STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 25-2000:

ANACONDA POLICE PROTECTIVE ASSOCIATION, OR OFFICERS, AGENTS, REPRESENTATIVES, AND/OR MEMBERS OF THE ANACONDA POLICE PROTECTIVE ASSOCIATION,	)	**Case No. 1959-2000**
Complainants,	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**
vs.	)	
ANACONDA-DEER LODGE COUNTY,	)	
Defendant,	)	

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IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 2-2001:

ANACONDA-DEER LODGE COUNTY,	)	**Case No. 1044-2001**
Petitioner,	)	
vs.	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**
ANACONDA POLICE PROTECTIVE ASSOCIATION, OR OFFICERS, AGENTS, REPRESENTATIVES, AND/OR MEMBERS OF THE ANACONDA POLICE PROTECTIVE ASSOCIATION,	)	
Defendant,	)	

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I. INTRODUCTION

On March 14, 2000, the Anaconda Police Protective Association (Association) filed an Unfair Labor Practice charge with the Board alleging that Anaconda-Deer Lodge County (ADLC or

County) violated § 39-31-401(1), (2) and (5), MCA. The Association charge against the County alleged that the County committed unfair labor practices by:

1. threatening employees;
2. failing and refusing to bargain in good faith; and
3. interfering with member statutorily protected rights.

The County denied the charges, and on August 26, 2000, filed a counter charge alleging the Association violated §§ 39-31-303 and 39-31-402(1)(2), MCA, by:

1. failing and refusing to supply requested information necessary for bargaining in good faith and the processing of grievances;
2. restraining or coercing the County in the selection of the representatives for the purpose of collective bargaining and/or adjustment of grievances;
3. bargaining to impasse on a permissive subject of bargaining; and
4. refusing to bargain in good faith by having a captain on the negotiating team.

The Association denied any violation of the law.

By agreement, the above charges were combined. Prior to hearing, the County withdrew its allegation concerning failure to supply information.

Hearing Officer Michael T. Furlong conducted a hearing on this matter in Anaconda, Montana on February 27, 28, and March 1, 2001. The Association was represented by Tim McKittrick, Attorney at Law, Great Falls, Montana. Association witnesses were Carl Stetzner, Tom Blaz, John Sullivan, Larry Huber, Steve Barclay, Steve Ernberger, William Jather, and George Mattson. The County was represented by Rick D'Hooge, labor relations consultant, Helena, Montana. Peter Boyce and Dave Beatty appeared as witnesses for the County. The parties submitted briefs in the case on May 1, 2001.

Exhibits 01, 02, 1 through 17, and 19 through 41, submitted by the County, and Exhibits A through Z, AA through HH, X-1, and U-2, submitted by the Association, were admitted without objection.

II. ISSUES

1. Whether the County committed unfair labor practices in violation of ' 39-31-401(1), (2) and (5), MCA.
2. Whether the Association committed unfair labor practices in violation of §§ 39-31-303 and 39-31-402(1) and (2), MCA.
3. If either party committed an unfair labor practice, what is the appropriate relief?

III. RULING ON MOTION TO DISMISS

On February 21, 2001, the County filed a motion to "limit any finding" of unfair labor practices and to dismiss any charges which occurred prior to September 13, 1999, as being outside the six-month statute of limitations. The Association argues that the motion was not timely made, that neither the facts nor the law support the motion, and therefore, it should be denied. The Hearing Officer reserved ruling on the motion. § 39-31-404, MCA.

Section 39-31-404, MCA, requires an unfair labor practice claim to be filed within 6 months of the alleged unfair labor practice. The Association filed its charge on March 14, 2000. Thus, alleged unfair labor practices which occurred before September 14, 1999 would not be timely.

The Association's complaint in this matter alleges that the County engaged in a course of conduct beginning in May 1998 demonstrating that the County failed to bargain in good faith, and threatened and coerced members of the Association. It alleges certain events in support of the complaint which occurred before September 14, 1999, including a letter dated July 9, 1999, a statement made August 16, 1999, a bargaining proposal made May 19, 1999, and a May 1999 request for a list of recently hired officers. The County contends that these allegations are outside the statute of limitations and cannot be the basis for an unfair labor practice finding.

The Association contends that events prior to September 14, 1999, can be considered, both because they were the subject of an earlier unfair labor practice charge (ULP 13-99) which was dismissed without prejudice, and because they were part of the totality of the conduct at issue in this unfair labor practice charge.

The Association's contention that the Board can consider charges set forth in ULP 13-99, which was dismissed without prejudice based on a stipulation of the parties, is without merit. The Association did not ask to reopen that case before the Board. The notice of hearing in this matter stated that the issue was whether the County committed unfair labor practices as alleged in the complaint filed in the matter of ULP 25-2000. To hold that the Board can consider a related charge, simply because that charge was dismissed without prejudice, would deny due process because the County would not have proper notice of the charges being considered. The case cited by the Association, Cantrell v. Henderson, 221 Mont. 201, 718 P.2d 318 (1986), does not stand for the proposition that the claims set forth in ULP 13-99 are properly before the Board.

However, the Association is correct in its contention that allegations to which the County objects are part of the overall conduct at issue in ULP 25-2000. The charge alleges a continuing course of conduct. At the time the Association filed the charge, the parties had been attempting to negotiate a contract for about 10 months, and the bargaining continued even after the charge was filed. The history of the bargaining is relevant to the overall question of whether the County engaged in bad faith bargaining.

