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 <u>Sheriff of Butte-Silver Bow since he has become the designated representative of the employer by the employer's conduct</u>."

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

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

DATED this 22 day of October, 1982.

BOARD OF PERSONNEL APPEALS

By John Kelly Addy
John Kelly Addy
Chairman

* *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 25th day of October, 1982:

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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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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contract for the purpose of negotiating wages and insurance.

7. There has been no clear, undisputable practice by the parties of limiting negotiations to those subjects raised prior to the beginning of formal negotiating sessions. On occasion they have expanded the subjects during negotiations.

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

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

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

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

12. The Union also objected to the Sheriff representing the employer for purposes of negotiations.

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

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

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-

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

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

> 39-31-103. 'Public employer' means the State of Montana or any political subdivision therof, including but not limited to any town, city, county, district school board, board of regents, public and quasi-public corporation, housing authority or other authority established by law, and any representative or agent designated by the public employer to act in its interest in dealing with public employees.
>
> 39-31-301. The chief executive officer of the state, the governing body of a political subdivision, the commissioner of higher education, whether elected or appointed, or the designated authorized representative shall represent the public employer in collective bargaining with an exclusive representative.
>
> 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 bargaining or the adjustment of grievances.

The charge filed by the Employer was a refusal by the

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

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

> Section 7 of the National Labor Relations Act, 29 U.S.C 157 guarantees certain rights to employees including the right . . . "to bargain collectively through representatives of their own chosing." This right of employees

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

It appears that under General Electric, supra, to avoid bargaining with the other side's representative, a party must show that there is a danger the collective bargaining process is likely to be impaired or that good faith bargaining will be rendered impractical because of ill-will or conflict of interest. In reviewing the facts of the present case I find none of those elements present. In fact, the Union was ready and willing to negotiate over its proposals on December 23rd, it refused to negotiate the Employer's submission, but only because they had not been timely offered by the designated representative. One could hardly conclude there was a danger to the process itself under such circumstances. The demeanor of the witnesses proscribes any serious contention that there exists ill-will, personal or otherwise, between the parties. They both appeared to be able, sophisticated negotiators who bore no ill-will toward each other. With respect to a possible 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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

RECOMMENDED ORDER

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

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

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

NOTICE

Execptions to these findings of fact, conclusions of law and recommended order may be filed within twenty (20) days of service. If no exceptions are filed, the recommended order will become the final order of this Board. Address exceptions to the Board of Personnel Appeals, Capitol Station, Helena, Montana 59620.

Dated this 16th day of July, 1982.

BOARD OF PERSONNEL APPEALS

BY:
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:

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