

BEFORE THE ARBITRATOR

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

Case ID: 161.0023  
Case Type: MA

AWARD NO. 7939

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**Appearances:**

Attorney Graham P. Weimer, McGillis Weimer, LLC, 11040 W. Bluemound Road, Suite 100, Wauwatosa, Wisconsin, appearing on behalf of the Milwaukee Deputy Sheriff's Association.

Assistant Corporation Counsel James M. Carroll, Milwaukee County Office of Corporation Counsel, 901 N. 9th Street, Milwaukee, Wisconsin, appearing on behalf of Milwaukee County.

**ARBITRATION AWARD**

The Milwaukee Deputy Sheriffs' Association (the "Association") and the County of Milwaukee, Wisconsin (the "County") requested that the Wisconsin Employment Relations Commission provide an arbitrator to hear and decide this grievance brought by the Association. I was assigned to serve as the arbitrator in this matter. This matter was heard in accordance with the grievance and arbitration provisions of the parties' 2014 collective bargaining agreement (the "Agreement"). The parties' 2014 Agreement expired on December 31, 2014, but is their most recent agreement and remains in effect. Hearing was held in Milwaukee, Wisconsin, on March 28, 2017. The hearing was not recorded or transcribed. The parties submitted briefs, the last of which was received on May 19, 2017, whereupon the record was closed. Based upon the evidence received at hearing and arguments of the parties, the arbitrator makes and issues the following award.

**ISSUES**

The parties were unable to agree on a statement of the issue, but agreed I could frame the issue after giving consideration to their positions. The Association would frame the issue as follows:

Did Milwaukee County violate Section 3.01 of the Collective Bargaining Agreement and the past practice of the parties when it did not place Sergeants Luke Chang and Sarah Wronski in top step of the Sergeant's pay scale upon promotion?

The County would frame the issue as follows:

Must Milwaukee County place all Deputy Sheriffs who are promoted to Deputy Sheriff Sergeant at the top of the pay scale upon promotion?

Although not framed by the County as a separate issue, the County, in its May 5, 2017 brief, questioned the arbitrability of the instant grievance under the Agreement.<sup>1</sup>

After giving consideration to their respective positions, I conclude the issues are as follows:

Is the group grievance submitted by the Association on December 30, 2016, on behalf of Sergeants Luke Chang and Sarah Wronski arbitrable under the parties' 2014 Agreement?

If the December 30, 2016 grievance is arbitrable, did Milwaukee County violate the parties' 2014 Agreement when it did not pay Sergeants Chang and Wronski at the top step of the Deputy Sheriff Sergeant's pay scale upon promotion?

## **RELEVANT CONTRACT LANGUAGE**

### **PART 3**

#### **3.01 WAGES**

- (1) All new hires in the classification of Deputy Sheriff I and Deputy Sheriff I (Bilingual)(Spanish), pay range 17BZ shall be hired in step one of pay range 17BZ.
- (2) Movement from one step in the new pay range to the next higher step shall be based upon meritorious performance and completion of a satisfactory performance appraisal by

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<sup>1</sup> The County makes an argument that "[t]his matter is not properly before [the Wisconsin Employment Relations Commission] and should be dismissed on jurisdictional grounds." County Br. p.1. I understand this to be an argument that the issue presented by the instant grievance is not arbitrable under the Agreement and that I, as the arbitrator, should therefore decline to address the issue grieved by the Association and its members. The County first raised this argument when the arbitration request was filed. The parties thereafter agreed to proceed to arbitration without waiving any objection to arbitrability.

the appointing authority or his/her designee after completion of 2,080 straight time hours paid at a step.

- (3) ....
- (4) Effective Pay Period 3, 2014 (January 5, 2014), one point two five percent (1.25%) across-the-board base rate of pay increase.
- (5) Effective Pay Period 12, 2014 (May 11, 2014), one point two five percent (1.25%) across-the-board base rate of pay increase.

