

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: February 14, 2013

TO: Olivia Garcia, Regional Director
Region 21

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: CalOptima 177-1683-5000
Case 21-CA-090685 280-9440

The Region submitted this Section 8(a)(1) and (3) case for advice regarding whether the Board may assert jurisdiction over an employer that is a public agency created under the authority of a state statute, and pursuant to a county ordinance, to manage Orange County's Medi-Cal and Medicaid programs. We conclude that the Employer is exempt from the NLRB's jurisdiction because it is a "political subdivision" of the state of California under both prongs of the Board's *Hawkins County*¹ test.

FACTS

CalOptima ("Employer") is a County Organized Health System ("COHS") created in 1993. The California State Code authorizes counties to create a COHS to administer public health care benefits to eligible county residents. Pursuant to this law, Orange County passed an ordinance establishing CalOptima as its COHS. Under the State Code, the Employer, as a COHS, has all the "powers, rights, privileges, and immunities that the county" had in its administration of public health benefits.

The Employer is funded by the state and federal governments. It is considered an independent "public agency" under California law. As a public agency, the Employer is subject to California's open meetings act, public records act, and tort claims act,² and it must file with the Secretary of State as a public agency.³ The Employer is also subject to federal audits of its disbursements.

¹ *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971).

² "Public entities" subject to the California Tort Claims Act include the state, county, and city, as well as a public agency "and any other political subdivision or public corporation in the State." CAL. GOV'T CODE § 811.2.

Although the Employer is a “public agency” under California law, it is authorized to act without seeking prior approval from the county. For example, it has the authority to enter into contracts in its own name. In addition, state law provides that neither the state nor the county is liable for the Employer’s obligations. The Employer’s eleven-member Board of Directors includes a County Supervisor and two other government employees as well as private-sector members of the local medical community. Nominees to the Board of Directors are first vetted by the Orange County Health Care Agency and then appointed by the Board of Supervisors. The Board of Directors drafts and approves the Employer’s budget. It is not clear whether the Orange County Board of Supervisors or any other elected official has any role in approving the Employer’s budgets.

CalOptima employees must take an oath of office and swear to support and defend the Constitutions of the United States and California. They also receive benefits afforded to public employees by participating in the state’s retirement plan and contributing to CalPers, the state’s social security fund.

ACTION

We conclude that the Employer is exempt from the NLRB’s jurisdiction because it is a political subdivision and therefore does not meet the definition of “employer” under Section 2(2) of the Act.

Under Section 2(2), an “employer” for purposes of the NLRA does not include “any State or political subdivision thereof.” As the Supreme Court acknowledged in *NLRB v. Natural Gas Utility District of Hawkins County*, the Board will find entities are political subdivisions if they are either 1) created 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.”⁴ Federal law, rather than state law, defines whether an entity is a political subdivision of the state, but “State law declarations and interpretations are given careful consideration.”⁵

³ The California Government Code requires “public agencies” to file with the Secretary of State for inclusion in California’s “Roster of Public Agencies.” These include “a district, public authority, public agency, and any other political subdivision or public corporation in the state, but does not include the state or a county, city and county, or city.” CAL. GOV’T CODE § 53050.

⁴ 402 U.S. at 604-605.

⁵ *Id.* at 602-603.

The key inquiries to determine if an entity is a political subdivision under the first prong of the *Hawkins County* test are 1) whether the entity was created pursuant to a state-level authority, such as by statute,⁶ and 2) whether the state intended to create an arm of government.⁷ The Board has found this first requirement satisfied where a local government creates an agency pursuant to a state-enabling statute.⁸ When examining whether an entity was created to be an arm of the government, the Board has looked to whether the entity fulfills the state's "perceived obligation or constitutionally mandated requirement."⁹ The Board considers other factors as well, including the level of governmental control over the entity's budget,¹⁰ whether employees receive benefits typically afforded to state employees,¹¹ the extent to which the entity receives public funding,¹² and whether the entity is subject to the state open meetings and public records laws.¹³

⁶ Compare *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB No. 41, slip op. at 7 (2012) (determining a charter school was not exempt under the first *Hawkins* prong because it was not created pursuant to state statute, but rather, by private individuals as a nonprofit corporation) with *University of Vermont*, 297 NLRB 291, 295 (1989) (finding the University of Vermont exempt under the first *Hawkins* prong where the University was created by a special act of the Vermont legislature).

⁷ See *Hinds County Human Resource Agency*, 331 NLRB 1404, 1404 (2000).

⁸ *Id.* (agency created by county to administer programs to assist low-income people).

⁹ *The New York Institute for the Education of the Blind*, 254 NLRB 664, 667 (1981) (discussing an exempt entity's fulfilling the state's obligation to provide education to its residents).

