

IN THE SUPREME COURT OF MISSOURI

SC91736

**EASTERN MISSOURI COALITION OF POLICE,
FRATERNAL ORDER OF POLICE, LODGE 15,**

Respondent,

v.

CITY OF CHESTERFIELD,

Appellant.

Appeal from the Circuit Court of St. Louis County
Twenty-First Judicial Circuit, Division No. 20
Honorable Colleen Dolan, Judge
Case No. 09SL-CC00023
Transferred from the Missouri Court of Appeals, Eastern District
Court of Appeals No. ED95366

SUBSTITUTE REPLY BRIEF OF APPELLANT

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ARGUMENT

I

As to Respondent's "Introduction"

Respondent Fraternal Order of Police, Lodge 15 ("FOP") continues to assert that the trial court's overreaching Findings of Fact, Conclusions of Law and Judgment--requiring the City of Chesterfield ("City") to establish a collective bargaining framework that includes a date, time and procedures for an election leading to the certification of FOP Lodge 15 as the exclusive bargaining representative for all the City's police officers and sergeants--is valid based on Article 1, § 29 of the Missouri Constitution. However, the trial court's order is not only unauthorized by Article 1, § 29; it goes far beyond any Missouri court's constitutional powers, and it must be reversed.

The collective bargaining rights that the City's police officers and sergeants have under the Missouri Constitution are no more than the right of access to meet with the City for the purpose of negotiating over the terms and conditions of their employment. That right, in turn, is consistent with the employees' more fundamental First Amendment rights of free speech, assembly and petition, as observed in *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35 (Mo. 1969), and in certain of the suggestions of *Amici Curiae* American Civil Liberties Union Foundation of Kansas & Western Missouri and American Civil Liberties Union of

Eastern Missouri (*see* A.C.L.U. Brief, at page 11). But it does not support the maximal demands of FOP, nor the trial court’s judgment.

No statute, constitutional provision or case in Missouri suggests that the City must or can use taxpayer funds to conduct an election to certify a union as the exclusive bargaining agent for its police officers and sergeants.

Further, a review of the record in this case clearly establishes that no police officers or sergeants have ever actually asked anyone at the City to bargain collectively. While the City would necessarily have some general “role” in its employees’ collective bargaining process, as the *dicta* in ***Independence-National Education Association v. Independence School District***, 223 S.W.3d 131, at 136 (Mo. banc 2007) imply, that “role” begins only when employees of the City--and not some interloper claiming without documentation to act on their behalf--tell the City they want to bargain collectively. Here all the City received was four letters from FOP itself, asking the City to recognize FOP as the exclusive representative of all the City’s police officers and sergeants. Not until well after this case started did the City even learn, through discovery, that some police officers and sergeants had purportedly signed cards indicating they supported FOP as their exclusive representative for collective bargaining.

Neither the trial court record, nor any statute, nor Article 1, § 29 of the Constitution of Missouri, nor this Court’s holding in ***Independence*** supports the broad, sweeping mandate of the trial court’s order requiring an election and exclusive representation of the supposed bargaining unit of police officers and

sergeants for the benefit of FOP. This Court should therefore reverse the trial court's judgment.

Respondent's "Introduction" to its present brief, a rhetorical interpolation which is not actually authorized by Missouri Supreme Court Rule 84.04(f), also complains rather intemperately (Substitute Brief of Respondent, at pages 6-7) about the Conclusion to the City's brief (Appellant's Substitute Brief, at page 45). In part of that Conclusion, Appellant referred to the obvious extra-legal context of this case. But in taking issue with Appellant's remarks, Respondent simply raises the political temperature of its own self-serving efforts to obtain from the judiciary what it has not been able to gain through the legitimate democratic process.

II

As to Respondent's Statement of Facts

FOP states as a “fact” in its brief that all the signatures on its Representation Interest Cards were those of Chesterfield police officers and sergeants (Substitute Brief of Respondent, at pages 9 and 12), although the City’s brief and the record show there was only evidence as to the authenticity of three such individuals’ signatures. (Appellant’s Substitute Brief, at page 4; Tr. 64-67, 83-87, 101, Exhibits 2, 3, 13-16). Some of the City’s seventy-eight police officers and sergeants (Tr. 133) did not sign any of the Representation Interest Cards.

