

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE COMPLAINT-LABOR )  
PRACTICE #27-1977.

KALISPELL POLICE PROTECTIVE  
ASSOCIATION,

Complainant,

vs.

CITY OF KALISPELL, MONTANA,

Defendant.

FINAL ORDER

\*\*\*\*\*

No party to the above captioned matter has filed exceptions to the Findings of Fact, Conclusions of Law, and Recommended Order within the time limits established by the rules and regulations of the Board of Personnel Appeals.

THEFORE, the Board adopts the Recommended Order in the above captioned matter as the Final Order of the Board.

DATED this 4<sup>th</sup> day of October, 1978.

BOARD OF PERSONNEL APPEALS

  
Brent Cronley, Chairman

\*\*\*\*\*

CERTIFICATE OF MAILING

I, Robert R. Jensen, do hereby certify and state that on the 4<sup>th</sup> day of October, 1978, a true and correct copy of the above captioned FINAL ORDER was mailed to the following:

Herbert F. Donahue  
City Attorney  
City Hall  
Kalispell, MT 59901

H. James Olson  
Attorney at Law  
P.O. Box 1057  
Kalispell, MT 59901

  
Robert R. Jensen

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR  
PRACTICE #27-77,

KALISPELL POLICE PROTECTIVE  
ASSOCIATION,

Complainant,

vs.

CITY OF KALISPELL, MONTANA,

Defendant.

FINDINGS OF FACT  
CONCLUSIONS OF LAW  
AND  
RECOMMENDED ORDER

\* \* \* \* \*

On August 22, 1977, the Complainant, in the above captioned matter, filed an Unfair Labor Practice Charge with the Board of Personnel Appeals. The Complainant contended the Defendant violated certain sections of the Collective Bargaining Act for Public Employees. The specific charges were as follows:

- I. The Defendant has refused and is still refusing to furnish information requested by the Complainant's exclusive representative on or about May 24, 1977. Said information requested concerned wages and other financial matters of the City's employees. By the above acts and conduct, the public employer has violated Section 59-1605 (1)(e) of the Act.
- II. The Defendant has refused since June 14, 1977, to meet at reasonable times, dates and places, upon request by the exclusive representative. When meetings are requested, the Defendant's agent states that he is unable to locate their bargaining representative. By the above acts and conduct, the Defendant has further violated Section 59-1605 (1)(e) and (3) of the Act.
- III. The Defendant has interfered with, restrained, and coerced individual Association members since June 1977 when collective bargaining commenced by attempting to compel individual Association members to work different hours and shift assignments than prescribed by the collective bargaining agreements. When the Defendant's individual offer was refused, the Defendant then withdrew and modified their employment conditions. By the above acts and conduct, the Defendant has violated Section 59-1605 (1)(a)(c)(e) and (3) of the Act.
- IV. The Defendant, on August 5, 1977, threatened to place Association members under personal surveillance or, fire them outright for

1 alleged concerted union activities. By the  
2 above acts and conduct, the Defendant has  
violated Section 59-1605 (1) (a) of the Act.

3 V. The Defendant, on August 8, 1977, required  
4 the exclusive representative to attend a  
5 meeting in the Defendant's office and there-  
6 after attempted to require the exclusive  
7 representative to disclose how each indivi-  
8 dual Association member had voted in a secret  
9 ballot election regarding their wage offer.  
10 By the above acts and conduct, the Defendant  
11 has violated Section 59-1605 (1)(a) and (c)  
12 of the Act.

13 VI. The Defendant, in an open City Council meet-  
14 ing conducted at 8:30 p.m., August 8, 1977,  
15 made a full and final offer regarding wages,  
16 however, refused to consider the non-economics  
17 items proposed by the Complainant. Thereafter,  
18 the Defendant stated there would be no need  
19 to meet and confer and that the Complainant  
20 could do whatever they desired to do about  
21 the matter. By the above acts and conduct,  
22 the Defendant has violated Section 59-1605  
23 (1)(e) and (3) of the Act.

24 On August 23, 1977, the Board of Personnel Appeals served  
25 Mayor Norma E. Happ with the Unfair Labor Practice Charge.

26 On September 1, 1977, the Board of Personnel Appeals re-  
27 ceived an Answer and Motion to Dismiss from the Defendant on the  
28 grounds that Complaint, as filed, does not state a cause upon  
29 which relief can be granted.

30 On September 16, 1977, the Board of Personnel Appeals denied  
31 Defendant's Motion to Dismiss and issued Notice of Hearing.

32 On September 22, 1977, the Board of Personnel Appeals re-  
ceived Application for Definite and Detailed Statement from the  
Defendant.

On September 30, 1977, the Board of Personnel Appeals Ordered  
Complainant to make More Definite Statement and Ordered Defendant  
to Answer said More Definite Statement.

On October 3, 1977, the Board of Personnel Appeals received  
More Definite Statement from the Complainant.

