

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

FILED
MAR 09 2011

LAURA ROY
CLERK, 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,

91766

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.

FILED

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REPLY BRIEF OF PLAINTIFFS/APPELLANTS

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CLERK, SUPREME COURT

SCHUCHAT, COOK & WERNER

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SCANNED

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	2
POINTS RELIED ON	3
ARGUMENT	3
CONCLUSION	9
CERTIFICATE OF COMPLIANCE	10
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

<u>Case</u>	<u>Page</u>
<i>Independence NEA v. Independence School District</i> , 223 S.W. 3d 131 (Mo. 2007)	3
<i>NLRB v. Insurance Agents' Int'l Union</i> , 361 U.S. 477, 487 (1960)	8
<i>Quinn v. Buchanan</i> , 298 S.W. 2d 413 (Mo. 1957)	4
<u>Missouri Revised Statutes</u>	
Chapter 168 R.S.Mo., Section 168.221.....	6
<u>Missouri Constitution</u>	
Article I, Section 29	3, 4, 5, 7, 9
<u>National Labor Relations Act</u>	
Section 8(d), 29 U.S.C. Section 158 (d) (1988)	4, 8

ARGUMENT

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFFS IN THAT THE TRIAL COURT ERRONEOUSLY 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 PLAINTIFFS HAVE A CONSTITUTIONAL RIGHT TO BARGAIN COLLECTIVELY WITH DEFENDANTS AND TO COMPEL DEFENDANTS TO BARGAIN IN GOOD FAITH AS PROTECTED BY ARTICLE 1, SECTION 29 OF THE CONSTITUTION OF MISSOURI, AND DEFENDANTS HAVE A CORRESPONDING DUTY TO BARGAIN COLLECTIVELY WITH PLAINTIFFS.

Defendants argue that *Independence NEA v. Independence School District*, 223 S.W. 3d 131 (Mo. 2007) does not require a public employer in Missouri to bargain with the representatives of its employees. Defendants argue that they are not required to bargain because they are not required to reach agreement and are free to reject all employee proposals. Defendants fail to recognize that bargaining is a process distinct from agreement. Plaintiffs agree that Defendants are under no obligation to agree to any terms with Plaintiffs. Instead, Defendants are obligated not to engage in conduct designed to frustrate the possibility of agreement.

Plaintiffs have never argued that Defendants were obligated to reach agreement with Plaintiffs on any subject or to accept any proposal made by Plaintiffs. Plaintiffs have

consistently argued that Defendants have the limited duty not to bargain in bad faith during the process of bargaining through conduct designed to frustrate the possibility of agreement. Defendants' failure to recognize the distinction between the duty to bargain and a non-existent duty to reach agreement demonstrates their fundamental misunderstanding of the collective bargaining process and the holding in *Independence*, supra.

The trial court made clear that it relied on *Quinn v. Buchanan*, 298 S.W. 2d 413 (Mo. 1957), and stated that *Quinn* expressly held that Section 29 did not include an obligation to bargain at all, much less to bargain in good faith and that the section simply imposed no duty even to "meet and confer" with employee bargaining representatives. (L.F. p. 72-73). Under the terms of the trial court's Order and Judgment Defendants must recognize Plaintiff American Federation of Teachers, St. Louis as the exclusive bargaining representative of all teachers and cannot bargain collectively with any other representative of those employees, but Defendants are not required to do anything more. Defendants conceded that the trial court relied on *Quinn* but Defendants read the trial court's holding as limited to the proposition that a public employer in Missouri does not have to reach agreement through collective bargaining and that a public employer may reject any proposal made by its employees. (Brief Defendant/Respondent p. 6). Even under federal law, applicable to private employers, there is no obligation to reach agreement as a result of collective bargaining. *National Labor Relations Act*, Section 8(d) 29 U.S.C. § 158(d).