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## **PART 5**

### **5.01 GRIEVANCE PROCEDURE**

- (1) APPLICATION: The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits, and position classifications established by ordinances and rules which are matters processed under other existing procedures. Any disputes that arise between the Association and the County including employee grievances shall be resolved under this section. Only matters involving the interpretation, application or enforcement of rules, regulations or the terms of this Agreement shall constitute a grievance.

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### **5.02 SELECTION OF ARBITRATOR**

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- (4) ARBITRATOR'S AUTHORITY

The Arbitrator in all proceedings outlined above shall neither add to, detract from nor modify the language of any civil service rule or resolution or ordinance of the Milwaukee County Board of Supervisors, nor revise any language of this Agreement. The Arbitrator shall confine himself to the precise issue submitted.

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## PART 6

### 6.01 ENTIRE AGREEMENT

The foregoing constitutes the entire Agreement between the parties by which the parties intend to be bound and no verbal statement shall supersede any of its provisions. All existing ordinances and resolutions of the Milwaukee County Board of Supervisors affecting wages, hours and conditions of employment not inconsistent with this Agreement are incorporated herein by reference as though fully set forth. To the extent that the provisions of this Agreement are in conflict with existing ordinances or resolutions, such ordinances and resolutions shall be modified to reflect the agreements herein contained.

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### RELEVANT MILWAUKEE COUNTY ORDINANCE

Chapter 17 – CLASSIFICATION SALARY  
STANDARDIZATION ORDINANCE

#### **17.09. – New appointments.**

- 1) Salary rate on new appointments. Appointments to newly created or vacant positions in pay ranges shall be made at the first step of the range except as follows, unless otherwise specified in a collective bargaining agreement:
  - (a) When an employee is promoted from one classification to another he/she shall be placed in that step of the new range immediately above the compensation he/she is receiving at the date of promotion without further review.
  - (b) A department head may appoint an individual whose training and experience exceed the minimum qualifications to a non-[Executive Compensation Plan] position at a rate of pay higher than the first step of the pay range which shall be effective immediately upon appointment.
  - (c) The director of human resources shall provide a monthly report to the committee on personnel

which lists all new appointments at an advanced step of the pay range, along with a fiscal note for each. This report shall be distributed to all county supervisors and placed on the committee on personnel agenda for informational purposes.

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### **BACKGROUND AND FACTS**

In August, 2016, Association bargaining unit members Chang and Wronski were both promoted within the Milwaukee County Sheriff's Office from the classification of Deputy Sheriff to Deputy Sheriff Sergeant (hereinafter sometimes "Sergeant"). Chang joined the Sheriff's Office in September, 1998; Wronski joined the Sheriff's Office in April, 1997.

The "Pay Grade Table" established by Milwaukee County for Deputy Sheriff Sergeants is number 22B which has seven steps. The pay rate for 22B, Step 1, is \$29.7620 per hour. The pay rate for 22B, Step 7, is \$34.8526 per hour. At the time of their promotions, the Sheriff's Office requested that Milwaukee County's human resources and compensation officials place both Chang and Wronski at Step 7 of pay grade 22B – the "top step."

Sheriff's Office Inspector Richard Schmidt, who functions as second-in-command of the Sheriff's Office and manages its day-to-day operations, testified that Chang and Wronski both exceeded the minimum qualifications for promotion to Sergeant. He further testified that the Sheriff's Office wanted both assigned to the top step on the Sergeant's pay grade table. He believes that the Sheriff has the authority to direct pay levels for employees promoted to the grade of Sergeant.

Milwaukee County Director of Total Rewards Matthew Hanchek disagrees with Schmidt. He believes that any request from a department head (including the Sheriff) to pay an employee at an advanced pay table step must be approved by the County's compensation officials. Hanchek was not personally involved in the pay grade assignments of Chang and Wronski. His predecessor was involved in the County's decision, before Hanchek's Director of Total Rewards position was created.

The County assigned Chang to pay grade 22B, Step 5, at the time of his promotion to Sergeant and assigned Wronski to pay grade 22B, Step 6, at the time of her promotion to Sergeant.

