Chicago Mathematics & Science Academy Charter School, Inc., Employer *and* Chicago Alliance of Charter Teachers & Staff, IFT, AFT, AFL–CIO, Petitioner. Case 13–RM–001768

December 14, 2012

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES, GRIFFIN, AND BLOCK

The issue in this case is whether a private, nonprofit corporation that established and operates a public charter school in Chicago, Illinois, is exempt from our jurisdiction because assertedly it is a political subdivision of the State of Illinois within the meaning of Section 2(2) of the National Labor Relations Act.[1] The union that seeks to represent teachers employed at the school—under Illinois law—argues that the Board lacks jurisdiction. In contrast, the nonprofit corporation itself has filed an election petition with the Board and argues that the Act does apply.

This case is governed by the Board's longstanding test as examined by the Supreme Court in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) (*Hawkins County*). Under that test, an entity may be considered a political subdivision if it is either (1) created directly by the State so as to constitute a department or administrative arm of the Government, or (2) administered by individuals who are responsible to public officials or to the general electorate. Id. at 604–605. Here, the Acting Regional Director for Region 13 found that the school is a political subdivision under both prongs of *Hawkins County*. We granted the nonprofit corporation's request for review of the Acting Regional Director's decision and invited the parties and interested amici to file briefs addressing the issues. Amicus briefs were filed, but none by a government entity.

Having carefully considered the entire record, including the briefs filed by the parties and amici, we find, contrary to the Acting Regional Director, that the nonprofit corporation is not a political subdivision of the State of Illinois under either analytical prong of the *Hawkins County* test. We find, rather, that the corporation is an "employer" within the meaning of Section 2(2) of the Act, and therefore subject to the Board's jurisdiction. In turn, we have not been presented with persuasive reasons here for declining, as a matter of discretion, to exercise our jurisdiction. Accordingly, we reinstate the petition and remand this case to the Regional Director for further processing. Our decision is based on the facts of this case, which involves the operation of a public charter school under the particular provisions of Illinois law. We certainly do not establish a bright-line rule that the Board has jurisdiction over entities that operate charter schools, wherever they are located and regardless of the legal framework that governs their specific relationships with state and local governments.

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

Background

On June 23, 2010, Chicago Alliance of Charter Teachers & Staff, IFT, AFT, AFL–CIO (the Union) filed a petition with the Illinois Educational Labor Relations Board seeking to represent teachers employed by the Chicago Mathematics & Science Academy Charter School, Inc. (CMSA or the Employer). On July 29, 2010, CMSA filed the instant petition with the National Labor Relations Board.

On September 20, 2010, the Acting Regional Director for Region 13 issued a Decision and Order dismissing CMSA's petition, for the reasons stated above. Thereafter, CMSA filed a request for review of the Acting Regional Director's decision. On January 10, 2011, the Board granted review and issued a notice and invitation to file briefs, requesting that the parties and interested amici address whether CMSA "is a political subdivision within the meaning of Section 2(2) of the Act, and therefore exempt from the Board's jurisdiction." The Board received four amicus briefs, as well as briefs and reply briefs from CMSA and the Union.[2]

Facts

Illinois Charter Schools Law

The Illinois Charter Schools Law provides the framework for the establishment and operation of charter schools in Illinois. The preface to the law states as follows:

> In authorizing charter schools, it is the intent of the [Illinois] General Assembly to create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating children within the public school system. The General Assembly seeks to create opportunities within the public school system of Illinois for development of innovative and accountable teaching techniques. The provisions of this Article should

[2] The Board received amicus briefs from the Nevada Local Government Employee-Management Relations Board (NLGEMRB); National Education Association, California Teachers Association, Illinois Education Association, and New Jersey Education Association (NEA); AFL–CIO and American Federation of Teachers (AFL); and National Alliance for Public Charter Schools (NAPCS).

> be interpreted liberally to support the findings and goals of this Section and to advance a renewed commitment by the State of Illinois to the mission, goals, and diversity of public education.

The Charter Schools Law permits local public school boards to contract with third parties to provide educational services to children who typically are served by local public schools. It states that a charter school must be "organized and operated as a nonprofit corporation or other discrete, legal, nonprofit entity authorized under the laws of the State of Illinois"; sponsored and authorized by a local public school board; and certified by the Illinois State Board of Education (State Board). In addition, an Illinois charter school must be a "public, nonsectarian, nonreligious, non-home based, and non-profit school"; Illinois charter schools receive most of their operating funds from public sources.

Although Illinois charter schools are exempt from certain state laws and regulations that otherwise pertain to public schools, they are required to comply with those statutes specified in the Charter Schools Law and the Illinois Code, including, inter alia, the State's Freedom of Information and Open Meetings Acts and the same health and safety laws that apply to Illinois public schools.[3] Charter schools are also covered by State laws requiring criminal background checks for employees, the Abused and Neglected Child Reporting Act, the Illinois School Student Records Act, and Illinois School Code policies pertaining to report cards and student discipline. In addition, a charter school must comply with the Federal Individuals with Disabilities Education Improvement Act, as well as with other Federal and State laws prohibiting discrimination.

The Charter Schools Law requires that a charter school's teachers be certified under the Illinois School Code or possess alternate qualifications as stated in the Charter Schools Law and the school's charter, and that they participate in the same assessments required of public school teachers. A charter school's students must come from within the geographical boundaries of the school district in which the school is located, and they may not be charged tuition. A charter school must grant access to the local school board so that the board may evaluate the school's operations and performance.

A proposal to establish a charter school may be initiated by, inter alia, the board of directors or other governing body of the corporation that intends to operate the charter school. The Charter Schools Law specifies, in considerable detail, the information that must be included in a charter school proposal and sets forth guidelines by which the local school board and the State board evaluate the proposal.

Upon approval of a proposal to establish a charter school, the local school board and the corporation that intends to operate the charter school enter into an agreement, i.e., "the charter," which is a "binding contract and agreement between the corporation and a local school board under the terms of which the local school board authorizes the governing body of the charter school to operate . . . on the terms specific in the contract." A charter school is responsible for the management and operation of its own financial affairs, and its board of directors is ultimately responsible for governing the school and upholding the charter agreement. The charter agreement provides that the local school board may withhold funds if the charter school violates the terms of its charter. Moreover, the Charter Schools Law provides that a charter may be revoked or not renewed, or the charter school put on probation, if the school's obligations are not or cannot be met or if the school commits a material violation of its charter agreement.

CMSA

CMSA is a private, nonprofit corporation that was established in 2003 by five individuals under the Illinois General Not-for-Profit Corporation Act of 1986 for the purpose of operating a charter school. CMSA's affairs, including the "business of operating a charter school," are conducted or directed by CMSA's board of directors. After the State of Illinois confirmed CMSA's incorporation, CMSA sought and was granted tax exempt status under Section 501(c)(3) of the Internal Revenue Code. CMSA's board of directors has delegated the management of the corporation to its president, vice president, secretary, and chief financial officer; its financial affairs are conducted by a finance and audit committee.

CMSA's board of directors selects other members, as needed, and only the board of directors may remove sitting board members.[4] No government entity has the authority to appoint or remove a CMSA board member, and no member of the board of directors is a government official or works for a government entity. The four officers who manage the corporation were selected by and are subject to the control of CMSA's board of directors.

[3] In January 2010, the Illinois General Assembly amended the Charter Schools Law to provide that charter schools must comply with the Illinois Educational Labor Relations Act (IELRA). At the same time, the IELRA was amended to provide that the "governing body of a charter school established under Article 27A of the School Code" and "a subcontractor of instructional services of" a charter school are included within the definition of a public "educational employer."

