

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PILSEN WELLNESS CENTER,)
)
 Employer,)
)
 and) Case No. 13-RM-1770
)
CHICAGO ALLIANCE OF CHARTER)
TEACHERS AND STAFF, *et al.*,)
)
)
 Union.)

BRIEF OF THE PETITIONER

Submitted by:

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I. INTRODUCTION

On or about September 20, 2010 the Chicago Alliance of Charter Teachers and Staff, Illinois Federation of Teachers, AFT, AFL-CIO (the “Respondent” or “Union”) filed a majority interest representation petition with the Illinois Education Labor Relations Board (the “IELRB”) seeking to represent a unit of teachers employed by Petitioner Pilsen Wellness Center (the “Petitioner” or “Pilsen”) at Latino Youth High School (“LYHS”). (Tr. 8; Jt. Ex. 1). Because Pilsen is a private employer, the IELRB does not have jurisdiction over the Petitioner. Accordingly, on October 22, 2010, Pilsen filed the instant RM Petition (the “Petition”) with the National Labor Relations Board (“NLRB”) — where jurisdiction is proper. (Tr. 8; Bd. Ex. 1(a)).¹

The sole issue in the Petition is whether Pilsen is a political subdivision of the state of Illinois and therefore exempt from jurisdiction of the NLRB under Section 2(2) of the National Labor Relations Act (the “NLRA” or “Act”). On January 3, 2011, the Regional Director found Pilsen to be a political subdivision of the state of Illinois and, thereby, denied Pilsen’s Petition.

Pilsen filed a Request for Review on the grounds that the Regional Director’s decision is clearly erroneous on the record. *See NLRB Rules and Regulations* § 102.67(c)(2). On October 12, 2011, the Board granted Pilsen’s Request for Review.

In this matter, the Regional Director erred by applying a uniform analysis to Pilsen that essentially makes all employers who contract with charter holders in Illinois political

¹ The parties stipulated that the appropriate bargaining unit includes (Tr. 7):

All full-time teachers employed at the Latino Youth Alternative High School, located at 2001 South California Avenue, Chicago, Illinois and excluding all confidential, supervisory and managerial employees as defined by the National Labor Relations Act and all other employees.

subdivisions, regardless of how they are created or operated. The Regional Director's decision is erroneous because the record evidence shows that Pilsen was neither: "(1) created directly by the state, so as to constitute departments or administrative arms of the government; nor (2) administered by individuals who are responsible to public officials or to the general electorate." See *NLRB v. Natural Gas Utility Dist. of Hawkins County*, 402 U.S. 600, 604-605 (1971) (noting the requirements under Section 2(2)'s exemption for political subdivisions).

The *Hawkins County* test demands more than a uniform and mechanical analysis that turns every entity contracting with a charter school in Illinois into a "political subdivision." See *Hawkins County*, 402 U.S. at 604 (noting that the Board must examine an employer's "actual operations and characteristics" to determine whether it is a political subdivision). The Regional Director improperly discounted evidence that Pilsen receives no direct funding from the state and instead receives the vast majority of its money from the actual charter holder Youth Connection Charter School ("YCCS"). Similarly, the Regional Director also placed little importance on the fact that Pilsen is not subject to direct oversight by any state agency. Instead, the Regional Director held that because the Company's "budget and expenditures are submitted to [Chicago Public Schools] for review "indirectly through YCCS," Pilsen is ultimately "accountable" to CPS. The Regional Director's reasoning, however, is flawed and ignores established precedent.

As discussed in more detail herein, the instant situation is remarkably similar to *Charter School Admin Servs.*, 353 NLRB 394 (2008) and *Civitas Schools, LLC*, 13-RM-1764. In both cases the Board and Region 13 respectively found that independent management companies, like Pilsen, who did not hold charters, but merely contracted with an entity that held the charter, were employers subject to the jurisdiction of the NLRB. This instant case warrants the same result. As in *Charter Schools Admin Servs.* and *Civitas Schools*, the evidence shows that Pilsen has

none of the hallmarks of an employer that is a political subdivision of the state. Among other things, Pilsen has complete power to hire and fire teachers, to create its own budget, and to structure its own curriculum. More importantly, no member of Pilsen's Board of Directors or any other official is responsible to public officials or to the general electorate and Pilsen does not receive any direct funding from the state.

