

ATLANTIC LEGAL'S GUIDE TO
LEVELING THE PLAYING FIELD

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

Jackson Lewis LLP

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60 East 42nd Street
New York, NY 10165

This publication has been made possible by grants from the Pumpkin Foundation, at the request of Joseph H. and Carol F. Reich, and The Achelis and Bodman Foundations. The Atlantic Legal Foundation gratefully acknowledges their support.

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ISBN 0-9770421-0-3

Library of Congress Cataloging-in-Publication is available upon request

Published in the United States by:
Atlantic Legal Foundation
60 East 42nd Street, Suite 2102
New York, NY 10165

Cover design by Kevin Doyle
Interior design by Studio Grafo

Printed in the United States of America

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LEVELING THE PLAYING FIELD

What New York Charter School Leaders
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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 not do—to ensure that charter school teachers and employees have the knowledge to make a fully informed choice, should a union attempt to organize their school.

This report is a comprehensive examination of the issue, and a practical guide to what New York 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 York and elsewhere, contending that charters should be given maximum flexibility to permit innovative programs leading to student 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 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 we have 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. We are grateful to Jackson Lewis partner Thomas V. Walsh, Esq., whose presentation to the New York Charter Schools Association was the basis for this guide. We also thank Jackson Lewis partner Roger S. Kaplan, Esq., for his co-authorship of this text. Their guidance 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 Schools Act was passed in New York, as was similar legislation in many other states, to provide an alternative to the traditional public school. Among the criticisms leveled at public education is that meaningful change has been stifled by collective bargaining agreements that codified unsuccessful educational practices and severely constrained the flexibility of school administration. Indeed, in New York's public education system—in which virtually every traditional school is subject to a union contract—many principals are themselves represented by a union.

When it enacted the charter school law in 1998, the New York legislature made it possible for many charter schools (subject to certain exceptions) to be relieved of the collective bargaining obligations which encumber the traditional public school districts. However, the law does not prevent a charter school from being unionized. The Charter Schools Act states that such schools shall be subject to the New York public employees labor law, commonly referred to as “the Taylor Law.”

The story of the New York charter schools is in many ways the story of the teachers' unions' ongoing attempts to

oppose them. That story begins with opposition by United Federation of Teachers (UFT) to the charter school legislation. When it became clear that the political will existed to create charter schools in New York, UFT changed its tactics. Calling the charter school bill “union busting,” UFT lobbied to have mandatory union affiliation for charter school teachers and staff built into it. UFT was only partially successful. The Charter Schools Act does stipulate that teachers in charter schools formed as conversions from public schools and those with more than 250 students in their first year of operation automatically are union-represented, but it also guarantees smaller, independently created charter schools the ability to open their doors union-free. These smaller schools are exempt from the terms of existing collective bargaining agreements in their district. However, with the exception of up to ten schools that are specifically designated by the SUNY Trustees as permanently non-union schools, the teachers in charter schools themselves ultimately have a choice about whether they want to be unionized.

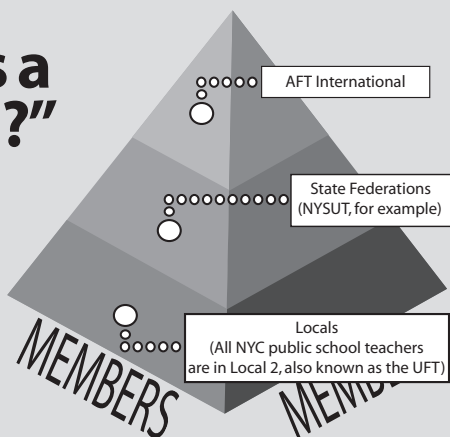
The unions may be gaining ground in New York’s charter schools. As of February 2004, 250 teachers from nine New York charter schools had joined New York’s largest teachers’ union, the New York State United Teachers (NYSUT), an affiliate of the American Federation of Teachers.

The union drive to organize charter schools is not limited to New York. The National Education Association (NEA) has recently committed \$1.75 million to organizing efforts at charter schools.

