

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

IN THE MATTER OF UNFAIR LABOR PRACTICE:)
INTERNATIONAL ASSOCIATION OF)
FIREFIGHTERS, LOCAL NO. 448,)
Complainant,) ULP #19-1978
- vs -) FINAL ORDER
CITY OF HELENA,)
Defendant.)

A Findings of Fact, Conclusions of Law, and Recommended Order were issued on October 18, 1978, by Hearing Examiner, Jack H. Calhoun.

Exceptions of Defendant were filed on November 8, 1978, by Jeffrey M. Sherlock on behalf of the City of Helena.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant to the Findings of Fact, Conclusions of Law, and Recommended Order filed by Mr. Jeffrey M. Sherlock are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law, and Recommended Order of Hearing Examiner, Jack H. Calhoun, as the Final Order of this Board.

DATED this 26 day of January, 1979.

BOARD OF PERSONNEL APPEALS

By: Brent Cromley
Brent Cromley, Chairman

CERTIFICATE OF MAILING

I, Jennifer Jacobson, hereby certify and state that on the 26 day of January, 1979, I mailed a true and correct copy of



1 the above FINAL ORDER to the following persons:

2 Jeffrey M. Sherlock
3 Hull, Driscoll & Sherlock
4 P. O. Box 534
5 Helena, MT 59601

6 Barry L. Hjort
7 Attorney at Law
8 3030 North Montana Avenue
9 Helena, MT 59601

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

Jennifer Jacobson

BEFORE THE BOARD OF PERSONNEL APPEALS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

IN THE MATTER OF UNFAIR LABOR)
PRACTICE NO. 19-78:)
INTERNATIONAL ASSOCIATION OF) FINDINGS OF FACT,
FIREFIGHTERS LOCAL NO. 448,) CONCLUSIONS OF LAW
AND
Complainant,) RECOMMENDED ORDER
vs.)
CITY OF HELENA,)
Defendant.)

An unfair labor practice charge was filed with this Board on July 13, 1978 by the International Association of Firefighters Local No. 448 (Union) against the City of Helena. Complainant alleged that Defendant violated Section 59-1605 (1)(e), R.C.M. 1947. At a pre-hearing conference held on August 14, 1978 the specific issue was narrowed to the question of whether the City insisted upon bargaining on the composition of the bargaining unit to impasse. A hearing under authority of Section 59-1607, R.C.M. 1947 was conducted on August 29, 1978. Complainant was represented by Mr. Donald A. Garrity. Defendant was represented by Mr. Jeffery M. Sherlock.

The following Findings of Fact, Conclusions of Law and Recommended Order are based upon the substantial evidence in the record including sworn testimony, exhibits and briefs.

FINDINGS OF FACT

1. The International Association of Firefighters Local No. 448 is the certified exclusive representative for the purposes of collective bargaining for the bargaining unit in the City of Helena, Fire Department.
2. The Union has been recognized by the City through previous contracts as the exclusive representative for all employees of the Helena Fire Department except the Fire Chief, the Assistant Fire Chief and clerical employees.
3. On May 3, 1978 the Union requested of the City that

1 negotiations be opened to discuss revisions of certain sections
2 of the existing contract; Section 1 of the contract, was not
3 included among those sections.

4 4. Section 1 of the existing contract defined the Union a
5 exclusive bargaining agent for all employees of the Fire
6 Department except the Fire Chief, the Assistant Fire Chief and
7 clerical employees.

8 5. On May 9, 1978 the City proposed that Section 1 of the
9 contract be changed to read as follows:

10 "The Employer recognizes the Union as the exclusive
11 bargaining agent for all employees of the Fire Department
(except for the Fire Chief, the Assistant Chief, the Fire
12 Marshall, the Fire Captains, and clerical employees)."

13 The proposal also included offers on other sections of the
14 contract.

15 6. On June 1, 1978 in its counter proposal the Union
16 rejected the City's proposed revision of Section 1; the Union
17 proposed that Section 1 remain unchanged. The Union also made
18 proposals on other sections of the contract.