The current guiding decision on whether or not an alleged unfair labor practice is timely filed is found in Redd-I. Inc., 290 NLRB No. 140, 129 LRRM 1229 (1988). In that case the Board held that complainant's charges filed outside the six-month period could be added to timely filed charges if they met three criteria: The otherwise untimely charges are of the same class as the original timely ones; they arise from the same situation; and, they would engender the same or

similar defense from defendants against when they were made as the original charges. This "closely related" test has been reaffirmed in numerous NLRB decisions involving similar situations. See Pioneer Hotel Inc., 324 NLRB No. 148, 158 LRRM 1190 (1997); and Sams Club, 325 NLRB No. 6, 157 LRRM 1220 (1997). Therefore, the County's motion to dismiss or limit findings on the basis that charges are outside the statute of limitations, is DENIED.

IV. FINDINGS OF FACT

1. The Association is a "labor organization" within the meaning of § 39-31-103 (6), MCA.
2. The County is a "public employer" within the meaning of § 39-31-103 (10), MCA.
3. The Association is exclusive bargaining representative for members of the police department employed by the County.
4. The Association and the County have been party to a series of collective bargaining agreements (CBAs) for more than 25 years. The last agreement was for the period July 1, 1997, through June 30, 1999. (Exhibit EE). Members of the Association have been working without a signed CBA since July 1, 1999.
5. Article XVI of the 1997-99 CBA is a wage re-opener clause which permitted the parties to open the contract for purposes of negotiating wages for the years 1998-99.
6. On or about May 12, 1998, the parties starting bargaining a mid-contract wage adjustment to their 1997-99 CBA. (Exhibit B). During the course of the bargaining, each party filed unfair labor practice charges against the other party (ULP 13-99 and ULP 15-99). The Association charges included issues such as fund balances, an allegedly intoxicated negotiator, a belligerent negotiator, and violation of ground rules. The matter went before a Department of Labor and Industry mediator, who found probable cause in both charges.
7. The Association also filed a grievance under the "me too" clause in the 1997-99 CBA. The "me too" clause provides that if any employee in the county, including officials, received a raise after June 30, 1998, the employees in the Association were entitled to the same raise. (Exhibit EE, p. 26). The Association contended that the County failed to abide by that clause.
8. On May 18, 1999, the Association and County stipulated to dismissal without prejudice of ULP 13-99 and ULP 15-99 charges related to the "me too" clause to allow the "me too" grievance to proceed to arbitration. (Exhibit D).
9. On May 19, 1999, the parties started bargaining proposals for a new CBA to replace the 1997-99 agreement.
10. The same day, the County issued a proposal which identified each Article in the 1997-99 CBA and stated: "Anaconda-Deer Lodge County reserves the right to modify the language of this Article at any time during the process of negotiations." (Exhibit F).
11. On May 19, 1999, the County's chief executive officer (CEO) sent a written notice to the Association referring to the lay off clause in the CBA. The letter asked for a list of the last 5 officers hired. (Exhibit E).

12. On June 16, 1999, the County CEO sent a letter to the Anaconda Leader newspaper indicating that there was a budget shortfall that could result in the elimination of 4 to 5 police officer positions. (Exhibit H).
13. On June 22, 1999, the County CEO reported to the commissioners that the County had a surplus of $1.6 million.
14. On July 9, 1999, the County CEO notified the Association that the commissioners had decided not to engage in further negotiations and had placed a temporary freeze on any expenditures, including wages of police officers until after the "me too" arbitration was concluded.
15. On July 15, 1999, the County CEO notified the Association that the County had placed a freeze on any monetary items including wages until after the conclusion of the arbitration.
16. On November 15, 1999, the arbitrator rendered his decision which held that the County violated the "me too" contract clause when it refused to grant members of the Association bargaining unit the same raise and benefits it granted members of other bargaining units. The arbitration ruling held that the County had an obligation to match the increase in wages and fringe benefits it granted its other bargaining units for the 1998-1999 contract year. (Exhibit L).

17. County Commissioner Dave Beatty was actively involved in negotiations with the Association. In a November 19, 1999 newspaper article following an interview regarding the arbitrator's decision, Beatty was quoted as saying:

> No one is a winner; the County will lose, the taxpayers will lose, and in the long run the police union will lose. I believe this money should come out of the police budget, and when it runs out, there will be lay-offs in the department. (Exhibit M)

18. Beatty also was quoted in another news article in the Montana Standard as saying that the additional funds required to pay the police as a result of the arbitration could eventually lead to police lay-offs. (Exhibit N).
19. Bargaining between the parties continued to be contentious throughout the negotiation process. At a bargaining session, one of the commissioners referred to an Association negotiator, describing him as a "f--ing jew." (Exhibit J, p. 10) Also during negotiations, the County CEO threatened to turn police officers in to the IRS because the County was not withholding taxes on the officers' gun and clothing allowances. (Exhibit C).
20. During negotiations, the County placed ads (FYI ads) in the Anaconda Leader concerning the terms and conditions of police officer employment within the county. The ads addressed the crime rate within the county, county budget, and the position taken by the Association during negotiations.
21. In one ad, the County stated that the police officers made close to $50,000.00 per year. Several citizens approached police officers stating that the citizens did not realize that the officers earned such high salaries until they read the article. They said they felt the police were being paid too much.