On October 12, 1977, the Board of Personnel Appeals received  
Defendant's Amended Answer in which Defendant admits that Com-

1 plainant requested a copy of the payroll of the City Fire Depart-  
2 ment employees, but denies that Complainant offered to excise the  
3 names appearing thereon (reference to charge I). Defendant  
4 denies the allegations in Complainant's charges II, III, IV, V  
5 and VI.

6 A formal hearing in this matter was held October 19, 1977,  
7 in the Council Chambers, City Hall, Kalispell, Montana, before  
8 Stan Gerke, Hearing Examiner. The formal hearing was held under  
9 authority of Section 59-1607 R.C.M. 1947 and as provided for by  
10 the Administrative Procedure Act (Title 62, Chapter 42, R.C.M.  
11 1947).

12 On November 21, 1977, the Complainant in this matter filed a  
13 second Unfair Labor Practice Charge with the Board of Personnel  
14 Appeals alleging the Defendant has, and is continuing to violate  
15 the Public Employees' Collective Bargaining Act by refusing to  
16 bargain collectively in good faith. The specific charges were as  
17 follows:

18 VII. The Defendant has failed to bargain in good  
19 faith, violating Section 59-1605 (1)(e), by  
20 not moving from the \$45 offer.

21 VIII. The Defendant has failed to bargain in good  
22 faith, violating Sections 59-1605 (1)(a) and  
23 59-1605 (1)(e) by re-opening a closed negotiated  
24 item.

25 On November 22, 1977, the Board served Mayor E. Happ with  
26 the Unfair Labor Practice Charge, then captioned ULP #35-77.

27 On December 5, 1977, the Defendant filed Motion to Dismiss  
28 and alternate Motion for Consolidation with the Board of Personnel  
29 Appeals.

30 The Board of Personnel Appeals, on December 15, 1977, by  
31 Order, denied Defendant's Motion to Dismiss and granted Motion  
32 for Consolidation, thus consolidating ULP #35-77 with ULP #27-77.

A formal hearing was held April 12, 1978, in the Council  
Chambers, City Hall, Kalispell, Montana, before Stan Gerke,  
Hearing Examiner, which addressed the specific charges VII and

1 VIII. The hearing was held under authority of Section 59-1607  
2 R.C.M. 1947 and as provided for by the Administrative Procedure  
3 Act (Title 82, Chapter 42, R.C.M. 1947).

4 At the April 12, 1978, hearing the Parties in this matter  
5 made two stipulations, below, for purposes of addressing charges  
6 VII and VIII.

- 7 1. Time period in question - October 19, 1977,  
8 to November 21, 1977.
- 9 2. That the City of Kalispell had, prior to  
10 August 9, 1977, offered the KPPA [Kalispell  
11 Police Protective Association] a forty-five  
12 dollar [\$45] per month per employee salary  
13 raise for the fiscal year 1977-78, and had  
14 not changed its position prior to and in  
15 cluding November 21, 1977, relative to wages.

16 Post-hearing briefs were requested and received by Hearing  
17 Examiner in this matter. The briefs were duly reviewed and  
18 considered.

19 Little case law exists relative to the Montana Collective  
20 Bargaining Act for Public Employees. However, since the Montana  
21 Act is clearly modeled after the National Labor Relations Act, we  
22 can look at decisions of the National Labor Relations Board for  
23 guidance. Case law cites appearing herein are of that nature.

24 After examining all testimony and evidence and after having  
25 reviewed the Parties' briefs in this matter I make the following  
26 FINDINGS OF FACT:

27 FINDINGS OF FACT

28 GENERAL

- 29 1. The City of Kalispell, Montana, Defendant, has recognized  
30 the Kalispell Police Protective Association (KPPA), Complainant,  
31 as the exclusive representative for police officers employed by  
32 the Defendant.
2. On July 1, 1976, the City and the KPPA entered into a written  
agreement (Defendant's Exhibit No. 1).

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I.

The Defendant has refused and is still refusing to furnish information requested by the Complainant's exclusive representative on or about May 24, 1977. Said information requested concerned wages and other financial matters of the City's employees. By the above acts and conduct, the public employer has violated Section 59-1605 (1)(e) of the Act.

3. Mr. Ron Fredenberg, a representative of the KPPA and member of the KPPA's Negotiating Committee, testified that he requested the City to provide certain information relative to overtime wages earned by firemen in connection with the operation of the City Ambulance. Mr. Fredenberg maintained the requested information was "germane" to the current contract negotiations so "...we could make an intelligent request from the City on wages, based on what possibly was being paid to other City employees." Mr. Dale Gifford, a representative of the KPPA and member of the KPPA's Negotiating Committee, testified he also requested the information which specifically was the individual monthly overtime wages earned by firemen relating to the City Ambulance operation. Both Mr. Fredenberg and Mr. Gifford testified they had not received the requested information. Mr. Gary Nystall, Director of Finance for the City, in his testimony, confirmed the information was requested and that the specific information was not delivered to either Mr. Fredenberg or Mr. Gifford. Mr. Nystall did describe the information that was delivered to the KPPA,

" We [City] provided them with the salary ordinance adopted by the City Council in August of 1976 which set out the hourly or the monthly rate of pay for all employees of the City of Kalispell from which they [KPPA] could determine the hourly pay and thus the overtime rate of the firemen who were called back. We provided them with the, a copy of one of the clerk's reports, I can't tell you which month, which the clerk's report sets out the revenues derived by the ambulance fund from charges for services as well as the expenditures made from that fund and the expenditures are broken down between two salary categories, the clerical salary category and then the overtime salary category so

1 that we felt it was reasonable for them to  
2 determine from that information what the,  
3 let's say the average additional monthly  
4 income a fireman could be earning for the  
5 ambulance call back."

