

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

TWIN CITIES GERMAN IMMERSION SCHOOL

Employer

and

EDUCATION MINNESOTA: FEDERATION OF
CHARTER SCHOOL EMPLOYEES¹

Petitioner

Case 18-RC-113483

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of all full-time and regular part-time instructional staff, including classroom and special education instructors, employed by the Employer at its St. Paul, Minnesota facility. Petitioner proposes to exclude from the unit instructional assistants, office staff, lunchroom staff, managers and supervisors within the meaning of Section 2(11) of the Act, as well as all other employees not classified as instructional staff. The sole issue in dispute is whether the Board should assert jurisdiction over the Employer, which is a public charter school organized pursuant to Minnesota law. Based on the record and the Board's analysis of charter schools in the State of Illinois in *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB No. 41 (December 14, 2012) (*CMSA*), I conclude that jurisdiction should be asserted. Therefore, I am ordering an election in this matter.

¹ Petitioner's name appears as amended at the December 4, 2013, hearing.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding I find:

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

2. The parties agree that the Employer meets the Board's discretionary jurisdictional standards in that the Employer's gross revenues in the calendar year ending on December 31, 2012, a representative period of time, exceeded \$1,000,000 and the Employer purchased goods and services valued in excess of \$5,000 directly from suppliers located outside the State of Minnesota. Therefore, the jurisdictional question in this matter is limited to whether the Employer is a political subdivision of the State of Minnesota within the meaning of Section 2(2) of the Act.

3. The labor organization involved claims to represent certain employees of the Employer.

4. This Decision begins with a review of the lengthy procedural history of this case. The second section of the Decision is an overview of the Employer's operation, including its board of directors. Minnesota law creating and regulating charter schools is the subject of the third section, followed by a section comparing Minnesota law to the law creating and regulating charter schools in the State of Illinois. Finally, the decision describes relevant Board law regarding the meaning and application of Section 2(2) of the Act, and then applies the law to the facts of this case, explaining my conclusion that the Board should assert jurisdiction over the Employer because it is not a political subdivision of the State of Minnesota.

Procedural History

This petition was filed on September 17, 2013. However, because of the government shutdown, processing of the petition was delayed. Subsequent to the reopening of the government a hearing was scheduled for October 30. However, by letter dated October 22, 2013, I notified the parties that I was considering making a decision based on an administrative review of Minnesota Statutes affecting charter schools, as well as documents relating to the Employer's operation submitted by Petitioner. This notification occurred partly in response to Petitioner's expressed view that it did not anticipate offering testimony at the scheduled hearing. In the October 22, 2013, letter, I identified the relevant materials as Minnesota Statutes 124D.10, 179A, and 181; the Twin Cities German Immersion School's Charter School Application; and the Charter School Contract between the Germanic-American Institute and the Twin Cities German Immersion School, as well as documents attached to the Contract. The documents attached to the contract include a document setting forth school and student goals and performance indicators; the school's articles of incorporation; the school's by-laws; the agreement signed by members of the Board of Directors agreeing to comply with federal and state laws governing charter schools; a document titled "Charter Contract Renewal Process and Timeline;" and, finally, a plan for closing the school, setting forth procedures for closing the school in the event closure becomes necessary.

In addition to the foregoing, the October 22, 2013, letter invited the parties to submit their positions on whether the Board should assert jurisdiction in this matter, to submit any documentary evidence not identified above which they believed relevant to the jurisdictional issue, and finally to advise me if they objected to me issuing a decision without a hearing. Neither party contended that I should consider additional evidence,

and neither party objected to my suggestion that this matter be decided based on an administrative record. Petitioner submitted a position statement dated October 30, 2013, and contended that the Board has jurisdiction in this matter. The Employer did not submit anything further in response to my October 22 letter.

On October 31, 2013 I issued a Decision and Order dismissing the petition after concluding that the Board lacked jurisdiction over the Employer because it is a political subdivision within the meaning of Section 2(2) of the Act. On November 13, 2013, Petitioner filed a Motion to Reopen the Record, contending that my October 31 Decision and Order failed to appreciate the similarities between Illinois law creating and regulating charter schools and Minnesota law creating and regulating charter schools (noting that the Board asserted jurisdiction over a charter school in the State of Illinois). Moreover, according to the Motion, Petitioner changed its view and believed that testimony and the introduction of further documentary evidence were warranted to explain how the Minnesota charter school law functions.

By Order dated November 18, 2013, I granted Petitioner's Motion to Reopen Record and scheduled a hearing for December 4, 2013. In view of my granting the Motion to Reopen Record and the fact a hearing was held, this Decision and Direction of Election supersedes the October 31, 2013 Decision and Order.

The Employer's Operation, Including Its Board of Directors

Overview of Operation

The Employer operates a charter school in the city of St. Paul, Minnesota. It is a nonprofit corporation, and it was incorporated on March 4, 2004, under the laws of the State of Minnesota. The Employer is organized "exclusively to provide education services in the German language immersion format as a public nonsectarian charter

school.” (*By-laws, Article 1: Section 2*). The charter school is sponsored by the Germanic-American Institute (GAI), which is also referred to as the “authorizer.” GAI has as its mission to foster an appreciation and understanding of the culture, language, arts, and ongoing history of German-speaking peoples through public educational and cultural programs. GAI is a 501(c)(3) nonprofit organization. The most recent contract between GAI and the Employer is for the period from July 1, 2012 through June 30, 2017.

