UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION FIVE

ISLAMIC SAUDI ACADEMY

Employer

and

Case No. 05-RC-080474

ISLAMIC SAUDI ACADEMY EMPLOYEE
PROFESSIONAL ASSOCIATION (ISAEPA)

Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer, Islamic Saudi Academy, an instrumentality of the Kingdom of Saudi Arabia, is a non-profit private educational institution located in Fairfax County, Virginia. The Petitioner seeks to represent employees in the following unit:

> all full-time and regular part-time employees employed by the Employer, but excluding all bus driver managers; maintenance managers; vehicle maintenance foremen; temporary health employees; English as a second language temporary teachers, also known as ESL temporary teachers; physical education temporary teachers, also known as PE temporary teachers; controllers; elementary coordinators; West Campus coordinators; assistant principals; vice principals; principals; directors of education; personnel managers; business managers; finance officers; transportation managers; directors general; acting directors general; executive assistants; managerial employees; guards; and supervisors as defined in the Act.

The parties stipulated that the following classifications in the proposed unit are all professionals, including department heads, guidance counselors, boys high school counselors, nurses, IT employees, also known as information technology employees, computer specialists, librarians, assistant librarians, finance accountants, internal auditors, finance clerks, teachers, transportation accountants, and finance

employees.[1] There are approximately 125 employees in the unit sought by the Petitioner. The Petitioner is willing to proceed to an election in any unit I find appropriate.

A hearing officer of the National Labor Relations Board held a hearing and the parties filed briefs with me. The Employer raised three contentions: (1) the Employer is not subject to the Board's jurisdiction because it is an instrumentality of a foreign government under the Foreign Sovereign Immunities Act (FSIA); (2) the Board should not assert jurisdiction in this case because the Employer is a religious school under *NLRB v. Catholic Bishop of Chicago*, 440 US 490 (1979); (3) if the Board should assert jurisdiction over the teachers in this case, then the department heads are supervisors under Section 2(11) of the Act and should be excluded from the unit. The Petitioner contends that: (1) the Employer is engaged in commercial activity and thus not covered by the Foreign Sovereign Immunities Act (FSIA); (2) the Employer is not a church-operated school within the definition of *Catholic Bishop*; and (3) department heads, who are teachers, lack indicia of supervisory authority under Section 2(11) and should be part of the unit.

At the hearing, the parties stipulated that there is no history of collective bargaining between the Employer and the Petitioner involving the Employer's facilities in

[1] The parties further stipulated that these employees are either (1) "engaged in work, predominantly intellectual and varied in character" and "involving the consistent exercise of discretion and judgment in its performance," that their work "output" or "result" "cannot be standardized in relation to a given period of time" and "require[es] knowledge of an advanced type in the field of science or learning customarily acquired by a prolonged course in specialized intellectual instruction and study in an institution of higher learning or a hospital;" or (2) that "they are employees who have completed the courses of specialized intellectual instruction and study described above in performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined above."

Fairfax County, Virginia. The parties also stipulated that there is no contract bar or any other bar that would preclude the processing of the petition at issue.

The parties stipulated that the Employer, Islamic Saudi Academy, an instrumentality of the Kingdom of Saudi Arabia, is a non-profit private educational institution with its principal place of business in Fairfax County, Virginia. During the past 12 months, in conducting its operations described herein, the Employer derived gross revenues available for operating expenses in excess of one million dollars. In conducting the operations described herein during the period described above, the Employer purchased and received at its Alexandria, Virginia facility products, goods, and materials valued in excess of $5,000 directly from points outside the Commonwealth of Virginia.

I have carefully considered the evidence and arguments presented by the parties, at the hearing and on brief, regarding these issues. As discussed below, I conclude that: (1) the FSIA does not bar the assertion of jurisdiction in this case, (2) the Employer is a religious school within the meaning of *Catholic Bishop* and thus the Board will not assert jurisdiction over the teachers.[2] However, I find that it is appropriate to assert jurisdiction over a facility-wide unit consisting of non-teaching employees, except for guidance counselors, who will be permitted to vote under challenge. Accordingly, I am directing an election in an appropriate unit in this case.

[2] Because I have determined that the Board should not assert jurisdiction over the teachers in this case, it is not necessary for me to decide whether department heads are supervisors because both parties agree that they are teachers.

I. FACTS

a. Overview of the school

The school was established in 1984 by the Saudi Arabian embassy, and it operates at two locations in Fairfax County, Virginia. The main facility, containing grades 2-12, is located on Richmond Highway in the Alexandria section of the county. Fairfax County owns this property and leases it to the embassy.[3] The school, "via the embassy," leases a parking lot next to the school. The other facility is on Popes Head Road and is owned by the embassy. This facility, also known as the West Campus, contains kindergarten and first grade. Most of the record evidence concerns the facility and operations at the Richmond Highway facility. Unless otherwise indicated, when this decision refers to the "school" or the "facility," the reference is to the Richmond Highway facility.

Except for kindergarten and first grade, there are separate boys and girls schools within the same building. The girls school is on the first floor and the boys school is on the second floor. Each school has its own principal and assistant principal. A mosque, or prayer room, is used by the boys in grades 7-12 for mandatory afternoon prayer. This facility also contains other rooms typical of a school, such as a library, gymnasium, classrooms, offices, and a cafeteria. The school owns its own buses and employs its own bus drivers.

