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## COMMENT

# THE PUBLIC EMPLOYEE LABOR LAW IN MISSOURI

### I. INTRODUCTION

The rights of private employees in Missouri, as well as in all other states, are protected by the National Labor Relations Act.<sup>1</sup> Private employees have, among other rights, the right to join unions,<sup>2</sup> the right to strike,<sup>3</sup> the right to bargain collectively,<sup>4</sup> and the right to sue to enforce collective bargaining agreements.<sup>5</sup> Public employees, however, are not covered by the National Labor Relations Act.<sup>6</sup> Other than constitutional protection, public employees have only such rights as may be granted by statute.<sup>7</sup> Missouri has enacted the Public Sector Labor Law<sup>8</sup> which covers public employees in Missouri. Under the Missouri statute and case law, public employees do have the right to join a union.<sup>9</sup> However, public employees in Missouri have no right to strike,<sup>10</sup> no right to bargain collectively as that term is understood in the

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1. 29 U.S.C. 151-169 (1982).

2. National Labor Relations Act § 7, 29 U.S.C. § 157 (1982).

3. National Labor Relations Act § 13, 29 U.S.C. § 163 (1982).

4. National Labor Relations Act § 7; 29 U.S.C. § 157 (1982).

5. Labor Management Relations Act § 301, 29 U.S.C. § 185 (1982).

6. National Labor Relations Act § 2(2)-(3), 29 U.S.C. § 152(2)-(3) (1982).

Section 2(2) states: "The term 'employer' . . . shall not include the United States or any State or political subdivision thereof . . . ." Section 2(3) states: "The term 'employee' . . . shall not include . . . any individual employed by . . . any person who is not an employer as herein defined." *Id.*

7. In addition, the federal government has statutes apart from the National Labor Relations Act which cover federal employees. *See, e.g.*, Civil Service Reform Act of 1978, § 701, 5 U.S.C. §§ 7107-7135 (1982).

8. Mo. REV. STAT. §§ 105.500-.530 (1978).

9. *E.g.*, *City of Springfield v. Clouse*, 356 Mo. 1239, 1245, 206 S.W.2d 539, 542 (1947) (en banc).

10. *E.g.*, *St. Louis Teachers Ass'n v. Board of Educ.*, 544 S.W.2d 573, 575 (Mo. 1976) (en banc); *see also* Mo. REV. STAT. § 105.530 (1978).

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private sector,<sup>11</sup> and no right to enforce any agreement which they reach with a public employer.<sup>12</sup> What is the difference between public employees and private employees in Missouri? Why should they be treated differently? The answer, according to Missouri court decisions, is that the private employer was established to make a profit for its owners while "the public employer was established by and is run for the benefit of all the people and its authority derives not from contract nor the profit motive inherent in the principle of free private enterprise, but from the constitution, statutes, civil service rules, regulations and resolutions . . . ."<sup>13</sup> For this reason, then, according to the courts, public employment labor relations law in Missouri differs from the law of private employment under the National Labor Relations Act.

## II. THE RIGHTS OF PUBLIC EMPLOYEES

### A. „ Constitutionally Protected Rights of Public Employees

The Missouri Supreme Court set the parameters of public employee bargaining rights in 1947 in *City of Springfield v. Clouse*.<sup>14</sup> The court in *Clouse* acknowledged that the right of public employees to organize into labor organizations, subject to some regulation for the public welfare,<sup>15</sup> is insured by the federal and state constitutional guarantees of the right to speak freely, to peaceably assemble, and to petition public bodies.<sup>16</sup> The court, however, went on to hold that the guarantee in the Missouri constitution "that employees shall have the right to organize and to bargain collectively through representatives of their own choosing"<sup>17</sup> was inapplicable to public employees.<sup>18</sup>

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11. See, e.g., *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 41 (Mo. 1969).

12. E.g., *Sumpter v. City of Moberly*, 645 S.W.2d 359, 363 (Mo. 1982) (en banc).

13. *Curators of Univ. v. Public Serv. Employees Local No. 45*, 520 S.W.2d 54, 58 (Mo. 1975) (en banc) (quoting KAN. STAT. ANN. § 75-4321(a)(4)); see also *Sumpter*, 645 S.W.2d at 366 (Donnelly, J., dissenting) ("authority of a public body derives only from the consent of the people") (emphasis in original); *City of Grandview v. Moore*, 481 S.W.2d 539 (Mo. Ct. App. 1972).

14. 356 Mo. 1239, 206 S.W.2d 539 (Mo. 1947) (en banc). This case was a "declaratory judgment action seeking determination of the legal power of the City to make collective bargaining contracts, with labor unions representing city employees, concerning wages, hours, collection of union dues, and working conditions." *Id.* at 1245, 206 S.W.2d at 541.

15. *Id.* at 1247, 206 S.W.2d at 542.

16. *Id.*

17. Mo. CONST. art. I, § 29.

18. 356 Mo. at 1247, 206 S.W.2d at 542.

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This holding, that public employees cannot bargain collectively with their employer, was grounded on two major rationales. The first rationale was based on the non-delegation doctrine. The court stated that

a whole matter of . . . working conditions for any public service, involves the exercise of legislative powers . . . . [T]he legislature cannot [constitutionally] delegate its legislative powers . . . . If such powers cannot be delegated, they surely cannot be bargained or contracted away; and certainly not by any administrative or executive officers [who would be the ones bargaining with the public employees if they had the right to bargain collectively.] Thus . . . working conditions of public . . . employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract.<sup>19</sup>

Besides the non-delegation rationale, the court also made a sovereignty argument.<sup>20</sup> Because working conditions of public employees are matters to be handled within the legislature's discretion, the court reasoned that public employees have no right to bargain and contract with respect to their working conditions because "no legislature can bind itself or its successor to make or continue any legislative act."<sup>21</sup> In other words, public employees cannot make a binding contract with their employer with respect to working conditions even when the legislative body has approved the contract, because the legislative body must be free to alter these working conditions at will.<sup>22</sup> Because of the non-delegation doctrine and the sovereignty of the legislature, public employees cannot engage in collective bargaining, as that term is understood in the private sector, i.e., negotiation between employer and employees over conditions of employment for the purpose of reaching a mutual agreement binding on both. At most, public employees can give "expression to desires for the lawmaker's consideration and guidance."<sup>23</sup>

The court in *Clouse* did hold open one possible instance in which public employees might have a right to bargain collectively with their employer in the same manner as private employees. The court stated that the General Assembly might be able to provide for the operation of the proprietary functions of a public body distinctly and separately from its traditional governmental functions.<sup>24</sup> In such circumstances, the court suggested that public

19. *Id.* at 1251, 206 S.W.2d at 545.

20. The designation of the two rationales used in *Clouse* for denying collective bargaining rights to public employees as the non-delegation argument and the sovereignty argument was adopted by Comment, *Missouri Public Employment Agreements: The Enforceability Issue*, 21 St. Louis U.L.J. 981 (1983).

21. *Clouse*, 356 Mo. at 1251, 206 S.W.2d at 545.

22. *Id.* at 1248, 206 S.W.2d at 543.

23. *Id.* at 1247, 206 S.W.2d at 545.

24. "A governmental duty is one which is performed for the common good of all. A proprietary duty is one which is performed for the special benefit or profit of the city as a corporate entity." *Counts v. Morrison-Knudsen, Inc.*, 663 S.W.2d 357, 362 (Mo. Ct. App. 1983). In performing governmental functions "a city acts as

employees engaged in the public body's proprietary function might be able to bargain collectively with the public employer in a manner similar to bargaining in private industry.<sup>25</sup>

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the agent of the state in the exercise of sovereign powers . . . . Proprietary functions are acts performed in the pursuit of private or corporate duties for the particular benefit of the corporation and its inhabitants." *Nanna v. Village of McArthur*, 44 Ohio App. 2d 22, 24-25, 335 N.E.2d 712, 715 (1974). The operation of police and fire departments is generally accepted as a governmental function, while the operation of public utilities by a city is generally accepted as a proprietary function.

25. *Clouse*, 356 Mo. at 1252, 206 S.W.2d at 546. The Missouri Supreme Court came close to confirming this exception two years after *Clouse* in *State ex rel. Moore v. Julian*, 222 S.W.2d 720 (Mo. 1949) (en banc). The bus system of the city of Springfield was municipally owned and operated by board of public utilities of that city. The board of public utilities and the union representing bus drivers and bus support personnel were unable to reach an agreement on working conditions. The union sought to invoke the jurisdiction of the State Board of Mediation, a state agency created by the King-Thompson Act, MO. REV. STAT. §§ 295.010-.210 (1978), to regulate public utility labor disputes. The State Board of Mediation refused to accept jurisdiction. 222 S.W.2d at 720-21. The Missouri Supreme Court held that the 1945 Board of Public Utilities Act, MO. REV. STAT. §§ 91.330-.430 (1969) (repealed 1975), which empowered any city of the second class to establish a Board of Public Utilities to operate city-owned utilities, separated proprietary functions from governmental functions in cities of the second class. This separation of functions "remov[ed] any impediment to the handling of employer-employee relations in municipally operated utilities on the same basis as in private industry . . . at least in cities of the second class," and thus the King-Thompson Act was held to be applicable to the Springfield labor dispute. The court ordered the State Board of Mediation to accept jurisdiction of the dispute. 222 S.W.2d at 725-26.

In *Gildewell v. Hughey*, 314 S.W.2d 749 (Mo. 1958) (en banc), unions representing employees of city-owned public utilities in Springfield sought a declaration that the unions had a right to enter into collective bargaining agreements with the Board of Public Utilities. At this time Springfield was no longer a city of the second class because, subsequent to *Julian*, Springfield had adopted a city charter. *Id.* at 750-51. Unlike the 1945 Board of Public Utilities Act, which applied only to cities of the second class, Springfield's charter did not provide for the separation of the city's public utilities from its general governmental functions. Therefore, the court held that the general rule of *Clouse* controlled and that the public utilities employees had no right to bargain collectively with the Board of Public Utilities. *Id.* at 755-56. While the court did not retreat from the proprietary-governmental dichotomy of *Clouse* and *Julian*, it did state that the decision in *Julian* was not that the 1945 Board of Public Utilities Act authorized collective bargaining by public employees, but only that the combination of that act and the King-Thompson Act gave the State Board of Mediation jurisdiction over labor disputes in city-owned public utilities. *Id.* at 753.

No other public employee bargaining cases in Missouri have turned on the proprietary-governmental dichotomy. However, in *State ex rel. Board of Pub. Util. v. Crow*, 592 S.W.2d 285 (Mo. Ct. App. 1979), in which the issue was whether the Open Meetings Act, MO. REV. STAT. §§ 610.010-.030 (1978), requires that discussion sessions between public employees and their employers over working conditions be open to the public, the court held that the distinction between proprietary and gov-

In a companion case to *Clouse, Kind v. Priest*,<sup>26</sup> the Missouri Supreme Court elaborated on what it had meant when it recognized that public employees have the right to join labor organizations subject to some regulation for the public welfare. In *King*, police officers challenged a city rule prohibiting police officers from joining a union as being unconstitutional because it denied them the freedoms of speech, assembly, and petition guaranteed under the federal and state constitutions.<sup>27</sup> The court upheld the rule on the ground that it was a reasonable rule designed to protect the public from "friction and dissent within the force" and from "prejudice and favoritism in the enforcement of the laws" that could potentially result from allowing police officers to organize into unions.<sup>28</sup>

Police officers again challenged, on the same grounds as in *King*, a city rule prohibiting them from joining unions in *Vorbeck v. McNeal*.<sup>29</sup> The three-judge federal court recognized that allowing police to organize into a union "raises the specter of a strike against the public interest."<sup>30</sup> However, this rule was found to "sweep unnecessarily broadly" and thus to exceed the permissible bounds of the first and fourteenth amendments.<sup>31</sup> The court stated that "[t]he appropriate method for protecting the state's legitimate interest in averting such a strike is not to restrict freedom of association, but rather to fashion precise legislation declaring such strikes illegal."<sup>32</sup> In view of *Vorbeck's* rejection of the *King* reasoning, it appears that a public employee's constitutional right to join a union can never be denied as a regulation to

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ernmental functions was irrelevant to the issue. *Id.* at 288.

