

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

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

EMPLOYER'S BRIEF
IN SUPPORT OF REQUEST FOR REVIEW

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I. BACKGROUND OF CHARTER SCHOOLS IN PENNSYLVANIA

A. Grounds for Seeking Review of Regional Director’s Decision

Pursuant to Section 102.67(b) of the Rules and Regulations of the National Labor Relations Board (“Board” or “NLRB”), the Pennsylvania Virtual Charter School (“PA Virtual” or “Employer”) submitted a Request for Review of the Decision and Direction of Election of Region Four’s Regional Director. In support of that Request for Review, PA Virtual now submits the instant Brief.

In the aforementioned Decision, Regional Director Dennis P. Walsh granted the Petition filed by the Pennsylvania Virtual School Education Association, PSEA/NEA (“Union”) under Section 9(c) of the National Labor Relations Act (“NLRA” or “the Act”) seeking to represent a unit consisting 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 NLRA. Despite the fact that PA Virtual is by statute a public school, the Regional Director concluded that PA Virtual is not a “political subdivision” of the Commonwealth of Pennsylvania within the meaning of Section 2(2) of the NLRA. The Decision further concluded that PA Virtual: (1) was not created by the Commonwealth even though the public cyber charter school was established directly by the Pennsylvania Department of Education (“the Department” or “PDE”) through issuance of its charter; and (2) was not administered by public officials even though the top administrators and the entire Board of Trustees are comprised of statutorily-defined public officials who report to other public officials in the Commonwealth, including the Secretary of Education.

Pursuant to Section 102.67(c) of the Board’s Rules and Regulations, Board review of the Decision is necessary in order to correct an improper departure from well-established Board case law that has narrowly interpreted the meaning of a “political subdivision” to include only those

entities that are either: (1) created directly by the State so as to constitute a departmental arm of the government; or (2) administered by individuals who are responsible to public officials or to the general electorate. Charter School Administrative Services, Inc., 353 NLRB 35 (2008). In his Decision, the Regional Director ignored this test, finding instead that a public school established and operated under a charter issued by the Commonwealth of Pennsylvania, through the Department, is allegedly created by private individuals without sufficient government involvement to qualify as a “political subdivision.” The Regional Director ignored this Board’s instructions in Chicago Mathematics & Science Academy Charter School, Inc., (“CMSA”) 359 NLRB 41 (2012), and misapplied the two-part test established in NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600, (1971), when he determined that a Department-chartered Pennsylvania public cyber charter school was not a “political subdivision.” The Regional Director ignored the Board’s instructions in CMSA by failing to conclude that a political subdivision exists despite a Pennsylvania governmental entity’s creation of the cyber charter school, tight governmental regulation over it and a specific state statute which designates the public school’s trustees and administrators to be “public officials.” Instead, the Regional Director relied primarily on a strained and overly-broad application of this Board’s language stating that entities created by private individuals as nonprofit corporations are not exempt under the first prong of the Hawkins County test.

Furthermore, the Regional Director’s conclusion that PA Virtual is not an arm or department within the Commonwealth’s public education system is clearly erroneous and substantially prejudices PA Virtual. As outlined herein, the legislative intent of the Pennsylvania Charter School Law (“CSL”), 24 PS 17-1701-A et seq., was for public cyber charter schools to function as part of the public school system in the Commonwealth. PA Virtual is a public

employer and a part of the public education system within the Commonwealth under applicable state law. The intent and applicable law dictate that public cyber charter schools should be treated as an arm of the Pennsylvania Department of Education. For this compelling reason, the Decision of the Regional Direct should be overturned.

As outlined in the Request for Review and herein, the degree of government oversight (above and beyond mere “reporting purposes”), as well as the fact that substantially all of its revenue is government generated, qualify this public cyber charter school as a “political subdivision.” While the Board recently discounted these factors in CMSA, the percentage of government revenue in the matter at bar far exceeds the percentage in that case. PA Virtual is far different from government contractors, or other non-profit entities, in that the charter issued to it directly from the Department limits its operation to that of a public cyber charter school. Because of this limitation, PA Virtual has no ability to do any business outside of operating a public cyber charter school **within the boundaries of the Commonwealth of Pennsylvania** and pursuant to its enacting regulations and oversight. The Board does not routinely and should not assert jurisdiction over entities which have a very limited scope of operation such as to provide public educational services to the Commonwealth of Pennsylvania’s student population.

