanism by which grievance, as compared with interest, disputes are to be arbitrated.”).

129. *Id.* (quoting 43 PA. STAT. AND CONS. STAT. ANN. § 217.1 (West 2024)).

130. *See Iris, Unbinding Arbitration, supra* note 23, at 560 (“The wording makes it quite clear the arbitration process, as described, applies to what is generally known as interest arbitration. Typically, that refers to arbitration used in reaching an overall collective bargaining agreement, resolving employee-employer differences over wages, overtime, benefits, holiday and vacation, and other common conditions of employment.”).

right to settle grievances, but no means to accomplish that settlement through Act 111.¹³¹ Finding that Act 111 strongly affirmed “the use of non-adversarial methods for the resolution of disputes between governmental employers and police,” the Pennsylvania Supreme Court attempted to correct the contradiction by applying Act 111 arbitration to interpretation disputes like the one in *Chirico*.¹³² In doing so, the supreme court held that the court of common pleas should not have substituted its own judgment for the “expertise of arbitrators.”¹³³ The court’s deference towards arbitrators under Act 111 would continue to expand over other types of grievances, principally disciplinary grievances.¹³⁴

b. The Pennsylvania Supreme Court Allows the Use of Grievance Arbitration in Pennsylvania State Police Discipline

In 1990, the Pennsylvania Supreme Court allowed Pennsylvania State Police troopers to use grievance arbitration as an alternative to court-martial proceedings.¹³⁵ The case of *State Conf. II* turned on the validity of a grievance arbitration provision within a collective bargaining agreement between the State Conference of State Police Lodges of the Fraternal Order of Police (“the Pennsylvania State Police FOP”) and the Commonwealth of Pennsylvania (“the Commonwealth”).¹³⁶ The Pennsylvania State Police FOP and the Commonwealth began collective bargaining negotiations in 1987,¹³⁷ which continued until the Pennsylvania State Police FOP declared an impasse and sought Act 111 interest arbitration.¹³⁸ An appointed arbitration board issued an arbitration award with several provisions, including a provision permitting the substitution of grievance arbitration for court-martial proceedings.¹³⁹

The Commonwealth filed suit in response to the various provisions of the arbitration award, including the grievance arbitration over discipline provision.¹⁴⁰ The Commonwealth argued that the award was in conflict with the Commissioner’s powers and duties to issue demotions, discharges, or reinstatements under Section 711.¹⁴¹ The Pennsylvania Commonwealth Court agreed with the Commonwealth and rejected grievance arbitration as an alternative method for challenging offenses subject to

131. *Chirico*, 470 A.2d at 474–75; Iris, *Unbinding Arbitration*, *supra* note 22, at 560.

132. *Chirico*, 470 A.2d at 474–75 (“Finally, we are convinced that arbitration is the proper forum for resolution of grievance disputes involving the interpretation of a provision of an award because the right sought to be enforced is not clear where there is an ambiguity.”).

133. *Id.* at 475.

134. See *infra* Part II.C.2.c for a discussion of the application of Act 111 deference to arbitration awards pertaining to disciplinary decisions.

135. *State Conf. II*, 575 A.2d 94, 100 (Pa. 1990), *superseded by statute*, 71 PA. STAT. AND CONS. STAT. ANN. § 5955 (West 2024).

136. *Id.* at 96.

137. *Id.*

138. *Id.* (referencing 43 PA. STAT. AND CONS. STAT. § 217.4 (West 2024)).

139. *Id.*

140. *Id.*

141. *Commonwealth v. State Conf. of State Police Lodges (State Conf. I)*, 546 A.2d 697, 702 (Pa. Commw. Ct. 1988), *rev’d*, 575 A.2d 94, 96 (Pa. 1990).

court-martial proceedings.¹⁴² The court determined that, because “the legislature made the court martial proceeding an essential and integral part of a fundamental statutory scheme,” the Commissioner should have “the sole responsibility to determine the ultimate outcome of such discipline.”¹⁴³ The court also offered a public policy justification to invalidate grievance arbitration, finding that “where matters of police discipline are at issue, the impact upon the public can be especially great.”¹⁴⁴

The Pennsylvania Supreme Court reversed the commonwealth court.¹⁴⁵ In making its decision, the court relied heavily on *Board of Education v. Philadelphia Federation of Teachers Local No. 3*.¹⁴⁶ In that case, the Pennsylvania Supreme Court upheld a collective bargaining agreement between the Philadelphia Board of Education and the Philadelphia Federation of Teachers, “which permitted grievance arbitration of disputes over discipline.”¹⁴⁷ The *Board of Education* court supported its ruling by finding a “defect” in the Board of Education’s disciplinary process for nontenured teachers.¹⁴⁸ The defect arose from the board’s dual role as prosecutor and judge in the dismissal process.¹⁴⁹ The court made clear that the “opportunity for judicial review of . . . discharge[s]” did not cure the defect because judicial review of the board’s decisions was so limited.¹⁵⁰

In *State Conf. II*, the Pennsylvania Supreme Court compared the role of the commissioner to that of the Philadelphia Board of Education in *Board of Education*.¹⁵¹ First, the court found that Section 711 of the Administrative Code allowed for the commissioner to play a *dual role* of prosecutor and judge in a court-martial hearing.¹⁵² Second, as was the case in *Board of Education*, the standard of judicial review of court-martial decisions was too narrow, and thus, the court did “no[t] substitute for an impartial fact-finder.”¹⁵³ Finally, contrary to the Commonwealth’s argument, the grievance arbitration provision did not “detract[] from the Commissioner’s authority to establish rules and regulations,” nor “inhibit the Commissioner’s ability to prefer charges and recommend discharge.”¹⁵⁴ Instead, “[t]he arbitration award merely add[ed] the alternative of a hearing before an impartial arbitrator.”¹⁵⁵ As such, the Pennsylvania

142. *Id.* at 703.

143. *Id.*

144. *Id.* at 702.

145. *State Conf. II*, 575 A.2d at 100.

146. *Id.* at 98–99.

147. *Id.* at 99 (citing *Bd. of Educ. v. Phila. Fed’n of Tchrs. Local No. 3*, 346 A.2d 35, 42–43 (Pa. 1975)).

148. *Bd. of Educ.*, 346 A.2d at 41.

149. *Id.* (citing *Brentwood Borough Sch. Dist. Appeal*, 267 A.2d 848, 851 (Pa. 1970)).

150. *Id.* at 41–42.

151. *State Conf. II*, 575 A.2d at 99.

152. *See id.* (“Like the school board in *Board of Education*, the Commissioner of Pennsylvania State Police plays a ‘dual role’ in a court martial—he is required to furnish a detailed written statement of charges and then makes the ultimate decision on the merits.”).

153. *Id.* at 99–100.

154. *Id.* at 100.