22. The Association wrote a letter published in the Anaconda Leader outlining how the FYI ads were misleading. The letter contended that the wages mentioned in the ad included gross wages and such employer costs as retirement contributions, gun allowance, longevity, clothing allowance, gun and range allowance, withholding taxes, workers's compensation premiums, and unemployment insurance. The Association indicated that police take-home pay was about one half the amount listed in the County's letter printed in the paper.
23. The Association also approached a member of the County Commission and asked that the County publish information which would reflect the true pay rates. The Commission told the Association that it would publish such information in an FYI ad setting forth the officers' net pay. However, that ad was never published in the newspaper.
24. The County had several different wage proposals regarding the budget. The proposals included an "if" proposal, an "if, if" proposal, and an "if, if, if" proposal. The proposals included the language "tentative sign off number 2, the parties agree as follows," and then had a signature line for parties to date and sign. Each proposal also contained language as follows: "ADLC is not making the following proposal." The County maintained that the proposal was made as a way of exploring the difference between the parties without moving from their current proposals.
25. Beginning in January 2000, the parties had a series of approximately 12 bargaining meetings, during which they agreed to and signed off about 34 items.
26. When interviewed by the Anaconda Leader on January 7, 2000, about negotiations with various unions, the County CEO stated, "I think I'm pretty close with 911, police and engineers, I'm still not sure I'd probably settle with everybody but the police." (Exhibit P). The County settled contract negotiations with every union except for the Association.
27. On January 26, 2000, the County and Association agreed in writing to a raise for the first year of 34¢ per hour for captains, 32¢ per hour for lieutenants, 30¢ per hour for sergeants, 28¢ per hour for patrolmen, and 28¢ per hour for probationary patrolmen.
28. On February 2, 2000, the County advised the Association that it wanted to eliminate the four day, 10 hour schedule which had been in place for more than 10 years. The County also proposed that the Chief Law Enforcement Officer determine what schedule the police should work. The County claimed that by removing the four-10 schedule, the Police Department budget would be reduced.
29. The County received notice from the Association by letter dated February 2, 2000, that the Association believed the parties had reached impasse and requested to return to the table with its last, best and final offer which stated in part:

> We've given everything--ADLC has dropped a few things they wanted to take away from our contract. Attempting to enter the "me-too" clause into negotiations at this time is "the proverbial straw that broke the camels back"

> Therefore we are directed to a final resolution before requesting mediation:
>
> > A. APPA requests we return to a two year contract (similar to the one proposed last)
> > B. Four ten-hour shifts will remain--current contract
> > C. Holiday pay will remain 10 hours--current contract
>
> Unless there is agreement to the three above, APPA feels no reason to continue at this time, as we have continually bargained in good faith and have no movement left on the above issues. (Exhibit 24)

30. The Association informed the County that there was no reason to continue at that time unless agreement were reached regarding the three items above. On several other occasions after February 3, 2000, the Association indicated in correspondence with the County that negotiations might be at impasse because of deadlocked bargaining over some disputed issues.
31. On February 13, 2000, the Association informed the County by letter (Exhibit 31), that if there were no movement in the negotiations on the four-10 schedule and the number of officers per shift, they would be at impasse and the Association would request mediation. The County responded by letter to the Association on February 23, 2000 that the County agreed that the parties were deadlocked without any hope of resolving some of the items on the table.
32. On February 23, 2000, the County and Association agreed to retroactive pay at the hourly rates for the Association bargaining members under the written agreement they entered into on January 26, 2000.
33. On February 27, 2000, the Association requested mediation assistance in negotiations with the County and indicated that the parties were at impasse.
34. On March 14, 2000, the Association filed unfair labor practice charge 25-2000, alleging threats, bad faith bargaining, and interference with their protected rights by the County.
35. On March 20, 2000, the County and Association agreed in writing to a contract effective for a period beginning July 1, 1999.
36. On March 23, 2000, the County sent a proposal including open items in the contract for scheduling, assignment of police officers at sporting events, holiday pay and staffing levels.
37. On March 24, 2000, the Association informed the County that even though it appeared that a stalemate still existed, the Association wanted to meet in order to reach some sort of compromise.
38. On April 3, 2000, by notice of intent, the County stated it would pay the agreed to and signed wage increase without a complete contract (Exhibit 44).
39. On April 3, 2000, the Association rejected the County's notice of intent. (Exhibit 46).

