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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

In the matter of Unit Clarification Petition No. 1-81  
Between American Federation )  
of State County and Municipal )  
Employees, AFL-CIO )  
and )  
The City of Whitefish, )  
Montana )

\* \* \* \* \*

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER

\* \* \* \* \*

The American Federation of State, County and Municipal  
Employees, (Union, AFSCME) filed a unit clarification petition  
requesting an order clarifying the city of Whitefish's  
water, sewer, streets and alley bargaining unit to include  
the water clerk and the water clerk-meter reader position in  
the bargaining unit. Because the Board of Personnel Appeals  
has little precedence in some areas, I will cite federal  
statute and case law for guidance in the application of  
Montana's Collective Bargaining Act, Title 39, Chapter 31  
MCA. The federal statute will generally be the National  
Labor Relations Act, 29 USCA Section 151-166 (NLRA). The  
Montana Supreme Court, when called upon to interpret the  
Montana Collective Bargaining for Public Employees Act, has  
consistently turned to the National Labor Relations Board  
(NLRB) precedent for guidance. (State Department of  
Highways vs. Public Employees Craft Council, 165 Mont. 349,  
529 P.2d 785, 1974; ASFCME 2390 vs. City of Billings, 55  
P.2d 507, 93 LRRM 2753, 1976; State of Montana ex. rel.  
Board of Personnel Appeals vs. District Court of the 11th  
Judicial District, 598 P.2d 1117, 36 State Reporter 1531,  
1979; Teamsters Local 45 vs. Board of Personnel Appeals

1 and Stuart McCarvel, 635 P2d 1310, 38 State Reporter 1841,  
2 1981).

3 At the hearing held September 18, 1981, the party  
4 stipulated that there is no disagreement concerning the  
5 application of Rule 24.26.630 (1)(b),(c), and (d) ARM or  
6 Section 39-31-103(4)(12) MCA; that there is a disagreement  
7 concerning the application of Rule 24.26.630 (1)(a) and Rule  
8 24.26.611 ARM; and that the Board of Personnel Appeals has  
9 jurisdiction of the petition. During the hearing and by  
10 briefs the parties raised the additional question of should  
11 the Board of Personnel Appeals substitute its judgment for  
12 the judgment of the parties concerning a recognition clause,  
13 can the employer and the union reach an agreement in nego-  
14 tiations on a recognition clause which would usurp a right  
15 given an employee through Montana's Public Employees Collec-  
16 tive Bargaining Law, and can the City make changes in the  
17 water department by subcontracting out the meter reading  
18 duties?

19 I. FINDINGS OF FACT

20 After a thorough review of the testimony, exhibits and  
21 post hearing briefs, I make the following findings of fact:

22 1. In a brief, the Union sets forth the following  
23 history of the bargaining unit. On June 17, 1976, the Board  
24 of Personnel Appeals conducted an election for the bargaining  
25 unit. On June 24, 1976, Robert R. Jensen sent a letter to  
26 the Mayor of Whitefish stating "the Board of Personnel  
27 Appeals hereby certifies the American Federation of State,  
28 County and Municipal Employees as the exclusive represen-  
29 tative for collective bargaining purposes for employees of  
30 the water, sewer, street and alley department of the City of  
31 Whitefish." Through the negotiation process a recognition  
32 clause was adopted between the parties which excluded the

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clerk of the water department.

2. The 1980-81 collective bargaining agreement between the parties contains the following pertinent articles:

Article No. 1 - Recognition - The employer recognized the Union as the bargaining agent for all employees of the city's sanitation, sewer, street and water departments, excepting and excluding: clerk of the water department, supervisors as defined by the Act, and all other employees.

The collective bargaining agreement also contains Article XVI, Grievance and Arbitration provision which defines a grievance as an alleged violation or misapplication of a specific provision of this negotiated agreement. The Article culminates in binding arbitration. The collective bargaining agreement also contains Article XIX, a contracting out provision, plus a wage addendum listing wages for meter readers. The record contains information about the existence of a new collective bargaining agreement between the parties, but the record contains no information about any changes in the above Articles. (Joint Exhibit I).

3. Caroline Wehr is a clerk in the water department who first started working for the City of Whitefish about February, 1981. Caroline Wehr's testimony contains no information about any changes in the job duties or job relationships.

4. Carolyn Zwisler is a clerk-meter reader in the water department who first started working for the City of Whitefish about May, 1981.

On August, 31, 1981, Carolyn Zwisler and the City of Whitefish entered into a contractor's agreement for Carolyn Zwisler to read water meters for the City. The contractor's agreement starts October 1, 1981, and ends September 30, 1982. The City of Whitefish agreed to pay the contractor \$310 per month for basic services of reading water meters.

1 (Management Exhibit A). The record contains no other evi-  
2 dence of changes in the clerk-meter reader position.