In sum, Pilsen's operations and structure show that it is not a political subdivision as defined by the Supreme Court in *Hawkins County*. Pilsen is a private employer and, thus, falls under the jurisdiction of the NLRB.

II. FACTS

A. The Operations of Pilsen Wellness Center

In 1975, a group of individuals incorporated Pilsen as a privately run not-for-profit corporation (Tr. 19-20). Originally incorporated as Pilsen Little Village Community Mental Health Center, it later adopted the d/b/a Pilsen Wellness Center. (Tr. 20). Being a private company, Pilsen was not created by the state of Illinois or any municipal entity. (Tr. 21).

Pilsen actively seeks to provide holistic human services to individuals and families through culturally sensitive education, prevention, treatment, and recovery interventions. These services are geared toward supporting family relationships, facilitating community empowerment, and stimulating economic development. Pilsen provides programs and support related to substance abuse, mental health, youth services, and education. (Tr. 17; Emp. Ex. 1).

Pilsen's main office is located at 2319 South Damen Avenue, Chicago, Illinois 60608. (Bd. Exh. 1(a)). Pilsen's office space is not shared with any other organization. (Tr. 45). Pilsen has its own telephone systems, computers, software licenses, and other office supplies and

equipment, none of which are shared with any other organization. (Tr. 45-46). Pilsen also carries its own workers' compensation insurance and general liability insurance. (Tr. 46). Pilsen has its own financial management and does not share any bank accounts with other organizations. (Tr. 46).

Pilsen employs approximately 180 employees. (Tr. 16). Since 2000, Francisco Cisneros has been President and CEO. (Tr. 20; Emp. Ex. 1). Mr. Cisneros reports only to an internal Board of Directors. (Tr. 20). Since 2006, Dr. Monica Masana has served as Corporate Compliance Officer for Pilsen. (Tr. 15-16; Emp. Ex. 1). Ms. Masana reports directly to Mr. Cisneros. (Tr. 20; Emp. Ex. 1). There are currently nine Board of Directors. (Tr. 22; Emp. Ex. 2). No government entity or official has ever appointed a Board Member. (Tr. 24). Nor does any government official or entity have the power to make such an appointment. (Tr. 24). Also, only Members of the Board have the authority to remove a Board appointee. (Tr. 24-25). No member of Pilsen's management or Board of Directors is accountable to any government official. (Tr. 37). Likewise, Pilsen is not subject to governmental civil service requirements, competitive bidding or purchasing practices. (Tr. 55).

B. The Operations of YCCS

Youth Connection Charter School ("YCCS") is a private 501(c)(3) not-for-profit organization. (Tr. 125, 174). YCCS has its own Board of Directors separate and apart from Pilsen. (Tr. 174). Like Pilsen, YCCS was not created by the state of Illinois. (Tr. 174). YCCS officers and directors are not appointed by anyone in the government and they do not take an oath as public officials. (Tr. 175). No government official can remove a YCCS board member and no state regulation mandates a specific composition of YCCS' Board of Directors, which is

instead privately determined by its bylaws. (Tr. 175). YCCS has its own offices located at 10 West 35th Street, Chicago, IL 60616, which are separate and apart from Pilsen's offices. (Emp. Ex. 3). No one employed by Pilsen works out of YCCS's offices. (Tr. 179).

Pursuant to a charter granted under the Illinois Charter School Law, YCCS has held a charter since 1997. (Tr. 125). The term of YCCS' current charter contract began in February 2007 and expires in February 2012. (Tr. 126). YCCS is currently responsible for twenty-two individual campuses under its charter, including Latino Youth High School ("LYHS") located at 2001 South California Avenue in Chicago, Illinois. (Tr. 31, 125). YCCS operates two of the campuses directly and contracts with management companies to run the other twenty. (Tr. 28, 125, 135). The various contract operators function as a vendor of educational services, but do not hold independent individual charters to manage the schools. (Tr. 135-136).

