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Does It Make a Difference? Granting Public Employees the Right to Collectively Bargain

*Independence-National Education Ass'n v. Independence School District*¹

I. INTRODUCTION

In *Independence-National Education Ass'n v. Independence School District*, the Missouri Supreme Court granted public employees the right to collectively bargain. This holding breathed new life into an argument more than sixty years old: that the Missouri Constitution grants both public and private sector employees the right to collectively bargain. However, a close reading of this seemingly landmark case shows that Missouri's highest court smothered the numerous possibilities afforded by this holding before they could be tested by both public employers and public employees. This Note will argue that the Missouri Supreme Court's holding was unnecessary and affords no new rights to employees, that the Court's abrogation of the nondelegation doctrine is undermined by the Court's own reliance on the doctrine, and that public employers may still be able to unilaterally change the terms of a collectively bargained for employment agreement.

II. FACTS AND HOLDING

For more than twenty years before the instant dispute arose, the Independence School District ("District") near Kansas City, Missouri, held discussions regarding salaries and working conditions with a group representing the District's teachers and paraprofessionals known as the Independence-National Education Association (INEA).² Pursuant to Missouri's Public Sector Labor Law (hereinafter "Public Labor Law"),³ the INEA was certified as the exclusive collective bargaining representative of the paraprofessionals of the District.⁴ While the INEA was not the certified collective bargaining representative of the District's teachers (due to the exclusion of Missouri's public school teachers from portions of the Public Labor Law⁵), the group was still recognized by the District and discussions

1. (*Independence-Nat'l Educ. Ass'n II*), 223 S.W.3d 131 (Mo. 2007) (en banc).

2. Brief of the Appellants at 3, *Independence-Nat'l Educ. Ass'n II*, 223 S.W.3d 131 (No. SC 87980).

3. MO. REV. STAT. §§ 105.500-.530 (2000).

4. Brief of the Appellants, *supra* note 2, at 1-2.

5. MO. REV. STAT. § 105.510.

were held on the teacher's behalf through a "discussion procedure" adopted by the District.⁶

During this time, the District also separately met and held discussions about salaries and working conditions with two other employee groups, one representing the District's custodial employees—the Independence-Educational Support Personnel (IESP)—and another representing the District's transportation employees—the Independence-Transportation Employees Association (ITEA).⁷ Pursuant to the Public Labor Law, each of these organizations is certified as the exclusive collective bargaining representative of their respective employee groups.⁸ After each employee organization met with representatives of the District to discuss proposals relating to salary and working conditions, the results of the discussions were included in memoranda of understanding which were subsequently approved by District representatives.⁹

In April of 2002, the District adopted a "Collaborative Team Policy" that changed the terms of employment for each of the employee groups represented by the INEA, the IESP, and the ITEA.¹⁰ This policy was unilaterally adopted by the District without meeting or conferring with the employee groups to discuss the adoption of the policy,¹¹ an action that conflicted with the memoranda of understanding then in effect with the IESP and the ITEA.¹² The new policy also rescinded the "discussion procedure" in place governing the representation and bargaining power of the INEA.¹³

As a result, the INEA, ITEA, and the IESP brought suit in the Circuit Court of Jackson County, Missouri, in March of 2003, alleging that the "Collaborative Team Policy" was not in compliance with the Public Labor Law because the policy did not allow each employee group to meet and confer *separately* with the District.¹⁴ Further, the plaintiffs alleged that, in adopting the policy without meeting or conferring with the employee groups, the District unilaterally violated the memoranda of understanding previously

6. *Independence-Nat'l Educ. Ass'n II*, 223 S.W.3d at 134.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* "The [Collaborative Team Policy] took away the ability of the representatives of the employee associations to meet and confer separately with representatives of the board about . . . salaries and working conditions. . . . In addition the board unilaterally changed the . . . agreement in existence between the board and the transportation employees The articles unilaterally changed by the board related to grievance procedure, payroll deductions, and dismissal and discipline procedure." *Id.* at 142.

11. *Id.* at 134.

