a case of casualty or accident or extraordinary emergency which arose after the budget was fixed. The facts outlined in your letter do not indicate that a casualty, accident or extraordinary emergency has arisen since said budget was fixed.

COMMISSIONER OF LABOR: Trade Unions. Right of governmental employees to join a trade union—collective bargaining procedures not applicable to governmental employees.

June 10, 1944.

Opinion No. 55

Hon. Thomas R. Hutson,  
Commissioner of Labor,  
Room 225 State Capitol,  
Indianapolis, Indiana.

Dear Sir:

I have your letter in which you request an official opinion upon the following questions:

"1. Do state, city and county employees have the right to join a union of their own choosing without fear of intimidation, coercion or restraint?

"2. Is there any legal bar to the recognition of a union representing a majority of its employees by state, city or county officials?

"3. To what extent can recognition as a collective bargaining agent be implemented by accepted collective bargaining procedures? Specifically, may union committees meet with and negotiate wages, hours and working conditions with city councils, mayors, boards of county commissioners, boards of education, boards of trustees of public institutions, chairmen and boards of commissions and departments, etc?

"4. To what extent may such a process of negotiating or bargaining be formalized in a written document which outlines the duties, privileges and responsibilities of each of the parties of the negotiations?

"5. What would be the character of such a document under the present laws of the State of Indiana? What would be the maximum amount of protection
which the employee could be afforded in such a document?"

The right of employees to associate themselves together, whether that association is known as a union or by some other name, is well recognized. Within lawful bounds this right is protected by state legislation.

See Sec. 1, Ch. 76, Acts 1893 (10-4906, Burns' 1942 Replacement);
Sec. 2, Ch. 12, Acts 1933 (40-502, Burns’ 1940 Replacement);
Vol. 63 C. J. 657.

By the Acts cited, the policy of the State of Indiana has been declared by the legislature to be freedom of the individual employee to join or refrain from joining a union.

In the absence of an opposing public policy there is no reason why employees of cities, counties and the state should not enjoy the same freedom of association. As stated in a note in 54 Harvard Law Review at page 1362, "The legality of unions of government employees is not seriously questioned."

Your second, third, fourth and fifth questions may properly be considered together. In considering those questions it is well to bear in mind at the outset that collective bargaining procedures are new to our law and in the absence of statute have an uncertain status.


The Federal Statute (The National Labor Relations Act, 29 U.S.C.A. 151, et seq.) appertaining thereto, does not apply to government employees. Section 152 defines employer as follows:

“(2) The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, * * *.”

An examination of the statutes of the State of Indiana fails to disclose any express authorization for collective bargaining between a governmental unit and its employees.
What legal basis remains for collective bargaining contracts between governmental units and employees in the absence of express statutory authority in Indiana? At the beginning of this discussion it is well to keep in mind that, except as limited by the Constitution, the General Assembly has the power to regulate the matter of governmental contracts or agreements, both as to the nature of the subject matter and the terms and formalities that must be observed in their execution. The general rule with reference to contracts of governmental units, like the exercise of other governmental powers, is that unless the statute expressly grants the power, or unless it may be fairly implied as necessary or proper to carry out an express power, the officer, board or unit of government has no power to make the contract.

"It is well settled that a municipal corporation is a subordinate branch of the domestic government of the state and possesses only those powers expressly granted by the Legislature, those necessarily or fairly implied in or incident to powers expressly granted, and those indispensable to the declared purposes and objects of the municipality. * * *

City of Huntington v. Northern Indiana Power Co. (1937), 211 Ind. 502, 519.

"* * * Where a particular manner of contracting is prescribed, the manner is the measure of power and must be followed to create a valid contract. And no implied contract can be predicated upon acts of such officers in attempting to make contracts beyond the scope of corporate power. Provisions of statutes relating to the power to contract, the manner of its exercise, or its terms may not be waived, but must be strictly pursued."

This principle of construction with reference to contracts is consistent with the decisions in Indiana holding that officers, boards, commissions and units of government have their powers limited by the statutes defining their duties.

“The Public Service Commission derives its power and authority solely from the statute, and unless a grant of power and authority can be found in the statute it must be concluded that there is none.”

Chicago & E. I. R. Co. v. Public Service Commission (1943), 221 Ind. 592, 49 N.E. (2d) 341.

“The State Board of Tax Commissioners is a creature of the legislature, and, like other statutory boards, possesses only such powers as are conferred upon it by legislative enactment.

* * *”

Doyle v. Lafayette Savings Bank (1923), 81 Ind. App. 177, 178.

“The State Board of Tax Commissioners is a creature of the statute. * * *. The statute marks the limit of its power, and if it goes beyond the statute its acts are void.”

Bell v. Meeker (1906), 39 Ind. App. 224, 233, 234;

Accord: Local 26, National Brotherhood of Operative Potters, et al. v. City of Kokomo, et al. (1937), 211 Ind. 72, 79;

City of Logansport v. Public Service Commission of Indiana, et al. (1931), 202 Ind. 523.