C. Pilsen's Independent Contractor Relationship with YCCS to Manage LYHS

Since at least 2006, Pilsen has entered into yearly independent contractor vendor contracts with YCCS (the charter holder) to provide educational services at LYHS. (Tr. 25-27, 29-30, 36, 139-140; Emp. Ex. 3; Un. Ex. 14-15). Pilsen does not have a direct charter to run LYHS. (Tr. 25-26, 36, 176). YCCS did not need approval from CPS or the state to enter into the vendor agreement with Pilsen. (Tr. 177). Pilsen owns the building which houses the LYHS campus and did not receive any funding from the state or any government entity to fund its purchase. (Tr. 31). The current vendor agreement (the "Agreement") is effective July 1, 2010 through June 30, 2011. (Tr. 39; Emp. Ex. 3).

The student body at LYHS is primarily composed of students who previously attended other schools, but have returned to LYHS. (Tr. 34). LYHS provides instruction for grades ten

through twelve. (Tr. 35). Currently, 193 YCCS students attend LYHS. In addition, there is a group of other non-YCCS students enrolled under a program financed by a private not-for-profit organization known as Alternative Schools Network. (Tr. 35, 185).

Since July 1, 2010, Alfredo Nambo has been the Director of Education Initiatives for Pilsen and the acting Principal at LYHS. (Tr. 76-77; Emp. Ex. 1). Pilsen hired Mr. Nambo directly. (Tr. 87). No state or government official placed Mr. Nambo in his position or had any role in his selection or approval to become Principal. (Tr. 87). Likewise, Pilsen did not need approval from YCCS before hiring Mr. Nambo. (Tr. 87-88, 97). It is undisputed that YCCS cannot discipline Mr. Nambo or terminate his employment. (Tr. 97).

In order to run LYHS, Pilsen receives no direct funding from the state or any public entity.² (Tr. 42-43, 60, 71, 88, 92-93, 114, 120). Pilsen's funding to run LYHS is derived by virtue of its Agreement with YCCS. (Tr. 42). Pilsen incurs all expenses related to LYHS, including all the salaries, utilities, insurance, and supplies. (Tr. 42). Pilsen then submits vouchers to YCCS for reimbursement pursuant to its Agreement. (Tr. 42). Pilsen has no direct reporting obligation to CPS or the state regarding the use or allocation of any funds received. (Tr. 114, 121).

YCCS does not compensate any of the Pilsen employees nor determine their rate of pay. (Tr. 89). Pilsen is directly responsible for all its employees' salaries, fringe benefits,

² Bargaining unit employees Claudia Beaudoin and Christopher Baehrend testified that a woman purportedly employed social by CPS delivers lunches to LYHS for student consumption. (Tr. 202-209). Both employees acknowledge, however, that they have no personal knowledge regarding the terms or conditions surrounding the lunch "program," including who arranges for the lunches or provides financing, if any. (Tr. 203, 209). Accordingly, their testimony lacks relevance and credibility. In any event, it is clear that Pilsen does not receive any funds directly from CPS for this program or include it in its operating budget. (Tr. 113). Similarly, although a part-time CPS nurse, psychologist and worker are made available to students of LYHS, CPS does not provide any instructional staff. (Tr. 115.) Also, none of these part time CPS employees are under Pilsen's direction or control. (Tr. 115-119, 121-122).

employment taxes and other employment-related costs and expenses. (Tr. 44, 49). Pilsen also has sole responsibility for determining the amounts of compensation for all employees. (Tr. 44, 49-50). Decisions about compensation and benefits are made without input or approval from YCCS. (Tr. 49-50). Pilsen also creates its own budget and is not required to submit its budget to CPS or any other government entity. (Tr. 50-51, 64-65, 112). Pilsen has its own human resources department, which performs no duties for YCCS. (Tr. 51-52, 175; Emp. Ex. 1).

Pilsen and YCCS do not share any employees and are prohibited under their Agreement from doing so. (Tr. 36, 48, 176, 179; Emp. Ex. 3). As provided in the Agreement, Pilsen must employ and is responsible for all the personnel who work at LYHS. (Tr. 28, 89; Emp. Ex. 3). Thus, if any Pilsen employee has a grievance or work-related complaint, it is addressed by Pilsen's human resources department without any input from YCCS. (Tr. 54). Likewise, Pilsen has ultimate responsibility for the training and development of its teachers. (Tr. 107-108). While YCCS offer some teacher training opportunities, it is up to Pilsen as to whether to take advantage of the opportunities. (Tr. 106-107).

