IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. ED 95131

Mtn filed w CED

AMERICAN FEDERATION OF TEACHERS; LOCAL 420 OF THE AMERICAN FEDERATION OF TEACHERS; MARY ARMSTRONG; and, BYRON CLEMENS

Plaintiffs/Appellants

FILED

MAY 18 2011

Thomas F. Simon
CLERK, SUPREME COURT

v.

RICHARD LEDBETTER; PAUL SHAUGHNESSEY; GERALD HUTCHINSON; HATTIE JACKSON; TERRY NELSON; DON POHL; TRIP ZUMWALT; JOHN COSTELLO; and THE BOARD OF EDUCATION OF THE CONSTRUCTION CAREER CENTER CHARTER SCHOOL DISTRICT

Defendants/Respondents

AMICUS CURIAE BRIEF OF MISSOURI SCHOOL BOARDS' ASSOCIATION IN SUPPORT OF DEFENDANTS/RESPONDENTS RICHARD LEDBETTER; PAUL SHAUGHNESSEY; GERALD HUTCHINSON; HATTIE JACKSON; TERRY NELSON; DON POHL; TRIP ZUMWALT; JOHN COSTELLO; and THE BOARD OF EDUCATION OF THE CONSTRUCTION CAREER CENTER CHARTER SCHOOL DISTRICT

Missouri School Boards' Association
Susan Goldammer
[illegible]

SCANNED

TABLE OF CONTENTS

Table of Authorities 2

Interest of Amicus Curiae 7

Jurisdictional Statement 8

Statement of Facts 8

Point Relied On 9

Argument 10

Conclusion 21

Certificate of Service 23

Certificate of Compliance 24

TABLE OF AUTHORITIES

Cases

Bonner School Dist. No. 14 v. Bonner Educ. Ass'n,,

176 P.3d 262, 270 (Mont. 2008) 15

Chicago Local No. 458-3M, Graphic Communications Intern. Union, AFL-CIO

v. N.L.R.B., 206 F.3d 22, 32 (D.C. 2000)..... 14

Daily News of Los Angeles v. N.L.R.B., 73 F.3d 406, 410 (D.C. 1996) 12

Des Moines Mailers Union, Teamsters Local No. 358 v. N.L.R.B.,

381 F.3d 767, 769 (8th Cir. 2004)..... 12

Ford Motor Co. v. N.L.R.B., 441 U.S. 488, 503 (1979) 12

Honeywell Intern, Inc. v. N.L.R.B., 253 F.3d 125, 132 (D.C.2001) 12

Independence-Nat. Educ. Ass'n v. Independence School Dist.,

223 S.W.3d 131 (Mo.banc 2007) 7, 8, 17, 19, 21

Library of Congress v. Federal Labor Relations Authority,

699 F.2d 1280, 1282 (D.C. 1983) 12

Lincoln Cnty. Educ. Ass'n v. Lincoln Cnty. School Dist.,

67 P.3d 951, 953 (Or.App, 2003)..... 15

Local #77, International Association of Firefighters v. City of St. Joseph,

Buchanan County Circuit Court, May 13, 2010 ..... 13, 18, 21

Martin Marietta Energy Systems, Inc. v. N.L.R.B., 1988 WL 24225

(6th Cir. 1988)..... 11

Media General Operations, Inc. v. N.L.R.B., 2007 WL 806023

(4th Cir. March 15, 2007) 12

Naperville Ready Mix, Inc. v. N.L.R.B., 242 F.3d 744, 755 (7th Cir. 2001).. 12, 14

National Steel Corp. v. N.L.R.B., 324 F.3d 928, 933 (7th Cir. 2003) 12

Nat'l Labor Relations Bd. v. Acme Industrial Co., 385 U.S. 432, 439 (1967)..... 13

