

California Charter Schools Association KNOWLEDGE BRIEF

BY
CALIFORNIA
CHARTER
SCHOOLS
ASSOCIATION

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A GUIDE FOR CHARTER SCHOOLS ABOUT UNION ORGANIZING

SUMMARY: Public school employers should be familiar with the laws and regulations which grant employees the right to form, join and participate in a union organized to represent them in the collective bargaining of employment related matters.

AUDIENCE: You will find this article useful if you are a public school employer, employee, or other individual anticipating a possible union campaign.

Before a labor union becomes certified as the exclusive representative of a group of public school employees, charter school employers have certain rights and obligations under the state **Educational Employment Relations Act ("EERA")**.

The following Knowledge Brief provides a general overview of:

- The legislative basis for employee rights to choose a single employee organization as their exclusive representative union for purposes of bargaining over working conditions with the public school employer.
- Rights and obligations of employers, employees, employee organizations and exclusive representatives.
- Jurisdiction over unfair labor practices by the state Public Employment Relations Board ("PERB").

LEGISLATIVE OVERVIEW

Educational Employment Relations Act Background

The EERA was enacted in California in 1976 to:

- Improve employer-employee relations within the public schools.
- Provide a uniform basis for recognizing the right of public school employees to choose, join and be represented by "employee organizations," or unions.

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- Allow public school employees, in their professional and employment relationships, to select an exclusive bargaining representative and to give employees a voice in forming educational policy.

The EERA was made applicable to charter schools by AB 631 (Stats. 1999, Chap. 828). The Act establishes a framework of labor relations for the 450,000 employees in approximately 1,030 school districts, 70 community college districts and nearly 500 charter schools statewide. The Act begins at Government Code Section 3540. Regulations implementing the Act begin at Title 8 Cal. Code Regs. 32000.

Most importantly, charter school employers need to know that SB 253 (Stats. 2003, Chap. 190), **which is a new law for 2004**, changes the union certification process. Now, an employee organization may be selected without a vote under certain circumstances. Previously, the employer could require a secret ballot vote conducted by the PERB. Now, with enactment of SB 253, the employer is required to recognize the union without a formal election if the union can demonstrate:

- Proof of majority support.
- Clarity as to the bargaining unit to be represented.
- No other union has come forward with the support of 30% of the affected employees to intervene.

This means that employees are presumed to be indicating their support for selecting the union as their exclusive representative when they sign a dues deduction authorization, membership list, membership card or any other petition which demonstrates the employees' desire to be represented by the employee organization for purposes of collective bargaining. For example, if 50% of a school's employees have signed a petition indicating their intent to join a particular union, and no other employee organization is garnering interest, then the employer cannot call for a vote and the union can go directly to the PERB for certification as the exclusive representative.

Educational Employment Relations Act Terms and Definitions

Public School Employer: The governing board of a school district, school district administration, a county board of education, a county superintendent of schools or a charter school that has declared itself a public school employer.

Public School Employee: A person employed by a public school employer **but not** elected by popular vote, appointed by the Governor, management employees or confidential employees.

Employee Organization: An organization, or organization representative, which includes public school employees and which has as one of its primary purposes representing those employees in their relations with their public school employer. An employee organization is generally a "labor union", but can include a group of employees that are not affiliated with a recognized union. There is no minimum or maximum number of members

Case Study

Some school employees are eager to join a union and others are reluctant.

Public school employees:

Have the right to form, join and participate in a union organized to represent them in the collective bargaining of employment related matters;

AND

Have the right to choose not to form, join or participate in a union.

Public school employers:

May tell employees that they prefer that the employees be unrepresented and hope that they vote against recognizing an exclusive representative;

BUT

May not question employees about their views, activities or sympathies toward the employee organization.

of an employee organization. Status as an employee organization is not impacted by the structure of the employee organization, whether it actually negotiates with the public school employer or whether it represents employees on negotiable matters.

Exclusive Representative: An employee organization which has been recognized or certified with the PERB as the exclusive negotiating representative of employees in an appropriate unit of a public school employer.

