

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. ED95131

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

Plaintiffs/Appellants,

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.

BRIEF OF DEFENDANTS/RESPONDENTS

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STATEMENT OF FACTS

Defendants/Respondents (hereinafter “CCC”) adopt the Statement of Facts of Plaintiffs/Appellants, with a few additional facts to be incorporated.

After the January 20, 2009 meeting with Plaintiffs where CCC representatives agreed to provide a salary and extra pay proposal in writing, CCC representatives presented the negotiated tentative agreement to the CCC Board of Education (hereinafter “CCC Board”) at the Board of Education Meeting Executive Session on January 26, 2009 (Legal File at page 32, hereinafter “L.F. at ___”). The CCC Board reviewed the draft agreement and voted six to zero to forward the agreement to the Board’s attorney for review. (L.F. at 32). The CCC Board revisited the proposed agreement at their February 17, 2009 Executive Session meeting and, after much discussion, the motion to accept the terms of the tentative agreement failed eight to zero. (L.F. at 32).

During the April 9, 2009 negotiations, after CCC representatives announced proposed raises in the salaries of teachers for the 2009/2010 school year by a total of less than \$19,000.00 and that contracts would be presented to teachers the next day (L.F. at 34), by the conclusion of the meeting, CCC representatives agreed to extend their deadline for presenting contracts to the teachers represented by Plaintiffs for six (6) days in order to allow the Plaintiffs to respond to CCC’s decision as to salaries for the 2009/2010 school year. (L.F. at 34). On April 13,

2009, CCC representatives met with Plaintiffs' representatives who proposed that raises totaling \$65,000.00 be granted to the teachers. (L.F. at 34). This proposal was rejected by the CCC representatives. (L.F. at 34).

ARGUMENT

I. THE TRIAL COURT CORRECTLY ENTERED JUDGMENT IN FAVOR OF DEFENDANTS IN THAT THE TRIAL COURT CORRECTLY DECLARED THE LAW WHEN IT DECLARED THAT DEFENDANTS HAVE NO DUTY TO BARGAIN IN GOOD FAITH WITH PLAINTIFFS AND THE PLAINTIFFS HAVE NO RIGHT TO COMPEL DEFENDANTS TO DO SO BECAUSE WHILE PLAINTIFFS HAVE A CONSTITUTIONAL RIGHT TO BARGAIN COLLECTIVELY WITH DEFENDANTS, THEY CANNOT COMPEL DEFENDANTS TO BARGAIN IN GOOD FAITH UNDER ARTICLE I, SECTION 29 OF THE CONSTITUTION OF MISSOURI.

A. Standard of Review.

This case was tried to the court on a stipulation of fact. The standard of review is *de novo* as Appellants seek review of the trial court's legal conclusions drawn from the stipulation of fact. In a court tried case upon a stipulation of facts, the only question before a reviewing court is whether the trial court drew the proper legal conclusions from those facts. *Schroeder v. Horack*, 592 S.W.2d 742, 744 (Mo. banc 1979); *Western Cas. & Sur. Co. v. Kohm*, 638 S.W.2d 798, 799 (Mo. App. 1982).

B. The trial court correctly held that Article 1, Section 29 of the Missouri Constitution does not require public employers to bargain with its employees’ representatives under both *Independence-National Education Association et al. v. Independence School District*, 223 S.W.3d 131 (Mo. 2007) and *Quinn v. Buchanan*, 298 S.W.2d 219 (Mo. banc 1957) and both cases are applicable to Plaintiffs’ claims.

Defendants did not violate Article I, Section 29 of the Missouri Constitution since Defendants met, conferred and discussed with Plaintiffs proposals relative to salaries and other conditions of employment. Article I, Section 29 of the Missouri Constitution provides, “employees shall have the right to organize and to bargain collectively through representatives of their own choosing.” The Missouri Supreme Court in *Independence-National Education Association v. Independence School District*, 223 S.W.3d 131 (Mo. 2007) (hereinafter “*Independence*”) held that these bargaining rights apply to public employees as well as private sector employees. Furthermore, Mo. Rev. Stat., §105.520 (2008)¹, governing the relationship between the Construction Careers Center and Plaintiffs, as agreed to by both parties, provides that when a proposal is presented to the public employer by the exclusive bargaining representative, the employer or its designated

¹ All Missouri statutes referenced are 2008 unless otherwise noted.

representatives “shall meet, confer and discuss such proposals relative to salaries and other conditions of employment.”