6 Mr. Nystall further explains some of the mechanics necessary to  
7 figure the firemen's wage overtime amounts. Under examination  
8 and in answer to the question, "So when you get right down to it,  
9 the Policemen [KPPA] got the information they were after?", Mr.  
10 Nystall answered, "I would say reasonably yes."

11 The NLRB has long held that it is the duty of the employer  
12 to furnish the union, upon request, sufficient information to  
13 enable the union to understand and intelligently discuss the  
14 issues raised in bargaining. (S.L. Allen and Co., Inc. -vs-  
15 Federal Labor Union, Local No. 18526, 1 NLRB 714 (1936)). Com-  
16 plainant cites Boston Herald-Traveler Corp. v. NLRB (ICA 1955)  
17 223 F.2d 58, 36 LRRM 2220 (1955), as authoritative when dis-  
18 cussing the question of furnishing information. In the Boston-  
19 Herald-Traveler Corp. case, supra, subject matter dealt with the  
20 furnishing of linked wage data of bargaining unit employees. In  
21 this instant case the KPPA has requested wage data of employees  
22 not in the bargaining unit, however, the issue of non-unit em-  
23 ployees was not at issue.

24 In this instant case, the City has provided the basic infor-  
25 mation from which, by means of mathematical calculations, the  
26 KPPA could derive further specific detailed information. In  
27 reference to S.L. Allen and Co., Inc., supra, the City, in instant  
28 case, has marginally fulfilled the duty to furnish information.

29 Defendant argues that the specific information was not  
30 provided because the City Ambulance is a City "enterprise opera-  
31 tion", is not tax supported, and the income from the City Ambu-  
32 lance is not a regular general fund source of revenue and has no  
33 bearing on the ability of the City to grant further wage increases  
34 to KPPA members. Much testimony was given by Mr. Nystall explain-

1 ing how the Ambulance Fund is operated not unlike any other City  
2 fund or operation. Mr. Nystall explains, "I would say it [City  
3 Ambulance] is an enterprise operation of the City of Kalispell,"  
4 and further testified the City Ambulance was a City-owned service.  
5 Mr. Gifford and Mr. Leonard York, professional negotiator hired  
6 by the City, both testified the feasibility of KPPA members  
7 participating in the ambulance operation had been discussed  
8 during negotiations. Because the Ambulance Fund, in essence, is  
9 City owned and operated and participation of KPPA members in the  
10 ambulance operation was, at the least, discussed in the bargain-  
11 ing arena, I dismiss Defendant's arguments.

## 12 II.

13 The Defendant has refused since June 14,  
14 1977, to meet at reasonable times, dates and  
15 places, upon request by the exclusive repre-  
16 sentative. When meetings are requested, the  
17 Defendant's agent states that he is unable to  
18 locate their bargaining representative. By  
19 the above acts and conduct, the Defendant has  
20 further violated Section 59-1605 (1)(e) and  
21 (3) of the Act.

22 4. Evidence presented revealed the parties initiated negotia-  
23 tions sometime in May of 1977. Three "formal" meetings were held  
24 in June, 1977, with Mr. Grainger, Mr. York and Mr. Gifford attend-  
25 ing. These meetings occurred on June 3, 13 and 14, 1977, and  
26 each meeting lasted two hours or less. The term "formal" was  
27 used by Mr. Grainger to describe these three meetings because he  
28 felt meetings were "formal" when Mr. York was present. On the  
29 conclusion of the last "formal" meeting, the KPPA had before them  
30 a City monthly wage offer of 5% (then figured at \$46.46). The  
31 testimony differs at this point. Mr. Gifford and Mr. Fredenberg  
32 both testified that Mr. Grainger was to supply additional finan-  
cial information, contact Mr. York, and arrange another "formal"  
meeting. Mr. Grainger testified he had supplied the information  
and,

1 "...I do not think there was a guarantee made  
2 because at that time Mr. Gifford refused our  
3 offer and when we [City] tried to renegotiate  
4 on the \$45 [recalculations changed \$46.46 to  
5 \$45.00] Mr. Gifford and Mr. Fredenberg refused  
6 that offer, so as far as you trying to say  
7 that I or they tried to say that I guaranteed  
8 them a meeting with Mr. York, that guarantee  
9 was not there, Mr. Olson, no sir, it was  
10 not."

