LEVELING THE PLAYING FIELD

What Michigan Public School Academy Leaders Need to Know About Union Organizing

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A joint project of
The Atlantic Legal Foundation and the Mackinac Center for Public Policy

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Foreword

The Atlantic Legal Foundation, a public interest law firm now in its 30th 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. It has published a number of guides similar to this one.

The Mackinac Center for Public Policy is a nonpartisan research and educational institute dedicated to improving the quality of life for all Michigan residents by promoting sound solutions to state and local policy questions. The Center promoted school choice in Michigan, including charter schools, even before the movement's inception and continues to study and comment on it.

We welcome this opportunity to help serve the charter school community in Michigan.

Efforts to organize charter school teachers and other employees, although lawful, are likely to have a significant impact

on the flexibility a school needs to meet its responsibilities. Charter school administrators need to know how to react when a union seeks to represent employees.

In 2005, the Atlantic Legal Foundation enlisted the services of Jackson Lewis LLP to prepare a guide for New York's charter school leaders, which became the base text for the present work. Jackson Lewis LLP is a prominent national law firm whose practice is limited to representing employers in a wide variety of labor and employment law matters. Jackson Lewis partner Thomas V. Walsh, Esq., whose presentation to the New York Charter Schools Association was the basis for this guide, is owed a great deal of thanks. We also thank Jackson Lewis partner Roger S. Kaplan, Esq., for his co-authorship of the New York text. Their guidance in this contentious area is greatly appreciated. To prepare the current text, we turned to Thomas W. Washburne, Esq., a Michigan-licensed attorney and the Mackinac Center's director of labor policy at the time.

Close attention to this discussion of union organizing efforts will ensure that charter school leaders comply with the law while making their views about the merits of dealing with a union known to staff members. We wish charter school administrators every success as they manage the unique schools that make up the charter school movement in Michigan.

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Note: This guide is intended to provide charter school administrators with a general understanding of Michigan's labor relations law applicable to charter schools. We offer 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. This book 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 field.

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The Charter School Movement

In December 1993, Michigan became one of the first states to authorize the creation of charter schools, officially referred to as public school academies.* The public school academies allowed by the law, known informally as the Charter Schools Act, are an alternative to the conventional public school. They are not governed by a locally elected school board, but rather by a board appointed by a state approved authorizer. The board members are public officials who serve subject to the state law and the charter contract.[1] (Because the phrase "charter schools" is used in most places in the United States, we will use it interchangeably with the Michigan designation "public school academy.")

* The evolution of Michigan's Charter Schools Act is complicated. The first charter schools act, 1993 PA 284, MCL §§ 380.501 *et seq.*, became effective December 28, 1993, but was repealed on January 14, 1994, when a second charter schools act, 1993 PA 362, MCL §§ 380.501 *et seq.*, was signed into law. Thereafter, on December 13, 1994, the Legislature passed a third charter schools act,1994 PA 416, which amended the second charters schools act, PA 362, in response to a trial court ruling that PA 362 was unconstitutional. However, the amendments were such that if a court found PA 362 to actually be constitutional, then the third act, Act 416, would repeal itself. The Michigan Supreme Court found PA 362 constitutional in 1997, thus PA 416 repealed itself and the law reverted back to the provisions of the second charter schools act, PA 362. See *Council of Organizations v. Governor*, 556 N.W.2d 208, 212-13 (Mich. 1997).

The current movement toward charter schools is strong. Nationwide, the Center for Education Reform estimates that in 2006-2007 there were nearly 4,000 charter schools operating in 40 states and the District of Columbia, educating nearly 1.15 million students.[2] In Michigan, it is estimated that in 2006-2007 there were 241 public school academies with a combined enrollment of 89,297.[3] With mediocre academic performance, budget woes and strained labor relations in the conventional public schools, the growth of charters is easily understood.

Michigan Distinctives

In Michigan the state's approach to charters is unique in several respects. First, a charter school receives at least the state's minimum per-pupil foundation allowance for school operating purposes (although a charter school may receive less per-pupil operational money than the district in which the school is located).* Second, several different institutions, such as public universities, community colleges, intermediate school districts and local school districts, are permitted to authorize charters.[4] Third, charter school teachers are exempt from the Michi-

* "Charter schools receive a district foundation allowance, just as conventional local school districts do. However, a charter school's foundation allowance is equal to the lesser of the foundation allowance of the surrounding conventional school district and the basic foundation allowance [for all Michigan school districts] plus $300. In fiscal 2007, the basic foundation allowance is $7,085, meaning that no charter school is receiving a foundation allowance of more than $7,385 in fiscal 2007." Ryan S. Olson and Michael D. LaFaive, *A Michigan School Money Primer for Policymakers, School Officials, Media and Residents* (Midland, Michigan: Mackinac Center for Public Policy 2007) p. 78, *citing* MCL § 388.1620(6).

gan Teachers' Tenure Act.[5] Michigan also places specific limitations on charters, such as a prohibition on community colleges chartering schools in Detroit.* Finally, if a school district refuses to grant a charter, Michigan uniquely allows for a district-wide vote in which citizens may overturn the district's decision and approve the charter.[6]

Unionization: The Collective Bargaining Issue

Among the criticisms leveled at public education that gave rise to the push for charter schools is that meaningful change in the conventional schools has been stifled by collective bargaining, the process by which unionized schools must arrive at employee contracts. Eva Moskowitz, former member of the New York City Council and current executive director of the Harlem Success Charter School, puts this issue in stark terms:

> "The problem with the Soviet Union was not its leaders or its employees; it was the closed, uncompetitive economic system that stifled its innovation. We have the Soviet equivalent in our schools; it's a system that shuns competition and thwarts change. But in America, it's the collective bargaining agreements that are the glue keeping the monopoly together."[7]

To help the academies achieve their reforms, the Michigan Legislature made it possible for some public school academies to be relieved of the collective bargaining obligations which encumber the conventional public school districts. The

* At the time of publication, enrollment in the Detroit Public Schools had fallen below the legal threshold needed to sustain the prohibition on community colleges' chartering schools in the district. Legislative action to restore the prohibition is pending.

Legislature did yield to union concerns and require that if the authorizing authority is a public school district, the academy would be bound by the collective bargaining agreements in place in the school district. However, most public school academies are chartered by other authorities, such as public universities, that are not subject to this provision. Teachers at these public school academies are free to select their own representatives and negotiate their own contracts or, as most have chosen, may opt not to have union representation.

Michigan law, however, does not prevent any public school academy from being organized by a union. Public school academies remain subject to the Public Employment Relations Act, the law that governs the certification of public sector unions and the process of collective bargaining.[8] Accordingly, it is a very real possibility that public school academies may face unionization efforts.

Unions and the Charter School Movement

On the face of it, the major education unions do not oppose charter schools. Just how deeply the unions actually support the concept of charters, however, remains unclear. For example, the National Education Association's resolution on charter schools (see "NEA Resolution on Charter Schools" in the appendix), while allowing for the existence of charters, sets forth so many requirements for their acceptance as to call into question whether a charter school program complying with the NEA's resolution would be in any better position to effectuate change than a conventional public school.

Indeed, the story of Michigan charter schools is in many ways the story of the teachers unions' ongoing attempts to oppose them. This opposition arose at the outset. The constitutionality of the Charter Schools Act was immediately challenged by education organizations, including the Michigan Federation of Teachers. Initially, these organizations met with success. In fact, both the trial court and Michigan Court of Appeals held the law unconstitutional.[9] But in the end, the Michigan Supreme Court held the schools constitutional, reinstating the law in 1997.[10]

Is the Law Constitutional?

