STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 36-2004:

LEWIS AND CLARK COUNTY SHERIFF'S EMPLOYEES' ASSOCIATION,	)	Case No. 2616-2004
Complainant,	)	
vs.	)	
LEWIS AND CLARK COUNTY,	)	
Defendant.	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

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I. INTRODUCTION

On June 1, 2004, the Lewis and Clark County Sheriff's Employees' Association filed a charge with the Board alleging that Lewis and Clark County had committed an unfair labor practice by unilaterally changing the manner in which it calculated wages and longevity for sheriff's deputies. On June 17, 2004, the defendant filed a response to the charge denying that its actions constituted an unfair labor practice.

On September 16, 2004, an investigator for the Board issued a finding that the charges had probable merit and transferred the case to the Hearings Bureau for a hearing on the charges.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on May 19, 2005. J.C. Weingartner represented the association. K. Paul Stahl III represented the County. Wayde Cooperider and Sheila Cozzie presented witness testimony in the case. Exhibits 1 - 3, 5 - 7, 9, A - G, I - N, FF, GG, and HH were admitted into evidence by stipulation. Exhibit II was also admitted without objection. However, Exhibits FF, GG, HH, and II were admitted with the

understanding that the handwritten notations on the documents were neither part of the original documents nor intended as evidence in the case.

The complainant did not provide copies of the collective bargaining agreements intended to be admitted as Exhibit 7. Copies of two agreements were admitted as defendant's Exhibits A and F. Exhibit 9, admitted by stipulation of the parties, is the administrative file compiled by the Board in this matter from the filing of the unfair labor practice charge June 1, 2004, to the issuance of the investigative report and determination on September 16, 2004, including a thick 3-ring binder. The binder contains the collective bargaining agreements between the parties for the period July 1, 1983, through June 30, 2005.

The parties stipulated that all of the testimony and other evidence admitted in the companion wage claim proceeding would be made a part of the record in the case. Those exhibits were marked as 9, O-1 through O-39, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, and EE in the wage claim proceeding. Exhibits DD and EE were admitted for demonstrative purposes only in the wage claim proceeding. The parties also agreed that, for purposes of the wage claim proceeding, the hearing officer could take administrative notice of the Department of Labor's investigative files. The hearing officer has not included the investigative files of the wage claims in the record of the unfair labor practice claim, however. The evidentiary record of the wage claim proceeding also includes the nine audiotapes of the hearing itself.

The parties also stipulated that, with minor revisions, the facts and matters identified by the hearing officer in the pre-hearing order dated May 14, 2005 as the procedural history and as appearing to be undisputed were in fact undisputed.

Following hearing, the hearing officer held the record open for the submission of additional evidence from the defendant by affidavit to establish the actual date on which the defendant implemented the changes in pay methodology at issue in this case. The defendant did not submit the additional evidence, a fact the hearing officer did not note until preparing the decision in the case. However, in view of the conclusions of law arrived at by the hearing officer, that evidence is immaterial.

The parties filed post-hearing briefs on June 10, 2005. At that time, the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether Lewis and Clark County committed an unfair labor practice in violation of Mont. Code Ann. § 39-31-401, as alleged in the complaint filed by the Lewis and Clark County Sheriff's Employees' Association.

III. FINDINGS OF FACT

1. The Lewis and Clark County Sheriff's Employees' Association is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6), and is the exclusive representative of the employees of the Lewis and Clark County Sheriff's office for collective bargaining purposes.

2. Lewis and Clark County is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).

3. For a number of years, the association and the County have been parties to a collective bargaining agreement. The agreement covers all sworn and non-sworn County employees of the sheriff's office, and has historically been renegotiated every two years. The agreement in place at the time of hearing was effective July 1, 2003 through June 30, 2005.

4. Montana law requires the County to pay its sheriff's deputies between 74% and 90% of the elected sheriff's salary, according to a rank structure established for the office. Mont. Code Ann. § 7-4-2508. In addition, Montana law provides that sheriff's deputies are entitled to longevity payments. Mont. Code Ann. § 7-4-2510.