After arguing that they have no duty to bargain Defendants concede they must meet and confer with the Plaintiffs even though the trial court did not believe Defendants were required to do so. Defendants conclude that, while they must meet, confer and discuss salaries and other conditions of employment with Plaintiffs, Defendants were not required to accept any proposed offer and for that reason their conduct violated no duty. Defendants' argument misses the point entirely. Plaintiffs do not contend that Defendants violated the duty to bargain with Plaintiffs imposed by Article 1, Section 29 by refusing to agree to terms or any proposal. Plaintiffs contend that Defendants conduct during the negotiation process violated the rights of Plaintiffs to engage in collective bargaining. It is the conduct in which the Defendants engaged in the process of negotiating with the Plaintiffs that constitutes bargaining in bad faith not the failure to reach agreement on a contract or on any proposal. The stipulated facts set forth the undisputed conduct that constitutes the violation of the Defendants' duty not to engage in bad faith bargaining.

It is undisputed that on January 20, 2009 Defendants' representatives agreed to provide the Defendants' salary and extra pay proposals for the upcoming 2009-2010 school year in writing within a week. (L.F. p. 32). It is undisputed that Defendants did not present a salary proposal to Plaintiffs until April 9, 2009, and then only after Defendants had met on March 30, 2009 in executive session and adopted teachers' salaries for the 2009-2010 school year that Defendants never previously discussed or proposed to Plaintiffs. (L.F. p. 33). Despite adopting salaries on March 30, 2009, Defendants did not disclose that fact in the March 31, 2009 negotiation session with Plaintiffs, but waited until April 9, 2009 when the Defendants proposed implementing

those salaries the next day. (L.F. p. 34). At the request of Plaintiffs, Defendants agreed to postpone implementation of the 2009-2010 salaries until April 13, 2009. The next day the Defendants announced the new salaries to its teachers. Despite its assertion that it did not unilaterally impose salaries for the 2009-2010 school year, Defendants executive meeting minutes of March 30, 2009 show that the salaries were adopted at that meeting. The trial court concluded that Defendants had unilaterally implemented their 2009-2010 salary proposal, and that Defendants in so doing had bargained in bad faith. (L.F. p. 72).

In their brief to this court the Defendants' attempt to justify their conduct by claiming that they were compelled to offer contracts to teachers by April 15, 2009 by provisions of Chapter 168 R.S.Mo. relating to teacher tenure and retention. That claim is disingenuous at best. As a charter school, Defendants have consistently maintained that they are not subject to the provisions of Chapter 168 and not bound by teacher tenure provisions of Chapter 168. It is undisputed that salaries for the 2008-2009 school year were not adopted by Defendants until July 2008. If the Defendants are bound by the provisions of Chapter 168 R.S.Mo. including Section 168.221 as they claim in their brief then they are subject to the teacher tenure provisions of that same section. Such a position is totally inconsistent with the Defendants' insistence that they would not negotiate teacher tenure because as a charter school Defendants were not bound by the teacher tenure law. Even if the Defendants believed that contracts with salaries were required for each teacher by April 15, 2009 that does not explain why Defendants did not present a proposal as promised in January 2009 or why they unilaterally adopted salaries

without negotiating on March 30, 2009 and then never mentioned that fact in bargaining the with Plaintiffs then next day.

In addition to unilaterally adopting and implementing 2009-2010 salaries, the Defendants adopted a resolution not to negotiate over teacher tenure and other terms they determined to be policy and presented their implemented salaries directly to the teachers represented by Defendants. (L.F. p 33-34).

Defendants after arguing that they have no duty to bargain in good faith with Plaintiffs spend most of their brief attempting to explain why their conduct in negotiations was not for the purpose of avoiding the possibility of reaching agreement. They conclude with the proposition that with no obligation to reach agreement Defendants have no need to make the negotiation process a sham. The argument ignores the fact that collective bargaining is a process and not a result. It is a right to engage in the process of collective bargaining through representatives of the employees choosing that is protected by Article I, Section 29.

Defendants' rhetorical question as to why it would engage in actions to thwart an agreement when they were not required to agree is easily answered. Many employers, both public and private, abhor the very concept of collective bargaining. It is not hostility to the terms of a proposal made by a union that motivates an employer to engage in bad faith bargaining, but hostility to the process and the employees support for their chosen representative. Collective bargaining by its very nature limits an employer in managing its employees without the limitation of having to engage in a process in order to exercise a prerogative of management. Without a requirement that an employer not engage in bad

faith the process can be shown to be of no benefit to the employees who have selected a bargain representative. An employer can free themselves from the restrictions of having to bargain in the future by conduct that destroys employees' belief in the process.