The contention of the opponents of Michigan's charter schools was that the law violated the Michigan Constitution by divesting the State Board of Education of its authority to supervise public education.[11] In addition, they claimed the law lacked a mechanism mandating that a public body select the board of directors for a charter school.[12] However, in 1997, the Michigan Supreme Court rejected both arguments, and declared the Charter School Act to be constitutional. [13]

Despite their apparent issues with charter schools as currently authorized, union efforts to organize these schools are intensifying. In 2007, the American Federation of Teachers (AFT) "reaffirmed its commitment to quality, accountable public education, pledging it will intensify its nationwide effort to organize charter schools" by establishing a charter school teacher network, "the Alliance of Charter Teachers and

Staff … to represent the interests of AFT-represented charter school educators nationwide."[14]

Union efforts at organizing public school academies in Michigan have met with mixed results. In January 2000, the Michigan Education Association (MEA) was successful in organizing what was then the largest charter school in the nation, the Lansing-based Mid-Michigan Public School Academy; the MEA has since been decertified there.[15] After voting in the MEA in August 2000, the teachers of Island City Academy, a charter school in Eaton Rapids, voted to decertify the MEA in October 2001.[16] In 2005, the MEA successfully organized the Joseph K. Lumsden Bahweting School in Sault Ste. Marie, chartered by Northern Michigan University, only to see the union voted out in February of 2007.[17] The MEA also represents teachers at the Old Redford Academy in Detroit, after winning an election in 2006.[18]

The unions' efforts to organize charter schools must be seen in the wider context of their continuing opposition to charter schools. In 1999, for example, the presidents of a Flint teachers union and the Flint Board of Education called for the resignation of a school board member for her support of a proposed charter school for Hispanic and Native American students.[19] In 2005, the MEA sued the state to prohibit Bay Mills Community College from chartering 30 schools across the state of Michigan.[20] The MEA challenged Bay Mills's contention that as a federal, tribal community college, it should be permitted to charter schools throughout the

state. The MEA's suit was dismissed.[21] In the 2006 Michigan governor's election campaign, the MEA Voice magazine published an article blasting candidate Dick DeVos for his support of lifting the cap on the number of charter schools in Michigan.[22]

Having failed to prevent charter schools from forming, teachers unions have apparently moved on to an alternative strategy for dealing with charter schools: attempt to unionize them. This new approach should not be taken to mean that the MEA and MFT now approve of charter schools. At most this indicates that the unions can tolerate charters as long as they are unionized.

Suffice it to say that charter school staff who lack a clear understanding of the motivation behind a union's interest in them, and who do not know what a union can realistically deliver, may be easily drawn in to union promises.

What Is a Union?

Unions are organizations made up of several layers. At the top is the "home office," usually called the "National." In the case of the National Education Association, the main office is in Washington, DC. The Michigan Education Association is actually a state affiliate of the parent organization, the NEA. There are NEA affiliates for all 50 states. Below the state affiliates are the "branch offices," commonly called "Locals," that represent school employees in an individual school district or, in rare cases, a charter school. The American Federation of Teachers has a similar structure of national, state, and local organizations.

Every worker represented by a union is required to pay union dues or agency fees for the local, state, and national union. Thus, every member of the NEA's Grand Rapids affiliate, the Grand Rapids Education Association, helps finance the MEA statewide, and the NEA nationally.

This is no small matter, since all the funding for the union comes from compulsory dues and other fees paid by members. Members pay their locals. Teachers can choose not to join, but nonmembers still must pay a representation fee. The locals keep some money, then send the rest upstairs, to the state federation and to the national. 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 AFT had expenditures of $196 million during 2006-07. This number does not count the millions spent by all the other local and state federations.

The National Education Association is similarly designed. There is a national headquarters, intermediate bodies (councils and state affiliates) and locals. The MEA is the largest public education union in Michigan and among the most powerful affiliates of the NEA. In 2006-2007, the MEA reported 156,000 members and expenditures of $124 million.

The Success of Michigan's Public School Academies

Michigan's public school academies are growing because parents, teachers and charter school leaders have found that conventional school administration — bound by restrictive collective bargaining agreements — is too stifling to be an instrument of educational progress. They desire something more, and public school academies are filling this niche.

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 administrators may see a union as an obstacle to success.

- Unions often bargain for contracts that reduce management's flexibility in the direction of staff;
- Unions can restrict direct communications between administrators and employees;
- An "us versus them" atmosphere can develop, often prompted by union leaders;
- Managing a union bargaining relationship requires much time, energy and extra cost, all better spent on educating children;
- Unions often overemphasize seniority, which may hurt merit-based systems;
- Risk of labor strife may increase, and with it a loss of community confidence; and,
- Of particular concern to charter school leaders, unions can present an obstacle to progressive changes.

The hope expressed by the parents of charter school students is well grounded. The evidence is mounting that contrary to union predictions, charter schools are getting results and in many cases are outpacing neighboring conventional public schools. Not only are charter schools educating stu-

dents who come from low income families and are more academically challenged than those attending conventional public schools, but they also are more successful at preparing those students for state exams.

For example, in 2007 the Michigan Association of Public School Academies noted that on the 2006 Michigan MEAP tests:

- "Charter public schools in Detroit exceed the local district on 24 of 27 tests — up from 20 last year. They tie on two additional tests and are within 1 point on the remaining exam.
- "Flint charter schools exceeded the local district on 17 tests, including by 20 or more percentage points on eight of those.
- "Grand Rapids charters out-scored the local district on all 27 tests — by more than 30 points on six, and by 20-29 points on another 13. …
- "Charters dramatically outpace their host-district peers in middle school. For example, nearly 60% top the hosts in 7th-grade reading; 55% are above in 8th-grade writing."[23]

The success of public school academies in Michigan is a testament to the value of greater educational freedom, the hard work of the charter school pioneers, and their vision for public education.

Employee Free Choice

Under Michigan's Public Employee Relations Act (PERA), public school 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. This is no less true in charter schools. However, PERA also guarantees employees that this decision will be of "their own free choice."[24]

By signing representation cards or a petition (sometimes referred to as an "expression of interest"), charter school teachers or staff members set in motion the events that can authorize a union to represent them as their collective bargaining representative. An employer may call for a certification election to determine whether or not a union has the support of a majority of the school's employees, but if a majority in turn votes for union representation, the employer must respect that outcome.[25]

Although the law grants employees freedom of choice, the law also grants certain advantages to unions seeking to organize employees. The only way for charter school teachers and other staff to avoid the unintended consequences of bargaining collectively through a union is to have 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. An organization drive is the first step a union takes to becoming a public school academy's employees' exclusive bargaining representative.

Which Law Applies?

Michigan's Charter Schools Act provides that charters are subject to the laws of the state of Michigan, which would include Michigan's labor relations law, the Public Employment Relations Act. It has been suggested by some that the federal labor law (the National Labor Relations Act) should apply to Michigan charters, as it does to many private schools. There are very significant differences between the laws. For instance, the NLRA allows for its covered unions to conduct strikes. Under PERA, unions are legally prohibited from striking, although this prohibition has been flouted in the past.

