BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case ID: 161.0035
Case Type: MA

(2.5% Pension Calculation Grievance)

AWARD NO. 7953

Appearances:

Graham Wiemer, MacGillis Wiemer, LLC, Attorneys at Law, 11040 West Bluemound Road, Suite 100, Wauwatosa, Wisconsin, appearing on behalf of Milwaukee Deputy Sheriffs' Association.

James Carroll, Assistant Corporation Counsel, Milwaukee County, 901 North Ninth Street, Room 303, Milwaukee, Wisconsin, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association, hereinafter referred to as MDSA or the Association, and Milwaukee County, hereinafter referred to as the County or the Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of all disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide the above-captioned grievance. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on June 20, 2018. The hearing was transcribed. Afterwards, the parties filed briefs and reply briefs whereupon the record was closed on August 17, 2018. Having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned issues the following Award.

ISSUES

The parties did not stipulate to the issue(s) to be decided in this case. The Association framed the issue as follows:

> Does Section 3.21 of the collective bargaining agreement and the past practice of the parties require Milwaukee County to use a deputy sheriff's start date with Milwaukee County and enrollment in ERS when determining retirement benefits?

The County framed the issues as follows:

1. Is this dispute over the applicable pension multiplier for a subset of Milwaukee Deputy Sheriffs' Association (MDSA) members subject to the grievance process under the collective bargaining agreement?

2. Is the grievant entitled to the relief sought; namely, continued application of the higher (2.5%) multiplier to the identified subset of MDSA members?

What I have essentially done is adopt the County's first issue (dealing with arbitrability) and then combined it with the Association's substantive issue (dealing with the merits), although I slightly modified the Association's proposed wording.

Thus, the issues which will be decided herein are as follows:

1. Is this dispute over the applicable pension multiplier for a subset of Milwaukee Deputy Sheriffs' Association (MDSA) members subject to the grievance process under the collective bargaining agreement?

2. Does Section 3.21 of the collective bargaining agreement - as interpreted by the parties' past practice - require Milwaukee County to use a deputy sheriff's start date with Milwaukee County and enrollment in ERS when determining retirement benefits?

PERTINENT CONTRACT PROVISIONS

The agreement being interpreted here is the parties' 2014 collective bargaining agreement. It contained the following provisions:

1.01 RECOGNITION

The County of Milwaukee agrees to recognize and herewith does recognize the Milwaukee Deputy Sheriffs' Association as the exclusive collective bargaining agent of all Deputy Sheriffs I, Deputy Sheriffs I (Bilingual)(Spanish), and Deputy Sheriff Sergeants in the employ of the County of Milwaukee in respect to wages, hours and conditions of employment.

Wherever the term "employee" is used in this Agreement, it shall mean and include only those employees of the County of Milwaukee within the certified bargaining unit represented by the Association.

* * *

3.21 RETIREMENT BENEFITS

(1) The retirement allowance for all employees retiring on and after January 1, 1976, except as noted in (2) and (3) below, shall be computed at the rate of two and one half percent (2.5%) for each year of service multiplied by the final average salary of such employee as defined in Ch. 201, C.G.O., and in accordance with all the rules and regulations set forth herein.

(2) Subject to paragraph (3) below, for employees hired on and after January 1, 1982, the provisions of Ch. 201, C.G.O., Employee Retirement System, shall be modified as follows:

(a) Any employee whose last period of continuous membership began on or after January 1, 1982, shall not be eligible for a deferred vested pension if his employment is terminated prior to his completion of ten (10) years of service.

(b) Final average salary means the average annual earnable compensation for the five consecutive years of service during which the employee's earnable compensation was the highest or, if he should have less than five years of service, then his average annual earnable compensation during such period of service.

(3) Notwithstanding any other provision of this agreement, active employees on January 1, 2012, and employees hired on or after January 1, 2012, shall be eligible for a deferred vested pension if the employee's employment is terminated, other

than for fault or delinquency on the employee's part, on or after the employee's completion of five (5) years of service.

(4) For employees hired on or after July 1, 1995, the provision of Ch. 201, C.G.O. Employees' Retirement System, shall be modified as follows: An employee who meets the requirements for a normal pension shall receive an amount equal to two percent (2%) of his final average salary multiplied by the number of years of service.

(5) Employees who are granted an accidental disability pension as that term is defined in Section 201.24(5.3) of the County General Ordinances will have their health insurance paid by Milwaukee County regardless of length of service, except Milwaukee County shall pay the full cost of the basic health plan or the full premium of an HMO whichever is the least expensive for employees with less than fifteen (15) years of service.