12. *Id.*

13. *Id.*

14. *Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist. (Independence-Nat'l Educ. Ass'n I)*, 162 S.W.3d 18, 20 (Mo. App. W.D. 2005).

in place with the ITEA and the IESP, as well as the “Discussion Procedure” in place with the INEA.¹⁵

The District then filed a Motion for Summary Judgment, which was granted by the trial court.¹⁶ As the basis for summary judgment, the court held that the “Collaborative Team Policy” did not violate the Public Labor Law and that the District was able to unilaterally rescind an existing agreement with any employee group without consequence.¹⁷ The employee groups then appealed to the Court of Appeals for the Western District of Missouri, arguing that the cases upon which the trial court based its decision were wrongly decided and that genuine issues of material fact existed, making the case inappropriate for summary judgment.¹⁸ The Court of Appeals agreed that genuine issues of material fact existed and remanded the case back to the trial court for further proceedings.¹⁹ However, the Court of Appeals refused to entertain the claim that the case law used by the trial court was erroneous, noting that the courts of appeal are “constitutionally bound to follow the most recent controlling decision of the Missouri Supreme Court.”²⁰

On remand, the Circuit Court of Jackson County tried the case on a stipulated factual record in which the District acknowledged that its actions in adopting the “Collaborative Team Policy” constituted a failure to bargain collectively with the respective employee groups.²¹ The trial court agreed with this proposition and also held that the District unilaterally rescinded its agreements previously in place with the plaintiffs.²² However, the court held that these actions were permitted under then-existing Missouri precedent, which forbade public employees from collectively bargaining with their employers and allowed any agreements made between public employees and the government to be changed at any time.²³

The employee groups then appealed directly to the Missouri Supreme Court, challenging the precedent on which the trial court based its holding.²⁴ The Missouri Supreme Court agreed that the then-existing case law should be overturned and held that all Missouri employees, both public and private, have the right to collectively bargain.²⁵ Further, the court held that

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 21, 23.

19. *Id.* at 26.

20. *Id.* at 21 (quoting *Kinder v. Mo. Dep’t of Corr.*, 43 S.W.3d 369, 374 (Mo. App. W.D. 2001)).

21. *Independence-Nat’l Educ. Ass’n v. Independence Sch. Dist. (Independence-Nat’l Educ. Ass’n II)*, 223 S.W.3d 131, 134 (Mo. 2007) (en banc).

22. *Id.* at 134-35.

23. *Id.* at 135.

24. *Id.*

25. *Id.* at 133.

agreements made between employees and public employers were not subject to unilateral rescission by the employer.²⁶

III. LEGAL BACKGROUND

In 1945, Missouri's voters approved the state's current constitution, including article I, section 29 (hereinafter "section 29") which ensures "[t]hat employees shall have the right to organize and to bargain collectively through representatives of their own choosing."²⁷ While this section of the constitution was ensnared in considerable debate,²⁸ voters eventually passed this rather facially uncomplicated provision. However, at this time the nondelegation doctrine²⁹ was thriving and controversy surrounded who this bare bones constitutional provision applied to and what, exactly, was meant by the term "collective bargaining."

Just two years after the passage of section 29, the Missouri Supreme Court had its first opportunity to interpret the meaning of this provision in *City of Springfield v. Clouse*.³⁰ In *Clouse*, the Missouri Supreme Court considered a declaratory judgment action brought by the city of Springfield, Missouri, against representatives and officers of labor unions representing the city's employees.³¹ In a factual scenario that would later repeat itself many times over, the city claimed that section 29 only applied to the private sector, while the members of the labor unions contended that the provision applied "with equal force" to private and public employees.³² The Missouri Supreme Court found for the city, holding that section 29 could only have been intended to apply to collective bargaining in the private sector.³³

The basis for the court's holding was that under the existing nondelegation framework, allowing public employees to collectively bargain resulted in the "bargain[ing] away" of legislative discretion.³⁴ However, the court noted that collective bargaining, as secured by section 29, was significantly different from the right to speak freely and to peaceably assemble, as secured by the United States Constitution and article I, sections

26. *Id.*

27. MO. CONST. art. I, § 29.

28. See Francis J. Loevi, Jr., *The Development and Current Application of Missouri Public Sector Labor Law*, 36 MO. L. REV. 167 (1971).

29. The nondelegation doctrine is a basic principle of law which limits a legislature's ability to transfer its legislative power to another branch of government. See BLACK'S LAW DICTIONARY 459 (8th ed. 2004).

30. 206 S.W.2d 539 (Mo. 1947) (en banc).

31. *Id.* at 541.

32. *Id.* at 541-42.

33. *Id.* at 543 ("Undoubtedly Section 29 had a different purpose. It was intended to safeguard collective bargaining as that term was usually understood in employer and employee relations in private industry.").

34. *Id.* at 543, 545.

