must make individual determinations based upon all the facts and the application of § 501.

In conclusion, the recodification of the drainage laws of Indiana by The Indiana Drainage Code must be liberally construed if it is to accomplish the worthwhile purpose for which it was enacted. I have dealt in considerable detail in answering the questions posed herein and in the preceding opinion in the hope that they will insure uniformity of interpretation throughout the state in implementing this important statute.

OFFICIAL OPINION NO. 22

October 6, 1966

PUBLIC EMPLOYEES—Right to Grievance Procedure —Conditions for Co-Operation Adopted by Trustees of Indiana University.

Opinion Requested by Hon. Patrick Chavis, State Senator.

You have advised me that the Trustees of Indiana University at their July 7-10, 1966, meeting adopted "Conditions for Cooperation between Employee Organizations and the Administration of Indiana University" (hereinafter referred to as "Conditions for Cooperation"). A copy of said document was attached to your letter and is set out as Appendix A to this opinion.

You also stated that two Attorney General's Opinions, 1949 O.A.G. 184, No. 51 and 1944 O.A.G. 224, No. 55, cast doubt upon the authority of any governmental agency or political subdivision thereof in Indiana to enter into any type of collective bargaining with its employees. You then asked my Official Opinion as to whether the Trustees of Indiana University and other Indiana public officials at the state and local levels

have authority to adopt and implement the provisions contained in the Conditions for Cooperation.

The two Attorney General's Opinions referred to above concern officials of city, county and state government and their employees, who may be denominated "public employees."

Indiana University is the successor to the educational institution first established as the State Seminary in 1820 pursuant to Art. 9, § 2 of the 1816 Constitution of the State of Indiana. After the present constitution was adopted in 1851, the General Assembly enacted 1 R.S. 1852, ch. 114, to continue the relationship of Indiana University as the University of the State under Art. 8 of the new Constitution. Indiana University is "an integral part of our free school system . . . it was the special creation of the Constitution. . . ." *Fisher v. Brower*, 159 Ind. 139, 144, 64 N.E. 614, 616 (1902).

It is apparent from the history of the relationship between the University and its employees that both have regarded the University as an agency of government subject to the law regulating the relationship between government and its employees. According to a Staff Bulletin dated January 27, 1965, by Mr. J. A. Franklin, Vice-President and Treasurer of Indiana University, the Trustees of the University took the position in 1950 that the Trustees and their administrative officials "do not have statutory authority to contract or bargain with a labor union, nor can they make collective bargaining agreements." The language of the Conditions for Cooperation also indicates that the Trustees consider Indiana University an agency of the state government. The provisions of the Conditions for Cooperation are, to a great extent, patterned after President John F. Kennedy's Executive Order No. 10988, which may be found in 5 U.S.C.A. § 631, at p. 65 of the 1965 Supplement, F.C.A. 5 § 631, 1966 Supp., p. 113, 27 Fed. Reg. 551, and which applies to federal employees.

The provisions of the Conditions for Cooperation must be examined in order that I may determine whether the Trustees of Indiana University and other Indiana state and local public officials have authority to promulgate them.

The stated purpose of the Conditions for Cooperation is to serve the interests of Indiana University by providing for

the orderly presentation of the employees' collective employment interests. The manner in which such purpose is to be achieved may be briefly summarized as follows:

> The Conditions for Cooperation provide for exclusive, formal or informal recognition of "employee organizations." By definition, those organizations which assert the right to strike against the state or its agency or advocate the overthrow of the constitutional form of government in the United States, or which discriminate in membership because of race, color, sex, creed or national origin, are not entitled to recognition. Exclusive recognition may be granted by university administrative officials to an employee organization which represents a majority of the regularly employed nonsupervisory staff employees of a common campus (as defined in the Conditions of Cooperation). When no organization has qualified as the exclusive representative of a common campus, University officials may grant formal recognition to any organization which represents at least ten per cent (10%) of the regularly employed staff members of a common campus. Regardless of whether any other organization in a common campus is exclusively or formally recognized, any group may be granted informal recognition, and no recognition of any group shall preclude an employee or another group of employees from bringing matters to the attention of appropriate officials or selecting its own representative in a grievance or appellate action.
>
> When an employee organization has been informally recognized, it is permitted to present to appropriate officials its views on matters of concern to its members. However, administrative officials are not bound to consult with it in the formulation of personnel policies.
>
> A formally recognized employee organization is entitled to discuss with administrative officials matters of personnel policy and practice that are of concern to its members, and to present its views in writing to administrative officials. The formally recognized organization is also permitted to have organizational