The proprietary governmental dichotomy has been criticized in the years since the *Julian* and *Glidewell* decisions. One commentator has stated that it is "nearly impossible to draw any meaningful line between the proprietary and governmental functions." Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 890 (1973). The United States Supreme Court has called the proprietary-governmental dichotomy a "quagmire" and "a rule of law that is inherently unsound." *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (case decided under the Federal Tort Claims Act). However, Missouri courts still accept the proprietary-governmental dichotomy in determining tort liability of municipal corporations. See, e.g., *Counts v. Morrison-Knudsen, Inc.*, 663 S.W.2d 357, 362-63 (Mo. Ct. App. 1983) ("A city may be held liable for torts arising out of the performance of proprietary functions but no recovery is allowed for torts arising out of the performance of governmental functions.").

26. 357 Mo. 68, 206 S.W.2d 547 (Mo. 1947) (en banc), *appeal dismissed*, 333 U.S. 852, *reh'g denied*, 333 U.S. 878 (1948).

27. *Id.* at 80, 206 S.W.2d at 556.

28. *Id.* at 80-85, 206 S.W.2d at 556-57.

29. 407 F. Supp. 733 (E.D. Mo.) (three-judge court), *aff'd without opinion*, 426 U.S. 943 (1976).

30. *Id.* at 738.

31. *Id.*

32. *Id.*

protect the public welfare because the public welfare can always be protected by more precisely fashioned legislation.

### B. *Statutory Rights of Public Employees.*

The General Assembly enacted Missouri's first public employee bargaining statute in 1965.<sup>33</sup> The act provided that public employees, other than police, deputy sheriffs, highway patrolmen, members of the national guard, and teachers,<sup>34</sup> had the right to form and join labor organizations and to present proposals to their employers relative to conditions of employment.<sup>35</sup> No such employee was to be discriminated against because of the exercise of these rights or coerced into joining or not joining a labor organization.<sup>36</sup> Public bodies were authorized, but not required, to negotiate with labor organizations relative to conditions of employment of the public body's employees.<sup>37</sup> The results of the negotiation were to be reduced to writing and presented to the governing body<sup>38</sup> for appropriate action.<sup>39</sup> It has been sug-

33. See MO. REV. STAT. §§ 105.500-.530 (Supp. 1965) (amended 1978).

34. For a discussion of the justification for these exceptions, see Loevi, *The Development and Current Application of Missouri Public Sector Labor Law*, 36 Mo. L. Rev. 167, 174 (1971).

35. MO. REV. STAT. § 105.510 (Supp. 1965).

36. *Id.*

37. *Id.* § 105.520; 23 Op. Att'y Gen. No. 68 (May 6, 1966). A controversy arose over whether the word "negotiations" meant collective bargaining. Loevi, *supra* note 34, at 175. If the term did mean collective bargaining, it appeared that this section violated the Missouri Constitution as interpreted in *Clouse*. The Missouri Attorney General, however, soon concluded that "negotiations" did not mean collective bargaining. See 23 Op. Att'y Gen. No. 68 (May 6, 1966). The word merely meant that representatives of the public employees and of the public employer could "meet . . . and talk about problems of mutual interest." *Id.*

38. There may be some confusion over the terms "public employer" (or "public body") and "governing body." They are not necessarily the same entity, although they are closely related. The governing body is the legislative authority for the particular governmental subdivision in which the public employees work. Examples are the city council of a city and the board of education of a school district. The public employer is usually a particular governmental agency, board, commission, department, etc., within a governmental subdivision. Examples are the police departments, fire departments, and public works departments. For a discussion of the occasional difficulty in determining who the public employer is, see Locke, *A Missouri Plan for Public Employee Collective Bargaining*, 23 St. Louis U.L.J. 62 (1979). Under the procedures of the current public employee labor law the public employer would probably meet, confer, and discuss proposals with the bargaining representative of its employees. Then any results of the discussions would be written down and passed on to the governing body for adoption, modification, or rejection. In some cases the governing body negotiates directly with the public employees. Probably the most common example of this is teachers negotiating with the board of education or its representatives.

39. MO. REV. STAT. § 105.520 (Supp. 1965). The Missouri Attorney General found that the results of the negotiations were not binding on the employer. 23 Op. Att'y Gen. No. 68 (May 4, 1966).

gested that this act granted public employees no more rights than they already possessed under *Clouse*.<sup>40</sup>

This act was replaced in 1967 by the Public Sector Labor Law (PSLL),<sup>41</sup> which, with one amendment,<sup>42</sup> is Missouri's current statute governing public employee bargaining. As in the 1965 act, this act provides that public employees, with the same exceptions, have the right to form and join labor organizations and to present proposals to their employers relative to conditions of employment, and that no such employee is to be discriminated against because of exercising these rights or coerced into joining or not joining a labor organization.<sup>43</sup> In a significant departure from the 1965 act, this act provides that public bodies<sup>44</sup> or their designated representatives "shall meet, confer and discuss"<sup>45</sup> . . . proposals relative to . . . conditions of employment . . . with the labor organization which is the exclusive bargaining representative<sup>46</sup> of [the public body's] employees in a unit appropriate<sup>47</sup> if such proposals are presented by the exclusive bargaining representative.<sup>48</sup> Thus, unlike the 1965 act which says the public body *may* deal with labor organizations, the 1967 act *requires* that the public body at least meet and talk with the exclusive bargaining representative of its employees. The results of these discussions are to be reduced to writing and presented to the appropriate governing body for "adoption, modification or rejection."<sup>49</sup>

The second significant change from the 1965 act gives the State Board of Mediation<sup>50</sup> (hereinafter referred to as the Board) the authority to resolve

40. See Loevi, *supra* note 34, at 173.

41. Mo. REV. STAT. §§ 105.500-.530 (1978).

42. See *infra* notes 54-55 and accompanying text.

43. Mo. REV. STAT. § 105.510 (1978).

44. *Id.* § 105.500(1) (public body defined as "the State of Missouri, or any officer, agency, department, bureau, division, board or commission of the state, or any other political subdivision of or within the state").

45. It is fairly clear that, given the Attorney General's interpretation of the term "negotiations," 23 Op. Att'y Gen. No. 68 (May 6, 1966), that term as used in the 1965 act and the term "meet, confer and discuss" as used in the 1967 act mean the same thing. Loevi, *supra* note 34, at 179.

46. Mo. REV. STAT. § 105.500(2) (exclusive bargaining representative defined as "an organization which has been designated or selected by majority of employees in an appropriate unit as the representative of such employees in such unit for purposes of collective bargaining").

47. *Id.* § 105.500(1) (appropriate unit defined as "a unit of employees at any plant or installation or in a craft or in a function of a public body which establishes a clear and identifiable community of interest among the employees concerned").

48. See *id.* § 105.520.

49. *Id.*

50. The Board was established in 1947, Mo. REV. STAT. § 295.030 (1978), to regulate public utility labor disputes. It consists of two members with ties to organized labor, two members with ties to employers, and a chairman. The board's public utility regulation functions were transferred to the Department of Labor and Industrial Relations. Mo. REV. STAT. § 286.005.7 (Supp. 1984).



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the issues of appropriate bargaining units and majority representation.<sup>51</sup> Jurisdiction for appeal from Board decisions is vested in the circuit courts.<sup>52</sup> The final provision of the 1967 act states, just as the final provision of the 1965 act had, that nothing in this act shall be construed as granting a right to strike to employees covered by the act.<sup>53</sup>

In 1969, the PSLL was amended to provide that those employees who were not given the right to join unions by the act—police, deputy sheriffs, highway patrolmen, members of the national guard, and teachers—did have the right to form benevolent, social, or fraternal associations.<sup>54</sup> The amendment also provided that membership in these associations could not be restricted because of race, creed, color, religion, or ancestry.<sup>55</sup>

The constitutionality of the PSLL was affirmed in 1969 by the Missouri Supreme Court in *State ex rel. Missey v. City of Cabool*.<sup>56</sup> In that case, the city challenged the law's constitutionality on three grounds. Using *Clouse*, the city argued that the PSLL, by granting public employees the right to bargain collectively, unconstitutionally delegated away the legislative power

51. MO. REV. STAT. § 105.525 (1978).

52. *Id.*

53. MO. REV. STAT. § 105.530 (1978). Arguably this provision does not itself make strikes by public employees illegal. An interpretation of the wording of this provision is that while the right to strike has not been granted, neither has it been enjoined. An attorney for a public employee union who claims responsibility for drafting the wording has indicated that this was the intent of the clause. However, given the attitude of Missouri legislators toward public employee bargaining at the time of the PSLL's passage, the Missouri General Assembly probably did not have a similar intention. See Loevi, *supra* note 34, at 176. In any event, Missouri courts have held that public employee strikes are illegal at common law. See *State ex rel. Ashcroft v. Kansas City Firefighters Local No. 42*, 672 S.W.2d 99, 105 (Mo. Ct. App. 1984); *City of Grandview v. Moore*, 481 S.W.2d 555, 557 (Mo. Ct. App. 1972). Missouri courts have also interpreted section 105.530 to mean that public employee strikes are illegal. See *St. Louis Teachers Ass'n v. Board of Educ.*, 544 S.W.2d 573, 575 (Mo. 1976) (en banc); *State ex rel. O'Leary v. Missouri State Bd. of Mediation*, 509 S.W.2d 84, 88 (Mo. 1974) (en banc); *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 41 (Mo. 1969); *State ex rel. Ashcroft v. Kansas City Firefighters Local No. 42*, 672 S.W.2d 99, 105 (Mo. Ct. App. 1984); *Willis v. School Dist. of Kansas City*, 606 S.W.2d 189, 191 (Mo. Ct. App. 1980); *City of Webster Groves v. Institutional and Pub. Employees Union*, 524 S.W.2d 162, 165 (Mo. Ct. App. 1975); *City of Grandview v. Moore*, 481 S.W.2d 555, 557 (Mo. Ct. App. 1972).

54. MO. REV. STAT. § 105.510.

55. *Id.*

56. 441 S.W.2d 35 (Mo. 1969). In this case, the city of Cabool had refused to meet with the union representing its employees in the electrical, park and pool, street and water and sewer departments. The city had also discharged, laid off, or reduced the pay of a number of its employees because of their union activities. The union, through its officers, and the employees it represented sought, *inter alia*, an order requiring the city to deal with the union as provided by the PSLL and reinstatement and back pay for the employees against whom the city had acted. *Id.* at 38-39.

of the governing bodies which control the public employers with whom the public employees bargained. In answer, the court stated that the law did not give public employees the right to bargain collectively as that term is understood in the private sector because the PSLL did not make it an unfair labor practice for the governing body to refuse to adopt the agreement produced by the bargaining and did not give public employees the right to strike. The court held that the PSLL did not violate the *Clouse* decision because the public employer is required only to meet, confer, and discuss; it need not agree to any arrangement reached in the discussions. Also the legislative discretion of the governing body is preserved because it may adopt, modify, or reject outright the results of the discussions.<sup>57</sup>

The city's second argument was that the PSLL was unconstitutional because it made arbitrary and unreasonable classifications in that it granted rights to some public employees while excluding private employees and certain public employees. The court responded by pointing out that private employees already had the right to organize and bargain collectively. The court stated that the exclusion of police, deputy sheriffs, highway patrolmen, and members of the national guard was based upon an appropriate classification because those performing police functions are *sui generis*. The exclusion of teachers was said to be consistent with other provisions applicable only to teachers and with other similar distinctions made in other states.<sup>58</sup>

Third, the city argued that the provision requiring the public employer to meet, confer, and discuss with the bargaining representative of the employees was a violation of representative government because those with views differing from the majority in the unit would be shut out of the process. The court rejected this argument on the ground that the minority members have a constitutionally protected right to present their differing views to the public employer.<sup>59</sup>

One part of the PSLL has been declared unconstitutional by the federal courts. In *Vorbeck v. McNeal*,<sup>60</sup> police officers challenged their exclusion from the PSLL's general grant to public employees of the right to form unions. They contended that the exclusion of police officers from the coverage of the PSLL denied them their rights of free speech and assembly and

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57. *Id.* at 41.

