BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case ID: 161.0022
Case Type: MA

AWARD NO. 7943

Appearances:

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

James M. Carroll, Assistant Corporation Counsel, 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. The parties submitted stipulated facts and a hearing was held in Milwaukee, Wisconsin, on April 7, 2017. The hearing was not recorded or transcribed. The parties submitted briefs, the last of which was received on June 9, 2017, whereupon the record was closed. Based upon the evidence received at hearing and the 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 3.20(2) of the Collective Bargaining Agreement when it unilaterally increased the pension percentage withheld from MDSA members' income?

The County would frame the issue as follows:

> Does Section 3.20 of the 2014 MDSA CBA with Milwaukee County permit the annual pension contribution required for MDSA members to vary from year to year?

Although not framed by the County as a separate issue, the County, in its May 26, 2017 brief, argued that the instant grievance should be dismissed because it was not timely filed as required by the parties' Agreement. After giving consideration to their respective positions, I conclude the issues are as follows:

> Is the group grievance submitted by the Association on May 5, 2016, arbitrable under the parties' 2014 Agreement?
>
> If the May 5, 2016, grievance is arbitrable, did Milwaukee County violate Section 3.20(2)(b) of the parties' 2014 Agreement when it increased the percentage of compensation withheld from MDSA members' pay as the employee contribution to the County Employees Retirement System?

RELEVANT CONTRACT LANGUAGE

PART 2

2.01 DURATION OF AGREEMENT

The provisions of this Agreement shall become effective January 1, 2014 and shall expire December 31, 2014….

PART 3

3.20 CONTRIBUTION TO RETIREMENT SYSTEM

(1) ….

(2) Mandatory employee contributions.

(a) Each employee of the Employees' Retirement System, shall contribute to the retirement system a

percentage of the "Member's Compensation" according to (b). "Member Compensation" shall include all salaries and wages of the member, except for the following: overtime earned and paid; any expiring time paid such as overtime, and holiday; and injury time paid; and any supplemental time paid such as vacation or earned retirement.

(b) Contribution percentage: The percentage shall be as follows: Effective the first day of the first pay period following ratification of the successor agreement by the parties, one-half (1/2) of the Annual Required Contribution (ARC) to the Employees' Retirement System as calculated by the Retirement System actuary.

(3) There shall be one (1) member of the Milwaukee Deputy Sheriffs' Association who shall serve as an employee member of the Milwaukee County Employees Retirement System Board in accordance with Chapter 201, Section 8.2 of the [Milwaukee County General Ordinances].

….

PART 5

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….

BACKGROUND AND FACTS

On February 3, 2015, the Association and the County entered into the Agreement. The Agreement was for the 2014 calendar year. The parties have not negotiated a successor agreement and the terms of the 2014 Agreement remain in effect.

The language of Section 3.20(2)(b) in the 2014 Agreement was the same as that in the parties' 2013 agreement. Previously, Section 3.20(2)(b) of the parties' 2009-2012 agreement

provided that the contribution "percentage shall be as follows: Effective January 1, 2012, a six point five nine percent (6.59%) employee contribution."

For the years 2014 through 2017, the Annual Required Contribution ("ARC") for public safety employees, including Association members, one-half of the ARC, and the employee contribution rates, calculated by the Employees Retirement System ("ERS") actuary were:

Year	ARC	One-half (1/2) of ARC	Employee Contribution Rate
2014	$2,015,709	$1,007,855	5.20%
2015	$2,053,825	$1,026,913	5.30%
2016	$3,080,346	$1,540,173	7.90%
2017	$3,884,729	$1,942,365	8.10%

The ERS actuary presented its annual Actuarial Valuation Reports, containing the information for the following year (and which is summarized in the table above), to the Milwaukee County Employees Retirement System Board (also known as the "Pension Board") in June 2013, May 2014, August 2015, and July 2016.