19 7. On June 9, 1978 the City made an offer to the Union
20 which included a proposal to change Section 1 to exclude the Fire
21 Chief, Assistant Chief, Battalion Chiefs, Fire Marshal and
22 clerical employees. This offer included proposals on other
23 contract sections and was termed a "final and last" offer by the
24 city negotiator.

25 8. On June 27, 1978 the City made another offer to the
26 Union, the terms of which were to remove the Fire Marshal from
27 the unit and to include Battalion Chiefs in the unit. This offer
28 also included a proposal on Section 10 of the contract.

29 9. On June 28, 1978 the Union made an offer to the City by
30 which it proposed that Section 1 remain unchanged. Proposals on
31 other sections of the contract were also set forth.

32 10. On June 28, 1978, subsequent to the Union's offer of
that same date, the City proposed to change Section 1 to exclude

the Fire Marshal. Proposals on other sections were also made.

1
2 11. On June 29, 1978 the Union proposed that Section 1
3 remain as in the existing contract. Offers on other sections
4 were included in the proposal.

5 12. On June 29, 1978 the City made the following proposal
6 on the wording of Section 1:

7 "The employer recognizes the Union as the exclusive
8 bargaining agent for all employees of the Fire Department
9 except for the Fire Chief, Assistant Fire Chief, Battalion
10 Chiefs, clerical employees and the Fire Marshal. Provided
11 further that if the "Battalion Chiefs" position as
12 identified in the case pending before the Board of Appeals
13 is ultimately decided so that the "Battalion Chiefs"
14 position continues in the Billings contract, the City agree
15 to immediately open this section of the contract for the
16 purpose of placing the "Battalion Chief" position in Helena
17 back in this unit."

18 On the same date the city furnished wage and benefits
19 information to the Union for Battalion Chiefs and Fire Marshal.
20 Such wages and benefits were to be applicable, if the positions
21 were removed from the bargaining unit.

22 13. On June 30, 1978 the City proposed to exclude the Fire
23 Chief, Assistant Chief, Battalion Chiefs and clerical employees
24 from the bargaining unit. An offer on Section 10 language was
25 made at the same time.

26 14. On June 30, 1978 the Union made the following proposal
27 on Section 1:

28 "Formal recognition exception to read: Except for the Fire
29 Chief, the Assistant Chief, Battalion Chiefs and clerical
30 employees."

31 The union also made offers on other sections of the
32 contract.

15. On July 11, 1978 at 1:15 p.m. the City proposed to the
Union that Captains be excluded from the unit; the remaining
wording of Section 1 was to be unchanged. The City also made
offers on other sections.

16. On July 11, 1978 at 3:30 p.m. the Union made a proposal
on Section 1 which would have left the bargaining unit as it was
under the previous contract. Offers on other sections of the

contract were also made.

1 17. On July 11, 1978 at 4:45 p.m. the City made the
2 following proposal to the Union:

3 "Sect. 1 Formal Recognition

4 The employer recognizes the Union as the exclusive
5 bargaining agent for the fire marshall, captains,
6 lieutenants, firemen first class, firemen, fire inspector
7 and mechanic."

8 Also included were offers on other sections of the contract.

9 18. The above proposal made by the City included all
10 positions in the unit which were not excluded from the unit by
11 Section 1 of the previous contract.

12 19. On July 11, 1978 at 5:00 p.m. the Union offered
13 proposals on various sections of the contract including Section 1
14 which was to remain as it existed in the previous contract.

15 20. On July 11, 1978 the Union requested that the City and
16 Union agree to submit "impasse issues" to final and binding
17 arbitration. The following is the body of that request:

18 "Firefighters Local Union #449, Helena request that the City
19 and the Union agree to submit the Impasse Issues, (Section
20 1. Formal Recognition, Section 10. Department objectives,
21 Section 11. Cost of Living and Salary Adjustment, Section
22 12, Shift Exchange Section 27. Savings Clause, Section 29.
23 Duration of Agreement) to final and binding arbitration."

24 21. The City did not agree to submit the unresolved issues
25 to arbitration, nor did it agree that impasse had been reached.

26 22. On July 13, 1978 the Union filed an unfair labor
27 practice charge against the City.