155. *Id.*

Supreme Court held that Section 711 did not prevent the substitution of grievance arbitration for the court-martial process through an interest arbitration award.¹⁵⁶

The Pennsylvania Supreme Court also rejected the commonwealth court's argument that police discipline was unique because it had an especially significant impact upon the public.¹⁵⁷ Instead of addressing the argument head on, however, the Pennsylvania Supreme Court justified the use of arbitration in police discipline by distinguishing the voluntary nature of Pennsylvania State Police trooper service from that of "the indentured nature of military service."¹⁵⁸ While Pennsylvania State Police troopers could abandon their post with only the risk of termination from employment, military personnel could possibly face "execution by firing squad" if they tried to leave their jobs.¹⁵⁹ To the supreme court, a Pennsylvania State Police trooper's job was less like service in the military and more like a "civilian job."¹⁶⁰ From this logic, the court held that the Pennsylvania State Police court-martial process was not "sacrosanct" and that Pennsylvania State Police discipline was simply an "employment-related disciplinary matter[]" that could "be referred to grievance arbitration."¹⁶¹

c. The Pennsylvania Supreme Court Limits Scope of Judicial Review Over Grievance Arbitration

Just five years after *State Conf. II*, the Pennsylvania Supreme Court would significantly expand the power of arbitrators over disciplinary proceedings by limiting the scope of judicial review over grievance arbitration awards in *Betancourt*.¹⁶² The oft-cited *Betancourt* case involved a state trooper, Trooper James Betancourt, who, after going through the court-martial process and receiving a thirty-day suspension, appealed his discipline to an arbitrator under the collective bargaining provision described above.¹⁶³ The arbitrator reversed the disciplinary decision, awarded Trooper Betancourt backpay, and expunged the discipline from his work record on the grounds that Trooper Betancourt had already received adequate punishment when he was placed on restricted duty and made to do janitorial work.¹⁶⁴

When the Pennsylvania State Police appealed the decision to the commonwealth court, they requested that the court review the scope of judicial review "for an appeal of an Act 111 grievance arbitration award."¹⁶⁵ The commonwealth court agreed that the scope of review for a grievance arbitration award was more expansive than what had been applied in previous cases.¹⁶⁶ The Pennsylvania Supreme Court disagreed,

156. *Id.*

157. *See id.*

158. *See id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *See Pa. State Police v. Pa. State Troopers Ass'n (Betancourt)*, 656 A.2d 83, 88 (Pa. 1995).

163. *Id.* at 85.

164. *Id.*

165. *Id.*

166. *See id.* at 86.

however, and held that “the proper scope of review [was] narrow certiorari.”¹⁶⁷ This narrow certiorari limited the court to only review “questions regarding (1) the jurisdiction of the arbitrators; (2) the regularity of the proceedings; (3) an excess of the arbitrator’s powers; and (4) deprivation of constitutional rights.”¹⁶⁸ The court ultimately found that the grievance arbitrator’s award withstood narrow certiorari.¹⁶⁹

d. Judicial Discontent with Limited Review Power

Two Pennsylvania judges expressed immediate discontent with the *Betancourt* ruling. The first was Pennsylvania Commonwealth Court Judge Pellegrini, who criticized the narrow scope of review for leaving arbitrators “virtually unaccountable.”¹⁷⁰ Pennsylvania Supreme Court Justice Newman would be the first justice to propose expanding narrow certiorari review to include an analysis of whether an arbitrator’s award violated public policy.¹⁷¹

The same year *Betancourt* was decided, Judge Pellegrini wrote in a concurring opinion that the narrow certiorari test made “arbitrators unaccountable to anyone [regardless of] whether their decisions [were] at all rational.”¹⁷² He would reiterate this point in his majority opinion in *Pennsylvania State Police v. Pennsylvania State Troopers Ass’n (Smith I)*,¹⁷³ which, as previously discussed, involved the reinstatement of State Trooper Rodney Smith after he was fired for putting his gun into his former girlfriend’s mouth, threatening to kill her, and being indicted on several charges, including drunk driving.¹⁷⁴ Though the facts of the case were not disputed and Trooper Smith pled guilty to five charges, an arbitrator ordered his reinstatement after finding that Smith’s actions were less egregious than actions committed by troopers who had merely been suspended.¹⁷⁵

When the Commonwealth sought an appeal to overturn the arbitrator’s award, Judge Pellegrini reluctantly affirmed the arbitration award that reinstated Trooper Smith.¹⁷⁶ Judge Pellegrini again expressed deep dissatisfaction with the scope of review under *Betancourt*, stating that “no one—not the governor, not the State Police, not this court, not the Supreme Court, unless it reverses *Betancourt*, or the General Assembly, unless it amends Act 111—has the power to change an arbitrator’s irrational

167. *Id.* at 89.

168. *Id.* at 85.

169. *Id.* at 88.

170. *Pa. State Police v. Pa. State Troopers Ass’n (Smith I)*, 698 A.2d 688, 690 (Pa. Commw. Ct. 1997), *aff’d*, 741 A.2d 1248 (Pa. 1999).

171. *Smith II*, 741 A.2d 1248, 1253 (Pa. 1999) (Newman, J., dissenting) (“Further, in these limited circumstances where the public employer is the State Police . . . binding arbitration must cede to the public policy of insuring that the employees who are bound to carry out these duties are of the highest integrity and character.”).

172. *See City of Philadelphia v. FOP Lodge No. 5*, 658 A.2d 453, 458 (Pa. Commw. Ct. 1995) (Pellegrini, J., concurring).

173. *See Smith I*, 698 A.2d at 690.

174. PA. OFF. OF INSPECTOR GEN., *supra* note 30, at 40 (citing *Smith I*, 698 A.2d at 689).

175. *Smith I*, 698 A.2d at 689.

176. *Id.* at 690.

award.”¹⁷⁷ Judge Pellegrini also noted the importance of ensuring “that [law enforcement] officers properly serve [their] communit[ies].”¹⁷⁸ Not only did Judge Pellegrini find that the arbitrator put the public at risk by reinstating a dangerous trooper, but he also believed that the reinstatement would make “it more difficult for other troopers who carry out their day-to-day duties in a professional and competent manner.”¹⁷⁹

On appeal, the Pennsylvania Supreme Court not only affirmed the grievance arbitration award reinstating Trooper Smith,¹⁸⁰ but also rejected the argument that it should overturn grievance arbitration awards it thought contravened public policy.¹⁸¹ Such interference, in the court’s opinion, would broaden its scope of review beyond narrow certiorari.¹⁸² The court believed that adding a public policy exception equated to rewriting Act 111 and would undermine the purpose of Act 111 to expedite the labor grievance dispute process.¹⁸³ The court clarified in a footnote that although it reinstated Trooper Smith, it did not condone his actions.¹⁸⁴

In her dissent, Justice Newman argued for the public policy exception and believed that it should apply when reviewing arbitration awards in cases where the public employer was the Pennsylvania State Police.¹⁸⁵ To Justice Newman, the responsibilities of the Pennsylvania State Police, which include enforcing the Commonwealth’s laws and ensuring the safety of its citizens, required a “public policy of [e]nsuring that the employees who are bound to carry out [those] duties are of the highest integrity and character.”¹⁸⁶ Justice Newman concluded that the public policy concerns unique to Pennsylvania State Police should supersede the public policy of binding arbitration.¹⁸⁷ As such, Justice Newman would have found that the reinstatement of Trooper Smith contravened “basic public policy” by forcing the Pennsylvania State Police to rehire someone “convicted of serious crimes.”¹⁸⁸ Even with this initial antagonism from Pennsylvania judges, however, the Pennsylvania courts continue to utilize the *Betancourt* narrow certiorari scope of review.¹⁸⁹

177. *Id.*

178. *Id.*

179. *Id.*

180. *Smith II*, 741 A.2d 1248, 1253 (Pa. 1999).

181. *Id.* at 1252.

182. *Id.* at 1252–53.

183. *Id.*

184. *Id.* at 1253 n.8.

185. *Id.* at 1255 (Newman, J., dissenting).

186. *Id.*

187. *Id.*

188. *Id.* at 1258.

189. *Northern Berks Reg’l Police Comm’n v. Berks County FOP, Lodge No. 71*, 230 A.3d 1022, 1032–34 (Pa. 2020).

