OPINION NO. 79-054

Syllabus:

1. The Ohio Department of Mental Health and Mental Retardation may voluntarily negotiate and contract with labor organizations representing its employees, provided that the Department does not conduct the negotiations in a manner which amounts to a

delegation of executive responsibility or enter into contracts, the terms of which conflict with Ohio law. 1967 Op. Att'y Gen. No. 67-083 overruled.

2. The Ohio Department of Mental Health and Mental Retardation may conduct an election, or may contract with an independent third party to conduct an election, to determine if a majority of the Department's employees at any particular facility wish to be represented by a single labor organization.

3. The Ohio Department of Mental Health and Mental Retardation may recognize a labor organization, elected by a majority of the employees at any particular facility, as the exclusive representative of all the employees at that facility, and may grant to that organization such exclusive privileges as are reasonably necessary to the performance of the organization's representational responsibilites.

To: Timothy B. Moritz, M.D., Director, Ohio Department of Mental Health and Mental Retardation, Columbus, Ohio

By: William J. Brown, Attorney General, August 31, 1979

I have before me your request for an opinion concerning the following questions:

(1) Can the Ohio Department of Mental Health and Mental Retardation enter into collective bargaining with labor organizations which represent the employees of this Department when no legislation pertaining to that specific act is in effect?

(2) Can the Ohio Department of Mental Health and Mental Retardation enter into labor contracts with labor organizations without an express statute confirming that right?

(3) Can the Ohio Department of Mental Health and Mental Retardation:

(a) Conduct an election for the purpose of determining if a majority of the Department's employees at any given facility wish to be represented by a single labor organization; and
(b) Recognize that labor organization, if any, as the exclusive representative of the employees of such facility of the Department?

(4) Can the Ohio Department of Mental Health and Mental Retardation contract with an independent third party for the purpose of conducting the elections referred to in Question No. 3?

The last three decades have witnessed a dramatic evolution in the attitude of the Ohio Supreme Court relative to collective bargaining in the public sector. In its 1947 decision in Hagerman v. Dayton, 147 Ohio St. 313, the Supreme Court held that the civil service laws of the State "cover fully all questions of wages, hours of work and conditions of employment" and that "labor unions have no function which they may discharge in connection with civil service appointees." 147 Ohio St. 313, 328-9. The Court also indulged the presumption that public sector bargaining would necessarily entail an unlawful delegation of executive responsibility:

> There is no authority for the delegation either by the municipality or the civil service appointees of any functions to any organization of any kind. Each tub must stand on its own bottom. The law provides for the election and appointment of officials whose duties would be interfered with by the instrusion of the outside [labor] organizations. Nothing said herein is intended to limit free speech but it is intended to limit interference by [labor] organizations with the duties of the duly elected and appointed officials. 147 Ohio St. 313, 329.

Hagerman was followed in 1967 Op. Att'y Gen. No. 67-083 which stated that a state university could hold "informal" discussions with, and elicit position statements from, labor organizations but could neither recognize a union as bargaining agent of its employees nor contract relative to public employee working conditions.

The first visible erosion of the rigid approach of Hagerman began in 1970 when two members of the panel which decided Foltz v. Dayton, 27 Ohio App. (2d) 35 (Montgomery Co., 1970) were openly critical in their concurring opinion(s):

> With great reluctance, I concur in the judgment, being constrained to do so by Hagerman v. Dayton (1947), 147 Ohio St. 313, 34 O.O. 238, 46 Ohio Law Abs. 141, 71 N.E. 2d 246, 170 A.L.R. 199.
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> Many commentaries cite this case as illustrative of a definitely conservative point of view. Vast changes have occurred and are still occurring in the social, economic and governmental structure which tend to weaken the philosophical basis of that decision....
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> . . . .
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> It is no longer valid to say that these [dues check-off] deductions support only a private, personal and selfish purpose. Satisfactory relations between government and its employees is a matter of the utmost public concern, directly conducive to the general welfare.
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> "Under some circumstances * * * public administrators may deem collective bargaining the most satisfactory method of handling the government's relations with its employees." 21 U. Cinc. L. Rev. 354.
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> In all the years since Hagerman, apparently only once has the Supreme Court expressly mentioned that decision. See State, ex rel. Leach v. Price (1959), 168 Ohio St. 499 at 504.
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> It is earnestly to be hoped that present day conditions may prompt careful review of the problem. 27 Ohio App. (2d) 35, 43-4.