40. On April 5, 2000, the County indicated that it agreed with the Association that the parties were deadlocked, since the County had not made any change to its initial proposal since February 2000, and since the County was not willing to give up on the main proposal differences.
41. On April 5, 2000, the Association filed a second "me too" grievance when the parties could not reach an agreement concerning wages. (Exhibit 49). It filed the grievance two days after the notice of intent to pay the agreed to and signed wage increase (Exhibit 99).
42. During a scheduled grievance meeting on April 17, 2000, the County alleged that Association representatives refused to provide information necessary to address the issues.
43. On April 26, 2000, Commission chairman Beatty sent a letter to Association shop steward, Mike Fink, that a meeting concerning the second "me too" grievance had been scheduled for May 2, 2000. The letter included a list of questions for the Association to be prepared to answer at the meeting. The questions were similar to the questions alleged to have been left unanswered at the April 17 meeting.
44. On May 2, 2000, the grievance meeting was continued because the Association said it had no knowledge of the April 26 Beatty letter to Fink.
45. On May 8, 2000, Beatty sent a letter to the Association grievance committee which included 17 questions for the Association to address at the rescheduled grievance meeting.
46. On May 15, 2000, the Association, through its attorney, notified the County that it would not answer the questions and requested that the Commission complete Step III of the grievance procedure.
47. On August 16, 2000, the County filed unfair labor practice charge 2-2001 against the Association, alleging failure to provide information, bargaining over posting/filling of job vacancies, and bargaining misconduct by including a member of management on the bargaining team.
48. On September 14, 2000, the parties settled the second "me too" grievance for the proposed wage increase, as agreed to in the February 26, 2000, agreement between the County and the Association (Exhibit 29).
49. In response to a letter from the Association dated September 11, 2000, the County agreed to resume negotiation meetings concerning the outstanding issues.
50. On October 9, 2000, the Association informed the County of its preferred times for negotiation meetings. However, the Association indicated that its proposals on the remaining issues would not change.
51. On November 13, 2000, the Association received a copy of the County's last, best and final offer, which was to go before the County Commission at its November 2000 meeting. The County asked the Association to present any additional proposals or offers to the Commission. The Association immediately requested a bargaining meeting. As a result, the County suggested dates for the meeting for either November 26 or November 27, 2000.
52. The Association submitted its proposal, which included no significant changes regarding the four major bargaining differences.

53. At the scheduled Commission meeting on November 21, 2000, the Commission elected not to implement the County's last, best and final offer, in hopes that the County and Association could reach a settlement, or at least narrow the outstanding issues. The bargaining meeting was set for November 27, 2000.
54. No movement was made toward an agreement on the outstanding issues at the November 27, 2000, meeting, but the County and Association agreed to engage in further negotiations.
55. At the end of the series of meetings begun in January, the parties continued to disagree over four items including:

(a) work schedules;
(b) holiday pay;
(c) manning of sports events; and
(d) job posting.

56. The 1997-99 CBA addressed work scheduled for police officers as follows:
A. WORKDAY WORKWEEK SHIFT ROTATION

1. The workday shall be ten (10) hours. The work week shall be forty (40) hours.
2. SCHEDULE FOR LAW ENFORCEMENT OFFICERS

The schedule shall be four (4) ten day (10) hour work weeks with three (3) consecutive days off to be scheduled by the supervisor. Department seniority will be considered in assigning the shifts. There will be three (3) shifts in each twenty-four (24) hour period. Shifts will be as follows:

Day Shift	7:00 a.m. to 5:00 p.m.
Afternoon Shift	5:00 p.m. to 3:00 a.m.
Night Shift	9:00 p.m. to 7:00 a.m.

57. During negotiations, the County proposed a change under Article VI, Section A(1), to read: "For officers specified as full time, the work week shall be 40 hours." The County also proposed that the Chief Law Enforcement Officer have authority to set the work schedule for police officers. In the proposed changes dated November 28, 2000, the County Commission changed Section A(2) to read: "Starting immediately, November 26, 2000, at 7 a.m., the shifts, the number of shifts, the length of shifts, the days off, and the assignment of shifts will be assigned by the Chief Law Enforcement Officer, and the Chief Law Enforcement Officer may change the same." Also, the Commission proposed a change in Section A(3) to read in total, "no split shifts will be worked." (Exhibit 11, sheet 4).
58. The County proposed the change to the four-10 schedule in order to reduce the

police department budget so that the County could operate within its budget. The County indicated it would have to lay off police officers if the schedule was not changed. (Exhibit H). During one of the bargaining sessions, the County CEO indicated that one of the officers might be laid off, but only if there was a change in the four-10 schedule. He also indicated that if the schedule did not overlap, a layoff would not be needed.

59. The Association objected to removing the four-10 schedule from the CBA. The Association and Police Chief Blaz contended that the four-10 schedule was necessary to protect the community and the police officers. With the four-10 schedule, the police department had 4 officers on shift from 9:00 p.m. until 3:00 a.m., which is the peak crime period.

60. The Association maintained that, without the four-10 schedule, the peak period of time would be patrolled by only two officers, making adequate community protection impossible with such limited on-duty staff. It was the Association's position that elimination of the four-10 schedule would leave officers on duty at greater risk and decrease their enforcement presence in the community. The Association also believed that the four-10 work schedule is important for morale and the safety and protection of officers.

61. In the 1997-99 CBA, holiday pay (VII, A, p. 6) is provided as follows: "Employees shall be granted the following holidays without loss of pay: [holidays list]". During negotiations, the County maintained that it could not legally pay 10 hours holiday pay, pursuant to an Attorney General opinion. (Exhibit 40).

62. The County implied that paying police officers for 10 hours on holidays was a violation of law, relying on 43 Op. Att'y Gen. No. 14 (1989).

63. The Association contacted its attorney for a legal interpretation concerning holiday pay. The Association discovered that the County had not given the entire Attorney General opinion concerning holiday pay to the Association. The Association believed the action to be a significant omission by the County, which provided a different legal interpretation. The two pages of the opinion which the County had failed to provide specifically stated, "[N]othing in the opinion should be construed as addressing the issue of whether a county employer is authorized to enter into a collective bargaining agreement which provides for a holiday pay amount in excess of 8 hours."

64. The Association presented the County with the Attorney General opinion, which it believed supported the Association position. However, the County continued to assert that it was correctly interpreting the law. (Exhibit 125).