3 5. The city engineer, public works director, Paul  
4 Wells currently supervises the position of water clerk and  
5 water clerk-meter reader. Mr. Wells outlines a plan to  
6 subcontract the meter reading job, to hire a part-time  
7 temporary water clerk from September 28, 1981, to December  
8 31, 1981, (Management Exhibit B), to replace the old Burrough's  
9 L6000 accounting machine with a new computerized accounting  
10 machine, and to eliminate the part-time temporary water  
11 clerk position after the new computerized accounting machine  
12 becomes fully operational about December 1, 1981.

13 6. The City Manager since July 1981, Mr. Don Morrison  
14 testified at length about future changes in the form and  
15 structure of the city government required by the new City  
16 Charter and testified at length about the future plans for  
17 reorganizing the city departments, employee's supervision  
18 and employee's job duties. All future plans and changes are  
19 subject to the approval and/or disapproval of the Whitefish  
20 city council.

21 Mr. Morrison also states that there are a few employees  
22 in the city treasurer's office and other city offices which  
23 could be part of a city clerical bargaining unit along with  
24 the positions in question.

## 25 II. DISCUSSION

26 The first question is, can the parties negotiate a  
27 recognition clause?

28 In unfair labor practice case Helena Firefighters,  
29 (ULP #19-78), the Board of Personnel Appeals relied on the  
30 teachings of Borg Warner, Wooster Division 356 US 342, 42  
31 LRRM 2034, 1958, and found a recognition clause to be a  
32 permissive subject of bargaining which could not be taken to

1 impasse. The teachings of Borg Warner, supra, are in full  
2 compliance with Hess Oil and Chemical Corp. vs. NLRB, 415  
3 F.2d 440, 72 LRRM 2123, CA5-1969, which the Union cites as  
4 controlling. In Hess Oil, supra, the NLRB found a bargain-  
5 ing lock-out to be lawful and not a violation of NLRA Section  
6 8(a)(3) notwithstanding that the employer violated the NLRA  
7 Section 8(a)(5) by insisting that certain employees be  
8 excluded from the bargaining unit. The NLRB continues to  
9 hold that it is a violation of the NLRA Section 8(a)(5) to  
10 insist to impasse that certain classifications be removed  
11 from a certified and/or contractually established bargaining  
12 unit. (See National Fresh Fruit and Vegetable Company  
13 vs. NLRB, 565 F.2d 1331, 97 LRRM 2427, CA5-1978, enfor-  
14 cement denied because of no impasse).

15 In the second part of the question, the Union has  
16 argued the parties have no business modifying a Board of  
17 Personnel Appeals Unit decision. In Douds vs. International  
18 Longshoremen's Association 241 F.2d 278, 39 LRRM 2388, 1957,  
19 the Second Circuit Court of Appeals stated that a unit  
20 decision of the NLRB ". . . may be altered by agreement of  
21 the parties, if the process of alteration involves no interrup-  
22 tion of the bargaining process or obstruction on commerce  
23 and if the Board does not disturb the agreement in a subse-  
24 quent representation proceeding." (39 LRRM at 2391). I can  
25 see this Board should follow the above teachings.

26 In the third part of the question, the union has argued  
27 the parties have no business compromising any employee's  
28 representation rights. By bargaining the water clerk and  
29 the water clerk-meter reader out of the bargaining unit, the  
30 Union argues the parties are effectively denying the employees  
31 the right to join, form, and assist a labor organization as  
32 set forth in Section 39-31-201 MCA. I disagree because the

1 rights set forth in Section 39-31-201 MCA are employee's  
2 rights, not union rights. That is, if one union agrees with  
3 the employer not to represent a group of employees, the  
4 employees are still free to be represented by all other  
5 unions or form their own independent union. In this case,  
6 employees in question could join the clerical employees from  
7 other city departments and form a clerical unit. The only  
8 thing that has been waived is AFSCME's opportunity to repre-  
9 sent those employees. (See Valley Mould & Iron Corp.  
10 vs. NLRB, 116 F.2d 760, 7 LRRM 524, CA7-1940, where the  
11 court said Section 7 of NLRA was intended to secure and  
12 preserve the employees the right to bargain collectively  
13 without intimidation, coercion or other improper influence  
14 from anybody, whether it be employer, labor union or other).

15 Therefore, in this case, because the two employees in  
16 question are not the only employees eligible to join a labor  
17 organization excluded from the collective bargaining unit  
18 and because of the teachings of Borg Warner, supra, National  
19 Fresh Fruit, supra, and Douds, supra, the parties can negotiate  
20 and modify a recognition clause for collective bargaining  
21 purposes short of impasse.

22 The second question is, should the Board of Personnel  
23 Appeals substitute its judgment for the parties concerning a  
24 recognition clause?