The unions' current efforts to organize the charter schools must be seen in the wider context of their continuing opposition to these schools. In 2003, for instance, NYSUT called for a moratorium on new charter schools, calling them "a luxury we can no longer afford." Arguing that charter schools are "an education experiment with disappointing results," NYSUT President Thomas Y. Hobart Jr. urged the legislature to stop funding charter schools and to "concentrate our scarce resources on providing all children in public schools with smaller classes, certified teachers and good remedial programs. These are reforms that we know work." The effort to unionize charter school teachers is not a sign of NYSUT's acceptance of the charter school movement, but a means to influence or even control them from within.

Having failed to convince the state legislature to reject charter schools or to impose union membership on all charter school teachers, the unions campaigned to discredit the charter school movement. At the same time, however, the unions have been working to get inside charter schools. They have begun soliciting charter school teachers to join the union. Charter school teachers who lack a clear understanding of the union's motives for its interest in them, and who do not know what a union can realistically deliver, may be easily drawn in. That New York law plainly discourages careful deliberation by employees on this important issue only makes matters worse. Indeed, in most cases, public sector employees such as charter school teachers may be unionized without ever having an actual opportunity to vote on the subject.

What is a "Union?"



Unions are organizations made up of several layers. At the top is the “home office,” usually called the “International.” In the case of the American Federation of Teachers (AFT), the main office is in Washington, D.C. The New York State United Teachers (NYSUT) is actually a “regional office” of the parent organization, the AFT. There are many state federations. Below the regional level are the “branch offices,” commonly called “Locals.” Some locals are very big, such as Local 2 in New York City—better known as the United Federation of Teachers (UFT). Many teachers are surprised to learn that the UFT and NYSUT are all part of the same organization, the AFT.

At the bottom are the members. Every member is a member of his or her local, state federation, and international. Thus, every UFT member downstate helps fund NYSUT statewide, and the AFT 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. These payments are called “per capita taxes,” because they are “taxes” that the subordinates must pay “per head.”

It takes a lot of money to fund the union. The UFT has over 1,400 full and part time employees. NYSUT has about 470 employees, and the AFT in Washington has about 450. The AFT had expenditures of \$179 million in the last reported year; the UFT was close behind with \$170 million, and NYSUT spent \$144 million. Those numbers don't count the thousands of employees and millions spent by all the other locals and state federations.

The AFT is not the only union active among teachers. The National Education Association is also a high profile union. It is similarly designed. There is a national headquarters, intermediate bodies (councils and state affiliates) and locals. The New York affiliate, NEA/NY, has a much smaller presence in New York than the AFT's subordinates in the state.

Charter schools are growing because parents, teachers and charter school leaders have found that traditional school administration was too often not an instrument of educational progress. Traditional schools' collective bargaining agreements stifled efforts to improve educational performance. Many charter school leaders believe that the unions' goal is not academic achievement, but to secure greater compensation for less work and to minimize accountability.

Attempts to unionize charter school teachers follow directly from failed union efforts to block charter schools from forming. Seen this way, the connection between the two seemingly opposing approaches becomes abundantly clear. The unions have not changed their minds about charter

schools, but they have changed their methods of opposing them.

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 school administration may see a union as an obstacle to success.

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:

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

In December 2003, the state Board of Regents released its five-year report on New York charter school performance. The report showed that contrary to union predictions, charter schools are getting results and in many cases they are outpac-

ing traditional public schools. Not only are charter schools educating students who, on average, come from low income families and are more academically challenged than those attending traditional public schools, but they also are more successful at preparing those students for state exams. On the strength of this report, New York City Mayor Michael Bloomberg announced plans to open 50 more charters in the next five years. Meanwhile, the Buffalo Board of Education began approving its own charter schools.

Mayor Bloomberg's plans will also necessitate even greater vigilance and awareness by charter school administrators and teachers. Despite the demonstrated results in the December 2003 report, the National Education Association continues to claim that New York charter schools are a failure and a waste of money, stating in July 2004 that "New York charter schools put a heavy fiscal burden on public schools while delivering no proven gains in student achievement."