EMPLOYEE ORGANIZATION RIGHTS AND EMPLOYER OBLIGATIONS

In the realm of employee relations, the Public School Employer constitutes Management, and Public School Employees make up Labor. Generally speaking, Management must maintain an arm's length relationship with Labor and refrain from exercising inappropriate influence. **Under the EERA, a public school employer may not impose or threaten to impose reprisals on employees, discriminate or threaten to discriminate against employees or otherwise interfere with, restrain or coerce employees because they exercised their right to join a union.** Conversely, a public school employer may not interfere with or dominate the "formation or administration of an employee organization, contribute financial or other support to it, or encourage employees to join any organization in preference to another."

Employee Organization Rights

- **Right of Access**

Under the EERA, unions may access employee work areas, bulletin boards, mailboxes and other means of communication. The unions have this right of access at **reasonable times** and subject to **reasonable regulation**. For example, the employer may reasonably require all visitors, including union representatives, to identify

themselves prior to entering the facility, or restrict use to predetermined times of day. Unions also have the right to use institutional facilities at reasonable times for meetings concerned with the exercise of rights guaranteed by the EERA. The unions have this right of access at reasonable times and places and with reasonable manner of access, because access may intrude on public school employer interests such as maintaining order and discipline. For example, the union could not call a meeting during lunch in the student cafeteria while students are present and teachers have supervision responsibilities.

Generally, restrictions should be applied evenly across all groups in a nondiscriminatory fashion and not just aimed at or targeted to employee organizations. **It is recommended that all access restriction policies be in writing and adopted by the public school employer governing body in advance of any union organizing campaign.**

- **Right To Represent**

Under the EERA, employee organizations have the right to represent members in their employment relations with public school employers. The right to represent extends to any employee organization, as long as an exclusive representative has not yet been recognized or certified by the PERB to represent that group of employees. If a group of employees elect to form their own bargaining unit rather than join an established union, they must file for certification by the PERB in order for their exclusive representative to be recognized.

In general, the EERA allows the exclusive representative to represent union members concerning:

- Wages
- Hours of employment
- Health and welfare benefits
- Leave
- Transfer and reassignment policies

- Safety conditions of employment
- Class size
- Employee evaluation procedures
- Organizational security
- Grievance procedures
- Layoffs of probationary certificated school district employees
- Alternative compensation or benefits for employees adversely affected by pension limitations.

The union's right to represent:

- Obligates the public school employer to negotiate with the exclusive representative.
- Requires the employer to fulfill certain "impasse" procedures before unilaterally implementing a new term and condition of employment.
- Allows the employer to implement a change in a term or condition of employment to which the union concurs.
- Incorporates the employer obligation to deduct union dues from employee wages.
- Includes the right to file unfair labor practice charges with the PERB.
- Includes the right to represent employees in the presentation of their grievances. However, once an exclusive representative is selected or certified by the PERB, only the exclusive representative has the right to represent members in the grievance process and file unfair labor practice charges alleging a violation of the duty to negotiate.

Employer Obligations

- **No Interference or Discrimination Based On Exercise Of Protected Rights**

A public school employer is subject to two distinct areas of unlawful conduct:

- ◇ Interference with protected rights.
- ◇ Discrimination because of the exercise of protected rights.

It is a violation of the EERA for a charter school employer to take or threaten to take an adverse action against employees because they exercised their rights under the EERA. It is also a violation to discriminate or threaten to discriminate against employees because they exercise their rights under the EERA.

◇ **Interference by Employer**

It may be considered an "unfair practice" if an employer interferes or tends to interfere with an employee's exercise of protected rights. This is a problem for public school employers if they are unable to justify their actions by proving an operational necessity. It is not necessary for the charging party to show that the public school employer acted with an unlawful motivation. The effect of the public school employer conduct is measured against the objective standard of whether a "reasonable person" would have felt intimidated rather than whether a particular employee actually felt intimidated.

