

**IN THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT**

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**Appeal No. ED95131**

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**AMERICAN FEDERATION OF TEACHERS; LOCAL 420 OF THE AMERICAN  
FEDERATION OF TEACHERS; MARY ARMSTRONG; and, BYRON CLEMENS**

**Plaintiffs/Appellants,**

**v.**

**RICHARD LEDBETTER; PAUL SHAUGHNESSEY; GERALD HUTCHINSON;  
HATTIE JACKSON; TERRY NELSON; DON POHL; TRIP ZUMWALT; JOHN  
COSTELLO; and THE BOARD OF EDUCATION OF THE CONSTRUCTION  
CAREER CENTER CHARTER SCHOOL DISTRICT**

**Defendants/Respondents.**

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**BRIEF OF PLAINTIFFS/APPELLANTS**

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**SCHUCHAT, COOK & WERNER**

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## **JURISDICTIONAL STATEMENT**

The jurisdiction of the Trial Court was invoked pursuant to Section 527.010 R.S.Mo. in that the Appellants sought to have the rights of Appellants and Respondents declared as to whether Respondents' actions in bargaining collectively with Appellants concerning wages, hours and conditions of employment of teachers employed by Respondents were in bad faith and, therefore, in violation of Article I, Section 29 of the Constitution of the State of Missouri which guarantees the right of employees to bargain collectively with their employers through representatives of their choosing.

This Court has jurisdiction over this appeal pursuant to Article V, Section 3 of the Constitution of the State of Missouri which provides for the general appellate jurisdiction of this Court.

## **STATEMENT OF FACTS**

### **A. The Trial Court's Findings of Fact.**

The facts are not disputed. The case was decided by the Trial Court on a stipulated record and facts. On that record the Trial Court found:

Plaintiffs/Appellants are two unincorporated labor organizations and two individuals. (Legal File at 70, hereafter "L.F. at \_"). Plaintiff Armstrong is a member and president of Plaintiff American Federation of Teachers, St. Louis ("AFT-St. Louis"); Plaintiff Clemens is a member and vice-president of Plaintiff AFT-St. Louis. (L.F. at 70). The trial court inferred that Plaintiffs are members of Plaintiff American Federation of Teachers, a national organization. (L.F. at 70). The trial court found that there was no question that the individual Plaintiffs will fairly and adequately protect the interests of their associations pursuant to Mo. R. Civ. Pro. 52.10. (L.F. at 70 - 71).

Defendants/Respondents are the Construction Career Center, a charter school organized under Missouri law, and the members of the board of the Construction Career Center. (L.F. at 71). In March 2008, Defendants formally recognized Plaintiff labor organizations as the bargaining representative of all teachers and certified personnel employed by Defendants. (L.F. at 71). Plaintiffs and Defendants then proceeded to negotiate a collective bargaining agreement. (L.F. at 71). Although Defendants unilaterally established salary and benefits for the bargaining unit employees for the 2008-09 academic year, the parties continued to negotiate. (L.F. at 71). The negotiators reached a tentative agreement (stipulation ex. B) as to all issues except salaries in January

2009, but both parties recognized that the agreement was subject to ratification by Plaintiffs' local membership and Defendant board members. (L.F. at 71).

The labor negotiations were discussed by Defendant board members at closed meetings in January, February and March 2009. (L.F. at 71). Advance notice of the meetings and tentative agenda was posted at Defendants' meeting place, 24 hours in advance. (L.F. at 71). Notice of the reason for closed meetings was included. (L.F. at 71). No roll call vote was recorded on any motion to close the meetings, but Defendants' minutes reflect both the board members who were present and that the motion to close the meeting was approved unanimously. (L.F. at 71).

Defendant board members unanimously rejected the tentative labor agreement at a closed meeting on February 17, 2009, and instructed their negotiators to present a revised proposal to Plaintiffs. (L.F. at 71 - 72). On March 30, 2009, Defendants resolved not to negotiate teacher tenure matters with Plaintiffs and unilaterally adopted teacher salaries for the 2009-10 academic year. (L.F. at 72). No recorded roll-call votes were taken on the motions on February 17 or March 30. (L.F. at 72).