Missouri Supreme Court Rule 84.04(c) and (f), which FOP cites as authority for filing its own statement of facts, only authorizes such a statement if the Respondent “is dissatisfied with the accuracy or completeness” of the statement of facts in Appellant’s Brief, which is not applicable here. *Beeks v. Hierholzer*, 831 S.W.2d 261, at 263 (Mo.App.W.D. 1992), *overruled in part on other grounds by Brines v. Cibis*, 882 S.W.2d 138 (Mo. banc 1994); *cf. Douglas v. Twenter*, 259 S.W.2d 353, at 356 (Mo. 1953). Respondent does not point to any inaccuracy or omission in Appellant’s Statement of Facts.

III

As to the Substantive Issues Under Article 1, § 29 (Respondent's Point I)

The City agrees that at such time as employees of the City say they want to bargain collectively, the City is obligated to permit those employees' chosen representative(s) to meet with representatives of the City to discuss the terms and conditions of employment. But there is no duty under Article 1, § 29 of the Constitution of Missouri to establish a particular framework for collective bargaining, to conduct an election, or to certify one union as the exclusive bargaining representative for a judicially specified bargaining unit.

FOP, the *Amici Curiae* and the trial court have conceived Article 1, § 29 as a labor relations act. It is not. While legislation that FOP has lobbied for and supported could very well contain requirements for election or certification of an exclusive representative, to date this has not happened. (Tr. 30-33, 171-172; Exhibits P, Q, R, S, T, U, V, and W.) Even a broad reading of the language of Article 1, § 29 that "employees shall have the right to organize and to bargain collectively through representatives of their own choosing," does not find the word "election" or "exclusive". The dictionary definitions of "collective bargaining" do not require exclusive representation, nor elections to certify a union. Nor do they have anything to do with the establishment or recognition of a bargaining unit.

The right to bargain collectively is a right of employees to meet, through the representative(s) of their choice, with their employer to discuss the terms and

conditions of employment. The *Independence* Court was in agreement about the extent of the constitutional right under Article 1, § 29, and also in agreement that Missouri's Public Sector Labor Law (R.S.Mo. §§ 105.500-105.530) provides for different, perhaps more extensive rights for certain categories of public employees and burdens for their governmental employers. These distinctions were a crucial recognition by the *Independence* Court of differences between the rights enjoyed by some public employees, as opposed to those of police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, and all teachers of all Missouri schools, colleges and universities. The trial court's judgment in this case effectively eliminated that distinction by ordering the City to conduct an election that would lead to an exclusive representative for all employees in a bargaining unit FOP itself defined and the trial court then ratified.

Respondent's enthusiasm about the Court's holding in *Independence*, notwithstanding the subsequent unwillingness of the legislature to amend Section 105.530 to include teachers and police officers under Missouri's Public Sector Labor Law, caused FOP erroneously to assume that Article 1, § 29 requires such union elections and exclusive representation. Nothing in the *Independence* holding leads to this conclusion. The trial court was in error when it issued a judgment saying anything beyond a declaration that the police officers and sergeants have collective bargaining rights which the City must recognize.

For a court to specify details regarding how and when these collective bargaining rights are to be validated in the context of municipal government would

turn Article 1, § 29 into a labor relations act, which it clearly is not. *Quinn v. Buchanan*, 298 S.W.2d 413, at 418 (Mo. banc 1957). One cannot both uphold and denigrate *Quinn*, as Respondent has attempted to do here, by first agreeing that Article 1, § 29 cannot be the basis of power to order injunctive relief against an employer, and then arguing that Article 1, § 29 gives employees the right to enforce, by mandatory injunction, their right to select an exclusive collective bargaining representative and compel their employer to bargain with that representative. (Substitute Brief of Respondent, at pages 21-22.) It is difficult to square FOP's support for the trial court's decision in this case with its concession that *Quinn* is still valid law.

FOP and the trial court also erred when they believed that somehow the sending of letters from FOP's Chief Legal Counsel to the City, over the course of several months, constituted actual proof that any police officers and sergeants wanted to bargain collectively with the City. While these letters might have shown the City (if accompanied by the officers' and sergeants' Representation Interest Cards, which they were not) that such police officers really did want to bargain collectively, the letters themselves--like the trial court's judgment--went both too far and not far enough. They asked for both voluntary recognition and exclusive representation on behalf of FOP Lodge 15, but not for any of the City's employees themselves.

