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MISSOURI SUPREME COURT RECOGNIZES PUBLIC EMPLOYEES' COLLECTIVE BARGAINING RIGHTS

Agreements With Employee Representatives Are Enforceable*

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In 2003, three employee associations and several individuals filed a lawsuit against the Independence, Missouri School District challenging the District's refusal to "bargain collectively" with employee representatives and objecting to the District's unilateral repudiation of existing agreements. In bringing their claims, the employee representatives took dead aim at several long-settled principles of Missouri's public sector labor law.

On Tuesday, May 29, 2007, the Missouri Supreme Court handed down its long-awaited decision in the case. *Independence-National Education Association v. Independence School District*, 223 S.W.3d 131, (Mo. banc 2007). In an opinion authored by Chief Justice Michael Wolff, the Court overruled two earlier Supreme Court decisions, one dating from 1947, *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. banc 1947), and a second from 1982, *Sumter v. City of Moberly*, 645 S.W.2d 359 (Mo. banc 1982). These cases have provided critical guidance to Missouri public employers for decades and their abandonment by the Court creates new ground rules for public employers and employee representatives.

What Did the Court Decide?

In its *Independence School District* decision, the Supreme Court made four key holdings:

- **Missouri public employees have the right to "bargain collectively."**

In *Clouse*, the Missouri Supreme Court held that all public employees had the right to bring "their views and issues to any public officer or legislative body," but to recognize a right of public employees to "bargain collectively" would result in the unlawful delegation of legislative authority

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to non-governmental entities. The *Clouse* decision held: "[q]ualifications, tenure, compensation and working conditions of public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract."

In its *Independence School District* decision, the Court flatly repudiates its 1947 view and holds that "all employees, including those represented by the employee associations in this case, have the 'right to bargain collectively.'"

- **The right to bargain collectively extends to <u>all</u> classifications of public employees, including employee groups that are not covered by the current public sector labor law. R.S.Mo. §105.500, *et seq*.**

Although in its 1947 decision in *Clouse*, the Missouri Supreme Court had held that all public employees had the right to join unions and bring their views to their public employer, when Missouri later adopted its public employee labor law - in 1965 - the statute excluded police, deputy sheriffs, Missouri State Highway Patrolmen, Missouri National Guard and all teachers of all Missouri schools, colleges and universities from its coverage. R.S.Mo. §105.510. The Supreme Court's *Independence School District* decision now makes it clear that teachers (and presumably, police, deputy sheriffs, state highway patrolmen, Missouri National Guard and college and university teachers) have the same right to bargain collectively through representatives of their own choosing as all other public employees. According to the Supreme Court, these groups' exclusion from the Missouri public sector labor law merely means that there is no statutorily prescribed framework for selecting representatives for these classifications of employees, and no prescribed process for memorializing the results of bargaining.

In this connection the Supreme Court said, "[i]nstead of invalidating the public sector labor law to the extent that it excludes teachers, this Court's [new] 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."

- **Missouri public employers must bargain collectively with the representatives of their employees, but they need not reach agreement as to any specific proposal made by the representative.**

So long as a public employer satisfies its obligation to entertain proposals from the employees' representative, the employer remains empowered to implement its own terms and

conditions over the objection of the employees' representative. Analogizing the process of collective bargaining for groups of employees to the process of negotiating with a single individual, the Supreme Court observed,

> "Public employers routinely engage in bargaining for employees. A school district that wishes to hire a superintendent may negotiate and reach an agreement that then becomes the subject of a contract. . . . [citations omitted] Nothing obligates a school district to agree to the superintendent's proposal – the school district can set the salary and other terms of employment and the superintendent can take them or leave them. . . .
>
> How does individual negotiation differ from bargaining that occurs with groups of employees? Conceptually it would appear to be the same process: Proposals are made and either accepted or rejected…."

