Summary of SC91736, *Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*
consolidated with
SC91737, *Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 v. City of University City*
Appeals from the St. Louis County circuit court, Judges Colleen Dolan and Barbara Wallace
Argued and submitted Nov. 3, 2011; opinion issued Nov. 20, 2012

Attorneys: In SC91736, the city was represented by Robert M. Heggie, Mark D. Mittleman and Harold V. O'Rourke of Stewart, Mittleman, Heggie & Henry LLC in St. Louis, (314) 863-8484; and the union was represented by Gregory C. Kloeppel and Danielle M.S. Thompson of the local union in St. Louis, (314) 432-8003. Several entities filed briefs as friends of the Court. The city of Hazelwood was represented by Kevin M. O'Keefe and Edward J. Sluys of Curtis, Heinz, Garrett & O'Keefe PC in St. Louis, (314) 725-8788. The ACLU of Kansas & Western Missouri and the ACLU of Eastern Missouri were represented by Stephen Douglas Bonney of the ACLU of Western Missouri in Kansas City, (816) 756-3113, and Anthony E. Rothert and Grant R. Doty of the ACLU of Eastern Missouri in St. Louis, (314) 652-3114. The Missouri National Education Association was represented by Sally E. Wheeler and Loretta K. Haggard of Schuchat, Cook & Werner of St. Louis, (314) 621-2626, and Jacqueline D. Shipma of the association in Jefferson City, (573) 634-3202.

In SC91737, the city was represented by Timothy A. Garnett and Nathan J. Plumb of Ogletree, Deakins, Nash, Smoak & Stewart PC in St. Louis, (314) 802-3935; and the union was represented by Gregory C. Kloeppel and Danielle M.S. Thompson of the local union in St. Louis, (314) 432-8003. The ACLU of Kansas & Western Missouri and the ACLU of Eastern Missouri – which filed a brief as friends of the Court – were represented by Stephen Douglas Bonney of the ACLU o and Grant R. Doty of the ACLU of Eastern Missouri in St. Louis, (314) 652-3114.

Overview: In separate actions consolidated for purposes of opinion, two cities appeal circuit court judgments ordering them to establish procedures under which their police officers and sergeants could bargain collectively and placing certain requirements on them to establish procedures for bargaining. In a 5-1 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the judgments in part and reverses them in part.

The circuit court's declarations that the cities must meet and confer is affirmed. Article I, section 29 of the Missouri Constitution – which gives employees "the right to organize and to bargain collectively through representatives of their own choosing" – imposes on employers an affirmative duty to bargain collectively with the exclusive bargaining representative elected by employees with a goal of reaching an agreement and, when necessary, create procedures to participate in the bargaining process, so long as the procedures satisfy constitutional requirements. Because the holding of *Quinn v. Buchanan*, 298 S.W.2d 413 (Mo. banc 1957), provides an incorrect reading of article I, section 29, it is overruled.

This Court withholds judgment as to whether the circuit courts' judgments offend the separation of powers doctrine set forth in article II, section I of the Missouri Constitution, but it does find the judgments are too broad. The circuit court erred in ordering the cities to establish a specific procedure for meeting and conferring with the union and in ordering the cities to organize an election to designate the union as the exclusive bargaining representative. Pursuant to Rule 84.14, this Court reverses the circuit court's summary judgments and orders the cities to recognize the union as the exclusive bargaining representatives for the cities' police officers and sergeants and to meet and confer with the union for collective bargaining.

Judge Zel M. Fischer dissents. He would follow the plain language of article I, section 29 and this Court's longstanding precedent interpreting it and would hold that this provision serves only to guarantee the right of Missouri employees to organize and to bargain collectively through representatives of their own choosing and that it does not impose any affirmative duty on an employer, public or private, that is not created by the legislature or other governing body. He also finds that the circuit court's orders and the principal opinion's mandate that the cities recognize the union as the exclusive bargaining representative and to meet and confer with the union raise serious concerns about separation of powers principles embodied in article II, section 1 of the Missouri Constitution.

Senior Judge James R. Hartenbach, a retired circuit judge from the 21st Judicial Circuit (St. Louis County), sat in this case by special designation to fill the then-vacancy on the Court.

Facts: A majority of police officers and sergeants in Chesterfield and University City certified the Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 union as their exclusive representative for collective bargaining under the public sector labor law. The unions then asked each city to recognize the union's representative status and to establish a procedural framework for collective bargaining. Both cities denied the union's request. In separate actions, the union sought declaratory judgment, asserting that each city has an affirmative duty under the state constitution to establish a meaningful procedural framework allowing law enforcement employees to bargain collectively with their employers. The circuit court in each case ruled against the city and entered judgment in favor of the union. In each judgment, the court ordered the city to establish procedures expeditiously under which the police officers and sergeants could bargain collectively and placed certain requirements on those procedural frameworks. The cities appeal.

