

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION**

and

**MILWAUKEE COUNTY  
(SHERIFF'S DEPARTMENT)**

Case 608  
No. 66621  
MA-13578

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**Appearances:**

Eggert & Cermele, S.C., Attorneys at Law, by **Mr. Matthew L. Granitz**, 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

**Mr. Timothy R. Schoewe**, Deputy Corporation Counsel, Room 303, Courthouse, 901 North 9<sup>th</sup> Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County (Sheriff's Department).

**ARBITRATION AWARD**

Milwaukee Deputy Sheriffs' Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a member of its staff as Arbitrator to hear and decide a dispute between the Association and Milwaukee County, hereinafter the County or Employer. The Commission subsequently designated Coleen A. Burns as Arbitrator. Pursuant to the agreement of the parties, an arbitration hearing was held on April 12, 2007 in Milwaukee, Wisconsin. The hearing was not transcribed and the record was closed on July 9, 2007, following receipt of the Employer's confirmation that it would not be filing a reply brief.

**ISSUES**

The parties were unable to stipulate to a statement of the issue(s). The Association frames the issues as follows:

Whether Deputies Fox and Rutter dates of hire is April 18, 2003?

If so, what is the appropriate remedy?

The Employer frames the issues as follows:

Are the grievances time barred?

Did Milwaukee County violate Sec. 3.30 of the collective bargaining agreement when it terminated deputies Rutter and Fox during their probationary period?

If so, what is the appropriate remedy?

### **RELEVANT CONTRACT LANGUAGE**

The parties agree that this dispute is governed by the language of the parties' 2005-2006 collective bargaining agreement and cite the following language:

#### **5.01 GRIEVANCE PROCEDURE**

...

(9) No grievance shall be initiated after the expiration of (60) calendar days from the date of the grievable event, or the date on which the employee becomes aware, or should have become aware, that a grievable event occurred, whichever is later. This clause shall not limit retroactive payment of economic benefits for which it has been determined the County is liable nor would it prohibit a prospective adjustment of an ongoing situation.

...

#### **3.30 LAYOFF AND RECALL**

(1) Whenever the County reduces the number of County employees represented by the Association in any position in the classified service, the Sheriff shall notify the Director of Human Resources of the number of employees to be laid off, including titles of positions, upon the form prescribed and furnished by the Department of Human Resources. The Director of Human Resources, upon receipt of the notice from the Sheriff, shall give to the Sheriff the names and addresses of the initial employees who should be laid off in accordance with these provisions:

(a) The order of layoff shall be as follows:

1. Employees on Emergency Appointment;
  2. Employees on Temporary Appointment;
  3. Employees on Regular Appointment, beginning with the employee with the least seniority in the affected classification.
- (b) The affected employee may, at his option, displace the least senior employee holding a position in the next lower classification, providing he is more senior than the employee he is displacing.
- (c) This displacement into a lesser classification shall be followed beginning with the highest classification affected, including sergeant, and continuing to the lowest classification affected, unless the affected employee decides not to initiate his option and leaves the County service.
- (d) When the County lays off deputy sheriffs in any rank or classification represented by the Association, the order of layoffs shall be based on rank seniority.\*
- (e) An employee who elects to take a position in a lower classification displacing an employee with the least seniority in such lower classification shall be paid at the maximum of the pay range to which such lower classification is allocated, provided that such rate is not higher than the rate he was receiving in the classification from which he was displaced.
- (f) Displacement and recall as contemplated herein shall be restricted to vertical movement only within those classifications represented by the Association.
- (g) When the County increases the number of employees in any classification, an employee having accepted a voluntary reduction to a lower classification shall be reinstated to the position from which he left, as if he were recalled from layoff. If more than one employee is affected, reinstatement shall be by application of seniority in reverse order of displacement. Any employee who is laid off under these provisions and rehired for the same work within two years of the date of such layoff shall be reinstated to the same relative position and pay range within the department at the same step in the pay range which he held at the time of layoff and at a rate currently being paid to that classification at the time of recall. Seniority shall be broken if an employee:

1. Retires;
  2. Resigns from County service;
  3. Is discharged and the discharge is not reversed;
  4. Is not recalled from layoff for a period of two years. This provision shall not apply to an employee not reinstated to a position from which he was displaced to a lower classification in the event he is not returned to the higher position within a two-year period.
  5. Does not return at the expiration of a leave of absence.
- (h) An employee's refusal to accept the position in a lower classification shall not be construed as a termination but rather such employee shall be placed on the appropriate reinstatement list as though laid off in accordance with these provisions.
- (i) Whenever a member of the bargaining unit is promoted to a classification outside of the unit in order to fill a position for an indeterminate period of time, he shall, upon discontinuation of the program to which he was assigned, be returned to the unit in the same rank he held prior to such temporary assignment and without loss of seniority for any purpose.
- (j) An employee who has retained his/her membership in the Retirement System who is recalled from layoff from the appropriate reinstatement list, shall return at the pension rate in effect at the time of layoff. \* Language from Case 265, No. 41540, A-5401 Decision of Dennis P. McGilligan, Arbitrator.

