bonds purchased by you. These bonds comprise parts of two issues of bonds—one in the aggregate amount of $598,600 of an authorized aggregate of $3,377,600, relief, sanitary and storm sewer fund No. 1 bonds, dated February 1, 1936, as of December 15, 1933, bearing interest at the rate of 2¾% per annum; the other part of an aggregate of $186,000 of an authorized aggregate $400,000, Main Street bridge fund No. 1 bonds, dated February 1, 1936, as of May 1, 1934, bearing interest at the rate of 2¾% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said city.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

745.

EXCLUSIVE EMPLOYMENT OF UNION LABOR IS UNCONSTITUTIONAL—LABOR CONTRACTS, LAWFUL, WHEN—COLLECTIVE BARGAINING, GOVERNMENT MAY NOT—COUNTY ENGINEERS MAY NOT CONTRACT TO USE UION LABOR EXCLUSIVELY—SUCH CONTRACT VOID.

SYLLABUS:

Exclusive employment of union labor on public work is an unconstitutional class distinction or discrimination. Although it is well established that labor contracts are lawful between private employers and their employes, such contracts are not similarly applicable to service of the government, and there is not the same basis of reason for collecitve bargaining between a government and its employes as there is in private enterprise. A contract by a county engineer to the effect that he would employ only teamsters, chauffeurs, stablemen, and helpers who are members of a local union, affiliated with an international brotherhood, is contrary to the constitutional principle which has thus far prevailed; hence it is beyond the authority of the engineer and is void.

COLUMBUS, OHIO, May 17, 1937.

HON. PAUL D. REAGAN, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR: This is in answer to your recent inquiry which reads as follows:

"Recently, the County Engineer had labor difficulties with Local Union No. 295 in connection with his county trucks. Certain demands were made and, after a conference between the representatives of the Union and the Engineer, an agreement was made to be effective for one year, and enclosed is a copy of such agreement.

The Engineer desires to know if he has authority to sign a written agreement such as I have enclosed to bind the County of Trumbull Highway Department.

Will you kindly furnish me an opinion in response to this inquiry."

The agreement herein referred to reads as follows:

"THIS AGREEMENT entered into this 29th day of April, 1937, between The Trumbull County Highway Department (hereinafter referred to as the 'Department') and local Union No. 295 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America (hereinafter referred to as the 'Union').

ARTICLE 1.

It is agreed that only members of the Union shall drive trucks of one and one-half tons capacity or more used by the Department.

ARTICLE 2.

The work week shall start at eight (8) o'clock a. m. on Monday and shall end at four-thirty (4:30) o'clock p. m. on Friday.

ARTICLE 3.

The work day shall start at eight (8) o'clock a. m. and shall end at four-thirty (4:30) o'clock p. m. with one-half (½) hour of this time allowed for lunch.

ARTICLE 4.

It is agreed that all work done before or after the time set forth the work week in Article 2 of this Agreement, and all work

done before or after the time set for the work day in Article 3 of this Agreement shall be considered as extra work, said work to be paid for by the Department at the regular rate of compensation as set forth elsewhere in this Agreement.

ARTICLE 5.

The rate of compensation shall be sixty-five (65) cents per hour for all work done, provided, however, that any employee who is receiving more than sixty-five (65) cents per hour at the present time shall not suffer any reduction in rate of compensation because of this Agreement.

ARTICLE 6.

Representatives of the Union will at all times be recognized by the Department in the adjustment of grievances involving members of the Union.

There shall be no discrimination, interference, restraint, or coercion by the Department or any of its agents against any member of the Union because of membership in the Union, because of activity in behalf of the Union, or because of holding an office in said Union.

ARTICLE 7.

It is agreed between the parties hereto that any work done on Saturdays shall be rotated among the respective truck drivers.

ARTICLE 8.

It shall not be a violation of this Agreement for any member of the Union to refuse to go through any picket lines.

ARTICLE 9.