Nat'l Labor Relations Bd. v. Hardesty Co., Inc., 308 F.3d 859, 864

(8th Cir. 2002) 14

Nat'l Labor Relations Bd. v. Truitt Mfg. Co., 351 U.S. 149, 152-3 (1956) 13, 14

Nat'l Labor Relations Bd. v. Wooster Div. of Borg-Warner Corp.,

356 U.S. 342, 349 (1958) 13

Norris v. N.L.R.B., 417 F.3d 1161, 1170 (10th Cir. 2005)..... 13, 14

Retlaw Broadcasting Co.v. N.L.R.B., 172 F.3d 660, 665-6 (9th Cir. 1999) 13

Ryan Iron Works, Inc. v. N.L.R.B., 257 F.3d 1, 6-7 (1st Cir. 2001) 14

Sherrard Community Unit School Dist. No. 200 v. Illinois Educational,

696 N.E.2d 833, 837-8 (Ill.App. 4 Dist.,1998) 15

Springfield NEA v. The School District of Springfield,

Greene County Circuit Court, September 10, 2009 18

Missouri Constitution

Article 1, §29 ..... 7, 9, 10, 17, 20

Article V, §3 8

Statutes

29 U.S.C. 158 (d) 20

Alaska Stat. § 23.40.110 20

Cal. Gov. Code § 3543.5 20

Conn. Gen. Stat. § 10-153a 20

Del. Code Ann. 14 § 4007 20

Fla. Stat. § 447.309 20

Haw. Rev. Stat. § 89-9 20

Idaho Code Ann. § 33-1271 20

115 Ill. Comp. Stat. 5/10 20

Ind. Code § 20-29-2-2 20

Iowa Code § 20.9 20

Kan. Stat. Ann. §72-5413 20

Me. Rev. Stat. 26 § 965 20

Md. Code Ann., Education, § 6-408 20

Mass. Gen. Laws 150E § 6 20

Mich. Comp. Laws § 423.30 20

Minn. Stat. § 179A.07 20

Mont. Code Ann. § 39-31-305 20

Neb. Rev. Stat. § 48-824 20

Nev. Rev. Stat. §288.033 20

N.H. Rev. Stat. Ann. § 273-A:3 20

N.J. Stat. Ann. § 34:13A-5.4 20

N.M. Stat. Ann. § 10-7E-17 20

N.Y. § 209-a 20

N.D. Cent. Code § 15.1-16-13 20

Ohio Rev. Code Ann. § 4117.01 20

Okla. Stat .tit. 70 § 509.6 20

O.R.S. § 243.672 20

Or. Rev. Stat. § 243.672 20

43 Pa. Con. Stat. Ann.§ 1101.701 20

R.I. Gen. Laws § 28-9.3-4 20

S.D. Codified Laws § 3-18-2 20

Tenn. Code Ann. § 49-5-601 20

Vt. Stat. Ann. tit. 16 § 2001 20

Wash. Rev. Code §41.59.020 20

Wis. Stat. § 111.70. 20

Bills

Missouri House Bill 2030 (2008) 21

Missouri House Bill 1159 (2009) 21

Missouri House Bill 2227 (2010) 21

Missouri Senate Bill 473 (2009) 21

Missouri Senate Bill 761 (2010) 21

Other

Randall W. Eberts, *Teachers Unions and Student Performance: Help or Hindrance?*, 17 Future of Children (Princeton University) 175 (2007), http://www.eric.ed.gov/

ERICWebPortal/search/detailmini.jsp?_nfpb=true&_&ERICExtSearch_SearchValue_0=EJ795878&ERICExtSearch_SearchType_0=no&accno=EJ795878..... 15, 16

Frederick M. Hess and Martin R. West, *A Better Bargain: Overhauling Teacher Collective Bargaining for the 21st Century*, Program on Education Policy and Governance (Harvard University)(2006), http://www.hks.harvard.edu/pepg/PDF/Papers/BetterBargain.pdf 16

INTEREST OF AMICUS CURIAE

The Missouri School Boards' Association (MSBA) is a nonprofit association of Missouri public school districts created to provide assistance to public school board members and public schools. Currently, 385 public school districts in the state are members of MSBA, representing over ninety percent (90%) of Missouri public school students. Because Article I, §29 now applies to public school employees pursuant to Independence-Nat. Educ. Ass'n v. Independence School Dist., 223 S.W.3d 131 (Mo.banc 2007), this Court's decision in this case will directly impact public school districts across the state.