Previously, from at least March 2, 1999, until July 31, 2006, all employees promoted from the grade of Deputy Sheriff to Sergeant were assigned to the top step on each then-existing pay grade table for Sergeants. Nine Sergeants promoted to that grade during that period testified they were assigned to the top step of the Sergeant's pay table upon promotion. Chang and Wronski were the first employees permanently promoted to Sergeant since July 31, 2006.

Although no employees were permanently promoted to Sergeant for ten years beginning on August 1, 2006, several were temporarily promoted to Sergeant during that time. Wronski received such a temporary promotion that was effective from September, 2009, until January, 2012. During that period, Wronski was paid at the top step on the then-existing pay grade table for Sergeants.

Other relevant facts are presented below in this award as necessary.

### **POSITIONS OF THE PARTIES**

#### **The Association**

The Association contends the issue of Chang's and Wronski's assignment on the Sergeant's pay table is ripe for arbitration. It argues Section 5.01 of the Agreement provides that any dispute arising between the parties shall be resolved through arbitration. The Association challenges the County's interpretation of Section 3.01 of the Agreement related to pay. It asserts that no other forum exists to resolve this dispute.

The Association admits that the Agreement, as written, is silent regarding the process for determining the step at which newly-promoted Sergeants are placed upon promotion. It asserts that a past practice exists under the Agreement, however, such that Chang and Wronski should be paid at the top step of the Sergeant's pay grade table.

Arbitrators may look to the parties' past practice in order to interpret otherwise silent provisions of a collective bargaining agreement, according to the Association. *Citing St. Croix Falls School Dist. v. Wis. Employment Rel. Comm.*, 186 Wis.2d 671, 678-9, 522 N.W.2d 507 (Ct. App. 1994). It argues the past practice here demonstrates that for twenty years the parties agreed that when a Deputy Sheriff is promoted to Sergeant, she is paid at the top step on the Sergeant's pay table. The Association argues the practice has become part of the Agreement and is enforceable. The County has never, according to the Association, tried to end this practice during the collective bargaining process.

The Association argues recency is not an element necessary to establish a past practice. On this point, the Association submits that a ten-year hiatus in promotions to the grade of Sergeant does not diminish the practice of newly-promoted Sergeants receiving top step pay.

According to the Association, Milwaukee County Ordinance Section 17.09(1) provides that a department head sets the rate of pay for a newly-promoted employee. It argues the Sheriff, who is the department head of the Sheriff's Office, determined that Chang and Wronski both exceeded the minimum training and experience necessary for a Sergeant and therefore ought to be paid at the top step. In light of the Sheriff's determination, the Association further argues that Chang and Wronski should be paid at the top step. In the Association's view, no statute, ordinance, or other authority provides the County with the right to overrule the Sheriff's determination. The Association argues it is appropriate for the arbitrator to review the County's ordinances to determine the grievants' rights under Section 3.01 of the Agreement.

## The County

The County argues this matter is not arbitrable and the grievance should be dismissed.<sup>2</sup> It avers Section 5.01 of the Agreement provides that the grievance procedure is not to be used to resolve disputes over wage schedules or position classifications established by ordinance. Further, according to the County, the Agreement itself, and Section 3.01, in particular, says nothing regarding promotions or where newly-promoted Sergeants are assigned on the pay table.

This matter, in the County's view, is related to wage schedules and position classifications. According to the County, the grievance procedure is explicitly not to be used to resolve disputes regarding those topics. Additionally, it argues the arbitrator has no authority to modify any County ordinance or revise the Agreement. The County finds that the Agreement contemplates a grievance procedure (and an arbitrator's role under that procedure) that is limited in scope.

The County argues that the arbitrator is confined to interpreting the contract and his role does not extend to determining a grievant's rights under a statute. *Citing Mil. Dep. Sheriff's Assoc. v. Milwaukee County*, Award No. 7935 (Davis, 1/10/17). It further argues that the arbitrator, if he has the ability to hear the grievance at all, has no authority to determine the relative authority of the Sheriff and the County under Ordinance Section 17.09(1).

