

LATSHA DAVIS & McKENNA



ATTORNEYS AT LAW

PLEASE REPLY TO Exton
WRITER'S E-MAIL kcmckenna@ldylaw.com

January 30, 2015

Via Electronic Mail
and First Class Mail

Dennis P. Walsh, Regional Director
National Labor Relations Board, Region Four
615 Chestnut Street
One Independence Mall, 7th Floor
Philadelphia, PA 19106

Re: Employer: PA Virtual Charter School
Petitioner: PA Virtual Charter Education Association, PSEA/NEA
Case No.: 04-RC-143831
Our File No.: 872-14

Dear Director Walsh:

Enclosed please find the Brief of the Employer Pennsylvania Virtual Charter School in the above-referenced matter. An original copy of the brief was filed with the Board electronically on January 30, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kevin M. McKenna', written in a cursive style.

Kevin M. McKenna

cc: Kathleen O'Neill, Esquire (via email: Kathleen.oneill@nlrb.gov)
Annemarie Dwyer, Esquire (via email: adwyer@psea.org)
Dr. Joanne Barnett, CEO (via Electronic Mail)
Glenn Davis, Esquire (via Electronic Mail)

350 Eagleview Boulevard, Suite 100 • Exton, PA 19341 • (610) 524-8454 • FAX (610) 524-9383

1700 Bent Creek Boulevard, Suite 140 • Mechanicsburg, PA 17050 • (717) 620-2424 • FAX (717) 620-2444

3000 Atrium Way, Suite 251 • Mt. Laurel, NJ 08054 • (856) 231-5351 • FAX (856) 231-5341

Maryland Telephone: (410) 727-2810

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION FOUR

THE PENNSYLVANIA VIRTUAL CHARTER :
SCHOOL :

Employer, :

and :

PA VIRTUAL CHARTER EDUCATION :
ASSOCIATION, PSEA/NEA :

Petitioner. :

Case No.: 04-RC-143831

BRIEF OF EMPLOYER

Submitted by:

LATSHA DAVIS & McKENNA, P.C.



Dated: January 30, 2015

By:

Kevin M. McKenna, Esquire
Attorney I.D.No.: 47986
Glenn R. Davis, Esquire
Attorney I.D. No.: 31040
350 Eagleview Blvd., Suite 100
Exton, PA 19341
(610) 524-8454

Attorneys for Employer,
Pennsylvania Virtual Charter School

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**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION FOUR**

THE PENNSYLVANIA VIRTUAL CHARTER SCHOOL	:	
Employer,	:	
and	:	Case No.: 04-RC-143831
PA VIRTUAL CHARTER EDUCATION ASSOCIATION, PSEA/NEA	:	
Petitioner.	:	
	:	

BRIEF OF EMPLOYER
PENNSYLVANIA VIRTUAL CHARTER SCHOOL

I. Statement of the Relevant Facts

The Constitution of the Commonwealth of Pennsylvania requires that the state provide a thorough and efficient system of public education. Pa. Const. Art. III, §§ 14, 15. In order to achieve this mandate, the statutes of the Commonwealth’s General Assembly concerning public education are collected in The Public School Code of 1949 (“the Code”). The Code is implemented through the Commonwealth’s Board of Education (“the Board”) and the Department of Education of the Commonwealth (“the Department” or “PDE”). The Board has the power and duty to review and adopt regulations that govern educational policies and principles and establish standards governing the educational programs of the Commonwealth, upon recommendation of its Council of Basic Education. *Id.*

Per 24 PS § 26-2606-B:

“Statements of policy, standards, rules and regulations promulgated by the board shall be binding upon the Department of Education. The department shall submit to the board for approval, modification or rejection, all rules and regulations proposed by the department in the areas under the control of the board. The Department of Education shall furnish upon request of the board such data and information as the board may, from time to time, require, and the department shall provide administrative services for and on behalf of the board for the implementation of the board's statements of policy, standards, rules and regulations.”

In short, the Department of Education has the authority from the Commonwealth to implement regulations and policies to achieve the Constitutional mandate that the Commonwealth provide a system of public education. Pa. Const. Art. III, § 14. In order to achieve this mandate, the Department of Education oversees the public education system through a variety of means, including the creation and ongoing authorization of cyber charter schools. 24 P.S. § 17-1741-A. This implementation of the public education system by the Department is then supervised by the Pennsylvania Secretary of Education (“the Secretary”), who is directly appointed by the Governor of the Commonwealth, and who serves as both the head of the Department of Education and the chief executive officer of the Board of Education.¹

In the instant matter, the Pennsylvania Virtual Charter School (“PA Virtual” or “Charter School”) is a public school in the Commonwealth of Pennsylvania.² 24 P.S. § 17-1701-A *et seq.* Under statutory authority, the Department and the Secretary authorize PA Virtual to operate as a public cyber charter school in the Commonwealth. Pursuant to the Pennsylvania Charter School Law, PA Virtual is chartered through the Department and utilizes innovative teaching methods *within* the public school system. 24 P.S. § 17-1703-A; *see also* February 12, 2001 Resolution

¹ http://www.portal.state.pa.us/portal/server.pt/community/about_the_board/19678/overview/529077

² The Petitioner in this matter has stipulated that PA Virtual is a public school under Pennsylvania Law. *See* January 20, 2015 Transcript (hereinafter “Transcript”) attached hereto as “Exhibit 13” at 6:1-11.

and Charter Agreement, Employer Exhibit 1 (“Er. 1”). As a cyber charter school, PA Virtual must enroll students throughout the Commonwealth and cannot charge tuition.

Under the authority of the Department and applicable laws and regulations, PA Virtual provides students the same general educational services as traditional school district public schools, including a free and appropriate public education (“FAPE”) that is required by the Pennsylvania Public School Code, 22 Pa. Code Ch. 4. *See* 2010 Charter Renewal Application, Employer Exhibit 6 (“Er. 6”) at 43; *see also* July 27, 2011 Charter, Employer Exhibit 5 (“Er. 5”). Similar to a traditional public school district in Pennsylvania, PA Virtual is considered a local educational agency (“LEA”). Transcript at 14:6-10.

Pursuant to Act 88 of 2002, the Department became directly responsible for reviewing and granting applications and/or charter renewals for cyber charter schools. 24 P.S. § 17-1741-A(a)(1); Transcript at 20:1-9. PA Virtual is currently operating under its July 2011 Charter issued by the Commonwealth of Pennsylvania through the Department. Er. 5; Transcript at 19:21-20:9. More specifically, the Pennsylvania Secretary of Education at the time, Ronald J. Tomalis, granted and signed PA Virtual’s current charter, which is evidenced by the signature on the first page. Er. 5. Prior to the current charter, the Department previously renewed the Charter School’s initial charter on or about September 14, 2006, and as a result of a change in the law, PA Virtual’s charter (as well as those of all cyber charter schools) became directly authorized by the Department at that time. September 14, 2006 Charter, Employer Exhibit 4 (“Er. 4”). The 2006 Charter Renewal was signed by the then Secretary of Education, Gerald L. Zahorchak, and issued for a period of five years. Er. 4.

When the Charter School was first created, prior to the change in legislation as aforementioned, PA Virtual applied to the Norristown Area School District (that is also overseen

by the Department) in November of 2000 for its initial charter to operate as a public charter school pursuant to the Public School Code of 1949. Transcript at 78:15-17. On February 21, 2001, PA Virtual's initial charter agreement was approved by the Norristown Area School District for a five-year charter term. *See* Er. 1.

Currently, per both the Charter School Law and the Public School Code, the Department authorizes PA Virtual to continue operating as a public charter school through its current charter.