In 1973 and 1974 two Ohio appellate courts broke stride with Hagerman and expressly sanctioned collective bargaining in the public sector. In Youngstown Education Ass'n. v. Board of Education, 36 Ohio App. (2d) 35 (1973), the Mahoning County appellate court (two members concurring) found implied statutory authority for collective bargaining in R.C. 9.41 which was enacted 12 years after Hagerman and which authorizes public employers to check-off union dues from the wages of public employees. The Court obviously viewed the enactment of R.C. 9.41 to be a legislative overruling of Hagerman, to wit:

> It is the established law in Ohio that in the absence of any specific grant of power by the constitution or laws of the state or charter of the municipality, a municipality or any subdivision thereof is without authority to enter into a binding collective bargaining agreement with any union or organization of employees. Hagerman v. Dayton, 147 Ohio St. 313; Cleveland v. Division 268, 51 Ohio Law Abs. 498, 30 Ohio Op. 395, and 41 Ohio Op. 236, 57 Ohio Law Abs. 173; 33 Ohio Jurisprudence 2d 146, Labor, Section 33.
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> In 1959 the legislature enacted R.C. 9.41, which provides in part as follows:

> "* * * the state of Ohio and any of its political subdivisions or instrumentalities may checkoff on the wages of public employees for the payment of dues to a labor organization or other organization of public employees upon written authorization by the public employee. Such authorization may be revocable by written notice upon the will of the employee."
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> . . . .
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> We hold that R.C. 9.41 authorizes a board of education to enter into a binding collective bargaining agreement with an association of school teachers, but that such collective bargaining agreement is limited by applicable statutes. 36 Ohio App. (2d) 35, 42-3.

In North Royalton Educ. Assn. v. Board of Educ., 41 Ohio App. (2d) 209 (1974), the Cuyahoga County appellate court joined the anti-Hagerman ranks. The Court found that although no Ohio statute specifically authorized public employers to bargain, the latter had the option, but not the duty, to engage in collective bargaining. In so holding, the Court expressly rejected the Hagerman rationale that state civil service laws so completely occupy the field relative to wages, hours and working conditions that public sector bargaining would necessarily entail a conflict with such statutes:

> [N]o Ohio statute specifically prohibits, allows, or compels [public sector bargaining]. Thus, the appellee has no duty to bargain collectively to establish terms and conditions for its employees but this does not foreclose the questions whether it may bargain and what its responsibilities are if it does negotiate a collective bargaining agreement.
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> V.
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> It has been argued variously that strict construction of local governmental powers (absent home rule) and the separation of powers doctrine requires specific legislation to establish the power of local governmental units, such as school boards, to bargain collectively. It is also said that an existing civil service or merit system so occupies the employee relations field that specific enactments are necessary to legalize collective bargaining . . . .
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> The first two objections are easily met. There is nothing about either strict construction or the separation of powers, assuming the power to contract at all, which requires that the power be exercised in a particular way. And, while a collective agreement could not overturn or modify either a statutory civil service standard or a valid regulatory scheme under such a statute, collective bargains can anticipate and take account of existing law so as not to conflict with it. 41 Ohio App. (2d) 209, 215-16.

The issue left unresolved by the foregoing appellate court opinions was the unlawful delegation of authority rationale of Hagerman. The Supreme Court had been willing to presume in 1947 that public sector bargaining would necessarily entail an "interference" with executive decision making. In reality, Hagerman reflected a highly pessimistic view of collective bargaining as a process. Traditionally, collective bargaining has been viewed as imposing on an employer nothing more than a duty to negotiate in good faith and to try to reach a mutually acceptable common ground. Hagerman seemed, instead, to view bargaining as imposing on public employers not a duty to weigh the views of their employees but, instead, as a duty to reach agreement no matter how much the final agreement differed from the public employer's own views. The Ohio Supreme Court eliminated this pessimistic view of the bargaining process in 1975 and, in the process, expressly sanctioned public sector bargaining.