The Employer’s board of directors (further described below) provides organizational direction for the school, determines and directs the budget, and handles employment matters. The board of directors hires an executive director and assistant director to supervise the day-to-day operation of the school, including acting as liaisons between parents and teachers. Hiring of school staff is the responsibility of the executive director or her designees. In general, the executive director is also responsible for hiring third-party vendors, although at times (not specified in the record) the board of directors might also become involved.

The Employer has no assets that generate revenue. Virtually all of its funding is from the State of Minnesota. Less than \$100,000 of its-over \$2,000,000 annual revenues is generated from fundraising. The money from the State of Minnesota includes a certain amount per pupil which is determined by a state formula used for all public and charter schools; a significant amount (roughly \$500,000) in “lease aid” (for the purpose of assisting with space costs as the Employer is not allowed to own space); and “quality compensation” – a Minnesota Department of Education (MDE) program for alternative teacher pay. Through this program the Minnesota Department of Education provides webinars and training for teaching staff. By participating, teachers receive

additional pay. In order to participate in the program, public or charter schools are required to write a formal plan and submit it to MDE. The formal plan delineates how the school will implement the benefits of the training provided by MDE.

In addition to the executive director and assistant director, the Employer employs four full or part-time administrative staff and 27 teachers. Two of the 27 teachers serve on the Employer's board of directors. It appears that the parties agree that, should an election be ordered, the unit would consist of 25 teachers, excluding the two who serve on the board of directors. The teachers must be licensed consistent with requirements for licensed teachers for public schools. Nurse, custodial and cafeteria services are contracted out to third parties. The Employer also contracts with an individual who serves as the director of special education (this individual has contracts with other schools in addition to the Employer). In order to obtain special education money, the Employer has to report to the State on its special education students. However, the record does not reveal whether the Employer has any special education students.

According to the contract between GAI and the Employer, the charter school is a "public elementary school for children in grades kindergarten through eighth grade. It will provide an academically challenging curriculum in a German language immersion environment. The curriculum allows for German language fluency, along with mastery of a core curriculum . . ." (*Section 2.1*).

Evaluation of the Employer and Applicable State Regulations

Section 2.2 of the contract contains the charter school's performance indicators and evaluation. This section makes clear that the school will comply with federal requirements established by the No Child Left Behind Act, and therefore will participate in all statewide assessments (although the State of Minnesota and therefore the

Employer has been granted an exemption from the requirements of the No Child Left Behind Act). The first attachment to the contract sets forth specific student goals and performance indicators. Section 2.2(c) of the contract requires that the school file an annual report with the authorizer and the Commissioner of the Minnesota Department of Education (Commissioner), containing information on performance required by Minnesota's charter school law.

While the charter school is authorized to lease space from any public or nonsectarian private organization, it must submit the lease to MDE for "review and comment," as well as to the authorizer should the authorizer request to review the lease (*Section 3.1(d)*). The school also cannot expand its grade levels or number of students beyond what it specified in its submission to MDE without the approval of the authorizer and the Commissioner, as required by statute, and the school calendar must include at least the number of instruction days required by Minnesota law (*Section 3.1(f) and (g)*).

In addition, the contract makes clear that the charter school may not limit admissions to pupils on the basis of intellectual ability, aptitude measures, athletic ability, or any criteria that would violate the Minnesota Human Rights Act. (*Section 5.5*). While the charter school does not charge tuition, it may impose fees for activities to the extent the fees are not prohibited by law. It is the authorizer's responsibility to ensure compliance with these contractual provisions.

With regard to reports, the school is to file them with the authorizer, as well as with the Commissioner "consistent with the procedures established by the Commissioner." (*Section 5.6*). Data disclosure is governed by Minnesota statute. Financial reports (annual budget and audits) are submitted to the authorizer, and audit procedures and requirements are to comply with those required of all schools (*Section*

5.7(c)). If an audit “includes findings that a material weakness exists in the financial reporting systems of the School, the School must submit a written report to the Commissioner (of the Minnesota Department of Education) explaining how the material weakness will be resolved in accordance with the procedures set by the Commissioner.”
Id.

The school is required to comply with the same health and safety requirements as the school district, as well as with Minnesota law regarding immunizations, educating students with disabilities, and the dismissal of students from the school. (*Section 5*). For purposes of tort liability, the school “will be considered a school district . . . under Minnesota Statutes chapter 466.”

GAI’s role is to provide ongoing oversight to determine whether the Employer is complying with the terms of the contract with GAI, including the terms described above, as well as to determine whether the Employer is meeting its responsibilities under Minnesota law. The contract between GAI and the Employer specifies the criteria used by GAI in determining the Employer’s compliance, and specifies the “good cause” reasons under which GAI can refuse to renew the contract at the end of its term. Attached to the contract are several documents, including a document setting forth school and student goals and performance indicators, the school’s articles of incorporation, the school’s by-laws, the agreement signed by members of the Board of Directors agreeing to comply with federal and state laws governing charter schools, a document titled “Charter Contract Renewal Process and Timeline,” and a plan for closing the school, setting forth procedures for closing the school in the event closure becomes necessary.