PA Virtual respectfully submits that the Board should overturn the Decision of the Regional Director and conclude there to be existence a political subdivision in this matter. If the Board overturned the Decision, there would be minimal, if any, impact upon other commerce, employers or their employees. This, in part, is a result of there being a defined number of cyber charter schools within the Commonwealth (testimony verified only 14 cyber charter schools exist in Pennsylvania). See January 20, 2015 Transcript (“Transcript”) at 22:10-11. Moreover, there would be no employees of a Pennsylvania cyber charter school that could find themselves in a

legal “no man’s land” totally removed from similar coverage under the Act as Pennsylvania’s charter school legislation that specifically provides that a Pennsylvania-chartered public cyber school is subject to Pennsylvania’s Public Employee Relations Act (“PERA”). See also Frontier Virtual Charter School, PERA-C-12-80-E (2012)(“Frontier”)(concluding that a public cyber charter school is a public employer under PERA). As a result, there would be no risk of disenfranchising any employees in the Commonwealth from their right to organize as the state statute would provide for the same protections. This result is consistent with the Board’s historical practice of narrowly construing Section 2(2)’s definition of employer. See San Manuel Indian Bingo, 341 NLRB 1055, 1058 (2004).

Therefore, PA Virtual respectfully requests that the Board, in granting the Employer’s Request for Review, now issue an order addressing this very important issue that has significant impact on the Employer, but only limited impact on Pennsylvania brick-and-mortar charter schools, government contractors and their respective employees. The Board should overturn the Regional Director’s Decision that found jurisdiction was appropriate over Pennsylvania public cyber charter schools like PA Virtual. The Secretary of Education within the Department and all members of the Board of Trustees of PA Virtual are statutorily designated to be public officials.

Moreover, such ruling will place the Commonwealth’s public cyber schools in congruity with the Pennsylvania public school districts in regards to its employees’ rights to organize and other collective bargaining obligations, including the limitations on employees’ right to strike. In light of the limited “stakes” involved in this jurisdictional question and the limitations on a “Board Decision,” especially if exercising its discretion, there is little potential to disenfranchise other educational employees across the nation. The NLRB must explore waiving jurisdiction in this matter to further aid a unified labor system under state law. Such a decision would be non-

precedential to non-public cyber school employers, especially those outside of the Commonwealth of Pennsylvania.

B. Legislative History: Public Cyber Charter Schools are Public Schools Within the Pennsylvania State Education System

By statute and case law precedent, public cyber charter schools in Pennsylvania are unequivocally public schools and a part of the public education system. 24 P.S. § 17-1701-A et seq. To conclude that an entity that is—by statute—a public school is somehow nonetheless a private employer is illogical. A public cyber charter school is not a contractor of the Department of Education; a public cyber charter school lacks the capacity—that a typical contractor would possess—to negotiate the terms of its operational agreement or contract. Instead, the charter school is mandated by law to operate according to detailed and extensive statutory policies and procedures and other mandatory administrative regulations, which are discussed in detail herein. 24 P.S. § 17-1701-A et seq.; see also 24 P.S. § 1-101 et seq.; Er. 1; Er. 4; Er. 5; Er. 8; Er. 10; Er. 11. The Board should consider the practicality and precedential impacts of determining that a **public** school is a private employer. Even when applying the test delineated in Hawkins County, PA Virtual remains a public school that functions as arm or department of PDE and therefore meets the definition of a “political subdivision” exempt from NLRB jurisdiction.

In order to understand precisely why PA Virtual should be deemed a public employer and political subdivision of the Commonwealth, it is critical to understand the legislative history of charter schools nationally and within the Commonwealth. From the initial introduction of charter schools (within the state of Minnesota in or about 1991) to the instant matter before the Board, the intent has been for charter schools to function as a part of the state public education

systems. Specifically, within Pennsylvania, the intent for public charter schools to be an extension or part of the public education system is unequivocal.¹

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 Board of Education ("the Board") and Department of Education. 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 P.S. § 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 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 legislators within the Commonwealth enacted the Pennsylvania Charter School Law (as an amendment to the Code), known as Act 22 of 1997, 24 PS 17-1701-A et seq. A review of the legislative remarks within both the Commonwealth's Senate and House Journals discussing Act 22

