

BEFORE THE ARBITRATOR

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

and

MILWAUKEE COUNTY

Case 720
No. 69606
MA-14674

Appearances:

Graham P. Wiemer, MacGillis Wiemer, LLC, Attorneys at Law, 2360 North 124th Street, Suite 200, Wauwatosa, Wisconsin 53226, for the labor organization.

Roy L. Williams, Principal Assistant Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, for the municipal employer.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association (MDSA) and Milwaukee County are parties to a Memorandum of Agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance concerning the meaning and application of the terms of the agreement relating to the grievance procedure. The Commission appointed Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Milwaukee, Wisconsin, on August 10, 2010. The parties filed written arguments by November 10, 2010, and waived their right to file replies.

ISSUE

“Did Milwaukee County violate sec. 3.01(2) of the collective bargaining agreement and Civil Service Rule IX sec. 2(5) when it did not give Donnie Rutter the same step in the new pay range as he was receiving in the former pay range? If so, what is the appropriate remedy?”

RELEVANT CONTRACTUAL PROVISIONS

MEMORANDUM OF AGREEMENT

Section 3.01 Wages

- (2) Movement from one step in the new pay range to the next higher step shall be based upon meritorious performance and upon completion of a satisfactory performance appraisal by the appointing authority or his/her designee after completion of 2,080 straight time hours at a step.

...

- (4) Effective January 1, 2007, wages of bargaining unit employees shall be increased by one and one-half percent (1.5%).
- (5) Effective July 1, 2007, wages of bargaining unit employees shall be increased by one and one-half percent (1.5%).
- (6) Effective January 1, 2008, wages of bargaining unit employees shall be increased by one and one-half percent (1.5%).
- (7) Effective July 1, 2008, wages of bargaining unit employees shall be increased by one and one-half percent (1.5%).

Section 5.01 Grievance Procedure

(6) FORMS

- (c) Procedure To Be Followed When Initiating A Written Grievance:
1. The employee alone or with his/her Association Representative shall cite the precise rule, regulation or contract provision that was alleged to have been violated at the first step of the grievance procedure.
 2. The employee alone or with his/her Association Representative shall in writing provide his/her immediate supervisor designated to hear grievances an explanation as to when, where, what, who, and why the employee believes that his/her contractual rights have allegedly been violated. The written Grievance Initiation Form shall contain the date or time that the employee alleges that his/her contractual rights have been violated.

3. The employee alone or with his/her Association Representative shall detail, in writing, the relief the employee is requesting.
4. If more space is required than is provided for on the Grievance Initiation Form in order to comply with the provisions of this section, the employee shall be permitted to submit written attachments to said form.
5. The Grievance Initiation Form shall be prepared by the employee or with his/her Association Representative in a manner that is neat, clear, and discernible. The grievant(s) must sign the grievance. Failure of the grievant(s) to sign the grievance shall bar the grievance from being processed.
6. If the employee alone or with his/her Association Representative fails to follow section 5.01(6)(c) 1, 2, 3, 4, or 5, the employee's immediate supervisor designated to hear grievances may return the Grievance Initiation Form to the employee for corrections. If this employee fails to make the corrections within 15 days of such return, the grievance shall be barred.
7. The procedure outlined in 5.01(6)(c) 1, 2, 3, 4, 5 and 6 is to clarify the procedure to be followed. These procedures are to assist the employee, the Association and management in the resolution of grievances at their lowest level of the grievance procedure.

(7) STEPS IN THE PROCEDURE

(a) STEP 1

1. The employee alone or with his/her representative shall explain the grievance verbally to the person designated to respond to employee grievances in his/her department.
2. The person designated in Par. 1. shall within three (3) working days verbally inform the employee of his/her decision on the grievance presented.

3. If the supervisor's decision resolves the grievance, the grievance shall be reduced to writing on a Grievance Disposition Form within five (5) working days from the date of the verbal decision and a copy of said disposition shall be immediately forwarded to the Director of Labor Relations.

