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STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 45-81:

BUTTE-SILVER BOW, a municipal )  
government of Montana, )  
 )  
Complainant in 45-81, )  
Defendant in 1-82, )  
 )  
- vs - )  
 )  
LOCAL NO. 2033, BUTTE-SILVER )  
BOW SHERIFF'S OFFICERS, )  
 )  
Defendant in 45-81, )  
Complainant in 1-82. )

FINAL ORDER

\* \* \* \* \*

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack Calhoun on July 16, 1982.

Exceptions to Findings of Fact, Conclusions of Law and Recommended Order were filed by Local No. 2033, Butte-Silver Bow Sheriff's Officers on August 4, 1982. Oral argument was heard before the Board on October 18, 1982.

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

1. IT IS ORDERED, that Exceptions filed by Local No. 2033 to the Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED, that Item No. 2 of the Recommended Order, page 11, be clarified as follows: "That Local No. 2033, Butte-Silver Bow Sheriff's Officers, cease and desist from refusing to recognize and bargain with the Sheriff of Butte-Silver Bow since he has become the designated representative of the employer by the employer's conduct."

3. IT IS ORDERED, that this Board therefore adopts, with the clarification noted above, the Findings of Fact, Conclusions

1 of Law and Recommended Order of Hearing Examiner Jack Calhoun  
2 as the Final Order of this Board.

3 DATED this 22 day of October, 1982.

4 BOARD OF PERSONNEL APPEALS

5  
6 By John Kelly Addy  
7 John Kelly Addy  
8 Chairman

9 \* \* \* \* \*

10 CERTIFICATE OF MAILING

11 The undersigned does certify that a true and correct copy  
12 of this document was mailed to the following on the 25<sup>th</sup> day  
13 of October, 1982:

14 Maurice F. Hennessey  
15 Attorney at Law  
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Butte, MT 59701

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18 POORE, ROTH, ROBISCHON & ROBINSON, P.C.  
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STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICES NOS. 45-81 & 1-82:

BUTTE-SILVER BOW, a municipal )  
government of Montana, )  
 )  
Complainant in No. 45-81, )  
Defendent in No 1-82, )  
 )  
-vs- )  
 )  
LOCAL NO. 2033, BUTTE-SILVER )  
BOW SHERIFF'S OFFICERS, )  
 )  
Defendant in No. 45-81, )  
Complainant in No. 1-81. )

FINDINGS OF FACT  
CONCLUSIONS OF LAW  
AND  
RECOMMENDED ORDER

\* \* \* \* \*

Butte-Silver Bow (hereinafter the Employer) filed ULP No. 45-81 on December 28, 1981 charging Local No. 2033 (hereinafter the Union) with refusing to bargain collectively in good faith in violation of 39-31-402(2) MCA. In its answer the Union denied any violation. On January 12, 1982 the Union filed ULP No. 1-82 charging the Employer with refusing to bargain collectively in good faith in violation of 39-31-401(5) MCA. The employer denied the charge. Under authority of 39-31-406 MCA and in accordance with 24.26.215 and 24.26.682 et seq. a hearing was conducted in Butte on April 13, 1982. The Employer was represented by Mr. Donald C. Robinson and the Union was represented by Mr. Maurice F. Hennessey.

ISSUES

The first question raised by these charges is whether the Union was under a duty to bargain with the person purporting to represent the Employer on certain contract proposals submitted by the employer. The second question raised is whether the Employer waived its right to make proposals for negotiations. The third issue is whether the Employer's proposal to change the recognition clause of the



1 contract was a violation of its duty to bargain in good  
2 faith.

3 After reviewing the evidence on the record, including  
4 the sworn testimony of witnesses, the briefs and proposed  
5 findings of fact of the parties, I make the following:

6 FINDINGS OF FACT

7 1. At all times pertinent herein the Union and the  
8 Employer were signatory to a collective bargaining agreement  
9 covering the terms of wages, hours, and working conditions  
10 of certain law enforcement officers in Silver Bow County.