JURISDICTIONAL STATEMENT

This case involves a determination as to whether the Construction Career Center Charter School District ("Charter School") in any way interfered with the rights of its teachers under Article I, §29 of the Missouri Constitution, as interpreted by the Missouri Supreme Court in Independence-Nat. Educ. Ass'n v. Independence School Dist., 223 S.W.3d 131 (Mo.banc 2007). Pursuant to Article V, §3 of the Missouri Constitution, this Court has general appellate jurisdiction over this case.

STATEMENT OF FACTS

The Missouri School Boards' Association (MSBA) adopts the facts submitted by the Defendants/Respondents, Richard Ledbetter, Paul Shaughnessey, Gerald Hutchinson, Hattie Jackson, Terry Nelson, Don Pohl, Trip Zumwalt, John Costello, and the Board of Education of the Construction Career Center Charter School District ("Charter School").

POINT RELIED ON

I. The trial court correctly ruled that the Charter School did not violate Article I, §29 of the Missouri Constitution because the trial court has no authority to impose a federal good faith" negotiating obligation in that a) this standard would expand the legal obligations and expense associated with public-sector collective bargaining, b) Missouri courts have consistently refused to apply federal private-sector labor requirements to the Missouri public sector, and c) the Missouri Supreme Court has recognized the Missouri legislature as the entity to set the framework for Missouri public sector collective bargaining, not the courts.

ARGUMENT

I. The trial court correctly ruled that the Charter School did not violate Article I, §29 of the Missouri Constitution because the trial court has no authority to impose a federal good faith" negotiating obligation in that a) this standard would expand the legal obligations and expense associated with public-sector collective bargaining, b) Missouri courts have consistently refused to apply federal private-sector labor requirements to the Missouri public sector, and c) the Missouri Supreme Court has recognized the Missouri legislature as the entity to set the framework for Missouri public sector collective bargaining, not the courts.

The Appellants are asking the Court to do much more than reconsider the trial court's decision. The Appellants desperately want the Court to impose a "good faith" negotiation obligation on Missouri public entities, incorporating the law developed over decades under the National Labor Relations Act ("NLRA") and other federal statutes into Missouri's common law by using these two simple words. Although the term "good faith" seems innocuous and even desirable, it is a term of art in labor law and a term loaded with a multitude of additional legal obligations that go far beyond the requirement for an employer to engage in negotiations with the willingness to reach an agreement. Imposing this standard will seriously increase the time, expense and technical expertise necessary for Missouri public school districts - as well as all state departments, cities, counties, police departments, sheriff's offices, fire departments, water districts, and other

municipalities – to meet their legal obligations under Article 1, §29 of the Missouri Constitution.

A. "Good faith" bargaining is a term of art in labor law and, if applied, would expand the legal obligations and expense associated with public-sector collective bargaining far beyond what is currently required by Missouri law.

Although the term "good faith" is usually associated with the obligation for parties to meet at reasonable times and discuss issues of mutual concern with a willingness to reach an agreement, courts across the country have interpreted "good faith" negotiation to include a broad array of additional technical mandates, including, but not limited to, the following:

- ***Under "good faith" bargaining the employer must negotiate all bargaining subjects determined to be "mandatory."*** If a subject is "mandatory" the employer is not only required to negotiate it upon request, but the employer is also prohibited from acting on any mandatory issue until a sufficient amount of negotiation has occurred. This is true even if the change would benefit the employees. For example, in Martin Marietta Energy Systems, Inc. v. N.L.R.B., 1988 WL 24225 (6th Cir. 1988) the employer was prohibited from offering union employees even more health insurance options than were required in the collective bargaining agreement because insurance was a "mandatory" subject and the employer could take no actions without first negotiating with the union.