Even though employees have the right to organize and bargain collectively, the employer’s only obligation is to meet and confer with employee representatives. *Independence*, 223 S.W.3d at 136. Upon the completion of negotiations, the terms agreed upon must be reduced to writing and then presented to the governing body in the appropriate form required for adoption, modification or rejection. *Id.* at 138; §105.520 RSMo. The employer is not required to accept any proposed offer. *Independence*, 223 S.W.3d at 136.

CCC representatives met, conferred and discussed with Plaintiffs proposals relative to salary and other conditions of employment. In March of 2008, CCC voluntarily recognized AFT St. Louis as the exclusive representative for collective bargaining purposes and later entered into two (2) agreements regarding voluntary recognition of certain of its employee groups.

Representatives of both CCC and Plaintiffs met for negotiation purposes on the following days: May 13 and 20, June 10 and 25, July 15, 24 and 29, September 4, October 23, November 11, 20 and 24 in 2008. In 2009, the representative groups met for negotiation purposes on January 20, February 19, March 10, 19 and 31, and April 9. The representatives from each party reduced negotiated terms to writing to be presented to the Board of Education, CCC’s governing body, and to

the members of AFT St. Louis. CCC representatives presented the negotiated terms to the Board during the Executive Session of the January 26, 2009 Board of Education meeting. After reviewing the draft agreement, the Board voted six to zero to forward the agreement to the Board's attorney for review. On February 17, 2009, the Board revisited the terms of the proposed negotiated offer. After much discussion, the motion to accept the terms of the current form failed eight to zero. The Board of Education then instructed its negotiation representatives to develop a new proposal to submit to AFT St. Louis that did not include Board Policy. Of particular concern to the CCC Board of Education was the incorporation of teacher tenure and other items into the agreement that the Board felt should remain under its legislative authority, as discussed in *Independence*. “. . . the public employer is free to reject any proposals of employee organizations, and thus to use its governing authority to prescribe wages and working conditions . . .” *Independence* at 136.

In entering judgment in favor of Defendants, the trial court relied on *Quinn v. Buchanan*, 298 S.W.2d 413 (Mo. banc 1957), and Missouri Supreme Court's interpretation of Article I, Section 29 of the Missouri Constitution as it relates to bargaining in good faith. The trial court correctly noted that the Missouri Supreme Court held in *Quinn* that Article I, Section 29 does not require the parties to reach an agreement, *Id.* at 420, and that the Missouri Supreme Court's holding in

Independence upheld this interpretation when holding that “public sector labor law allows employers to reject all employee proposals, as long as the employer has met and conferred with employee representatives.” *Independence*, 223 S.W.3d at 136.

The trial court correctly held Defendants complied with Article I, Section 29 of the Missouri Constitution, as interpreted by the Missouri Supreme Court in *Independence* and *Quinn*. The trial court in *Local #77, International Association of Firefighters v. City of St. Joseph, Missouri*, Case No. 09BU-CV01900, while not binding, came to a similar conclusion as the trial court in this matter without reliance on *Quinn*. Plaintiffs in that case argued that the City of St. Joseph, a public employer, was required to make a written counterproposal in response to its wage increase proposal, rather than to simply reject the proposal. The court held:

. . . the clear language of *Independence* . . . requires that a public entity meet, confer, and discuss the proposals of employees through their duly authorized representatives and to present the proposals to the appropriate governing body for adoption, modification, or rejection.

Page 1-2 (Opinion included in Appendix).

CCC representatives met, conferred and discussed with Plaintiffs’ representatives proposals relative to salary and other conditions of employment. The representatives of both groups reduced the negotiated terms to writing and the CCC representatives presented said terms to the CCC Board of Education. The Board reviewed, discussed and considered the proposal, but ultimately voted not to

accept said terms. While Defendants must meet, confer and discuss with Plaintiffs salaries and other conditions of employment, Defendants were not required to accept any proposed offer.

C. The Defendants did not violate Article I, Section 29 of the Missouri Constitution nor was their conduct designed to thwart and frustrate the collective bargaining process since Defendants conduct did not amount to a refusal to bargain collectively with the representatives of its employees, but rather was to comply with Missouri statute.

A public employer may only negotiate matters that fall within its governing authority. *Independence*, 223 S.W.3d at 136. While a public employer is authorized to negotiate wages and other conditions of employment, *Id.*, §105.520, RSMo., a public employer may not negotiate any compensation for work already performed under Mo. Constitution, Art. III, Section 39(3). The Missouri Constitution states that the general assembly shall not allow a public entity “to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part.” Mo. Const., Art. III, Sec. 39(3). Thus, a public employer may not negotiate wages to be applied retroactively to its employees.

