

ATLANTIC LEGAL'S GUIDE TO
LEVELING THE PLAYING FIELD

What New Jersey Charter School Leaders
Need To Know About Union Organizing

Jackson Lewis LLP

Atlantic Legal Foundation
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LEVELING THE PLAYING FIELD

What New Jersey Charter School Leaders
Need To Know About Union Organizing

Preface

Now that charter schools have become widely accepted quality options to the conventional public schools across the nation, labor leaders continue to try to interfere. They are focused on bringing charter school teachers and other charter employees to their collective bargaining table. By doing so, they threaten the freedom that many charters were formed to enjoy.

While the decision to join a union is solely that of the charter school employee, it is important to recognize that teachers' unions at the local, state and national levels have been staunchly vocal in their opposition to charter school laws and policy. Given this political history, many charter advocates have found that organized labor's agenda is not consistent with the vision of the charter school movement that guarantees accountability in exchange for flexibility.

Charter leaders—especially board members and administrators—need to be aware of the strategies that unions may use to organize employees. They also need to know what

they are legally permitted to do—and what they cannot do—to ensure that charter school teachers and other employees have the knowledge to make a fully informed choice, should a union attempt to organize their school.

Leveling the Playing Field is a comprehensive examination of this important area and a practical guide to what New Jersey charter schools need to know about their rights and responsibilities regarding union issues. We are pleased to endorse this discussion and encourage your close review.

Jeanne Allen

President

The Center for Education Reform

Washington, D.C.

Foreword

The Atlantic Legal Foundation, a public interest law firm now in its 28th year of operation, has been proud to represent charter school advocates in New Jersey and elsewhere, contending that charters should be given freedom to permit innovative programs leading to academic success. We welcome this opportunity to serve the charter community.

Efforts to organize charter school teachers and other employees, altogether lawful, are likely to have a significant impact on the flexibility the school needs to meet its charter responsibilities, and charter administrators need to know how to react when the union seeks to represent employees.

This thorough guide—an important component of Atlantic Legal’s Charter School Advocacy Program—offers advice that is not always available from corporate or not-for-profit attorneys who often are not skilled in labor law matters. Labor law is highly specialized. Charter boards and administrators are well advised to seek counsel from firms that practice regularly in this area.

In preparing this guide Atlantic Legal has enlisted the services of Jackson Lewis LLP, a prominent national law firm whose practice is limited to representing employers in a wide variety of labor and employment law matters. This guide is the second in a series, the first of which was prepared by New York Jackson Lewis partners Thomas V. Walsh, Esq. and Roger S. Kaplan, Esq. We are grateful to Jeffrey J. Corradino, Esq., a partner in the Jackson Lewis New Jersey office, who has prepared the New Jersey edition. Messrs. Walsh and Kaplan continue to serve as Series Editors. The guidance of the Jackson Lewis firm in this contentious area is greatly appreciated.

Close attention to this discussion of union organizing efforts will ensure that charter leaders comply with the law while making their views about the merits of dealing with a union known to staff members.

William H. Slattery
President
Atlantic Legal Foundation
New York, N.Y.

I

The Landscape

The Charter School Program Act of 1995 was passed in New Jersey, as was similar legislation in many other states, to provide an alternative to the traditional public school. Indeed, in the Findings and Declarations section of the Act, the legislature stated that charter schools offer the potential “to improve public learning” and that the public policy of New Jersey is “to encourage and facilitate the development of charter schools” (N.J.S.A. § 18A: 36A-2). Many of those dissatisfied with the often lackluster performance of conventional public schools were quick to take advantage of the Charter School Program Act and within the first year, the Commissioner of Education granted sixteen charters, more than half of which were in New Jersey’s poorest Abbott Districts. At this writing, fifty-five charters have been granted, serving over 14,000 students in fourteen counties.

Leaders of the charter school movement have been staunch critics of the status quo perpetuated, in part, by rigid collective bargaining agreements that stifle the creativity and flexibility needed to test new educational delivery systems. Many observers conclude that the need for charter schools has grown in proportion to the defects in the current public

education system in New Jersey—a system in which virtually every school administration is restrained by the limits of its union contract.

Leading charter school advocates applauded the fact that the Charter School Program Act established schools “independent” of local school boards and relieved the charter school’s boards and administrations from the encumbrances of existing collective bargaining agreements. However, the law neither prevents a union from organizing charter school employees nor exempts charter schools from the burdens of collective negotiations should a union successfully organize a charter school.

Charter schools’ freedom from existing collective bargaining agreements is a luxury that should be guarded carefully. The New Jersey Education Association (“NJEA”) has its sights set on organizing charter school employees. The NJEA has organized successfully a number of New Jersey charter schools, with organizing currently going on at many others. Every charter school administration in the state must assume that its faculty has been approached by the NJEA or at least expect that they will be in the near future.

Charter school leaders must consider the overtures of organized labor with care. A visit to the websites of both the NJEA and the American Federation of Teachers (“AFT”) (the other major labor organization involved in organizing school employees) reveals a philosophy which can be summarized as follows: “charter schools are acceptable—as long as they are the same as other public schools.” While making

public statements supporting the concept of charter schools, the major educational unions can barely hide their collective glee when one survey or another concludes that charter schools underperform when compared to conventional public schools. Labor’s “support” for charter schools and its efforts to organize them is not a sign of acceptance, but a means to influence or even dominate them from within. Charter school teachers and other employees should know about the mission of the teachers’ unions and should be made aware of their rights under New Jersey law when they are asked to join a union.

What is a “Union?”

NEA International

State Federations (NJEA, for example)

Locals (Each organized public system constitute a “local”)

MEMBERS

MEMBERS

Unions are organizations made up of several layers. At the top is the “home office,” usually called the “International.” In the case of the National Education Association (“NEA”), the main office is in Washington, D.C. The New Jersey Educational Association is like a “regional office” of its affiliate, the NEA. Below the regional level are the “branch offices,” commonly called “Locals.” Generally, when the

NJEA organizes a school system, the teachers in that system form their own local.

At the bottom are the members. Every member is a member of his or her local, state federation, and international. Thus, every NJEA member helps fund the union statewide, and the NEA nationally.

This is no small matter, since all the funding for the union comes from dues and other fees paid by members. Members pay their locals. The locals keep some money, then send the rest upstairs, to the state federation and to the international.

It takes a lot of money to fund a union. The NJEA employs over 250 full time staff and over 100 part time consultants.

The choice of whether to affiliate with a union rests with school employees. However, charter school administrators cannot assume that teachers and staff have a clear understanding of labor's motives. Charter school administrators should assist employees in grasping the concept of collective bargaining. At its core, collective bargaining is economic muscle flexing which most times is contrary to collegial deliberation and consensus building. The process has limitations that charter school employees should know about before making any decision. As this guide will explain, unions can organize a school quickly and before any administrator even knows what is happening. Charter school leaders must be proactive in their approach.

Under New Jersey's Employer-Employee Relations Act, employees have the right to join a union, support a union, and take affirmative steps to make a union the legally recog-

nized bargaining agent for school employees. However, the law also guarantees employees the right to *refrain* from supporting a union. Section 5.3 of the law is explicit: “[P]ublic employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee or organization or to refrain from any such activity . . .”

Nevertheless, simply by signing an authorization card (formally referred to as an “expression of interest”), charter school staff members can authorize a union to represent them in the process of collective bargaining. Although the law grants employees freedom of choice in this regard, the law also grants certain advantages to unions. As we describe below, the law creates an environment in which employees unknowingly may obligate themselves and their charter school to a bargaining relationship. The only way to avoid this unintended consequence is through a basic knowledge of the law and an awareness of the limits and potential risks of unionization.

Why Many Charter School Leaders Do Not Want to Have a Union

While a charter school leader may have an opinion as to whether a union is desirable, the choice belongs to the employees. Having said that, there are many reasons why a school administration may see a union as an obstacle to achieving its mission.

Schools may see unions as obstacles to progressive change, based on their experiences in the traditional public school system. All evidence suggests that charters challenge the union agenda.