The Employer's Board of Directors

The Employer's by-laws first define who are "members" of the Employer:

"Members shall be staff members . . . including teachers providing instruction under a contract with the cooperative, and all parents or legal guardians of children enrolled at TCGIS."² Section 2 of the by-laws further states that all members as defined above are eligible to elect the Employer's board of directors. Moreover, according to the by-laws, the Employer regularly maintains a list of the names of all eligible voters for inspection by any member at the annual meeting or for at least seven days prior to each annual meeting, special meeting, or election. Members are also allowed to vote by proxy.

Article 4 of the by-laws sets forth the powers of the board of directors, and states:

"The affairs of Twin Cities German Immersion School shall be managed by its Board of Directors," including performing all functions of the school, except as limited by the articles of incorporation, the by-laws themselves, or by Minnesota statute. These functions include reviewing, approving, and monitoring the budget; deciding matters related to operation of the school, including curriculum and operating procedures; and ensuring the school meets student outcomes contained in the contract with the authorizer.

The by-laws also state that the board shall consist of at least five non-related members, although the "target configuration" is nine members, and the board can have as many as twelve members. Board members serve three-year terms, and can serve only two successive terms. Consistent with Minnesota law, the by-laws state that at least one member must be from the licensed teaching staff, at least one member must be a parent or legal guardian of a student, and at least one member (who is not

² "TCGIS" is Twin Cities German Immersion School.

employed by the Employer and who does not have a child enrolled in the school) must be from the community.

Board members are elected at the annual meeting to replace those members whose terms are expiring. The by-laws specify how the balloting is conducted. Three directors are elected at each annual meeting to serve a term of three years. The Board Chair has the power to appoint up to three additional directors for one-year terms, subject to approval by the board of directors. Vacancies are filled by the remaining board members, and the board can remove any director who is absent from four consecutive meetings without good cause.

The board is required to meet at least six times during the school year; although the record reveals that the board meets monthly. The board is empowered to call special meetings to discuss particular topics if the chair, a majority of the directors, or 25 percent of the members, calls for such a meeting. The by-laws also define what constitutes a quorum of the board and the voting power of each director. Board members are also required to be in compliance with the conflict-of-interest law contained in Minnesota 124D.10.4A. In addition, the by-laws set forth the officers of the Board of Directors, the officers' duties, and policies regarding vacancies and removal of officers. One director is elected as the parent liaison and attends meetings of the Parent Teacher Organization, and one director is elected the teacher liaison and attends staff meetings held by the Employer. The by-laws also specify standing committees of the board.

Minnesota Statutes Creating and Regulating Charter Schools and Record Evidence Regarding the State's Role in Regulating the Employer

Chapter 124D.10 Establishing and Regulating Charter Schools

Chapter 124D.10 of the Minnesota Statutes establishes and regulates charter schools located in the State of Minnesota. The statute makes clear that charter schools may be “authorized” by a school board or education district, by a Minnesota private college or university, by a nonprofit entity, or by a charitable organization as defined by Section 501(c)(3) of the Internal Revenue Code of 1986. However, in the event the authorizer is a charitable organization, it may not be a nonpublic sectarian or religious institution, which is further defined in the statute. Moreover, the statute has additional conditions that must be met by a charitable organization in order for it to be an authorizer of a charter school. A “single purpose” authorizer is allowed—that is, an organization created solely to establish one or more charter schools is permitted under the statute.

The authorizer of a charter school must first apply to the Commissioner and be approved as an authorizer before submitting any affidavit to actually charter a school. The statute describes the factors to be considered by the Commissioner, as well as what must be contained in the authorizer's application, in order for the authorizer to successfully apply. The Commissioner has the ability to reject the application of an authorizer, but is obligated to set forth in writing the authorizer's deficiencies so that the authorizer can address them to satisfy the Commissioner. However, the authorizer's failure to address the deficiencies to the satisfaction of the Commissioner results in ineligibility to be an authorizer. The statute requires that the Commissioner review the authorizer's performance every five years (or more often at the discretion of the

Commissioner), and calls on the Commissioner to take corrective action against the authorizer when warranted.

After an authorizer is approved, and after the authorizer receives an application from a school developer, then the authorizer can establish a charter school. The school developer and the school itself must be non-profits. The authorizer then submits a business plan for approval by the Commissioner. The statute describes in some detail what must be in the business plan. If and after the Commissioner approves the business plan, then the authorizer submits an affidavit to the Commissioner to charter a school. This affidavit must also be approved by the Commissioner. The affidavit must state the terms and conditions under which the school would be chartered and how the authorizer intends to oversee fiscal and student performance, as well as compliance with the written contract between the authorizer and the charter school board of directors.

The statute also establishes some parameters regarding who may serve on a charter school's board of directors. The initial board of directors is established by the authorizer/school developer and is to be composed of at least five members who are not related parties. This board serves until a timely election for members of the ongoing board of directors is held. According to the statute, an ongoing board must be elected before the charter school completes its third year of operation. The election of the members of the ongoing board is to be consistent with the charter school's articles and by-laws. The statute requires that the ongoing board consist of at least five members who are not related parties. The ongoing board, whatever its size, must include one licensed teacher employed at the charter school, one parent or legal guardian of a student attending the charter school, and one interested community member who

resides in Minnesota. The parent or legal guardian may not be employed by the school, and the interested community member may not be employed by the school or have a child enrolled in the school. A majority of the members of an ongoing board of directors may consist of teachers, or parents, or community members, or there may not be a majority from any group. The statute also prohibits certain individuals from serving on the board: specifically, it considers individuals who have conflicts of interests. For example, an individual is prohibited from serving on the board of directors if an immediate family member is an employee of the school or if the individual is an immediate family member, or the individual's partner is a full or part owner or principal with a for-profit or nonprofit entity or independent contractor with whom the charter school contracts.