65. Under the 1997-99 CBA, the Police Department had regularly assigned at least two police officers to be present at all basketball and football games. However, during games against Butte and Dillon teams, it increased the number of officers to four, due to the intense rivalries. In an attempt to negotiate and settle the contract dispute, the Association proposed a change to the contract, reducing the number of officers present for the Butte/Dillon games from four to two. In making its proposal to the County, the Association proposed stationing two police officers at all sports events.

66. The County interpreted the proposal to mean that the Association wanted two officers present for every sports event, including golf, track, cross country, volleyball, and so on. As a result, the County said that it was reluctant to change from the previous staffing of sporting events that had been practiced under the contract.
67. Pursuant to Article XII, p. 18, of the 1997-99 CBA, the County must post a job opening when a vacancy occurs or a new position is created. That article provides:

> A. When a new position is created or a vacancy occurs in any existing position within a series, the Employer shall within five (5) working days, prepare and post on the Association bulletin board a bulletin stating among other things:
>
> 1. Location and title of position to be filled;
> 2. A listing of the principle [sic] duties of the position;
> 3. Minimum qualifications;
> 4. Current assigned hours of service;
> 5. Current assigned days of rest;
> 6. Salary range of the position;
> 7. Starting date of the assignment;
> 8. Last date when applications will be received and accepted;
> 9. With whom the applications shall be filed.
>
> B. Filling of job vacancies and openings shall be applied according to ability, experience, competency, and seniority. Scheduling of vacation and layoffs will be on a strict seniority basis.

The County proposed to eliminate the article involving posting and filling of jobs, citing budget.
68. During negotiations, the County proposed to remove the job posting requirement from the contract. The Association maintained that the County wanted to remove the job posting mandate in order to reduce manpower within the police department. The police staff had been reduced by 11 officers by not replacing officers lost to attrition and failure to promote in the last several years. The Association believedthat the County's proposal to eliminate the job posting/vacancy filling article, was an attempt by the County to further reduce manpower in the department, jeopardizing the safety and protection of the community and officers.
69. The County CEO listed other departments in addition to the police department as subject to proposed lay-offs due to budget concerns. The lay-off list included:

(a) three part-time employees in the courthouse;
(b) two full time clerks in the courthouse;
(c) one road employee;
(d) part-time personnel in the parks department.

70. During fiscal year 1999, the County had a cash reserve of $1.6 million. In fiscal 2000, the County had a cash reserve of $1.48 million. The decrease in reserve in fiscal 2000 was primarily due to a court order that the Deer Lodge county jail was to be closed for safety reasons. As a result, prisoners were sent to prisons outside the County, which significantly increased costs.
71. During negotiations, the Association did not take a vote to strike and did not inform the County that Association members were going to go on strike. County representatives heard a rumor that the police had threatened to strike. As a result, the County sent what it described as a precautionary letter to county employees, including the County Commissioners, department heads and the teamsters union, directing them to cross the picket line should a strike occur.
72. Sometime in September 2000, Commissioner Beatty discovered that he had a flat tire while returning from a commission meeting to his home. He believed that police officers caused the flat tire. Sometime later, while in a local business establishment, he approached two off-duty officers, Madsen and another officer. Beatty told one of the officers that he suspected members of the police department had flattened his tire, and commented to them that "every dog has its day." Madsen understood Beatty's comment as a direct threat against the police department and became concerned about his job since he was the least senior officer.
73. Sometime in February 2001, another officer asked Beatty if there were any way the Association and the County could get together and settle the contract dispute. Beatty responded, "That will never happen."
74. On two separate occasions Stetzner declared impasse and attempted to unilaterally impose terms and conditions upon the Association. (Exhibits AA and III) The Association was still in negotiations and enlisted the aid of Board Mediator Mike Bentley. When Stetzner asked the Commission to unilaterally implement the terms of the last offer, the Commissioners voted no. The Association considered this to be another threat against it.
75. Under Article I, the 1997-99 CBA states in part that Captains may not be a part of the negotiating team. (Exhibit A, EE, 1: Article I, page 1).
76. Captains Barkell and Roach are members of the collective bargaining unit. They participated at the bargaining table as part of the Association negotiating team.
77. The County's bargaining team consisted of CEO Stetzner and Commissioners Boyce, Beatty, and Chirico. During the course of bargaining a new agreement, at least one Commissioner attended all bargaining meetings, including those who were members of the bargaining team and those who were not members, but the Commissioners rotated their participation in the sessions, so that different Commissioners attended different meetings. All Commissioners had input into the County proposals. In January, 2001, the Association requested that they meet with

all County officials in order to "hammer out" an agreement. Their request to meet with all 5 commissioners was rejected by the County CEO on January 25, 2001.
78. During the bargaining period the Association met to discuss various proposals with non-bargaining team commissioners. They did not continue to meet with the other commissioners after their request was denied. The Association did not believe that its contacts with commissioners outside of the sessions was in violation of the bargaining process, based on the rotating participation at sessions. The Association found that some commissioners made representations during bargaining while another commissioner would present a different point of view on the same issue.
79. The Association believed that the County's proposal which insisted on removal of the four-10 schedule and the job posting clause from the CBA, had the goal of laying off police officers and reducing the size of the department.
80. The County's statements and comments that it might have to lay off Association members did not constitute unlawful threats or coercion.
81. The County's adjustment of the police officer wage rate without consulting Association representatives to reflect the arbitrator's ruling was not an unlawful failure to bargain.
82. The County failed to bargain in good faith during negotiations with the Association and had no intention to reach a CBA.
83. The job posting provision in the 1997-99 CBA was a term or condition of Association member employment and as such was a mandatory subject of bargaining.
84. The presence of individual participants at the bargaining table who are not designated bargaining team members constitutes a violation of the CBA and, therefore, should be enforced as provided in the CBA.
85. The Association did not restrain or coerce the County in the selection of its representatives for collective bargaining, since all commission members attended and participated in the negotiations.