If the arbitrator does examine the ordinance, the County argues that the Sheriff, as a department head, has no independent right to assign employees to steps on the pay table after promotion. According to the County, the appointment of a newly-promoted employee to a higher pay rate is subject to review and approval by the County's human resources and compensation officials.

The County argues no past practice exists related to newly-promoted Sergeants receiving top step pay. It contends strong proof is required to establish a binding past practice and the Association has failed to meet that burden. The County argues the Association offered no foundation regarding what pay tables were in effect when other Deputy Sheriffs were promoted to Sergeant. In its view, there is no context for what top pay was or how each witness knew they were receiving top pay.

Additionally, the County summarizes that the witnesses who testified were all promoted to Sergeant within a six-year period between 1999 and 2006, with the majority of the promotions occurring in 2006.<sup>3</sup> There is no recent practice or practice of long duration related to promotional pay for Sergeants, according to the County.

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<sup>2</sup> The County phrases its objection to arbitrability as an argument that the Wisconsin Employment Relations Commission lacks jurisdiction over this matter. The Commission is the agency designated by the parties in their agreement to provide an arbitrator to resolve disputes between them. I therefore interpret the argument that the Commission lacks jurisdiction as an argument that this matter cannot be arbitrated under the Agreement.

<sup>3</sup> According to the testimony received at hearing, four of nine promotions occurred in 2006. This was the most promotions in a single year but not a majority.

The County states that parties bargained a pay range for Sergeants. It argues that if all employees promoted to Sergeant immediately advance to the top step on the pay range, the range itself is meaningless. It contends the fact that a negotiated pay range exists refutes the Association's position that all newly-promoted Sergeants must receive top pay.

## **DISCUSSION**

### **Substantive Arbitrability**

This matter is ripe for arbitration under the parties' 2014 Agreement. Section 5.01 of the Agreement broadly contemplates arbitration as the process to resolve "any disputes," including grievances, between the parties. Grievances are defined in Section 5.01 as "matters involving the interpretation, application or enforcement of rules, regulations or terms of this Agreement." This dispute clearly falls within the scope of that definition. The grievance procedure exclusion stated in Section 5.01 does not apply here.

The exclusion contained in Section 5.01 provides that arbitration (as a part of the grievance procedure) "shall not be used to change existing wage schedules ... and position classifications." Here, the Association does not attempt to change either the wage schedule for Sergeants or the position classification for Sergeants. Instead, the Association seeks an interpretation of the Agreement to determine where Chang and Wronski ought to be assigned within the existing wage schedule for Sergeants.

The issue raised in the December 30, 2016, grievance is substantively arbitrable under the Agreement. This award will address the merits of the dispute below. I acknowledge, however, that the issue of substantive arbitrability is ultimately for the courts to decide if a party chooses, and the County has not waived its objection to substantive arbitrability of this matter by proceeding to hearing or by submitting its argument.

### **Merits of the Grievance**

The Agreement is silent on its face as to pay for Sergeants upon promotion. Section 3.01 of the Agreement discusses wages generally. That section establishes the starting pay for newly-hired Deputy Sheriffs' advancement on the pay grade table for Deputy Sheriffs, and across the board percentage pay increases for all members of the Association in 2014.

When an agreement is silent on a topic, the parties' past practice may nonetheless create a binding contractual provision. *City of Madison v. AFSCME, AFL-CIO, Local 60*, 124 Wis.2d 298, 303, 369 N.W.2d 759 (Ct. App. 1985). In finding a past practice that the parties are contractually bound by, the arbitrator does not alter or modify the contract. *Id.*

The parties agree that to be considered a contractually binding past practice, the practice "must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Elkouri &



Elkouri, *How Arbitration Works*, 6th Ed. (2006), pp.608-9 (*cited by* Association Br. p.8; County Br. p.4). Strong evidence of the past practice's existence is required. Elkouri, p.607.

