**IN THE CIRCUIT COURT OF COLE COUNTY**
**STATE OF MISSOURI**

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| AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, COUNCIL 61 et al., Plaintiffs, | ) | |
| vs. | ) | Case No. 18AC-CC00407 |
| STATE OF MISSOURI, et al., Defendants. | ) | |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT**[1]

**Findings of Fact**

**A. The Plaintiff Unions**

1. Plaintiffs (also referred to as the "Unions") are the certified bargaining representatives of different bargaining units of state employees. Plaintiffs bargain labor agreements on behalf of state employees, service those contracts, and educate and train their members on issues that relate to their jobs and politics that affect their ability to do their jobs.

2. Plaintiffs are associations of individual dues-paying members, including Missouri state employees. They are governed by elected executive boards. Plaintiffs' members have the right to vote on union officers and to run for union office.

3. State employees who are members serve on Plaintiffs' bargaining teams and participate in bargaining with Defendants. They also serve as stewards for the Unions to help resolve employee disputes with Defendants.

4. Plaintiffs represent state employees whether or not they are dues-paying members. The Unions process grievances for both members and non-members. The Unions

[1] While the document signed by the court on May 10, 2021 was not denominated as a judgment, it was referred to as a judgment in the clerk's certification. The Court enters this judgment to remove any confusion as to the intent of the Court.

also meet with both members and non-members to get their input on possible contract proposals and to update them on the Unions' activities.

5. Plaintiff American Federation of State, County and Municipal Employees, AFLCIO, Council 61 ("AFSCME") is a labor organization certified to represent two bargaining units of state employees employed by several Departments of the State, consisting of a "Craft and Maintenance Bargaining Unit" and a "Direct Care Bargaining Unit." AFSCME and multiple employer agencies are parties to a single collective bargaining agreement ("AFSCME CBA") covering both bargaining units.

6. Danny Homan is the current president of AFSCME and serves at its chief negotiator.

7. The most recent AFSCME CBA expired[1] on December 31, 2018.

8. The AFSCME CBA includes an "evergreen" clause, under which it remains in full force and effect during successor negotiations. (Jt. Ex. 41 at Article 37, Section 1.)

9. Plaintiff Communications Workers of America, AFL-CIO, Local 6355 ("CWA"), is a labor organization representing certain employees of the Departments of Social Services and Health and Senior Services, and the Office of Administration. CWA and the employing agencies are parties to a collective bargaining agreement ("CWA CBA") covering the CWA Bargaining Unit.

10. The most recent CWA CBA expired on December 31, 2018. The CWA CBA also includes an "evergreen" clause.

[1] In using the term "expired," the Court simply means when a contract reaches its end date.

11. Natashia Pickens is the current President of CWA. Prior to being President, she worked as a full-time employee for the Department of Social Services.

12. Plaintiff Service Employees International Union, Local 1 ("SEIU"), is a labor organization representing three bargaining units of state employees: the "Probation and Parole Officers Bargaining Unit" and the "Probation and Parole Assistants Bargaining Unit" consisting of employees of the Department of Corrections; and, the "Patient Care Professionals Bargaining Unit," consisting of employees of the Departments of Corrections and Mental Health and the Missouri Veterans Commission. SEIU and the State are parties to collective bargaining agreements covering the Probation and Parole Officers, Probation and Parole Assistants, and Patient Care Professionals.

13. The most recent PPO CBA expired on September 14, 2018. The most recent PPA CBA expired on April 14, 2018. And, the most recent PCP CBA expired on May 31, 2018. (Jt. Stip. at ¶¶ 20-23; Jt. Exs. 69, 73 & 75.) The SEIU CBAs do not include evergreen clauses.

14. Nancy Cross is vice-president of SEIU. She serves as the Union's chief negotiator. She has bargained CBAs with the State since 2010.

**B. The Defendants**

15. Defendants are the State of Missouri, the Office of Administration ("OA"), Missouri Personnel Advisory Board ("PAB"), and various departments and agencies of the State (referred to collectively as the "State").

16. Defendant OA negotiates collective bargaining agreements with AFSCME, CWA and SEIU with respect to the state employee bargaining units represented by each union and also

employs employees in the AFSCME and CWA bargaining units. Guy Krause worked for OA until his retirement on December 1, 2019, and between 2014 and his retirement, served as the State's chief negotiator in bargaining with the Unions.

17. Defendant PAB prescribes by rules the procedures for merit selection, uniform classification, and pay under Missouri's Merit Law.

**C. Collective bargaining under the former merit system law.**

18. Prior to the effective date of SB 1007, the Missouri state merit system provided certain minimum workplace protections for state employees including enumerated causes for dismissal and the right to a dismissal hearing and provisions concerning hiring, promotions, transfers, demotions, layoffs, and recalls. *See, e.g.*, §§ 36.150 and 36.240-.390, RSMo. (2017).

19. Under Missouri's former Merit Law, Plaintiffs bargained collective bargaining agreements (CBAs) with Defendants, setting forth terms and conditions of employment for represented employees. The CBAs included terms similar to those in Missouri's Merit Law as well as additional protections, such as progressive discipline, broader for "cause" discipline and due process provisions, extra seniority considerations in certain employment decisions, and grievance arbitration procedures for resolving disputes. When Plaintiffs and Defendants reached agreement on terms, they included them in their CBAs. (Jt. Stip. at ¶¶ 18, 20, 24; Jt. Exs. ¶¶ 4178; Tr. at p. 136, ll. 3-13; Tr. 514, ll. 11-23; Tr. at p. 519, l. 18 to p. 521, l. 18.) By example, an AFSCME CBA from 1987 includes a provision stating that "Disciplinary action shall only be imposed for cause." (Jt. Ex. 54 at Section 4.03.). And, the SEIU PPO and PCP CBAs from 2002 and 2003 include grievance procedures culminating in binding arbitration before a neutral. (Jt. Ex. 72 at Article 17; Jt. Ex. 78 at Article 17.)

20. In the typical bargaining process, the Unions formulate proposals for a successor CBA and then exchange them with representatives of the State across the table. For their proposals, the Union bargaining teams look at existing language in their CBAs and determine what needs to be changed. In years past, the State has not sought a lot of changes.

21. The bargaining process goes back and forth across the table. A Union will start with what it wants and the State will start with what it wants. The Union may then modify its proposal based on what the State tells it at the table and what employees want. In many cases, the parties eventually reach agreement. (Tr. at p. 160, l. 25 to p. 162, l. 3.) Both sides may make concessions. (Tr. 449, ll. 14-17.) The Union does not always obtain everything it wants in a contract. It sometimes withdraws proposals. (Tr. 162, ll. 12-18.) The Union will also work to convince the State to give the Union what it wants. The Union will present its case as to why the Union's proposal is in the interest of the State as well as the employees. It will also explain to the State what is wrong with its proposals. The Union will offer a solution and try to convince the employer of the Union's view. (Tr. at 450, ll. 7-20.) If the parties are close, the Union may "package" a proposal with other articles in dispute. The Union will offer the employer a trade of language that the Union may not like for language it wants, in order to get to an agreement. (Tr. 230, ll. 12-20; Tr. p. 451, l. 5 to p. 452, p. 4.) The Union may also take some protest action, like sending postcards, to convince the State to accept a proposal.

22. The Unions seek for "cause" job protections in CBAs to protect employees from being arbitrarily dismissed. (Tr. 225, ll. 12-16; Tr. 446, ll. 20-25.). They seek seniority protections to protect against favoritism, to protect older employees from being pushed out, and as a reward to longer-term employees. (Tr. 227, ll. 13-18; Tr. 551, ll. 11-25.)

And, the Unions seek grievance language so the parties to the CBA have a mechanism to address contract interpretation issues and so the Union has a process for protecting employee rights. (Tr. 226, ll. 21-41; Tr. 447, ll. 10-12.). A grievance process also ensures that employees who express concerns will be heard. (Tr. 551, ll. 6-17.)

**D. The processing of grievances before SB 1007.**

23. Prior to August 28, 2018, the Unions regularly filed grievances against various Defendants seeking to enforce terms of the CBAs, including grievances over promotions, overtime, workload, wages, discipline, discharge, and suspensions. (Tr. at p. 138, l. 19 to p. 140, l. 6; Tr. 395, ll. 12-20; Tr. 522, ll. 1-4.) On numerous occasions Plaintiffs obtained favorable outcomes. (Tr. at p. 141, ll. 7-18; at p. 147, ll. 6-22; Tr. at p. 401, l. 5 to p. 403, l. 16; Jt. Ex. 7989, 91-92, 94-96.) AFSCME, for example, convinced a state agency to re-instate a terminated employee and reimburse him for lost pay. (Jt. Ex. 83.) The CWA persuaded the state to revise an employee's five day suspension to a three day suspension. (Jt. Ex. 85.). And, in 2016, the SEIU successfully arbitrated a pay dispute against the Department of Mental Health, resulting in an award of backpay. (Jt. Ex. 94; Tr. at p. 144, ll. 8-10.)