58. *Id.* at 43. Examples given by the court of statutes applicable only to teachers were statutes providing special pension rights, Mo. REV. STAT., Chapter 169. and certification procedures, Mo. REV. STAT. Chapter 168. *Id.*

59. *Id.* After upholding the constitutionality of the PSLL, the Supreme Court held that the employees discharged and demoted for union activities were entitled to reinstatement and back pay and that the union was entitled to have the city enjoined from discriminating against the union and its members and to recognition by the city as the representative of its employees. *Id.* at 44-45.

60. 407 F. Supp. 733 (E.D. Mo.) (three-judge court), *aff'd without opinion*, 426 U.S. 943 (1976).

to petition for redress of grievances, and created an unreasonable and arbitrary classification between police officers and other employees, in violation of the federal and state constitutions.<sup>61</sup> The court agreed, stating that the exclusion of police officers from the PSLL's coverage swept unnecessarily broad, thus exceeding the permissible bounds of the first and fourteenth amendments. The court held that the PSLL was unconstitutional insofar as it prohibited police officers from forming or joining labor organizations.<sup>62</sup> The court also held, however, that the exclusion of police officers from the provisions of the PSLL which regulate bargaining procedures of public employees was constitutional because the unique role of police officers in society makes the decision of bargaining procedure applicability to police officers one properly reserved to the state legislature.<sup>63</sup>

On a different note, the question has been raised as to whether the PSLL may be applied to constitutional charter cities.<sup>64</sup> The question arises because article VI, section 22 of the Missouri Constitution states that "no law shall be enacted creating or fixing the powers, duties, or compensation of any municipal office or employment, for any city framing or adopting its own charter under this or any previous Constitution." This provision is limited by article VI, section 19 which states that "[a]ny city adopting a charter for its own government can do so only as far as the charter is consistent with the subject to the laws of the state." In interpreting these seemingly conflicting provisions, the Missouri Supreme Court in *State ex rel. Burke v. Cervantes*,<sup>65</sup> held that a state statute takes precedence over a city charter only when the statute is intended to deal with a statewide concern, and is thus beyond the scope of constitutional charter city power.<sup>66</sup> One commentator thinks that as to the question of local versus statewide concern, "there would seem to be little doubt that the overall conduct of public employee labor relations is as important to the state as state aid and welfare programs which frequently specify minimum qualifications for local professional employees to insure a reasonable level of competence."<sup>67</sup> Based largely on *Cervantes*, this commentator concludes that Missouri courts are likely to find that constitutional charter cities are subject to the PSLL.<sup>68</sup>

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61. *Id.* at 735.

62. *Id.* at 739.

63. *Id.*; see also *Beverlin v. Board of Police Comm'r*, 722 F.2d 395, 396 (8th Cir. 1983).

64. See *Loevi*, *supra* note 34, at 182-84.

65. 423 S.W.2d 791 (Mo. 1968).

66. *Id.* at 793-94; see also *City of St. Louis v. Missouri Comm'n on Human Rights*, 517 S.W.2d 65, 70 (Mo. 1974) ("The state has the right in the exercise of the police power to prescribe a policy of general state-wide application which applies to [constitutional] charter cities.").

67. *Loevi*, *supra* note 34, at 183.

68. *Id.* at 184. Although the courts have decided cases involving constitutional

C. *Does the PSLL Grant Any Rights to Public Employees Which are not Already Constitutionally Guaranteed?*

The PSLL grants public employees, except police, deputy sheriffs, highway patrolmen, members of the national guard, and teachers, the right to form and join labor organizations.<sup>69</sup> Public employees already had the right to form and join labor organizations, subject to some regulation for the public welfare, under *Clouse*.<sup>70</sup> And though police officers could be denied this right by their employer under *King v. Priest* as a regulation to protect the public welfare,<sup>71</sup> the *King* reasoning was rejected in *Vorbeck v. McNeal* where the court found that any denial to police officers of the right to form or join labor organizations was unconstitutional.<sup>72</sup> *Vorbeck* appears to say that the protection of the public welfare exception to the right of public employees to form and join labor organizations, recognized under *Clouse*, is no longer good law. No stronger argument that a particular group of public employees should be denied the right to form or join labor organizations as a regulation to protect the public welfare could be made than in the case of police officers, and *Vorbeck* holds that police officers cannot be denied this right. Therefore, it appears that all public employees have a constitutionally protected right to form and join labor unions.

Since police officers have a constitutional right to form and join labor organizations under *Vorbeck*, it is arguable that deputy sheriffs, highway patrolmen, and members of the national guard also have such a constitutional right because they also perform police functions. This is particularly true because the public welfare exception to the general right of public employees to form and join labor organizations seems to retain no vitality after *Vorbeck*. Teachers have been specifically recognized as having a constitutional right to form and join labor organizations.<sup>73</sup> Thus, the constitutional right of public employees to form and join labor organizations is broader than the PSLL's grant of the right to form and join labor organizations.

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charter cities, the issue of whether the PSLL applies to constitutional charter cities seems never to have been raised by the parties. One court, though, has recognized that the issue exists when it assumed without deciding that the PSLL applied to Kansas City, a constitutional charter city. *German v. City of Kansas City*, 577 S.W.2d 54, 57 (Mo. Ct. App. 1978).

69. MO. REV. STAT. § 105.510.

70. See 356 Mo. at 1246-47, 206 S.W.2d at 542.

71. See *King v. Priest*, 357 Mo. 68, 85-88, 206 S.W.2d 547, 555-57 (1947) (en banc).

72. 407 F. Supp. at 739.

73. See *Peters v. Board of Educ.*, 506 S.W.2d 429, 431 (Mo. 1974); *Bergmann v. Board of Educ.*, 360 Mo. 644, 654-55, 230 S.W.2d 714, 720 (1950). But see *Willis v. School Dist.*, 606 S.W.2d 189, 191 (Mo. Ct. App. 1980) (teachers are prohibited from forming and joining labor organizations under Mo. Rev. Stat. § 105.510 (1978); *Peters* and *Bergmann* not mentioned).

The PSLL grants most public employees the right to present proposals to their employer relative to working conditions through the representative of their own choosing.<sup>74</sup> *Clouse* recognized that all public employees were guaranteed this right under the federal and state constitutions.<sup>75</sup> Thus the constitutional right of public employees in this area is broader than the rights granted under the PSLL.

The PSLL requires public bodies or their representatives to meet, confer, and discuss proposals relative to conditions of employment with the bargaining representative of their employees.<sup>76</sup> At first this appears to be a benefit granted to public employees by the statute which they did not already enjoy under the constitution, particularly since the Missouri attorney general had stated that "[i]n the absence of any statutory provisions authorizing it to do so, a county court [public employer] does not have the power and cannot enter into negotiations with a labor union."<sup>77</sup> However, in 1969, in *State ex rel Missey v. City of Cabool*, the Missouri Supreme Court interpreted *Clouse* as constitutionally requiring public employees to meet, confer, and discuss proposals with labor organizations representing their employees.<sup>78</sup>

Thus, the PSLL added nothing to the already existing constitutional rights of public employees. What the PSLL does provide is a statutory vehicle by which public employees may assert their constitutional rights.<sup>79</sup>

### III. THE MECHANICS AND LAW OF PUBLIC EMPLOYEE BARGAINING

#### A. *The State Board is Role in Public Employee Bargaining*

The PSLL gives the Board the authority to determine which bargaining unit is appropriate and whether a particular labor organization has the ma-

74. See Mo. Rev. Stat. § 105.510.

75. See 356 Mo. at 1246, 206 S.W.2d at 542; see also *Peters v. Board of Educ.*, 506 S.W.2d 429, 432 (Mo. 1974).

76. Mo. Rev. Stat. § 105.520.

77. See 14 Op. Att'y Gen. No. 68 (March 15, 1957).

78. 441 S.W.2d at 41. *But see* *Parkway School Dist. v. Provaznik*, 617 S.W.2d 489 (Mo. Ct. App. 1981) (circuit court invaded broad discretion of the board of education by ordering that the board and teachers association meet and confer in order to solve a salary dispute). Actually, *Missey*, 441 S.W.2d 35, probably does not contradict the Attorney General's Opinion because the Attorney General was most likely referring to negotiations in the strict sense of collective bargaining, i.e., where the employer and union are under a duty to listen to and seriously consider each other's positions. It was not until nine years after this Opinion that the Attorney General defined the term "negotiations," appearing in the 1965 public employee bargaining act, as meaning essentially to meet, confer, and discuss. See 23 Op. Att'y Gen. No. 68 (May 6, 1966); see also *supra* note 37.

79. *Sumpter v. City of Moberly*, 645 S.W.2d 359, 363 (Mo. 1982) (en banc); *Curators of Univ. v. Public Serv. Employees Local No. 45*, 520 S.W.2d 54, 57 (Mo. 1975) (en banc); *Missey*, 441 S.W.2d at 41; *Null v. City of Grandview*, 669 S.W.2d 78, 80 (Mo. Ct. App. 1984). *But see* *Roberts v. City of St. Joseph*, 637 S.W.2d 98, 101 n.1 (Mo. Ct. App. 1982) ("Since [the *Clouse*] decision labor relations in the public sector have been liberalized by [the PSLL].").

jority support required to become the exclusive bargaining representative in that unit.<sup>80</sup> An appropriate bargaining unit is a group of employees working for a particular public body who have a clear and identifiable community of interest.<sup>81</sup> A bargaining unit must be *an* appropriate unity; but it does not have to be the *most* appropriate unit.<sup>82</sup>

Three of the five Board members constitute a quorum. A quorum is required to hear a case.<sup>83</sup> In addition the PSLL requires that the Board use the services of the state hearing officer in all contested cases.<sup>84</sup> A board decision was challenged in one contested case because the Board did not use the services of the state hearing officer.<sup>85</sup> The court found that Missouri statutes did not provide for this position. Besides, the court stated, all issues in such a hearing are to be resolved by the Board, and thus the scope of the hearing officer's duties would be limited to conducting the hearing and making recommendations.<sup>86</sup> The court held that the Board properly disregarded the requirement of using the hearing officer because it would be an absurd result for the Board to have the duty to resolve issues but be unable to do so because it must make use of the services of a non-existent hearing examiner.<sup>87</sup>

Before hearing a case the Board must first determine whether it has jurisdiction over the group of public employees seeking certification of an appropriate unit and/or an exclusive bargaining representative. As previously discussed there are a few groups of public employees statutorily excluded from the PSLL. Although it now appears that police officers, deputy sheriffs, highway patrolmen, members of the national guard, and teachers have a constitutional right to form and join labor organizations despite their exclusion from coverage under the PSLL,<sup>88</sup> the Board still has no jurisdiction over the excluded groups since the Board derives its jurisdiction solely from the PSLL. Such exclusion of police officers from the procedures of the PSLL

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80. MO. REV. STAT. § 105.525.