Further, Pilsen has its own employee policy manual, which was created without any input from YCCS. (Tr. 52-53; Emp. Ex. 5). Accordingly, Pilsen has the sole discretion and authority to interview, hire, terminate and discipline teacher and staff and does not need approval from YCCS, CPS or any government entity. (Tr. 28, 43, 51-52, 90, 92, 96, 190). Essentially, the only role YCCS has in Pilsen's hiring of teachers is mandating that the applicants successfully complete a criminal background check conducted by CPS. (Tr. 151-152). While teachers are required to be state certified, failure to obtain such certification does not put Pilsen in jeopardy with CPS or any other government entity. (Tr. 190, 193). Failure to obtain certification is merely a violation of Pilsen's Agreement with YCCS. (Tr. 68, 95, 190).

Although YCCS employs two special education teachers who are dispatched to provide services at LYHS, Pilsen has no control or authority over these teachers. (Tr. 48). As such, Pilsen has no role in selecting the special education teachers, does not pay their salaries and has no authority to hire, fire or discipline them. (Tr. 48, 80, 97). Pilsen also does not plan the special education teachers' curriculum or evaluate their performance. (Tr. 48-49, 108).

With respect to its students, Pilsen determines the curriculum that is used at LYHS without review or oversight from the state Board of Education. (Tr. 37, 43-44, 78; Un. Ex. 19). Although YCCS must approve the curriculum, it does not create or design the curriculum's contents. (Tr. 78-79, 183-184; Un. Ex. 19). At most, YCCS provides general guidelines that Pilsen must follow in creating the curriculum. (Tr. 78-79). Similarly, Pilsen has established its own code of conduct for its students. (Tr. 82-83).

Pilsen does not submit any education related reports to CPS or the state Board of Education. (Tr. 44, 64-66, 91, 114-115). This is because neither CPS nor any government entity has any direct oversight of Pilsen. (Tr. 69, 74, 91, 114-116). In other words, no government entity has the ability to terminate Pilsen's Agreement with YCCS. (Tr. 69). Whatever state or CPS requirements Pilsen follows is purely a matter of contract pursuant to its Agreement with YCCS and its compliance with those requirements is monitored by YCCS alone. (Tr. 74, 91-92, 114-116, 189).

The only connection Pilsen has with CPS or the state is through YCCS. (Tr. 111). Thus, if Pilsen is going to provide any administrative information to CPS, such as attendance figures or student adds or drops, a Pilsen registrar must go to YCCS to seek its permission to use its computers which have software connecting to CPS databases. (Tr. 85-87). Pilsen has no way to

provide this information directly to CPS and must obtain YCCS's authorization and permission to use its proprietary computer equipment and software. (Tr. 85-87, 111-112, 205).

III. ARGUMENT

The record developed before Region 13 is rich with evidence that Pilsen operates with little oversight from either CPS or the state. The Regional Director ignored these important facts and instead authored a generalized decision based primarily on the fact that Pilsen receives funds from an entity ("YCCS") that has a direct reporting relationship with the state.

While Pilsen acknowledges by virtue of its contract with YCCS, it must comply with certain requirements of the charter school law, the only relevant consideration to the determination of whether Pilsen is a political subdivision is its "actual operations and characteristics". *Hawkins County, supra*, 402 U.S. at 604. The Regional Director, however, discounted numerous facts which prove that Pilsen is a private employer. For instance, Pilsen has an independent board of directors that are no subject to appointment or removal by an governmental agency. Additionally, Pilsen receives no funding directly from the state or any government agency. Pilsen also makes its own personnel decisions free from any government oversight or intervention and implements its own curriculum. Furthermore, Pilsen is a 501(c)(3) tax exempt organization under the IRS code, which the Board has found weighs against a political subdivision finding. Simply put, the actual operations of Pilsen demonstrate that it is a private employer subject to NLRB jurisdiction.

A. Applicable Legal Standard

Congress passed the NLRA to promote labor policy uniformity and avoid conflict and diversity amongst the states. *See Garner v. Teamsters, Chauffeurs & Helpers Local Union*, 346

U.S. 485, 490-491. The Supreme Court has made clear that the NLRB is to have the “fullest jurisdictional breadth constitutionally permissible under the commerce clause.” *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). Accordingly, the Union being the party asserting that the NLRB is without jurisdiction bears the burden of persuasion. (Tr. 13); *see also, Civitas Schools, LLC*, 13-RM-1764; *Int’l Ass’n of firefighters*, 292 NLRB 1025 (1989) (citing *NLRB v. Austin Develop. Ctr. Inc.*, 606 F.2d 785, 789 (7th Cir. 1979).

