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Pilsen Wellness Center *and* Chicago Alliance of Charter Teachers and Staff, IFT, AFT, AFL–CIO. Case 13–RM–001770

March 8, 2013

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

This case involves a petition for an election among teachers working at a public charter school in Chicago, Illinois. The issue is whether a private, nonprofit educational services corporation that employs the teachers and provides them to the charter school is a political subdivision of the State of Illinois within the meaning of Section 2(2) of the National Labor Relations Act and therefore exempt from the Board's jurisdiction.[1] Pilsen Wellness Center (Pilsen), the nonprofit corporation that employs the teachers, asserts that it is not a political subdivision and that it is subject to the Board's jurisdiction. It has filed an election petition with the Board. The Union, which seeks to represent the teachers under Illinois State law, argues that the Board lacks jurisdiction.

Whether an employing entity is a political subdivision within the meaning of Section 2(2) of the Act is determined under the Board's longstanding test, set forth and discussed in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) (referred to herein as the *Hawkins County* test). Under that test, an entity may be considered a political subdivision if it is either (1) created directly by the State so as to constitute a department or administrative arm of the government or (2) administered by individuals who are responsible to public officials or to the general electorate. Id. at 604–605. Here, the Regional Director for Region 13 found that Pilsen is a political subdivision under the second prong of the *Hawkins County* test. The parties filed briefs on review.[2]

On December 14, 2012, we issued our decision in *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB No. 41 (*Chicago Mathematics*), in which we applied the principles of *Hawkins County* and found that a nonprofit corporation that established and operated a public charter school in Chicago was not a political subdivision of the State of Illinois under either prong of the *Hawkins County* test. Unlike *Chicago Mathematics*, which involved a charter school itself, the present controversy is one step removed: it concerns a private company that has contracted with a charter school to provide teaching staff and other educational services.

Having carefully considered the entire record, including the briefs on review, and applying Chicago Mathematics, we find, contrary to the Regional Director, that Pilsen, the nonprofit corporation that employs the public charter school's teachers, is not a political subdivision of the State of Illinois. We find, instead, that Pilsen is an "employer" within the meaning of Section 2(2) of the Act, and therefore subject to the Board's jurisdiction. Accordingly, we reinstate the petition and remand this case to the Regional Director for further processing.

Background

On September 20, 2010, Chicago Alliance of Charter Teachers and Staff, IFT, AFT, AFL–CIO (the Union), filed a petition with the Illinois Educational Labor Relations Board seeking to represent teachers employed by Pilsen at a public charter school. On October 22, 2010, Pilsen filed the present petition with the National Labor Relations Board.

On January 3, 2011, the Regional Director for Region 13 issued a Decision and Order dismissing Pilsen's petition for the reasons stated above. Thereafter, Pilsen filed a request for review of the Regional Director's decision. On October 12, 2011, the Board granted review. Pilsen and the Union filed briefs on review.

Facts

The Employer's Corporate Structure

Pilsen is a private, nonprofit corporation established in 1975 by a group of individuals to serve as a community-based human services organization. It provides mental health and preventive health services, substance abuse treatment, and alternative secondary education programming to under-resourced communities in Chicago. Pilsen's affairs are managed by Dr. Francisco Cisneros, its president (also the chief executive officer), who reports to its board of directors. The board fills vacancies by appointing board members as needed, and only the board may remove sitting board members. No government entity or public official has the authority to appoint or remove a member of Pilsen's board.

The Agreement Between Pilsen and YCCS

In December 2006, Pilsen entered into an Education Services Provider Agreement with Youth Connection Charter Schools (YCCS) to provide management and

[1] Sec. 2(2) of the Act provides that the term "employer" shall not include any state or political subdivision thereof.

[2] The Regional Director found that Pilsen is not a political subdivision under the first prong of the *Hawkins County* test because it was not created directly by the State of Illinois. No party requested review of that finding.

educational services for Latino Youth High School (LYHS). YCCS is a private, nonprofit corporation that has a charter agreement with the Chicago Board of Education (Chicago Board) to establish and operate public charter schools, such as LYHS, under the oversight of Chicago Public Schools.[3] The agreement between Pilsen and YCCS expressly provides that Pilsen is an independent contractor of YCCS, and that YCCS is not a joint employer of Pilsen's employees. The only connection that Pilsen has with any government agencies is through its agreement with YCCS.