The federal law is administered by the National Labor Relations Board, which largely decides the extent of its own jurisdic-

tion. While federal labor law is supreme, the NLRB has never taken jurisdiction over a Michigan charter school (and rarely has asserted jurisdiction over a charter school anywhere else). Further, since the clearly expressed intent of the Michigan Legislature is that charter schools be considered "public" and subject to PERA, it is doubtful that Michigan charters would be deemed subject to the federal law. Therefore, we assume that charter schools will continue to be covered by PERA.*

Nevertheless, further exploration of this issue is not foreclosed. Charter school administrators requiring closer examination of this question should consult with labor law counsel.

Organizing the Non-Union Employee

Michigan's PERA establishes employees' rights to support or refrain from supporting unionization. To organize employees under the law, a union must first gain written expressions of support from employees. Typically, a petition or "union authorization cards" are the means used for such expression.

In signing a petition form or card, employees state that they designate a specific labor union to be their representative for collective bargaining purposes. The union needs to

* In one instance, the Michigan Court of Appeals did refer a charter school matter to the NLRB for a determination of whether academy employees were covered by the NLRA, rather than PERA. In a case involving Mosaica Academy of Saginaw, the issue was whether the workers were employed by a private company managing the academy, or employed by the academy itself (see *Mosaica Academy of Saginaw v. Michigan Educ. Ass'n*, 2002 WL 1375890 (unpublished, Mich. App. 2002)). The school in question is no longer affiliated with Mosaica, however, and the case appears to have become moot, with no decision having been rendered by the NLRB.

get signatures from 30 percent of the employees in a particular unit to force a certification election. The employer may also agree to recognize a union voluntarily if that union has signatures from a majority of employees. This procedure, called a "card check," is controversial. Peer pressure to sign a card or petition can be intense, and consequently signatures alone have proven to be less reliable than a secret-ballot vote as a means of gauging employee support for a union. Union members themselves are uneasy with the card-check process; a 2004 survey by Zogby International and the Mackinac Center for Public Policy found that 84 percent of union members believe that workers should have the right to vote on whether they wish to belong to a union.[26]

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

Signatures often are solicited by unions and given 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 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, including PERA, are based. It may help explain the law's curious, almost conspiratorial-sounding procedures.

American labor laws, both state and federal, are based on an industrial workplace model that is now almost 100 years old. Back then, that workplace was subject to virtually no safety laws or anti-discrimination laws, and offered

employees few meaningful outlets for their frustrations. Unions at that time were of questionable legality.[27]

Employers often responded ruthlessly to efforts to unionize their workers, retaliating against employee "troublemakers" without legal limitation. Conflict — sometimes violent — was inherent in this employment relationship. The nation's labor laws were written while this model was still widely applicable. 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 or she supports a union may be deemed coercive and unlawful employer conduct. 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. Such silence also serves a tactical objective. It strategically delays the public employer's response to the organizing drive.

Unions are often well-structured, well-funded, and skilled in recruiting new members and supporters. Never forget, for example, that the NEA is an organization with nearly 3 million members that has "a network of 1,650 full-time and 200 part-time employees who provide local affiliates guidance on matters including negotiations and grievance resolution."[28]

As lawyers experienced in employment relations know well, the AFL-CIO, as well as many of its member unions, has long taught organizers that the most successful tool in organizing is *stealth*. Unions are most successful when they can obtain a large number of employee signatures *without attracting the employer's attention*. They appeal to employees so as to make unionization appear highly attractive, promising benefits that come at little or no cost to employees. Union organizers will rarely provide workers with any negative information about union representation.

Why this secrecy? To prevent employers from responding. Unions know full well that when the employer is aware of union organizing, the employer will begin educating employees lawfully as to the less-than-attractive realities of unionization. Statistics and years of experience demonstrate that when employees understand the facts about unionization, both good and bad, they frequently reject the idea of union representation.

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 cost 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. These characterizations are simply not true.

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 is those who demand that employees hear just one side of the story who are being unfair 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."

The 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, bylaws, and collective bargaining agreements, so employees could learn about the organization in detail. Unions would inform employees that they cannot guarantee any results and 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; and
- A new vocabulary is heard: "grievances," "tenure," "seniority," etc.

Ideally, charter school administrators should create a positive work environment and make sure that staff know all the facts about unionization before any "tell-tale signs" emerge.

This disclosure, unfortunately, hardly ever happens. Union officials are not required, and certainly cannot be expected, to offer employees a fair or complete explanation of the potentially far-ranging 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 giving their signature by threatening that they will be fired if they do not sign 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 signature. For example, they may make it sound inconsequential:

- "Oh, it's nothing."
- "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 only so we can finally get the administration to listen to us."
- "We just want to see if people are interested."

Such statements may be duplicitous or even false; nonetheless, they are the type of comments that might be made — and they are very effective.[29]

Certification Elections

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 Michigan Employment Relations Commission (MERC), the Michigan administrative agency established to oversee public employee matters.[30] In either case, the process usually begins with a union testing the level of employee support.

If a union can show that it has the support of a majority of the employees in an appropriate bargaining unit it may request voluntary recognition by the public employer. (See box on Page 25 for discussion of an appropriate unit.) If the employer agrees that the union has the support of a majority of employees it may recognize the union voluntarily. [31] Typically this is done through a "card check," with a union presenting petitions or union authorization cards signed by a majority of bargaining unit members. The employer also may decline recognition — even if the union has signatures from a majority of bargaining unit members. If the employer has declined, the union may file a petition with MERC requesting a certification election.

When the union files its petition, it also must file a "showing of interest" indicating that at least 30 percent of the unit's employees have provided supporting signatures. This showing can be in the form of union cards or a petition sheet provided by MERC. The petition must be "supported by a showing of interest existing at the time of filing of the petition of 30 percent of the employees in the unit claimed to be appropriate."[32] Once a petition for certification is filed, MERC will conduct an investigation to determine if there is "reasonable cause to believe that a question concerning representation exists," that is, whether the requisite 30 percent support is present.[33] It is at this point that an employer may challenge the validity of the support. If the petition is deficient, a union has 48 hours to show the requisite interest, or the petition will be dismissed.[34]

If valid support for unionization is found, MERC will ask for a "consent election agreement," which governs the conduct of the election and will include "a description of the appropriate bargaining unit, the payroll period to be used in determining the employees within the appropriate unit who shall be eligible to vote, and such other matters as the commission considers appropriate."[35] If a consent election agreement is entered into, "The time and place of the election shall be determined by the [MERC] commission or its election agent after consultation with the parties."[36]

If union and employer cannot reach a consent election agreement, the union's petition will be referred to an administrative law judge, who will hold a hearing for the purpose of gathering facts on the matters in dispute.[37] At least five days notice will be given on such a hearing.[38] After the hearing, MERC will order an election, dismiss the petition, or make other disposition of the matter. If an election is directed, it may only be delayed by a court-issued order pending appeal.

Elections or Card Checks? Which Protect the Employees' Interests?

Recently, unions have sought 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 labor relations laws (such as New York's Taylor law) have reduced the role of elections, relying more and more on the initial showing of support through "card check." In a card check, employees' choices are locked in by their signatures on authorization cards. Their signatures are their "votes." If a majority of bargaining unit members sign authorization cards no election is necessary. There are many reasons why this may not reflect an informed choice, an uncoerced choice, or even a knowing choice.

Michigan has not adopted this approach, though calls for this approach have been made in union lobbying both in Washington and Lansing.