3. The Pennsylvania General Assembly Overrules Pennsylvania Supreme Court and Precludes Interest Arbitration

In at least two instances, the Pennsylvania General Assembly enacted legislation precluding binding interest arbitration, in response to the Pennsylvania Supreme Court giving interest arbitration boards permission to modify employee pension benefits¹⁹⁰ and municipal recovery plans.¹⁹¹ The Pennsylvania General Assembly overruled the court in both instances by amending existing statutes to explicitly prevent *arbitration awards* from altering key provisions of those statutes.¹⁹²

In 1991, the Pennsylvania General Assembly, in reaction to the Pennsylvania Supreme Court's 1990 *State Conf. II* decision, explicitly precluded interest arbitration over statutorily mandated pension benefits.¹⁹³ As discussed above, the Pennsylvania Supreme Court in *State Conf. II* allowed state troopers to have their disciplinary grievances arbitrated through binding arbitration.¹⁹⁴ In that same case, the court also addressed the question of whether the State Employees' Retirement Code ("Retirement Code"),¹⁹⁵ which explicitly prohibited collective bargaining agreements from determining pension benefits,¹⁹⁶ also prevented arbitration awards from doing the same.¹⁹⁷

The *State Conf. II* court answered in the negative, holding that it would not rewrite the Retirement Code by adding the phrase "nor any arbitration award."¹⁹⁸ A year later, the general assembly overruled the court by amending the Retirement Code to include the court's proposed language: "[P]ension [and benefit] rights of State employees shall be determined solely by this part or any amendment thereto, and no collective bargaining agreement *nor any arbitration award* between the Commonwealth and its employees *or their collective bargaining representatives* shall be construed to change any of the provisions herein"¹⁹⁹ The Pennsylvania Commonwealth Court noted in 2001 that although the Pennsylvania General Assembly

190. See, e.g., *State Conf. II*, 575 A.2d 94 (Pa. 1990), *superseded by statute*, 71 PA. STAT. AND CONS. STAT. ANN. § 5955 (West 2024).

191. See, e.g., *City of Scranton v. Firefighters Local Union No. 60*, 29 A.3d 773 (Pa. 2011), *superseded by statute*, 53 PA. STAT. AND CONS. STAT. ANN. § 11701.252 (West 2024).

192. *Upper Gwynedd Twp. v. Upper Gwynedd Twp. Police Ass'n*, 777 A.2d 1187, 1193 (Pa. Commw. Ct. 2001); *FOP Fort Pitt Lodge No. 1 v. City of Pittsburgh*, 203 A.3d 965, 969 (Pa. 2019).

193. Act of Aug. 5, 1991, Pub. L. No. 183, sec. 24, § 5955, 1991 Pa. Legis. Serv. (West) (as amended 71 PA. STAT. AND CONS. STAT. ANN. § 5955 (West 2024)) (adding the language "nor any arbitration award"); see also *Upper Gwynedd Twp. Police Ass'n*, 777 A.2d at 1193 (describing the amendment of the State Employees' Retirement Code).

194. *State Conf. II*, 575 A.2d at 100.

195. 71 PA. STAT. AND CONS. STAT. ANN. §§ 5101–5958; see also *Upper Gwynedd Twp. Police Ass'n*, 777 A.2d at 1193 (describing the amendment of the State Employees' Retirement Code); *Firefighters Local Union No. 60*, 29 A.3d at 789 n.26.

196. § 5955(a).

197. *State Conf. II*, 575 A.2d at 97.

198. *Id.*

199. Act of Aug. 5, 1991, § 5955 (as amended 71 PA. STAT. AND CONS. STAT. ANN. § 5955) (emphasis added); see also *Upper Gwynedd Twp. Police Ass'n*, 777 A.2d at 1193.

had precluded state troopers from modifying pension benefits through arbitration, it had never done the same for the use of binding grievance arbitration over discipline.²⁰⁰

The Pennsylvania General Assembly would again limit the reach of interest arbitration in 2012, this time over municipal recovery plans.²⁰¹ In 2002, the City of Scranton maintained the status of “distressed municipality” under the Municipalities Financial Recovery Act (“Act 47”),²⁰² and thus was placed under a recovery plan.²⁰³ The recovery plan coincided with the expiration of the collective bargaining agreements between Local Union No. 60 of the International Association of Fire Fighters, AFL-CIO, and E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police (collectively referred to here as “the Unions”).²⁰⁴ After reaching an impasse, Scranton and the Unions selected interest arbitration boards under Act 111.²⁰⁵ The arbitration boards, finding that Scranton provided significantly lower wages and benefits compared to other Pennsylvania cities, issued interest arbitration awards that contravened the recovery plan by awarding lump-sum bonuses, salary increases, and adjustments to health insurance deductibles to police and fire.²⁰⁶

Scranton filed suit, seeking to either vacate or modify the compensation awards.²⁰⁷ The city argued that, because Section 252 of Act 47 prevented collective bargaining agreements and arbitration settlements from altering the recovery plans, the interest arbitration boards “lacked legal authority to award relief impinging upon the Recovery Plan.”²⁰⁸ The central issue in *City of Scranton v. Firefighters Local Union No. 60*, then, was whether the term “arbitration settlement[s],” in Section 252, included arbitration awards issued under Act 111.²⁰⁹ The Pennsylvania Supreme Court held that the term “arbitration settlement” was ambiguous²¹⁰ and that any displacement of the policies underlying Act 111 interest arbitration must be explicitly conveyed by the Pennsylvania General Assembly.²¹¹ As in *State Conf. II*, the Pennsylvania General Assembly wasted no time amending Act 47 to clarify that “arbitration settlement”

200. *Upper Gwynedd Twp. Police Ass’n*, 777 A.2d at 1193.

201. *See* FOP Fort Pitt Lodge No. 1 v. City of Pittsburgh, 203 A.3d 965, 969 (Pa. 2019) (describing the amendment to the Municipalities Financial Recovery Act).

202. 53 PA. STAT. AND CONS. STAT. ANN. §§ 11701.101–.712 (West 2024).

203. *See* FOP Fort Pitt Lodge No. 1, 203 A.3d at 969 (describing the amendment to the Municipalities Financial Recovery Act).

204. *City of Scranton v. Firefighters Loc. Union No. 60*, 29 A.3d 773, 776 (Pa. 2011), *superseded by statute*, § 11701.252.

205. *Id.*

206. *Id.* at 777.

207. *Id.* at 778.

208. *Id.* at 776.

209. 29 A.3d 773, 781 (Pa. 2011) (“As their lead issue, the Unions maintain that, by its very terms, Section 252 of Act 47 applies only to ‘collective bargaining agreement[s]’ and ‘arbitration settlement[s].’ The Unions stress the absence from Section 252 of the term ‘award,’ while explaining that this word evokes a distinct, straightforward, and universally-appreciated understanding in the domain of public-sector labor relations.” (alterations in original) (citation omitted) (quoting 53 PA. STAT. AND CONS. STAT. ANN. § 11701.252(a) (West 2024))).

210. *Id.* at 787.

211. *Id.* at 789.

included both collective bargaining agreements *and* Act 111 arbitration awards,²¹² thus overruling the Pennsylvania Supreme Court.²¹³

D. *Disciplining New Jersey State Police*

This Part provides an overview of the New Jersey State Police disciplinary process. Part II.D.1 will discuss the New Jersey State Police's enabling statute and rules and regulations pertaining to discipline, as well as the limited judicial review of agency disciplinary decisions. Part II.D.2 will then explore the New Jersey Legislature's and the New Jersey Supreme Court's respective decisions to prevent New Jersey State Police troopers from using grievance arbitration to review disciplinary disputes.

1. Internal Discipline and Judicial Review for New Jersey State Police

a. *New Jersey State Police Leadership Controls Trooper Discipline*

Title 53 of the New Jersey Revised Statutes establishes the structure and powers of the New Jersey State Police.²¹⁴ The Superintendent, who leads the New Jersey State Police,²¹⁵ “make[s] all rules and regulations for the discipline and control” of New Jersey State Police troopers.²¹⁶ These rules and regulations include “obey[ing] any lawful order emanating from any superior or commissioned officer, superior non-commissioned officer, or other member placed by competent authority in a position of supervision over such member.”²¹⁷ After receiving reports on any violations of rules or regulations promulgated by the superintendent,²¹⁸ the Office of Professional Standards administers the investigative and disciplinary process for the New Jersey State Police.²¹⁹ The Office of Professional Standards' substantiation of an allegation of officer misconduct is followed by the imposition of discipline by the superintendent.²²⁰ A disciplined officer can seek plenary review of contested disciplinary charges through the New Jersey court system²²¹ or an administrative law judge (ALJ).²²²

212. 53 PA. STAT. AND CONS. STAT. ANN. § 11701.103 (West 2024).