(6) For employees hired after November 12, 1987, overtime shall not be included in the computation of Final Average Salary.

(7) Employees retiring on and after July 31, 1989 shall be entitled to pension service credit for military service under Section 201.24 II (10) of the Employees' Retirement System as amended by the County Board of Supervisors through File No. 85-583(a), notwithstanding the effective date indicated in the amendment.

(8) Deputy Sheriffs I, Deputy Sheriffs I (Bilingual)(Spanish), and Deputy Sheriff Sergeant shall be eligible to retire without penalty: at age fifty-seven (57) regardless of their number of years of service, or at age fifty-five (55) with at least fifteen (15) years of creditable pension service.

(9) Employees who became Deputy Sheriffs I, Deputy Sheriffs I (Bilingual)(Spanish), and Deputy Sheriff Sergeant prior to January 1, 1994 shall be eligible to retire without penalty when the total of their age and years of creditable pension service equals or exceeds seventy-five (75).

(10) Employees who meet the minimum requirements for retirement and who retire on and after January 1, 1994 shall receive additional pension service credit for each hour of sick allowance balance they have at the time of retirement. This additional pension

service credit shall not be used to meet the minimum retirement requirements nor shall this additional pension service credit be used to compute the fifteen (15) years of creditable pension service as provided for in 17.14(7)(h) C.G.O. This section shall not apply to any employee selecting a deferred retirement.

* * *

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.

PERTINENT COUNTY ORDINANCE

In addition to the contract language quoted above, Milwaukee County has adopted the following County Ordinance:

MCGO § 201.24(5.1) – NORMAL PENSION

(3) A member who is a deputy sheriff whose continuous membership began prior to July 1, 1995, and who meets the requirements for a normal pension shall receive an amount equal to two and five-tenths (2.5) percent of his final average salary multiplied by the number of years of service as a deputy sheriff. A member who is a deputy sheriff whose continuous membership began on or after July 1, 1995 and who meets the requirements for a normal pension shall receive an amount equal to two (2) percent of his final average salary multiplied by the number of his years of service as a deputy sheriff. Incumbents of positions of chief investigator or investigator authorized in the office of the district attorney shall receive the same pension benefit as a deputy sheriff. Incumbents of the positions of airport fire chief, assistant airport fire chief, and firefighter shall receive an amount equal to one and one-half (1½) percent of their final average salary multiplied by the number of years of service for all service in these classifications prior to January 1, 1999, and two (2) percent of their final average

> salary multiplied by the number of years of service in these classifications for all service after December 31, 1998.

FACTS

The County operates a sheriff's office. MDSA is the exclusive bargaining agent for all law enforcement employees of the sheriff's office holding the rank of deputy sheriff and deputy sheriff sergeant.

As County employees, MDSA members are eligible for certain benefits upon retirement. The collective bargaining agreement (hereinafter CBA) provides for differing benefits in retirement depending on the date that each MDSA member was hired. Section 3.21 of the CBA addresses retirement benefits. That section works in conjunction with Chapter 201.24 of the Milwaukee County General Ordinances (hereinafter MCGO), which governs the Milwaukee County Employees' Retirement System (hereinafter ERS). Section VI of MCGO § 201.24 is titled "Amount of Retirement Benefit," and clarifies the process for determining the pension benefits a County employee is entitled to upon retirement. Subsection 3 of Section VI of MCGO § 201.24 specifically addresses the calculation of retirement benefits for MDSA members.

MDSA members' retirement allowances are computed at the rate of either 2.5% or 2% for each year of service multiplied by their final average salary. The percentage used to determine an MDSA member's retirement allowance is often referred to as his "pension multiplier." As an example, if an MDSA member with 25 years of service and a final average salary of $65,000 has a 2.5% pension multiplier, his/her pension would be $40,625 annually ($65,000 x 25 x .025 = $40,625). If that same MDSA member had a 2% pension multiplier, his/her pension would be $32,500 annually ($65,000 x 25 x .02 = $32,500).

The date used for determining whether an MDSA member's pension multiplier is 2.5% or 2% is July 1, 1995. This date comes from two different provisions of Section 3.21. In Section 3.21(1), it provides that the pension multiplier used to determine a retiring MDSA member's retirement allowance is 2.5%. In a later subsection – Section 3.21(4) – the CBA changes that pension multiplier, stating:

> For employees hired on or after July 1, 1995, the provision of Ch. 201, C.G.O. Employees' Retirement System, shall be modified as follows: An employee who meets the requirements for a normal pension shall receive an amount equal to two percent (2%) of his final average salary multiplied by the number of years of service.