In *Management Training Corp.*, 317 NLRB 1355, 1358 (1995), reconsideration denied 320 NLRB 131 (1995) (Overruling *Res-Care, Inc.*, 280 NLRB 670 (1986)), the Board announced that in deciding whether to assert jurisdiction, it would consider only whether the subject entity meets Section 2(2)’s definition of “employer” and satisfies the applicable monetary jurisdictional standard. Section 2(2) of the Act provides that the term “employer” shall not include “any state or political subdivision thereof.” The Supreme Court in *NLRB v. National Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 604-05 (1971) held that an entity is exempt from the Board’s jurisdiction as a political subdivision if it is either (1) created directly by the state, so as to constitute a department or administrative arm of the government, or (2) it is administered by individuals who are responsible to public officials or to the general electorate.

B. Pilsen is a Not a Political Subdivision of the state of Illinois

1. The Regional Director correctly found that Pilsen was not created directly by the state so as to constitute a department or administrative arm of the government.

As the Regional Director noted, Pilsen does not fall within the first prong of the *Hawkins* test because it was not created directly by the state of Illinois so as to constitute a department or administrative arm of the government. *See Hawkins County*, 402 U.S. at 604. The Board will

find that an entity is directly created by the state when its existence is established by an enabling statute or a public body. *See, e.g., Madison County Mental Health Center*, 253 NLRB 258, 259 (1980).

Here, it is undisputed that that the state of Illinois did not directly or indirectly create Pilsen. (Tr. 19-21). Rather, it is undisputed that Pilsen is a private 501(c)(3) tax exempt organization under the IRS code, which the Board has found weighs against a political subdivision finding. The Company is a private non-profit institution that was created by individuals long before any charter laws went into effect. (Tr. 19-21). Notably, the Board routinely exercises jurisdiction over 501(c)(3) nonprofit entities, such as hospitals and colleges. *See e.g. FiveCAP, Inc.* 331 NLRB 1165, 1168 (2000) (finding that the respondent's tax exemption under [501(c)(3)] did not support, and indeed tended to negate, a finding of political subdivision status).

Furthermore, Pilsen does not hold a direct charter with the state. Instead, Pilsen acts as a management company pursuant to a contractual agreement with YCCS (the actual charter holder). Pursuant to its contract with YCCS, Pilsen receives a fixed fee from YCCS to manage LYHS. As such, Pilsen receives no funds directly from the state or any government or public entity. Pilsen is also not subject to government civil service requirements, competitive bidding or purchasing practices.

Simply put, the Regional Director's finding that there is no evidence to conclude that Pilsen was created directly by the state is correct. Because the state of Illinois did not create Pilsen, it does not fall within the first prong of the *Hawkins* test. *See Research Foundation of the City Univ. of NY*, 337 NLRB 965, 968 (2002) (finding "[t]he creation of the Employer by private

individuals as a private corporation, without any state enabling action or intent, clearly leaves the Employer outside the ambit of the Section 2(2) exemption.”

2. The Regional Director’s finding that Pilsen is administered by individuals who are responsible to public officials or to the general electorate is wrong and ignores clear precedent to the contrary.

The Regional Director applied the wrong analysis in determining that Pilsen is exempt from Board jurisdiction under the second prong of the *Hawkins County* test. Pilsen listed multiple cases in its post-hearing brief to the Regional Director in which the Board stated that a majority of an entity’s Board of Directors must be responsible to public officials or the general electorate for the second prong to be met. The Regional Director disregarded the majority requirement and stated instead that it is just one factor to consider. The Regional Director is incorrect. The majority requirement is the determinative factor regarding whether the second prong of the *Hawkins County* test has been met because the Board has never found an entity to be a political subdivision where its board of directors was composed of less than a majority of individuals responsible to public officials or to the general electorate. *See e.g. Charter School Admin Servs.*, 353 NLRB 394 (1998) (noting that the Board “looks to whether the composition, selection and removal of the employer’s board of directors are determined by law or by the employer’s own governing documents” in deciding whether the employer is responsible to any public official or to the general electorate within the meaning of *Hawkins County*).