As required by Pennsylvania law, a charter school is also mandated to be incorporated as a public non-profit entity; in this case, PA Virtual is a non-profit corporation that operates strictly for educational purposes. Transcript at 18:17-24; *See* Articles of Incorporation, Employer Exhibit 2 ("Er. 2"). It was only **after** applying for the initial charter that PA Virtual applied for and was granted incorporation as a non-profit entity on or about January 16, 2001. In the Charter School's Articles of Incorporation, it expressly states that PA Virtual is to operate *solely for educational purposes*. Er. 2; Transcript at 78:15-17. If PA Virtual—as a public school—lost its charter (via revocation or nonrenewal by the Department) at any time, the non-profit entity would also cease to exist. Transcript at 18:17-24. All of the assets of Charter School would revert to its local "sister" public educational agency, which is the local intermediate unit or be otherwise distributed to other public school entities. Transcript at 18:17-19:1; 24 P.S. § 17-1729-A. The Articles of Incorporation reflect that PA Virtual is a *public* non-profit that is accountable to the taxpayers in the Commonwealth of Pennsylvania and which operates *exclusively* for educational purposes. Er. 2.

PA Virtual has operated, through the Department, as a public cyber charter school since 2001. However, since the creation of PA Virtual, there has been no history of collective bargaining. *See* Transcript at 7:11-17. In the instant matter, the proposed unit would consist of

all full-time and regular part-time K-12, Regular Education, Academic Support, and Special Education teachers, excluding managerial and non-professional employees, guards and supervisors as defined in the act.”³ See Transcript at 6:15-19.

II. Legal Argument

PA Virtual was created directly by the Commonwealth of Pennsylvania and continues to operate only through, and as a part of, the Department of Education. PA Virtual is also administered by public officials within the Commonwealth, including the Secretary of Education (appointed by the Governor) and the Auditor General. Further, there are also public officials within the Charter School itself; the members of the Charter School’s Board of Trustees are public officials by legal definition and are responsible for ultimate administration of the Charter School. The administration of PA Virtual is comprised of public officials under both the Pennsylvania Charter School Law and Public Official and Employee Ethics Act (“Ethics Act”), 65 Pa.C.S.A. § 1101 *et seq.*

As a result, PA Virtual is not subject to the jurisdiction of the National Labor Relations Board (“NLRB”) because of the “political subdivision” exemption within Section 2(2) of the National Labor Relations Act (“NLRA”). The definition of a “political subdivision” is set forth in a two-part test in NLRB v. Natural Gas Util. Dist. of Hawkins Cnty., 402 U.S. 600 (1971) (“Hawkins County”). In *Hawkins County*, an entity is defined as a “political subdivision” if it is

³ Pursuant to the Public Employee Relations Act, these individuals would constitute public employees, which are defined in the act as “any individual[s] employed by a public employer . . .” 43 P.S. § 1101.301. A **public employer includes** the “Commonwealth of Pennsylvania, its **political subdivisions including school districts** and any officer, board, commission, agency, authority, or other instrumentality thereof **and any nonprofit organization or institution** and any charitable, religious, scientific, literary, recreational, health, **educational or welfare institution receiving grants or appropriations from local, State or Federal governments. . .**” See 43 Pa. Stat. Ann. § 1101.301. As discussed *infra*, PA Virtual constitutes a public employer because, by definition, it is a political subdivision of Pennsylvania and its administration is accountable to public officials. Furthermore, evidence that these individuals are considered public employees is reflected in the requirement that “**all employees of a charter school shall be enrolled in the Public School Employee’s Retirement System . . .**” (“PSERS”). 24 P.S. § 17-1724-A(c). There is no option not to participate in PSERS. Transcript 51:8-16.

either created directly by the state or administered by individuals who are responsible to public officials or to the general electorate. *Id.* An entity can be classified as a political subdivision even if it only meets one prong of the *Hawkins County* test.

The NLRB previously considered the issue of whether an Illinois charter school was a political subdivision in the case of In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc., 359 NLRB No. 41 (Dec. 14 2012)(“CMSA”). In that case, the NLRB concluded that the charter school are not a political subdivision. Here, PA Virtual’s classification as a cyber charter school under Pennsylvania law as well as the differences between Illinois and Pennsylvania charter school laws make the instant matter highly distinguishable. As a result of the aforementioned, the NLRB lacks jurisdiction over PA Virtual.

A. *In Re Chicago Mathematics & Science Academy Charter School, Inc.* is Distinguishable by Both the Substance and Circumstances in that Matter

PA Virtual is exempt from jurisdiction of the NLRB because it meets the definition of a political subdivision of the Commonwealth of Pennsylvania within the meaning of Section 2(2) of the NLRA and under the *Hawkins County* two-prong test. In this matter, PA Virtual meets both prongs of the *Hawkins County* test based upon important factual and legal distinctions between itself and the charter school in *CMSA*.

In the aforementioned *CMSA* case, the NLRB found that the charter school was not exempt from its jurisdiction because the employer was not a political subdivision of the State of Illinois within the meaning of Section 2(2) of the NLRA. The Board applied the two-part test set out *Hawkins County*. Under the *Hawkins County* test, an entity may be considered a political subdivision (and therefore exempt from jurisdiction) 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.

Applying these criteria, the NLRB found that the Illinois charter school was not a political subdivision under the first analytical prong of *Hawkins County* because it was not created directly by any government entity, statute, or public official. Rather, it ruled the charter school was established by private individuals as a nonprofit corporation under the Illinois General Not-for-Profit Act and only *after* it was established and incorporated did the employer establish a charter school following the process set out in the Illinois Charter Schools Law. Under the second analytical prong of *Hawkins County* test, the NLRB also found that the charter school was not a political subdivision because it was not administered by individuals who were responsible to public officials or the general electorate. The NLRB concluded that members of the charter school's board of directors were appointed by and subject to removal only by private individuals and not by public officials.

The NLRB was careful to note that its ruling in *CMSA*, "***certainly do[es] 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.***" Rather, this decision was **explicitly** limited to Illinois law. This is an important factor to consider; while the Illinois Charter Schools Law, 105 ILCS 5/Art. 27A *et seq.*, and the Pennsylvania Charter School Law, 24 P.S. § 17-1701-A *et seq.*, share numerous provisions similar in substance, there are pertinent and noteworthy distinctions that exist between the laws.

(1) PA Virtual Meets the First Prong of the *Hawkins County* Test Because PA Virtual was Created Directly by the Commonwealth under Pennsylvania Law so as to Constitute a Department or Administrative Arm of the Government

Pennsylvania law specifically allows for the creation of “cyber charter schools” to be “established and operated under a charter *directly from the [Pennsylvania] Department of Education* (the “Department” or “PDE”).” *See* 24 P.S. 17-1703-A. While Illinois law does permit what it terms “virtual-schooling,” in Illinois schools such programs are chartered by a *local school district*. This is one critical distinction between *CMSA* and the instant matter.

As aforementioned, PA Virtual’s current charter was issued in 2011 *directly* from the Commonwealth of Pennsylvania, Department of Education, not a local school district. Er. 5; Transcript 80:1-5. In other words, PA Virtual operates directly through its charter issued by the Department of Education and, as a result, is a part of the public education system and the Department within the Commonwealth of Pennsylvania. Er. 5. For this pivotal reason alone, PA Virtual meets the requirements of a political subdivision under the first prong of the *Hawkins County* test. PA Virtual was directly created and continues to be administered by a department of the Commonwealth of Pennsylvania.

It is also critical to note that the “arm” of the Department “reaches” cyber charter schools in a much more direct capacity than brick-and-mortar charter schools or traditional school districts. As aforementioned, pursuant to Act 88 of 2002, the Department became directly responsible for reviewing and granting applications from cyber charter schools for charters and/or charter renewals. 24 P.S. § 17-1741-A(a)(1). Historically, Pennsylvania Charter School Law has developed to specifically address the differences between brick-and-mortar charters and cyber charter schools. Transcript 20:14-24. In fact, the Pennsylvania Charter School Law has a separate section that speaks specifically to cyber charter schools. 24 P.S. § 17-1745-A. The

Department also issues guidance that is applicable specifically to cyber charter schools (rather than all charters). Cyber Charter School Physical Facilities, July 2013 Basic Education Circular (BEC), Employer Exhibit 10 (“Er. 10”); September 2006 Cyber Charter School Basic Education Circular (BEC), Employer Exhibit 11 (“Er. 11”).