Under New York's Taylor Law, employees have the right to join a union, support a union, and take affirmative steps to make a union the legally recognized bargaining agent for school employees. However, the Taylor Law also guarantees employees the right to refrain from supporting a union. Section 202 of the law is explicit: "Public employees shall have the right to form, join and participate in, or to refrain from forming, joining or participating in, any employee organization of their own choosing."

Nevertheless, by signing representation cards (formally referred to as an "expression of interest"), charter school staff

members can authorize a union to represent them as their collective bargaining representative.

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 for charter school teachers and other staff to avoid this unintended consequence is through a basic knowledge of the law, and an awareness of the potential risks.

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.

First, let's look at some basics of the law...

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 York’s Charter Schools Act expressly states that charters are subject to the Taylor Law. It has been suggested by some that the federal labor law (the National Labor Relations Act) should apply to New York charters, as it does to many private schools. There are very significant differences between the laws. For instance, the NLRA (in almost every case) calls for unionization through secret ballot election; however, under the Taylor Law, unions commonly avoid having to face a democratic election by obtaining signed representation cards from teachers and demanding recognition.

The federal law is administered by the National Labor Relations Board, which largely decides the extent of its own jurisdiction. While federal law is supreme, the NLRB has never taken jurisdiction over a New York charter school (and rarely has asserted jurisdiction over a charter school anywhere else). Further, since the clearly expressed intent of the New York Legislature is that charter schools be considered “public” and subject to the Taylor Law, it is

doubtful that New York charters will be deemed subject to the federal law. Therefore, we assume that charter schools will continue to be covered by the Taylor Law.

Further exploration of this issue is not foreclosed. Charter School administrators requiring closer examination of this question should consult with labor law counsel.

How do unions go about organizing?

The Taylor law establishes employees' rights to support or refrain from supporting unionization. To organize employees under the law, a union must gain written expressions of support 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). It only needs to get a 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 that a union announce its intention to organize the employees of any particular employer. In fact, unions are most successful when they secure employee signatures without management'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 100 years old. Back then, that workplace was subject virtually to no safety laws or anti-discrimination laws, and offered employees few meaningful outlets for their frustrations. Unions back 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 the labor laws—even the more recent ones dealing with public employment—have not kept pace. They continue to assume that an employer will discriminate against, or even discharge, employees in retaliation for union activity.

The laws, therefore, were written not only to establish the employees' right to engage in concerted activities, but also

to expressly forbid employers from punishing employees for exercising their right. The laws, however, go even further. They forbid employers and their agents from questioning employees as to their union activities, or those of their co-workers. Merely *asking* an employee if he supports a union may be deemed coercive and intimidating. We will discuss these restrictions on employers in more detail below.

Given the historical context of the law, it is understandable that a union need not announce its intention to seek employee signatures.

Unions often are well-structured, well-funded, and skilled in recruiting new members and supporters. 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 so as 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 as to 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 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 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 true, and are nothing more than expressions of the unions’ political agenda.

Charter School employers must understand the law does *not* prevent them from educating their employees about union representation. Further, schools 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 only those who want employees to hear just one side of the story are not being fair to the staff.

Unions often rail against employers who oppose their interests by branding them “union busters.” Unions hope this label will scare the employer into silence, thereby giving the unions an advantage in securing signatures. Silence, however, does not help the school or its 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 as they can 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. They would offer employees copies of the labor organization’s financial reports, by-laws, and collective bargaining agreements, so employees could learn about the organization in detail. 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 York 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. These 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 Taylor Law: Elections are Rare

Unions have two avenues to secure lawful establishment as the collective bargaining representative of a school’s employees: voluntary recognition by the employer, or certification through the procedures of the Public Employment Relations Board (PERB), the New York administrative agency established to oversee public employee matters. The following general description of the process assumes there is no union already in place.

If the union secures signatures from thirty percent of the employees in an appropriate bargaining unit, it may request

voluntary recognition by the public employer. (See box on pages 19 and 20 for discussion of an appropriate unit). The employer is permitted to recognize the union—even though the union has not been authorized by a majority of employees. The employer also may decline recognition. Assuming the employer has declined, the union may file a petition with PERB requesting a “certification” of unit representation.

