UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN

THE LEONA GROUP, LLC[1]

Employer

and **Case 07-RC-125463**

MICHIGAN ALLIANCE OF CHARTER TEACHERS AND STAFF (ACTS), AMERICAN FEDERATION OF TEACHERS (AFT) MICHIGAN, AFL-CIO

Petitioner

and

VOYAGEUR ACADEMY

Party-in-Interest

APPEARANCES:

Floyd Allen, Esq. and Shaun P. Ayer, Attorneys, of Detroit, Michigan on behalf of The Leona Group

William M. Thacker, Esq. and Aimee Gibbs, Attorneys, of Ann Arbor, Michigan on behalf of Voyageur Academy

Channing M. Cooper, Attorney (on brief), of Washington, D.C. and Nathan Walker, Organizer, of Detroit, Michigan on behalf of Petitioner

Anne-Marie Vercruysse Welch, of Birmingham, Michigan, on behalf of Michigan Association of Public School Academies (Amicus)

[1] The case name is amended to reflect the parties' stipulation on the last day of hearing that The Leona Group, LLC is the sole Employer of the petitioned-for employees herein and Voyageur Academy is a party- in-interest.

DECISION AND DIRECTION OF ELECTION

Petitioner, the Michigan Alliance of Charter Teachers and Staff (ACTS), American Federation of Teachers (AFT), seeks to represent teachers, social workers and guidance counselors working for The Leona Group LLC at Voyageur Academy (the Academy).

The Academy operates under a public school charter (also known as a charter school). Its charter is granted by the Board of Control of Ferris State University, under Part 6(a) of the Revised School Code, entitled The Public School Academies Act, MCL-380.501, et seq. Pursuant to this charter, the Academy operates a school for students in kindergarten through eighth grade (K-8), and participates in a consortium with two other charter school academies to operate a school for students in grades 9-12. These schools are in Detroit, Michigan.

The Employer provides central administrative services to the Academy. These services include hiring and supervising the employees in the proposed bargaining unit. At the hearing in this matter, the parties stipulated that the Employer is the sole employer of the petitioned-for classroom teachers, guidance counselors and social workers working at the Academy.

The parties also stipulated that, if a question of representation is found to exist, the appropriate unit is as follows:

> All certified classroom teachers, licensed or certified guidance counselors, and licensed or certified social workers employed by the Employer for grades K-8 at 4321 Military Street, Detroit, Michigan and 4366 Military Street, Detroit, Michigan, but excluding non-professional employees, aides, administrators, technicians, office/clerical employees, athletic coaches, custodial employees, maintenance employees, food service employees, transportation employees, guards and supervisors as defined by the Act, and all other employees.

The Employer contends that the instant petition should be dismissed because it has issued layoff notices to all of its employees at the Academy and notified them that its contract with the Academy will expire on June 30, 2014. Beginning July 1, 2014, a new management company, American Promise Schools (APS), will assume the Employer's role in providing administrative services to the Academy. APS is not a party to these proceedings.

The Petitioner contends that an election should be held so that employees can have the opportunity to bargain over the effects of the termination of the Employer's contract. Petitioner also argues that the unit will remain unchanged because APS will likely become a successor employer to the Employer.

Based on the record and relevant Board law, I find that the instant petition is timely and that an election should be held for employees in the above unit.

I. OVERVIEW

A. Employer's Operation

The Employer is a Michigan limited liability company that performs school management services in Michigan, Indiana, Ohio, Florida and Arizona. The Employer has a main office in Arizona, and a regional office in Okemos, Michigan.

The Employer provides management services and personnel to the Academy, a charter school for students in kindergarten through twelfth grade (K-12), located at 4321 Military Street and 4366 Military Street, Detroit, Michigan. Grades K-4 are housed in the building located at 4321 Military, and grades 5-8 are located across the street, on the first floor of the building located at 4366 Military. The Academy owns both buildings.

In addition to a charter school for grades K-8, the Academy also operates a high school for grades 9-12 as part of a consortium with two other charter schools, George Crockett Academy and Hope Academy. Grades 9-12 are housed on the second floor of the Academy's building located at 4366 Military in Detroit. The Employer provides management services to George Crockett Academy and Hope of Detroit Academy.

The Academy is a Michigan non-profit corporation that operates subject to a charter from Ferris State University. Under the terms of its charter agreement with Ferris State University, the Academy may either hire employees directly, or utilize a management company. As the chartering authority, the Ferris State Board must approve any contracts that the Academy makes with the Employer or any other management company.

