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JURISDICTIONAL STATEMENT

The jurisdiction of the Trial Court was invoked pursuant to Section 536.150 R.S.Mo. in that the Appellants sought review of an administrative decision in a noncontested case. The Petition for review alleged that the Board of Education of the City of St. Louis (SLPS) had violated Sections 168.281 and 168.291 R.S.Mo. and breached an agreement reached with IUOE Local 2 pursuant to Section 105.520 R.S.Mo. by unilaterally changing the terms of that agreement before the expiration of its term, and thereafter placing Plaintiffs on leave of absence without pay and subcontracting with a third party to perform the work previously performed by the Plaintiffs.

This Court has jurisdiction over this appeal pursuant to Article 5, Section 3 of the Constitution of the State of Missouri which provides for general appellate jurisdiction in this Court.

STATEMENT OF FACTS

Defendant is the Board of Education of the City of St. Louis and is vested with the supervision and government of public schools within a metropolitan school district as set forth in Section 162.561 R.S.Mo. Defendant is an administrative body existing by virtue of Missouri statute. (A-2)

All of the Plaintiffs were employed by the Defendant as stationary engineers at the time of the filing of their Petition. All Plaintiffs have completed more than one year of employment with the Defendant as non-certificated employees and as a result all were permanent employees pursuant to Section 168.281 R.S.Mo. (A-2)

The Plaintiffs were employed by the Defendant as stationary engineers. As stationary engineers, the Plaintiffs maintained and operated the nine (9) high pressure boilers owned by the Defendant as well as several complex low pressure boilers. Under Ordinance 65021 of the City of St. Louis, the Defendant is required to have licensed stationary engineers maintain and operate its nine (9) high pressure boilers. (A-2, A-3)

Plaintiffs are all members of the collective bargaining unit represented in regard to wages, hours, and working conditions by the International Union of Operating Engineers Local 2, hereinafter referred to as Local 2, a labor organization within the meaning of Section 105.520 R.S.Mo. On July 1, 2003 Local 2 and Defendant reached an agreement that was adopted by Defendant as a Policy Statement with a term through June 30, 2008. (A-2)

On July 12, 2005 the Defendant, by a majority vote and without the consent of Local 2, changed the Policy Statement to allow persons other than Plaintiffs to perform the work previously reserved for the Plaintiffs. At that same time Defendant decided to place the Plaintiffs on leave of absence without pay and to allow a third party, Sodexo, to perform the work previously performed by Plaintiffs. Subsequently, Plaintiffs were informed by the Defendant that they would be paid through July 31, 2005. After that date their work would be outsourced to a third party, Sodexo. As a result Plaintiffs were placed on leave of absence without pay on August 1, 2005. After July 31, 2005 the Plaintiffs will not receive wages or fringe benefits from the Defendant nor would Plaintiffs be allowed to participate in the retirement system established for employees of the Defendant. (A-2, A-3, A-4)

Persons employed by Sodexo performed the duties previously performed by the Plaintiffs from and after August 1, 2005 as a result of the work being outsourced to Sodexo by the Defendant. (A-4, A-6)

The Defendant was at all relevant times a Financially Stressed District as identified by the Missouri Department of Elementary and Secondary Education pursuant to Section 161.520 R.S.Mo. and was projected to have a fund deficit of \$23.5 million as of June 30, 2006. Annual savings from the outsourcing of the duties of the Plaintiffs as well as custodial jobs is \$233,000. (A-4, A-5)

POINTS RELIED ON

POINT RELIED ON I

THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE DEFENDANT ST. LOUIS METROPOLITAN PUBLIC SCHOOLS, (SLPS) BECAUSE PLAINTIFFS WERE ENTITLED TO A PERMANENT INJUNCTION IN THAT PLAINTIFFS WERE PERMANENT EMPLOYEES AND THE SLPS HAD PLACED THEM ON LEAVE OF ABSENCE WITHOUT PAY AND ALLOWED OTHERS TO PERFORM THEIR WORK IN VIOLATION OF SECTIONS 168.281 AND 168.291 R.S.Mo.