With the general principles above stated limiting the power of public officers, boards and governmental units well established, it becomes necessary to examine into the legal nature of collective bargaining agreements, to determine whether or not such agreements are in fact contracts, and if they are contracts, who are the parties to them and the rights created. Since the questions you propound are not based upon any specific contracts submitted for my examination, this opinion can not be final on any particular contract which might be drafted to cover a particular situation.
A union may incorporate, or it may choose to operate as an unincorporated association. If the union is incorporated it is then a legal entity, but if it is an unincorporated association, as most of them now are, it is not a legal entity.

Karges Furniture Co. v. Amalgamated, etc.,
Union No. 131 (1905) 167 Ind. 421;
Colt v. Hicks (1933), 97 Ind. App. 177.

Although each collective bargaining agreement must depend upon its own particular terms for its legal effect, yet when courts have had to pass upon such contracts there has been little uniformity in the decisions concerning the general legal principles involved. Apparently this confusion has been caused by the failure of the courts to keep in mind the fact that many unions are not incorporated, and hence not legal entities. For an excellent discussion of the confusion in the decisions see: "Legally Enforceable Interests in American Labor Union Working Agreements," by C. Lawrence Christenson, 9 Indiana Law Journal, page 69, et seq. A search of the Indiana decisions fails to disclose a case where the court decided the exact nature of a collective bargaining agreement by an unincorporated union. The lack of uniformity of the decisions is well stated as follows:

"In America, collective labor agreements were at first considered as binding in morals but not in law. In fact, the term 'contract' was rarely applied to them, because the majority of the unions, being unincorporated, could not be competent parties to a contract. It has been observed that in itself, the collective agreement is rarely the subject of a court action, because it is incomplete. It establishes no concrete contract between the employer and any employee, but is only an agreement as to terms on which contracts of employment may be satisfactorily made and carried out. It is, according to some courts, a mutual general offer, to be closed by specific acceptance. Other courts hold that the collective agreement is not even an offer, for none of its terms can be construed as a proposal, but that it constitutes a usage, that is to say, an established method of dealing which acquires legal force when people contract with reference to it. Ordinarily, the
rules of the union do not require the members to serve under the agreement, but only that if they serve, they will do so according to its terms.

"The theory has been advanced that a collective agreement is a valid contract between the employer and the employees acting through the agency of the organization or group. *

"* * * The Supreme Court of the United States has declared that the right of collective bargaining is a fundamental right of employees which existed prior to and is independent of the National Labor Relations Act. There can be no doubt that a labor union when authorized by its members may make contracts in their behalf. *


The most recent treatise on the law of contracts states in part as follows:

"A more recent development in the field of third party agreements has been the enforcement of collective bargaining agreements between labor unions and employers by the individual members of a union. The greater number of cases which permit recovery by an employee from the employer because of the violation of such a contract do so on the theory that a usage is created which has been adopted as a part of each individual's contract of employment. 'It is only an agreement as to terms on which contracts of employment may be satisfactorily made and carried out. It is a mutual general offer, to be closed by specific acceptance. When negotiated by representatives of an organization, it is called collective bargaining, but ordinarily the laws of the order do not require the members to serve under it, but only that if they serve they will do so according to its terms. When the collective agreement is published by the managers, it becomes then the rule of that industry.'

"A number of courts, however, have adopted the theory that the employee is the beneficiary of a valid contract between the union and the employer. One case has gone so far as to apply this to an employee
who was not and who could not become a member of the union because of his race, since the contract of the union with the employer contained a clause that 'rights in this agreement shall be understood to apply to both white and colored employees alike.' In permitting him to recover the difference between the wages paid him and the union scale, the court held it was intended by the parties that he should be a beneficiary under the agreement.

"If the former theory is adopted, the situation does not present the features of a third party beneficiary contract. If, however, the facts are insufficient to warrant the implication that the terms of the contract with the union are adopted in the individual contracts of employment, there seems no difficulty in dealing with the matter on the latter theory if the elements of a contract exist. The fact that there is no adequate remedy for the enforcement of such an agreement between a union and an employer against one another affords no reason in such a case why the beneficiary of such an agreement should not enforce it."

Williston on Contracts, Rev. Ed. Sec. 379A, pp. 1099 to 1101.