Roy Felber, the Association's former president and current business agent, testified that a member of the Association has served as a representative on the Pension Board since 2014 or earlier. The Association's representative attends meetings of the Pension Board. Felber has talked with the representative about individual issues, but not regarding the ARC. Felber does not know if the representative keeps the Association up to date regarding pension issues.

On May 5, 2016, Deputy Sheriff William Cieslik, a member of the Association, brought forward the instant grievance. In Cieslik's group grievance, he states: "the ARC (pension payment) was raised at the end of last year, and that we are paying more now." The grievance alleges this violates Section 3.20 of the Agreement. Felber is unaware if the County ever told the Association of changes made to the ARC or the resulting employee contribution rate.

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

PROCEDURAL ARBITRABILITY

The County argues that this matter should be dismissed because the grievance filed on May 3, 2016, was untimely. The Agreement provides that any grievance must be initiated within sixty days of when the grievant knew or should have known of a grievable event. Agreement, § 5.01(9). Questions of procedural arbitrability, including those related to the timeliness of a grievance under the provisions of a collective bargaining agreement, are decided by the arbitrator and not the courts. *Beer, Soft Drink, Water, Fruit Juice, Carbonic Gas, Liquor Sales Drivers, Helpers, Inside Workers, Bottlers, Warehousemen, School, Sightseeing, Charter Bus Drivers, General Promotional Employees of Affiliated Industries, Local Union No. 744 v. Metropolitan*

Distributors, Inc., 763 F.2d 300, 303 (7th Cir. 1985); *see also*, *The Common Law of the Workplace: The Views of Arbitrators*, § 2.24 (Theodore J. St. Antoine, ed., 2nd ed., 2005).

In support of its argument, the County asserts that the Association's member sitting on the Pension Board knew of or should have known of the 2016 changes to the contribution percentage in August 2015, when the actuary's report was presented to the board. In the alternative, the County argues that at the very least, the Association should have been aware of the increased contribution percentage deducted from its members' paychecks after the first pay period of 2016. As the instant matter is a group grievance, the County asserts that the Association as a whole should be held accountable for information that was available to any of its members.

The Association responds by arguing that the time to bring a claim is tolled by the continuing nature of the County's alleged violation of the Agreement. It argues that this case is analogous to a breach of contract claim in that "'a contract is breached in each instance' that damage is caused as a result of the initial breach, therefore tolling the time period in which a party can bring a claim." Response Brief for Association at 5 (*citing Cianciola, LLP v. Milw. Metro. Sewerage Dist.*, 2011 WI App 35, ¶19, 331 Wis. 2d 740, 796 N.W.2d 806). A new violation occurs, the Association argues, each time the County withholds the increased contribution percentage from the pay of the Association's members. The sixty day time limit to file a grievance begins anew with each violation, according to the Association. While the Association argues that the grievance should not be dismissed outright, it concedes that the County may have a valid argument for limiting the calculation of any potential remedy in favor of the Association to sixty days before the grievance was filed (and not to the beginning of the contract year). Id. at 7.

The August 2015 actuary's report to the Pension Board shows that the contribution percentage for public safety employees in 2016 is 8.1 percent. This is higher than the contribution rate of 5.3 percent in effect during 2015. While this information was presented by the actuary, this in and of itself does not constitute any violation of the Agreement that the Association should have grieved within sixty days.

If it is a violation of the Agreement to change the contribution percentage, as the Association alleges, a violation could not occur until the County acted upon the actuary's report and took some action to change the contribution percentage. The record presents no evidence sufficient to find that the Association knew, or should have known, in August 2015 that the County would change members' contribution percentage in 2016. There is no evidence that the Association's member on the Pension Board received a copy of the actuary's report or that, if he had, he should have understood from the report that the contribution percentage would change for the Association's members in 2016.

The County's argument that the Association's members ought to have known about the contribution percentage change after receiving their first pay checks in 2016 is more persuasive. However, that argument is also not supported by a factual basis in the record. Nothing in the record indicates when the first pay period of 2016 ended, when employees received their pay,

when they received their paystubs, or whether their paystubs were itemized to show the contribution percentage withheld from their pay.