**B. Additional facts stipulated to by the parties.**

In addition to the facts found by the Court, the parties stipulated to the following facts. (L.F. 27 - 35). The parties had reached tentative agreement on non-economic terms of a contract in November 2008, only to have Defendants withdraw their agreement to the terms covering "just cause" for the termination of teachers. (L.F. at 30 - 31). Thereafter, prior to January 20, 2009, Defendants' chief negotiator represented to Plaintiffs that he

had circulated to all of the then members of the Defendant Board of Education a modified tentative agreement that had been reached with Plaintiffs and that the only issue left for negotiations was salary and extra duty pay. (L.F. at 31).

On January 20, 2009 representatives of the Defendants agreed that within a week they would provide their salary and extra pay proposal in writing, and the representatives of the Plaintiffs communicated to Defendants that they intended to present the tentative agreement along with the wage offer to the teachers represented by the Plaintiffs for a ratification vote. (L.F. at 32). Instead of doing as they had represented to Plaintiffs' representatives, Defendants never made a wage proposal and rejected the proposed tentative agreement on February 17, 2009. (L.F. at 32).

Defendants met in executive session on March 30, 2009 and resolved not to bargain with Plaintiffs over the subject of teacher tenure. (L.F. at 33). At that same meeting the Defendants adopted teacher salaries for the 2009-2010 school year even though Defendants had met with the representatives of the Plaintiffs on March 19, 2009 and had made no proposal to Plaintiffs regarding salaries for the 2009-2010 school year. (L.F. at 33). Representatives of Defendants met again with Plaintiffs' representatives on March 31, 2009, the day after unilaterally adopting salaries, and did not mention or propose salaries for the 2009-2010 school year. (L.F. at 33). During a meeting on April 9, 2009 the Defendants announced that they were proposing teachers' salaries for the 2009-2010 school year and that contracts would be presented to teachers the next day. (L.F. at 34).



**POINTS RELIED ON**

**I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFFS IN THAT THE TRIAL COURT ERRONEOUSLY DECLARED THE LAW WHEN IT DECLARED THAT DEFENDANTS HAVE NO DUTY TO BARGAIN IN GOOD FAITH WITH PLAINTIFFS AND THE PLAINTIFFS HAVE NO RIGHT TO COMPEL DEFENDANTS TO DO SO BECAUSE PLAINTIFFS HAVE A CONSTITUTIONAL RIGHT TO BARGAIN COLLECTIVELY WITH DEFENDANTS AS PROTECTED BY ARTICLE 1, SECTION 29 OF THE CONSTITUTION OF MISSOURI, AND DEFENDANTS HAVE A CORRESPONDING DUTY TO BARGAIN COLLECTIVELY WITH PLAINTIFFS.**

## ARGUMENT

**I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFFS IN THAT THE TRIAL COURT ERRONEOUSLY DECLARED THE LAW WHEN IT DECLARED THAT DEFENDANTS HAVE NO DUTY TO BARGAIN IN GOOD FAITH WITH PLAINTIFFS AND THE PLAINTIFFS HAVE NO RIGHT TO COMPEL DEFENDANTS TO DO SO BECAUSE PLAINTIFFS HAVE A CONSTITUTIONAL RIGHT TO BARGAIN COLLECTIVELY WITH DEFENDANTS AND TO COMPEL DEFENDANTS TO BARGAIN IN GOOD FAITH AS PROTECTED BY ARTICLE 1, SECTION 29 OF THE CONSTITUTION OF MISSOURI, AND DEFENDANTS HAVE A CORRESPONDING DUTY TO BARGAIN COLLECTIVELY WITH PLAINTIFFS.**

**A. Standard of Review.**

The case was tried to the court on a stipulation of fact. The standard of review is *de novo* as Appellants seek review of the trial court's legal conclusions drawn from the stipulation of fact. In a court tried case upon a stipulation of facts, the only question before a reviewing court is whether the trial court drew the proper legal conclusions from those facts. *Schroeder v. Horack*, 592 S.W.2d 742, 744 (Mo. banc 1979); *Western Cas. & Sur. Co. v. Kohm*, 638 S.W.2d 798, 799 (Mo. App. 1982).