According to the statute, the ongoing board of directors is elected by staff members of the school (including teachers), members of the existing board of directors, and all parents or legal guardians of students attending the school. The board of directors may not change the governance structure of a charter school unless supported by a majority of licensed teachers at the school, as well as a majority of board members. In addition, the authorizer must approve of any change in the governance structure. Any change in the governance structure must of course comply with the statute.

The statute requires that minutes of meetings of the board of directors be published on a website to be maintained by the school. The website must also include information about the members of the board of directors and identifying and contact information of the authorizer. Upon request by an individual, financial statements and balance sheets of both the school and authorizer must also be provided. The statute

also details what must be contained in the charter contract between the board of directors and the authorizer, as well as financial reports.

According to Subdivision 7 of Chapter 124D.1, “A charter school is a public school and is part of the state’s system of public education. A charter school is exempt from all statutes and rules applicable to a school, school board, or school district unless a statute or rule is specifically applicable to a charter school or is included in this section.” The statute goes on to state that charter schools must meet federal, state, and local health and safety requirements applicable to school districts; that charter schools must comply with state laws regarding pupil dismissal and fee laws; that charter schools must comply with the same financial audit requirements as a district (except that the audits are submitted to the Commissioner); and that charter schools are considered like school districts for the purposes of tort liability. The statute also lists a variety of other ways a charter school must comply with state law related to the Pledge of Allegiance, online courses, transfer and maintenance of student records, early childhood screening, athletic activities, truant notification, teacher evaluations, pupils with disabilities, instructional hours, transportation of students to and from schools, and budgeting. There are also some regulations regarding admission of students, pupil performance, and the publication of annual reports. Charter schools are required to employ teachers licensed by the State of Minnesota, although administrators employed by charter schools are not required to meet Minnesota licensure requirements. Finally, the statute states that teachers at charter schools are public school employees for purposes of their retirement system.

Subdivision 23(a) prohibits a charter school from entering a lease of real property with a related party unless the lessor is a nonprofit corporation or a cooperative, and the

lease cost is reasonable as defined in the statute. Leases are submitted to the Commissioner for review and comment.

The statute also allows for charter schools and school districts to enter into agreements for collaboration. The agreements are voluntary; the charter school must be in the geographical area of the school district, and the agreements in no way affect the autonomy of the charter schools. The collaboration may include facilities, transportation, training, student achievement, assessments, mutual performance standards, and other areas of mutual agreements. Moreover, the school district may include the academic performance of students of a collaborative charter school site for purposes of student assessment and reporting to the state.

According to Subdivision 21, “Employees of the board of directors of a charter school may, if otherwise eligible, organize under chapter 179A, and comply with its provisions. The board of directors of a charter school is a public employer, for the purposes of chapter 179A, upon formation of one or more bargaining units at the school. Bargaining units at the school must be separate from any other units within an authorizing district.”³

Chapter 179 Establishing the Minnesota Relations Act

“It is the public policy of this state and the purpose of sections 179A to 179.25 to promote orderly and constructive relationships between all public employers and their employees.” (*Chapter 179, Subdivision 179A.01*) Therefore, the State of Minnesota grants public employees certain rights to organize; imposes on public employers the obligation to meet and bargain with public employees in appropriate bargaining units;

³ The subdivision goes on to describe the circumstances when the bargaining unit may be combined with other units in a district. However, this language applies only when the authorizer is a school district, and not a nonprofit corporation.

and establishes special responsibilities, procedures and limitations regarding public employment relationships.

“Public employers” are defined in Subdivision 15 of Chapter 179. While charter schools or their boards of directors are not specifically defined as “public employers” in Subdivision 15, obviously Subdivision 21 of Chapter 124D which creates charter schools (quoted above) purportedly authorizes charter school employees to organize collective-bargaining units in accordance with Chapter 179. Thus, Subdivision 21 in essence amends Subdivision 15 of Chapter 179 to include charter schools as public employers. In addition, Subdivision 13 of Chapter 179 explicitly defines “professional employee” to include “a teacher.”

Chapter 179 also defines confidential employees, supervisory employees, part-time employees, temporary employees, exceptions to the definition of “public employee” and it defines “essential employees.” It also makes clear that the Commissioner for the Bureau of Mediation Services (the statute establishes the Bureau of Mediation Services, which is supervised and controlled by a commissioner appointed by the governor of the State of Minnesota) certifies the employee organization that is designated by employees to meet and negotiate with the public employer on behalf of employees in appropriate bargaining units.

The chapter also regulates collective bargaining. It requires, inter alia, that either party give the other written notice of proposed changes to contracts and, if no agreement is reached, that notice may be given to the commissioner of mediation services so that the commissioner can take jurisdiction of the dispute. The statute states that unless the petition is filed with the commissioner 90 days prior, any strike or lockout is illegal. The purpose of this provision is to give the commissioner notice of the

issues in dispute, so that the commissioner can take whatever steps he or she deems most expedient to bring about an agreement. The parties are bound to meet with the commissioner. Moreover, the statute allows for arbitration of disputes in the event mediation fails, by written agreement of the parties. Finally, the statute defines unfair labor practices by employees, labor organizations, and employers, and provides for relief in the district courts of Minnesota.