In Dayton Classroom Teachers Assn. v. Board of Educ., 41 Ohio St. (2d) 127, the board of education of a city school district refused to arbitrate certain employee grievances as purportedly required by a collective bargaining agreement it had signed with a teachers' union. The board defended its failure to arbitrate on the grounds that the contract was "extra-legal" in that it constituted an improper delegation of the board's power. The Supreme Court clearly recognized the absence of express statutory authorization for public sector bargaining in Ohio, to wit:

> Labor relations law in the public sector lacks uniformity from state to state. For instance, that of Hawaii is regulated by an extremely comprehensive statutory scheme. Public labor relations Acts are present in an overwhelming majority of states, but Ohio has none. 41 Ohio St. (2d) 127, 129.

Notwithstanding this lack of express statutory authority, the Supreme Court held that the board was "vested with discretionary authority to negotiate and to enter into a collective bargaining agreement with its employees." supra at 132.

In the early Hagerman decision, the court opined that public sector collective bargaining agreements served no public purpose and were "contrary to the spirit and purpose" of state laws concerning wages, hours and working conditions. Dayton Teachers Assn. rejected that narrow view of public purpose and held that the collective bargaining process, including arbitration of disputes, would "contribute to more harmonious relations" between a public employer and its employees.

More importantly, Dayton Teachers Assn. put to rest the "unlawful delegation" rationale of Hagerman. The Court recognized in Dayton that bargaining entails only an honest effort to reach agreement and that it is only when the public employer's views are either altered or satisfied as a result of the give and take of the bargaining process that a binding collective bargaining agreement results. In short, it is not an unlawful delegation of executive responsibility for a public employer to make its discretionary "judgment calls" by a process which includes negotiations and discussions with representatives of its employees, to wit:

> Neither reason nor authority prohibits a board of education from manifesting its policy decisions in written form and calling the writing an agreement or contract. It can not be seriously argued that entering into such agreement is a departure from, or surrender of, independent exercise of a board's policy-making power. 41 Ohio St. (2d) 127, 134.

The same thought was expressed in another manner by the Supreme Court of Colorado:

> The fact that the municipality engages in collective bargaining does not necessarily mean that it has surrended its decision making authority with respect to public employment. The final decision as to what terms and conditions of employment the municipality will agree to, or whether it will agree at all, still rests solely with its legislative body. Fellows v. La Tronica 377 P. 2d 547, 551 (1962).

The foregoing view of the bargaining process is undoubtedly correct. The only viable means of coercing employer acceptance of bargaining demands is the employee work stoppage and the General Assembly has expressly denied that "economic weapon" to public employees. See R.C. Chapter 4117 and Diebler v. Denton, 49 Ohio App. (2d) 303, 313-14 (1976).

In 1976 the Ohio Supreme Court reaffirmed its Dayton Teachers Assn. decision in the case of Civil Service Personnel Assn. v. Akron, 48 Ohio St. (2d) 25 where it stated: "This court has recently recognized the right of public employees, under appropriate circumstances, to bargain collectively." 48 Ohio St. (2d) 25, 28.

The Supreme Court again reaffirmed Dayton Teachers Assn. and elaborated on the "unlawful delegation" issue in Loveland Educ. Assn. v. Board of Educ., 58 Ohio St. (2d) 31 (1979), which involved the question of whether a recognition agreement which outlined procedures to be followed in the process of negotiating a collective bargaining agreement constituted an unlawful delegation of responsibilty by a public employer. Noting the absence of any requirement that the parties reach an agreement, the Supreme Court found no unlawful delegation:

> [Appellants contend] that acknowledging the validity of these preliminary agreements would place a judicial stamp of approval on an unlawful delegation and impairment of the board's statutory responsibility to manage and control its schools.
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> . . . .
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> The critical inquiry, whether it involves a collective bargaining agreement or a preliminary agreement depicitng the process of negotiation directed towards that end, is whether either accord "conflict[s] with or purport[s] to abrogate the duties and responsibilities imposed upon the board of education by law." Dayton Teachers Assn., supra. For example, a clause in the recognition agreement providing for binding issue arbitration concerning the terms of a proposed collective bargaining agreement would be an unlawful delegation of the board's statutory obligations.
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> [T] here is a conspicuous absence [in the recognition agreement] of any language that could be construed to require the parties to reach a final agreement. The limited extent of the undertaking on behalf of the school board is set forth in Article IV, which states:
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> "This recognition constitutes an agreement between the Board and the Association to attempt to reach mutual understandings regarding terms and conditions of employment for members of the negotiating unit. * * *"
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> In conclusion, a recognition agreement, voluntrailly executed by a board of education and a teachers association, outlining procedures to be followed in the process of negotiating for a collective bargaining agreement does not conflict with or purport to abrogate the duties and responsibilities imposed upon a board of education by law. 58 Ohio St. (2d) 31, 32-6.