11 Mr. York's office is in Portland, Oregon, and obviously he  
12 must travel to Kalispell to attend negotiating services. Mr.  
13 Grainger testified that Mr. York was hard to contact although  
14 conflicting testimony by Mr. York revealed he utilized a tele-  
15 phone answering service, but more interestingly, Mr. York travels  
16 to Kalispell approximately every two weeks. Mr. Grainger testi-  
17 fied that Mr. York's services were terminated after the last  
18 "formal" meeting,

19 "... Mr. York was subsequently dismissed by  
20 the City Council because of these same prob-  
21 lems that Mr. Gifford was bringing up as if  
22 he was hard to get a hold of because he does  
23 not just negotiate for us, so consequently we  
24 dismissed him and then from then on, formal  
25 or informal, I negotiated with them [KPPA]  
26 back to the City Council so that everybody  
27 knew where we were standing at that time."

28 Mr. Fredenberg testified,

29 "...my definition of a formal meeting would  
30 be when, whether it be Mr. Grainger or Mr.  
31 York, would come up and say, okay, we have  
32 had another meeting, we are hereby authorized  
33 to make what I would consider a formal offer  
34 to which we would have to call a vote of our  
35 Association members and whether acceptance or  
36 rejection would be, to me that would be a  
37 formal meeting. To me it wouldn't matter who  
38 was there as long as there was a formal offer  
39 and a formal either acceptance to turn down  
40 an offer type situation."

41 Mr. Grainger testified it is not necessary that all members of  
42 his negotiating Committee be present in order to negotiate,  
43 however Mr. Grainger preferred that Mr. York be present. In  
44 answer to a question if it were completely necessary that Mr.  
45 York be present, Mr. Grainger replied,

46 "Well, Mr. York and I discussed that and when  
47 we, you know, when you arrived at a figure

1 and there is nothing more in the budget, Mr.  
2 York's a busy gentleman as I stated, that is,  
3 we just never really got back together, I  
4 guess. I do like to have him there because  
5 as I find out now I guess it's necessary to  
6 have a professional."

7 I find Mr. York's presence was not a necessary ingredient in  
8 order for the City's negotiating Committee to function.

9 As stated earlier, the parties had three "formal" meetings  
10 in June of 1977. No further "formal" meetings were held from  
11 June 14, 1977, to date of hearing on this matter (October 19,  
12 1977), however several "informal" meetings were held between the  
13 parties with Mr. Grainger representing the City and with Mr.  
14 Gifford and/or Mr. Fredenberg representing the KPPA. Mr. Grainger  
15 Mr. Gifford and Mr. Fredenberg all testified these "informal"  
16 meetings did occur and the number of meetings held was approxi-  
17 mated between eight and ten. Both Mr. Gifford and Mr. Fredenberg  
18 testified they felt the "informal" meetings were just that, just  
19 informal. They described the "informal" meetings as visits with  
20 Mr. Grainger to discuss negotiations, not to negotiate. Both Mr.  
21 Gifford and Mr. Fredenberg testified they requested Mr. Grainger  
22 to contact Mr. York and schedule a "formal" meeting to actually  
23 negotiate. As discussed earlier, however, Mr. York's presence  
24 was not necessary for the parties to negotiate. I believe an  
25 examination of certain portions of the record will be helpful in  
26 understanding the dilemma:

27 Grainger: ...yes, I did have several [informal] meetings  
28 with them [Mr. Gifford and/or Mr. Gredenberg] and at that  
29 time we disclosed \$45 was the maximum that we could pay....

30 Oleson: As I understand it, there wasn't really room to  
31 negotiate, it was either \$45 or nothing, is this correct?

32 Grainger: Well, unless they wanted to take less than \$45.

Oleson: So the only negotiation that the city offered the  
KPPA...

1 Grainger: Was \$45 a month.

2 Oleson: You either take \$45 a month or less?

3 Grainger: No, no, that is hard core, Mr. Oleson, we settled  
4 with all the other employees at \$45 a month and that is all  
5 we could pay them because we took revenue sharing and that  
6 was not a hard core you either take it or else, it was that  
7 is what we have to pay.

8 Oleson: I guess I am kind of lost here, I thought you  
9 testified that you said it was either \$45 or less, is this  
10 correct?

11 Grainger: That's all the money we have, right.

12 Oleson: So then you are not saying that it is hard core,  
13 that this isn't really what we said,

14 Grainger: No, what I am saying is that we didn't just say  
15 either you take it or, that's not how it was delivered, I  
16 have never delivered that to these people yet.

17 Oleson: Right, but in the testimony here you said that they  
18 refused to negotiate further, that you had only offered them  
19 \$45 a month period.

20 Grainger: That's all we had.

21 Oleson: There was no possibility at all of any negotiations  
22 for anything else?

23 Grainger: What else are you going to negotiate if you have  
24 only got \$45.

25 \* \* \* \* \*

26 Oleson: Now getting to these informal meetings, do you  
27 recall and I am not trying to pin you down to times and  
28 places here, but approximately how many were had, at whose  
29 insistence they were had, or how they came about?

30 Grainger: Some of them they called me, I can recall one day  
31 Mr. Gifford called and he come down and we talked on a  
32 Sunday afternoon, they had both Mr. Fredenberg and Mr.