The separation of the students exists in other ways outside the classroom. Younger grades attend a morning assembly in the auditorium, but boys and girls sit

[3] The lease states that the county and the embassy "d/b/a" the school will be bound by the applicable laws of the United States and the Commonwealth of Virginia. Additionally, the school's contract for cleaning services states that the "jurisdiction and venue" for any suit brought under the cleaning contract will be in the governmental division of the county where the contractor's office is located. The school's contract for security services states that it is governed by the laws of Virginia and the "guidelines of the Department of Criminal Justice Services." The school's contract for parking spaces also is governed by Virginia law.

in different sections. High school students attend the assembly in different rooms entirely. Boys and girls do not eat lunch in the cafeteria at the same time. If both groups need to be in the gym at the same time, there is a divider to separate them. When riding the school's buses, the two groups sit on opposite sides of the bus. The school's bus drivers are responsible for maintaining this separation.

There are some male teachers who teach female students, some female teachers who teach male students, and there are some teachers who teach both boys and girls in a subject. However, there is no cross-over for physical education and Islamic studies.

The schools' Acting Director General Ronald Schultz[4] described the school this way: "It's a K-12 educational system set up under Saudi law by King Fahd at the time, 1984, to provide education for Saudi diplomats' children and any other Muslim children who are in the area of Washington, D.C. [It] [f]ollows an American curriculum with Saudi Arabian Islamic and Arabic." Schultz elaborated on the school's purpose:

> Well, it's to provide, first of all, for the Saudi students and other Muslim students a background and to strengthen their belief and their understanding of the Quran and the Islamic faith. It's to provide them, then, secondary, with a firm education that they can take to other schools throughout the world, other universities, whatever grade level that they leave. Grade 5, they can go to grade 6 anyplace and be successful. So we follow Fairfax County curriculum and use that as our curriculum basis so that they can transfer anyplace in the world and be successful. The ultimate goal is if they stay with us and graduate, which most of them do, they can get admissions to outstanding universities and go on and . . . continue in professional careers, prepare for professional careers. We have an outstanding

[4] The school's current Director General, Schultz is Acting, but there is no indication he is in the position temporarily. Although Schultz is not a Muslim, prior Directors General were. He is "Acting" because his position is supposed to be filled by a Saudi. He is responsible for the overall supervision of every division within the school.

> record of our students at the universities they are admitted to. Year after year they're admitted to the most outstanding universities in this part of the U.S.

As the Acting Director General, Schultz is responsible for making sure that the academy is fulfilling its mission and purpose as expressed in the charter, which he characterized as giving "unswerving commitment . . . to foster Islamic understanding and religious education and development of its young people." I will discuss further below the school's charter and governance structure.

The Parent/Student Handbook states on p. 1 under "Mission" that the school wants students to excel academically "while maintaining the values of Islam." At the top of the page is written "Bismillah Al-Rahman Al-Raheem," which translates to "In the name of Allah, the most merciful, the most gracious," which is "how we start in our religion" according to Farida Turkistani, the principal of the girls school. The operations manual explains the mission statement, and includes a statement that the school promotes the five pillars of Islam, and formally adheres and practices the principles of Islam. The Mission Statement, Philosophy, and Goals and Objectives of the operations manual have several references to the school's goal of instilling Islamic values in its students. Employer's Exhibit 2 is a book that was created by the school for its 20th anniversary. It also attests to the school's goals of maintaining the Muslim faith of the students. The school's website, updated at the beginning of the school year, states under "mission" that it is an Islamic school. The academy's information brochure that is handed out to people is in both English and Arabic. When students join the National Honor Society at ISA, they pledge to abide by Islamic values.

The school has divisions for finance, personnel, admissions, transportation, cafeteria or food service, maintenance, and technology. The Department of Education, consisting of the teachers, constitutes a separate division, and is headed by the Director of Education, Rahima Abdullah. Abdullah supervises the curriculum for the whole school, including the international baccalaureate program. Although the principals report to Schultz on non-academic matters, they report to Abdullah on matters concerning curriculum and other academic issues.

Within the Department of Education, there are eight or nine[5] departments, each with its own department head, who is a teacher. The departments are science, math, social studies, English, Arabic studies, Islamic studies, PE, and art. The school is accredited by an organization called AdvancED.

b. The role of Islam at the school

1. Curriculum

All students at the school take a class in Islamic studies, from kindergarten through 12th grade. This class is mandatory and there are no exceptions. According to the curriculum map of Islamic studies, it is the "cornerstone in the program of studies in ISA." The Ministry of Education for Saudi Arabia has an Islamic curriculum that the school modified and which the ministry then approved. The students spend on average about 45 minutes per day in Islamic studies. Ziad Alzakari, principal of the boys school, testified about the Islamic studies curriculum:

> [S]tarting from [grades] 7 through 12. There is the Holy Quran[.] Tafsir, which is the explanation of the Holy Quran; Tawhid, which is the subject that talks about there is one god only that we believe in; the Fiqh, which is the regulation of the Islamic [sic]; Hadith, which is

[5] The record refers to both social studies and Arabic social studies.

> the Prophet Muhammad Salah Salem saying; and Quran, Tawhid, Fiqh, hadith, and Tafsir . . . . [Grades] [t]wo through six. There is the subject starts from 4th grade or 5th grade, but I believe it's from 4th grade, the Tawhid and Fiqh. The Hadith and Tafsir is implemented from the 6th grade. Second and 3rd grade, they do have Quran, Tawhid, and Fiqh. They don't have the Hadith, nor the Tafsir.

All students also take Arabic so that they can read the Quran, the holy book of Islam, and because the Islamic studies class is taught in Arabic. For students who are not native Arabic speakers, there is an Arabic as a Second Language class to get them up to speed so that they can then take a regular Arabic class. Most of an Arabic class is spent on non-religious learning, and is structured much like an English class would be in an American school, e.g., learning grammar, reading famous literature, etc. The 8th grade Arabic textbook contains numerous sayings of Muhammad and verses from the Quran. Students also read poems, or Nasheeds, that instill Islamic values and character.