Here, Pilsen does not fall within the second prong of this test because its Board of Directors consists of nine members, none of whom are employees of the state or elected officials. (Tr. 22, Emp. Ex. 2). The Board Members are elected by other board members and not by the state or district and they receive no pay from any government entity for their service. (Tr. 24). Further, no public official has the authority to or has ever tried to manage Pilsen. (Tr. 37).

Pilsen is managed internally in all respects by its CEO, who reports to an independent Board of Directors. (Tr. 15-20). Pilsen employs no one who is appointed by, or subject to, removal by any public official. (Tr. 69, 74, 87, 91, 114-116). As such, the government cannot remove Pilsen's CEO or any of its Board Members. Pilsen is also not subject to governmental civil service requirements, competitive bidding or purchasing practices. (Tr. 55).

Nor is there "significant government control" over Pilsen's budget or expenditures. Pilsen creates its own budget and is not required to submit its budget to CPS or any other government entity. (Tr. 50-51, 64-65, 112). Nor does Pilsen have any reporting obligation to CPS or the state regarding the use or allocation of any funds received. (Tr. 114, 121). Pilsen incurs all expenses related to LYHS, including all the salaries, utilities, insurance, and supplies. (Tr. 42). Pilsen then submits vouchers to YCCS for reimbursement pursuant to its Agreement. (Tr. 42). Thus, its budget is subject to approval only by YCCS.

Likewise, there is no government control over Pilsen's labor relations. Pilsen has the sole discretion and authority to interview, hire, terminate and discipline teacher and staff and does not need approval from YCCS, CPS or any government entity. (Tr. 28, 43, 51-52, 90, 92, 96, 190). Pilsen also has sole responsibility for determining the amounts of compensation for all its employees. (Tr. 44, 49-50). This is significant because the Board has taken jurisdiction over nonprofit institutions where *inter alia* the institution largely determined salaries and other economic policies and therefore controlled economic terms and conditions of employment essential to meaningful bargaining. *See e.g. Long Stretch Youth Home, Inc.*, 280 NLRB 678 (1986).

While teachers are required to be state certified, failure to obtain such certification does not put Pilsen in jeopardy with CPS or any other government entity. (Tr. 190, 193). Failure to obtain certification is merely a violation of Pilsen's Agreement with YCCS. (Tr. 68, 95, 190). Similarly, Pilsen's curriculum is not monitored by CPS or the state. Pilsen determines the curriculum that will be used at its campuses without review or oversight from the state Board of Education. (Tr. 37, 43-44, 78; Un. Ex. 19.)

In fact, Pilsen does not submit any education related reports to CPS or the state Board of Education. (Tr. 44, 64-66, 91, 114-115). This is because neither CPS nor any government entity has any direct oversight of Pilsen. (Tr. 69, 74, 91, 114-116). Whatever state or CPS requirements Pilsen follows is purely a matter of contract pursuant to its Agreement with YCCS and its compliance with those requirements is monitored by YCCS alone. (Tr. 74, 91-92, 114-116, 189). Whether Pilsen is subject to periodic random inspections by CPS or other state agencies does not make it different than other private employers who are also subject to government standards and regulations. Such requirements are no different than a government inspection of a restaurant, used to determine whether the restaurant should continue to receive a government license to operate.

Despite the fact that Pilsen's Board of Directors are independent in every way, the Regional Director nonetheless found that Pilsen is accountable to state and government bodies by virtue of its relationship with YCCS. In particular, the Regional Director found that Pilsen can be deemed to be a recipient of public funding because the money it receives from YCCS originates from public sources. The Regional Director further noted that Pilsen's expenditures are subject to "extensive public reporting and auditing" by CPS, because YCCS submits reports to CPS containing information provided by Pilsen.

Contrary to the Regional Director's unsupported assertions, the fact that Pilsen does not receive any state funds directly is significant. Indeed, under the Regional Director's rationale, any private employer who provides services for money to an entity that is funded by public sources would be exempt from NLRB jurisdiction. In other words, under the Regional Director reasoning if company A receives public funds and uses those funds to pay company B, Company B is not covered by the NLRA. Such a mechanical result fails to take into account the actual operations of the company being scrutinized. If the Supreme Court had wanted to articulate a standard in which only patently private entities were private employers subject to NLRB jurisdiction, it would have done so in *Hawkins County*. Instead, the Supreme Court created a standard that requires consideration of an entity's actual operations.

