UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

HYDE LEADERSHIP CHARTER SCHOOL - BROOKLYN,	:	
Employer/Petitioner	:	
and	:	**Case No. 29-RM-126444**
UNITED FEDERATION OF TEACHERS UNION, LOCAL 2,	:	
Union	:	

PETITIONER'S OPPOSITION TO UNION'S REQUEST FOR REVIEW

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This brief is submitted by Hyde Leadership Charter School - Brooklyn ("the Employer," "the School," or "Hyde") in opposition to the Request for Review of the United Federation of Teachers Union, Local 2, ("the UFT" or "the Union") in the above captioned matter.

EMPLOYER'S POSITION

On May 28, 2014, Regional Director James Paulsen issued a Decision and Direction of Election ("DDE") in this case. An election was held on June 23, 2014 albeit with ballots impounded. The Union filed its Request for Review on June 18th, its sole issue being that the Regional Director erred in finding the National Labor Relations Board ("NLRB" or "the Board") should assert jurisdiction of the National Labor Relations Act ("the NLRA" or "the Act") over Hyde, the Petitioner in this case.

The Union's several arguments are all variations on the same contention: that the Regional Director was wrong in finding that the Employer is not a political subdivision of the

State of New York. The Union asserts a prolific number of details, rendering its arguments with minute specificity. Although exhaustive, the Union's claims only muddle the principal issue. Placing form before substance, the UFT seeks to have the Board ignore its own precedent – and that of the Supreme Court – by limiting analysis of the issue to the Union's constrained interpretation of relevant state law.

The Union contends that the Regional Director found that Hyde is "a private employer - not a political subdivision of the State." Request for Review at 1. Of course, the Regional Director made no finding of "private" status, and need not have under Board law. The question is not whether the School is a "private" employer, but whether it is a political subdivision under the test articulated by the U.S. Supreme Court in NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600 (1971) ("Hawkins County") – a case which squarely articulated the rule for Board jurisdiction, and which was duly followed by the Board in the seminal case for assessing the status of charter schools under the Act, Chicago Mathematics & Science Academy, 359 NLRB No. 41 (Dec. 14, 2012) ("Chicago Mathematics"). The Regional Director followed the Chicago Mathematics – Hawkins County test to the letter in finding that Hyde, as a New York charter school, is not exempt from jurisdiction of the Act as a political subdivision.

The UFT further argues that "the Regional Director ignored the unambiguous public policy of the State of New York, undermined the basic structure of New York State's public education system, and disregarded the fundamental distinctions between the charter school law in New York and those states where the Board has previously asserted NLRB jurisdiction." Request for Review at 1. In sum, the Union contends that the NLRB should be guided not by the Hawkins County test, but by the wording of state legislation.

The DDE was amply supported by Board and Supreme Court precedent in determining that Hyde is an "employer" within the meaning of the Act.

A. Although New York Law Is Not Controlling, it Does Not Support the Union's Contentions

It is beyond cavil, and is not argued by the Union, that by virtue of the Supremacy Clause, the Act takes precedence over state law where the statutes conflict. *See* U.S. Const. art. VI, cl. 2. Here, the DDE acknowledged state law but applied clearly articulated Board and Supreme Court precedent. In the seminal case, Chicago Mathematics, the Board did not ignore state law, but recognized that, like New York, "Illinois characterizes charter schools as being within the public school system" – a fact the Board said "is 'worthy of careful consideration,' but is 'not controlling in ascertaining whether an entity is a political subdivision.'" 359 NLRB No. 41, slip op. at 7, *citing* Hinds County Human Resource Agency, 331 NLRB 1404 (2000), and Hawkins County, 402 U.S. at 602. The Chicago Mathematics Board concluded

> We find nothing in the Charter Schools Law showing that the legislature intended that the State of Illinois itself operate charter schools. By providing that school districts may contract with third parties to establish and operate charter schools, the State has shown that its intention is to permit others to establish and operate charter schools, albeit within a framework of regulations fashioned by the State.

359 NLRB No. 41, slip op. at 7. The Regional Director's findings here are completely consistent with the Chicago Mathematics precedent.[1]

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[1] The recent Supreme Court decision in National Labor Relations Board v. Noel Canning, et al., No. 12-1281 (June 26, 2014) may raise a question as to the status of Chicago Mathematics, which was a 3 to 1 decision including in the majority recess appointees Block and Griffin. However, not only was Chicago Mathematics a well-reasoned decision on its merits, but it relied on the solid precedent of the Supreme Court's Hawkins County decision. Further, although Chicago Mathematics was the first reported case in which the NLRB asserted jurisdiction of the Act over a charter school, it followed the same Hawkins County principles as the Board applied in Charter School Administration Services, 353 NLRB 394 (2008) (itself questioned as a "two-

1. State Law Characterizations Do Not Determine "Political Subdivision" Status under the Act

It is not questioned that the New York Charter School Law refers to Hyde, and other charter schools as "public schools." *See* New York Education Law § 2851(2)(b), (f), (n), (q), *et al.* However, talismanic reliance upon usage of this term is misplaced. The very notion of "charter schools" is itself a recent innovation. Our civic nomenclature lacks any other term to describe a educational institution that is publicly funded and which serves the public at large. That hardly means charter schools are "political subdivisions" of the state. As the Chicago Mathematics Board said, "charter school operators arguably are akin to government contractors in that they are operating 'public schools'...however, the fact that an entity operates pursuant to a government contract is insufficient to establish an exemption [from NLRA jurisdiction] under Hawkins County. *Id.* at 7. This finding is no less true in New York.