V. DISCUSSION/RATIONALE

A. Association Allegations

The Association alleges the County violated § 39-31-401(1), (2), and (5), MCA, by repeatedly threatening police officers with layoffs, engaging in surface bargaining tactics and interfering with the protected rights of Association members during negotiations.

1. Allegations of Threats and Interference

Threatening employees with lay-offs, discharge, or discipline in reprisal for exercising their rights including but not limited to processing grievances violates ' 39-31-401 (1) and (2), MCA.
The Association contends that the County Commissioners and negotiating team members repeatedly threatened to lay off bargaining unit members by remarks made at the bargaining table, interviews with the media and personal conversation

throughout the course of unsuccessful negotiations. The alleged threats primarily center around the statements made by the County's bargaining team that a budgetary shortfall would exist within the department unless the four-10 schedule were eliminated, and also as a result of the arbitrator's award of additional wages for police in accordance with the "me too" grievance.
The County did not unlawfully threaten Association members. Objective predictions concerning the financial impact of certain bargaining positions do not constitute unlawful intimidation or coercion. NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969).

2. Allegations of Bad Faith Bargaining
Montana law requires public employers and labor organizations representing their employees to bargain in good faith on issues of wages, hours, fringe benefits, and other conditions of employment. § 39-31-301(5), MCA. The failure to bargain collectively in good faith is a violation of §§ 39-31-401(5) and 39-31-402(2), MCA. The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using federal court and National Labor Relations Board (NLRB) precedent as guidance in interpreting the Montana Collective Bargaining for Public Employees Act. State ex rel. Board of Personnel Appeals v. District Court, 183 Mont. 223, 598 P.2d 1117 (1979); City of Great Falls v. Young (Young III), 211 Mont. 13, 686 P.2d 185 (1984).

Good faith bargaining is defined in § 39-31-305, MCA, as performance of the mutual obligation of the public employer or his representative and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits and other conditions of employment or the negotiation of an agreement or any question arising thereunder in the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a substantive proposal or require the making of a concession. See NLRB v. American National Insurance Company, 343 U.S. 395, 30 LRRM 2147 (1952) and Daily News of Los Angeles v. NLRB, 73 F.3rd 406, 151 LRRM 2242 (D.C. Cir. 1996). In The Developing Labor Law, Third Edition, Patrick Hardin, Editor in chief, BNA Publications, Washington, D.C., 1992, p.608-9, the proper role of the parties is described as follows:

> The duty to bargain in good faith is an "obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . . ." This implies both "an open mind and a sincere desire to reach an agreement" as well as a "sincere effort ... to reach a common ground." Except in cases where the conduct fails to meet the minimum obligation imposed by law or constitutes and outright refusal to bargain, relevant facts of a case must be studied to determine whether the employer or the union is bargaining in good or bad faith. The "totality of conduct" is the

> standard by which the "quality" of negotiations is tested. Thus, even though some specific actions, viewed alone, might not support a charge of bad-faith bargaining, a party's over course of conduct in negotiations may reveal a violation of the Act. [Citations omitted]. (Emphasis added)

The Board of Personnel Appeals has adopted this standard. (See for example, ULP No. 4-76, No. 33-81 and No. 19-85). The "totality of conduct" is the standard by which the quality of negotiations is tested. NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 9 LRRM 405 (1941), B.F. Diamond Constr. Co., 163 NLRB No. 25, 64 LRRM 1333 (1967). In reviewing the totality of the employer's conduct, the Board also takes into consideration an employer's anti-union behavior away from the bargaining table NLRB v. Billion Motors Inc., 700 F.2d 454, 112 LRRM 2873 (8th Cir. 1983).

When examination of the "totality" of a party's conduct during bargaining discloses that the forms of negotiation have been employed to conceal a purpose to frustrate or avoid mutual agreement, the party is said to have engaged in "surface bargaining." Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732, 27 LRRM 2012 (D.C. Cir. 1950) cert. denied, 341 U.S. 914, 27 LRRM 2633 (1951). Although an employer may be willing to meet at length and confer with the union, the board will find a refusal to bargain in good faith, if it concludes the employer is merely going through the "motions" of bargaining. Greensboro News Co., 222 NLRB No. 144, 91 LRRM 1308 (1976), enforced *per curium* 549 F.2d 308, 94 LRRM 2752 (4th Cir. 1977).

Where an employer has repeatedly declared that it would sign no written agreement, the Fourth Circuit in NLRB v. Highland Park Mfg. Co., 110 F.2d 632, 6 LRRM 786 (4th Cir. 1940) found an unfair labor practice and declared:

> [T]he act, it is true, does not require that the parties agree; but it does require that they negotiate in good faith with the view of reaching an agreement if possible; and mere discussion with representatives of employees, with fixed resolve on the part of the employer not to enter into any agreement with them even as to matters to which there is no disagreement does not satisfy its provisions.