5. The collective bargaining agreement between the parties contains a rank structure and the percentage of the sheriff's salary accorded each rank.

6. Since at least 1991, the percentage associated with each rank has neither been negotiated nor changed.

7. Historically, the parties did not negotiate base pay or longevity. Instead, after negotiations for a collective bargaining agreement were concluded, the County Human Resource Department (HRD) prepared an addendum to the agreement containing a salary schedule. The salary schedule was derived by applying the negotiated rank structure to the amount set by the County to be the salary of the sheriff. Article XII of the agreement, Classification and Compensation, states

"employees covered by this agreement shall be paid in accordance with the salary schedule and pay regulations attached hereto and made a part as fully set forth herein."

8. Since at least 1997 (and again in agreements negotiated in 1999, 2001, and 2003) Article XII, Paragraph H, Longevity Pay (A) of the agreement has stated "sworn personnel shall receive longevity pay pursuant to statutory provisions" as set forth in Mont. Code Ann. § 7-4-2510.

9. Prior to July 1, 2001, the Lewis and Clark County Board of Commissioners (Commission) set the sheriff's annual salary increase pursuant to Mont. Code Ann. (1999) § 7-4-2503. During the 2001 legislative session, the Legislature amended Mont. Code Ann. § 7-4-2503. The amendments established a County Compensation Board (Board).

10. Beginning October 1, 2001, the Board was required to recommend a compensation schedule for elected officials. This procedure and compensation schedule replaced the procedure wherein the HRD recommended to the Commission a cost of living increase as set by the bureau of business and economic research of the University of Montana-Missoula. The schedule and increase applied to the salaries of all elected officials. The Board was staffed by the HRD.

11. Prior to 2001, the salaries of the sheriff's deputies were set applying the rank percentage contained in the collective bargaining agreement to the salary of the sheriff, including a $2,000.00 "addition" to the sheriff's salary as provided for in Mont. Code Ann. § 7-4-2503.

12. During the 2001 collective bargaining process between the association and the County, the association became concerned about the $2,000.00 addition and the methodology for calculating longevity. The association believed that the County intended to request an Attorney General's opinion on the proper way to calculate deputy salary and longevity following the changes in the law that went into effect in 2001. The County did not request an Attorney General's opinion.

13. On October 25, 2001, the Commission adopted a resolution to establish County compensation for 2001 with an effective date of July 1, 2001.

14. When the County calculated the salaries for sheriff's deputies based on the resolution adopted in October 2001, it applied the rank percentage to the salary

of the sheriff, excluding the $2,000.00 addition. Each sheriff's deputy nevertheless received a cost of living increase after the salaries were recalculated.

15. Prior to 2001, both the County and the association had interpreted Mont. Code Ann. § 7-4-2510 to require longevity for sheriff's deputies at 1% of the salary of the individual deputy for each year of service. The parties referred to this method as the "rank basis" for calculating longevity. When it established the salary schedule for deputies in 2001, the County continued to pay longevity on the rank basis.

16. In July 2002, the second year of the agreement, the Board convened to recommend a salary schedule and to increase the sheriff's salary as required by Mont. Code Ann. § 7-4-2504.

17. The Board recommended that the Commission adopt the HRD recommendation.

18. The Commission adopted a resolution implementing the Board's recommendation.

19. For fiscal year 2002-2003, the HRD calculated and implemented increases in longevity and salary without negotiation, effective July 1, 2002. The salary calculations continued to exclude the $2,000.00 "addition" from the salary of the sheriff to derive deputy salaries, and continued to use the rank basis to calculate longevity.

20. On March 31, 2003, the association sent a memo to the County outlining issues for negotiation.

21. This memo, for the first time, contained a minimum cost of living adjustment (COLA) increase request of 3.5%. However, the request was for an increase in the salaries of the non-sworn civilian employees, not the salaries of the sworn sheriff's deputies. A 3% COLA increase was eventually agreed upon for the non-sworn officers.

