IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT OF MISSOURI

FILED
LAURA ROY

EASTERN MISSOURI COALITION OF POLICE, FRATERNAL ORDER OF POLICE, LODGE 15,	)	
Respondent,	)	
v.	)	Appeal No. ED 95564
CITY OF UNIVERSITY CITY,	)	
Appellant.	)	

FILED
MAY 6 2011
Thomas F. Simon
CLERK, SUPREME COURT

Appeal from the Circuit Court of St. Louis County, Missouri
Division 13, Honorable Judge Barbara W. Wallace
Case No. 09SL-CC01454

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The trial court erred when it ordered Appellant to establish any specific procedures, reasonable or otherwise, for collective bargaining with its police officers and sergeants.

A. The trial court's order does require Appellant to establish a specific framework for collective bargaining and does require Appellant to take legislative action.

Respondent argues the trial court's order and judgment did not violate the separation of powers doctrine because it did not order Appellant to establish a specific framework for collective bargaining but instead ordered Appellant to establish some generic "reasonable" framework for collective bargaining that could be done by through an "administrative function". (Resp. Br. at 15, 16). Without question, the lower court orders a very specific procedural framework for collective bargaining that includes: (1) terms defining the scope of the bargaining unit entitled to bargain under the framework to include only Appellant's police officers and sergeants; (2) terms defining the procedures for an election process by which Respondent could be certified as the exclusive bargaining agent for the defined bargaining unit, including the date, time, and place of an election by which those procedures could be implemented; (3) terms defining how such an election would be held; and (4) terms defining how the parties would "meet and confer" with one another following the election certifying Respondent as the exclusive bargaining agent for Appellant's police officers and sergeants. (LF 120, the Wherefore section of the court's Order and Judgment). Moreover, even if the trial court had merely ordered a "reasonable" framework and nothing more, that only begs the question of "what are the specific reasonable procedures Appellant would need to enact to satisfy the

court's order?". Whether the court ordered "reasonable" procedures now and then ultimately sits in judgment of whether the procedures enacted are in fact "reasonable" or ordered specific procedures now, the court is ordering Appellant to take some affirmative acts with regard to the collective bargaining rights of its police officers and sergeants and doing violates the separation of powers doctrine.

Further, there is no basis for Respondent to argue that Appellant is not required to pass an ordinance to put into effect the collective bargaining framework ordered by the trial court. First, Respondent fails to cite a single case to support its rebuttal of Appellant's argument that it could only adopt the framework ordered by the trial court by passing an ordinance. Second, Respondent fails to cite a single case to support its argument that Appellant could adopt the framework ordered by the trial court as an "administrative act". And contrary to Respondent's "assumption" otherwise, Appellant does in fact have both Constitutional Charter provisions and ordinances in place that direct it on how to act in its capacity as an employer. (See City of University City Charter, Art. VII, Secs. 50-55; City of University City Ordinance 2.16, attached hereto in Appellant's Appendix).

B. The court in Lenette Realty did not order the municipality there to enact specific zoning ordinances.

Respondent misconstrues the import of Lenette Realty. (Resp. Br. at 17). In that case, the Court of Appeals recognized that it was "implicit" in the trial court's order that the city there would adopt a reasonable zoning classification for the property at issue. Lenette Realty v. City of Chesterfield, 35 S.W.3d 399, 408 (Mo. Ct. App. 2000).

However, the court went on to specifically reject the plaintiff's argument that the trial court erred by failing to order the city to adopt the plaintiff's specific plan for zoning the property and in doing so recognized that "[a]ny such judicial command to a legislative body raises series questions regarding the constitutionally mandated distinction between the legislative and judicial branches." See id. at 408. What's more, Lenette Realty is distinguishable on one important fact from the facts in this case. In Lenette Realty, the city already had a set of zoning ordinances dictating how it must zone property, and the trial court simply found that the city was applying those ordinances in an "arbitrary, capricious, and unreasonable" manner and declared the city's decision in that regard "null and void" and ordered the city to reclassify the property consistent with the its zoning ordinances. Id. at 404. In other words, the trial court was not ordering the city to take any new affirmative steps, legislatively or even administratively, with regard to the property; the trial court was ordering the city to comply with its own laws that already existed. In stark contrast, Appellant has no ordinances addressing collective bargaining, and it certainly has not failed to apply any of its own laws otherwise in an unlawful manner.

C. Nothing about the holding in Independence School District gives public employees the right to any specific procedures for collective bargaining.