As stated during the hearing, cyber charter schools in Pennsylvania are legally required to enroll any compulsory school-aged student who reside anywhere within the Commonwealth. PA Virtual is required to have open enrollment in the same manner as any traditional public school district. However, a cyber charter school does not have the residential or geographic limitations of traditional school districts or brick-and-mortar charter schools when enrolling its students. Transcript 20:14-24; 24 P.S. § 17-1723-A. As cyber charters are obligated to enroll students throughout the Commonwealth, it would be logistically impossible for one traditional school district to retain oversight of a cyber charter school in Pennsylvania, which is typically how brick-and-mortar charter schools operate (as they are chartered through the traditional school district). Transcript 20:14-24; 24 P.S. § 17-1717-A. In this sense, cyber charters are much more intertwined and linked to the Department. Similarly, unlike a traditional brick-and-mortar charter school or a school district, Parents or other individuals with complaints against the Charter School are not required to “go up the food chain” of the local school district when they have a complaint against the cyber charter. Rather, a complaint relating to a cyber charter school, such as PA Virtual, can be directly filed with the Department. Transcript 48:22-49:5. For these reasons, a cyber charter school such as PA Virtual meet the first prong of the *Hawkins County* test; a cyber charter school functions within the Department.

In addition, the fact that PA Virtual is classified as a LEA also permits the Charter School to be eligible for and receive various public funds, including federal educational funds to which

governmental entities would not be entitled. If the Charter School was not a part of the public school system, it would not be eligible to receive these sources of funding, including funding under the Individuals with Disabilities Education Act (IDEA), Title I and Title II of the No Child Left Behind Act (NCLB) and other federal grant monies. Transcript 53:1-21, 97:6-98:1. For purposes of distribution of federal educational funding—through the Commonwealth of Pennsylvania via the Department—PA Virtual is considered its own “school district” and granted status as an LEA. PA Virtual’s recognition as an LEA exemplifies that the Charter School operates as a part of the public school system. Transcript 14:7-15, 97:6-98:1.

The conclusion that PA Virtual is a political subdivision within the meaning of the two-prong test is supported by Pennsylvania’s Commonwealth Court who, in the seminal case of Warner v. Lawrence, 900 A.2d 980 (Pa. Commw. Ct. June 2, 2006), affirmed a lower court’s ruling that stated in part, “charter schools are the creation of the legislature.”⁴ See also Slippery Rock Area Sch. Dist. v. Pa. Cyber Charter Sch., 612 Pa. 486, 490, 31 A.3d 657, 659 (2011) (“*[PA Cyber] is an independent public school operating under a charter granted by the [Department], initially effective July 1, 2000 to June 30, 2005 and currently renewed.*”). In *Warner*, a minor brought a negligence action against a Pennsylvania charter school for personal injuries the minor received while on the school premises. The Court held that (1) a charter school established under Pennsylvania’s Charter School Law was entitled to immunity under the state’s Tort Claims Act in the same manner as political subdivisions and local agencies, and (2) the legislature’s grant of immunity to the charter school did not violate the Open Courts provision

⁴ The impact of the *Warner* decision should not be lessened by the Third Circuit’s unpublished and therefore non-precedential ruling in Pocono Mt. Charter Sch. v. Pocono Mt. Sch. Dist., 442 F. App’x 681 (3d Cir. 2011) that the language in Section 1714–A of Pennsylvania’s Charter School Law stating a charter school may “sue and be sued ... to the same extent and upon the same condition that [a] political subdivision[] ... can be sued” does not equate to a charter school being a political subdivision. See Pocono Mt. Charter Sch., 442 F. App’x at 686. Upon that determination, Judge Rendell reversed the district court’s ruling based (apparently solely) on its interpretation of the above-referenced statute.

of the Pennsylvania Constitution. In this case, PA Virtual is chartered as a cyber charter school identical to Pennsylvania Cyber Charter School in the *Slippery Rock* case. Moreover, PA Virtual is its own local educational agency (LEA) (similar to a traditional public school district).

Transcript 14:6-10. For the foregoing reasons, PA Virtual meets the first prong of the *Hawkins County* test because it is a public school under the “arm” of the Department.

(2) PA Virtual Meets the Second Prong of the *Hawkins County* Test Because PA Virtual is Administered by Individuals who are Responsible to Public Officials.

PA Virtual likewise meets the second prong of *Hawkins County* because the Charter School is administered by individuals who are not only responsible to public officials but who are themselves deemed by statute to be public officials. Pennsylvania Charter School Law clearly states that “*trustees of a charter school shall be public officials.*” 24 P.S. 17-1715-A(11).⁵ No such provision exists in Illinois Charter Schools Law. This is a critical distinction from the facts of *CMSA* case. While the Board in *CMSA* found the Board of Trustees to be private individuals, here the Regional Director has no discretion to make such finding. The Pennsylvania legislature in its creation of Cyber Charter Schools has dictated that its Board of Trustees are public officials.

The administration of the school by public officials at PA Virtual is two-fold: (1) the Board of Trustees, comprised entirely of public officials (as defined under Pennsylvania law), directly administers the Charter School; and (2) these public officials on the Board are also

⁵ The members of the Board of Trustees, as public officials, are subject to Pennsylvania’s Public Official and Employee Ethics Act. Public official is defined as, “Any person elected by the public or elected or appointed by a governmental body or an appointed official in the executive, legislative or judicial branch of this Commonwealth or any political subdivision thereof, provided that it shall not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense or to otherwise exercise the power of the State or any political subdivision thereof.” 65 Pa. Cons. Stat. Ann. § 1102.

directly overseen and accountable to other public officials, primarily the Secretary of Education, under Pennsylvania law.

(i) The Public Officials on the Board of Trustees Are Directly Overseen and Accountable to Other Public Officials in the Commonwealth

As discussed herein, the members on the Board of Trustees are by legal definition public officials under both the Charter School Law and the Ethics Act. 24 P.S. 17-1715-A(11); 65 Pa. Cons. Stat. Ann. § 1102. Therefore, the Board consists of public officials who administer the Charter School. However, the administration of PA Virtual by public officials goes a step further and reaches outside of the Charter School itself. First, the Board of a Pennsylvania cyber charter school is closely overseen and regulated by the Department and specifically Pennsylvania's Secretary of Education by various means; the Secretary not only issues and renews the Charter School's charter, through her/his Department as charter authorizer, but also provides direct oversight of the Charter School on an ongoing and continuous basis. This role of the Department as authorizer of PA Virtual is not complete upon signing the charter agreement.

PA Virtual must report annually to and is overseen directly by the Commonwealth of Pennsylvania through the mandated annual filing of the school budget, filing of an annual audit report, and obligation to allow the Department to conduct on-site visits and have open access to school records. Transcript 23:19-24:3, 26:23-27:2, 31:14-21, 40:4-8, 49:17-18, 50:3-9, 70:12-17, 72:13-22. The Department regularly and annually reviews the Charter School's finances, operations, and educational programming or curriculum. The Department dictates the curriculum to be utilized by the Charter School, critiques the finances and operations and even oversees and scrutinizes the election process for Board Members. Transcript 25:19-27:25, 30:1-31:13, 40:4-8, 71:5-17, 72:13-22, 114:21-115:5; Er. 6. The Department, at least every two

years, physically comes to PA Virtual's offices and conducts an onsite visitation and review to ensure the Charter School is compliant with state laws and regulations. Transcript 23: 19-24:3. As discussed in the Basic Education Circular (BEC) relating to cyber charter schools dated September 2006, the onsite visits from the Department including all of the following:

“As part of the site visit the PDE staff will expect to be provided access to the following information:

- Student performance data eg. Reports cards, attendance records, discipline, etc
- Professional development plans for staff
- Enrollment records
- Teacher criminal history and child abuse reports
- Direct observation of teachers working with students
- Hardware and software used by the school
- Board of Trustee meeting minutes
- Board approved school calendar
- Fiscal records
- Audit reports
- Lease or purchase agreements for school building/office
- Lease or purchase agreements for student supporting equipment
- Parent, student and teacher handbooks
- School policies related to student and teacher conduct
- Administrative procedures for parent/student input and complaints
- Student health records and academic files
- Special education student records with IEP's
- ***Other items as deemed necessary by PDE staff***

Employer Exhibit 11 (“Er. 11”).