The Employer, pursuant to the terms of its management agreement with the Academy as described below, hires and supervises the teachers, guidance counselors and social workers assigned to the Academy. The employees are paid by the Employer from funds allocated by the Academy.

B. Management agreement between the Employer and the Academy

The Employer and Academy are party to a management agreement that is scheduled to expire on June 30, 2014. Under the terms of this agreement, the Employer provides central administrative services for the Academy on both a fixed and variable fee basis. The fixed fee is pre-negotiated, and is paid to the Employer on a monthly basis. The variable fee is 9% of the gross revenues of the Academy.

The administrative services that the Employer provides to the Academy include budgeting, marketing, payroll, benefits administration and human resources. The Employer is responsible for hiring employees to teach and provide other services to students at the Academy. It is also responsible for paying the employees, withholding their taxes, and administering their benefits. The Employer evaluates, assigns, and disciplines employees at the Academy. Employee files are maintained at the Employer's offices in Okemos, Michigan.

Employees are paid from funds which are allocated to the Academy from the State of Michigan. The Academy deposits those funds into a bank account designated for the Academy's operating funds. The Employer has access to that account and can draw funds from it to pay employees and operate the Academy. The Employer is responsible for drafting a recommended budget for the Academy and assessing the staffing needs of the school. The Employer's budget is presented to the Academy board for approval.

The Employer is responsible for selecting and hiring the school leader for the Academy, with input from the Academy's board. The school leader is responsible for hiring and supervising staff to work at the Academy. Currently the Academy has one school leader for grades K-12, Pamela English. English reports to the Employer's regional vice-president, Raymond Gant, who also oversees other schools managed by the Employer.

C. Expiration of contract between the Employer and Academy

At an Academy board meeting on March 14, 2014, the Academy board voted not to renew its contract with the Employer. The Academy board is currently working with APS to draft an agreement that will allow APS to provide personnel and management services to the Academy for the 2014-2015 school year, beginning on July 1, 2014. The Academy's contract with the Employer has not been terminated, but will expire on June 30, 2014.

The contract between the Employer and the Academy states that, in the event the contract is terminated for any reason, the Employer shall, at the Academy's option, provide the Academy with assistance in the transition for a period of up to 90 calendar days following the date of termination. In return for such services, the Employer shall

receive a fee equal to 1/365 of the annual fee paid to it during the previous fiscal year, multiplied by the number of days it provides transitional services.[2]

APS has not made any contractual commitment to hire the staff currently working for the Employer at the Academy. The president of the Academy board was informed that APS typically hires between sixty and seventy percent of existing staff when taking over the management of a school. APS has been given access to Academy buildings, and employees have been encouraged to apply for employment, but to date no employment offers have been made.

On March 26, 2014, the Employer held a meeting for employees and distributed a notice pursuant to the Worker Adjustment and Retraining Notification (WARN) Act. Employees were notified that, due to the Academy's decision to engage a different management company, most or all of the employees working for the Employer at the Academy would experience layoffs. Employees were informed that the lay-off should be considered permanent unless they were able to secure employment either at the Academy under its new management, or at another Employer-managed school.

The WARN notice further stated that the Employer would not consider seniority in determining which employees may be hired at other Employer-managed schools, but that experience, length of service, business necessity, credentials, expertise and past performance would all be taken into account in making decisions about which employees would be hired at other schools. Employees were informed that if the Employer offered them employment at another school, their salary may or may not remain the same. Employees were also given information about their final paychecks and their benefits.

The Employer manages other charter schools in Detroit and elsewhere in the surrounding area. Employees have transferred from one Employer-managed school to another, either at the employee's request or because of a school closure or loss of a management contract.

For example, the Employer formerly provided management services to Pierre Toussaint Academy. When that school closed, some of the employees transferred from that school to the Academy and to other schools managed by the Employer. Similarly, when another Employer-managed school, Beacon International Academy, closed, employees were transferred to other schools managed by the Employer. In addition, when the Employer lost its contract to provide management services to the Academy of Warren, some employees transferred from that school to jobs at other schools managed by the Employer.

[2] The record did not reflect whether the Academy plans to exercise that option.

The Employer considers the salary and benefits received by the employee at their former school in making an employment offer at a new school. Employees are also able to transfer some of their benefits.

II. Analysis

A. Board Law

1. Timeliness of petition

When an election would be futile because the employer has imminent plans to terminate the operation, an election petition may be dismissed as untimely. A case-by-case approach must be taken in determining whether an election should be ordered. ***Norfolk Maintenance Corporation***, 310 NLRB 527, 528 (1993), citing ***Clement-Blythe Cos***., 182 NLRB 502 (1970). An employer's contention that layoffs are imminent must be based on evidence that is more than speculative. ***Canterbury of Puerto Rico***, 225 NLRB 309 (1976).