The decision in Independence-National Educ. Ass'n. v. Independence School District, 223 S.W.3d 131 (Mo. 2007), holding that Art. I, Sec. 20 of the Missouri Constitution applies to public employees, is not "meaningless" simply because Appellant has no legally enforceable duty to establish a specific framework for collective

bargaining. (Resp. Br. at 18). Respondent's argument on this point drives to the heart of the dispute in this case. Respondent wrongly believes that since public employees now have the constitutional right to organize and bargain collectively then that means by extension that public employees must also have the constitutional right to a certain set of procedures that would allow them to "organize" and "bargain collectively" in some specific way. Independence School District addressed that argument and rejected it.

Respondent's argument on this point is based on the language in Independence School District saying the Court "recognizes the role of the General Assembly, or in this case, the school district – in the absence of a statute covering teachers – to set the framework for these public employees to bargain collectively through representatives of their own choosing." (Resp. Br. at 18).[1] Basically, Respondent thinks the use of the word "role" means "duty". In this regard, Independence School District is addressing the issue in the context of whether it should find Missouri's Public Sector Labor Law (the "Labor Law") unconstitutional because it omitted the public employees in that case (and omits the police officers in this case). See Independence School District, 223 S.W.3d at 136. Ultimately, the Court did not hold the Labor Law unconstitutional. See id. Instead, as the Court very plainly said, it read the Labor Law "*to provide procedures*" that allow

[1] In the Amicus Brief filed by the Mo. NEA supporting Respondent, there is an argument that the source of the school district's duty to establish a collective bargaining framework in Independence School District was not the contractual agreements at issue in that case because the trial court had rejected the argument that the teachers and school district had an enforceable contract and the Missouri Supreme Court did not reverse that portion of the trial court's decision. (Amicus Brief at 9-10). That's wrong. Independence School District clearly addressed that issue and reversed the trial court decision accordingly. See Independence School District, 223 S.W.3d at 139-140.

for the exercise of a public employee's constitutional right to organize and bargain collectively "for those occupations included" in the Labor Law. Id. (emphasis added). In other words, contrary to what Respondent argues in this case, it is NOT the Court's decision in Independence School District that gives public employees a right to certain procedures for organizing and bargaining collectively. It *is* the Missouri Public Sector Labor Law that gives employees such a right to procedures for organizing and bargaining. And to the extent occupations are excluded from the Labor Law, employees in those occupations do NOT have such a right. If they had such a right, then the Missouri Supreme Court would have had to rule the Labor Law unconstitutional because it very plainly denies certain, excluded occupations from its procedures.

Respondent's argument on this point, based on the quoted language in Independence School District, also belies reason. The language cited by Respondent cannot meant that public employees have a constitutional right to a certain set of procedures that would allow them to "organize" and "bargain collectively" in some specific way or that otherwise the employer of that public employee has a legally enforceable *duty* to create a specific framework of "procedural rights" for collective bargaining. The fact the Missouri Supreme Court said the General Assembly *and* public employers are both said to have had a "role" in establishing the framework for collective bargaining proves the point. Assuming, *arguendo*, that Independence School District meant to give public employees excluded from the Labor Law a constitutional right to a certain set of procedures for organizing and bargaining with their respective employers, then, as an example, a union organization purporting to represent Missouri State Highway

Patrol Officers (another occupation excluded from the Labor Law) could file a petition asking a court to order the General Assembly to amend the Labor Law to include highway patrol officers or otherwise pass a statute that sets forth a specific collective bargaining framework for the patrol officers.[2] Obviously, such a petition would be ridiculous and any order from a court making such a declaration would be in obvious violation of the separation of powers doctrine. Yet, that is exactly what Appellant has been ordered to do in this case by the trial court. Actually, several bills have been introduced to the Missouri General Assembly since the decision in Independence School District attempting to have Missouri's Public Sector Labor Law amended to provide collective bargaining procedures for police officers, as well as other employee groups excluded from the Law. (See S.B. 1115, 94th General Assembly, 2nd Reg. Sess. (Mo. 2008); S.B. 473, 95th General Assembly, 1st Reg. Sess. (Mo. 2009); S.B. 761, 95th General Assembly, 2nd Reg. Sess. (Mo. 2010) (all attached hereto in Appellant's Appendix) and see also H.B. 2030, 94th General Assembly, 2nd Re. Sess. (Mo. 2008); H.B. 1159, 95th General Assembly, 1st Reg. Sess. (Mo. 2009); and H.B. 1829, 95th General Assembly, 2nd Reg. Sess. (Mo. 2010). Each of those bills failed. But there has been no court action taken in an attempt to require the General Assembly to pass one of these bills as Respondent argues is mandated by the decision in Independence School District because no court, including the Missouri Supreme Court, could require the General Assembly to take such action.