The New York Court of Appeals has repeatedly acknowledged that charter schools are not political subdivisions of the State. In 2009, the Court of Appeals held that the state controller's authority to conduct audits of state political subdivisions did not extend to charter schools because the court conclusively found that "charter schools are not political subdivisions of the State." New York Charter Schools Association, Inc. v. DiNapoli, 13 N.Y.3d 120, 131 (2009) ("Charter Schools Association"). In this case, the Court of Appeals reversed the findings of the Appellate Division, Third Department which had itself reversed a state Supreme Court determination that charter schools are not political subdivisions of the state. New York

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member" decision, *see* New Process Steel v. NLRB, 130 S. Ct. 2635 (2010)). Subsequently, a full Board denied review of a Regional Director's Chicago Mathematics and Hawkins County-based assertion of Board jurisdiction over a charter school in Pennsylvania Cyber Charter School, 2014 NLRB LEXIS 259 (April 9, 2014). *See also* Twin Cities German Immersion School, 18-RC-113483 (Dec. 19, 2013). It is quite clear that the Board intends to maintain the Chicago Mathematics analysis irrespective of the Noel Canning and New Process Steel holdings.

Charter Schools Association, Inc. v. DiNapoli, 20 Misc. 3d 235 (2008), *reversed,* 60 A.D.3d 119 (2009).

The trial court's decision in Charter Schools Association, ultimately upheld by the state's highest court, is particularly informative. Unlike public school districts, charter schools are incorporated as independent and autonomous education corporations which, said the court, "were established as legal entities separate and distinct from the State." 20 Misc. 3d at 259. As such, they are like public benefit corporations "deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission." *Id.* The court explained at length how charter schools differ from true political subdivisions, including the interposition of a separate and independent corporate entity for increased flexibility and protection from liability; the lack of a defined, contiguous geographic territory; and the lack of the recognized sovereign powers of taxation, eminent domain and the police power. 20 Misc. 3d at 265.[2]

Moreover, the Court of Appeals has found that charter schools are not "public

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[2] The UFT asserts that the April 2014 amendment to § 2853(1)(c) of the Education Law states that "a charter school shall be deemed an independent and autonomous public school... and a political subdivision having boundaries coterminous with the school district or community school district in which the charter school is located." Request for Review at 4. This bare legislative assertion – adding the term "political subdivision" to the charter school law for the first time – does not disturb the analysis of the Court of Appeals as the characterization carries with it no other indicia of actual government authority. Moreover, whatever benefit the Union seeks to gain by citation to this provision is undermined by another section of the same statutory amendment; this to § 2854(1)(b) of the Education Law which added the term "political subdivision" as follows (addition in italics): "[a] charter school shall be exempt from all other state and local laws, rules, regulations or policies governing public or private schools, boards of education, school districts *and political subdivisions*, including those relating to school personnel and students, except as specifically provided in the school's charter or in this article." This new wording – not cited by the UFT – only highlights the differentiation of charter schools from public schools and true political subdivisions. The remainder of the amendment reveals its specific limited purpose – to allow auditing of public funds utilized by charter schools – authority the Court of Appeals found lacking in Charter Schools Association.

entities" for the purpose of New York's public works prevailing wage laws.[3] These state laws apply to "[e]ach contract to which the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law is a party, and any contract for public work entered into by a third party acting in place of, on behalf of and for the benefit of such public entity pursuant to any lease, permit or other agreement between such third party and the public entity." Labor Law § 220 (2). The seminal case in this area, Erie County Industrial Development Agency v. Roberts, 94 A.D. 2d 532 (1983) *affd* 63 N.Y. 2d 810 (1984), held that two conditions must be met for the prevailing wage law to apply: (1) a public agency must be a party to a contract, and (2) the contract must concern a public works project. 94 A.D. 2d at 537. In New York Charter School Association v. Smith, 15 N.Y. 3d 403 (2010), the Court of Appeals considered whether a school charter creates a "public entity" within the meaning of the law. The court found:

> A charter agreement is not such a document. It is an authorizing agreement under which an agency has determined that an applicant school is competent to be licensed as an education corporation and nothing more (*see* Education Law § 2852 (2)).

15 N.Y. 3d at 409. The Court of Appeals went on to find that charter schools are not "public entities" under the state law.

