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**POINTS RELIED ON**

**POINT 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 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.**

**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.**

Defendant properly states that the sole issue in Count I of Plaintiff's Petition is whether Defendant Board of Education is authorized to lay off all employees in the classification of stationary engineer and to contract with Sodexo Operations L.L.C. to operate and maintain the Board's high pressure boilers upon the Board's findings that it has insufficient funds or lack of work to continue to employ stationary engineers. (Brief Resp. p. 15). At issue in Plaintiffs' first point is exactly that question. Does Section 168.291 prevent Defendant from placing employees on leave without pay and then allow others to perform the work of the laid off employee?

Defendant agrees that this matter is on appeal from the judgment of the Circuit Court in a non-contested case brought by the Plaintiffs pursuant to Section 536.150 R.S.Mo. There is no dispute but that, under the APA, the Circuit Court, after determining the facts de novo in a non-contested case, decides whether the

Defendant's decision was unconstitutional, unlawful, unreasonable, arbitrary capricious, or otherwise an abuse of discretion. Section 536.150.1; MNEA v. Missouri State Board of Education, 34 S.W. 3d 266, 274 (Mo. App. W.D. 2000).

This Court makes a de novo review of the application of the law by the Circuit Court. MNEA v. Missouri State Board of Education, supra. at 280. In this case the Circuit Court of the City of St. Louis incorrectly declared and applied the law when it determined that Defendant was authorized to lay off all employees in the classification of stationary engineer and to contract with Sodexho to employ persons to perform the work of the stationary engineers based upon a finding by the Defendant that it had insufficient funds or lacked work to employ stationary engineers. In so concluding the Circuit Court did not properly apply Section 168.291 R.S.Mo. in that the Circuit Court ignored the very purpose of the statute. That is to provide permanent employees with the protection against an employer school district allowing others to perform their work while they are placed on layoff without pay.

Had the Defendant determined that it would no longer operate its high pressure boilers and thereby eliminated the very work performed by the Plaintiffs, there would be no basis for challenging the Defendant's action. Defendant in such a case would have lacked work for the Plaintiffs and they would have properly been placed on layoff in accordance with the provisions of Section 168.291 R.S.Mo. Likewise, when the Defendant determined that it would employ only those Plaintiffs necessary to comply with Ordinance 65021 of the City of St.

Louis, Defendant could have properly placed the surplus operating engineers on layoff for lack of work or insufficient funds in accordance with Section 168.291 R.S.Mo. Only when Defendant placed the Plaintiffs on leave of absence without pay and contracted with Sodexo to perform the work required by Ordinance 65021 did Defendant run afoul of the statute because, Defendant's findings notwithstanding, it was undisputed that there was no lack of work and there was sufficient funds to pay persons to do the required work. To find otherwise is an abuse of discretion and a misapplication of the statute.

In arguing that it is free to place Plaintiffs on leave of absence without pay and to subcontract out Plaintiffs' work, Defendant ignores an important feature of Section 168.291. Once Plaintiffs are placed on leave of absence without pay for any of the reasons specified in the statute, Defendant is prohibited from hiring others to perform Plaintiffs' work. Section 168.291 R.S.Mo. provides, in relevant part: "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 department ..." Section 168.291 R.S.Mo. (2000). Thus, while a district might make a finding that it had "insufficient funds" or a "lack of work" in order to justify placing employees on leave without pay, that district could not hire other employees to perform the work in the stead of laid off employees. The legislature, by including the restriction on hiring while qualified persons were on leave of absence, recognized that the hiring of new employees in such a circumstance would be inconsistent with the findings

that justified the lay off. The legislature therefore required that qualified persons on leave of absence be given the right to rehire. If Defendant is prohibited from hiring new employees to perform the work of the Plaintiffs, it cannot pay a third party to do so without contradicting its reason for placing those persons on leave without pay. Just as allowing the hiring of new employees would contradict a claim of insufficient funds or lack of work, the subcontracting of the work in hiring a subcontractor to provide employees makes a claim of insufficient funds or lack of work indefensible.

While it is not in the record, Defendant asserts in its brief and it is undisputed that, since July 31, 2005, Sodexo has employed a number of the Plaintiffs to perform the exact work they performed as licensed stationary engineers while employed by the Defendant. Those Plaintiffs who accepted work with Sodexo have done so without the protection of Section 168.281 R.S.Mo. which provides for termination of employment only for specific cause and the right to a hearing. Despite performing the same work in Defendant's schools that they performed as employees, the Plaintiffs working for Sodexo do not have the protection from termination or layoff provided by Section 168.291 R.S.Mo. Those same Plaintiffs work without the benefit of continued participation in the Retirement System established for employees of the Defendant. Section 169.410 R.S.Mo.