- **Agreements between public employers and employee representatives are enforceable contracts and may not unilaterally be repudiated by the public body.**

In its 1982 decision in *Sumter v. City of Moberly*, the Supreme Court had held that a public employer that entered into an agreement with a union and adopted the terms of the agreement by ordinance, administrative rule or regulation, nevertheless "was not bound by the agreement it had signed with the union and . . . the terms could be changed unilaterally by the City even during the effective period of the agreement."

Again, the Court now squarely rejects its quarter century old precedent, and holds in its *Independence School District* decision that "agreements that the school district [makes] with employee groups are afforded the same legal respect as contracts made between the district and individuals, although public employees – unlike their private-sector counterparts – are not permitted to strike. As long as the duration and terms of such agreements comply with the limits provided by law for school districts to bind themselves, and are consistent with other statutes such as the Teacher Tenure Act, the agreements are enforceable as any other contractual obligations undertaken by the district."

The Supreme Court notes that there may be significant questions as to the duration that a collective bargaining agreement will be enforceable. "In any public contract, there is the question of what duration a public entity is permitted to bind itself. Some of these limits are set by statute, and some that involve financial commitments may be limited by the length of the budget process." Importantly, the Court states, "[s]chool districts certainly are free to include clauses excusing contractual obligations. . . ."

What Does The Decision Mean?

Although the Supreme Court's *Independence School District* decision answers several fundamental questions concerning the relationship between public employers and employee representatives, it raises a host of issues that public employers must carefully consider.

- **First Contracts**

Public employers that have never had a bargaining relationship and are confronted with negotiations for the first time should ensure that the first contract that may result is carefully drafted. Labor relations experts in both the public and private sectors agree that the first collective bargaining agreement is often the most important document the employer and union will ever negotiate. Employee benefits or limitations on management prerogatives that are casually bargained in a first contract can be exceedingly difficult to modify in subsequent negotiations. Vague or confusing language in the first agreement often leads to frequent disputes down the line. Precise draftsmanship is important to avoid unintended consequences.

- **Termination Provisions**

Public employers that are currently in the process of negotiating with employee groups should pay particular attention to the duration and termination procedures in their agreements. Public employers who do not wish to "tie the hands" of future city councils, boards of directors, etc., may wish to include provisions for contract reopeners by a vote of the elected body within a certain period of time after each local election. Public employers will probably want to coordinate carefully the reopener language in their agreements with the public body's budget cycle. To guard against unanticipated changes in circumstances such as significant drops in tax revenue, state aid or other income, public employers should consider including an "emergency" reopener, permitting the body to reopen the contract for negotiations upon a specific finding of exigent circumstances.

The key message employers should take away from the Supreme Court's discussion concerning repudiation of contracts is that public employers wishing to preserve their prerogative to reopen the agreed upon terms and conditions of employment must take steps to build their own termination dates or other "escape hatches" into the agreement.

- **Dispute Resolution Procedures**

Public employers that reach agreements with their employee representatives must give careful consideration to including simple, straightforward dispute resolution procedures. By contract, parties can agree to have disputes resolved by third party arbitration, by joint employee-management panels, or even by one of the parties themselves. In the public sector it is not unusual for certain kinds of employment disputes that remain unresolved after exhausting the parties' grievance procedure, to be resolved by the elected body itself. However, in the absence of an agreed upon dispute resolution procedure, breach of contract claims are generally resolved through a lawsuit. No public employer will want to submit routine contract disputes to the expense of a jury trial.

- **Procedural Regulations Concerning Bargaining**

The *Independence School District* decision broadly establishes the right of public employees to bargain collectively through a representative of their own choosing, but does little to define the details of the public employer's bargaining obligations. For example, must a public employer meet with an employee representative any time the representative requests? Must a public employer meet repeatedly with an employee representative if the two sides are unable to reach an agreement after an initial round of negotiations? Is there any obligation to engage in the "give and take" of bargaining, or may a public employer stand by its initial proposals without alteration, as it may do when offering a contract to an individual employee? The Supreme Court's use of an example of "bargaining," in which the employee's proposal is met with a "take it or leave it" response by the employer, suggests that the Court may not view the employer's bargaining duty to be particularly onerous. More specific answers to these questions and others may eventually be provided in new legislation to be enacted or in future court decisions. In the meantime, however, the Supreme Court has clearly "recognize[d] the role of …[the public body]… to set the framework for … public employees to bargain collectively…."

