

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 1-83:

LEWIS & CLARK COUNTY,)	
)	
Public Employer & Petitioner,)	FINDINGS OF FACT,
)	CONCLUSION OF LAW
-and-)	AND RECOMMENDED ORDER
)	
MONTANA PUBLIC EMPLOYEES')	
ASSOCIATION,)	
)	
Labor Organization.)	

* * * * *

On March 2, 1983 the above public employer filed this petition for unit clarification seeking to exclude "all chief deputy positions" from the existing unit. On March 29, 1983 the above labor organization filed an answer which admitted that the labor organization entered into a contract addendum "which excluded the chief deputies from the unit", but alleged that the chief deputies still retained "certain protections and conditions of employment".

A hearing was held on May 13, 1983, wherein the employer was represented by Duane Johnson and the labor organization was represented by Dave Stiteler. Initial briefs were filed by both parties on June 15, 1983 and reply briefs were filed by both parties on July 7, 1983. Based on the record and the briefs I make the following

FINDINGS OF FACT.

1. This unit was originally certified by the Board of Personnel Appeals in a 1976 Unit Determination. That unit, also described in the parties' current, 1983-85 collective bargaining agreement, is as follows: "Chief deputies and assistant deputies in the office of Clerk and Recorder, Auditor, Treasurer, and Clerk of Court; all probation officers in the Probation Department; all secretaries, bookkeepers, clerks, and stenographers, in the Courthouse of

1 Lewis and Clark County, Helena, Montana; excluding super-
2 visors and managerial employees and any employee whose
3 employment is less than a six month period or a temporary
4 nature."

5 2. On September 27, 1978, the Lewis and Clark County
6 Board of Commissioners on behalf of the employer and three
7 other persons on behalf of the bargaining unit, two of whom
8 are members of the bargaining unit, entered into a document
9 entitled Memorandum of Agreement. Relevant portions of that
10 contract read as follows:

11 Lewis and Clark County and Lewis and Clark
12 County Board of County Commissioners (hereinafter
13 referred to as the County) and the Montana Public
14 Employees' Association, Inc. (hereinafter referred
15 to as the Association), hereby enter into the
following agreement which shall be incorporated
into the existing Courthouse collective bargaining
agreement between the parties:

16 1. That the appropriate unit for purposes
17 of Article 1, Section 2, of said Courthouse agree-
18 ment, shall be hereinafter modified to exclude (1)
19 "Chief Deputy" position in the offices of County
Treasurer, County Auditor, County Clerk and
Recorder and County Clerk of Court.

20 This Memorandum of Agreement was admitted as Employer's
21 Exhibit Number Two at the hearing.

22 3. The parties have entered into a current collective
23 bargaining agreement which covers the time period from 1983
24 to 1985 with a reopener for economic issues only for July 1,
25 1984.

26 ISSUES

27 1. Whether the chief deputies of the elected offices
28 of County Clerk and Recorder, County Auditor, County Treas-
29 urer, County Clerk of Court, are in the existing bargaining
30 unit?

1 2. Whether those same positions of chief deputies of
2 the elected officials should by law be in the bargaining
3 unit?

4 DISCUSSION

5 The Montana Public Employees' Association in its answer
6 to this petition for unit clarification moved to dismiss the
7 petition for lack of jurisdiction "since the unit has been
8 modified by the parties in the course of bargaining and a
9 valid collective bargaining agreement exists and is in full
10 force and effect." The initial question before this hearing
11 examiner is whether the chief deputies' positions are in the
12 bargaining unit. That question appears to be conclusively
13 answered by resort to the clear wording of the addendum
14 entitled Memorandum of Agreement, wherein the chief deputies
15 are clearly excluded from the bargaining unit. The employer
16 argues that the addendum is an invalid contract primarily
17 for two reasons: "First, since Board Rule 24.26.501(2)
18 provides in pertinent part that labor agreements shall not
19 exceed two years in duration and since the memorandum of
20 agreement has been in existence since 1978, that the col-
21 lective bargaining agreement is therefore defunct. Second-
22 ly, that the part of the agreement which incorporates into
23 the existing Courthouse bargaining agreement between the
24 parties is invalid on its face. The Act simply does not
25 permit supervisors to be placed in bargaining units."

26 Addressing the employer's arguments on the invalidity
27 of the contract in reverse order we see that the second
28 argument presupposes the fact that the chief deputies are
29 supervisors. That fact has not been established and for the
30 reasons stated below will not be reached in this decision.
31 Addendums to contracts which incorporate by reference those
32

1 addendums into the main collective bargaining agreement are
2 a normal and customary addition to collective bargaining
3 agreements and in no way can an addendum be said to be
4 invalid on its face merely because it incorporates itself
5 into another collective bargaining agreement. Concerning
6 the employer's first argument on the invalidity of the
7 contract, the employer cites rule 24.26.501(2) ARM, for the
8 proposition that labor agreements shall not exceed two years
9 in duration. Employer then concludes that labor agreements
10 which contain a duration clause longer than two years, or no
11 duration clause, are invalid. The above cited rule does not
12 make a collective bargaining agreement with a longer dura-
13 tion clause illegal per se. We do not need to reach the
14 question of whether the legislature gave the Board of Per-
15 sonnel Appeals authority to so rule. Rather the purpose of
16 the rule is to allow Decertification (DC) petitions at least
17 every 2 years. Clearly the 1978 addendum could not be used
18 by itself to bar a DC petition. The rule does not render
19 collective bargaining agreements with no duration clause
20 illegal. No other arguments or authority have been given
21 this hearing examiner which show that the addendum is other-
22 wise illegal or invalid. Hence, the addendum is valid, and
23 because no evidence, law or arguments were either introduced
24 or made to the contrary, it is presumed that the addendum
25 still modifies the current 1983-85 collective bargaining
26 agreement between the parties.