8 and 9 of the Missouri Constitution.³⁵ The Missouri Supreme Court encouraged public employees to exercise such free speech and assembly rights in order to voice their grievances and desires to their employer, as citizens petitioning the government for the reformation of administrative rules, ordinances, or statutes.³⁶

Notably, however, the Missouri Supreme Court made no attempt to define the parameters of collective bargaining or to establish the seemingly fine line where free speech and peaceable assembly end and collective bargaining begins.³⁷ Nonetheless, the court *did* define the purpose of collective bargaining to be reaching binding employment contracts between the employer and the union representing the employees.³⁸ In light of the nondelegation doctrine, this purpose could not be served when public employment was at issue – allowing government entities to enter into binding contracts would be tantamount to an executive entity “bind[ing] itself or its successor to make or [to] continue any legislative act.”³⁹ This refusal to conclusively define collective bargaining caused major confusion in courts throughout the state, a confusion that was exemplified in the number of cases brought under section 29 in the wake of *Clouse*.

Eleven years after *Clouse*, the Missouri Supreme Court was called upon to decide how the rights afforded by section 29 were applicable when a city separates its public utilities from the rest of the city’s government. In *Glidewell v. Hughey*,⁴⁰ the city of Springfield’s Board of Public Utilities refused to enter into agreements with local labor unions.⁴¹ The labor unions contended that the city had separated its Board of Utilities from the rest of the city’s functions in such a way that the Board was a private corporate entity that would be required to bargain collectively with its employees.⁴² The court rejected this argument, however, holding that the city council’s oversight of the Board made Board members *ex-officio* members of the city council.⁴³ Therefore, allowing collective bargaining to take place between employees

35. *Id.* at 542 (“This ruling does not mean . . . that public employees have no right to organize. All citizens have the right . . . to peaceably assemble and organize for any proper purpose Employees had these rights before Section 29, Article I, [of the] 1945 [Missouri] Constitution was adopted.”).

36. *Id.*

37. *See id.* Instead the court chose to use the phrase “collective bargaining as that term was usually understood in employer and employee relations in private industry.” *Id.* at 543.

38. *Id.* at 543.

39. *Id.* at 545.

40. 314 S.W.2d 749 (Mo. 1958) (en banc).

41. *Id.* at 751.

42. *Id.* at 752.

43. *Id.* at 754-55. The city council had control over the Board’s budget, rates, and disbursements. *Id.* The council could also abolish the Board or transfers to another department of the city. *Id.* at 755.

and the Board was equivalent to a delegation of the city's legislative powers—a clear violation of *Clouse*.⁴⁴

In seeming defiance of the Missouri Supreme Court's decisions in *Clouse* and *Glidewell*, the Missouri legislature passed the Public Labor Law in 1965.⁴⁵ In part, the law guarantees most public employees the right to “form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through representatives of their own choosing.”⁴⁶ Further, the initial version of the statute granted public entities the ability to engage in negotiations with employee labor unions to establish salaries and other working conditions *if they so wished*.⁴⁷ However, just two years later this portion of the law was repealed and replaced⁴⁸ in order to more clearly define the procedure by which public bodies could interact and enter into agreements with labor unions.⁴⁹

This new version of the law, which remains in effect today,⁵⁰ requires that public employers “meet, confer, and discuss” proposals presented by the employee labor unions.⁵¹ After such discussions are completed, the parties are *required* to reduce the results to writing and to present the writing to the legislative entity.⁵² The entity may then choose to adopt, modify, or reject the proposal.⁵³ As a result, while government entities are required to at least listen to the unions representing their employees, there is no requirement that

44. *Id.* at 755.

45. Act of June 25, 1965, 1965 Mo. Laws 232 (codified as amended at MO. REV. STAT. §§ 105.500-105.530 (2000)).

46. MO. REV. STAT. §105.510. Some public employees exempted by the statute include police officers, deputy sheriffs, Missouri State Highway Patrol officers, Missouri National Guard Members, and teachers in Missouri's public schools, including college and university professors and teachers of elementary and secondary schools. *See id.*

47. MO. ANN. STAT. § 105.520 (West 1966) (“Any public body may engage in negotiations relative to salaries and other conditions of employment of the public body employees, with labor organizations. Upon completion of negotiations the results shall be reduced to writing and presented to the governing or legislative body in the form of an ordinance or resolution for appropriate action.”).

48. Act of June 7, 1967, 1967 Mo. Laws 192, 193 (codified at MO. REV. STAT. § 105.520 (2000)). For a more complete history of the enactment of Missouri's Public Labor Law, see Loevi, Jr., *supra* note 28, at 173-82.

49. *See* MO. REV. STAT. § 105.520.

50. *Id.* In 1969, the Public Labor Law was amended one final time. *See* Act of Aug. 8, 1969, 1969 Mo. Laws 186. The effect of this amendment was to alter § 105.510 of the Act so as to permit excepted employees “the right to form benevolent, social, or fraternal associations.” *Id.*; *see also* Loevi, Jr., *supra* note 28, at 181.