81. MO. REV. STAT. § 105.500(1) (1978). Among the factors considered by courts in making a determination on the community of interests of private employees are the similarity in skills, interests, duties, and working conditions of the employees and the employer's organizational and supervisory structure. *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1042-44 (9th Cir. 1978).

82. Comment, *Bargaining Units for State and Local Employees*, 39 Mo. L. Rev. 187, 200 (1974).

83. *City of Kirkwood v. Missouri State Bd. of Mediation*, 478 S.W.2d 690, 698 (Mo. Ct. App. 1972).

84. MO. REV. STAT. § 105.525. A contested case is "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." MO. REV. STAT. § 536.010(2) (1978).

85. See *City of Kirkwood*, 478 S.W.2d at 695.

86. *Id.* at 695-96.

87. *Id.* at 697.

88. See *Vorbeck v. McNeal*, 407 F. Supp. 733, 739 (E.D. Mo.), *aff'd without opinion*, 426 U.S. 943, *reh'g denied*, 429 U.S. 874 (1976); *Bergmann v. Board of Educ.*, 360 Mo. 644, 654-55, 230 S.W.2d 714, 720 (Mo. 1950); see also *supra* notes 69-73 and accompanying text.

has been upheld as permissible because the unique position occupied by police officers in society provides a rational basis for the classification.<sup>89</sup> It is probably safe to assume that this reasoning would also apply to deputy sheriffs, highway patrolmen, and members of the national guard. Arguably, the reasoning here does not apply to teachers who, although they also hold a unique position in society, are not so closely related to police officers as are the other excluded groups. However, the exclusion of teachers from the Board's jurisdiction has never been challenged.

The Board has refused jurisdiction, with court affirmance, over public safety officers using the police officer exclusion.<sup>90</sup> The court justified its decision on the grounds that the public safety officers performed both police and firefighting duties, were licensed by the State of Missouri as police officers, were generally under the command of the patrol lieutenant rather than the fire lieutenant, were required to carry firearms, and were identified as "police" or "police patrolmen" on their badges.<sup>91</sup> The Board has, also with court affirmance, accepted jurisdiction over, and determined an appropriate unit including, corrections officers. The Board held that the corrections officers, whose primary responsibility was the security and custody of inmates confined in the county jail, were not excluded from the coverage of the PSLL under the police officer or deputy sheriff exclusions.<sup>92</sup> The decision was based on the grounds that, despite a historic association between jail guards and deputy sheriffs, corrections officers are neither commissioned nor sworn to carry firearms, do not wear uniforms or badges, and are not responsible for enforcing laws.<sup>93</sup> In addition to this case law, the attorney general has issued an opinion which states that the national guard exclusion does not apply to the guard's civilian employees. The civilian employees thus may join labor organizations and enjoy procedural rights under the PSLL.<sup>94</sup>

Besides the statutory exclusions, the Board and courts have also encountered several cases in which it was argued that particular types of employees should be judicially excluded from the coverage of the PSLL. The Supreme Court of Missouri has held that employees of the juvenile division of a circuit court are covered.<sup>95</sup> It was argued that the PSLL did not, on its face, apply to courts or their functions and that, even if such employees were covered by the terms of the law, an assertion of jurisdiction by the Board

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89. See *Vorbeck*, 407 F. Supp. at 739.

90. See *St. Louis County Police Officers Union Local 844 v. Gregory*, 622 S.W.2d 713, 714 (Mo. Ct. App. 1981).

91. *Id.*

92. See *Jackson County v. Missouri State Bd. of Mediation*, 690 S.W.2d 400, 401 (Mo. 1985) (en banc).

93. *Id.*

94. 25 Op. Att'y Gen. No. 285 (Dec. 10, 1968).

95. *State ex rel. O'Leary v. Missouri State Bd. of Mediation*, 509 S.W.2d 84, 89 (Mo. 1974) (en banc).

over court employees would constitute an invasion of, and interference with, the powers of the judicial department, violating the separation of powers doctrine.<sup>96</sup> The court answered the first argument by stating that employees of the juvenile court are covered by the PSLL because the juvenile court falls within its definition of "public body."<sup>97</sup> In response to the second argument the court held that jurisdiction by the Board over juvenile court employees is not an invasion of the judiciary by an administrative board because the Board's decisions are appealable to the courts.<sup>98</sup>

In another case the curators of the University of Missouri asserted that the provisions of the PSLL purporting to cover the university's non-academic employees were unconstitutional given the provision of the Missouri Constitution<sup>99</sup> granting the government of the university to the Board of Curators.<sup>100</sup> The court held that the PSLL's coverage of the university's non-academic employees did not encroach upon the curators' power to govern the university because the PSLL is merely a procedural vehicle for assertion of public employee's constitutional rights.<sup>101</sup>

The most difficult issue in the area of judicial exclusions seems to be whether supervisors are covered by the PSLL. The earliest case dealing with this issue in Missouri was *Golden Valley Memorial Hospital v. Missouri State Board of Mediation*.<sup>102</sup> There the court found that the term "employee" as used in the PSLL could not mean everyone on the payroll of a public body because someone had to act for the interests of the public employer. The court stated that it is the duty of the board to identify those employees who act directly or indirectly in the interest of their employer in relation to other employees. The court concluded that such employer-oriented employees should be excluded from a bargaining unit representing public employees.<sup>103</sup> *Golden Valley* could be interpreted to mean either that supervisors are completely excluded from coverage under the PSLL or that supervisors are covered but must be in bargaining units separate from non-supervisory employees. The

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96. *Id.* at 88.

97. *Id.* at 89.

98. *Id.*

99. Mo. CONST. art. IX § 9(a).

100. *See* Curators of Univ. v. Public Serv. Employees Local No. 45, 520 S.W.2d 54, 55 (Mo. 1975) (en banc).

101. *Id.* at 58.

102. 559 S.W.2d 581 (Mo. Ct. App. 1977).

103. *Id.* at 583 (The case was remanded to the Board for determination of whether the duties of head nurses and assistant head nurses involved them in acting in the interest of the hospital in relation to the other nurses. If so, they were to be excluded from the bargaining unit.); *see also* City of Columbia v. Missouri State Bd. of Mediation, 605 S.W.2d 192, 194-95 (Mo. Ct. App. 1980) (Board's inclusion of fire captains in a unit of firefighters was not arbitrary and capricious); *Germann v. City of Kansas City*, 577 S.W.2d 54, 55-56 (Mo. Ct. App. 1978) (battalion chiefs in the fire department lawfully excluded from a unit of fire fighters).



Board evidently construed the *Golden Valley* decision to exclude supervisors from coverage by the PSLL completely and has developed a set of factors to determine whether a particular employee is a supervisor.<sup>104</sup>

In *City of Cabool v. Missouri State Board of Mediation*,<sup>105</sup> the Missouri Supreme Court for the first time was presented with the question of whether supervisors are excluded from coverage under the PSLL. The court noted that the National Labor Relations Act originally contained no exclusion of supervisors from the definition of "employee," and that the United States Supreme Court had refused to imply such an exclusion in the face of the plain and ordinary meaning of the term "employee."<sup>106</sup> The Missouri Supreme Court, however, found that the employee involved in *City of Cabool* clearly was not a supervisor and refused to settle the question.<sup>107</sup>

In its most recent case involving the PSLL, *Missouri National Educational Association v. Missouri State Board of Mediation*<sup>108</sup> (hereinafter re-

104. *City of Cabool v. Missouri State Bd. of Mediation*, 689 S.W.2d 51, 54 (Mo. 1985) (en banc). The board's set of factors are:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees.
2. The authority to direct and assign the work force.
3. The number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees.
4. The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees.
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employees.
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees.
7. The amount of independent judgment and discretion exercised in the supervision of employees.

*Id.* at 54 n.2.

105. 689 S.W.2d 51 (Mo. 1985) (en banc).

106. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

107. *City of Cabool*, 689 S.W.2d at 55. Judge Welliver, in his concurrence in the result, found that the intent of the General Assembly when enacting the PSLL was to exclude supervisory employees. He stated that such an interpretation of the PSLL was necessary if public employers are to effectively manage personnel. *Id.* at 56 (Welliver, J., concurring). The Missouri Supreme Court signalled its acceptance of the *Golden Valley* decision in *Missouri Nat'l Educ. Assoc. v. Missouri State Bd. of Mediation (MNEA)*, 695 S.W.2d 894, 897 (Mo. 1985) (en banc), by citing it favorably and quoting its discussion on the issue of employer-oriented employees. *MNEA*, however, involved confidential employees, not supervisors.

108. 695 S.W.2d 894 (Mo. 1985) (en banc). In this case MNEA sought to have twelve secretaries included in a bargaining unit of all clerical employees, teacher aides, and school nurses employed by the Belton School District. The State Board of Mediation determined the secretaries were confidential employees and excluded them from the unit. *Id.* at 896. Four of the secretaries were assigned to the central administrative office and worked closely with the superintendents of the district and the members of the Board of Education. Their duties included helping the superin-

ferred to as *MNEA*), the Missouri Supreme Court approved the Board's exclusion, from otherwise appropriate bargaining units, of managerial employees and confidential employees from PSLC coverage.<sup>109</sup> Managerial employees were defined as those employees who formulate, determine, or effectuate policies on behalf of their employer.<sup>110</sup> Confidential employees were defined as those employees who, in the normal performance of their duties, have access to confidential information affecting the employer-employee relationship.<sup>111</sup> These two types of employees "are excluded from the bargaining unit either because their inclusion could create conflicts of interests in the performance of their duties or because they lack sufficient community of interest with other workers."<sup>112</sup> Just as with supervisors, there is some ambiguity as to whether managerial employees and confidential employees are completely excluded from the PSLC's coverage or whether they are excluded only from bargaining units containing other types of employees. In *MNEA*, there was also an issue as to whether all confidential employees must be excluded or just those confidential employees with a "labor nexus." The latter are those employees acting in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.<sup>113</sup> The National Labor Relations Board excludes from coverage under the National Labor Relations Act only those confidential employees with a labor nexus.<sup>114</sup> The Board, however, rejected the labor-

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tendent prepare to negotiate teacher's salaries and processing monthly payments made by the district. *Id.* at 899-900. The other eight secretaries were assigned to the individual principals and assistant principals. Their duties included the typing of teacher performance evaluations and statements relating to formal grievances filed by teachers, both of which are prepared by the principals and assistant principals. These secretaries also had access to the personnel records of the district's teachers. *Id.* at 900.

109. *Id.* at 898-99.

110. *Id.* at 898. College professors are an example of a type of employees which a court might find to be managerial employees. The United States Supreme Court has found that the faculty members of a particular private university were managerial employees because of the large measure of independence they enjoyed. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).

111. *MNEA*, 695 S.W.2d at 898. An example of a confidential employee is the personal secretary to a university dean in charge of academic affairs, if the secretary has access to confidential information affecting the employer-employee relationship, such as the personnel files.

112. *Id.*

113. *Id.* An administrative assistant to a high school superintendent would be a confidential employee with a labor nexus if the superintendent takes an active part in determining, formulating, and effectuating management policies with respect to the school's employees. The same administrative assistant would still be a confidential employee, but not one with a labor nexus, if the superintendent left labor relations matters solely to the school board.

114. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 178 (1981).

nexus test and thus excluded all confidential employees. The Board thought the labor-nexus test too narrow "to provide a workable basis . . . [to] identify those employees whose interests are more closely allied to the public employer than to the rank and file employees."<sup>115</sup> The court refused to overturn the Board's decision.<sup>116</sup>

In determining whether a particular employee falls within one of the statutory or judicial exclusions, the courts look primarily at the duties of the employee, not his job title.<sup>117</sup> Even if a particular employee or group of employees is excluded from the PSL's coverage or a particular bargaining unit, there is still a constitutional right to petition their public employer directly, without going through a union.<sup>118</sup>

Besides determining its jurisdiction, the Board must also determine when a particular labor organization has majority support in an appropriate bargaining unit so as to become the exclusive bargaining representative for the unit.<sup>119</sup> However, nothing in the PSL explains how employees are to select their bargaining representative nor how the Board is to resolve the issue of majority status. Given this absence, it appears that the General Assembly left these matters to the Board's discretion.<sup>120</sup> One case indicates that an election is the preferred method for determining the bargaining unit's representative, but that in some circumstances the use of authorization cards<sup>121</sup> is acceptable.<sup>122</sup>

#### B. *Judicial Review of the Board of Mediation.*

Decisions of the Board may be appealed to the circuit court of the county where the public employer and the public employees are located or to the circuit court of Cole County.<sup>123</sup> Except in extraordinary circumstances, appeal may not be taken from a Board bargaining unit determination until the Board has held an election and certified an exclusive unit representative. The ad-

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115. *MNEA*, 695 S.W.2d at 898.

116. *Id.* at 899.

117. *See* Jackson County v. Missouri State Bd. of Mediation, 690 S.W.2d 400, 402 (Mo. 1985) (en banc).

118. *See* State *ex rel.* Missey v. City of Cabool, 441 S.W.2d 35, 43 (Mo. 1969).

119. MO. REV. STAT. § 105.525 (1978).

120. *City of Kirkwood v. Missouri State Bd. of Mediation*, 478 S.W.2d 690, 695 (Mo. Ct. App. 1972).

121. Authorization cards are cards signed by members of the unit authorizing a particular labor organization to be their exclusive bargaining representative. In the event an election cannot be held, the majority status of the labor organization can be determined by counting the number of authorization cards which have been signed.

122. *See City of Kirkwood*, 478 S.W.2d at 695.

123. MO. REV. STAT. § 105.525 (1978).

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ministrative process is not complete until that time.<sup>124</sup> Although there is no case law, presumably appeal may be taken immediately from a board certification of an exclusive bargaining representative because the administrative process would then be complete.

Circuit court review of Board decisions is then appealable to the appellate courts.<sup>125</sup> The appellate court reviews the findings and decisions of the Board and not the judgment of the circuit court.<sup>126</sup>

Courts must defer to the Board's findings of fact insofar as they are supported by competent and substantial evidence<sup>127</sup> and are not arbitrary, capricious, or unreasonable.<sup>128</sup> Courts are not permitted to weigh the evidence or to substitute their own discretion.<sup>129</sup> The evidence must be considered in the light most favorable to the Board's decision,<sup>130</sup> drawing from that evidence all reasonable inferences supportive of the decision.<sup>131</sup> The review must be on the record as a whole.<sup>132</sup>

The competent and substantial evidence test does not apply when the Board's determination involves only the application of law to fact. The reviewing court may weigh the evidence for itself and determine the facts accordingly. In such a determination the court shall give due weight to the opportunity of the Board to observe the witnesses and to the Board's expertise and experience.<sup>133</sup> Questions of law are reserved for the independent judgment of the reviewing court.<sup>134</sup>

124. *Lincoln County Memorial Hosp. v. Missouri State Bd. of Mediation*, 549 S.W.2d 665, 669 (Mo. Ct. App. 1977); *see also Golden Valley Memorial Hosp. v. Missouri State Bd. of Mediation*, 559 S.W.2d 581, 582 (Mo. Ct. App. 1977).

125. *See* Mo. REV. STAT. § 512.020 (1978).

126. *Missouri Nat'l Educ. Ass'n v. Missouri State Bd. of Mediation*, 695 S.W.2d 894, 896 (Mo. 1985) (en banc); *City of Cabool v. Missouri State Bd. of Mediation*, 689 S.W.2d 51, 53 (Mo. 1985) (en banc); *City of Columbia v. Missouri State Bd. of Mediation*, 605 S.W.2d 192, 194 (Mo. Ct. App. 1980); *see also* Mo. REV. STAT. § 536.140.2 (1978).

127. *MNEA*, 695 S.W.2d at 897; *Jackson County v. Missouri State Bd. of Mediation*, 690 S.W.2d 400, 402 (Mo. 1985) (en banc); *St. Louis County Police Officers Union Local 844 v. Gregory*, 622 S.W.2d 713, 714 (Mo. Ct. App. 1981); *City of Columbia v. Missouri State Bd. of Mediation*, 605 S.W.2d 192, 194 (Mo. Ct. App. 1980); *see also* *City of Kirkwood v. Missouri State Bd. of Mediation*, 478 S.W.2d 690, 693 (Mo. Ct. App. 1972); Mo. REV. STAT. § 536.140.2(3)(1978).

128. *City of Columbia*, 605 S.W.2d at 194; *see also* Mo. REV. STAT. § 536.140.2(6) (1978).

129. *City of Columbia*, 605 S.W.2d at 194.

130. *Id.*; *St. Louis County Police Officers Union Local 844 v. Gregory*, 622 S.W.2d 713, 714 (Mo. Ct. App. 1981).

131. *City of Columbia*, 605 S.W.2d at 194.

132. *Gregory*, 622 S.W.2d at 714; *City of Kirkwood v. Missouri State Bd. of Mediation*, 478 S.W.2d 690, 693 (Mo. Ct. App. 1972); *see also* Mo. REV. STAT. § 536.140.2(3) (1978).

133. *City of Cabool v. Missouri State Bd. of Mediation*, 689 S.W.2d 51, 54

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 C. *Strikes and Picketing by Public Employees.*

“Nothing contained in [the PSLL] shall be construed as granting a right to [public] employees . . . to strike.”<sup>135</sup> Although this provision of the PSLL does not actually state that public employee strikes are illegal, such strikes were illegal at common law and the PSLL was interpreted as meaning that such strikes were illegal.<sup>136</sup> A Missouri court has stated that public employee strikes are illegal because governmental functions may not be impeded or obstructed and because the profit motive is absent in governmental functions.<sup>137</sup>

Public employee strikes, as well as work slowdowns and failure to properly care for publicly owned equipment under one’s control, are enjoinable.<sup>138</sup> The injunction must sufficiently specify what acts are enjoined.<sup>139</sup> Picketing by public employees may also be enjoined.<sup>140</sup> Picketing by public employees is not protected by the Constitution when the result or object contravenes state law or policy, or when the result disrupts governmental functions or harms the public health and safety.<sup>141</sup> Actual or threatened wrongs to a governmental body constitute sufficient reason to enjoin picketing.<sup>142</sup>

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(Mo. 1985) (en banc); *see also* Missouri Nat’l Educ. Ass’n v. Missouri State Bd. of Mediation, 695 S.W.2d 894, 897 (Mo. 1985) (en banc); Jackson County v. Missouri State Bd. of Mediation, 690 S.W.2d 400, 402 (Mo. 1985) (en banc); MO. REV. STAT. § 536.140.3 (1978).

134. *MNEA*, 695 S.W.2d at 897; *Jackson County*, 690 S.W.2d at 402; *City of Cabool*, 689 S.W.2d at 54. A good example of the differences between questions of law, questions of fact, and applications of law to fact is a case involving an exclusion of a particular type of employee from the PSLL’s coverage. Whether the PSLL does in fact exclude a particular type of employee is a question of law for the court to decide. *City of Cabool*, 689 S.W.2d at 54. The Board’s findings as to what are the duties and responsibilities of the group of employees involved in the particular case are findings of fact. The court is bound by these findings provided they are supported by competent and substantial evidence. *Jackson County*, 690 S.W.2d at 402. A legal conclusion by the Board that the group of employees involved in the particular case, given their duties and responsibilities, is excluded from the PSLL’s coverage is an application of the law to the facts. Therefore, the court may weigh the evidence and determine the facts for itself, although the court must give due weight to the Board’s decision. *City of Cabool*, 689 S.W.2d at 54.

135. MO. REV. STAT. § 105.530 (1978).

136. *See supra* note 53.

137. *City of Grandview v. Moore*, 481 S.W.2d at 555, 558 (Mo. Ct. App. 1972) (quoting Board of Educ. of Community Unit School Dist. No. 2 v. Redding, 32 Ill. 2d 567, 571, 207 N.E.2d 427, 430 (1965)).

138. *See id.* at 556-68; *see also* State *ex rel.* Ashcroft v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99, 109 (Mo. Ct. App. 1984).

139. *See City of Grandview*, 481 S.W.2d at 559.

140. *City of Webster Groves v. Institutional and Pub. Employees Union*, 524 S.W.2d 162, 166 (Mo. Ct. App. 1975).

141. *Id.*

142. *Id.*

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In addition to being subject to an injunction for a strike, public employees may also be liable for damages under the recent case of *State ex rel. Ashcroft v. Kansas City Firefighters Local No. 42*.<sup>143</sup> In *Firefighters*, the State of Missouri sued the local to recover for the cost of national guard replacements who performed firefighting duties during a strike.<sup>144</sup> The union contended that no remedy for damages against the union existed because the PSLL provides for no damage remedy and because judicial remedies are sufficient.<sup>145</sup> The court rejected the union's second argument by pointing out that the union had struck in the face of an injunction. Since the injunction had been ignored, judicial remedies had not been sufficient.<sup>146</sup> The court also rejected the union's first argument by reasoning that despite the PSLL's silence on remedies, the intent and purpose of the PSLL required the creation of a new cause of action independent of common law remedies. The remedy against the union for damages would, stated the court, serve to insure the integrity of the firefighting function and deter the risk of harm to persons and property that disruption of service would entail.<sup>147</sup> The court did not say every public employee strike would create a cause of action for damages.<sup>148</sup> Damages were recoverable in this case because firefighters perform a critical service, any interruption of which would present a danger to the public.<sup>149</sup> The court left open the question of whether someone besides the public employer could have a cause of action for damages against a union for an illegal strike.<sup>150</sup>

In addition to the union, the court in *Firefighters* indicated that the individual members could also be liable for the union's acts.<sup>151</sup> The court stated that a union member becomes personally liable for the acts of the union if the member participates in, authorizes, or ratifies those acts.<sup>152</sup> Thus each member who votes for or participates in an illegal public employee

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143. 672 S.W.2d 99 (Mo. Ct. App. 1984).

144. *Id.* at 103.

145. *Id.*

146. *Id.* at 109.

147. *Id.* at 108-10.

148. *Id.* at 111.

149. *Id.*

150. *Id.* at 110. In *Berger v. City of Univ. City*, 676 S.W.2d 39 (Mo. Ct. App. 1984), a private citizen had sued the city and the firefighters union for damages caused by a fire which striking firefighters had refused to fight. The firefighters had also picketed the fire and threatened firefighters from surrounding municipalities with physical harm if they attempted to extinguish the blaze. The circuit court had entered judgment against the city, the union, and the president of the union. Neither the union nor the president appealed. *Id.* at 40. No appellate court has addressed the question of whether a private citizen can recover from a union damages which are caused by an illegal strike.

151. See 672 S.W.2d at 123-24.

152. *Id.* at 124.

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 strike faces potential personal liability for damages resulting from the strike.<sup>153</sup>  
 Only those union members who do not acquiesce in the strike can avoid  
 personal liability.<sup>154</sup>

#### D. *Agreements Between Public Employees and Employers*

Under the PSLL, representatives of the public employer are required to meet, confer, and discuss proposals relative to conditions of employment<sup>155</sup> with the exclusive bargaining representative.<sup>156</sup> Upon completion of these discussions the results are to be reduced to writing and presented to the appropriate governing body for adoption, modification, or rejection.<sup>157</sup>

The meetings between the representatives of the public employees and their employers are not required by the Open Meetings Act<sup>158</sup> to be open to the public. Neither are the public employer's conferences to discuss these meetings.<sup>159</sup> Courts have recognized but not answered the question of whether the deliberations of the governing body with respect to adopting, modifying, or rejecting the results of the discussions between the representatives of the public employees and their employer must be open to the public.<sup>160</sup>

The PSLL requirement that upon completion of discussions the results shall be reduced to writing and presented to the appropriate governing body<sup>161</sup> does not require that the representative of the public employer and public employees actually reach an agreement. Discussions are complete when agreement is no longer possible, i.e., when an impasse has been reached. Thus the governing body need not wait for an agreement between the public employers and its employees before it adopts proposals regulating conditions of employment.<sup>162</sup>

Even if an agreement is reached and is adopted by the appropriate governing body, it still is generally not enforceable.<sup>163</sup> The first case that

153. As a practical matter it would be difficult to prove how particular union members voted on the strike issue. But it would not be too difficult to prove that particular union members participated in the strike.

