OPINION NO. 77-035

Syllabus:

There is no basis in law for the Department of Administrative Services to establish guidelines for minimum membership in a public employee organization for the purposes of collective bargaining.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, June 27, 1977

I have before me your request for my opinion which poses the following questions:

> (1) Is there a basis in law for the Department of Administrative Services to establish guidelines for minimum membership before an appointing authority may collectively bargain with a public employee organization?
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> (2) If there is a basis in law for such guidelines and since such guidelines exist, are they directory or mandatory?
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> 3. If there is a basis in law for such guidelines and since they exist, is there any basis in law for the percentages or are they arbitrary?
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> (4) On the basis of existing law, can an appointing authority refuse to negotiate with a labor union representing some of his employees on the basis of Administrative Services Guidelines requiring a 30% membership while at the same time enter into a contract with another labor organization representing over 30% but less than 50% thus to all intent and purpose creating but one union (a minority union) and denying representation to a smaller but equally minority union?

The legal policy in Ohio concerning collective bargaining in the public sector is not clear. Although legislation permitting public employers and employees to enter into collective bargaining agreements is currently pending before the General Assembly (H.B. No. 299; H.B. No. 325; S.B. No. 122; S.B. No. 222), current statutes do not address this issue. It is true that R.C. 9.41 permits a public employer to check off dues to labor unions or public employee organizations from the wages of its employees. There is, however, no statutory recognition of an appointing authority's ability to either recognize or collectively bargain with such a union or employee organization.

The Ohio Supreme Court has, however, recognized the right of public employees under appropriate circumstances, to bargain collectively under certain circumstances. In Dayton Teachers Association v. Dayton Board of Education, 41 Ohio St. 2d 127 (1975) the Court held that a Board of Education has discretionary authority to enter into collective bargaining agreements with its employees as long as the agreement does not conflict with or purport to abrogate the duties and responsibilities imposed upon the board by law. The authority to so contract was found in statutes designating a board of education as a body politic and corporate, and, as such, capable of contracting.

In Malone v. Court of Common Pleas, 45 Ohio St. 2d 245 (1976), however, the court indicated that the right to bargain collectively does not extend to employers who do not hold a contractual relationship with their employees. In holding that an administrative judge of the juvenile division of the court of common pleas is without authority to enter into an employment agreement with employees of the court, the Court noted at 248 as follows:

> "Unlike a board of education, a court . . . is not sui juris . . . . R.C. 2151.13 specifically provides that employees of the Juvenile Court . . . shall serve during the pleasure of the judge. These court employees do not stand in the same contractual relationship to their employees as do school teachers."

Moreover, the issue of collective bargaining in the public sector is further complicated by the operation of state civil service statutes. In Hagerman v. City of Dayton, 147 Ohio St. 313 (1947) the Court stated that the appointment, tenure, promotion, removal, transfer, lay-off, suspension, reduction, reinstatement or dismissal and working conditions of persons in the classified civil service of the state, the several counties, cities and school districts thereof are regulated exclusively by Section 10 of Article XV of the Ohio Constitution and the laws, rules and regulations enacted in pursuance thereof. There is no authority for the delegation of any powers or functions of either a municipality or its civil service appointees to any organization of any kind.

In Foltz v. City of Dayton, 27 Ohio App. 2d 35 at 42 (1976) the court stated "the civil service employees of a city have a right to bargain collectively with the city respecting their wages, hours, and conditions of their employment and have a right to designate a union to represent

them in such bargaining." However, the court went on to hold, based on Hagerman, supra, that the city's agreement with the union whereby the city was obligated to discharge its employees if they failed to pay union dues or an equivalent service charge was a police regulation in conflict with the general laws of Ohio relating to civil service. The concurring opinion noted at 44 that "there is considerable merit in defendant's argument that time has had a depreciating influence upon the holding in the Hagerman case, but under the doctrine of stare decisis, any change in existing law must emanate from the Supreme Court of Ohio."

In Civil Service Personnel Association v. City of Akron, 48 Ohio St. 2d 25 (1976), the Supreme Court affirmed the lower court's action in enjoining the execution of a collective bargaining agreement pending an employee election to determine the representative status of two competing unions. The court stated that the right of public employees to bargain collectively, as recognized in Dayton Teachers, supra, cannot be eliminated for a significant number of employees through the employer's selection of a bargaining representative. In reaching this conclusion the Court relied on broad equitable principles of fairness and noted that such principles could be applied since the rights of the parties were not clearly defined and established by law through constitutional or statutory provisions. The Court did not comment further on the basic incompatibility between civil service laws and collective bargaining that formed the basis for its decision in the Hagerman case, supra.

Thus, those decisions which have dealt with the subject of collective bargaining for public employees, present a rather confusing range of holdings. Although the permissibility and scope of collective bargaining in the public sector is, therefore, somewhat uncertain, it is unnecessary for purposes of this opinion to define the precise limits of this power. You do not inquire as to the general power of an appointing authority to enter into collective bargaining agreements. Rather, you inquire as to the authority of the Department of Administrative Services to implement guidelines in this area.

It is well settled in Ohio that an administrative agency or public officer has only such powers as are expressly delegated to him by statute and such as are necessarily implied from those delegated. State v. Switzer, 22 Ohio St. 2d 47 (1970); Stubbs v. Mitchell, 114 N.E. 2d 158 (1952); 1973 Op. Att'y Gen. No. 73-088. Thus, in order to determine if there is a basis in law for the Department of Administrative Services to establish guidelines for minimum membership before an appointing authority may collectively bargain with a public employee organization, it is necessary to consider the specific statutory power of the Department of Administrative Services.

The powers and duties of the Department of Administrative Services are contained in R.C. Chapters 123, 124 and 125. R.C. 124.02 specifically provides that all functions, powers and duties formerly exercised by the state civil service commission are vested in the Department of Administrative Services. In addition, R.C. 124.03 creates the state Personnel Board of Review to perform certain duties imposed upon the Department

of Administrative Services. R.C. 124.04 provides that the powers of the department not specifically assigned to the Personnel Board of Review are vested in the director and sets forth a non-exclusive list of powers, duties and functions. This listing is further augmented by R.C. 124.09 relating to the powers and duties of the director of the department.

The rule-making authority of the Department of Administrative Services is provided for in R.C. 124.09(A) which states as follows:

> "The director of administrative services shall:
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> (A) Subject to approval, disapproval or modification by the state personnel board of review, prescribe, amend and enforce administrative rules for the purpose of carrying out the functions, powers and duties vested in and imposed upon him by this chapter."

Thus, the Department of Administrative Services exercises broad statutory powers in the area of public employment. These powers, however, do not either expressly or implicitly extend to the issue of collective bargaining.

An agency of the state, in promulgating guidelines is in effect determining policy. The authority of such an agency to do so must be recognized by statute. In this particular situation, the Department of Administrative Services is prepared to enter into an area unknown at common law, as yet undetermined by statute and in which the case law is inconclusive. I must conclude, therefore, that there is no basis in law for the Department of Administrative Services to establish guidelines for minimum membership in a public employee organization for purposes of collective bargaining. In light of this conclusion, it is unnecessary to discuss the remaining questions.

Thus, in answer to your first question, it is my opinion and you are so advised that there is no basis in law for the Department of Administrative Services to establish guidelines for minimum membership in a public employee organization for the purposes of collective bargaining.