213. *See* FOP Fort Pitt Lodge No. 1 v. City of Pittsburgh, 203 A.3d 965, 969 (Pa. 2019) (“The General Assembly then amended Act 47 by clarifying that ‘arbitration settlement’ includes both collective bargaining agreements and binding arbitration awards or determinations . . .”).

214. N.J. STAT. ANN. § 53:1-1 (West 2024).

215. *Id.* § 52:17B-7.

216. *Id.* § 53:1-10.

217. N.J. STATE POLICE, RULES & REGULATIONS 7 (1977).

218. OFF. OF PRO. STANDARDS, N.J. STATE POLICE, ANNUAL REPORT 2020, at 5 (2020).

219. *Office of the Superintendent*, N.J. STATE POLICE, <https://nj.gov/njsp/division/office-superintendent.shtml> [<https://perma.cc/7YEU-PLM7>] (last visited Jan. 24, 2024).

220. OFF. OF PRO. STANDARDS, *supra* note 218, at 17.

221. N.J. STAT. ANN. § 52:14-17.2 (West 2024); *see also* State v. State Troopers Fraternal Ass'n (*Troopers II*), 634 A.2d 478, 493 (N.J. 1993) (acknowledging that “troopers can challenge removals from the Division by appeals to the Appellate Division”).

222. N.J. ADMIN. CODE § 1:1-1.1 (West 2024); *see also* State Troopers Fraternal Ass'n of N.J., Inc. v. New Jersey, No. 13-cv-1065, 2013 WL 6501742, at *3 n.3 (D.N.J. Dec. 11, 2013) (“The Division regularly

b. Scope of Judicial Review Favors Superintendent Discipline

New Jersey State Police troopers may appeal removal decisions to the Appellate Division of the New Jersey Superior Court.²²³ However, appellate review of the superintendent's decisions, like other administrative agencies, is limited.²²⁴ The court's scope of review is guided by three major inquiries: (1) whether the New Jersey State Police's decision conforms with relevant law; (2) whether the decision is supported by "substantial evidence" in the record; and (3) whether, in applying the law to the facts, the New Jersey State Police clearly erred in reaching its conclusion.²²⁵ When a decision satisfies these factors, the courts accord "substantial deference" to the New Jersey State Police, acknowledging the agency's "expertise and superior knowledge."²²⁶

2. No Grievance Arbitration Over New Jersey State Police Troopers
Disciplinary Matters

a. Legislative Prohibition on Grievance Arbitration for New Jersey State Police Troopers

In 1968, the New Jersey Legislature amended the New Jersey Labor Mediation Act,²²⁷ renaming it the New Jersey Employer-Employee Act²²⁸ (EERA) to provide New Jersey public employees, including New Jersey State Police troopers, the right to collectively bargain²²⁹ and use binding arbitration as a means of resolving disputes.²³⁰ However, in 1981, the New Jersey Appellate Division of the Superior Court ruled that employers and employees could not collectively bargain over disciplinary disputes.²³¹ The New Jersey Legislature overruled the court's decision in 1982 by amending the

transmits disciplinary matters to the Office of Administrative Law (the 'OAL') for a plenary review of any disciplinary charges by an administrative law judge ('ALJ').")

223. N.J. STAT. ANN. § 52:14-17.2 (West 2024); *see also In re Carberry*, 556 A.2d 314, 315–16 (N.J. 1989).

224. *In re Herrmann*, 926 A.2d 350, 355 (N.J. 2007) (citing *Carter v. Township of Borden*, 924 A.2d 525, 530 (N.J. 2007)).

225. *See In re Stallworth*, 26 A.3d 1059, 1066 (N.J. 2011) (quoting *Carter*, 924 A.2d at 530).

226. *See, e.g., Circus Liquors, Inc. v. Governing Body of Middletown Twp.*, 970 A.2d 347, 352 (N.J. 2009) (quoting *Greenwood v. State Police Training Ctr.*, 606 A.2d 336, 342 (N.J. 1992)).

227. New Jersey Labor Mediation Act, ch. 100, 1941 N.J. Sess. Law Serv. 228 (West).

228. New Jersey Employer-Employee Act, ch. 303, 1968 N.J. Sess. Law Serv. 891, 891, 895–96 (West) (codified as N.J. STAT. ANN. § 34:13A-1 (West 2024)).

229. *Id.* at 895–96 (amending § 34:13A-5.3).

230. *Id.* at 896 (amending § 34:13A-5.3).

231. *State v. Local 195*, 430 A.2d 966, 969 (N.J. Super. Ct. App. Div. 1981) (citing *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 393 A.2d 278, 285–86 (N.J. 1978)), *superseded by statute*, N.J. STAT. ANN. § 34:13A-5.3 (West 2024); *see also Jersey City v. Jersey City Police Officers' Benevolent Ass'n*, 430 A.2d 961, 962 (N.J. Super. Ct. App. Div. 1981) (citing *Ridgefield Park Educ. Ass'n*, 393 A.2d at 285–86) ("The matter of the discipline of the members of a municipal police department is plainly a subject of essential inherent managerial prerogative which has been delegated by the Legislature to the municipality and cannot be negotiated away by agreement by the municipality.").

EERA.²³² The amendment (“1982 EERA discipline amendment”) made clear that administrative decisions subject to collective bargaining negotiations under the EERA would include “disciplinary determinations,” disciplinary review procedures, and disciplinary disputes in general.²³³ The 1982 EERA discipline amendment was drafted so as to not apply to employees with an alternate statutory appeal procedure for contesting discipline,²³⁴ leaving New Jersey State Police without the right to collectively bargain over discipline.²³⁵

Two additional amendments to the EERA provided public employees with the right to arbitrate over minor discipline²³⁶ and major discipline.²³⁷ In both amendments, the New Jersey Legislature deliberately excluded the New Jersey State Police.²³⁸

232. An Act of July 30, 1982, ch. 103, sec. 1, § 34:13A-5.3, 1982 N.J. Sess. Law Serv. 544, 544–46 (West) [hereinafter EERA 1982 Amend.]; see also Assembly Member Patero, *Statement to Assembly Bill* app. 706, at 3 (Feb. 1, 1982), <https://repo.njstatelib.org/bitstream/handle/10929.1/89888/L1982c103.pdf> [<https://perma.cc/8APK-VTW7>] (“In June of 1981 the Appellate Division of the State Superior Court ruled that disciplinary determinations did not fall within the scope of mandatory negotiations and that collective agreements could not, therefore, provide for the submission to binding arbitration of contested disciplinary actions. This bill would overturn that court ruling so as to give meaning to the State Constitution’s guarantee of the right of public employees to ‘present . . . their grievances and proposals through representatives of their own choosing’.” (omission in original) (quoting N.J. Const. art. I, ¶ 19)); N.J. PUB. EMP. RELS. COMM’N, PERC AFTER 40 YEARS 13 (2008), https://www.state.nj.us/perc/documents/PERC_after_40_Years.pdf [<https://perma.cc/YJ5L-HW4C>].

233. EERA 1982 Amend., ch. 103, sec. 1, at 545 (adding the language “disciplinary disputes,” “disciplinary review,” and “disciplinary determinations”); Patero, *supra* note 232, at 3.

234. EERA 1982 Amend., ch. 103, sec. 7, at 546.

235. See N.J. STAT. ANN. § 53:1-10 (West 2024).

236. Law Enforcement Officers’ Protection Act, ch. 115, sec. 4, § 34:13A-5.3, 1996 N.J. Sess. Law Serv. 812, 821 (West) [hereinafter EERA 1996 Amend.] (adding the language, “except that such procedures may provide for binding arbitration of disputes involving the minor discipline of any public employees protected under the provisions of section 7 of P.L.1968, c. 303 (C. 34:13A-5.3)”; N.J. PUB. EMP. RELS. COMM’N, *supra* note 232, at 14 (“The Legislature responded by once again amending N.J.S.A. 34:13A-5.3, this time to make clear that public employers could agree to arbitrate minor disciplinary disputes involving any public employees *except State troopers*.” (emphasis added)).