In ***Martin Marietta Aluminum, Inc***., 214 NLRB 646, 647 (1974), the Board dismissed an election petition when it found that the employer's operations were coming to a definite close. A substantial number of employees had been terminated prior to the representation hearing, and at least half of the workforce was scheduled to be terminated before the scheduled election.

In ***Hughes Aircraft Company***, 308 NLRB 82 (1992), the Board found that it would not serve the purposes of the Act to hold an election when the employer had already executed letters of agreement with two subcontractors to take over the plant protection services performed by employees in the petitioned-for unit, and had issued layoff notices to employees to be effective about two months after the hearing. Id. at 83. The Board did not adopt the petitioner's argument that a joint employer relationship might develop between the employer and the subcontractors, as it was too speculative and the subcontractors were not parties to the representation proceedings. Ibid.

In contrast, the Board found in ***Norfolk Maintenance Corporation***, supra at 528, that an election was timely despite the imminent expiration of the employer's contract with the Naval Air Station site on which it operated, because that contract had been extended for an additional four months, leaving seven months between the expiration of the contract and the date of the Decision and Direction of Election. Similarly, the Board ordered an election in ***Gibson Electric, Inc***., 226 NLRB 1063 (1976), when the project on which the unit employees were working remained in full force at the time of the hearing and was likely to continue for at least four months.

The Board may also consider whether the employer has ongoing projects in the same geographical area. For example, in ***Fish Engineering & Construction Partners, Ltd***., 308 NLRB 836 (1992), the Board ordered an election even though the project on which the petitioned-for employees worked was about to end, when the record demonstrated that the employer had current projects in the same geographic area. In ***Davey McKee Corp***., 308 NLRB 839 (1992), the Board dismissed a petition after finding no evidence that the employer had any work under bid in the geographical area.

The Employer relies upon ***In re Corrections Corp. of America***, 338 NLRB 452 (2002) for its argument that the instant petition should be dismissed as moot. In that case, the employer supplied guards and management services at a prison for the Commonwealth of Puerto Rico (the Commonwealth). After an election was held, the employer timely filed an objection to the election, alleging that the unit was inappropriate. While the objections were pending before the Board, the Commonwealth canceled its contract with the employer. The employer then filed a motion to dismiss the election petition as moot. The Board issued an order to show cause why the petition should not be dismissed, noting that the employees' rights to bargain with the employer over the effects of the termination of the contract were too speculative to justify holding an election. The case history does not reflect whether any of the parties responded to the order to show cause, or whether the petition was ultimately dismissed.

2. Successorship

An employer is a successor to the prior employer when there is "substantial continuity" between the two business operations, and the new employer has hired a majority of the predecessor's employees. ***Fall River Dyeing & Finishing Corp. v. NLRB***, 482 U.S. 27, 42-44, 46-47 (1987). Unless it is "perfectly clear that the new employer plans to retain all of the employees in the [bargaining] unit, the new employer is free to unilaterally set its own terms and conditions of employment, without bargaining with the union." ***Burns International Security Services***, 406 U.S. 272, 287-291 (1972).

C. Application of Board Law to this Case

1. Timeliness of the petition

In reaching the conclusion that the petition is timely and that an election should be held, I rely upon the following analysis and record evidence.

The parties have stipulated that the contract between the Employer and the Academy will expire on June 30, 2014. The Employer has given employees notice that they will be laid off effective on that date. The Employer asserts that there is nothing for the Petitioner and Employer to bargain about, should the Petitioner become the

employees' collective bargaining representative, because all potential issues are addressed in the WARN notice it provided to employees.

The Petitioner asserts that the employees have many issues that they may choose to bargain with the Employer about, including year-end evaluation procedures, transfer rights of employees to other schools operated by the Employer, payment of sick leave, and access by APS to the employees' personnel files, which are in the possession of the Employer.

The chance that employees may be able to transfer to other Employer-managed schools highlights an important difference between this case and the circumstances in ***Martin Marietta Aluminum***, supra, where the employer was in the process of ceasing all of its operations, leaving little for the union to bargain about in the event that it won the election. Here, the Employer will remain in operation, and continues to manage other schools in the geographic area.