Turning specifically to the powers and duties of the director of mental health and mental retardation ("the director"), I find no statutory indication that his authority in the area of employee relations would be any less than that of other public sector employers. Indeed, there is significant statutory support for a broad reading of his discretion in relation to employee matters. The director is empowered by R.C. 5119.01 to supervise and determine general policies for each of the department's divisions. The division chiefs, in turn, have "entire executive charge" of their divisions, including the selection of employees, subject to the supervision of the director. At the institutional level, the managing officers of each institution have "entire executive charge" of their facilities including the appointment of employees and the assignment of their duties. R.C. 5119.48-.49. In addition to the foregoing express powers, R.C. 5119.46 states:

> The department of mental health and mental retardation, in addition to the powers expressly conferred, shall have all power and authority necessary for the full and efficient exercise of the executive, administrative, and fiscal supervision over the state institutions described in section 5119.05 of the Revised Code.

Naturally, the director is subject to all the express requirements of R.C. Chapter 124 and R.C. 5119.071 regarding employee matters but, as recognized in North Royalton Educ. Assn., supra, public sector collective bargaining may

"anticipate and take account of existing law so as not to conflict with it." 41 Ohio App. (2d) 209, 216.

I am constrained by the foregoing Ohio judicial authorities to opine that the Department may negotiate and contract with labor organizations representing its employees.[1] In so stating, I am not unmindful of the fact that on various occasions, efforts to pass a public sector collective bargaining bill have not been successful. However, such proposed legislation was intended to grant to public employees and the labor organizations to which they belong a positive right to bargain collectively and to impose a correlative duty on public employers. To say, as I have, that a public employer has sufficient authority to voluntarily agree to bargain and contract is far different from establishing a duty to do so. I need not, and do not, express any opinion on the latter.

The authority of the Department to negotiate and contract is not unfettered or absolute. It does not include for instance the authority to:

(a) Ignore, disobey, or negotiate contract terms which conflict with laws (or rules validly promulgated thereunder) relative to employee wages, hours or working conditions.

(b) Delegate or abjure its discretionary executive responsibilities relative to employee and institutional matters imposed by law.

(c) Bind itself to reach a final agreement or permit third parties to mandate contract terms.

Having decided that the Department possesses sufficient authority to engage in collective bargaining with its employees, we must next consider your proposed method of implementing such bargaining. Specifically, the question is whether the Department may hold employee elections at its institutions and recognize the winner of any such election as the exclusive representative of all the employees of the particular institution.

Before analyzing the applicable legal authorities, further examination of the terms "election" and "exclusive representative" is in order. Concerning the method of conducting elections, you have informed me that the elections will be conducted under the auspices of a neutral, independent third party and will include the concepts of the secret ballot, poll observers who may challenge irregularities, curtailment of election day campaigning, and resolution of any disputes (including voter eligibility questions) by the independent third party.[2] Except for professional, supervisory, and confidential employees, all employees of an institution will be eligible to vote in the election as members of the bargaining unit. In addition to listing all unions which qualify to participate in the election, the ballot will afford the employee-voters the opportunity to vote "no union." Any union which receives a majority of the votes cast by eligible employees will be recognized as the bargaining representative for the institution.

Turning to the concept of an "exclusive" bargaining agent, you have informed me that you intend a "majority rule" situation wherein the prevailing union will represent all bargaining unit employees and the Department will not bargain or contract with any other union relative to working conditions at the subject institution. Any privileges (including exclusive recognition) granted to the prevailing union will be conditioned on the latter's retention of majority support

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[1] 1967 Op. Att'y Gen. No. 67-083 is overruled.