As a result, for employees who are hired and enrolled in ERC on and after July 1, 1995, the pension multiplier is reduced from 2.5% to 2%.

To summarize then, for a MDSA member hired by the County and enrolled in ERS before July 1, 1995, who also became a deputy sheriff before July 1, 1995, his/her pension modifier is

clearly 2.5%. Likewise, for an MDSA member hired by the County and enrolled in ERS after July 1, 1995, who also became a deputy sheriff after July 1, 1995, his/her pension modifier is clearly 2%.

* * *

This case involves a group of at least eleven current and former MDSA members who were employed by the County in other positions before July 1, 1995, but who became deputy sheriffs after that date. On February 21, 2017, MDSA timely filed Grievance No. 61078 on behalf of that group (i.e. those members who worked for the County immediately prior to July 1, 1995, but who were hired by the sheriff's office as deputy sheriffs after July 1, 1995). The grievance challenges the County's decision to compute the affected MDSA members' retirement allowance at the rate of 2% instead of 2.5% for each year of service earned as a deputy sheriff. The County denied the grievance and it was appealed to arbitration.

Another grievance was subsequently filed by a deputy which also raised the same pension multiplier matter. The parties have agreed that that grievance (i.e. Grievance No. 61085) would be consolidated with Grievance No. 61078 for the purpose of determining the pension multiplier matter.

* * *

Grievance No. 61078 is not the first time the County and MDSA have addressed retirement issues involving MDSA members who were employed by the County prior to becoming deputy sheriffs. In Grievance No. 64981, MDSA challenged the County's refusal to allow individuals with prior County employment to retire under the Rule of 75 even though they first became deputy sheriffs after January 1, 1994. (NOTE: Section 3.21(9) in the CBA is often referred to as the "Rule of 75.") The parties resolved that grievance by agreement. The resolution of that grievance is what MDSA is referring to when it references the "Rule of 75 pension ruling" in Grievance No. 61078. Paragraph 2 of the parties' grievance settlement agreement says:

> [I]ndividuals are entitled to the Rule of 75 benefit in the Collective Bargaining Agreement between the MDSA and Milwaukee County, including Section 3.21(9), if the individuals were members of the ERS, including the adjusted enrollment date of membership based on a buy-back prior to January 1, 1994.

Per this settlement agreement, a deputy sheriff's eligibility for the Rule of 75 benefit is determined based on the deputy sheriff's date of membership in the ERS. Deputy sheriffs are therefore entitled to the Rule of 75 benefit in Section 3.21(9) of the CBA if they were members of the ERS prior to January 1, 1994.

* * *

The record shows that there are at least eight retired MDSA members who were hired by the County before July 1, 1995, but who became deputy sheriffs after that date. All of them had their retirement allowance calculated with a pension multiplier of 2.5% upon retirement. The record does not contain any instances where an MDSA member was employed by the County immediately prior to becoming a deputy sheriff and not having his pension allowance calculated at 2.5%. Notwithstanding that, the County now takes the position that the 2% multiplier applies, and always should have applied, to those and any identically situated employees.

* * *

With regard to the parties' bargaining history, the record shows that the County never raised the issue addressed in this grievance in negotiations for a successor CBA.

DISCUSSION

Arbitrability

As a threshold matter, the County takes the position that this grievance raises an issue that is not arbitrable under the CBA. To support that premise, the County relies on Section 5.01. The first sentence of that provision states:

> (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.

The County specifically points to the phrase "fringe benefits" and argues it is applicable here. Building on that, it's the County's view that this grievance involves a "fringe benefit," so the arbitrator is precluded from addressing the merits. I disagree. While the grievance certainly involves a "fringe benefit" (i.e. the pension benefit calculation), the County has not shown that the Association seeks to "change" it, which is the action that is prohibited by the provision. Instead, the Association simply seeks to have a contract provision (namely Section 3.21) interpreted and applied to the employees covered by the grievance. That action is not precluded by the first sentence in Section 5.01. As a result, the undersigned finds that this matter is arbitrable.

The County also contends that the instant grievance "raises concerns that can be addressed via '__other existing procedures'; namely review by the ERS Pension Board." Even if that's true, the Association decided to ask a Commission arbitrator to decide the instant grievance. It has the right to do that under Section 5.01. Consequently, this arbitrator will rule on the matter pending before him.