**B. The trial court erred by holding that Article I, Section 29 of the Missouri Constitution does not require public employers to bargain with its employees' representative because *Independence-National Education Association et. al v. Independence School District*, 223 S.W.3d 131 (Mo. 2007) is applicable to Plaintiffs' claims rather than *Quinn v. Buchanan*, 298 S.W.2d 219 (Mo. banc 1957).**

Article I, Section 29 of the Missouri Constitution provides: "employees shall have the right to organize and to bargain collectively through representatives of their own choosing." The holding in *Independence-National Education Association et. al v. Independence School District* makes clear that Article I, Section 29 applies to public employees, and that a public employer in Missouri may not refuse to bargain collectively with its employees' representatives. *See* 223 S.W.3d 131, 133 (Mo. 2007).

In *Independence*, the employer school district acknowledged that its unilateral adoption of new terms and conditions of employment constituted a refusal to bargain collectively with the employee associations that represented groups of its employees. *Id.* at 134. It was undisputed that the employer did not meet and confer with the employee associations or obtain their consent before imposing the new terms and conditions of employment. *Id.* at 134 - 135. There was, therefore, no question in *Independence* that an employer violates Article I, Section 29 if it explicitly refuses to bargain with its employees' representatives.

In the present case, the trial court found, and it is undisputed, that after January 20, 2009 the Defendants: 1) unilaterally imposed contract terms; 2) refused to bargain over

teacher tenure and any other term that Defendants unilaterally deemed to be “policy”; and, 3) endeavored to bypass Plaintiffs and deal directly with the employees represented by Plaintiffs. (L.F. at 72). After finding that Defendants’ conduct would have constituted a failure to bargain in good faith under federal labor law, the trial court declared that, “nothing in the language of Mo. Const. Art. I, Sec. 29 imposes any duty on the employer to bargain.” (L.F. at 72). Going further, the court declared: “The employees have a right to select a collective bargaining representative, but the constitutional provision simply imposes no duty on the employer even to “meet and confer” with that representative.”

Relying on *Quinn v. Buchanan* the trial court held that the Defendants have no duty to bargain with the Plaintiffs, in good faith or otherwise. *See* 298 S.W.2d 413 (Mo. banc 1957). The trial court declared that *Quinn* foreclosed the Plaintiffs’ arguments and that the Plaintiffs have no right to compel Defendants to bargain with them. (L.F. at 78). Thus, the trial court held that the Defendants could unilaterally refuse to negotiate over salaries, teacher tenure and any other subject they deemed “policy,” and such refusal did not violate Plaintiffs’ rights as guaranteed by Article 1, Section 29 of the Missouri Constitution. The court’s reliance on *Quinn* is misplaced. Moreover, the entry of judgment declaring that Plaintiffs have no right to compel Defendants to bargain in good faith is clearly wrong in light of the holding in *Independence*.

In *Independence* the trial court found that the employer school district refused to bargain collectively with the unions, but concluded that Missouri law allowed such action and entered judgment for the district. *Independence*, 223 S.W.3d at 134 - 135. The

unions in *Independence* argued that the employer school district violated Article I, Section 29 of Missouri’s Constitution by refusing to bargain collectively with the representatives of their employee association. *Id.* The Missouri Supreme Court agreed reversed the trial court, and remanded the matter holding, “Article I Section 29's guarantee that employees have ‘the right to bargain collectively’ is clear and means what it says.” *Id.* at 141. Therefore, to the extent that *Quinn* held that Article I, Section 29 does not require public employers to collectively bargain with its employees, that holding was implicitly overruled by the Court in *Independence*.

Further, *Quinn* is not applicable to the case at bar. *Quinn* did not involve a public employer, but instead a private business, an important distinction noted by the Court in *Quinn*. 298 S.W.2d at 416. Article I, Section 29 could not be applied to the conduct of private persons without action by the legislature, but as to governmental action the provision is self-executing and any governmental action in violation of the declared right is void. *Id.* at 418-419. It was for that reason that the court pointed out that legislative action was necessary before the courts of Missouri could compel Buchanan, a private employer, to bargain with its employees’ union. Here, the employer is a public employer and its actions, like those of the school district in *Independence*, are governmental actions that are void and violate the provisions of the Missouri Constitution.