> Only four public entities are specifically identified under Labor Law § 220 (2): the State, a public benefit corporation, a municipal corporation or a commission appointed pursuant to law. By its terms, the statute does not expressly apply to education corporations...

Id. The Court of Appeals further held that charter schools are simply not on the same footing as truly public entities.

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[3] New York State Labor Law section 220 mandates that all contractors engaged by public entities to perform construction must compensate their employees according to set minimums established by the New York Department of Labor.

> We recognize that charter schools possess some characteristics similar to a public entity. The Legislature created charter schools as "independent and autonomous public school[s]" and granted them powers that "constitute the performance of essential public purposes and governmental purposes of this [S]tate." At the same time, however, charter schools are not governed by appointees of the government, but by a self-selecting board of trustees that has "final authority for policy and operational decisions of the school." Further, the Legislature made clear that charter schools are exempt from all other state and local laws, rules, regulations or policies governing public schools.

Id. at 409-410 (citations omitted).

Thus, under the analysis of New York's highest court, charter schools are neither public entities nor political subdivisions of the state.

2. <u>The UFT's "Incorporation" Argument Attempts to Create State Action from Whole Cloth</u>

As the New York courts noted, *supra*, an education corporation in New York is neither a public entity nor a political subdivision, but rather is on the same footing as a government contractor. Nonetheless, the UFT makes much of the fact that Hyde Leadership Charter School – Brooklyn did not actually become an "education corporation" until such time as it received its charter. Request for Review at 10-11. The Union asserts that because a charter school must be an education corporation, and because the entity cannot become an education corporation until the charter is awarded, and because only certain state agencies are authorized to award charters, it must follow *a fortiori* (says the UFT) that issuance of the charter <u>was</u> creation of the School by the state. *Id.*

The UFT thus conflates the chartering process with education corporations and with the National Labor Relations Act. It also places form over substance in an effort to create a legal construct to support its claims that charters are political subdivisions of the state. Thus, the Union posits that the extensive preparatory work undertaken by Dr. Sandra DuPree and the other

members of the founding board of trustees in originating the school, planning its operations, submitting the technical application, and navigating the chartering process were of no legal significance in creating Hyde. According to the UFT's argument, the School was creating solely by the issuance of the charter by the Chancellor of the New York City Department of Education. Thus, the Union contends, Hyde was created by state action.

The Union's contention is not supported by the state Court of Appeals, nor by the uncontroverted record evidence, but is rather an effort to bootstrap the state's ministerial act of incorporation to "state creation" of the charter school.

B. The Regional Director's Decision Serves the Purposes of the Act and Does No Harm to the New York Charter School Law

Contrary to the UFT's bombastic assertion, the DDE does no damage to the New York Education Law. Rather than "undermining the basic structure of New York State's public education system," jurisdiction of the NLRA only serves to change the vehicle for collective bargaining designated by the law. In no way does Board jurisdiction alter the educational mission of the schools, nor does it change the performance standards of the schools, nor the funding mechanism of the schools. All the Regional Director has done is substitute the National Labor Relations Act for New York's Public Employees Fair Employment Act ("the Taylor Law"). There will be no impact on the state Department of Education, nor upon the students served by the School.

However, the protections of the National Labor Relations Act will have a salutary effect on the rights of employees, and thus well serve the purposes of the Act. The Public Employees Fair Employment Act has no protection for employees engaging in concerted activity

– only for participating in organizing and in collective bargaining.[4] The Taylor Law's protections fall short of Section 7. Moreover, under the Taylor Law, employees have virtually no opportunity to participate in a secret ballot election to determine whether, and by whom, they would be represented for the purposes of collective bargaining.[5]

CONCLUSION

For the foregoing reasons, as well as those in the Employer's Hearing Brief to the Regional Director, the Request for Review should be denied.

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[4] Public employees' rights under the New York Public Employees Fair Employment Act (Civil Service Law, Article 14) are limited to the following:

> §202 Right of Organization Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.
>
> §203 Right of Representation Public employees shall have the right to be represented by employee organizations, to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder.

[5] Under the state's Rules of Procedure, the standard practice for certification of a bargaining representative is as follows:

> Certification without an election. If the choice available to the employees in a negotiating unit is limited to the selection or rejection of a single employee organization, that choice may be ascertained by the director on the basis of dues deduction authorizations and other evidence instead of by an election. In such a case, the employee organization involved will be certified without an election if a majority of the employees within the unit have indicated their choice by the execution of dues deduction authorization cards which are current, or by individual designation cards which have been executed within six months prior to the date of the director's decision recommending certification without an election.

4 NYCRR Ch. VII,§201.9 (g) (1).

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CERTIFICATE OF SERVICE

I hereby certify that today, July 2, 2014 a true and correct copy of the Petitioner's Opposition to Union's Request for Review for the above-captioned matter has been served by mailing a copy of the same via Federal Express this date to the following:

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Dated: July 2, 2014