POINT RELIED ON II

THE TRIAL COURT ERRED IN ENTERING JUDGEMENT IN FAVOR OF THE ST. LOUIS METROPOLITAN PUBLIC SCHOOL DISTRICT (SLPS) BECAUSE THE TRIAL COURT HELD THAT SLPS COULD UNILATERALLY ALTER THE TERMS OF AN AGREEMENT REACHED PURUSANT TO SECTION 105.520 R.S.MO. WITH IUOE LOCAL 2 IN THAT SUCH AGREEMENTS ARE BINDING UPON THE PARTIES AND CANNOT BE UNILATERALLY ALTERED BY SLPS.

POINT RELIED ON I

ARGUMENT

THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE DEFENDANT ST. LOUIS METROPOLITAN PUBLIC SCHOOLS, (SLPS) BECAUSE PLAINTIFFS WERE ENTITLED TO A PERMANENT INJUNCTION IN THAT PLAINTIFFS WERE PERMANENT EMPLOYEES AND THE SLPS HAD PLACED THEM ON LEAVE OF ABSENCE WITHOUT PAY AND ALLOWED OTHERS TO PERFORM THEIR WORK IN VIOLATION OF SECTIONS 168.281 AND 168.291 R.S.Mo.

The Administrative Procedure Act that provides that the Court in a non-contested case may determine whether the agency's decision is unlawful as well as arbitrary or capricious or unreasonable. Section 536.150 R.S.Mo. In a non-contested case the Court makes a de novo determination of both the facts and the law. *MNEA v. Missouri Board of Education, 34 S. W. 3d 266 (Mo. App. 2000)*.

Defendant is empowered with the general supervision and governance of the public schools in the City of St. Louis by Section 162.571 R.S.Mo. Chapter 168 R.S.Mo. places limitations on the power of the Defendant as the employer of certain classes of employees by the Defendant. Specifically, Sections 168.211 R.S.Mo. through 168.291 R.S.Mo. restrict the discretion of the Defendant, a metropolitan district, with regard to its employees from the employment of the

superintendent down to noncertificated employees such as the Plaintiffs. In Chapter 168 the legislature chose to limit the powers otherwise granted Defendant in Chapter 162 that might otherwise have allowed Defendant treat its employees as “at will” employees.

As a metropolitan school district, Sections 168.251 through 168.291 regulate the employment of noncertificated employees by Defendant. The extent to which Section 168.281 and Section 168.291 limit the power of a metropolitan school district to place noncertificated permanent employees on unpaid leaves of absence and outsource the work of those employees to third parties is at issue here. The issue appears to be a matter of first impression.

Plaintiffs are all permanent noncertificated employees within the meaning of Section 168.251. As such, the Plaintiffs enjoy the protection of Section 168.281 that provides that they cannot be terminated from employment except for the reasons set forth in that section, and then only after the completion of the due process requirements contained in the statute. Defendant does not contend that any of the Plaintiffs have been terminated for cause under the provisions of Section 168.281. Since there is no contention that Plaintiffs were terminated for cause, Section 168.291 is the controlling law.

Section 168.291 provides:

Whenever it is necessary to decrease the number of employees because of insufficient funds or decrease in pupil enrollment or lack of work the board of education may cause the necessary number of employees, beginning

with those serving probationary periods, to be placed on leave of absence without pay, but only in the inverse order of their appointment. Each employee placed on leave of absence shall be reinstated in inverse order of his placement on leave of absence. Such reemployment shall not result in a loss of status or credit for previous periods of service. No new appointments shall be made while there are available employees on leave of absence who have not attained the age of seventy years and who are adequately qualified to fill the vacancy in the particular department unless the employees fail to advise the board within thirty days from date of notification by the board that positions are available to them, that they will return to employment, and will assume the duties of the position to which they are appointed not later than the beginning of the month following the date of the notice by the board.