1 Gifford been in my office; we had went for coffee, we had  
2 met in city hall, we had met in the police station and all  
3 the discussion was back to the wage thing and \$45 was all we  
4 could expend and as far as, we always, I always brought it  
5 back to the council of where we were sitting.

6 Oleson: I am still a little I guess not clear in my mind,  
7 during any of these informal meetings did they ever request  
8 a formal meeting with yourself and Mr. York relative to wage  
9 negotiations that you recall, now I am not trying to...

10 Grainger: I would assume we probably discussed it yes.

11 Oleson: You don't recall specifically then requesting any  
12 particular formal meetings?

13 Grainger: Yes, we did have, because at that time we were  
14 with \$45 a month and that is as far as we could go.

15 Oleson: Is that still the position of the city today that  
16 KPPA accept \$45, no negotiations other than if you went less  
17 than \$45?

18 Grainger: If we had more money maybe I would have a little  
19 bit more leniency but we do not have the money.

20 Oleson: I guess I am not making my questions clear enough,  
21 that's your sole authority which is what I am trying to find  
22 out is that you have the authority only to say either \$45 or  
23 less than \$45.

24 Grainger: You're rephrasing your question wrong Mr. Oleson,  
25 you are asking me one thing and trying to get another answer  
26 and you are not going to get that out of me, the responsi-  
27 bility is 45 bucks because that is all we have in the money,  
28 the budget, now if there were more money in the budget the  
29 authority would be higher, so you are asking one question  
30 and searching for another answer.

31 Oleson: No, I am not doing that, I am asking what was your  
32 authority.

1 Grainger: My authority is what the budget has and the  
budget has \$45 so that is your answer.

2 Oleson: Okay, so your main authority was...

3 Grainger: You got that answer.

4 Oleson: The city would offer \$45 or less

5 Grainger: I have answered that.

6 Oleson: Fine, and there is no room for negotiating other  
7 than that...

8 Grainger: I have already answered that, no  
9 there is not.

10

11 Also, in his testimony, Mr. Grainger stated, in several instances,  
12 he was willing to meet with the KPPA basically at any time.

13 I believe Mr. Grainger is sincere in his willingness to meet  
14 with the KPPA and Mr. Grainger is the authorized representative  
15 for the City for negotiations. However, as the above quoted  
16 record clearly indicates, Mr. Grainger was extremely limited as  
17 to discussions on wage increases. The record indicates Mr.  
18 Grainger felt it would not be fruitful to meet with the KPPA in a  
19 "informal" meeting unless the KPPA was willing to accept the \$45  
20 offer or, at least, discuss the \$45 offer. Mr. Grainger had  
21 nothing more to offer on wages, but he did meet with the KPPA in  
22 an "informal" setting.

23 I find that an authorized representative of the City (Mr.  
24 Grainger) was available and willing to meet with representatives  
25 of the KPPA.

26

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### 28 III.

29 The Defendant has interfered with, restrained,  
30 and coerced individual Association members  
since June 1977 when collective bargaining  
31 commenced by attempting to compel individual  
Association members to work different hours  
and shift assignments than prescribed by the  
collective bargaining agreements. When the  
32 Defendant's individual offer was refused, the

1 Defendant then withdrew and modified their  
2 employment conditions. By the above acts and  
3 conduct, the Defendant has violated Section  
4 59-1605 (1)(a)(c)(e) and (3) of the Act.

5 5. The written agreement between the parties (Defendant's  
6 Exhibit No. 1), contains provisions for work schedules:

7 ARTICLE V  
8 HOURS OF WORK AND OVERTIME

9 SECTION 1. STARTING TIMES AND WORK SCHEDULES:  
10 The following starting times and work schedules,  
11 as determined by the Chief of Police, shall be as  
12 follows:

13 Six (6) days on and three (3) days off, for a  
14 minimum of an eight (8) hour shift each day except  
15 in the event of civil disorder or national disaster,  
16 or unusual occurrences.

17 In the event of any proposed major change in  
18 work schedules, advance notice of such proposed  
19 change and an opportunity for prior consultation  
20 and mutual agreement shall be afforded to the  
21 Association. Shift change shall not be made for  
22 disciplinary reasons.

23 Testimony given documented that three police officers,  
24 Patrolman Dyer, Sgt. Stotts and Lt. DuPuy, were requested by  
25 Police Chief LeRoy McDowell to change their work schedules from  
26 the 6-3 to a 5-2 schedule while working in the Detective Division.  
27 Chief McDowell explained the 5-2 schedule was more compatible  
28 with investigation work. Mr. Gifford testified the change of  
29 work schedules which is an apparent violation of the written  
30 agreement was reported to him by the officers affected. No  
31 formal grievance was filed on the matter, however, the alleged  
32 contract violation was verbally reported to Mr. Grainger and  
33 Chief McDowell by Mr. Gifford. When Mr. Donahue asked why the  
34 KPPA did not file a formal grievance, since the contract contains  
35 a definite grievance procedure, Mr. Gifford answered,

36 "Because over the two years that we have had  
37 this contract, we have attempted to work out  
38 our problems with the Chief [Police Chief  
39 McDowell] and whoever he talks to, the Mayor,  
40 without going through the commotion or rigors  
41 of grievances and this worked fairly  
42 well; that's why we didn't file a grievance."