One final jurisdictional statement will be made. I'm going to base my decision herein on the language contained in the CBA, not the language contained in the County ordinance.

The Merits

My discussion begins with the following overview. This case involves the pension benefit calculation for a class of at least eleven current and former deputy sheriffs who were employed by the County in other positions immediately prior to becoming deputy sheriffs. Said another way, this class involves current or former deputy sheriffs who were County employees and enrolled in the ERS prior to July 1, 1995, but who did not become deputy sheriffs until after that date (i.e. July 1, 1995). At issue is whether the class members are contractually entitled to a 2.5% pension multiplier. The Association asserts that they are, and that the determinative factor is when the employees became County employees in an ERS position. The County disputes that contention. According to the County, the correct pension multiplier for the class members involved here is 2%. The County contends that the determinative factor is when the employees became deputy sheriffs – not when they became County employees in an ERS position. Based on the following rational, I find that the class members involved here are contractually entitled to a 2.5% pension multiplier.

Here's an overview of how the rest of my discussion is structured. Since this is a contract interpretation case, I will first address the contract language cited by the parties. They relied on two contract provisions: Section 3.21 (retirement benefits) and Section 1.01 (recognition). After that contract language has been reviewed, attention will be given to certain evidence external to the CBA. The evidence I am referring to involves an alleged past practice.

I'll first focus on Section 1.01 (the recognition clause). The second paragraph in that provision contains a definition of the word "employee." It states that "[w]herever the term "employee" is used in this Agreement, it shall mean and include only those employees of the County of Milwaukee within the certified bargaining unit represented by the Association."

The focus now turns to Section 3.21. Before the specific provisions involved here are addressed, I've decided to give an overview of that section. That section addresses – in great detail – the process for determining which retirement benefits employees will receive. Broadly speaking, that section provides for differing benefits in retirement depending on the date the employee began employment with the County and enrollment in the County pension system. This contract language dovetails with a chapter in the MCGO – specifically Chapter 2.01.24 – which addresses the process for determining the pension benefits of a County employee. Specifically, that ordinance also references a pension multiplier of 2.5% for those "whose continuous membership began prior to July 1, 1995," and a pension multiplier of 2% for those "whose continuous membership began on or after July 1, 1995."

* * *

In this case, just three parts of Section 3.21 are relevant here: subsections (1), (4), and (9). The first two subsections will be addressed here, and the third subsection will be addressed later in the discussion. Subsection (1) says that:

> The retirement allowance for all employees retiring on and after January 1, 1976, except as noted in (2) and (3) below, shall be computed at the rate of two and one half percent (2.5%) for each year of service …"

The exceptions referenced in subsections (2) and (3) are not relevant here. Thus, the pension multiplier for employees covered by this subsection is 2.5%. Subsection (4) states that:

> For employees hired on or after July 1, 1995, the provision of Ch. 201, C.G.O. Employees' Retirement System, shall be modified as follows: An employee who meets the requirements for a normal pension shall receive an amount equal to two percent (2%) of his final average salary multiplied by the number of years of service.

Thus, the pension multiplier for employees covered by this section is 2%.

As previously noted, the question to be answered here is whether the class members who were employed by the County in other positions prior to becoming deputy sheriffs are covered by subsection (1) or subsection (4). Simply put, do they qualify for the 2.5% pension multiplier referenced in subsection (1) or are they stuck with the 2% pension multiplier referenced in subsection (4)?

I begin my analysis on that question by first looking at the word "employees" which is used in the beginning of both subsections. According to the County, that word refers to those individuals who were employed as deputy sheriffs in the sheriff's office as of July 1, 1995. The Association reads the word "employees" more broadly, and contends it applies to those individuals who were employed by the County "in an ERS covered position" as of July 1, 1995.

In reviewing the term "employees" in subsections (1) and (4), my initial inclination was to adopt the County's position and read that term as applying to just those individuals who were employed as deputy sheriffs as of July 1, 1995. Here's why. That definition comports with the definition of "employee" that is found at the beginning of the CBA. As previously noted, in the contractual recognition clause it defines "employee" as meaning "only those employees of the County of Milwaukee within the certified bargaining unit represented by the Association." Thus, I initially planned to read the term "employees" in subsections (1) and (4) of Section 3.21 via the definition of that term that is stated in the contractual recognition clause.

