



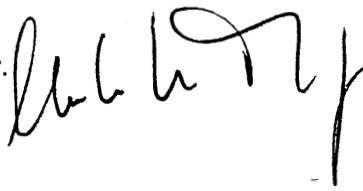
OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan  
County Executive

Charles W. Thompson, Jr.  
County Attorney

MEMORANDUM

TO: Hon. Nancy Dacek,  
Councilmember

FROM: Charles W. Thompson, Jr.  
County Attorney 

DATE: April 21, 2000

RE: Union Activity on County Property

You requested by memorandum on March 6, 2000, that this Office provide advice regarding the Municipal and County Government Employees Organization ("MCGEO") distribution of materials on County Property as illustrated by the flyer attached to your memorandum. A review of the content of MCGEO union materials must be guided and limited by the applicable Collective Bargaining Agreement ("CBA") and County, State, and Federal law.

- In response to your two specific questions: First, while the County Ethics Law prohibits the use of County property or work time for personal use, Union business is not 'personal business' within the meaning of the ethics law. Since collective bargaining is authorized by the Charter and implemented by Statute and the County Code, it follows that conducting union business is public not personal business within the context of the ethics law. Second, the County does not engage in the prior review of Union materials to determine whether the **content** of a Union message constitutes "Union business", before the material is distributed. For the County to do otherwise would violate the First and Fourteenth Amendments of the U.S. Constitution and constitute the prohibited acts of dominance, restraint and interference with the administration of an employee organization in violation of the MCGEO CBA and Section 33-109 (a) (1) and (2).<sup>1</sup>

MCGEO CBA

Under the MCGEO CBA, Article 35, the County has agreed to provide union representatives with reasonable access to County workplaces during work hours to conduct Union business. The only restriction on Union business in this Article is that it not interfere with

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<sup>1</sup> Unless otherwise indicated, section references are to the Montgomery County Code (1994).

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County business and the employee's work. In assessing MCGEO's request to distribute written information to its members, there was no evidence of potential disruption or interference with work. Moreover, nothing in the MCGEO CBA delineates the acceptable form or content of union informational, educational, or advocacy materials, nor does the CBA allow or require content review prior to distribution. The CBA prescribes only the content of employer notices in Article 30, not the content of MCGEO notices.<sup>2</sup>

Section 33-101 declares that it is the public policy of Montgomery County to promote a harmonious, peaceful, and cooperative relationship between the county government and its employees through the collective bargaining process. Censorship of union materials would not foster the cooperative relationship promoted in the Code. Furthermore, the County as the employer is prohibited from interfering with, restraining, or coercing employees in the exercise of any collective bargaining rights and from dominating or interfering with the formation or administration of a Union.<sup>3</sup> Prior restraint of union materials would constitute both management interference and domination of the Union activities. These 'prohibited practices' are analogous to the provisions of the NLRA which define 'unfair labor practices'. While there is no County case law on point, several relevant cases regarding union involvement in partisan

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<sup>2</sup> Reference to Union notices also appears in MCGEO CBA, Article 36, which provides that while on "administrative leave" Union members may, *inter alia*, post notices on official departmental bulletin boards and distribute literature in non-work areas.

During my initial review of this issue, the question of the form of leave utilized for this purpose was not raised. However, it is possible that this is a related issue that we may have to address in future cases. In a recent Michigan labor case, *Michigan State AFL-CIO v. Civil Service Commission*, 566 N.W.2d 258 (1997), the Michigan Supreme Court addressed a similar issue when the State changed work rules to "clarify" under the Michigan Political Freedom Act that permissible partisan political activities by the Union could not be engaged in during the hours while the employee is on "actual duty." Siding primarily with the Union, the Court established a two prong test to determine whether a union representative was on "actual duty". The first prong requires the employee to be compensated by the employer during the time in question. Second, if being compensated by the employer, the compensation must be for the employee's duties as a public employee. While some union leave situations met the first prong of the test, the Court held that the union representatives on administrative leave for union business, did not satisfy the second prong of the test because the employee was not being compensated for the performance of his duties as a public employee. This holding permitted the union representative to engage in partisan political activities while on union administrative leave. As the Supreme Court held in *NLRB v. INS Agents Int'l*, 361 U.S. 89 (1983), there is a "basic assumption underlying collective bargaining in both the public and the private sector that the parties proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." An employee is only on "actual duty" when she is performing the work she was specifically employed to perform.