22. The Commission adopted a resolution approving the Board's recommendation for county compensation for 2003.

23. These increases were calculated and implemented as of July 1, 2003. Sheriff's deputy salaries continued to be based on the salary of the sheriff without the $2,000.00 addition, and longevity continued to be set on the rank basis.

24. In early 2004, following a wage claim by a retiring sheriff's deputy concerning payment of longevity in payouts of sick and annual leave to departing employees, the HRD asked the County Attorney to review the statutes governing the salary and longevity of sheriff's deputies.

25. On January 14, 2004, the County Attorney's office issued an opinion regarding salary and longevity for sheriff's deputies.

26. The opinion concluded that the County was not correctly applying the statutes when determining the wages of deputies, and that the $2,000.00 was required to be included in calculating the salaries of the deputies, but that longevity was required to be based on the minimum base salary for deputies provided for in Mont. Code Ann. § 7-4-2508, excluding the $2,000.00 addition from the salary of the sheriff in calculating that base.

27. Based upon the County Attorney's opinion, the HRD recalculated the salary and longevity of each sworn deputy.

28. On February 24, 2004, the County provided each deputy a memo outlining what the individual change in his or her compensation would be as a result of this recalculation, and stating that the changes would be reflected in the paychecks issued on February 27, 2004.

29. On February 26, 2004, the County Attorney's opinion was sent to the association representatives and its attorney.

30. In the first week of March, 2004, representatives of the County met with members of the association and Bob Murdo, the association's attorney, to discuss the planned changes in deputy compensation. The County representatives indicated that the purpose of the meeting was not to negotiate, but rather to afford the association an opportunity to present its position on why the County's legal analysis or calculations were incorrect.

31. After the meeting, Murdo provided the County Attorney's office with an outline of issues regarding compensation for the sheriff's deputies (Exhibit N). The outline took issue with a number of the County Attorney's conclusions.

32. After receiving Exhibit N, the County Attorney's office advised the HRD to proceed with the salary adjustments in accordance with the opinion of the County Attorney. On March 19, 2004, the County issued checks to sheriff's deputies for back wages.

33. Under this recalculation, the County increased the salary levels of the deputies and decreased longevity amounts.

IV. DISCUSSION[1]

The association contends the County's unilateral change in pay methodology for sheriff's deputies on March 19, 2004, violated Mont. Code Ann. § 39-31-401, because the County unilaterally changed working conditions that are mandatory subjects of bargaining without first bargaining with the association.

The County maintains that its actions do not constitute an unfair labor practice by a public employer as set forth in Mont. Code Ann. § 39-31-401, because pay for sheriff's deputies is set by statute, and is not subject to modification through collective 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. Mont. Code Ann. § 39-31-305(2). Failure to bargain collectively in good faith is a violation of Mont. Code Ann. § 39-31-401(5). The Board of Personnel Appeals can properly use federal court and National Labor Relations Board (NLRB) precedent as guidance in interpreting the Montana collective bargaining laws. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

The basic, fundamental purpose of labor relations is the good faith negotiation of the mandatory subjects of bargaining–wages, hours, and other terms and conditions of employment. An employer who makes unilateral changes during the course of a collective bargaining relationship concerning mandatory subjects of bargaining violates the requirement of good faith bargaining. *NLRB v. Katz* (1962), 369 U.S. 736. Absent waiver or other relief from the obligation, it continues during

[1]Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

the term of the collective bargaining agreement. *NLRB v. Sands Manufacturing Co.* (1939), 306 U.S. 332, 342.

As a general rule, the issue of employee wages is a mandatory subject of bargaining. As noted above, the statute expressly requires public employers to bargain with employee representatives over wages. In the case of sheriffs' deputies, however, base wages and longevity are established by statute. Base wages are established by Mont. Code Ann. § 7-4-2508(2), which states:

> (a) The sheriff shall fix the compensation of the deputy sheriff based upon a percentage of the salary of that sheriff according to the following schedule:
>
> In counties with population of:
>
> | | |
> |---|---|
> | Below 15,000 | 85% to 90% |
> | 15,000 to 29,999 | 76% to 90% |
> | 30,000 to 74,999 | 74% to 90% |
> | 75,000 and over | 72% to 90% |
>
> (b) The sheriff shall adjust the compensation of the deputy sheriff within the range prescribed in subsection (2)(a) according to a rank structure in the office.