**C. The Defendants violated Article I, Section 29 of the Missouri Constitution when they engaged in conduct designed to thwart and frustrate the**

**collective bargaining process because such conduct amounts to a refusal to bargain collectively with the representatives of its employees.**

There is no question following the Missouri Supreme Court's decision in *Independence* that a public employer cannot affirmatively refuse to bargain with its employees' representative. In the present case, the issue before this Court is whether a public employer violates Article I, Section 29 of the Missouri Constitution when it agrees to bargain and does meet with its employees representatives, but engages in conduct with the intent to avoid reaching an agreement. The trial court found that the Defendants engaged in conduct intended to frustrate collective bargaining and to avoid reaching agreement with Plaintiffs, but that such conduct did not violate Article I, Section 29. (L.F. at 72, 78). Plaintiffs assert that the trial court erred when it held that the Defendants' undisputed conduct did not violate Article I, Section 29. The point of bargaining is to reach agreement. *Independence*, 223 S.W.3d at 138. While nothing requires either party to reach agreement, it is clear from the holding in *Independence* that Defendants cannot refuse to bargain collectively with Plaintiffs regarding wages, hours, and conditions of employment. *Independence, Id.* at 139.

In the present case, the public employer refused to bargain collectively when it: 1) unilaterally declared that it would not bargain over subjects that are clearly wages, hours, or other conditions of employment and thereafter met but refused to discuss those subjects; 2) unilaterally imposed salaries on employees without reaching impasse; and 3)

bypassed the collective bargaining representative and endeavored to bargain directly with the employees. The fact that the Defendants engaged in such conduct is not disputed.

Plaintiffs do not contend that either party is under any obligation to agree to terms or enter into an agreement. Plaintiffs also agree that Missouri law allows a public employer to engage in hard bargaining and that an employer is not required to agree or even make concessions. Rather, Plaintiffs contend that the Defendants engaged in a course of conduct that demonstrated that they never intended to reach an agreement, were negotiating in a manner to avoid reaching an agreement, and by doing so Defendants refused to bargain collectively with its employees' representative in violation of Article 1, Section 29. The trial court agreed that Defendants did not negotiate with an intent to reach an agreement but held that, in spite of that fact, Plaintiffs could not compel Defendants to negotiate in good faith because the trial court erroneously declared no such duty existed under Missouri law.

The right of employees to organize and bargain collectively through the representatives of their choosing would be hollow and meaningless if a public employer could defeat that right by engaging in conduct designed to thwart negotiations. The right of employees to engage in collective bargaining through the representatives of their choosing has, in the United States, traditionally been paired with a requirement prohibiting parties from engaging in conduct which would render the process meaningless, or frustrate the possibility of agreement. "The bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by

bluntly withholding recognition. \* \* \* The concept of “good faith” was brought into the law of collective bargaining as a solution to this problem.” Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1413 (1958). Collective Bargaining is a process that exists in this country only as a creation of law, and was otherwise unlawful. *Independence*, 223 S.W.3d at 139. In this case, the duty to recognize employee representatives and to bargain collectively with those representatives is imposed on a governmental agency by the people of Missouri through their constitution.

As a general rule a person has no legal duty to bargain with an individual employee or any other person or entity with whom they do business. One may choose with whom and over what subjects to bargain, or may choose not to bargain at all without interference from government. The duty to bargain collectively with the representatives of one’s employees is imposed by law and is not a matter of the mere consent or convenience of the parties. Collective bargaining is a creation of the law abrogating the common law that made agreements among employees to bargain collectively illegal. *Hitchman Coal & Coke Co. V. Mitchell*, 245 U.S. 229, 250-251 (1917); *Independence*, 223 S.W.3d at 139. As a result, an employer most often engages in collective bargaining because it is so compelled by law, not because it perceives collective bargaining to be in its self-interest. While an employer may meet with its employees’ representative, it can easily defeat the real purpose of the obligation to bargain by conduct designed to stall, thwart or otherwise frustrate the process. As Professor Cox pointed out, it is for that reason that federal labor law (which imposes a duty on an employer to recognize

employee representatives and bargain collectively) has, from its inception in 1935, prevented an employer from acting in bad faith to avoid its legal obligation. *Cox, Supra* at 1411. This interpretation was affirmed in 1947 when Congress added Section 8(d) to the NLRA. *Id., citing* 29 U.S.C. § 158(d).