11 2. During previous collective bargaining negotiations  
12 between the parties the Chief Executive of Butte-Silver Bow  
13 has acted as the representative and chief spokesman for the  
14 Employer.

15 3. Sometime prior to October 21, 1981 members of the  
16 Employer's negotiating team, including the Chief Executive,  
17 the Sheriff and their attorney who had been retained by the  
18 Sheriff to assist in labor negotiations, prepared a number  
19 of contract proposals to be submitted to the Union for  
20 negotiation. The Chief Executive designated the Sheriff as  
21 the person to send notice to the Union that the Employer  
22 desired to open the contract.

23 4. On October 21, 1981 the Sheriff wrote a letter to  
24 the Union president advising him that the Employer wished to  
25 open the contract to negotiate new terms and conditions, the  
26 written specifics of which would be submitted to the Union  
27 when negotiations began.

28 5. The collective bargaining agreement provided that  
29 either party could open it by giving sixty days written  
30 notice to the other prior to December 31, 1981.

31 6. On October 28, 1981 the Union president wrote a  
32 letter to the Chief Executive stating it desired to open the

1 contract for the purpose of negotiating wages and insurance.

2 7. There has been no clear, undisputable practice by  
3 the parties of limiting negotiations to those subjects  
4 raised prior to the beginning of formal negotiating sessions.  
5 On occasion they have expanded the subjects during negotia-  
6 tions.

7 8. Before negotiations were to have begun the Union  
8 and the Sheriff negotiated certain work rules and polices  
9 pursuant to the provisions of the collective bargaining  
10 agreement.

11 9. On December 23, 1981 the parties met to negotiate  
12 a new collective bargaining agreement at which time the  
13 Employer submitted to the Union written proposals on a  
14 number of items it wanted to negotiate including a proposal  
15 to exclude certain positions from the bargaining unit.

16 10. After receiving the Employer's proposals on  
17 December 23rd the Union refused to negotiate on any of them  
18 and insisted it would only negotiate wages and insurance.

19 11. The Union's objection on December 23rd to the  
20 Employer's proposals was not specifically to the different  
21 recognition clause language, which would have changed the  
22 composition of the bargaining unit, but rather to any pro-  
23 posals submitted by the Employer on matters other than wages  
24 and insurance.

25 12. The Union also objected to the Sheriff represen-  
26 ting the employer for purposes of negotiations.

27 13. The Employer did not insist that any of the proposals  
28 contained in its submission to the Union was a condition to  
29 settlement of a new agreement.

30 14. The Council of Commissioners, the governing body  
31 of the Employer, has never formally designated the Chief  
32 Executive or anyone else as its representative in collective

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bargaining.

15. The Union has never questioned the status of the Chief Executive in representing the Employer during negotiations.

16. The Charter of the government of Butte-Silver Bow provides, in pertinent part:

That the sheriff shall have the powers therein given to the mayor in a mayor-council form of municipal government.

17. The Sheriff is an elected official of Butte-Silver Bow and is the person primarily responsible for the administration of the contract for the Employer.

All proposed findings of fact which are inconsistent with the above findings are hereby rejected on the grounds that they are not supported by the evidence on the record as a whole.

DISCUSSION

The facts supported by the evidence on the record compel the conclusion that the Employers' proposal on the composition of the bargaining unit was not the reason the Union refused to negotiate. The Employer did not insist to impasse on bargaining over a permissible or non-mandatory subject. The general principle laid down by the U.S. Supreme Court in NLRB v. Wooster Division of the Borg-Worner Corp., 356 US 342, 82 LRRM 2034 (1958), is that neither party may condition bargaining on mandatory subjects upon agreement on a non-mandatory term. However, either party may propose permissive subjects for bargaining. There is no dispute that the Employer's proposal to change the recognition clause was a permissive subject of bargaining and one on which the Union could have refused to negotiate. This Board so held in International Association of Firefighters Local-



1 No. 448 vs. City of Helena, ULP 19-78. The Union, however,  
2 did not decline to negotiate over that particular subject,  
3 it refused to negotiate over any of the items offered by the  
4 Employer and insisted on negotiating only on wages and  
5 insurance, contending the Employer untimely submitted its  
6 proposals. Impasse did not occur because the Employer  
7 insisted on bargaining over the recognition clause, it  
8 occurred because the Union believed none of the subjects  
9 offered by the Employer was negotiable at that time and it,  
10 therefore, refused to negotiate anything except its own  
11 subjects. There is no evidence on the record to support the  
12 Union's allegation that the Employer illegally demanded to  
13 negotiate matters "set out in State law."