The Arabic, Islamic studies, and Arabic social studies books that are currently used were developed at the school. The Saudi government sent CDs, and then the staff took the text from the CDs and modified them for use at the school. As is noted elsewhere in this Decision, the Saudi government had to approve the curriculum concerning these subjects.[6] The Islamic studies book was rewritten in 2008 after the Employer was accused by the United States Commission on Religious Freedom of "teaching things that were against other religions," according to Abdullah. After the rewriting, the school had the book reviewed by two academics to make sure it was appropriate for use in the United States.

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[6] The time of the hearing was shortly before the visit of the Vice Minister of Education, who was to come to evaluate the school. Shortly after the hearing, boys school principal, Ziad Alzakari, was leaving to consult with the Saudi Ministry of Education on curriculum matters. The discussion below will contain more details of the school's relationship to the Saudi government.

The school participates in the International Baccalaureate (IB) program, which is a set curriculum from which the school is not allowed to deviate. That curriculum applies to 11th and 12 graders. They take IB classes and if they complete them all successfully, at graduation the students receive an IB diploma which is recognized throughout the world. The school had to be certified by IB in order to participate. The school became involved in the IB program because the Saudi Ministry of Education mandated it. Currently, the school is seeking to expand this to what the IB calls the Middle Years Program, or MYP, which would include grades lower than high school. That certification is still pending. The IB program has its own values which, IB makes clear to participating schools, become part of the school's values also. Those values are to enable students "to be citizens of the world and to promote peace and to internalize that other people with their differences can also be right." The IB program is not a religious program and maintains no position on religion. Abdullah testified that the IB values were similar to the school's values. About 97-98% of the eligible students take IB classes.[7]

As has already been noted, students take a full range of secular subjects. In some of these classes, Islam is sometimes discussed or influences the teaching of the subject. For example, in art class, there are no drawings of naked bodies because it is prohibited by Islam. In math and science, students are taught contributions made by Muslim scholars.

Sheena Friend, a biology teacher, testified about Islamic influences in that subject. During discussions of DNA, the curriculum mandates that the class discuss the religious arguments against in vitro fertilization, as well as discussion about

[7] One of the school's main goals is to be a college-prep school, while teaching Islamic values, as the handbook states under "College Admissions." Nearly every student who graduates from the high school attends college. Abdullah opined that the school was more secular than religious.

arguments in favor of it. The curriculum also mandates that the arguments against stem cell research be raised in the class.[8] One time, a student asked Friend why the students should be concerned with who created the world, since, the student stated, Allah created the world. She told him they still had to understand how the natural world works. David Kovalik, a psychology teacher, testified that he had a discussion with students during a class on Kohlberg's theory of morality, concerning the effect of religion on a child's decision-making. He made clear what Kohlberg taught, and told the students they could decide to do what they wanted.

2. Religious practices at the school

Students do not have to be Muslim to attend the Islamic Saudi Academy, but all current students are Muslim. Generally speaking, the employee handbook states that policies and procedures have been developed that are based on "accepted professional standards and ethical practices, legal requirements, and the teachings of Islam." There are numerous references in the employee handbook indicating the importance of Islamic values.[9]

Girls and boys start the school day with a reading from the Quran during morning assembly. This takes place at 7:45 a.m., the official start time of the school day according to the school's policies. Instruction does not begin until 8:00 a.m.. Students who are driven to school and do not arrive until after 7:45 a.m. do not receive discipline.

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[8] The biology curriculum requires that students learn about evolution, although the record is not clear concerning the Islamic position on this topic, and that students learn about the effects of alcohol on the body, even though Islam prohibits the consumption of alcohol.

[9] Additionally, a commemorative book that was published on the school's 20th anniversary begins with the following: "Praise be to God for what he has graciously bestowed upon us, and thanks to those who participated in the building of this educational edifice, with which God has accomplished excellent results through his grace and benevolence." This book also states that the main purpose of the school is to form "an Islamic character."

However, Alzakari said that if a student arrived at school in time for the assembly and was caught hanging out in the hallway or otherwise skipping it, he could be disciplined. The girls and boys in grades 2-6 use the auditorium for the morning assembly, and the high school boys use the cafeteria. The boys' assemblies occur every day; the record does not reflect how often the girls' assemblies occur. Teachers of students in grades 2-6 must attend the assemblies in order to make sure their students attend and then return to their classes afterward.

During the assembly, students read or recite from the Quran and recite a prayer in Arabic as well. Sometimes, students recite non-religious poetry, or nasheed, at this time. Announcements are also made during the assembly. Alzakari testified that, among the boys, there may be about 30 elementary students and 50 of the 100 7-12th graders attending morning assembly.

A student conducts the call to prayer, or athan, using the school's speaker system so that it is heard throughout the school. This happens every day. Students wash before prayer. On Fridays, there is a kutbah, or speech before the prayer. The Islamic studies department head usually delivers this, but a student could do it as well. Students must attend prayer, unless excused for some reason. If a student does not attend prayer and is not excused, he or she will be talked to for a first offense, and then more serious discipline may be issued for continued infractions. Alzakari testified that the school has marked students as "unexcused" for missing prayer. Biology teacher Friend testified that she reported some girls to the office for missing prayer, and the students received three days of detention as a result. Only Muslim teachers supervise this activity.

The school also maintains a halal cafeteria. Halal means that the meat has been cut in a certain way. This idea is similar to kosher foods in Judaism.[10] The two individuals who prepare the food are both Muslim. If students bring their own lunch, there are no restrictions on what they bring. The school serves Domino's Pizza twice a week, but the school's imam has told Schultz that this is okay because the pepperoni is halal (made from beef).