Defendant's asserts that Plaintiffs are protected by Section 168.291 because if the Board of Education later determines to terminate its contract with Sodexo

and employ stationary engineers to operate and maintain any remaining high pressure boilers that remain within the District, the Board of Education will be required under Section 168.291 to reinstate the laid off employees in inverse order of seniority of their placement on leave of absence. Plaintiffs should be forgiven if the promise of recall, when or if the Defendant determines to hire them back, is not considered meaningful if the Defendant can give their work to others by merely “finding” that there are insufficient funds or lack of work.

Defendant also argues that Bonner v. Eminence R-1 School Dist., 55 F.3d 1339 (8<sup>th</sup> Cir. 1995) is applicable here for the premise that the Court has no power to interfere with a decision by Defendant to place an employee on leave of absence without pay when Defendant has found that it has “insufficient funds”.

Defendant’s reliance is misplaced. The facts in Bonner show that the board of education had eliminated two teaching positions by the consolidation of a drivers’ education and two physical education positions. The complaining teacher (Bonner) and a second teacher did not have the required certification to teach the remaining available position and was therefore unqualified to perform the available work. Bonner, supra at 1342. It is clear from the facts that the work performed by the two teachers placed on layoff was either performed by the qualified teacher that was retained or not performed at all. In Bonner the school district did not subcontract out Mr. Bonner’s work to a third party who performed the very duties previously performed by Mr. Bonner. As a result, Section 168.124(4) R.S.Mo. was not implicated in Bonner. That provision, like Section

168.291R.S.Mo., prohibits the hiring of new employees while qualified persons are on leave without pay. The Bonner case is clearly not on point.

The statutory scheme adopted by the legislature for permanent employees of a metropolitan school district is substantially the same as that adopted in the Teacher Tenure Act as applicable both in metropolitan and non-metropolitan school districts. Sections 168.221(5) and 168.124(4) both prohibit the hiring of new teachers while persons qualified are on leave of absence. The replacement of teachers placed on leave of absence with others was prohibited in order to prevent exactly the kind of action by a school board that Plaintiffs experienced here.

If the Defendant can place Plaintiffs on leave of absence without pay based on one of the reasons given where every teacher was hired by the subcontractor and placed in the same position in the schools just as occurred to the Plaintiffs. Such a result would subvert the entire Teacher Tenure Act and is a matter that is within the power of the Legislature and the Executive Branch and not the courts.

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 limited to whether the St. Louis Board of Education can unilaterally amend a Policy Statement adopted pursuant to Mo. Rev. Stat. Section 105.520. Respondent contends that it had the right to make unilateral changes to the terms and conditions of employment adopted in the Policy Statement pursuant to Section 105.520 by operation of law as expressed in Sumpter v. City of Moberly, 645 S.W.2d 359 (Mo. 1982) and under the express terms of the Policy Statement.

- a. The Policy Statement does not by its terms allow unilateral modification by the St. Louis Board of Education

The language relied upon in the Policy Statement by Respondent is far from a clear expression of the right to modify its terms over the objection of the exclusive bargaining representative of the Appellants. The Respondent in Article I of the Policy Statement agreed that it will “make no changes in any policies or regulations to the extent that they affect the terms and conditions of employment of the Employees as addressed in this Policy Statement without having given written advance notification to the Union, which would allow sufficient time for discussion thereon prior to the action by the Board and/or any standing committee of the Board, if such discussion is requested by the Union.” (L.F. 20) Nothing in the language relied upon by the Respondent would permit modification of the Policy Statement or its terms. Instead, the language is designed to address discussions about changes in the hundreds of rules and regulations of the Respondent that exist outside of the Policy Statement when a change to one of

those rules or regulations might affect the terms agreed upon between the Respondent and the union representing the Appellants. Nowhere in the Policy Statement is there any express right granted to the St. Louis Board of Education to modify the terms of the Policy Statement. Indeed, the very last sentence of the Policy Statement reads: “The terms of this policy statement shall remain in effect from July 1, 2003 - June 30, 2008.” There could not be a more unambiguous statement of the intent that a unilateral change of terms is not permitted during the effective dates of the Policy Statement. Therefore the terms of the Policy Statement do not provide the basis for allowing a unilateral abrogation of its terms.