It is not possible from the record in this matter to determine when the Association and its members should have known that the contribution percentage was changed. When the date of a grievable event is debatable, "arbitrators generally favor upholding arbitrability." Elkouri & Elkouri, *How Arbitration Works,* § 5.7.A.i (Kenneth May, ed., 7th ed., 2012). It cannot be determined on this record if the May 3, 2016, grievance was filed more than sixty days after the grievable event and therefore untimely. For these reasons, it is not appropriate to dismiss the grievance as untimely, as the County requests.[1]

POSITIONS OF THE PARTIES

The Association

The Association argues that the language of Section 3.20(2)(b) is clear. It asserts that Association members are required to contribute to their pension a percentage of their pay that was determined on the first day of the first pay period after ratification of the successor agreement (meaning the 2014 Agreement).

Nothing in the Agreement, according to the Association, permits the County or the Association to unilaterally change the contribution percentage. Once the contribution percentage was set, the Association argues, it cannot be changed again until a successor agreement to the 2014 Agreement is ratified.

The Association argues that the provisions of Section 3.20(2)(b) are plain and unambiguous. In the Association's view, Section 3.20(2)(b) should be understood as stating, "the pension contribution percentage must remain consistent and unchanged until the parties ratify another successor agreement." Brief of Association at 6. In support of this reading, the Association argues that the words "shall be," which are used in Section 3.20(2)(b), indicate permanence in the contribution percentage that was set upon ratification of the Agreement. The Association additionally suggests that the parties bargained for such specific language for a reason: it will encourage settlement of successor agreements.

If the arbitrator finds any ambiguity in the language of Section 3.20(2)(b), the Association argues that extrinsic evidence supports its position. In support of its reading of Section 3.20(2)(b), the Association offered Felber's testimony. Felber testified that he understood Section 3.20(2)(b) meant the contribution percentage would be determined once and

[1] Even if the County had demonstrated when the grievable event first should have been known to the Association, the violation alleged by the Association is a 'continuing violation.' In such a case, a new violation occurs each time the County commits the same grievable act – here, the act of withholding a greater contribution percentage. Under such circumstances, most arbitrators would not dismiss the grievance, but would toll any potential remedy in favor of the union, to be calculated back to the date on which the grievance was actually filed and not back to the first violation or grievable event. *See* Elkouri & Elkouri, *Id*., § 5.7.A.ii.

would not change again until a successor agreement was ratified. He testified that he discussed this provision specifically with the County's lead negotiator, Fred Bau. According to Felber, Bau agreed that under the terms of Section 3.20(2), the contribution percentage would be set on the first day of the first pay period following ratification, and it would not change until a successor agreement was ratified. The County offered no testimony to refute that presented by Felber.

The Association avers that in the County impermissibly ignores the language of Section 3.20(2)(b) regarding the effective date. The effective date language, as read by the Association with the rest of Section 3.20(2)(b), says that "[i]f a new ARC is calculated, its implementation date is the first day of the first pay period following ratification of a successor agreement." Response Brief for Association at 2.

The Association states that calculation of a new ARC by the actuary was not unexpected. It argues that the County's decision to increase the contribution percentage based upon the ARC changes was unexpected and a unilateral act contrary to the terms of the Agreement.

The County

The County also argues that the language of Section 3.20(2)(b) is plain and unambiguous. But, the County's plain reading of Section 3.20(2)(b) is very different than that of the Association. The County asserts that the language of the Agreement provides that the employee contribution percentage is "based on the ARC calculated by the ERS actuary in each year." Brief for County at 5. The County asserts that the language of Section 3.20(2)(b) recognizes that the ARC, and thereby the contribution percentage, may change annually.

Felber's testimony recounting his conversations with Bau is, according to the County, inadmissible hearsay. The County argues that the arbitrator should not credit such testimony offered to establish facts about the collective bargaining process. Additionally, the County argues that the examination of extrinsic evidence, such as Felber's testimony regarding the bargaining history, is not needed because the plain reading of Section 3.20(2)(b) resolves this matter in favor of the County.