Besides these charter school-specific reasons, administrators may well be concerned that a union would interfere with the successful and harmonious operation of the enterprise. For example:

- An “us versus them” atmosphere can develop, often prompted by union leaders.
- Unions often reduce flexibility.
- Unions can restrict direct communications with employees.
- Union relationships require much time, energy, and extra costs, all better spent on educating children.
- An over-emphasis on seniority may hurt a merit-based system.
- Risk of labor strife may increase, and with it a loss of community.

Of course, if employees truly want union representation, they will be willing to take these chances. The final part of this guide offers some fundamental management advice in fostering a workplace in which unions would be considered unnecessary by employees.

II

How a Union Organizes Employees

The process of unionization is referred to as “union organizing,” because it “organizes” the employees for the purposes of collective action into appropriate bargaining units represented by a union.

Which Law Applies?

New Jersey’s Charter School Program Act states that charters must operate in accordance with the laws that govern other public schools. Thus, the rights of employees, the rights of unions and the rights of charter school boards, as they relate to labor relations, are governed by the New Jersey Public Employer-Employee Relations Act. The New Jersey Public Employment Relations Commission (“PERC”) is the agency charged with administering the Act.

In many ways the New Jersey state law mirrors the federal National Labor Relations Act (“NLRA”) that governs private sector labor relations. The National Labor Relations Board (“NLRB”) administers the NLRA. There are some significant differences between New Jersey law and federal law which this guide will discuss further. PERC, however, functions like a mini-NLRB and many of the legal precedents established under federal law have been adopted by PERC and the New Jersey courts.

As noted, New Jersey law establishes employees' rights to support or refrain from supporting unionization. To organize employees under the law, a union must gain written expressions of interest from employees. Typically, union authorization cards are the means used for such expression. Employees state that they designate a specific labor union to be their representative for collective bargaining purposes and sign their names to the cards. Obtaining these signed cards is essential to the union's efforts. The union's success in obtaining formal recognition as the employees' bargaining representative depends on the number of signed employee cards it can obtain (relative to the total number of employees in the bargaining unit). The union only needs to get a mathematical majority.

Significance Of Authorization Cards

- An authorization card is a binding legal document.
- It is similar to a power of attorney.
- It is likely to result in unionization without any secret ballot election.

Before reviewing the legal process further, let us consider the methods used by unions to obtain signatures.

How the Union Obtains Representation Cards

Union authorization cards often are solicited by unions and signed by employees before an employer is aware of what is taking place. The law does not require a union to announce its intention to organize the employees of any particular em-

ployer. In fact, unions are most successful when they secure employee signatures without the employer's knowledge.

Let us pause here to talk about some assumptions upon which labor laws are based. It may help explain the laws' curious, almost conspiratorial-sounding procedures.

American labor laws, both state and federal, are based on a workplace model that is now almost one hundred years old. Back then, the workplace was subject virtually to no safety laws or anti-discrimination laws, and offered employees few meaningful protections or outlets for their frustrations. Unions then were of questionable legality. Employers often responded ruthlessly to efforts to unionize their workers, retaliating against employee "troublemakers" without legal limitation. Conflict—often violent—was inherent in this employment relationship. The nation's labor laws were written while this model was still widely practiced. Employment relations have changed greatly, but labor relations laws—even the more recent New Jersey laws dealing with public employment—have not kept pace. Precedents established under labor law continue to assume that an employer will discriminate against, or even discharge, employees in retaliation for union activity.

Therefore, labor laws are designed to establish the employees' right to engage in concerted activities, and expressly forbid employers from punishing employees for exercising that right. In zealous efforts to protect employees from ill-willed employers, legal precedents interpreting labor law go several steps further. They forbid employers and their agents from questioning employees about their union activities or

those of their co-workers. Merely *asking* employees what they think about a union may be deemed coercive and intimidating. We will discuss these restrictions on employers in more detail below.

The unions charter schools will face in New Jersey are well-structured, well-funded, and skilled in recruiting new members. The AFL-CIO, as well as many of its member unions, has long taught organizers that the most successful tool of organizing is stealth. Unions are most successful when they can obtain a large number of employee signatures *without attracting the employer's attention*. They will appeal to employees to make unionization appear highly attractive, at little or no cost to the employees, without providing any negative information in an effort to get signatures swiftly.

Why this secrecy? Unions know full well that when the employer is aware of union organizing the employer lawfully will begin educating employees about the less attractive realities of unionization. Statistics and years of experience demonstrate that when employees understand the facts about unionization, both good and bad, they reject the idea of union representation more often than not.

Honest Information is Not "Union Busting"

Unions often rail against employers who oppose their interests by branding them "union busters." Unions hope this label will trigger employer silence, thereby giving the unions an advantage in securing signatures. Silence, however, does not help the school or its staff.

Unions do not want employers to discuss their views of unionization with employees. Unions do not want employers to provide employees with information about the costs of a union, the risks and limitations of collective bargaining, the rules imposed by unions on their members, and other subjects. Time and again, unions have characterized such discussions as illegal, or even immoral.

Such characterizations are simply not accurate, and are nothing more than expressions of the unions' political agenda.

Charter school employers must understand that the law does not prevent them from educating their employees about union representation. Further, school administrators are not forbidden from expressing their opinion about unionization. As for the question of "morality:" Would it be ethical to conceal relevant facts from employees? Would it be moral to remain silent and so prevent employees from making informed personal judgments? If you believe unionization would harm the mission of your school, could you serve your students and their families honorably through silence? Of course not.

It may be argued that those who want employees to hear just one side of the story are not being fair to the staff.

By providing your employees with honest factual information, you serve your charter school and your employees. The law gives employees the right to decide. You have the right, and arguably the moral obligation, to provide employees with information they would not otherwise hear.

In short, the unions want to obtain employee signatures before the employer can provide employees with the other side of the story.

Indeed, experience shows that unions frequently attempt to secure signatures from many employees at the same time by

using several organizers, and even by visiting employees at their homes. Unions refer to this approach as a “blitz.” They seek to gain as many signed cards in the shortest possible time, before the employer can respond.

The Sales Pitch: How Unions Convince Employees to Sign

Some employees are more than willing to support a union. They may feel this way because of their political beliefs, because they resent their employer, or because they do not understand the shortcomings of union representation.

In a perfect world, unions would provide employees with a balanced view of unionization. Unions would inform employees that there are limits to what can be accomplished at the bargaining table and be honest about the fact that many of the things they are concerned about will not be addressed at all. Unions would inform employees that they cannot guarantee any results, that it is possible employees could end up with less in wages and benefits than they had before bargaining, and that unions have other objectives for which they might be willing to trade these terms of employment.

Signs of Organizing Activity

There are many examples of employee conduct that may signal union organizing:

- new employee cliques form;
- new employee “leaders” emerge;
- heated discussions erupt among employees;

- the employee “rumor mill” becomes very active—and unusually negative in tone;
- employees start meeting after work;
- employees stop speaking freely to administration;
- adversarial challenges are made towards administration; and
- new vocabulary: “grievances,” “tenure,” “seniority,” etc.

Charter school administrators should educate staff before any “tell-tale signs” emerge—remember, under New Jersey law, signed cards are likely to take the place of an election.

This disclosure, unfortunately, never happens. Union officials are not required, and certainly cannot be expected, to offer employees a fair or complete explanation of the consequences of signing a representation card. Moreover, unions also rely on pro-union employees to convince their co-workers to sign with the union. Employee-organizers generally know very little about collective bargaining or about the union, and can be the source of a good deal of misinformation.

Reports over many decades unveil a pattern of deception, misdirection, or outright dishonesty by unions to get employees’ signatures. Unions routinely promise employees they will “get” a contract with better wages, benefits, and work rules—promises that they simply cannot guarantee. All too often, unions (and their employee allies) have coerced employees into signing cards by threatening that they will be fired if they do not sign a card immediately, and by other means. Such threats are not only incorrect, they are unlawful. They may also encourage employees to sign by misstating

the real meaning of the card. For example, they will make it sound inconsequential:

- “Oh, it’s nothing.”
- “It’s non-binding.”
- “It’s only to find out about free insurance.”
- “It’s just to get on their mailing list.”
- “You’re the only one who hasn’t signed.”
- “It’s just so we can have an election.”