Notwithstanding my initial inclination that the meaning of the word "employees" was seemingly unambiguous and referred to just those individuals who were employed as deputy sheriffs as of July 1, 1995, there is record evidence – which will be addressed below – that establishes the parties have treated the word "employees" as having a different meaning than what is stated in Section 1.01. Specifically, the record evidence shows that the parties have not limited the word "employees" to just those individuals who were employed as deputy sheriffs as of July 1, 1995. That's significant because it makes the meaning of the word "employees" ambiguous in light of the proffered evidence.

That conclusion (i.e. that the term "employees" is ambiguous in light of the proffered evidence) also applies to the very next word that follows "employees" in Section 3.21(4). I'm referring to the word "hired" in the phrase "For employees hired on or after July 1, 1995 …." The term "hired" is not defined in the CBA. It could refer to being initially hired by the County or being hired as a deputy sheriff. Since either definition is plausible, that makes the word "hired" ambiguous.

* * *

When contract language is found to be ambiguous, arbitrators routinely look beyond the contract language itself for guidance in determining its meaning. Oftentimes, they consider the parties' past practice. Past practice is a form of evidence commonly used to clarify and interpret ambiguous contract language. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given to the contract. Thus, the manner in which the parties have carried out the terms of their agreement in the past provides reliable evidence of what a particular provision means.

Here's what the record shows regarding how the 2.5% pension multiplier has historically been applied.

First, the record shows that there are at least eight retired MDSA members who were hired by the County before July 1, 1995, and who became deputy sheriffs after that date. All of them had their retirement allowance calculated with a pension multiplier of 2.5% upon retirement (not 2%). The following chart shows this.

	Name of Retired Deputy Sheriff	Date Hired by Milwaukee County	Date Hired By Sheriff's Office	2.5% Pension Modifier?
1	Nancy S. Beaumier	1/7/80	4/19/96	Yes
2	Bradley J. Fergot	9/26/88	4/19/96	Yes
3	Kathleen M. Gleason	11/16/89	4/25/97	Yes
4	Katie O. Adams Hart	3/9/80	7/1/96	Yes
5	Christopher S. Keen	7/17/89	9/22/95	Yes
6	Timothy J. Lockwood	1/1/93	9/22/95	Yes
7	Elizabeth M. Martin	11/11/85	4/19/96	Yes
8	Geraldine M. Rodgers	8/24/87	4/22/96	Yes

These eight retired deputy sheriffs all started working for the County prior to July 1, 1995, and became deputies after July 1, 1995. The first of these employees to retire was Adams Hart (number 4 above), who retired in 2002. When she retired, she received a 2.5% pension multiplier for each year of service as a deputy sheriff. When the other seven similarly-situated deputy sheriffs on the chart retired in the years since then, they all received a retirement allowance calculated at 2.5% too. It is significant that the County does not identify a single similarly-situated deputy sheriff

(i.e. someone who started working for the County prior to July 1, 1995, and became a deputy sheriff after that date) who did not receive a 2.5% pension multiplier.

Second, the record shows that over the years, various County pension officials have told several of the class members involved here that when they retire, their pension multiplier will be 2.5%. The following shows this. On March 19, 2001, Jac Amerall, Manager of the ERS, sent a letter to Deputy Sheriff Matthew Takerian wherein Amerall confirmed that Takerian's pension benefit calculation for his time with the sheriff's department would be calculated at 2.5% even though he became a deputy sheriff after July 1, 1995. Later that same month, Matthew Janes, Employee Benefits and Services Manager for the County, confirmed in a letter to Takerian that Takerian's adjusted enrollment date with ERS is June 1, 1985. Twelve years later, Theresa Valazquez, ERS Administrative Specialist, again confirmed to Takerian that he qualifies for the 2.5% multiplier. Deputy Sheriff Jeffery Gaidosh received a similar written assurance from Janes on July 29, 2003.

Third, the record shows this grievance is not the first time the parties have addressed retirement issues involving MDSA members who were employed by the County prior to becoming deputy sheriffs. In Grievance No. 64981, the MDSA challenged the County's refusal to allow individuals with prior County employment to retire under the Rule of 75 even though they first became deputy sheriffs after January 1, 1994. That grievance was settled. Paragraph 2 of the settlement agreement says:

> [I]ndividuals are entitled to the Rule of 75 benefit in the Collective Bargaining Agreement between the MDSA and Milwaukee County, including Section 3.21(9), if the individuals were members of the ERS, including the adjusted enrollment date of membership based on buy-back prior to January 1, 1994.