Other Record Evidence Regarding State Regulation of Charter Schools

According to the Employer's executive director, the MDE has a separate division staffed to serve the needs of charter schools as well as to ensure charter schools comply with Minnesota law and MDE regulations. The record contains no other evidence regarding this separate staff.

Petitioner introduced into the record certain materials from the website of the MDE. Perhaps the most relevant is Petitioner's Exhibit 14, which includes forms for a new charter school affidavit, authorizer eligibility certification, authorizer assurance and certification, new charter school affidavit, school assurance and certification, and instructions for completing these forms. The instructions reveal that an approved authorizer is responsible for reviewing and evaluating a new school's application to ensure the application comply with Minnesota statutes. According to the instructions, successful affidavits should (among other things) explain the statutory purposes the school will address, including how the school will improve student achievement "and exceed the academic performance of existing public schools . . ." In addition, the affidavits should explain accountability goals, including academic and nonacademic outcomes as set forth in Minnesota statutes. The authorizer must also explain how it intends to oversee the fiscal and student performance of the charter school and to

comply with the terms of the written contract between the authorizer and charter school that is consistent with the Commissioner-approved authorizer application and Minnesota statutes. Finally, the instructions make clear that while an authorizer has 20 business days to address any deficiencies in its initial submission, after that, the Commissioner's approval or disapproval of an application is final.

Comparison of the Minnesota Statutes Governing Charter Schools to the Illinois Statutes Governing Charter Schools

Because the Board asserted jurisdiction over a charter school in the State of Illinois (the case is described in more detail later herein), this section notes the similarities and differences between the Minnesota and Illinois statutes. In this regard, I note that Petitioner contends that the statutes are nearly identical, and that any differences between them do not warrant departing from the Board decision in the Illinois case.

Petitioner contends, and a review of the statutes confirms, that charter schools in both states are nonprofit corporations subject to federal, state and local health and safety requirements, anti-discrimination laws, and financial audits akin to those required of public schools, and they are required to comply with state laws regarding the dismissal and discipline of students and with regard to academic, curriculum and assessment standards. Moreover, charter schools in both states are required to submit their audited financial records to each state's overseer of charter schools. Charter schools are also required to be nonsectarian and to conduct criminal background checks on potential employees, to be school districts for the purpose of tort liability, and are subject to both states' open meeting laws and accessibility of data. In both states, instructional employees are included in the state's teachers' pension plan. In addition,

in both states charters may be revoked or not renewed if the schools fail to comply with the requirements of the statutes. Significantly, both Minnesota and Illinois clearly define charter schools as part of the public school system, including explicit statutory language that employees at charter schools are covered by each state's labor relations act. In addition, of course, charter schools in both states receive nearly all of their operating funds from the state.

There are some differences between charter schools in Illinois and charter schools in Minnesota. In Illinois, local school boards authorize the governing bodies of charter schools to operate. The proposed contracts between the local school boards and governing bodies of charter schools are subject to review and certification by the Illinois State Board of Education, although the review and certification appear to be limited to whether the proposed contracts are consistent with Illinois law establishing charter schools. In addition, if a local school board refuses to contract with a particular charter school, that refusal can be reviewed and reversed by the State Board of Education. By comparison, in Minnesota, charter schools can be created by either public school boards or by private entities, including non-profit corporations, certain charitable organizations, or colleges and universities. Moreover, unlike in Illinois where only local school districts and the Illinois State Charter School Commission can serve as authorizers, in Minnesota the charter school authorizer can be a school district or private entity. If the authorizer is a private entity, it must obtain permission to be an authorizer from the MDE before organizing the charter school. In other words, in Minnesota the authorizer's credentials must be approved, and the Minnesota statutes set out the requirements to be an authorizer. Once the authorizer is approved, the authorizer and school developer must submit a business plan to the MDE, which is

subject to approval by the Commissioner. Again, the Minnesota statutes describe in some detail what must be in the business plan. If the Commissioner approves the business plan, then the authorizer must submit another affidavit to the department explaining how the authorizer intends to oversee the fiscal and student performance of the charter school and to comply with the terms of the contract between the authorizer and the charter school's board of directors.

With regard to the boards of directors of charter schools, it appears that Minnesota law more closely regulates who may serve. It limits who can serve on the boards, establishes the minimum size of the boards, and requires that permanent boards of directors be established by the third year of operation. The Minnesota statutes also designate who may vote in electing members of the boards and limits how the governance structures of charters schools can be changed. The Illinois statutes merely state that charter schools are to be administered and governed by their boards of directors "in the manner provided" in their charters.

Board Law

Hinds County Human Resource Agency, 331 NLRB 1404 (2000)

In *Hinds County Human Resource Agency*, 331 NLRB 1404 (2000) (*Hinds County*), the Board considered whether the employer was a political subdivision of the State of Mississippi. As noted by the Board, an employer is a political subdivision if it is either (1) created directly by the State so as to constitute a department or administrative arm of government; or (2) administered by individuals who are responsible to public officials or the general public. *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) (*Hawkins County*). Two of three members on the Board panel in the *Hinds County* case concluded that the employer was an exempt political subdivision

under the first prong of the *Hawkins County* test, while the third Board member concluded that the employer was an exempt political subdivision under the second prong of the *Hawkins County* test.