¹ It is also worth noting that Hawkins County was decided in 1971 or more than 25 years before charter schools initially came into existence, including specifically in Pennsylvania where charter school legislative was proposed in 1997. Hawkins County, 402 U.S. 600, (1971); see also Act 22 of 1997, 24 PS 17-1701-A et seq.

demonstrate that the intent in developing charter schools was to allow for additional educational options within the public school system. The development of charter schools was designed to “provide the Commonwealth’s parents with a new educational option for their children, that is within Pennsylvania’s system of public schools, an option that still maintains high standards of accountability.” See June 11, 1997 Commonwealth of Pennsylvania Senate Legislative Journal, Session of 1997, No. 38, at 756: Senator Rhoades. Furthermore, quotes from other Senators, including Senator Schwartz, when this legislation was initially proposed, exemplify that public cyber charter schools were definitively intended to function as a part or arm of the Commonwealth’s education system:

So I support this legislation because **it is a part of the public school system**. I have worked diligently over the last few years and particularly in the last few months and particularly even more specifically in the last few weeks to improve this charter school legislation so **that we still assure accountability**, we still assure local control, that we still can assure commitment to standards and to actual educational excellence for these schools as well, **that they not just be almost anything for anyone but they be a part of the public school system ...**

Id. at 755: Senator Schwartz.

Still further comments from the House of Representatives clarify that charter schools “are not private schools, but instead public schools” and as such that they “will be treated as public schools” via “fund[ing] with public dollars with public accountability for use of those dollars.” See June 11, 1997 Commonwealth of Pennsylvania House of Representatives Legislative Journal, Session of 1997, No. 41, at 1456: Representative Cowell. From the onset, the Commonwealth’s own state government intended and has treated public charter schools, including cyber charter schools, as a part of the public education system (or in other words as a part of the political subdivision of the Department).

Under both the Code, and specially the Charter School Law amendment to the Code, the Department oversees the public education system through a variety of means, including specifically the creation and ongoing authorization and oversight of public cyber charter schools. 24 P.S. § 17-1741-A. This implementation of the public education system is supervised or overseen by the Pennsylvania Secretary of Education (“the Secretary”). The Secretary is directly appointed by the Governor of the Commonwealth (with consent and advice of the Commonwealth’s Senate) and serves as both the head of the Department of Education and the chief executive officer of the Board of Education.²

In considering whether there is jurisdiction in this matter, it is critical to note that the “arm” of the Department “reaches” public cyber charter schools in a much more direct capacity than it does for brick-and-mortar charter schools or traditional school districts in Pennsylvania. Pursuant to Act 88 of 2002, the Department became directly responsible for reviewing and granting applications for public cyber charter school 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 public brick-and-mortar charters and public cyber charter schools. 24 P.S. § 17-1745-A; see also Transcript 20:14-24. In fact, the Pennsylvania CSL has a separate section that specifically regulates 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 public charter schools). See Cyber Charter School Physical Facilities, July 2013 Basic Education Circular (“BEC”), Employer Exhibit 10 (“Er. 10”); see also September 2006 Cyber Charter School Basic Education Circular (“BEC”), Employer Exhibit 11 (“Er. 11”). As stated during the January 20, 2015 Hearing in the instant matter, charter schools in Pennsylvania are

² http://www.portal.state.pa.us/portal/server.pt/community/about_the_board/19678/overview/529077

legally required to enroll all compulsory school-aged students who reside anywhere within the Commonwealth. Transcript 27:6-10. PA Virtual is required to have open enrollment in the same manner as any traditional public school district, which a private school or private educational entity would not be obligated to do. However, a public cyber charter school does not have the residential or geographic limitations of traditional school districts or brick-and-mortar charter schools when enrolling students. Transcript 20:14-24; 24 P.S. § 17-1723-A. As cyber charter schools 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 districts). Transcript 20:14-24; 24 P.S. § 17-1717-A. In this sense, cyber charters are more intertwined with the Department; public cyber charter schools in Pennsylvania function as an arm of the Department. The legislative history of public cyber charter schools reflects that the intent was to provide different educational opportunities for students **within** the state public school system. Due to the nature of public cyber charter schools, the legislators in Pennsylvania included specific statutory provisions to create an interlinked relationship with the Department.

