specific statute applying solely to that sub-class. Whether a particular residential institution is a "health facility" or a "hospital" depends on whether it is primarily intended to provide care and maintenance or to provide treatment and care, a determination that must be cooperatively made by the state agencies involved.

OFFICIAL OPINION NO. 25

June 6, 1968

PUBLIC EMPLOYEES—LABOR RELATIONS—Supervisory or Professional Employees Holding Membership in Labor Union.

Opinion Requested by Hon. Roger D. Branigin, Governor.

You have asked me to advise you on the following question:

> "May a department of State Government prohibit its supervisory and/or professional employees from holding membership in any employee association?"

You stated that one department head reports that some of his supervisory employees are not effectively carrying out department policies and orders because of a conflict with their loyalty to the employees' union to which they belong. You also ask whether, if such membership cannot be prohibited under the law, association activities of supervisory and professional employees can be restricted in any way by the department head. Although your question is rather broad, from the context I have concluded that you are concerned primarily with unions organized on a "vertical" pattern, *i.e.*,

those which include non-supervisory employees and their supervisors in the same union.

That it is essential to business and industry that some employees be more responsive to management than to labor unions has long been recognized. The United States Supreme Court decided in March of 1947 that foremen were "employees" whose rights to bargain collectively were protected by the National Labor Relations Act, *Packard Motor Car Co. v. National Labor Relations Bd.*, 330 U. S. 485 (1947). Within four months, Congress had amended the Act specifically to exclude "supervisory employees" from the definition of employees with whom employers are required to bargain collectively under the terms of the Act, thus nullifying the effect of the Supreme Court opinion. The Labor Management Relations Act of 1947, 61 Stat. 137, amended section 2 of the National Labor Relations Act, 29 U. S. C. § 152. Congress did, however, preserve the right of foremen to become and remain members of labor organizations. The Labor Management Relations Act of 1947, 61 Stat. 151, amending section 14(a) of the National Labor Relations Act (last amended by 73 Stat. 541), 29 U. S. C. § 164(a). The purpose of the amendments was explained in *National Labor Relations Bd. v. Retail Clerks Int'l Ass'n. A. F. L.*, 211 F. 2d 759, at 763-764 (9th Cir. 1954), *cert. den.* 348 U. S. 839:

> "A primary objective of § 2(11) of the Act . . . was to assure to the employer his right to procure the loyalty and efficiency of his supervisors and managers. The reports which accompanied the legislative bill which Congress enacted into the Labor Management Relations Act of 1947, made this abundantly clear. The reports were specific as to certain evils which the congressional committees thought they could avoid by excluding foremen and other supervisors from the operation of the Labor Act. Much emphasis was laid upon the desirability of assuring their independence of unions of the rank-and-file. It was noted that what had been happening in respect to unionizing of foremen under the former Act was 'bad for output' and

> hurt the free flow of commerce which the Act was intended to promote."

In *Carpenters Dist. Council v. National Labor Relations Bd.*, 274 F. 2d 564 (D.C. Cir. 1959), the Court said:

> "Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2 (3) evidences its intent to make the obligations to the employer paramount. That provision excepts foremen from the protection of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations." 274 F. 2d at 566.

However, the fact that some supervisors are members of a union of their subordinate employees does not excuse an employer from bargaining with the union, and an employer may treat the supervisory employees as employees covered by the National Labor Relations Act if he desires to do so. *Pharmacists & Retail Drug Store Employees Union v. Lake Hills Drug Co.*, 255 F. Supp. 910 (W. D. Wash., 1964). See also *Carpenters Dist. Council v. National Labor Relations Bd., supra.*

The National Labor Relations Act does not apply to state employees. National Labor Relations Act, section 2(2), 29 U. S. C. § 152(2); 1966 O.A.G. 144, 151; 1944 O.A.G. 244. Neither is there an Indiana statute defining the bargaining rights of the public employees. As I pointed out in 1966 O.A.G. 144, the lack of an Indiana labor relations law for public employees creates daily problems for public officers in the executive and administrative departments of government. Public employees also are left without definite standards to guide their legitimate attempts to secure better working conditions and wages.