Aside from just providing access to records during onsite visits, the Department even has involvement in the staffing decisions of the School, including professional development, hiring, firing and discipline of teachers. Transcript 73:18-74:6; Pa. Stat. Ann. tit. 24, §§ 2070.1a to 2070.18a.

As testified to by PA Virtual's CEO, Dr. Barnett, in order to even get a charter approved by the Department, PA Virtual must subject itself to extensive access and oversight to the Department:

Q. What type of information does your school have to provide to the Department of Education to get that charter issued?

A. Everything. But let me be very specific. We have to provide the philosophy of the school. We have to -- many of the things that you would find in Act 14 of the Public School Code under the duties and powers of the school, all of those things are picked up in this renewal application, so we have to describe the instruction of the program. We have to give an overview of the board. We have to talk about student performance in relationship to student achievement on mandated state assessments. We have to talk about the teachers. We have to give an overview of the finances of the school. We have to give an overview of the operation of the school. And then we give any anticipated changes. We have to give an overview of special education. **So when I said everything, it really is all-encompassing."**

Transcript at 30:1-16.

The continuous responsibility to and oversight by public officials is further exemplified by PA Virtual being required to submit a mandated annual audit report to the Department. Transcript 26:25-27:1, 40:4-8. The information contained in the audit report is not only comprehensive, but also the same detailed information mandated by PDE for other public schools. Transcript 23:19-24:3, 26:23-27:2, 40:4-8, 70:12-17, 72:13-22. In addition to this annual audit report, PA Virtual is also required to file an annual budget to the Department, on the PD-2028 Form, that contains specific information mandated by the Department. Transcript at 31:14-21, 49:17-18, 50:3-9. PA Virtual is then further required, by PDE, to publically post its annual budget on the school website per mandates by the Department. Transcript at 37:6-17, 50:3-9. The entirety of the Charter School's funding or monies consists of public state and federal revenue; PA Virtual is a non-profit entity and does not charge tuition. Transcript 28:13-23, 52:14-23. As a result, the Charter School is obligated to provide the public access to its budget.

As discussed *supra*, PA Virtual as a cyber charter school enrolls students from throughout the Commonwealth of Pennsylvania and, therefore, this oversight by the Department of the Charter School becomes extremely extensive. The extent of this oversight is reflected in the various forms of guidance issued by the Department to cyber charter schools. Guidance on administration of cyber charter schools is issued by the Department in various forms, most notably its Basic Education Circular (“BEC”). BECs are issued from the Department to the Charter School. *See* Transcript at 46:8-47:1. From the outset, the BEC relating to cyber charter schools makes clear that “cyber charter schools are established when the [Department] grants the cyber charter applicant a charter.” Er. 11.⁶ Various other references within this BEC also exemplify that a cyber charter school is beholden to the Department and that the Charter School here falls within the political subdivision status under *Hawkins County*. Er. 11. These references include:

PDE is responsible for the oversight of cyber charter schools that it has chartered, including decisions whether to renew, non-renew or revoke the charter.

If a cyber charter school wants to amend its charter, it must provide PDE’s Division of Nonpublic, Private and Charter School Services with a written proposal outlining the amendment, at least 60 days prior to submission of the amendment, explaining the requested amendment and its purpose. PDE will notify the cyber charter school, in writing, that it approves or disapproves the proposed amendment and its effective date. Please note: The cyber charter school may not unilaterally amend material provisions of its charter, including but not limited to: changing its curriculum, changing its location, or changing its mission and focus.

When PDE denies a cyber charter school applicant a charter, the applicant may revise and resubmit the denied application or may appeal the denial to the Charter Appeal Board. A cyber charter school applicant may only revise and resubmit a denied application

⁶ This unqualified statement confirms PA Virtual’s status as a political subdivision under the first prong of the *Hawkins County* test.

to PDE one time. Any revised and resubmitted application must be provided to PDE within at least 120 days prior to the originally proposed opening date of the cyber charter school.⁷

As public officials, members of the Board of Trustees of a charter school are subject to the provisions of the Public Official and Employee Ethics Act, 65 P.S. §1101-1113 (“Ethics Act”) and are required to file Statements of Financial Interest & Code of Conduct by May 1 each year. In addition, as members of the Board of Trustees they have legal obligations under the Charter School Law and the Public School Code. A Board of Trustees has a responsibility to be a good and effective steward of public money, and it needs to provide independent governance of the charter school’s administrators.

Section 1741-A [of Pennsylvania’s Charter School Law] has established certain powers and duties upon PDE. Those duties include annually assessing: (1) whether a cyber charter school is meeting the goals of its charter; (2) whether a cyber charter school is in compliance with its charter; and, (3) the cyber charter school’s performance on the PSSA, standardized tests and other performance indicators to ensure compliance with academic standards. PDE must also conduct a comprehensive review of a cyber charter school prior to granting a five-year renewal of the charter. 24 P.S. §17-1742-A. This review will include, but not be limited to, an examination of specific program areas by PDE staff.

PDE will arrange periodic visits to the cyber charter school main offices and/or other educational sites, which may include random parent and student contacts.

To help PDE perform the annual assessment, all charter schools are required to submit an Annual Report to PDE no later than August 1 of each year. This document is an important tool for evaluation of the cyber charter school. The information collected from the Annual Reports will be used to help make decisions about renewal or non-renewal of the charter. Repeatedly submitting Annual Reports after the due date or providing insufficient information may constitute a material violation of the charter. If a cyber charter school fails to provide an Annual Report by August 1, PDE will provide written notice to the cyber charter school that

⁷ Over the last two years, approximately seventeen cyber charter school applications (*i.e.* eight in 2012, six in 2013 and three in 2014) have been submitted to PDE for review and consideration. All seventeen applications have been denied and as such, no cyber charters schools have been established during that period. In other words, it is evident that a cyber charter school can only exist as part of the Department.

failure to provide the Annual Report within a reasonable amount of time may result in the initiation of revocation proceedings.

As part of PDE oversight the cyber charter schools are required to provide PDE staff access to records, instructional materials and student and staff records 24 P.S. §17-1742-A.

Cyber charter school offices and education centers shall be available for PDE staff to visit any time the school is in operation and interacting with students. Refusal of a cyber charter school to allow PDE access to any facility may result in the initiation of revocation proceedings.

[PDE] is responsible for the intake, investigation and resolution of complaints concerning students enrolled in cyber charter schools.

PDE also has the authority to immediately revoke the charter of a cyber charter school if: (1) a material component of the student's education as required under subdivision (c) of the Charter School Law is not being provided; or (2) the cyber charter school has failed to maintain the financial ability to provide services required under subdivision (c) of the Charter School Law. 24 P.S. §17-1741-A (3)(ii).

Er. 11; 65 Pa. Cons. Stat. Ann. § 1102.

This BEC also evidences that PA Virtual meets the “responsible to” requirement in the second prong proxy of *Hawkins County* when the statute provides the Department with the power to immediately revoke a public *cyber* charter school's charter if a material component of a student's education is not being provided or if the public cyber school has failed to maintain financial responsibility. Er. 10; 24 P.S. § 17-1729-A. The Department's ability to immediately revoke a public cyber school's charter and put it out of existence gives the Department far more power and oversight over a *cyber charter school* than the Department holds over a traditional public school district or even a brick-and-mortar charter school. As with most of these controls, they appear to be much more stringent than those in the *CMSA* matter.