If the employer expressly refuses to recognize the union, the union must file with PERB a petition seeking a certification within 30 days of the employer’s refusal. If the employer simply ignores the union’s request for recognition, then the union must file a petition with PERB during a window period between 30 and 120 days after the union made its request for recognition from the employer.

When the union files its petition, it also must file a “showing of interest” indicating that at least 30 percent of the unit employees have provided supporting signatures. This showing of interest can be in the form of union cards or a petition sheet. The signatures must be dated within six months of the date the petition is filed.

Once the petition is filed, *time is of the essence for the employer*. Within 10 working days after it receives a copy of the petition, the school must file a response, outlining any factual errors or omissions in the petition, and providing the employer’s description of the unit claimed to be appropriate. To the extent any issues are unresolved (most commonly, the composition of the unit), PERB may require a hearing for the purpose of resolving the issues.

Elections or Card Checks? Which Protects Employees' Interests?

Unions 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.

Many public sector laws (such as the Taylor Law) have reduced 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 these 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—at the cost of employee free choice.

If only one union is seeking representation (as generally is the case), *and the union has provided evidence that it has obtained the signatures of a majority (as opposed to merely 30%) of unit employees, PERB will determine that the signatures alone demonstrate the employees' choice*, so long as the signatures were executed within six months prior to the date of PERB's decision, and certify the union. **There will be no election.** Elections take place only if more than one union is involved, or if the union has failed to show “current” majority support.

Plainly, a union is best served by obtaining signatures quickly and quietly from a majority of employees. If it does, it generally will avoid the risk of losing an election. This presents a real challenge to the charter school administrator, for very practical reasons.

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, 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 PERB, which will examine each workplace and proposed unit on a case-by-case basis.

As of this writing very few charter school units have been certified. One certification included all "full time teachers, social workers, and library media specialists." Another included "SETSS Teachers, the Special Education Coordinator, teaching assistants and teaching fellows." In general, school units include teachers 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 public employer managers and their related confidential employees from being in the same unit as the employees they supervise. Certain highly placed managers in policy-making positions may be excluded from union representation entirely.

The Charter Schools Act requires schools to “afford reasonable access to any employee organization during the reasonable proximate period before any representation question is raised.” While this statutory obligation is not clearly defined, it is clear that the New York legislation not only allows “drive by” organizing, but also requires the charter to open the door and put out a welcome mat.

While the extent of this invitation is undefined (and as of this writing no decision has been rendered), it would seem that charters need not interrupt the school day to permit such access, and may set reasonable time and place requirements on organizers. *Any school receiving a request for access is urged to seek experienced legal counsel immediately.*

Fortunately, while the statute compels the granting of access, if a union seeks such access, it loses the advantage of surprise; the charter administration then has an opportunity to educate its staff.

III

What the Charter School Employer Can Do

As noted, the Charter Schools Act gives employees the absolute right to act independently in choosing whether to support a union. Naturally, the union will emphasize that collective bargaining is permitted for charter school employees and extol its benefits. The union would prefer that employees hear only its argument for representation.

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 what cannot and must be avoided—can be a powerful voice in promoting an informed workforce.

Are Charter School Employers Permitted to Educate Employees About Unions?

The answer is “YES.” The Taylor Law establishes a framework for collective bargaining in the public sector. While the law does not 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. The Taylor Law does provide some limita-

tions, however. These are called “Improper Employer Practices” and are discussed in the next chapter.

The Charter Schools Act has a provision entitled “Employer Neutrality.” However threatening this title may sound, this section does not require that you avoid expressing your opinion or educating your staff. This section states only that you must avoid violating § 209-a, subsection 1 of the Taylor Law, which simply includes the “Improper Employer Practices” mentioned above.

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

In communicating with your 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 than is available to them in the traditional schools.
- Unions have strongly opposed charter schools.
- Unions have begun a campaign to represent charter schools, while continuing to fight their existence.
- Employees have the right to decide for themselves whether they want union representation.
- 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. While these are not specifically made part of the Taylor Law, we believe they are equally pertinent to the public employment arena. Your communications should be limited to these subjects: Facts, Opinions and Examples.