[4] There were seven members of CMSA's board of directors at the time of the hearing in this matter.

Members of the finance and audit committee are drawn from CMSA's board of directors; they are not appointed or removed by any public officials or government entities.

Upon its incorporation, CMSA submitted a proposal to Chicago Public Schools, a division of the Board of Education of the City of Chicago (Chicago Board), to obtain a charter to establish the Chicago Mathematics & Science Academy Charter School (the Academy). Chicago Public Schools reviewed the proposal, and recommended that the Chicago Board grant the charter to CMSA, which it did. The charter agreement, more fully described below, spells out the terms of the relationship between the charter authorizer, i.e., the Chicago Board, and the charter holder, i.e., CMSA. The charter sets out expectations for the Academy and the manner in which it will be held accountable during the term of the charter agreement.

At some point after its creation, CMSA entered into a contract with Concept Schools, a nonprofit charter school management organization, to provide management services.[5] Concept Schools prepares various financial reports for CMSA and determines the wage and benefits package for CMSA's employees, subject to the approval of CMSA's board of directors. The principal and the business manager of CMSA were hired by, and are employees of, Concept Schools. The principal is responsible for the day-to-day operation of the Academy, and the business manager is responsible for, among other things, payroll, including administration of CMSA employees' benefits and taxes.

CMSA's Charter Agreement with Chicago Public Schools

As mentioned above, CMSA has a charter agreement with the Chicago Board; the charter agreement cannot be changed without the Chicago Board's approval. The parties to the agreement expressly acknowledge that the CMSA is not operating as the agent of, or under the direction and control of, the Chicago Board, except as required by law or the charter agreement.

The charter agreement is for a term of 5 years. The agreement incorporates CMSA's charter school proposal, sets forth insurance requirements and a student accountability plan, and specifies the health and safety laws applicable to charter schools as set out in the Illinois School Code, Illinois Vehicle Code, Eye Protection in School Act, School Safety Drill Act, Toxic Art Supplies in Schools Act, and Chicago Building Code. The agreement may be revoked by the Chicago Board for material violation of any of its terms, including the accountability plan, failure to meet or make reasonable progress towards achievement of pupil performance standards set out in the agreement, failure to meet generally accepted standards of fiscal management, or violation of applicable laws.

CMSA receives about 80 percent of its budget to operate the Academy from Chicago Public Schools, with the remainder derived from Federal and State sources.[6] Although CMSA must submit a proposed budget to Chicago Public Schools, its budget is ultimately approved by CMSA's board of directors. Chicago Public Schools merely reviews the budget; it has never rejected a budget proposed by CMSA, and does not advise CMSA how it should allocate its resources. CMSA is the employer of the Academy's teachers and of most of its administrative, secretarial, and custodial employees.[7]

Charter Agreement Requirements Vis-à-Vis the Operation of the Academy

The charter agreement provides guidelines for the Academy's school calendar and curriculum. It requires that CMSA make reasonable progress toward the achievement of the goals, objectives, and pupil performance standards set forth in the charter proposal and in the accountability plan included in the charter agreement. CMSA must administer standardized tests and participate in assessments required by the Illinois School Code, including the Illinois Standards Achievement Test, the Prairie State Achievement Examination, and the Illinois Alternate Assessment for students with significant cognitive disabilities.

The charter agreement specifies that CMSA must provide special education services in accordance with a student's Individualized Educational Plan, the Individuals with Disabilities Education Act, procedures approved by the Chicago Board, and any applicable Federal court orders. CMSA may hire its own special education teachers, although the Chicago Board will reimburse CMSA

[5] Concept Schools was created by private individuals and has its own board of directors, chief executive officer, and vice president, none of whom are appointed by or subject to removal by any public official or government entity. The status of Concept Schools under Sec. 2(2) of the Act is not at issue in this case.

[6] The amount of funds received from Chicago Public Schools is based on the number of students enrolled in the Academy. As to other sources of funding, CMSA recently received $115,000 under Title I for schools with at-risk students; $26,000 under Title II for professional development; $340,000 in general State aid; and $30,000 in State aid for non-English speaking students. CMSA also received $60,000-$100,000 in private grants and through its own fundraising efforts.

[7] Chicago Public Schools provides CMSA with a nurse, a speech therapist, and a social worker. In addition, as noted above, CMSA's principal and business manager are employed by Concept Schools, a charter school management organization.

for their salaries and provide resources for assistive technologies as necessary.

The charter agreement also establishes guidelines regarding student enrollment. CMSA must maintain enrollment data and daily records of student attendance and submit that information on a daily basis to the Chicago Board using the Chicago Board's computerized "IMPACT" system.[8] The agreement requires that CMSA must submit specific student eligibility data to the Chicago Board in order to obtain initial funding, supplemental general State aid, Title I funds, special education reimbursement, and allocations for English language learners. The agreement also mandates that the Chicago Board must approve the Academy's disciplinary system, unless CMSA adopts the Chicago Public Schools' School Code of Conduct, and that CMSA may not expel students without providing notice to Chicago Public Schools.

Charter Agreement Requirements Vis-à-Vis CMSA

The charter agreement states that the membership and composition of CMSA's governing board "shall be subject to and in accordance with the bylaws of the Charter School," that vacancies on CMSA's governing board are to be filled by the governing board, and that CMSA's board of directors "shall have duties and responsibilities consistent with the Illinois General Not-for-Profit Corporation Act of 1986."

Under the charter agreement, CMSA agrees to "at all times maintain itself as an Illinois general not-for-profit corporation capable of exercising the functions of the Charter School under the laws of the State of Illinois." The agreement requires that CMSA operate at all times in accordance with the Charter Schools Law "and all other applicable Federal and State laws from which the Charter School is not otherwise exempt and constitutional provisions prohibiting discrimination."[9] CMSA is also required to make contributions to the Chicago Teachers' Pension Fund on behalf of the Academy's certified teachers, though it has discretion to determine how much of the statutorily required contribution it will pay on behalf of its employees.

The charter agreement provides that CMSA shall maintain appropriate governance and managerial procedures and financial controls, and that its financial accounting methods must be such as to allow CMSA to prepare reports that the Chicago and State Boards require, such as quarterly financial reports, an annual budget and an annual financial audit. The Chicago Board must approve any contract into which CMSA enters for school management or operations services, e.g., CMSA's contract with Concept Schools; the charter agreement sets forth the terms required in such contracts.[10]

The Acting Regional Director's Decision

The Acting Regional Director found that CMSA is a political subdivision of the State of Illinois under the first prong of the *Hawkins County* test. He recognized that CMSA is a privately incorporated entity with its own self-appointed governing structure, but examined CMSA's "actual operations and characteristics" and found that CMSA "operates a charter school only through its charter agreement with [Chicago Public Schools]." The Acting Regional Director further found that CMSA and its board of directors "are subject to statutory restrictions, regulations, and privileges that a private employer would not be subject to and negate a finding that CMSA is a private employer." The Acting Regional Director emphasized that the State's "enabling legislation," i.e., the Illinois Charter Schools Law, shows that the State's declared purpose in enacting the Law was to create new educational avenues and opportunities "within the public school system." The Acting Regional Director also observed that the governing body of an Illinois charter school is defined as an "educational employer" subject to the Illinois Educational Labor Relations Act. Finding that CMSA was "directly chartered by a public body [Chicago Public Schools]" and that CMSA has a "direct relationship with that public body, including being subject to certain state laws and direct funding from said public body," the Acting Regional Director concluded that CMSA was created directly by the State of Illinois so as to constitute a department or administrative arm of the State.