24. The grievance process benefits employees, the Union, and the State. In some cases, management may realize the information that they were given by lower level supervisors was not accurate and reverse the original decision. (Tr. 397, ll. 4-9.) Even if the Union ultimately determines that management acted within its rights, and withdraws the grievance, employees still get the benefit of telling their side of the story and having their "day in court." (Tr. at p. 153, l. 25 to p. 154, l 13; Tr. at p. 404, l. 20 to p. 405, l. 3.). The Union benefits from ensuring that management is reading contract language the same way as they do, knowing where the line is for discipline and what an employee can and cannot be disciplined for, and holding

management accountable for their actions. The State benefits because the grievance procedure is a less costly way for the employer to resolve issues.

**E. SB 1007 and the Emergency Rules.**

25. SB 1007 was passed by the General Assembly on May 17, 2018, with an effective date of August 28, 2018. (Jt. Exs. 1-2.)

26. SB 1007 makes a number of changes to Missouri's civil service law, including:

- Eliminates the merit system's appeals process to protest dismissals, demotions and other discipline for cause, compare § 36.150.1 and § 36.390.5 (2017) with § 36.150.1 and § 36.390.2 (2018);
- Designates all employees of the state as employed "at-will," who may be discharged for no reason or any reason not prohibited by law; see § 36.025 (2018);
- Deletes provisions concerning factors the state must consider, including seniority, when making promotions, transfers, layoffs, recalls and other employment actions, see §§ 36.340 & .380 (2017).

27. Beginning in June 2018, OA Commissioner Sarah Steelman sent a series of emails to state employees about the merit reforms in SB 1007, and telling employees, including union-represented employees, that they were now at-will. (Jt. Exs. 3, 4 & 5.)

28. AFSCME sent a letter to OA dated August 17, 2018, explaining that employees covered by the AFSCME CBA could only be fired for cause and that SB 1007 did not alter the State's contractual commitments or duty to bargain. (Jt. Ex. 20.) AFSCME got no response. (Tr. at 394, l. 4.)

29. Natashia Pickens at the CWA contacted Guy Krause in mid-July 2018, asking for a meeting about SB 1007. (Tr. at p. 533, l. 2 to p. 534, l. 5; Tr. 825, ll. 3-6.) Krause did not respond until September 4, 2018, after the law was in effect.

30. On August 17, 2018, the PAB promulgated Emergency Rules purporting to implement SB 1007. (Jt. Ex. 7.). It subsequently adopted Final Rules making the same changes. (Jt. Ex. 8.)

31. The Emergency and Final Rules (collective the "Rules") modified the PAB's former rules on personnel matters, including the following:

- 1 CSR 20-3.070(2)-(5), the amended rules delete language requiring cause for dismissals and demotions and include new language stating that employees "do not have the right to notice, opportunity to be heard, or appeal" from a suspension, demotion, or dismissal and that the appointing authority may take such action against employees for "no reason or any reason not prohibited by law."

- 1 CSR 20-3.070(1), the amended rules delete language on the order of layoffs and recalls, including that layoffs be in inverse order of service credit, and add language that states that layoffs shall be administered "based on the needs of the service."

- 1 CSR 20-4.020(1), the amended rules include new language that "no state agency may establish a grievance procedure permitting a state employee... to grieve any discipline, suspension, demotion, notice of unacceptable conduct . . . or any employment action taken by an appointing authority that is alleged to have an adverse financial impact on a state employee or enter into an agreement with a certified bargaining unit providing for the same or any alternative dispute resolution procedure regarding matters prohibited herein"

(Jt. Exs. 7 & 10.)

**F. State agency policies issued on SB 1007 and the Rules.**

32. On or around August 28, 2018, Defendant Department of Mental Health ("DMH") amended some of its policies, by adding that *all* employees were "at will," deleting language stating that disciplinary action may be appealed "according to the appropriate union agreement," and adding new language that discipline may not be grieved. (Jt. Ex. 13 at DMH 103, 105 & 136.) Around the same date, Defendant Office of Administration took similar action, amending or rescinding seven personnel policies in

light of SB 1007, including policies on discipline and the employee grievance procedure. (Jt. Exs. 15 & 17.)

33. AFSCME filed grievances over the new DMH policies and sent a letter to OA contesting the policy rescissions. (Jt. Exs. 18, 128 & 130; Tr. 410, ll, 1-5.) AFSCME noted in a grievance that "we are supposed to have rights too per the contract." (Jt. Ex. 130). DMH and OA stated in response that the changes were "necessary updates resulting from new legislation," (Jt. Ex. 131), and were made because of "SB 1007 (2018) and its implementing regulations." (Jt. Ex. 19).

34. After SEIU received DMH's new policies, it wrote back that DMH was required to bargain over the changes. (Pls' Ex. 262.) At that time, the SEIU's CBA with DMH had expired and was not in effect but the parties had started the process of bargaining a successor labor agreement. (Tr. at 182, ll. 13-17; Tr. at 183, ll. 5-14.) SEIU did not receive a response to its letter. (Tr. 185, ll. 8-10.)

**G. Defendants' handling of grievances after SB 1007.**

35. Beginning August 28, 2018, state agencies began rejecting grievances filed by the Unions or placing them on hold. Defendants cited SB 1007 and the Emergency Rules for the proposition that employees were now at-will and did not have the right to pursue grievances. (Jt. Exs. 104 – 111; Jt. Exs. 118, 119 & 121; Jt. Ex. 125, at PLF RQP #12 – 0100.)

36. By example, AFSCME filed a grievance on September 4, 2018 over a written reprimand given to employee "J.F." (Jt. Ex. 104.) DMH wrote that "per Senate Bill 1007 and 1 CSR 20.4.020, DMH employees can no longer grievance disciplinary

actions. I wanted to make you aware that this grievance will not be processed." (*Id.* at PLF RQP #12 - 003.)

37. In response to grievances filed by CWA-represented employees, DSS told the Union that the grievances were being placed in "pending status" because the "Labor Agreement Grievance Procedure" was being reviewed to determine the impact of changes to Chapter 36, R.S.Mo., by SB 1007. (Jt. Exs. 118, 119 & 121.) The CWA had never gotten responses like this from the State before. (Tr. 537, ll. 16-18.) Although two out of three grievances were ultimately resolved, DSS did not follow normal procedures, did not involve the Union in the process, and took months longer than typical to resolve. (Tr. at p. 591, l. 23 to p. 592, l. 25.)

38. When the SEIU filed a grievance on behalf of a DMH employee, the State's response was the same as for AFSCME grievances - "Per Senate Bill 1007 and 1 CSR 20.4.020, DMH employees can no longer grieve disciplinary actions and therefore there is no longer a due process." (Jt. Ex. 125, at PLF RQP #12 – 0100.) DoC also rejected grievances filed by PPA and PPO employees.

**H. Bargaining after SB 1007 went into effect and before the Preliminary Injunction Order, including bargaining between SEIU and the State.**

39. At the time that SB 1007 and the Emergency Rules went into effect, the three unions were either preparing for in person negotiations with the State (AFSCME and CWA) or about to hold their first bargaining sessions with representatives of the State (the SEIU).

40. In fall 2018, after SB 1007 went into effect, Guy Krause met with representatives of each Union to discuss bargaining. At each meeting, Krause told the Unions that the State was

unable to agree to provisions in a new CBA that conflicted with SB 1007 and the Rules. (Tr. at p. 843, l. 23 to p. 844, l. 6.). The Unions disagreed with Krause.

41. At a meeting with the SEIU on September 24, 2018, Krause told Nancy Cross that employees were "at will," that the contract had to be in "congruence" with SB 1007, that the grievance process "did not exist," that the State "viewed the law as all encompassing," and that the State's position on the contract was compelled by SB 1007. (Tr. at p. 188, l. 14 to p. 189, l. 6.) Krause also told Cross that, because the CBAs had ended, that the SEIU would have to submit a new agreement in its entirety and that the State would not honor anything that was currently in place. (Tr. at p. 189, l, 21 to p. 190, l. 3.) Cross disagreed, telling Krause the State had to bargain any changes. (Tr. 190, ll. 7-12.)

42. In fall 2018, the SEIU sent the State initial proposals for the PCP, PPA, and PPO CBAs. The SEIU proposed, for each CBA, to maintain existing language on "cause" for discipline, progressive discipline, prior notice of charges, layoffs by seniority, promotions using seniority, and grievance-arbitration. (Jt. Exs. 167, 169 & 172.)