43 Mr. Gifford testified to a meeting held in the Mayor's where an  
44 agreement was reached,

1 "The final settlement, I guess you could say,  
2 was in the Mayor's office and I can't tell  
3 you what day or hardly even the month, it was  
4 this summer. We sat down and worked out a  
5 schedule that had an equal amount of days off  
6 for the plainclothesmen even though their  
7 shift wasn't 6-3, it was such that they would  
8 work 5-2 two weeks and 5-4, anyway over a  
9 year it equaled out that they had the same  
10 amount of days off as we [uniformed officers],  
11 did...."

12 Mayor Hupp and Chief McDowell also testified as to the agreement.

13 Complainant contends the City of Kalispell has failed to  
14 bargain in good faith by (1) Negotiating directly with employees,  
15 or (2) Unilaterally changing wages or other employment conditions  
16 that are mandatory subjects for collective bargaining. Com-  
17 plainant cites Medo Photo Supply Corp. v. NLRB, U.S. Sup. Ct.  
18 1944, 14 LRRM 581, which states in part:

19 That it is a violation of the essential  
20 principle of collective bargaining and an  
21 infringement of the Act for the employer to  
22 disregard the bargaining representative by  
23 negotiating with individual employees, whether  
24 a majority or a minority, with respect to  
25 wages, hours and working conditions was  
26 recognized by this Court in [cites].

27 Medo Photo at page 4.

28 In the instant case, a representative of the KPPA, Mr.  
29 Gifford, did, in fact, meet with the City to negotiate, if you  
30 will, an alternative shift for the three affected officers. I  
31 cannot find that the City either negotiated with individual  
32 employees or changed the work shift unilaterally.

33 Complainant also contends the City of Kalispell failed to  
34 bargain in good faith by unilaterally changing employment condi-  
35 tions which may be mandatory subjects for collective bargaining  
36 when Officer Dick Stotts was told by the City to discontinue the  
37 practice of driving the police van home. The reason given for  
38 such change in practice was that the City suspected Officer  
39 Stotts of using the police van for private use. Officer Stotts  
40 denied such private usage and testimony revealed no investigation  
41 was performed on the City's allegation. The record does not

1 provide sufficient evidence on this matter giving the history of  
2 the police van to determine if, in fact, it is a mandatory sub-  
3 ject for collective bargaining. Therefore, I cannot make find-  
4 ings on this matter.

5 Two other matters were discussed during the Formal Hearing  
6 and addressed in the Defendant's post-hearing proposed Findings  
7 of Fact. The first item dealt with the non-payment of state law  
8 established increment pay for police officers. Testimony re-  
9 vealed the City, for the months of July and August, 1977, did not  
10 include the \$7.50 increment pay due July 1, in police officers  
11 paychecks. The undisputed testimony of Mr. Grainger explained  
12 the City was anticipating a completely modified pay schedule  
13 because of contract negotiations and it would be more convenient  
14 to change the entire pay modifications at one time. Mr. Grainger  
15 continued to explain because salary increases were settled, the  
16 City paid the police officers their increments for the months in  
17 question later in September of 1977. Mr. Fredenberg affirmed the  
18 payments.

19 The second matter dealt with Mr. Fredenberg alleging the  
20 City had not allowed him to attend a certain school (Intermediate  
21 School held in Bozeman, Montana) after such school was promised  
22 to him. Mr. Fredenberg inferred the school was denied him because  
23 of his involvement with the KPPA. Following is dialogue between  
24 Mr. Donahue and Mr. Fredenberg:

25  
26 Donahue: And you are stating now that you were, that Chief  
27 McDowell did not send you to that school as a matter of bias  
28 and prejudice, is that what you are saying?

29 Fredenberg: I said that I could only speculate that.

30 Donahue: So it is merely your speculation, you don't have  
31 any knowledge or don't have any other reason to believe  
32 that...

1 Fredenberg: No sir, I do not.

2 Donahue: You did, it is a matter of fact that you did go to  
3 another school in June, is it not, didn't you go to a traffic  
4 school in June?

5 Fredenberg: Yes, I did.

6 Donahue: And how long did that school last?

7 Fredenberg: One week.

8 Donahue: Where was it held?

9 Fredenberg: Great Falls.

10 Donahue: Are you aware of the policy of your department  
11 that the Chief of Police tries to give as much cross train-  
12 ing as possible to members of the department?

13 Fredenberg: I...

14 Donahue: Are you aware or aren't you aware?

15 Fredenberg: No, I am not aware.

16  
17 Chief McDowell, in his testimony, explained the policy of  
18 the Police Department concerning training schools; Mayor Happ  
19 affirmed the policy as it was by her directive. The policy is to  
20 allow all police officers to attend training schools on a rota-  
21 tion basis so each police officer can participate in the schools.  
22 Chief McDowell also denied that Mr. Fredenberg was "promised" any  
23 particular school. I cannot find the above referenced subject  
24 matter could be construed to substantiate an unfair labor prac-  
25 tice by the City as charged by the KPPA.