AFFIRMED IN PART AND REVERSED IN PART.

Court en banc holds: (1) The union has associational standing to enforce the rights of its member police officers and sergeants under article I, section 29 of the Missouri Constitution. First, the union's members would have standing to sue in their own right because, as discussed in paragraph 2, they legally are entitled to a collective bargaining process. Second, the interests the union seeks to protect are germane to its purpose because its main purpose is to defend and promote its members' rights. Third, neither the claim asserted nor the relief requested requires the participation of individual members. The relief the union requests – an order that the cities

establish a framework for collective bargaining – is prospective only, and no request was made for monetary damages or other relief specific to individual members.

(2) Article I, section 29 of the Missouri Constitution – which gives employees "the right to organize and to bargain collectively through representatives of their own choosing" – imposes on employers an affirmative duty to bargain collectively and, when necessary, to adopt procedures to participate in that process. The circuit courts' declarations that the cities must meet and confer is affirmed.

(a) In a case specifically involving teachers, this Court held that article I, section 29 grants public employees – including those excluded from Missouri labor laws – the right to bargain collectively. *Independence-National Education Association v. Independence School District*, 223 S.W.3d 131, 136 (Mo. banc 2007). For most public employees, Missouri's public sector labor law, section 105.500 *et seq.*, governs the process by which an employer can "meet, confer, and discuss" with designated employee representatives. *Independence*, 223 S.W.3d at 136. The lack of codified procedures for employees excluded from the statute does not excuse public employers from the duty to bargain collectively because the very notion of collective bargaining entails "negotiations between an employer and the representatives of organized employees to determine the conditions of employment …." *Id.* at 138 n.6. An employer of statutorily excluded employees, therefore, has a duty to bargain collectively with those employees and, when necessary, to adopt procedures to participate in that process. *Id.*

(b) While conceding that *Independence* identifies the role of public employers in establishing a framework for collective bargaining, the cities rely on *Quinn v. Buchanan*, 298 S.W.2d 413 (Mo. banc 1957), to argue that article I, section 29 does not impose on public employers a legally enforceable duty to bargain collectively and that a court cannot compel a public employer to do so. In *Quinn*, this Court held article I, section 29 does not guarantee union members the right to bargain collectively with their employers but rather only protects employees from government actions that would contravene that right. *Id.* at 419. The primary rationale for this holding, however, is based on two erroneous inferences. The first is that a bill of rights – there the Missouri "declaration of rights" found in article I of the state constitution – does not grant new rights but merely declares those rights the people already possess, regardless of whether they are granted by the government. The second is that the provisions in a bill of rights may be only self-executing limitations on government that do not require any additional legislation to guarantee their observance. Under these inferences, any constitutional provision placed under a "bill of rights" heading may serve only as a shield against governmental action and not as a sword allowing individuals to require its enforcement. The authority *Quinn* cites, however, does not support either inference. Provisions in article I of Missouri's constitution need not be self-executing. Moreover, inclusion in Missouri's "declaration of rights" does not mean a provision cannot grant an affirmative right, as the people of Missouri can place anything they wish in their constitution so long as it is not contrary to the federal constitution. Further, other states have recognized that provisions in their bills of rights impose affirmative duties. Because *Quinn*'s holding was in error, providing an incorrect reading of article I, section 29, it is overruled.

(3) Although legislative power remains the province of legislative bodies (here, the power of cities to enact ordinances), it is a proper role of courts to compel legislative bodies to meet their constitutional obligations while leaving it to those bodies to determine how to meet them. This Court withholds judgment as to whether the circuit courts' judgments offend the separation of powers doctrine set forth in article II, section I of the Missouri Constitution.

(4) The circuit court's judgments are too broad. Because the cities may be able to meet their duty without establishing a procedural framework, the circuit court erred in requiring the cities to establish a specific procedure for meeting and conferring rather than simply ordering them to meet and confer with the union and allowing them to make whatever arrangements are necessary to carry out that order. Each city has the ability to establish procedures for collective bargaining with its excluded employees if necessary to effectuate its duty. The circuit court also erred in ordering the cities to organize an election to designate the union as the exclusive bargaining representative. The election process was not challenged in these proceedings, and the undisputed facts of both cases show the majority of each city's police officers and sergeants already selected the union as their exclusive bargaining representative. Pursuant to the authority Rule 84.14 grants this Court "to give such judgment as the court ought to give," this Court reverses the circuit court's summary judgments and orders the cities to recognize the union as the exclusive bargaining representative for the cities' police officers and sergeants and to meet and confer with the union for collective bargaining.