Like Article I, Section 29, nothing in the text of the National Labor Relations Act (“NLRA”) originally prohibited bargaining in bad faith - or conversely mentioned a duty to bargain in good faith - regarding wages, hours and conditions of employment. Since 1935, Section 7 of the NLRA, 29 U.S.C. Section 157, has provided that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 8(a)(5) of the NLRA makes it unlawful for an employer to “refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). Yet, despite the fact that there is no statutory language requiring, or even referencing, a duty to bargain in good faith prior to the 1947 Taft-Hartley Act, it has been settled federal law for more than seventy-five (75) years that the duty to bargain collectively with the representative of one’s employees included the duty to bargain in good faith with a “*bona fide* intent to reach an agreement.” *See Bell Oil and Gas Co.*, 1 NLRB 562, 1 LRRM 16 (1935); *Atlas Mills* 3 NLRB 10, at 21, 1 LRRM 60 (1937); and *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940).

From the outset the National Labor Relations Board (the “NLRB”) made clear that collective bargaining is something more than the mere act of an employer meeting with representatives of its employees. “[T]he essential thing is rather the serious intent to adjust grievances and reach acceptable common ground.” *First Annual Report of the National Labor Relations Board*, 1 NLRB Ann. Rep. at 85 (1936), *citing Canton Enameling & Stamping Co.*, 1 NLRB 402, 1 LRRM 9 (1936). Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of “take it or leave it.” Rather, collective bargaining presupposes a desire to reach ultimate agreement to enter into a contract. *See Heinz Co. v. NLRB*, 311 U.S. 514 (1941).

By the time the Missouri Constitution was adopted in 1945, it was settled federal labor law that the duty to bargain collectively included the duty to bargain in good faith. Had the Missouri Constitution intended the right of employees to bargain collectively through representatives of their choosing to be something less than that established in federal law, the drafters at the constitutional convention would have adopted different language. Instead, the language of Article 1, Section 29 appears to have been taken directly from Section 7 of the NLRA. Both Article 1, Section 29 and Section 7 of the NLRA guarantee and protect the right “to bargain collectively through representatives of their own choosing.” While the language differs as to other rights, the language used in Article I, Section 29 to describe the right to engage in collective bargaining is identical to that used in Section 7 of the NLRA. The use of this language in the Missouri

Constitution was not random or coincidental. It was an expression of an intent to adopt a system of collective bargaining established for more than a decade in federal law.

Defendants in this case engaged in precisely the conduct prohibited by federal labor law from the outset of its enforcement in 1935. Specifically, while meeting with the Plaintiffs, the Defendants refused to bargain over terms of employment and unilaterally implemented terms over which Plaintiffs sought to bargain. The fact that the Defendants engaged in such conduct while meeting with the Plaintiffs does not distinguish this case from the *Independence* case. The communication in person of one's refusal to bargain over a condition of employment is not materially different from doing so by letter or other method. Defendants did not meet their duty to bargain collectively with Plaintiffs simply because the Defendants met with Plaintiffs and then refused to bargain over certain terms and conditions of employment. The physical location of the parties does not change the fact that Defendants refused to engage in collective bargaining. Such conduct is not only inconsistent with the concept of collective bargaining as it is understood today, it is certainly inconsistent with the understanding of that term at the time Article 1, Section 29 was proposed and adopted by the people of Missouri.

Without the right to compel an employer to bargain in good faith or to prohibit an employer from bargaining in bad faith, the right to bargain collectively as announced in *Independence* is reduced to the mere right to compel an employer to attend a meeting where the employees could, through a union, petition their employer for redress of their grievances. The employer could then choose to implement any, all or none of the

employees proposals or simply do as it chose with no consequence. Public employees had that right before *Independence* and had that right without Article I, Section 29. *City of Springfield v. Clouse*, 206 S.W.2d 539, 542 (Mo. banc 1947). The trial court's declaration shrinks the right to bargain collectively back to the limited right to petition the government pursuant to the First Amendment of the United States Constitution and Article 1, Sections 8 and 9 of the Missouri Constitution. That right was all that was recognized for employees by the Supreme Court in *Clouse*.