◇ **Discrimination by Employer**

Unlike interference cases, unlawful intent is an essential element in discrimination cases. In order to establish discrimination, an employee must prove that he has engaged in protected activity, that the public school employer's conduct was motivated by that participation and that the public school employer's conduct was "adverse" to the employee.

Proof that an employee was engaged in protected activity is rarely an issue. However, it is possible to prove discrimination even when the employee was not engaged in protected activity. Further, a public school employer may not discriminate against an employee who is not a union activist in order to camouflage discrimination against an actual union activist, or to discriminate against an entire group of employees based on unlawful intent toward union activists in the group.

actual or likely knowledge of the employee's protected activity. Factors that could suggest knowledge include:

- Timing of the employer's conduct.
- The employer's different treatment of other employees.
- The employer's departure from established procedures and standards.
- The employer's inconsistent or contradictory justifications.

In one case, PERB found unlawful different discipline when an employer issued a written reprimand to a teacher/chief negotiator for arriving late to school whereas the rest of her carpool received no reprimand.

Rebuttal to an Employee Interference or Discrimination Claim

Once an allegation is made, the burden shifts to the public school employer to prove that its actions would have been the same despite the employee's protected activity. Some examples of successful rebuttals were where the employer could show that:

- The discharge or transfer was based on an employee's poor work habits rather than on the filing of grievances or unfair practice charges.
- Refusal to hire was based on an employee's physical inability to perform the work rather than his protected union activities.
- Transfers and changes in work schedule or hours were based on program necessity rather than retaliation for filing grievances or engaging in a union organizing campaign.

However, unlawful intent may be presumed if a public school employer's conduct is "inherently destructive." In one case, PERB held that the discharge of a union organizer for theft was not inherently destructive and concluded that the harm to employees' rights by the discharge of a dishonest employee who happened to be a union organizer was outweighed by the employer's need to protect itself against theft.

UNFAIR LABOR PRACTICES AND THE PUBLIC EMPLOYMENT RELATIONS BOARD

The state Public Employment Relations Board (PERB) has jurisdiction over all matters relating to the EERA. Any employee, employer, or employee organization has the right to file an unfair practice complaint with PERB alleging violations of the EERA.

In carrying out its statutory duties, PERB is authorized to issue a decision and order directing an offending party to cease and desist from the unfair practice. If the unfair labor practice occurred during a union organizing campaign, PERB can order a second election. PERB may seek a permanent injunction or a temporary restraining order after issuance of an unfair practice complaint, pending its final resolution.

GENERAL GUIDANCE FOR EMPLOYER ACTION DURING A UNION CAMPAIGN

The following is a general overview of what public school employers may or may not do when faced with a potential union organizing campaign:

“YOU MAY”

Public school employers may engage in the following activities during union organizing campaigns:

- Tell employees that it prefers that they be unrepresented and hope that they vote against recognizing an exclusive representative.
- Answer employee questions about public school employer policies and discuss campaign issues.
- Tell employees that if they join an employee organization, they will have to pay monthly union dues and obey organization rules.
- Refute any untruths or inaccuracies in organization materials.
- Prohibit activities that are disparaging of or detrimental to the public school employer and not related to the employees’ interests as employees.
- Be aware that employees are presumed to be indicating their support for selecting the union as their exclusive representative when they sign a dues deduction authorization, membership list, membership card or any other petition which demonstrates the employees’ desire to be represented by the employee organization for purposes of collective bargaining. This is new for 2004.

TIPs

Remember the acronym: **TIPs**.

A public school employer may not engage in:

- T**hreats,
- I**ntimidation, or
- P**romises

without violating the EERA.

“YOU MAY NOT”

Public school employers may not:

- Change wages or fringe benefits for the purpose of influencing an election. This includes promising or granting pay increases or new benefits for the purpose of influencing votes.
- Question employees about their views, activities or sympathies toward the employee organization.
- Solicit employee grievances or question employees about the causes of their dissatisfaction in order to expressly or impliedly promise to improve working conditions.
- Encourage employees to join one union in preference to another.
- Ask employees whether they are forming an employee organization or if they have signed authorization cards or attended organization meetings.
- Enforce rules strictly against employee organization supporters while being lenient toward anti-organization employees.
- Prohibit employees from passing out organization literature in non-work areas on their own time.
- Misrepresent material facts.
- Threaten employees with harm or reprisals if they support an employee organization.
- Prohibit or limit employees from wearing union buttons unless management can show that it is a threat to safety or discipline.
- Prohibit employees from having representation in meetings and interviews for investigatory, disciplinary or non-disciplinary situations.
- After certification of union representation, negotiate terms and conditions of employment with individuals or individual groups of employees without participation of the exclusive representative.

Ask the Charter Association Help Desk

Your questions are answered by the California Charter Schools Association and the Law Offices of Spector, Middleton, Young & Minney LLP (SMYM). For more information, you can contact the Charter Association at 866.411.2272 or email info@charterassociation.org. You can contact SMYM at 916.646.1400 or email pminney@smymcharterlaw.com.

Q: Why was the Educational Employment Relations Act created?

A. The Educational Employment Relations Act was enacted in California in 1976 to improve employer-employee relations within the public schools by providing a uniform basis for recognizing the right of public school employees to choose, join and be represented by "employee organizations," or unions, in their professional and employment relationships, to select an exclusive bargaining representative, and to give employees a voice in forming educational policy.

Q: How will school communication with employees be affected if the employees form an employee organization?

A. After certification of union representation, the school may not negotiate terms and conditions of employment with individuals or individual groups of employees without participation of the exclusive representative.

Q: Will school employees be obligated to do anything if they form an employee organization?

A. The school employees will have to pay monthly dues and obey organization rules if they become union members. For example, annual union dues for an organized union average more than \$600.

Q: What can my school do to help school employees feel fully valued in the absence of an employee organization?

A. An effective "best practice" is to provide a positive work environment true to the mission of the school so that employees feel engaged in the life of the school. It is extremely helpful to have a personnel manual or employee handbook to provide clarity and demonstrate respect.

Q: How can I help my school administration team comply with the law if school employees are considering forming an employee organization?

A. Remember the acronym: **TIPS**.

A public school employer may not engage in:

- T**hreats,
- I**ntimidation, or
- P**romises

without violating the EERA.

Information Resources

California Charter Schools Association Professional Development Workshops

For registration information, call 866.411.2272 or email info@charterassociation.org.

Charter Association Help Desk

- Charter Association Help Desk, 866.411.2272, info@charterassociation.org.

State Regulatory Codes and Statutes

- Government Code § 3540: Educational Employment Relations Act (EERA) begins here.
- Title 8 Cal. Code Regs. 32000: Regulations implementing the EERA begin here.
- AB 631 (Stats. 1999, Chap. 828): Law making EERA applicable to charter schools.
- SB 253 (Stats. 2003, Chap. 190): Law allowing employee organization selection without a vote under certain circumstances.

Website Links

- <http://www.leginfo.ca.gov/calaw.html>: California legal codes (click on Government Code, then enter code numbers from above)
- <http://www.perb.ca.gov>: Public Employment Relations Board
- <http://www.dir.ca.gov>: California Department of Industrial Relations
- <http://www.dol.gov>: US Department of Labor
- <http://www.cde.ca.gov/sp/cs>: California Department of Education's charter school pages.

Contacts

- Spector, Middleton, Young & Minney LLP: 916.646.1400 or email pminney@smymcharterlaw.com.
- California Charter Schools Association: Charter Association Help Desk, 866.411.2272, info@charterassociation.org.

This Knowledge Brief was prepared by our Help Desk Team in partnership with the Law Offices of Spector, Middleton, Young & Minney LLP (SMYM). It provides a general overview of the rights and obligations of employers, employees and employee organizations under the Educational Employment Relations Act (EERA). If you anticipate a possible employee union campaign at your school, this Knowledge Brief will provide valuable information for your consideration. Individuals and organizations may want to consult legal counsel for further information on how to proceed. **The Help Desk Team can be reached toll free at (866) 411-2272 or at info@charterassociation.org.**