In discussing why the employer in *Hinds County* met the first prong of the *Hawkins County* test, Board Members Hurtgen and Brame began their analysis with the observation that, “It is well established that the National Labor Relations Board recognizes entities created by county governments pursuant to an enabling state statute, as having been directly created by the state under *Hawkins*.” *Hinds County* at 1404. Therefore, according to the Board, “The issue remains as to whether the Employer was created by HCBS⁴ so as to ‘constitute a department or administrative arm of government.’” *Id.* In examining this question, the Board stated it was clear from the enabling statute that it was the intent of the Mississippi legislature that entities like the employer be operated under local government control. Moreover, the Board noted that it was clear that the State of Mississippi viewed the employer as an exempt political entity. While the state’s view is not controlling, “such determinations are worthy of careful consideration, and the Board has found the state’s characterization of an entity to be an important factor in determining the more specific issue of whether the Employer was created so as to constitute a department or administrative arm of the government.” *Id.* (citations omitted).

In *Hinds County* the Board therefore examined the governmental control over the employer. It found that there was significant government control over the employer’s budget, auditing, and operations. The control included the facts that virtually all funding was from various government bodies; that HCBS reviews the employer’s annual audit

⁴ “HCBS refers to the Hinds County Board of Supervisors.

and has the power to call the employer in for clarification; that the employer's financial records are subject to audit by two government bodies; and that the employer makes two yearly presentations to HCBS to justify the allocation of funds provided by the county, as well as twice a year to explain its progress on its goals. Moreover, the Board noted that the employer in *Hinds County* could not borrow money unless authorized by the legislature, and that the use of certain grant funds were restricted by federal and state requirements.

Besides budgetary control, the Board concluded that the enabling statute mandated that HCBS oversee the employer's operation, including ratifying and approving by-laws and subsequent changes to the by-laws, and approval of members of the board of directors. Finally, the Board pointed to the facts that the employer was exempt from federal and state taxes, and that employees had the option of participating in the state retirement system, as additional factors supporting a finding that the employer was created as an administrative arm of government.

In his concurring opinion, Board Member Truesdale agreed that the Board lacked statutory jurisdiction, but on the basis that the employer in *Hinds County* met the second prong of the *Hawkins County* test. Member Truesdale concluded that a majority of the employer's board of directors were responsible to public officials or the general electorate. Therefore, Member Truesdale found it unnecessary to pass on whether the employer met the first prong of the *Hawkins County* test.

Chicago Mathematics & Science Academy Charter School, Inc., 359 NLRB No. 41 (2012)

In *Chicago Mathematics & Science Academy Charter School, Inc., 359 NLRB No. 41 (2012) (CMSA)*⁵, the Board considered the question of whether to assert jurisdiction over a public charter school in the State of Illinois. In doing so, the Board considered whether the public charter school in Illinois was a political subdivision of Illinois, applying the two-part test set out in *Hawkins County*. In asserting jurisdiction, the Board distinguished the facts in *CMSA* from those in *Hinds County*.

First Prong of the *Hawkins County* Test

In considering the first prong of the *Hawkins County* test, the Board noted in *CMSA* that it has routinely found employing entities to be exempt political subdivisions where they were created pursuant to legislation or statute in order to discharge a state function. Moreover, the Board stated that it has found the first prong of *Hawkins County* satisfied where the employing entity is created by an act of the judiciary, rather than the legislature. On the other hand, the Board made clear in *CMSA* that it has consistently held that entities created by private individuals as nonprofit corporations are *not* exempt under the first prong of *Hawkins County*, and that an entity is not exempt simply because it receives public funding or operates pursuant to a contract with a governmental entity. Rather, the Board routinely asserts jurisdiction over private employers that have agreements with government entities to provide certain types of services.

The Board's explanation of the first prong in *CMSA* also relied on its decision in

⁵ I note that the efficacy of the Board's decision in this case is in doubt in view of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). Nevertheless, I view *CMSA* as the Board's most recent and comprehensive analysis of charter schools. In addition, I note that the dissent by Member Hayes states that he agrees that *CMSA* is not a political subdivision exempt from the Board's jurisdiction under Section 2(2) of the Act, as interpreted by *Hawkins County*. Rather, the dissent urges the Board to decline jurisdiction for policy reasons.

Research Foundation of the City Univ. of NY, 337 NLRB 965 (2002). In that case the Board held that where private individuals create the entity in question pursuant to state law, where there is no evidence that the entity in question intended to operate under the control of a governmental entity or as a department or arm of any governmental entity, and where the charter of the entity in question specifies that the governance and powers of the corporation are vested solely in the private incorporators, then the entity in question is not exempt under the first prong of *Hawkins County*. See also, *Truman Medical Center v. NLRB*, 641 F.2d 570, 572 (8th Cir. 1981) (medical center organized under state not-for-profit statutes but requiring no special legislative action or action by public officials, not created directly by state so as to constitute a department or arm of the government).