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[2] The employment of State Highway Patrol Officers is entirely governed by Missouri Rev. Statute, Section 43.010, et seq., and thus directly controlled by the General Assembly.

Not only does Independence School District itself reject the notion that public employees have the right to any procedures at all for organizing or collective bargaining or that their employers otherwise have an affirmative, legally enforceable duty to create such rights, the precedent of Quinn v. O.J. Buchanan, 298 S.W.2d 413, 418-19 (Mo. banc 1957), puts the nail in the coffin of Respondent's argument in this regard. That case recognized that the constitutional right to organize and bargain collectively is a "fundamental right of individuals" but does not set out any "required affirmative duties" of employers. Id. at 418-19. Rather, the constitutional provision simply means employers are prohibited from taking affirmative acts that would "prevent or interfere with" an employee's right under Art. I, Sec. 29. Id. at 419.[3] That is a fundamental understanding of basic constitutional law. For example, the U.S. Supreme Court recently held that the Second Amendment gives citizens the constitutional right to keep and bear arms. See Dist. of Columbia v. Heller, 128 S.Ct. 2783, 2797-98 (2008). No reasonable argument could be made that the Heller decision imposed an affirmative duty on Congress to pass a law creating certain procedures that would allow citizens to exercise that right. Respondent has no more of argument that Independence School District's interpretation of Art. I, Sec. 29, requires affirmative duties of Appellant than the National

[3] Contrary to Respondent's suggestion otherwise (Resp. Br. at 24-28), the precedent of Quinn on this argument is alive and well. On January 6, 2010, Thomas C. Mummert, III, U.S. Magistrate Judge, E.D.Mo. cited Quinn for the proposition that Art. I, Sec. 29, of the Missouri Constitution simply "protects an employee from any coercive conduct by the employer." Strinni v. Mehlville Fire Protection District, 681 F.Supp.2d 1052, 1079 (E.D.Mo. 2010).

Rifle Association could argue that Heller's interpretation of the Second Amendment requires affirmative duties of Congress.

Independence School District is not meaningless just because Appellant has no duty to take affirmative steps – particularly the steps it was ordered to take – to create a procedural framework that would allow its police officers' or sergeants' to organize and bargain collectively in any specific way. Rather, Independence School District, consistent with the holding of Quinn, recognizes that Appellant would be prohibited from doing anything to prevent or interfere with the right to organize and bargain collectively. Yet, Appellant has done nothing of the sort in this case. It has not prevented its police officers or sergeants from choosing someone to represent their interests to Appellant's city council. It has not closed the doors of its city council meetings to the police officers or sergeants. It has not refused to sit down and discuss with its polices officers or sergeants their concerns. As Quinn said, Art. I, Sec. 29, is intended to be a "shield" against abusive, coercive acts infringing on the right to organize and bargain collectively; it is not to be used as a "sword" to goad an employer into doing anything specific with respect to the right to organize and bargain collectively. Quinn, 298 S.W.2d at 419. That is exactly what Respondent is trying to do here – use Independence School District's decision as sword to force Appellant to take specific action that would allow its police officers and sergeants the ability to "organize" and "bargain collectively" in a specific way. The trial court was wrong to accept Respondent's argument on that point; it was wrong to order Appellant to take the steps it ordered it to take; and its judgment and order should be reversed accordingly.

II. The trial court erred in declaring a "justiciable controversy" existed.

Respondent argues there is a justiciable controversy in this case because Appellant has denied its police officers and sergeants the ability to exercise their right to organize and bargain collectively. (Resp. Br. at 24). Again, Appellant has never denied that right to its police officers and sergeants. And as also argued above, nothing in Independence School District suggests Appellant's police officers and sergeants have any rights to any specific collective bargaining framework – let alone the procedure framework ordered by the trial court in this case (procedures defining the bargaining unit, procedures setting an election process, procedures for the election, and procedures for the "meet and confer" after the election).

Respondent is not really interested in the actual holding of Independence School District. Instead, Respondent is interested in having this Court read that holding – that public employees have the right "to organize and bargain collectively through representatives of their choosing" (the express words of Art. I, Sec. 29) – to actually mean "to organize and bargain collectively through one, exclusive bargaining agent using the procedural framework set forth in the Labor Law." In other words, Respondent wants this Court to hold that for an employee to have a constitutional right to organize and bargain collectively really means that the employee has a constitutional right to the specific set of procedural framework elements ordered by the trial court in this case, which is basically the procedures out in the Labor Law. (Compare procedures set out in Trial Court's Order and Judgment (LF 120) with the procedures in the Labor Law, § 105.500, RSMo., et seq.). However, in addition to the arguments above that the actual

language and context of Independence School District specifically did not give Appellant's police officers and sergeants any specific "procedural rights" for collective bargaining and certainly did not give them the rights afforded other public sector employees through the Labor Law, the reasoning behind the decision in Independence School District also destroys any notion that this Court can read Art. I, Sec. 29, as held by the trial court and argued by Respondent.