237. Act of July 1, 2003, ch. 119, sec. 2, § 34:13A-5.3, 2003 N.J. Sess. Law Serv. 711, 713–14 (West) [hereinafter EERA 2003 Amend.] (“Where the State of New Jersey and the majority representative have agreed to a disciplinary review procedure that provides for binding arbitration of disputes involving the major discipline of any public employee protected under the provisions of this section . . . the grievance and disciplinary review procedures established by agreement . . . shall be utilized for any dispute covered by the terms of such agreement.”); see also N.J. PUB. EMP. RELS. COMM’N, *supra* note 232, at 38 (“The prohibition still applies to negotiations units of local government employees.”).

238. Both amendments explicitly reference § 53:1-10, which pertains to the superintendent’s ability to make rules and regulations for discipline and control of the state police. See N.J. STAT. ANN. § 53:1-10 (West 2024). The 1996 amendment states, “except that such procedures may provide for binding arbitration or disputes involving the minor discipline of any public employees protected under the provisions of section 7 of P.L.1968, c. 303 (C.34:13A-5.3), other than public employees subject to discipline pursuant to R.S.53:1-10.” EERA 1996 Amend., ch. 115, sec. 4, § 34:13A-5.3, at 821. The 2003 amendment states, “Where the State of New Jersey and the majority representative have agreed to a disciplinary review procedure that provides for binding arbitration of disputes involving the major discipline of any public employee protected under the provisions of this section, other than public employees subject to discipline pursuant to R.S.53:1-10.” EERA 2003 Amend., ch. 119, sec. 2, § 34:13A-5.3, at 714–15.

Instead, the Superintendent's rules and regulations pertaining to discipline were, and still are, the sole disciplinary structure for New Jersey State Police troopers.²³⁹

b. New Jersey Courts Preclude Arbitration for New Jersey State Police Troopers

In 1993, the New Jersey Supreme Court prevented New Jersey State Police troopers from collectively bargaining over alternative disciplinary procedures, including grievance arbitration.²⁴⁰ The case of *State v. State Troopers Fraternal Ass'n (Troopers II)* began when the State Troopers Fraternal Association "sought relief [for four disciplined officers] through the binding arbitration procedure available" through their collective bargaining agreement.²⁴¹ In response, the State of New Jersey (the State) filed a scope-of-negotiations petition with the Public Employment Relations Commission (PERC) to determine whether the New Jersey State Police were obligated to negotiate over the "arbitration of state trooper disciplinary proceedings."²⁴² PERC denied the State's request, holding that the 1982 EERA disciplinary amendment did obligate such negotiations.²⁴³ The Appellate Division of the New Jersey Superior Court affirmed PERC's decision on appeal.²⁴⁴ The Appellate Division held that the lack of an alternative statutory appeal procedure for minor disciplinary decisions permitted troopers to bargain for grievance arbitration.²⁴⁵

The New Jersey Supreme Court reversed the lower court's decision, holding that the 1982 EERA discipline amendment did not apply to the New Jersey State Police.²⁴⁶ The court first found that the 1982 EERA discipline amendment did not affect county or municipal police departments because they were covered by other statutory appeal procedures.²⁴⁷ This led the court to address whether the New Jersey Legislature intended the New Jersey State Police to be "the only major police force" that the 1982 EERA discipline amendment applied to.²⁴⁸

In making its determination, the court considered past precedent, the statutory provisions that authorized and governed the operations of the Division, and the New Jersey State Police rules and regulations that established the New Jersey State Police disciplinary procedure.²⁴⁹ First, the court relied on its analysis in *In re Carberry* to establish that various statutes delegated authority over discipline to the New Jersey State Police Superintendent.²⁵⁰ Next, the court determined that the statutory provisions

239. N.J. STAT. ANN. § 53:1-10 (West 2024).

240. *Troopers II*, 634 A.2d 478, 492 (N.J. 1993).

241. *Id.* at 481.

242. *Id.*

243. *Id.* at 480.

244. *State v. State Troopers Fraternal Ass'n (Troopers I)*, 615 A.2d 1286, 1293 (N.J. Super. Ct. App. Div. 1992), *rev'd*, 634 A.2d 478 (N.J. 1993).

245. *Id.*

246. *Troopers II*, 634 A.2d at 489–93.

247. *Id.* at 492.

248. *Id.* at 489–90.

249. *Id.* at 490–91.

250. *Id.* at 490 (citing *In re Carberry*, 556 A.2d 314, 315–16 (N.J. 1989)).

relating to the New Jersey State Police distinguished the agency from other state and local government agencies, including local police departments.²⁵¹ Unlike other agencies, statutory law required New Jersey State Police troopers to establish “their mental and physical fitness and general qualifications,”²⁵² work for a continuous period of time before becoming a member of the New Jersey State Police,²⁵³ and face criminal charges for voluntary withdrawal from the New Jersey State Police “without the consent of the Superintendent.”²⁵⁴ Finally, the court found that the provisions of the New Jersey State Police rules and regulations demonstrated that discipline should be an inherently managerial privilege, granted only to the Superintendent and not to an outside arbitrator.²⁵⁵

The court also recognized the unique importance of disciplining law enforcement officers, as compared to employees in other state government agencies:

Unlike the comparably routine issues of discipline that might arise in connection with employees in other departments of state government, the discipline of state troopers implicates not only the proper conduct of those engaged in the most significant aspects of law enforcement, involving the public safety and the apprehension of dangerous criminals, but also the overall effectiveness, performance standards, and morale of the State Police.²⁵⁶

Given the unique nature of the New Jersey State Police and the need to vest disciplinary power in the hands of the New Jersey State Police Superintendent, the court held that the 1982 EERA discipline amendment did not apply to the New Jersey State Police and that it precluded New Jersey State Police troopers from seeking grievance arbitration for discipline.²⁵⁷ The court concluded its opinion by making clear that the New Jersey Legislature had every right to overrule its decision on the scope of the 1982 EERA discipline amendment by passing clarifying legislation.²⁵⁸ When the New Jersey Legislature amended the EERA in both 1996 and 2003, it codified the court’s decision by explicitly precluding all troopers from using grievance arbitration to review major and minor discipline.²⁵⁹

III. DISCUSSION

The Pennsylvania General Assembly must pass legislation preventing Pennsylvania State Police troopers from using grievance arbitration as a substitute for the court-martial disciplinary process. Part III.A discusses various reasons why the Pennsylvania General Assembly should ensure that the court-martial process is the only

251. *Id.*

252. *Id.* (citing N.J. STAT. ANN. § 53:1-9 (West 2024)).

253. *Id.* (citing § 53:1-8.1).

254. *Id.* (citing § 53:1-11).

255. *Id.* at 490–91.

256. *Id.* at 491.

257. *Id.* at 493.

258. *Id.*

259. *See supra* Part II.D.2.a.

disciplinary procedure for state troopers. First, the court-martial process is effective and unbiased. Second, prohibiting grievance arbitration will reinforce the Pennsylvania State Police paramilitary structure. Finally, arbitration continually undermines public safety by preventing the removal of dangerous and insubordinate troopers. Part III.B argues that Pennsylvania should emulate New Jersey. Both the New Jersey Supreme Court and the New Jersey Legislature recognize the unique importance of disciplining state troopers and the significance of vesting disciplinary power with New Jersey State Police leadership. Finally, Part III.C provides model legislation explicitly preventing state troopers from using grievance arbitration. Specifically, the Pennsylvania General Assembly must amend both Section 711 of the Pennsylvania Administrative Code of 1929 and Act 111, the Collective Bargaining by Policemen or Firemen Act, to effectively remove grievance arbitration from the Pennsylvania State Police disciplinary process.