43. The State provided its responses to the PCP CBA on January 10, 2019. (Jt. Ex. 170.) The State struck every reference to dismissal and discharge for cause, a probationary period, progressive discipline, prior notice of discipline against an employee, the entire grievance-arbitration procedure, employee appraisals, the use of seniority in promotions, and layoffs by seniority. It was the most changes that Cross had ever seen in bargaining with the State. (Tr. at p. 204, l. 1-5.)

44. When the SEIU and the State met on the PCP CBA, Krause went through the State's proposals and explained the reasons for the changes. On items relating to discipline and discharge, seniority, and grievance arbitration, Krause told the Union bargaining team that the

State was striking the language "because of SB 1007" and was "compelled to follow the law." (Tr. at p. 205, l. 25 to p. 210, l. 19; Tr. at 324, ll. 9-15; Tr. p. 353, l. 20 to p. 354, l. 2; Tr. at p. 846, l. 4 to p. 847, l. 22; Tr. 849, ll. 1-7; Tr. 852, ll. 1-15; Tr. p. 854, l. 13 to p. 855, l. 23; Tr. at p. 856, l. 3 to p. 857, l. 8.) Krause told the Union that "there is not a grievance procedure under SB 1007." (Tr. at 324, ll. 1-2.) Krause cited SB 1007 for striking each provision because it was "an argument that settles" the provision. (Tr. 883, l. 16.)

45. In response to the SEIU's proposal for the PCP CBA, the State also struck language on non-discrimination, holidays, sick leave, and vacations. For those items, Krause told Cross that the State did not "want to be bound by" language on those subjects. (Tr. 208, ll. 3-6.)

46. In response to the SEIU's proposals for PPA and PPO CBAs, the State struck the same sort of language as in the SEIU''s proposal for the PCP CBA. (Jt. Exs. 166 & 173.)

47. In responses to Requests for Admission, Defendants admitted that they could not lawfully agree to provisions in a new CBA, similar to those in the most recent CBAs, on for cause discipline, progressive discipline, prior notice of charges, grievances, arbitration, and the use of seniority in layoffs, recalls and reinstatement. Defendants admitted that they could use seniority as a "factor" in filling vacancies and promotions, (Requests Nos. 5 & 6); but Krause stated at trial that the State could not agree to such a clause if seniority was a "deciding factor." (Tr. 854, ll. 13-23).

**I. The status of the AFSCME and CWA CBAs**

48. On June 28, 2018, the State sent a letter notifying AFSCME of its intent to modify or amend the CBA "per Article 37, Section 1." (Jt. Ex. 135.)

49. In fall 2018, Krause met with Danny Homan to discuss the bargaining process for a successor CBA.

50. In November 2018, AFSCME sent the State draft ground rules for bargaining. (Pls' Ex. 276.)

51. In its March 2019 Preliminary Injunction Order, this Court found that bargaining had "reopened," and the AFSCME's CBA remained in full force and effect pursuant to its evergreen clause after its expiration.

52. After the Court entered its Preliminary Injunction Order, AFSCME sent its initial CBA proposals to the State. (Tr. 442, l. 15 to p. 443, l. 3.) The parties continue to schedule bargaining dates but have not yet reached agreement for a successor CBA.

53. In late fall 2018, Krause asked Pickens whether the CWA intended to negotiate a successor contract and said that, if so, she needed to send notification to the State. (Tr. 577, ll. 114.) Krause also said that he did not know how the parties would negotiate a contract with everything going on with HB 1413. (*Id.*) Pickens subsequently sent a letter to Krause, more than 30 days before the expiration of the CWA CBA, asking "to postpone a meet and confer and meeting for negotiating a successor contract" until the lawsuit challenging HB 1413 had been settled in the courts. (Jt. Ex. 146.) Krause sent a response to Pickens' letter about a week later, saying that Pickens' letter was not "a request to meet and confer" and thus the CBA would expire on December 31, 2018; Krause also wrote that the employers "agree that reaching a new agreement could be complicated by the on-going lawsuits concerning House Bill 1413 and SB 1007," and "[a]ccordingly, accept your offer to postpone meeting to negotiate a new contract." (Jt. Ex. 147.)

54. After December 31, 2018, the State continued to follow certain provisions of the CWA CBA, including giving the CWA access to new employees and to meet with current employees. (Tr. 547, ll. 7-20.)

55. In March 2019, after this Court and the St. Louis County Circuit Court issued preliminary injunctions against SB 1007 and HB 1413, respectively, CWA sent a letter to the State requesting to "begin the process for negotiating a successor contract." (Jt. Ex. 148.) The State agreed, and the parties are now in bargaining. (Tr. 548, ll. 21-25.) The State, though, does not view the CWA CBA as in effect. To date, the CWA and the State have not reached agreement on a successor contract.

56. The SEIU and State continue to bargain but have not, to date, agreed to successor contracts.

**J. Irreparable Harm.**

57. The State's position in bargaining - that it is "open to seeing" the Union's proposals on items like for "cause" discipline, the use of seniority as deciding factors in layoffs, recalls, and promotions, and a grievance-arbitration procedures but "cannot lawfully agree" to them -- causes a chilling effect on bargaining. No matter what the Union proposes, if that is the State's position, the Union cannot reason with the Employer, or attempt to sell it on a proposal, or make a trade for the language the Union wants. (Tr. p. 217, l. 13 to p. 218, l. 5.; Tr. at 218, l. 15 to p. 219, l. 5; Tr. 230, ll. 21-24l Tr. 356, ll. 5-16; Tr. 452, ll. 1-5; Tr. 553, ll. 14-21.) An employer taking a position like the State is "not at the table to bargain" but there to "dictate to us what will be the terms and conditions of employment." (Tr. 452, ll. 10-17.) The parties are "meeting just for the sake of meeting." (Tr. 553, ll. 14-21.)

58. Without a grievance process, employees have fewer options for enforcing their rights, for example, if they are unfairly denied a promotion. Employees also lose "confidence in there being a fair and just system." (Tr. 552, l. 5-7.) Employees may go to court, but that process takes longer and more expensive.

59. Even if SB 1007 allows a grievance procedure for discrimination claims, most of the Union's grievances do not involve discrimination. Employees can also go to federal or state court with those claims.

60. Employees represented by the Unions are concerned that they can be fired for arbitrary reasons. They thought they had their protections in the CBAs and the right to bargain for job protections. After SB 1007 went into effect, AFSCME-represented employees were devastated, even though the Unions told them it was going to fight, and fewer CWA-represented employees attended unions meetings.

61. Employees whose grievances were rejected were denied information about their discipline, and the opportunity to tell their side of the story, and the possibility of a favorable outcome, including reinstatement for discharged employees. Defendant DSS's decision to place grievances in pending status excluded the CWA from the regular process of resolving grievances and caused delay.

**K. Debate over Merit Reform**

62. Dr. Felix Vincenz is the chief operating officer for the St. Louis Psychiatric Rehabilitation Center, which employs approximately 280 employees (nursing staff, LPNs, psychiatric technicians, and maintenance and housekeeping) represented by AFSCME and 60 employees (psychiatrists, physicians, and social workers) represented by the SEIU. Vincenz believes that SB 1007 gives him the flexibility to hire and promote better qualified employees

and to pay higher salaries based on skill and experience and makes it easier for him to fire poor performing employees.

63. Contrary to Vincenz's testimony, Krause testified that the old merit law allowed an employer to give a wage increase to an employee based on skill.

64. About 20% to 30% of the time, the Administrative Hearing Commission reversed Dr. Vincenz's decision to terminate an employee, finding that he did not make a proper decision. On another occasion, a neutral arbitrator found that he failed to pay SEIU-represented employees the same as a newly hired employee in the same classification in violation of the PCP CBA.

65. Guy Krause testified that there is a benefit to appeal rights like those under the old merit law and under the CBAs because "they minimize the chances of arbitrary" action. (Tr. at p. 859, l. 21 to p. 860, l. 23.)

66. Defendants offered three expert witnesses on the benefits of merit reform. In general, they testified that at-will employment benefits the State, employees, and the public, by giving the State greater flexibility to reward employees, to get rid of poor performers, and to increase efficiencies.

67. The Court has reviewed the expert testimony, and for the reasons set forth below, finds that it does not assist the Court in this matter and gives it little weight.

## Conclusions of Law

### A. Threshold Statutory Interpretation Question

1. The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning. *Eminence R-1 School District v. Hodge*,

635 S.W.2d 10, 13 (Mo. 1982). In construing legislative intent, it is appropriate to consider its history, the presumption that the legislature had knowledge of the law, the surrounding circumstances and the purpose and object to be accomplished. *Person v. Scullin Steel Company*, 523 S.W.2d 801, 803 (Mo. 1975).