Aside from the direct oversight and administration by the Department via regulations and state law, PA Virtual is additionally subject to oversight from the Pennsylvania Auditor General (an elected official). The Auditor General functions as the “fiscal watchdog of the Commonwealth of Pennsylvania.” Transcript 106:19-25. PA Virtual was audited recently by the Auditor General in 2008. Transcript at 30:4-8; *see also* Auditor General Report, Employer Exhibit 9 (“Er. 9”). In order to comprise their Audit Report, representatives of the Auditor General spent “three-and-a-half to four weeks” or “quite some time” onsite at PA Virtual reviewing “everything” and “every corner” of the Charter School, which included all of the operation and financial records of the Charter School. 42:5-8, 106:16-18.

As stated explicitly in the Auditor General’s Audit Report, the goal of the Audit is:

- to determine whether the charter school complied with the compulsory attend provisions in accordance with both Section 1327⁸ and Chapter 11 of the State Board of Education Regulations⁹ (Regulations) and, if not, whether the charter school removed days in excess of ten consecutive unexcused absences from the school’s reported membership totals pursuant to 22 Pa. Code § 11.24 of the Regulations.¹⁰
- to determine whether each of the charter school’s trustees and administrators . . . complied with the Code and the Public Official and Employee Ethics Act¹¹ . . .
- to determine whether the charter school complied with Section 1303-A of the Code¹² . . .
- to determine whether the charter school is in compliance with Section 17-24-A(c) of the Law¹³ requiring all employees of the charter school be enrolled in the Public School Employees’ Retirement System . . .; and
- to determine whether the charter school is in compliance with Section 1728-A of the Law¹⁴ requiring each charter school to assess whether it is

⁸ 24 P.S. §13-1327

⁹ 22 Pa. Code, Chapter 11

¹⁰ 22 Pa. Code 11.24

¹¹ 65 Pa.C.S.A. § 1101 *et seq.*

¹² 24 P.S. § 13-1303-A(c)

¹³ 24 P.S. § 17-1728-A(c)

¹⁴ 24 P.S. § 17-1728-A

meeting the goals of its charter and to submit a report of its assessment to [the Department] no later than August 1 each year.

Er. 9.

Once the Auditor General completed the Audit Report of PA Virtual, it was distributed to the Pennsylvania House of Representatives and Senate Education Committees, the Governor's Office and the Department of Education. Transcript at 43:15-44:6; Er. 9 at 25, 27. PA Virtual is held accountable by the Department for the findings of the Auditor General in the Audit Report.

Er. 9.

PA Virtual is also accountable to public officials through the numerous provisions within Pennsylvania's Charter School Law, which evidence and outline a cyber charter school's responsibilities to the Department. The ways in which Pennsylvania law holds cyber charter schools accountable to public officials extends far beyond the Charter School Law itself. In Pennsylvania, cyber charter schools must also comply with a plethora of other laws similarly applicable to Pennsylvania's traditional school districts. These laws include, but are not limited to, the public bidding statute,¹⁵ Public Works Contractors' Bond Law,¹⁶ the Pennsylvania Prevailing Wage Act,¹⁷ the Steel Products Procurement Act,¹⁸ the Right-to-Know Act,¹⁹ the Sunshine Act²⁰ and the Ethics Act.²¹ All of these Pennsylvania state laws consider PA Virtual to be a public employer or effectively as political subdivision of the Commonwealth by holding the Charter School accountable to public officials.

¹⁵ 24 P.S. §§ 7-751 and 7-751.1.

¹⁶ 8 P.S. § 191 *et seq.*

¹⁷ 43 P.S. § 165-1 *et seq.*

¹⁸ 73 P.S. § 1881 *et seq.*

¹⁹ 65 P.S. § 67.101 *et seq.*

²⁰ 65 Pa.C.S.A. § 701 *et seq.*

²¹ 65 Pa.C.S.A. § 1101 *et seq.*

(ii) Under the Authority of the Department, State and Federal Laws and Regulations, the Public Officials on the Board of Trustees Maintain Control Over Charter School Administration Including the Charter School's Educational Programing, Staffing and Finances

Under the Charter School Law, the Board of Trustees:

“The board of trustees of a charter school shall have the authority to decide matters related to the operation of the school, including, but not limited to, budgeting, curriculum and operating procedures, subject to the school's charter. The board shall have the authority to employ, discharge and contract with necessary professional and nonprofessional employees subject to the school's charter and the provisions of this article..”

24 P.S. §17-1716-A(a).

As discussed *supra* and mandated by the Charter School Law, the Board of Trustees (“the Board”) is comprised entirely of public officials. 24 P.S. 17-1715-A(11). As outlined in the Articles of Incorporation, PA Virtual was established under Pennsylvania law as a **public non-profit** that is accountable to the taxpayers in the Commonwealth of Pennsylvania. Er. 2.

While PA Virtual has a provision in its bylaws similar to the charter school in *CMSA*, whereby its Board of Trustees elects its own members, the critical difference is that in Pennsylvania, and as dictated by Pennsylvania law, such new members are elected by existing trustees in **their capacity as public officials** and not as private citizens. Unlike the *CMSA* scenario, by Pennsylvania statute the trustees of PA Virtual (as an independent public school), are public officials. 24 P.S. 17-1715-A(11) and (12). The Pennsylvania scheme making the Cyber Charter School Board of Trustees public officials is much broader. Pursuant to the Pennsylvania Sunshine Act, 65 Pa.C.S.A. § 701 *et seq.*, the public officials serving as members of the Charter School's Board of Trustees must vote during public session at a publically-advertised meeting when conducting any official business, which includes election of new board members or new public officials. 65 Pa.C.S.A. §§ 704, 705. As stated in the Charter School's

own Bylaws, the members or public officials on the Board of Trustees must be voted on in “an open, public ballot.” *See* September 16, 2011 Amended Bylaws, Employer Exhibit 7 (“Er. 7”) at 2.

The members of the Board of Trustees at PA Virtual can typically only be removed by other members of the Board of Trustees.²² Transcript 62:24-63:3. In addition, as public officials, the members of the Board of Trustees and the chief school administrators, who report directly to the Board, are legally required to take various actions that are required of public officials or public employees under Pennsylvania law including the Ethics Act. These actions include avoiding conflicts of interest and the filing of Statement of Financial Interests (SOFIs) that are required under the Ethics Act. 65 Pa.C.S.A. §§ 1103, 1104. The entire Pennsylvania statutory framework for cyber charter schools sets up a scheme where the school’s Board of Trustees have the heavy obligations and responsibilities because they are public officials.

Similar to the oversight that a board of directors provides for traditional public school, the Board here is also responsible to oversee finances of PA Virtual. *See* Transcript 49:20-24, 108:21-25. As testified to by PA Virtual’s Chief Financial Officer, Jose Parrilla (“Mr. Parrilla”), during the hearing:

- Q. Mr. Parrilla, who in the school is the ultimate -- the person that has the ultimate responsibility of the finances of the school?
- A. The board of trustees has the ultimate responsibility for the finances of the school.

Transcript at 108:21-25.

In addition to being comprised entirely of public officials, the Board provides direct and extensive oversight and guidance to the Charter School’s CEO and other staff. As a result, the

²² In some limited circumstances, such as in the event of revocation or nonrenewal of a charter, the Department may be able to sanction the Charter School via removal of board members. Transcript 62:24-63:3; 24 P.S. § 17-1729-A.

School's day-to-day operations are managed and administrated by individuals who report directly to public officials. More specifically, the Chief Executive Officer ("CEO") of PA Virtual, Dr. Joanne Barnett ("Dr. Barnett"), has to be appointed by the Board to oversee and manage the Charter School. Transcript at 12:3-12; *see also* 24 P.S. § 17-1703-A; Er. 7 at 8. In her position as CEO, Dr. Barnett is responsible to report to and is held accountable by the Board, which is comprised entirely of public officials per the Charter School Law. Dr. Barnett is required specifically to administer the Charter School by "... carrying out policies that are approved by the [B]oard." Transcript 12:3-12. Furthermore, as stated in the Bylaws:

"School CEO: The CEO shall attend all meetings of the Board of Trustees. ***The CEO serves in an advisory capacity to the Board.*** The CEO shall not vote at meetings, nor shall the CEO's absence or presence be counted towards reaching quorum."