It is further agreed that in the best interest of both parties there shall be no strike, cessation of work, or lockout until such time as any grievance that may arise has been discussed by both parties. Should either party refuse to discuss any grievance for the purpose of adjusting said grievance satisfactorily, or if it is impossible to reach a satisfactory settlement of any grievance, then shall this Agreement become null and void.

ARTICLE 10.

This Agreement shall continue in full force and effect until December 31, 1937, inclusive, provided, however, that either party may terminate this Agreement by giving thirty (30) days' notice in writing to the other party.

TRUMBULL COUNTY HIGHWAY DEPARTMENT
By .....
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 295.
By .....
....."

Provisions for the establishment and the operation of the office of county surveyor (now designated the county engineer) are made in Sections 2782, et seq., General Code. The duties are prescribed in Section 2792, General Code, which reads:

"The county surveyor shall perform all duties for the county now or hereafter authorized or declared by law to be done by a civil engineer or surveyor. He shall prepare all plans, specifications, details, estimates of costs, and submit forms of contracts for the construction or repair of all bridges, culverts, roads, drains, ditches, and other improvements, except buildings constructed under the authority of any board within and for the county. When required by the commissioners, he shall inspect all bridges and culverts, and on or before the first of June of each year report their condition to the commissioners. Such report shall be made oftener if the commissioners so require. Provided, the county surveyor shall not be required to prepare plans, specifications, details, estimates or costs or forms of contracts for emergency repairs authorized under Section 2792-1, General Code, unless he deems them to be necessary."

Section 2792-1, General Code, in part, provides that:

"For the purposes of this act, necessary repairs, the total cost of which is not more than two hundred dollars, shall be deemed emergency repairs.

> The Commissioners are hereby authorized to appropriate a sum of money each year sufficient to enable the surveyor to carry out the purposes of this section. All expenses incurred in employing extra help or in purchasing materials used in such repairs shall be paid from such fund on vouchers signed by the county surveyor."

The duties of such an office, provided for by statute, are to be strictly construed. They are thus limited to those implicit in the statutes and those arising by necessary implication from the primary powers granted. It is assumed, therefore, that like other county officers who hire their own deputies, assistants, and clerks that the county engineer has adequate authority to engage all employes necessary for his work; that is, within the limitations of the funds appropriated, under his estimated budget, by the county commissioners.

In this connection, Division III of Title X, General Code, which is devoted to the salaries of county officers, details the provisions for those employes. It reads:

> "Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers, or *other employes* for their respective offices, fix their compensation, and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. * * *" (Italics the writer's.)

In support of the statutory authority are a number of opinions by previous Attorneys General.

County surveyors are authorized by Section 2981, General Code, to appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, 1928 O. A. G., Volume IV, page 2990.

Under Section 2981, General Code, the authority to appoint a deputy county surveyor or assistant is in the county surveyor, and not in the county commissioners, 1929 O. A. G. Volume I, page 407.

County commissioners have no authority to fix the number or compensation of assistants to county officials but compensation of assistants is not to exceed the appropriation of the commissioners. 1927 O. A. G. Volume IV, page 2432.

Returning to Title X, Chapter 6, which deals fully with the office and the duties of the county engineer, it is observed that under Section 2788-1, General Code, that official is authorized to designate one of his

deputies as county maintenance engineer. The second part of the section reads:

> "The county surveyor, when authorized by the county commissioners, shall appoint a maintenance supervisor or supervisors to have charge of the maintenance of improved highways within a district or districts established by the commissioners and surveyor and containing not less than ten miles of improved county roads. Such maintenance supervisor shall act under the direction of the county surveyor, and the county surveyor, when authorized by the commissioners, *shall establish a patrol or gang system of maintenance* under direct charge of such supervisor * * *" (Italics the writers.)

Relying on the authority to establish a "patrol or gang system of maintenance," as well as on the authority in the county engineer, under Section 2981, General Code, to appoint "deputies, clerks, bookkeepers or other employes," it appears clear that the county engineer of any county would be the proper officer to employ such workmen as those discussed in your letter. Just as clearly, under Section 2981, General Code, he would properly "fix their compensation," with only the limitation that all the wages and salaries fixed by him must not exceed the aggregate for his office appropriated by the county commissioners. (See *Commissioners* vs. *Rafferty,* 19 N. P. (N. S.) 97.