2. SB 1007 eliminates previous civil service statutory protections and defines the resulting employment status as at-will. It says nothing about collective bargaining agreements or subjects of bargaining. In fact, the statute leaves unchanged the only mention in Chapter 36, RSMo, relating to labor "agreements." Section 36.510(6), RSMo. (state personnel director coordinates the state's labor relations, including bargaining).

3. Missouri's civil service law was enacted in 1945, and Missouri's Public Employee Labor Law was enacted 1965. These systems have long existed in harmony, and the parties have bargained multiple labor agreements over the years that include for "cause" discipline protections, grievance procedures, and seniority as a determining factor in layoffs, recalls, and transfers. If the General Assembly had intended SB 1007 to preclude bargaining over such terms and to trump labor agreements, it surely would have said so. It did not.

4. Courts have long recognized that at-will employees in the public sector may obtain for cause job protections by "contract." *Cole v. Conservation Comm'n*, 884 S.W.2d 18, 20 (Mo App. W.D. 1994). Given the statute's silence on collective bargaining, it is not reasonable to construe SB 1007 as prohibiting the State from bargaining heightened protections for its employees.

5. The "at will" mandate in SB 1007 does nothing more than establish a default

rule of at will employment like that in the private sector. The default rule functions as a floor, not a ceiling, on terms and conditions of employment. *See Coop. Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 583 (Mo. 2017) (statute that states every employer "shall" pay to each employee wages at the rate of the current state minimum wage standard is simply a floor; it does not set a maximum wage).

6. The Court's conclusion is supported by HB 1413, a public employee bargaining bill passed the same day as SB 1007. HB 1413 requires every labor agreement between a public employer and a union to include a provision reserving to the employer "the right to hire, promote, assign, direct, transfer, schedule, discipline, and discharge public employees," § 105.585(1), RSMo. (2018). HB 1413 expressly exempts the Department of Corrections and its employees from coverage, while they are covered by SB 1007.

7. In determining legislative intent, courts should take into consideration "statutes involving similar or related subject matter when those statutes shed light on the meaning of the statute being construed." *State v. Knapp*, 843 S.W.2d 345, 347 (Mo. 1992). "This principle that statutes should be construed harmoniously when they relate to the same subject matter is all the more compelling when the statutes are passed in the same legislative session." *Id.*

8. According to Defendants' own experts, the provision in HB 1413 on a public body's right to hire, promote, fire, and discipline involves the same issues as in this case on SB 1007. It makes little sense for the General Assembly to pass a provision in HB 1413 that essentially prohibits public employers from bargaining for "cause" job protections, *but exempts employees of the Department of Corrections*, and then, on the same day, pass a provision in SB

1007 that precludes agreement on for "cause" protections, *and includes employees of the Department of Corrections*. Read this way, HB 1413 and SB 1007 hopelessly conflict.

9. The more logical interpretation, which harmonizes these statutes, is that the General Assembly intended HB 1413 to address collective bargaining and intended SB 1007 to separately address statutory merit protections.

10. Courts must construe legislative enactments so as to render them constitutional if it is reasonably possible to do so. *State ex rel. Union Elec. Co. v. PSC*, 399 S.W.3d 467, 470 (Mo. App. W.D. 2013). If one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-39 (Mo. 1991).

11. For reasons explained below, interpreting SB 1007 to allow the state to take unilateral actions without bargaining and abrogate existing labor agreements would render the statute unconstitutional in violation of Article I, Section 29 and Article 1, Section 13.

12. Since SB 1007 neither expressly nor impliedly curtails the right to collectively bargain, and HB 1413 does address these subjects, it is "reasonably possible" to interpret SB 1007 to avoid these constitutional questions. The court therefore construes the law's provision for at-will employment to set a floor, not a ceiling, allowing employees to bargain for more robust job protections.

**B. Contractual Issues**

13. Before resolving Plaintiffs' three Counts, the Court must address several preliminary contractual issues.

14. Defendants, AFSCME, and CWA dispute the application of the "evergreen/full force and effect" clauses in their labor agreements. The AFSCME and CWA agreements both provide that upon the reopening of bargaining for a successor agreement, the terms of the expiring agreement continue in effect while bargaining is underway. (Jt. Ex. 41, Article 37, Section 1; Jt. Ex. 58, Article 35, Section B.2).

15. The State gave notice to AFSCME on June 18, 2018 of its intent to modify or amend the contract. Such notice "reopened" bargaining with AFSCME within the meaning of the evergreen clause. Bargaining proceeded with a meeting in the fall of 2018 and the exchange of ground rule proposals starting in November, 2018. The Court reaffirms its earlier finding that the terms of AFSCME's contract remain in effect while the parties bargain a new agreement.

16. Although CWA did not argue the point during the preliminary injunction hearing, it argues now that the terms of its CBA likewise continued in effect beyond the expiration of the contract on December 31, 2018. CWA's decision not to raise this issue at the preliminary injunction does not foreclose its ability to try this claim. *State ex rel. Koster v. Didion Land Project Ass'n*, 469 S.W.3d 914, 918 (Mo. App. ED 2015).

17. Article 35, Section B.2 of the CWA CBA states that all provisions of the Agreement shall remain in full force and effect "during any successor negotiations, provided the parties are bargaining in good faith." (Jt. Ex. 58.) CWA President Pickens and the State's Chief Negotiator Krause discussed successor negotiations in the fall of 2018, and agreed that negotiations would be difficult in light of litigation over HB 1413 and SB 1007. Krause asked Pickens to send a notice if the Union intended to negotiate a successor contract. Pickens sent a letter on November 30, 2018, asking to "postpone" bargaining pending the lawsuits. The letter can only reasonably be interpreted as a request to reopen bargaining, with actual meetings sometime in the future.

The State agreed to a "postponement," knowing that sometime in the future the parties would actually meet. The Court finds that the terms of the CWA contract continue in effect during bargaining in accordance with its "full force and effect clause."

18. At trial, Defendants for the first time made an argument that the AFSCME and CWA CBAs are not supported by consideration. (Tr. 735, ll. 13-19.) It is bizarre to suggest that the parties spent years bargaining contracts that did no more than mirror the law and were not independently enforceable. The far better explanation is that the Unions sought those provisions in the CBAs, as well as extra job protections like progressive discipline, to make them binding and to prevent what the State from abrogating them legislatively. In any event, Defendants waived this affirmative defense by not pleading it in its Answer. *Century Fire Sprinklers v. CAN/Transport. Ins. Co.*, 23 S.W.3d 874, 877 (Mo. App. WD 2000).

19. The parties also dispute the meaning and application of the "Savings Clauses" in their collective bargaining agreements. (Jt. Ex. 41, Article 33; Jt. Ex. 58, Article 33, Section B; Jt. Ex. 75, Article 22; Jt. Ex. 69, Article 19; Jt. Ex. 73, Article 22). Defendants argue that Plaintiffs consented in advance, through the Savings Clauses, to the wholesale repudiation of core provisions of their CBAs. The Court disagrees.

20. "Where the language of the contract is unambiguous, the intent of the parties will be ascertained from the language of the contract alone and not from extrinsic or parol evidence of intent." *Newco Atlas, Inc. v. Park Range Constr., Inc.*, 272 S.W.3d 886, 891 (Mo. Ct. App. WD 2008). "'A contract is ambiguous only if its terms are reasonably open to more than one meaning, or the meaning of the language used is uncertain.'" *Id.* (internal quotation omitted). "A contract is not rendered ambiguous simply because the parties disagree as to its construction." *Id.*

21. The self-evident purpose of the Savings Clauses is to preserve the contract provisions to the maximum extent possible if any portion of the contract is "rendered invalid, unenforceable, or unenforceable" because it is inconsistent with the law, and to require the parties to bargain over a "mutually satisfactory" replacement for the invalidated provision. The Court has found that SB 1007 does not restrict collective bargaining. For that reason, there is no "conflict" between SB 1007 and the parties' labor agreements, and the Savings Clauses are entirely irrelevant to the case.[2]

22. Even if there were some conflict between SB 1007 and the labor agreements, the Savings Clauses cannot reasonably be construed to give the State unfettered authority to legislate away the terms of its own contracts. The Florida Supreme Court rejected such a construction of savings clauses in the case of *Chiles v. United Faculty of Fla.*:

> We do not agree that the savings clauses in the contracts are sufficient to nullify them. The savings clauses clearly were meant as a means of preserving the contracts in the event of partial invalidity; they are not an escape hatch for the legislature. Indeed, were we to accept the state's position on this point, we necessarily would be required to conclude that there was no contract here at all for lack of mutuality because one party could nullify the agreement at any time, and for any reason. Obviously the parties intended there to be a contract, and we will construe the provisions so as to achieve that result.