Section 168.291 dovetails with Section 168.281 in that both allow the reduction in the number of employees only “because of insufficient funds or decrease in pupil enrollment or lack of work,” and Section 168.281 provides for termination for misconduct. No other basis for reduction in the number of permanent noncertificated employees is allowed by either Section. In that there is no finding that Plaintiffs were terminated for misconduct under Section 168.281, Plaintiffs may only be displaced “because of insufficient funds or decrease in pupil enrollment or lack of work”.

In its Resolution of July 12, 2005 wherein it decided to outsource the work of the Plaintiffs to Sodexo, the Defendant found that it had insufficient funds to continue to employ the Plaintiffs. It is undisputed, however, that Defendant has sufficient funds to pay Sodexo to perform the work that was performed by the Plaintiffs prior to August 1, 2005. It is also undisputed that the Defendant, in order to comply with the ordinances of the City of St. Louis, must have licensed stationary engineers to maintain and operate the nine high pressure boilers owned by the Defendant and that Plaintiffs hold such licenses. Defendant has arranged for Sodexo to perform the operation of the high pressure boilers and, unless the ordinance is changed, the Defendant will have no choice but to see that the terms of the ordinance are met by paying some person to monitor the boilers as stationary engineers. The Defendant, while a “Financially Stressed District”, is paying Sodexo to perform the work previously performed by the Plaintiffs. It is undisputed that the Defendant has sufficient funds to pay for the work at issue because it is doing so by paying Sodexo. Defendant may be paying less for the work but it is paying nonetheless. How is it that the Defendant has enough funds to pay Sodexo but not enough to pay Plaintiffs?

Not only does the clear unambiguous meaning of the word “insufficient” prohibit placing the Plaintiffs on leave while paying others to perform Plaintiffs’ work, but the overall statutory scheme to protect permanent noncertificated employees prohibits Defendant’s outsourcing. If the Defendant can simply trade the Plaintiffs for a person or persons who will perform the Plaintiffs’ work for less

money, the protections afforded by Sections 168.251 through 168.291 R.S.Mo. are meaningless.

The statutory scheme that was adopted in 1961 provides for termination of a permanent employee only for cause and limited the reasons a permanent employee could be placed on layoff. The legislature did not stop by listing the three acceptable reasons for placing a permanent employee on unpaid leave. The statute allows the layoff of only the “necessary number of employees”; establishes the order of layoff; and provides for recall rights. The inclusion of those provisions is indicative of a desire to provide noncertificated employees with a minimum level of job security. That is, once an employee becomes permanent they will not be replaced in their job unless for cause under Section 168.281.

The use of the term “necessary number” evidences the clear intent to protect permanent employees from job loss except when their labor is no longer needed. Necessary means required or inevitable. By limiting the persons placed on leave of absence without pay to the “necessary number of employees”, and by referring to occasions when it is “necessary to decrease the number of employees”, the legislature used language that limited the Defendant to only those reductions in force that are necessitated by the Defendant’s insufficient funds.

In addition to the meaning of the language used in the statute, the establishment of recall rights by seniority reinforces the protection given the Plaintiffs. The specification that employees be placed on layoff and recalled in a particular order further indicates that the Defendant is not allowed to let persons

other than the Plaintiffs perform their work. Recall rights are meaningless if the employer may at its discretion allow persons other than Plaintiffs to perform the work through the vehicle of subcontracting with a third party. The granting of permanent status with due process rights, limited grounds for layoff, and specific rights to recall to work evidences an intent to place the permanent noncertificated employee in a position where, if the work they performed for Defendant was to be performed, they would do it. Again, to hold otherwise would render the protections of Sections 168.281 and 168.291 meaningless. What good are recall rights if Defendant can hire persons to perform the work simply because it finds that Defendant can save money by doing so?

