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Contrary to Union's Argument, NLRB Finds Jurisdiction Over Nonprofit Corporation Operating Charter School in Chicago

By Tanja Thompson and Brenda Canale

In *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB No. 41 (Dec. 14, 2012), the National Labor Relations Board ("the Board" or "NLRB") rejected the position of a teachers' union and found that it had jurisdiction over an Illinois nonprofit corporation that operates a public charter school in Chicago. The Board majority concluded that the nonprofit was not the sort of government entity exempt from the National Labor Relations Act ("the Act"), and there was no reason for the Board to decline jurisdiction. This recent ruling falls in line with other decisions from the Obama Board favoring expansive NLRB jurisdiction, but it runs counter to the position of labor unions, which often favor card check organizing in charter schools rather than NLRB-run secret ballot elections.

Factual Background

The Chicago Mathematics and Science Academy Charter School, Inc. (CMSA) is a private, nonprofit corporation established under the Illinois General Not-for-Profit Corporation Act of 1986 for the purpose of operating a charter school. CMSA's affairs are conducted by a board of directors, which selects its members, and no public officials or government entities are involved in the selection or removal of members of the board of directors.

Pursuant to the Illinois Charter Schools Law, following its incorporation, CMSA submitted a proposal to and was granted a charter by the Chicago Public Schools, a division of the Board of Education of the City of Chicago (Chicago Board). The charter agreement set forth the guidelines and expectations for CMSA and the manner in which it would be held accountable during the five-year term of its agreement. The agreement provided that the charter could be revoked by the Chicago Board for material violation of any of its terms. CMSA receives approximately 80% of its budget from the Chicago Public Schools. However, although the Chicago Public Schools reviews the budget, it has never rejected a budget proposed by CMSA and it does not advise CMSA on the allocation of its resources. Moreover, CMSA's board of directors has the ultimate authority to approve the budget. CMSA employs the school's teachers and most of its administrative, secretarial, and custodial employees.

In June 2010, the Chicago Alliance of Charter Teachers and Staff, IFT, AFT, AFL-CIO (“the Union”) filed a petition with the Illinois Educational Labor Relations Board seeking to represent teachers employed by CMSA. CMSA, in turn, filed an election petition with the NLRB. The NLRB Acting Regional Director dismissed CMSA’s petition, finding that the school is a political subdivision and, as such, exempt from jurisdiction of the Board pursuant to Section 2(2) of the Act. The Board granted CMSA’s petition to review the decision.

NLRB Decision

In analyzing the case, the Board applied the U.S. Supreme Court’s decision in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), which set forth a disjunctive test governing whether an entity is a political subdivision and thereby exempt from Section 2(2) of the Act’s definition of “employer.” Under the *Hawkins County* test, an entity may be considered a political subdivision if it is either: “(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.” The NLRB also considered its decision in *Research Foundation of the City University of New York*, 337 NLRB 965 (2002), which held that private entities acting as government contractors are not exempt from NLRA jurisdiction under Section 2(2). Applying the test set forth in *Hawkins County*, the Board determined that CMSA was not “created directly by the State” nor was it “administered by individuals who are responsible to public officials or the general electorate.” Specifically, the Board found that CMSA was created by private individuals, not by a government entity, special legislative act, or public official. Further, the Board noted that an entity is not exempt from NLRA jurisdiction simply because it receives public funding or operates pursuant to a contract with a governmental entity. The Board also noted that pursuant to the Charter Schools Law, a charter school must be organized by a nonprofit corporation or other discrete, legal nonprofit entity authorized by Illinois law. Neither the Charter Schools Law, nor any other Illinois statute directs that charter schools be created, or creates charter schools. On the contrary, the Board concluded that Illinois law authorized only private corporations to establish and operate charter schools, with the Charter Schools Law simply providing the “framework” in which the private entities would operate the schools. The Board considered the fact that Illinois characterized charter schools as being “within the public school system,” but did not find this controlling because there was nothing in the Charter Schools Law suggesting that the legislature intended the state to operate the schools.

Analyzing the second prong of the *Hawkins County* test, the Board examined whether the individuals responsible for administration of the school were appointed by or subject to removal by public officials. “Given the undisputed method of appointment and removal of CMSA’s board members,” the Board concluded, “we find that none of them are responsible to public officials in their capacity as board members, and that, therefore, CMSA is not ‘administered’ by individuals who are responsible to public officials or the general electorate.” Having determined that CMSA was not a political subdivision, the Board concluded that it was an “employer” within the meaning of Section 2(2) of the Act, because it controlled most, if not all, matters relating to the employment relationship with the teachers, including hiring, firing, pay, and most benefits.

Finally, the Board rejected the view of Member Hayes, who concurred that CMSA was not a political subdivision exempt from the Board’s jurisdiction but argued that the Board should decline to exercise jurisdiction for policy reasons. Based on the circumstances of this case and the record before it, the Board concluded there were no policy reasons to decline jurisdiction.

Effect on Charter Schools Nationally

The Board majority (with agreement by the dissent) was careful to point out that this decision was specific to the facts of this case and did not establish a “bright-line rule” that the NLRB has jurisdiction over all entities that operate charter schools without regard to location and the legal framework governing their relationships with state and local governments. Despite this caveat, this decision potentially subjects a number of charter school employers to NLRB jurisdiction and may open the door to further expansion of the Board’s jurisdiction. While the nonprofit corporation in the instant case favored NLRB jurisdiction, in other circumstances NLRB jurisdiction may not be favorable for charter school employers seeking to maintain their nonunion status.

Depending on the applicable law that authorizes and governs charter schools, as well as the role of the state or local government in regard to such schools, charter school employers may be at risk of falling within NLRB jurisdiction. In some cases, such as with CMSA, coverage may

be helpful to an employer. In other instances, coverage may not be helpful. Charter schools that may be targeted by a union should work with experienced labor counsel to determine their most effective actions and strategies given this new development.

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