While the letters were sent to the City on behalf of FOP Lodge 15, they make no reference to any Chesterfield employee. Until the day of trial in 2010, no

police officer or sergeant ever asked anyone at the City for collective bargaining. In its haste to get to the courthouse, FOP failed to review the actual evidence it would need to produce in this case, and it now asks the Court to ignore the fact that the City merely denied the unsubstantiated and overbroad requests of FOP for voluntary recognition and exclusive representation.

FOP now asks this Court to ignore the issue of exclusive representation, and claims (at least in one part of its brief) that discussion of the exclusivity issue is premature. (Substitute Brief of Respondent, at page 41.) However, in the present posture of this appeal it is impossible to ignore the actual terms of the trial court's judgment, which requires the City to set a framework for collective bargaining that includes elections and exclusive representation for a specifically defined bargaining unit. The City stands ready to bargain collectively with its police officers, and with its sergeants (perhaps in the manner of *Amicus Curiae* City of Hazelwood), upon the request of even one such employee. But FOP does not want that process, as established by its correspondence and trial proof. FOP wants, instead, what Article 1, § 29 does not provide it: judicially imposed elections and exclusive representation. Thus, this case is neither about applying, extending, or overruling ***Independence***; it is about reversing a trial court judgment that, at the urging of FOP, goes too far.

IV

As to the Substantive Issues Of Standing (Respondent's Point II A-F)

Quinn v. Buchanan, *supra*, requires that FOP do much more than it has actually done to establish its standing to bring its claim. Again in its haste to get to the courthouse, FOP asks this Court to overrule or ignore *Quinn* and *Wrinkle v. International Union of Operating Engineers, Local 2, AFL-CIO*, 867 S.W.2d 633 (Mo.App.S.D. 1993), and asks the Court to assume--based on obvious hearsay--that FOP represents a majority of the City's police officers and sergeants, although not one of them is a party. The Court should not allow this end run around the rules of evidence and of standing.

FOP's argument in regard to the admittance of the "Representation Interest Cards" is circular. It relies on statements and conclusions from the trial court's rulings, the decisions which are directly at issue on this appeal. FOP argues that trial courts are vested with broad discretion on the admissibility of evidence; but the case it has cited for that general point (*see* Substitute Brief of Respondent, at page 33) is factually quite dissimilar to this one. In *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813 (Mo. banc 2000), the evidence at issue (videotaped deposition testimony of a party) was called into question not because it was legally inadmissible, but because of the appellant's failure to "seasonably" supplement its discovery, which was properly sanctioned by means short of exclusion of the evidence. *Id.* at 819-821. Here, in contrast, FOP's evidence was challenged due to a serious question of its authenticity.

Specifically, FOP presented only three people claiming to have signed its “Representation Interest Cards,” yet was allowed to enter into evidence over one hundred signed cards. FOP has presented no case law here to support the admittance of such unauthenticated evidence, nor has it addressed the matter of the cards being hearsay. While Missouri does give trial courts wide latitude in admitting evidence, this discretion does not mean the rules of evidence may be abandoned. The substantive issues in this case are important, but the rush to resolve those issues should produce, in effect, a new exception to the hearsay rule.

Respondent similarly attempts to assert, with flawed reasoning, that FOP Lodge 15 represents and has standing to sue on behalf of the entire alleged bargaining unit due to the overlap of members of both the lodge and the Chesterfield Police Officers’ Association. (Substitute Brief of Respondent, at page 34.) Respondent states that all members of the Chesterfield Police Officers’ Association are also members of FOP Lodge 15. (*Id.*) But that proves nothing. Respondent’s own witness, James Carroll, the president of the Chesterfield Police Officers’ Association testified that only sixty-four police officers are members of the Association. (Tr. 44.) There are seventy-eight total sergeants and officers employed by the City of Chesterfield. (Tr. 133.) FOP’s claim that it is the representative of the supposed bargaining unit for all the police officers and sergeants of the City is not supported, due to the insufficient and questionable evidence which it presented.