The duties of the county engineer in regard to drainage are set forth in Sections 6466, et seq., General Code, in regard to road construction and improvement by county commissioners in Sections 6911, et seq., General Code, in regard to a county system of highways in Sections 6966, et seq., General Code, and as to his acting as county highway superintendent in Sections 7181, et seq., General Code.

Under Section 7184, General Code, the duties of the office are again set forth. The section reads:

> "The county surveyor shall have general charge of the construction, improvement, maintenance, and repair of all bridges and highways within his county under the jurisdiction of the county commissioners. The county surveyor shall also have general charge of the construction, reconstruction, resurfacing, or improvement of roads by township trustees under provisions of Sections 3298-1 to 3298-15a, inclusive, General Code. The county surveyor shall have general charge of the construction, reconstruction, resurfacing, or improvement of the roads of a road district under provisions of Sections 3298-25

> to 3298-53, inclusive, General Code. The county surveyor shall not be authorized, however, to perform any duties in connection with the repair, maintenance, or dragging of roads of township trustees, except that upon the request of any board of township trustees he shall be required to inspect any road or roads designated by them and advise them as to the best methods of repairing, maintaining, or dragging the same."

Provision for the appointment of the county engineer to the position of resident engineer for the state, or as termed in the statute "resident district deputy director," is made in Section 1183, General Code. The county engineer may thus combine the two positions; otherwise, the State Director of Highways is authorized to appoint an engineer especially to represent him in the prescribed district.

Section 7198, General Code, relates to force account or direct labor. It reads:

> "The county surveyor when authorized by the county commissioners *may employ such laborers* and teams, lease such implements and tools and purchase such material as may be necessary in the construction, reconstruction, improvement, maintenance, or repair of roads, bridges, and culverts by force account." (Italics the writers.)

Section 7200, authorizes the commissioners to purchase such machinery, tools, or other equipment as they deem necessary, and also provide that all such property shall be under the custody of the county engineer.

In keeping with these two sections, there is a long line of opinions by previous Attorneys General.

By virtue of Sections 7198 and 7200, General Code, the county surveyor, if first authorized by the county commissioners, may employ a mechanic whose duty it will be to keep in repair the road machinery and road repair trucks of the county. The compensation of the mechanic should be paid from the road maintenance fund. 1921 O. A. G., Volume I, page 374.

The county surveyor is without authority to pay workmen engaged in the repair and maintenance of roads for the time spent in going to and from the place designated by the proper authority as the place to report for labor. 1927 O. A. G., Volume I, page 201.

The word "laborers" as used in Section 7198, should be liberally construed to effect the purpose intended, and includes such foremen, laborers, engineers, mechanics, and other persons as may be necessary

efficiently to accomplish the road work in question. 1927 O.A.G., Volume I, page 201.

In the maintenance and repair of county roads which is authorized to be done by force account and without contract, *the employment of the necessary laborers rests with the county surveyor* and not with the commissioners, 1930 O. A. G. Volume II, page 1136.

When the county commissioners have authorized the surveyor to construct or improve a road by force account, the surveyor has the sole power to contract with laborers, and approval by the commissioners is not necessary as a condition precedent to payment of such wages. 1931 O. A. G., Volume I, page 527.

From the foregoing, the multitudinous duties of the county engineer appear with a fair degree of certainty. His duties are prescribed by statute; hence he has no others.

In the particular case under consideration, the county engineer, according to information from the State Highway Department, is not a resident engineer representing the State Director, as he might have been by appointment under Section 1183, General Code. Thus his work is confined to that done under authority of the other pertinent sections and particularly for his own county.

Since it is assumed that any major projects are let under contract, there would remain for the present consideration only the work by force account, or from every day up-keep. It would generally be confined to maintenance, patching, cleaning ditches, and mowing weeds. It is decidedly seasonal. In summer the force is increased, while with the coming of winter it is correspondingly decreased. In many counties there is not such a need for division of labor that some men are constantly engaged as truck drivers or mechanics. Rather, a man might drive a truck to the job, and there be put to work with other employes in the gang.