Significantly, the Board routinely asserts jurisdiction over private employers who have agreements with government entities to provide certain types of services and thereby indirectly receive public funds. See e.g. *Research Foundation of the City University of New York*, 337 NLRB 965 (2002); *Connecticut state Conference Board, Amalgamated Transit Union*, 339 NLRB 760 (2003); *Enrichment Services Program*, 325 NLRB 818 (1998). In fact, the Board has even asserted jurisdiction over companies who received public funding directly. Cf. *Parents and Friends of Specialized Living Center*, 286 NLRB 511, 519 (1987) (Board exerted jurisdiction over employer that received 99% of its funding from public sources); *San Diego Civic Facilities Corp.*, 175 NLRB 1461 (1969) (Board exerted jurisdiction over employer even though any budget shortfall would be reimbursed by city).

Likewise, the fact that YCCS submits certain reports to CPS that contain budget information from Pilsen has no bearing on whether Pilsen is "administered by individuals who are responsible to public officials or to the general electorate." See *Research Foundation of the*

City of New York, 337 NLRB 965 (2002) (Board exerted jurisdiction even though employer was obligated to submit quarterly and annual financial statements and audits to a city university); *Parents and Friends of the Specialized Living Center*, 286 NLRB 511 (1987) (Board exerted jurisdiction over employer required to submit financial reports to the state of Illinois). This is especially true here where Pilsen has no direct connection with CPS or the state. (Tr. 111).

Pilsen has no way to provide information directly to CPS; this can only be done with YCCS's authorization and the use of its proprietary computer equipment and software. (Tr. 85-87, 111-112, 205). The fact that its compliance with any charter laws is only monitored by YCCS, shows that Pilsen is a private employer. Pilsen does not need government approval to run a charter school on behalf of a charter holder and the government has no ability to revoke this right. Any responsibility that Pilsen has with the state is born from its contractual relationship with YCCS.

While the Regional Director maintains that Pilsen is "directly" subject to various provisions of Illinois statutes such as the Illinois Educational Labor Relations act, the Freedom of Information Act; the Open Meetings Act; the Illinois Student Records Act; and the School Code, there is no support in the record or otherwise for this conclusion. Any responsibility that Pilsen has under these acts is because YCCS has demanded as such under the vendor Agreement. Notably, however, even under the Agreement, Pilsen has not agreed to follow any parts of the Illinois Educational Labor Relations act, the Freedom of Information Act, or the Open Meetings Act.

Moreover, the Board has noted that "[s]tate standards embodied in statutes or regulations, clearly have an effect on [the school employer] and other private schools; but they are no more

than licensing requirements for engaging in the business of education.” *Wordsworth*, 263 NLRB 438, 440 (1982). Thus, whether Pilsen subjects its teachers to background checks or supplies budgetary information to YCCS to pass along to CPS is of no consequence. Indeed, the instant situation is exactly the same as in *Civitas Schools, LLC*, 13-RM-1764, where the Region 13 Director found that an independent management company not holding a charter, but merely contracting with an entity who held the charter, was an employer subject to the jurisdiction of Section 2(2) of the Act because the employer’s administration had no direct personal accountability to public officials or the general electorate.

Inexplicably, the Regional Director did not distinguish how the instant matter is different from the situation in *Civitas*. It is unclear why the Region chose to ignore its own precedent given the overwhelming factual similarities involved. Specifically, in *Civitas*, Region 13 took into consideration, among other things, that, like Pilsen, *Civitas Schools* did not have any direct reporting requirements to CPS, was not required to submit its budget to the state for review, did not directly receive any public funds, and its employees did not enjoy government immunity. Although the Region assigned great importance here to the fact that Pilsen receives public funds “indirectly,” the funding structure in *Civitas* was exactly the same. Yet, the Region in *Civitas* relied on the fact that *Civitas* did not receive any direct funding from the state to hold it was not exempt from NLRB jurisdiction. There is no explanation for the Region’s dramatic about face

In sum, because no member of Pilsen’s staff or Board of Directors is responsible to public officials or the general electorate, Pilsen is not a political subdivision under the second prong of the *Hawkins* test. Not only do Pilsen officials operate independently of the state, but Pilsen acts as any other private employer would in, among other things, making hiring and firing decisions, formulating budgets, and determining its own expenditures.