Despite the obvious flaws to certifications without elections, 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. An overwhelming majority of union members themselves disagree, however, and would support making elections mandatory, eliminating "card check" union certification altogether.[39]

Elections, whether by consent or by order, are to be by secret ballot and under the direction of a MERC election agent. School employers are required to provide to MERC and "other interested parties," including the union, a list of the names and addresses of all employees eligible to vote.[40] MERC may conduct an election in whole or in part by mail ballot by "mutual agreement of the parties, by order of the

commission, or by determination of its agent after consultation with the parties."[41]

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 often referred to as the "community of interest" test.[42] The unit need not be the perfect unit, just an appropriate one. The unit is ultimately determined by MERC, 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. In states where unionization of charters is more developed, one certification included all "full-time teachers, social workers, and library media specialists." Another included "SETSS (Special Education Teacher Support Services) Teachers, the Special Education Coordinator, teaching assistants and teaching fellows." In general, school bargaining units include teachers and other members of the staff that work in teaching-related bargaining positions. Because fact-based analyses are used to decide appropriate units, no "one size fits all." MERC does, however, generally allow for placing unrepresented, nonfaculty, nonsupervisory positions into one bargaining

unit even though "gathering up remaining employees into a residual unit will nearly always involve joining employees with diverse job descriptions."[43]

There are clear *exclusions* from an appropriate unit, however. The law forbids public employer supervisors from being in the same unit as the employees they supervise.[44]

Union Access to Public School Academy Employees

A union engaging in an organizing campaign likely will seek some level of access to school employees to promote union representation. This access can take the form of meetings and literature distribution, but can also extend to simple pro-union T-shirts that employees wear to work.

The degree to which an employer must grant access, like many issues in labor law, is not, nor probably can be, fully defined. At issue is balancing the need to accommodate the employees' organizational rights with an employer's need to maintain an orderly, productive workplace. Courts will also take into account the employer's policies towards volunteer groups and other organizations that might seek access to employees at the workplace. These issues must often be decided on a case-by-case basis.

PERA declares that it is unlawful for an employer to "interfere with, restrain or coerce public employees in the exercise of their [organizing and collective bargaining] rights … or to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor

organization.…"[45] This statutory obligation has been infrequently interpreted by MERC or the courts in charter school cases, but matters in other contexts and matters before the National Labor Relations Board — the agency which applies federal labor law — are instructive.[46] From these contexts the following guidelines emerge:

(1) *Restrictions on union access must be reasonable in time, place, and manner.* Employers are fairly free to prohibit union organizing conduct while employees are on school time. Likewise, literature distributions in work areas may be curtailed. This is not true of employee non-work time. There, employees are presumptively free to discuss union issues and distribute literature. Note that break time — even paid lunch time — has been interpreted to be non-work time, and employees are usually permitted to pursue organizing during these times.[47]

(2) *Restrictions on employee "pro-union meetings" are more permissible than restrictions on employee "solicitation."* In discussing the appropriate amount of access that any public employer must provide to a union engaged in an organizing drive, the Michigan Court of Appeals has noted a distinction between a union "meeting" and union "solicitation." According to the court:

> "A meeting is typically an assemblage of persons gathered for a common purpose. Solicitation, on the other hand, involves little more than an appeal for something by one to another."[48]

The court found that organizational solicitation may be conducted by employees on the employer's premises if it only involves non-work areas on non-work time. However, the court also held that there exists no right to schedule a meeting on property not designated for this type of meeting.[49] Accordingly, if non-work "meetings" for other purposes are prohibited on charter school property, a union is not entitled to conduct such a meeting for organizing purposes. Charter school leaders should be mindful of what actually is, or has been, occurring in the past on school property to avoid charges of discrimination.

(3) *Rules must not discriminate against union activities.* Any rule regarding the use of the school's property or impacting the speech or activities of an employee must not discriminate against union activities. To be valid, rules restricting union access to academy employees need to be tied to operational necessity, evenly applied, and drafted without bias against union access. Rules that would impact unionization efforts need to be tied to safety, cleanliness, or some other legitimate school interest.

(4) *Access restrictions on non-employees or off-duty employees may be greater than restrictions placed on current employees.* There is more leeway in constructing rules that bar non-employee access to current employees, and it is possible to set forth sustainable rules that bar outsiders from coming into the school to talk with employees about union organizing.[50] Again, however, these rules cannot be discriminatory towards union organizers either in design or in selective enforcement.

Crafting appropriate rules is complicated and subject to ever-changing law. A school which has not considered adopting policies in this area is encouraged to do so. *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, Michigan's 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, of course, 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." PERA establishes a framework for organizing and 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 employers from discussing unions with employees. PERA does provide some limitations, however. For instance, an employer may not "dominate or interfere with the formation or administration of any labor organization."[51] This topic is further explored in Chapter IV.

Permissible Topics

Following 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 conventional schools, where unions have worked against many education reforms.
- Unions generally have opposed charter schools.
- 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.

As noted, organizing a public sector union in Michigan is controlled by PERA and the interpretations of it by the state courts and by MERC. However, and while not controlling, precedent generated under the National Labor Relations Act has often influenced MERC in its implementation of

PERA.[52] Accordingly, in addition to Michigan law, much can be gleaned from the seventy years of experience under federal labor law.

Precedent has produced several core principles of lawful employer communication. Permitted communication generally pertains to three subjects: facts, opinions, and examples.

Using Legal Counsel — FOIA

An employer can communicate with its employees about unions. However, it is advisable to obtain advice from experienced legal counsel. Not only will such counsel be beneficial, developing communications with an attorney will help shield the school from having to turn over strategy documents under a Freedom of Information Act (FOIA) request. This statute requires that public documents be made available to any asking party.

FOIA requests are designed to make public any documents prepared by government officials. Since Michigan public school academies are public by nature, they are subject to FOIA. As such, even documents prepared by a public school academy pertaining to strategy in responding to a union organizing drive could conceivably be subject to FOIA.

FOIA provides an exception to public release for "information or records subject to the attorney-client privilege."[53] "The purpose of the privilege is to enable a client to confide in an attorney, secure in the knowledge that the communication will not be disclosed.… The scope of the privilege is narrow: it attaches only to confidential communications by the client to its advisor that are made for the

purpose of obtaining legal advice."[54] While this exception may not apply under all circumstances, it may well be a help in situations where a union files a FOIA request.

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 PERA, and the procedures of MERC. 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. For example, the federal government requires the MEA to file a financial disclosure form (called an "LM-2") with the Department of Labor. This document shows how the union uses its funds.[55] Union by-laws are often available over the internet, as are the national union's resolutions.

This information may be shared lawfully. You will also want to familiarize yourself with current information relevant to your community. Although this guide is not intended as a script for charter school employers, 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 require "full disclosure" by union organizers of all the facts needed for employees to have a balanced view.
- 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 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 law requires good faith bargaining, but does not require either the union or the employer 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 and when a union contract goes into effect, all employees in the bargaining unit are covered, whether or not they signed a petition or voted for the union (no "opting out").
- The union will almost certainly seek a "union security" clause that mandates all bargaining unit members either join the union and pay union dues or pay an equivalent amount, called an "agency fee," in lieu of membership dues if they refuse to join the union. These dues and fees typically cost hundreds of dollars annually.

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;
- Fines and penalties; and
- Special assessments (sometimes used to fund political activities).

Unions also 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. The charter school, like any employer, is allowed to call for concessions and may pursue them with as much determination as does the union. Because of their independence, charter schools may actually be in a better position than most regular school districts to avoid the inclusion of unduly expensive or restrictive clauses in collective bargaining agreements.