Er. 7 at 12.

In fact, all employees of PA Virtual are overseen by the Board of Trustees; the Board of Trustees is responsible for all hiring and discharge of employees and setting employees' pay rates. *See* Transcript at 69:20-70:1; *see also* Er. 7 at 8-9. Furthermore, the Board also controls all of the financial operations of the Charter School and is responsible for submission of the Charter School's renewal applications. Er. 7 at 7. These applications are extremely detailed and outline the entire operation of the school, including the staffing of the Charter School. Once approved by the Department, the detail becomes a legally-binding agreement between the Charter School and the Department by which the Charter School must be operated. Er. 7; Transcript 23:11-14. Finally, and perhaps most importantly, the public officials on the Board are also responsible for establishing all of the policies and procedures (in compliance with state and federal law and the regulations of the Department) under which PA Virtual operates. Er. 7 at 8. This includes

policies relating to employment (as well as curriculum, student assessment and achievement, and all contracting). Er. 7 at 8.

Per its Bylaws, the Board is also responsible for ensuring that the Charter School's funding is dispersed only for charter school purposes. The Board is required to adopt an annual budget, authorize an annual audit by an independent certified accountant, and to authorize acquisition, management and disposition of all property, among other responsibilities. Er. 7 at 8. The Board also prepares and adopts an annual budget for PA Virtual in accordance with the Public School Code of 1949. Transcript at 98:16-25. The Board is obligated, under its By Laws, to ensure "that the School is run in compliance with the Charter Application, all applicable laws and ensur[e] that the school remains financially viable." Er. 7 at 7.

Furthermore, the Board also votes and requires an affirmative vote of the majority of the quorum of present Board members, at a public meeting, on all business and actions. Er. 7 at 2. As outlined in the By Laws, the Board shall also execute a written charter with the Department, adopt curriculum or courses of study, establish and maintain all policies and procedures regarding employment, approve the appointment of the Chief Executive Officer (CEO), designate depositories for school funds, establish enrollment policies and procedures, approve and ratify all policies and procedures to assess student achievement, approve and ratify *all* contracts, appoint a hearing officer to hold hearings regarding recommendations for student suspension or expulsion, among other responsibilities. Er. 7 at 8-9.

As a result of the administration of the Charter School by public officials, PA Virtual is a "political subdivision" of Pennsylvania, which falls within the statutory jurisdictional exception. The instant matter is unlike other cases where the NLRB has justifiably asserted jurisdiction over employers in the matter at issue, In *Charter School Administration Services*,

Inc. & Michigan Association/NEA, 353 NLRB 394 (2008), the NLRB found that the employer, a private for-profit corporation, was not a political subdivision of the State of Michigan and, therefore, not exempt from the Board's jurisdiction. In *Charter School Administrations Services*, the charter school had a contract to be operated by a for-profit corporation, which the NLRB concluded managed the educational program and financial aspects of the school's operations. *Id.* Following the test set out in *Hawkins County*, the Board examined the operations of the private for-profit employer and found that the members of the board of directors were appointed and removed by the corporation's shareholders and not by any public officials. *Id.* Therefore, the NLRB found that none of the directors or corporate officers had "direct personal accountability to public officials or the general electorate," and the for-profit corporation was not administered by individuals who are responsible to public officials or the general electorate. *Id.* Thus, the for-profit corporate employer was not exempt from NLRB jurisdiction. Here, that is not the case.

Although Counsel for the Petitioner in cross examination attempted to differentiate between the Board of Trustees of the Charter School and the Board of a traditional public school district, Counsel's assertions were both inaccurate and based on Form without substance. During the hearing, Counsel incorrectly tried to assert that PA Virtual's Board of Trustees is not elected and that, because the election of the PA Virtual Board may vary from a traditional public school district using a general election, PA Virtual is somehow not a public school or employer. However, members of the Board of Trustees for PA Virtual are indeed elected and meet the *Hawkins County* requirements. As outlined *supra*, the members of the Board of Trustees are (a) public officials, (b) elected by other public officials, (c) during a public vote and (d) during a vote that occurs at an advertised public meeting session. *See also* Transcript 33:21-34:1; Er. 2; 24 P.S. § 17-1716-A(c); 65 Pa.C.S.A. § 704. In summary, members of the Board of Trustees for

PA Virtual are elected and that election is conducted publically by individuals defined as public officials under Pennsylvania law. *Id.*; 24 P.S. 17-1715-A(11). Furthermore, Counsel for Petitioner failed to reference that members of the traditional school district boards are frequently appointed or elected by other board members rather than being “elected” by members of the general public.

Nonetheless, as outlined in *Hawkins County*, the second prong of the test only requires that the Charter School be *administered* by public—not necessarily elected—officials. In the instant matter, PA Virtual has sufficiently demonstrated that the Charter School is administered by public officials as defined expressly defined within The Charter School Law and the Ethics Act. 65 P.S. § 1102; 24 P.S. 17-1715-A(11). Further, the Public School Code, Charter School Law and PA Virtual’s own Bylaws delineate all of the manners in which the School is administered by public officials. 24 P.S. §§ 17-1703-A, 17-1716-A; Er. 7 at 8-9; 2004 Charter School Basic Education Circular (BEC), Employer Exhibit 8 (“Er. 8”); Er. 11.

The findings in *Charter School Administrations Services* and *Hawkins County* and the basis upon which NLRB jurisdiction was established are in direct contrast to the operations at PA Virtual. In the instant case, the Board of Trustees comprised entirely of public officials, and that Board maintains strict control over both the finances and educational operations of the Charter School. There is no for-profit corporation that would or could be the employer of the Petition’s proposed bargaining unit teachers. Under both Pennsylvania Law and precedent set in previous NLRB opinions, the NLRB lacks jurisdiction over the cyber charter school and the proposed bargaining unit in this matter.

B. Statutory Provisions Contained Within State Law Also Make Clear that the Pennsylvania Legislators Intended for Cyber Charter Schools to Fall Under the Jurisdiction of the Pennsylvania Labor Relations Board

It is apparent that the Pennsylvania General Assembly intended for union activity at charter schools to fall within the scope of the state law and therefore within the jurisdiction of the Pennsylvania Labor Relations Board (“PLRB”). As expressly stated in the Charter School Law, “Employees of a charter school may organize under the [Public Employee Relations Act].” 24 P.S. § 17-1724-A(a). By including this authorization provision, the legislators intended for cyber charter schools to be public employers under jurisdiction of the Pennsylvania Public Employee Relations Act in the same manner as any public school district in the Commonwealth.

Further, there are several state statutory provisions in state law that specifically address union activity. For example, under Pennsylvania law, unions are limited to two strikes during a given school year. *See* 24 P.S. § 11-1101-A. (“The employee organization having called a strike once and unilaterally returned to work may only call a lawful strike once more during the school year.”). Moreover, advisory arbitration is mandatory when a strike will prevent the school entity from providing 180 days of instruction before June 15 or the last day of the scheduled school year, whichever comes first. *See* 24 P.S. § 11-1125-A(b).

Pennsylvania’s Secretary of Education may also seek an injunction when the union has been on strike long enough that the school entity will not be able to provide 180 days by June 30. *See* 24 P.S. § 11-1161-A. Under federal law, there is no limitation on the number or length of strikes and such other methods incorporated into Pennsylvania’s Public School Code to promote student success are likewise lacking. Subjecting Pennsylvania’s charter schools to the NLRB’s jurisdiction would grant the federal government power to control at least a substantive portion of Pennsylvania’s educational system and remove it from Secretary of Education’s control, a

scheme never contemplated by the Pennsylvania legislature when creating this alternative system of public education.