### **RELEVANT BACKGROUND**

Deputies Brian Fox and Donnie Rutter, hereafter Grievants, were hired by the Sheriff's Department on April 18, 2003. Subsequently, each received a letter from Ms. Minnie Linyear, Human Resources Manager, that is dated December 4, 2003 and states, *inter alia*:

This past November the County Board of Supervisors voted to abolish several Deputy Sheriff I positions.

A review of your employment record indicates you are on probation and your employment must be terminated due to budget constraints. Your last day of employment is Saturday, December 20, 2003. The paycheck for the hours you worked during the pay period ending 12/20/03 will be issued 12/31/03. After your last day of work, you will be paid all accrued hours to which you are entitled.

Your county-paid health and dental insurance continues through January 31, 2004, provided you submit payment for the employee portion. You will receive a billing statement at your home address from the County Benefits Office, which will include instructions as to where your payment is to be submitted. You may continue with the County plan(s) after January 31, 2004 via the Federal "COBRA" continuation of benefits law and the County Benefits Office will contact you by mail with information.

Because you are being separated during your probationary period, you will not have any layoff/recall rights back to the Deputy Sheriff I position. You may, however, write to the Division of Human Resources and request that your name be restored to the Public Safety List for Correction Officer I and Deputy Sheriff I eligible lists for future consideration. Please address your correspondence to: Daniel Pierzchala, Employment and Staffing Manager, Division of Human Resources, Room 210, 901 N. 9<sup>th</sup> Street, Milwaukee, WI 53233.

Please assure that your signed timesheet is completed and submitted to your supervisor, along with key/card identification card(s), and other county owned equipment, etc. before you leave at the end of the workday on Saturday, December 20, 2003.

Best wishes in future endeavors.

In a letter dated March 15, 2004, County Department of Human Resources Employment and Staffing Manager Daniel Pierzchala advised James Fuerst, President of the Deputy Sheriff's Association, as follows:

This letter is to confirm that the nine (9) Deputies that were separated during probation in December of 2003 have been placed on the Reinstatement list for Deputy Sheriff I. This includes the following individuals: Becita Fields, Brian Fox, Essie Fox, Andrew Hansen, Matthew Hendren, Anthony Henner, David Rein, Donnie Rutter and Timothy Zwicke. The term for Reinstatement list is defined in Civil Service Rule I (42).

It should be understood that if these individuals turn down an offer of employment to a position of Deputy Sheriff I their name will be removed from the list. It is also very important that if they have a change of address or phone number that they inform the Division of Human Resources in writing. If we do not have a correct address and are unable to make contact they will be removed from the list. Please remember that the Sheriff makes the final employment decisions.

If you need any additional information please contact me at 278-4153.

...

The Grievants were reinstated as Deputy Sheriffs in December, 2004. On or about September 10, 2006, each Grievant filed a grievance alleging a violation of Sec. 3.30 – Layoff and Recall (Sub G) and that seniority was not broken when:

Due to budgetary reasons I was laid off by Milwaukee County Sheriffs Office. The State of Wisconsin Department of Workforce Development Division of Unemployment Insurance also agrees that I was laid off and not fired.

Each Grievant requested that his “hire date” go back to his original “hire date” of April 18, 2003; that his seniority and pension go back to the date of April 18, 2003; and to be made whole.

Human Resources Manager Thea Flasch denied each grievance on November 16, 2006. Grievant Fox’s denial states, *inter alia*:

**DECISION AND BASIS FOR DECISION:** Grievance denied

Prior to scheduling a first step hearing on the above grievance, an investigation of the information as presented on the grievance was conducted. The grievant, Deputy Brian Fox, states that due to budgetary reasons he was laid off by the Milwaukee County Sheriff’s Office. Grievant contends that the State of Wisconsin Department of Workforce Development Division of Unemployment Insurance also agrees that he was laid off and not fired.