The academy observes Muslim holy days, and they are listed in the operations manual. The school also observes Christian holidays like Christmas, which is also a federal holiday. In this regard, the school follows the policies of the local public schools. The Saudi ambassador approves the school calendar. The school creates the calendar by integrating the Gregorian with the Islamic calendar, taking note of Islamic holy days such as Ramadan. After approval, the school distributes the calendar to students and parents. The school closes for at least part of Ramadan. The school also closed for a week for Eid Al Adha in 2011, which lasted for a week in November. The school collects food during Ramadan and distributes it to needy families. The school also collects toys for charity, which are distributed around the Eid festival, which the school celebrates additionally through decorations. Due to the fasting requirements for Ramadan, during this period students during lunch hour can go to the prayer room or go outside rather than go to the cafeteria.

The school regulates, to some extent, the appearance of both students and teachers. Employees must dress modestly, and women must not wear tight-fitting clothes out of respect for Islamic culture. There are Muslim female teachers at the academy who

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[10] However, the most important dietary restrictions are that no pork or alcohol be ingested, rather than that meat be halal.

do not cover their hands, hair, or arms. Students and parents must sign a uniform agreement, in which they agree to abide by the uniform requirements, including the requirement that girls' skirts extend below the knees.[11] This agreement states that the students agree to dress in keeping "with the Islamic traditions at ISA." The handbook also states that the dress code is based on Islamic values. Alzakari has asked a vice principal to speak to a female teacher who he thought was wearing clothes that were too tight for the standards of the school. Also, boys are not allowed to have unusual hairstyles at the school. Contrary to the school's other officials, the Director of Education, Rahima Abdullah, testified that the dress code simply reflects professionalism.

Social studies department head Dolores Rader described an incident where a teacher wanted to take both boys and girls to a Model UN event in New York, and Rader had to stop her because the teacher had not cleared it with the administration first, and boys and girls cannot travel together on an out-of-town trip.

c. The school's governance structure and relationship to the Kingdom of Saudi Arabia

As stated above, the Saudi embassy established the school in 1984. In addition to the administration described above, the school has a Board of Trustees. Acting Director General Schultz reports to the Board of Trustees, on which he sits as a non-voting member. He is the only non-Saudi member of the board. The Chairman of the Board of Directors is the Saudi ambassador to the U.S. The Board sets tuition rates

[11] Girls volleyball team members do not wear shorts.

for the school and establishes its policies. The Board has only met twice[12] since Schultz became Acting Director General in 2009, but both times the ambassador ran the meetings. There is no daily communication between Schultz and the ambassador, because Schultz is expected to manage the typical daily decisions concerned with operating the school. Schultz sends about one memo a week to the ambassador and consults the ambassador on major decisions, such as the school's recent attempt to renew its lease with the county and the school's decision to participate in the International Baccalaureate program. Prior to the school's board meeting in May 2012, Schultz sent a copy of the agenda to the ambassador. Schultz received a response from the ambassador's secretary with decisions about which items were to be on the agenda.

The Board is responsible for setting the school's polices. The operations manual, a large binder in English and Arabic,[13] was approved by the Board. Schultz consults the operations manual while performing his job. The Board also created a set of bylaws, which describes the organizational structure of the board of trustees, the administrative officers of the school, and some of the powers of the Board and officers. The school also has a charter from the Saudi embassy. The charter states that the school was established by the Saudi embassy, on instructions from the King of Saudi Arabia as an instrumentality of the Saudi government and governed by Saudi law.[14] According to the

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[12] On the two occasions when Board meetings occurred, the meeting did not commence until the Board members finished their prayers.

[13] The record contains many documents that are in both English and Arabic, and some that are only in Arabic.

[14] The charter also states that the school was established "pursuant to the Kingdom's Islamic responsibilities as custodian of Islam's two most holy mosques in Makkah and Medinah, and its unswerving commitment and policy to further Islamic understanding and the religious education and development of its young people." The bylaws state that all actions and regulations of the school must be consistent with the charter.

charter, the activities of the school will be limited to those "reasonably necessary to achieving the religious and education purposes described herein."

Schultz believes he is the only non-Muslim who has been on the Board. The bylaws do not require that Board members be Saudis or Muslims. All the other Board members are employed by the Saudi embassy in an official capacity, or are representatives of the Saudi government to the IMF and World Bank.

Schultz has many interactions with the embassy. For example, Schultz speaks on the phone, via interpreter, with the embassy's Director of Finance, Fuad Shukrey, who sits on the Board. Shukrey must co-sign many checks, such as checks for parking contracts or other leases. Sometimes Shukrey requests clarification or documents that the embassy needs in order to approve these school expenditures. Schultz keeps the originals of some of these contracts, like the cleaning contract, in his office at the school.

The Kingdom of Saudi Arabia provides $12 million every year to the academy, and the most recent budget for the academy was $14 million. Saudi students, who make up about half the student body, pay no tuition. The school receives no donations, although it could according to its bylaws.

Schultz testified that in 2008 the school tried to be classified as non-profit, but because of its relationship with Saudi Arabia it was denied. The school does not file a tax return with the IRS, but it does report salaries of employees. The school provides no information to the Commonwealth of Virginia concerning the salaries of its employees. The school does not provide W2s or 1099s to its employees. The school pays no taxes to the U.S. government. Every year, the school files a request with the IRS for a refund of

all sales taxes paid on gas and other fuel costs for its transportation department, and every year the IRS refunds this money.