In deciding that the charter school in *CMSA* failed to meet the first prong of the *Hawkins County* test, the Board emphasized the school was created by private individuals, and not by a government entity, special legislative act, or public official. 359 NLRB No. 41, slip op. at 9. Moreover, the Board noted that the charter school in *CMSA* was authorized not by Illinois charter schools law, but by the Illinois General Not-for-Profit Corporation Act. Important to the Board was the fact that Illinois charter school law directed that a charter school must be organized as a nonprofit corporation or other nonprofit legal entity authorized under the General Not-for-Profit Corporation Act. Thus, the charter school law in Illinois “does nothing to bring charter schools into existence . . . it must be created by private individuals who *first* (emphasis by Board) establish a private corporation that in turn creates the charter school.” *Id.* Thus, in essence, the State of Illinois authorized individuals, acting through private corporations, to create and operate charter schools, with the charter school law acting as the

“framework” or “roadmap” for the schools’ operation.

The Board emphasized that while it carefully considered the fact that the State of Illinois characterizes charter schools as being with the public school system, this fact is not controlling, particularly where there is nothing in the statute showing that the legislature intended that the State of Illinois itself operate charter schools. Therefore, “charter school operators arguably are akin to government contractors in that they are operating ‘public schools’ for the State of Illinois . . . In sum, we find that CMSA does not satisfy the first prong of the *Hawkins County* test, because no conduct on the part of the State of Illinois was required to bring it into existence.” *Id.* at 10.

Second Prong of the Hawkins County Test

Under the second *Hawkins County* prong, an entity may be deemed a political subdivision if it is “administered by individuals who are responsible to public officials or to the general electorate.” In making a determination under the second prong, the Board examines whether the individuals in question are appointed by or subject to removal by public officials. *Hawkins County*, at 604-605. To quote the Supreme Court, “[p]lainly, commissioners who are beholden to an elected public official for their appointment, and are subject to removal procedures applicable to all public officials, qualify as ‘individuals who are responsible to public officials or to the general electorate’” *Id.* at 608. In *CMSA*, the Board also noted that it sometimes considers whether additional factors demonstrate a responsibility to public officials or the electorate. *CMSA*, slip op. at 10. However, in *CMSA* the Board held that the fact that none of *CMSA*’s governing board members was appointed by or subject to removal by any public official is dispositive. *Id.*

In *CMSA*, while acknowledging that it is non-precedential, the Board adopted

what it referred to as the “soundly reasoned” decision in *Charter School Administration Services*, 353 NLRB 394 (2008). The *CMSA* Board stated that the two-member Board in *Charter School Administration Services* found the charter school in that case to not be a political subdivision of the State of Michigan because “the members of CSAS’s governing board were not responsible to public officials or the general electorate inasmuch as they were not appointed by, or subject to removal by, public officials.” *CMSA*, at 10.

Application of Board Law to the Employer

Contrary to my October 31 Decision and Order and in spite of the similarities between the employer in *Hinds County* and the Employer in this case, I conclude that the Board’s decision in *CMSA* compels the assertion of jurisdiction over the Employer in this matter. Thus, I conclude that it is not an exempt political subdivision of the State of Minnesota.

First, in *CMSA* the Board is clear that under the first prong of the *Hawkins County* test, in order to find an exempt political subdivision, the employer must be created by a governing entity, special legislative act, and public official or by an act of the judiciary. On the other hand, entities created by private individuals as nonprofit corporations are not exempt under the first prong even when the evidence demonstrates that the entities receive public funding or operate pursuant to a contract with a governmental entity. As in *CMSA* “absent the independent initiative of private individuals” the charter school laws of Minnesota “would do nothing to bring charter schools into existence.” *CMSA*, slip op. at 9. More specifically, in this case it is the action of the German-American Institute, a non-profit corporation that is the authorizer, that brought the Employer into existence. Moreover, the Employer itself is a non-profit corporation created by private

individuals who contract with the German-American Institute to operate the charter school in this case. These facts by themselves appear to be determinative and to compel a conclusion that the Employer is not an exempt political subdivision.

In my October 31 Decision and Order, I noted that while Minnesota law permits either a public or private entity to “authorize” a charter school, “authorize” as used in the statute appeared to mean “initiate” rather than “create.” Moreover, I viewed that Minnesota law suggested that the public or private entity initiated the process, but that the Commissioner of the Department of Education for the State of Minnesota created charter schools. I noted that an authorizer of a charter school cannot even organize a charter school until the Commissioner approves the authorizer’s credentials to be an authorizer; that the Minnesota statute establishing charter schools sets out requirements to be an authorizer; that once the authorizer is approved by the Commissioner, the authorizer must submit a business plan (also subject to the approval of the Commissioner), with the statute describing in some detail what must be in the business plan; and finally that if the Commissioner approved the business plan, then the authorizer must submit yet another affidavit to the Commissioner setting forth information required by the statute. I concluded that this series of approvals by the Commissioner suggested that the Commissioner of the Department of Education for the State of Minnesota – and not private entities – creates the charter schools in Minnesota.