(b) STEP 2

1. If the grievance is not settled at the first step, the employee alone or with his/her representative shall prepare the grievance in writing on the Grievance Initiation Form and shall present such form to the person designated in Step 1 to initial as confirmation of his/her verbal response. The employee alone or with his/her representative shall fill out the Grievance Initiation Form pursuant to Section 5.01 (6)(c) 1, 2, 3, 4, 5, 6, 7, of this Agreement.
2. The employee or his/her representative after receiving confirmation shall forward the grievance to his/her appointing authority or the person designated by him/her to receive grievances within fifteen (15) working days of the verbal decision. Failure of the person designated or the appointing authority to provide confirmation shall not impede the timeliness of the appeal.
3. The person designated in Step 2, paragraph 2, will schedule a hearing with the person concerned and within fifteen (15) working days from date of service of the Grievance Initiation Form, the Hearing Officer shall inform the aggrieved employee, the Director of Labor Relations, and the Association in writing of his/her decision.
4. Those grievances, which would become moot if unanswered before the expiration of the established time limits will be answered as soon as possible after the conclusion of the hearing.
5. The second step of the grievance procedure may be waived by mutual consent of the Association and the Director of Labor Relations. If the grievance is not resolved at Step 2 as provided, the Association shall

appeal such grievance within thirty (30) working days from the date of the second step grievance disposition to Step 3.

(c) STEP 3

1. The Director of Labor Relations or his/her designee shall attempt to resolve all grievances timely appealed to the third step. The Director of Labor Relations or his/her designee shall respond in writing to the Association within thirty (30) working days from the date of receipt by the Director of Labor Relations of the Step 2 appeal.
2. In the event the Director of Labor Relations or his/her designee and the appropriate Association representative mutually agree to a resolve of the dispute it shall be reduced to writing and binding upon all parties and shall serve as a bar to further appeal.
3. The Step 3 of the grievance procedure shall be limited to the Director of Labor Relations or his/her designee and the appropriate Association representative and one of his/her designee, an Attorney for the Association and representatives of the Sheriff designated to respond to employee grievances. The number of representatives at any Step 3 hearing may be modified by mutual consent of the parties.
4. The first and second step hearing officers shall forward a copy of the disposition to the Department of Labor Relations at the same time they notify grievants of their disposition.

- (8) Grievances designated for arbitration shall be appealed to the Wisconsin Employment Relations Commission within thirty (30) calendar days of the date of the written response from Step 3. The Association shall, in writing, notify the Director of Labor Relations or his/her designee within forty-eight (48) hours prior to the arbitration hearing the names of the employees the Association wishes to have released for the arbitration hearing. The release of said employees shall be subject to review by the Director of Labor Relations or his/her designee and shall be subject to mutual agreement of both the Association and the Director of Labor Relations or his/her designee. The release of employees shall not be unreasonably denied.

- (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.

MILWAUKEE COUNTY CIVIL SERVICE RULE IX,
SECTION 2 ADVANCEMENT ON EFFICIENCY AND SENIORITY

- (5) In the event of an increase or decrease in the range of compensation for any classification, employees in this classification on the effective date of the change shall receive the same step in the new range as they were receiving in the former range, and shall continue to receive salary advances when merited on the same anniversary date as theretofore.

BACKGROUND

This grievance concerns the implementation of the parties' mutual decision to eliminate two steps from the pay scale for deputy sheriffs.

Donnie Rutter began working as a deputy sheriff with the Milwaukee County Sheriff's Office (MCSO) on December 17, 2004. On his second anniversary, he advanced to the next higher step in the pay range, Step 3, earning \$18.93 per hour.

On December 31, 2006, pursuant to the 2005-2006 Memorandum of Agreement between the parties, steps one and two of the pay range were removed from the deputy sheriff's salary schedule. The Fiscal Note prepared by the County's Department of Administrative Services contained the following explanation of this provision:

2. Collapsing of Steps 1 and 2 into Step 3 for Title Code 17BZ

Effective December 31, 2006, the steps for title code 17BZ shall be collapsed to 10 steps from 12 steps. All employees in the old steps 1 and 2 shall be transferred to step 3. In effect the starting wage rate for Deputy Sheriff members goes from \$17.1075 to \$18.9358, on January 1, 2007. All employees in old steps 1 and 2 will have a new anniversary date of January 1, 2007. The steps will then be revised for this title code with the new step 1 equal to the old step 3.

The cost of this step change was \$0, since there are not anticipated to be any members in either step 1 or step 2 as of the transition date of January 1, 2007. As of July 2005 there were four members in step 1 and 38 members in step 2. If

there were members in step 1 or step 2, at the transition date, the annual cost would be \$4,400 and \$2,200, respectively. This includes both straight time and overtime wages.

This Fiscal Note was part of the comprehensive Fiscal Note prepared by the Department of Administrative Services on September 16, 2005 to inform the County Board prior to its vote on ratification of the 2005-2006 MOA between the parties. A copy of the Fiscal Note was provided at the time to MDSA President Roy Felber and MDSA Chief Spokesperson Pat Coraggio. There is nothing in the record to indicate either Coraggio or Felber disagreed with this explanation of the effect of this provision.

The County Board ratified the agreement on September 29, 2005. County Executive Scott Walker, whose office also received the Fiscal Note, approved it on October 12, 2005.