Control of such details has rested with the engineer, whether acting personally or through his supervisor. The engineer also, as shown above, has had authority to decide on the number of men he needed and to fix the rates of pay. His authority in all such details has been clearly recognized. That authority, however, is not without limitation, but rather it rests on the fact that the officer to whom it is entrusted stands, not as a private individual who may follow his own will, but as the representative of the county government. In consequence, he may do only that which the county as a political subdivision of the state may do.

Does the State of Ohio, or the county as a unit of the state government, have the power to sign a contract such as that submitted with your inquiry?

There is no question that a private citizen, as an employer, may sign any lawful contract that takes his fancy or appeals to his business judgment. The legal soundness of labor contracts has long been recognized.

It is now well etsablished that both statutory law and judicial decisions recognize the lawful place of labor unions in the life of the nation, and there is no negation of the principle that workmen may combine for their mutual benefit. See 16 R. C. L. 418, et seq., 24 O. J. 628; *Local Branch* vs. *Solt,* 8 O. App. 437, 28 O. C. C. 501.

Undoubtedly a labor union, when authorized by its members so to do, may make contracts in their behalf. 24 O. J. 638.

Until recently the right of an employer to contract with his employe not to join a union or to withdraw from a union was upheld. In 1931, however, there was made statutory declaration, by Section 6241-1, General Cade, to the effect that such agreements are against public policy.

The underlying philosophy as to unions is well expressed in Oakes, Organized Labor and Industrial Conflict. There, at page 7, it is said:

> "The view now universally prevailing is that labor has the same right to organize as has capital. Labor organizations are no more unlawful than any organization or combination of farmers or manufacturers, doctors, or lawyers. The right of laborers to organize unions is an exercise of the common-law right of every citizen to pursue his calling, whether of labor or business, as he, in his judgment, thinks fit. The only restriction on such organizations in seeking to accomplish their lawful purposes is that they must proceed only by lawful and peaceful means. The right to organize has been held not to be so absolute that it may be exercised under any circumstances and without any qualifications, but it must always be exercised with reasonable regard for the conflicting rights of others."

This philosophy, however, relates entirely to private enterprises. It is well to keep that reservation in mind.

The maximum number of hours which should constitute a day of labor has long been the subject of thought among both sciologists and legislators. In early English statutes such attention was given to men engaged in agricultural labor. Ben Franklin, in his day, maintained that by a proper distribution of labor the working hours could be cut in half. More recently the Congress has increasingly sought to shorten the daily hours of labor, and the legislatures of most states have shown a similar attitude. In consequence, there has been a growing sentiment to the effect that in the circumstances arising from modern industrial

conditions such laws arise logically from a proper exercise of police power.

At the same time, it is not here overlooked that owing to the conflicting economic views of judges there has been a conflict of opinion as to labor laws. In some instances, for example, statutes fixing minimum wages for women and also for minors in private industry are accepted, because of a recognized desire to protect such workers; whereas similar statutes for men have been regarded as of doubtful constitutionality.

At the same time, there is more freedom from doubt as to constitutional limitation when public work is considered. In recent years the legislatures of many states have been impressed with the belief that unskilled laborers are compelled to accept employment for inadequate wages. They have accordingly provided that unskilled laborers employed on public work of the state or municipalities shall receive not less than a specified amount per hour or per day. The power of the legislature to establish a minimum wage for state or municipal employes has been sustained. 16 R. C. L. 497; also 51 L. R. A. (N. S.) 687.

The state, in its proprietary capacity, may prescribe the conditions upon which it will permit work to be done in its behalf or in behalf of its municipalities. Not only a state, but a city may enact a minimum wage law for persons engaged on public work. Ibid. 498.

In Section 17-4, General Code, specific provision is made to the effect that any public authority in Ohio contracting for public improvement may fix a fair rate of wages to be paid by the successful bidder.