154. *Firefighters*, 672 S.W.2d at 124.

155. For a discussion of which conditions of employment must be discussed, see Sullivan, *Subjects of Collective Bargaining in the Public Schools: Not Really Collective Bargaining*, 33 Mo. L. REV. 409 (1968).

156. For a discussion on bargaining unit determination, see Comment, *Bargaining Units for State and Local Employees*, 39 Mo. L. REV. 187 (1974).

157. MO. REV. STAT. § 105.520 (1978).

158. *Id.* §§ 610-610.030.

159. *State ex rel. Bd. of Pub. Util. v. Crow*, 592 S.W.2d 285, 287 (Mo. Ct. App. 1979).

160. *Id.* at 291.

161. MO. REV. STAT. § 105.520.

162. *Null v. City of Grandview*, 669 S.W.2d 78, 80 (Mo. Ct. App. 1984).

163. See *Sumpter v. City of Moberly*, 645 S.W.2d 359, 363 (Mo. 1982) (en banc); *Null*, 669 S.W.2d at 80.

reached this result was *Sumpter v. City of Moberly*.<sup>164</sup> There, a firefighters' union and the city entered into a two-year agreement. The city council enacted the agreement as an ordinance. Before the agreement's expiration, the city manager announced unilateral changes in the firefighters' conditions of employment which conflicted with the provisions of the agreement. The mayor and city council approved these changes.<sup>165</sup> The firefighters brought suit, seeking to enforce the original agreement. The firefighters argued that the provision of the PSLL which allows the appropriate governing body to adopt, modify, or reject agreements reached under the procedure of the PSLL<sup>166</sup> authorized the governing bodies to enter into binding agreements with public employees. Therefore, the firefighters contended, the city entered into a binding and enforceable contract when the city council adopted the original agreement by ordinance.<sup>167</sup>

The court held the agreement unenforceable. The provision of the PSLL at issue says the results of the discussions between public employees and their employer shall "be presented to the appropriate administrative, legislative or other governing body . . . for adoption, modification or rejection."<sup>168</sup> Under *Clouse* an administrative body cannot enter into a binding contract with employees because such action would require an impermissible delegation of legislative power. The court could not conclude that the General Assembly, by the provisions of the PSLL, intended to authorize and provide for a binding contract if the governing body is a legislative body, but something less if it is an administrative board or other governing body.<sup>169</sup> The court also stressed that the PSLL says nothing about a public body entering into a contract if it decides to adopt an agreement between a public body and its employees.<sup>170</sup> Finally, the court found that the PSLL did not extend its grants of authority beyond the constitutional boundaries set forth in *Clouse*. Since a binding contract with public employees was beyond the authority of a public employer under *Clouse*, such action is also beyond the public employer's authority under the PSLL.<sup>171</sup>

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164. 645 S.W.2d 359 (Mo. 1982) (en banc).

165. *Id.* at 360.

166. MO. REV. STAT. § 105.520 (1978).

167. *Sumpter*, 645 S.W.2d at 362-63.

168. MO. REV. STAT. § 105.520 (1978).

169. *Sumpter*, 645 S.W.2d at 363.

170. *Id.*

171. *Id.* Another court has stated that governing bodies cannot enter into binding contracts because the legislative function to alter the agreement by successive ordinance remains unimpaired. See *Null v. City of Grandview*, 669 S.W.2d 78, 80 (Mo. Ct. App. 1984). This conclusion also fits within the reasoning of *Clouse*, particularly the *Clouse* court's sovereignty argument. See *supra* notes 20-23 and accompanying text. Judge Seiler, in a dissent to *Sumpter*, stated that submitting results of the discussions to the governing body for its adoption was rendered completely meaningless by the holding that after adoption the agreement thus made could be disregarded. *Sumpter*, 645 S.W.2d at 365 (Seiler, J., dissenting).



Agreements adopted by a governing body are sometimes enforceable. The court in *Sumpter* stated that the ordinance which enacted the original agreement, just as any other city ordinance, governed and was binding until changed by appropriate action.<sup>172</sup> Other cases indicate that the "appropriate action" referred to in *Sumpter* is an action of the same character as the one which approved the original agreement. In other words, since the city in *Sumpter* had adopted the original agreement by ordinance, that agreement remained binding until another ordinance was passed to supplant the adopting ordinance.<sup>173</sup>

Some types of agreements do appear to be completely enforceable against public employers. In *Peters v. Board of Education*,<sup>174</sup> a teachers' association entered into a written agreement with the board of education. The agreement provided for meetings and negotiations between the parties and the necessary procedures. Recommendations reached in the negotiations were to be submitted to both parties for ratification and, if approved, were to be entered in the minutes of the board of education as district policy. The teachers association sought a declaratory judgment that the agreement was valid.<sup>175</sup> The court upheld the agreement because the recommendations reached in the negotiations were advisory only and the board itself still made the final decision. Since the board was not bound by any arrangements reached in the negotiations, the agreement did not conflict with the *Clouse* prohibition against collective bargaining agreements between public employees and their employer.<sup>176</sup>

An agreement similar to the one in *Peters*, also between a teachers' association and a school district, was involved in *Finley v. Lindbergh School District*.<sup>177</sup> Six years after the agreement took effect, the school board unilaterally cancelled it.<sup>178</sup> The court ordered the agreement enforced because it required only that the school board accept additional input during the decision-making process; the ultimate decision was left to the school board.<sup>179</sup>

Although the *Peters* and *Finley* decisions were not decided under the PSLL (because teachers were the public employees involved), there is no logical reason why agreements between public employees covered by the PSLL and their employers which provide only for discussions and recommendations not binding on the employer should not be equally enforceable.

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172. *Sumpter*, 645 S.W.2d at 363 n.4.

173. See *Murray v. City of Jennings*, 639 S.W.2d 220 (Mo. Ct. App. 1982).

174. 506 S.W.2d 429 (Mo. 1974).

175. *Id.* at 430-33.

176. *Id.* at 433.

177. 522 S.W.2d 299 (Mo. Ct. App. 1975).

178. *Id.* at 300.

179. *Id.* at 302-03. The court also held that 100% membership in the teachers association was not required before the agreement would be enforced. Other associations and individuals could still participate in the negotiations between the school board and the teachers association. *Id.* at 303.

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As a final note on the enforceability issue, an agreement produced as the result of an illegal strike is void and thus unenforceable.<sup>180</sup>

### E. *Unfair Labor Practice Adjudication*

The PSLL provides no sanctions for violations of its provisions. Administration of unfair labor practice complaints under the PSLL has been taken on by the courts of Missouri.<sup>181</sup> Public employees are entitled to relief against a governmental body committing unfair labor practices.<sup>182</sup> Few Missouri cases have dealt with unfair labor practices in the public employment area, but several rules nevertheless have been articulated. Public employers have the general discretion to layoff and discharge their employees and courts usually will not interfere with this general discretion.<sup>183</sup> However, the Supreme Court of Missouri has held that the public employer cannot exercise that discretion for an illegal purpose that violates statutory rights.<sup>184</sup> Thus, employees discharged or demoted because of union activities—employer conduct forbidden by the PSLL<sup>185</sup>—may be awarded reinstatement and backpay.<sup>186</sup> Another court has found that a unilateral salary increase immediately prior to a representational election was not an unfair labor practice.<sup>187</sup> This court also found that a meeting of city employees called by the city manager to advise the employees of a pending representational election, outline the election procedure, read statutes covering the right of public employees to organize, and to discuss a recently adopted plan for salary increases was not an unfair labor practice.<sup>188</sup>

## IV. DIRECTIONS FOR CHANGE FOR MISSOURI PUBLIC EMPLOYEE BARGAINING LAW

### A. *The Right to Organize*

The Missouri General Assembly enacted the PSLL in 1967.<sup>189</sup> With the exception of one minor amendment in 1969,<sup>190</sup> Missouri public employee

180. *St. Louis Teachers Ass'n v. Board of Educ.*, 544 S.W.2d 573, 575 (Mo. 1976) (en banc).

181. *State ex rel. Ashcroft v. Kansas City Firefighters Local No. 42*, 672 S.W.2d 99, 108 (Mo. Ct. App. 1984).

182. *City of Webster Groves v. Institutional and Pub. Employees Union*, 524 S.W.2d 162, 165 (Mo. Ct. App. 1975); *see also State ex. rel. Missey v. City of Cabool*, 441 S.W.2d 35, 43-45 (Mo. 1969).

183. *Missey*, 441 S.W.2d at 42.

184. *Id.*

185. MO. REV. STAT. § 105.510 (1978).

186. *See Missey*, 441 S.W.2d at 44-45.

187. *See City of Webster Groves v. Institutional and Pub. Employees Union*, 524 S.W.2d 162, 165 (Mo. Ct. App. 1975).

188. *Id.* at 164-65.

189. For a general discussion of the provisions of the PSLL, *see supra* notes 41-53 and accompanying text.

190. *See supra* notes 54-55 and accompanying text.

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bargaining law has remained stable for almost twenty years. Public employee relations ideas, however, have not remained stable. As an indication of this change, many states have adopted completely new public employee bargaining systems in the last twenty years.<sup>191</sup> Most of these new public employee bargaining statutes are comprehensive schemes with the rights of public employees expressly stated, unfair labor practices carefully defined, and certification of exclusive bargaining representative procedures clearly set out.<sup>192</sup> Although minute legislative regulation of an area of society is not always necessary or even desirable, the Missouri General Assembly should at least study the recent developments in public employee bargaining statutes and make a deliberate decision to either make some changes or stand pat.

In studying potential changes for Missouri law, the General Assembly should consider the feasibility of granting public employees in Missouri four of the most important rights which private employees enjoy under the federal labor laws. These four rights are the right to organize, the right to bargain collectively, the right to enforce any agreements reached, and the right to strike.<sup>193</sup>

The right of public employees to organize into unions is not particularly controversial. Twenty-nine states and the District of Columbia have statutes applicable to public employees which specifically state that they have the right to organize.<sup>194</sup> Even without these statutes, the right of public employees

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191. See, e.g., ILL. ANN. STAT. ch. 48, paras. 1601-1627 (Smith-Hurd Supp. 1985) (adopted 1983); IOWA CODE ANN. §§ 20.1-.29 (West 1978 & Supp. 1985) (adopted 1974); KAN. STAT. ANN. §§ 75-4321 to -4337 (1984) (adopted 1971); OHIO REV. CODE ANN. §§ 4117.01-.23 (Anderson Supp. 1984) (effective 1984).

192. See, e.g., *supra* note 191.

193. For the provisions of federal labor law which grant these rights to private sector employees, see *supra* notes 2-5 and accompanying text.