In addition to the language of Section 168.291, there is other legislation that provides insight into the meaning of Section 168.291 R.S.Mo with regard to the term insufficient funds. Section 168.221.5 R.S.Mo. establishes the circumstances in which a metropolitan school district may place teachers on leave. The identical language is used in that statute to describe the circumstances when teachers may be placed on leave that is used in Section 168.291. The legislature decided that persons employed by a metropolitan district as tenured teachers would be subject to the same conditions for layoff as noncertificated employees. If the Defendant may place the Plaintiffs on leave of absence without pay under the facts of this case, it could also do so with its tenured teachers thereby evading all the protections granted to tenured teachers. Had the intent of the statute been to allow employees to be placed on leave without pay because it was cheaper to outsource,

the legislature would have used different language in both sections. It would have specified its approval of subcontracting or outsourcing as an appropriate cause for placing an employee on leave without pay. Teacher tenure cannot possibly be subject to loss through the subterfuge of subcontracting.

The language of Chapter 168 applicable to non-metropolitan school districts provides for the use of wide discretion in stark contrast to that used for metropolitan districts. Had the legislature meant to allow Defendant wide discretion to determine whether to layoff for financial reasons, the legislature would have used the language that applies to non-metropolitan districts. Instead of using “insufficient funds” as it did with metropolitan districts, the legislature used the term “financial condition of the district” to describe when tenured teachers could be placed on leave without pay in non-metropolitan districts.

In Section 168.124 R.S.Mo. by referencing the “financial condition of the district”, the legislature provided for broad discretion by the non-metropolitan boards. It is very different to allow layoff because of “insufficient funds” than because of the mere “financial condition of the district”. While the financial condition of a district might justify a layoff merely to obtain a lower cost through a subcontractor, “insufficient funds” means more than a financially expedient decision. “Insufficient” means an inability to pay. If the same standard was intended the same language would appear throughout Chapter 168.

Likewise the Court’s determination that Sections 168.281 and 168.291 were not violated by Plaintiffs’ placement on unpaid leave because there was a

“lack of work” is also in error. The Court found that there was a lack of work for the Plaintiffs because Defendant had given their work to Sodexo. Again, the very purpose for creating a class of permanent employees and protecting them from layoff except in three very specific circumstances is rendered meaningless if Defendant can merely give the work to another and then claim it has met the requirement of a lack of work.

POINT RELIED ON II

ARGUMENT

**THE TRIAL COURT ERRED IN ENTERING JUDGEMENT
IN FAVOR OF THE ST. LOUIS METROPOLITAN PUBLIC
SCHOOL DISTRICT (SLPS) BECAUSE THE TRIAL COURT
HELD THAT SLPS COULD UNILATERALLY ALTER THE
TERMS OF AN AGREEMENT REACHED PURUSANT TO
SECTION 105.520 R.S.MO. WITH IUOE LOCAL 2 IN THAT
SUCH AGREEMENTS ARE BINDING UPON THE PARTIES
AND CANNOT BE UNILATERALLY ALTERED BY SLPS.**

The second issue on appeal is whether the trial court erred in holding that Defendant is free to unilaterally void a term of an agreement with IUOE Local 2 when that agreement is reached pursuant to Section 105.520 R.S.Mo. The Circuit Court held that Defendant SLPS may do so because of the holding in *Sumpter v. City of Moberly*, 645 S. W.2d 359 (Mo banc 1982). Plaintiffs assert that the intent of the Legislature was to authorize binding agreements and that nothing in

Missouri law compels a contrary result and that *Sumpter v. City of Moberly, supra.* was wrongly decided.

The process for reaching an agreement is not at issue. The Legislature chose not to adopt the language of Section 8(a) of the National Labor Relations Act that requires an employer to bargain with the collective bargaining representative of its employees. As a result, the Missouri Courts have concluded that there is no duty, as there is under federal law, for the employer to bargain in good faith but only a duty to meet and confer.