26 IV.

27 The Defendant, on August 5, 1977, threatened  
28 to place Association members under personal  
29 surveillance or, fire them outright for  
30 alleged concerted union activities. By the  
31 above acts and conduct, the Defendant has  
32 violated Section 59-1605 (1)(a) of the Act.

6. Mr. Fredenberg testified to a meeting of the KPPA at which a  
slow-down was discussed as a possible tactic to enhance their  
bargaining position. Mr. Fredenberg explained the meeting was

1 called to "discuss these facets of the slow-down." However,  
2 insufficient members of the KPPA attended the meeting to form a  
3 quorum, and no decision was made concerning a slow-down according  
4 to Mr. Fredenberg. Mr. Gifford and Mr. Klingler also testified  
5 to the meeting held and also denied that any organized concerted  
6 activity was implemented upon by the KPPA.

7 The KPPA charged that the City interfered with the protected  
8 right of the KPPA to engage in a concerted activity. In this  
9 case, there was not a concerted activity (slow-down) implemented  
10 by the KPPA. Therefore, I cannot find that the City committed  
11 an unfair labor practice.

12 V.

13 The Defendant, on August 8, 1977, required  
14 the exclusive representative to attend a  
15 meeting in the Defendant's office and there-  
16 after attempted to require the exclusive  
17 representative to disclose how each indi-  
vidual association member had voted in a  
secret ballot election regarding their wage  
offer. By the above acts and conduct, the  
Defendant has violated Section 59-1605 (1)(a)  
and (c) of the Act.

18 On August 8, 1977, Mr. Gifford was requested to attend a  
19 meeting in the Mayor's office at approximately 3:00 o'clock in  
20 the afternoon. At that meeting, Mr. Gifford was asked the out-  
21 come of a vote taken earlier by the KPPA on the question of  
22 either accepting or rejecting the City's \$45 wage offer. Mr.  
23 Gifford reported, "The results were 17 against accepting and 1  
24 for accepting." Mayor Happ and Mr. Grainger both testified they  
25 were amused with the voting report because Mr. Gifford had said  
26 it was conducted by "secret ballot", yet the vote was taken by  
27 telephone. Mayor Happ explained she asked Mr. Gifford which  
28 employee voted for acceptance of the \$45 wage offer in a "joking  
29 manner" and did not expect Mr. Gifford to reveal how anyone  
30 voted. Mayor Happ testified she did not make any further effort  
31 to elicit additional voting information from Mr. Gifford. Mr.  
32 Gifford affirmed that the Mayor did not attempt coercive effort

1 or any other kind of force to elicit any confidential vote results.  
2 I find that Mayor Happ did not attempt to require Mr. Gifford to  
3 disclose how each individual Association member voted in a secret  
4 ballot election.

5 VI.

6 The Defendant, in an open City Council meeting  
7 conducted at 8:30 p.m., August 8, 1977, made  
8 a full and final offer regarding wages,  
9 however, refused to consider the non-  
10 economics item proposed by the Complainant.  
11 Thereafter, the Defendant stated there would  
12 be no need to meet and confer and that the  
13 Complainant could do whatever they desired to  
14 do about the matter. By the above acts and  
15 conduct, the Defendant has violated Section  
16 59-1605 (1)(e) and (3) of the Act.

17 8. At a City Council meeting held on August 8, 1977, the various  
18 city departments represented by bargaining agents responded to  
19 the \$45 per month per employee wage increase offered by the City.  
20 As reported at the City Council meeting, according to Mr. Gifford,  
21 all City employees accepted the \$45 offer except for the Police  
22 Department and the Street Department (who had not taken a vote as  
23 of August 8, 1977).

24 Complainant charges the City refused to consider the non-  
25 economics item proposed by the Complainant. Mr. Gifford testi-  
26 fied the non-economics item was not "mentioned" at the August 8,  
27 City Council meeting, "...got up on their heels and marched out  
28 and that was the last we saw of them", after the \$45 offer was  
29 made. Obviously, no opportunity remained to discuss or negotiate  
30 any further matters on August 8th. I do not find that the Defen-  
31 dant refused to consider this non-economics item, however, I do  
32 find the Defendant was unable to discuss the item in question.

33 The Complainant further charges the Defendant stated that  
34 there was no further need to meet and confer. In reference to  
35 Finding of Fact #4, above, Mr. Grainger was and would be avail-  
36 able to meet with representatives of the KPPA. Mr. Gifford also  
37 testified he had met with Mr. Grainger after the August 8th City

1 Council meeting. If, in fact, the Defendant did expressly state  
2 there would be no further need to meet and confer, that statement  
3 was not adhered to. I find that the City did meet and confer  
4 with the KPPA before and after the City Council meeting of  
5 August 8, 1977.

6 VII.

7 The Defendant has failed to bargain in good  
8 faith, violating Section 59-1605 (1)(e), by  
not moving from the \$45 wage offer.