14 Those sections of the statute which are relevant to the  
15 question of whether the Union had a duty to negotiate with  
16 the Sheriff are:

17  
18 39-31-103. 'Public employer' means the State of Montana  
19 or any political subdivision thereof, including but not  
20 limited to any town, city, county, district school  
21 board, board of regents, public and quasi-public corpora-  
22 tion, housing authority or other authority established  
23 by law, and any representative or agent designated by  
24 the public employer to act in its interest in dealing  
25 with public employees.

26 39-31-301. The chief executive officer of the state,  
27 the governing body of a political subdivision, the  
28 commissioner of higher education, whether elected or  
29 appointed, or the designated authorized representative  
30 shall represent the public employer in collective  
31 bargaining with an exclusive representative.

32 39-31-305(1). The public employer and the exclusive  
representative, through appropriate officials or their  
representatives, shall have the authority and the duty  
to bargain collectively . . .

39-31-402. It is an unfair labor practice for a labor  
organization or its agents to: (1) restrain or coerce  
its employees in the exercise of the rights guaranteed  
in 39-31-201 or a public employer in the selection of  
his representative for the purpose of collective bar-  
gaining or the adjustment of grievances.

The charge filed by the Employer was a refusal by the

1 Union to bargain under 39-31-402(2) MCA, on the subjects  
2 presented by the Employer at their first negotiating session  
3 on December 23rd. The Union admitted it refused to bargain  
4 on those subjects, but it asserted that its refusal was  
5 justified because: (1) the Sheriff was not the designated  
6 representative of the Employer; and (2) the subjects were  
7 untimely raised based on the parties' past practices in  
8 reopening the contract.

9 The Board of Personnel Appeals in construing the Montana  
10 Act, has been guided in the past by decisions of the National  
11 Labor Relations Board and the federal courts interpreting  
12 the National Labor Relations Act. State Department of  
13 Highways vs. Public Employees Craft Council, 529 P.2d 785  
14 (1974). The leading case, in the private sector, on the  
15 designation of bargaining representatives is General  
16 Electric Co. vs. NLRB, 412 F.2d 512, 71 LRRM 2418 (1969).  
17 There the court, by way of summary, stated that there is a  
18 general rule favoring freedom in the designation of bar-  
19 gaining representatives, that the limitations are narrow and  
20 infrequent, and that one seeking to refuse to bargain because  
21 of an objection to the other party's bargaining spokesman  
22 "clearly undertakes a considerable burden, characterized in  
23 an analogous situation in NLRB vs. David Buttrick Co, 399  
24 F.2d 505, 507, 69 LRRM 2044 (1st Cir. 1968), as the showing  
25 of a 'clear and present' danger to the collective bargaining  
26 process." The question before the court was whether a  
27 union's inclusion of members of other unions on its bar-  
28 gaining committee justified the employer's refusal to bargain.  
29 In concluding that it did not the court noted:

30  
31 Section 7 of the National Labor Relations Act, 29 U.S.C  
32 157 guarantees certain rights to employees including  
the right . . . "to bargain collectively through represent-  
atives of their own choosing." This right of employees

1 and the corresponding right of employers, see section  
2 8(b)(1)(B) of the Act, 29 U.S.C. 158(b)(1)(B), to  
3 choose whomever they wish to represent them in formal  
4 labor negotiations is fundamental to the statutory  
5 scheme. In general, either side can choose as it sees  
6 fit and neither can control the other's selection, a  
7 proposition confirmed in a number of opinions, some of  
8 fairly recent vintage . . . There have been exceptions  
9 to the general rule that either side can choose its  
10 bargaining representatives freely, but they have been  
11 rare and confined to situations so infected with ill-  
12 will, usually personal, or conflict of interest as to  
13 make good faith bargaining impractical. (Citations  
14 omitted.)