The Acting Regional Director also found that CMSA is a political subdivision under the second prong of the *Hawkins County* test. He recognized that CMSA's board of directors is not appointed by, or subject to removal by,

[8] The Chicago Board agreed to provide CMSA with the necessary system access, software, and training.

[9] In addition to laws referred to elsewhere, CMSA must abide by The No Child Left Behind Act of 2001; the Illinois Pension Code; Federal and State orders and agreements concerning Chicago Public Schools that pertain to desegregation, bilingual education, special education, and the like; Federal, State, and local disability access laws including the Americans with Disabilities Act, the Rehabilitation Act of 1973, the Illinois Environmental Barriers Act, and the Chicago Building Code; and all laws that protect the rights of homeless children, such as the McKinney-Vento Homeless Assistance Act and Illinois Education for Homeless Children Act.

[10] The charter agreement further requires CMSA and any such contractors to provide the Chicago Board with the names of employees who come into direct regular contact with students, along with information regarding those employees' background checks, teaching qualifications, and certifications.

public officials. Nevertheless, he found it appropriate to consider other factors "bearing on [CMSA's] relation to the State," specifically "[Chicago Public Schools'] oversight of CMSA's budget, [Chicago Public Schools'] considerable funding to CMSA, CMSA's reporting requirements, and CMSA's overall accountability to [Chicago Public Schools]." The Acting Regional Director concluded that even though CMSA's board of directors is privately appointed, members of the board are "nonetheless accountable to [Chicago Public Schools] to such an extent that [CMSA's] governing body is responsible to public officials or to the general electorate."

Contentions of the Parties and Amici

The Union contends that the Acting Regional Director correctly found that CMSA is a political subdivision under both prongs of the *Hawkins County* test. As to the first prong, the Union asserts that State law shows that CMSA is a public educational employer and part of the State's public school system, "not simply a contractor subject to government oversight." According to the Union, CMSA operates the Academy because of the charter granted to it by Chicago Public Schools; without the charter, CMSA would not be able to operate the Academy as a charter school. It also points out that CMSA's budget consists almost entirely of public funds that pass through Chicago Public Schools, and its budget and finances are subject to scrutiny by Chicago Public Schools. Finally, the Union argues that while CMSA is a nonprofit corporation with its own board of directors, "an examination of CMSA's actual operations shows that CMSA is an administrative arm of the State in providing educational services to the public." As to the second *Hawkins County* prong, the Union asserts that the Acting Regional Director properly considered "whether [CMSA] possesses attributes commonly associated with public status," in addition to considering the appointment and removal methods of CMSA's board of directors.

Three amici—NLGEMRB, NEA, and AFL–CIO—support the Union's contention that CMSA is exempt from the Board's jurisdiction as a political subdivision. In general, they contend that charter schools have no existence outside of the particular State laws that authorize their creation, their continued existence, and, often, their funding. They further contend that the State of Illinois, in particular, intended that charter schools be considered part of the State's public school system, and that the State created them to carry out its education policy objectives. Regarding the second *Hawkins County* prong, these amici assert that the inquiry is not solely a question of who appoints or removes an entity's governing board, but includes consideration of other factors that show the degree of public accountability to which the entity is subject.

CMSA, on the other hand, contends that the Acting Regional Director erred in finding that CMSA is a political subdivision. As to the first *Hawkins County* prong, CMSA asserts that Federal law, not State law, controls political subdivision status, and that the State's intentions, although relevant, are not determinative. CMSA contends that an employer is exempt only where a government entity "literally has 'created' an employer via some type of statutory proclamation," and "the fact that private individuals have sought to establish an entity is not enough." In this regard, CMSA emphasizes that no Illinois statute directly created it, and the Illinois General Assembly did not "direct" that charter schools be created. Rather, according to CMSA, private individuals established it under the Illinois General Not-for-Profit Corporation Act, and only after incorporation did CMSA obtain a charter to operate the Academy. CMSA points out that if the charter agreement were to be revoked, CMSA would continue to exist as a corporate entity until dissolved by its own board of directors. CMSA also asserts that the Charter Schools Law merely provides a procedure or "framework" by which private individuals may seek approval to operate a charter school: "But for the efforts of a group of private individuals, CMSA would never exist."

As to the second prong, CMSA contends that Board precedent shows that the Board's "sole focus" is on whether an entity's governing body is appointed by public officials or private individuals; the Board may consider other factors, but is not required to do so. CMSA emphasizes that there is no dispute here that members of CMSA's board of directors are selected and retained by the board itself; that there is no Federal, State, or local law that addresses the composition of CMSA's governing board; and, therefore, that the Board's inquiry need proceed no further. Nonetheless, CMSA contends that other factors, should the Board consider them, support the conclusion that CMSA's governing board is not accountable to public officials.

Amicus NAPCS agrees that CMSA is not a political subdivision under either prong of the *Hawkins County* test. It contends that CMSA fails to satisfy the first prong because it was created by private individuals, not directly by the State. It further contends that, for purposes of the inquiry, the more relevant statute is the Illinois General Not-for-Profit Act of 1986, not the Charter Schools Law. As to the second *Hawkins County* prong, NAPCS contends that no factors need be considered other than the means of appointing and removing CMSA's board of directors. NAPCS points out that the Board

routinely asserts jurisdiction over private employers who are government contractors, many of which are subject to exacting oversight comparable to the manner in which Chicago Public Schools oversees CMSA.

Analysis

As noted above, Section 2(2) of the National Labor Relations Act provides that the term "employer" shall not include any state or political subdivision thereof. The term "political subdivision" is not defined in the Act, and the legislative history of the Act is silent as to whether Congress considered its meaning. In *Hawkins County*, however, the Supreme Court observed that the legislative history revealed that Congress enacted Section 2(2)

> to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike. In the light of that purpose, the Board . . . "has limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."

402 U.S. at 604–605. The Board has held that "[t]he plain language of Section 2(2) 'exempts only government entities or wholly owned government corporations from its coverage—not private entities acting as contractors for the government.'" *Research Foundation of the City University of New York*, 337 NLRB 965, 968 (2002), quoting *Aramark Corp. v. NLRB*, 179 F.3d 872, 878 (10th Cir. 1999). Applying these principles, we find, contrary to the Acting Regional Director, that CMSA is not a political subdivision of the State of Illinois under either prong of the *Hawkins County* test.

CMSA was Not "Created Directly by the State"

In order to determine whether an entity is a political subdivision under the first prong of the *Hawkins County* test, the Board determines first whether the entity was created directly by the state, such as by a government entity, a legislative act, or a public official. If it was, the Board then considers whether the entity was created so as to constitute a department or administrative arm of the government.[11] We find that CMSA fails the first prong of the *Hawkins County* test because it was created by private individuals, and not by a government entity, special legislative act, or public official.

The Board 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.[12] The Board has also found the first prong of *Hawkins County* satisfied where the employing entity was created by an act of the judiciary, rather than the legislature.[13] In contrast, the Board has consistently held that entities created by private individuals as nonprofit corporations are *not* exempt under the first prong of *Hawkins County*.[14] Furthermore, an entity is not exempt simply because it receives public funding or operates pursuant to a contract with a governmental entity, as does CMSA. The Board routinely has asserted jurisdiction over private employers that have agreements with government entities to provide certain types of services.[15]

[11] *Hawkins County*, supra at 604; *Hinds County Human Resource Agency*, 331 NLRB 1404 (2000).