A. *Reasons for Change*

1. Court-Martials as an Effective and Unbiased Disciplinary Process

The court-martial process was an effective and unbiased method of disciplining Pennsylvania State Police troopers. The Pennsylvania Supreme Court and Commonwealth Court recognized this before the transition to grievance arbitration after 1990.²⁶⁰ Prior to *State Conference*, both the court-martial process and the Pennsylvania State Police Field Regulations underwent at least three separate constitutional challenges (*Dussia v. Barger*,²⁶¹ *Berman v. Commonwealth*,²⁶² *Swaydis v. Commonwealth*).²⁶³ In *Dussia*, the Pennsylvania Supreme Court found that Section 711 was not defective in and of itself, but that its implementation through the Field Regulations unconstitutionally commingled the role of judge and prosecutor within the Pennsylvania State Police Commissioner.²⁶⁴ After this finding, the Commissioner updated the Field Regulations to cure the deficiencies found by the court.²⁶⁵ These updated rules and regulations were challenged in *Berman* and *Swaydis*, both with the same outcome—there was no evidence of actual bias in the disciplinary process, and there was no unconstitutional commingling of prosecutorial and judicial functions within the Commissioner.²⁶⁶

The current edition of the Field Regulations is similar, if not identical, to the versions analyzed in *Berman* and *Swaydis*.²⁶⁷ As such, the Field Regulations still

260. See generally *Berman v. Commonwealth*, 391 A.2d 715, 718–19 (Pa. Commw. Ct. 1978); *Swaydis v. Commonwealth*, 477 A.2d 917, 918 (Pa. Commw. Ct. 1984).

261. 351 A.2d 667, 675 (Pa. 1975).

262. 391 A.2d at 716.

263. 477 A.2d at 918.

264. *Dussia*, 351 A.2d at 675.

265. *Swaydis*, 477 A.2d at 918 n.5.

266. *Berman*, 391 A.2d at 716–19; *Swaydis*, 477 A.2d at 918–19.

267. Compare *Berman*, 391 A.2d at 717 n.3, and *Swaydis*, 477 A.2d at 918 n.5, with INTERNAL INVESTIGATIONS, *supra* note 92, at 30–31.

prevent the Commissioner from playing a dual role as prosecutor and judge.²⁶⁸ When a state trooper is alleged to have committed misconduct, an adjudicating officer will issue a disciplinary report and provide that report to the accused officer.²⁶⁹ From there, a disciplinary officer plays the role of prosecutor, reviewing the disciplinary record and either disciplining the trooper or initiating a court-martial proceeding.²⁷⁰ The Commissioner is then obligated, under Section 711, to appoint a court-martial board and determine the guilt or innocence of the accused trooper.²⁷¹ This fulfills the Commissioner's judicial role.²⁷² The separation between the disciplinary officers and the Commissioner creates an unbiased and impartial system to adjudicate state trooper misconduct, thus removing the need for an arbitrator to act as an "impartial fact-finder."²⁷³

2. Arbitration Disrupts the Paramilitary Administrative Model

The use of arbitration disrupts the paramilitary command structure of the Pennsylvania State Police. The Pennsylvania General Assembly, which created the Pennsylvania State Police, recognizes that the agency is a paramilitary organization.²⁷⁴ The Pennsylvania State Police maintain a rank structure similar to that of the military, even using military rank terms like colonel, lieutenant colonel, sergeant, and trooper.²⁷⁵ This rank structure creates a chain of command with a commissioner at the head of the department.²⁷⁶ The Pennsylvania General Assembly²⁷⁷ and the Field Regulations vest the commissioner with the power to discipline officers in the way they see fit.²⁷⁸ Under the Field Regulations, "Commanders, Directors, and supervisors are responsible for the

268. *Bd. of Educ. v. Phila. Fed'n of Tchrs., Local No. 3*, 346 A.2d 35, 41 (Pa. 1975).

269. *See supra* note 91 and accompanying text; *see also* INTERNAL INVESTIGATIONS, *supra* note 92, at 30–31.

270. DISCIPLINE REGULATIONS, *supra* note 91, at 6.

271. 71 PA. STAT. AND CONS. STAT. ANN. § 251(b)(1) (West 2024).

272. *See id.* ("Before any enlisted member who has not reached mandatory retirement age is dismissed or refused reenlistment by the commissioner, the commissioner shall furnish such enlisted member with a detailed written statement of the charges upon which his dismissal or refusal of reenlistment is based, together with a written notice, signed by the commissioner or the proper authority, of a time and place where such enlisted member will be given an opportunity to be heard either in person or by counsel, or both, before a Court-martial Board appointed by the commissioner. The board shall consist of three commissioned officers.").

273. *State Conf. II*, 575 A.2d 94, 99 (Pa. 1990), *superseded by statute*, 53 PA. STAT. AND CONS. STAT. ANN. § 11701.252 (West 2024).

274. LEGIS. BUDGET AND FIN. COMM., *supra* note 75, at S-3.

275. *Id.*; *Pennsylvania State Police Insignias*, PA. STATE POLICE, <https://www.psp-hemc.org/insignias/index.html> [<https://perma.cc/S798-7RBE>] (last visited Jan. 24, 2024).

276. *See* 71 PA. STAT. AND CONS. STAT. ANN. § 65(a) (West 2024).

277. § 251(b)(2) ("[T]he Court-martial Board shall, by a two-thirds vote of all members . . . determine whether or not such charges or complaints have been sustained and whether the evidence substantiates such charges and complaints, and in accordance with such determination, shall recommend the discharge, demotion or refusal of reenlistment of such enlisted member to the commissioner The commissioner may, in his discretion, follow or disregard the recommendations of the Court-martial Board.").

278. DISCIPLINE REGULATIONS, *supra* note 91, at 3.

conduct and performance of members of their immediate command.”²⁷⁹ This chain of command is strict. Commanders and directors cannot discipline troopers that are not under their direct command.²⁸⁰

The Pennsylvania Supreme Court’s precedent allows an arbitrator, and not the Commissioner, to be the true adjudicator of discipline for the Pennsylvania State Police.²⁸¹ This substitution of disciplinary roles contravenes the organizational principles embraced by the paramilitary model, which includes the prioritization of top-down management structures, the promotion of discipline, and the requirement of obedience to higher ranking members of the department.²⁸² Arbitration weakens the Pennsylvania State Police’s paramilitary administrative model by stripping the commissioner of their power to discipline state troopers. The current collective bargaining agreement between the Commonwealth and the Pennsylvania State Troopers Association (PSTA) allows an arbitrator to review an entire disciplinary decision.²⁸³ At their discretion, the arbitrator may reduce or reverse the commissioner’s discipline²⁸⁴ and bind both the commissioner and the PTSA to their decision.²⁸⁵ Although there is an opportunity to appeal an arbitrator’s decision, *Betancourt*’s narrow certiorari limits the ability of the courts to reverse a grievance arbitration decision.²⁸⁶ As long as the Pennsylvania State Police employ a paramilitary model, arbitration should not be allowed to replace the Commissioner’s disciplinary role.

3. Arbitration for Police Misconduct Endangers Public Safety

Given their heightened responsibilities, Pennsylvania State Police troopers require a more stringent disciplinary process than arbitration to promote public safety. The Pennsylvania Supreme Court was misguided in *State Conf. II* when it equated the service of a state trooper to civilian employment²⁸⁷ and described the Pennsylvania State Police court-martial proceedings as simply an “employment-related disciplinary matter[.]”²⁸⁸ Unlike other civilian employees, Pennsylvania State Police are sanctioned

279. *Id.* at 4.

