STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 1-83:

LEWIS & CLARK COUNTY, Pulic Employer & Petitioner, -and- MONTANA PUBLIC EMPLOYEES' ASSOCIATION, Labor Organization.	))))))))))	FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDED ORDER

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On March 2, 1983 the above public employer filed this petition for unit clarification seeking to exclude "all chief deputy positions" from the existing unit. On March 29, 1983 the above labor organization filed an answer which admitted that the labor organization entered into a contract addendum "which excluded the chief deputies from the unit", but alleged that the chief deputies still retained "certain protections and conditions of employment".

A hearing was held on May 13, 1983, wherein the employer was represented by Duane Johnson and the labor organization was represented by Dave Stiteler. Initial briefs were filed by both parties on June 15, 1983 and reply briefs were filed by both parties on July 7, 1983. Based on the record and the briefs I make the following

FINDINGS OF FACT.

1. This unit was originally certified by the Board of Personnel Appeals in a 1976 Unit Determination. That unit, also described in the parties' current, 1983-85 collective bargaining agreement, is as follows: "Chief deputies and assistant deputies in the office of Clerk and Recorder, Auditor, Treasurer, and Clerk of Court; all probation officers in the Probation Department; all secretaries, bookkeepers, clerks, and stenographers, in the Courthouse of

Lewis and Clark County, Helena, Montana; excluding supervisors and managerial employees and any employee whose employment is less than a six month period or a temporary nature."

2. On September 27, 1978, the Lewis and Clark County Board of Commissioners on behalf of the employer and three other persons on behalf of the bargaining unit, two of whom are members of the bargaining unit, entered into a document entitled Memorandum of Agreement. Relevant portions of that contract read as follows:

> Lewis and Clark County and Lewis and Clark County Board of County Commissioners (hereinafter referred to as the County) and the Montana Public Employees' Association, Inc. (hereinafter referred to as the Association), hereby enter into the following agreement which shall be incorporated into the existing Courthouse collective bargaining agreement between the parties:
>
> 1. That the appropriate unit for purposes of Article 1, Section 2, of said Courthouse agreement, shall be hereinafter modified to exclude (1) "Chief Deputy" position in the offices of County Treasurer, County Auditor, County Clerk and Recorder and County Clerk of Court.

This Memorandum of Agreement was admitted as Employer's Exhibit Number Two at the hearing.

3. The parties have entered into a current collective bargaining agreement which covers the time period from 1983 to 1985 with a reopener for economic issues only for July 1, 1984.

ISSUES

1. Whether the chief deputies of the elected offices of County Clerk and Recorder, County Auditor, County Treasurer, County Clerk of Court, are in the existing bargaining unit?

2. Whether those same positions of chief deputies of the elected officials should by law be in the bargaining unit?

DISCUSSION

The Montana Public Employees' Association in its answer to this petition for unit clarification moved to dismiss the petition for lack of jurisdiction "since the unit has been modified by the parties in the course of bargaining and a valid collective bargaining agreement exists and is in full force and effect." The initial question before this hearing examiner is whether the chief deputies' positions are in the bargaining unit. That question appears to be conclusively answered by resort to the clear wording of the addendum entitled Memorandum of Agreement, wherein the chief deputies are clearly excluded from the bargaining unit. The employer argues that the addendum is an invalid contract primarily for two reasons: "First, since Board Rule 24.26.501(2) provides in pertinent part that labor agreements shall not exceed two years in duration and since the memorandum of agreement has been in existence since 1978, that the collective bargaining agreement is therefore defunct. Secondly, that the part of the agreement which incorporates into the existing Courthouse bargaining agreement between the parties is invalid on its face. The Act simply does not permit supervisors to be placed in bargaining units."

Addressing the employer's arguments on the invalidity of the contract in reverse order we see that the second argument presupposes the fact that the chief deputies are supervisors. That fact has not been established and for the reasons stated below will not be reached in this decision. Addendums to contracts which incorporate by reference those

addendums into the main collective bargaining agreement are a normal and customary addition to collective bargaining agreements and in no way can an addendum be said to be invalid on its face merely because it incorporates itself into another collective bargaining agreement. Concerning the employer's first argument on the invalidity of the contract, the employer cites rule 24.26.501(2) ARM, for the proposition that labor agreements shall not exceed two years in duration. Employer then concludes that labor agreements which contain a duration clause longer than two years, or no duration clause, are invalid. The above cited rule does not make a collective bargaining agreement with a longer duration clause illegal per se. We do not need to reach the question of whether the legislature gave the Board of Personnel Appeals authority to so rule. Rather the purpose of the rule is to allow Decertification (DC) petitions at least every 2 years. Clearly the 1978 addendum could not be used by itself to bar a DC petition. The rule does not render collective bargaining agreements with no duration clause illegal. No other arguments or authority have been given this hearing examiner which show that the addendum is otherwise illegal or invalid. Hence, the addendum is valid, and because no evidence, law or arguments were either introduced or made to the contrary, it is presumed that the addendum still modifies the current 1983-85 collective bargaining agreement between the parties.