The Constitution of Ohio itself declares the prevailing principle as to hours of labor on public work. In Article II, Section 37, it is stated that:

> "Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state or any political subdivision thereof, whether done by contract or otherwise."

The legislature has enacted this constitutional principle into law by copying the language verbatim in Section 17-1, General Code. It is also provided under the Administrative Code, in Section 154-20, that for the state all employes of the several departments shall render not less than eight hours of labor each day.

There can be no doubt about the power of the state by valid legislative enactment to limit the hours of labor upon public works of the state. This rule would seem to extend to public works of counties and townships. In the case of municipalities, however, there is a sharp conflict of authorities. 24 O. J. 621.

It is thus observed that contracts to hire exclusively union labor are within the business judgment of a private employer. It is also observed that for public work the state may prescribe the hours constituting a day of labor and fix the minimum wages to be paid by a successful bidder. Is it lawful, next, for the state or a county to enter into a contract which provides that in its public service only members of a labor union will be hired?

The first objection that suggests itself is that such contracts would work a discrimination. They would draw the line of exclusion between citizens who were and who were not members of a union. Such a discrimination may be made by a person in private business, if he so chooses, but may a government in which all citizens share the benefits as well as the burdens take such a course?

Stipulations in contracts for public work, or in bids therefor that none but union labor shall be employed have been held invalid, on the ground that they make an unlawful class distinction, and tend to increase the cost of the work and prevent competitive bidding. 16 R. C. L. 426.

The case of *Adams* vs. *Brennan,* (177 Ill. 194, 52 N. E. 314) is in point. In that case, which is frequently cited, the Board of Education had entered into an agreement with a combination of labor unions to the effect that none but union labor would be employed. The contractor submitted an alternative bid in which he stated one price, if permitted to employ labor available, and a higher price, if required to hire only members of the unions. The board accepted the higher bid. A taxpayer then brought suit and the court held against the contract as awarded.

It appears upon perusal of the cases that such a stipulation by a board of education or an ordinance to a similar effect by a municipal council is ultra vires and illegal.

In L. R. A. (N. S. under Case Notes, at page 293, this view is reenforced. There it is reported that:

> "Stipulations in contracts for public work or in bids therefor, that none but union labor shall be employed, have uniformly been held invalid, on the ground that they are class discrimination, and tend to increase the cost of work and prevent competitive bidding. *Atlanta* vs. *Stein,* III Ga. 789, 51 L. R. A. 335, 36 S. E. 932; *Marshall & B. Co.* vs. *Nashville,* 109 Tenn. 495, 71 S. W. 815; *Holden* vs. *Alton,* 179 Ill. 318, 53 N. E. 556; *Lewis* vs. *Board of Education* (Mich.) 102 N. W. 756; *Fiske* vs. *People,* 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985."

Judicial decision in Ohio is also in direct support of the view that in contracts for public work exclusive employment of union labor would

be unlawful discrimination. Of special interest is the case arising from the construction of the new state office building, 125 O. S. 301. In that opinion, six judges of the court concurring, it was stated that:

> "The clear issue of the law in this case—and it is the only issue—is whether a public contract may be denied to the lowest bidder upon the sole ground that he employs only union labor, or upon the sole ground that he does not employ union labor. If an award of a public contract can be denied upon the latter ground, it could for the same reason be denied upon the former. Can our public officials permit such discrimination? Courts without exception announce the rule that no such discrimination can be made. * * *
>
> The claim is made that costly delays and added expense may occur because of possible trouble if this contract be not awarded to the bidder employing union labor. This claim assumes that a great state can not control its laws requiring public bidding; can not protect its citizens from unconstitutional discrimination. If such discrimination be permitted, all the laws controlling public bidding and requiring awards to be made to the lowest bidder have no potency. The state would be helpless.
>
> But let us assume that the shoe had been placed on the other foot, assume that public officers, anticipating labor troubles, would refuse to award a bid to a contractor employing union labor. What would be the answer of the respondents to that proposition and what would be the answer of the dissenting member of this court? In such event organized labor would protest, and rightly so; and this court would scrupulously protect it from such unconstitutional discrimination. * * *"

The central objection, therefore, appears to be that of class distinction or such a discrimination as is violative of the Constitution.