51. MO. REV. STAT. § 105.520.

52. *Id.*

53. *Id.*

any agreement actually be made.⁵⁴ As a result, some commentators have suggested that these particular sections of Missouri's Public Labor Law have granted public employees "no more rights than they possessed constitutionally under the *Clouse* decision."⁵⁵

This suggestion likely stemmed from the Missouri Supreme Court's decision in *State ex rel. Missey v. City of Cabool*.⁵⁶ In 1967, a majority of the employees of the city of Cabool, Missouri,⁵⁷ joined the International Brotherhood of Electrical Workers ("IBEW") and notified the city of Cabool, by letter, that the union was authorized to represent them in negotiations with the city.⁵⁸ The city refused to meet with representatives of the union, and, after learning the identity of the employees who had authorized the IBEW to act on their behalf, the city began laying off and reducing the pay of many of the employees who had joined the union.⁵⁹ Further, the city offered certain employees raises and other benefits in exchange for their withdrawal from the union.⁶⁰ Employees affected by the city's actions brought suit, seeking injunctive relief⁶¹ and a declaration directing the city to "recognize and deal with [the IBEW] as provided by [Missouri's Public Sector Labor Law]."⁶²

In response, the city argued that it was not required to recognize and negotiate with the union because the Public Labor Law was in direct violation of *Clouse* and therefore was an unconstitutional attempt at delegating legislative power.⁶³ The Missouri Supreme Court disagreed, however, holding that the Public Sector Labor Law only provided a "procedure of communication" through which public employees could exercise their rights, as previously enumerated in *Clouse*.⁶⁴ According to the court, the Public Labor Law did not give public employees the right to collectively bargain because the city was not required to *agree* to the union's proposals, only to hear them as a legislative body.⁶⁵ Again, however, the court refused to define the term "collective bargaining," and instead merely noted that collective

54. *Id.*

55. Loevi, Jr., *supra* note 28, at 173.

56. 441 S.W.2d 35 (Mo. 1969).

57. At the time this case was heard, the city of Cabool had approximately "11 employees in the electrical, park and pool, street and water and sewer departments." *Id.* at 38.

58. *Id.*

59. *Id.* The actions taken by the city affected "more than half the employees in the bargaining unit." *Id.*

60. *Id.* at 39.

61. *Id.* ("The prayer . . . was for a permanent injunction that respondents reinstate plaintiff employees to jobs and rates of pay prior to discharge . . .").

62. *Id.*

63. *Id.* at 40.

64. *Id.* at 41 ("The public employer is not required to agree but is required only to 'meet, confer and discuss,' a duty already enjoined upon such employer prior to the enactment of this legislation.").

65. *Id.*

bargaining has an “attendant connotation of unfair labor practice . . . [with] the use of strike as a bargaining device constitutionally protected to private employees.”⁶⁶

Although teachers are not granted the right to join labor organizations under the Missouri Public Sector Labor Law, they are allowed to form or join “benevolent, social, or fraternal associations.”⁶⁷ The distinction between these “associations” and “labor organizations” became an issue for the Missouri Supreme Court in *Peters v. Board of Education*.⁶⁸ In *Peters*, the plaintiffs – representing an association of teachers – filed a petition for declaratory judgment, asking that a written agreement between the association and a local school district be declared valid.⁶⁹ The basis for the teachers’ argument was that the school district’s refusal to honor the agreement constituted a violation of the teachers’ rights to be heard and to peacefully assemble, as enumerated in *Clouse*.⁷⁰

The school district recognized the right of the teachers to “organize or select representatives,”⁷¹ but claimed that actions taken by the district’s teachers amounted to more than mere organization and representation.⁷² Instead, the district claimed that the agreement was the result of collective bargaining and was therefore void.⁷³ The court disagreed, noting that the agreement at issue only required the district to listen to the recommendations of the teachers’ association – it did not bind the board to accept the recommendations.⁷⁴ However, once again the Missouri Supreme Court refused to define or even speculate as to what it might practically look like if an association of teachers was to *collectively bargain*. Moreover, the court did not use this opportunity to define the line between a “labor organization” and a “benevolent, social, or fraternal association,” and instead granted an “association” the same right to present proposals to legislative bodies as “labor organizations,” despite the attempt by Missouri’s legislature to except teachers from the Public Labor Law.⁷⁵

The same year that *Peters* was decided, the Missouri Supreme Court heard another challenge to the Public Labor Law. *State ex rel. O’Leary v. Missouri State Board of Mediation*⁷⁶ dealt with a petition by circuit court judges to prevent the State Board of Mediation from recognizing a union

66. *Id.*

67. MO. REV. STAT. § 105.510 (2000).

68. 506 S.W.2d 429 (Mo. 1974).

69. *Id.* at 430.