The Court in Independence School District said there was "no authority" ... to read into the Constitution words that are not there." Independence School District, 223 S.W.3d at 137. For that reason, the Court held that the word "employees" in Art. I, Sec. 29, "plainly means employees" and is not limited to private sector employees only. Id. Respondent is asking this Court to ignore that reasoning from the Missouri Supreme Court. Respondent wants this Court to read into Art. I, Sec. 29, a right to bargain through one "exclusive" representative when the "express words" of the Constitution plainly say the right to bargain is "through representatives", plural. Id. at 133. And actually, the "express words" of the constitution, when it uses the plural form of the word "representatives", would seem to directly allow for multiple, non-exclusive representatives for employees wanting to organize and bargain collectively. Those words certainly, in no way, contemplate bargaining by one, exclusive representative.

Respondent is effectively arguing that the phrase from Art. I, Sec. 29, "bargain collectively" is a term of art that carries with it all the "rights" granted by the Labor Law. Respondent wants this Court to construe that phrase as it would have been specifically understood at the time that provision of the Missouri Constitution was adopted in 1945 or

as that phrase has otherwise come to be understood from the history of labor negotiations pursuant to the National Labor Relations Act or even the Missouri Public Sector Labor Law and other similar state laws. Essentially, Respondents wants this Court to construe the phrase "bargain collectively" to mean "bargain through one exclusive agent, such as a union". But to give "bargain collectively" a special or historical meaning flies in the face of the reasoning in Independence School District. In that case, both parties cited to the debates of the 1943 and 1944 Constitutional Convention to support their respective arguments as to what the constitutional delegates may or may not have intended by the words actually used in Art. I, Sec. 29 and what they may have understood about the meaning of those words as they had been historically used in the context of labor negotiations. See Independence School District, 223 S.W.3d at 136-37. Referencing the contrasting arguments by the parties there, the Missouri Supreme Court said "[w]hile the debates of the convention are interesting, they neither add to nor subtract from the *plain meaning* of the constitution's words. Missouri voters did not vote on the words used in the deliberations of the constitutional convention. The voters voted on the words in the Constitution, which says 'employees shall have the right to organize and bargain collectively'." Independence School District, 223 S.W.3d at 137 (emphasis added). To give special meaning to "bargain collectively" also ignores the reason the Missouri Supreme Court had to overrule City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. 1947). That decision had implied from the words of Art. I, Sec. 29 a historical understanding of what it meant to "bargain collectively" that "contradicts the *plain*

meaning of article I, section 29." Independence School District, 223 S.W.3d at 137 (emphasis added).[4]

And Respondent's argument that Quinn supports its argument that Appellant has a duty under Art. I., Sec. 29, to establish the specific framework ordered by the trial court because "that view" was expressed by the Missouri Supreme Court in Missey v.City of Cabool, 441 S.W.2d 35 (Mo. 1969) is just wrong. (Resp. Br. at 26). The employees in Missey had the right to the specific framework at issue in that case, and the protections from retaliatory termination that came with it, because they were covered by the Labor Law, unlike Appellant's police officers and sergeants in this case. See Missey, 441 S.W.2d at 40-41.

Until and unless Appellant prevents or otherwise interferes with its police officers' and sergeants' efforts organize themselves (however they want to do that), choose representatives (however they want to do that), or present their employment-related issues collectively to Appellant's governing body (however they want to do that), Appellant has not violated their constitutional rights. Therefore, no justiciable controversy exists in this case, and the trial court's order and judgment should be reversed for this reason.

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[4] Ironically, the Unions in Independence School District were the party arguing for the "plain meaning" of the constitution's words. See Independence School District, 223 S.W.3d at 137. There, the Unions wanted the Court to give the word "employees" a plain meaning despite the fact that the delegates at the Constitution Convention (as well as the sponsor of Art. I, Sec. 29, a Union leader no less) suggested "employees" did *not* mean "public employees". See id. (FN3).