Applying these principles of good faith bargaining, the facts as established at the hearing show that the County had no genuine intention of entering into a collective bargaining agreement with the Association. At the time of the hearing, the Association member employees had been working without a contract for more than 20 months. The County had also refused to bargain with the Association on the wage reopener provision in the previous contract. While the County had been willing to meet and confer with the Association over an extended period of time, it

continued to display an inflexible attitude concerning mandatory subjects of bargaining, including wages, work schedules, holiday pay and staffing sports events. The County refused to enter into any agreement unless the Association agreed to the elimination of certain provisions which had long been a part of its agreement with the County.

The duty to bargain in good faith is an obligation to participate actively in deliberation so as to indicate a present intention to find a basis for agreement.

The record shows that the County engaged in surface bargaining tactics over the course of negotiations which it refers to as "sandwich bargaining" and had no intention to find a basis for an agreement. The County proposed to change virtually every mandatory and non-mandatory subject in the CBA. It then reserved the right to modify or change the language at any time during the process of negotiations. The County's "if", the "if, if," and the "if, if, if" proposals made during the course of negotiations is another indication of surface bargaining demonstrating a lack of good faith in the bargaining process. This tactic allowed the County to change its mind at a later date even when the parties had reached a tentative agreement on collective bargaining issues. Using this type of strategy during deliberations reveals a lack of real desire to reach an agreement on a bona fide effort to reach a common ground to establish its obligatory duty to bargain in good faith. The County's conduct during negotiations went beyond hard bargaining and is not indicative of participation in negotiations in good faith, using an open mind and sincere effort to successfully reach an agreement.

Also, the County represented inconsistent amounts concerning its finances during the period negotiations were taking place, indicating as much as $734,000.00, in the hole to a surplus of $1.6 million, which further frustrated the bargaining process. County officials made comments to the effect that a settlement with the police would never happen and that the County would settle all contracts except with the Association. The County also spread rumors that the police were going on strike and misrepresented the salaries of police officers in its communications to the community. It also misrepresented an Attorney General's opinion on holiday pay for workers on 10 hour shifts.

Although the parties were able to reach agreement on many issues, the conduct of the County was designed to avoid actually entering into a CBA. For example, when the parties arrived at agreement on the salary levels for the CBA, the County proposed to implement the new salary schedule without integrating the salary changes into a final CBA. Of the four issues in serious dispute between the parties, wages, the four-10 schedule, job posting, and holiday pay, three remained unresolved as of the time of hearing. When the Association proposed a change in assignment of police officers to sporting events designed to reduce staffing levels, the County seized on the proposal as an effort to increase staffing levels. Based on the record as a whole, I am left with the firm impression that the County had no

intention of entering into a CBA with the Association, and therefore failed to bargain in good faith.

At hearing, the Association also contended that the County unilaterally modified the contract terms regarding police wage rates, which was not presented during negotiations. This allegation is without merit. The County CEO made the change to comply with the wage rate awarded in the arbitrator's decision. Both parties participated in the binding arbitration hearing process. Therefore, the County's actions regarding the wage modification did not violate the law.

B. County Allegations

The County alleges that the Association committed unfair labor practices in violation of §§ 39-31-303 and 39-31-402 (1) and (2), MCA by restraining and coercing the County in the selection of its representative for collective bargaining, by bargaining to impasse on a permissive subject of bargaining, and by having a captain on the collective bargaining team in violation of the CBA. These allegations are set forth in the unfair labor practice charge. In its post-hearing submissions, however, the County also alleges that the Association engaged in surface bargaining. The allegation of surface bargaining was not included in the charge and will not be addressed in this decision.

1. Selection of County's Representative for Collective Bargaining

Section 39-31-402 (1), MCA, makes it an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of its representatives for collective bargaining. The County contends that the Association violated this section when Association members met with members of the Commission who were not members of the County bargaining team in an effort to influence the course of the negotiations. However, there is no evidence that the Association was attempting in any way to restrain or coerce the County. It neither attempted to force the County to select or replace a representative or applied conduct against a County representative designed to affect the manner of bargaining. Teamsters Local 507 (George R. Klein News Co.), 306 NLRB 118, 139 LRRM 1145 (1992). Further, the facts of this case show that the Commissioners who were not members of the bargaining team regularly participated in the negotiations, and had input into the County's proposals. Under these circumstances, it was not an unfair labor practice for members of the Association to contact the members of the Commission.

2. Bargaining to Impasse Over a Permissive Subject of Bargaining

One of the issues on which the parties were unable to reach agreement was the job posting requirement. The County maintains that because the provision requires the posting of a position whenever a vacancy occurs, the provision interferes with the right of management to determine staffing levels. Both in bargaining and in this proceeding, the Association has maintained that the job posting requirement is necessary to prevent the County from reducing the size of the police force. However, neither the language of the provision nor the past practice of the parties supports a finding that the provision requires that the County fill vacancies as they

occur. The contract provision calls only for initial posting of vacancies internally. Although somewhat ambiguous in that it does not define exactly what a vacancy is, the evidence shows that the County has not filled all positions as they become vacant, even with the language of the agreement. A provision for internal posting of vacancies to unit members, which is what this provision seems to require, is a term or condition of employment, and as such is a mandatory subject of bargaining. Thus, it is not an unfair labor practice for the Association to bargain to impasse over this provision.
In view of the finding that the provision is a mandatory subject, it is not necessary to reach the question of whether the parties were in fact at impasse.