28 23. The president of the Union testified that the City made
29 several offers which included all positions which are in the
30 present bargaining unit; that the City had changed the wording of
31 its various proposals on the recognition clause, however, all
32 appeared to him to have the same intent, i.e., to take positions
out of the unit immediately or be allowed to later.

33 24. The City Manager testified that the City had never
agreed during negotiations to the present language of Section 1,
nor had such an offer been made; that the City intended, by its

1 proposals on the recognition clause, to gain the flexibility to
2 create positions outside the bargaining unit; that the City did
3 not intend to take present positions outside the bargaining unit,
4 but rather wanted to create, e.g., an assistant chief for
5 operations position.

6 25. The Union president testified that the statement he
7 swore to in the unfair labor practice charge in which he stated
8 the City had not made a proposal which would include all present
9 members of the unit, was in conflict with the City's proposal
10 made on July 11, 1978 at 4:45 p.m.; but, that his understanding
11 was that the proposal did not include all present unit members.

12 26. On July 24, 1978 at 10:30 a.m. the Union made an offer
13 to the City to leave Section 1 as it was previously and also made
14 proposals on other sections of the contract.

15 27. On July 25, 1978 the City made an offer to the Union on
16 Section 1 language and on other sections of the contract. The
17 proposed wording for Section 1 was as follows:

18 "The employer recognizes the union as the exclusive
19 bargaining agent for the fire marshal, captains,
20 lieutenants, firemen first class, firemen, fire inspector
21 and mechanic. (In addition the union shall give a letter to
22 the City recognizing the City's right to petition the Board
23 of Personnel Appeals for unit clarification.)"

24 This proposal included all positions not excluded by Section
25 1 of the previous agreement.

26 28. On July 27, 1978 the City made offers on various
27 sections of the contract including the following proposal on
28 Section 1:

29 "The City recognizes the Union as the exclusive bargaining
30 agent for all employees of the Fire Department except the
31 Fire Chief, Assistant Fire Chiefs, and clerical employees."

32 The above proposal included all positions in the unit which
were not excluded by Section 1 of the previous contract; the City
did not plan to create additional positions during the fiscal
year; and, the Fire Department had only one Assistant Fire Chief
at the time.

1 29. On July 27, 1978 the Union proposed that Section 1
2 remain unchanged; it also made proposals on other sections.

3 30. On July 28, 1978 the City made the same offer with
4 respect to Section 1 as was made on July 27, 1978; offers by the
5 City on other sections were also made; the proposal on Section 1
6 included all positions in the unit which were not excluded by
7 Section 1 of the previous agreement; the City did not plan to
8 create additional positions during the fiscal year; and, the
9 Department had only one Assistant Fire Chief at the time.

10 31. On August 9, 1978 the Union made an offer to the City
11 to leave Section 1 as it was in the previous contract and made
12 proposals on other sections.

13 32. On August 15, 1978 the City made proposals on several
14 sections including Section 1 which was as follows:

15 "The employer recognizes the Union as the exclusive
16 bargaining agent for the fire marshal, captains,
17 lieutenants, firemen first class, fire inspector and
18 mechanic. (In addition, the Union shall give a letter to
19 the City recognizing the City's right to petition the Board
20 of Personnel Appeals for unit clarification.)"

21 The difference between the above proposal for Section 1
22 language and the proposal made by the City on July 25, 1978 is
23 the word "firemen" which was left out of the above proposal. The
24 proposal, as written, does not include all positions not excluded
25 by Section 1 of the previous contract.

26 33. The last negotiations were held on August 15, 1978; up
27 to that time the parties had reached agreement on some of the
28 issues in dispute, however, the language for the recognition
29 clause had not been agreed upon, nor had agreement been reached
30 or some other issues.

31 34. Throughout the negotiations the City made various
32 proposals to change the wording of Section 1; the City did not
33 ever propose to leave Section 1 as it existed in the previous
34 contract.

1 35. The City never insisted on any one version of wording
2 of Section 1 as a condition precedent to any agreement; however,
3 the City did not make any proposals which did not include changes
4 to that Section.

5 36. On one occasion the Union indicated a willingness to
6 bargain on the recognition clause; the Union did not since that
7 time offer to bargain on Section 1, i.e., the Union sought to
8 leave the clause as it existed previously.

