



In the Missouri Court of Appeals
Eastern District
DIVISION THREE

EASTERN MISSOURI COALITION)	No. ED95564
OF POLICE,)	
FRATERNAL ORDER OF POLICE,)	
LODGE 15,)	
)	
Respondent,)	Appeal from the Circuit Court of
)	St. Louis County
vs.)	
)	
CITY OF UNIVERSITY CITY,)	Hon. Barbara Wallace
)	
Appellant.)	FILED: May 3, 2011

OPINION

University City appeals the trial court's summary judgment in favor of its local police union, the Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 (Union), ordering the City to establish a framework for collective bargaining. We would affirm in part and amend in part. However, due to the general interest and importance of the issues presented, we transfer the case to the Supreme Court, under Rule 83.02.

Background

The facts are undisputed. In December 2008, a majority (71%) of City police officers and sergeants signed interest cards supporting the certification of Union as their exclusive representative for collective bargaining. With that mandate, Union asked City to voluntarily recognize Union's representative status. City declined. Union persisted

and asked City to establish a procedural framework for collective bargaining. City declined. Union filed its petition for declaratory judgment asserting that City has an affirmative duty, under the Missouri Constitution, to establish a meaningful framework of procedures allowing City law enforcement employees to bargain collectively with City. Both parties subsequently filed cross-motions for summary judgment. City argued that it had no duty to adopt a process for collective bargaining and, moreover, the court lacked authority to force City to do so. The trial court entered judgment in favor of Union, and this appeal followed.

City contends that the trial court erred in that: (1) Union lacks standing to sue on behalf of its members, (2) City has no legal duty to establish collective bargaining procedures, and (3) the separation of powers doctrine prohibits the court from ordering City to adopt such procedures.

Standard of Review

This case is an action for declaratory judgment decided by summary judgment. The appellate standard of review for declaratory judgment is the same as in any court-tried case: we will affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Guyer v. City of Kirkwood, 38 S.W.3d 412, 413 (Mo. 2001).

The purpose of summary judgment is to resolve cases in which there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Rule 74.04(c)(6); Grattan v. Union Elec. Co., 151 S.W.3d 59, 61 (Mo. 2004). City asserts three points of legal error. Our review is *de novo*. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993).

Discussion

Standing

As a threshold issue, City submits that Union has no legally protectable interest - *i.e.*, standing - in the present dispute.¹ A plaintiff has standing if it is directly and adversely affected by the action in question.” Ste. Genevieve School Dist. V. Board of Alderman of City of Ste. Genevieve, 66 S.W.3d 6, 10 (Mo. 2002). A voluntary membership association may acquire standing by seeking to vindicate whatever rights its members may enjoy. Ferguson Police Officers Association v. City of Ferguson, 670 S.W.2d 921, 924 (Mo.App. 1984), citing Warth v. Seldin, 422 U.S. 490, 511 (1975). The criteria for associational standing are: (1) the members have standing to sue in their own right, (2) the interests that the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members. Ferguson Police, citing Hunt w. Washington State Apple Advertising Commission, 432 U.S.333, 343 (1977).

City does not challenge Union’s satisfaction of the second and third elements. Clearly, Union’s central purpose is to defend the rights of its members, and neither its claim nor the relief requested requires membership involvement (in contrast to a suit for individual money damages). See Ferguson Police at 925-926. Rather, City argues that Union fails the first element because its members are not legally entitled to a collective bargaining process in the first place. We disagree, as discussed herein.

¹ “Legally protectable interest” signifies “standing” in the context of a declaratory judgment action. Ste. Genevieve School Dist. V. Board of Alderman of City of Ste. Genevieve, 66 S.W.3d 6, 10 (Mo. 2002). We employ the shorter term simply for the reader’s ease.