Strong evidence exists in this matter. Schmidt, the Sheriff's second-in-command, who manages the day-to-day operations of the Sheriff's Office, testified that in his experience no Deputy Sheriff has ever been promoted to Sergeant without simultaneously being assigned to the top pay step on the wage schedule. Schmidt began working with the Sheriff's Office in 1986. He became an Inspector and a member of the Sheriff's command staff in 2004, and assumed his present duties in 2010. The County produced no witnesses or evidence to refute Schmidt's recollections.

The testimony of nine Sergeants corroborated Schmidt's general recollections. Three Deputy Sheriffs promoted to Sergeant in 1999 were assigned to the top pay step upon promotion. The same occurred for a newly-promoted Sergeant in 2000 and another in 2003. In 2006, four newly-promoted Sergeants were assigned to the top pay step upon promotion. When Wronski was temporarily promoted to Sergeant in 2009, she was also assigned to the top pay step until she reverted to the grade of Deputy Sheriff in 2012.

The practice is unequivocal – it is free from uncertainty – and it was acted upon. Deputy Sheriffs promoted to Sergeant before 2016 were assigned by the County to the top step on the Sergeant's pay grade table upon promotion.

The practice is also readily ascertainable over a reasonable period of time as a practice accepted by both parties. It existed prior to 1999, and potentially as far back as 1986, when Schmidt joined the Sheriff's Office. The custom clearly existed between 1999 and 2006. The County argues that a ten-year gap in application of the custom reveals that it is not readily ascertainable. Between 2006 and 2016, no Deputy Sheriff was permanently promoted to the grade of Sergeant for reasons that are unclear in the record. The record is clear, however, that during this period those Deputy Sheriffs temporarily promoted to the grade of Sergeant were assigned to the top step on the pay table, despite the temporary nature of the promotion. Application of the practice, even for temporary promotions, demonstrates continued acceptance of it by the parties. The practice continued to exist, but reason for its application only arose for temporary promotions.

The County argues that the record contains no evidence regarding what the top step was at the time of each promotion. Although the record is silent on this point, it is clear that each newly-promoted Sergeant was assigned to the top step then existing on the Sergeant's pay table. The hourly wage applicable at each point in time does not affect the practice. Assignment to the top step, whatever it was, on the pay table accompanied promotion to the grade of Sergeant and is the past practice of the parties.

The six steps below the top step on the pay table are superfluous until the parties bargain otherwise. On this record, there is no evidence that the six lower steps on the Sergeant's pay scale were ever used.

Milwaukee County Ordinance Section 17.90(1), incorporated into the Agreement via Section 6.01 of the Agreement, does not resolve the instant issue. The ordinance reads that a department head, such as the Sheriff, may assign an employee to an advanced step on the pay table.<sup>4</sup> Without citing an authority, the County argues that its Director of Total Rewards (or his predecessor) must approve such assignments. The County is correct that it is not the arbitrator's job in this matter to define the respective roles of the County and the Sheriff. Whatever Ordinance Section 17.90(1) says *may* be done by the County or Sheriff related to wage scale assignment of employees, the contractually binding past practice of the parties *requires* that newly promoted Sergeants be assigned to the top step on their pay scale.

On the basis of the foregoing, and the record as a whole, I make the following:

### **AWARD**

Yes, the instant grievance is arbitrable under the parties' Agreement.

Yes, the County did violate the parties' Agreement when it did not assign Luke Chang and Sarah Wronski to the top step of the Sergeant's pay table upon their promotions to Sergeant. The County shall make Chang and Wronski whole from the dates of their respective promotions.

Signed at the City of Madison, Wisconsin, this 27th day of June, 2017.

### **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Karl R. Hanson, Arbitrator

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<sup>4</sup> Schmidt testified that the Sheriff assigned Chang and Wronski to receive top step pay upon promotion to Sergeant. He also testified that the Sheriff requested such assignment from human resources.