C. The Recent Amendments to the Illinois Charter School Law and the Illinois Education Labor Relations Act Have No Relevance Because Pilsen is Not a Direct Charter Holder

Whether an employer is a “political subdivision” is determined by federal law, not state law. *See Hawkins County, supra, 402 U.S. at 602.* Again, the test articulated by the Supreme Court in *Hawkins* requires that each entity under examination be reviewed based on its “actual operations and characteristics” and that the exemption be narrowly construed. *Id.* at 604.

Here, a review of Pilsen’s actual operations shows that it is not subject to any meaningful oversight by the government. While YCCS requires Pilsen to follow certain requirements of the Charter Law under their Agreement, Pilsen has no independent obligation to do so. As such, the instant situation is identical to one in *Charter School Admin Servs.*, 353 NLRB 394 (1998) where the Board found that a private corporation that managed a charter school was an employer within the meaning of Section 2(2) of the NLRA, despite the existence of state legislation regarding charter schools similar to that of Illinois.

Although the charter school involved, The Academy of Waterford, was a “public charter school” under Michigan law, the Board did not consider that a determinative factor because the management company was completely independent of the charter holder. Specifically, the management company received a fixed fee from the charter school based on a percentage of the funds the charter school received from the state of Michigan. The management fee, as in the present case, was paid to the management company as consideration for services provided pursuant to its contract within the charter school. Also, the management company was contractually responsible for all day-to-day operations of the school, including preparing budgets, hiring teachers, counselors and other staff, and supervising the charter school’s

employees. As with Pilsen, the school employees were paid by the management company, which was responsible for setting wage and benefit rates.

As in the present case, the charter school remained ultimately responsible for the management company's compliance with its charter and all applicable laws. While, similar to the recent amendments to Illinois law, the charter school was expressly defined by state law as a "government agency," the Board nonetheless found that under *Hawkins* the management company was not created directly by the state. This was true even though the parties also did not dispute that the charter school itself constituted a government body.

When Pilsen's "actual operations" are analyzed it is clear that it is a private employer subject to the NLRB's jurisdiction. The recent amendments to the Charter School Law and IELRA do not change the fact that Pilsen is not a charter holder and therefore has no direct responsibilities to CPS or the state. Because it has no reporting obligation to CPS or the state, it cannot be considered a political subdivision exempt from jurisdiction.

IV. CONCLUSION

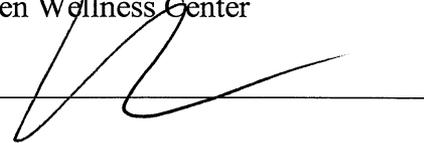
Pilsen is a private not-for-profit corporation and contracted by YCCS to provide educational services at LYHS. The relationship between Pilsen and YCCS is governed by the terms of their vendor Agreement. Under this vendor Agreement, Pilsen has the exclusive responsibility not only for the management, operation, and administration of LYHS, but also for the educational services that LYHS provides its students. The Agreement spells out the responsibilities and rights of Pilsen in its role as independent contractor.

No member of Pilsen's Board of Directors is responsible to public officials or the general electorate. Likewise, Pilsen officials operate independently of the state. Pilsen is not influenced

or controlled by the state, but acts as any other private employer would in, among other things, making hiring and firing decisions, formulating budgets, and contracting with outside vendors. Accordingly, Pilsen is not a political subdivision under the second prong of the *Hawkins County* test. The Regional Director's arbitrary conclusion that Pilsen is a political subdivision does not have any support in the record and is contrary to Board precedent. Pilsen therefore respectfully requests that that the Board reverse the Regional Director's decision.

Respectfully submitted,

Pilsen Wellness Center

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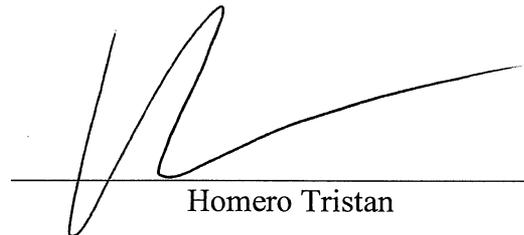
Dated: October 26, 2011

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on October 26, 2011, he caused a copy of Petitioner Pilsen Wellness Center's Request for Review to be served by First Class U.S. Mail upon the following:

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