[12] See, e.g., *University of Vermont*, 297 NLRB 291 (1989) (university created directly by special act of Vermont General Assembly); *New York Institute for Education of the Blind*, 254 NLRB 664, 667 (1981) (corporation formed by special act of New York State legislature); *The New Britain Institute*, 298 NLRB 862 (1990) (institute incorporated by special act of Connecticut General Assembly and later established as public library in accordance with state statutes governing public libraries).

[13] See *State Bar of New Mexico*, 346 NLRB 674 (2006) (New Mexico Supreme Court's enactment of rule creating State Bar amounted to direct creation by State government).

[14] For example, in *Regional Medical Center at Memphis*, 343 NLRB 346 (2004), the board of county commissioners dissolved the county hospital authority contingent upon the formation of a not-for-profit health care corporation (the employer) and the execution of a contract providing that the "new" corporation would operate the previously-operated hospital facilities. The Board found that because the employer was created by private individuals as a nonprofit corporation, it was not established by the county, despite the actions of the county commissioners. Id. at 358.

The Board reached a similar conclusion in *Research Foundation*, supra at 965, where private individuals created the employer as a not-for-profit educational corporation under the New York State Educational Law. The Board stated that the "plain language" of Sec. 2(2) did not exempt private entities acting as government contractors. Id. at 968. Although the employer's purpose benefitted The City University of New York (CUNY), a public university, there was no indication that the employer was intended to operate under the control of a public entity. The creation of the employer under the State Educational Law did "not constitute creation directly by the state or CUNY so as to constitute an arm of the state or CUNY." Id.

See also *Truman Medical Center v. NLRB*, 641 F.2d 570, 573 (8th Cir. 1981) (medical center organized under Missouri not-for-profit statute); *Woodbury County Community Action Agency*, 299 NLRB 554 (1990) (community action agency incorporated by private individuals under State law as nonprofit corporation); *Economic Security Corp*., 299 NLRB 562 (1990) (same). In *Enrichment Services Program, Inc*., 325 NLRB 818 (1998), the Board overruled *Woodbury* and *Economic Security Corp.* on other grounds, but did not disturb the principle that an entity must be created directly by the state to be exempt under the first prong of *Hawkins County*.

[15] See, e.g., *Connecticut State Conference Board, Amalgamated Transit Union*, 339 NLRB 760 (2003) (private employer that had a contract with the state to provide public bus service); *Methodist Hospital of Kentucky*, 318 NLRB 1107 (1995), enfd. in relevant part sub

As the Board stated in *Research Foundation,* supra at 968, the "plain language" of Section 2(2) does not exempt private entities acting as government contractors from the Board's jurisdiction. Further, "[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."[16] Id.

Applying these principles here, we find that CMSA does not share the "key characteristic of political subdivision status" with those entities that the Board has found to be exempt. That is, CMSA was not created directly by any State of Illinois government entity, special statute, legislation, or public official. There is no dispute that CMSA was created and incorporated by private individuals as a not-for-profit corporation under the Illinois General Not-for-Profit Act, and only after it was established and incorporated did CMSA establish the Academy following the process set out in the Illinois Charter Schools Law.

We examine CMSA under the Illinois General Not-for-Profit Corporation Act—and not under the Charter Schools Law—because it is the statute that "authorized" CMSA's creation. Indeed, the Charter Schools Law directs that a charter school must be "organized and operated as a *nonprofit corporation* or other discrete, legal, nonprofit entity authorized under the laws of the State of Illinois," i.e., the Illinois General Not-for-Profit Corporation Act. There is no Illinois statute that directs that charter schools be created or that directly creates charter schools. Indeed, absent the independent initiative of private individuals and the separate authority of the Not-for-Profit Corporation Act, the Charter Schools Law would do nothing to bring charter schools into existence. Rather, the Charter Schools Law provides that if a charter school is to be created, it must be created by private individuals who *first* must establish a private corporation that in turn creates the charter school. And that is what happened here: private individuals established CMSA first as a nonprofit corporation, and only then did CMSA establish the Academy. The State of Illinois, by enacting its Charter Schools Law, has in essence authorized individuals, acting through private corporations, to establish and operate charter schools, with the Charter Schools Law acting as the "framework" or "roadmap" by which the schools are operated.

That the State of Illinois characterizes charter schools as being within the public school system is "worthy of careful consideration," but is "not controlling in ascertaining whether an entity is a political subdivision." *Hinds County Human Resource Agency*, 331 NLRB at 1404, citing *Hawkins County*, 402 U.S. at 602.[17] 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. In this regard, then, charter school operators arguably are akin to government contractors in that they are operating "public schools" for the State of Illinois. As discussed above, however, the fact that an entity operates pursuant to a government contract is insufficient to establish an exemption under *Hawkins County*.

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.[18]

CMSA is Not Administered by Individuals Who are Responsible to Public Officials or the General Electorate

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 this deter-

nom. *Pikeville United Methodist Hospital of Kentucky v. United Steelworkers of America*, 109 F.3d 1146 (6th Cir. 1997), cert. denied 522 U.S. 994 (1997) (private business entity that performed health care services for the state); *Jefferson County Community Center, Inc.*, 259 NLRB 186 (1981), enfd. 732 F.2d 122 (10th Cir. 1984), cert. denied 469 U.S. 1086 (1984) (employer that contracted with or was licensed by the State to perform services for citizens with special needs); *NLRB v. Parents & Friends of the Specialized Living Center*, 879 F.2d 1442 (7th Cir. 1989) (same).

[16] Two decisions by the Seventh Circuit are instructive on this issue. See *NLRB v. Parents & Friends of the Specialized Living Center*, supra (enforcing a Board order asserting jurisdiction over a not-for-profit corporation that operated a residential facility for adults with disabilities pursuant to a contract with a state agency); *NLRB v. Kemmerer Village, Inc.,* 907 F.2d 661 (7th Cir. 1990) (finding that a nonprofit corporation operating a foster home was not a political subdivision; observing that "[t]here are no public directors here. There is nothing but a state subsidy, and what is implicit in a state subsidy—that the enterprise is seeking to accomplish something that the state wants accomplished. That cannot be enough").

[17] A state's characterization of an entity is an important factor in determining "the more specific issue of whether [an employer] was created so as to constitute a department or administrative arm of government"—a factor not at issue absent a finding that the entity was created directly by the State. *Hinds County Human Resource Agency*, supra.

[18] In light of this finding, we find it unnecessary to examine whether CMSA is an administrative arm or department of the Government. *Regional Medical Center at Memphis*, 343 NLRB at 358 (upon finding that employer was not created by the State, Board stated that employer could be exempt under *Hawkins County* only under a second prong analysis, i.e., "only if officials who are responsible to public officials or to the general electorate administer it"); *Enrichment Services Program*, 325 NLRB at 819 (same).

mination, the Board examines whether those individuals are appointed by or subject to removal by public officials.[19] As the Supreme Court stated, "[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.'" *Hawkins County*, supra at 608. In some cases, the Board has also considered whether additional factors demonstrate a responsibility to public officials or the electorate. Here, for the reasons that follow, we find it dispositive that none of CMSA's governing board members are appointed by or subject to removal by any public official. No further inquiry is required.