This State case also provides guidance on what constitutes working hours under the Maryland Political Freedom Act, MD. CODE ANN., Article 24, § 13-105 (1999).

<sup>3</sup> Section 33-109 (a) (1) and (2).

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political activities have been decided under the NLRA.<sup>4</sup> Post distribution review of the materials and action that can be taken based on that review are different issues and in some contexts, based upon certain facts, might warrant assertion of claims of unfair labor practices, defamation suits, disciplinary actions, or support causes of action for violation of law.

### NLRA

In *Eastex, Inc. v. National Labor Relations Board*, 437 U.S. 556 (1978), the Supreme Court of the United States upheld a National Labor Relations Board ("NLRB") ruling that a company committed an unfair labor practice by prohibiting distribution of a union newsletter. The union newsletter had urged employees to write their legislators regarding a right-to-work statute, criticized a Presidential veto of a minimum wage increase, and urged employees to register to vote to defeat the Union's "enemies" and elect their "friends." The Court found that these activities came within the Act's Section 7 guarantees and were fairly characterized as concerted activity for the mutual aid and protection of the employees.<sup>5</sup> Responding to the employer's complaints that the newsletter issues were "political", the Court responded that "almost every issue can be viewed as political" and the purposes of the Act would be "frustrated if the mere characterization of conduct or speech removed it from the protection of the Act."<sup>6</sup> Moreover, the Court balanced employer and employee rights and noted that the employer had not shown that its management interests would be prejudiced by this exercise of employee rights.

The balance between employer and union interests discussed in *Eastex* was also addressed in *Hesse Corporation and Edward A. Burkhardt*, Case 17-CA-8541, National Labor Relations Board, 244 N.L.R.B. 985 (1979). In *Hesse*, union members affixed bumper stickers to their welding helmets opposing a proposed Missouri "right to work" statute. When their employer demanded that the stickers be removed, the union filed an unfair labor practice charge against the employer. The NLRB found that the employer's actions constituted an unfair labor practice. Furthermore, the Board held that the employer has the burden of establishing substantial evidence of special circumstances of interference with production before an employer may prohibit the display of a union message. *Eastex* and *Hesse*<sup>7</sup> exemplify the substantial burden

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<sup>4</sup> Montgomery County is not required to comply with the NLRA. However, NLRA decisions constitute a large proportion of labor law decisions and are often utilized as persuasive authority by labor arbitrators.

<sup>5</sup> The union distribution in this case occurred on private rather than public property, in the "clock alley" that led to the employee time clock, on non-work time.

<sup>6</sup> *Eastex, Inc. v. National Labor Relations Board*, 437 U.S. 556, n. 20.

<sup>7</sup> *But see Auto Workers Local 174 v. NLRB*, 645 F2d 1151, 106 LRRM 2561 (D.C. Cir. 1981), *denying review of* 244 NLRB 826, 102 LRRM 1172 (1979). In this case, the U.S. Court of Appeals for the District of

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on employers to show prejudice and interference with management rights when the employer attempts to interfere with a Union's role in providing informational, educational, or advocacy materials to its members.