None of these statements is true; nonetheless, they are repeated again and again—and they are very effective.

Procedure Under the Employer-Employee Relations Act: Elections are a Thing of The Past

Under New Jersey law, unions have two avenues to secure lawful representation rights of a charter school employees: voluntary recognition, or certification through the procedures of the Public Employment Relations Commission (“PERC”). The following general description of the process assumes there is no union in place.

Should a union approach a school board and request the board to recognize it as the bargaining agent for school employees, it is important to remember that there is no requirement that the board do so voluntarily. A charter school may decline to recognize a union and direct it to file a petition for certification with PERC. At PERC, the union has several options dependent upon the number of signatures the union has obtained.

At a minimum, a union seeking certification from PERC must have a valid “showing of interest” with at least thirty percent of the unit employees providing support. The showing of interest is usually in the form of signed and dated authorization cards but also may be in the form of a traditional petition. There is no standard regarding the length of time an employee signature remains valid. PERC will rule on the timeliness and validity of the showing in light of all of the circumstances, including whether the dates of the signatures suggest recent ongoing organizing. If PERC rules that the showing of interest is valid, it will convene the interested parties to agree to a date, time, and place for an election. Assuming there are no issues concerning the classifications eligible to vote in the election, PERC will conduct an election between 30 and 60 days from the date of the election agreement.

Importantly, a recent legislative victory for organized labor in New Jersey renders the aforementioned “election” procedure practically moot. Effective July 2005, the New Jersey Legislature amended the Employer-Employee Relations Act to require PERC to certify a union and require an employer to recognize and bargain with it based upon authorization cards alone. If a union convinces a bare majority of employees in a unit to sign authorization cards, the union has the option of either asking PERC to conduct an election or simply to certify the union after viewing the authorization cards. However, with a majority the union likely will not call for an election.

Elections or Card Checks? Which Protects Employees' Interests?

Unions across the nation seek to reverse decades of membership losses by eliminating the need for elections altogether. Since an election gives employees the opportunity to receive information from the employer (which tends to diminish union support), and since there is no peer pressure in a voting booth during a secret ballot election, unions do not favor balloting.

In New Jersey, organized labor has succeeded in reducing (or eliminating) the role of elections, relying more and more on the card check. In a card check, employees' choices are locked in by their signatures on authorization cards. Their signatures *are* their votes. There are many reasons why this may not reflect an informed choice, an uncoerced choice, or even a knowing choice.

Despite the obvious flaws, unions continue to argue that the card check somehow better reflects employee sentiments. They make this contention because a card check gives them an advantage—a quick decision without the checks and balances of a supervised election and at the cost of employee free choice.

Plainly, a union is best served by obtaining signatures quickly and quietly from a majority of employees. In essence, the law permits a labor union to become the legally-recognized bargaining representative of the charter school's employees simply by getting the signature cards of a majority of employees, without any discussion of the disadvantages, limitations, costs, risks, or requirements of union membership.

What's an "Appropriate Unit?"

Under the law, to obtain bargaining rights, a union needs signatures from a certain percentage of employees in an "appropriate unit" for bargaining. In essence, an appropriate unit is that group of employees whose job titles share workplace interests to the extent that it would be practical to negotiate one collective bargaining agreement to cover all of them. This is referred to as the "community of interests" test. The unit need not be the "perfect" unit, just an "appropriate" one. The unit is ultimately determined by PERC, which will examine each workplace on a case-by-case basis.

In general, school units include teachers, librarians, guidance counselors and other members of the staff that work in teaching-related positions. Because a fact-based analysis is used to decide appropriate units, no one size fits all.

There are clear *exclusions* from an appropriate unit, however. The law forbids managerial executives and their related confidential employees from being represented. The law also prevents supervisors from being in the same union as the employees they supervise.

III

What the Charter School Employer Can Do

The charter school law and the precedents under the Employer-Employee Relations Act give charter school employees the absolute right to act independently in choosing whether to support a union. Naturally, a union will emphasize that collective bargaining is permitted for charter school employees and extol its benefits.

As a practical matter, the party best suited to provide employees with the necessary information is the employer: a representative of the school administration, armed with a clear understanding of the rules of the road—what can be said and must be avoided.

Are Charter School Employers Permitted to Educate Employees About Unions?

The answer is “YES.” The Employer-Employee Relations Act establishes a framework for collective bargaining in the public sector. While the law does not affirmatively state that as an employer you have the right to provide information to employees, it also does not prohibit you from discussing unions with your employees. PERC has followed federal law and precedent that protects employer free speech. The law does provide some limitations, however. These are called “Unfair Practices” and are discussed in the text.

While we strongly recommend that you get advice from an experienced attorney before undertaking a program of communication, there are general guidelines on what you can share with employees.

In communicating with employees about unions, there are several key concepts you want to be sure employees understand.

- Our mission is to provide children with a better education through alternatives to traditional public schools.
- Employees have the right to decide for themselves whether they want union representation.
- Unions have strongly opposed charter schools.
- Unions have begun a campaign to represent charter schools, while continuing to undermine their viability and fight their existence.
- Unions make bold promises that sound wonderful ...
- But, there is a lot more to the story that they *don't* tell you.
- If anyone ever asks you to sign a union card or paper—wait until you first get all the information you need to make an informed decision.
- Elections are rare—signing a card may well be your only chance to “vote”—so you need to get the facts first before you sign anything.

Seventy years of experience under federal labor law have produced several core principles of lawful employer communication. They are equally pertinent to the public employment arena. Your communications should be limited to these categories: Facts, Opinions and Examples.

Facts: There Is No Defense Like the Truth

Facts are the best means of illustrating to employees that unions have not been wholly frank.

Employers may inform employees of any facts regarding unions, collective bargaining, the operation of the law, and the procedures of PERC. Lawful communications may include facts that are uncomplimentary to unions, such as the costs of unionization, stories of union corruption, or failures of collective bargaining. Although some facts may be unpleasant or bluntly critical, it is not unlawful to share them with employees.

What facts may you share?

There is an enormous amount of information available regarding unions. It may be shared lawfully. You will want to familiarize yourself with current information relevant to your community. Although this guide is not intended as a script for charter school employers, and you should obtain legal counsel in the event you are faced with union organizing, employees are likely to find the following facts of particular interest.

Facts about employee rights, and the limitations on their rights, under the law:

- They have the right to decide for themselves, free from coercion, whether they want—or don't want—to be represented by a union.
- The law denies them the right to a secret ballot election in most cases.

- The law does not require “full disclosure,” or even truthful disclosure, by union organizers of all the facts needed to have a balanced view.
- Signing a card now will most likely deprive them of an opportunity to make a choice later.
- Once a union is in, the agreement binds everyone in the unit.
- Decertifying (getting rid of) a union is possible, but difficult.

Institutional facts about the international unions and locals in your area, such as:

- The size and scope both of the international union and the local union, as well as their payrolls, expenditures, and political contributions.
- The initiation fee charged by the local.
- The monthly (or possibly weekly) dues charged by the local.
- The possibility of extra assessments members are required to pay.
- The rules which members must follow, which are found in both the international's constitution and in the local's by-laws. All unions must have such documents.
- Union rules generally include the right to discipline members for violations (typically through fines).

Newsworthy information about relevant local unions, including:

- The union's successes and failures in organizing.
- Collective bargaining agreement information.
- Political views and position statements made by the

union which may be contrary to the goals and principles of the charter school movement and contrary to the employees' personal beliefs.