The term "salary of the sheriff" is likewise established by statute. Mont. Code Ann. § 7-4-2503 states:

> (1)(a) The salary paid to the county treasurer, county clerk and recorder, clerk of the district court, county assessor, county superintendent of schools, county sheriff, county surveyor in counties where county surveyors receive salaries as provided in 7-4-2812, justice of the peace, and county auditor in all counties where the office is authorized must be established by the county governing body based upon the recommendations of the county compensation board provided for in subsection (4). . . .
>
> (2) . . .
>
> (b) The county sheriff must receive, in addition to the salary based upon subsection (1), the sum of $2,000 a year. . . .
>
> (4)(a) There is a county compensation board. . . .
>
> (b) The county compensation board shall prepare a compensation schedule for the elected county officials, including the

> county attorney, for the succeeding fiscal year. The schedule must take into consideration county variations, including population, the number of residents living in unincorporated areas, assessed valuation, motor vehicle registrations, building permits, and other factors considered necessary to reflect the variations in the workloads and responsibilities of county officials as well as the tax resources of the county. . . .

Finally, Mont. Code Ann. § 7-4-2510 establishes longevity pay for sheriffs' deputies in Montana, and provides:

> Beginning on the date of his first anniversary of employment with the department and adjusted annually, a deputy sheriff or undersheriff is entitled to receive a longevity payment amounting to 1% of the minimum base annual salary for each year of service with the department, but years of service during any year in which the salary was set at the same level as the salary of the prior fiscal year may not be included in any calculation of longevity increases. This payment shall be made in equal monthly installments.

Under this scheme, once the county governing body has established the salary of the sheriff, deputy base salaries and longevity follow automatically from that base. Except to set the rank structure, a county has no authority to set the salary of the sheriff's deputies.

The Montana Attorney General has issued a number of opinions holding that when the legislature has imposed an employment standard for public employment intended among comparably situated governmental entities to be uniform, that standard cannot be modified through collective bargaining without statutory authorization. The most directly applicable of these is 43 Op. Att'y Gen No. 34 (1989), addressing whether a collective bargaining agreement could alter the method for calculating longevity pay increases under Mont. Code Ann. § 7-4-2510. That opinion states:

> Your question essentially presents the recurring issue of whether a public employer is foreclosed from entering into or giving effect to a collective bargaining agreement provision which differs from a statute dealing with the same condition or term of employment. E.g., 42 Op. Att'y Gen. No. 37 (1987); 38 Op. Att'y Gen. No. 116 at 408 (1980); 38 Op. Att'y Gen. No. 20 at 71 (1979); 37 Op. Att'y Gen. No. 113 at 486 (1978). Resolution of this issue typically requires determining whether the

> involved statutory provision circumscribes the public employer's discretion with respect to establishing the particular employment condition -- i.e., whether the Legislature has decided to impose an employment standard which, at least among comparably situated governmental entities, is to be uniform. Attorney General Greely thus stated as the general rule "that, when a particular employment condition for public employees has been legislatively set, it may not be modified through collective bargaining without statutory authorization." 42 Op. Att'y Gen. No. 37, slip op. at 2. That rule grows out of the canon of statutory construction giving controlling significance to a specific legislative enactment where a conflict exists with a more general statutory provision or scheme. Ibid. Instantly, the specific provision is section 7-4-2510, MCA, and the general provision is section 39-31-304(2), MCA, obligating a public employer to bargain in good faith over wages, hours, fringe benefits and other conditions of employment. . . .
>
> It is clear, therefore, that compensation rates for deputy sheriffs have been statutorily controlled for almost 100 years. These statutes have been construed without exception as exclusive and mandatory. Indeed, 1981 Montana Laws, chapter 603, section 7 (codified at § 7-4-2507, MCA) expressly states that, "[i]f there is a conflict between 7-4-2508 through 7-4-2510 and any other law, 7-4-2508 through 7-4-2510 govern with respect to undersheriffs and deputy sheriffs." There can thus be no legitimate dispute that under the circumstances here the county commissioners lacked discretion to enter into a collective bargaining agreement provision that conflicted with section 7-4-2510, MCA.