The NLRB reviewed the historical role of unions in vindicating the rights of workers in *Novatel New York*, 321 NLRB No. 93 (1996). The Board explained that unions have traditionally undertaken a variety of actions to protect and advance the rights of workers. They have a long history of monitoring legislation, lobbying for legislation on a multitude of workplace issues, and conducting a broad array of worker education and training programs.<sup>8</sup> "Unions engage in this broad range of activity on behalf of both employees they represent, as well as, employees they are seeking to organize. Unions engage in this conduct, moreover, to demonstrate to employees their suitability to serve, or continue to serve, as the employee's collective-bargaining representative"<sup>9</sup> and to improve the terms and conditions of employment. The NLRB stated, however, that "it is not the province of the Board to judge the wisdom or effectiveness of conduct undertaken by the unions to demonstrate their suitability to represent employees." The County should similarly decline from judging the wisdom or effectiveness of union business and instead rely on the unions to make their own determinations on the content and quality of their literature.

This does not mean that Union discretion is completely unfettered. The Union must comply with the terms of the CBA and applicable law. Additionally, union members govern the activities of their union through elections. In cases involving free speech rights guaranteed by the First and Fourteenth Amendments of the U.S. Constitution, members may also engage in dues refund suits for the reimbursement of the portion of dues which they feel have been expended in violation of their rights. As the Court noted in *Toledo Area AFL-CIO v. Anthony G. Pizza*, 898 F.Supp. 554 (1995),

labor unions differ from corporations in that union members who disagree with a union's political activities need not give up full membership in the organization to avoid supporting its political activities. Although a union and employer may require that all bargaining unit employees become union members, a union may

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<sup>7</sup>(...continued)

Columbia Circuit upheld a Board decision denying Section 7 protection for a leaflet featuring union-endorsed candidates for public office. The court distinguished this leaflet from the newsletter in *Eastex* because its principal thrust was to induce a vote for specific candidates, not to educate employees on political issues relevant to their employment conditions. We understand that MCGEO maintains that the purpose of the flyer attached to your memorandum was to educate its members.

<sup>8</sup> *Eastex, Inc. v. National Labor Relations Board*, 437 U.S. 556 (1978).

<sup>9</sup> *Id.*

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not compel those employees to support financially 'union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment'."<sup>10</sup>

### Free Speech Guarantees

The U.S. Constitution guarantee of Free Speech is another reason that supports the conclusion that only the Union can determine if the content of a Union message is consistent with conducting "Union business." If this were not the case, the County, a government not private employer, would have to engage in the prior regulation of speech. This would present grave problems for the County under the First Amendment.

The First and Fourteenth Amendments to the U.S. Constitution guarantee freedom of speech and association to all citizens. Moreover, State law specifically guarantees the right of local government employees to engage in political activities declaring that "[e]mployment by a local entity does not affect any right or obligation of a citizen under the Constitution and laws of the United States of America or under the Constitution and laws of this State."<sup>11</sup> Freedom of speech is an exceedingly important constitutional right which encompasses the rights of political expression and association.<sup>12</sup> The Supreme Court has determined that speech on public issues is entitled to the highest level of Constitutional protection.<sup>13</sup> Moreover, the Supreme Court has recognized that public employees do not relinquish their First Amendment rights by virtue of simply accepting government employment.<sup>14</sup> These fundamental rights are not absolute<sup>15</sup>, however, and may be restricted if government can demonstrate a sufficiently important interest

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<sup>10</sup> *Toledo Area AFL-CIO v. Anthony G. Pizza*, 898 F.Supp. 554 (1995); quoting *Communications Workers v. Beck*, 487 U.S. 735 (1988). See also Gerald J. Miller, *Collective Bargaining v. The First Amendment; Court-Ordered Remedies for the Political Use of Mandatory Union Fees*, 18 U.C. Davis L.Rev. 555 (1985).

<sup>11</sup> MD CODE ANN., Art. 24, § 13-102 (1999). Such provisions have been referred to as "Anti-Hatch Acts" because their authorization of political activities by state and local government employees stands in marked contrast to the restrictions of the federal Hatch Act. *Att'y Gen. Op. No. 88-014* (March 1, 1988) (Unpublished).