70. *Id.*

71. *Id.* at 433.

72. *Id.*

73. *Id.*

74. *Id.*

75. *See id.* at 430-33.

76. 509 S.W.2d 84 (Mo. 1974) (en banc).

representing certain court personnel.⁷⁷ In holding that the Board of Mediation could recognize the union and certify it as the exclusive bargaining unit for court employees, the Missouri Supreme Court again reaffirmed that Missouri's Public Sector Labor Law only presents a "procedure for communication" through which employees may exercise their right to organize and select representatives and does not violate the nondelegation doctrine.⁷⁸ Again the court failed to define "collective bargaining" but did note that the term usually "contemplates a binding contractual obligation being placed on the employer."⁷⁹

Interestingly, the most notable part of the court's opinion in *O'Leary* can be found in dicta at the end of the written opinion. This dicta reflects a shift toward a more liberal and flexible interpretation of the nondelegation doctrine by making reference to an "ultimate truth, i.e., that 'government' can be more efficient and responsive when the three departments thereof realize that a cooperative approach to problems of mutual concern is not per se violative of the separation of power doctrine."⁸⁰ This flexible interpretation allowed the Public Labor Law to remain intact throughout the 1970s.⁸¹ However, by the 1980s the constitutionality of Public Labor Law was firmly established and the court began to hear claims regarding the actual procedure and practical consequences of the Law.

In *Sumpter v. City of Moberly*,⁸² a group of firefighters brought suit against the city of Moberly, Missouri, claiming that the memorandum of understanding adopted by the city pursuant to the Public Labor Law constituted a binding contract between the union and the City of Moberly.⁸³ The firefighters sought injunctive relief to prevent the city from unilaterally revoking this contract.⁸⁴ The court denied the injunction, holding that any agreements reached by employees and government bodies pursuant to the Public Sector Labor Law resulted only in "an administrative rule, an ordinance, [or] a resolution."⁸⁵ Further, the court held that such rules, ordinances, and resolutions only bind the city until the city takes appropriate legislative action to amend or revoke the rule, ordinance, or resolution at issue.⁸⁶

77. *Id.* at 85.

78. *Id.* at 88.

79. *Id.* at 87.

80. *Id.* at 90.

81. *See, e.g., St. Louis Teachers Ass'n v. Bd. of Educ. of the City of St. Louis*, 544 S.W.2d 573 (Mo. 1976) (en banc); *Curators of the Univ. of Mo. v. Pub. Serv. Employees Local No. 45*, 520 S.W.2d 54 (Mo. 1975) (en banc).

82. 645 S.W.2d 359 (Mo. 1982) (en banc).

83. *Id.* at 359.

84. *Id.* at 360-61.

85. *Id.* at 363.

86. *Id.* at 363 n.4.

Just two months prior to the Missouri Supreme Court's decision in *Independence*, the court heard another challenge to both *Clouse* and *Sumpter*. In *Reichert v. Board of Education of the City of St. Louis*,⁸⁷ a group of district employees brought suit after the school board unilaterally altered the terms and conditions of a "policy statement" enacted pursuant to the Public Labor Law.⁸⁸ The "policy statement" was an agreement between the International Union of Operating Engineers Local 2 and the school board which governed the employees' salaries and working conditions.⁸⁹ The employees claimed that they were "entitled to relief because once the Board adopts the terms and conditions discussed at a meeting held in accordance with [the Public Labor Law], it may not unilaterally alter those terms and conditions."⁹⁰ In essence, the employers were arguing that *Sumpter* and *Clouse* had been wrongly decided.⁹¹

The Missouri Supreme Court refused to decide the issue.⁹² Instead of choosing to explicitly overrule or even affirm *Sumpter* and *Clouse*, the court held that the language of the "policy statement" allowed the Board to make changes to the agreement at any time – as long as the union was given written notice prior to taking any action.⁹³ In this case, sufficient notice was given to the union and therefore the school board did not act in a manner that was inconsistent with the "policy statement,"⁹⁴ giving the Missouri Supreme Court the option to bypass the validity of *Clouse* and *Sumpter*.⁹⁵

Prior to the instant case, Missouri's public employees did not have a right to "collective[ly] bargain[] [as] usually understood . . . in [the] private industry,"⁹⁶ but they did have a right to organize and choose representatives to petition government employers for changes and agreements relating to salaries and working conditions.⁹⁷ However, government employers were not required to adopt the recommendations of the employee organizations, and, if the government employers *did* choose to adopt the recommendations, the recommendations became a legislative action which could be rescinded at any time through the appropriate action.⁹⁸

87. 217 S.W.3d 301 (Mo. 2007) (en banc).