In a flawed attempt to claim that it has standing to sue for the relief it has sought in its own name, without the participation of any individual employee plaintiffs--apparently because of its contention that exclusive bargaining rights can be imposed by the courts for the benefit of a union under Article 1, § 29--FOP inaccurately interprets the *Independence* case, and the partially concurring, partially dissenting opinion written by Judge Price therein. Respondent contends that Judge Price “specifically set out that the right to collective bargaining for teachers and police officers is the same as the rights to collective bargaining for all occupations and that such right to collective bargaining specifically includes the ability of the bargaining unit members to choose an exclusive bargaining representative.” (Substitute Brief of Respondent, at page 40.) However, that statement is untrue. Judge Price made no such assertions, and instead clearly distinguished between constitutional rights under Article 1, § 29, and statutory rights under the Public Sector Labor Law, which are clearly inapplicable here.

In reality, Judge Price disagreed with the majority opinion which overruled *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. banc 1947), a case which had held that “the term ‘collective bargaining’ simply had no relation, by definition, to public employment. The holding has been relied upon as the correct interpretation of [Article I, section 29] in Missouri for 60 years.” *Independence, supra*, at 223 S.W.3d 146. FOP contends that Judge Price “set out in clear terms” police officers’ rights to collective bargaining (Substitute Brief of Respondent, at page 40), when in fact he did no such thing.

Judge Price concluded his *Independence* opinion with a statement that completely undercuts Respondent's position. He explained that: "It seems less harm would result from leaving this longstanding [meet and confer] procedure in place than from giving public employees a new constitutional right to 'collective bargaining' that the majority does not define, describes in terms similar to 'meet and confer,' and the application of which no one can predict." *Id.* at 148. Respondent's assertion that Judge Price "further explained" or "specifically set out" the right of police officers to bargain collectively is unsupported by the language and overall position of his opinion. A comparison of Judge Price's opinion with the contentions made by FOP proves that Respondent has wholly misused the opinion in a misguided attempt to bolster FOP's argument on the issue of its standing. The union cannot claim it is suing under Article 1, § 29, on behalf of the City's police officers and sergeants, when it is actually presenting claims for its own benefit as their supposed bargaining unit's supposedly exclusive representative. Only the City's employees themselves--as individuals—are entitled to assert the *individual* rights which are protected under that constitutional provision.

As to the Separation of Powers Issue (Respondent’s Point III)

FOP’s argument appears to turn the constitutional separation of powers on its head. FOP claims Article 2, Section 1 of the Constitution of Missouri is an open-ended justification for the courts to do anything they think is good (as long as they agree with FOP).¹

FOP wrongly suggests that the trial court was merely implementing the unquestioned principles of both this Court’s decision in *Independence-National Education Association v. Independence School District*, 223 S.W.3d 131 (Mo. banc 2007), and the Missouri Court of Appeals’s decision in *Lenette Realty & Investment Company v. City of Chesterfield*, 35 S.W.3d 399 (Mo.App.E.D. 2000), when it ordered the City of Chesterfield “to ‘establish a framework for

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If a state wants to provide a framework for collective bargaining by any categories of public sector employees, it may properly accomplish that result through legislative action, as Missouri itself has done for many categories of government workers in Sections 105.500-105.530, R.S.Mo. *See, e.g.*, the Illinois Public Labor Relations Act, 5 ILCS 315/1-27, the Iowa Public Employment Relations Act, Iowa Code §§ 20.1-31, and the Wisconsin Municipal Employment Relations Act, Wis.Stats. §§ 111.70-77, all of which contain express mandates for the collective bargaining process made applicable, *inter alia*, to municipal police.

collective bargaining’ to include the scope of the bargaining unit, certification election procedures, and procedures for the meet and confer process.” (Substitute Brief of Respondent, at page 44.) Respondent tries to suggest that FOP and the trial court are the heroes in this case, the great and only legitimate defenders of the constitutional rights of the City’s police officers, whereas the City “has usurped the power of the judiciary in declaring its own version of the constitutionality of its employees’ rights.” (Substitute Brief of Respondent, at page 45.) That statement is not only presumptuous, but simply untrue.

The City recognizes the rights of the City’s employees, including its police officers and sergeants, to bargain collectively, pursuant to Article 1, § 29, the First Amendment, and (to the extent actually applicable) the Missouri Supreme Court’s holdings in *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35 (Mo. 1969), and *Independence*, *supra*. However, the City does assert that it is the role of the legislative branch of government, and not the courts, to establish any specific framework for collective bargaining.