membership dues collected by paycheck withholding on written request of the employee, to use University facilities for meeting places, and to call for equal representation committee meetings.

An employee organization recognized as the exclusive representative of employees on a common campus is entitled to speak on behalf of all employees, to be represented, upon request of the employee, at discussions between administrative officials and employees concerning grievances, personnel policies and practices, or other matters affecting working conditions, to call an equal representation committee meeting and to be represented at such meeting. It is also responsible for representing the interests of all employees without discrimination.

The Conditions for Cooperation provides for an equal representation committee to negotiate recommendations concerning personnel policy and working conditions to be submitted to the trustees. An equal representation committee consists of one panel of representatives of the employees and one of administrative officials. A non-voting designee of the trustee shall preside. A joint recommendation of both panels may be submitted, or, in case of disagreement, each panel may make its own written recommendations. No recommendations may be negotiated, however, concerning "such areas of discretion and policy as the mission of the university, its budget including wages and salaries, its organization and assignment of its personnel, or the technology of performing its work."

The Conditions for Cooperation also provides some guidelines for administrative procedures for the handling of grievances. For the purposes of this opinion it is necessary to note only that the Conditions for Cooperation provides that arbitration of grievances shall be advisory in nature, with any decision or recommendation subject to the approval of the president of the university.

In addition to the language in that document specifying what procedures may be taken by and concerning employee organizations, certain powers are reserved to the trustees and administrative officers of the university. The preamble states:

> ". . . These provisions shall not be construed as the relinquishment by the trustees of their obligations, responsibilities and authorities, conferred upon them by the people of the state through legislative statutes, to act in final judgment on the management of institutional affairs in the public interest, nor as a recognition by the trustees of a right to strike by employees of the university, or of a right to take any other concerted action to impede, or to threaten to impede, the trustees or administrative officials in the operation of the university."

Section 8 of the document reads as follows:

> "(1) Management officials retain the right and responsibility, (a) to direct employees of the university, (b) to hire, promote, transfer, assign, and retain employees in positions, and to suspend, demote, discharge, or take other disciplinary action against employees, (c) to relieve employees from duties because of lack of work or for other legitimate reasons, (d) to maintain the efficiency of the operations entrusted to them, (e) to determine the methods, means and personnel by which such operations are to be conducted, and (f) to take whatever actions may be necessary to carry out the mission of the university."

The university also retains the privilege to discontinue the employment of any person who participates in a strike or other interruption of university activities.

It is readily apparent that the Conditions for Cooperation is exactly what the preamble states it to be: *"procedures for* the recognition of employee organizations and *the consideration of collective presentations of their views, suggestions and employment interests."* (Emphasis added.)

It would certainly appear at first glance that there could be no serious question concerning the right of public officials to agree to listen to their employees, either singly or in groups or through their chosen representatives. However, it does appear that the two Attorney General's Opinions you cited have been interpreted by many persons to forbid any type of discussion or agreement between public officials and representatives of public employees concerning any conditions of employment, although neither opinion so held.

The 1944 Attorney General's Opinion, 1944 O.A.G. 224, No. 55, was issued in response to the following questions concerning state, city and 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.?' " 1944 O.A.G. at 224.

The Commissioner of Labor, who requested the opinion, also inquired:

> " '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?' " 1944 O.A.G. at 224-25.