In this respect, we draw on the nonprecedential, but soundly reasoned, decision in *Charter School Administration Services*, 353 NLRB 394 (2008) (*CSAS*), unanimously finding that a private, for-profit corporation that managed and operated charter schools was not a political subdivision of the State of Michigan. The two-member *CSAS* Board found that 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. Id. at 397–398. We are persuaded by that reasoning and adopt it here.[20]

We summarize the principles that the *CSAS* Board applied: In determining whether an entity is administered by individuals who are responsible to public officials or the general electorate, the "relevant inquiry" is whether a majority of the individuals who administer the entity—the governing board and executive officers—are appointed by and subject to removal by public officials.[21] The Board examines whether the composition, selection and removal of the members of an employer's governing board are determined by law, or solely by the employer's governing documents.[22] Id. at 397.

Where the appointment and removal of a majority of an entity's governing board members is controlled by private individuals—as opposed to public officials—the entity will be subject to the Board's jurisdiction. See, e.g., *Research Foundation*, supra (no exemption where employer's bylaws, not state law, defined appointment and removal of members of the board of directors)*; St. Paul Ramsey Medical Center*, 291 NLRB 755 (1988) (medical center not a political subdivision because there was no requirement that board of directors be public officials or appointed and removed by public officials); *Truman Medical Center*, 641 F.2d 570 (8th Cir. 1981) (hospital's governing body was self-perpetuating board of directors, majority of whom were not appointed by or subject to removal by public officials). The Board in *Truman Medical Center*, notably, pointed out that the responsibility of the board of directors to public agencies, "while undoubtedly heavy, derive[d] from the contractual relations between [the hospital] and these political subdivisions, and is not the sort of direct personal accountability to public officials or to the general public to support a claim of exemption under Section 2(2)." Id. at 573.

The *CSAS* Board's "sole focus" was on the composition of the employer's board of directors and to whom the board members were accountable. The members of CSAS's board of directors were elected by the employer's shareholders, who could remove a director with or without cause. Furthermore, CSAS's corporate officers were elected or appointed by, and subject to removal by, the board of directors. The *CSAS* Board found that no person involved in running CSAS's corporate enterprise—not its board of directors, executive board, or administrative staff—was appointed by or subject to removal by any public official, and that there was no indication that the board of directors or corporate officers had any "direct personal accountability to public officials or the general electorate."[23] The *CSAS* Board concluded:

> Simply stated, no person affiliated with [the charter school], [the charter grantor], the relevant school district, the Michigan Department of Education, nor any other local or State official, has any involvement in the selection or removal of any members of [CSAS's] governing board . . . . The members of [CSAS's] board of directors are appointed by and subject to removal *only* by private individuals and not by public officials. Given the undisputed method of appointment and removal of board members, we find that none of the board

[19] *Hawkins County*, supra at 604–-605; *Regional Medical Center at Memphis*, supra at 359.

[20] We recognize that *CSAS* lacks precedential value. See *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010). But having carefully reviewed the decision in *CSAS*, we adopt its reasoning. We would reach the same conclusion here without relying on that case.

[21] *Hawkins County*, supra at 605; *Aramark Corp. v. NLRB,* 156 F.3d 1087, 1093 (10th Cir. 1998), vacated in part on rehearing en banc 179 F.3d 872 (10th Cir. 1999); *Research Foundation*, 337 NLRB at 969, citing *FiveCAP, Inc*., 331 NLRB 1165 (2000); and *Enrichment Services Program,* 325 NLRB at 819. "This requirement is consistently evidenced throughout Board decisions." *Regional Medical Center at Memphis*, supra at 359.

[22] *Research Foundation*, supra at 969.

[23] *Cape Girardeau Care Center*, 278 NLRB 1018, 1019 (1986). In *Mar Del Plata Condominium*, 282 NLRB 1012, 1014 (1987), the Board found no second prong exemption where the employer was a privately owned, operated and controlled corporation whose board of directors was chosen by the corporation's shareholders and responsible only to them.

> members are responsible to public officials in their capacity as board members and that, therefore, [CSAS] is not "administered" by individuals who are responsible to public officials or the general electorate [emphasis in original].

Supra at 398. The *CSAS* Board declined to look to any other factors in making its determination, finding the nature of the board's appointment and removal dispositive.

Although CMSA is not a charter school management organization, as was CSAS, it is, nonetheless, a private corporation whose governing board members are privately appointed and removed. Our sole focus is on the composition of CMSA's board of directors and to whom they are accountable, and we examine only the operations of CMSA, which itself is not a public charter school. The method of selection of CMSA's governing board members is dictated by its bylaws, and not by any law, statute, or governmental regulation. The bylaws provide that only sitting board members may appoint and remove other CMSA board members. Only board members may elect and remove CMSA's corporate officers, and only board members are selected to be included on CMSA's finance and audit committee. There is no dispute that CMSA, not Chicago Public Schools, appoints CMSA's board of directors, officers, and finance and audit committee members, none of whom is controlled by Chicago Public Schools. Simply stated, no person affiliated with Chicago Public Schools, the Chicago or State Boards of Education, the Illinois Department of Education, or any other local or State official has any involvement in the selection or removal of any members of CMSA's governing board. The members of CMSA's board of directors are appointed by and subject to removal *only* by private individuals and not by public officials.

Given the undisputed method of appointment and removal of CMSA's board members, we find that none of them are responsible to public officials in their capacity as board members, and that, therefore, CMSA is not "administered" by individuals who are responsible to public officials or the general electorate.[24] We conclude, therefore, that CMSA is not a political subdivision under the second *Hawkins County* prong. Contrary to the Acting Regional Director, we do not view the fact that CMSA's governing board is subject solely to private appointment and removal as merely *one* factor of many in a second-prong analysis. Rather, it is properly regarded as the critical and determinative factor in a second-prong analysis.

We recognize that the Board has, on occasion, explicitly referred to additional factors.[25] But it has done so only after making a political subdivision finding based on its examination of the method of appointment and removal of an entity's governing board.[26] As the *CSAS* Board correctly observed, the reference to other factors merely supports or reinforces the Board's determination.[27] Supra at 398 fn. 17. Where an examination of the appoint-

[24] Cf. *Oklahoma Zoological Trust*, 325 NLRB 171 (1997) (employer exempt from Board jurisdiction where city mayor appointed its governing trustees). Compare *Enrichment Services Program,* supra (employer not an exempt political subdivision where less than a majority of members of board of directors was comprised of public officials or individuals responsible to the general electorate); *Connecticut State Conference Board*, 339 NLRB 760 (employer that had a contract with the state to provide public bus service was not an exempt political subdivision where its managers were not responsible to public officials or the general electorate); *Morristown-Hamblen Hospital Assn.*, 226 NLRB 76 (1976) (privately-incorporated entity that operated a nonprofit hospital not an exempt political subdivision where, inter alia, some trustees served on board of trustees because of their public positions, but majority of trustees were private citizens).

[25] For example, after finding that the University of Vermont was a political subdivision controlled by the State of Vermont because 12 of 21 trustees were publicly appointed, the Board noted "other factors indicating that the University is a political subdivision." *University of Vermont*, 297 NLRB at 295. See also *Regional Medical Center at Memphis*, 343 NLRB at 360; *Truman Medical Center*, 641 F.2d at 572–573 fn. 2; and *Cape Girardeau Medical Care Center*, supra at 1019 fn. 5. The Supreme Court in *Hawkins County*, although finding that the gas utility district was a political subdivision *primarily* because the commissioners administering the district were appointed by an elected county judge and were subject to removal at the request of the governor or county prosecutor, considered "other factors" in determining whether the district operated in a manner "so as to constitute [a] department[] or administrative arm[] of the government." 402 U.S. at 604, 608–609.