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 campaign, maximizing educational achievement is not the union's primary goal. Unions — almost by definition — are institutionally motivated to maximize the number of employees, minimize work, eliminate accountability and protect the least productive employees. Many teachers chafe under union-imposed limitations on performance and autonomy.

Opinions: A Highly Persuasive Tool

The law allows employers to express their opinions on 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 conventional 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

Union organizing drives can be very challenging from the perspective of an employer. Unions play to win. They have vast resources and they are not afraid to use the Freedom of Information Act or other sources of public information to obtain leverage against the employer resisting the drive. Unions have frequently resorted to personal attacks directed against administrators and board members. How an employer responds will prove critical both in thwarting the organizing drive and in avoiding an unfair labor practice allegation.

The Law

While nothing in the law prohibits a charter school employer from discussing unionization with its employees, PERA provides a general outline of activities employers must avoid. These activities are classified as "prohibited conduct." Here is the statute itself in italics. Explanatory comments are provided in plain text:

MCL § 423.210 Prohibited conduct; service fee.

Sec. 10.(1) It shall be unlawful for a public employer or an officer or agent of a public employer

(a) to interfere with, restrain or coerce public employees in the exercise of their rights…

Under section (a), charter school leaders are prohibited from deliberately interfering with employees' rights "to organize together or to form, join or assist in labor organizations…."[56] 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 other coercive action to try to prevent employees from exercising their rights.

(b) to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization: Provided, That a public employer shall not be prohibited from permitting employees to confer with it during working hours without loss of time or pay;

Section (b) prohibits employers from developing or maintaining a "company 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 their independence in representing employees.

(c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: Provided further, That

nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 [MCL 423.211] to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative;

(d) to discriminate against a public employee because he has given testimony or instituted proceedings under this act;

Akin to section (a), sections (c) and (d) forbid 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.

To establish a case of discrimination under this section, MERC requires that the aggrieved party prove: (1) union or other protected concerted activity; (2) employer knowledge of that activity; (3) union animus; and (4) suspicious timing or other evidence that the employer's alleged discriminatory action was motivated by the employee's protected conduct.[57]

There is one important exception to this rule against discrimination; a collective bargaining agreement can include a requirement that all workers covered by it must either join the union or pay an "agency fee." This "agency fee" or "forced dues" clause means that employees will pay the union the same amount, regardless of whether or not they are satisfied with

the union's efforts on their behalf, forcing employees to pay dues to an organization they may not support and shielding the union from accountability to the people it represents. Unions place a high priority on the agency fee clause and, unfortunately, the vast majority of union contracts in Michigan, in public education, government, and the private sector, include some version of forced dues.

(e) to refuse to bargain collectively with the representatives of its public employees, subject to the provisions of section 11 [MCL 423.211];

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.

If there is a collective bargaining agreement, the terms of that contract that pertain to mandatory subjects of collective bargaining — wages, hours, and conditions of employment — must be continued until a new contract is negotiated, or an impasse is declared. This will be discussed further in Chapter V.

These prohibitions seem intimidating, but what do they mean?

Improper employer practices can be the basis for unfair labor practice charges, which a charging party — usually an employee or union — may file with the Michigan Employment Relations Commission. MERC determines whether or not the unfair labor practice charges have merit.

The remedy for a violation is usually 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 an even more significant penalty charter schools may face for violation of PERA.

The Charter Schools Act states that:

> *"To obtain a contract to organize and operate 1 or more public school academies, 1 or more persons or an entity may apply to an authorizing body described in subsection (2). The application shall include at least all of the following:*
>
> ***
>
> > *(h) An agreement that the public school academy will comply with the provisions of this part and, subject to the provisions of this part, with all other state law applicable to public bodies and with federal law applicable to public bodies or school districts."* [58]

Accordingly, public school academies are subject to Michigan law. This would, of course, include PERA. Hence, a violation of PERA could conceivably result in the revocation of a charter.

The Charter Schools Act provides that:

> *"(1) The authorizing body for a public school academy is the fiscal agent for the public school academy.... An authorizing body has the responsibility to oversee a public school academy's compliance with the contract and all applicable law. A contract issued under this part may be revoked by the authorizing body that issued the contract if the authorizing body determines that 1 or more of the following has occurred:*
>
> ***
>
> *(b) Failure of the public school academy to comply with all applicable law.*
>
> ***
>
> *(2) The decision of an authorizing body to revoke a contract under this section is solely within the discretion of the authorizing body, is final, and is not subject to review by a court or any state agency. An authorizing body that revokes a contract under this section is not liable for that action to the public school academy, public school academy corporation, a pupil of the public school academy, the parent or guardian of a pupil of the public school academy, or any other person."* [59]

As discussed in Chapter III, you have tremendous ability to engage employees in discussion of the facts they need to know. Nevertheless, the law requires that certain subjects are off limits.

So what do you have to steer clear of? Although the law does limit what you can say and do, for the most part it

prohibits what 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.**

However, 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 union contract! Never!" Look at it this way: If a union came in, you would be required to bargain in good faith. To say "never!" in advance 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 a threat, and not a very credible one at that.

Likewise, even if you do not expressly tie repercussions to employees joining a union, you can run afoul of the law by conveying this message. For example, the Michigan Court

of Appeals has ruled that a supervisor made a threat by telling an employee that if she were successful in her attempt to be admitted to the union, her wage would be out of the range for her occupation and she might "place herself out of a position."[60]

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.

Polling of employees is likewise generally prohibited. It is considered "presumptively coercive" and is permitted only if the poll is conducted by secret ballot, is being used to determine whether a union has actually achieved majority status, and employees are assured that there will be no reprisal.[61] Any charter school seeking to conduct a poll would be wise to retain the advice of counsel.

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 statement of *facts, opinions, or examples*. However, care should be taken not to get drawn into asking these prohibited questions.

Bribes: The Employer Can't "Promise" Its Way Out

Unions are permitted to make promises to employees, even though 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 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 not in a position to fulfill them unilaterally.)

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."

Wait! I Don't See "Threats," "Retaliation," and Similar Misconduct Mentioned in the PERA Law.

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

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

MERC's improper employer practice decisions offer little clear guidance on communicating with employees. However, the reason for this is that few public employers ever say *anything* negative about unions in their departments. 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 "prohibited conduct" that applies to unions, although it is a little shorter than the employer's list. Under the law,[62] a union may not:

- "Restrain or coerce" public employees into supporting a union or withholding support from a rival union;
- "Cause a public employer to discriminate" against a public employee;
- "Refuse to bargain collectively" with a public employer in good faith.

There certainly are many restrictions placed upon an employer. But a charter school leader should not come away from this discussion with a sense of paralysis. Under Michigan law a charging party has a substantial burden. An aggrieved employee or union must do more than create suspicion or surmise about an employer's conduct, but must adduce substantial evidence from which a reasonable inference of discrimination may be drawn. [63] Without such proof, the charging party's claims will fail.

V Collective Bargaining

Industrial style collective bargaining is now the norm in Michigan's conventional public schools. As the Mackinac Center has previously found, this mode of negotiating is "poorly suited for educational institutions and works to the detriment of students and teachers alike. It stifles communication and injects conflict and confrontation into situations where consensus and cooperation should prevail." [64] Should a union succeed in organizing a public school academy, the school will have to negotiate contracts through this process. Accordingly, at least a cursory understanding of collective bargaining is in order for public school academy leaders as they consider the implications of unionization and strategize on how to defeat an organizational drive.

