

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHICAGO MATHEMATICS AND
SCIENCE ACADEMY CHARTER
SCHOOL, INC.,

Employer-Petitioner,

and

13-RM-1768

CHICAGO ALLIANCE OF
CHARTER TEACHERS & STAFF,
IFT, AFT, AFL-CIO,

Union.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS AND
THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO,
AS AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations and the American Federation of Teachers, AFL-CIO, file this brief in response to the request of the National Labor Relations Board for *amicus* briefs addressing whether the employer-petitioner in this case – an Illinois public charter school – is a political subdivision of a State within the meaning of Section 2(2) of the National Labor Relations Act.

The employer-petitioner is a charter school created by the Chicago Public Schools pursuant to the Illinois Charter Schools Law. The Illinois Charter Schools Law provides that “[a] charter school shall be a public . . . school,” 105 ILCS 5/27A-5(a), “within the public school system,” 105 ILCS 5/27A-2(a)(2). As a public school within the public school system of the State of Illinois, the employer-petitioner is exempt from NLRA

coverage under the “political subdivision” exception in Section 2(2).

1. Section 2(2)’s “exemption for political subdivisions [applies] to entities that are . . . created directly by the state, so as to constitute departments or administrative arms of the government.” *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604 (1971).¹ The determination of whether a particular entity is a “political subdivision” requires a close examination of its “actual operations and characteristics,” *ibid.*, giving “careful consideration” to “State law declarations,” *id.* at 602.

Given the concrete nature of the “political subdivision” inquiry, it is difficult to state general rules that will determine the outcome in any particular case. This is especially true with respect to the nature of charter schools, because, as the Board’s news release in this case observes, “State charter school laws vary.” This is the first time the Board has addressed the question of whether a charter school itself is a “political subdivision.” *Compare Charter School Administration Services, Inc.*, 353 NLRB 394 (2008) (addressing the nature of “a private, for-profit corporation . . . engaged in the management of charter schools in several states”). All that being so, we submit that the Board can best give guidance as to when charter schools are “political subdivisions” by carefully analyzing the “actual operations and characteristics” of the particular charter

¹ The exemption also applies “to entities that are . . . administered by individuals who are responsible to public officials or to the general electorate,” even if they were not created directly by the State as arms of government. *Hawkins County*, 402 U.S. at 604-05. In light of our showing that the charter school in this case was created by the State as an arm of the State public school system, we do not discuss the alternative test for finding a political subdivision.

school at issue in this case.²

2. There is no serious question that the Chicago Mathematics & Science Academy Charter School was “created directly by the state.” *Hawkins County*, 402 U.S. at 604. The CMSA Charter School came into existence as a school through the grant of a charter by the Chicago Board of Education exercising the Board’s authority under the Illinois Charter Schools Law. *See* 105 ILCS 5/27A-8(f) & 9(a) “It is well established that . . . entities created by [local] governments pursuant to an enabling state statute [are deemed to] hav[e] been directly created by the state under *Hawkins*.” *Hinds County Human Resource Agency*, 331 NLRB 1404, 1404 (2000).

The remaining issue is whether the CMSA Charter School was created *as a* department or administrative arm of government. “[T]he state’s characterization of an entity [is] an important factor in determining the more specific issue of whether [it] was created so as to constitute a department or administrative arm of government.” *Hinds County Human Resource Agency*, 331 NLRB at 1404. “It is clear from the language of the enabling statute that it was the legislature’s intention,” *ibid.*, that Illinois charter schools be part of the State’s public school system functioning as “an ‘administrative arm’ of the State, in providing educational services,” *New York Institute for Education of the Blind*, 254 NLRB 664, 667 (1981), quoting *Hawkins County*, 402 U.S. at 602. And, a

² *See, e.g., Brooklyn Excelsior Charter School*, Case No. C-5672 (NY PERB, Feb. 14, 2011), slip op. 39-44 (finding that New York charter schools are political subdivisions); *Options for Youth-Victor Valley, Inc.*, PERB Dec. No. 1701 (Cal. PERB, Nov. 5, 2004), ALJ dec. 17-20 (finding that a California charter school is a political subdivision) .

review of the “actual operations and characteristics” of the Illinois charter schools confirms that they do, in fact, function as the legislature intended.