¹⁰ *Hinds County*, 331 NLRB at 1405 (finding "significant governmental control" over the budget where the entity received its funding from the state, county, and federal governments, the entity was required to report to the county Board of Supervisors regarding its budget and whether it was meeting its achieved goals, and the entity was subject to audit by the county, state, and federal governments); *Jervis Public Library Ass'n, Inc.*, 262 NLRB 1386, 1387 (1982) (finding government control over the budget where the employer was required to submit its budget to the state and county in order to receive funding).

¹¹ *Hinds County*, 331 NLRB at 1405 (employees could participate in the state's retirement system); *Jervis Public Library Ass'n*, 262 NLRB at 1387 (employees were covered by the city's health insurance plan and participated in the state's retirement

Under the second prong of the *Hawkins* test, the “critical and determinative factor” of whether an entity is administered by individuals responsible to public officials or to the general electorate is whether the individuals are appointed by and subject to removal by public officials.¹⁴ The Board has also examined many of the same factors described above.¹⁵ However, the Board recently held that references to these additional factors in past decisions were merely to support or reinforce a

system); *see also University of Vermont*, 297 NLRB at 293 (university’s retirement system created by state statute).

¹² *Hinds County*, 331 NLRB at 1405 (“The Employer receives virtually all of its funding from the state, county, and the Federal government[.]”); *Jervis Public Library Ass’n*, 262 NLRB at 1387 (finding the exempt association received almost its entire annual gross revenue from city, county, and state appropriations).

¹³ *University of Vermont*, 297 NLRB at 295.

¹⁴ *Chicago Mathematics & Science Academy Charter School*, 359 NLRB No. 41, slip op. at 7-8, 9 (holding that whether members of the governing board are subject to appointment and removal by elected officials is “properly regarded as the critical and determinative factor in a second-prong analysis.”); *Regional Medical Center at Memphis*, 343 NLRB 346, 358-59 (2004) (reiterating that whether an entity is “administered” by individuals responsible to the general electorate depends on whether the individuals are appointed by and subject to removal by public officials); *Cape Girardeau Care Center*, 278 NLRB 1018, 1019 (1986) (finding the employer was not exempt under the second *Hawkins* prong because its directors were not appointed or removed by the county and therefore did not have “direct personal accountability” to public officials). *But see Economic Security Corp.*, 299 NLRB 562, 565 (1990) (finding “removal by public officials or the general electorate has never been the critical factor in determining responsibility to public officials or the general electorate” and thus holding the Board lacked jurisdiction even though the board of directors was appointed by but not subject to removal by public officials or the general electorate), overruled on other grounds, *Enrichment Services Program, Inc.*, 325 NLRB 818 (1998).

¹⁵ *See, e.g., Regional Medical Center at Memphis*, 343 NLRB at 360 (discussing additional factors to consider under the second prong of *Hawkins*, such as whether the entity’s employees share common working conditions with city or county employees, whether the annual budget is subject to governmental approval, whether the entity is subject to governmental audits, and whether the entity is subject to state laws governing state administrative agencies, such as an open meetings act).

determination that an entity was a political subdivision based upon the method of appointment and removal of its governing board.¹⁶ If the “appointment-and-removal method yields a clear answer” as to the second prong of the *Hawkins* test, “the Board’s analysis properly ends.”¹⁷

We agree with the Region that the Employer is exempt from the Board’s jurisdiction under the first prong of the *Hawkins* test. The Employer was created by a county ordinance pursuant to a state statute enabling counties to create county organized health systems to administer public health benefits. Further, the Employer was created to serve as an arm of the county to fulfill the county’s duty to administer public health benefits to its low-income residents. Indeed, the state defines COHS’s like the Employer as “public agencies,” which must file with the California Secretary of State and are subject to California’s tort claims act, public records act, and open meetings act. The Employer is funded solely by federal and state funds. In addition, its employees receive benefits afforded to state employees, and must take the oath of office required of public employees. We do not find the fact that the state and county purport to limit their liability for the Employer’s obligations to be controlling. Instead, based on all the relevant factors, we conclude that the Employer is a political subdivision because it was created by the state as an administrative arm of the government.

We also conclude that the Employer is a political subdivision under the second prong of the *Hawkins County* test. Candidates for the Board of Directors are vetted by the Orange County Health Care Agency and are then appointed by the Board of Supervisors. Assuming that the Board of Supervisors also has the authority to remove board members, the Employer is administered by individuals who have “direct personal accountability” to public officials and therefore is a political subdivision under the second prong of the *Hawkins County* test.

Accordingly, the Region should dismiss the instant charge, absent withdrawal.

/s/
B.J.K.

¹⁶ *Chicago Mathematics and Science Academy Charter School*, 359 NLRB No. 41, slip op. at 9-10.

¹⁷ *Id.*, slip op. at 10.