The Saudi Office of Schools Abroad, part of the Saudi Ministry of Education, sends emails in Arabic to the principals of the school, who translate them for Schultz. The primary representative of the Saudi government at the school is boys school principal Ziad Alzakari, and he generally receives the emails. These emails contain requests for statistics, enrollment figures, and recently information about a proposed Arabic curriculum modification. Schultz does review the responses sent by Alzakari. At the time of the hearing, Alzakari was preparing to visit the Saudi Ministry of Education after the hearing to discuss this curriculum and seek approval of it. The Saudi ministry periodically visits the school. The last time the Saudi Ministry of Education visited the school was in late 2011, at which time three officials from the Ministry, including the Director General of the Saudi Schools Abroad office, evaluated the school.

The school is not affiliated with any religious institution because there is no established Islamic hierarchy or institution that speaks for Muslims.

The school's connection with Saudi Arabia is visible in different ways at the school. There are pictures of the King of Saudi Arabia and high-ranking ministers in the school, as well as flags of the United States and Saudi Arabia. When a person enters the school, the first thing he or she will see will be verses from the Quran in gold on the wall.[15] Additionally, the school has pictures of the Holy Mosque in Mecca on the walls of the library and in the common area of the school offices. Verses from the

[15] Islamic law forms the basis of Saudi law. According to one of the Employer's expert witnesses, Dr. Muqtedar Khan, the Quran is the constitution of Saudi Arabia. The Basic Law of Governance of the kingdom recognizes the special role Islam plays in the country, and states that the religion of the kingdom is Islam.

Quran appear in that same area of the offices on the wall. The auditorium contains pictures of the Kaaba and Hajj and an additional picture of the king. There are Islamic study books in the library, and a Saudi collection of Arabic books. The school has posted the mission statement in different places, including the front entrance and library.

Diplomas from the school are stamped by the school and, once stamped by the Saudi government, are accepted at any public high school or college in Saudi Arabia.

In 2008, the school registered a new entity with the Commonwealth of Virginia, the Islamic Saudi Academy of Washington (ISAW). Employment contracts were modified that year to state that in the event that ISAW operated the school, the employment contracts would still be binding. The school also began the process of making ISAW a 501(c)(3). Accounts for ISAW were created in 2009 at HSBC, the same bank used by the school. Some amount of money was deposited into these accounts to allow for two checks to be drawn on them (totaling $900) that were paid to Time Check, a payroll management company. Time Check was to have handled payroll for ISAW. A set of bylaws and a board of directors were also created for ISAW. However, no assets were transferred and ISAW never operated the school. The bank accounts at HSBC for ISAW are now closed. ISAW no longer exists because the certificate was never renewed with the Commonwealth of Virginia.[16]

[16] The record does not indicate if this was the incident about which Schultz testified.

d. Teachers

The school does not require that teachers accept the Islamic faith.[17] When the school advertises that a teaching position is open, it refers to the school as "private." The school does ask candidates about their religion. The school requires that Islamic studies teachers be Muslim. Teachers who teach subjects related to Islam need to be Muslim, according to Dolores Rader, head of the social studies department. According to Rader, non-Muslim teachers do not have a sufficient understanding of Islamic culture. All of the bus drivers are Muslim. The school does not require, but prefers, that its teachers have Virginia certification. Teachers sign employment contracts with the school which are governed by Virginia law.

The employee handbook states that teachers are supposed to model proper Islamic values to the students. Non-Muslim teachers must respect Muslim culture and practices, for example, not bringing in non-Halal food, or not eating in front of Muslims during Ramadan. Non-Muslims are not to brag about drinking alcohol. Psychology teacher David Kovalik testified that no one ever told him he cannot teach things against Islam, but he knows his contract requires him to uphold Islamic values. The girls' school principal, Farida Turkistani, recently relieved a social studies teacher of his teaching duties after he showed a video to 8th graders that blamed the attacks of September 11, 2001 on Muhammad, and claimed that Islam had been spread by terror. The school had not fired the teacher as of the hearing in this case, though he remains suspended.

[17] Sixty percent of the teachers, however, are Muslim. The operations manual includes a leave request form for teachers who wish to request leave for Umra and Hajj, the pilgrimage to Mecca.

Muslim teachers are encouraged to pray after the call to prayer. Non-Muslim teachers are simply expected to continue working. For teachers who want to participate, there is prayer after the school day ends, called prosnic.

II. ANALYSIS

a. Legal standard for asserting jurisdiction over instrumentalities of foreign governments

The FSIA only applies to judicial proceedings, but the Board has analyzed its application in Board cases as a matter of discretionary jurisdiction. *Goethe House of New York*, 288 NLRB 257, 261 (1988). The Board stated in *State Bank of India*, 229 NLRB 838, 842 (1977), that the FSIA "manifests a congressional intent to deny "sovereign immunity" to a "foreign state's private or commercial acts" occurring within the United States." Id. The Board held in that case that "it will better effectuate the policies of the Act for the Board to assert, rather than in our discretion decline, jurisdiction in any case involving employees employed within the territorial jurisdiction of the United States by any "agency" or "instrumentality" of a foreign state, engaged in commercial activity which meets the Board's jurisdictional standards for such enterprises." Id.; see also *The German School of Washington, D.C.*, 260 NLRB 1250 (1982).

The Board analyzed the extent to which a foreign government was engaged in commercial activity in *Goethe House of New York*, 288 NLRB 257 (1988). In that case, the Board extended jurisdiction over a cultural center established by the Federal Republic of Germany. The center was formed under West German law, funded by the West German government, carried out West German foreign policy in the area of cultural functions, and had its programs approved by the West German consulate. Id. at 257-58.