The truth about collective bargaining:

- The union, not the teachers, decides what to propose in negotiations.
- The union bargains with the school.
- The school will make its own proposals at the bargaining table.
- The law requires good faith bargaining, but does not require either side to agree to terms it does not want.
- The parties must negotiate in good faith, but there is no time limit on how long it may take to reach agreement, and no requirement that an agreement actually be reached.
- Negotiations may result in employees receiving higher pay and benefits than they have now, the same as they have now, or *less* than they have now.
- The union may have made many promises, but it cannot guarantee any of them.
- If a union contract goes into effect, all employees in the bargaining unit are covered, whether or not they signed a card or voted for the union (no “opting out”).
- Despite the fact the New Jersey courts have ruled that public employees do not have the right to strike, school strikes can and often do happen.

Is There a “Downside” to Unionization?

Yes, although you will never hear a union talk about it. To make an informed judgment about unions—and about whether they want to become members—employees must have information about the potential negative impacts of a union.

It is not the purpose of this guide to provide an exhaustive list, but some of the most important concerns include:

Financial

Unions require members to fund the union through

- Initiation fees
- Dues
- Assessments

Unions often pressure members to contribute to their political action funds.

Risks of Negotiations

There is no guarantee that a union will obtain higher pay, better benefits or even attempt to address the issues that caused an employee to seek a union in the first place. In fact, the union cannot guarantee that negotiations will not result in a reduction of wages or benefits. While unions have had success in negotiations with many public entities, there are also failures. Charter schools are well positioned to resist union proposals they deem adverse to their mission. Conversely, the choice of either compromising its mission or incurring labor strife may be devastating to a charter school and threaten its existence.

Opinions: A Highly Persuasive Tool

Opinions are a marriage of facts and intellect to predict

a likely result, or to infer facts which as yet are unknown. The law allows employers to express their opinions regarding unionization. For charter school operators, these might include the following:

- That union values and aims are contrary to the charter school's core mission.
- That union contracts have hurt the traditional schools' ability to meet student needs.
- That the teachers' unions will seek to impose work standards and procedures that will reduce flexibility.
- That strikes are possible and a strike could devastate a charter school to the point of forcing its closure.

Union Control of Members

Unions require members to obey rules. A union will expect all its members to act and speak with one voice—dissent and individuality are strongly discouraged. This can also extend to political activities beyond the workplace. In recent years, unions have increasingly pressured members to contribute and campaign for the union's preferred political and social agenda.

Negative Impact on the Educational Mission

Despite their public relations campaigns, maximizing educational achievement is *not* the union's primary goal. Unions—by definition—are institutionally motivated to maximize the number of employees, minimize work, eliminate accountability, and to promote the lowest common denominator. Many teachers chafe under union-imposed limitations on performance.

Examples: the Power of the Press

Facts are driven home by real-world examples. The law permits you to share with employees any relevant newspaper articles, position papers, or other media pieces on subjects such as:

- Union leaders' statements in opposition to charter school approvals and legislative initiatives.
- Articles about restrictive union contract rules preventing meaningful change in the public schools.
- Websites devoted to trashing the performance of charter schools and other educational alternatives.

IV Limitations on Employer Communications with Employees

While nothing in the law prohibits a charter school employer from discussing unionization with employees, the Employer-Employee Relations Act provides a general outline of activities employers must avoid. These activities are called “Unfair Practices.” Here is the statute itself, along with some explanatory comments:

§ 34:13A-5.4 Unfair Practices;

(a) Public employers, their representatives or agents are prohibited from:

(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.

Under section (a) (1), it is an unfair practice to intentionally interfere with employees in their right to “form, join and assist” a union or “to refrain from any such activity.” This interference can take the form of adverse actions or threats of adverse actions against employees for their union activity. Ironically, interference also can take the form of providing benefits to employees or promising benefits in the face of union activity.

(2) Dominating or interfering with the formation, existence or administration of any employee organization.

Section (2) prohibits an employer from establishing an “in-house union” which it controls. It also prohibits employers from financially supporting a union, which can undermine a union’s ability to fairly represent its members.

(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act

Akin to section (1), section (3) forbids discrimination against employees based on union sentiments or activity, either for or against.

(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act.

This section prohibits an employer from taking adverse action against an employee who participates in any proceeding under the Employer-Employee Relations Act.

(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

If a union is certified, the employer must negoti-

ate in good faith with the union. The duty to negotiate in good faith does not require reaching agreement on any topic. The duty requires an employer to approach negotiations with an open mind, discuss topics raised by the union, and support its rationale for the positions it takes.

The unfair practice prohibitions might seem intimidating, but what do they mean?

The unfair practices can be the bases for charges which a complainant—usually an employee or union—may file with PERC. PERC determines whether or not the charges have merit. The remedy for a violation is for the employer to restore the situation that existed before the improper practice was committed. If an employee has lost pay due to the violation, the employee receives backpay; if an employee has been terminated, he receives an offer of reinstatement. The employer also must promise to act lawfully in the future. Charges are filed against the *employer*, not the individual supervisor or manager. There is no “fine” for a violation and unfair practices are not “crimes.”

What You Should Avoid: the Unlawful and the Counter-Productive

You have a tremendous ability to engage employees in discussion of the facts they need to know.

So what do you have to steer clear of? Although the law does limit what you can say and do, for the most part what it prohibits you probably would never do anyway. In a nutshell, the law prohibits you from engaging in the following con-

duct: threats, retaliation, interrogation, bribes and promises of bribes, and surveillance.

Having described which acts are unlawful, we can add the good news: they are easy to avoid.

Threats: No Way to Treat an Employee

The law does not allow employers to make threats to employees in connection with their support for, or activities for, the union. Some examples are obvious:

- If I find out you signed a card, you'll be sorry!
- If you bring in a union, you can forget about that extra prep time!
- If we get a union here, I'll have to find some new teachers.
- If we get a union here, I'll stop seeking your input on curriculum issues.

However, the ban also includes indirect threats, such as, "We'll never agree to a contract! Never!" Look at it this way: if a union came in, you would be required to bargain in good faith. To say in advance, "never!" tells employees that unionization is futile, because you have no intention of honoring your obligation of negotiating in good faith. That would be unlawful. So even if you feel that a union contract would harm your ability to operate, to say to employees that you never will agree to a contract is unlawfully threatening.

Avoid threats.

Retaliation: Vengeance Is No Virtue

Retaliation is likewise prohibited. This includes all forms of

discrimination against employees based on their union activity or sentiments. Employees have the right to make their own decisions. All promotion, assignment, discipline, and compensation decisions are to be made without regard to the employee's union likes or dislikes (if any). A pro-union employee should not be given preferential treatment. Indeed, to do so also would violate the law. The safe path is to conduct business as usual. Any decisions regarding an employee must be made on the merits, without consideration of union activity, one way or the other.

Interrogation: Don't Ask

Employees have the right to make their decisions on unionization without being coerced. While employers may share *facts, opinions, and examples* about unions, they should avoid asking employees questions about their possible union support or activity. Examples of improper questions include:

- Has the union been asking employees to sign cards?
- Why would you want a union here?
- Have you signed a card?
- You wouldn't sign a card, would you?
- Did Jane go to the union meeting?
- What is the union promising?
- Do you support our union-free principles?
- What is bothering you so much that you would seek union representation?

The reason supervisors and administrators may not make these inquiries is that the law generally views such questions as “inherently coercive.” Don't ask them.

Of course, there is nothing wrong with an employee expressing union sentiment, or providing information about union activities voluntarily, possibly in response to an administrator's statement of *facts, opinions, or examples*. However, you should be careful not to get drawn into asking prohibited questions.

Bribes: You Cannot Buy Your Way Out

Unions are permitted to make promises to employees, even if they cannot guarantee to deliver. However, employers are forbidden from making promises to employees, or from improving wages, benefits, or working conditions, in response to union organizing activity and to discourage employees from supporting the union.

There are two main reasons for this difference in treatment. The law promotes collective bargaining. If an employer could “buy its way out” of an obligation to bargain, unions might never prevail. Also, an employer's promise may give it an unfair advantage. After all, a union's promises are merely “campaign rhetoric” because the union can't deliver unless the employer agrees to concede those items in collective bargaining. The employer's promises, however, stand on a different footing, because it can fulfill them without any third party's agreement. (At least, that's the thinking. By the same logic, a union can make promises because they are worthless.)