Nonetheless, there are several applicable rules of law:

(1) No person has a right to public employment, which is, instead, a benefit or privilege. *Keyishian v. Board of Regents,* 385 U. S. 589, 605-606 (1967), *State ex rel. Buttz v.*

Marion Cir. Ct. 225 Ind. 7, 72 N.E. 2d 225 (1947) (public office).

(2) Despite that fact, the United States Constitution prohibits that conditions be placed upon the benefit or privilege of public employment which infringe upon the liberties of free expression and association. It was not always so. See *Adler v. Board of Education,* 342 U. S. 485 (1952). However, the Supreme Court of the United States recently said, in holding New York's Feinberg Law unconstitutional,

> "the . . . Law was, however, before the Court in *Adler* and its constitutionality was sustained. But constitutional doctrine which has emerged since that decision has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. Teachers, the Court said in *Adler,* 'may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.' 342 U. S., at 492. The Court also stated that a teacher denied employment because of membership in a listed organization 'is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice.' *Id.,* at 493.
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> "However, the Court of Appeals for the Second Circuit correctly said in an earlier stage of this case, '. . . *the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' Keyishian v. Board of Regents,* 345 F. 2d 236, 239. Indeed, that theory was expressly rejected in a series of decisions following *Adler.* See *Wieman v. Updegraff,* 344 U. S. 183; *Slochower v. Board of Edu-*

cation, 350 U. S. 551; *Cramp v. Board of Public Instruction, supra; Baggett v. Bullitt, supra; Shelton v. Tucker, supra; Speiser v. Randall, supra;* see also *Schware v. Board of Bar Examiners,* 353 U. S. 232; *Torcaso v. Watkins,* 367 U. S. 488. In *Sherbert v. Verner,* 374 U. S. 398, 404, we said: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.' " *Keyishian v. Board of Regents, supra,* 385 U. S. at 605-606. (Emphasis added.)

(3) The protected right of free association and expression includes labor union membership, under both the United States Constitution and Art. 1, § 31 of the Indiana Constitution. *N. L. R. B. v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, 33 (1937); *Karges Furniture Co. v. Amalgamated Woodworkers Local Union,* 165 Ind. 421, 75 N. E. 877 (1905); 1966 O.A.G., pp. 144, 150-151.

(4) One condition of the exercise of the right of free association which may not be imposed on the benefit or privilege of public employment is the requirement that an employee refrain from mere membership in an organization See *Keyishian v. Board of Regents, supra.*

(5) As previously stated, it has been long recognized in ordinary business and industrial labor management relations that there are employees who must be more responsive to the wishes of the employer than to those of a union made up primarily of non supervisory employees. This principle is as necessary in government as it is in business and industry.

It is, therefore, my opinion that a department of state government may not prohibit a supervisory or professional employee from holding membership in an employee association which is primarily an organization of his subordinate employees, because such a prohibition would violate the supervisory or professional employee's right of free association protected by both the United States and the Indiana Constitutions. Obviously, however, any supervisory or professional employee who is not effectively carrying out department

policies and orders, for whatever reason, including responsiveness to a union of his subordinates rather than to the department he is hired to represent, can be disciplined or dismissed as otherwise authorized by law for failure to perform his duties properly. Some supervisory and professional employees of the state at high levels have the duty of implementing the policy of the State of Indiana with regard to employment practices and salaries. Active participation, such as making policy in or negotiating on behalf of a labor union of subordinate employees, would put those professional and supervisory employees in the untenable position of negotiating with themselves. For those employees, it would seem reasonable to me that refraining from such activities would be the wisest course to follow.

One further problem consistently emerges when the degree of responsiveness to management required of a particular employee is questioned. That problem is the selection of those employees who may properly be designated "supervisory" or "professional" employees, and from whom responsiveness to management (in this case, the state) rather than to a labor union of his subordinates may fairly be demanded. The designation of such employees is ordinarily made, in business and industry, according to definitions in the National Labor Relations Act. Since the state government must operate without the General Assembly's expression of detailed policy on this subject, the matter appears to be a proper subject of bargaining between the state and the employee unions. A reasonable level of employment must be selected to be designated as "supervisory" or "professional." When the state enters into agreements with employee unions, the definition of the bargaining unit therein could well be drawn to exclude those employees which the parties can agree are "supervisory" and "professional."