615 So.2d 671, 673 (Fla. 1993).

23. The Court sustained Plaintiffs' objections to Defendants' attempts to present parol evidence to prove the meaning of the Savings Clauses. The Court finds that the Savings Clauses are unambiguous, and parol evidence may not be used to modify unambiguous terms. Even if such evidence had been admissible, it was not reliable. Guy Krause's "mindset" about what the Savings Clauses meant, and Natashia Pickens' recollection about what he might have said at the

[2] Any conflict between the labor agreements and the PAB's rule on grievance procedures merely reflects that the rule is "unauthorized" by SB 1007 and invalid, for the reasons explained below.

bargaining table in 2014 or 2015 were both irrelevant, because neither of them was involved in bargaining when the Savings Clauses were first negotiated.

24. Lastly, the Savings Clauses in the CBAs have no bearing on bargaining for new agreements. It is absurd to suggest that Plaintiffs have waived in perpetuity their right to bargain over core subjects like just cause, seniority, and grievance-arbitration in future bargaining for a successor agreement.

**C. Expert Testimony**

25. Plaintiffs moved in limine to preclude testimony and evidence from Defendants' three expert witnesses pursuant to Section 490.065, RSMo. The Court denied the motion and allowed Defendants' experts to testify on the benefits of merit reform and at-will employment. Defendants' experts opined that SB 1007 had a rational basis, separate and apart from collective bargaining, which they did not address.

26. While Defendants' expert evidence was admitted, it deserves very little weight. Defendants' experts did not assist the Court to "understand the evidence or to determine a fact in issue," because their testimony was irrelevant to the central statutory construction issue. §490.065.1(1), RSMo. Defendants' expert evidence could have been relevant to Plaintiffs' alternative constitutional challenge to SB 1007, but Defendants' experts offered no opinions supporting the conclusion that SB 1007 is narrowly tailored to further a compelling state interest or even merely a legitimate state interest. Defendants' experts were not qualified "by knowledge, skills, experience, training, or education" to offer opinions on the topic of collective bargaining; and the facts and data they relied on were not "of a type reasonably relied upon by

experts in the field" of collective bargaining. Sections 490.065.1(1), (3), RSMo. In fact, they did not rely on any Missouri-specific data to reach their conclusions and did not make any effort to test their theories by doing a comparison of worker productivity, employee morale, or savings from before versus after SB 1007.

**D. Count I – Article I, Section 29**

27. Plaintiffs' primary argument in Count I is that as a matter of statutory construction, SB 1007 has no application to collective bargaining, in which case Defendants are violating Article I, Section 29 by acting as if it did. Their alternative argument is that if SB 1007 restricts collective bargaining in the manner argued by Defendants, then the law itself is unconstitutional as applied to the facts of this case.

28. Plaintiffs challenge three types of conduct by Defendants as a violation of Article I, Section 29: 1) their unilateral rescission of portions of the AFSCME and CWA labor agreements while they were in force; 2) their refusal to bargain in good faith with all three unions over the core subjects of just cause, seniority, and grievance-arbitration; and 3) their unilateral changes to terms established by the SEIU labor agreements even after they expired, without bargaining with the SEIU.

29. The Missouri Supreme Court's three precedents on public sector collective bargaining squarely apply to this case.

30. In *Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 144 (Mo. 2007), the Missouri Supreme Court held that a school district violated Article I, Section 29 by unilaterally rescinding the bargaining procedures in two labor agreements, and unilaterally imposing a joint bargaining process with multiple unions without negotiating the issue with any of them. Like Defendants here, the Independence School District also unilaterally

rescinded discipline and dismissal provisions and a grievance procedure in one of the labor agreements. *Id.* at 134.

31. The school district in *Independence* admitted that it had not bargained with the unions before making unilateral changes to terms and conditions of employment – but argued pursuant to *City of Springfield v. Clouse*, 206 S.W.2d 539, 542 (Mo. banc 1947) that Article I, Section 29 did not apply to public employees. The Supreme Court reversed *Clouse*, holding that the language of Article I, Section 29 is plain and includes all employees. 223 S.W.3d at 137.

32. The Independence School District also admitted in the case that it rescinded portions of its labor agreements without bargaining, but claimed that it was legally privileged to do so under *Sumpter v. City of Moberly*, 645 S.W.2d 359 (Mo. banc 1982). The Court in *Independence* overruled *Sumpter* and held that collective bargaining agreements with public employers are just as enforceable as any other kind of contracts. 223 S.W.3d at 140.

33. The Supreme Court fleshed out the contours of Article I, Section 29 in *AFT v. Ledbetter*, 387 S.W.3d 360 (Mo. 2012). The defendant charter school in *Ledbetter* unilaterally changed the non-economic terms of a tentative first labor agreement reached with the union representing its teachers at the bargaining table, and imposed new wages unilaterally during the negotiation process, without bargaining with the union. *Id.* at 362. The trial court found that the charter school's conduct would have constituted "bad faith bargaining" if the National Labor Relations Act (NLRA) applied – but concluded that Article I, Section 29 imposed no affirmative duties on public employers whatsoever, much less a duty to bargain in "good faith." *Id.*

34. The Supreme Court in *Ledbetter* reversed. Acknowledging that Missouri has no statutory duty to bargain in good faith, the Supreme Court held that such a duty is necessarily implied by Article I, Section 29 – otherwise the right to organize and bargain collectively would

be nullified, and the Section would do no more than duplicate the right to petition for redress of grievances. "Both of those results are unreasonable." *Id.* at 364.

35. "The ultimate purpose of bargaining is to reach an agreement.... If public employers were not required to negotiate in good faith, they could act with the intent to thwart collective bargaining so as never to reach an agreement — frustrating the very purpose of bargaining and invalidating the right." *Id.* (citations omitted). The Court continued,

> "[C]ollective bargaining," as a technical term, always has been construed to include a duty to negotiate in good faith – even when it was not required explicitly by statute. When the constitution employs words that long have had a technical meaning, as used in statutes and judicial proceedings, those words are to be understood in their technical sense unless there is something to show that they were employed in some other way.

*Id.* (*citing Ex parte Bethurum*, 66 Mo. 545, 548 (1877)).

36. This holding is not contingent upon a contract. The employer in *Ledbetter* made unilateral changes to wages during the bargaining process. Unilateral changes to the status quo even if the absence of a contract frustrate the bargaining process and the ability to reach an agreement.

37. While acknowledging that "good faith" within the meaning of Article I, Section 29 is a question arising under state law, and federal law is not binding, the *Ledbetter* Court devoted several pages to an analysis of the development of the concept of good faith bargaining under the National Labor Relations Act (NLRA) and its predecessors. *Id.* at 364-366 & n.5.

38. The Court continued, "collective bargaining requires an employer to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement." *Id.* at 366 (*citing NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 402 (1951)).

39. Ultimately, the Court held, "the course of a negotiation between parties acting in good faith should reflect that both parties sincerely undertook to reach an agreement." *Id.* at 367. The Court remanded with instructions for the trial court to apply a state law standard for good faith, noting that "[f]ederal law and cases can give guidance to the extent they are consistent with Missouri law." *Id.* at 367-68 & n.5. There is no published record of proceedings on remand.

40. The mere fact that Defendants may have subjectively believed that SB 1007 compelled their actions, or may have hoped to reach an overall labor agreement does not insulate them from liability. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962); *accord Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032-33 (2nd Cir. 1990). Well intentioned or not, Defendants' conduct in this case frustrates collective bargaining just as much as the actions of the school employers in the *Independence* and *Ledbetter* cases.

41. Judge Zel Fischer dissented in *Ledbetter* (*Id.* at 369-370), arguing that the majority opinion was inconsistent with *Quinn v. Buchanan*, 298 S.W.2d 413 (Mo. 1957). The Court in *Quinn* analyzed a private sector employer's duties under Article I, Section 29, and held as follows:

> ***Sec. 29, Art. I is not a labor relations act, specifying rights, duties, practices and obligations of employers and labor organizations, as plaintiffs seem to claim***.... This provision is a declaration of a fundamental right of individuals. It is self executing to the extent that all provisions of the Bill of Rights are self-executing, namely: Any governmental action in violation of the declared right is void. As between individuals, because it declares a right the violation of which surely is a legal wrong, there is available every appropriate remedy to redress or prevent violation of this right. However, ***the constitutional provision provides for no required affirmative duties concerning this right and these remedies can only apply to their violation***.... [I]mplementation of the right to require any affirmative duties of an employer concerning it is a matter for the Legislature.

298 S.W.2d at 418-19 (emphasis added).

42. The majority in *Ledbetter* undercut the logic of *Quinn* without expressly discussing it. In the companion case of *Eastern Mo. Coal. of Police v. City of Chesterfield,* issued the same day, the majority expressly overruled *Quinn's* holding that Article I, Section 29 imposes no affirmative duties on employers. 386 S.W.3d 755, 762 (Mo. 2012).