[26] The exception is *Rosenberg Library Assn.*, 269 NLRB 1173 (1984), in which the Board found that the employer was an exempt political subdivision under prong two even though its trustees and directors were not appointed by public officials. The Board did not discuss how the trustees and directors could be removed. Among other factors, the Board noted that the respondent's librarian also served as the county and city librarian, and the respondent's directors served as directors of the county library's board. Id. at 1175. Those unique circumstances are not present here, but to the extent *Rosenberg* can be read to conflict with our decision today, it is overruled.

[27] Although not necessary to our determination that CMSA is not a political subdivision under the second *Hawkins County* prong, additional facts supporting that finding are that CMSA hires its own employees, establishes their pay and benefits, and developed its own personnel handbook. Although CMSA employees participate in the Chicago Public Schools pension plan, CMSA has the discretion to determine how much of the statutorily required contribution it will pay on behalf of its employees. Further, CMSA's board of directors retains control over CMSA's operations, including selecting and removing and fixing the salaries of CMSA's officers, agents, and employees and entering into contracts on behalf of CMSA. Additionally, CMSA's finance and audit committee is responsible for CMSA's overall financial management, and CMSA's board of directors approves CMSA's annual budget. Finally, CMSA does not appear to have any powers that are typically associated with public status. For example, CMSA does not have the power of eminent domain, nor does it have subpoena power, and it has no authority to assess or collect taxes or issue tax-exempt bonds.

ment-and-removal method yields a clear answer to whether an entity is "administered by individuals who are responsible to public officials or to the general electorate," the Board's analysis properly ends. [28]

CMSA is an Employer Within the Meaning of Section 2(2) of the Act, and the Board Should Assert Jurisdiction over It

In light of our finding that CMSA is not a political subdivision of the State of Illinois under *Hawkins County*, the only remaining jurisdictional question is whether CMSA is itself an "employer" within the meaning of Section 2(2) of the Act. *Management Training Corp*., 317 NLRB 1355, 1358 (1995). There is no dispute that CMSA controls most, if not all, matters relating to the employment relationship involving the petitioned-for teachers, i.e., CMSA hires, fires, pays, and provides them with most benefits.[29] In many, if not most, respects, this charter school case is not much different from other Board cases involving government contractors. Many government contractors are subject to exacting oversight in the form of statutes, regulations, and agreements. Yet the Board routinely asserts jurisdiction over private entities that provide services, under contract, to governmental bodies.[30] "The plain language of Section 2(2) 'exempts only government entities or wholly owned government corporations from its coverage—*not private entities acting as contractors for the government.*'" *Research Foundation,* 337 NLRB at 968, quoting *Aramark Corp. v. NLRB*, 179 F.3d at 878 (emphasis added).[31]

Amici NEA argue that even if the Board has statutory jurisdiction over CMSA, the Board should exercise its discretion and decline to assert jurisdiction over charter schools for policy reasons. Under Section 14(c)(1) of the Act, the Board may "in its discretion . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." Amici argue, in essence, that the state's obligation to provide public education is largely a matter of state and local concern, and that the state's regulation of charter schools creates a "special relationship" between charter schools and the state.

We are not directly presented with an issue of Federal-State comity here, however. No government entity—whether the State of Illinois, the Illinois Educational Labor Relations Board, the Illinois State Board of Education, the Chicago Public Schools, or the Board of Education of the City of Chicago—has endorsed the union amici's argument before us.

We have carefully considered the amici's contentions, as well as the views of our dissenting colleague, but we have decided that the Board should not, under Section 14(c)(1), decline to assert jurisdiction over CMSA. It is well established, of course, that the Board does not assert jurisdiction over public schools established by state or local governments, but that is because unlike CMSA, a private corporation, they do not come within the Section 2(2) definition of "employer." *Children's Village, Inc*., 197 NLRB 1218, 1220 (1972). As we have explained, CMSA was not established by a State or local govern-

[28] We recognize that CMSA's charter agreement with Chicago Public Schools is subject to extensive compliance and reporting requirements, including the submission of a proposed budget and various financial reports. CMSA receives 80 percent of its funding from Chicago Public Schools, which may revoke or not renew CMSA's charter, put CMSA on probation, or withhold funds in the event of a material breach of the charter. CMSA's teachers must be certified under the Illinois School Code and participate in the same assessments required of public school teachers, and they participate in the Chicago Public Schools pension fund. Finally, CMSA is subject to a variety of state statutes. These factors, however, do not speak to the crucial point here.

[29] *Recana Solutions*, 349 NLRB 1163, 1164 (2007) ("The employer in question must, by hypothesis, control some matters relating to the employment relationship, or else it would not be an employer under the Act"), citing *Management Training*, supra at 1358.

Our dissenting colleague finds "instructive" the "adjunct theory" on which the Board once relied in declining to assert jurisdiction over private, nonprofit schools that had contracts with local governments to provide educational services. But he acknowledges that the Board has long rejected that approach. See, e.g., *D. T. Watson Home for Crippled Children*, 242 NLRB 1368 (1979), overruling *Overlook School for the Blind*, 213 NLRB 511 (1974). The "adjunct theory" is at odds with the Board's current approach to the assertion of jurisdiction over government contractors, as set out in *Management Training*, supra.

[30] See, e.g., *Recana Solutions*, supra (private employer had contract with city to provide temporary day laborers); *Connecticut State Conference Board*, 339 NLRB 760 (employer managed and operated public bus system pursuant to contract with State); *Bergensons Property Services*, 338 NLRB 883 (2003) (private corporation provided cleaning services to University of California at San Diego); *Regional Construction Corp.*, 333 NLRB 313 (2001) (New York corporation performed road work for State of New Jersey); *Servicios Correccionales de Puerto Rico*, 330 NLRB 663 (2000), enfd. 234 F.2d 1321 (D.C. Cir. 2000) (Delaware corporation operated and managed prisons in Puerto Rico); *Correctional Medical Services*, 325 NLRB 1061 (1998) (private employer provided health care services at prisons pursuant to contract with state); *R & W Landscape & Property Management*, 324 NLRB 278 (1997) (private corporation provided cleaning and landscaping services under contract with Massachusetts Bay Transportation Authority).

[31] Courts of appeals have regularly agreed with the Board's assertion of jurisdiction over private employers. See, e.g., *Aramark Corp. v. NLRB*, supra at 874 (private corporation had contracts with county in Florida and with The Citadel, a military college owned and operated by State of South Carolina); *Pikeville United Methodist Hospital of Kentucky,* supra (private entity operated hospital under lease from the city); *Teledyne Economic Development v. NLRB,* 108 F.3d 56 (4th Cir. 1997) (private employer operated Job Corps Center under contract with Department of Labor); and *NLRB v. Federal Security, Inc.,* 154 F.3d 751 (7th Cir. 1998) (private employer hired by Chicago Housing Authority to provide security services).

ment, and it is not itself a public school. Notwithstanding the State's statutory characterization of charter schools as being "within the public school system," State law does not *mandate* the establishment of charter schools as a means of fulfilling "the state's obligation to provide public education" in the same manner that it mandates the establishment of public schools. The Board has long exercised jurisdiction over both nonprofit and for-profit private schools. See *Windsor School*, 200 NLRB 991 (1972); *Shattuck School*, 189 NLRB 886 (1971).[32]

Unlike our dissenting colleague, we do not find that the statutes and regulations that govern Illinois charter schools create a special relationship between CMSA and the State similar to the "unique relationship" that led the Board to decline jurisdiction in *Temple University*, 194 NLRB 1160, 1161 (1972). In that case, the University was designated by the Commonwealth of Pennsylvania as an instrumentality of the Commonwealth and made a "State-related university." The Commonwealth's involvement in the University's financial affairs was "substantial, if not controlling," and Commonwealth funds were used to upgrade the University's facilities, the title to which was held by the Commonwealth. Furthermore, the Commonwealth established Temple's 36-member board of trustees and decreed that one-third were to be "Commonwealth trustees"; that is, the Governor, the president pro tempore of the state senate, and the speaker of the state house of representatives were each authorized to appoint four trustees to 4-year terms. The governor of the Commonwealth, the mayor of Philadelphia, and the Commonwealth's superintendent of the department of public education were appointed ex officio members of the board of trustees.