Although "mandatory" subjects include common issues such as wages and hours worked, this obligation has also been broadly applied to the placement of hidden surveillance cameras, severance pay, holiday bonuses, the placement of work stations, office doors and partitions, and the price of vending machine and cafeteria food. Ford Motor Co. v. N.L.R.B., 441 U.S. 488, 503 (1979); Media General Operations, Inc. v. N.L.R.B., 2007 WL 806023 (4th Cir. March 15, 2007); National Steel Corp. v. N.L.R.B., 324 F.3d 928, 933 (7th Cir. 2003); Honeywell Intern, Inc. v. N.L.R.B., 253 F.3d 125, 132 (D.C.2001); Library of Congress v. Federal Labor Relations Authority, 699 F.2d 1280, 1282 (D.C. 1983); Daily News of Los Angeles v. N.L.R.B., 73 F.3d 406, 410 (D.C. 1996). Imposition of this standard would require public employers such as school districts to jump through additional hoops before making numerous decisions and will result in much litigation over the definition of which topics were "mandatory."

- ***Under "good faith" bargaining, before the employer can take action without union approval (unilateral action) on mandatory bargaining subjects, the employer must bargain to bona fide impasse first.*** The courts are filled with cases litigating whether an impasse was "bona fide." Des Moines Mailers Union, Teamsters Local No. 358 v. N.L.R.B., 381 F.3d 767, 769 (8th Cir. 2004); Naperville Ready Mix, Inc. v. N.L.R.B., 242 F.3d 744, 755 (7th Cir. 2001). This requirement could paralyze public school boards, composed completely of unpaid laypersons. School board members will worry if the district has discussed topics enough, if there is enough documentation of thorough discussions, and whether

the district will be sued simply because the union disagrees with action the board ultimately takes.

- ***The employer cannot bargain to impasse on subjects that are considered "permissive" in "good faith" bargaining.*** Nat'l Labor Relations Bd. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958); Retlaw Broadcasting Co.v. N.L.R.B., 172 F.3d 660, 665-6 (9th Cir. 1999)(An employer cannot "hold up an agreement over a permissive term . . . because it effectively precludes collective bargaining on mandatory terms.") This requirement would keep public employers from conditioning agreement on topics the employer feels are necessary to address, even though a court has determined otherwise.
- ***The employer must provide counterproposals if a union's offer is rejected to avoid a complaint that the employer did not bargain in "good faith."*** Norris v. N.L.R.B., 417 F.3d 1161, 1170 (10th Cir. 2005)(" [A] party refuses to bargain in good faith when it merely repeats its prior position in response to a concession by the other party . . .") One Missouri court has already rejected this obligation as a "significant burden" to public entities. Local #77, International Association of Firefighters v. City of St. Joseph, Buchanan County Circuit Court, May 13, 2010, Appendix 1.
- ***When bargaining in "good faith," the employer must provide relevant information upon request, answer germane questions the union poses to the employer, and substantiate claims of economic inability to increase wages.*** Nat'l Labor Relations Bd. v. Acme Industrial Co, 385 U.S. 432, 439 (1967); Nat'l Labor

Relations Bd. v. Truitt Mfg. Co., 351 U.S. 149, 152-3 (1956); Nat'l Labor Relations Bd. v. Hardesty Co., Inc., 308 F.3d 859, 864 (8th Cir. 2002) These requests may include highly confidential information. For example, in Norris the employer did not act in "good faith" when it refused to provide the union representative doctor's notes regarding employee absences. Norris, at 1168-9.