43. The majority disagreed with two inferences underpinning the *Quinn* decision: (1) that a "Bill of Rights" merely declares those rights the people already possess independent of a government grant, and (2) that provisions in a Bill of Rights are merely "self-executing limitations on government that do not require any additional legislation to guarantee their observance." *Id.* at 761. These inferences set forth in the older treatises relied on by *Quinn* "do not encompass the breadth of modern constitutional law," the Court held. *Id.*

44. "The people of Missouri may place anything they wish within their constitution so long as it is not contrary to the federal constitution." *Id.* An example of an affirmative right contained in Missouri's Bill of Rights is Section 32, granting crime victims rights to information, restitution, and reasonable protection as provided by law. *Id.* The Court also cited examples of affirmative rights contained in the bill of rights of other states. *Id., citing Sheff v. O'Neill,* 678 A.2d 1267, 1284-85 (Conn. 1996) (substantially equal educational opportunity); *Great Falls Tribune v. Mont. Pub. Serv. Comm'n,* 82 P.31 876, 886 (Mont. 2003) (duty to make all records and proceedings available to public). "Likewise," the *Chesterfield* majority held, "article I, section 29 of the Missouri Constitution imposes on employers an affirmative duty to bargain collectively." *Id.*

45. The issue in *Chesterfield* was whether two police departments had an affirmative duty to establish a framework for police to elect a union representative, since they were exempt from the State's Public Sector Labor Law, Section 105.500-105.530, RSMo. (2012). The

municipalities relied on *Quinn* to defend their refusal to establish an election procedure. The trial court granted summary judgment for the union which had collected authorization cards from virtually all the police officers employed by both cities. As relief, the trial court ordered the cities to establish a framework for determining the scope of an appropriate bargaining unit, details of the election process, and procedures for the bargaining process. 386 S.W.3d at 762-763.

46. The Supreme Court affirmed in part, overruling *Quinn* and ruling that the cities had an affirmative duty to bargain with the union. "***Although legislative power remains the province of legislative bodies***," the Court explained, "***it is a proper role of the courts to compel legislative bodies to meet their constitutional obligations while leaving it to those bodies to determine how to meet them***." *Id.* at 763 (emphasis added). The Court reversed in part, finding that the trial court's relief was overly broad to the extent it required the cities to establish a framework meeting certain substantive standards, and to hold an election. *Id.* at 763-64. Since an undisputed majority of the police officers in both cities signed authorization cards, the Court held, the trial court should simply have ordered the defendants to bargain with the union. *Id.* at 764.

47. Defendants have abrogated just cause and grievance-arbitration provisions in the AFSCME and CWA contracts. The Employers have rejected grievances over employee discipline and other matters or put them on hold to the exclusion of the Union. The Department of Mental Health and OA adopted new personnel policies purporting to rescind collectively bargained agreements over just cause, seniority, and dispute resolution procedures. DMH also made changes per the policies to terms established by the SEIU PCP CBA, including "cause" for discipline, without bargaining with the SEIU. The Department of Corrections also continues to reject grievances filed by PPO and PPA employees.

48. Defendants have consistently refused to bargain with any of the Plaintiffs over discipline, seniority considerations, and grievance procedures in good faith and with a sincere intent to reach agreement. Defendants have consistently maintained, and they told SEIU during bargaining that they cannot lawfully agree to provisions in collective bargaining agreements that they believe conflict with SB 1007 and its implementing regulations.

49. Defendants' contention that they are willing to "discuss" or "hear" such proposals, even though they cannot agree to them, does not satisfy the duty to bargain in good faith. So long as Defendants take the position that they cannot legally agree to them, there is nothing that the Plaintiffs can say or offer as a counter-proposal to get Defendants to modify their position or agree to such subjects. They are left with meaningless discussions that cannot make a difference. This renders the bargaining process futile. There can then be no sincere effort by Defendants to reach agreement on these subjects, which under *Ledbetter*, is bargaining in bad faith.

50. "For cause" job protections, seniority, and grievance-arbitration are important subjects which Defendants are required to bargain about. Past labor agreements included such provisions. Moreover, as a legal matter, these subjects also go to the heart of employment. Whether an employee can be fired for any reason, or laid off instead of a less senior employee, or can seek to enforce their contractual rights by grievance, is critical to an employee's job and tenure. The Court in *Independence-NEA* acknowledged this fact. It noted generally that "collective bargaining" means "negotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, **discipline,** and fringe benefits." 223 S.W.3d at n. 6 (emphasis added). More specifically, it held that the public employer there could not adopt a grievance procedure without first bargaining

with representative of the employees, because "[g]rievance procedures are clearly a condition of employment." Id. at 144. Similarly, the Court in *Ledbetter* dealt with changes in tenure (a form of job protection) and salaries. *Ledbetter*, 387 S.W.3d at 362.[3]

51. When Article I, Section 29 became part of the Bill of Rights in 1945, the term "bargain collectively" was widely understood to require good-faith negotiations over promotion, assignment, discharge, schedule, work rules, and other similar topics. *See, e.g., NLRB v. Westinghouse Air Brake Co.*, 120 F.2d 1004, 1006 (3d Cir. 1941); *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 881 (1st Cir. 1941).[4]

52. Defendants' conduct renders meaningless the constitutional right to bargain collectively in violation of *Ledbetter*. Plaintiffs are therefore entitled to judgment on Count I.

53. Since the Court has found that SB 1007 does not affect collective bargaining, it is unnecessary for the Court to reach Plaintiffs' alternative claim that SB 1007 itself violates Article I, Section 29. But in the interests of judicial economy, the Court will address the claim so that the appellate court has a full record in the event it disagrees with this Court's statutory construction.

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[3] Federal courts and the NLRB have long recognized the importance of for "cause" protections, seniority, and grievance procedures, and consider them mandatory subjects of bargaining. *See, e.g., Hughes v. Pittsburgh Testing Lab*, 624 F.Supp. 54, 56 (N.D.Ill. 1985) (just cause); *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB No. 132, at n. 8 (2014) (just cause); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766 (1976) (seniority); *Litton Financial Printing Div., Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190, 199 (1991) (arbitration); *Socony Mobil Oil Co., Inc.*, 147 NLRB 337, 340 (1964) (seniority).

[4] Even Judge Price, in his dissent in *Independence*, recognized that grievance procedures and dismissal and discipline "plainly deal with salary and conditions of employment," and cannot be unilaterally changed. *Independence Sch. Dist*, 223 S.W.3d at 144-145 (citing *Schaffer v. Bd. of Educ. of City of St. Louis*, 869 S.W.2d 163, 166 (Mo. App. 1993) for the proposition that "federal authority is persuasive in the interpretation of the phrase, "other conditions of employment").

54. The Missouri Supreme Court has repeatedly recognized that a right is fundamental if it is "explicitly . . . guaranteed by the Constitution." *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991). This Court already held in its preliminary injunction order that the right to collectively bargain is a fundamental right. Courts in other jurisdictions that have similar constitutional protections have concluded that collective bargaining is a fundamental right that triggers strict scrutiny. *See Hillsborough County. Govtl. Emps. Ass'n v. Hillsborough Cnty Aviation Auth.*, 522 So.2d 358, 362 (Fla. 1988); *Hernandez v. State*, 173 A.D.3d 105, 113-15 (N.Y. App. Div. 2019).

55. Defendants argued at trial that their burden is only to show that the State had a rational basis for removing merit protections from most State employees and instead making them at-will employees. That argument misunderstands Plaintiffs' alternative claim in Count I. When evaluating an as-applied challenge to a statute, courts are to examine how the specific parties before the Court are affected by the statute, not how the statute might apply to other parties not before the Court. *Phelps-Roper v. Ricketts,* 867 F.3d 883, 896 (8th Cir. 2017). As set forth below, rational basis analysis allows the legislature to disregard express constitutional rights simply because have a reason to do so. It doesn't even have to be a better idea.

56. Strict scrutiny applies to Plaintiffs' as-applied challenge because Plaintiffs have proven that the application of SB 1007 to them substantially burdens their fundamental right of collective bargaining. *Cf. Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7 (Mo. 1986) (as applied to minor, medical malpractice statute of limitations violated fundamental right of access to the courts); *Geier v. Mo. Ethics Comm'n*, 474 S.W.3d 560, 565-69 (Mo. 2015) (applying exacting scrutiny and upholding campaign reporting and disclosure statutes as applied to dormant PAC);

*St. Louis County Bd. of Election Commissioners v. McShane*, 492 S.W.3d 177, 183 (Mo. App. E.D. 2016) (affirming writ of mandamus requiring board of election commissioners to keep polling places open beyond 7 pm, because application of statute mandating poll closure at 7 pm would have unconstitutionally deprived voters of fundamental right to vote). *See also Telescope Media Group v. Lucero*, 936 F.3d 740, 754 (8th Cir. 2018) (reversing dismissal of free speech claim of wedding videographers who objected to filming same gender weddings; on remand, trial court should apply strict scrutiny to their as-applied challenge to Minnesota's prohibition against discrimination based on sexual orientation).