9 37. The city Manager did not have authority from the City
10 Commission, at any time, to settle the contract with the previous
11 recognition clause language in it.

12 38. The City did not join the Union in requesting mediation
13 because the City Manager did not feel impasse had been reached.

14
15 **RULING ON OFFERED EVIDENCE**

16
17 The city objected to the introduction of evidence on events
18 subsequent to the filing of the unfair labor practice charge on
19 the grounds that the charge, as filed, did not indicate that the
20 alleged violation was a continuing one. The objection was
21 properly overruled. To hold otherwise would require that
22 Complainant file a charge after each proposal made by the City,
23 if it believed the City was refusing to bargain in good faith.
24 Further, since one of the primary questions raised by the charge
25 was whether the City's conduct relative to negotiations had
26 caused impasse and because impasse is such an ephemeral
27 abstraction, to require the charging party to predict the exact
28 date on which it should file to the exclusion of all future dates
29 would be to impose an undue burden on the party who is alleged to
30 be harmed by the actions of another. This is especially so
31 where, as here, by the very nature of the charge the continuing
32 conduct of the party against whom it is filed is obvious.

OPINION

1 The charge by the Union against the City was an alleged
2 violation of Section 59-1605(1)(e), R.C.M. 1947 which states "It
3 is an unfair labor practice for a public employer to:...refuse to
4 bargain collectively in good faith with an exclusive
5 representative." Sub-section 4 defines collective bargaining as
6 "...the performance of the mutual obligation of the public
7 employer, or his designated representatives, and the
8 representative of the exclusive representative to meet at
9 reasonable times and negotiate in good faith with respect to
10 wages, hours, fringe benefits, and other conditions of
11 employment, or the negotiation of an agreement or any question
12 arising thereunder, and the execution of a written contract
13 incorporating any agreement reached. Such obligation does not
14 compel either party to agree to a proposal or require the making
15 of a concession."

16 Although the Board of Personnel Appeals is not bound by
17 precedents set by the National Labor Relations Board, it is well
18 established that, since the language of our statute is
19 substantially identical to the National Labor Relations Act, NLRB
20 interpretations are valuable and persuasive.
21

22 The obligation of a Montana public employer and the public
23 employees' representative under Title 59, Chapter 16, R.C.M. 1947
24 is to negotiate in good faith on wages, hours, fringe benefits
25 and other conditions of employment. Those four subjects of
26 bargaining are the limits of the parties' statutory
27 responsibility. On other subjects the parties are under no
28 obligation to bargain.

29 One of the questions raised here is whether the composition
30 or scope of the bargaining unit in the Helena Fire Department
31 represented by the Union is a statutorily mandated subject of
32 bargaining. If it is a mandatory subject, the employer may
insist on bargaining to impasse; if it is not a mandatory

1 subject, but rather, a permissive subject, the employer may not
2 so insist. See *NLRB v. Wooster Division of the Borg-Warner*
3 *Corp.*, 356 US 342, 42 LRRM 2034(1958) where the Court declared,
4 with reference to the NLRA, that:

5 "...these provisions [Section 8(a)(5) and 8(d)]
6 establish the obligation of the employer and the
7 representative of the employees to bargain with each other
8 in good faith with respect to wages, hours, and other terms
9 and conditions of employment...The duty is limited to those
10 subjects, and within that area neither party is legally
11 obligated to yield...As to other matters, however, each
12 party is free to bargain or not to bargain, and to agree or
13 not to agree." and further that "good faith does not
14 license the employer to refuse to enter into agreements on
15 the ground that they do not include some proposal which is
16 not a mandatory subject of bargaining. We agree with the
17 Board that such conduct is, in substance, a refusal to
18 bargain about the subjects that are within the scope of
19 mandatory bargaining. This does not mean that bargaining is
20 to be confined to the statutory subject. Each of the two
21 clauses is lawful in itself. Each would be enforceable if
22 agreed to by the unions. But it does not follow that,
23 because the company may propose these clauses, it may
24 lawfully insist upon them as a condition to any agreement."