In fact, contrary to the suggestion of Respondent, this Court in the *Independence* case was careful to note the role of the general assembly and local legislative body, rather than the courts, to set the framework for public sector collective bargaining. *Independence*, *supra*, at 223 S.W.3d 136. Likewise, the *Lenette* opinion asserted the proposition that the courts cannot mandate or compel a legislative branch entity to act in a specific fashion, even if they find that the City has somehow acted improperly. *Lenette*, *supra*, at 35 S.W.3d 399.

Indeed, Respondent undercuts its own argument and in effect acknowledges this point. Respondent points out that the Court of Appeals in the instant case found trouble with the trial court's judgment in regard to the separation of powers doctrine. (*See* Substitute Brief of Respondent, at page 47.) Respondent tries but fails to suggest some principled distinction between the "general perimeters set forth in the trial court's order" that the Court of Appeals found "too specific to withstand constitutional scrutiny" (*Id.*, citing the Court of Appeals's Slip Opinion at page 9), and the other provisions of that judgment. FOP contends that those other, equally specific provisions can somehow survive as part of a hypothetical, more finely tuned judgment complying with the constitutional limits on the scope of the courts' authority to mandate the City to act. But by Respondent's own acknowledgment, its argument that the trial court did not violate the separation of powers doctrine in entering the judgment against the City fails.

Then, as if disquieted by that notion, Respondent returns to its position that the courts can actually do whatever they want, without limit, to produce the outcome FOP seeks. Thus, FOP cites Missouri cases on subjects not remotely related to the issues here, but vaguely describing the "authority that the constitution places exclusively in the judicial department" to include "judicial review and the power of courts to decide issues and pronounce and enforce judgments," as if those words could somehow render all the other, exclusive powers of the legislative and executive branches of government irrelevant. In the end, FOP betrays its self-serving agenda in this case: to undermine the real

meaning of the separation of powers in our constitutional government, calling it “a legal scapegoat” (Substitute Brief of Respondent, at page 48) that would frustrate FOP’s unmeritorious claims for relief.

In fact, the cases FOP cites (*see* Substitute Brief of Respondent, at page 49)--*State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69 (Mo. banc 1982), *Asbury v. Lombardi*, 846 S.W.2d 196 (Mo. banc 1993), and *Dabin v. Director of Revenue*, 9 S.W.3d 610 (Mo. banc 2000)--presented the exact opposite of the separation of powers issue in this case: they did not involve allegations that the judiciary had invaded the exclusive powers of the other branches, but rather that the other branches were usurping the judiciary’s own power to review administrative actions. The *State Tax Commission* case held that the legislature could not enact a statute delegating to an administrative agency the power to issue declaratory judgments on the propriety of rules promulgated by another agency. Likewise, *Asbury* invalidated a statute precluding the final judicial review of administrative personnel decisions. But *Dabin* found *no* separation of powers violation where a statute enabled judges to review the findings of administrative traffic commissioners (and only an “as-applied” due process violation, to the extent the court itself was providing insufficient opportunity for the judicial review guaranteed by the statute).

Respondent’s position is incorrect, and the trial court’s judgment should be reversed outright.

CONCLUSION

The judgment of the Circuit Court of St. Louis County should be reversed in its entirety, and FOP's Petition should be dismissed.

Respectfully submitted,

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CERTIFICATE OF RULE 84.06(c) COMPLIANCE

The undersigned counsel for Appellant hereby certifies that this brief consists of

4,033 words excluding the cover, this Certificate of Compliance required by Missouri Supreme Court Rule 84.06(c), the Certificate of Service and the signature block, and that it was prepared using Microsoft Word Version 2003, utilizing Times New Roman font, 13-point type, in full compliance with the requirements of Missouri Supreme Court Rules 55.03 and 84.06(c).

The undersigned further certifies that the computer discs provided herewith to the Court and to opposing counsel have been scanned for viruses and have been found to be virus-free.

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellant hereby certifies that two true and accurate copies of the above and foregoing Appellant's Reply Brief, together with a copy of a computer disc containing the same, were served by first-class United States Mail, postage prepaid, this 21st day of July, 2011, upon the following counsel of record herein:

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