Here the meet and confer process has been concluded. The union, IUOE Local 2, and the employer, Defendant, reached an agreement that was adopted by the appropriate body in accordance with Section 105.520 R.S.Mo. The agreement by its terms was to run through June 30, 2008. On July 12, 2005 the Defendant unilaterally changed the terms of the agreement thereby negating the term of the agreement that prohibited Defendant from allowing persons other than Plaintiffs from performing the work of stationary engineers for Defendant. The Plaintiffs specifically challenge the notion that a public employer is not bound by the agreement it reaches through the meet and confer process of R.S.Mo. Section 105.520.

The proposition that a public employer is not bound to an agreement reached with a union is inequitable, archaic, and inconsistent with the intent of the Legislature and therefore must be abandoned. Given that the public employer in Missouri is compelled to do no more than listen to a union's proposals, and is not even compelled to bargain in

good faith, allowing a public employer that has reached and adopted an agreement for a specific term to renege on a deal is particularly inequitable.

Prior to the adoption of the current statute, the courts in Missouri (and elsewhere in the country) struggled with the balance to be struck between the rights of employees to organize and act in concert, and the public interests represented by state and local government. The issue was not restricted to the courts but also found its way into the deliberations and debate over the terms of the current Missouri Constitution.

During the debates at the constitutional convention in 1943-1944 the delegates considered and debated the inclusion of an article on collective bargaining. The result was the inclusion of Article I, Section 29 which reads: “That employees shall have the right to organize and to bargain collectively through representatives of their own choosing.” Just prior to the adoption of the language which is set out above, the Constitutional Convention considered an amendment to Section 29 of Article I which read: “Provided however, that the right of collective bargaining shall not apply to the state or any subdivision or municipality thereof.” The amendment was defeated. Section 29 of Article 1 was not therefore limited on its face to employees in the private sector. Minutes of Debates of the Constitutional Convention of 1943-1944 pp. 1932-1974.

In the course of the debate, much of the discussion was centered not on whether employees should be allowed to engage in collective bargaining with their public employers but on peripheral issues such as strikes and the closed shop. The

objections were largely to what was perceived to be the undesirable products of the process rather than to the process of collective bargaining. Early Missouri Court decisions focused on the same undesirable products of collective bargaining rather than on the process of bargaining and enforcement of agreements.

In *City of Springfield v. Clouse*, 206 S.W. 2d 539 (Mo. 1947), which predated the current statute, the Court declared that the city had no authority to enter in to several contracts proposed by unions to the City of Springfield in that to do so would violate state statutes in two distinct areas. Three of the contracts at issue contained a provision for a closed shop or hiring hall provision that required the city to hire persons who were union members thereby allowing the unions to determine who could be hired by the City of Springfield. All of the contracts established wages and rates of pay.

The Court ruled that the city had no power to enter into the contracts due to statutory restrictions that then limited the authority of the City of Springfield. It held that the contracts were inconsistent with state statute that provided that hiring and promotion be through the civil service commission for the city. The Court further held that by statute only the city council had the power to raise and lower wages and rates of pay. Further, the Court went on to decide that Article I, Section 29 of the Missouri Constitution did not pertain to public employees and therefore did not trump the two statutes that conflicted with the provisions of the agreements. *Clouse, supra at 542*. As a result the Court held:

For the reasons hereinafter stated, we must rule that Section 29 does not apply to any public officers or employees. We must further hold that the statutes, Article 3 Chapter 3 providing the organization and powers of cities of the second class prevent the City from making any of the proposed contracts. *Clouse, supra at 542.*

The discussion of Article I, Section 29 of the Missouri Constitution by the Court in *Clouse* was only for the purpose of holding that the provision was not an independent constitutional basis for the authority of the City of Springfield to enter into the proposed contracts. *Clouse* never held that it would be unconstitutional for a public employer, through its board of directors, to enter into a collective bargaining agreement with a union. The Court held only that the City of Springfield was prohibited by statutes at the time from entering into the contracts with unions that were at issue, and that Article I, Section 29 of the Missouri Constitution was not independent authority for the City of Springfield to do so.