C. Case Law Precedent That Cyber Charter Schools are Public Schools

The fact that charter schools are public schools and a part of the public education system within the Commonwealth has been articulated within case law precedent as well. For example, there is ample case law discussing the distribution of State public education funding to charter schools because of their status as part of the public education system. In Zogby, the Commonwealth Court dealt with the redirection of public education funding, comprised of taxpayer monies, dispersed by the local school district to a charter school, and the Pennsylvania

Secretary of Education's ability to withhold charter school payments from the districts. Pa. Sch. Bds. Ass'n v. Zogby, 802 A.2d 6, 2002 Pa. Commw. LEXIS 505 (Pa. Commw. Ct. 2002)(citing Boyertown Area School District v. Department of Education, 797 A.2d 421 (Pa. Cmwlth. 2002); see also Slippery Rock Area Sch. Dist. v. Pennsylvania Cyber Charter Sch., 612 Pa. 486, 490, 31 A.3d 657, 659 (2011)(in which the Secretary deducted funds because the school district failed to timely distribute funding to the charter school). In the aforementioned Zogby, Slippery Rock, and Boyertown cases, the cyber charter schools were considered public schools and in each case the Department was directly involved in disputed issue. Zogby, 802 A.2d 6 (Pa. Commw. Ct. 2002); Boyertown, 797 A.2d 421 (Pa. Cmwlth. 2002); Slippery Rock, 612 Pa. 486 (2011). These cases reflect the Department's direct and ongoing regulation of cyber charter schools as public schools.

In addition to funding distribution, prior case law demonstrates the cyber charter schools have traditionally been treated as part of the Department and the public education system in other circumstances. For example, the Department initiated legal action against Agora Cyber Charter School ("Agora"), which was defined by the Court as a "public cyber charter school." United States v. Brown, 2014 U.S. Dist. LEXIS 106054, 1, 2014 WL 3797201, 1 (E.D. Pa. July 31, 2014); see also Commonwealth of Pennsylvania, Department of Education v. Agora Cyber Charter School, Case No.: 243 MD 2009 (Pa. Commw. Ct. 2009). In regards to Agora, The Department initiated an investigation after receiving complaints directly from a cyber charter school parent; PDE audited and investigated Agora's operations and management because the public cyber charter was a public school and was utilizing public funding. Id. Following the investigation, the Department then initiated legal proceedings against Agora. Id. This is just one recent example of Courts treating cyber charter schools as public schools.

Under both the legislative intent and applicable law, cyber charter schools are considered public schools and a part of the State public education system. As such, PA Virtual is a public entity and a public employer. It was contradictory for the Regional Director to unilaterally conclude that PA Virtual is purportedly a private employer. Furthermore, the Regional Director's Decision fails to consider the factual differences between the instant matter and the previous CMSA or PA Cyber cases, which constitutes prejudicial error by the Regional Director.

II. PROCEDURAL HISTORY

On or about January 5, 2015, the Petitioner Union brought a Petition with Region Four. The Petition asserts that Union is presenting a claim to be recognized as the representative of a group of PA Virtual teachers. The Petitioner Union, is affiliated with PSEA/NEA, the largest Pennsylvania state union among the Commonwealth's public school districts. The Union choose not to file its Petition with the Pennsylvania Labor Relations Board ("PLRB")³ demanding certification as an exclusive bargaining representative of a group of PA Virtual employees, but rather under the Act with the NLRB. On January 20, 2015, a fact-finding hearing was held at Region Four's Office in Philadelphia. See January 20, 2015, Transcript.⁴ After the submission of post-hearing briefs, Regional Director Dennis P. Walsh issued a Decision and Direction of Election on February 11, 2015, finding that PA Virtual—although a public school—was not a "political subdivision" within the meaning of Section 2(2) of the Act and therefore was allegedly subject to the Act's jurisdiction. The Regional Director concluded that the Board had

³ The PLRB is a Commonwealth of Pennsylvania state agency established to regulate labor relations between labor organizations and public employers such as Pennsylvania public cyber charter schools. See generally 24 P.S. §17-1701-A, et seq. and 43 P.S. §1101.101 et seq. known as the Public Employee Relations Act ("PERA").

⁴ In the event the Board requests a copy of the record evidence from the proceeding below, the Employer will provide citations to the record evidence. The hearing transcript will be referred to as "Transcript at ____." Employer Exhibits will be referred to as "Er. ____."

jurisdiction to process the Petitioner Union’s representation petition and has accordingly directed an election.