15 It appears that under General Electric, supra, to  
16 avoid bargaining with the other side's representative, a  
17 party must show that there is a danger the collective  
18 bargaining process is likely to be impaired or that good  
19 faith bargaining will be rendered impractical because of  
20 ill-will or conflict of interest. In reviewing the facts of  
21 the present case I find none of those elements present. In  
22 fact, the Union was ready and willing to negotiate over its  
23 proposals on December 23rd, it refused to negotiate the  
24 Employer's submission, but only because they had not been  
25 timely offered by the designated representative. One could  
26 hardly conclude there was a danger to the process itself  
27 under such circumstances. The demeanor of the witnesses  
28 proscribes any serious contention that there exists ill-  
29 will, personal or otherwise, between the parties. They both  
30 appeared to be able, sophisticated negotiators who bore no  
31 ill-will toward each other. With respect to a possible  
32 conflict of interest on the part of the Sheriff, no such  
allegation was made nor is there anything on the record to  
indicate that possibility.

It seems clear that under the federal Act and federal  
court precedent the Union's refusal to bargain with the  
Sheriff or to recognize him as a representative of the  
Employer who could properly submit proposals for bargaining

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would amount to a refusal to bargain in good faith.

This Board, in Teamsters Local No. 2 vs. Board of County Commissioners, Silver Bow County, Montana, ULP 4-76, ruled it an unfair labor practice for an employer to refuse to negotiate with a Teamster Union official even though the official's conduct toward one of the Commissioners was insulting and made it impossible, in the Commissioner's mind, for negotiations to proceed. The decision went on to state that to allow the refusal to negotiate with a particular representative would be tantamount to allowing the employer to have a voice in choosing the employees' negotiating committee. Although ULP 4-76 involved an employer's refusal to negotiate with an employee representative, the rationale is sound and should apply equally to the facts of the instant case. The only factor which might be viewed as differentiating here is the language in 39-31-301 MCA stating ". . . the designated authorized representative shall represent the public employer . . ." In my view that section does not limit the public employer's freedom in deciding who it selects or when it makes the selection. Nor does it require a declaration by the public employer to the labor organization concerning its designee. When the Union received the October 21st letter from the Sheriff, if any serious question as to the identity of the employer's representative(s) existed in the minds of the Union officials, they should have asked the Chief Executive or the Council of Commissioners whether the Sheriff represented the Employer. Instead they chose to remain silent until the first meeting on December 23rd at which time they refused to talk about any proposals but their own. Even then they could have ascertained the identities of the employer's representatives and proceeded. However, they refused to acknowledge the



1 Sheriff as a representative of the employer until that same  
2 date contending, therefore, that the contract had not been  
3 properly (i.e., as in the past) reopened by the employer. I  
4 believe the Union was under a duty to inquire of the Employer,  
5 if it questioned the status of the Sheriff on October 21st  
6 as a representative of the Employer. Failing to do so  
7 should not serve to limit his function as an Employer repre-  
8 sentative until December 23rd. It is worthwhile to note  
9 that there has never been a formal designation by the  
10 Employer of its representative, and yet, negotiations have  
11 proceeded over the years without protest or inquiry by the  
12 Union.

13 The general rule in the private sector is to give full  
14 freedom in the designation of bargaining representatives,  
15 General Electric, supra. And, as stated by Gorman in Labor  
16 Law, Unionization and Collective Bargaining, West Publishing  
17 Co., (St. Paul, Minn. 1976) at Chapter 20, page 405, "It  
18 must be noted that the employer's freedom to bargain through  
19 a representative of its own choosing has been memorialized  
20 in section 8(b)(1)(B) of the Labor Act, which makes it an  
21 unfair labor practice for a labor organization to restrain  
22 or coerce . . . an employer in the selection of his represent-  
23 ative for the purposes of collective bargaining or the  
24 adjustment of grievances." The Montana equivalent of section  
25 8(b)(1)(B) is 39-31-402 MCA.