Any educational endeavor needs to provide facts and examples. Difficult decisions often benefit from the opinions of colleagues. Employers may share with employees facts, opinions, and examples regarding unions.

Facts: There Is No Defense Like the Truth

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

Employers may inform employees of any facts regarding unions, collective bargaining, the operation of the Taylor Law, and the procedures of PERB. Lawful communications may include facts which are uncomplimentary to unions, such as the costs of unionization, stories of union corruption, or failures of collective bargaining. Because a *fact* is *unpleasant* does not render it *unlawful*.

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 of particular interest. Facts about employees' 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 does not guarantee them the right to a secret ballot election.
- The law does not require “full disclosure” by union organizers of all the facts needed for employees to have a balanced view.
- Signing a card now could deprive them of an opportunity to make a choice later.
- 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 may 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 (for instance, tenure), but it cannot guarantee any of them.
- If and when 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”).

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 a union will obtain higher pay or better benefits. In fact, the union cannot guarantee negotiations will not result in a reduction of wages or benefits. While unions have had success in negotiations with many public entities, charter schools are well positioned to resist union proposals they deem adverse to their mission.

Union Control of Members

Unions require members to obey their rules—under pain of trial and potential fines. A union will expect all of 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.

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 rules that will reduce flexibility.

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.

IV Limitations on Employer Communications with Employees

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

§ 209-a (1). Improper employer practices. It shall be an improper practice for a public employer or its agents deliberately

(a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights;

Under section (a), supervisors and managers are prohibited from deliberately interfering with employees’ rights “to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing” under Section 202. This prohibits retaliating against employees (or threatening retaliation) because of their union activity, making threats to discourage unionization, such as telling employees they will lose wages

or benefits in bargaining, or taking coercive action to try to prevent employees from exercising their rights.

(b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights;

Section (b) prohibits employers from developing or maintaining a “captive union” which is controlled by the employer. It also prohibits unions from becoming too reliant on the employer for money or other support, which can undermine its independence in representing employees.

(c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization;

Akin to section (a), section (c) forbids discrimination against employees based on their union sentiments or activity. This includes taking disciplinary action against an employee, denying promotion, or taking any other adverse action because of the employee’s union sentiments or activities.

(d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees;

If a union is certified to represent employees, the employer must negotiate in good faith with the union. While this does not mean the union gets whatever it seeks, it does mean the employer must make a sincere effort to reach common ground and negotiate a collective bargaining contract.

(e) to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article; or

If there is a collective bargaining agreement, the terms of that contract must be continued until a new contract is negotiated. The second half of the section refers to the law's prohibition of strikes.

(f) to utilize any state funds appropriated for any purpose to train managers, supervisors, or other administrative personnel regarding methods to discourage union organization or to discourage an employee from participating in a union organizing drive.

This curious provision reflects a political compromise. As labor unions shrink in size in the private sector, they continue to grow in public employment. One reason for this is laws such as section (f). Public employers may not use any state funding to train administrators to “discourage” unionization.

Considering that labor unions are among the largest sources of campaign financing for state legislators, it is little wonder that the legislature passed this law. It did not want state money to be used for “anti-union” purposes.

A Word about the “No-Training” Rule

It is an improper employer practice to spend New York State funds for the purpose of training managers on the shortcomings of unionization or discouraging employees from seeking union representation. The political purpose of this section is evident. The section is aimed at inhibiting the public employer from employing professional union avoidance consultants and attorneys.

This section, however, does not forbid the charter school from obtaining legal counsel for advice and representation regarding the rights and responsibilities of the school and its employees.

This section of the law has never been tested in court. There are no decisions explaining the statute. The distinction that arguably exists between “education”, which should be permitted, and “discouragement”, which is prohibited, is unclear. To be safe, managerial training on employees’ rights should be funded through sources other than state financing.

These prohibitions seem intimidating, but what do they mean?

Improper Employer Practices can be the bases for charges which a charging party—usually an employee or union—may file with the Public Employment Relations Board (PERB). PERB 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

must commit 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 improper employer practices are not “crimes.”