The issue raised in this grievance is not a violation of Section 3.30 Layoff and Recall. When Milwaukee County finds it necessary to reduce the workforce due to budgetary reasons, the least senior employees within the classification being reduced are released first. Employees who are on probation are considered released or separated during their probationary periods and are not considered layoffs. County payroll records reflect grievant’s separation as “**separated during probationary period**” effective December 20, 2003. Milwaukee County Civil Service Rule IV, Section 5 – Probation states that employees in the classification of Deputy Sheriffs serve a probationary period of 2,600 hours of straight time hours paid excluding overtime. If separated during their probationary period, employees may at the discretion of the Director of the Dept. of Human Resources be reinstated to the eligible list for future consideration. Deputy Fox was reinstated to the Deputy Sheriff I eligible list, as evidenced by the Certification List dated 11/17/04 on file with the Department of Human Resources. He was thereafter rehired on December 13, 2004 as evidenced by the payroll records for Milwaukee County.

Grievant was not laid off, but rather separated during his probationary period, which caused a break in his county service. Grievant was not a layoff recall and therefore is not eligible for layoff recall rights with regards to seniority or pension purposes.

It is also noted that this Grievance is not timely. It has been filed nearly two years after the grievable event occurred. The DSA Contract, Section 5.01(7)(c)(9) states that no grievance shall be initiated after the expiration of (60) calendar days from the date of the grievable event, or the date on which the employee became aware, or should have become aware, that a grievable event occurred, whichever is later.

The grievance, as written, is denied.

Grievant Rutter received the same response. Each grievance was processed through the parties' contractual grievance procedure and submitted to arbitration.

### **POSITIONS OF THE PARTIES**

#### **Association**

The grievances were properly initiated. The County relies upon the first sentence of Sec. 5.01(9) and ignores the second sentence. This second sentence confirms that grievances involving economic benefits or an ongoing situation are not time barred. Here, retroactive payments of economic benefits, as well as an adjustment of an ongoing situation, are at issue. The economic benefits determined by seniority include pension benefits, amount of vacation, sick and compensatory hours, and overtime selection.

The Grievants were hired on April 18, 2003 and laid-off on December 20, 2003. The County created a reinstatement list for Deputies who were laid-off; which list included the Grievants.

In December of 2004, the Grievants were recalled and not required to go through Academy training for a second time. The Grievants returned to the positions that they held prior to layoff and received most of the equipment that they had been initially issued. The Grievants' claim that their date of hire is April 18, 2003 is supported by the above conduct, as well County records. (Jt. Ex. #5; Jt. Ex. #6, and Assoc. Ex. #8)

The plain and unambiguous language of the relevant Sec. 3.30 language provides only five instances in which seniority may be broken. None of these five instances have occurred and, thus, seniority has not been broken. The County's assertion that the Grievants were not laid-off is seriously undercut by its creation of a reinstatement list. (Jt. Ex. #7)

In suggesting that probationary status trumps this plain language, the County is attempting to create a contractual provision that was not intended by the parties. Sec. 1.01 explicitly confirms that all Deputies are subject to the agreement.

Under the agreement, positions are eliminated upon the basis of seniority. The Grievants were laid-off pursuant to seniority; not probationary status. As a direct result, they are entitled to contractual benefits dating back to April 18, 2003. Where, as here, the contract fails to define seniority, arbitrators define seniority as the length of service with an employer.

The grievances should be sustained. The Grievants' date of hire should be established as April 18, 2003.

### **Employer**

Deputies Rutter and Fox were hired in 2003 and, prior to their appointment becoming permanent, they were terminated. (County Ex. #10 and 11) Each Grievant admits receipt of the letters advising them of this termination. Neither Grievant asserts that anyone told them they were being laid-off.

Their two grievances were not initiated until September, 2006. The language of Article 5.01(9) can not be clearer. Inasmuch as this case is time barred, the grievances should be denied and dismissed.

There is a distinction between a probationary employee and one whose service has ripened to a permanent appointment. *DELA HUNT V. MILWAUKEE COUNTY*, 26 WIS.2D 345 (1965). Neither Grievant ever reached permanent status in 2003 or was laid off, as that term may have meaning under the collective bargaining agreement. The Grievants have not articulated a contract violation and, by their own testimony, no harm has come to them.

The Association bears the burden of proof on the merits and the Association has not met this burden. The grievance should be denied.

## **DISCUSSION**

### **Issue**

In responding to each grievance, the County expressly stated that "this Grievance is not timely." Accordingly, it is appropriate for the Arbitrator to consider the following County issue:

Are the grievances time barred?

As set forth in the grievance documents (Jt. Ex. #2 and 3), the Grievants allege that they were laid-off in 2003; that, under Sec. 3.30 of the parties' collective bargaining



agreement, their return to employment on December 13, 2004 should have been without any break in seniority; and that, therefore, their “date of hire” is April 18, 2003. Upon consideration of the grievances, as filed and processed through the grievance procedure, the undersigned concludes that the Association’s statement of the issue of the merits of the grievances is more appropriate than the County’s statement of the issue.