If a collective bargaining agreement in Indiana be construed as merely a continuing offer on the part of the employer, clearly there is no statutory provision in Indiana authorizing the making of such an agreement between a governmental unit and an unincorporated union. If the agreement be construed as a contract, then, it is submitted, it must be upon the theory that the members of the unincorporated union authorize their agents to enter into a contract binding upon the individual members for their own benefit, and also for the benefit of third parties who might subsequently become members of the union. A search of the statutes fails to disclose any authorization for the making of this sort of a contract by any unit of government within this state. Some provisions in the statute clearly preclude such a possibility, as in cases where competition is required, or where merit or civil service provisions are mandatory, as in the State Personnel Act. In many instances salaries or wages of employees are fixed by statute or the method in which they are fixed is provided by
statute. This method would have to be followed, and they could not be fixed by collective bargaining. Until the General Assembly provides by statute for the making of collective bargaining agreements with boards, bureaus, commissions, agencies and units of the government, I am of the opinion that such agreements are unauthorized.

In addition to the foregoing authorities, many of the conclusions herein expressed are supported by the statement in Volume One of Teller's Labor Disputes and Collective Bargaining, Section 171. I quote from the 1941 Supplement as follows:

"It would seem clear that the government should be under no duty to bargain collectively with its unionized employees, since the government would be impotent to contract with its employees differently from the terms and conditions of employment prescribed by the applicable law. The making of complaints to the given governmental agency and the presentation of grievances to the legislature would seem to be the limit of the employees' collective rights.

"Nor may governmental employees insist, if having majority authorization, upon the right to represent all the employees in the given unit, since this right is the creature of the labor relations acts, is unknown to the common law, and runs counter to the plain terms of the provisions of the labor relations acts excluding governmental employees from their benefits.

"Clearly, governmental employees should not be permitted to contract for the closed shop, since, as is pointed out in the main work, 'government exists for the benefit of all, all are required to pay for the support of government, and finally, government has a responsibility to all of its inhabitants alike.'

"In Petrucci v. Hogan, the transport workers' union picketed the homes of employees employed by a transit system owned and operated by the city, to compel them to reaffiliate with the union. The question was whether the picketing was for a lawful labor objective. The Court held it was not, reasoning as follows: ""* * * Appointments and promotions in the Civil Service must be determined upon merit and fitness, under suitable regulations adopted by Commissions created by
the Civil Service Law under the mandate of the Constitution. The right to appoint depends upon merit and fitness, not upon membership in a labor organization. Inasmuch as plaintiffs have acquired civil service status, they may be removed only for causes recognized by law (Sec. 22, Subd. 2) and not for their failure to resume union membership. The Court further found that the picketing was part of a plan to establish a closed shop for transport workers in the city transit system, and stated: "The City is not at liberty to act in derogation of the provisions of the Constitution or the Civil Service Law, and picketing that has for its ultimate object establishment of a "closed shop" wherein only those shall be employed who are members of the union cannot be viewed as legal."

However, since in general there is no statutory prohibition forbidding the employees of the government forming their own associations, there would be no legal bar to their collective presentation of their employment interests to the public officials charged with the duty of fixing the terms of employment. The general rule concerning the right of the public to appear before meetings of boards, bureaus, and commissions is that such meetings are not required to be public unless the statute so provides. 43 C. J. 497. A well-known provision for public meetings is that contained in the statutes on cities and towns, wherein it is provided that all meetings of the common council shall be public. 48-1402, Burns 1933. Where there is no statute or constitutional provisions requiring public meetings, it is discretionary with the officials as to whether the meeting be public or not. The right of petition contained in the Indiana Constitution is not broad enough to provide that unions have an enforceable right to appear before boards, bureaus, commissions, etc., to present their interests.

"No law shall restrain any of the inhabitants of the State from assembling together in a peaceable manner, to consult for their common good; nor from instructing their representatives; nor from applying to the General Assembly for redress of grievances."

Constitution of Indiana, Art. 1, Sec. 31.
Therefore, I am of the opinion that although officials charged with the duty of making employments may properly meet with representatives of the union to discuss matters of employment, yet there is no binding duty upon the officials to do so, and that until the Legislature specifically provides for the making of collective bargaining agreements where a board, bureau, commission, official agency, or unit of the government is the employer, such collective bargaining agreements would be *ultra vires* and of no legal force.

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**STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS:** Where licensed embalmer fails to renew his license on or before March first of year following expiration of license. State Board is without power to renew such license except upon re-examination.

June 12, 1944.

*Opinion No. 56*

Hon. Luther J. Shirley, Secretary,  
Board of Embalmers and  
Funeral Directors,  
946 North Illinois Street,  
Indianapolis 4, Indiana.

Dear Sir:

Your letter of June 8, 1944, received in which you request an official opinion on the following question:

"Can the State Board of Embalmers and Funeral Directors of Indiana renew an embalmer's license who did not make application for renewal and who did not pay the renewal fee on or before March 1st of the year following the last year for which renewal fees were paid?"

This question is controlled by Section 63-724, Burns' R. S. 1943 Repl., same being Sec. 8, Ch. 165, Acts of 1939, which is as follows:

"All embalmers' licenses and funeral directors' licenses hereafter issued shall automatically terminate on the 31st day of December in each calendar year. On or before the last day of each calendar year each