Surveillance: No Big Brother

The law also prohibits the employer from “surveilling,” or spying on, union activities. A classic example of surveillance is

where an administrator stations himself outside a union meeting to see who is attending. The simple rule is, *don't spy*.

Administrators and supervisors may not attend union meetings. Any attempt to monitor attendance is a violation. (It also may be unlawful to give employees the impression that the employer is spying on them, such as by saying, "I understand you went to the union meeting yesterday.")

Of course, this rule does not apply to discussions between employees on school premises which happen to be overheard by school officials. If a school administrator happens to walk in on a union discussion in the staff room where he or she usually goes, it is not "spying."

As a charter school leader, you already are committed to observing the law. You would not abuse the public's trust by denying employees their rights. You would not discriminate against employees on any unlawful basis. Complying with the law, and avoiding the consequences of violations, is your standard operating procedure. Therefore, carefully counseled, you should not be deterred from speaking to your employees about unions.

Do Unions Have To Follow Any Rules?

Absolutely. The law specifies a list of "improper employee organization practices" as well, although it is a little shorter than the employer's list. Under the law, unions are prohibited from:

- Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this [Employer-Employee Relations] act.

- Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances.
- Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.
- Refusing to reduce a negotiated agreement to writing and to sign such agreement.

V

Collective Bargaining

If a union successfully organizes a group of employees, the process of collective bargaining will begin.

What does this mean? Charter school employees must focus upon what lies at the essence of choosing union representation. Charter school employees need to understand that if they choose union representation what they really are choosing is a process—the process of collective bargaining. Collective bargaining in its purest form is the flexing of economic muscles. The struggles at the bargaining table, many times, are in stark contrast to the collegial discourse teachers believed they were signing on for when they chose to teach in a charter school.

The New Jersey Employer-Employee Relations Act does not comprehensively define collective bargaining except for stating the requirement that the union and the employer “meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes and other terms and conditions of employment.” As with other concepts in the Employer-Employee Relations Act, New Jersey courts have looked to federal labor law for guidance when deciding issues about good faith bargaining. The National Labor

Relations Act defines bargaining in Section 8(d) as follows:

“[T]o bargain collectively is the performance of the mutual obligations of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such agreement does not compel either party to agree to a proposal or require the making of a concession.*”

We emphasize the final words of the definition to highlight an important point. While the law requires the parties to sit down and negotiate, the law does not require either side to concede on any issue. The dynamics of collective bargaining generally lead to a long, drawn-out process where virtually everything that affects an employee's work life must be hashed and rehashed, discussed and discussed again.

A charter school faces two major challenges when sitting down at the bargaining table with a union like the NJEA. The first hurdle is history. Once a union wins representation rights at a charter school, the first item on the agenda will be to establish “protections” similar to those found in traditional public school contracts. Issues such as the number of “prep” periods a teacher should receive, what constitutes a prep period (is honors math and regular math one prep or two?),

and how much compensation is due for “extra” prep periods become subject to the economic tug of war at the bargaining table. The process many times transforms highly motivated professionals into piece-workers seeking compensation on a task basis. Despite all good intentions, the institutional inertia of unions lures negotiators into following the patterns of contract in other school districts.

The second hurdle is time and resources. By nature, collective bargaining consumes a lot of time and resources—intellectual, monetary and emotional. While time and money are spent at the bargaining table, other critical needs are left wanting. Unions address this issue by charging that employers unnecessarily complicate the process by not agreeing to their demands. Faced with this conundrum, charter school employers have two choices: agree with the union’s demands even though they may be counter to the educational mission of the school; or, to stick to its principles, hold firm, and allow the process to drag on.

What Actually Happens During Bargaining?

Collective bargaining involves actual meetings between the union and the administration. The union may, or may not, have some employees present at the table. However, they will have an experienced negotiator participate. Experience is important. Collective bargaining is not like an ordinary negotiation over an individual or commercial contract. While administration officials surely will be involved in bargaining, it is highly recommended that they

obtain the assistance of experienced counsel at the negotiating table. Successful bargaining requires preparation and, yes, strategy.

There is no time limit on negotiations. The parties trade proposals back and forth, agreeing to some, rejecting others, asking questions, suggesting changes... all these are elements of bargaining.

The realities of bargaining can be devastating. A charter school seeking to break the mold of the traditional educational model and seeking innovation, responsiveness, and the flexibility to address the needs of a student population starving for a better way, likely will find itself handcuffed by the cumbersome process of collective bargaining.

On a positive note, the Employer-Employee Relations Act does set some limitations on what can be subject to bargaining. Issues such as promotional criteria, performance criteria, selection, and class size are called illegal subjects of bargaining. Unfortunately, the procedural aspects of these subjects must be negotiated and schools find themselves unable to exercise their prerogatives because of the procedural requirements. Schools also need to contend with the NJEA's aggressive approach to push the limits of the scope of bargaining. Further, the NJEA has an aggressive political agenda that seeks to expand the permissible scope of bargaining to include issues such as academic freedom and textbook selection.

Collective bargaining always raises the specter of a strike. While New Jersey courts consistently have held that public sector strikes are illegal, it is rare that a September goes by without one school system or another being at the brink of

a strike or actually involved in a strike. Despite the court's pronouncements, the NJEA and AFT publicly maintain their position that teachers have a right to strike.

There are times when a public sector negotiation becomes deadlocked. Contract dispute resolution in school cases is handled as follows. A party may file an Impasse Petition with PERC. If PERC finds impasse, that is, if negotiations are deadlocked, it will appoint a mediator to help the parties reach agreement. The mediator, however, cannot impose any terms on either party.

If mediation fails, PERC will assign a fact-finder. The fact-finder inquires into the causes and circumstances of the impasse, along with the positions of the parties. The fact-finder is empowered to make public recommendations for resolving the impasses—but he, too, cannot impose a settlement. Either party is free to accept or reject the fact-finder's report and recommendations. The purpose of the public recommendations is to put pressure on the parties to reach agreement. If fact-finding fails to resolve the impasse, PERC may order additional mediation. *In no event will there be any imposition of contract terms on the parties by any outside agency.*

What does this mean to the charter school employer? Just this: the school must bargain in good faith—which means it must make an honest and earnest effort to reach agreement. Failure to bargain in good faith may result in a PERC unfair practice charge. However, the good faith refusal of an employer to agree to terms is not unlawful. Although there are various vehicles to help reach agreement,

the law has no way to compel a charter school or a union to agree to terms it does not want.

Put plainly, a charter school may or may not be as susceptible to the political pressures which often impact a public employer. Although the issue is obviously fact sensitive, charter schools—which are not subject to governmental election campaigns—may be better suited to maintain their values and principles at the bargaining table and weather strikes and uncertainty. Otherwise, the school's mission may be compromised.

VI

Union Decertification Petitions

For any one of a number of reasons, union representation may not satisfy employee expectations. Perhaps the promises made by organizers with respect to wages or benefits when authorization cards were solicited have not been delivered; maybe heavy-handed school administrators have been replaced with ones more attuned to needs of the staff; or, staff turnover may have resulted in a workforce that would never have opted for union intervention in the first place. So, how can charter schools become free of an unwanted union? And, of greater relevance for charter school leaders, what can the employer do if it appears that the union is not really serving the interests of teachers and other members of the staff?

Employee Petitions

The Employer-Employee Relations Act accords *employees* the right to decertify their union through an election conducted by PERC. The process is similar to the process used to certify a union through an election. The “reverse” process may be initiated by a decertification petition filed by an employee, a group of employees, any individual acting on their behalf, or even another labor organization seeking to replace

the current one. The petition *cannot* be filed by the school, an administrator or other supervisor.

The petition must be supported by thirty percent of the employees in the certified unit. This support, or “showing of interest,” must be demonstrated by dated signatures on petitions or by individual cards signed and dated by the employees, asserting that the union is “no longer the representative” or the employees “no longer wish to be represented” by the union.