[2] While the Department has the authority, pursuant to R.C. 5119.46, to contract for the services of an independent third party for this purpose, the compensation to be paid to such contractor is subject to the provisions of R.C. 127.16. Cf. State ex rel. Sigall v. Aetna, 45 Ohio St. 2d 308 (1976) (authority of State university to hire independent contractor).

among bargaining unit members. A decertification procedure will be available to test the question of continued majority support following a reasonable "election-certification bar" period.[3] You are also considering a denial of union dues check-off to rival, non-majority unions.[4] The terms of any contract negotiated by the exclusive bargaining agent will apply to all bargaining unit employees but you do not anticipate compulsory union membership or financial support.[5] Rival unions will not be permitted to demand a new election during the pendency of any collective bargaining agreement negotiated by the exclusive representative.[6] However, any such "contract bar" will not prevent the employees themselves (as differentiated from rival unions) from seeking decertification following a reasonable election-certification bar period.

Having examined in some detail the intended method of implementing the exclusive representative concept, we turn to the legal authorities concerning its propriety.

It can hardly be said that the choice of an exclusive bargaining agent by means of fairly conducted elections violates the "reasonable selection of method" test relative to the exercise of implied governmental powers. After all, that was precisely the method selected by Congress over three decades ago to govern private sector bargaining. Section 9(a) of the National Labor Relations Act provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer. . . . 29 U.S.C.A. §159(a).

The certification of exclusive bargaining agents pursuant to expressions of the majority will of employees was also the method selected by Congress for bargaining in the railroad and postal industries. See §2 of the Railway Labor Act (45 U.S.C. §152) and §1203 of the Postal Reorganization Act. (39 U.S.C. §1203(a)).

Nor can it be contended that the fundamental concept of choosing "exclusive" bargaining representatives by means of employee elections is per se unconstitutional. In N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct.

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[3]See Brooks v. N.L.R.B., 348 U.S. 96 (1954) upholding the federal Labor Board's authority to adopt and enforce a certification bar rule.

[4]See Bauch v. City of New York, 21 N.Y. (2d) 599, 237 N.E. (2d) 211 (1968) cert. denied 393 U.S. 834, holding that an exclusive bargaining agent may be granted exclusive dues check-off rights.

[5]The Supreme Court recently held that "agency" shop clauses in public sector collective bargaining agreements are constitutional insofar as the service charges levied against non-members are used to finance expenditures by the union for collective bargaining, contract administration and grievances adjustment purposes. A public employer may not, however, validly enforce and agency shop clause where the service charge would be used to support and ideological cause to which the employee is opposed. Abood v. Detroit Bd. of Edn, 97 S. Ct. 1782 (1977).

[6]See Maple Heights Bd. of Educ. v. Teachers Assn., 97 L.R.R.M. 2032 (C.P. Cuyahoga Co., 1977) enforcing a contract-bar provision in a public sector contract.

615 (1937), the "exclusive" bargaining agent proviso of §9(a) of the National Labor Relations Act was expressly upheld against constitutional challenges. 301 U.S. 1, 43-45, 57 S. Ct. 615, 627-8.

In reaffirming the concept of exclusive representation, the Supreme Court in N.L.R.B. v. Allis Chalmers Mfg. Co., 388 U.S. 175, 87 S. Ct. 2001 (1967), pointed out that the will of the majority is properly accorded greater weight than individual preferences in the area of collective bargaining:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. . . . Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. 'The majority-rule concept is today unquestionably at the center of our federal labor policy.' 'The complete satisfaction of all who are represented is hardly to be expected'. . . . 388 U.S. 175, 180.

Consistent with the aforesaid view, Mr. Justice Brennan recently stated in a public sector bargaining case that it was "abundantly clear" that a State may constitutionally adopt a policy that "authorizes public bodies to accord exclusive recognition to representatives by collective bargaining chosen by the majority of an appropriate unit of employees." City of Madison v. Wisconsin Employee Rel. Comm., 97 S. Ct. 421, 428 (1976).