However, there is a significant penalty charter schools may face for violation of the employer neutrality requirements. The Charter Schools Act states:

Employer neutrality. It shall be an improper practice for a charter school board of directors, chief administrative officer and their agents to commit any of the acts set forth in subdivision one of section [209-a] and could in accordance with section [2855], result in the revocation of the charter.

This section carries the title “employer neutrality,” suggesting that the charter school has no right to express a point of view. This is not so. The provision itself explains merely that the management of the charter school cannot commit any of the improper employer practices under the Taylor Law.

Politics and the Law

It should be no great surprise that the Charter Schools Act was a political football at the time of its passage in 1998. The teachers’ unions wanted the bill killed. Failing that, it wanted guaranteed unionization. Early versions of the bill contained such language. The “neutrality” provision was part of the back-and-forth battle of

the drafts. The bill was passed by the Senate after 1:00 AM. The Assembly passed it after 4:00 AM the same day. This may explain why the title of § 2854 (c-2) ("Employer Neutrality") does not reflect the text that follows.

Nonetheless, the Charter Schools Act does have one very significant sanction. It says that commission of improper employer practices could result in charter revocation. The Charter Schools Act spells it out:

§ 2855. Causes for revocation or termination.

1. The charter entity, or the board of regents, may terminate a charter upon any of the following grounds:

** * **

(b) Serious violations of law;

** * **

(d) When the public employment relations board makes a determination that the charter school demonstrates a practice and pattern of egregious and intentional violations of subdivision one of section two hundred nine-a of the civil service law involving interference with or discrimination against employee rights under article fourteen of the civil service law.

This section suggests strongly that a school's charter can be revoked for Taylor Law violations only where it is proven the school engaged in a *practice and pattern of egregious and intentional* improper employer practices. This means, in our

view, that there must be: (1) more than one actual improper employer practice; (2) which indicate a common scheme or design by the employer; (3) to purposely commit acts which are unlawful; and, (4) which are of an extreme or outrageous nature.

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 conduct: **threats, retaliation, interrogation, bribes and promises of bribes, and surveillance.**

Having described earlier 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.

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 you never will agree to a contract is technically 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 decision; if they decide to support a union, they still must be treated as if that were not the case. All promotion, assignment, discipline, and compensation decisions are to be made without regard to the employee’s union likes or dislikes (if any). This does not mean a pro-union employee should 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?
- 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?

The reason supervisors and managers 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 a manager's provision of *facts, opinions, or examples*. However, you should be careful not to get drawn into asking these 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 in order to discourage employees from supporting the union.

There are two main reasons for this difference in treatment. The law promotes collective bargaining. If an em-

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

Supervisors and managers may not attend union meetings, and 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 has a right to go, 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 by this aspect of the law from speaking to your employees about unions.

**Wait! I don't see "threats,"
"retaliation," and similar misconduct
mentioned in the Taylor Law.**

That's right. You won't. These rules are not part of the statute. Furthermore, it is very rare for a New York public employer to mount an informational campaign among its employees to inform them about unionization.

As a result there are virtually no PERB cases addressing employer communications. The examples cited in the text come from the decisions of the National Labor Relations Board, which has long experience in deciding these issues in the private sector.

PERB improper employer practice decisions offer little clear guidance on communicating with employees. Few cases have found employer communications unlawful. However, the reason for this is that few public employers ever say *anything* negative about unions, for political reasons. Thus, there has been little for unions to complain about. There just aren't many cases on the subject.

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, a union may not:

- Interfere with, restrain or coerce public employees in the exercise of their § 202 rights—and it may not cause, or attempt to cause, a public employer to do so;
- Refuse to negotiate collectively in good faith with a public employer; or
- Breach its duty of fair representation to public employees.

Collective Bargaining

Collective bargaining is defined by the Taylor Law. Many find the definition to be surprising. Here it is:

For the purpose of this article, to negotiate collectively is the performance of the mutual obligation of the public employer and a recognized or certified employee organization 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 agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. Taylor Law, § 204(3).

In essence, collective bargaining is the obligation of the union and the employer to meet and confer in good faith concerning employees' terms and conditions of employment. Thus, a good faith effort must be made by both parties to seek agreement. However, an agreement is not required or

guaranteed, since neither side is forced to accept any terms it does not want.