- b. The Policy Statement adopted pursuant to Section 105.520 R.S.Mo. is binding on the parties thereto for its term and cannot be unilaterally amended by either the St. Louis Board of Education or Appellants’ Union.

Respondent argues that the decision in Sumpter v. City of Moberly, 645 S.W.2d 359 (Mo. 1982) is a correct interpretation of legislative intent and should, in any event, be protected by the doctrine of stare decisis. Appellants respectfully suggest that Respondent is wrong in both regards.

The doctrine of stare decisis should not prevent reversal of a precedent when it results in a recurring injustice or absurd results. Crabtree v. Bugby, 967 S.W.2d 66, 71-72 (Mo. 1998). Respondent acknowledges that standard for reversal announced in Crabtree is applicable. The application of the holding in

Sumpter has resulted in both a recurring injustice and absurd results. The instant case is an example of both.

It is undisputed but that the Policy Statement that is at issue in this case was the product of the meet and confer process created by the adoption of Section 105.520 R.S.Mo. Neither the representatives of the St. Louis Board of Education or the Appellants' union were compelled to reach agreement. Nor was either party obliged to bargain in good faith. State ex rel. Missey v. City of Cabool, 441 S.W.2d 35, 41 (Mo. 1969). Once the meet and confer process ended the results were presented to the Board of Education that was free under the provisions of Section 105.520 to adopt, modify or reject the results. The results of the meet and confer process were adopted by Respondent including the term of duration from July 1, 2003-June 30, 2008.

Under the holding in Sumpter the adopted Policy Statement which by its terms is otherwise binding can be unilaterally changed by Respondent. The contract with Sodexo to perform the very work previously performed by Appellants that was also adopted by Respondent is binding on both Sodexo and Respondent. Respondent, like school boards all over the State of Missouri, adopts agreements made with a multitude of entities all of which are binding. Only those reached pursuant to Section 105.520 are not. The result of the holding is not just absurd but unjust as employees of Respondent who agree to terms through their union can have those terms changed at the will of the Respondent while an employee acting alone can enforce their agreement if adopted by the Board. City

of Springfield v. Clouse, 206 S.W.2d 539, 541 (Mo 1947). In addition, there remains the issue of whether only the employer can unilaterally declare the terms of an agreement reached pursuant to Section 105.520 void. A literal reading of Sumpter would suggest that the employees and their exclusive bargaining representative might be bound and the power to amend or revoke is held exclusively by the public employer. Id. at 363

Appellants do not, as suggested by Respondent, attempt to displace Clouse. Appellants do seek the reversal of Sumpter because of its misplaced reliance on Clouse and its progeny. As demonstrated by Respondent's brief, the holding in Clouse has been misstated for almost sixty years. In 1947 this Court held that the City of Springfield had no constitutional or statutory authority to enter into any of four proposed collective bargaining agreements that the city board had not then adopted. City of Springfield v. Clouse 206 S.W. 2d 539, 541-542 (Mo. 1947). In argument before the Court, counsel for the defendants in Clouse conceded that an ordinance adopting terms and conditions of employment could be changed by the city council at any time. Id. at 543. At no time before the Sumpter case was the issue presented here decided.

In 1967 Section 105.520 R.S.Mo. was adopted thereby providing the authority for public bodies like the Respondent to adopt, modify or reject the results of the meet and confer process. According to Clouse and Glidewell v Hughey, 314 S.W.2d 749 (Mo. 1958) there was no such authority at the time those case were decided as both predated the adoption of Section 105.520 R.S.Mo.

Likewise the cases of State ex rel. Missey v. City of Cabool, 441 S.W.2d 35 (Mo. 1969) and Curators of the University of Missouri v. Public Service Employees Local No. 45, 520 S.W.2d 54 (Mo. 1975) dealt with the right to join unions and the scope of the duty to meet and confer, but neither case dealt with the enforcement of agreements reached through the process.

There is not a long line of cases on the issue before this Court. There is one case, Sumpter and a long line of dicta. Appellants seek to overturn Sumpter and nothing more.

### **CONCLUSION**

For the forgoing reasons and those set forth in Appellants' main brief, the judgment of the Circuit Court must be reversed and the case remanded with instructions that the Circuit Court enter judgment prohibiting Defendant from placing Plaintiffs on leave of absence without pay so long as the Defendant allows other persons to perform the work of stationary engineer.

Respectfully submitted,

SCHUCHAT, COOK & WERNER

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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 3,165 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.

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George O. Suggs

### CERTIFICATE OF SERVICE

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

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