III. The trial court erred in declaring Respondent had a "legally protectable interest" in the dispute of this case.

Respondent argues it satisfies the "legally protectable interest" element because it is has "associational standing" to bring this action on behalf of Appellant's police officers and sergeants. (Resp. Br. at 30). Respondent has no "associational standing" because the officers and sergeants do not have standing to bring this suit on their own behalf, which is a required element of an associational standing case. See Ferguson Police Officers Assoc. v. City of Ferguson, 670 S.W.2d 921, 924 (Mo. Ct. App. 1984). Appellant's arguments above that its police officers and sergeants do not have a right to the specific procedural framework elements ordered by the trial court also support the argument that the officers and sergeants do not have standing to bring this suit on their behalf.

Moreover, Appellant is not arguing that Respondent could have associational standing in some circumstances for its "members". (Resp. Br. at 33). Rather, Appellant's argument is that in this case Respondent does not have associational standing because the "members" it purports to represent (the police officers and sergeants) do not have rights to the specific collective bargaining procedures the trial court ordered Appellant to establish and therefore, the "members" do not themselves have any "legally protectable interest" in the case.

Further, Appellant misses the point of Appellant's argument when it suggests that Appellant is arguing that that Respondent could never sue to enforce the constitutionally protected collective bargaining rights of its "members" but could sue to enforce a contract between Appellant and its police officers and sergeants granting to them the

right to organize and bargain collectively. (Resp. Br. at 34). The point is not that Respondent would have associational standing in a contractual issue but not with regard to a constitutional issue. The point of the argument is that in Independence School District, there was associational standing by the union because its members there had legally protectable interests themselves because of the contractual agreements the school districts had entered into with the members (the school employees) and by which the members were allowed to select an exclusive bargaining representative to represent their interests with the school district. Whereas in this case, Respondent has no associational standing because its members (the police officers and sergeants) have no rights to the procedures awarded to them by the trial court either from a constitutional provision or from a contractual provision. The argument is not circular. The police officers and sergeants themselves have no legally protectable interest, and therefore Respondent does not have associational standing to bring this suit demanding Appellant establish the specific collective bargaining framework ordered by the trial court, because there is no source – neither a contractual provision nor a constitutional provision – that gives the officers and sergeants the right to that specific framework. Consequently, the trial court's order and judgment must be reversed.

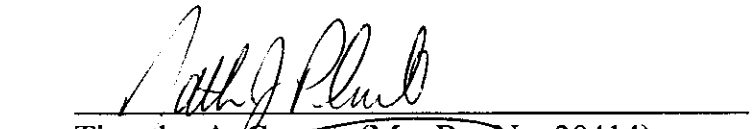
CONCLUSION

The real dispute in this case is whether Appellant's police officers and sergeants have a constitutional right to the specific procedures for collective bargaining ordered by the trial court – basically do they have a constitutional right to the collective bargaining procedures set out in the Labor Law. The answer to that question is "no". Independence

School District did not give them such a right. Quinn destroys any notion that such a right ever existed. If Appellant's police officers and sergeants want the right to a certain set of collective bargaining procedures created for their use, then they are free to lobby the necessary legislative branch to get them. But until their efforts in that regard are successful, they are not entitled to the procedures the trial court ordered Appellant to establish, and its order and judgment should be reversed.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2011, a copy of the foregoing was served via U.S. Mail, postage prepaid, and via electronic mail, to the following:

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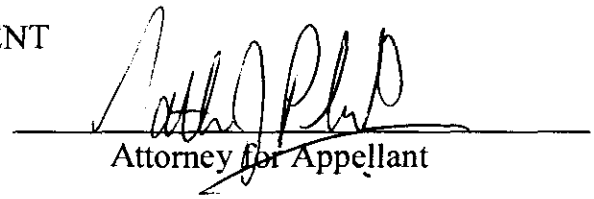

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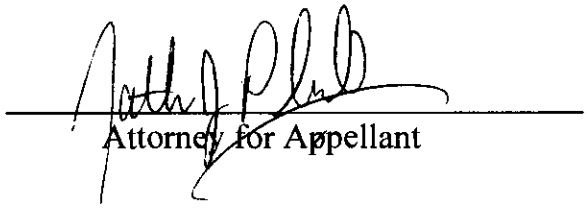
CERTIFICATE OF COMPLIANCE

I certify that this Brief is typed in Times New Roman, 13 point type, Microsoft Word. This Brief contains 3,817 words, which is in compliance with the 3,875 word count allowed. This Brief is otherwise in compliance with Rule 84.06(b) and Local Court Rule 360.

I also certify that an electronic mail message attaching a copy of this brief in Word for Windows format has been filed in lieu of a floppy disk to moapped@courts.mo.gov. I also certify that the attachment has been scanned for viruses and was at the time of scanning found to be virus free.



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Respondent,	)	
v.	)	**Appeal No. ED 95564**
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APPELLANT'S APPENDIX TO ITS REPLY BRIEF

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