See also 42 Op. Att'y Gen. No. 37 (1987) ***and*** 38 Op. Att'y Gen. No. 20 (1979); ***cf.*** 38 Op. Att'y Gen. No. 116 (1980) ***and*** 37 Op. Att'y Gen. No. 113 (1978).

It is not seriously disputed that the County unilaterally changed the manner of computing the base salary and longevity of its sheriff's deputies in March 2004, following the opinion of the County Attorney that its previous methodology did not comport with the statutory provisions. A unilateral change in a condition of employment is an unfair labor practice, however, only if the unilateral change implicates a mandatory subject of bargaining. If a County has no authority to vary the base salary or longevity amounts established by law, those matters cannot be mandatory subjects of bargaining.

The collective bargaining agreement and the history of bargaining between the parties appear to recognize that compensation issues, other than the rank structure, are not within the scope of bargaining. The agreement states that deputies would be paid in accordance with a salary schedule that was not negotiated. Instead, the salary schedule was developed by applying a statutory formula, once the salary of the sheriff was established by the County. The agreement provides that longevity would be paid in accordance with statutory provisions. Even though the parties had a mutual misunderstanding concerning the interpretation of those statutes concerning pay for deputies, the County still had an obligation to pay the deputies according to law. Therefore, even though the County did unilaterally change the compensation methodology for the deputies, its action did not constitute an unfair labor practice.

In addition, even though the County could not bargain with the association over base salary and longevity, it demonstrated good faith in its dealings with the association. It did this by providing the basis for its opinions, meeting with representatives of the association, and affording the association an opportunity to provide legal authorities that would counter the conclusions of the County Attorney's office. Although the association believed that the County had agreed to obtain and should have obtained an opinion of the Attorney General on the compensation questions, the Attorney General had previously issued opinions on these issues, and the provisions of law in question had not changed since the earlier opinions. An opinion, therefore, would have been of limited value in resolving the questions at issue.

Ultimately, the question of whether the County was properly interpreting the statutes governing compensation for sheriff's deputies had to be resolved through the filing of wage claims, not through an unfair labor practice proceeding. Members of the association filed such claims, the related wage claims which have been addressed in a final agency decision issued October 3, 2005. Regardless of the status of those claims, the County did not commit an unfair labor practice.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this case. Mont. Code Ann. § 39-31-207.

2. A public employer may not refuse to bargain collectively in good faith on questions of wages, hours, fringe benefits, and other conditions of employment with an exclusive representative of its employees. Mont. Code Ann. §§ 39-31-305 and 39-31-401(5). An employer that makes unilateral changes during the course of a

collective bargaining relationship concerning wages, hours, fringe benefits, and other conditions of employment has refused to bargain in good faith. *NLRB v. Katz* (1962), 369 U.S. 736.

3. The issues of base salary and longevity pay for sheriffs' deputies in Montana are not mandatory subjects of bargaining about which an employer is obligated to bargain collectively, because those issues are statutorily determined.

4. Because base salary and longevity pay for sheriffs' deputies are not mandatory subjects of bargaining, Lewis and Clark County did not violate Mont. Code Ann. § 39-31-401 in March 2004 when it unilaterally changed the base salary and longevity pay for its sheriff's deputies.

VI. RECOMMENDED ORDER

The unfair labor practice charge is hereby dismissed.

DATED this 15th day of November, 2005.

BOARD OF PERSONNEL APPEALS

By: /s/ ANNE L. MACINTYRE
Anne L. MacIntyre, Hearing Officer
Department of Labor and Industry

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than December 8, 2005. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

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