The Board noted in that case that "[t]he commercial character of an activity shall be determined by reference to its nature . . . rather than . . . its purpose." Id. at 260. The Board distinguished diplomatic, civil service and military personnel from laborers, clerical staff, public relations and marketing employees, the latter groups being an example of employees being "engaged in commercial activity." Id. In that case, where the unit sought did not include any German nationals or government employees, the center engaged in commercial activity like purchasing supplies and entering into contracts with American institutions, the Board asserted jurisdiction. Id. at 261; *German School* 260 NLRB at 1255-56.

b. The school's relationship with Saudi Arabia does not prevent the assertion of jurisdiction

In this case, the FSIA and any affiliation to the Kingdom of Saudi Arabia are not barriers to the assertion of jurisdiction. First, the parties stipulated that the school is an instrumentality of the Kingdom of Saudi Arabia. However, under *State Bank* that is not enough if the instrumentality is engaged in commercial activity which meets the Board's jurisdictional standards. The parties stipulated that the school, during the past 12 months derived gross revenues available for operating expenses in excess of one million dollars, and purchased and received at its Richmond Highway facility products, goods, and materials valued in excess of $5,000 directly from points outside the Commonwealth of Virginia. These facts show that the school meets the Board's jurisdictional standard for a private school. *Archdiocese of Baltimore*, 216 NLRB 249 (1975).

Second, this case is similar to *Goethe House*. In that case, the Federal Republic of Germany established the institution and maintained significant controls over it.

However, the center there still employed non-German citizens like any other commercial entity in this country, entered into contracts and purchased supplies, and thus carried on normal commercial operations. The same can be said for the school here. The school contracts with teachers like any other private school in this country, purchases supplies, and enters into contracts with local businesses for cleaning services, security services, and parking space. All of these activities are normal commercial activities. Further, the Petitioner is not seeking to represent the management officials who have been appointed by the Saudi government or are Saudi nationals. Furthermore, these private contracts are all subject to the law of Virginia or other local jurisdictions. Recently, the employment contracts have been ruled to be a waiver of any claim of immunity under FSIA. *Ghawanmeh v. Islamic Saudi Academy*, 672 F. Supp.2d 3, 9-10 (D. D.C. 2009).

The Employer argues that the extremely close relationship between the Kingdom of Saudi Arabia, as demonstrated above, precludes a finding that the school is engaged in commercial activity that is subject to federal government regulation. However, I have found, and the parties have stipulated, that the school is an instrumentality of the Saudi government. That finding is not dispositive of this issue. *State Bank of India*, supra. Rather, what is dispositive is whether the school is a commercial activity of a foreign government. Id. The Employer further argues that the nature of the school demonstrates that it is not a normal commercial activity, because it was established by the Saudi government as part of its duty to make sure all Saudi children receive an education, and that the school is an extension of the Saudi educational system. However, as *Goethe House* makes clear, the Board examines the nature of the commercial activity, not the purpose. *Goethe House*, 288 NLRB at 260. In that case, the West German government

established the center to further its foreign policy goals, which is as much a governmental activity as the educational purpose of the school here. The Employer also argues that the district court judge in *Ghawanmeh* failed to appreciate the unique nature of the school at issue here, but again, the unique relationship of the school to official Saudi educational policy does not determine the commercial activity in this case.

For all these reasons, I find that the FSIA is not a bar to the assertion of jurisdiction in this case.

c. Legal standard for religious schools determined by *Catholic Bishop*

In *Catholic Bishop*, supra, the Supreme Court held that the Board lacked jurisdiction over teachers in religious schools. Citing *Lemon v. Kurtzman*, 403 US 602, 617 (1971), the Court stated, "[t]he key role played by teachers in such a school system has been the predicate for our conclusions that governmental aid channeled through teachers create impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools." The Court stated that there was a "conflict of functions" in the way a teacher under religious control and discipline would teach purely secular subjects. Id. at 501. The Court further stated that the government regulation of mandatory collective-bargaining could not avoid "entanglement with the religious mission of the school." Id. at 502. The Court furthermore stated that after an investigation by the Board into unfair labor practices at a religious school, "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." Id. at 502. Moreover, because "nearly everthing that goes on" at a school affects teachers' terms and conditions of employment, "[i]nevitably the

Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions." Id. at 503. Again, quoting *Lemon*, the Court stated "[p]arochial schools involve substantial religious activity and purpose," and that "[t]he substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses ought to avoid." Id. at 503. Accordingly, the Court concluded that it saw "no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated and the consequent serious First Amendment questions that would follow." Id. at 504. Finally, after finding that there was no "clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board," the Court refused to interpret the Act in a way that would have required it to balance the interests of the Act with First Amendment guarantees. Id. at 507.

The leading Board case interpreting *Catholic Bishop* is *Jewish Day School of Greater Washington*, 283 NLRB 757 (1987). In that case, the Board held that the lack of a formal "church" affiliation was not dispositive of the Board's analysis concerning whether an institution was a religious school under *Catholic Bishop*. Id. at 760. Rather, the Board held that *Catholic Bishop* required it to analyze the "purpose of the school, the role of the teacher in effectuating that purpose, and the potential effects of the Board's exercise of jurisdiction." Id. at 760. The Board held that "*Catholic Bishop* precludes the Board from exercising its jurisdiction where a union seeks to represent a unit of teachers in a school whose purpose and function in substantial part are to propagate a religious faith." Id. at 761. In a footnote, the Board added that it "need not consider here whether the Board's exercise of jurisdiction with respect to other employee classifications in such

institutions would raise serious constitutional questions." Id. at fn. 48. The Board declined jurisdiction, finding the purpose and function in substantial part is the propagation of a religious faith based on the articles of incorporation, the recruitment manual, testimony that the school was designed to encourage Jewish identity and provide an "intense" Jewish religious education, mandatory religious instruction, an "array of courses" in Judaic studies which made up 40% of a child's school day, integration of Judaic studies into the general studies, mandatory prayer services, adherence to dietary laws, and Jewish dress codes. Id. at 761-62. See also *Nazareth Regional High School*, 283 NLRB 763 (1987) (dismissing complaint and finding school was religious under *Jewish Day*, noting mostly lay board of trustees, daily Mass, morning prayer read over public address system, and mandatory religious instruction).

d. Islamic Saudi Academy is a religious school within the meaning of *Catholic Bishop* and *Jewish Day*

I find that the school's purpose and function in substantial part is to propagate the religious faith of Islam and so find that I am precluded from asserting jurisdiction over the teachers. *Jewish Day*, 283 NLRB at 761.