Thereafter, PA Virtual filed its Request for Review to the Board on February 25, 2015. The Board subsequently granted the Request for Review by Order dated March 25, 2015, which is the subject of this instant Brief.

III. FACTS INTRODUCED DURING THE FACT-FINDING HEARING BELOW

A. Creation of the Pennsylvania Virtual Charter School and Subsequent Establishment of the Nonprofit Corporation

The Pennsylvania Virtual Charter School is a public school in the Commonwealth of Pennsylvania. PA Virtual provides students the same general educational services as traditional public schools, including a free and appropriate public education (“FAPE”) as required by law. Er. 6 at 43; Er. 5; see also Pennsylvania’s Charter School Law (hereinafter “CSL”) at 24 P.S. § 17-1701-A et seq. As a public cyber charter school, PA Virtual must enroll students throughout the Commonwealth and cannot charge tuition. Similar to a traditional public school district in Pennsylvania, PA Virtual is considered a local educational agency (“LEA”) in regards to the distribution of public funding. Transcript at 14:6-10. Currently, per both the Code and the CSL, the Department authorizes PA Virtual to continue operating as a public cyber charter school through its current charter. 24 P.S. § 17-1741-A(a)(1); Transcript at 20:1-9.

PA Virtual currently operates under its July 2011 Charter issued by the Commonwealth of Pennsylvania via the Department. Er. 5; Transcript at 19:21-20:9. The Pennsylvania Secretary of Education at the time, Ronald J. Tomalis, granted and signed PA Virtual’s current charter, which is evidenced by his signature. Er. 5. Prior to the current charter, the Department previously renewed PA Virtual’s initial charter on or about September 14, 2006 and, as a result of a change in the law, the charter (as well as those of all public cyber charter schools in

Pennsylvania) became directly authorized by the Department at that time. See 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 PA Virtual 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. Er. 1. Since the initial charter, all subsequent charters for PA Virtual have been granted directly by the Department. Er. 4; Er. 5; Er. 6.

As required by Pennsylvania law, a public cyber 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 also Articles of Incorporation, Employer Exhibit 2 (“Er. 2”). It was only after applying for the initial charter that PA Virtual filed for and was granted incorporation as a public non-profit entity on or about January 16, 2001. The Articles of Incorporation for the public non-profit expressly state 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 public non-profit entity would 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 otherwise distributed to public school districts within the Commonwealth. Transcript at 18:17-19:1; 24 P.S. § 17-1729-A. The Articles of Incorporation

also reflect that PA Virtual is a public non-profit that is accountable to the taxpayers in the Commonwealth of Pennsylvania. 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. 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.”⁵ Transcript at 6:15-19.

B. Duties and Responsibilities of the Charter School’s Chief Executive Officer

The Chief Executive Officer (“CEO”) of PA Virtual, Dr. Joanne Barnett (“Dr. Barnett”), functions as an advisor to and employee of the Board of Trustees (“the Board”). The CEO must be appointed by the Board to oversee and manage the Charter School onsite and on a daily basis. Transcript at 12:3-12; see also 24 P.S. § 17-1703-A; Er. 7 at 8. As CEO, Dr. Barnett is responsible to report to and is held accountable by the Board, which is comprised entirely of public officials. Dr. Barnett is required to administer the Charter School by “. . . carrying out policies that are approved by the [B]oard.” Transcript 12:3-12. 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.

⁵ These individuals would constitute public employees, which are defined in the Public Employee Relations Act (“PERA”), 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.** . . .” 43 P.S. § 1101.301. Further 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.

Importantly, the CSL also establishes Dr. Barnett, in her administrator capacity, as a public official herself. See 24 P.S. 17-1715-A(12). The Regional Director’s Decision fails to note this important fact.

The Regional Director’s Decision references that Dr. Barnett oversees a management team of administrators and supervisors who handle technical and financial aspects of the School. However, the Decision fails to note that Dr. Barnett is appointed by the public officials on the Board to act as their advisor or representative. Dr. Barnett does not oversee or manage the School except as an employee of the Board and at the Board’s discretion. Er. 7 at 12. Rather, all school policies—not just those regarding personnel—are enacted and approved by the Board (and not Dr. Barnett herself). Er. 7. Finally, all official action by the School in relation to operations or finances (*i.e.* contracts, financial reporting, and so forth) is conducted by the Board at a public meeting. Er. 7; see also 24 P.S. § 17-1749-A; 24 P.S. § 17-1716-A. In other words, it is not Dr. Barnett herself who oversees the Charter School, but the public officials on the Board.