Pilsen alone manages LYHS's operations. It developed the school's curriculum without review or oversight by the Chicago Board or the State Board of Education (State Board), although YCCS initially reviewed Pilsen's curriculum proposal to ensure that it conformed to city and state educational requirements. Pilsen also periodically submits information such as curriculum plans and attendance figures to YCCS. The principal of LYHS is a Pilsen employee and reports directly to Cisneros. Pilsen alone may discipline or terminate the principal. With the exception of two special education teachers, the teachers at LYHS are also Pilsen employees, and Pilsen alone may discipline or terminate them. Pilsen determines the teachers' salaries and most of their benefits, and it contributes to the Chicago Public Schools' teachers' pension fund on their behalf.[4] It has its own employee policy manual, resolves work-related complaints and grievances on its own, and conducts its own employee training.[5]

Pilsen does not directly receive any public moneys to operate LYHS; its funding to operate the charter school is derived solely through its agreement with YCCS. LYHS is located in a building that Pilsen owns; a summary of the YCCS 2010 budget indicates that YCCS pays Pilsen a "facility supplement" for the use of the building. Pilsen prepares an annual operating budget for LYHS that it submits to YCCS. Pilsen also incurs expenses to operate LYHS, including employees' salaries, educational supplies, utilities, and insurance, and it submits an accounting of these expenses to YCCS. YCCS "reimburses" Pilsen from the moneys that it receives from public sources.

As part of its agreement with YCCS, Pilsen agreed to adhere to the terms of YCCS's charter with the Chicago Board and to "all applicable Federal, state of Illinois, and city of Chicago laws, statutes, codes, and ordinances, including the Illinois Charter Schools Law and those laws, terms and provisions referenced in the Charter School Agreement between the Chicago Public Schools and [YCCS]." YCCS may terminate its agreement with Pilsen if Pilsen is in default of any contractual provision, or if YCCS determines that "operational, fiscal, or unforeseen circumstances exist that warrant termination." YCCS is responsible for ensuring that Pilsen complies with the agreement and, as the charter holder, YCCS must periodically submit information regarding LYHS operations to Chicago Public Schools or to the Chicago or State Boards. Pilsen itself does not submit any information directly to these agencies.

The Regional Director's Decision

Finding that Pilsen is administered by individuals who are responsible to public officials or to the general electorate, the Regional Director concluded that Pilsen is a political subdivision of the State of Illinois under the second prong of the *Hawkins County* test. The Regional Director recognized that Pilsen has its own self-appointed governing body, but he examined additional factors and concluded that Pilsen's relationship to the State of Illinois was "sufficient to warrant finding that it is administered by individuals who are in turn responsible to 'public officials.'" In particular, the Regional Director relied on the following: (1) Pilsen's funding for the operation of LYHS is "passed" from YCCS to Pilsen and therefore comes from public sources;[6] (2) YCCS reimburses Pilsen for its expenses to operate LYHS, and YCCS is required to report those expenses to Chicago Public Schools; (3) Pilsen must comply with a multitude of local, State, and Federal laws and regulations, including Illinois laws requiring that LYHS teachers employed by Pilsen be certified, pass background checks, and participate in the public school teachers' pension fund; (4) Pilsen must comply with State and Chicago Public School requirements memorialized in its agreement with YCCS in order to operate LYHS as a charter school; and (5) YCCS cannot change its agreement with Pilsen without the Chicago Board's approval. Based on those considerations, the Regional Director found that the State of

[3] As we explained in *Chicago Mathematics*, Chicago Public Schools is a division of the Chicago Board and monitors public charter schools in Chicago. See 359 NLRB No. 41, slip op. at 3. Our decision in *Chicago Mathematics* provides detailed information about the operation of public charter schools in the State of Illinois generally and Chicago in particular. See id., slip op. at 1–2.

[4] YCCS hired and set the salaries and benefits of the two special education teachers.

[5] LYHS's teachers must be certified by the State and pass a background check conducted by Chicago Public Schools.

[6] The Regional Director found that Pilsen's budget and expenses are submitted to Chicago Public Schools for review through YCCS and, "ultimately," that Pilsen is accountable to the school system, "albeit indirectly. . . ." The Regional Director also found that although Pilsen does not directly transmit educational reports to Chicago Public Schools, Pilsen's operation of LYHS is "highly scrutinized" by Chicago Public Schools through submissions that it receives from YCCS.

Illinois considers both YCCS and Pilsen to be public entities in their operation of LYHS.

Contentions of the Parties

Pilsen argues that the Regional Director erred in finding that it is exempt from the Board's jurisdiction as a political subdivision. It contends that the determinative factor under the second prong of the *Hawkins County* test is whether the majority of an employing entity's board of directors comprises individuals who are responsible to public officials or to the general electorate. Pilsen emphasizes that its board members are selected and removed only by other board members, not by any public official, and that it is managed in all respects by its president, who reports solely to Pilsen's board of directors.

Pilsen contends that the Regional Director incorrectly disregarded the lack of evidence that its board members are responsible to public officials or to the general electorate, and instead relied on factors that are not relevant to the second prong of the *Hawkins County* test. It further argues that, in any event, the nonrelevant factors relied on by the Regional Director do not show that it is accountable to government agencies through its relationship with YCCS. Pilsen emphasizes that it does not receive funding directly from any public source; it is not required to submit any reports directly to any public agency; it independently makes its own personnel decisions, including hiring, firing, disciplining, and setting most benefits for the petitioned-for charter school teachers; and no government entity has any direct oversight of its operations. Pilsen stresses that it is an independent management company that itself does not hold a charter to operate a school, and that its only connection with Chicago Public Schools is through its agreement with YCCS, the charter holder. Pilsen also maintains that it must comply with State educational laws and school system requirements only because of its agreement with YCCS, not because Pilsen itself is directly subject to those laws or requirements.