First, the charter and bylaws of the school here expressly state the school was established to teach Islam to its students. The school's charter states that it was established "pursuant to the Kingdom's Islamic responsibilities as custodian of Islam's two most holy mosques in Makkah and Medinah, and its unswerving commitment and policy to further Islamic understanding and the religious education and development of its young people." The bylaws state that all actions and regulations of the school must be consistent with the charter. The Mission Statement of the school, expressed in the

employee handbook states the school wants students to excel academically "while maintaining the values of Islam." The operations manual states that the school promotes the Five Pillars of Islam. The school's website also states that it is an Islamic school.

Second, religious instruction and attendance at prayer services are mandatory for the students. Every grade level must take Islamic studies, which is taught in Arabic, the language of the Quran. Additionally, all students must attend the afternoon prayer. The record indicates that students have been disciplined for missing it without an excuse. Additionally, the school requires Arabic for all its students, so that they can attend Islamic studies classes, and read the Quran. The teachers for Islamic studies must be Muslim.

Third, there is some integration of Islamic principles in other subjects. Teachers are required to raise Islamic principles during discussions of various issues in the biological and other natural sciences, and they teach students Islamic-based objections to certain scientific practices. Islamic values require that the teachers in the art department not teach the students how to depict a nude human form. Although Arabic classes are not expressly intended to be religious, the Arabic textbook contains numerous religious sayings from the Quran and other sayings of Muhammad.

Fourth, the school maintains a halal cafeteria. While the restrictions in this case may not be as strict as in *Jewish Day*, since here there are no restrictions on what food non-Muslim teachers may bring to the school, the cafeteria does not serve non-halal food. During Ramadan, students do not eat in the cafeteria and non-Muslim teachers are expected to not eat in front of Muslim students and teachers.

Fifth, the teachers, regardless of their religious affiliation, must maintain the Islamic values taught at the school. Islamic studies teachers are Muslim. One teacher who showed a movie hostile to Islam and Muhammad was removed from his teaching duties. Teachers testified that they understand it is a Muslim school and that they must uphold Islamic values in the classroom.

Sixth, the school has a dress code which the school's policies state is based on Islam. Students must dress modestly and skirts must extend below the knee. This dress code is enforced as illustrated by Alzakari's testimony that he told a vice principal to talk to a female teacher who he considered to be wearing inappropriate clothing.

All of these factors demonstrate that the school's purpose and function in substantial part is to propagate Islam. This does not mean that inculcating Islam is the only purpose of the school, but rather that the evidence shows the substantial religious character of the school. Accordingly, I will dismiss the portion of the petition concerning the teachers, including the department heads.

The Petitioner argues that this case is controlled by *University of Great Falls*, 331 NLRB 1663 (2000), enf. denied 278 F.3d 1335 (D.C. Cir. 2002), but that case is distinguishable. In that case, there were no required religion classes or religious services, no evidence of integration of the religious curriculum with the secular subjects, no dietary restrictions, and virtually no evidence of any religious practice at the school. In this case, as I have found above, the school engages in all of those activities, making it much more similar to *Jewish Day*.

My conclusion that the Board should not assert jurisdiction over the teachers does not end the inquiry. *Jewish Day*, 283 NLRB at fn. 48. There are several non-teaching

classifications at the school that are included in the proposed unit and that have no role in the inculcation of religion, and the Petitioner has stated that it would proceed to an election in any unit that was found appropriate. The Petitioner seeks to represent a facility-wide unit of all the employees over which the Board has jurisdiction. Thus, this is a presumptively appropriate unit. *Hegins Corp.*, 255 NLRB 1236 (1981). *The Riverside Church*, 309 NLRB 806 (1992), where the Board declined to assert jurisdiction over employees whose duties were necessary to accomplish the institution's religious mission, is inapposite as that institution was a church, not a school, and the employees there were engaged in activities that furthered the interests of the church. *St. Edmund's Roman Catholic Church*, 337 NLRB 1260 (2002), is also inapposite. In that case again involving a church as the named employer, the Board declined to assert jurisdiction over custodial employees who furthered the religious mission of the church itself, and were directly employed by the church. Id. at 1260-61. Again, the school here is not a church. Further, "the record fails to establish that the unit employees perform secular tasks without which the Employer would be unable to accomplish its religious mission." *Ecclesiastical Maint. Services, Inc.*, 325 NLRB 629, 630-31 (1998). The Board has asserted jurisdiction over non-teachers in similar factual situations. See *Ecclesiastical Maintenance Services, Inc.* (asserting jurisdiction over custodial employees who worked for diocesan-established company that cleaned churches, schools, and other diocesan buildings); *Hanna Boys Center*, 284 NLRB 1080 (1987), enfd. 940 F.2d 1295 (9th Cir. 1991) (asserting jurisdiction over non-teachers at a boys home that was established by a Catholic diocese and overseen, in part, by diocesan officials). Accordingly, I will direct an election in a unit of non-teaching employees at the school.

The record indicates that the school employs guidance counselors. I have already determined that teachers should be excluded from the unit because the Board does not have jurisdiction over them. However, the record does not indicate the extent of the guidance counselors' duties in propagating the Islamic faith at the school. Because guidance counselors typically work closely with students concerning academic and career planning, the guidance counselors at the school may have a role in propagating Islamic values when discussing these issues with students. The record is not clear on this issue, however. For this reason, guidance counselors should be permitted to vote under challenge at the election.