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.

This may sound like a recipe for failure, since parties rarely are in full agreement. How does one side persuade the other to reach agreement?

In the private sector, unions have leverage to push employers toward compromise and agreement through the “economic weapon” of the strike. The possibility or actuality of a strike drives the parties toward agreement. The employer does not want to be shut down and employees do not want to lose paychecks. The incentive to settle is strong.

Under the Taylor Law, however, *the union cannot go on strike*. What leverage, then, does the union have? Actually, with ordi-

nary public employers, a union has considerable leverage.

For one thing, public employee unions may not have to struggle as hard as their private sector counterparts. It is generally accepted that public sector employers who are not concerned with profits usually come to terms at the table more readily than private sector employers. For another, unions possess political power through their ability to raise cash for candidates for elected public office, to provide campaign volunteers, and to influence legislation. Put plainly, the public employer does not want a labor dispute with a powerful political force.

However, there are times when public sector negotiations become deadlocked. What does the law say? For police and firefighters, the law provides that an arbitrator ultimately may determine the terms of a contract. The procedure is called “interest arbitration.” That law does not apply to charter schools. There is no mandatory interest arbitration for educational institutions. For other public agencies, the law says the local or state legislature may impose a contract settlement. This, too, does not apply to educational institutions.

Contract dispute resolution in school cases is handled as follows: a party may file a Declaration of Impasse with PERB’s Office of Conciliation (OOC). If the OOC finds impasse, that is, negotiations are deadlocked, it will appoint a mediator to help the parties reach agreement, but the mediator cannot *impose* any terms on either party.

If mediation fails, the OOC may 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 may hold a hearing to take testimony and other evidence. Ultimately, the fact-finder is empowered to make public recommendations for resolving the impasse—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, the OOC may appoint a conciliator to provide additional mediation. *In no event will there be any imposition of contract terms on the parties by any outside agency.* As PERB has said, the law “lacks a mechanism to provide finality.”

What does this mean to the charter school operator? 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 PERB improper employer practice charge. However, the good faith refusal of an employer to agree to terms (tenure, for instance) will not be unlawful. Although there are various vehicles to help reach agreement, the law has no way to compel the charter school to agree to terms it does not want.

Put plainly, a charter school 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.

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, for the great majority had little choice 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.

In a growing number of cases, employees are governed by an agreement (or law) that calls for unionization simply by card count. Often, there is 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.

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,” or in the case of charter schools, “tenure.” If these truly were the reasons, we might all be unionized—after all, everyone wants more money, benefits and job security. In fact, these enticements generally matter little, because there is no guar-

antee that a union can deliver them.

Employees actually are motivated to support a union when they feel ignored 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. (They may also seek out government agencies or private attorneys willing to make claims on their behalf.) The word commonly used in organizing campaigns is “respect.”

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 upper management of any enterprise should be committed to the welfare of its employees, the lower levels of management 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 and managers can affect employees' morale and their view of the school. Employees spend more of their waking hours

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

Naturally, employees vividly recall their exchanges with their managers 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.

Conduct by managers at any level which is inappropriate 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 may decide that the school really has no interest in their concerns. In such cases, employees will be more willing to look outward for help. They may seek out a union.

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.

VIII

Skilled Administration Makes a Union Unnecessary

Union avoidance has two key elements: (1) educating employees to the realities of unionization, and (2) creating a management 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 a eleven-point program for success.

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 which 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 in resisting union organizing and avoiding 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 which 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 Communications
Your Personnel Record	Standards & Discipline
Performance Evaluations	Substance Abuse Policy
Salary Increases	Personal Appearance
Benefits	Inclement Weather Closings
Retirement Plan	Safety
Vacation (Eligibility & Usage)	Bulletin Boards
Paid Holidays	Smoking
Sick Pay	
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 which 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 you 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 to 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;
- 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 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 (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 more difficult later. 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 management 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 Taylor Law and the sim-

plicity 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 express 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 which 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 management 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 to 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. However, 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. 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 York, 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 York'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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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 21 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 intervention 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

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