Two things about that sentence are significant here. One, the sentence references a contract provision that has not yet been reviewed herein, namely Section 3.21(9). Section 3.21(9) – like Sections 3.21(1) and (4) – also contains a reference to a date of eligibility for certain retirement benefits. Section 3.21(9) begins as follows: "Employees who became Deputy Sheriffs I, Deputy Sheriffs I (Bilingual)(Spanish), and Deputy Sheriff Sergeant prior to January 1, 1994 …" and then goes on to say that those employees shall be eligible for a Rule of 75 retirement. The phrase just quoted is actually more favorable to the County's position because it clearly states that "[e]mployees who became Deputy Sheriffs I … prior to January 1, 1994 …" – yet the County agreed in the settlement that eligibility for the Rule of 75 retirement would be determined based on when employees became "members of the ERS." Two, that phrase (i.e. "members of the ERS") refers to the employees' initial date of hire with the County. Thus, when the parties settled that grievance, the County agreed that for the purpose of determining whether an employee is eligible for the Rule of 75, the date that controlled their eligibility was when they became County employees (and thus "members of the ERS"), not when they became deputy sheriffs. In making that agreement, the County was no doubt aware that the settlement allowed some MDSA members to receive Rule of 75 benefits for which they would not otherwise be eligible if the County had determined their eligibility was based solely on their start date as deputy sheriffs.

Having reviewed the record evidence just noted, the next question is whether that evidence establishes the existence of a past practice. The definition of past practice which I've been citing in my arbitration awards for years is this: in order for a past practice to be considered binding, the conduct must be clear and consistent, of long duration, and mutually accepted by both sides. Said another way, the past practice must be shown to be the understood and accepted way of doing something over an extended period of time. Here, the record shows that for years the County's well established and consistent practice has been that when a deputy sheriff's start date with the County is prior to the date he/she became a deputy sheriff, the employee's retirement benefits are calculated based on his/her start date with the County and enrollment in the ERS. In other words, the County has historically been computing MDSA members' retirement allowance based on the date a member became employed by the County, not the date he/she became a deputy sheriff. That being so, I find that a past practice exists here. I further find that this past practice clarifies the ambiguous term "employees" which is found in Sections 3.21(1) and (4), and the ambiguous term "hired" which is found in Section 3.21(4). Specifically, the past practice establishes how the parties themselves have come to interpret Sections 3.21(1) and (4), namely that when determining retirement benefits, the County is to use a deputy sheriff's start date with the County and enrollment in the ERS, not the date he/she became a deputy sheriff.

My finding that a past practice exists is significant because the County has notified the MDSA that henceforth the employees in question will only get the 2% pension multiplier and not the 2.5% multiplier. Obviously, that's problematic given the existence of the past practice whereby those employees have historically received the 2.5% pension multiplier, or been told they will get the 2.5% multiplier when they retire.

It's a commonly accepted tenet in labor relations that when a party wants to end a past practice which clarifies ambiguous contract language, there's an accepted way of doing it. The accepted way is to change the contract language. Until that happens (meaning until the contract language is changed), the past practice which clarifies the ambiguous contract language continues.[1] That didn't happen here. In this case, the County never even tried to change the contract language, or the practice, in bargaining. Instead, it just disregarded the practice. It couldn't do that though because the practice clarifies how the pension multiplier applied to the employees in question.

Given the above, I find that the County's unilateral ending of the past practice violated Section 3.21, as that provision has come to be interpreted by the parties themselves.

* * *

Having found a contractual violation, the final matter to address is the remedy. I hereby award the following remedy: Going forward, when the employees covered by this grievance retire, they are to receive a 2.5% multiplier on their pension – not a 2% multiplier.

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[1] *See, for example*, "The Common Law of the Workplace, The View of Arbitrators," pp.83-84. "A practice that serves to clarify an ambiguous provision in the agreement becomes the definitive interpretation of the term until there is a mutual agreement on rewriting the contract. The practice cannot be repudiated unilaterally."

In light of the above, it is my

AWARD

1. That this dispute over the applicable pension multiplier for a subset of MDSA members is subject to the grievance process under the CBA and is therefore arbitrable;

2. That Section 3.21 of the CBA – as interpreted by the parties' past practice – requires the County to use a deputy sheriff's start date with the County and enrollment in ERS when determining retirement benefits;

3. That the County's proposed action of determining retirement benefits based on when the employee became a deputy sheriff violates the CBA; and

4. That to remedy this contractual violation, the County shall take the following action: going forward, when the employees covered by this grievance retire, they are to receive a 2.5% multiplier on their pension – not a 2% multiplier.

Dated at Madison, Wisconsin, this 15th day of November, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Raleigh Jones, Arbitrator