In addition, it is also critical to note that unlike the charter schools involved in either the CMSA or PA Cyber cases, discussed *infra* herein, PA Virtual is not overseen by a management company. Er. 7. In essence, the public officials on the Board control the entirety of the Schools operations in this case, which is discussed in detail herein.

C. Composition of the Board of Trustees for the Charter School

The Board of Trustees consists of five (5) to nine (9) members. See Er. 7 at 2. PA Virtual’s operations are controlled by the statutorily-defined public officials on its Board and all member appointments or removals are done by the current board members. 24 P.S. 17-1715-A(11). While PA Virtual has a provision in its Bylaws similar to the charter school in CMSA, whereby its Board 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 the existing trustees' capacity as public officials** and not as private citizens. Unlike the CMSA scenario, the trustees of PA Virtual (as a public cyber charter school) are public officials by Pennsylvania statute. 24 P.S. 17-1715-A(11) and (12). The Pennsylvania statutory scheme making the Charter School Board of Trustees public officials is much broader. This is a critical factual distinction that was not noted or considered in the Regional Director's Decision.

The members of the Board of Trustees at PA Virtual can typically only be removed by other members of the Board of Trustees in their capacity as public officials.⁶ Transcript 62:24-63:3. In addition, as public officials, the members of the Board of Trustees and the chief school administrators (including the CEO), 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 Pennsylvania Public Official and Employee Ethics Act ("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. The Regional Director ignored this power and oversight within his Decision.

D. The Charter School's Responsibilities to State Public Officials Including the Department and Other Commonwealth Agencies

The Regional Director's Decision fails to recognize that in addition to being responsible to the public officials on the Board, PA Virtual also reports annually to and is continuously overseen directly by the Commonwealth of Pennsylvania; PA Virtual must submit the mandated

⁶ 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.

annual filing of the school budget, filing of an annual audit report, and obligation to allow the Department to conduct onsite visits and have open access to school records. 24 P.S. § 17-1743-A(f); see also 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.

PA Virtual is also responsible to report to the Pennsylvania's Secretary of Education and the Department for a multitude of reasons; the Secretary not only issued PA Virtual's charter, through the Department, but also provides direct oversight of the Charter School **on a continuing basis**. Er. 4; Er. 5; Er. 6; Er. 8; Er. 10. 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 public cyber charter schools, 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 (2) years, physically comes to PA Virtual's offices and conducts an onsite visitation and review to ensure compliance with state laws and regulations. Transcript 23: 19-24:3. In addition, 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. See Transcript at 43:4-44:2; Er. 9 at 25, 27.

As noted in the dissent in previous matter before the NLRB regarding The Pennsylvania Cyber Charter School, **"That the Secretary decided whether or not to renew the charter is dispositive evidence that the trustees are accountable to that public official. Full bore appointment of the trustees by the Secretary is not required under the test."** The Pennsylvania Cyber Charter School, Case 06-RC-120811, April 9, 2014 Order, at 4 (2014).

The Decision by the Regional Director references the September 1, 2006 BEC, which outline the Department’s complaint procedures. However, the Decision fails to discuss the full complaint process in that BEC. Er. 11. As stated therein, the Department typically refers such a complaint to one of the Department’s internal complaint procedures (including for example referral to the Bureau of Special Education that handles special education complaints). Only when it “cannot be referred under existing procedures” is the complaint then forwarded to the cyber charter school and the cyber charter school is given only ten (10) business days to issue a written response. Er. 11. Upon receipt of the cyber charter school’s response, the Department makes a determination as to whether the complaint is resolved or whether additional investigation by the Department is necessary.⁷ Er. 11. This functions as one more example of how the Department directly and continuously oversees public cyber charter schools. The oversight by the Department amounts to much more than the mere “grant of a charter by PDE” as referenced in the Decision. This is another prejudicial error by the Regional Director.

