

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between the

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case ID: 161.0085

Case Type: MA

(Grievance No. 63313)

AWARD NO. 7994

Appearances:

Attorneys Christopher MacGillis, Ryan MacGillis, and Kevin Todt, for the Association.

Attorney Melinda Lawrence, for the County.

ARBITRATION AWARD

The Milwaukee County Deputy Sheriffs' Association asked the Wisconsin Employment Relations Commission to assign a member of the Commission's staff to serve as a grievance arbitrator as to a dispute between the Association and Milwaukee County. The undersigned was assigned.

A hearing was held in Milwaukee, Wisconsin on September 26, 2023. The proceedings were not transcribed or otherwise recorded. The parties thereafter filed briefs and reply briefs until December 12, 2023. On February 14, 2024, I sought additional information from the parties and the resulting email exchanges extended to February 28, 2024.

ISSUE

The parties were unable to agree on a statement of the issue but did agree that I could frame the issue after giving due consideration to their respective positions. Having done so, I define the issue as:

Did the County violate the parties' 2019-2020 contract by refusing to provide subsequently bargained percentage wage increases to former bargaining unit employees who were discharged or quit employment prior to agreement being reached on the 2019-2020 contract? If so, what remedy is appropriate?

DISCUSSION

For bargaining agreements covering the period 2008-2014, employees who quit or were discharged before agreement was reached on a new contract did not receive any additional wage payments related to whatever wage increase was subsequently bargained. However, the 2015-2018 agreement did provide for such payments by virtue of the following contractual language:

All MDSA members employed during the years 2015, 2016, or 2017 shall receive retroactive salary payments. This includes any employees who retired prior to the agreement being ratified and approved by the parties.¹

When agreement was reached on a 2019-2020 contract, a tentative agreement document dated April 14, 2021 was prepared listing the agreed upon items. There is no specific mention in that document of retroactive payments to any former employees who quit or were discharged prior to agreement being reached.

The 2019-2020 contract was prepared and subsequently executed by the parties in September and October 2021. Unlike the 2015-2018 agreement, there is no mention in that document of retroactive payments to any former employees who quit or were discharged prior to agreement being reached.

A County representative subsequently concluded that the retroactive language from the 2015-2018 agreement should be inserted into the previously agreed upon and ratified 2019-2020 contract as there had not been a specific agreement to delete it. The County provided the Association with a proposed amended 2019-2020 agreement adding the 2015-2018 language "To correct a scriviner's (sic) error in the Agreement signed by the County on 9/29/2021 and countersigned by the Union on 10/6/2021." Attached to the language from the 2015-2018 contract was the following footnote:

²This paragraph from the 2015-2017 (sic) Agreement was deleted in the signed version of the 2019-2020 Agreement but had not been subject to any proposal by either party, nor the topic of any discussions during the parties' negotiations; therefore, its deletion was a scriviner's (sic) error and it is restored here in this Amended version as remedy to this error.

¹The absence of a contractual reference to 2018 creates an inference that no retroactive payments were made in 2018 even though there may have been some 2018 applicable quits and discharges. However, because agreement was reached on the 2015-2018 contract in early 2018, there was no need for a contractual reference to 2018 retroactive payments as there were no applicable quits or discharges.

The Association did not agree to amend the 2019-2020 agreement. The proposed amendment triggered what likely would nonetheless have inevitably been the dispute between the parties that is now before me.

The parties disagree as to whether there was bargaining table discussion about retroactive payments during the 2019-2020 contract negotiations. It is noted that all hearing testimony about that topic would require accurate recollection of conversations that occurred several years prior to the hearing in this matter. The County witness did not recall any such discussion. Union witnesses asserted that the issue was raised and, in response to a leading question, one Union witness testified that the County agreed to retroactive payments. However, that same witness also testified that retroactive payments were made during the 2008-2014 period—a recollection that could not be verified and is contrary to County testimony I have found to be credible. On the other hand, the County chose not to call any of the rebuttal witnesses who the Union witness testified would have been present for any specific retroactive payment discussion.

Ultimately, I conclude that the contract language itself (or the absence thereof) forms the most reliable basis for resolving this matter. In the context of the mixed history of retroactive payments that I find to have existed, had there been an agreement upon 2019 and 2020 retroactive payments, the parties presumably would have included specific language referencing those years (just as they did in the 2015-2018 agreement) or created generic contract language. They did neither.²

In reaching my conclusion that there needed to be a contractual reference to retroactive payments (as there was in the 2015-2018 agreement but was not in some prior agreements where no payments were made) for the Association to prevail, I necessarily reject the Association premise that, absent a specific agreement to delete the 2015-2018 language, it was part of the 2019-2020 contract and obligated the County to make retroactive payments. If the 2015-2018 language did not reference specific years, the Association agreement would be much more persuasive.³ But given the reference to specific years, it is a stretch I am not willing to make to conclude that 2015-2018 language created 2019-2020 retroactive obligations.

I acknowledge that the interest arbitrator's Award for the parties' 2021-2023 agreement concluded:

Equitable estoppel applies here because the County took unfair advantage of the Association when it failed to cross out the retroactivity language in the draft of the

²There certainly is an argument to be made that there must have been a substantive purpose for the County to want to add the 2015-2018 language to the 2019-2020 agreement and that said purpose must have been to reflect an ongoing agreement for retroactive payments. While it is indeed unusual to want to reinsert obsolete language back into a successor agreement because there was no specific agreement to exclude same, I accept as credible the County representative's explanation for that action.

³In this regard, I acknowledge that the April 14, 2021, tentative agreement document did state "all other terms status quo." Had the retroactive language in the 2015-2018 contract been generic and not included specific years, this matter may well have turned out differently.

2019-2020 contract and when it failed to put the Association on notice that it was doing so. That induced the Association to agree to the 2019-2020 contract which did not provide for retroactivity and injured the Association by taking away that benefit from its members. No weight therefore can be given to that bargaining history or the absence of the retroactivity language in that contract.

Importantly, the arbitrator did not find that the 2019-2020 contract included an obligation for the County to make the retroactive payments at issue before me. Indeed, he acknowledges the contract's silence on the issue. While he faults the County for the absence of a "red-lined" version of the 2019-2020 contract, it is my judgment that both parties have an equal obligation and opportunity to review a contract before it is executed. Further, even if the Association had timely noted and objected to the absence of the 2015-2018 language from the 2019-2020 proposed contract, it is apparent that the dispute before me would simply have emerged earlier than it did.

Lastly, some comment is warranted as to Association argument based on the Court's holding in *Beaudette v. Eau Claire Cnty. Sheriff's Dep't*, 2003 WI App 153, 265 Wis. 2d 744, 668 N.W.2d 133. In that case, the Court concluded that retroactive payments were part of a contractual agreement even where, as here, there was no specific reference to retroactivity. Absent the evidence in this record of some prior agreements where there was no specific reference to retroactive payments, no retroactive payments were made and no Association protests were made, I might feel compelled to follow the Court's view. However, in the context of that history, I conclude this matter is significantly distinguishable from *Beaudette*.

In summary, I find that the County did not violate the 2019-2020 contract by refusing to provide retroactive payments.

Issued at the City of Madison, Wisconsin, this 13th day of March 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Arbitrator