Dissenting opinion by Judge Fischer: (1) The author would follow the plain language of article I, section 29 and this Court's longstanding precedent interpreting it and would hold that this provision serves only to guarantee the right of Missouri employees to organize and to bargain collectively through representatives of their own choosing and that it does not impose any affirmative duty on an employer, public or private, that is not created by the legislature or other governing body.

> (a) There is nothing in the text of article I, section 29, the debates concerning that provision's adoption or this Court's prior interpretation of the provision that suggests this Court should not continue to follow *Quinn v. Buchanan*, 298 S.W.2d 417 (Mo. banc 1957). In *Quinn*, this Court held that the purpose of article I, section 29 was to declare that collective bargaining rights were established in this state such that employees have the right to organize and function for the purpose of collective bargaining. This view that the supporters of article I, section 29 envisioned that this right would be free from legislative interference is supported by the debates over the 1945 state constitution. The principal opinion dramatically expands the clear and express language of article I, section 29 into a "labor relations act." But this Court consistently has held that article I, section 29 is not a labor relations act, specifying rights, duties, practices and obligations of employers and labor organizations, and it never before has been interpreted or construed to require any affirmative duty on the part of an employer, public or private. Further, *Quinn* was not overruled or modified in any way by *Independence-National Educational Association v. Independence School District*, 223 S.W.3d 131 (Mo. banc 2007). *Quinn* specifically held that article I, section 29 serves only to establish and guarantee the right

to bargain, does not include affirmative rights in its language and does not to create a comprehensive labor regulation.

(b) The principal opinion incorrectly assumes that if the government does not establish a procedure to participate in the bargaining process, then it is denying the right to bargain collectively. Under all previous interpretations of the provision, an employer – either public or private – does not violate article I, section 29 by refusing to bargain. So long as government leaves intact the ability of employees to organize and to bargain collectively, then it has not violated the constitution. Nothing in *Independence* changes this understanding of article I, section 29. *Independence* does not hold that public employees have the right to bargain collectively under a procedural framework set by their employer; rather, it recognized that when a public employer *chooses* to bargain, the legislature or relevant public employer – not this Court – has a role in establishing a bargaining framework. 223 S.W.3d at 136.

(c) The principal opinion misreads a sentence of dicta in *Independence* as requiring that public employers create a procedure for collective bargaining. But this dicta recognized only that setting bargaining frameworks is for legislative bodies, not courts. This is in line with the separation of powers provision in article II, section I of the Missouri Constitution and *Quinn*'s holding that implementation of the right to require any affirmative duties of an employer concerning the right to collective bargaining is a matter for the legislature. That the legislature has created a framework for certain employees does not obligate it, under article I, section 29, to create a framework for all other employees. In fact, there are policy reasons supporting why federal and state labor laws exclude law enforcement officers and public school teachers from their application. Yet the principal opinion now has expanded the rights of those personnel beyond those legislative acts based on a new interpretation of article I, section 29. *Independence* specifically held that nothing in article I, section 29 requires public employers to reach agreements with their employee associations, and this holding imposes no affirmative duty on public employers. When *Independence* reversed years of precedent, it did so based on the language of article I, section 29, and in so doing, it expressly stated there is no authority for this Court to read into the constitution words that are not there. Yet that is what the principal opinion does in this case.

(2) The author finds that the circuit court's orders and the principal opinion's mandate that the cities recognize the union as the exclusive bargaining representative and to meet and confer with the union raise serious concerns about separation of powers principles embodied in article II, section 1 of the Missouri Constitution. This Court's role in reviewing the constitutional validity of the legislature traditionally has been to declare whether the legislature's action is constitutional. This function derives from the Court's duty to make final determinations about questions of law. It is the legislature's function, however, to make policy decisions or, when there are multiple answers to a question, to choose the best one. If the Court's declaration renders a statute void, it is left to the legislature, therefore, to decide whether to attempt to pass a similar – but constitutionally acceptable – replacement statute. Similarly, when legislative inaction is declared unconstitutional, it is the role of the legislature to decide the best way to comply with the constitution. The principal opinion goes beyond its authority and treads on the cities'

legislative power by ordering them to recognize the union as the exclusive bargaining representative and to meet and confer with the union. In doing so, the principal opinion mistakenly relies on notions of collective bargaining that derive from federal or state labor laws, but those same labor laws expressly exclude police officers. Whether or how to meet, confer and negotiate with such employees is a policy decision for the legislature and local governing bodies. This Court should not mandate that these cities create a procedural framework in which they have an affirmative duty to bargain with their police officers. Moreover, neither of the cases the principal opinion cites confers authority on the Court to order the cities to meet and confer with the union or to set procedures to facilitate that process.