9 9. As mentioned above, the Parties to this matter made two  
10 stipulations in considerations of changes VII and VIII. The  
11 Stipulations, again, are as follows:

12 Time period in question - October 19, 1977 to  
13 November 21, 1977.

14 -and-

15 That the City of Kalispell had, prior to  
16 August 8, 1977, offered the KPPA a \$45 per  
17 month per employee salary raise for the  
fiscal year 1977-78 and had not changed its  
18 position prior to and including November 21,  
1977, relative to wages.

18 Further testimony given during the hearing revealed that by  
19 letter of October 28, 1977, the KPPA made a formal offer of  
20 settlement (Defendant's Exhibit A). The Parties met in bargain-  
21 ing session on November 7, 1977, and by letter dated November 10,  
22 1977, addressed to H. James Oleson, Mr. Donahue reported the  
23 outcome of the November 7th bargaining session which, in short,  
24 resulted in no settlement as attested to by Mr. Grainger.

25 During the hearing Complainant suggested the City could  
26 initiate an emergency budget in order to raise their \$45 wage  
27 offer. Both Mayor Happ and Mr. Grainger testified that creating  
28 an emergency budget would be unsound and irresponsible. Mr.  
29 Grainger testified the City could only afford the \$45 after  
30 examining the total budget.

31 Because of the limitations dictated by the stipulation  
32 (above), I can only examine testimony relating to events between

1 October 19, 1977, and November 21, 1977. In that time frame and  
2 referencing the second stipulation and testimony, I find that the  
3 City offered \$45 per month per employee salary raise for fiscal  
4 year 1977-78, which they felt was fair in light of the financial  
5 condition of the City. I find that the City did not move from  
6 the \$45 offer during the time frame dictated (also reference the  
7 second stipulation). Not moving from a bargaining position, in  
8 itself, is not an unfair labor practice as discussed in Wal-lite  
9 Division of United States Gypsum Company vs. National Labor  
10 Relations Board, 94 LRRM 2129 (1973). In U.S. Gypsum Company,  
11 the U.S. Court of Appeals, Eighth Circuit, found, at 2131:

12 Without substantial evidence that a negotiating  
13 party's attitude is inconsistent with its  
14 duty to seek an agreement, the mere fact that  
15 it adamantly insists on a bargaining position  
16 or has not budged from its position on most  
17 issues cannot suffice to render it guilty of  
18 a refusal to bargain in good faith. [cases  
19 cited]

20 In the instant case and within the time frame dictated,  
21 there is no evidence that the City expressed the desire not to  
22 seek an agreement. The City did adamantly retain its position on  
23 the \$45 offer.

#### 24 VIII.

25 The Defendant has failed to bargain in good  
26 faith, violating Sections 59-1605 (1)(a) and  
27 59-1605 (1)(e) by re-opening a closed negotiated  
28 item.

29 10. As per the written agreement between the Parties (Defendant's  
30 Exhibit No. 1), aside from wages, each Party to the agreement may  
31 open one non-economic item for the purpose of negotiations. The  
32 KPPA's chosen non-economic item was "overtime and sick shift" as  
explained in the October 28, 1977, letter (Defendant's Exhibit  
A). Mr. Grainger and Mr. Gifford testified the City's one non-  
economic item, the 6-3 work shift, was first introduced at the  
November 7, 1977, bargaining session. Complainant contends the  
6-3 work shift item was settled at earlier negotiating sessions

1 and Complainant further contends that the City designated its one  
2 non-economic item too late for consideration.

3 Although some testimony given at this hearing related to  
4 this matter, I cannot examine such evidence because of the time-  
5 frame stipulation since the testimony given related to events  
6 occurring before October 19, 1977. Any facts, other than those  
7 indicated above, are unavailable to this hearing examiner and,  
8 therefore, I cannot find on this matter.

9  
10 CONCLUSIONS OF LAW

11 I. The Defendant has not violated Section 59-1605 (1)(e),  
12 R.C.M. 1947.

13 II. The Defendant has not violated Sections 59-1605 (1)(e)  
14 and (3) R.C.M. 1947.

15 III. The Defendant has not violated Section 59-1605 (1)(a),  
16 (c), (e) and (3) R.C.M. 1947.

17 IV. The Defendant has not violated Section 59-1605 (1)(a)  
18 R.C.M. 1947.

19 V. The Defendant has not violated Section 59-1605 (1)(a)  
20 and (c) R.C.M. 1947.

21 VI. The Defendant has not violated Sections 59-1605 (1)(e)  
22 and (3) R.C.M. 1947.

23 VII. The Defendant has not violated Section 59-1605 (1)(e)  
24 R.C.M. 1947.

25 VIII. The Defendant has not violated Sections 59-1605 (1)(a)  
26 and (e) R.C.M. 1947.

27 RECOMMENDED ORDER

28 All Unfair Labor Practice Charges in this matter are hereby  
29 dismissed.

30 DATED this 15<sup>th</sup> day of August, 1978.

31 BOARD OF PERSONNEL APPEALS

32 By Stan Gerke  
Stan Gerke  
Hearing Examiner