PERC has very explicit rules concerning when a valid decertification petition can be filed. The rules are technical and strict compliance with them is required. A union is irrefutably presumed to have majority support for the twelve month period immediately following a certification or valid election. Therefore, employees cannot ask PERC to conduct a decertification election until twelve months have passed after the union is certified by “card-check” or wins an election.

A union also is irrefutably presumed to have majority status during the life of a collective bargaining agreement. The regulations that apply to decertification in public schools provide that petitions are to be filed between September 1 and October 15, inclusive, in the last year of the agreement. The period between September 1 and October 15 is called the “open period.” For example, if an agreement is set to expire on August 31, 2007, the open period is September 1 and October 15, 2006. It is worth noting that the longest any agreement can bar an election from occurring is three years. Therefore, if the duration of the agreement is more than

three years, the bar will apply only for the first three years of the agreement. An agreement that is longer than three years will be treated as a three year agreement and the open period will be in the third year of the agreement. For example, if an agreement runs from September 1, 2005 through August 31, 2009, the open period will be September 1 through October 15, 2008. Finally, once a contract expires, a decertification petition can be filed any time prior to a new agreement being negotiated and signed.

When the petition is filed, the PERC will notify the school and request a list of employees to verify the petitioner's claim that the petition is supported by at least thirty percent of the employees in the unit. PERC will then schedule a conference and seek to obtain the parties' consent to an election. Absent consent, PERC either will order an election or conduct a hearing. Typically, the union may raise such issues as employee eligibility, the appropriateness of the unit, or the timeliness of the petition.

A union also may file unfair practice charges against the school as a defensive measure. The charges typically accuse the school of unlawfully instigating or encouraging the decertification effort. In many cases a union files charges to buy time in the hope of regaining support. A charge filed under such circumstances is called a "blocking" charge, because the petition is held in abeyance while the charge is investigated. If the PERC finds the charge to be meritless, the charge will be dismissed and the petition will be processed. If the charge articulates a reasonable basis for

believing a violation has been committed, a hearing will be held to determine the issue.

If PERC rejects the union's contentions, an election will be held in the unit described in the collective bargaining agreement. If a majority of the employees voting in an election vote to decertify the union, then the union will cease to be their collective bargaining representative.

How the School May Respond

PERC has ruled that an employer may not initiate, instigate, solicit, encourage, or assist in the filing of the petition. Therefore, a school must not plant the idea of decertification in its employees' minds through unsolicited advice. If school administrators incite a movement to oust the union, the decertification resulting petition will be tainted and dismissed, and the school's actions may be ruled unlawful.

Nonetheless, certain employer actions are permitted in *response to employees inquiries* such as:

- Informing employees of the address and phone number of PERC and advising them to contact PERC for further information, assistance and/or forms.
- Advising employees how to phrase the required statement to be signed by employees.
- Outlining for employees the contents of any letter they wish to send to the PERC seeking assistance or information.
- If specifically requested, providing employees with a list of names and addresses of unit employees.

Once a decertification petition has been filed, it is

lawful for an employer to take an active role in campaigning to decertify a union. Thus, employers may campaign as vigorously as they can in resisting initial organization. In this respect, there is little difference between certification and decertification campaigns and the rules concerning communications discussed in this guide's prior chapter apply.

Employer Petitions for an Election

In certain circumstances, an employer may file its own petition for an election, but only where the employer has reasonable cause to believe that the union has lost its majority status. PERC labels an employer petition an "RE petition."

To file an RE petition, a school must believe that the union had lost its majority status based upon "objective considerations." Whether a school has a basis to file a petition is dependent upon a number of factors, including:

- A clear manifestation that the employees no longer wish to be represented by the union;
- An absence of the union's activity; or
- An admission by a union official that the union lacks majority status.

An RE petition is processed by PERC in much the same manner as a decertification petition. Again, a majority of the employees voting in the secret ballot elec-

tion determine whether or not the union can continue as the collective bargaining representative.

In the private sector, under federal law, and under specific circumstances, current law permits an employer to “withdraw recognition” from a union without going through the petition and election process. Such a process can be a powerful tool in asserting the employer’s right to decline to deal with a union that is not supported by employees.

Unfortunately, New Jersey law covering public sector employers and employees is not as well developed as its federal counterpart. A school’s rights and obligations are not so clearly defined. A school wanting to withdraw recognition without petitioning, therefore, should carefully review all the evidence and the law with legal counsel. Aggressive “self-help” actions may be appropriate, but also may precipitate charges and a PERC proceeding if the employer acts hastily or inappropriately.

Sample Statement by Employees Who No Longer wish to be Represented by the Union

“The undersigned employees of [Employer], no longer wish to be represented by [Union].”

(Signatures go below the statement and the date of signing must be included.)

*** If employees inquire, you may lawfully advise them about the appropriate language for the statement to PERC. You may not type the statement or otherwise assist employees in its preparation.

Why Employees Might Want to Support a Union

Unions represent only a small minority of employees in the workforce. Not all of those employees support their unions wholeheartedly. The great majority inherited their union and had no choice as to whether to be represented. Indeed, most unionized employees are union because they *have to be*. They have gone to work for an enterprise whose employees already were subject to a collective bargaining agreement.

Employees in New Jersey now are governed by a law that calls for unionization simply by card count. Often there will be only a minimal effort to educate employees as to the disadvantages of union representation. A continually shrinking number of employees actually have an opportunity to vote in a secret ballot election. Even so, surveys show that many Americans favor the notion of unions, but relatively few favor having one where *they* work.

When one is asked why employees would support unionization, there is a temptation to say “money,” or “benefits.” If unions meant more money and better benefits, we might all be unionized. The fact is, these issues generally matter little, because they are dictated, for the most part, by the market

and an employer's ability to pay. The market factors do not change when a union is on the scene.

Experience establishes that employees seek outside representation when they feel mistreated or hurt by their employer. If they believe their employer has no interest in them, will not listen to them, or has treated them unfairly or abusively, they will look to unions for help. The word commonly used in organizing campaigns is "respect." (They may also seek out government agencies or private attorneys willing to make claims on their behalf.)

While it is true that employees who are educated about unions are less likely to support organizing than those who are not, where employees believe they are treated unfairly by their employer, they often are willing to take a chance on unions.

Who is the employer? In a technical sense, it is the employing organization—here, the charter school. In a real sense, however, it is every supervisor, every manager, and of course, every administrator. While the top-level management of any enterprise should be committed to the welfare of its employees, the lower level supervisors have more interaction with employees. To an employee, his or her immediate supervisor is management. No matter how progressive an employer tries to be, it will be viewed negatively by employees if its first line supervisors are seen as uncaring or unfair.

Do not underestimate the extent to which supervisors can affect employees' morale and their view of the school. Employees spend more of their waking hours with their col-

leagues than they do with anyone else. Employees take the directions, comments, praise, and criticism from their supervisors very seriously. Even a supervisor's off-hand remark, seen by that supervisor as inconsequential, may weigh upon an employee for days.

Naturally, employees vividly recall their exchanges with administrators and supervisors. Employees want the support and approval of those above them. They gauge their relationships with supervision (and thus with the school itself) by the feedback they get, both spoken and unspoken, and by their observations of how other employees relate with management. This is perfectly normal, and in a well-functioning workplace, it is beneficial.

Inappropriate conduct by managers at any level can produce undesirable results. Even a perfectly pleasant individual can accidentally create a problem. Minor incidents in sufficient number can become a major headache. When an employee's personal catalogue of slights and hurts reaches a critical point (which will differ for every person), that employee will sour on the enterprise. Employees who reach this point have low morale and poor performance. Worse, their unhappiness spreads to other employees, demoralizing the organization.