From an analysis of the thought behind a purpose to bargain collectively with a governmental unit for wages, it at once appears that there is a confusion of associated ideas. These ideas arise from regarding government in relation to public employes in exactly the same economic relation as a private employer to his employes. This is a false concept. Collective bargaining does arise logically from private enterprise, with employers and employes contending for what each deems a fair share in the product of the joint effort. It does not arise with similar logic from employment by the government in which at least ideally there can be no such conflict of interest arising from a desire to share fairly in products of labor.

Wages in industry are a chargeable part of the cost of production. With material, interest, taxes, depreciation, and reserves, they are integrated in selling price, which ordinarily is cost plus profit. Thus they are directly related to profit, and even rise or fall with profit.

Wages in government, however, have no such economic base. They are related not to profit but only to taxes, or expense of government. There is no fluctuation of demand or consumption or other economic factor to influence readjustment. There can be no increase of profit on which to predicate a demand for increase of wages. Public funds, accruing from taxes, or secondarily from bonds, are alone the source of public wages. Consequently, the reasons for collective bargaining for the mutual benefit of employes in private industry are not applicable to wages in service of the government.

If it is not a wrench to constitutional principles for a county to enter into a contract providing for the exclusive employment of union labor, so may the state adopt the same view, and if the state, the nation also. When the proposal is carried to that height, what is the outlook? The nation thereupon would say to all citizens that before they may be employed by the government they must first belong to the union of their classification.

It is hardly debatable that unions to be effective must have power and must assert discipline. If a difference of opinion arose between all the members of a union, or all the members of all the unions and the government, which authority would the union members obey? Could a government, jealous of its sovereignty, acquiesce in such an arrangement?

That question is a fine one for philosophers. Perhaps the federal government, recognizing new impulses in the economic aspect of the national life, will find the answer. Recent events indicate that profound readjustments are under way. What has been the law in one era is not always the law in another era. Even the Constitution appears to be elastic in meeting the demands for new social and economic forces. Prophecy today is therefore more hazardous than ever before. Yet until the federal government adopts such a course in relation to its employes, and thus softens or abridges what would now be regarded by the law as unconstitutional discrimination, a state government or a county government would be adventuring along paths which lack constitutional guideposts.

In view of the foregoing, and particularly the law as defining the exclusive employment of union labor as discrimination or class distinction, it is my opinion, in specific answer to your inquiry, that a county engineer has no lawful authority to sign such a contract as that submitted with your letter. The contract itself is void ab initio because it

does violence to the present interpretation of the rights of citizens under the Constitution.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

746.

COUNTY COMMISSIONERS MAY REJECT CLAIMS ALLOWED BY TOWNSHIP TRUSTEES, WHEN—MAY HEAR ADDITIONAL EVIDENCE, WHEN—DECISION FINAL, WHEN—CLAIMANT MAY APPEAL TO PROBATE COURT—COMMISSIONER MAY NOT REVERSE CLAIM ACTION OF PRIOR BOARD OF CONTROL.

SYLLABUS:

1. *The board of county commissioners may reject entirely a sheep claim allowed by township trustees under procedure set forth in Sections* 5840-5847, *inclusive, of the General Code, as such power is within the discretion given them by law under that statute.*

2. *When the county commissioners elect to hear additional evidence on claims, notice should be given to the claimant.*

3. *When the board of county commissioners in proper compliance with Section* 5846, *of the General Code, act upon a claim, their decision is final, unless the claimant appeals to the Probate Court as provided by law.*

4. *The board of county commissioners may not rescind or reverse the action on a claim taken by the prior board of county commissioners at another session.*

COLUMBUS, OHIO, June 17, 1937.

HON. NELSON CAMPBELL, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication which reads as follows:

> "R, a resident of H. township, suffered a sheep loss. Her claim was regularly presented to the Township trustees. The trustees, upon hearing, allowed the claim in the amount of $84.00 and submitted their report to the County Auditor. In due course, the claim, together with testimony, was heard by the