a. In the first place, “[t]he state legislature . . . has consciously and specifically denominated [the charter schools] . . . as [among] its agent[s] in satisfying the State’s . . . constitutionally mandated requirement of providing the State’s residents with a suitable education.” *New York Institute for Education of the Blind*, 254 NLRB at 667. *See* Illinois Const. Art. X, § 1 (“A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.”). The Illinois Charter Schools Law declares that “[a] charter school shall be a public . . . school.” 105 ILCS 5/27A-5(a). The Law is equally clear that charter schools function “within the public school system.” 105 ILCS 5/27A-2(a)(2). Thus, the Illinois School Code treats “charter schools” as equivalent to “other public entities responsible for administering public schools,” such as the Chicago “school district.” 105 ILCS 5/2-3.25a(a). *See* 23 Ill. Adm. Code § 25.845 (“the term ‘school district’ shall be understood to include charter schools”).

b. The Illinois legislature has done more, however, than merely denominate charters schools to be “public schools.” The legislature has imbued the charters schools with all of the essential features of public schools by requiring that they offer all children within their geographical area a publicly-funded, tuition-free education meeting certain prescribed core requirements. *See* Ill. Const. Art. X, § 1 (describing “the system of public education” as making “free” “high quality educational institutions” available to “all

persons”).

First, Illinois charter schools are “open to any pupil who resides within the geographic boundaries of the area served by the local school board.” 105 ILCS 5/27A-4(d). Students who enroll in charter schools are treated as enrolled in the public school system. The charter school maintains the official “school student records” of its pupils as required by the Illinois School Student Records Act. 105 ILCS 10/4(a). *See* 105 ILCS 5/27A-5(g)(6). “A pupil who is suspended or expelled from a charter school shall be deemed to be suspended or expelled from the public schools of the school district in which the pupil resides.” 105 ILCS 5/27A-4(h).

Second, Illinois charter schools may “not charge tuition.” 105 ILCS 5/27A-5(e). Consistent with the Illinois Constitution’s mandate that “[t]he State has primary responsibility for financing the system of public education,” Ill. Const. Art X, § 1, Illinois charter schools are principally financed out of tax revenues distributed according to per pupil formulas that are similar to the funding formulas applied to other public schools. 105 ILCS 5/27A-11(b) & (c). *See Research Foundation of the City University of New York*, 337 NLRB 965, 966 (2002) (“The Employer receives no direct tax-levy funds, (i.e., government-appropriated funds), from any appropriating authority or political subdivision.”). The Illinois charter schools are required to annually account to the State Board of Education for their financial management. *See* 105 ILCS 5/27A-5(f).

Finally, Illinois charter schools are subject to the basic educational requirements applied to other public schools. Illinois charter schools are subject to the “recognition

standards for student performance and school improvement” established by the State Board of Education for “all public schools operated by school districts.” 105ILCS 5/2-3.25a(b). The Charter Schools Law specifically provides that charter schools must comply with “the State goals, standards, and assessments established [by the State Board of Education] pursuant to Section 2-3.64 [of the School Code].” 105ILCS 5/27A-6(b). The charter schools are required to report on their students’ progress with regard to meeting the State standards in the same manner as school districts under the “[b]etter schools accountability” provision of the Illinois School Code. 105ILCS 5/10-17a. *See* 105ILCS 5/27A-5(g)(7).

In sum, the Illinois legislature has mandated that the charter schools possess the three essential characteristics of public schools – they are open to all; they meet the State’s basic educational requirements; and they are publicly funded from the State’s tax revenues.

c. Not only do Illinois charter schools have all of the essential “characteristics” of public schools, the “actual operations” of charter schools must conform to the operational requirements governing public functions performed by other parts of Illinois government generally and of the state public school system in particular. *Hawkins County*, 402 U.S. at 604.

The governing board of a charter school is treated as a public body subject to the Illinois Freedom of Information and Open Meetings Acts. 105 ILCS 5/27A-5(c). The Open Meetings Act requires “that the actions of public bodies be taken openly and that

their deliberations be conducted openly.” 5 ILCS 120/1. To a similar end, the Freedom of Information Act provides that “all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials.” 5 ILCS 140/1. By expressly providing that these two statutes apply to the “governing board of a charter school,” the Illinois Charter Schools Law confirms that a charter school board is a “public bod[y]” engaged in carrying out “the affairs of government.”