In fact, the WARN notice that the Employer gave to employees discusses the possibility to apply for transfers to other charter schools managed by the Employer. The Employer noted some factors which may be considered in determining whether employees would be transferred, and also indicated that their salaries may or may not remain the same in the event that they transfer. Employees may wish to bargain with the Employer over the terms under which transfers may be granted. The record evidence demonstrates that employees have transferred in the event of a school closure or contract termination in one of the Employer's schools in the past.

This case is therefore distinguishable from ***Martin Marietta Aluminum*** and other cases such as ***Davey McKee***, where the employers had no future projects planned, and ***Hughes Aircraft*** in which the employer was no longer providing its own plant protection services. Here, the Employer continues to operate providing management services to charter schools, making it more likely that the parties would be able to engage in productive bargaining should the employees choose to be represented by the Petitioner.

Unlike in ***Fish Engineering & Construction Partners***, supra, where an election was ordered because the employer had bid on additional projects in the area and the petitioned-for unit covered all of the employer's worksites, the unit here includes only those employees who work for the Employer at the Academy. However, employees may wish to opt for representation in their dealings with the Employer over the possibility of transferring to other locations.

There is also a possibility, pursuant to the Employer's contract with the Academy, that it will be providing transitional services after its contract expires. Although there is no evidence that, as in ***Norfolk Maintenance Corporation***, supra, and ***Gibson Electric, Inc***., supra, the Employer's contract will be extended, if the Academy exercises its option

to have the Employer provide transitional services, issues may arise over which the Union may be able to bargain, such as recommendations by the Employer regarding hiring and the sharing of employee files.

In addition, there are other issues the employees may choose to bargain over, including the termination of their benefits, evaluations and recommendations to other employers, and the availability of severance pay.

I am not persuaded by the case the Employer cites in its brief, ***In re Corrections Corp. of America***, 338 NLRB 452, for two reasons. First, by the time the Board issued its decision in that matter, the employer's contract with the government had been canceled and the employees were already laid off, making it less likely that any collective bargaining that occurred would be fruitful. Second, the case history does not reflect whether any party responded to the order to show cause, so it is impossible to compare the facts of that situation with the ones before me in this case.

Although there is a short time between the issuance of this Decision and Direction of Election and the expiration of the Employer's contract with the Academy, the continued viability of the Employer as a provider of management services convinces me that holding an election would not be an exercise in futility. I therefore find that the instant petition is timely.

2. Successorship

It is premature to determine whether APS is a successor to the Employer. It has not yet hired any of the Employer's employees and it is unclear whether it will do so and if so, how many. The testimony that an Academy board member was informed that the common practice at APS is to hire between sixty and seventy percent of the former employer's employees when taking over the management of the school is not enough to establish that American Promise Schools will do that in this case, particularly as it has made no commitment to hire any of the Employer's employees. Further, APS was not a party to this proceeding, and was thus unable to present any evidence as to its plans for future hiring.

CONCLUSIONS AND FINDINGS[3]

Based on the foregoing discussion and on the entire record,[4] I find and conclude as follows:

[3] The Employer's Motions to Dismiss raised during the hearing are hereby denied.
[4] The Employer and Petitioner timely filed briefs, which were considered. Neither the Academy or the Michigan Association of Public School Academies filed a brief.

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

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

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

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All certified classroom teachers, licensed or certified guidance counselors, and licensed or certified social workers employed by the Employer for grades K-8 at 4321 Military Street, Detroit, Michigan and 4366 Military Street, Detroit, Michigan, but excluding non-professional employees, aides, administrators, technicians, office/clerical employees, athletic coaches, custodial employees, maintenance employees, food service employees, transportation employees, guards and supervisors as defined by the Act, and all other employees.

Dated at Detroit, Michigan, this 12th day of May 2014.

(SEAL)

/s/ Terry Morgan

Terry Morgan, Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **MICHIGAN ALLIANCE OF CHARTER TEACHERS AND STAFF (ACTS), AMERICAN FEDERATION OF TEACHERS (AFT) MICHIGAN, AFL-CIO.** The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such 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 quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

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

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. ***North Macon Health Care Facility***, 315 NLRB 359, 361 (1994). 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.). 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 **May 19, 2014**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the 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.nlrb.gov**,[5] by mail, or by facsimile transmission at **313-226-2090**. 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. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995).]

[5] To file the eligibility list electronically, go to the Agency's website at **www.nlrb.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

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 **May 27, 2014.**. The request may be filed electronically through the Agency's website, **www.nlrb.gov**,[6] but may **not** be filed by facsimile.

[6] To file a Request for Review electronically, go to the Agency's website at **www.nlrb.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.