C. The NLRB’S Regional Director’s Decision in the Region Six Case Regarding *The Pennsylvania Cyber Charter School* is Distinguishable

(1) The Decision Contained a Legal Inaccuracy Because the Department can Legally Discipline, Suspend and Terminate the Charter School Employees Who are Members of the Potential Bargaining Unit

The Decision in *The Pennsylvania Cyber Charter School* concluded that the employees of the charter school in that case were not subject to be hired, fired and/or disciplined by the Department. *The Pennsylvania Cyber Charter School*, Case 06-RC-120811 (2014) at p. 7-8 (“PA Cyber”). However, the Department does in fact have the power to both discipline and/or terminate the employees in the proposed bargaining unit in the instant matter. Transcript 73:18-74:6; Pa. Stat. Ann. tit. 24, §§ 2070.1a to 2070.18a. The Professional Practices and Standards Commission (consisting of members appointed by the State Governor and approved by consent of a majority of the State Senate) under the Educator’s Discipline Act is able to direct the Department to: (a) suspend an educator’s certificate and employment eligibility for criminal offenses; (b) issue discipline against any educator for conduct not permitted under § 2070.9c(a); (c) direct the Department to revoke a certificate and employment eligibility of an educator who is a named perpetrator of a founded report of child abuse or responsible for injury or abuse in a founded report for a school employee; and/or (d) immediately reinstate a certificate and employment eligibility upon receipt of a certified document indicating a founded report of child abuse founded report for a school employe was reversed or determined to be unfounded. 24 P.S. §§ 2070.9b, 2070.9c, 2070.9d. An educator is defined by the Educator’s Discipline Act to include any person “who holds a certificate, who is a charter or cyber charter school staff member or who is a contracted educational provider staff member.” 24 P.S. § 2070.1b. In this

instant case, the proposed bargaining unit would consist of all full-time and regular part-time K-12, Regular Education, Academic Support, and Special Education teachers. Transcript at 6:15-19. At PA Virtual, 100% of the teachers are certified; Dr. Barnett was explicitly asked and testified that “100 percent” of the Charter School’s teachers have Pennsylvania certification. Transcript 74:22-24. In other words, all of the teachers in the proposed bargaining unit hold a certificate. Therefore, as expressly stated in the Educator’s Discipline Act, the Department does has express legal authority to both discipline, suspend and/or terminate (through revocation of employment eligibility) the employees or potential bargaining unit members in at issue here. Therefore, this instant matter is distinguishable from the *PA Cyber* case.

(2) Contrary to the Decision in *PA Cyber*, PA Virtual was Created by the Department and Not Private Individuals

Despite the ministerial requirement that Pennsylvania’s charter schools be incorporated as public nonprofit entities, they do not gain status as a public school and therefore do not meet the definition of “cyber charter school” **until** such time as Pennsylvania’s Secretary of Education issues its charter. Prior to the issuance and receipt of a signed charter, only a cyber charter school **applicant** exists and not a cyber charter school itself. *See* 24 P.S. § 17-1703-A (defining “cyber charter school” as “an independent **public school** established and operated under a charter from [the Department] and in which the school uses technology in order to provide a significant portion of its curriculum and to deliver a significant portion of instruction to its students through the Internet or other electronic means”). Furthermore, as previously mentioned, PA Virtual submitted its application to become a charter school in November of 2000, which was several months before incorporating the non-profit entity. Transcript at 78:15-17. As a result, private individuals did not “create” PA Virtual; PA Virtual was “created” upon issuance of the initial charter agreement.

In this case, PA Virtual would not exist separate and apart from the Department of Education. Rather, PA Virtual would dissolve immediately if the aforementioned charter, granted, regulated and operationally overseen by the Department, was lost via revocation or nonrenewal by the Department. If PA Virtual lost its charter and ceased to operate, the public non-profit entity would also cease to exist. Transcript at 18:17-24. All of the assets of Charter School would revert to its local “sister” public educational agency, the local intermediate unit, or be distributed on a proportional basis to the school districts of residence with students enrolled in PA Virtual at the time. 24 P.S. § 17-1729-A(6)(i); Transcript at 18:17-19:1. As stated explicitly within the Articles of Incorporation, PA Virtual is a *public* non-profit that is accountable to the taxpayers in the Commonwealth of Pennsylvania and that operates *exclusively* for educational purposes. Er. 2. In short, PA Virtual is a creation of and exists within the Commonwealth’s public school system via the Department.

(3) The Decision in *PA Cyber* was Inaccurate When it Concluded that the Department Provides Only “Periodic Renewal” of a Cyber Charter School

As discussed as length *supra*, the Department not only functioned as the authorizer of PA Virtual at the time the current charter was issued back in 2011, but the Department also operates as an ongoing authorizer through its continued administration of PA Virtual. The Department (a) thoroughly reviews and approves all of the Charter School’s operation through the Charter Renewal Application that is incorporated in the Charter approved by the Department, (b) requires the Charter School file an annual budget report, (c) mandates the filing of an annual audit report, must be provided extensive access to operational records,(d) conducts thorough and invasive onsite visits every two years, (e) investigates and holds the Charter School directly accountable for complaints filed against the School, (f) can discipline, suspend or terminate Charter School

employees, and (g) can revoke or not renew the Charter School's current, among other significant involvement as discussed as length *supra*.

(4) The Decision Incorrectly Concluded that Public Officials are Not Involved in the Appointment or Removal of Members of the Board of Trustees

As aforementioned, Pennsylvania Charter School Law clearly states that “*trustees of a charter school shall be public officials.*” 24 P.S. 17-1715-A(11).²³ As a result, all new members of the Board of Trustees are elected by existing trustees in *their capacity as public officials* and not as private citizens. As outlined *supra*, the members of the Board of Trustees are (a) public officials, (b) elected by other public officials, (c) during a public vote and (d) during a vote that occurs at an advertised public meeting session. *See also* Transcript 33:21-34:1; Er. 2; 24 P.S. § 17-1716-A(c); 65 Pa.C.S.A. § 704. In summary, members of the Board of Trustees for PA Virtual are elected and that election is conducted publically by individuals defined as public officials under Pennsylvania law. *Id.*; 24 P.S. 17-1715-A(11).

In this matter, there is evidence in the record here to establish that the Secretary of the Department of Education (a public official under Pennsylvania law) does indeed have involvement in the election process for members of the Board of Trustees. The Pennsylvania Secretary of Education at the time, Ronald J. Tomalis, granted and signed PA Virtual's current charter, which was based on the Charter School's Charter Application. Er. 5; Er. 6. As testified during the hearing, during the charter application process:

²³ The members of the Board of Trustees, as public officials, are subject to Pennsylvania's Public Official and Employee Ethics Act (“Ethics Act”). Public official is defined as, “Any person elected by the public or elected or appointed by a governmental body or an appointed official in the executive, legislative or judicial branch of this Commonwealth or any political subdivision thereof, provided that it shall not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense or to otherwise exercise the power of the State or any political subdivision thereof.” 65 Pa. Cons. Stat. Ann. § 1102.

“And in that process, you have to tell the Pennsylvania Department of Education how you are going to select board members, what kind of training you're going to do, what's going to happen. They then approve that process. And then that process is given to them each year again in the annual report.”

Transcript 72:17-22.

It is apparent from the record in the instant matter that the Secretary of Education (as well as the Auditor General) maintains direct and ongoing involvement in the election process for members of the Board of Trustees. Contrary to the Decision in *Pennsylvania Cyber Charter School*, the oversight and reporting requirements for the cyber charter school are far more demanding than those requirements for a brick-and-mortar charter under the law in Illinois; these differences are discussed at length *supra*.

For all of the aforementioned reasons, the Decision in *Pennsylvania Cyber Charter School* is distinguishable from the instant matter.