57. "[I]f all that was required to overcome the right [to organize and bargain collectively through representative of their own choosing] was a rational basis, [Article I, Section 29] would be redundant . . . and would have no effect." *Alpert v. State*, 543 S.W.3d 689, 598 (Mo. banc 2018) (citing *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008)).

58. Under strict scrutiny, the challenged provisions of SB 1007 lose any presumption of constitutionality, and the burden of proof shifts from the Plaintiffs to the State Defendants to defend their validity. *See Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 n.2 (Mo. banc 1992). Those provisions can only survive if the State Defendants can show that the burdens on the right of collective bargaining serve "compelling state interests" and that the infringements are "narrowly tailored" to that objective. *See Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. banc 2006).

59. Defendants cannot remotely meet their burden under a strict scrutiny standard or any meaningful level of review. SB 1007 contains no findings, no statement of purpose, nothing that suggests that it was intended to substantially restrict the right of collective bargaining. *See*

*Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992) (concluding that the Missouri Legislature's failure to create findings or a record made it "virtually impossible" for the state to justify a restriction subject to heightened constitutional scrutiny). In fact, SB 1007 made no change to the reference in Chapter 36, giving OA the ability to participate in negotiations with unions for agreements relating to "uniform wages, benefits, and those aspects of employment which have a fiscal impact on the state."

60. Defendants' experts do not offer any opinions whatsoever about collective bargaining, let alone opinions that the legislature had a compelling reason for restricting bargaining. Nor do Defendants' experts offer any opinion supporting the proposition that SB 1007's restrictions on bargaining are narrowly tailored to further a compelling state interest. Defendants' experts candidly admit that they are not experts on collective bargaining, they were not involved in drafting SB 1007, and they know nothing about the legislature's intent with respect to collective bargaining. As Dr. Hedlund testified, SB 1007 "is not a collective bargaining-centric bill." Jt. Ex. 35, Tab 15, at 72.

61. At best, Defendants' experts opine that at-will employment is a good thing, because greater flexibility will enable the State to deliver services more efficiently. Greater efficiency and improved service delivery may be worthy goals, but they are not so compelling as to warrant the evisceration of collective bargaining. *Hillsborough County*, 522 So.2d at 362 ("uniform personnel administration is not so compelling an interest as to warrant the abridgement of [the] express fundamental right" of collective bargaining); *Coastal Fla. Police Benev. Assoc. v. Williams*, 838 So.2d 543, 552 (Fla. 2003) ("maintaining a traditional relationship such as that existing between a sheriff and a deputy sheriff" is not a compelling state interest sufficient to warrant denying collective bargaining rights to deputy sheriffs). *See also*

*Elrod v. Burns*, 427 U.S. 347, 363 366 (1976) (governmental interest in "effectiveness and employee efficiency" does not support patronage dismissals; benefits claimed by state do not outweigh the loss of constitutional rights).

62. Even if governmental efficiency was a compelling interest, the application of SB 1007 so as to truncate collective bargaining is not at all narrowly tailored to accomplishing such interest. *See Hillsborough County,* 522 So.2d at 363 (uniform personnel administration and equal pay for equal work are noble goals, but they could be achieved through collective bargaining, rather than by allowing the local civil service board to unilaterally veto portions of a ratified labor agreement); *Chiles v. United Faculty of Fla.,* 615 So.2d 671, 673 (Fla. 1993) (legislature may reduce appropriations for salaries in collective bargaining agreement if it can demonstrate a compelling state interest, but only if it first demonstrates "no other reasonable alternative means of preserving its contract with public workers"); *Chiles v. State Employees Attorneys Guild*, 734 So.2d 1030, 1036 (Fla. 1999) ("The State has failed to demonstrate that its interest in preserving the attorney-client relationship justifies an absolute prohibition against collective bargaining by public sector lawyers."); *overruled on other grounds by N. Fla. Women's Health & Couns. Svcs. v. State,* 866 So.2d 612, 627 (Fla. 2003); *Coastal Fla. Police*, 838 So.2d at 552 ("less restrictive means could be found to preserve the traditional relationship between sheriffs and their deputies without depriving the latter of the right to collective bargaining."). Defendants have not even attempted to show that SB 1007's purported restrictions on collective bargaining are narrowly tailored to furthering any compelling state interest.

63. Article I, Section 29 requires Defendants to bargain in good faith over their proposals to make employees at will and eliminate arbitration. The Constitution does not compel Defendants to agree to any particular contract language. What the General Assembly cannot do,

is to remove entire subjects of bargaining from the table and thereby privilege Defendants from having to engage in a meaningful back and forth with the Unions over these subjects and make a sincere effort to reach agreement. *See City of Tallahassee v. Public Employees Relations Commission*, 410 So.2d 487 (Fla. 1981) (striking down statute that relieved public employers of the obligation to negotiate over retirement benefits); *Florida State Fire Serv. Ass'n, IAFF, Local S-20 v. State*, 128 So. 3d 160, 164 (Fla. Dist. Ct. App. 2013) ("The Legislature may not remove the subject of pensions from the bargaining process, nor may the State reserve to the Legislature the exclusive authority to determine retirement benefits for public employees.").

64. The Court in *Independence* and *Ledbetter* described a robust process, a give-and take on multiple issues, in order to reach agreement, not a union bowing to the State's fixed and limited view of an important term and condition of employment. To the extent SB 1007 prohibits the State from bargaining over core subjects of bargaining, it violates Article I, Section 29.

**E. Count II – Impairment of Contract**

**65.** Since the Court resolved the statutory construction issue in Plaintiffs' favor, it is not necessary for the Court to address Count II. If SB 1007 does not affect collective bargaining, then Defendants had no lawful basis for repudiating the labor agreements of AFSCME and CWA, and their relief will be complete under Count I. However, this Court will address Count II so that the appellate court has a complete record if it were to disagree on the threshold statutory construction question.

**66.** The Missouri Constitution of 1945 guarantees "[t]hat no ... law impairing the obligation of contracts... can be enacted." Mo. Const. Art. I, § 13. Agreements reached through

collective bargaining are binding contracts, *Independence-NEA*, 223 S.W.3d at 140-41, and therefore may not be unconstitutionally impaired.

67. Missouri courts interpret the state impairment of contract provision in the same manner as the federal provision. *Educational Employees Credit Union v. Mutual Guaranty Corp.*, 50 F.3d 1432, 1437 n.2 (8th Cir. 1995). In deciding an impairment of contract claim, the Court must answer the following questions: "'(1) Does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment substantial?'" *Koster v. City of Davenport*, 183 F.3d 762, 766 (8th Cir. 1999) (internal citations omitted). "If a substantial impairment of a contractual relationship exists, the legislation nonetheless survives a constitutional attack if the "impairment is . . . justified as 'reasonable and necessary to serve an important public purpose.'" *Id.* at 766.

68. Defendants relied on SB 1007 to repudiate binding contractual commitments to AFSCME and CWA by terminating employees without cause and refusing to process grievances predating the expiration of their collective bargaining agreements. Federal courts have held that state laws purporting to nullify clauses of lesser significance contained in collectively-bargained contracts violate the federal contracts clause. *University of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999) (statute creating a "pay lag" violated CBA and contracts clause); *Toledo Area AFL–CIO Council v. Pizza, 154 F.3d 307, 319–320* (6th Cir. 1998) (elimination of payroll deductions under CBA violated contracts clause).

69. To the extent SB 1007 compelled the State to abrogate the just cause and grievance provisions in the AFSCME and CWA contracts prior to their expiration date, it substantially impaired those contracts.

70. The State has complied with the terms of the AFSCME CBA under its evergreen clause, because the Court so ordered in its preliminary injunction ruling.

71. Because the Court made no such ruling concerning the CWA's full force and effect clause, the State has continued to repudiate the terms of the CWA CBA by terminating employees without cause and refusing to process grievances post-dating December 31, 2018.

72. To the extent SB 1007 compelled the State to repudiate the CWA CBA after December 31, 2018, the statute substantially impaired the contract.

73. Defendants have not even attempted to present evidence that a substantial impairment of the contracts of AFSCME and CWA is "justified as 'reasonable and necessary to serve an important public purpose.'" *Koster,* 183 F.3d at 766. Defendants' experts do no more than offer a rational basis for SB 1007's modifications to the merit system, and say nothing about collective bargaining.