Small indignities eventually can poison the working atmosphere. If a manager or supervisor:

- Is too busy to deal with employees;
- Is rude, abrupt, or discourteous;
- Fails to address employee issues;

- Appears to “play favorites”;
- Enforces standards that seem inconsistent;
- Does not want to hear employee suggestions; or,
- Is insensitive to employee concerns,

then, employees will decide that the school really has no interest in their concerns. In such cases, employees will look outward for help. They may contact the union that has been making overtures.

The good news is that the workplace need not be this way. These slights may be avoided or at least corrected promptly. Even better, the same management skills which make for highly productive and successful workplaces also can create positive employee relationships. When such relationships exist, unions cease being attractive.

Skilled Administration Makes a Union Unnecessary

Union avoidance has two key elements: (1) educating employees to the realities of unionization, and (2) creating a workplace environment in which employees feel no need to seek outside representation. The first element was described in Chapter III.

The second element can be summarized in an eleven point program for ensuring a healthy work environment.

Eleven Point Program to Enhance Team Morale and Performance

Any enterprise which follows these eleven points will enjoy improved morale and performance. It will recognize and deal with employee issues before they become conflicts. Schools employing this program will better serve their students. Workplaces operating in this environment will experience less conflict and find the notion of a labor union to be irrelevant to employees.

1. Develop and Maintain Clear and Lawful Workplace Policies

The first step in successful management is to ensure that the employees have a clear understanding of the employer's policies and rules. That means the employer

must have policies which are not only functional, but also lawful and clearly expressed. They should cover every aspect of work, and address fully the relationship between the school and its employees. These policies should be collected into one master file or manual, and updated as laws or your school's needs change.

The charter school will have a well-worded *mission statement*. It will give your employees a sense of common purpose. Your mission as a charter school should be plain: to create an alternative educational resource that has the flexibility to succeed where the traditional schools often have not. Do not underestimate the value of your school's mission to motivate employees. Together, you are embarked on an exploration of education, always looking to enhance your students' educational experiences.

There are resources which can assist you in preparing employment policies. However, off-the-shelf policies will not fully satisfy your school's needs. "Generic" policies should be reviewed and modified to meet your circumstances. The school's employment law counsel should be asked to review the materials. Proper policies are the first line of defense against union organizing and litigation.

2. Create and Distribute an Employee Handbook

Once you have prepared sound policies for your school, you must *communicate* them to your employees. An employee handbook is an excellent vehicle.

A well-prepared handbook allows all employees to fully understand the policies that apply to them. It also offers the school an opportunity to publicize its mission and provides employees with a resource to understand the school's benefits for them and expectations from them.

As with employment policies, there are resources that can provide suggestions for employee handbooks. You must put your own stamp on any handbook; most important, the handbook must be kept current. Because these handbooks are important and will raise expectations by employees that the policies will be followed, they too should be reviewed by counsel.

What's in a Handbook?

Here are some topics that typically are found in an employee handbook:

Our Mission	Continuing Education
Our Philosophy	Workers' Compensation
Anti-Harassment Policies	Leaves (and Procedures)
About Your Job	Bereavement Leave
Your Supervisor	Jury Duty
Employee Classifications	Military Leave
Problem Solving	Solicitation & Distribution
Attendance & Time Records	Access & Trespass
Work Hours	Confidentiality
Your Paycheck	Monitoring of Electronic
Your Personnel Record	Communications
Performance Evaluations	Standards & Discipline
Salary Increases	Substance Abuse Policy
Benefits	Personal Appearance
Retirement Plan	Inclement Weather Closings
Vacation (Eligibility & Usage)	Safety
Paid Holidays	Bulletin Boards
Sick Pay	Smoking
Disability (Short & Long Term)	

3. Educate Employees About Your Mission

If you are a school administrator, you are committed to the great experiment of charter school education. If you are a founder of a charter school, the enterprise is the product of your vision. Your school could not have been created and maintained without your enthusiasm and hard work. Chances are many of your employees share that enthusiasm. You should encourage them to spread the enthusiasm. You are doing important work—make sure they know it! Share your vision with every person who works for you.

- Don't be afraid to tell employees you cannot succeed without them.
- Explain that you *exist* to be different.
- Explain your *finances*. Employees should understand funding issues and the problems you may face.
- Take pride in the flexibility you have. You can change when you need to, while traditional schools are bound by union contracts under which it may take years to solve problems, if ever.
- Make employees part of the process. Grow employees' enthusiasm by soliciting their ideas.
- Meet with employees regularly to discuss the "state of the school."

Sample Pro-Employee Mission Statement

Our school strives to maintain an environment that provides excellent working conditions and non-confrontational working relationships. Every employee is essential to the success of our mission. Each employee deserves to be treated as an individual.

We believe in meeting our challenges together through individual consideration and direct collegial relationships. In our view, these principles provide the best environment for staff development and the education of our students. We seek to create a climate that enhances the teamwork necessary for us to attain our mutual goals. We want our school to be free from the artificially created tensions and interruptions that often arise when a third party, such as a union, and the collective bargaining process stand between the school and its staff.

We enthusiastically accept our responsibility to provide our employees with good working conditions, competitive wages and benefits, fair treatment, and the personal and professional respect they deserve. We do so because of our continuing interest in our employees, our students, and the community we serve.

We firmly believe that collegiality and teamwork will enable us to succeed in our mission of providing the best possible educational opportunities for our students. Your participation in our school community by expressing your problems, suggestions, and comments in a constructive atmosphere allows us to understand each other better.

4. Supervisors Are Not Born—They Are Trained

American business culture sometimes mistakenly believes that because an individual has ambition or drive, or because an employee has a good performance history, that employee will be a good supervisor or manager. This is not necessarily true. The qualities which will make someone successful as a worker are not always the ones needed for success in management.

All individuals in a managerial or supervisory capacity should receive training on fundamental supervisory principles. Subjects may include

- The employment policies of the school;
- Effective supervision and delegation of duties; and
- Constructive (not confrontational) correction.

All levels of school management could benefit from instruction on these subjects.

5. Clearly State Performance Expectations: Accountability and Corrective Action Are Essential

All employees in the school must fully understand the performance expectations held by the administration. This is essential to their doing a good job and to any evaluation of their work. Where an employee fails to meet goals because he or she did not fully understand them, management has only itself to blame. Do not assume that the staff will “know what to do.”

Having stated your expectations, *all* employees must be held accountable for their performance. This

is not intended to be harsh. It is intended to be fair; fair to all employees (they are treated equally), fair to the students (so they are not shortchanged), and fair to the school (so that it is better able to succeed).

Holding employees accountable is more difficult than it may appear. Many educators are reluctant to discipline or correct subordinates for fear that the collegial atmosphere of the school will be disrupted. This is not wise. Avoiding critical discussion prolongs the problem and makes the correction later more difficult. Constructive criticism can correct a problem before it becomes deeply rooted.

Likewise, a laid-back, “let live” approach, which “lets the small things pass” is not conducive to a good working environment, and is likely to prove troublesome as time passes. Looking the other way creates an environment in which standards slip. Moreover, it creates an expectation that infractions are permitted. When corrective action finally is taken, there may well be resentment (“Why is it a problem when I do that, but not someone else?”). Experience proves that the best way to maintain a fair workplace is to hold all employees to the same standards all the time.

6. Provide Meaningful Performance Evaluations

Develop a program of formal performance evaluations which provide a true measure of strengths and weaknesses. Employees should have at least one meeting with the appropriate supervisor every year

in which their written evaluation will be discussed. Avoid last-minute fill-in-the-blank or circle-the-number formats for evaluations. Use the interview as an opportunity to help the employee grow. Where improvement is desired, be sure the school is providing the tools to the best of its ability. However, don't forget to mention the individual's successful qualities and accomplishments as well.

In addition to these formal evaluations, employees deserve ongoing feedback and support. An employee should never learn at her annual evaluation that she has not been meeting expectations for many months. If performance is substandard, interim correction should be provided.

The school will never go wrong by having too much constructive communication.

7. Meet Frequently with all Employees

It should be clear from these recommendations that *communication* is the key to a successful school, and to remaining union free. Part of the school's program of communication should be regular meetings—preferably weekly—which all employees attend. Management can use these meetings to discuss its goals, as well as the school's performance, and any other issues. It can also use this time to provide in-service training on various subjects.