- ***Withdrawing proposals or moving backwards on positions previously taken (regressing) can be a violation of "good faith."*** Chicago Local No. 458-3M, Graphic Communications Intern. Union, AFL-CIO v. N.L.R.B., 206 F.3d 22, 32 (D.C. 2000).
- ***In "good faith" bargaining, the employer must refrain from dealing directly with the employees the union represents.*** Naperville, at 757; Ryan Iron Works, Inc. v. N.L.R.B., 257 F.3d 1, 6-7 (1st Cir. 2001). Most public entities in Missouri are in small, rural communities where employees are also neighbors and friends with district administrators and school board members. Particularly given the infancy of the law in Missouri, it will be easy to turn what previously would have been an innocent conversation into a charge of direct dealing.

Needless to say, these "good faith" obligations go far beyond meeting and conferring with a union over issues of interest. Although some of these obligations seem innocuous, the entire "good faith" package is technical, time-consuming and costly. The "good faith" standard will require more formal negotiations, additional documentation, excessive meetings to prove "good faith" has occurred, and speculation and litigation

regarding which topics are "mandatory" or "permissive." Public-sector employers will need to hire persons trained in labor relations and important decisions will be delayed while more and more meetings are held so that public employers can demonstrate that enough discussion occurred to prove "good faith" sufficiently to a court. "Good faith" negotiations will no doubt be a boon for labor attorneys, but will stretch taxpayer dollars and make public entities less responsive to a changing economy.

School districts in states that have legislatively adopted the "good faith" standard for public sector negotiations have far less flexibility to immediately address student needs and, in some cases, the concerns of employees in the bargaining unit. Bonner School Dist. No. 14 v. Bonner Educ. Ass'n,, 176 P.3d 262, 270 (Mont. 2008)(District violated good faith obligation when it refused to negotiate teacher reassignments prior to moving teachers, even though negotiations for the current contract had ended.); Lincoln Cnty. Educ. Ass'n v. Lincoln Cnty. School Dist., 67 P.3d 951, 953 (Or.App.,2003)(The amount of time teachers spend with students during the day is a mandatory subject of negotiation that cannot be unilaterally changed by the district.); Sherrard Community Unit School Dist. No. 200 v. Illinois Educational, 696 N.E.2d 833, 837-8 (Ill.App. 4 Dist.,1998)(School district failed to negotiate in good faith when it allowed a teacher to address the Board regarding her reassignment without union representation, even though the teacher did not belong to the union.)

Appellants are now asking the court to adopt these same standards in Missouri at a time when there is a national movement to separate public school district labor relations from the private-sector factory model. Randall W. Eberts, *Teachers Unions and Student*

Performance: Help or Hindrance?, 17 Future of Children (Princeton University) 175 (2007), http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?_nfpb=true&_&ERICExtSearch_SearchValue_0=EJ795878&ERICExtSearch_SearchType_0=no&accno=EJ795878; Frederick M. Hess and Martin R. West, *A Better Bargain: Overhauling Teacher Collective Bargaining for the 21st Century*, Program on Education Policy and Governance (Harvard University)(2006), http://www.hks.harvard.edu/pepg/PDF/Papers/BetterBargain.pdf. The U.S. Department of Education has recognized that school district labor relations can pose a significant barrier to addressing student achievement issues, and has called a joint conference with union representatives and school districts to discuss changes. Press Release, U.S. Department of Education, *Conference on Labor-Management Collaboration Set for Denver: School Board Presidents, Superintendents, Union Leaders Invited*, (January 3, 2011), http://www.ed.gov/news/press-releases/conference-labor-management-collaboration-set-denver.

The term "good faith" comes with hidden obligations that will significantly expand the Missouri public sector labor law far beyond what is contemplated in the Missouri Constitution or in state statute. The Court should not use the term lightly and MSBA strongly encourages the Court not to use it at all.