Duty to Create Framework

Article I, section 29, of the Missouri Constitution states that “employees shall have the right to organize and to bargain collectively through representatives of their own choosing.” Missouri’s public sector labor law, codified in section 105.500 *et seq.* RSMo, provides a procedural framework for collective bargaining for most public employees, but it expressly excludes law enforcement officers and teachers. The Missouri Supreme Court considered the fate of the latter in Independence-NEA v. Independence School Dist., 223 S.W.3d 131, 136 (Mo. banc 2007). There, the teachers’ union sought to enforce their constitutional right of collective bargaining after the school district rescinded their prior agreement, unilaterally instituted new terms, and refused to engage in further discussions with the union. The Court held that the constitution grants all public employees a right to bargain collectively, including those not covered by statutory labor laws. When the procedural framework for bargaining is not codified, *i.e.*, for excluded employees, the Court recognized the role of their public employers to set the framework:

To be consistent with article I, section 29, the statute’s exclusion of teachers cannot be read to preclude teachers from bargaining collectively. Rather, the public sector labor law is read to provide procedures for the exercise of this right for those occupations included, but not to preclude omitted occupational groups from the exercise of the right to bargain collectively, because all employees have that right under article I, section 29. Instead of invalidating the public sector labor law to the extent that it excludes teachers, this Court’s reading of the statute 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.

Id. at 136. The Court was mindful to clarify, however, that nothing requires a public entity to reach an agreement with its employee unions; the employer is free to reject any proposal. Id. And public employees are forbidden to strike. Id. at 133.

City contends that article I, section 29, as interpreted in Independence, does not impose a legally enforceable *duty* to establish a framework for collective bargaining. In support of its position, City relies on Quinn v. O.J. Buchanan, where the Court held that article I, section 29, while granting collective bargaining rights to employees, casts no correlative obligation on employers. 298 S.W.2d 413, 419 (Mo. banc 1957). Union counters that this particular holding is implicitly overruled by Independence and, even accepting *arguendo* that Quinn remains good law, it is factually inapposite here. We find Quinn inapplicable. Quinn involved a class action by individual employees of a private company that threatened to fire them for unionizing. The Court held that the employees were entitled to organize free of coercion but the private employer was not required to negotiate with their union absent legislation, which did not exist at the time. Quinn acknowledged, however, that the constitutional right of collective bargaining could not be denied by the *government*. Quinn at 417.

Moreover, as a court of error, we must follow the Missouri Supreme Court's most recent pronouncements on the subject. Workes v. Embassy Food Enterprises, Inc., 592 S.W.2d 864, 868 (Mo.App. 1979); Godfrey v. Union Pacific Co., 874 S.W.2d 504 (Mo.App. 1994) (court of appeals is constitutionally bound to follow the last controlling decision of the Missouri Supreme Court (citing Mo. Const. art. V, §2)). Here, those pronouncements reside in Independence. Employees have a constitutional right to bargain collectively under a procedural framework set by their employer. Independence

at 136. Within that framework, “proposals are made and either accepted or rejected.” Id. at 138. The employer remains free to reject any proposal. Id. at 136. Missouri’s statutory framework requires an employer to “meet, confer, and discuss,” and then the results are reduced to writing and a proposal is presented to the employer for adoption, modification, or rejection. Id. at 138; §105.520 RSMo. While no such guidelines exist for employees excluded from the statute, by common understanding collective bargaining entails “negotiations between an employer and the representatives of organized employees to determine the conditions of employment . . .” Id. at n.6, citing Black’s Law Dictionary (8th Ed. 2004). We interpret these pronouncements by our Supreme Court to mean that an employer of statutorily excluded employees must not only adopt procedures for collective bargaining but also participate in the process it created. We find support for this interpretation in Judge Price’s observation, in his separate opinion, that “the majority does not appear to have given public employees anything more than the rights public employees already enjoy to *meet and confer* and to choose their own representative.” Id. at 147. (emphasis added) Our interpretation is further supported by basic logic: if one is granted the right to bargain, he must bargain with someone other than himself. City’s suggestion that it has no duty to engage with employee representatives renders meaningless those rights guaranteed to City’s employees under article I, section 29. Indeed, the trial court recognized this inherent reciprocity when it reasoned that “the police officers’ right to collectively bargain is effectively extinguished by the City sitting on its hands and refusing to act.”

Following Independence, we would conclude that employees’ constitutional right of collective bargaining implies a corresponding duty of City to facilitate the exercise of

that right. We also caution, however, that City is under no obligation to reach agreement, and Union is prohibited from striking in protest.