194. ALASKA STAT. § 23.40.080 (1984); CAL. GOV'T CODE § 3415 (West Supp. 1986) (applies to state employees); *id.* § 3502 (West 1980) (applies to local government employees); CONN. GEN. STAT. ANN. § 5-271(a) (West Supp. 1985) (applies to state employees); *id.* § 7-468(a) (West 1972) (applies to municipal employees); DEL. CODE ANN. tit. 19, § 1302 (1985); D.C. CODE ANN. § 1-618.6(a)(1) (1981); FLA. STAT. ANN. § 47.301(1) (West 1981); HAW. REV. STAT. § 89.3 (Supp. 1984); ILL. ANN. STAT. ch. 48, para. 1606 (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 20.8 (West 1978); KAN. STAT. ANN. § 75-4324 (1984); ME. REV. STAT. ANN. tit. 26, § 979-B (1974) (applies to state employees); MASS. GEN. LAWS ANN. ch. 150E, § 2 (1982); MICH. COMP. LAWS ANN. § 423.209 (West 1978); MINN. STAT. ANN. § 179A.06 subd. 2 (Supp. 1985); MO. REV. STAT. § 105.510 (1978); MONT. CODE ANN. § 39-201 (1985); NEB. REV. STAT. § 48-837 (1984); NEV. REV. STAT. § 288.140 (1985) (applies only to local government employees); N.H. REV. STAT. ANN. § 273-A:3 (1977); N.J. STAT. ANN. § 34-13A-5.3 (West Supp. 1985); N.Y. CIV. SERV. LAW § 202 (McKinney 1983); N.D. CENT. CODE § 34-11.3-03 (Supp. 1985); OHIO REV. CODE ANN. § 4117.03(A)(1) (Anderson Supp. 1984); OR. REV. STAT. § 243.662 (1985); PA. STAT. ANN. tit. 43, § 1101.401 (Purdon Supp. 1985); R.I. GEN. LAWS § 36-11-1 (1979) (applies to state employees); *id.* § 28.9.4-3 (applies to municipal employees); S.D. CODIFIED LAWS

to organize into unions in all fifty states seems to have been given constitutional protection by *Vorbeck v. McNeal*<sup>195</sup> where the court struck down Missouri's denial of the right of police officers to organize as a violation of the first and fourteenth amendments to the United States Constitution.<sup>196</sup> Similar restraints upon the rights of police officers and firefighters have also been held unconstitutional by other federal courts.<sup>197</sup> Since no stronger argument that a particular group of public employees should be denied the right to organize can be made than in the case of police officers and firefighters, *Vorbeck* and the other cases indicate that all public employees have the right to organize.

The PSLL already grants Missouri public employees, except teachers and those performing police functions, the right to organize. The General Assembly should amend the PSLL to delete these exceptions. The police officer exception has been struck down as unconstitutional in *Vorbeck* and should be removed in recognition of that decision. It is also probable, as discussed above, that the other exceptions are also unconstitutional under *Vorbeck* and should also be removed.<sup>198</sup>

### B. *The Right to Bargain Collectively*

In the private sector, which operates under the National Labor Relations Act,<sup>199</sup> the employer is required to negotiate with respect to conditions of employment<sup>200</sup> with the union that is the exclusive bargaining representative of its employees. Any agreement reached is submitted to the union and the

ANN. § 3-18-2 (1985); VT. STAT. ANN. tit. 3, § 903(a) (1985) (applies to state employees); *id.* tit. 21, § 1721 (1978) (applies to municipal employees); WASH. REV. CODE ANN. § 41.56.040 (1972) (applies only to local government employees); WIS. STAT. ANN. § 111.82 (West 1974) (applies to state employees); *id.* § 111.70(2) (West Supp. 1985) (applies to local government employees).

195. 407 F. Supp. 733 (E.D. Mo.) (three-judge court), *aff'd without opinion*, 426 U.S. 943 (1976).

196. *Id.* at 739.

197. *Newport News Fire Fighters Ass'n Local 794 v. City of Newport News*, 339 F. Supp. 13 (E.D. Va. 1972); *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D. Ga. 1971); *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969).

198. Missouri courts already recognize the right of teachers to organize. *See supra* note 73. As discussed *supra* at notes 60-63, 88-89, and accompanying text, the court in *Vorbeck* held that the exclusion of police officers from the bargaining procedures of the PSLL was constitutional. Thus, the exclusion of teachers and others performing police functions is also probably constitutional. The General Assembly, then, should also either amend the PSLL so that teachers and those performing police functions are covered by the bargaining procedures of the PSLL or provide for separate bargaining procedures tailored to the particular circumstances of these groups.

199. 29 U.S.C. §§ 151-169 (1982).

200. National Labor Relations Act § 8(a)(5), (d), 29 U.S.C. § 158(a)(5), (d) (1982).

employer for approval. The employer probably approved the agreement during the negotiations, but if it was negotiated by representatives of the employer who did not have the authority to give final approval, then those with final authority will have an opportunity to review the agreement and approve or reject it.

Under the PSLL, a public body<sup>201</sup> or its representatives are required to meet, confer, and discuss proposals relative to conditions of employment with the union that is the exclusive representative of its employees.<sup>202</sup> The results of such discussions are required to be reduced to writing and then presented to the appropriate governing body for approval.<sup>203</sup> Up to this point, the procedures under the PSLL and the National Labor Relations Act for negotiation of labor agreements seem to be equivalent. But it is here that the procedures diverge. If the employer in the private sector ultimately rejects the labor agreement reached by its representatives and the union, then the negotiations continue until a mutually satisfactory agreement is reached. Under the PSLL, the governing body may adopt, reject, or modify the agreement reached between the public body and the union.<sup>204</sup> There is no provision for further negotiation between the public body and the union in the event the governing body rejects or modifies the agreement. Essentially, the conditions of employment existing in the private sector are reached through true collective bargaining, i.e., negotiation between the parties and mutual agreement, while under the PSLL the conditions of employment are imposed unilaterally by the governing body, albeit with input from the union.

Other states have taken a variety of approaches on the issue of how closely the bargaining process for their public employees should approach true collective bargaining. Some states, like Missouri, give final approval of any agreement reached between a public body and a union to the appropriate governing body, with no provision for further negotiations in the event the governing body rejects the agreement.<sup>205</sup> One state requires approval by the governing body, the state legislature in this instance, of any agreement reached between the state and a union, but in the event the legislature rejects or modifies the agreement, the state and union are to continue negotiations.<sup>206</sup> The scheme is somewhat closer to true collective bargaining in that, even though the governing body may reject or modify any agreement reached between a public body and a union, the public body and the union are allowed

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201. See *supra* note 38 for the definitions of, and the distinctions between, public bodies and governing bodies.

202. MO. REV. STAT. § 105.520 (1978).

203. *Id.*

204. *Id.*

205. See CAL. GOV'T CODE § 3505.1 (West 1980) (applies to local government employees only); NEB. REV. STAT. § 48-837 (1984); S.D. CODIFIED LAWS ANN. § 3-18-7 (1985).

206. WIS. STAT. ANN. § 111.92 (West Supp. 1986).

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to negotiate further and thus have the opportunity to present their mutual views to the governing body again and possibly gain acceptance by the governing body of a subsequent agreement.

Other states require governing body approval of particular items in the labor agreement. The items in the agreement which do not require governing body approval become effective upon union and public body approval. Thus, public sector bargaining closely approaches true collective bargaining with respect to the items not requiring governing body approval.<sup>207</sup> The states using this scheme define the parts of the labor agreement which require governing body approval in at least three different ways. Some of these states require governing body approval of any legislative action.<sup>208</sup> Depending on the interpretation of items which require legislative action, the scope of items which do not require governing body approval can be expansive or restrictive.

Other states are more explicit as to which items require governing body approval. One state requires governing body approval of items which conflict with any statute, ordinance, or other legislative enactment.<sup>209</sup> Under this scheme the scope of items which do not require governing body approval can be larger or smaller depending on the extent to which the state and its subdivisions regulate the conditions of public employment. Other states require governing body approval only of provisions which require the appropriation of funds.<sup>210</sup> This scheme creates the largest area not subject to governing body approval, in that a public body and a union can mutually agree to any provision that does not require appropriation of funds and not be concerned about whether the governing body will reject their agreement. Some states have a combination of the last two schemes and require governing body approval of the items in a labor agreement which require funding and which conflict with any laws of the state or its subdivisions.<sup>211</sup>

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207. If the public employees have the right to strike in support of their demands in regard to the items not requiring governing body approval, then true collective bargaining has been reached by the public employees. Where public employees have the right to strike in support of their demands, public sector bargaining cannot be significantly distinguished from private sector bargaining.

208. See KAN. STAT. ANN. § 75-4330(c) (1984); N.Y. CIV. SERV. LAW § 201.12 (McKinney 1983); OHIO REV. CODE ANN. § 4117.10(B) (Anderson Supp. 1985); PA. STAT. ANN. tit. 43, § 1101.901 (Purdon Supp. 1986).

209. VT. STAT. ANN. tit. 21, § 1725(c) (1978).

210. See ALASKA STAT. § 23.40.215 (1984); CAL. GOV'T CODE § 3517.7 (West Supp. 1986) (applies to state government employees only); HAW. REV. STAT. § 89-10(b) (1976); ME. REV. STAT. ANN. tit. 26, § 979-D.1.E(3) (Supp. 1986) (applies to state government employees only); MASS. GEN. LAWS ANN. ch. 150E, § 7(b), (c) (1982 & Supp. 1986); MONT. CODE ANN. § 39-31-102 (1985); N.H. REV. STAT. ANN. § 273-A:3.II(b) (1977); VT. STAT. ANN. tit. 3, § 982(c) (1985) (applies to state employees only).

211. See CONN. GEN. STAT. ANN. § 5-278(b) (West Supp. 1986) (applies to state government employees); *id.* § 7-474(b) (West 1972) (applies to municipal government employees); FLA. STAT. ANN. § 447.309(2), (3) (West 1981); IOWA CODE ANN. § 20.17.6 (West 1978); MINN. STAT. ANN. § 179A.22 subd. 4 (Supp. 1985).

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Most of the states which require governing body approval of particular items also provide for further negotiation between the public body and the union in the event the governing body does not approve any of the items requiring approval. As discussed above, a provision for further negotiations provides the public body and the union with a second chance to present their mutual views to the governing body with the possibility that the governing body will accept the subsequent agreement.

The public employee bargaining statutes in some states provide for bargaining between the public body and the union without any apparent requirement for governing body approval of any provision of the agreement reached.<sup>212</sup> Under such a scheme, public sector bargaining would approach true collective bargaining. Given the general constitutional requirement that appropriation of funds requires legislative approval, it is doubtful that any legislature would be forced to appropriate funds to give effect to any labor agreement which it had not adopted.<sup>213</sup>

The right of public employees to strike should also be considered under the general topic of collective bargaining.<sup>214</sup> Some states allow public employees a limited right to strike. In these states, public employee bargaining most closely approaches true collective bargaining. Regardless of which form of governing body approval the state has chosen, if the public employees are unhappy with the governing body's actions or with the public body's actions with respect to a labor agreement, the public employees may be able to strike to pressure the governing body or public body to modify its position. Thus, the mechanics of public employee bargaining would be quite similar to the mechanics of bargaining in the private sector.

Given the number of states which have enacted statutes which provide for true public sector collective bargaining, the Missouri General Assembly should also consider providing a scheme of bargaining for Missouri public employees that more closely approaches true collective bargaining. The reason the General Assembly should want to grant greater bargaining rights to public employees is stated in the declaration of policy of Alaska's public employee bargaining statute:

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212. These states include Delaware, Illinois, Michigan, Nevada, New Jersey, Rhode Island, Washington, and Wisconsin (with respect to local government employees only).

213. See *State v. AFSCME, Local 1726*, 298 A.2d 362 (Del. Ch. 1972) (state and its agencies cannot be bound to expenditures of funds which have not been appropriated). *But see Foster-Gloucester Regional School Committee, Rhode Island State Labor Relations Board, Case No. ULP-1012* (1971), discussed in 1 Pub. Employee Bargaining (CCH) para. 2510 (1980) (school committee compelled to sign agreements previously reached even though the financial town meeting reduced the appropriations).