In dicta, and without any citation of authority for the proposition, the Court said that working conditions, tenure, and compensation for city employees must be provided by ordinance and that those conditions of employment could be changed at any time thereafter in that no legislature could bind itself or its successors to make or continue any legislative act. *Clouse, supra at 543 and 545 respectively.* The right of a city to revoke an agreement with a union at anytime was conceded by counsel during argument and therefore never an issue in the case. *Clouse, supra at 543.*

Subsequent to the decision in *City of Springfield v. Clouse*, the legislature removed any statutory impediment to the authority of a public employer to meet and confer with a union and to adopt an agreement reached with a union through that process. The issue that had been before the Court in *Clouse*, that is, whether a city had the statutory authority to enter into agreements with unions, was no longer an issue after the passage of Section 105.500 et. seq. Instead, the focus of court challenges became whether the new law was enforceable to require employers to meet and confer.

In *Curators of the University of Missouri v Public Service Employees Local No. 45*, 520 S. W. 2d 54 (Mo. 1975), the Missouri Supreme Court dealt with a challenge to the requirement under Section 105.510 R.S.Mo. that the University of Missouri meet and confer with a union that represented a majority of its employees in an appropriate unit. Nowhere did the Court in *Curators, supra* reach the issue of whether, after the meet and confer process is completed and an agreement adopted, the public employer may repeal its agreement during the agreement's stated term.

The Curators argued that the statutory requirement to meet and confer with the representatives of an appropriate unit determined by the State Board of Mediation was unconstitutional in that it impinged on the powers of the Curators. The Court ruled that Section 105.500 et. seq. was not unconstitutional in its requirement that the University "meet and confer" with the union. The only issue was the breadth of the duty to "meet, confer, and discuss" with a union determined

to be an exclusive bargaining agent. Beyond that issue the Court was merely offering dicta as to the issue of enforcement of agreements and the Court said as much. *Curators of the University of Missouri v. Public Service Employees Local 45*, at 58. Seven years later the Missouri Supreme Court dealt for the first time with the issue of the enforcement of agreements reached under the Missouri “meet and confer” law.

In *Sumpter v. City of Moberly*, 645 S.W. 2d 359 (1982), the Court held that the City of Moberly could revoke an agreement reached with a union at anytime during the term of the agreement. The Court cited *Clouse* and *Curators of the University of Missouri* for the proposition that an agreement between a public employer and a union can be revoked at the will of the employer. As set forth above, those cases never addressed the issue except in dicta. Reliance on *Clouse* and *Curators of the University of Missouri* was misplaced. For that reason *Sumpter v. City of Moberly* stands alone for the proposition that such an agreement is not binding on the employer. Plaintiffs respectfully suggest that *Sumpter* was incorrectly decided.

In addition to its reliance on previous dicta from the *Clouse* and *Curators of the University of Missouri* cases, the Court reasoned that, while there was no constitutional unlawful delegation problem for the City of Moberly, a legislative body, the General Assembly, must not have intended that the adopted agreement be binding because of the inclusion of administrative bodies in the “meet and confer” statute. The inclusion of administrative agencies in the statute created, in

the view of the Court, a constitutional delegation problem. The Court concluded that the Section 105.500 et. seq could not therefore have been intended to result in binding agreements for any government entity because administrative bodies could not do so. The Supreme Court did not hold that it would be an unconstitutional delegation to hold the City of Moberly bound, but instead that the Legislature did not intend that result when it passed Section 105.520 R.S.Mo.

According to the Court, collective bargaining by an administrative agency would violate the constitutional restrictions regarding separation of powers because no legislative body was approving the agreement. The Court then reasoned that the General Assembly would not have given legislative bodies the right to contract while giving something less to administrative bodies. Therefore, the Legislature must not have intended to give any public employer the power to enter into a binding agreement with a union. *Sumpter v. City of Moberly, supra* at 363. The predicate for the decision, that allowing an administrative agency to enter into a binding agreement with a union would be an unlawful delegation of legislative authority, was mistaken.