88. *Id.* at 303.

89. *Id.*

90. *Id.* at 304.

91. *Id.*

92. *Id.* at 305.

93. *Id.*

94. *Id.*

95. *Id.*

96. *City of Springfield v. Clouse*, 206 S.W.2d 539, 543 (Mo. 1947) (en banc).

97. It is of note that Missouri's Public Sector Labor Law codifies this right for all public employees except teachers and those involved in state policing functions. MO. REV. STAT. § 105.510 (2000). However, *all citizens* have this right under various state and federal constitutional provisions.

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

IV. INSTANT DECISION

In *Independence-National Education Ass'n*,⁹⁹ the Missouri Supreme Court was asked to overturn decades of precedent refusing public employees the right to collectively bargain and instead to adopt a “plain language” approach to interpreting section 29 of the Missouri Constitution.¹⁰⁰ The majority found this argument persuasive and proceeded to overrule two longstanding cases dealing with the bargaining rights of public employees.¹⁰¹ Two members of the court dissented in part,¹⁰² arguing that the majority’s decision to overrule precedent made little difference in the instant decision.¹⁰³

In reaching its decision, the majority first noted that the reasoning behind the court’s decision in *Clouse* was “based on the now largely defunct nondelegation doctrine.”¹⁰⁴ Under the nondelegation doctrine, the salaries and other working conditions of public employees were considered to be matters entrusted to the legislative body and therefore not subject to contractual obligations.¹⁰⁵ Noting that this doctrine has been abandoned in both federal and Missouri state law,¹⁰⁶ the court re-examined the language of the constitutional provision at issue.¹⁰⁷

Upon examination of section 29’s language, the Missouri Supreme Court held that the provision was clear: “‘Employees’ plainly means employees. There is no adjective; there are no words that limit ‘employees’ to private sector employees.”¹⁰⁸ Although cited to by both parties, the court refused to consider the constitutional convention debates which took place prior to the ratification of section 29.¹⁰⁹ The court found this information

99. (*Independence-Nat'l Educ. Ass'n II*), 223 S.W.3d 131 (Mo. 2007) (en banc).

100. *Id.*

101. *Id.* at 137, 140. The two cases were *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. 1947) (en banc) and *Sumpter v. City of Moberly*, 645 S.W.2d 359 (Mo. 1982) (en banc). *Id.*

102. *Independence-Nat'l Educ. Ass'n II*, 223 S.W.3d at 141-48 (Price, J., concurring in part and dissenting in part).

103. *Id.* at 144 (“Assuming that neither *Clouse* nor *Sumpter* is overruled, the appellants are nonetheless entitled to relief on most, but not all, of their claims.”).

104. *Id.* at 135 (majority opinion).

105. *See id.* at 135-36 (citing *City of Springfield v. Clouse*, 206 S.W.2d 539, 545 (Mo. 1947) (en banc)).

106. *Id.* at 135.

107. *Id.* at 136-37. Article I, section 29 of the Missouri Constitution states, “employees shall have the right to organize and to bargain collectively through representatives of their own choosing.” MO. CONST. art. I, § 29.

108. *Independence-Nat'l Educ. Ass'n II*, 223 S.W.3d at 137.

109. *Id.* at 136-37 (“Both sides of this controversy cite the debates of the constitutional convention to support their respective positions as to whether the constitutional convention delegates did or did not intend that public employees be

largely unpersuasive because Missouri's voters, when voting for or against the current version of the Missouri Constitution, voted only on the actual words used in the constitution without considering what debates were had during the constitutional convention.¹¹⁰ As such, the court refused to "read into the Constitution words that are not there."¹¹¹

In the alternative, the Missouri Supreme Court held that even to the extent to which the nondelegation doctrine might still exist, allowing public employees to collectively bargain does not violate the doctrine.¹¹² Under the terms of Missouri's Public Sector Labor Law, public employers are not required to accept any proposals made by employee unions.¹¹³ Because public entities are free to accept, reject, or modify any employee proposals, the legislative branch is not delegating away any of its powers.¹¹⁴

With regard to the holding in *Sumpter*, the court noted that contracts between public employees and their employers are the only contracts which have been lawfully subject to unilateral rescission.¹¹⁵ While affirming that such agreements are subject to "legislative action," the court pointed out that school districts often enter into binding contracts to procure services necessary for their operation.¹¹⁶ This fact, combined with the court's decision that section 29 applies to both public and private employees, led the majority to hold that *Sumpter* should also be overruled.¹¹⁷ However, possibly in recognition of the decision in *Reichert*, the Missouri Supreme Court noted that school districts (and presumably other public employers) may include clauses in their agreements with employee unions that would excuse the district from its contractual obligations.¹¹⁸

Two members of the court dissented in part.¹¹⁹ As to *Clouse*, Judges Price and Limbaugh argued that in practice the end result in *Independence* was essentially the same, regardless of whether the Missouri Supreme Court

included in article 1, section 2. . . . Missouri's voters did not vote on the words used in the deliberations of the constitutional convention.").