### **Timeliness**

The County, contrary to the Association, argues that the grievances are not timely filed. In addressing the timeliness issue, each party relies upon the language of Sec. 5.01(9).

The language of Sec. 5.01(9) is not clear and unambiguous. The record is devoid of evidence of bargaining history or past practice with respect to this provision.

Giving effect to the most reasonable construction of the language of Sec. 5.01(9), the undersigned concludes that the sixty calendar day limitation set forth in the first sentence of Sec. 5.01(9) does not prohibit an arbitrator from asserting jurisdiction to determine the merits of an “ongoing situation.” Given the evidence that the Grievants’ “date of hire” impacts upon future entitlements, such as vacation, sick leave and overtime, the undersigned concludes that these grievances present an “ongoing situation” within the meaning of Sec. 5.01(9). Notwithstanding any County argument to the contrary, the Arbitrator is not prohibited from asserting jurisdiction to determine whether or not each Grievant has a “hire date” of April 18, 2003.

### **Merits**

Association President Felber recalls that, at the time of the Grievants’ separation from employment in 2003, he was informed that the Grievants, and similarly situated employees, were being laid-off in 2003 because of budgetary reasons. Association President Felber does not identify his informant. Association Felber’s recollection is insufficient to establish that, at the time of the Grievants’ separation from employment in 2003, the County acknowledged that the Grievants were being laid-off.

Each Grievant acknowledges receipt of Ms. Linyear’s letter of December 4, 2003. This letter includes the following:

. . .

Because you are being separated during your probationary period, you will not have any layoff/recall rights back to the Deputy Sheriff 1 position. You may, however, write to the Division of Human Resources and request that your name be restored to the Public Safety List for Correction Officer 1 and Deputy Sheriff 1 eligible lists for future consideration. . .

Grievant Fox recalls that this letter was initially rescinded and then reissued. Each Grievant acknowledges that he did not grieve this letter. Nor is it evident that the Association grieved this letter.

Grievant Fox recalls that he was present at a meeting in which there were discussions that differed from the County's position in the December 4, 2003 letter. Grievant Fox does not identify who was present at this meeting, nor does he relate what was specifically stated during these discussions; other than that no one told him that he was being discharged for cause. Grievant Fox's recollection does not provide a reasonable basis to conclude that any County representative told Grievant Fox that he was being laid-off, or that any County representative amended any of the statements contained in the letter of December 4, 2003.

Each Grievant acknowledges receiving County Department of Human Resources Employment and Staffing Manager Daniel Pierzchala's March 15, 2004 letter, which advises then Association President James Fuerst, that nine Deputies, including the Grievants, were placed on the "Reinstatement list for Deputy Sheriff I." In his letter, Mr. Pierzchala does not rescind Ms. Linyear's letter of December 4, 2003. Mr. Pierzchala continues to refer to the nine Deputies as being "separated during probation" and does not reference "lay-off," "recall," or Sec. 3.30 of the parties' collective bargaining agreement. Ms. Linyear's and Mr. Pierzchala's letters reasonably establish that the Grievants' 2003 separation from employment was not a layoff under Sec. 3.30 of the parties' collective bargaining agreement.

In asserting that he was laid-off in 2003, Grievant Fox relies upon the January, 2004 "Determination" of the State of Wisconsin Division of Unemployment Insurance which states:

THE EMPLOYEE WAS NOT DISCHARGED.

THE DEPARTMENT WAS NOTIFIED THAT THE EMPLOYER DISCHARGED THE EMPLOYEE. HOWEVER, FOR UNEMPLOYMENT INSURANCE PURPOSES, IT IS DETERMINED THAT THE EMPLOYEE WAS NOT DISCHARGED.

THE EMPLOYEE WAS LAID OFF DUE TO LACK OF WORK.

EFFECT

BENEFITS ARE ALLOWED.

In making this "Determination," the Division of Unemployment Insurance did not interpret or apply the provisions of the parties' collective bargaining agreement. The Division of Unemployment Insurance's "Determination" is not persuasive evidence that the Grievants were laid-off, as that term is used in Sec. 3.30 of the parties' collective bargaining agreement.

Grievant Rutter and Fox each state that he was brought back from the reinstatement list in December of 2004. It is not evident that, at the time of this reinstatement, the Grievants, or the Association, were advised that the Grievants had been on lay-off or that the Grievants were being reinstated pursuant to Sec. 3.30 of the parties' collective bargaining agreement.