27 Since the addendum is valid and is a part of the cur-
28 rent 1983-85 collective bargaining agreement, then the
29 addendum modifies the description of the bargaining unit
30 contained in the main body of the collective bargaining
31 agreement to exclude the chief deputies from the unit.
32 Under these circumstances, the chief deputies are out of the
unit.

1 The parties, Lewis and Clark County and the Montana
2 Public Employees' Association, appear to have clearly bar-
3 gained the chief deputies of the public officials in ques-
4 tion out of the unit. The definition of the bargaining unit
5 is a permissive subject of bargaining (NLRB v. Wooster Divi-
6 sion of Board Warner, US Supreme Court, _____ U.S. _____, 42
7 LRRM 2034 at 2037, (1958)) and is therefore of course allow-
8 able. The bargained-for bargaining unit is generally
9 allowed to stand even though it is different than the NLRB's
10 designation of the bargaining unit pursuant to the Board's
11 certification procedures. Douds v. Longshoremen's Associa-
12 tion, (C.A. 2, 1957) 39 LRRM 2388. By virtue of the Act's
13 definitions, the bargaining unit cannot contain supervisors
14 either by agreement of the parties or by certification from
15 the Board. Assuming arguendo that the chief deputies were
16 in the unit and the chief deputies were supervisors under
17 the standard test for supervisors, then this Board could not
18 include them in the unit.

19 However, the question we are initially presented with
20 is this, are the chief deputies in the unit? The parties
21 have answered that question by clearly excluding the chief
22 deputies from the bargaining unit by virtue of the addendum
23 which is incorporated by reference into and becomes a part
24 of the current collective bargaining agreement. The NLRB
25 accepts as lawful the bargaining unit which the parties
26 established by conventional agreement. Radio Corp. of
27 America, 135 NLRB 980, 49 LRRM 1606 at 1607, (1962); General
28 Motors Corp., 120 NLRB 1215, 42 LRRM 1143 at 1144 (1958).
29 Similarly, where the NLRB has originally fixed the unit, it
30 may be altered by agreement of the parties. Douds v. Long-
31 shoremen, supra.

1 It therefore appears that since the parties have bar-
2 gained the chief deputies out of the unit and this Board by
3 following NLRB precedent gives deference to the agreement,
4 that we have no jurisdiction over those chief deputies or
5 any other employees not in the bargaining unit. Thus it is
6 my conclusion that the bargaining unit as described in the
7 collective bargaining agreement including the 1978 addendum
8 which excludes the chief deputies from the bargaining unit
9 should stand as is.

10 A point raised by the Montana Public Employees' Assoc-
11 iation on page 3 of its June 15th, 1983 brief needs address-
12 ing. In that brief, the Montana Public Employees' Associ-
13 ation asserts as follows:

14 the Board of Personnel Appeals does not have
15 jurisdiction to alter, amend or delete this adden-
16 dum. The Board of Personnel Appeals has no author-
17 ity to compel a party make an agreement or reach a
concession, Section 39-31-305(2), MCA, and so has
no authority to compel the parties here to delete
this memorandum.

18 While it is true that this Board does not have the
19 authority to compel any party during negotiations to make an
20 agreement or grant a concession (39-31-305(2), MCA) the
21 portion of the addendum addressing the recognition clause
22 does not fall into that category. The distinction between
23 normal subjects of bargaining and questions concerning the
24 appropriateness of any given bargaining unit was addressed
25 by the Second Circuit Court of Appeals in the case of Douds
26 v. Longshoremen's Association, 39 LRRM 2388 at 2391. In
27 that case the Second Circuit Court of Appeals held that:

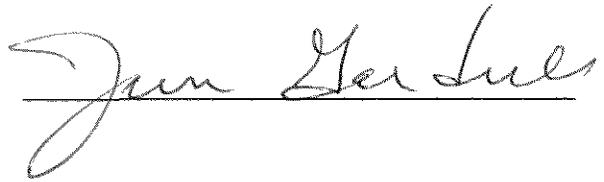
28 This duty [the duty to bargain in good faith]
29 "does not compel either party to agree to a pro-
30 posal", as Section 8(d) states, "or require the
31 making of a concession", and the Board has no
32 power to settle any of those questions. By way of
contrast, it [the NLRB] not only has the power,
but is indeed directed, to decide what is the
appropriate bargaining unit in each case.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of this Recommended Order was served upon the following on this 16th day of August, 1984, postage paid and addressed as follows:

Dave Stiteler
Montana Public Employees'
Association
1426 Cedar Street
P.O. Box 5600
Helena, MT 59604

Duane Johnson
P.O. Box 781
Helena, MT 59624



BPA8:Mcw