Collective bargaining is defined by Michigan's PERA law:

> *"[T]o bargain collectively is the performance of the mutual obligation 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 under the agreement, and the execution of a written contract, ordinance, or resolution incorporating any*

agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or require the making of a concession."[65]

As the Michigan courts have held, "When parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules — a new code of conduct for themselves — on that subject."[66] Contracts arrived at through collective bargaining define the employer-employee relationship and are enforceable in the courts.

Collective bargaining requires the union and the employer confer in "good faith" concerning terms and conditions of employment. Under PERA, terms and conditions of employment are so-called "mandatory" items that must be negotiated.[67] Other matters that do not relate directly to terms and conditions of employment are "permissive" and may be negotiated, but they do not have to be. Certain items are "prohibited" by the Michigan Legislature and may not be negotiated, such as a decision to competitively contract janitorial services, or the selection of a carrier for health insurance.[68]

Good Faith

By necessity, the definition of good faith is open to interpretation. According to the Michigan Supreme Court:

"The primary obligation placed upon the parties in a collective bargaining setting is to meet and confer in good faith.

The exact meaning of the duty to bargain in good faith has not been rigidly defined in the case law. Rather, the courts look to the overall conduct of a party to determine if it has actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement.… The law does not mandate that the parties must ultimately reach agreement, nor does it dictate the substance of the terms on which the parties must bargain. In essence the requirements of good faith bargaining is (sic) simply that the parties manifest such an attitude and conduct that will be conducive to reaching an agreement."[69]

Unfair Labor Practices

Where good faith is questioned, or some other impropriety is perceived, PERA provides that a union or public employer may file an unfair labor practice charge. MERC resolves these charges initially, but the parties can appeal to the Michigan Court of Appeals, and ultimately, the Michigan Supreme Court. It is not uncommon for several charges to be leveled in a bargaining session where contentious issues are involved.

However, even though bad faith bargaining charges may be filed, the law does not require an actual agreement. PERA ensures only a fair negotiating process. There is no guarantee that an agreement will be reached.

What Actually Happens During Bargaining?

Collective bargaining involves 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 recommended that they obtain the assistance of experienced counsel at the negotiating table. Successful bargaining requires preparation and a well thought-out strategy. (For more information, see the Mackinac Center publication *A Collective Bargaining Primer for Michigan School Board Members.*)

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. However, failing to meet or delaying unduly can result in charges.

Impasse

The potential for failing to reach an agreement is real, but the law anticipates this possibility. When negotiations become deadlocked, the parties are said to be at an impasse. In the private sector, this is the point where unions strike or employers may "lock out" their employees. Public sector collective bargaining is different.

For police and firefighters, Michigan law provides that at

impasse an arbitrator ultimately may determine the terms of a contract. [70] The procedure is called "binding arbitration." This law does not apply to public education. Accordingly, there is no mandatory binding interest arbitration to set contract terms for educational institutions.

Impasse in public school negotiations is handled first through mediation, sometimes referred to as fact finding, conducted by MERC. Mediation is not required before a school board declares an impasse, but it is usually sought in order to show good faith efforts to reach a mutually acceptable contract. If attempts to mediate the dispute fail, the school board in theory is free to implement its final offer. In reality, the process is a bit more complicated.

If a school board declares impasse and imposes contractual terms, the union frequently files unfair labor practice charges. If these charges are sustained, the imposed terms will not stand. However, if a school board has bargained in good faith and otherwise complied with PERA, it is allowed to dictate the terms of the contract. Indeed, Michigan law expressly sets forth "A public school employer has the responsibility, authority, and right to manage and direct on behalf of the public the operations and activities of the public schools under its control." [71]

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 PERA law, however, the union cannot go on strike *legally*, and an employer may not lock out employees. Nevertheless, with ordinary public employers, a union has considerable leverage that it can employ to secure the contract terms that it desires.

The Public Employees Relations Act and Strikes

PERA specifically declares strikes by public employees to be illegal.[72] However, strikes by public employees in Michigan do occur. For example, 7,000 Detroit teachers went on strike at the start of classes in September 2006. These strikes continue to occur because under the law public employees are entitled to individual hearings before they may be disciplined.[73] The unions understand that this is a very expensive and time consuming process. The unions thus are reasonably certain that the public pressures induced by the strike will yield movement in the collective bargaining process prior to the repercussions of the strike being felt by individual employees. This is especially true where the school board agrees to not pursue discipline against the individual employees that participated in the strike as part of a larger agreement that results in the signing of a contract and the end of the strike itself — a fairly common practice. This dynamic has led the threat of strikes to be common despite the clear pronouncement of the law that they are illegal. While a union may benefit from the short term by conducting a strike, the threat of a strike provides little long-term leverage as the law, while difficult to enforce, is ultimately on the side of the public employer.

Union Power in Collective Bargaining

A public sector union possesses political power. It has the ability to raise cash for candidates for elected public office, to provide campaign volunteers and to influence legislation. Indeed, education unions even run their own slate of candidates in the conventional public schools or push for recall elections of board members with whom they disagree. Much of this work is financed by the compulsory dues that unions are allowed to collect. Put plainly, the public employer does not want a labor dispute with a powerful political force. This is particularly true in the case of a publicly elected school board.

A public school academy may not be directly susceptible to the political pressures which often impact a public employer, since academy boards are not elected. But charter school authorizers may be subject to union pressure. Hence, collective bargaining disputes at a public school academy could result in a union placing pressure on the academy's authorizer to mandate that the academy move toward the union's position. This is especially possible in Michigan, where the MEA and the DFT are so dominant in the institutions of higher education that often issue charters to public school academies.

VI Decertifying a Union

Unions occasionally have a difficult time keeping their status as the employees' bargaining agent. Remember, a union is certified by majority vote. Accordingly, a substantial number of employees may never have supported the union. In addition, the promises made by organizers with respect to wages or benefits when support was solicited may not have been delivered; heavy-handed school administrators may 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. For example, in 2001, the teachers of Island City Academy, a charter school in Eaton Rapids, Michigan, voted to oust the MEA as their collective bargaining agent. In the petition to decertify, teachers complained that "the union is seeking to protect its own agenda and … is causing the district to spend precious resources of time and money that could be used to improve the compensation of teachers or to better meet the classroom instruction needs of students."[74]

So, what happens when a union is no longer wanted by the employees it represents? 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 Decertification Petitions

PERA accords *employees* the right to decertify their union through an election conducted by MERC. The process is identical 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 action on their behalf, or even another labor organization seeking to replace the current one. [75] There is no provision in Michigan law, however, for a decertification petition to be filed by a public school academy.

The petition must be supported by 30 percent of the employees in the certified unit. [76] This support, or "showing of interest," must be demonstrated by dated signatures on a form provided by MERC asserting that the union is no longer the representative, or that the employees no longer wish to be represented by the union.

MERC has explicit rules describing when a valid decertification petition can be filed. The rules are technical and strict compliance with them is required. For instance, a union is irrefutably presumed to have majority support for the 12 month period immediately following a certification or valid election. Therefore, employees cannot ask MERC to conduct a decertification election until 12 months have passed after the union is initially certified.[77]

A union also is irrefutably presumed to have majority

status during the life of a collective bargaining agreement.[78] In short, a union may not be decertified if it has successfully negotiated a current, valid contract.