B. Missouri courts have consistently refused to apply federal private-sector labor requirements to the Missouri public sector

The Appellants in this case try desperately to equate Article I, §29 with the National Labor Relations Act and to incorporate decisions interpreting federal law into Missouri law. However, the Missouri Supreme Court in Independence-Nat. Educ. Ass'n v. Independence School Dist., 223 S.W.3d 131 (Mo.banc 2007) made it clear that the rules applicable to Missouri public sector employees are different than those imposed on the private sector. "Unquestionably, public employees are differently situated from private employees and are treated differently under the law." Independence, 223 S.W.2d 131, 133 (Mo.banc 2007).

When defining the right to collectively bargain under the Missouri Constitution, the Independence Court looked to Missouri state statute, not the NLRA, finding that it is 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." Id. at 136. The only time the NLRA is discussed in Independence is when the Court is distinguishing the federal statute from the rights established under the Missouri Constitution. Id. at 139.

And the Independence court is not the only Missouri court that refused to apply the NLRA to the Missouri public sector. In 2009 the Greene County Circuit court found that the term "collective bargaining" does not require teachers to be represented by an exclusive bargaining representative, even though exclusive

representation is required under the NLRA and in other states. Springfield NEA v. The School District of Springfield, Greene County Circuit Court, September 10, 2009, ¶ 60, Appendix 2 ("Given the very real differences between bargaining in the public sector, as opposed to bargaining in the private sector, this Court is not persuaded that absent a statutory construct, such as the PSLL [public sector labor law], the phrase 'collective bargaining' must be universally understood as permitting only exclusive representation.")

Even more recently and on point, the Buchanan County Circuit Court found that the City of St. Joseph, Missouri had met its legal requirement to collectively bargain with the firefighters under the Missouri Constitution, even though the city had not followed NLRA "good faith" obligation requiring written counterproposals. The court emphasized that this "good faith" requirement would pose an extreme financial burden on public entities, particularly "in the throes of a declining economy." Local #77, International Association of Firefighters v. City of St. Joseph, Appendix 1.

> Plaintiff's position that Defendant was required to respond to each and every one of Plaintiff's initial economic proposals with an economic proposal of its own, ignores the significant differences between collective bargaining in the public sector and collective bargaining in the private sector. Plaintiff's argument and position that private sector collective bargaining law now applies to the public sector by virtue of the Missouri Supreme Court's decision in

the Independence-NEA case is based upon an erroneous reading of that case. It would be the role of the legislature, not the courts, to apply the exiting body of private sector labor law to the public sector if such was determined to be appropriate and in the state's interest.

Although the Appellants claim that federal standards are imbedded in the collective bargaining right, in fact Missouri courts have repeatedly rejected these standards as unnecessary and costly. The Missouri Supreme Court has clearly stated it is the legislature's responsibility to regulate public sector collective bargaining – not the courts.

C. The Missouri Supreme Court has explicitly designated the Missouri legislature as the entity best positioned to set the framework for Missouri public sector collective bargaining, not the court system.

[T]his Court's reading of the statute recognizes the role of the general assembly, . . . to set the framework for these public employees to bargain collectively through representatives of their own choosing.

Independence, at 136.

With these words, the Court in Independence emphasized the legislature's obligation to set the appropriate standards for Missouri public sector collective bargaining. The very basis for the Independence decision was that there is "no

authority for this Court to read into the Constitution words that are not there." Independence, at 137. The term "good faith" is not included in Article 1, §29 of the Missouri Constitution, the Missouri Public Sector Labor Law, or the Independence decision. This Court does not have the legal authority to read that term into the law.