Several pages of the 1944 Opinion are devoted to discussion of whether any collective bargaining agreement is an enforceable contract. The rights under such an agreement have been established by the Indiana courts. See *Faultless Castor Corp. v. United Electrical Workers,* 119 Ind. App. 330, 86 N.E. 2d 703 (1949). The 1944 Opinion did not cite *Janelene, Inc. v.*

Burnett, 220 Ind. 253, 41 N.E. 2d 942 (1942), which had decided that a union member, on behalf of herself and all other members of an unincorporated union, could bring an action to enforce a collective bargaining agreement. Therefore, collective bargaining procedures and contracts no longer have the "uncertain status" the Attorney General declared them to have in 1944. Several conclusions were reached in the 1944 Opinion, however:

(1) Public employees have the right to organize and form unions, citing Acts 1893, ch. 76, § 1, Burns IND. STAT. ANN., § 10-4906; Acts 1933, ch. 12, § 2, Burns § 40-502. The following public policy established by the General Assembly in § 2 of the 1933 statute is not set out in the opinion:

> "In the interpretation of this act and in determining the jurisdiction and authority of the courts of the state, as such jurisdiction and authority are herein defined and limited, the public policy of the state is hereby declared as follows:
>
> "Whereas, under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership associations, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definition of, and limitations upon, the jurisdiction and authority of the courts of the state of Indiana are hereby enacted."

This act restricts Indiana courts' issuance of restraining orders or injunctions in cases involving or growing out of a labor dispute, and prohibits the issuance of such orders contrary to the public policy declared in the act and quoted above. The "employer" in a "labor dispute" is not defined, and there is no language which limits the application of the statute or its declared public policy only to employees in private industry. No consideration is given in the 1944 Opinion to the fact that authorizing the organization of employees while permitting their elected representatives to be totally ignored by a public employer would be an exercise in futility, at best, and could not have been contemplated by the General Assembly when it enacted that statute in 1933. Since the date of the opinion, the General Assembly has prohibited *any* denial of the right of a resident Indiana worker or a group of such workers to select a bargaining representative or to organize into a local union or association. Acts 1957, ch. 181, § 2, Burns § 40-2802.

(2) The 1944 Opinion indicates that the National Labor Relations Act does not apply to public employees. The definition section of that act reads in part as follows:

> "(2) The term 'employer' . . . shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof. . . ." 29 U.S.C. § 152 (2), 61 Stat. 137 (1947).

While it is true that public employees specified in the National Labor Relations Act are excluded from that act, it is also true that their exclusion does not prohibit their exercise of any rights otherwise available to citizens of the United States and the State of Indiana. The rights of self-organization and collective bargaining are fundamental, and exist independently of the National Labor Relations Act, *Amalgamated Utility Workers v. Consolidated Edison Co.,* 309 U.S. 261, 263-64, 60 S. Ct. 561, 84 L. Ed. 738, 741 (1940). The same rule was announced in Indiana as early as 1905, *Karges Furniture Co. v. Amalgamated Woodworkers Local Union,* 165 Ind. 421, 75 N.E. 877 (1905).

(3) The 1944 Opinion also states that (a) a unit of government has no power to make a "collective bargaining agree-

ment" unless such power is expressly granted by statute or fairly implied as necessary to carry out an express power; that the statutes of the State of Indiana do not expressly authorize "collective bargaining," in the classical sense, between government and its employees; that such power may not be fairly implied as necessary to carry out any express powers.

The term "collective bargaining," although not defined in the opinion, is used therein in the classical National Labor Relations Act sense:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, *and the execution of a written contract incorporating any agreement reached if requested by either party, . . .*" 29 U.S.C. § 158(d), 61 Stat. 140 (1947). (Emphasis added.)

When a collective bargaining contract made under that statute is in effect, "the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract" unless the terms of the act are complied with. *Id.*

Classical "collective bargaining" has been further defined by the Supreme Court:

> "Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Agents' Int'l Union,* 361 U.S. 477, 485, 80 S. Ct. 419, 425, 4 L. Ed. 2d 454, 462 (1960).