In contrast, the Union contends that the Regional Director properly found that Pilsen is a political subdivision. The Union acknowledges that Pilsen's board of directors is not appointed by or subject to removal by public officials, but argues that the selection and removal method of Pilsen's board of directors is merely one factor to be considered under the second prong of the *Hawkins County* test. The Union asserts that the Board typically considers whether an employer possesses attributes commonly associated with public status, and that, in doing so, the Board examines "other factors" bearing on an entity's relationship to the state. The Union, in agreement with the Regional Director, contends that the "other factors" here show that Pilsen is accountable to Chicago Public Schools to such an extent that its board of directors is responsible to public officials or to the general electorate, and that Pilsen is therefore a political subdivision.

Analysis

In *Chicago Mathematics*, 359 NLRB No. 41, slip op. at 8, we explained that in analyzing whether an entity is administered by individuals who are responsible to public officials or to the general electorate under the second prong of the *Hawkins County* test, the relevant inquiry is simply whether a majority of the individuals who administer the entity—the governing board and executive officers—are appointed by and subject to removal by public officials. As we further explained, "[t]he Board examines whether the composition, selection, and removal of the members of an employer's governing board are determined by law, or solely by the employer's governing documents. Where the appointment and removal of a majority of an entity's governing board members are controlled by private individuals—as opposed to public officials—the entity will be subject to the Board's jurisdiction." Id. (citations omitted). Applying that analysis here, we have no difficulty concluding that Pilsen is not a political subdivision under Section 2(2) of the Act.

As stated above, Pilsen is a private, nonprofit corporation engaged in providing educational support services to public charter schools, and is not itself a public charter school.[7] Our sole focus is on the composition of Pilsen's board of directors and to whom the directors are accountable. This is the "critical and determinative factor in a second-prong analysis." Id., slip op. at 9. There is no dispute that the members of Pilsen's board of directors are appointed and subject to removal only by sitting members of the board, and not by public officials. The method of selection of Pilsen's board members is dictated by its bylaws, and not by any State law, statute, or governmental regulation. Given these undisputed facts, we find that Pilsen's directors are not responsible to public officials in their capacity as board members, and therefore that Pilsen is not administered by individuals who are responsible to public officials or the general electorate. Accordingly, "our analysis properly ends,"

[7] In this regard, Pilsen is similar to the private Michigan corporation that was engaged in the management of charter schools in *Charter School Administration Services*, 353 NLRB 394 (2008) (*CSAS*). In that decision, a two-member Board found that the corporation was not a political subdivision of the State of Michigan because the members of its governing board were not responsible to public officials or to the general electorate, inasmuch as they were not appointed by or subject to removal by public officials. Id. at 397–398. In *Chicago Mathematics*, we endorsed and adopted the reasoning of *CSAS*. See *Chicago Mathematics*, supra, slip op. at 8 fn. 20.

and we thus conclude that Pilsen is not a political subdivision under the second prong of the *Hawkins County* test.[8] See id., slip op. at 9–10.

Conclusion

We find that Pilsen is an employer within the meaning of Section 2(2) of the Act. As Pilsen satisfies the Board's monetary jurisdictional standards, we find that the Board should assert jurisdiction over it. Accordingly, we shall reinstate the petition and remand the case to the Regional Director for further processing.

ORDER

The Regional Director's dismissal of the petition is reversed. We reinstate the petition and remand the case to the Regional Director for further appropriate action.

Dated, Washington, D.C. March 8, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

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[8] Because the above analysis yielded a "clear answer," the consideration of other factors is not necessary. Id. Here, in any case, such factors would only reinforce our conclusion that Pilsen is not a political subdivision. As stated above, Pilsen hires its own employees, establishes their pay and most of their benefits, and developed its own personnel handbook. Pilsen's board of directors retains control over Pilsen's operations, including selecting and removing board members and preparing its own operating budget. Nor does Pilsen have any powers that are typically associated with public status. For example, Pilsen does not have the power of eminent domain nor subpoena power, and it has no authority to assess or collect taxes or issue tax-exempt bonds. Pilsen does not receive funding directly from any public sources, does not submit education-related documents to Chicago Public Schools, and is monitored for compliance with its Education Services Provider Agreement only by YCCS. Pilsen is not a party to the charter agreement between YCCS and the Chicago Board, and, accordingly, is not subject to the extensive compliance and reporting requirements to which YCCS, as the charter holder, is subject. In sum, Pilsen is simply a private employer that has entered into a contract to provide services to another entity.