The Supreme Court and the federal appellate courts have consistently rejected constitutional challenges to the exclusive bargaining provisions of the Railway Labor and Postal Reorganization Acts. See Virginia Ry. Co. v. Systems Federation No. 40, 57 S. Ct. 592 (1937); National Alliance of Postal & Fed. Emp. v. Klassen, 514 F. 2d 189 (D.C. Cir., 1975); National Postal Union v. Blount, 341 F. Supp. 370 (D.D.C., 1972); aff'd mem. sub. nom., Nat'l. Assn. of Letter Carriers, AFL-CIO v. Nat'l Alliance of Postal & Fed. Emp., 93 S. Ct. 67 (1972).

The federal courts have been equally consistent in rejecting various constitutional challenges to the granting of exclusive recognition, and its concomitant privileges, in the context of public sector bargaining. In a nutshell, these challenges have contended that granting exclusive rights to one union to represent all employees violates the free speech and equal protection rights of rival unions and the freedom of association rights of individual employees who would prefer alternate representation.

In 1976 the Sixth Circuit Court of Appeals in Cincinnati was confronted with constitutional challenges to an exclusive grant of collective bargaining privileges in the public sector. Memphis American Federation of Teachers v. Board of Educ., 534 F. 2d 699 (6th Cir., 1976) involved claims by a minority union and certain of its members that their rights to free speech and equal protection had been violated. The challenged action was that of the Memphis Board of Education in recognizing a majority union as the exclusive bargaining representative of all teacher personnel and in granting this majority union exclusive use of school bulletin boards, delivery services (including faculty mailboxes), meeting facilities and dues check-off.

The Sixth Circuit initially considered plaintiffs' First Amendment claim and rejected it:

> The grant of exclusive privileges by the Board to MEA did not involve the Board in regulating either the content or the subject matter of speech in its schools. The Board neither censored nor promoted a particular point of view. MEA was granted privileges because it was the recognized collective bargaining representative of well over two-thirds of the professional employees in the Memphis City Schools, and not because the Board attempted to regulate the content of the message conveyed to those professional employees. The exclusive privileges granted to MEA did not in any way impair the independent rights of other groups of teachers to exercise their First Amendment rights in the context of the school setting.
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> In the absence of any attempt by the Board to restrict the content or subject matter of speech in its schools, we agree with the holding of the District Judge that no substantive abridgement of First Amendment rights has been established by MAFT. 534 F. 2d 699, 702.

Essentially the same First Amendment challenge was made in Connecticut State Fed. of Teachers v. Board of Educ., 538 F. 2d 471 (2nd Cir., 1976) wherein the facts were practically identical to those in Memphis. The Second Circuit rejected plaintiff's First Amendment challenge. In so doing, it emphasized the non-public nature of the communications at issue:

> [A]ppellants are the members of a minority union which seeks to use the school's internal channels of communications to increase its power and status among the teachers, so that it may eventually become the majority union and exclusive bargaining representative.
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> The defendants . . . have established the school mailboxes and bulletin boards for the primary purpose of internal communication of school-related matters to the teachers. This is the normal use of these facilities. The boards have no constitutional obligation per se to let any organization use the school mailboxes, bulletin boards, or meeting rooms, to communicate its views to the teachers, whether or not the subject-matter of the communication is school-related. . . .
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> Further, it is questionable whether the types of communications appellants would make through these facilities, being primarily union and employment related matters, and of interest mainly to other teachers, are "public" communications. See Roseman v. Indiana University of Pennsylvania, 520 F. 2d 1364 (3 Cir. 1975). . . . As did the Third Circuit in Roseman, we conclude that since appellants seek to use facilities not open to the general public, and to transmit communications of limited public interest, the First Amendment interests in allowing them access to these facilities are "correspondingly reduced." 538 F. 2d 471, 479, 81.

Another important factor in the Second Circuit's analysis of the First Amendment issue was the availability of alternate means of communication, including on-premises solicitations between fellow employees during non-working times:

> The availability of alternative means of communication is a relevant factor in any case in which First Amendment rights are arrayed against asserted governmental interests. [Citations omitted]. Here, the appellants have numerous adequate, alternative opportunities to reach their desired audience. Absent specific allegations to the contrary, we can fairly assume that teachers in a given school may discuss union-related matters with each other before and after school and during mutual free periods and lunch.