When, however, an agreement is nearing termination, MERC's administrative rules set forth a specific time for the filing of decertification petitions. For public school contracts that expire between June 1 and September 30, the time period to file a decertification petition is January 2 to March 31 of the year in which the contract is scheduled to expire.[79] If the contract expires in a different period, a petition shall not be filed sooner than 150 days and not later than 90 days before the expiration date of the contract.[80] In either case, if the window is missed, the petition cannot be filed until after the contract has expired, and if a new contract is in place workers will need to wait until the next filing window.

While a union cannot be decertified during the term of a collective bargaining agreement, there is a limit on how long this bar remains in effect. By law, the longest any agreement can bar an election from occurring is three years.[81] Therefore, if the duration of the agreement is more than three years, the prohibition on decertification elections 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 for the purposes of setting deadlines for the decertification process and the open period will begin 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 January 2 through March 31, 2008. In

any event, because of the three year limitation and its effect on decertification elections, collective bargaining agreements seldom last in excess of three years.

When a decertification petition is filed, MERC will investigate the petition. If it has reasonable cause to believe that a question of representation exists, it will provide a hearing. If the commission finds upon the record of the hearing that such a question exists, it will direct an election by secret ballot.[82] The union may raise as well such issues as employee eligibility or the timeliness of the petition at that time.

A union also may file unfair practice charges against the school as a defensive measure. These 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 sometimes called a "blocking" charge, because the petition is held in abeyance and an election is forestalled while the charge is investigated.

If MERC finds the charge to be without merit, the charge will be dismissed; the petition will be processed; and an election will be held. If a majority of the employees voting in the election vote to decertify the union, then the union will cease to be their collective bargaining representative.[83] Occasionally, an election may involve not only decertification, but certification of a new union. If more than two choices are involved, a majority vote will still be required, with a runoff election being conducted between the two choices having the two largest numbers of votes in the first election.[84]

Public School Decertification Petitions

In some states, such as New Jersey, an employer may file its own petition for an election if an employer has reasonable cause to believe that the union has lost its majority status. Likewise, in the private sector, federal law provides that under certain circumstances an employer may 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. Michigan law, however, is not developed in this regard, and there is no provision in PERA apparently allowing the filing of such a petition.

How the School May Respond

There is little guidance in Michigan law on the role a school may take in a decertification petition. It is a basic principle of federal labor law, however, that an employer may not initiate, instigate, solicit, encourage, or assist in the filing of a decertification petition, and there is little doubt that the same would hold true in Michigan. 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 resulting decertification petition likely will be found tainted and dismissed, and the school's actions may be ruled unlawful.

Nonetheless, certain *employer* actions would likely be permitted *in response to employees' inquiries*:

- Informing employees of the address and phone number of MERC and advising them to contact MERC for further information, assistance and/or forms;
- If specifically requested, providing employees with a list of names and addresses of unit employees (ideally this should be done through a Freedom of Information Act request).

Once a decertification petition has been filed, there is nothing in Michigan law that keeps an employer from taking an active role in campaigning to decertify a union. Thus, employers may campaign as vigorously in decertification as they can in resisting initial organization. In this respect, there is little difference between certification and decertification campaigns. Accordingly, the rules concerning communications discussed in this guide's prior chapters apply and should be heeded.

VII Why Employees Might Want to Support a Union

Unions represent a shrinking minority of employees in the nation's 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.

Whether recognition is by secret ballot vote or granted voluntarily, often there is only a minimal effort by public employers to educate employees as to the disadvantages of union representation. Accordingly, a continually shrinking number of public employees actually have an opportunity to vote in a secret ballot election.

When one is asked why employees favor the notion of 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 guarantee that a union can deliver them.

Employees are more likely to be motivated to support a union because 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 a union 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 public school academy. 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.

The extent to which supervisors and managers can affect employees' morale and their view of the school should not be underestimated. Employees spend more of their waking hours with management than they do with any-

one 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 supervisors (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,"

- Seems inconsistent in the enforcement of standards,
- 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 can be avoided or at least corrected promptly. Even better, the same management skills that create highly productive and successful workplaces can create positive employee relationships. When such relationships exist, unions cease being attractive.

VIII Skilled Administration Makes a Union Unnecessary

Avoiding unionization has two key elements: (1) educating employees to the realities of union life, 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 is summarized here.

An Eleven-Point Program to Enhance Team Morale and Performance

Any enterprise that 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 with this environment will experience less conflict and employees will find the notion of union representation irrelevant.

1. **Develop and Maintain Clear and Lawful Workplace Policies**

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

must have policies that are functional, 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.

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 sound policies for the school have been prepared, they must be communicated to 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 provide 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. Your school must put its 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 legal counsel.

What's in a Handbook?

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

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

3. Educate Employees About Your Mission

The charter school should have a well-worded mission statement. It will give employees a sense of common purpose. The mission of a charter school should be plain: to create an alternative educational resource that has the flexibility to succeed where conventional public schools have not. The school's mission will motivate employees.

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. Your staff is 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 face.
- Take pride in the flexibility you have. You can change when you need to. By contrast conventional public 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, stands 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 businesses sometimes assume that an individual with ambition, drive, or a good performance history will automatically make a good supervisor or manager. This is not necessarily true. The qualities that 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 (they are not short-changed), and fair to the school (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 correction later more difficult. Constructive criticism can correct a problem before it becomes deeply rooted.

Likewise, a laid-back, "live and 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. People may ask, "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 that provide a true measure of strengths and weaknesses. Employees should have at least one meeting with management every year in which their writ-

ten 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 employee with the tools to perform at the best of his or her ability. However, it is important 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.

There is almost no such thing as 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, 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 PERA and 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 meetings with employees as an opportunity to listen. Be sure to reserve time at every meeting for employees to express concerns that are 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 have 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 do better not to listen 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, even if the answer happens to be "no."

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

10. Consider a Problem-Solving Procedure

Despite developing state-of-the-art policies, an employee handbook and constant communication with employees, there will be times when a conflict with an employee will emerge. One of the greatest attractions a union can offer is the possibility of a grievance and arbitration procedure to remedy actions perceived as unfair. To neutralize this feature

of unionization, consideration should be given to 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 in 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 who feel threatened by charters. Perhaps you have a less-than-cordial relationship with your authorizing authority or the local school district. Perhaps there are significant delays. You are not alone. There are many other public school academies in Michigan and elsewhere in the country that are experiencing the same challenges.

Your charter school association can offer a wealth of resources to assist you with many of the items in this guide. The Michigan Association of Public School Academies can be contacted at http://www.charterschools.org.

Endnotes

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25 MCL §§ 423.211, 423.212.

26 Joseph G. Lehman, "Union Members' Attitudes Toward Their Unions' Performance," Policy Brief (Mackinac Center for Public Policy, September 1, 2004), 4.

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55 Union LM-2 financial reports can be downloaded at http://www.unionreports.gov.

56 MCL § 423.209.

57 *University of Michigan*, 1990 MERC Lab Op 272; *Mosaica Academy of Saginaw*, Case No. C00-E-89 decided May 20, 2002.

58 MCL § 380.502(h).

59 MCL § 380.507 (revised school code).

60 *St. Clair County Intermediate School District v. St. Clair County Education Association*, 630 N.W.2d 909, 912 (Mich. App. 2001).

61 *Utica Community Schools*, 1989 MERC Lab Op 80.

62 MCL § 423.210(3).

63 *Redford Township*, 1975 MERC Lab Op 464.