In the private sector and in every state in which a "good faith" standard has been applied, there is a statute explicitly requiring "good faith" negotiation. *See 29 U.S.C. 158 (d); Alaska Stat. § 23.40.110; Cal. Gov. Code § 3543.5; Conn. Gen. Stat. § 10-153a; Del. Code Ann. 14 § 4007; Fla. Stat. § 447.309; Haw. Rev. Stat. § 89-9; Idaho Code Ann. § 33-1271; 115 Ill. Comp. Stat. 5/10; Ind. Code § 20-29-2-2; Iowa Code § 20.9; Kan. Stat. Ann. §72-5413; Me. Rev. Stat. 26 § 965; Md. Code Ann., Education, § 6-408; Mass. Gen. Laws 150E § 6; Mich. Comp. Laws § 423.30; Minn. Stat. § 179A.07; Mont. Code Ann. § 39-31-305; Neb. Rev. Stat. § 48-824; Nev. Rev. Stat. §288.033; N.H. Rev. Stat. Ann. § 273-A:3; N.J. Stat. Ann. § 34:13A-5.4; N.M. Stat. Ann. § 10-7E-17; N.Y. § 209-a; N.D. Cent. Code § 15.1-16-13; Ohio Rev. Code Ann. § 4117.01; Okla. Stat .tit. 70 § 509.6; O.R.S. § 243.672; Or. Rev. Stat. § 243.672; 43 Pa. Con. Stat. Ann.§ 1101.701; R.I. Gen. Laws § 28-9.3-4; S.D. Codified Laws § 3-18-2; Tenn. Code Ann. § 49-5-601; Vt. Stat. Ann. tit. 16 § 2001; Wash. Rev. Code §41.59.020; Wis. Stat. § 111.70.* If collective bargaining cannot exist without "good faith," there would have been no need for all these statutes to specifically require it.

The Missouri legislature should have the same opportunity to define the scope of public sector collective bargaining as other states have had – particularly because Missouri law had embraced public sector collective bargaining decades after other states did so in the 1960s and 70s. Notably, more than three years after the Independence decision the Missouri legislature has not approved the "good faith" standard, despite the fact that many bills have been introduced in an attempt to incorporate the term into the law. *See Missouri House Bill 2030 (2008); Missouri House Bill 1159 (2009), Missouri Senate Bill 473 (2009); Missouri House Bill 2227 (2010), Missouri Senate Bill 761 (2010).* None of these bills even moved out of their assigned legislative committee. The Appellants now hope that this court will assist them by circumventing the legislative process and imposing a "good faith" standard – along with all the baggage that goes with that standard.

MSBA prays this Court will respect the directives of the Missouri Supreme Court. As reiterated in the Local #77, International Association of Firefighters v. City of St. Joseph decision, "It would be the role of the legislature, not the courts, to apply the exiting body of private sector labor law to the public sector if such was determined to be appropriate and in the state's interest."

Conclusion

Public sector labor law is in its infancy in Missouri and this Court's decision will be the first post- Independence appellate decision. MSBA, on behalf of the public school districts of the state, encourages the Court to consider

carefully the broad implications its decision may have on not only the parties in front of it, but also the thousands of other governmental entities in the state that will follow the precedent set. If the Court applies the "good faith" standard in this case it will bring in a flood of additional obligations that will saddle governmental entities at a time when the economy is necessitating serious cuts in budgets and services. To date three Missouri courts have refused to apply private-sector labor law to Missouri public entities without explicit direction from the legislature. This Court should do likewise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by U.S. mail on February 18, 2011 on the following:

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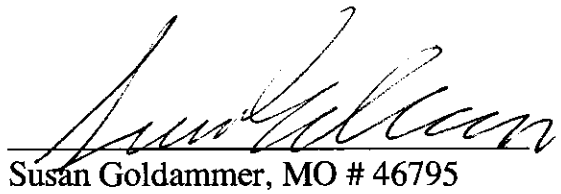

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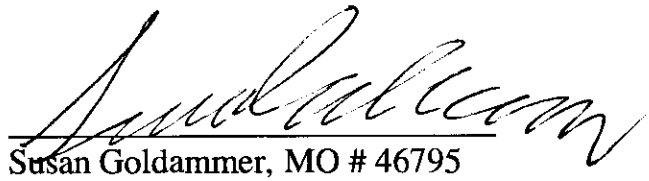
CERTIFICATE OF COMPLIANCE

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 4,174 words in this brief
(4) The CD containing a copy of this brief filed contemporaneously herewith has been scanned for viruses and is virus free.



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