Accordingly, I will direct an election in a unit of non-teaching employees at the school, with guidance counselors voting subject to challenge, and with the exclusions on which the parties have already agreed.

III. CONCLUSION

Based upon the entire record in this matter and in accord with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated that Islamic Saudi Academy Employees Professional Association, is a labor organization as defined in Section 2(5) of the Act, and claims to represent certain employees of the Employer.

4. A question affecting commerce does exist concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(I) and Sections 2(6) and (7) of the Act.

5. The Employer, Islamic Saudi Academy, an instrumentality of the Kingdom of Saudi Arabia, is a non-profit private educational institution with its principal place of business in Fairfax County, Virginia. During the past 12 months, in conducting its operations described herein, the Employer derived gross revenues available for operating expenses in excess of one million dollars. In conducting the operations described herein during the period described above, the Employer purchased and received at its Alexandria, Virginia facility products, goods, and materials valued in excess of $5,000 directly from points outside the Commonwealth of Virginia.

The parties stipulated that the petitioned-for-unit is a mixed unit consisting of professionals and non-professionals. Under the proscription of Section 9(b)(1) of the Act, professional employees cannot be included in a nonprofessional unit without their consent. The professional employees are entitled to vote on two questions:
(1) whether they desire to be included in a group composed of non-professional employees, and (2) their choice with respect to a bargaining representative. *Sonotone Corp.*, 90 NLRB 1236, 1241-42 (1950). If the majority of professionals vote "yes" on inclusion, their votes are counted with the nonprofessional; if the majority vote "no," their votes are counted separately to determine which labor organization, if any, they want to represent them in a separate unit.

Accordingly, I am directing elections in the following separate voting groups, one consisting of all full-time and regular part-time nurses, IT employees, also known as information technology employees, computer specialists, librarians, assistant librarians, finance accountants, internal auditors, finance clerks, transportation accountants, and finance employees, and the other consisting of all full-time and regular part-time employees employed by the Employer except for nurses, IT employees, also known as information technology employees, computer specialists, librarians, assistant librarians, finance accountants, internal auditors, finance clerks, transportation accountants, and finance employees:

> (a) All full-time and regular part-time nurses, IT employees, also known as information technology employees, computer specialists, librarians, assistant librarians, finance accountants, internal auditors, finance clerks, transportation accountants, and finance employees, employed by the Employer at its Fairfax County, Virginia school but excluding all teachers, bus driver managers, maintenance managers, vehicle maintenance foremen, temporary health employees, English as a second language temporary teachers, also known as ESL temporary teachers, physical education temporary teachers, also known as PE temporary teachers, controllers, elementary coordinators, West Campus coordinators, assistant principals, vice principals, principals, directors of education, personnel managers, business managers, finance officers, transportation managers, directors general, acting directors general, executive assistants, managerial employees, guards, and supervisors as defined in the Act.
>
> (b) All full-time and regular part-time employees employed by the Employer at its Fairfax County, Virginia school, but excluding all nurses, IT employees, also known as information technology employees, computer specialists, librarians, assistant librarians, finance accountants, internal auditors, finance clerks, transportation accountants, finance employees, teachers, bus driver managers, maintenance managers, vehicle maintenance foremen, temporary health employees, English as a second language temporary teachers, also known as ESL temporary teachers, physical education temporary teachers, also known as PE temporary teachers, controllers, elementary coordinators, West Campus coordinators, assistant principals, vice principals, principals, directors of education,

> personnel managers, business managers, finance officers, transportation managers, directors general, acting directors general, executive assistants, managerial employees, guards, and supervisors as defined in the Act.

Employees in voting group (a) shall be asked two questions on the ballot:

(1) Do you desire to be included in a unit with non-professional employees?

(2) Do you desire to be represented for purposes of collective bargaining by the Islamic Saudi Academy Employees Professional Association?

If a majority of the employees in voting group (a) vote "yes" to the first question, indicating a choice to be included in a unit with non-professional employees, the group will be so included. Voting group (a)'s vote on the second question will then be counted with the votes of the non-professional voting group (b) to decide the representative for the entire unit. If, on the other hand, a majority of the professional employees in voting group (a) do not vote for inclusion, these employees will not be included with the nonprofessional employees, and their votes on the second question will be separately counted to decide whether they want to be represented in a separate professional unit.

I make the following findings with regard to the appropriate unit:

1. If a majority of the professional employees vote for inclusion in a unit with non-professional employees, I find the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time employees employed by the Employer at its Fairfax County, Virginia school, but excluding all teachers, bus driver managers, maintenance managers, vehicle maintenance foremen, temporary health employees, English as a second language temporary teachers, also known as ESL temporary teachers, physical education temporary teachers, also known as PE temporary teachers, controllers, elementary coordinators, West Campus coordinators, assistant principals, vice principals, principals, directors of education, personnel managers, business managers, finance officers, transportation managers, directors general, acting

directors general, executive assistants, managerial employees, guards, and supervisors as defined in the Act.

2. If a majority of the professional employees do not vote for inclusion in the unit with non-professional employees, I find that the separate voting groups set forth above constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Islamic Saudi Academy Employees Professional Association. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strikes, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election. To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 5, Bank of America Center, Tower II 100 S. Charles Street, 6th Floor Baltimore, MD 21201-2700, on or before **June 21, 2012**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 - 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on **June 28, 2012**, at 5 p.m. (ET), unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[18] A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the

[18] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

(SEAL) /s/ Wayne R. Gold

Wayne R. Gold, Regional Director
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Baltimore, MD 21201-2700

Dated: June 14, 2012