Separation of Powers

Finally, City contends that the trial court's order directing City to adopt collective bargaining procedures violates the separation of powers doctrine.² Specifically, the court's order states as follows:

Defendant City shall expeditiously establish a reasonable framework of its choosing for collective bargaining that will include: the scope of an appropriate bargaining unit that will include the City's police officers and sergeants; procedures for the election process for certifying FOP Lodge 15 as the exclusive bargaining unit for the City's police officers and sergeants, including the date, time and place of election; the procedures for holding an election; and the procedures for the meet and confer process.

City argues that the order is an unconstitutional encroachment on City's legislative function because it commands City to legislate. Union counters that the court's order isn't unconstitutional because it doesn't dictate specific terms of the process and doesn't even require the passage of an ordinance. Rather, it merely directs City to establish a framework in accordance with Independence while preserving the City's prerogative to define the details like any other administrative measure relating to employees.

As a threshold matter, then, the parties dispute whether City's compliance requires an ordinance or simply an administrative act, for the latter would not implicate the separation of powers doctrine. The parties' respective assertions as to what form a framework should take are essentially bare. City's charter vests the city council with

² In Missouri, the doctrine is set forth in Article II, section 1, of the Missouri Constitution, stating, "The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted."

legislative power to adopt police regulations by ordinance but delegates personnel matters to the city manager. Authorities applying a separation of powers analysis instruct that courts should not interfere with the exercise of power by other branches of government except to enforce ministerial acts requiring no discretion. See *e.g.*, State ex rel. Johnson v. Regan, 76 S.W.2d 736, 741 (Mo. App. 1934). Here, clearly City’s adoption of a collective bargaining agreement entails more than a ministerial act.

Furthermore, Independence indicates that City’s role in setting a framework is indeed legislative in that it parallels the role of the general assembly in the absence of a statute. Independence at 136. As the Court further explained, because a public entity is free to reject any proposal “and thus to *use its governing authority* to prescribe wages and working conditions, none of the public entity’s legislative or governing authority is being delegated.” Id. (emphasis added) Therefore, although the trial court’s order does not specifically direct City to pass an ordinance, we are not persuaded that City could adopt a collective bargaining framework simply by administrative order. Independence suggests that the framework necessitates an ordinance, thus invoking the separation of powers doctrine.

Examining, next, whether the trial court’s order violates that doctrine, both parties rely on Lenette Realty & Inv. Co. v. City of Chesterfield, 35 S.W.3d 399 (Mo.App. 2000). There, the plaintiff sought a court order forcing the city to adopt his zoning proposal. The trial court deemed the city’s zoning classification unconstitutional as applied to the plaintiff, but it refused to order the city to adopt the plaintiff’s proposal instead. Rather, the court directed the city “to place a reasonable zoning classification on the properties,” thus leaving the specifics to the city’s discretion. Id. at 409. This court

affirmed, reasoning that “[a]ny such judicial command to a legislative body [as proposed by the plaintiff] raises serious questions regarding the constitutionally mandated distinction between the legislative and judicial branches of this state’s government.” Id. at 408.

Guided by Lenette, we would conclude that most elements of the trial court’s order here comport with the constitution by respecting City’s authority to define the specific terms of a “reasonable framework *of its choosing*” and providing only general guidance on basic components thereof (*e.g.*, scope, procedures for elections, procedures for meeting and conferring). However, the court’s directive that City designate Union as the exclusive bargaining unit goes too far in that it preempts the very procedures yet to be adopted and, applying Lenette, is too specific to withstand constitutional scrutiny.

Conclusion

In our view, the trial court did not err in determining that Union has standing or in ordering City to create a reasonable framework for collective bargaining, but we would conclude that the trial court erred in specifically directing City to designate Union as the exclusive bargaining unit at this stage of the process. We would amend the trial court’s judgment to eliminate that directive but otherwise affirm. However, given the general interest and importance of the questions presented, we order this case to be transferred to our Supreme Court pursuant to Rule 83.02.

CLIFFORD H. AHRENS, Judge

Sherri B. Sullivan, P.J., concurs.
Lawrence E. Mooney, J., concurs.