First, it is clear that the Court predicated its decision on the dicta in its previous cases. Missouri's reliance on the unlawful delegation doctrine has been criticized by scholars as an unsound basis for rejecting binding agreements. The Law of the Nondelegation Doctrine in Public Sector Labor Law: Lessons from Cases that Have Perpetuated an Anachronism, St. Louis University Law Journal Vol. 30 p. 332. Virtually every other court that has considered the doctrine in the

context of collective bargaining has rejected the unlawful delegation doctrine as prohibiting binding collective bargaining with public entities. *Littleton Education Association v. Arapahoe County School District No. 6*, 553 P.2d 793, 796-797 (Colo. 1976); *Chicago Teachers' Association v. Board of Education*, 222 N.E. 243, 251 (Ill. 1966); *Gary Teachers Union Local No. 4 v. School District of Gary*, 284 N.E. 2d 108 (Ind. 1972); *Louisiana Teachers' Association v. New Orleans Parish School Board*, 303 So. 2d 541 (La. 1975); and, *Dayton Classroom Teachers v Dayton Board of Education*, 323 N.E. 2d 714 (Ohio 1975).

Missouri should follow suit and reject the delegation doctrine reasoning but, even if it were to be held that it would be an unlawful delegation to allow administrative agencies to enter into binding agreements with unions, it does not follow that Section 105.520 R.S.Mo. did not intend to extend the power to enter into binding agreements to legislative bodies like Defendant.

The plain language of the statute provides in relevant part:

Upon the completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative, legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection.” Section 105.520 R.S.Mo.

Rather than take the most restrictive approach to the interpretation of the statute, the better approach would have been to give Section 105.520 R.S.Mo. the most expansive reading consistent with the Constitution. Even if an administrative agency might be limited in its ability under the separation of powers, it does not

follow that all the public employers mentioned in Section 105.520 were intended to be so limited. The conclusion that the legislature would have intended that all public employers, administrative and legislative, would have the same power to enter into binding collective bargaining agreements is not consistent with the myriad of different powers granted to public bodies in the State of Missouri both by statute and by the Constitution. Defendant, SLPS, is an example of just such a public body.

The General Assembly by adopting the federal model for collective bargaining was fully aware that the federal model favored collective bargaining. Like Congress, the Missouri Legislature intended that the courts flesh out a body of labor law based on the statute rather than attempting to do so through legislation. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)

The conclusion that the General Assembly intended to pass a law which merely restated a citizen's right to petition the government is not consistent with the adoption of the federal model and results in the conclusion that the Legislature engaged in a meaningless gesture. As pointed out by the dissent in *Sumpter*, the reduction of any results of discussions to writing for submission to the employer's governing body for adoption, modification or rejection is a meaningless act if the ultimate result is not binding. *Sumpter v. City of Moberly*, *supra* at 364-365. The result is a process that does not provide the single most important benefit of collective bargaining to the parties certainty and finality with regard to wages,

hours and conditions of employment. Without a binding agreement the only benefit of collective bargaining is denied.

Without a binding agreement, the union and the public body are left to a never ending process of meeting, conferring and discussing any new matter that arises or old issue that the union or employer demand to revisit. An agreement provides no closure even for a limited period of time. Providing a structure for the selection of exclusive bargaining representatives and the meet and confer process must have been for some purpose. Rather than find that the General Assembly engaged in a meaningless act, the better approach would be to hold that the General Assembly intended to change the status quo and determine from the language adopted what changes were intended.