110. *Id.* at 137.

111. *Id.*

112. *Id.* at 137-38.

113. *Id.*

114. *Id.* (citing *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 41 (Mo. 1969)).

115. *Id.* at 140.

116. *Id.* ("School districts execute binding contracts with school superintendents, creditors who hold the districts' bonded indebtedness, contractors that build and repair school buildings, textbook publishers, private cleaning services, and so forth.").

117. *Id.*

118. *Id.* at 140-41. The court did not explicitly state under what conditions such exculpatory clauses would be upheld. *See id.*

119. *Id.* at 141-48.

chose to overrule *Clouse*.¹²⁰ Citing the court's earlier precedent, the dissenters noted that teachers and other public employees already had the right to meet and confer with their representatives under *Clouse*, and overruling *Clouse* did little, if anything, to grant public employees any more rights than they already possessed in bargaining with their employers.¹²¹ However, the dissent agreed with the majority in that *Sumpter* should be overruled.¹²²

V. COMMENT

While some public employees are pleased with this "new" right to collectively bargain,¹²³ the majority decision in *Independence National Education Ass'n*¹²⁴ leaves much to be desired. As Judge Price notes in his dissent, the Missouri Supreme Court "spends great effort in overruling *Clouse* and in giving 'all employees, including those represented by the employee associations in this case . . . the right to bargain collectively,'"¹²⁵ but does little to explain if and how public employees will enjoy any rights other than those already statutorily granted by Missouri's Public Sector Labor Law.¹²⁶ In fact, a close reading of *Independence* and its predecessors makes it clear that public employees have gained little, if anything, from this decision.

A. Overruling Clouse Is Unnecessary and Affords No New Rights to Employees

As in past decisions of the Missouri Supreme Court, the opinion in *Independence National Education Ass'n* does little to define what is meant by "collective bargaining." The court does not adopt a formal definition of the term, but unlike many past opinions, does suggest a "common understanding"

120. *Id.* at 141 (Price, J., concurring in part and dissenting in part) ("The status of either case, however, makes little difference to the outcome of this matter in light of other case and statutory law that otherwise controls.").

121. *Id.* at 147.

122. *Id.*

123. See Missouri National Education Association, *Independence Lawsuit Reaches the Missouri Supreme Court*, http://www.mnea.org/news/Ind_SupremeCourt.htm ("A favorable decision by the [Missouri] Supreme Court would clear the way for public employees to exercise their constitutional right to have a legitimate voice at the decision-making table.").

124. 223 S.W.3d 131.

125. *Id.* at 146-47 (Price, J. dissenting in part and concurring in part) (omission in original).

126. *Id.* at 146-47 (In his dissent, Judge Price continually asks "Does it Make a Difference[?]").

of the term in footnote six of the majority opinion.¹²⁷ This “common understanding” amounts to nothing more than negotiations between employer and groups of employees. While this is far more than most, if any, of the opinions of Missouri’s highest court have done in this respect, it is still not enough.

When this “common understanding” is combined with the court’s affirmation that government bodies are in no way required to come to an agreement with employee unions,¹²⁸ one sees that under the Public Labor Law and *Clouse* this type of “collective bargaining” has been taking place for many years. As a result, the only true change in store for most government employers and employees is one of semantics. That is, prior to *Independence*, public employees could only “meet and confer” with their employers, but now post-*Independence*, public employees can only “meet and confer” with their employers *and* call it collective bargaining.

Further, overruling *Clouse* does not afford anything more to those groups excluded from the general provisions of the Public Labor Law. For years, the Missouri Supreme Court has interpreted the Public Sector Labor Law as providing a procedure of communication through which public employees were able exercise their rights of free speech and freedom of assembly as enumerated in *Clouse*.¹²⁹ Because teachers and other excluded groups also had these rights, the Public Labor Law was not read as excluding these groups from this procedure.¹³⁰ Instead, the exclusion of these groups meant that it was up to the employers and the employee unions to find their own “procedure of communication” for the exercise of these rights.¹³¹ The majority opinion in *Independence* does not change this precedent.¹³² Instead

127. *Id.* at 138 n.6 (majority opinion) (“What, by common understanding is ‘the right to bargain collectively?’ The dictionary definition says ‘collective bargaining’ is ‘negotiation for the settlement of the terms of a collective agreement between an employer or a group of employers on one side and a union or number of unions on the other.’ Webster’s Third New International Dictionary (1993). Similarly, Black’s Law Dictionary (8th ed. 2004) says ‘collective bargaining’ means ‘negotiations between an employer and the representatives or organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits.’”).