25 In Mungehelia Power Company, 198 NLRB No. 177, 81 LRRM  
26 1084, 1972, the NLRB set forth the following:

27 "Here, as in Wallace-Murray [192 NLRB No. 160, 78  
28 LRRM 1046, 1971] relied on by the Employer, the  
29 unit placement of the individuals involved was made  
30 clear in the unit description contained in the current  
31 agreement, and their status has not changed since its  
32 execution. In these circumstances, to permit one of  
the contracting parties to effect a change in the de-  
finition of the unit by means of a clarification  
procedure would, as we said in Wallace-Murray, be dis-  
ruptive of an established bargaining relationship.  
Moreover, there is another fundamental basis for denying

1 the requested clarification. Where, as here, the jobs  
2 of the involved individuals have been in existence for  
3 a number of years and no recent changes have occurred to  
4 warrant finding the individuals to be accretions to an  
5 existing unit, the Board has held that a request to add  
6 them to the unit raises a question concerning representa-  
7 tion and may not be resolved in a unit clarification  
8 proceeding.

9 Accordingly, we shall grant the Employer's motion  
10 to dismiss the petition.

11 Using the above teachings for guidance, I find that the  
12 agreement between the parties contains a clear recognition  
13 clause and that the job duties and job relationships have  
14 not changed. Therefore, I recommend that the Board of  
15 Personnel Appeals not proceed in this matter because there  
16 is no change in the job duties and the job relationships.  
17 Also, the dismissal of the union unit clarification petition  
18 would not be disruptive to the established collective bar-  
19 gaining relationship and would foster the policy of Montana's  
20 Collective Bargaining for Public Employees Act under Section  
21 39-31-101 MCA. The Board of Personnel Appeals should be  
22 free in other cases to clarify a bargained recognition clause  
23 if the petitioner can demonstrate a change in the job duties  
24 and job relationship and/or recognition clause is not clear.

25 The third question is the subcontracting of the meter  
26 reading duties.

27 This is a question of contract application and interpre-  
28 tation of Article XIX. The contract contains an internal  
29 method of resolving any contract dispute - the grievance and  
30 arbitration procedure, Article XVI. Therefore, I believe I  
31 should not address any question considering the correctness  
32 of the subcontracting even if by the largest stretch of the  
33 mind it could be read into this unit clarification petition.  
34 In this case, a complaint of subcontracting cannot be read  
35 into the petition. (See Billings School District No. 2  
36 vs. Board of Personnel Appeals 36 State Reporter 2311, 103  
37 LRRM 2285, 1979).

1           The fourth question is the application of Rule 24.26.630  
2 (1)(a) ARM which states "there is no question concerning  
3 representation."

4           The NLRB will dismiss a unit clarification petition if  
5 it raises an issue that can only be resolved by an election.  
6 (See American Broadcasting Company, 36 LARM 1063, 1955;  
7 General Motors Corp. 39 LARM 1316, 1957).

8           For resolution, the union suggests that the Board of  
9 Personnel Appeals dismiss the employer's claim and that  
10 the Board of Personnel Appeals order an election. The  
11 remedies requested by the union are contrary to the NLRB  
12 guidelines and raises a question of representation under  
13 Rule 24.26.630 (1)(a) ARM.

14                           III. CONCLUSIONS OF LAW

15           Because the unit clarification petition raises a ques-  
16 tion of representation and violates Rule 24.26.630 (1)(a)  
17 ARM and because the unit clarification petition does not  
18 foster the policy of Montana's Collective Bargaining for  
19 Public Employees Act, Section 39-31-101 MCA, a conclusion of  
20 law dismissing the unit clarification petition is in order.

21                           IV. RECOMMENDED ORDER

22           For reasons set forth above, I recommend that unit  
23 clarification petition No. 1-81 between the American Feder-  
24 ation of State, County and Municipal Employees and the City  
25 of Whitefish, Montana be dismissed.

26           Dated this 8<sup>th</sup> day of July, 1982.

27  
28                           BOARD OF PERSONNEL APPEALS

29                           *Rick D'Hooge*  
30                           Rick D'Hooge, Hearings Examiner

31           NOTE: As set forth in the Board of Personnel Appeals  
32 rules, the parties shall have twenty (20) calendar days to  
file written exceptions to this recommended order. If no  
exceptions are filed, this recommended order becomes the  
full and final order of the Board of Personnel Appeals.

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CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 8<sup>th</sup> day of July, 1982:

American Federation of State, County,  
& Municipal Employees, AFL-CIO  
600 North Cooke Street  
Helena, MT 59601

Duane Johnson  
1031 Monroe  
Helena, MT 59601

Don Morrison  
City Manager  
City Hall  
Whitefish, MT 59937



PAD2:J