<sup>12</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>13</sup> *NAACP V. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Carey v. Brown*, 447 U.S.455(1980).

<sup>14</sup> *United Autoworkers v. Ohio Education Association*, 700 N.E.2d 936 (1998), quoting *Pickering v. Bd. Of Edn. of Township High School Dist. 205*, 391 U.S. 563 (1968).

<sup>15</sup> *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947).

coupled with narrowly tailored means to accomplish that objective.<sup>16</sup>

The Supreme Court has also established that unions and their agents enjoy constitutional protection in conferring with employees to discuss unionization and its ability to improve working conditions.<sup>17</sup> This constitutional protection afforded to union conduct "is not limited to the mere narration to workers of the theoretical advantages of self-organization. Rather, the constitutional protection extended to union conduct necessarily includes the opportunity to persuade employees to action and to assist them in doing so."<sup>18</sup>

The Supreme Court has recognized that "the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."<sup>19</sup> "Permitting government officials unbridled discretion in determining whether to allow protected speech presents an unacceptable risk to both indefinitely suppressing and chilling protected speech."<sup>20</sup> Censoring or restricting the content of MCGEO's March 7<sup>th</sup> distribution to its members would have constituted an unconstitutional infringement on the employees' guaranteed rights of freedom of expression and association.

#### ARTICLE 24, §13-105

As noted previously, the prohibitions of the County Ethics Law are not violated when a employer recognized union engages in activity in furtherance of the union's business. Nevertheless, the prohibitions of Article 24, §13-105 that restrict employees from engaging in political activity while on the job during working hours might apply. Assuming the union distributed the materials to its members through its staff and not through its members, we do not see §13-105 implicated. Similarly, if members distributed the materials, but were on leave, either paid or unpaid, we do not believe that §13-105 is implicated. Regardless of our view, §13-107, provides that a violation of Article 24 constitutes a misdemeanor for which imprisonment can be imposed. Consequently, either the State's Attorney or the State Prosecutor has the authority to determine if prosecution is warranted.

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<sup>16</sup> *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

<sup>17</sup> *Novotel New York*, 321 NLRB No. 93 (1996) quoting *Central Hardware v. NLRB*, 407 U.S. 539, 543 (1972).

<sup>18</sup> *Novotel New York*, 321 NLRB No. 93 (1996).

<sup>19</sup> *FW/PBS v. City of Dallas*, 493 U.S. 215 (1990) (internal citations omitted).

<sup>20</sup> *11126 Baltimore Boulevard, Inc v. Prince George's County, Maryland*, 58 F.3d 988 (4<sup>th</sup> Cir. 1995).

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Summary

In summary, prior review and restraint of the MCGEO's distribution of information to union members would violate the MCGEO CBA, constitute prohibited practices under our Code, and violate the U.S. Constitution and State Constitution free speech guarantees. It is the public policy of Montgomery County to promote a harmonious, peaceful, and cooperative relationship between the county government and its employees through the collective bargaining process. Moreover, the County has agreed to provide reasonable access to County offices during work hours for representatives of the union to conduct union business. The County has agreed in the CBA that the expression or dissemination of any view, argument, or opinion, whether orally, in writing, or otherwise does not constitute and is not evidence of a prohibited practice by the County or the employee's organization. After balancing both the employer and union interests in this matter and for the reasons detailed above, we do not believe MCGEO's distribution of union materials could be prohibited.

I trust that this advice is fully responsive to your request and of assistance.

cc: Marta Perez, Director, Office of Human Resources  
Geno Renne, President, Municipal and County Government Employees Organization  
Walter Scheiber, Chair, Ethics Commission  
Sharon L. Mayhew  
✓ Marc P. Hansen  
David E. Stevenson  
Bernadette Lamson  
Anne T. Windle  
Edward B. Lattner  
Judson P. Garrett, Jr.  
Constance Donovan