Illinois charter schools are also covered by the Local Governmental and Governmental Employees Tort Immunity Act. 105 ILCS 5/27A-5(g)(3). That Act “protect[s] local public entities and public employees from liability arising from the operation of government.” 745 ILCS 10/1-101.1(a). Thus, the application of this statute to Illinois charter schools shows that these schools are “local public entities” engaged in “the operation of government.”

The Illinois Charter Schools Law requires that important employment practices of charter schools conform to employment practices common throughout the State public school system. In larger cities, at least half of a charter school’s teachers must meet the teacher certification requirements generally applicable to Illinois public schools, and the remaining teachers must possess a detailed set of professional qualifications. 105 ILCS 527A-10(c). The certified charter school teachers are covered by the Teachers’ Retirement System of the State of Illinois. 40 ILCS 5/16-106(9). The Board has held that “the fact that the employees participated in the state retirement system . . . weigh[s] in

favor of a finding that the first prong of *Hawkins* was satisfied.” *Hinds County Human Resource Agency*, 331 NLRB at 1405 n. 12. See *Jervis Public Library Association, Inc.*, 262 NLRB 1386, 1387 (1982); *New York Institute for Education of the Blind*, 254 NLRB at 667.

d. Of particular significance here, the Illinois legislature has clearly provided that the labor relations at charter schools should be carried out as public school labor relations. “[C]overage under the state public employment labor relations act” is a “[s]ignificant” factor in determining whether an employer is exempt from NLRA coverage as a “political subdivision.” *St. Paul Ramsey Medical Center*, 291 NLRB 755, 757 (1988).

The Charter Schools Law expressly provides that “[a] charter school shall comply with all provisions of . . . the Illinois Educational Labor Relations Act.” 105 ILCS 5/27A-5(g). The Illinois Educational Labor Relations Act “regulate[s] labor relations between educational employers and educational employees,” and defines “[e]ducational employer” to “mean[] the governing body of a public school district, including the governing body of a charter school.” 115 ILCS 5/1 & 5/2(a).

Illinois has chosen to regulate public school labor relations in a manner that differs from the NLRA in order to accomplish the statutory purpose of “promot[ing] orderly and constructive relationships between . . . educational employees and their employers” and “minimizing . . . and providing for the[] resolution” of “disputes between . . . educational employees and their employers” that would otherwise be “injurious to the public” by disrupting public education. 115 ILCS 5/1. For example, public educational employers

are not required to bargain over “matters of inherent managerial policy,” including “organizational structure” and the “direction of employees.” 115 ILCS 5/4. The parties’ collective bargaining agreement *must*, on the other hand, contain a grievance and arbitration procedure and a no-strike clause. 115 ILCS 5/10(c). If the parties fail to reach a collective bargaining agreement “within 15 days of the scheduled start of the forthcoming school year,” the Illinois Educational Labor Relations Board invokes mandatory mediation procedures. 115 ILCS 5/12. Similarly, representation petitions may only be filed “between January 15 and March 1 of the final year of a collective bargaining agreement,” 115 ILCS 5/7(d), presumably to allow sufficient time for the public educational employer to bargain with the newly-certified representative over the summer in order to avoid disruption of the following school year.

The obvious point of the NLRA’s “political subdivision” exemption is to prevent application of the federal labor law from interfering with State or local government labor relations. In applying the exemption it is therefore highly pertinent whether the State has made a choice in this regard. And, it could not be more clear that Illinois has decided that charter school labor relations should be regulated in the same manner as other public school labor relations.

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Giving “careful consideration” to “State law declarations” regarding the “actual operations and characteristics” of Illinois charter schools, it is clear that those schools are “created directly by the state” as part of the Illinois state school system and are thus

“administrative arms of the government.” *Hawkins County*, 402 U.S. at 602 & 604. The Regional Director was therefore correct in concluding that Illinois charter schools, such as the employer-petitioner in this case, are “political subdivisions” exempt from NLRA coverage under Section 2(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 11, 2011, I caused to be served a copy of the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amici Curiae* by electronic mail on the following:

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