The dissent's reliance on *Temple* is misplaced. First, the Chicago Board exerts far less financial control over CMSA than the Commonwealth did over Temple. Second, CMSA's governing board does not resemble the governing board of Temple. None of the seven members of CMSA's board of directors were politically or publicly appointed. CMSA's board members are selected by other board members, not by the local school district, not by Chicago Public Schools, and not by the Chicago Board. Significantly, the charter agreement between CMSA and the Chicago Board explicitly recognizes the private appointment method of CMSA's directors. These distinctions are clearly relevant to the Board's consideration of whether to decline jurisdiction in this case. See *Howard University*, 224 NLRB 385, 386 (1976).

Nor are we persuaded by our dissenting colleague's view that the Board's regulatory decision to decline jurisdiction over the horseracing and dogracing industries[33] serves as a guiding precedent here. That decision—which codified, through notice-and-comment rulemaking, the holding of prior cases—was tailored to the unique circumstances of the horseracing and dogracing industries, including, notably, the pattern of short-term employment, which minimized the industries' impact on commerce and posed obstacles to the potential effectiveness of the Board's oversight. The Board did not establish any general standard for the exercise of our discretion to decline jurisdiction.

To decline jurisdiction, of course, would deprive CMSA and its employees of the benefits of being covered by the Act. The Board has refused to take such a step in a broadly analogous case, where the private employees in question performed important public work subject to extensive government control. See *Firstline Transportation Security*, 347 NLRB 447 (2006) (asserting jurisdiction over private company providing airport passenger and baggage screening services, pursuant to contract with Federal Transportation Security Administration). In this area, we believe, the Board should act with great care. Under today's circumstances, and on the present record, we accordingly find no policy reasons to decline jurisdiction over CMSA.

We do note, however, that the proviso to Section 10(a) of the Act empowers the Board to enter into a cession agreement ceding its jurisdiction in any case in any industry, with certain exceptions not relevant here, to a State agency "unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of [the NLRA]." Neither the State of Illinois nor any agency of the State or City of Chicago, however, has petitioned the Board for negotiation of a cession agreement. Presented with such a petition, we would certainly consider whether we should cede jurisdiction to Illinois in this area. Cf. *Produce Magic, Inc.*, 318 NLRB 1171 (1995) (declining comity); *State of Minnesota*, 219

[32] The Board exercises its discretionary jurisdiction when doing so would effectuate the purposes of the Act and fairly protect the interest of employees. In keeping with these purposes, we have asserted jurisdiction over both private schools and nonprofit organizations, even when such entities have some relationship to the state or local government. See, e.g., *Boys &Girls Aid Society*, 224 NLRB 1614 (1976); *St. Aloysius Home*, 224 NLRB 1344 (1976). Sec. 14(c) of the Act manifests a congressional policy favoring the assertion of discretionary jurisdiction where "the Board finds that the operations of a class of employers exercise a substantial effect on commerce." *Cornell University*, 183 NLRB 329, 332 (1970). There is no suggestion here that CMSA does not "exercise a substantial effect on commerce."

[33] Sec. 103.3, Board's Rules and Regulations, 29 CFR § 103.3 (1989).

NLRB 1095 (1975) (declining to cede jurisdiction since statute was not parallel to NLRA).[34]

Conclusion

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

ORDER

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

MEMBER HAYES, concurring in part and dissenting in part.

I concur with my colleagues that Chicago Math & Science Academy (CMSA) is not a political subdivision exempt from the Board's jurisdiction under Section 2(2) of the Act, as interpreted in *NLRB v. Natural Gas Utility District of Hawkins County,* 402 U.S. 600 (1971). I also agree that the Board should not make a universal pronouncement in this case concerning the Board's jurisdiction in all charter schools as a class, considering that charter schools are created, designed, regulated, and operated differently in the various States, where their relationships to the States, local governments, and public school boards may vary substantially.

I am persuaded, however, by the arguments of amici that the Board should exercise its discretion and decline to assert jurisdiction over CMSA—and comparably-situated charter—schools—based on its official status as a public school, its integrated and highly regulated relationship with the State of Illinois and the Chicago Public Schools system, and its fundamentally local nature. Therefore, I would dismiss the petition.

The Act expressly authorizes the Board to decline to assert jurisdiction over a class of employers in certain circumstances.[1] Most notably, the Board has exercised this authority by declining jurisdiction over the horseracing and dogracing industries.[2] The Board has explained that these employers' operations, although not wholly unrelated to interstate commerce, are essentially local in nature, and that the various States in which they operate exert substantial control over them through extensive regulation, including State regulation of labor relations. The Board recognizes a "unique and special relationship" between the States and these employers, reflected in the States' continuing interest in and supervision over the industries.[3]

In my view, there is a similarly unique and special relationship between CMSA and the State of Illinois and city of Chicago, so that declining jurisdiction over this employer, and its like, would be conceptually consistent with our long-standing practice of declining jurisdiction in the racetrack industries.[4] As described below, the State's ongoing interest in and supervision of the public education of children is reflected in the elaborate statutory and regulatory framework within which CMSA is permitted to operate as a local public charter school.

The State of Illinois has authorized the creation of charter schools as an integral part of the public school system, established an extensive system of regulation pertaining to charter schools, and has endowed employ-

[34] If the Board were presented with such a petition, Member Griffin would be willing to revisit *Produce Magic's* interpretation of the scope of the 10(a) proviso.

[1] Sec. 14(c)(1) of the Act provides:

> The board, in its discretion, may, by rule of decision, or by published rules adopted pursuant to the Administrative Procedures Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

[2] Sec. 103.3, Board's Rules and Regulations. This Rule affirmed the Board's prior case precedent, which found that the extensive State regulation of horseracing and dogracing industries created a unique and special relationship between the States and employers in those industries. In addition, in adopting this Rule, the Board also considered that employment in the racing industries tended to be temporary or part-time. Id. Also see *Jefferson Downs, Inc.*, 125 NLRB 386 (1959), and *Hialeah Race Course, Inc.*, 125 NLRB 388, 390 (1959). Cf. *American Totalisator,* 243 NLRB 314 (1979), affd. in relevant part sub nom. *New York Racing Assn., Inc.*, 708 F.2d 46 (2d Cir. 1983), cert. denied 104 S.Ct. 276 (1983). I am aware, of course, that charter school and racetrack operations are different, but not meaningly so for purposes of determining whether to decline jurisdiction. I rely on an analogy to the Board's consideration of jurisdiction in the racing industries because, in my view, a "special relationship" is created by the State of Illinois' statutory and regulatory involvement in the establishment and oversight of charter schools. Whether or not CMSA's employees enjoy temporary or part-time status does not detract from my conclusion that CMSA's relationship with the State is comparable to those the Board has identified as exceptional in the racing industries.