25 The court held that the recognition clause, on which the
26 employer had insisted upon bargaining, did not come within the
27 definition of mandatory bargaining. As a general rule, it is an
28 unfair labor practice to insist to impose that employees be
29 added or excluded from a certified unit. If a party insists, as
30 a condition precedent to entering into an agreement, upon a
31 clause which constitutes a permissive subject, it is a per se
32 refusal to bargain without regard to subjective good or bad
33 faith. In *Hess Oil and Chemical Corp. v. NLRB*, 415 F. 2d 440, 72
34 LRRM 2132 (1969) the court held that an issue concerning the
35 restriction of an appropriate unit so as to exclude certain
36 members from a unit was not a subject for bargaining and
37 insistence upon it was a violation of the NLRA regardless of
38 whether the unit was a contractual unit or one certified by the
39 NLRB.

40 The City contends that many of its proposals on the
41 recognition clause did not exclude anyone from the bargaining
42 unit who was included under the old clause. That is true;
43 however, a bargaining unit definition which specifies those to be

1 included is not the same as one which specifies exclusions. The
2 language in the old clause was to the effect that all employees
3 were to be included except Chief, Assistant Chief and office
4 clerical employees. Such wording was very much to the Union's
5 advantage. No new positions could be created outside the unit
6 without the Union's consent. It was an advantage gained by the
7 Union through certification and/or collective bargaining. Any
8 change in the wording of the clause must meet with the approval
9 of the Union. If the Union did not choose to bargain on the
10 proposed change, it was under no obligation to do so. The City's
11 recourse would appear to be to file a petition for unit
12 clarification under the rules of this Board.

13 In the instant case there appears to be little dispute over
14 the issue of whether the proposals of the City relative to the
15 recognition clause is a permissive subject. It clearly is not
16 wages, hours or fringe benefits. And, in my opinion, is not a
17 condition of employment; therefore, I must conclude that our
18 statute does not require bargaining on the subject.

19 Since the City's proposals on the recognition clause are
20 permissive subjects, the parties were free to bargain or not
21 bargain as they saw fit. However, if the City insisted to the
22 point of impasse on bargaining, after the Union refused to
23 bargain on the permissive subject the City has not carried out
24 its obligation under the statute, i.e., to bargain in good faith
25 with respect to wages, hours, fringe benefits and other
26 conditions of employment.

27 Whether impasse existed is a matter of judgment. By the
28 very nature of the bargaining process it is not always apparent
29 when an impasse has been reached. The facts of each case must be
30 viewed in terms of applicable criteria. Generally, impasse is
31 said to exist when there are irreconcilable differences in the
32 parties' positions after exhaustive good-faith negotiations.

After negotiations have been carried on for a period of time, the

1 positions of the parties are fixed and talks reach the point of
2 stalemate, impasse may exist. The NLRB in Taft Broadcasting Co.,
3 64 LRRM 1387 (1967) set forth the following factors to be
4 considered in deciding whether impasse existed: (1) bargaining
5 history, (2) good faith of the parties, (3) length of
6 negotiations, (4) importance of the issue or issues as to which
7 there is disagreement, and (5) the contemporaneous understanding
8 of the parties as to the state of negotiations.

9 In applying the above factors to the facts of the present
10 case I find that no evidence is in the record concerning
11 bargaining history except that which took place this year. There
12 is nothing in the record to indicate that the City bargained in
13 bad faith; on the contrary, it appears the City sincerely wanted
14 to enter into an agreement with the Union, if a changed
15 recognition clause could be negotiated. The parties exchanged a
16 total of twenty-two proposals and counterproposals; therefore,
17 the conclusion, with respect to the length of negotiations, must
18 be that they were thorough and exhaustive. And, negotiations were
19 had from early May until mid-August. That the issue in dispute
20 was important to the parties is clear. Both parties as of August
21 15, 1978, believed they were at impasse and that further progress
22 toward agreement was improbable. The positions of the parties on
23 the recognition clause issue were fixed. Their differences were
24 irreconcilable. They were at impasse as of August 15, 1978 and
25 were still at impasse as of the date of the hearing.