The County argues that the potential for fluctuation in the ARC results in a fair outcome for both parties. Ultimately, the contribution percentage will "increase or decrease depending on the pension system's funding status" according to the County. Response Brief for County at 4. The County suggests that if the parties wanted to freeze the contribution percentage at a particular number, they could have done so by making specific reference to the 2014 ARC or stating a set amount.

DISCUSSION

The parties both argue that Section 3.20(2)(b) of the Agreement is unambiguous and not susceptible to more than one meaning. The parties, however, disagree on what Section 3.20(2)(b) says.

The Association argues that Section 3.20(2)(b) provides an adjustment to the contribution percentage one time, on the first day of the first pay period after ratification of the Agreement. They further argue that unless a successor agreement is ratified, the contribution percentage cannot change again.

The County argues that Section 3.20(2)(b) provides for adjustments to the contribution percentage annually, with the first such change commencing on the first day of the first pay period after ratification of the Agreement.

When the terms of a collective bargaining agreement are unambiguous, an arbitrator is without authority to disregard their plain meaning. *Madison Teachers, Inc. v. Madison Metropolitan School Dist*., 2004 WI App 54, ¶15, 678 N.W.2d 311, 317. Section 3.20(2)(b) provides:

> Contribution percentage: The percentage shall be as follows: Effective the first day of the first pay period following ratification of the successor agreement by the parties, one-half (1/2) of the Annual Required Contribution (ARC) to the Employees' Retirement System as calculated by the Retirement System actuary.

It is helpful to divide this provision into two parts where there is a clear grammatical break in its wording, denoted by a comma. "Clause 1" provides that the contribution percentage shall be "effective the first day of the first pay period following ratification of the successor agreement by the parties." "Clause 2" provides that the contribution percentage shall be "one-half (1/2) of the Annual Required Contribution (ARC) to the Employees' Retirement System as calculated by the Retirement System actuary."

If Clause 2 is isolated from Clause 1 and the only language in Section 3.20(2)(b), it is clear that the contribution percentage each year would be one-half of the ARC. Joint Exhibits 2 through 5 show that the ARC is variable. It changes each year based upon an actuarial valuation. Therefore, in isolation, Clause 2 allows that the contribution percentage shall be one-half of the variable ARC that is determined each year based upon the Retirement System actuary's report.

Clause 2 is the operative clause of the disputed provision. Clause 1, which provides an effective date for the provision, does not alter the unambiguous meaning of Clause 2. Instead, it provides language that directs when Clause 2, the operative clause, comes into effect. The 2014 Agreement was not executed by the parties until February 3, 2015. Agreement, p.54. The

Agreement came into being thirty three days after it expired by its own terms. Agreement, § 2.01.

By establishing a future effective date, Clause 1 prohibits either party from recalculating the contribution percentage required prior to ratification of the Agreement (which could have resulted in the County reimbursing the Association's members for any prior overpayment of the contribution percentage or the Association's members owing the County for prior underpayment of the contribution percentage). Clause 1 does not modify the meaning of Clause 2, which permits future changes to the contribution percentage. It establishes when Clause 2 becomes effective. Clause 1, alone or in conjunction with Clause 2, does not provide that the contribution percentage calculation be made only one time. Nor does Clause 1 establish a condition precedent to changing the contribution percentage as required by Clause 2.

The plain reading of Section 3.20(2)(b) resolves this grievance. Therefore, it is unnecessary to consider extrinsic evidence, such as testimony regarding the bargaining history of this provision.

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.

No, the County did not violate Section 3.20(2)(b) of the parties' Agreement when it recalculated and increased the percentage of compensation withheld from MDSA members' pay as the employee contribution to the County Employees Retirement System, in accordance with the valuation report produced by the Retirement System's actuary.

Signed at the City of Madison, Wisconsin, this 11th day of August, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Karl R. Hanson, Arbitrator