[3] See 38 Fed. Reg. 9537 (April 17, 1973); *Jefferson Downs, Inc.*, supra; and *Hialeah Race Course, Inc.*, supra.

[4] The Board has also declined to assert jurisdiction in other industries for related reasons. See *Seattle Real Estate Board*, 130 NLRB 608 (1961) (real estate agents' practice is local); *United States Book Exchange*, 167 NLRB 1028 (1967) (nature of book exchange's operation is not commercial); *Evans & Kuntz, Ltd.*, 194 NLRB 1216 (1971) (law firm's practice is essentially local). See also *Temple University of the Commonwealth System of Higher Education*, 194 NLRB 1160 (1972), discussed infra.

ees of charter schools with public employee status. The Illinois Charter Schools Law defines a charter school as a "public, nonsectarian, nonreligious, non-home based, and non-profit school." It requires a charter school to be open to all students in the school district and prohibits charter schools from charging tuition. It also requires charter schools to comply with certain regulations specific to public bodies. Charter schools are also subject to freedom of information and open meetings requirements, and are bound by tort immunity laws that apply to other government entities. Charter schools are further required by statute to submit to financial, tax, and payroll audits. Finally, pursuant to its charter agreement with the Chicago Public Schools, CMSA is subject to extensive, regular reporting requirements and must obtain approval to subcontract its management or operations.

Significantly, labor relations within Illinois public schools are governed by a statute that expressly defines charter schools as "educational employers" subject to state labor laws. Charter schools must also contribute to state pensions in which their certified teachers and many other employees participate.

Although the State of Illinois' characterization of charter schools is not determinative of whether CMSA is a political subdivision, it is essential for the Board to consider what kind of entity the State envisioned when it created the framework within which CMSA is permitted to exist. It is true that charter schools, including CMSA, must initially exist as private nonprofit organizations before they can be authorized by the school districts to exist as charter schools. However, CMSA cannot exist as a charter school unless it becomes a functioning subdivision of the public school system pursuant to the above-defined statutory and regulatory scheme. In my view, this extensive statutory and regulatory system establishes the kind of special relationship the Board has found should cause it to decline jurisdiction in the past.

Apart from the racetrack industry, there is precedent for declining jurisdiction over an employer in the quasi-public education domain. The Board declined to assert jurisdiction in *Temple University,* 194 NLRB at 1161, based on a unique relationship between the private, nonprofit university and the Commonwealth of Pennsylvania. That relationship was symbolized by the Commonwealth's statutory grant to Temple of the status of "instrumentality of the Commonwealth, to serve as a State-related university in the higher education system of the Commonwealth" for the purpose of providing low-cost higher education to Commonwealth residents.[5] Notwithstanding a prior recent change in Board policy resulting in the general assertion of jurisdiction over private nonprofit educational institutions,[6] the Board nevertheless found that Temple's relationship with the Commonwealth was so extensive it had become a "quasi-public" institution.[7]

I find the relationships between CMSA and both the State of Illinois and the Chicago Public Schools are similarly entwined. My colleagues distinguish this case on factors that I consider immaterial to the essence of the comparison. Similar to Temple, CMSA is designated by State law as a charter school to be a public entity designed to serve a public purpose. As with Temple, state law requires that CMSA be open to students within a certain jurisdiction, and state law controls the tuition charged. By statute, Temple University was denominated an "instrumentality of the state" making it a public employer pursuant to the Commonwealth's public employee relations law. Similarly, CMSA, as a charter school, was denominated by statute to be a public employer, subject to State public employment relations law. Like Temple, CMSA is subject to extensive auditing and reporting requirements, receives the vast majority of its financing from the State or from Federal moneys to which the State is entitled, and submits its budget to a state entity for approval.[8]

Although, unlike in *Temple University*, the State does not appear to have an interest in CMSA's facilities and there are no politically appointed board members, I am not persuaded that these distinctions make a difference when weighed against the obvious similarities. Moreover, I consider it important that public education of children from preschool through high school is traditionally local in character, which is not necessarily the case for university education. In any event, that the special relationship described in *Temple University* is not identical to the one established between CMSA and State entities, does not detract from my conclusion that CMSA's status as a public school places it in a similarly special relationship with the State of Illinois.

[5] The Temple University Commonwealth Act, 24 P.S. Sec. 2510, et seq., quoted in *Temple University*, supra.

[6] *Cornell University,*183 NLRB 329 (1970).

[7] *Temple University*, supra.

[8] Although Temple University submitted its budget to the secretary of education who ultimately submitted it to the legislature to be part of the State budget and CMSA's budget is not a legislative line item, CMSA is required to submit its quarterly and annual budgets to the Chicago Public Schools for monitoring and evaluation.

[8] Although Temple University submitted its budget to the secretary of education who ultimately submitted it to the legislature to be part of the State budget and CMSA's budget is not a legislative line item, CMSA is required to submit its quarterly and annual budgets to the Chicago Public Schools for monitoring and evaluation.

I further find instructive the Board's reasoning in cases declining jurisdiction over private, nonprofit schools contracting with local governments to provide public special education services, such as *Overlook School for the Blind*, 213 NLRB 511 (1974), and *Laurel Haven School for Exceptional Children, Inc.*, 230 NLRB 1197 (1977). The Board considered in these cases that the schools served the important public purpose of providing public education to children, and the state agencies and school districts with whom they contracted asserted substantial control over the schools by extensive regulation of education and through their contracts. The Board concluded that the schools essentially functioned as "adjuncts" of the States' public school systems. CMSA's official status as a Chicago public school creates a relationship that is even closer to the State than the "adjunct" relationships found in those cases.

I recognize that the Board overruled the foregoing precedent in conjunction with redefinition of the test for asserting jurisdiction over government contractors.[9] Since then, the Board has further revised that test in *Management Training Corp.,* 317 NLRB 1355 (1995), and held that it would no longer evaluate the extent of operational control retained by a government contractor when determining whether to assert jurisdiction. Instead, the Board will look only to whether the employer meets the 2(2) definition of employer and the discretionary jurisdictional amount standard for its operations. Id. at 1358. I express no view whether *Management Training* was correctly decided because in any event I am not convinced that it should apply to charter schools like CMSA, which is not a typical government contractor.[10]

In sum, while CMSA is not a political subdivision of the State of Illinois or the city of Chicago, I would decline jurisdiction because it is so closely intertwined with and defined by those governmental entities in providing services of a peculiarly public and local nature. I also note that declining jurisdiction would not leave CMSA's employees without the possibility of collective-bargaining representation. It would only subject them to the same labor relations laws as are applicable to others who, like them, are defined by statute as public employees in a public educational system. Accordingly, I would dismiss the petition.

[9] See *D. T. Watson Home for Crippled Children*, 242 NLRB 1368 (1979), relying on *National Transportation Service*, 240 NLRB 565 (1979) (holding that Board would assert jurisdiction over employer that retained sufficient control over employment conditions of its employees to enable it to bargain effectively with a labor organization as their representative). See also *Res-Care, Inc*., 280 NLRB 670 (1986) (reaffirming and clarifying *National Transportation* test).

[10] In this sense, I find this csse distinguishable from the void two-member Board decision discussed with approval by the majority. *Charter School Administrative Services*, 353 NLRB 394 (2008). In *CSAS*, the employer did not hold a charter with the State, but was a contractor with the charter school. Thus, any special relationship that may have existed between the charter school and the State would not have raised the same concerns as those raised in this case. Moreover, unlike CMSA, CSAS's operation cannot be considered local, as it operated in several States.