Since the addendum is valid and is a part of the current 1983-85 collective bargaining agreement, then the addendum modifies the description of the bargaining unit contained in the main body of the collective bargaining agreement to exclude the chief deputies from the unit. Under these circumstances, the chief deputies are out of the unit.

The parties, Lewis and Clark County and the Montana Public Employees' Association, appear to have clearly bargained the chief deputies of the public officials in question out of the unit. The definition of the bargaining unit is a permissive subject of bargaining (NLRB v. Wooster Division of Board Warner, US Supreme Court, _____ U.S. _____, 42 LRRM 2034 at 2037, (1958)) and is therefore of course allowable. The bargained-for bargaining unit is generally allowed to stand even though it is different than the NRLB's designation of the bargaining unit pursuant to the Board's certification procedures. Douds v. Longshoremen's Association, (C.A. 2, 1957) 39 LRRM 2388. By virtue of the Act's definitions, the bargaining unit cannot contain supervisors either by agreement of the parties or by certification from the Board. Assuming arguendo that the chief deputies were in the unit and the chief deputies were supervisors under the standard test for supervisors, then this Board could not include them in the unit.

However, the question we are initially presented with is this, are the chief deputies in the unit? The parties have answered that question by clearly excluding the chief deputies from the bargaining unit by virtue of the addendum which is incorporated by reference into and becomes a part of the current collective bargaining agreement. The NLRB accepts as lawful the bargaining unit which the parties established by conventional agreement. Radio Corp. of America, 135 NLRB 980, 49 LRRM 1606 at 1607, (1962); General Motors Corp., 120 NLRB 1215, 42 LRRM 1143 at 1144 (1958). Similarly, where the NLRB has originally fixed the unit, it may be altered by agreement of the parties. Douds v. Longshoremen, supra.

It therefore appears that since the parties have bargained the chief deputies out of the unit and this Board by following NLRB precedent gives deference to the agreement, that we have no jurisdiction over those chief deputies or any other employees not in the bargaining unit. Thus it is my conclusion that the bargaining unit as described in the collective bargaining agreement including the 1978 addendum which excludes the chief deputies from the bargaining unit should stand as is.

A point raised by the Montana Public Employees' Association on page 3 of its June 15th, 1983 brief needs addressing. In that brief, the Montana Public Employees' Association asserts as follows:

> ....the Board of Personnel Appeals does not have jurisdiction to alter, amend or delete this addendum. The Board of Personnel Appeals has no authority to compel a party make an agreement or reach a concession, Section 39-31-305(2), MCA, and so has no authority to compel the parties here to delete this memorandum.

While it is true that this Board does not have the authority to compel any party during negotiations to make an agreement or grant a concession (39-31-305(2), MCA) the portion of the addendum addressing the recognition clause does not fall into that category. The distinction between normal subjects of bargaining and questions concerning the appropriateness of any given bargaining unit was addressed by the Second Circuit Court of Appeals in the case of Douds v. Longshoremen's Association, 39 LRRM 2388 at 2391. In that case the Second Circuit Court of Appeals held that:

> This duty [the duty to bargain in good faith] "does not compel either party to agree to a proposal", as Section 8(d) states, "or require the making of a concession", and the Board has no power to settle any of those questions. By way of contrast, it [the NLRB] not only has the power, but is indeed directed, to decide what is the appropriate bargaining unit in each case.

The NLRB determines the appropriate unit either by itself or in appropriate cases gives deference to the parties' bargained-for agreement which defines the bargaining unit. Here that is what this Board is doing, we are giving deference to the parties' bargained-for bargaining unit. And since the parties have bargained the allegedly supervisory chief deputies out of the unit, those same positions are not before us in this proceeding to review the appropriateness of the existing unit.

It should be remembered that the description of the bargaining unit even as modified by the addendum is a permissive subject of bargaining and can therefore be modified by the several contrasting methods available to modify a permissive subject.

The petitioner wants this Board to exclude the chief deputies from the unit. Chief deputies are already excluded from the unit by virtue of the addendum and the collective bargaining agreement. We therefore have no jurisdiction over the chief deputies in <u>this</u> proceeding. We therefore cannot rule them out of the unit because they are already out.

CONCLUSION OF LAW

For the above reasons this petition for unit clarification is dismissed.

RECOMMENDED ORDER

It is recommended that this petition for unit clarification be dismissed.

DATED this 16th day of August, 1984.

BOARD OF PERSONNEL APPEALS

By: Jim Gardner
JAMES E. GARDNER
Hearing Examiner

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of this Recommended Order was served upon the following on this 16th day of August, 1984, postage paid and addressed as follows:

Dave Stiteler
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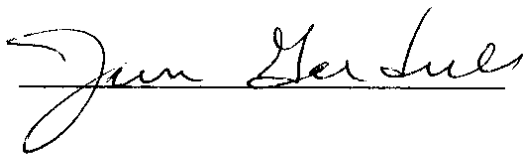

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