*Clouse* recognized that Article 1, Section 29 was drafted for a different purpose than the provisions of the First Amendment and Article I, Sections 8 and 9, and that Article I, Section 29 was intended to provide different rights. According to the Court in *Clouse*:

Undoubtedly Section 29 had a different purpose. It was intended to safeguard collective bargaining as that term was usually understood in employer and employee relations in private industry. It is in the exact language of the National Industrial Recovery Act of 1933 (48 Stat. 195, 198, Chap. 90, Sec. 7(a)(1)) the stated purpose of which was "promoting the organization of industry . . . to induce and maintain united action of labor and management." It is substantially the same as Section 7 of the NLRA, 29 U.S.C. § 157, which was adopted for the purpose of compelling collective bargaining in private industry and which specifically excluded public employees. 29 U.S.C.A. § 152. Thus the principal purpose of Section 29

was to declare that such rights of collective bargaining were established in this state. It means that employees have the right to organize and function for a special purpose: namely, for the purpose of collective bargaining. Surely the real purpose of such bargaining is to reach agreements and to result in binding contracts between unions representing employees and their employer.

*Clouse*, 206 S.W.2d at 543.

It was precisely because the right to engage in collective bargaining was much broader than the right to petition the government that the court in *Clouse* held that such a process violated the nondelegation doctrine rejected by *Independence*. *Id.* at 138; *Independence*, 223 S.W.3d at 135 - 136.

In addition to the historical context and plain language which supports a finding that Defendants' conduct in this case violated Article 1, Section 29, it would be nonsensical to grant a constitutional right to bargain collectively only to let an employer render that right meaningless by acting in bad faith throughout the process. The Missouri Supreme Court in *Independence* held that Missouri public employers have a duty to bargain collectively with their employees' representative, and while the employers have no duty to agree, they are bound by any agreements reached through the process. *Independence*, 223 S.W.3d at 140. In so holding, the Court pointed out that "(t)he point of bargaining is to reach agreement." *Id.* at 138. It would be an absurd result to recognize the right of employees to bargain collectively only to allow that right to become

meaningless by allowing either party to engage in conduct to make the process of bargaining a sham.

Defendants are the Board of Education of a charter school which exists pursuant to state statute and is funded with taxes collected from the public. Defendants concede that they are governed by Missouri law, including Article 1, Section 29. As public officials, they can not be allowed to act in bad faith while carrying out a duty imposed upon them by the Missouri Constitution.

The trial court found that Defendants, through their representatives, engaged in a course of conduct intended to frustrate the process of collective bargaining, thereby bargaining in bad faith. Bad faith in bargaining is typically determined from a party's conduct at or away from the bargaining table because a party rarely articulates an intent to thwart agreement. In order to determine whether a party has bargained in bad faith, the NLRB evaluates the "totality of the circumstances." *Barry-Wehmiller Co.*, 271 NLRB 471, 472, 116 LRRM 1496 (1984); *Summa Health Sys., Inc.*, 330 NLRB 1379, 170 LRRM 1308 (2000). Plaintiffs believe that the "totality of the circumstances" is the appropriate test in this case.

In the instant case the facts are undisputed. The Defendants on two occasions unilaterally implemented salary proposals over the objections of the Plaintiffs during negotiations. Such unilateral changes alone are *per se* violations of the duty to bargain in good faith. *NLRB v. Katz*, 369 U.S. 736 (1962). In addition, a unilateral change in wages is a strong indication of the employer's intent to fail to bargain in good faith. *Hyatt Corp.*

*v. NLRB*, 939 F.2d 361 (6<sup>th</sup> Cir. 1991). Likewise, injecting new issues at an advanced stage of bargaining is evidence of a bad faith intent. *Yearbook House*, 223 NLRB 1456, 92 LRRM 1191 (1976).