Public employers that wish to avoid essentially "perpetual" negotiations may want to consider adopting policies that call for bargaining over wage and benefit issues to take place during a particular time in the budget cycle. Public employers may also want to negotiate broad "management rights" clauses and bargaining waivers, sometimes referred to as "zipper clauses," to limit the subjects on which bargaining may be required during the term of a collective bargaining contract. In the private sector, where the collective bargaining process is extensively regulated by

the National Labor Relations Act, the parties are expressly relieved of any obligation to bargain over a term that has been negotiated for the duration of the contract. State law includes no such provisions.

- **Determining Representative Status and Appropriate Bargaining Units**

Public employers dealing with groups of employees excluded from Missouri's current public sector labor law, such as teachers or police officers, may want to consider how to determine the representative status of a particular employee association and what grouping of these employees constitutes an appropriate bargaining unit. For employee classifications covered by the current Missouri public sector labor law, the Missouri Department of Labor and Industrial Relations is tasked with the responsibility of certifying an employee group as a bargaining representative based on the results of a secret ballot election. It is also responsible for determining the composition of an appropriate bargaining unit. As matters presently stand, however, the department has no authority to conduct a vote to determine whether an organization represents a majority of a school district's teachers or to determine whether the police officers in a certain precinct or teachers at a single school constitute an appropriate unit for bargaining. As noted earlier, the Supreme Court in the *Independence School District* case has suggested that public bodies have the authority to prescribe their own procedures for making these determinations with respect to employee groups that are excluded from coverage under the current public labor law statute.

- **Supervisory Employee Bargaining Issues**

Public employers may need to prepare to confront claims by managerial and supervisory level employees that they too are entitled to bargain collectively. The Supreme Court's decision in the *Independence School District* case states unequivocally that "all" employees have the right to bargain collectively. The Supreme Court refused to read any exception into the constitutionally protected right to bargain because no such limitations appear in the language of the Constitution itself. Supervisors and managers are "employees" by almost any dictionary definition of the term. Consequently, supervisory employees may also insist on their right to bargain collectively.

Supervisors are excluded from bargaining in the private sector because the National Labor Relations Act expressly defines employees to exclude "any individual employed as a supervisor..." 29 U.S.C. §152(3).

Even if Missouri public sector supervisors have a right to bargain under the State Constitution, there are strong policy arguments for why supervisors should not be included in any

bargaining unit in which their subordinates are also members. The Department of Labor and Industrial Relations historically has excluded supervisors from a bargaining unit made up of rank and file employees. A public employer newly confronted with a bargaining demand by a group of teachers, police or other employees excluded from Missouri's current public sector labor law, may, at a minimum, wish to exclude supervisors from the bargaining unit.

Attorneys in Spencer Fane's Labor and Employment and Education Law Groups have extensive experience advising employers concerning collective bargaining issues, drafting collective bargaining contracts and serving as management negotiators in both the public and private sectors. Many of our public sector clients are located in states, like Kansas, where teachers and some other public employees have had collective bargaining rights for many years. Many of our Missouri public employer clients have long sought our assistance in negotiating formal agreements with their employee representatives that were all but indistinguishable from true collective bargaining contracts, except as to their enforceability. Additionally, our attorneys have assisted many public employers in proceedings before the Missouri Department of Labor and Industrial Relations to determine appropriate bargaining units and to arrange elections. We also have similar experience advising employers concerning communications with their employees during union organizing efforts. Our lawyers are always pleased to let our clients "Profit From our Experience."

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