As the Association argues, following their 2004 "reinstatement," the Grievants were not treated like new employees in that they were brought back without a posting; did not go through the academy; and did not undergo psychological or medical assessments or a background check. Grievant Fox states that he had the same duties, worksite, badge, firearm and some of the same uniform.

As Association President Felber states, the County's conduct in placing the Grievants on the "reinstatement list" and then "reinstating" the Grievants from this "reinstatement list" is consistent with the lay-off/recall procedures of Sec. 3.30 of the parties' collective bargaining agreement. However, given Ms. Linyear's and Mr. Pierzchala's letters, as well as the lack of evidence that the parties had reached an understanding other than that reflected in these letters, neither the placement of the Grievants on the "reinstatement list," nor the Grievants 2004 "reinstatement," reasonably indicates that the Grievants have been laid-off and recalled pursuant to Sec. 3.30 of the parties' collective bargaining agreement.

The Grievants and the Association argue that they have accessed records that establish that the County has recognized a 2003 "date of hire." As recognized in Mr. Pierzchala's letter of March, 2004, Deputy Timothy Zwicke was similarly situated to the Grievants. Association President Felber states that, in July 2005, he accessed a Sheriff's Department data base and printed the information on Deputy Zwicke that is contained in Jt. Ex. #6. This information includes the following:

Status	Act Active	Status Date: 12/17/2004
		. . .
Badge Number	(omitted)	Eff Date: 12/17/2004
		. . .
Callup code		Hire Date: 04/18/2003
		. .
Rank Date	04/18/2003	

Association President Felber states that he is no longer able to access this data base and that he does not know what information was contained on that data base with respect to either Grievant.

The record presented at hearing does not establish the purpose of the data base accessed by Association President Felber, nor does it explain what is meant by "Callup code" or "Status Date." The information retrieved by Association Felber is not specific to either Grievant.

On April 1, 2007, Grievant Rutter printed a Deferred Compensation Plan report that identifies his "hire date" as April 18, 2003. (Assoc. Ex. #9) It is not evident that the Deferred Compensation Plan report is a County generated document. Neither Deputy Zwicke's information, nor the Deferred Compensation Plan report, provides a reasonable basis to infer that the Grievants' have been laid-off or recalled under Sec. 3.30 of the parties' collective bargaining agreement.

On May 9, 2006, Grievant Fox accessed a Sheriff's Department data base and printed a "Personnel Report" that identified his "Activation Date" as "10/16/03" and his "Deactivation" date as "00/00/00." (Jt. Ex. #5) Grievant Fox states that the "03" date is his "date of hire," but fails to explain why this date is not "4/18/03." Assuming *arguendo* that this "Personnel Report" provides a reasonable basis to infer that the County has assigned Grievant Fox a 2003 "date of hire," such an inference would be rebutted by the parties' stipulation that the Department is using a 2004 "date of hire."

Grievant Rutter has accessed a Sheriff's Department data base from which he printed a "Sick/Late History," as well as "Staff Management Screen." (Assoc. Ex. #8) The former documents "sick/late" incidents in 2003, as well as in 2005 and 2006. The latter documents "counseling" that the Grievant received in 2003, as well as in 2005 and 2006.

Neither document references lay-off, recall, or states any "date of hire." It is not evident that either document has any function other than to provide a historical record of personnel transactions. Neither document provides a reasonable basis to infer that the Grievants were either laid-off, or recalled, under Sec. 3.30 of the parties' collective bargaining agreement.

### Conclusion

Ms. Linyear's and Mr. Pierzchala's letters provide the best evidence of the Grievants' status at the time of their 2003 separation from employment. These letters reasonably establish that the Grievants were not laid-off and did not have recall rights under Sec. 3.30 of the parties' collective bargaining agreement.

The record provides no reasonable basis to conclude that, when the Grievants were "reinstated" in 2004, they were recalled from lay-off. Nor is it evident that, since the Grievants' 2004 "reinstatement," the County has engaged in any conduct that warrants the conclusion that the Grievants were laid-off and/or recalled pursuant to Sec. 3.30 of the parties' collective bargaining agreement.

The record fails to establish that the Grievants have a contractual right to a "hire date" of April 18, 2003. The grievance is denied and dismissed.

Based upon the foregoing, and the record as a whole, the undersigned makes and issues the following

**AWARD**

1. The grievances are not time barred.
2. Deputies Fox and Rutter do not have a hire date of April 18, 2003.
3. The grievances are denied and dismissed.

Dated at Madison, Wisconsin, this 8th day of November, 2007.

Coleen A. Burns /s/

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Coleen A. Burns, Arbitrator