While not discussed in detail by the Board in *CMSA*, a review of the Illinois statute creating charter schools reveals that the creation of charter schools in Illinois involves public sector entities at least as much as in Minnesota. In Illinois, charter schools are created by agreement between the private party(s) creating the school and local school boards. The local school board “authorizes the governing body of the

charter school to operate the charter school on the terms specified in the contract.” 105 ILCS 5/27A-6(a). In addition, the proposed contract between the charter school and local school board must be submitted and certified by the State Board of Education before it can take effect. ILCS 5/27A-6(d). The State Board can suggest modifications to the agreement which must be consented to by the local school board and the governing body of the charter school. Id. Significantly, in Illinois, charter schools can also be created by the voters of a school district whenever 5% or more of the voters petition to do so. As long as the proposed charter school is certified by the State Board, then the proposed charter school is subject to a referendum vote by the residents of the school district. ILCS 5/27A-6.5. Finally, if a local school board either fails to act on a proposal to create a charter school or denies a charter school proposal, the Illinois State Charter School Commission can act and approve or reverse the denial. ILCS 5/27A-8(e) and (h).

Thus, a review of the Illinois statute suggests as much government involvement in the creation of charter schools as is the case in Minnesota. In fact, in Illinois it appears that local school boards are very involved in the creation and approval of charter schools, whereas in Minnesota local school boards have no involvement unless they create charter schools themselves. Moreover, any Illinois state entity’s involvement in approval of charter schools appears limited to ensuring that there is compliance with Illinois statutes creating and regulating charter schools. While Minnesota law is less clear on this point, it appears that the Minnesota Department of Education similarly reviews charter school agreements to ensure compliance with Minnesota state statutes creating charter schools. Nothing in the record suggests that

the MDE has created regulations or supervisory functions beyond those set out in the statute.

Thus I conclude that, unlike *Hinds County*, the record fails to establish that the language of the enabling statute makes it clear that it was the legislature's intention that charter schools in Minnesota be operated under local or state government control. I acknowledge that the Minnesota statute creating charter schools includes significant regulation of the operation of charter schools. This includes significant regulation of charter schools' financial reports, requiring accessibility of financial reports and minutes of the meetings of the board of directors to the public, placing some limits on charter schools that lease space, and requiring charter schools to meet various and numerous laws of the State of Minnesota governing public education. Moreover, charter schools in Minnesota must meet the same financial audit requirements as public schools and submit their audits to the Commissioner. However, in *CMSA* the Board found that charter schools in Illinois were required to meet the same standards and regulations, and nevertheless asserted jurisdiction.

The only meaningful distinction that I glean from the Minnesota statute regulating charter schools when compared to the Illinois statute is that Minnesota law somewhat regulates the make-up and function of boards of directors of charter schools. In this regard, Minnesota law establishes limits on who can serve on the boards, establishes their minimum size, and requires that ongoing (permanent) boards be established by the third year of operation. The Minnesota statute also designates who may vote in electing members of the boards and limits how the governance structures of charter schools can be changed. However, the Board seems to make clear in *CMSA* that state

regulation, however significant, does not trump the fact that the creation of the charter schools is by private individuals.

It is also very clear that the State of Minnesota views charter schools as part of its public school system. However, the State of Illinois also clearly views charter schools as part of its public school system. It is also clear that Minnesota's enabling legislation makes clear that Minnesota law, and not federal law, should govern any union organizing or collective bargaining that occurs in charter schools. However, the State of Illinois also clearly views Illinois law as governing union organizing or collective bargaining that occurs in charter schools. Similarly, in both states, charter schools are considered like public schools for the purpose of tort liability, instructional employees are required to be licensed (or in Illinois possess alternative qualifications specified in the law), and instructional employees are included in the states' teachers' pension plan. As none of these facts swayed the Board to find the charter school in *CMSA* to be an exempt entity within the meaning of Section 2(2), I also find that none of these facts suggests that the Board lacks jurisdiction in this matter.

With regard to the second prong of the *Hawkins County* test there is no doubt that the Employer is not administered by individuals who are responsible to public officials or the general electorate. The Employer's board of directors is not appointed by or subject to removal by public officials. While the composition of the Employer's board of directors is somewhat controlled by Minnesota statute, that control does not include the actual selection of the individuals who serve. There simply is no record testimony that members of the board have "any personal accountability to public officials or the general electorate." *Cape Girardeau Care Center*, 278 NLRB 1018, 1019 (1986).

In view of the foregoing and the record as a whole, and consistent with the parties' agreement on the unit description, I find the following employees constitute an appropriate unit for collective bargaining:

All full-time and regular part-time instructional staff, including classroom and special education instructors employed by the Employer at its St. Paul, Minnesota facility; excluding Board Members, classroom instructional assistants, office staff, lunchroom staff, managers, guards and supervisors as defined in the Act as amended, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.

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 strike 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.

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **Education Minnesota: Federation of Charter School Employees.**

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 Co.*, 394 U.S. 759 (1969).

Accordingly, it is 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). The 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.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **December 26, 2013**. No extension of time to file this list will be granted by the Regional Director except in extraordinary circumstances, nor will the filing of a request for review

affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,⁶ by mail, or by facsimile transmission at (612) 348-1785. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

⁶ To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **January 2, 2014**. *The request may be filed electronically through the Agency's website, www.nlr.gov,⁷ but may not be filed by facsimile.*

Signed at Minneapolis, Minnesota, this 19th day of December, 2013.

/s/ Marlin O. Osthus

Marlin O. Osthus, Regional Director
National Labor Relations Board
Region 18
330 South Second Avenue
Suite 790
Minneapolis, MN 55401-2221

⁷ To file the request for review electronically, go to www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.