There is no dispute that after nine (9) months and more than a dozen meetings, the Defendants unilaterally decided not to bargain over teacher tenure or any other matter they unilaterally deemed to be policy. In addition, despite a promise in August 2008 to bargain over the 2008-2009 salaries, and two separate promises to give a final proposal on 2008-2009 salaries within a week, neither promise was ever kept. Ultimately, the Defendants simply announced that no such proposal would be made. Finally, Defendants adopted salaries for the 2009-2010 school year on the evening of March 30, 2009. The next day two of the Defendants attended negotiations with Plaintiffs' representatives, and never disclosed that the 2009-2010 salaries had already been adopted. A week later, on April 7, 2009, the Defendants' representatives submitted the adopted salaries as a proposal, and announced for the first time that the salaries would be implemented the next day. While the Defendants waited a week, they once again imposed the salaries unilaterally.

The totality of the circumstances demonstrate that Defendants engaged in actions both at and away from the negotiation table that establish an intent not to reach agreement. On both occasions in which the parties agreed to present the salary proposals to the board and the bargaining unit for ratification, the Defendants either unilaterally

withdrew agreed upon language from the proposal, or simply did not make a salary proposal.

Defendants' conduct demonstrated a clear intent to avoid agreement with the Plaintiffs regarding wages, hours and other terms and conditions of employment. That intent is inconsistent with the Defendants' duty to bargain collectively with the representatives of their employees. The trial court concluded that Defendants had engaged in bargaining in bad faith, but held that, no matter how egregious the conduct, the Plaintiffs had no remedy under Article 1, Section 29 because the Defendants had no duty to bargain in good faith with Plaintiffs. The trial court then erroneously declared that Plaintiffs had no right to compel Defendants to do so. (L.F. 78).

By refusing to recognize that the right to bargain collectively provides Plaintiffs with the right to compel the Defendants to bargain in good faith, or to prohibit Defendants from bargaining in bad faith, the trial court has ignored the holding in *Independence* and applied the holding in *Clouse*. In limiting Plaintiffs' rights to mere recognition as the exclusive bargaining representative of Defendants' teachers, Plaintiffs' right to represent public employees is limited to simply bringing their views and desires to a public officer as provided by *Clouse*. Clearly, the right to engage in collective bargaining pursuant to Article I, Section 29 requires an employer to do more than meet and listen to the views and desires of its employees. The Supreme Court in *Clouse* recognized that, but for the nondelegation doctrine, Article I, Section 29 compelled public employers to engage in

collective bargaining as that term is generally understood. The *Independence* decision removed the nondelegation doctrine as an impediment to collective bargaining.

## CONCLUSION

Article I, Section 29 provides public employees the right to engage in collective bargaining through the representative of their choosing. For that right to have any meaning a public employer must be required to refrain from engaging in conduct for the purpose of frustrating the right to engage in the collective bargaining process. The trial court erred when it entered judgment for Plaintiffs but erroneously declared that Defendants have no duty to bargain in good faith and that Plaintiffs had no right to compel Defendants to do so. The holding in *Independence-National Educational Association. v. Independence School District*, 223 S.W.3d 131, 133 (Mo. 2007) provides that public employees have the right to engage in collective bargaining. The judgment of the trial court declaring that Defendants have no duty to bargain in good faith with Plaintiffs and that Plaintiffs had no right to compel Defendants to do so must be reversed with instructions that the trial court enter judgment for Plaintiffs declaring that Defendants have a duty to bargain with Plaintiffs in good faith and enjoining Defendants from failing to do so.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

The undersigned certifies that:

- (1) this brief contains the information required by Rule 55.03;
- (2) this brief complies with the limitations contained in Rule 84.06(b);
- (3) there are 5,132 words in this brief;
- (4) the CD containing a copy of this brief filed contemporaneously herewith has been scanned for viruses and is virus free.

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George O. Suggs

## **CERTIFICATE OF SERVICE**

The undersigned certifies that on January 20, 2011 a copy of Plaintiffs/Appellants' Brief was served by First Class Mail, Postage Pre-Paid upon: Darold E. Crotzer, Jr., and Cindy Reeds Ormsby, Crotzer & Ormsby, 130 South Bemiston, Suite 300, Clayton, MO 63105, Attorneys for Defendants/Respondents.

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