280. *Id.*

281. Pa. State Troopers Ass’n v. Pa. State Police, 667 A.2d 38, 41–42 (Pa. Commw. Ct. 1995) (“The arbitration of a grievance under the collective bargaining agreement between the FOP and the State Police essentially fulfills the role held by the Board and Commissioner of the State Police in court-martial proceedings.”).

282. NOVAK ET AL., *supra* note 69, at 141.

283. PA. STATE TROOPER ASS’N 2021 CONT., *supra* note 40, art. 28 § 7, at 32.

284. *Id.*

285. *Id.*

286. Iris, *Unbinding Arbitration*, *supra* note 23, at 561–62 (“Act 111, and the *Betancourt* precedent applying that Act, have been cited in subsequent judicial proceedings to constrain court intervention. As such, they serve as a major obstacle to any police (or fire) service employer seeking a reversal of an adverse disciplinary arbitration proceeding.” (footnote omitted)).

287. *State Conf. II*, 575 A.2d 94, 100 (Pa. 1990), *superseded by statute*, 53 PA. STAT. AND CONS. STAT. ANN. § 11701.252 (West 2024).

288. *Id.*

by the state to use force, including lethal force.²⁸⁹ Additionally, troopers are responsible for collecting information through police reports and must testify in court.²⁹⁰ With law enforcement's unique powers comes a greater need for self-control and integrity.

Officers that display attributes of aggression or dishonesty should be removed to ensure the safety of the community. Take, for example, Pennsylvania State Police Trooper Rodney Smith, the trooper who forced his gun into the mouth of his former partner after driving drunk.²⁹¹ Although Trooper Smith had been fired, he was subsequently rehired as the result of an arbitrator's decision.²⁹² The arbitrator determined that other troopers had received less severe punishment for more egregious actions.²⁹³ When reviewing the arbitration award, the Pennsylvania Commonwealth Court felt bound by narrow certiorari to side with the arbitrator.²⁹⁴

Judge Pellegrini clearly identified the issue created by the Pennsylvania Supreme Court's precedent: "Under the present state of the law, if Smith had 'blown off' the woman's head, as he explicitly threatened to do with the gun in his hand, and the arbitrator had put him back on the job as a law enforcement officer, this court could do nothing."²⁹⁵ Judge Pellegrini noted that returning Trooper Smith to the force "increased the risk to the public."²⁹⁶ On appeal, the Pennsylvania Supreme Court sided with the arbitrator.²⁹⁷ In her dissent, Justice Newman reasoned that the unique duties of state troopers, including the enforcement of laws and protection of citizens, justified the assertion that "the public policy of binding arbitration must cede to the public policy of [e]nsuring that the employees who are bound to carry out these duties are of the highest integrity and character."²⁹⁸

Returning dangerous officers to the force not only endangers the public, but also erodes the public's trust in the Pennsylvania State Police. Judge Pellegrini noted in *Smith I* that returning Trooper Smith to the force "brought disrespect to the force, making it more difficult for other troopers who carry out their day-to-day duties in a professional and competent manner."²⁹⁹ In 2000, federal lawsuits brought to light patterns of sexual assault within the Pennsylvania State Police, further eroding public

289. GENERAL REQUIREMENTS, *supra* note 89, at 14–16 ("The Department's standards with regard to the proper use and handling of firearms shall be strictly interpreted and enforced in accordance with FR 9-2 and FR 9-3.").

290. *See supra* note 19 and accompanying text; *see also* Wesley G. Skogan & Tracey L. Meares, *Lawful Policing*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 67 (2004); *see Adams, supra* note 15, at 151.

291. *Smith I*, 698 A.2d 688, 689 (Pa. Commw. Ct. 1997), *aff'd* 741 A.2d 1248 (Pa. 1999).

292. *Id.*

293. *Smith II*, 741 A.2d at 1250.

294. *Smith I*, 698 A.2d at 690.

295. *Id.*

296. *Id.*

297. *Smith II*, 741 A.2d at 1252 ("We hold that pursuant to *Betancourt*, the arbitrators in the instant matters did not exceed their powers.").

298. *Id.* at 1255 (Newman, J. dissenting).

299. *Smith I*, 698 A.2d at 690.

trust.³⁰⁰ In the aftermath of the lawsuits, Pennsylvania’s Inspector General, Donald Patterson, conducted a review of the Pennsylvania State Police’s disciplinary process.³⁰¹ The review uncovered that discipline for sexual misconduct and assault was either “minimal, disparate, or diminished during the grievance process.”³⁰² The Pennsylvania State Police justified minimal or diminished discipline, in part, by pointing to the anticipated result of arbitration decisions.³⁰³ A monitor hired to oversee the state’s efforts to improve disciplinary guidelines noted that “the goal of restoring the public’s confidence in the [state police] ha[d] . . . not been achieved” just over a year after the Inspector General’s report had been released.³⁰⁴ Prohibiting arbitration appeals for Pennsylvania State Police troopers will allow for the expedited removal of dangerous officers, increasing public safety and, thus, public confidence in the Pennsylvania State Police.

B. *New Jersey as a Model*

Pennsylvania should emulate New Jersey’s prohibition on arbitration for state troopers. In 1968, the New Jersey Legislature allowed public employees, including New Jersey State Police troopers, to use binding arbitration to resolve grievances under the New Jersey EERA.³⁰⁵ When the EERA was amended in 1982 to overrule the New Jersey Supreme Court’s decision to preclude public employees from bargaining over disciplinary disputes,³⁰⁶ it left the door open for state troopers to seek binding arbitration.³⁰⁷ For several reasons, the New Jersey Supreme Court closed that door on state troopers in *Troopers II*.³⁰⁸

First, the New Jersey Supreme Court reviewed statutory provisions governing the organization of the New Jersey State Police,³⁰⁹ along with the rules and regulations created by the New Jersey State Police Superintendent.³¹⁰ The court held that the determination of misconduct and the subsequent imposition of discipline were “plainly matters of inherent managerial prerogative to be discharged by the Superintendent and

300. *Rendell, Police Union Deadlocked on Discipline Issue*, POCONO REC. (Jan. 7, 2011, 12:00 AM), <https://www.pocorecord.com/story/news/2004/09/27/rendell-police-union-deadlocked-on/51057472007/> [<https://perma.cc/3H4J-RQ7E>].

301. *Id.*

302. PA. OFF. OF INSPECTOR GEN., *supra* note 30, at 35.

303. *Id.* at 35–36.

304. *See Buck Stops with Arbitrators in Trooper Discipline*, *supra* note 29.

305. *Compare* N.J. STAT. ANN. § 34:13A-1 (West 1968), *with* N.J. STAT. ANN. § 34:13A-1 (West 1982).

306. *State v. Local 195*, 430 A.2d 966, 969 (N.J. Super. Ct. App. Div. 1981) (citing *Ridgefield Park Educ. Ass’n v. Ridgefield Park Bd. of Educ.*, 393 A.2d 278, 285–86 (N.J. 1978)), *superseded by statute*, N.J. STAT. ANN. § 34:13A-5.3 (West 2024); Paterno, *supra* note 232, at 3.

307. *See* EERA 1982 Amend., ch. 103, sec. 1, § 34:13A-5.3, 1982 N.J. Sess. Law Serv. 544, 546 (West) (“The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws.”).

308. 634 A.2d 478 (N.J. 1993).

309. *Id.* at 490.