Defendants' conduct demonstrated to its employees that they were in total control of 2009-2010 teachers salaries by: reneging on Defendants' January 20, 2009 promise to make a proposal on salaries; secretly adopting salaries for teachers on March 30, 2009; not communicating those salaries on March 31, 2009 during negotiations; announcing the adoption of those salaries on April 9, 2009; and, communicating those salaries directly to Plaintiffs' members the day after rejecting Plaintiffs' salary proposal.

The motive for engaging in conduct to frustrate an agreement is to demonstrate to the employees who have selected a collective bargaining representative that the process is a meaningless sham and that their support for their union is misplaced. Once support for the collective bargaining representative is destroyed, the employer is free to return to the status quo in determining wages and other conditions of employment without engaging in the collective bargaining process.

“Federal labor law protects the process of collective bargaining without compelling agreement. As Section 8(d) plainly states, the duty to bargain ‘does not compel either party to agree to a proposal or require the making of a concession.’ 29 U.S.C. § 158(d) (1988).” *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 487 (1960). The process of collective bargaining is protected under federal law in recognition that the right to form and join a union is meaningless if an employer can engage in bad

faith bargaining and destroy the employees' belief in the process and, as a result, the collective bargaining process.

CONCLUSION

Defendants concede that they cannot refuse to bargain at all with Plaintiffs. There is no dispute about the right of Defendants to reject any proposal or contract proposed by the Plaintiffs. At issue is whether Defendants are permitted by Article 1, Section 29 of the Missouri Constitution to engage in conduct in bad faith to avoid reaching agreement. The trial court held that Defendants were permitted to do so and entered judgment accordingly. The right to engage in collective bargaining through representatives of their choosing is protected by Article 1, Section 29 is meaningless if a public employer can evade that right by engaging in conduct like that of the Defendants. The trial courts must be reversed and the case remanded for entry of judgment compelling Defendants to refrain from bad faith bargaining with the Plaintiffs.

Respectfully submitted,

SCHUCHAT, COOK & WERNER

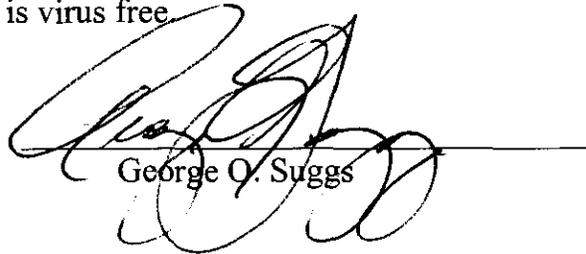


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CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

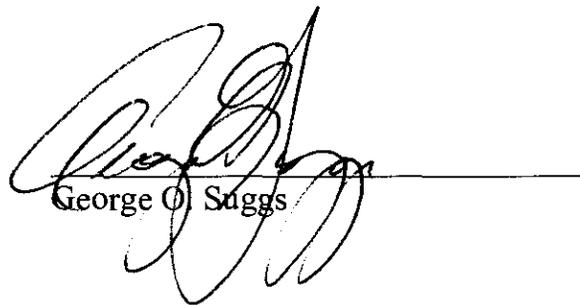
- (1) this brief contains the information required by Rule 55.03;
- (2) this brief complies with the limitations contained in Rule 84.06(b);
- (3) there are 1,781 words in this brief;
- (4) the floppy disk containing a copy of this brief filed contemporaneously herewith has been scanned for viruses and is virus free.



George O. Suggs

CERTIFICATE OF SERVICE

The undersigned certifies that on March 9, 2011 a copy of Plaintiff/Appellant[s] Reply Brief was served by First Class Mail, Postage Pre-Paid upon: Darold E. Crotzer, Jr., and Cindy Reeds Ormsby, Crotzer & Ormsby, 130 South Bemiston, Suite 300, Clayton, MO 63105, Attorneys for Defendants/Respondents.



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