128. *Id.* at 136 (“In fact, this Court has repeatedly recognized that the public sector labor law allows employers to reject all employee proposals, as long as the employer has met and conferred with employee representatives.”).

129. *See supra* notes 56-66 and accompanying text.

130. *See supra* notes 67-75 and accompanying text.

131. *See supra* notes 67-75 and accompanying text.

132. *Independence-Nat’l Educ. Ass’n II*, 223 S.W.3d at 136 (“Instead of invalidating the public sector labor law to the extent that it excludes teachers, this Court’s reading of the statute recognizes the role of the . . . school district-in the absence of a statute covering teachers-to set the framework for these public employees to bargain collectively through representatives of their own choosing.”).

the court reaffirms that it is up to the employer to come up with a way in which these rights can be exercised.¹³³

B. Overruling Clouse Is Undermined By the Court's Reliance on the Nondelegation Doctrine as It Applies to the Right to Strike

While some may argue that the term “collective bargaining” carries with it an implicit right to strike, no such right is afforded to Missouri’s public employees under the majority opinion in *Independence*.¹³⁴ The Public Labor Law makes it clear that the intention of Missouri’s legislature was not to grant public employees the right to strike, but it does not explicitly forbid strikes by public employees either.¹³⁵ The Missouri Supreme Court, however, both in past decisions¹³⁶ and in *Independence*, is clear that public employees are forbidden from striking.¹³⁷

The Missouri Supreme Court cited two overarching policies which forbid strikes by public employees. The first is that many public employees are “deemed essential to the preservation of public safety, health, and order.”¹³⁸ Employees such as police officers and firefighters are highly trained and must be available on a moment’s notice; allowing such employees to strike could result in serious negative consequences for society. Second, the court claims that striking allows the employee groups to “infringe on the constitutional prerogative of the public entity’s legislative powers . . . in a manner inconsistent with the best judgment of the entity’s governing board.”¹³⁹ By proffering this reasoning, the court is undermining its own abrogation of the nondelegation doctrine. Forbidding strikes on the premise that allowing them would constitute an infringement by employee groups on the legislature’s decision making process is merely a revival of the nondelegation doctrine.

C. Public Employers May Still Be Able to Unilaterally Change the Terms of an Agreement

One aspect of *Independence* that does have the potential to impact the rights of public employees is the Missouri Supreme Court’s decision to overrule *Sumpter*. Facially, it seems that public employers may no longer

133. *Id.*

134. *Id.* at 133.

135. MO. REV. STAT. § 105.530 (2000) states, “Nothing contained in sections 105.500 to 105.530 shall be construed as granting a right to employees covered in sections 105.500 to 105.530 to strike.”

136. *See, e.g.*, *St. Louis Teachers Ass’n v. Bd. of Educ. of the City of St. Louis*, 544 S.W.2d 573, 575 (Mo. 1976) (en banc).

137. *See Independence-Nat’l Educ. Ass’n II*, 223 S.W.3d at 133.

138. *Id.*

139. *Id.*

change the terms of an adopted employment agreement unilaterally, something Missouri precedent clearly allowed before the instant decision. However, the decision in *Reichert*¹⁴⁰ may undermine the court's decision to overrule *Sumpter*. Allowing public employers to include exculpatory clauses in any and all collective bargaining agreements, so long as there is sufficient notice and time for discussion, will put employees back in the same position they were in under *Sumpter*. Many employers may simply include exculpatory language to avoid the implications of *Independence*. If overruling *Sumpter* is going to effectuate any actual change in the enforcement of labor contracts, Missouri's courts or legislature should make clear that the only acceptable reason to change the terms of an employment agreement is for good cause, such as financial distress. Otherwise, the employment agreements now "collectively bargained" for under *Independence* become illusory.

VI. CONCLUSION

It appears that little has changed in the collective bargaining arena, at least practically speaking, after the Missouri Supreme Court's decision in *Independence*. The terms used by public employers and employees to describe their negotiations may certainly change, but the actual rights afforded to employees remain nearly identical to those held before the decision. Further, Missouri's highest court leaves a gaping loophole which allows employers to contract around the only new right given to public employees – the right to have employment agreements enforced by a court of law. Closing this loophole, either through judicial or legislative action, will be the first step in actually giving public employees any rights they did not hold prior to the instant decision.

AMANDA STOGSDILL

140. 217 S.W.3d 301 (Mo. 2007) (en banc).