26 The City argues that its various proposals on the
27 recognition clause, some of which did not exclude any of the
28 present unit members from the proposed unit, in effect, gave the
29 Union what it had under the previous clause. That argument has
30 one flaw - it did not give the Union what it had before, namely
31 an all inclusive unit except for certain specified positions. A
32 recognition clause which lists certain specified inclusions -
position by position - and excludes all others is not the

1 equivalent of a clause which lists certain specified exclusions
2 and includes all others. Under a clause which excludes all but
3 those named the City could create any number of positions outside
4 the unit by simply attaching a non-covered position title to
5 them. However, where those positions which are to be outside the
6 unit are specifically listed and identified the City would not be
7 able to create such positions. That the City made proposals
8 which changed from singular to plural a listed exclusion does not
9 change or alter the fact that it sought to change the recognition
10 clause from one which gave the Union considerable advantage to
11 one which took some of that advantage away. When it became clear
12 that the Union was refusing to bargain on the subject, the City
13 should have dropped the proposal and bargained on mandatory
14 subjects. I conclude that the City's insistence upon bargaining
15 on the recognition clause, in the face of the Union's refusal, is
16 a per se violation of Section 59-1605 (1)(e) R.C.M. 1947 and that
17 its good faith with respect to attempting to reach agreement must
18 be disregarded. The City's insistence upon bargaining on a
19 permissive subject is, in substance, a refusal to bargain about
20 mandatory subjects.

21 CONCLUSIONS OF LAW

22 The City of Helena violated Section 59-1605(1)(e), R.C.M.
23 1947 by insisting upon bargaining on a non-mandatory subject to
24 impasse. Impasse existed on August 15, 1978.

25 RECOMMENDED ORDER

26 In accordance with the authority granted this Board under
27 Section 59-1607, R.C.M. 1947, it is hereby ordered that the City
28 of Helena, its officers, agents and representatives shall:

- 29 1. Cease and desist from insisting upon bargaining on the
30 subject of the recognition clause or the composition of
31 the bargaining unit represented by the International
32 Association of Firefighters Local No. 443.

- 1
2
3
4
5
6
7
8
9
10
11
12
13
2. Cease and desist from refusing to bargain on mandatory subjects which are yet at issue.
 3. Take the following affirmative action:
 - a) Post in conspicuous places in its major place of business and in the fire station copies of the attached notice marked "Appendix." Copies of the attached notice shall be signed by the City Manager and posted immediately upon receipt thereof and shall remain posted not altered, defaced or covered for sixty (60) consecutive days.
 - b) Notify the Administrator of this Board, in writing, within twenty (20) days from receipt of this decision what steps have been taken to comply herewith.

14 The Union shall not be reimbursed for legal or other
15 expenses incurred as a result of bringing this charge.

16 Dated this 18th day of October, 1978.

17
18 BOARD OF PERSONNEL APPEALS

19 By Jack H. Calkoun
20 Jack H. Calkoun
21 Hearing Examiner

22
23
24
25 CERTIFICATE OF MAILING

26 I, Richard A. [Signature] do hereby certify and state that I did on
27 the 18th day of October, 1978 mail a true and correct copy of
28 the above FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED
ORDER to the following:

29 City of Helena
30 IAFF Local 448

31 [Signature]
32

1 APPENDIX

2 In accordance with the order of the Board of Personnel
3 Appeals and to effectuate the policies of Title 59, Chapter 16,
4 R.C.M. 1947, the City of Helena, acting through its officers,
5 agents and representatives, does hereby notify the employees in
6 the Fire Department that:

7 It will cease and desist from insisting upon bargaining on
8 the subject of the recognition clause or the bargaining unit
9 represented by the International Association of Firefighters
10 Local No. 448.

11 It will cease and desist from refusing to bargain on
12 mandatory subjects which are yet at issue.

13
14 CITY OF HELENA

15
16 BY _____
17 City Manager

18 Dated this _____ day of October, 1978.
19
20
21
22
23
24
25
26
27
28

29 This notice shall remain posted for sixty (60) consecutive
30 days from the date of posting and shall not be altered, defaced
or covered.

31 Questions relative to this notice or compliance therewith
32 may be directed to the Board of Personnel Appeals, 35 South East
Chance Gulch, Helena, Montana 59601.