> They may confer on these matters or pass union notices to each other in the teachers' lounge, the halls, and in each others' classrooms, when this does not interfere with the performance of their teaching duties. The notices may even be mailed to teachers' homes. Teachers may call each other at home to discuss union matters, or meet off-campus. The existence of such opportunities for communication among teachers . . . make the mere denial to CFT of the right to post notices on the school bulletin boards, or to distribute notices through the teachers' mailboxes, so inconsequential that it cannot be considered an infringement of First Amendment rights of free speech. These alternative means of communication may also be utilized in the exercise of associational rights, and therefore the denial of CFT of access to mailboxes, bulletin boards, and meeting rooms is only a de minimis interference with those rights. Id. at 481.

Turning from the first Amendment issues to the matter of equal protection, the Sixth Circuit in Memphis American Federation of Teachers, supra, held that since the recognition of one organization as exclusive bargaining agent and the concomitant grant of certain privileges involved neither fundamental constitutional rights nor suspect classifications of citizens, the question was whether the actions of the public employer were rationally related to achieving a valid state objective. Applying this "rationale basis" test, the Court found no violation:

> It is clear that the goal of labor peace and stability was promoted by the Board's recognizing and attempting to deal with the organization which more than two-thirds of the Board's professional employees had chosen to join. . . . We agree that the preferred status of MEA was rationally related to the valid state objective of ensuring labor stability.
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> MEA's status was made contingent upon its continued ability to demonstrate that it represented over two-thirds of the professional employees in the Memphis school system. This fact alone compels us to conclude that the specail privileges accorded to MEA were based solely upon its status as a majority representative and as such were rationally related to the goal of labor peace.
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> The District Judge held that the Board's action was violative of the Equal Protection Clause and ordered that equal privileges be accorded not only to MAFT, but also to all other organizations of professional personnel whose membership was in excess of 225; . . . .
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> . . . The District Judge erred to the extent that he ruled that the Board's classification was not rationally related to promoting labor stability.
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> . . .We hold that the grant of exclusive privileges to MEA by the Memphis Board of Education violated no First Amendment rights, and that the grant of those privileges survives rational basis scrutiny under the Equal Protection Clause. 534 F. 2d 699, 703.

An equal protection claim was also asserted in the Connecticut State Federation of Teachers case, supra:

> Appellants also argue that by granting the CEA affiliates . . . use of mailboxes, bulletin boards, and meeting facilities; by giving CEA affiliates . . . dues check-off privileges; and by permitting teachers . . . to rescind their check-off authorizations only at specified times, the respective school boards discriminate against

> CFT affiliates and their members in violation of the Equal Protection Clause. Specifically, they claim the grant of these privileges gives the majority union in each town a significant advantage in attracting and keeping members, and in maintaining its status as the majority union and exclusive bargaining representative. 538 F. 2d 471, 477.

The Second Circuit abstained from deciding the equal protection issue but its discussion of that issue pointed out a highly useful test relative to the extent to which exclusive privileges may be accorded to the majority union:

> [T]he school boards might be able to make a threshold showing that there is no "discrimination" because, as respects the purpose of the privileges granted, the CEA and CFT locals are not similarly situated. This would be in accordance with the principle that the equal protection clause does not deny to government the power to treat different classes in different ways, but rather only denies government the power to accord different treatment to persons placed into different classes on the basis of criteria wholly unrelated to legitimate governmental objectives. [Citations omitted]. Such a showing, if it could be made, would presumably take the form of demonstrating that the privileges extended to the (majority) CEA locals are reasonably necessary to the performance of the exclusive representational responsibilities placed on these locals . . . and not simply devices which give the CEA locals advantages in entrenching themselves as the majority unions, at the expense of the CFT locals. Id. at 483.

Pursuant to this test, any grant of exclusive privilege to the majority union would be sustained if it were reasonably necessary to facilitate the bargaining agent's exercise of its representational responsibilites. The bargaining agent qua bargaining agent may be given those privileges it reasonably needs to perform its duty of representing all bargaining unit members.[7] However, the purpose of any grant of exclusive privilege to the bargaining agent may not be to entrench it as the majority union.