214. For a more expansive discussion of the right of public employees to strike, see *infra* notes 231-33 and accompanying text.

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The legislature finds that joint decision-making is the modern way of administering government. If public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective.<sup>215</sup>

Also, any abridgement of bargaining rights of public employees can result in a breakdown in communications between public employers and employees and result in misunderstandings, resentment, strife, and unrest.<sup>216</sup>

Even if the General Assembly should decide that public employees should have greater bargaining rights, however, it may not be able to provide for such rights on its own. The problem is the *Clouse* decision. In *Clouse*, as discussed above, the Missouri Supreme Court held that public employees could not, under the Missouri Constitution, bargain collectively with their employer.<sup>217</sup> The interpretation of *Clouse* given in *State ex rel. Missey v. City of Cabool*<sup>218</sup> indicates that any increase in the bargaining rights of public employees beyond the rights granted in the PSLL would be unconstitutional. The court stated that the PSLL does not violate *Clouse* because the legislative discretion of the governing body is preserved in that the governing body can adopt, modify, or reject outright the agreement reached between the public body and the union.<sup>219</sup> Thus, removing any items of a labor agreement from the requirement of governing body approval, even those which conflict with no laws and which require no funding, would seem to violate the Missouri Constitution as interpreted in *Clouse* and *Missey*. The most the General Assembly could do on its own would be to provide for further negotiations between the public body and the union in the event the governing body rejects or modifies a labor agreement. Due to *Clouse* and *Missey*, any substantial increase in the bargaining rights of Missouri's public employees will probably require a constitutional amendment.

### C. *The Right to Enforce Any Agreement Reached*

The public employee bargaining statutes of some states specifically provide that labor agreements properly adopted under the provisions of the statute are "binding" or "enforceable" on the parties.<sup>220</sup> Other public em-

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215. ALASKA STAT. § 23.40.070 (1984).

216. See KAN. STAT. ANN. § 75-4321 (2) (1984).

217. *City of Springfield v. Clouse*, 356 Mo. 1239, 1245, 206 S.W.2d 539, 542 (Mo. 1947) (en banc).

218. 441 S.W.2d 35 (Mo. 1969).

219. *Id.* at 41.

220. See ALASKA STAT. § 23.40.210 (1984); HAW. REV. STAT. § 89-10(a) (1976); IOWA CODE ANN. § 20.17.5 (West 1978); MONT. CODE ANN. § 39-31-306(2) (1985); N.Y. CIV. SERV. LAW § 201.12 (McKinney 1983); OHIO REV. CODE ANN. § 4117.10(C) (Anderson Supp. 1984).



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 ployee bargaining statutes implicitly indicate that properly adopted agreements are to be binding and enforceable by calling such agreements "contracts" or stating that such agreements are "effective" or "valid" upon adoption.<sup>221</sup> Still other statutes make the breach of properly adopted agreements an unfair labor practice.<sup>222</sup> Finally, in some states properly adopted labor agreements are made binding and enforceable on the parties by court decision.<sup>223</sup>

In Missouri, under *Sumpter v. City of Moberly*,<sup>224</sup> properly adopted public employee labor agreements are binding and enforceable only so long as the governing body does not reverse an earlier acceptance of the labor agreement by legislative action of the same character as that action by which the governing body adopted the labor agreement.<sup>225</sup> Under *Sumpter*, the governing body can prevent enforcement of a labor agreement which it adopted, by enacting new legislation repudiating or modifying the earlier adoption.

The Missouri General Assembly should take all action within its power to reverse the *Sumpter* decision and make properly adopted public sector labor agreements specifically enforceable. Many other states provide for enforcement of labor agreements, and allowing the governing body to prevent enforcement of a labor agreement against itself by unilateral action introduces an asymmetry into public employee bargaining. Simply put, it is not fair to allow the governing or public body to enforce labor agreements against the union, while allowing the governing body to take action which can prevent the union from enforcing the agreement against the governing body and the public body.

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221. See CONN. GEN. STAT. ANN. § 5-278(d) (West Supp. 1986) ("effective") (applies to state government employees); KAN. STAT. ANN. § 75-4330(c) (1984) ("effective"); MINN. STAT. ANN. § 179A.20 subd. 1 (West Supp. 1987) ("contract"); PA. STAT. ANN. tit. 43, § 1101.901 (Purdon Supp. 1986) ("effective"); R.I. GEN. LAWS § 28-9.4-5 (1986) ("contract") (applies to municipal government employees); S.D. CODIFIED LAWS ANN. § 3-18-8 (1985) ("effective"); VT. STAT. ANN. tit. 21, § 1725(a) (1978) ("contract") (applies to municipal government employees only).

222. See HAW. REV. STAT. § 89-13(a)(8), (b)(5) (1976) (the Hawaii public bargaining statute also has a separate section stating that properly adopted labor agreements are enforceable); N.H. REV. STAT. ANN. § 273-A:51(h), (i), 11(f) (1977); OR. REV. STAT. § 243.672(1)(g), (2)(d) (1985); WIS. STAT. ANN. § 111.84(1)(e), (2)(d) (West 1974) (applies to state government employees); *id.* § 111.70(3)(a)(5), (b)(4) (West 1974) (applies to local government employees).

223. See *Glendale City Employees' Ass'n v. City of Glendale*, 15 Cal. 3d 328, 540 P.2d 609, 124 Cal. Rptr. 513 (1975) (en banc), *cert. denied*, 424 U.S. 943 (1976); *State v. AFSCME, Local 1726*, 298 A.2d 362 (Del. Ch. 1972) (labor agreements binding except insofar as in conflict with provisions of law or constitution); *Teamsters Local 331 v. City of Atlantic City*, 191 N.J. Super. 404, 467 A.2d 264 (Ch. Div. 1981), *aff'd*, 191 N.J. Super. 394, 467 A.2d 259 (Ct. App. Div. 1983).

224. 645 S.W.2d 359, 363 n.4 (Mo. 1982) (en banc).

225. *Id.*

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However, the General Assembly may not be able to take this action alone. *Sumpter* was based in large part upon the *Clouse* decision. The court stated that enforceable public sector labor agreements were beyond the constitutional boundaries of *Clouse*. Therefore, since the PSLL had been interpreted in *State ex rel. Missey v. City of Cabool*<sup>226</sup> and *Curators of University of Missouri v. Public Service Employees Local No. 45*<sup>227</sup> as not granting public employees rights which extended beyond *Clouse's* constitutional boundaries, public sector labor agreements were not enforceable under the PSLL.<sup>228</sup>

The Missouri Supreme Court did state in *Sumpter*, quoting from the *Curators* decision, that it would at least consider an attack on the limits of the *Clouse* decision if the General Assembly amended the PSLL to extend its requirements beyond the boundaries set in *Clouse*.<sup>229</sup> Thus there is hope that if the General Assembly does make public sector labor agreements enforceable, the Missouri Supreme Court will overrule *Clouse*, at least in part, and uphold the legislation.

If, however, a constitutional amendment is required to make public sector labor agreements enforceable, that course should be taken. There is no excuse for allowing one party to a contract to avoid its obligations while the other party can be held to its obligations under compulsion of law. This is true even where the party seeking to avoid its obligations is a governmental entity. Governmental entities frequently enter into construction and delivery contracts. These contracts are binding against the governmental entity.<sup>230</sup> Public sector labor agreements are not intrinsically different from such contracts and therefore should also be enforceable.

#### D. *The Right to Strike*

Few would argue that public employees should have an absolute right to strike. Given the nature of public services, the public health, safety, and welfare could be endangered by public employee strikes under certain circumstances. Acceptance of this view, however, does not automatically lead to the conclusion that no public employees should be allowed to strike. A strike by the clerks in the Department of Revenue would cause inconvenience, but so does a strike by the clerks of the local grocery store. A strike by garbage collectors causes some discomfort but would not endanger the public safety nearly as much as a strike by firefighters.

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226. 441 S.W.2d 35 (Mo. 1969).

227. 520 S.W.2d 54 (Mo. 1975) (en banc).

228. *Sumpter*, 645 S.W.2d at 363.

229. *Id.* (quoting *Curators*, 520 S.W.2d at 58).

230. *See Comment, supra* note 20, at 986.

In recognition of the similarities between some public employees and private employees and the differences between different groups of public employees, twelve states provide for a limited right to strike by some public employees. One state has done this by court decision,<sup>231</sup> nine have done so by statute,<sup>232</sup> and two have done so by court interpretation of statute.<sup>233</sup> The statutes establishing a limited right to strike differ in detail among the states, but the general philosophy of all the statutes is that public employee strikes are allowed unless there is an imminent danger to the public health, safety, and welfare.

In Missouri, public employee strikes are illegal, both at common law and by statute. The Missouri General Assembly should consider the similarities between some public employees and private employees and the differences among groups of public employees and enact a limited right to strike for Missouri's public employees. Such an enactment would recognize that there are situations in which a strike by public employees is no more disruptive or dangerous to the public than are private sector strikes. In such situations there is no rational basis for denying public employees the right to strike.

#### V. CONCLUSION

The law of public employee bargaining in Missouri has changed little since the *Clouse* decision in 1947. Missouri has since passed a statute dealing with the subject, but it has been interpreted as providing public employees with no additional substantive rights beyond those they already constitution-

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231. See *County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n*, 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424 (1985) (en banc).

232. See ALASKA STAT. § 23.40.200 (1984); HAW. REV. STAT. § 89-12 (1976 & Supp. 1984); ILL. ANN. STAT. ch. 48, para. 1617-18 (Smith-Hurd Supp. 1985); MINN. STAT. ANN. § 179A.18 (West Supp. 1985); OHIO REV. CODE ANN. § 4117.14(D) (Anderson Supp. 1985); OR. REV. STAT. § 243.726 (1985); PA. STAT. ANN. tit. 43, §§ 1101-1101.1003 (Purdon Supp. 1986); VT. STAT. ANN. tit. 21, § 1730 (1978) (applies to municipal government employees only); WIS. STAT. ANN. § 111.70(4)(cm)(5), (6c), (7m) (West Supp. 1985) (applies to local government employees only).

233. In *State Dep't of Highways v. Public Employees Craft Council*, 165 Mont. 349, 529 P.2d 785 (1974), the Montana Supreme Court held that MONT. CODE ANN. § 59-1603(1) (1947) (which is now MONT. CODE ANN. § 39-31-201 (1985)), which gives public employees the right to engage in concerted activities, also gives public employees the right to strike since a strike is a concerted activity. In *Local 1494 v. City of Coeur d'Alene*, 99 Idaho 630, 586 P.2d 1346 (1978), the Idaho Supreme Court interpreted IDAHO CODE § 44-1811 (1977), which states that firefighters cannot strike during the term of a contract, to mean that firefighters could strike after the contract expires. However, the court also held that striking gives cause for discharge, unless there are contract provisions to the contrary. This limited right to strike by firefighters does not extend to other public employees. *School Dist. No. 351 Oneida County v. Oneida Educ. Ass'n*, 98 Idaho 486, 567 P.2d 830 (1977).

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ally enjoyed under *Clouse*.<sup>234</sup> The PSLL does, however, provide a procedure under which most public employees can exercise their rights.<sup>235</sup> Also, almost twenty years of case law has fleshed out the bounds and implications of the rights declared under *Clouse*. It is time, however, to reevaluate public employee labor law. The justifications for the restrictions placed on public employees in *Clouse* need to be reexamined to determine whether they retain any validity in current circumstances. The perceived differences between public and private employment need to be reexamined too, with a view toward minimizing differences in treatment. In short, much has occurred since the PSLL was enacted and even more has occurred since the *Clouse* decision; it may be time for a change.

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234. *See supra* notes 69-79 and accompanying text.

235. *See supra* note 79 and accompanying text.

