STATE OF KANSAS

Office of the Attorney General

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September 27, 1977

ATTORNEY GENERAL OPINION NO. 77-313

Mr. Charles N. Henson
Eidson, Lewis, Porter & Haynes
1300 Merchants National Bank Building
Topeka, Kansas 66612

Re: Public Employees--Prohibited Practices--Unlawful Assistance

Synopsis: K.S.A. 1976 Supp. 75-4333(b)(2), which prohibits a public employer from willfully dominating, interfering, or assisting in the formation, existence or administration of any employee organization, does not prohibit cooperative action by the employer and furnish assistance to the organization which only assists the employees in carrying out their independent intentions. Furnishing services, materials and facilities to an employee organization, as described herein, is not a *per se* violation of the Kansas Public Employer-Employee Act, K.S.A. 1976 Supp. 75-4321 *et seq.*

* * *

Dear Mr. Henson:

You inquire whether it is a prohibited practice, as defined by K.S.A. 1976 Supp. 75-4333(b)(2) for a school district to furnish an organization which represents its professional employees in collective negotiations with the district with services, equipment, facilities and materials which are paid for from school district funds. More specifically, you question whether the "furnishing of items of economic value to an organization representing employees for purposes of collective bargaining constitutes assistance in the . . . existence of administration of the professional employees' organization."

Such items include furnishing office material, such as paper and duplicating equipment free of charge for communications between the organization and its membership; furnishing the organization with printed copies of the professional agreement between the organization and the school district in sufficient numbers to provide each member employee with a copy thereof; permitting use of the school district buildings and facilities for membership meetings free of charge; permitting the organization to occupy office space furnished by the district for its administrative offices free of charge, or for an annual payment substantially less than the fair market value of comparable space; and permitting the organization to use the district's interbuilding mail service, including sorting and delivery by district personnel using district equipment and vehicles.

K.S.A. 1976 Supp. 75-4333(b) provides in pertinent part thus:

> "It shall be a prohibited practice for a public employer or its designated representative willfully to:
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> * * *
>
> (2) Dominate, interfere or assist in the formation, existence, or administration of any employee organization . . . ."

This language is analogous to 29 U.S.C. § 158(a)(2), which provides that it shall be an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization *or contribute financial or other support to it*. . . ." [Emphasis supplied.] The prohibition against assistance in the Kansas act is directly analogous to the prohibition against contributing financial and other support in the National Labor Relations Act, *supra*, and decisions construing the latter provision are instructive in determining the reach of the former.

In *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955), the court distinguished between "support" which was prohibited by the act, and mere "cooperation" which the act was designed to foster:

> "These two Sections [8(a)(1) and 8(a)(2)] are designed to prevent the employer from having any influence (except by free speech)

> over unions or the employees' choice thereof. 'Support' is proscribed because, as a practical matter, it cannot be separated from influence. A line must be drawn, however, between support and cooperation. Support, even though innocent, can be identified because it constitutes at least some degree of control or influence. Cooperation only assists the employees in carrying out their independent intention. If this line between cooperation and support is not recognized, the employer's fear of accusations of domination may defeat the principal purpose of the Act, which is cooperation between management and labor." 221 F.2d at 167.

This distinction has been observed in a number of cases. *See NLRB v. Post Publishing Co.*, 311 F.2d 565 (5th Cir. 1963), and cases cited therein. In that case, the court held that absent any showing of employer motivation in original organization of the union or any subsequent employer domination thereof, a course of conduct over a period of 38 years whereby the employer permitted the union to hold meetings on company property (in the cafeteria) after working hours, to print notices on the employer's duplicating equipment, and to retain annual profits totalling approximately $720 from cafeteria and vending machine operations,

> "all at the instance and request of the union and under the circumstances as herein earlier set out, is a permissible form of friendly cooperation designed to foster and resulting in uninterrupted harmonious labor-management relations, and is not the form of 'support' designed to interfere with, restrain or coerce employees in the free exercise of their right to choose or change their bargaining representative." 311 F.2d at 569-570.

The court stated thus:

> "We conclude that the Board erred in failing to properly distinguish between 'support' and 'cooperation.' . . .

> "The course of conduct engaged in by respondent in its relationship with PCCU follows that pattern of friendly and courteous cooperation, or even generous action, of the sort we feel brings about the end result in labor-management relations sought by the underlying philosophy motivating the National Labor Relations Act." 311 F.2d at 569.