Section 67.101 RSMo. requires political subdivisions to prepare an annual budget. Public school districts’ fiscal year runs from July 1st through June 30th.

See §165.021.6 RSMo. Teachers must be notified on or before April 15th whether they will be employed the following school year. §§168.126, 168.221 RSMo. Contracts must be issued to returning teachers on or before May 15th for the following school year. §168.126 RSMo. Teacher contracts must contain the number of months school is to be taught and the wages per month to be paid. §168.126 RSMo.

CCC was required to meet their statutory obligations with regard to their budget and the issuance of teachers' contracts. Plaintiffs failed to make salaries a priority during the meetings and at no time submitted a proposal on behalf of CCC employees. CCC had no choice but to determine salaries since the negotiating process had not addressed it in a timely manner.

In the present case, Plaintiffs allege that CCC

refused to bargain collectively when it: 1) unilaterally declared that it would not bargain over subjects that are clearly wages, hours or other conditions of employment and thereafter met but refused to discuss those subjects; 2) unilaterally imposed salaries on employees without reaching impasse; and 3) bypassed the collective bargaining representative and endeavored to bargain directly with the employees. The fact that the Defendants engaged in such conduct is not disputed.

Appellant's Brief, page 15.

In fact, these "facts" are in dispute. After being presented with a proposed agreement on February 17, 2009, the CCC Board of Education, the governing body

of CCC, rejected the proposal. With no proposed agreements on the table, the Board of Education directed the CCC representatives that they would not agree to any proposal that included any form of teacher tenure. Charter schools are explicitly exempt from Missouri's Teacher Tenure Act, §§168.102, *et seq.* §160.405.5(3) RSMO. CCC representatives then drafted a counterproposal and presented it to the Board of Education on March 30, 2009. The counterproposal was presented to Plaintiffs' representatives on March 31, 2009. The counterproposal did not include any form of teacher tenure or other items that were addressed in Board policy. CCC did not unilaterally declare that it would not bargain over subjects that are clearly wages, hours or other conditions of employment and thereafter met but refused to discuss those subjects, as alleged by Plaintiffs.

CCC did not unilaterally impose salaries on employees. As the stipulated facts clearly show, during the April 9, 2009 negotiations, CCC representatives announced that the CCC Board had proposed raises in the salaries of teachers for the 2009/2010 school year by a total of less than \$19,000.00 and that contracts would be presented to teachers the next day. However, by the conclusion of the meeting, CCC representatives agreed to extend their deadline for presenting contracts to the teachers represented by Plaintiffs for six (6) days in order to allow the Plaintiffs to respond to CCC's decision as to salaries for the 2009/2010 school

year. On April 13, 2009, CCC representatives met with Plaintiffs' representatives who proposed raises totaling \$65,000.00 be granted to the teachers. This proposal was rejected by the CCC representatives because it was well over the authority given by the CCC Board of Education. Sections 168.126 and 168.221 RSMo. require that all teachers must be notified on or before April 15th whether they will be employed for the next school year. Failure to notify a teacher results in re-employment for the next year. *Id.* CCC was required by Missouri statutes to notify teachers of their re-employment on or before April 15th and issue contracts on or before May 15th. Contracts must include salary under §168.126 RSMo.

While the trial court held that imposing contract terms (salary) without first reaching impasse was a failure of CCC to bargain in good faith, the trial court failed to address the statutory confines to which CCC was required to act regarding contracts. By doing nothing in this situation, unneeded teachers would have been re-employed for the 2009/2010 school year, causing further budgetary travails. And because a public employer may not negotiate any compensation for work already performed under Mo. Constitution, Art. III, Section 39(3), CCC could not negotiate wages to be applied retroactively to its employees. The trial court correctly notes in the footnote on page 6 of its Memorandum, Order and Decision the "express constitutional limitation on retroactive increases to the compensation of public employees" under Mo. Const. Art. III, §39(3) would even prohibit the

Court to “decree salaries retroactively.” CCC had no choice but to issue contracts on or before May 15, 2009 once it had determined the number of returning teachers on or before April 15, 2009, after rejecting Plaintiffs’ representatives’ proposal of raises in salary totaling \$65,000.00.

Finally, there are no facts before this court, nor were there any such facts before the trial court, that alleged that CCC bypassed the collective bargaining representative and endeavored to bargain directly with the employees.