Pursuant to the 2007-2008 MOA between the parties, Rutter began earning \$19.22 per hour on January 1, 2007, reflecting a 1.5% increase on his wage of \$18.9358 per hour. Another 1.5% wage increase on July 1, 2007 brought his hourly wage to \$19.51. Based on his meritorious performance of 2,080 straight time hours, Rutter was advanced to Step 2 on December 17, 2007, with the hourly wage of \$20.45. Another 1.5% increase on January 1, 2008 brought Rutter's wage to \$20.76, with a further 1.5% increase on July 1, 2008 bringing him to \$21.07 per hour. Based on his meritorious performance of another 2,080 straight time hours, Rutter advanced to Step 3 on December 17, 2008, earning \$22.04 per hour. Rutter advanced to Step 4 on December 17, 2009, earning \$23.01 per hour.

On July 27, 2009, Rutter grieved, claiming the County violated Civil Service Rule IX, Section 2 (5). He explained, "I have 5 years as a deputy and have never been denied a merit increase. I am currently at step #3 22.04 per hour, I should be at step #5 of the new pay scale. This is an ongoing issue."

On October 1, 2009, MCSO Human Resources Coordinator Ara Garcia answered the grievance as follows:

Grievance Denied

...

The grievant and the union assert that management violated Civil Service Rule IX Compensation, Section 2 (5). In the event of an increase or decrease in the range of compensation for any classification, employees in the classification on the effective date of the change shall receive the same step in the new range as they were receiving in the former range.

In the 2005-2006 contract steps 1 and 2 were removed. Deputy Rutter's contention is that he has been in the Deputy Sheriff's classification for five years and a merit salary has never been denied. Currently, he is at step three of the range and should have been at step 5 of the new scale.

This is an on-going issue. Deputy Sheriff Robert Ostrowski also filed a grievance regarding the same issue. The union also contends that pursuant to advice received by County Corp. Counsel and Association's counsel that they needed to file a grievance to move the issue forward.

It is management's contention that the grievance process was not the method to resolve this issue. The grievant needed to file a claim with the Civil Service Commission. Deputy Rutter's pay step was restructured in accordance with the 2005-2006 contract language. The Deputy's hour (sic) salary remained the same.

Grievance denied on the basis that the pay step was restructured in accordance with language accepted by the Association.

The Association advanced the grievance to the next step. On February 1, 2010, County Labor Relations Analyst Michael Bickerstaff wrote MDSA President Felber as follows:

Dear Mr. Felber:

The disposition for the following grievance from the January 20, 2010, grievance appeal hearing between Milwaukee County Labor Relations, the Office of the Sheriff and the Milwaukee Deputy Sheriffs' Association is summarized as follows:

Grievant: Don Rutter **Grievance#:** 51438 **Appeal #:** DSA-242
Subject: Pay Steps Changed

Disposition According to the Memorandum of Agreement, section 5.01(7)(c)(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." The grievant says "therefore, in the 2005-2006 contract, steps 1 and 2 were removed." The grievance was filed on October 1, 2009, which is over two (2) years past the deadline that the grievance can be filed. Also according to the Memorandum of Agreement, section 5.01(1), "the grievance procedure shall not be used to change existing wage schedules, hours or work, working conditions, fringe benefits, and position classifications established by ordinances and rules which are matters processed under other

existing procedures.” The remedy that the grievant is requesting is against the grievance procedure.

Grievance denied.

Please circle your answer to the disposition of the grievance, sign, date and return the original to our office.

Felber circled the answer, “Not Approved.” The grievance was thereafter advanced to arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

The County violated Civil Service Rule IX, Sec. 2(5), which requires that employees receive the same step in the new range as they were receiving in the former range when there is an increase or decrease in the range of compensation. By moving Rutter back to Step 1 of the pay scale, and not leaving him in Step 3, the County violated this rule. When the first two steps of the pay scale were eliminated on December 31, 2006, Rutter should have been left at Step 3 in the new range. Step 3 is the same range he was receiving in the former pay scale. The County should have been paying Rutter a higher rate since January 1, 2007. Rutter is also seeking a prospective adjustment of an ongoing situation, as the County is still not paying him the correct hourly rate.

The County’s justification for keeping Rutter at Step 1 is not persuasive. He was Step 3 on December 17, 2006 and found himself Step 1 two weeks later. A deputy cannot be at both Step 1 and Step 3. The County’s position is incoherent. A pay scale does not begin at Step 3.