F. **Count III – Personnel Advisory Board Rules**

74. The Missouri Administrative Procedure Act, Section 536.050, RSMo., authorizes the courts to issue declaratory judgments respecting the validity, constitutional or otherwise, of an administrative rule adopted by the State or an agency thereof. Missouri courts have recognized repeatedly that a regulation must be within the authority of a statute and "cannot expand or modify a statute." *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 126 (Mo. 2014) (citing *PharmFlex, Inc. v. Div. of Emp. Sec.*, 964 S.W.2d 825, 829 (Mo. App. W.D. 1997).

75. Since the Court has ruled that SB 1007 does not restrict collective bargaining, the question before the Court in Count III is whether the Personnel Advisory Board's Rules, as applied to collective bargaining, are "authorized by" SB 1007. The Court concludes they are not.

76. This case is similar to *State Dep't of Labor v. Board of Public Utilities*, 910 S.W.2d 737 (Mo. App. S.D. 1995), where the Court of Appeals struck down a regulation imposing record-keeping requirements on public bodies. The court noted the statute at issue did not contain any reference to such a duty for public bodies and concluded that the Department, in enacting the regulation, sought to expand upon the statute in an invalid manner. *Id.* at 742. Likewise, SB 1007 does not abrogate labor agreements or preclude bargaining over "just cause" job protections, seniority considerations, or grievance procedures; and, the PAB's attempt through rulemaking to abrogate agreements and preclude bargaining over these subjects is unauthorized by law.

77. To the extent the Court of Appeals were to disagree with this Court's construction of SB 1007, this Court would find in the alternative that the application of the PAB's Rules to collective bargaining is unconstitutional for the same reasons that SB 1007 is unconstitutional – such application impermissibly fringes on the right to collectively bargain and the protection against impairment of contracts. Rules have the same force as law, and Defendants cannot use the Rules to impinge on collective bargaining and the labor agreements. *See Department of Social Services v. Villa Capri Homes, Inc.*, 684 S.W.2d 327, 332 (Mo. 1985) (agency rule cannot violate constitutional provision on ex post facto laws, as set forth in Article I, Section 13).

**G. Irreparable Harm**

78. Plaintiffs have suffered irreparable harm. Being subject to an unconstitutional law constitutes irreparable injury in itself. *Rebman v. Parson*, 576 S.W.3d 605, 612 (Mo. 2019). The State has "no significant interest" in an unconstitutional law or in applying a law in an unconstitutional manner; and, it is "always in the public interest to protect constitutional rights." *Traditionalist Am. Knights of Ku Klux Klan v. City of Desloge*, 914 F. Supp. 2d 1041, 1051 (E.D.

Mo. 2012).

79. In addition, the evidence demonstrates that both the Unions and employees have been harmed in fact. By repudiating Plaintiffs' collective bargaining agreements, refusing to process grievances, and refusing to bargain over core issues like just cause, seniority, and grievance procedures, Defendants have eviscerated the parties' long history of collective bargaining. They have rendered the Unions impotent to enforce existing contracts or bargain any meaningful protections going forward. All three Union witnesses explained how meeting and talking (what this Court previously described as "talk to the hand"), as envisioned by Defendants, is not really bargaining. The Unions cannot engage in the give and take of negotiations, cannot reason with Defendants, and cannot make trades if Defendants simply state they cannot lawfully agree to a provision.

80. The record evidence also shows employees repeatedly expressed concerns to the Unions about not having job protections and a grievance procedure. Natashia Pickens testified that participation in and attendance at union activities and meetings has declined. *See SEIU Health Care Michigan v. Snyder*, 875 F.Supp.2d 710 (E.D. Mich. 2012) (irreparable harm is caused to a union where actions "cause erosion of support from the union; cause impotence of the union; . . . and; make it difficult to preserve the collective bargaining process."). Employees were also harmed when their grievances were rejected. This denied them an opportunity to tell their side of the story and the possibility of convincing the State to reverse the discipline. It also harmed the Union by denying it a means to hold the employer accountable.

81. Plaintiffs and the employees they represent have no adequate remedy at law. Monetary damages are difficult to ascertain, particularly with respect to the harms associated with rendering the union impotent. So long as Defendants can refuse to enter into agreements

with provisions on cause and seniority and can refuse to abide by contracts, employees lose the intangible benefits of holding their employer to the give-and-take of bargaining and using union representative to effectively contest employment actions. *See Small v. Avanti Health Sys.*, LLC, 661 F.3d 1180, 1192 (9th Cir. 2011) ("monetary damages [for refusal to bargain with union] would not make the employees whole, because the value of the right to enjoy the benefits of union representation is immeasurable in dollar terms once it is delayed or lost.").

**H. The Remedy**

82. Following the *Independence* and *Ledbetter* cases, Defendants must be ordered to bargain in good faith. Defendants cannot use SB 1007 and the Rules to abrogate existing agreements. Further, they must bargain with Plaintiffs in good faith over for "cause" protections, seniority, and grievance-arbitration, quintessential topics of collective bargaining, before making any changes to such terms that represent the "status quo", and must make a sincere effort to reach agreement on these terms.

83. The Court finds that the AFSCME and CWA contracts remain in full force and effect during successor negotiations and Defendants must continue to abide by them until the parties reach agreement on new contracts or reach impasse.

84. Even though the SEIU CBAs have expired, and they have no evergreen clauses, Defendants cannot make unilateral changes to established conditions of employment until the parties bargain to impasse. By making unilateral changes, Defendants are not making a "sincere effort" to reach agreement and, in fact, are frustrating the bargaining process and making it harder to reach agreement. *See also NLRB v. Katz*, 369 U.S. 736, 747 *(1962) ("*Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct

bargaining . . . ."). Defendants must maintain the status quo, propose changes, and bargain over changes. *Laborers Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544, n.6 (1988) ("Freezing the *status quo ante* after a collective bargaining agreement has expired," and prohibiting an employer from making unilateral changes, "promotes industrial peace by fostering a noncoercive atmosphere that is conducive to serious negotiations on a new contract.").

WHEREFORE,

IT IS ORDERED, ADJUDGED, AND DECREED that:

1) Plaintiffs shall have judgment against Defendants on Count I, because SB 1007 does not restrict collective bargaining, and Defendants have violated Article I, Section 29 by acting as if it did – by repudiating labor agreements while they were in effect, refusing to process grievances, unilaterally changing terms of employment, and refusing to bargain in good faith over just cause protections, seniority as a factor in employment decisions, and grievance/arbitration procedures;

2) Count II is dismissed as moot, because SB 1007 does not restrict collective bargaining;

3) Plaintiffs shall have judgment against Defendants on Count III, because SB 1007 does not restrict collective bargaining, and the PAB's rules implementing SB 1007 are "unauthorized by law" as applied to collective bargaining;

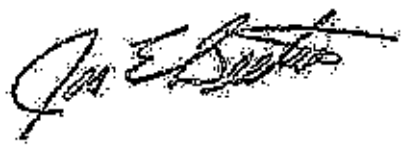
4) Defendants shall bargain in good faith with Plaintiffs over the terms of successor collective bargaining agreements, without any constraint from SB 1007, the PAB's Rules, or Defendants' policies effectuating SB 1007, and without unilaterally modifying the existing terms and conditions of employment during such bargaining and maintain the status quo pending bargaining;

5) Defendant agencies that are signatories to the AFSCME and CWA collective bargaining agreements shall comply with the terms and conditions of those agreements pursuant to their evergreen clauses until the parties agree on terms of a successor agreement or reach impasse;

6) Defendant agencies that are signatories to the AFSCME and CWA collective bargaining agreements shall process grievances that were filed during the terms of those agreements and as long as those agreements continue in effect pursuant to the terms of their evergreen clauses, without any constraint from SB 1007, the PAB's Rules, or Defendants' policies effectuating SB 1007; and

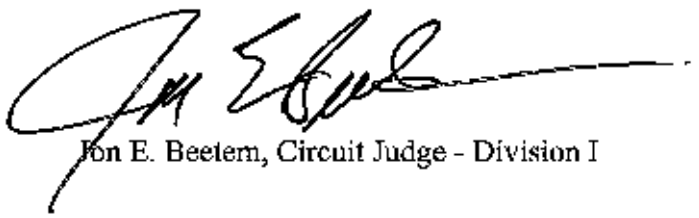
7) The Court makes no determination at this time as to the issue of reasonable attorneys' fees and costs requested by Plaintiffs in their pleadings or their entitlement thereto. The Court will entertain any such claims pursuant to the procedures set forth in § 536.050 RSMo only as to Count III.

SO ORDERED this 10th day of May, 2021.



Jon E. Beetem, Circuit Judge – Division I

This document denominated as a judgment and filed this 3rd day of September, 2021.



Jon E. Beetem, Circuit Judge - Division I