(b) The 1944 Opinion also states that when statutes expressly provide wages or salaries or a method for fixing them,

or provision is made for competition, or merit or civil service employment, such matters cannot be the subject of classical collective bargaining.

(c) There is no legal reason, according to the opinion, that employees of the government should not collectively present their employment interests to the public officials charged with the duty of fixing the terms of employment. In the absence of statute, it is stated, the decision to receive such presentation is within the discretionary power of the officials.

(d) However, the opinion concludes, employee representatives do not have a "collective bargaining" contractual right to appear before governmental agencies to present their interests.

The last paragraph of the opinion reads as follows:

> "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." 1944 O.A.G. at 233.

No answer was given in the 1944 Opinion to the question asking whether public officials might recognize a union. The 1944 Opinion did not describe the extent to which a process of negotiation may be formalized in a written document.

The 1949 Opinion referred to in your letter, 1949 O.A.G. 184, No. 51, adds nothing to the 1944 Opinion concerning the basic question here presented. The question therein concerned Acts 1947, ch. 341, Burns IND. STAT. ANN., §§ 40-2401—2415, which requires collective bargaining and arbitration between "public utilities" and their employees in order to protect the public from an interruption in the supply of necessary services. The term "public utilities" is defined in the

statute, but it is not specified whether the term includes public utilities which are municipally owned. The opinion simply recites the 1944 Attorney General's conclusion that public officials may not engage in collective bargaining unless a statute specifically authorizes it. The opinion then states that the definition of "public utility" found in a 1947 amendment to an act concerning regulation of rates of public utilities, Acts 1947, ch. 318, § 1, amending Acts 1913, ch. 76, § 1, Burns IND. STAT. ANN., § 54-105, excludes municipally owned public utilities from the term "public utilities" as used in the rate regulation act. Without explanation, that definition was then applied to the collective bargaining and arbitration statute, which theretofore, it was said, does not govern municipally owned public utilities. Not only was a definition in one act arbitrarily incorporated into another, but the purpose of the second act to protect the public from interruptions in utility services was ignored.

Accepting the validity of all of the conclusions of the two Attorney General's opinions previously cited, for the purposes of this discussion, and even without the benefit of current developments in labor relations, it is apparent that the adoption of the Conditions for Cooperation is well within the power of the Trustees of Indiana University. The Trustees of Indiana University are by statute empowered and required to manage the affairs of the university:

> "The board of trustees of the state university . . . shall be a body politic, with the style of 'The Trustees of Indiana University'; in that name to sue and be sued . . . to expend the income of the university for its benefit; . . . to elect a president, such professors and other officers for such university as shall be necessary, and prescribe their duties and salaries; to prescribe the course of study and discipline and price of tuition in such university; and to make all by-laws necessary to carry into effect the powers hereby conferred." 1 R.S. 1852, ch. 114, § 2, as last amended by Acts 1935, ch. 269, § 1, Burns IND. STAT. ANN., § 28-5302.

Although no specific overall authority of the trustees to hire employees was found, it is generally conceded that the

foregoing statute grants to the trustees the powers necessary to carry on the purposes of the university. See 1952 O.A.G. 265, at 269. See also *Southern Ind. Gas & Elec. Co. v. City of Boonville,* 213 Ind. 307, 12 N.E. 2d 122, 503 (1938), holding that in the absence of a prohibitory statute, a city has the incidental power to hire employees when necessary to execute a granted power, and that the matter rests "in the sound discretion of the officials of the municipality." 213 Ind. at 309, 12 N.E. 2d at 123. It is obvious that the trustees cannot operate the university without some employees other than professors and officers. The power to hire employees therefore is fairly implied from the express powers granted, and the authority to determine the terms and conditions of employment necessarily follows. As pointed out in the 1944 Attorney General's Opinion, the officials of any governmental agency certainly are authorized to meet with their employees when they desire to do so. They may also meet with representatives of the employees if they so desire. There is certainly nothing to prohibit their drafting requirements with which an employee or a representative of employees must comply as a condition precedent to meeting with the officials for discussion. Nothing prevents these requirements from being set out in writing. Therefore, the issuance of the Conditions of Cooperation by the trustees is proper and their authority is implied from their power to manage the affairs of the university which, by the very nature of its operation, requires that employees be hired to effectuate the purposes of the university. The same reasoning applies to other Indiana state and local governmental agencies discussed in this Opinion.