The Legislature made clear in its use of terms of art borrowed from federal labor law the purpose of the legislation. From the use of terms adopted from federal labor law the Legislature expressed its intention to adopt a statutory scheme modeled upon the federal law. When the General Assembly intended otherwise it chose different language, such as the use of “meet and confer” instead of “bargain”. The adoption of the federal labor law scheme, with certain modifications for the unique circumstances presented by public employment, is instructive as to the intent of the statute with regard to the question before the Court.

In giving the status of “exclusive bargaining representative” to a labor organization, the Legislature granted to unions the right to meet and confer with

the employer regarding wages, hours and other conditions of employment.

Previously that right had been reserved to individual employees. The General Assembly did not vary from the terms of the National Labor Relations Act when it used the term “exclusive bargaining representative”. *Section 9(a) of the National Labor Relations Act, 29 U.S.C. Sec. 159(a)*.

Individuals who are public employees and are not represented by an exclusive bargaining representative have the right to enter into individual employment agreements with their employer. Under federal law a union, once designated as the exclusive bargaining representative, is given the power to compel an employer to bargain while an individual employee’s right to bargain with their employer regarding a contract are lost to the will of the majority as represented by the union. *J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944)* and *NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967)*. Missouri’s adoption of this portion of the federal labor scheme is not disputed. *Missey v. City of Cabool, 441 S.W. 2d 35 (1969)* and *Curators of the University of Missouri, supra*.

Under the Missouri statute, as interpreted by the Court in *Sumpter*, an employee who is in an appropriate unit represented by an exclusive bargaining representative loses the individual right to contract in favor of a union that is impotent to do any more than compel the employer to meet and listen to proposals. The General Assembly did not intend such a result. The Legislature did not pass a public employee bargaining bill in order to make representation by a union less advantageous to those employees who choose union representation. Section

105.510 R.S.Mo. specifically prohibits discrimination against any employee because of their exercise of their right to be represented by a labor organization. It is absurd to hold that a public employee bargaining law adopted to promote collective bargaining results in less protection for a represented employee than that given to an individual without union representation.

CONCLUSION

Plaintiffs are all permanent employees as provided in Section 168.281 R.S.Mo. and cannot be placed on leave of absence without pay in favor of a third party who then performs the work previously performed by the Plaintiffs. Both Sections 168.281 and 168.291 R.S.Mo. require that permanent employees be placed on leave of absence without pay only because of insufficient funds or decreased pupil enrollment or lack of work. The subcontracting with a third party to perform the work of the Plaintiffs is inconsistent with any of the three statutory basis for placing permanent employees on leave of absence without pay and therefore Defendant violated Sections 168.281 and 168.291 R.S.Mo. when it placed the Plaintiffs on leave of absence without pay and allowed Sodexo to perform the work of the Plaintiffs. The judgment of the Trial Court must be reversed with instructions to enter judgment, an injunction prohibiting the placing of the Plaintiffs on leave of absence without pay so long as Defendant allows any other person to perform the work of the Plaintiffs.

The Trial Court also erred in holding that Defendant could unilaterally modify the terms of its agreement with Plaintiffs' Union, IUOE Local 2. Agreements regarding wage, hours and conditions of employment between the Defendant and a labor organization reached pursuant to Section 105.520 R.S.Mo. are binding on the parties and should be enforced for the term of the agreement barring some specific legal prohibition on a particular term. The judgment of the Trial Court must be reversed and the case remanded with instructions that the Trial

Court enforce the agreement between Defendant and IOEU Local 2, specifically the provisions prohibiting Defendant from allowing Sodexo from performing the work of the Plaintiffs.

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 6,554 words in this brief;
- (4) the floppy disk containing a copy of this brief filed contemporaneously herewith has been scanned for viruses and is virus free.

George O. Suggs

CERTIFICATE OF SERVICE

The undersigned certifies that on this _____ day of January, 2006, a copy of the foregoing was served by First Class Mail upon Kenneth C. Brostron and James C. Hetlage, Lashly & Baer, 714 Locust Street, St. Louis, MO 63101, Attorneys for the Defendant/Respondent.

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