There is a final question implicit in your request. You state that you intend to conduct the elections and recognize exclusive bargaining agents at individual institutions. In traditional labor parlance, this would raise the question of whether a single institution is an "appropriate bargaining unit." However, since the derivation of the latter term is statutory, it cannot be automatically inserted as the essential test. Fortunately, the Ohio Supreme Court has given ample guidance in this area and has incorporated the essential concept behind the "appropriate bargaining unit" concept.

In Civil Service Personnel Assn. v. Akron, 48 Ohio St. (2d) 25 (1976), the city recognized one union as the bargaining representative of all its civil service employees. In the midst of bargaining towards a new contract, the employees of certain city departments sought an election to carve themselves out as a separate bargaining unit. The "separatist" employees contended that they lacked a "community of interest" with the employees in the broader bargaining unit and that they should be permitted their own unit. The Supreme Court agreed and held that the right of employees sharing a mutual community of interest to have their own bargaining unit and representative was within the penumbra of their employer-granted "right" to bargain collectively, to wit:

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[7]It is assumed that all rival, non-majority unions will be treated similarly and that the only entity accorded exclusive privileges will be the bargaining agent qua bargaining agent. Any post-certification discrimination among minority unions would be difficult to justify and certainly could not be justified on the basis of granting necessary opportunities to the bargaining agent. See Clifford v. Moritz, No. C-2-79-414, Southern District of Ohio, Eastern Div., June 19, 1979, Kinneary, J.

> This court has recently recognized the right of public employees, under appropriate circumstances, to bargain collectively. See Dayton Teachers Assn. v. Dayton Bd. of Edn. (1975), 41 Ohio St. 2d 127, 323 N.E. 2d 714. That right cannot be effectively eliminated for a significant number of such employees through the employer's selection of a bargaining representative that is clearly and convincingly foreign to their interest. 48 Ohio St. (2d) 25, 28.

The lesson of the foregoing case is that a public employer who grants a right of collective bargaining to its employees and their representative may be compelled to bargain on the basis of bargaining units composed of persons sharing a community of interest in their working conditions. Given the autonomy of the managing officers at each mental health institution (R.C. 5119.48-.49), the lack of significant employee interchange among institutions, and the geographic isolation of many institutions, it would certainly appear that the individual institution is an appropriate bargaining unit in the Department of Mental Health and Mental Retardation.[8] Bargaining on an institution-wide basis would not appear to entail an excessive fragmentation and would accord with the Department's basic organizational make-up. Compare St. Vincent's Hospital v. N.L.R.B., 567 F. 2d 588 (3rd Cir., 1977).

Based upon the foregoing, I conclude that the Department may implement collective bargaining at individual institutions on the basis of selecting exclusive bargaining agents via employee elections.[9]

In specific response to your questions, it is, therefore, my opinion, and you are advised, that:

1. The Ohio Department of Mental Health and Mental Retardation may voluntarily negotiate and contract with labor organizations representing its employees, provided that the Department does not conduct the negotiations in a manner which amounts to a delegation of executive responsibility or enter into contracts, the terms of which conflict with Ohio law. 1967 Op. Att'y Gen. No. 67-083 overruled.

2. The Ohio Department of Mental Health and Mental Retardation may conduct an election, or may contract with an independent third party to conduct an election, to determine if a majority of the Department's employees at any particular facility wish to be represented by a single labor organization.

3. The Ohio Department of Mental Health and Mental Retardation may recognize a labor organization, elected by a majority of the employees at any particular facility, as the exclusive representative of all the employees at that facility, and may grant to that organization such exclusive privileges as are reasonably necessary to the performance of the organization's representational responsibilites.

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[8] I express no opinion on what might constitute an appropriate unit of employees sharing a community of interest in other departments or agencies. For guidance in that regard see Sullivan "Appropriate Unit Determinations in Public Employee Collective Bargaining" 19 Mercer Law Rev. 402 (1969) and In re Columbia Hospital, 87 LRRM 2727, 2728-9 (Pa., 1974).

[9] This opinion assumes that there are no problems of promissory estoppel relative to existing contracts or bargaining relationships between the Department and labor organizations previously recognized as representatives of its employees. You have informed me that all public employee unions who have previously been recognized as bargaining agents and who have contracts with the department are amenable to converting to the exclusive representative system proposed in your opinion request.