While first agreeing that neither party is under any obligation to agree to terms or enter into an agreement and that an employer is not required to agree or even make concessions, Plaintiffs then attempt to convince this court to apply federal law governing the private sector, developed through the National Labor Relations Act (NLRA), 29 U.S.C. section 151 *et seq.*, to the requirements of collective bargaining in the public sector. By its own terms, the NLRA does not apply to employees of “any State or political subdivision thereof.” 29 U.S.C. §152(2). In *Independence*, the Missouri Supreme Court recognized this distinction when it stated, “Unquestionably, public employees are differently situated from private employees and are treated differently under the law.” *Independence* at 133.

Plaintiffs’ basis for their lawsuit and subsequent appeal is to argue that CCC “frustrated” the bargaining process by engaging in actions that show an intent not to reach an agreement. CCC has addressed Plaintiffs’ specific allegations above

and deny that they engaged in such conduct. However, the Court should also consider this: Why would CCC engage in activity to thwart the reaching of an agreement since, as stated by Plaintiffs and the *Independence* court, “the law does not require the school district as public employer to reach agreements with its employee associations”? *Independence* at 133.

The Supreme Court, in fact, reinforced its position on this stance when it stated:

There is nothing in the law, as it has developed, that requires a public entity to agree to a proposal by its employee unions. In fact, this Court has repeatedly recognized that the public sector labor law allows employers to reject all employee proposals, as long as the employer has met and conferred with employee representatives. *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 41 (Mo. 1969); *State ex rel O’Leary v. Missouri State Board of Medication*, 509 S.W.2d 84, 88-89 (Mo. banc 1974); *Curators of University of Missouri v. Public Service Employees Local No. 45*, 520 S.W.2d 54, 57 (Mo. banc 1975); *Larry Reichert, et al. v. The Board of Education of the City of St. Louis*, 217 S.W.3d 301 (Mo. banc 2007).

Independence at 136. The Court further stated: “To allow employees to bargain collectively does not require the employer to agree to any terms with the representative groups. The employer is free to reject any and all proposals made by the employees.” *Id.* at 137. The Court continues:

The public sector labor law upheld in *Missey* does not define what is meant by the right to ‘bargain

collectively,’ but describes the actions allowed under the statute: employees are granted the right to present proposals, through their representatives, to the employer; the employer is required to ‘meet, confer and discuss’ such proposals; and the results of this discussion are to be put in writing and ‘presented to the appropriate administrative, legislative or governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection.’ [citations excluded]. The law makes clear that a public employer is not required to agree to anything. Section 105.020; *Missey*, 441 S.W.2d at 41; *O’Leary*, 509 S.W.2d at 88-89; *Curators*, 520 S.W.2d at 57.

Independence at 138.

If there is no requirement to reach an agreement, there is no need to engage in conduct to make the process of bargaining a sham. By adopting Plaintiffs’ line of reasoning, this Court would, in essence, require public employers to reach a binding agreement with their employees, contrary to current law as declared by the Missouri Supreme Court.

CONCLUSION

Article I, Section 29 provides public employees the right to engage in collective bargaining through the representative of their choosing. The holding in *Independence-National Educational Association v. Independence School District*, 223 S.W.3d 131, 133 (Mo. 2007) provides that public employees have the right to engage in collective bargaining and refers to *State ex rel. Missey v. City of Cabool*,

441 S.W.2d 35 (Mo. 1969) when defining what actions are required. In compliance with those Missouri Supreme Court opinions, CCC representatives met, conferred and discussed with Plaintiffs' representatives proposals relative to salary and other conditions of employment. The representatives reduced the negotiated terms to writing and presented said terms to CCC's Board of Education, the governing body of CCC. The Board reviewed, discussed and considered the proposal, but ultimately voted to reject said terms. While CCC must meet, confer and discuss with Plaintiffs salaries and other conditions of employment, Defendants were not required to accept any proposed offer. Therefore, the judgment of the trial court should be upheld.

Respectfully submitted,

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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 3160 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.

/s/ Cindy Reeds Ormsby
Cindy Reeds Ormsby

CERTIFICATE OF SERVICE

The undersigned certifies that on February 22, 2011 a copy of Defendants/Respondents' Brief was served via First Class Mail, postage prepaid, to: George O. Suggs, Schuchat, Cook & Werner, 1221 Locust Street, 2nd Floor, St. Louis, MO 63103-2364, Attorneys for Plaintiffs/Appellants.

/s/ Cindy Reeds Ormsby
Cindy Reeds Ormsby

APPENDIX

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Local #77, International Association of Firefighters v. City of St. Joseph, Missouri; Circuit Court of Buchanan County, MO;; Cause No. 09BU-CV01900A1 - A4