In my judgment, the prohibited practice respecting assistance of employee organizations at K.S.A. 1976 Supp. 75-4333(b)(2) should be construed similarly. In K.S.A. 1976 Supp. 75-4321(a)(1), the legislative has found and declared that

> "[t]he people of this state have a fundamental interest in the development of harmonious and cooperative relationships between government and its employees . . . ."

K.S.A. 1976 Supp. 75-4333(e) states thus:

> "In the application and construction of this section, fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment shall be regarded as binding or controlling precedent."

Both the National Labor Relations Act and the Kansas Public Employer-Employee Act have a common objective which applies equally to private and public employment, the development and promotion of harmonious and cooperative relationships between employer and employees. Thus, although not controlling, federal court decisions construing 29 U.S.C. § 158(a)(2) are certainly instructive and persuasive here.

In virtually every case in which an employer's conduct has been challenged as unlawful domination, interference or support, the questioned conduct has been reviewed in the context of a host of factual circumstances comprising the employer's relationship

with its employees and the labor union as their bargaining representative. Rarely is it possible to determine merely as a matter of law, without reference to such a highly factual background, whether particular conduct is or is not unlawfully supportive. In *NLRB v. Post Publishing Co., supra,* in which the court had distinguished between permissible "cooperation" and unlawful "support," the court stated thus:

> "We have carefully reviewed the many cases cited by the Board. In practically all of them, the facts clearly demonstrate antiunion bias by the employer, financial support combined with union domination by the employer, discriminatory discharges, threats or other unfair labor practices interwoven with acts of alleged illegal financial support." 311 F.2d at 569.

Certainly, the kinds of benefits or "assistance" which are described in your letter do not suggest on their face and as a matter of law unlawful support which operates to compromise the independence of the employees' organization and their free exercise of rights granted by the Act. In *Boyle's Famous Corned Beef Co. v. NLRB,* 400 F.2d 154 (8th Cir. 1968), the court held that permitting employees to hold meetings, including an organizational meeting, on company premises on their own time, was not a *per se* violation of the act. *See also NLRB v. Post Publishing Co., supra,* and *Chicago Rawhide Mfg. Co. v. NLRB, supra.* The weight of authority tends to support the position that permitting employees to meet on the employer's time of the premises is likewise not *per se* a violation. Furnishing printed copies of the professional agreement between the district and the organization in sufficient number to permit distribution to each member employee appears to me to be an entirely permissible gesture of cooperation. Likewise, furnishing office materials, such as paper and duplicating equipment without charge for communications between the organization and its membership, is precisely the kind of conduct which the court found in *NLRB v. Post Publishing Co., supra,* to be a "permissible form of friendly cooperation," and I cannot conclude as a matter of law that it constitutes unlawful assistance to the employee organization. Permitting the organization to use the district's interbuilding mail service, whereby the employee organization mail is distributed, sorted and delivered along with the district's own interbuilding communications, is not substantially different from the kind of neutral cooperative

conduct described above. Permitting use of the district's inter-building mail service does not, in and of itself, suggest any compromise of the employee organization's independence, or any coercion of the member's free exercise of the rights granted them under the act.

Permitting the employee organization to use district office space for its administrative offices is somewhat analogous to permitting the organization to hold meetings of its members on school property, the latter being clearly permissible. Certainly, it may constitute a valuable economic benefit to the employee organization. However, every valuable economic benefit, in the form of assistance or support, is not prohibited by the act. Obviously, if a competing employee organization were to allege a pattern of conduct by the district to undermine its independence, to create a relationship of dependence and weakness, and to dominate its activities, by granting preferential conduct to an existing organization to which it extended certain benefits, such as housing for its administrative quarters, and denying such benefits to the competing employee organization, making available such housing to one organization and not to another might well be found to constitute domination, interference or unlawful support. Absent any suggestion, however, supported by some factual basis that permitting use of district quarters to house administrative offices of the employee organization tends or operates, in and of itself, to compromise the independence of the employee organization, to foster a dependent and timid approach to the district by the organization on behalf of its member employees or otherwise hamper the organization in representing its members, I am not justified in concluding that this practice is *per se* unlawful assistance to the employee organization.

Yours truly,

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