The County has violated section 3.01 (2) of the collective bargaining agreement and Civil Service Rule IX, Sec. 2 (5). As remedy, Rutter should be advanced two steps in the pay scale, and made whole for the improperly reduced hourly wage paid for his hours worked since January 1, 2007.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

The elimination of the first two steps was agreed to by the County and Rutter’s union. The appropriate remedy should have been sought through the Civil Service Commission, not the grievance process.

Also, this grievance is extremely untimely. Rutter knew or should have known of the impact of the new pay structure on January 1, 2007, yet the grievance was not filed until July 27, 2009 – more than two years past the filing deadline. The inquiry should start and stop there.

Finally, the agreement between the parties states that the grievance procedure shall not be used to change existing wage schedules or position classifications, which is what granting this grievance would do.

DISCUSSION

This grievance presents two questions for consideration – one procedural, one substantive.

The collective bargaining agreement prevents any grievance from being “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.”

When a grievance has been filed beyond a clear and mandatory time limit, “an employer’s prompt protest at the lapse will result in the dismissal of the grievance at arbitration.” *How Arbitration Works*, 6th Edition Supplement, May, ed., BNA Books, 2010, p. 112. However, “if the parties allow the grievance to move from step to step in the procedure without making objections of untimeliness, the right to object may be deemed to have been waived.” *How Arbitration Works*, 6th Edition, Ruben, ed., BNA Books, 2003, p. 219. The purpose of this latter rule “is to favor the hearing of grievances on their merits....” CRESTLINE EXEMPTED VILLAGE SCHOOLS, 111 LA 114, 116 (Goldberg, 1998).

Rutter knew, or should have known, of his placement on the salary grid when he received his first 2007 pay check, but he did not file a grievance challenging his placement on the salary grid until July 27, 2009. As the County correctly notes, this is more than two years after the deadline for Rutter to have filed a timely grievance. However, the written decision by Human Resources Coordinator Garcia made no mention of timeliness when she denied the grievance on October 1, 2009. It was not until Labor Relations Analyst Michael Bickerstaff letter of February 1, 2010 that the employer first raised timeliness as a reason for denying the grievance. While a three month delay does not always prevent a party from asserting a timeliness defense, it does somewhat weaken the County’s position. Moreover, according to Ms. Garcia’s written statement denying the grievance, there is (or was) a related grievance also pending resolution, giving further need for a discussion of, and decision on, the merits.¹ Accordingly, I will proceed to consider the grievance on its merits.

¹ The record does not indicate the status of the Ostrowski grievance.

The Association contends the County's placement of Rutter at the new step 1 on January 1, 2007 Civil Service Rule IX, Section 2 (5), which reads as follows:

In the event of an increase or decrease in the range of compensation for any classification, employees in this classification on the effective date of the change shall receive the same step in the new range as they were receiving in the former range, and shall continue to receive salary advances when merited on the same anniversary date as theretofore.

The County counters that Rutter should have sought his remedy from the Civil Service Commission, and that this language doesn't support the Association's position.

The parties have not offered any evidence or argument on either the jurisdiction of the Civil Service Commission or the relevance of a Civil Service rule in the context of a grievance arbitration. Nor have they offered any guidance in interpreting the terms in this paragraph, several of which are open to various meanings.

The record, however, does offer explicit guidance in understanding the bargaining history of the new salary schedule. According to the fiscal note cited above, the effect of collapsing steps 1 and 2 was making "the new step 1 equal to the old step 3." Saying the new step 1 is equal to the old step 3 is another way of saying the old step 3 is the new step 1. Rutter had been at the old step 3; with the new agreement, he was placed at the new step 1 – precisely as called for in the fiscal note. This is also consistent with my understanding of the purpose and practice of compressing a salary schedule.

The fiscal note also said there would be no financial impact from the compression, because there would be no employees in Steps 1 or 2 at the time of implementation. However, if the compression were applied the way the Association asserts, there would have been a massive financial impact, as all employees would have been promoted two steps. Such a procedure would be inconsistent with my understanding of the purpose and practice of compressing a salary schedule.

The Association was aware of how the County understood this provision to operate prior to the time the county board adopted, and the County Executive approved, the MOA. Yet there is nothing in the record to indicate it took any steps to challenge this understanding. The County implemented the provision precisely as described in the accompanying fiscal note.

Almost four years later, however, the Association asserts that Rutter should have been moved from step 3 on the old schedule to step 3 on the new schedule. That is, the Association is now asserting an interpretation of the agreement directly contrary to the interpretation it left unchallenged when the agreement was ratified.

Deputy Rutter was correctly placed on the salary schedule under the terms of the 2005-2006 memorandum of agreement. He has been given the appropriate step increases and across-the-board increases since.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin, this 7th day of February, 2011.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator