

**Research Foundation of the City University of New York and United Automobile, Aerospace and Agricultural Implement Workers Union of America, AFL-CIO, Local 2110, Petitioner and the Professional Staff Congress of the City University of New York, Intervenor.** Cases 26-RC-8187 (formerly 2-RC-21706)

July 31, 2002

DECISION ON REVIEW AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN  
AND BARTLETT

The primary issue in this case is whether the Employer is exempt from the Board's jurisdiction as a political subdivision under Section 2(2) of the National Labor Relations Act. A subsidiary issue is whether a unit of employees in all of the Employer's "outreach programs" on the Bronx Community College (BCC) campus of the City University of New York (CUNY) constitutes an appropriate unit for collective bargaining.

On September 1, 2000, the Regional Director for Region 26 issued a Decision and Order dismissing the petition, finding that the Employer is an exempt political subdivision. The Regional Director also found that in the event the Board asserts jurisdiction over the Employer, a unit of employees in all the Employer's outreach programs on CUNY's BCC campus constitutes the smallest appropriate unit. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer and the Petitioner filed timely requests for review of the Regional Director's jurisdictional finding, contending that the Regional Director erred in finding that the Employer is an exempt political subdivision. The Intervenor<sup>1</sup> filed an opposition. The Employer also sought review of the Regional Director's unit finding, contending that either a multicampus unit limited to three outreach programs, or a unit of all the Employer's employees on the BCC campus of CUNY, is appropriate. The Petitioner filed an opposition.

On March 22, 2001, the Board granted the Employer's and Petitioner's requests for review.

The Board has delegated its authority in this proceeding to a three-member panel. Having carefully considered the entire record in this proceeding, we reverse the Regional Director's finding that the Employer is an exempt political subdivision under Section 2(2) of the Act.<sup>2</sup>

<sup>1</sup> The Professional Staff Congress of the City University of New York was permitted to intervene because it has a contractual relationship with the Employer (representing clericals at the Employer's central office) and with CUNY (representing instructional employees).

<sup>2</sup> The Regional Director based his finding on a single employer analysis. Even assuming arguendo that the test for political subdivision

We, therefore, find that the Employer is an employer under Section 2(2) of the Act and reinstate the petition. Further, we affirm the Regional Director's finding that a unit of the Employer's employees in all outreach programs on the BCC campus of CUNY is an appropriate unit.

I. FACTS

The Employer is a private, not-for-profit, educational corporation, established under the laws of the State of New York. The Employer is responsible for the postaward fiscal administration of grants and contracts (sponsored programs) awarded by public and private entities to units of CUNY. CUNY is a large, multicampus public university located throughout the City of New York. The parties stipulated that CUNY is exempt from the Board's jurisdiction under Section 2(2) of the Act.

The Employer was created in 1963 by 12 private incorporators under Section 216 of the New York State Education Law, which authorizes incorporation, in whole or in part, for educational purposes. The New York Board of Regents, on behalf of the State Education Department, granted a corporate charter to the incorporators. The charter designated the 12 incorporators as the Employer's first board of directors, with authority to adopt by-laws, including provisions regarding the selection of the board of directors. According to the charter, the corporate purpose of the Employer is to encourage gifts and grants for CUNY's benefit; to receive, hold, and administer these gifts and grants as trustee for CUNY; to finance research that benefits CUNY; and to enter into contractual relationships appropriate to the purposes of the corporation.

In the years following incorporation, the Employer administered sponsored programs in CUNY's Graduate School. In 1970, amid concern over the "sound and prudent management" of sponsored programs by CUNY, CUNY contracted with the Employer to administer sponsored programs for all of CUNY's operations. The relationship between the Employer and CUNY is currently governed by a 1983 agreement between the Employer and CUNY that designates the Employer as the fiscal agent for administering all grants and contracts awarded to any unit of CUNY.

The 1983 agreement specifies the Employer's responsibilities to include: assisting CUNY in identifying funds from public and private donors to support programs at CUNY; serving as joint grantee in applying for such

may be satisfied as a matter of law by a finding that an exempt employer is a single employer with a non-exempt employer, we find that, as explained below, the record demonstrates that the Employer and CUNY are not a single employer.

funds; administering grants and contracts in accordance with their terms and conditions; employing necessary personnel to conduct the programs, “who shall be deemed to be employees of the Foundation and not the University”; purchasing necessary equipment and supplies; providing “administrative functions including controlling and accounting for expenditures”; and establishing policies and procedures regarding personnel and equipment.

The benefits of being a private, rather than governmental, corporation were a major consideration in CUNY’s selection of the Employer to administer the sponsored programs. Unlike CUNY, the Employer is not subject to government competitive civil service requirements or purchasing practices, such as competitive bidding. A 1969 CUNY resolution<sup>3</sup> selecting the Employer to administer programs emphasized this distinction by recognizing that the Employer was needed “because of the desire to avoid cumbersome State (or city) regulations.” According to the Employer’s president, the exemption from such rules allows the Employer greater flexibility than would be the case “if the RF [Employer] were an arm of the University.”

The Employer obtains operating revenues from private fees charged to CUNY for the administrative services that the Employer provides.<sup>4</sup> The Employer receives no direct tax-levy funds, (i.e., government-appropriated funds), from any appropriating authority or political subdivision. CUNY, however, operates with publicly appropriated funds. The legal and fiscal separation of the Employer from CUNY prevents the commingling of tax-levy funds and sponsored program funds, which come from private and public sources.<sup>5</sup>

As provided in the Employer’s by-laws, the Employer’s board of directors adopts an annual budget. The budget is not approved by CUNY or any governmental agency. The by-laws require an annual audit by a certified public accountant designated by the board of directors. Pursuant to the 1983 agreement with CUNY, the Employer agreed to prepare an annual financial plan detailing the estimated income from grantors and the Employer’s expenditures. According to the agreement, the plan is “subject to the approval” of CUNY and the New

York State director of the budget. The Employer also agreed to submit quarterly financial reports to CUNY’s board of trustees. The agreement further provides that the Employer’s financial condition and operations are subject to postaudit review by the State comptroller.

The appointment and removal of the Employer’s board members is governed solely by the board’s by-laws and without reference to any statute or other law. The number of directors may be changed only by a two-thirds vote of the board at an annual or special board meeting. The current by-laws, as amended in 1998, provide for the selection of a 17-member board of directors. All members, except for three who serve *ex officio*, may be removed by a two-thirds vote of the board for cause or for absence from four consecutive meetings. No member of the Employer’s board is also a member of CUNY’s board of trustees, the highest governing entity of CUNY.

The Employer’s board of directors is currently comprised of the following: CUNY’s chancellor and CUNY’s president of the Graduate School, who serve *ex officio* and are the chairperson and vice chairperson of the board; two CUNY senior college presidents and two CUNY community college presidents, who are elected to the board by their fellow CUNY college presidents;<sup>6</sup> two appointees of the chancellor;<sup>7</sup> four “at-large” members, nominated by a nominating committee and then elected by the board, who “may not be employed by or under contract to” the Employer or CUNY; three faculty members selected by the CUNY faculty advisory council; the chair of the faculty advisory council, who serves *ex officio*; and a graduate student selected by the doctoral student council.<sup>8</sup>

Although the board of directors is ultimately responsible for management of the Employer, the daily management and supervision of the Employer’s operations and labor relations is carried out by the Employer’s adminis-

<sup>6</sup> One of the community college presidents currently on the board is the president of BCC.

<sup>7</sup> One of those appointees is CUNY dean of academic affairs, John Mogelescu. Although titled a “CUNY” dean, Mogelescu is on the Employer’s payroll, and he identified himself as an employee of the Employer. The identity of the other current appointee is unclear from the record.

<sup>8</sup> The current board membership is the product of 1998 by-law amendments that were designed to “increase the diversity . . . of the Board.” The amendments created the four at-large seats that must be independent from the Employer or CUNY. The amendments reduced from four to two the number of members who can be appointed by the CUNY chancellor. The amendments also removed the requirement that one of the chancellor’s appointees be an officer of CUNY, and a provision that the appointees serve at the pleasure of the chancellor. The number necessary for a quorum was increased from nine to ten members and the affirmative vote necessary to conduct business was raised from eight to nine members. The amendments increased the overall size of the board from 15 to 17.

<sup>3</sup> In 1969, CUNY was governed by the board of higher education of the city of New York. That authority later was assumed by the current CUNY board of trustees.

<sup>4</sup> The fee is 7.25 percent of the total sponsored program activity at each college. Most of the fees cover the Employer’s management costs for its administrative operations. A portion is used to fund some university-wide activities, such as faculty research.

<sup>5</sup> Although the Employer is qualified under Sec. 501(c)(3) of the Internal Revenue Code, it does not claim status under Sec. 501(c)(3) as a federal, state, or local government unit.

trators, managers, and supervisory personnel. The board of directors approves the Employer's \$180 million budget as required by its by-laws, but it appears to meet only two to three times a year. The Employer's by-laws permit a five-member executive committee<sup>9</sup> to act between meetings of the board, but the record does not indicate that the committee actively and regularly manages the Employer's daily operations. The board of directors appoints the Employer's president, but the daily administration of the Employer is left to its managers, supervisors, and project directors, none of whom sit on the board.

The Employer's management is independent from CUNY's management. The Employer employs a separate vice president for finance, Edward Kalaydjian, who oversees financial operations, and a separate director of human relations, John Zummo, who oversees labor relations. At the sponsored program level, project directors are responsible for labor relations decisions and directly supervise the petitioned-for employees.

Although sponsored programs operate largely on CUNY's campuses (for which CUNY is reimbursed), these operations are not integrated with CUNY's operations. Each entity has thousands of employees, with the Employer alone employing 4500 employees at any one time, and 10,000 overall each year. The Employer's central administrative offices (including its human resources and payroll, legal affairs, general accounting, internal audit, and systems information services departments) are housed in lower Manhattan, separate from CUNY's administrative operations. The two entities have separate payroll and computer operations. They file separate tax returns. The Employer retains private legal representation; it is not represented by any governmental agency. As indicated, CUNY does not approve the Employer's budget. No employee interchange occurs between the two entities. The Employer's private health and retirement plans are separate from CUNY's plans. The Employer also has a separate workers' compensation plan.

Further, the Employer's labor relations policies are separate from CUNY's policies, and the administration of labor relations is the province of the Employer's managers, particularly the project directors. Project directors make hiring decisions for unit employees. In addition, project directors assign and direct employees in their respective projects (including maintaining time and leave records). Project directors or their supervisors evaluate

employees. They also impose discipline.<sup>10</sup> Project directors may give employees raises. Except for salary ranges, which may be dictated by the grants and contracts, and for affirmative action, which may be subject to CUNY's campus-wide policies,<sup>11</sup> the Employer and CUNY have separate personnel policies and administration. Although CUNY managers, such as Dean John Mogelescu and George Sanchez, vice president of the office of institutional development of BCC, perform some "oversight" of sponsored programs, they are not significantly involved in the daily management or administration of the Employer or its programs.

The Petitioner seeks to represent a unit of the Employer's employees working in three outreach programs located on the BCC campus or alternatively, a unit of employees in all outreach programs on the BCC campus. The petitioned-for program employees provide education, training, counseling, and other outreach services to welfare recipients and underprivileged individuals in the community. These programs on the BCC campus include, be employed gain independence now (BEGIN), the adult basic education program (ABE), the general equivalency degree program (GED), and others. The programs on the BCC campus are largely housed in the Gould Residence Hall. Some of the programs, such as the ABE, exist at other campuses in the CUNY system.

Although similar programs are present on other CUNY campuses, working conditions among the campuses are very different, particularly since the programs often are geared to nearby residents. While interchange occurs among programs on the BCC campus, no significant interchange occurs with programs outside of the BCC campus. Although each program on the BCC campus has its own director, the directors sometimes substitute for each other and thus supervise each other's employees. In addition, the BCC programs often use the same equipment in the Gould Residence Hall.

The record is not clear regarding the remaining employees of the Employer on the BCC campus. Some employees work in academic-type programs for matriculating college students, taught by CUNY faculty but funded through the Employer. The work of these employees is unrelated to the work of the outreach programs as it may involve academic research or other matters relating to the core academic mission of CUNY. There

<sup>10</sup> When discharge issues arise, project directors consult or seek direction from Human Relations Director Zummo.

<sup>11</sup> The evidence regarding the role of each entity with regard to affirmative action policies is unclear. Although there is evidence that the Employer complies to some extent with CUNY campus affirmative action policies, the Employer also maintains its own affirmative action policies and practices, and employs an affirmative action officer.

<sup>9</sup> The executive committee comprises CUNY's chancellor, CUNY's president of the Graduate School, a CUNY college president, the president of the Employer, and the chair of faculty advisory council.

is no interchange or contact between the outreach programs and other sponsored programs on the BCC campus. The programs do not share supervision and do not appear to operate in the same facilities on the BCC campus.

## II. ANALYSIS

### A. Jurisdiction

Section 2(2) of the Act provides that the term “‘employer’ . . . shall not include . . . any State or political subdivision thereof[.]” To determine whether entities are political subdivisions, the Board applies the test described in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971). Under that test, entities are exempt from the Board’s jurisdiction as political subdivisions if they are “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.” *Id.* at 604. The Regional Director found that the Employer is a political subdivision under both prongs of the *Hawkins County* test. We find, contrary to the Regional Director, that the evidence fails to support a finding that the Employer is exempt under either prong of the test.

#### 1. The Employer was not created directly by the State so as to constitute a department or administrative arm of the government

It is undisputed that 12 private individuals created the Employer in 1963, under Section 216 of the New York Education Law, as a private, not-for-profit corporation. Section 216 authorizes the incorporation of institutions or associations whose purpose is, in whole or in part, educational. This section permits an entity to be formed as a business or not-for-profit corporation. No special legislative act or action by a public official was required to create the Employer. Although the Employer’s charter indicates a corporate purpose that benefits CUNY, nothing in the charter (or the language of Section 216) indicates that the Employer was intended to operate under CUNY’s control or as a department or administrative arm of CUNY. Rather, the charter specifies that the governance and powers of the corporation are vested solely in the private incorporators, and not in any governmental entity such as CUNY.

The plain language of Section 2(2) “exempts only government entities or wholly owned government corporations from its coverage—not private entities acting as contractors for the government.” *Aramark Corp. v. NLRB*, 179 F.3d 872, 878 (10th Cir. 1999), citing *Tele-dyne Econ. Dev. v. NLRB*, 108 F.3d 56, 59 (4th Cir.

1997); and see also *Pikeville United Methodist Hosp. of Ky. v. United Steelworkers of Am.*, 109 F.3d 1146, 1152 (6th Cir. 1997). The creation of the Employer by private individuals as a private corporation, without any state enabling action or intent, clearly leaves the Employer outside the ambit of the Section 2(2) exemption. Further, the creation of the Employer under Section 216 does not constitute creation directly by the state or CUNY so as to constitute an arm of the state or CUNY. See *Jefferson County Community Center*, 732 F.2d 122, 124–126 (10th Cir. 1984), overruled in other respects, *Aramark Corp.*, 179 F.3d at 878 (refusing to extend the exemption in Section 2(2) to government contractors), and *Truman Medical Center v. NLRB*, 641 NLRB 570, 572 (8th Cir. 1981) (medical centers, organized under state not-for-profit statutes and requiring no special legislative action or action by public officials, not created directly by the state so as to constitute a department or arm of the government); cf. *Hinds County Human Resource Agency*, 331 NLRB No. 186 (2000) (human resource agency, created pursuant to enabling statute that specifically grants county boards power to establish and operate human resource agencies and intends that such agencies be operated under local government control, is created directly by the state so as to constitute department or administrative arm of the government).

The Intervenor contends that since the Employer serves only CUNY, was created to serve CUNY, and is controlled by CUNY, it is part of CUNY and can be characterized as an administrative arm of CUNY. We disagree. The Intervenor’s argument ignores the evidence that for nearly 40 years the Employer has operated as a private corporation. As described above, the Employer was incorporated by private individuals. The Employer, unlike CUNY, does not receive publicly appropriated funds for its services. The legal and fiscal separation from CUNY prevents the commingling of tax-levy funds and sponsored program funds. The Employer also files separate tax returns and maintains separate legal representation from CUNY. The Employer’s employees are covered by a private retirement plan. The Employer, unlike CUNY, is not subject to government civil service laws or competitive bidding practices.

In addition, the record demonstrates that the Employer operates independently of CUNY’s control. While performing services for CUNY, the Employer, through an independent board of directors and managers, maintains direct and independent control over its employees, management, labor relations, budget, and daily operations. The record establishes that the Employer’s management, operations, and labor relations policies and practices are independent from CUNY’s policies and practices. Al-

though the Employer operates on CUNY's campuses, the Employer's operations and employees are not substantially integrated with CUNY's operations and employees.<sup>12</sup> Although the Employer agreed in the 1983 contract with CUNY (and not by any statutory mandate) to submit financial plans and other reports to CUNY, the State of New York and other state entities, this voluntary submission of financial information does not demonstrate any significant control by the government. Cf. *Hinds County Human Resource Agency*, supra.

We conclude, therefore, that the Employer was not created directly by the state so as to constitute an administrative arm of the government.

2. The Employer is not administered by individuals who are responsible to public officials or to the general electorate.

The Employer is administered by a 17-member board of directors and various managers and supervisors. The record fails to demonstrate that these administrators are responsible to any public official or to the general electorate. We find, therefore, that the second prong of the *Hawkins County* test is not met.

To determine whether an entity is "administered by" individuals responsible to public officials or to the general electorate, the Board considers whether those individuals are appointed by and subject to removal by public officials. See *Hawkins County*, 402 U.S. at 605; *Oklahoma Zoological Trust*, 325 NLRB 171 (1997). If a majority of an employer's board of directors is composed of individuals responsible to public officials or individuals responsible to the general electorate, the employer may be an exempt political subdivision. See *FiveCap, Inc.*, 331 NLRB 1165 (2000), *enfd.* 294 F.3d 768 (6th Cir. (2002)); and *Enrichment Services Program*, 325 NLRB 818, 819 (1998). Further, the Board considers whether the composition of a board is determined by law, or solely by the employer's governing documents. See *Southwest Texas Public Broadcasting Council*, 227 NLRB 1560, 1562 (1977); *Morristown-Hamblen Hospital Assn.*, 226 NLRB 76, 77 (1976); *Kentucky River Community Care v. NLRB*, 193 F.3d 444, 450-452 (6th Cir. 1999); and *Crestline Memorial Hospital Assn. v. NLRB*, 668 F.2d 243, 245 (6th Cir. 1982).

The Employer's by-laws, enacted by the Employer's board of directors, define how individuals are appointed to the board and how they can be removed. The appointment and removal of members is not governed by any statutory provisions. As delineated below, three

members of the 17-member board serve *ex officio*, while 14 members are elected by various groups and can be removed only by a two-thirds vote of the board for cause or for absence from four consecutive meetings. None of these members are appointed by or subject to removal by public officials.

Specifically, the by-laws provide for the membership of four elected "at-large" members, who are nominated<sup>13</sup> and then elected by the board. The by-laws require that these four members "may not be employed by or under contract to" CUNY (or the Employer). Four members of the board are tenured CUNY faculty but are not selected by any CUNY official. Rather, three are selected to serve by their peers on the faculty advisory council. The fourth serves *ex officio* as chairperson of the faculty advisory council. A ninth board member is a graduate student, selected by fellow graduate students. The remaining eight board members include four CUNY college presidents, who are not appointed to the board by any public officials, but who are elected by their fellow college presidents. Two other members are appointed by CUNY's chancellor, who, along with the president of the Graduate School, serves on the board *ex officio*.

In addition, it is undisputed that no member of the Employer's board also serves as a member of CUNY's board of trustees. Further, except for those members serving *ex officio*, board members are removable only by a two-thirds vote of the board, for cause or absence from four consecutive meetings.<sup>14</sup>

Significantly, the membership of the chancellor, president of the Graduate School, and the college presidents on the board is not determined by any statutory or other legal mandate, but solely by the Employer by-laws. See *Minneapolis Society of Fine Arts*, 194 NLRB 371, 372 (1971) (although some trustees hold their trusteeship because of their public office, the Board finds it significant that trustees who are public officials were made *ex officio* trustees by virtue of the employer's articles of incorporation, and not by virtue of any state requirement); *Southwest Texas Public Broadcasting Council*, 227 NLRB at 1562 (finding it significant that both the representatives of public institutions on employer's board and the number of trustees appointed by such public institutions were determined solely by the employer's articles of incorporation).

<sup>13</sup> The at-large members are nominated by a board committee consisting of two college presidents, one faculty member and one at-large member.

<sup>14</sup> Contrary to the contention of the Intervenor that the four at-large members serve "at the pleasure of the Chancellor," the 1998 by-law amendments eliminated this provision. The current by-laws clearly provide that all but the *ex officio* board members are removable only by a two-thirds vote of the board of directors.

<sup>12</sup> Although a few of the Employer's employees work in conjunction with CUNY's managers, the extent of such work is insubstantial given the thousands of employees working for each employer.

Even if we were to assume that CUNY's chancellor and the president of the Graduate School, as *ex officio* board members, are indirectly appointed and removable by CUNY, this evidence would demonstrate that only two members of the 17-member board, substantially less than a majority, are responsible to a public entity. Even further assuming that the four college presidents, and two appointees of the chancellor, are responsible to CUNY, the other 9 members (four faculty, four at-large members, the graduate student) would still not be responsible to CUNY.

Given the undisputed method of appointment and removal of the board members, we find that none of the board members, whatever their professional affiliation with CUNY, are responsible to CUNY in their capacity as board members. Compare *St. Paul Ramsey Medical Center*, 291 NLRB 755, 758 (1988) (medical center is not an exempt political subdivision since no requirement that board of directors be public officials or appointed by public officials, and no provision providing for their removal by public officials) with *Oklahoma Zoological Trust*, supra, 325 NLRB at 172 (zoo is an exempt political subdivision since trustees are appointed by an elected public official and removable by the district court). We conclude, therefore, that a majority of the Employer's board of directors is not responsible to any public official or the general electorate.

Further, the daily operations of the Employer are implemented by the Employer's managers and supervisors, who ultimately are responsible to the Employer's board of directors and not any managers, supervisors, or other personnel within CUNY or any other government agency. It is undisputed that the Employer's managers and supervisors are not appointed or removable by CUNY public officials. These managers administer all of the Employer's operations, including its financial operations, separately and independently from CUNY and the State of New York. Although the Employer agreed in 1983 to submit a financial plan to CUNY and to the New York State director of budget, and copies of other financial reports and audits to government entities, there is no evidence that the Employer's management is responsible to CUNY, the State of New York, or any other government entity for the Employer's budgetary or daily financial operations.

We conclude, therefore, that the Employer is not administered by individuals who are responsible to public officials or the general electorate.

### 3. The Employer and CUNY are not a single employer

The Regional Director found that the Employer is a political subdivision under *Hawkins County* based on his finding that the Employer and CUNY constitute a single employer. Even assuming that the *Hawkins County* test could be satisfied through a single-employer analysis, a question we do not reach, we find the evidence does not support the Regional Director's single employer finding.

The Board's test for determining whether employers constitute a single employer is succinctly set forth in *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283-1284 (2001):

Four criteria determine whether a single employer relationship exists: (1) common ownership; (2) common management; (3) functional interrelation of operations; and (4) centralized control of labor relations. It is well established that not all of these criteria need to be present to establish single employer status. Single employer status ultimately depends on "all the circumstances of a case" and is characterized by the absence of an "arms-length relationship found among unintegrated companies." The Board has generally held that the most critical factor is centralized control over labor relations. Common ownership, while significant, is not determinative in the absence of centralized control over labor relations. (Footnotes omitted).

As detailed above, the Employer is a not-for-profit corporation, while CUNY is a public university. The Employer was created by private individuals and not by CUNY. Neither employer is "owned" by shareholders nor by any other proprietary means. Indeed, no party contends that these two entities share the traditional attributes of common ownership. The evidence, therefore, does not demonstrate the existence of common ownership between the Employer and CUNY.

Nor are these entities controlled by common management. The Employer's board of directors ultimately is responsible for the management of the Employer, and the Employer's managers, supervisors and project directors conduct the daily management of the Employer's overall operations. None of these personnel serve in any similar capacity with CUNY. Further, the Employer's managers, supervisors, and project directors manage the Employer independently of any control by CUNY. Although the Employer's board of directors includes several CUNY-affiliated individuals, no member of CUNY's board of trustees is a member of the Employer's board of directors. The record fails to demonstrate any significant managerial control by CUNY over the Employer's operations. We find, therefore, that the

evidence fails to demonstrate that the Employer and CUNY share common management.

The Employer's labor relations policies and practices are independently administered by the Employer. The Employer employs a director of human resources, and various program directors and other supervisors to administer labor relations. Labor relations decisions, such as hiring, firing, discipline, assignment and direction, are made by the Employer, independently of CUNY's management. Benefits for the Employer's employees, including health and retirement plans, are determined by the Employer and not by CUNY. Responsibility for labor relations is not vested in CUNY's managers but in the Employer's project directors, their supervisors, and the human resource director. The record, therefore, does not demonstrate the existence of centralized control of labor relations.

Although the Employer performs the postaward fiscal administration of grants and contracts for CUNY, the daily operations of the two entities are not substantially integrated. The Employer's central administration is housed and operated separately from CUNY's administration. Although the outreach programs operate on CUNY's campuses, the Employer's program directors operate the programs independently of CUNY administrators. In addition, CUNY is reimbursed for any expenses related to the use of its facilities. The two employers have separate computer and payroll operations, different health and retirement plans, and separate workers compensation plans. No employee interchange takes place between the two entities.<sup>15</sup> The employers file separate tax returns and retain separate legal representation. The two employers must maintain a legal and fiscal separation to prevent the commingling of tax-levy funds and sponsored program funds. We find that, while the Employer provides a necessary function for CUNY pursuant to its contractual commitments, the evidence does not demonstrate the presence of substantial interrelated operations between the Employer and CUNY.

Based on our examination of the four criteria of single employer status, we find that the record does not support the Regional Director's finding that the Employer and CUNY are a single employer. The record does not demonstrate that the Employer and CUNY are commonly owned or that their operations are commonly managed. Nor are labor relations centrally controlled, which is the critical factor in determining single employer status. Finally, although the Employer provides the function of

postaward fiscal administration for CUNY's grants and contracts, the record demonstrates that the Employer operates independently of CUNY in performing this function. Accordingly, we find that the Employer and CUNY do not constitute a single employer.

#### 4. Conclusion

For all the preceding reasons, we find that the evidence fails to satisfy the *Hawkins County* test for an exempt political subdivision because the Employer is neither created directly by the state so as to constitute a department or administrative arm of the government, nor administered by individuals who are responsible to public officials or to the general electorate. Accordingly, we find that the Employer is an employer within the meaning of Section 2(2) of the Act.<sup>16</sup>

#### B. Appropriate Unit

As detailed below, the Regional Director also made an alternative determination concerning the appropriate unit for collective bargaining if the Board asserted jurisdiction.<sup>17</sup> We agree with the Regional Director that a unit of all outreach programs limited to the BCC campus is appropriate. Thus, the Regional Director correctly found that the single facility presumption as applied to the BCC campus has not been rebutted. Further, the Regional Director correctly found that a unit of all outreach programs on the BCC campus, excluding all other program employees, is an appropriate unit.

The Employer contends that a university-wide, multi-campus unit of the adult basic education program (ABE), be employed gain independence now (BEGIN), and general equivalency degree program (GED) is appropriate, or a BCC campus-wide unit of all the Employer's program employees, which would include all outreach and other (nonoutreach) program employees. The Employer contends that the unit found appropriate is not a distinct, identifiable group within the Employer's operation.

Turning first to the unit scope issue, to determine whether the single-facility presumption has been rebutted, the Board considers such factors as centralized control of over daily operations and labor relations, including the extent of local autonomy; similarity of skills, functions and working conditions; degree of employee interchange; geographic proximity; and bargaining his-

<sup>16</sup> Contrary to the contention of the Intervenor, the record establishes, and we find, that the Employer also meets the Board's discretionary jurisdictional requirements. See *Siemons Mailing Service*, 122 NLRB 81 (1958).

<sup>17</sup> The Regional Director found that the petitioned-for unit of three programs on the BCC campus is not appropriate and broadened the unit to include all outreach programs on the BCC campus, but excluding all nonoutreach employees of the Employer. The Petitioner does not seek review of this finding.

<sup>15</sup> Given the thousands of employees working for each employer, we find that the few isolated instances of employees on the Employer's payroll working in the offices of CUNY's managers are not representative of the otherwise separate operations of the two employers.

tory, if any. *New Britain Transportation Co.*, 330 NLRB 397 (1999).<sup>18</sup>

The outreach programs are operated by project directors. Although the Employer has common personnel policies that apply to all its programs, the project directors have significant local autonomy. They supervise and direct, hire, and impose discipline.<sup>19</sup> They have given employees promotions and wage increases.

While similar outreach programs exist at many other campuses in the CUNY system, there is wide variation in the functioning of these programs. Working conditions among the campuses are very different, particularly since the programs often are geared to nearby residents. The record contains no significant evidence of interchange of program employees among the campuses for these programs. We therefore affirm the Regional Director's finding that the single facility presumption has not been rebutted.

We further find that the Regional Director correctly limited the unit to all outreach program employees. Contrary to the Employer, the record establishes that the outreach programs are functionally distinct from the Employer's other operations on the BCC campus.

The outreach programs provide a common function: educational and training services to welfare recipients and underprivileged individuals. The programs are housed largely in one campus location, the Gould Residence Hall. The employees of the outreach programs use similar skills and have similar working conditions, although there is some variation in skills and duties de-

pending on the services provided by a program. Benefits are the same, although salaries vary among programs. The employees sometimes interchange among the programs in Gould Residence Hall on a formal and informal basis. While each program has its own director, the directors sometimes substitute for each other and supervise each other's employees. The programs are functionally integrated as they often use the same facilities and equipment.

A BCC campus-wide unit would include employees from a variety of programs largely unrelated to the function of the outreach programs. Many of the employees the Employer would include apparently work in core academic-type programs for matriculating college students, taught by CUNY faculty but funded through the Employer. Although they receive the same benefits and work similar hours as the outreach employees, they share no other community of interest. We find that the Regional Director correctly excluded the nonoutreach employees because college programs bear no relationship to noncollege programs designed to assist individuals with basic educational and job-training needs.

Accordingly, we affirm the Regional Director's finding that a unit of all outreach program employees on the BCC campus, excluding all other program employees, constitutes an appropriate unit.

#### ORDER

The Regional Director's Decision and Order finding that the Employer is a political subdivision is reversed, but his finding that a unit of all outreach program employees on the BCC campus is an appropriate unit is affirmed. The petition is reinstated, and this case is remanded to the Regional Director for further appropriate action.

<sup>18</sup> For groups on college campuses other than faculty and those closely related to that function, "the Board applies the rules traditionally used to determine the appropriateness of a unit in an industrial setting." *Livingstone College*, 290 NLRB 304, 305 (1988); and *Cornell University*, 183 NLRB 329, 336 (1970).

<sup>19</sup> Program managers, however, consult with the Employer's central human relations office whether to discharge employees.