Unionization should be included among these topics. Regular reminders about the ease with which

a union may come in without a vote, as well as suggestions that employees not sign anything unless they know all the details, may be included. Where the school promotes its mission and vision, instills pride in its employees, gives them the tools to succeed, and reminds them that union promises may not be fulfilled, employees are unlikely to succumb to the siren calls of union organizers.

8. Listen to your Employees

Too often, management engages in one-sided communication. Use your meetings with employees as an opportunity to listen. Be sure to reserve time at every meeting for employees to discuss issues important to them. Build an inviting environment in which employees are encouraged to bring up their concerns. It is far better to hear the issues early than to allow them to fester unresolved.

Move beyond your “open-door” policy. Your door may be open, but you are not always there, and when you are, you’re probably on the phone. Understand that employees may be reluctant to bother you.

Actively solicit employee input on problems or challenges facing the school. There is nothing that makes any employee feel more like part of the team than being asked for help in facing a common issue.

9. Document, Investigate, and Resolve

Now that you've listened, be sure to act on the employee's request or suggestion. You must close the loop. If management does not respond to employees promptly, it would have been better off not having listened to them in the first place. When you have received an employee question, concern or suggestion, *write it down immediately*. Give the employee a time frame for responding. Follow up on it. Get back to the employee with a reasoned response.

A grunting "NO" translates into "I'm the boss, you're the horse." However, telling an employee that you have discussed his or her idea with the trustees is empowering to that employee. It makes the staff member understand that his or her opinion is valued. It sends the message that the administration is not arbitrary, and is willing to consider change.

Also, be open to the likelihood that your employees have good ideas that you may want to implement. This will reflect well upon you, and the school, as well as the employee. After all, you're a charter school—you are able do things differently.

10. Consider a Problem-Solving Procedure

Despite your state-of-the-art policies, your employee handbook, and your constant communication with employees, there will be a time when you will have a conflict with an employee. One of the greatest attractions a union can offer is the possibility of

a grievance and arbitration procedure to remedy perceived unfair actions by management. Consider developing a process by which an employee may have a management decision reviewed.

There are many procedures available, from “peer review” to “alternative dispute resolution.” Not all of these procedures will be right for your school and it may be necessary to rely on the Advisory Grievance Committee Procedures. Where an employer has a meaningful outlet to assure employees they are receiving fair treatment, the chances for serious conflict are reduced.

11. Competitive Wages and Benefits

Lastly, be sure that your school is reasonably competitive with market rates for wages and benefits even beyond the requirements of the charter school legislation. Although there may be certain benefit plans under school district union contracts in which charter school employees cannot participate, your employees should be provided with an appropriate compensation package.

Use Your Charter School Association as a Resource

Operating a charter school can sometimes seem like a lonely task. There are powerful groups out there who feel threatened by charters. Perhaps you have a less than cordial relationship with the school district. Perhaps there are funding delays. You are not alone. There are many other

charter schools in New Jersey, and many around the country, who are experiencing the same challenges.

Your charter school association can offer a wealth of resources to assist you with many of the items discussed in this guide.

Note: This guide is intended to provide charter school administrators with a general understanding about New Jersey's labor relations law applicable to charter schools. It offers a broad description of the law and the rights and responsibilities of employees, charter schools and unions under the law—a subject that in large measure has escaped notice until now. It is not intended to be an exhaustive explanation of the law. It is not a substitute for professional legal advice. If your school faces any of the issues raised in this guide, you are urged to seek specific legal advice from an attorney who is knowledgeable in this specialized area of the law.

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Mr. Kaplan has addressed business and professional organizations on National Labor Relations Act issues, OSHA liability, workers compensation, workplace violence and substance abuse, and has written various articles on labor and employment law. He co-authored "Responding to Union Organizing Campaigns", a LEXIS NEXIS Matthew Bender Business Law *Monograph* (rev. 1998) and participated in re-writing Jackson Lewis's *Winning NLRB Elections*, (CCH 4th ed. 1997). Mr. Kaplan also edited and contributed to "*The Accountant's Role in Labor*" & *Employment Relations*," published by the American Society of Certified Public Accountants (CPE-DW). He is a past contributor to the American Bar Association's Committee on Labor Law publication, *The Developing Labor Law*.

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Mr. Walsh frequently lectures on labor and employment law developments before professional and business organizations. He is also an active resource for developing legal and legislative strategies for clients and industry groups.

Jackson Lewis LLP

Jackson Lewis LLP is a labor relations and employment law firm consisting of approximately 380 attorneys representing management exclusively. The firm's offices are located in twenty-one major commercial centers across the country. Jackson Lewis attorneys have handled labor relations matters, administrative hearings and litigation in virtually every jurisdiction in the United States.

Jackson Lewis has been, in many respects, a pioneer. It is probably the first firm actively to practice preventive labor and employment law. From its beginnings over 40 years ago, Jackson Lewis has advocated the education of management as the key to avoiding legal problems. For example, it was the first labor law firm, and possibly the first firm of any kind, to conduct annual client symposiums and publish monthly client bulletins. The firm has authored *Avoiding Unionization Through Preventive Employee Relations Programs*, published by CCH Incorporated, among other titles. This preventive approach continues to be the foundation of the firm's practice.

The firm's expertise in assisting clients in remaining union-free is recognized nationally. It has counseled employers in thousands of union organizing and election situations. But perhaps its proudest accomplishment is the number of clients who have relied upon the firm's expertise in developing issue-free environments, thereby making the interven-

tion of a union unnecessary. The firm's practical "hands on" approach consists of training supervisors, developing policies and procedures including employee handbooks and supervisory manuals, and conducting employee relations audits. This aggressively proactive, preventive approach is particularly warranted in an age when the growth of employee rights and the surge in employment-related litigation have seriously eroded employment-at-will.

For clients with unionized workforces, Jackson Lewis provides the full range of labor law services: negotiation of collective bargaining agreements, representation at all stages of the grievance and arbitration process, representation in deauthorization/decertification proceedings, and handling administrative and court litigation relating to these activities.

The firm also has been particularly active in litigating novel and challenging wrongful discharge and EEO cases. It is proud of its record of victories for management in cases at the trial stage, but is equally conscious that efficient pretrial resolution of such matters is frequently of paramount interest. The firm believes its reputation as aggressive litigators has enabled it to secure very favorable extra-judicial settlements of many matters, at minimum expense and exposure to clients. Indeed, it frequently provides counsel and conducts training seminars on implementing preventive employment practices and "avoiding the courthouse".

Additional information about Jackson Lewis LLP may be found on the firm's website, www.jacksonlewis.com, or by contacting an attorney at the firm's offices shown on the next page.

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Atlantic Legal: Mission and Programs

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm with a demonstrable history of advancing the rule of law by advocating limited, effective government, free enterprise, individual liberty, school choice, and sound science in the courtroom. To accomplish its goals, Atlantic Legal provides legal representation and counsel, without fee, to parents, scientists, educators, and other individuals, corporations, trade associations and other groups. The Foundation also undertakes educational efforts in the form of handbooks and conferences on pertinent legal matters.

Atlantic Legal's Board of Directors and Advisory Council include the active and retired chief legal officers of some of America's most respected corporations, distinguished scientists and academicians, and members of national and international law firms.

The Foundation currently focuses on four areas: representing prominent scientists and academicians in advocating the admissibility in judicial and regulatory proceedings of sound expert opinion evidence; parental choice in education; corporate governance; and, equal protection under the law by government agencies.

Atlantic Legal's cases in the past year alone have resulted in the protection of the rights of thousands of schoolchildren, employees, independent businessmen, and entrepreneurs. In case after case, Atlantic Legal brings about favorable resolu-

tions for individuals and corporations who continue to be challenged by those who use the legal process to deny fundamental rights and liberties. Please visit www.defendcharterschools.org, where the Foundation's most recent school choice activities are detailed.

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