310. *Id.* at 490–91.

his designated staff.”³¹¹ As such, both the power to determine misconduct and to enact discipline should not be delegated to an outside arbitrator.³¹²

Second, the court distinguished the discipline of police from that of other state government employees.³¹³ To the court, “discipline of state troopers implicates not only the proper conduct of those engaged in the most significant aspects of law enforcement, involving the public safety and the apprehension of dangerous criminals, but also the overall effectiveness, performance standards, and morale of the State Police.”³¹⁴ Taking into consideration these two criteria, the New Jersey Supreme Court narrowed the scope of the EERA’s 1982 discipline amendment to exclude state troopers.³¹⁵ Rather than abrogate the court’s decision, the New Jersey Legislature codified the exclusion of the New Jersey State Police in subsequent amendments to the EERA.³¹⁶

C. *Legislative Proposal*

In order to preclude the use of grievance arbitration over state trooper discipline, the Pennsylvania General Assembly must amend two laws: Section 711 of the Administrative Code of 1929 and Act 111. Section 711 of the Administrative Code details the powers of the Commissioner of Pennsylvania State Police.³¹⁷ These include the responsibility of the Commissioner to make rules and regulations governing the department, including disciplinary procedures.³¹⁸ When an officer is dismissed or refused reinstatement, Section 711 obligates the commissioner to create a court-martial board that will hear the discipline case.³¹⁹

For the Pennsylvania General Assembly to prohibit grievance arbitration over a topic of employment, including discipline, the legislative prohibition must be *explicit* and *unambiguous*. In *State Conf. II*, the Pennsylvania Supreme Court found that the absence of the phrase “nor any arbitration award” in the Pennsylvania Retirement Code meant that interest arbitration awards could alter pension rights for state troopers.³²⁰ The Pennsylvania General Assembly responded by amending the Retirement Code to include that explicit phrase: “[P]ension rights of State employees shall be determined solely by this part or any amendment thereto, and no collective bargaining agreement *nor any arbitration award* between the Commonwealth and its employees *or their collective bargaining representatives* shall be construed to change any of the provisions

311. *Id.* at 491.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 492.

316. N.J. STAT. ANN. § 53:1-10 (West 2024) (“The superintendent shall, with the approval of the governor, make all rules and regulations for the discipline and control of the state police, and provide the necessary preliminary and subsequent instruction to the troopers in their duties as police officers.”).

317. 71 PA. STAT. AND CONS. STAT. ANN. § 251 (West 2024).

318. *Id.* § 251(a).

319. *Id.* § 251(b)(1).

320. *State Conf. II*, 575 A.2d 94, 97 (Pa. 1990), *superseded by statute*, 71 PA. STAT. AND CONS. STAT. ANN. § 5955 (West 2024).

herein.”³²¹ This amendment effectively abrogated the portion of *State Conf. II* dealing with pension arbitrability.³²² The Pennsylvania Supreme Court has also made clear that the language used to prohibit arbitration must be unambiguous. When the supreme court found in *City of Scranton* that the phrase “arbitration settlements” was too ambiguous to mean “arbitration awards,”³²³ the Pennsylvania General Assembly amended the Municipality Financial Recovery Acts to clarify that both collective bargaining agreements and arbitration awards were included in the term “arbitration settlement.”³²⁴

In the words of Pennsylvania Commonwealth Court, the Pennsylvania General Assembly has “never altered the statutory law to preclude arbitration of police or state trooper discipline by binding grievance arbitration.”³²⁵ In order to accomplish such preclusion, the Pennsylvania General Assembly must amend Section 711 by adding the following subsection:

(c) Discipline of Pennsylvania State Police employees shall be determined solely by this section or any amendment thereto, and no collective bargaining agreement nor any arbitration award between the Commonwealth and its employees or their collective bargaining representatives shall be construed to change any of the provisions herein. No arbitration award shall amend the disciplinary decision of the Pennsylvania State Police Commissioner.³²⁶

This amendment tracks with both the original language and the amendment to the Pennsylvania Retirement Code.³²⁷ As with the Retirement Code, the first section of this amendment would invalidate the current disciplinary process set out in the PTSA’s collective bargaining agreement with the Commonwealth. It would also prevent any future collective bargaining over the state trooper disciplinary process and prohibit any interest arbitration board from issuing an award mandating grievance arbitration over discipline. This section would also effectively abrogate the grievance arbitration portion of *State Conf. II*.³²⁸ The second section of the amendment ensures that no grievance arbitration award would be able to alter the commissioner’s disciplinary decisions.

Ensuring that Pennsylvania State Police troopers are prohibited from seeking arbitration also requires an amendment to Act 111. Act 111 provides state troopers “the

321. Act of Aug. 5, 1991, Pub. L. No. 183, sec. 24, § 5955, 1991 Pa. Legis. Serv. (West) (as amended 71 PA. STAT. AND CONS. STAT. ANN. § 5955) (emphasis added).

322. *Upper Gwynedd Twp. v. Upper Gwynedd Twp. Police Ass’n*, 777 A.2d 1187, 1193 (Pa. Commw. Ct. 2001).

323. *City of Scranton v. Firefighters Loc. Union No. 60*, 29 A.3d 773, 786 (Pa. 2011), *superseded by statute*, 53 PA. STAT. AND CONS. STAT. ANN. § 11701.252 (West 2024).

324. 53 PA. STAT. AND CONS. STAT. ANN. § 11701.103 (West 2024).

325. *Upper Gwynedd Twp. Police Ass’n*, 777 A.2d at 1193. In the case text, “never” is bolded for emphasis, but I have noted the emphasis with italics instead.

326. 71 PA. STAT. AND CONS. STAT. ANN. § 251 (West 2024) (recommending the addition of this paragraph to the existing statute).

327. *See supra* notes 193–200 and accompanying text.

328. *See supra* Part II.C.2.b.

right to an adjustment or settlement of their grievances or disputes.”³²⁹ The Pennsylvania Supreme Court, in its interpretation of this provision in *Chirco*, extended the Act to grievance arbitration, including arbitration over disciplinary decisions.³³⁰ The Pennsylvania General Assembly should look to New Jersey for exemplary legislation. New Jersey has a collective bargaining law similar to Act 111, the EERA.³³¹ Under the EERA, public employees may agree, through collective bargaining, to a disciplinary process that provides for binding arbitration.³³² This section of the EERA, however, specifically carves out the New Jersey State Police.³³³ Like New Jersey, Pennsylvania should amend Act 111 by adding the following subsection:

(b) Where the Commonwealth and its employees or their collective bargaining representatives have agreed to a disciplinary review procedure that provides for binding arbitration of disputes of any policemen or firemen protected under the provisions of this Act, other than policemen subject to discipline pursuant to 71 Pa. Stat. Ann. § 251, the grievance and disciplinary review procedures established by agreement between the Commonwealth and a labor organization or other shall be utilized for any dispute covered by the terms of such agreement.³³⁴

IV. CONCLUSION

Police departments face significant barriers when attempting to rid their ranks of dangerous and insubordinate “bad apple” officers. Often, arbitration is the last hurdle departments must cross when disciplining an officer. In many states, arbitrators affirm, reduce, or reverse disciplinary decisions and face little to no oversight from state courts. Pennsylvania is one of the few states where arbitrators wield near-limitless discretion to reduce police disciplinary decisions. In the case of the Pennsylvania State Police, arbitrators have wielded their discretion to return dangerous and insubordinate troopers back to the force. The most effective way to curtail arbitrator overreach is to amend Pennsylvania law to eliminate grievance arbitration over Pennsylvania State Police trooper discipline. In lieu of grievance arbitration, the Pennsylvania State Police would retain an effective and unbiased court-martial procedure to discipline troopers, regain control over its paramilitary administrative structure, and ensure public safety by plucking “bad apples” from its ranks. Further research should evaluate strategies to expand arbitration prohibitions to other state police forces throughout the country, as well as local police departments.

329. 43 PA. STAT. AND CONS. STAT. ANN. § 217.1 (West 2024).

330. *Chirico v. Bd. of Supervisors*, 470 A.2d 470, 475 (Pa. 1983).

331. N.J. STAT. ANN. § 34:13A-1 (West 2024).

332. *Id.* § 34:13A-5.3.

333. *Id.* § 34:13A-5.3 (applying to public employees “[not] subject to discipline pursuant to R.S.53:1-10”).

334. 43 PA. STAT. AND CONS. STAT. ANN. § 217.1 (West 2024) (recommending the amendment of the section to include two subsections, (a) and (b), and adding the above section as subsection (b)).