D. The PRLB Proposed Decisions in *Agora* and *New Media* are Distinguishable and Should Not Govern the Instant Matter with PA Virtual

The PLRB has explicitly concluded that a cyber charter school in Pennsylvania is a public employer under Pennsylvania Law. In *Frontier Virtual Charter School*, PERA-C-12-80-E (2012)(“Frontier”), the PLRB’s Findings of Fact expressly state “**Frontier [Virtual Charter School] is a public employer within the meaning of Section 301(1) of PERA.**”

There have been other decisions by the PLRB wherein it was held that a charter school was a private employer subject to NLRB jurisdiction. However, the instant case with PA Virtual is distinguishable from those decisions and more in line with *Frontier*. More specifically, in *The Matter of the Employees of Agora Cyber Charter School*, PERA-C-12-146-E (2012)(“Agora”), the Pennsylvania Labor Relations Board (“PLRB”) made the following findings of fact:

- (1) The Agora Cyber Charter School is operated by K12, Inc. K12 Inc. is a ***for-profit*** education company that is publically traded on the New York Stock Exchange.
- (2) The members of the Board of Trustees of Agora are not publically elected. ***They are not appointed or removed by public officials.***
- (3) The National Labor Relations Board has taken jurisdiction over a Charter School in Pennsylvania with a ***privately appointed*** board.

In *Agora*, the PLRB referred to the *In Re Chicago*, discussed *supra*, where the NLRB reasoned that “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 [NLRB]’s jurisdiction.” *Id.*; *see also In Re Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB No. 41 (Dec. 14, 2012) (“CMSA”). As a result, PLRB concluded that *Agora* was a private employer subject to the jurisdiction of the NLRB.

This finding is dissimilar to the current case with PA Virtual. Unlike the charter school in *Agora*, PA Virtual’s operations are controlled by its ***non-profit*** public Board members, who are all public officials under the Charter School Law and not by a for-profit company with publically traded stock. *See* Articles of Incorporation, Er. 3; *see also* By Laws, Er. 9; 24 P.S. 17-1715-A(11). The charter school in *Agora* clearly fails to meet the second prong of the *CMSA* test because it is controlled by a for-profit entity and its board members were not appointed or approved by public officials. As a result, the charter school in *Agora* was operated under far different and distinguishable circumstances from PA Virtual.

In *Agora*, the PLRB also refers to and relies on a proposed decision in the *New Media Technology School* matter. *Id.* In *The Matter of the New Media Technology School*, PERA-R-11-130-E, and *Alliance of Charter School Employees Local 6056 AFT v. New Media Technology Charter School*, PERA-C-11-312-E and PERA-C-11-344-E, the PLRB concluded that the charter

school had a “privately appointed board of directors” and was therefore subject to NLRB jurisdiction. However, the PLRB failed to make an important distinction in *Agora* when it relied on the reasoning in the *New Media* case: ***New Media Technology School is a brick-and-mortar charter school that is chartered by the local school district.*** This is unlike cyber charter schools in Pennsylvania, such as PA Virtual, that are chartered directly by the Commonwealth through the Department of Education.

In *New Media*, the PLRB’s Findings of Fact state that, “The Members of the Board of Directors of New Media are not publically elected. ***They are not appointed or removed by public officials.***” This finding was based upon PLRB’s conclusion that:

“The members of New Media’s Board of Directors are neither elected by the public ***nor directly accountable to a public official.*** Consequently, New Media is a private employer under the National Board’s jurisdiction and not a political subdivision under this Board’s jurisdiction.”

Id.

However, as a brick-and-mortar charter school, *New Media* would not be subject to the same direct oversight as cyber charter schools in Pennsylvania. As aforementioned, cyber charter schools enroll students from throughout and entire Commonwealth of Pennsylvania (and not a specific geographic area within Pennsylvania) and this necessitates a different relationship with the Department, which involves much more direct administration. Furthermore, cyber charter schools are subject to specific regulations than are different from those applicable to charters generally. Therefore, the board member in the case of *New Media* may not have been directly accountable to public officials or the general electorate in the same capacity as Pennsylvania’s cyber charter schools. As a result, *New Media* failed to meet the first prong of the *Hawkins County* test as outlined in *CMSA*.

As discussed *supra*, PA Virtual's Board—unlike that of a brick-and-mortar charter school—is *directly* accountable to public officials and the general electorate. As stated, PA Virtual is specifically accountable to both the Department of Education and the Secretary of Education, which directly issued PA Virtual's current charter agreement and maintains the right to revoke/non-renew the charter. Er. 5; Transcript at 20:1-9; 24 P.S. § 17-1729-A. Furthermore, PA Virtual is also accountable, for a variety of other reasons, to the Pennsylvania House of Representatives and Senate Education Committees, the Governor's Office and the Department of Education. Therefore, PA Virtual is operated under a different and distinguishable set of circumstances from the charter school in the *New Media* matter.

As it did in the *Agora* case, the PLRB again relied on the NLRB'S reasoning and test outlined in the *CMSA* matter when it made its findings in *New Media*. Similar to the charter school in *CMSA*, PA Virtual also has a provision in its Bylaws whereby its Board of Trustees elects its own members. However, the critical distinction from the charter school in *CMSA* is that in Pennsylvania **new members are elected by other trustees in their capacity as public officials**. See 24 P.S. 17-1715-A(11).

PA Virtual, for all the reasons discussed *supra*, is a public employer because it is a political subdivision of the Commonwealth and the Charter School is administered by and accountable to public officials. As outlined in the Articles of Incorporation and previously discussed herein, PA Virtual was established under Pennsylvania law as a sole purpose **public non-profit** that is accountable to the taxpayers in the Commonwealth of Pennsylvania. The Charter School's operations are controlled by the public officials on its Board, and all appointments or removals are done by the current board members, who are themselves public officials. Transcript at 62:24-63:3; Er. 7 at 3-4.

Unlike the charter schools in *Agora* or *New Media*, PA Virtual—as a cyber charter school—is a political subdivision of the Commonwealth and cannot be held to be anything other than a public employer. While the charter schools in *Agora* and *New Media* fail to meet either prong of the *Hawkins County* test outlined in *CMSA*, PA Virtual has provided more than sufficient evidence to establish that the Charter School here meets both prongs of the *Hawkins County* test. As a result, PA Virtual—unlike the charter school in *CMSA* that was established under distinguishable law in Illinois—is not subject to the jurisdiction of the NLRB. Any ruling that a Pennsylvania cyber charter school, such a PA Virtual, is not a political subdivision and/or not administered by individuals accountable to public officials and is subject to the jurisdiction of the NLRB would have potentially dire consequences and be in direct contract to the precedent in *CMSA*.

III. Conclusion

For the above stated reasons, PA Virtual respectfully requests that the Regional Director find that PA Virtual is not subject to jurisdiction of the National Labor Relations Board and dismiss the instant petition in its entirety.

Respectfully submitted,

LATSHA DAVIS & McKENNA, P.C.



Dated: January 30, 2015

By:

Kevin M. McKenna, Esquire
Attorney I.D.No.: 47986
Glenn R. Davis, Esquire
Attorney I.D. No.: 31040
350 Eagleview Blvd., Suite 100
Exton, PA 19341
(610) 524-8454

Attorneys for Employer,
Pennsylvania Virtual Charter School

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION FOUR**

THE PENNSYLVANIA VIRTUAL CHARTER SCHOOL	:	
Employer,	:	
and	:	Case No.: 04-RC-143831
PA VIRTUAL CHARTER EDUCATION ASSOCIATION, PSEA/NEA	:	
Petitioner.	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Employer, Pennsylvania Virtual Charter School, was served on January 20, 2015, upon the following individuals via Electronic and First Class Mail:

Kathleen O'Neill, Hearing Officer
National Labor Relations Board
615 Chestnut Street
Philadelphia, Pennsylvania 19106

Annemarie Dwyer, Esquire
Pennsylvania State Education Association
Westtown Business Center
1512 McDaniel Drive
West Chester, Pennsylvania 19380

LATSHA DAVIS & McKENNA, P.C.

Dated: January 30, 2015

By: 

Kevin M. McKenna, Esquire
Attorney I.D.No.: 47986
350 Eagleview Blvd., Suite 100
Exton, PA 19341
(610) 524-8454

Counsel for Employer, Pennsylvania Virtual Charter School