3. Presence of Captains on the Association's Bargaining Team
The County maintains that the Association committed an unfair labor practice by the presence of Captains on the Association's bargaining team, in violation of the CBA. An unfair labor charge is not the proper means for addressing violations of the CBA. Mine Workers v. NLRB (Boone County Coal Corp.), 257 F.2d 211, 42 LRRM 2264 (D.C. Cir. 1958). The proper avenue by which to address this charge is through whatever mechanism exists to enforce the contract.

C. Remedy
Section 39-31-406 (4), MCA, provides that when the Board finds that an employer has engaged in an unfair labor practice, the Board shall order the employer to cease and desist from the unfair labor practice, and to take such affirmative action as will effectuate the policies of the Collective Bargaining Act. Thus the appropriate remedy for the County's failure to bargain in good faith is an injunction against future bad faith bargaining, an order requiring the County to return to the bargaining table and negotiate with the Association in good faith, and a posting requirement.

The Association has also requested an award of attorney fees as part of the remedy, alleging that the County attempted to break the Association not only through its unfair labor practices but in forcing the Association to hire an attorney to defend itself. The Association argues that it is entitled to attorney fees as a result of the County's conduct over the extended period of negotiations.

The Board of Personnel Appeals has no authority to award attorney fees at the administrative level. Thornton v. Commissioner of the Department of Labor and Industry, 190 Mont. 442, 621 P.2d 1062 (1981). In that ruling, the Montana Supreme Court held that attorney's fees may not be awarded to the successful party of the administrative hearing unless there is a contractual agreement or specific statutory authorization. There is no specific statutory authority to award attorney fees in an unfair labor practice case. In the absence of specific statutory authority, the Association is denied attorney fees for this administrative proceeding.

VI. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this matter pursuant to § 39-31-405, MCA.

2. Statements made by Anaconda-Deer Lodge County representatives that layoffs would occur due to a budget shortfall because of the arbitrator's award of wages and the Association's bargaining positions did not violate § 39-31-401 (1) and (2), MCA.

3. Anaconda-Deer Lodge County violated § 39-31-401 (5), MCA, by failing to bargain in good faith while using bargaining strategies designed to prevent reaching a CBA, including surface bargaining, inconsistent reports of County finances, misrepresenting police officer salaries, and misrepresenting the Attorney General opinion regarding holiday pay.

4. The Anaconda Police Protective Association did not violate § 39-31-402 (1), MCA, by contacting members of the County Commission who were not bargaining team representatives.

5. The Association did not bargain to impasse over a permissive subject of bargaining, and therefore did not violate §§ 39-31-303 or 39-31-402 (2), MCA.

6. An unfair labor practice charge is not the appropriate procedure to address the presence of Captains on the Association bargaining team contrary to the terms of the CBA.

7. The appropriate remedy for the County's violation of § 39-31-401 (5), MCA, is a cease and desist order, an order to return to the bargaining table, and an order to post and publish the notice set forth in Appendix A.

8. The Association may not recover attorneys fees in an unfair labor practice charge.

VII. RECOMMENDED ORDER

1. Anaconda-Deer Lodge County is hereby ordered:

a. to cease the practice of bargaining in bad faith with the Association and of bargaining with no intention of entering into a collective bargaining agreement.
b. to return to the bargaining table immediately and commence good faith negotiations.
c. to post copies of the notice contained in Appendix A at conspicuous places, including all places where notices to employees are customarily posted, including City Hall and all police stations for a period of 60 days and to take reasonable steps to insure that the notices are not altered, defaced, or covered by any other material.

2. ULP 2-2001 is DISMISSED.

DATED this 5th day of April, 2002.

BOARD OF PERSONNEL APPEALS
By: s/ Michael T. Furlong
Michael T. Furlong
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to ARM 24.26.215 within 20 days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. § 39-31-406(6), MCA. Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF STATE OF MONTANA
BOARD OF PERSONNEL APPEALS

The Montana Board of Personnel Appeals has found that we violated the Montana Collective Bargaining for Public Employees Act and has ordered us to post and abide by this notice.We will return to the bargaining table and bargain in good faith with the Anaconda Police Protective Association with the intent of arriving at an agreement.
We will cease the practice of surface bargaining and other bad faith bargaining practices.
We will not misrepresent county finances or any other information during the negotiation process.
We will cease misrepresenting police officer salaries to the community in media advertising.

DATED this day of April, 2002.
ANACONDA-DEER LODGE COUNTY
By:
* * * * * * * * * * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Anaconda Police Protective Association
Steve Barclay
PO Box 518
Anaconda, Montana 59711-0518

Timothy J. McKittrick
Attorney at Law
PO Box 1184
Great Falls, Montana 59403

Rick D'Hooge
PO Box 1143
Helena, Montana 59624

Carl Stetzner
Anaconda Deer Lodge County
800 South Main
Anaconda, Montana 59711

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day, served upon the following parties or such parties' attorneys of record by means of the State of Montana's Interdepartmental mail service.
John Andrew
Employment Relations Division
1805 Prospect
Helena, Montana 5962

DATED this 5th day of April, 2002.
s/ Michael T. Furlong