64 Thomas W. Washburne, Michael D. Jahr, *A Collective Bargaining Primer for Michigan School Board Members* (Midland, MI: Mackinac Center for Public Policy, 2007) p.86.

65 MCL § 423.215(1).

66 *Gogebic Community College Michigan Education Support Personnel Association v. Gogebic Community College*, 632 N.W.2d 517, 522 (Mich. App. 2001), *quoting Port Huron Educ. Ass'n v. Port Huron Area Sch. Dist.*, 550 N.W.2d 228 (1996).

67 *Detroit Police Officers Ass'n v. Detroit*, 214 N.W.2d 803, 809 (Mich. 1974).

68 MCL § 423.215(3).

69 *Detroit Police Officers Ass'n v. Detroit*, 214 N.W.2d 803 (Mich. 1974).

70 Interest arbitration in Michigan is frequently referred to as "Act 312 arbitration," in reference to the act that originally gave rise to this procedure.

71 MCL § 423.215(2).

72 MCL § 423.202.

73 MCL § 423.206(2).

74 "Charter School Ousts MEA in Historic Union Vote" (press release), Mackinac Center for Public Policy, October 29, 2001, http://www.mackinac.org/3834.

75 MCL § 423.212(a).

76 MCL § 423.212(a).

77 MCL § 423.214.

78 MCL § 423.214.

79 MERC Rule 423.141(3)(a).

80 MERC Rule 423.141(3)(b).

81 MCL § 423.214.

82 MCL § 423.212(b).

83 MCL § 423.214.

84 MCL § 423.214.

Appendices

NEA Resolution on Charter Schools

A-32. Acceptable Charter Schools and Other Nontraditional Public School Options*

The National Education Association supports innovation in public education. The Association believes that acceptable charter schools, which comply with Association criteria, and other nontraditional public school options have the potential to facilitate reforms, such as decentralized and shared decision making, diversity in educational offerings, and the removal of onerous administrative requirements. By developing new and creative methods of teaching and learning that can be replicated in mainstream public schools, these schools may be agents for positive change. The Association also believes that, when concepts such as charter schools and other nontraditional school options are proposed, affected public education employees should be directly involved in the design, implementation, and governance of these programs.

The Association further believes that plans should not negatively impact the regular public school program and

* See the *NEA Handbook* for the Policy Statement on Charter Schools adopted by the 2001 Representative Assembly.

must include adequate safeguards covering contract and employment provisions for all employees, voluntary participation, health and safety standards for all students and employees, nondiscrimination and equal educational opportunity, staffing by licensed education professionals, and financial responsibility.

The Association believes that programs must be adequately funded, must comply with all standards for academic assessment applicable to regular public schools, must include start-up resources, must not divert current funds from the regular public school programs, and must contain appropriate procedures for regular periodic assessment and evaluation, as well as adequate attendance and record keeping procedures. The granting of charters should be consistent with the following principles:

a. Charter schools should serve as a laboratory for field-testing curricular and instructional innovations and/or to provide educational opportunities for students who cannot adequately be served in mainstream public schools.
b. Charter school programs must be qualitatively different from what is available in mainstream public schools and not just an avenue for parental choice.
c. Local school boards should be the only entity that can grant or renew charter applications.
d. The criteria for granting a charter should include a description of clear objectives, missions, and goals. Renewal of a charter should be contingent on the achievement of these objectives, missions, and goals.

e. Appeals of local school board decisions in charter applications should be made to a state education agency but appeals should be heard only on the grounds of arbitrary, capricious, or unreasonable decision making, not on the educational judgment of the local school board.
f. Prior to employment at a charter school, educators should be given full disclosure with regard to working conditions, right of return, transfer rights, and financial implications.
g. Private, for-profit entities should not be eligible to receive a charter.
h. Charter schools should have a limited right to contract with for-profit entities for services only to the extent that mainstream public schools can do so.
i. Charters should not be granted for the purpose of home schooling, including providing services over the Internet to home schooled students.
j. Charter schools should be nonsectarian in nature.
k. Private schools should not be able to convert to charter school status. If state law allows such conversions, the chartering agency should ensure that the converted school is significantly different in student body, governance, and education program than its predecessor. This assurance should be especially vigorous in the case of schools with prior religious affiliation.
l. Charters should be granted for a limited period, with five years being the norm, and should be opened within one year of the date the charter was granted.

m. Charter schools should be monitored on a continuing basis and the charter should be subject to modification or revocation at any time if the children's or the public's interest is at stake.

n. Charters should not be granted unless the chartering agency is satisfied that adequate startup resources will be available.

o. Charter schools should secure insurance for liability, financial loss, and property loss. A school district should not be responsible for debts of a charter school, except for debts previously agreed upon in writing by both the district and the governing body of the charter school.

p. School boards must be authorized to deny applications that do financial harm to the authorizing school districts.

Charter schools should be designed and operated in accordance with the following principles:

a. Charter schools may have flexibility within the requirements of law dealing with curriculum, instruction, staffing, budget, internal organization, calendar, and schedule.

b. Charter schools must meet the same requirements as mainstream public schools with regard to licensure/certification and other requirements of teachers and education employees, health and safety, public records and meetings, finance and auditing, student assessment, civil rights, and labor relations.

c. Teachers and education support professionals should be considered public employees.

d. Teachers and education support professionals should have the same constitutional and statutory rights as other public employees.
e. Charter schools should be subject to the same public sector labor relations laws as mainstream public schools and charter school employees should have the same collective bargaining rights under law and local practice as their counterparts in mainstream public schools.
f. Students should not be charged tuition or required to pay a fee to attend a charter school.
g. Students should not be involuntarily assigned to attend a charter school.
h. Charter schools should have some discretion in selecting or rejecting students if they are designed to serve a targeted student population. Students shall not be screened on the basis of race, religion, gender, sexual orientation and/or gender identification, English-language proficiency, family income, athletic ability, special needs, parental involvement in school affairs, intellectual potential, academic achievement, or cost of educating the student. Indirect screening such as denying admission because of the cost of transportation of a student shall not be permitted.
i. Charter schools should meet the needs of at-risk students and those students requiring special education services.

j. The choice of employment at a charter school should be voluntary. Employees in conversion charter schools should be afforded an opportunity to transfer to a comparable position at another mainstream public school.
k. Charter schools should not disproportionately divert resources from mainstream public schools. Charter schools should receive the same amount of money as a comparable mix of students in a mainstream public school. Adequate funds must be available for capital expenditures such as buildings and equipment that do not come from the operating budget of the charter school or the host district. (1993, 2008)

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Mr. Kaplan frequently counsels clients with respect to National Labor Relations Board proceedings, including representation and unfair labor practice cases, collective bargaining, grievances and arbitrations, substance abuse testing issues, Americans with Disabilities Act and workers compensation issues, discrimination complaints and related issues, and OSHA investigations.

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 rewriting 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 publications, the Developing Labor Law.

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Mr. Washburne's numerous articles and Op-Eds have been published in a variety of newspapers, including the Washington Times, The Detroit News and the Lansing State Journal. He is the co-author of "A Collective Bargaining Primer for Michigan School Board Members," a 2007 publication of the Mackinac Center. His essay, "The Boundaries of Parental Authority: A Response to Rob Reich of Stanford University," was reprinted in "Taking Sides: Clashing Views on Controversial Issues in Teaching and Educational Practice," 2nd Edition, (Dennis Evans, editor, McGraw Hill 2005). Mr. Washburne regularly speaks before various groups on labor law and policy.

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