Nevertheless, the stifling effect of the interpretation given to the two Attorney General's Opinions discussed herein upon the creation of an enlightened relationship between government and its employees in Indiana requires a re-examination under today's standards of the conclusions reached therein. The attitude of the Attorney General in 1944 is shown by his statement that "collective bargaining procedures are new to our law and in the absence of statute have an uncertain status." 1944 O.A.G. at 225. The general attitude of courts and public administrators of that time is exemplified by the famous statement of President Franklin D. Roosevelt:

> "'All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations. The employer is the whole people who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many cases restricted by laws which establish policies, procedures or rules in personnel matters.'"
>
> Letter to Luther C. Steward, President, National Federation of Federal Employees, August 16, 1937.

It is estimated that by 1970, for every five employed persons there will be one government employee. Lab L.J. 688 (1965). The dramatic increase in the number of public employees since 1937 has intensified the problem created by the fact that public employees were excluded from the original statutes guaranteeing the collective bargaining rights of employees in the private sector of the economy.

Public employees are just as interested in the terms and conditions of their employment as are employees of business and industry. During the same period in which private employers have been developing an enlightened attitude toward their employees, some administrators who conduct the same relationships for the public in governmental employment have been less than enthusiastic in adopting these worthwhile labor management concepts.

Public approval of the rights of persons to designate representatives to speak and negotiate for them, wherever employed, is not always reflected in the attitude of these few administrators, who after all only perform their duties on behalf of the whole body politic.

That there are some differences between the rights of public and private employees in the field of collective bargaining

rights cannot be denied. For example, the right to strike has been denied public employees both by judicial decision, *e.g.*, *New Jersey Turnpike Authority v. American Federation of State, County and Municipal Employees,* 83 N.J. Super. 389, 200 A. 2d 134 (1964) and by statute, *e.g.*, N. Y. Civ. Serv. Laws § 108(2). See Note, 40 *Notre Dame Law.*, 606, 632 (1965). Indiana has a statute restricting the right of "public utility" employees to strike. Acts 1947, ch. 341, § 13, Burns § 40-2413. However, this is the statute which 1949 O.A.G. 184, No. 51, *supra,* stated does not apply to employees of municipally owned public utilities. It is also frequently stated, as it was in the 1944 Opinion, that the terms of statutes establishing wages, hours and conditions of employment, or providing procedures for their determination, cannot be varied by collective bargaining between a public official and public employees, *e.g.*, *Mugford v. Mayor of Baltimore,* 185 Md. 266, 44 A. 2d 745 (1945), as modified on denial of rehearing (1946). Although this may well be correct, it is only fair to point out that disputes between a public official and public employees often erupt over failures of a public official to follow such laws and procedures rather than from employee attempts to vary them by collective bargaining.

The fact that there is an area, even in the absence of an authorizing statute, in which employee representatives and public officials may work together, has often been ignored by courts and public officials and administrators. Since 1944, however, there has been a significant breakthrough in the establishment of enlightened relationships between public employees and their employers. President John F. Kennedy's issuance of Executive Order No. 10988 in 1962 made dramatic changes in the status of federal employees. Although under that order administrative and executive officers of government retained authority to make final decisions concerning the terms and conditions of employment, the role of employees and their representatives in addressing the officials was definitely established. See Note, 40 *Notre Dame Law.*, 606, 628 (1965). See also Constitution of New Jersey, Art. I, par. 19, for similar rights granted public employees. Other states have enacted specific statutes authorizing some or all of their public employees to bargain collectively with their public