26 Having concluded that the Union was under a duty to  
27 bargain with the Sheriff, as a representative of the Employer,  
28 from the time it received the letter from him dated October  
29 21, 1981, and that the Union did not bargain on the subjects  
30 proposed by him, it follows that the Union did not fulfill  
31 its obligation under 39-31-402(2) MCA. The Employer did not  
32 waive its right to make proposals for negotiations, in fact,

1 it properly reopened the contract in accordance with the  
2 provisions therein. The Union was faced on December 23rd  
3 with a number of proposals which were properly brought by  
4 the Employer's representative pursuant to the reopener  
5 clause of the contract. It was duty bound to negotiate any  
6 of those proposals it believed to be mandatory under the  
7 Act. It cannot be stated unequivocally that in the past the  
8 parties limited negotiations to those subjects raised in the  
9 pre-negotiations correspondence. For that reason I cannot  
10 conclude that either party was limited in the number or kind  
11 of issues they raised as negotiations began on December 23rd.

12 The disruption to the collective bargaining process  
13 caused by the Union's refusal to negotiate all statutorily  
14 mandated subjects laid on the table by the Employer on  
15 December 23rd and to acknowledge the Sheriff as one of the  
16 Employer's representatives for purposes of collective  
17 bargaining cannot be condoned. In short, I find that the  
18 Sheriff is a proper representative of the Employer pursuant  
19 to 39-31-301 MCA; that the Employer did not insist to impasse  
20 on bargaining over the recognition clause; and, that all  
21 mandatory subjects of bargaining put on the table by the  
22 Employer on December 23rd were proper.

#### 23 CONCLUSIONS OF LAW

24 1. The Sheriff of Butte-Silver Bow is the designated  
25 authorized representative of the Employer pursuant to 39-31-301  
26 MCA.

27 2. Negotiations were properly opened between the  
28 parties, pursuant to the collective bargaining agreement, by  
29 the Sheriff when he sent the letter dated October 21, 1981.

30 3. The Union was obligated to bargain on all subjects  
31 proposed by the Employer on December 23, 1981 with respect  
32 to wages, hours fringe benefits and other conditions of

1 employment as those terms are used in 39-31-305 MCA.

2 4. The proposal on the recognition clause submitted  
3 by the Employer is not a mandatory subject of bargaining  
4 under 39-31-305 MCA.

5 5. The Employer did not insist to impasse on bargaining  
6 on the recognition clause in violation of 39-31-401(5) MCA.

7 6. The cessation of negotiations was caused by the  
8 Union's refusal to negotiate in violation of 39-31-402(2) MCA.

9 RECOMMENDED ORDER

10 1. That Local No. 2033, Butte-Silver Bow Sheriff's  
11 Officers, cease and desist from refusing to bargain in good  
12 faith with the Employer, Butte-Silver Bow, on all statutorily  
13 mandated subjects proposed by the Employer on December 23, 1981.

14 2. That Local No. 2033, Butte-Silver Bow Sheriff's  
15 Officers, cease and desist from refusing to recognize and  
16 bargain with the designated representative of the Employer,  
17 the Sheriff of Butte-Silver Bow.

18 3. That the unfair labor practice filed by Local No.  
19 2033, Butte-Silver Bow Sheriff's Officers, be dismissed.

20 NOTICE

21 Exceptions to these findings of fact, conclusions of  
22 law and recommended order may be filed within twenty (20)  
23 days of service. If no exceptions are filed, the recom-  
24 mended order will become the final order of this Board.  
25 Address exceptions to the Board of Personnel Appeals,  
26 Capitol Station, Helena, Montana 59620.

27 Dated this 16th day of July, 1982.

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30 BOARD OF PERSONNEL APPEALS

31 BY: Jack H. Calhoun  
32 JACK H. CALHOUN  
Hearing Examiner

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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 16 day of July, 1982:

Maurice F. Hennessey  
Attorney at Law  
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