E. Administration of the Charter School by the Public Officials on the Board of Trustees

The Regional Director ignores the fact that—similar to the oversight that a board of directors provides for traditional public school—the Board here is also responsible to oversee the finances of PA Virtual. Er. 7 at 7-8. The officers of the Board have the duties of officers described in the Pennsylvania School Boards Association’s Manual. Er. 7 at 7-8. The Regional Director fails to recognize that per the Bylaws, the Board is responsible for ensuring that the

⁷ In response to direct parental complaints, the Department has initiated a full investigations, including an audit of a cyber charter school’s financial operations. United States v. Brown, 2014 U.S. Dist. LEXIS 106054, 24, 2014 WL 3797201 (E.D. Pa. July 31, 2014).; see also Commonwealth of Pennsylvania, Department of Education v. Agora Cyber Charter School, Case No.: 243 MD 2009 (Pa. Commw. Ct. 2009). Upon conclusion that there was reason to suspect fraud in regards to one cyber charter school, the Department then ceased any and all payments—comprised of taxpayer monies—to the public cyber charter school and the Commonwealth of Pennsylvania initiated legal action against the charter school’s top administrator. Id.

Charter School's funding is dispersed only for charter school purposes. Er. 7 at 2, 7-9. 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 Bylaws, 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.

In addition, the Charter School Law dictates that all employees of PA Virtual are overseen by the Board of Trustees. 24 P.S. § 17-1716-A. The Board of Trustees is responsible for all hiring and discharge of employees and setting employees' pay rates. Transcript at 69:20-70:1; see also Er. 7 at 8-9. As aforementioned, this includes the hiring and oversight of the CEO.

In order to maintain control over the Charter School's finances, the Board of Trustees provides oversight and policy guidance just as all public school boards provide the same to their schools. The public officials on the Board are 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. As outlined in the Bylaws, 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.

Finally, the Board votes and requires an affirmative vote of the majority of the quorum of Board members, at a public meeting, on all business or actions. Er. 7 at 2; 24 P.S. § 17-1716-A.

IV. LEGAL ARGUMENT

The Regional Director erred in finding that under the Act, PA Virtual is subject to the jurisdiction of the NLRB. The Director should have concluded that PA Virtual is a public employer and therefore a political subdivision of the Commonwealth of Pennsylvania. Even though PA Virtual's public school administration is comprised of public officials under the Pennsylvania Charter School Law and Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S.A. § 1101 *et seq.*, the Regional Director inexplicably concluded that the NLRB has jurisdiction over the instant matter. Even in the event that the Board agrees that it has jurisdiction, the Board should decline that jurisdiction because there is only a *de minimis* impact on both commerce and employees.

A. **The Regional Director's Decision is in Direct Contrast to Pennsylvania Law that Definitively Establishes the Charter School as a Public Employer with Public Employees**

The Decision references that charter schools may be established by individuals, such as teachers, parents or a college or university within the Commonwealth. However, the decision fails to appropriately interpret the plain language of the CSL. These individuals may submit an application for a charter school in the Commonwealth, but it is the actual charter issued by the Department that *establishes* a charter school. As stated directly within the Charter School Law: **"The charter, when duly signed, shall act as legal authorization of the establishment of a cyber charter school."** 24 P.S. § 17-1745-A(f)(3). The submission of an application by individuals or an individual does **not** establish a charter school. Per the CSL, until a charter is approved by the Department and signed, a charter school has not been established under

Pennsylvania law. This is expressly stated with in the CSL. The Regional Director’s failure to note this within the Decision is another erroneous and prejudicial error.

Once a charter school has been established via a charter issued by the Department, the Pennsylvania CSL defines a cyber charter school as:

‘Cyber charter school’ shall mean an independent **public school established and operated under a charter from the Department of Education** 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. A cyber charter school *must be organized as a public, nonprofit corporation*. A charter may not be granted to a for-profit entity.

See 24 P.S. § 17-1703-A; See also Er. 8; Er. 10.

As discussed above, PA Virtual constitutes a public employer because, by definition, it is a political subdivision of Pennsylvania under PERA. See 43 P.S. § 1101.301. PERA also defines public employees as “any individual[s] employed by a public employer . . .” See 43 P.S. § 1101.301. As the proposed collective bargaining unit is comprised of individuals employed by a political subdivision or instrumentality thereof or any nonprofit organization that receives appropriations from the state, local or federal government, these individuals should be considered public employees. Furthermore, the PLRB has already concluded that cyber charter schools in Pennsylvania are public employers subject to PERA in several other cases. For example, 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.**” To now find that public cyber charter schools are private employers is in direct contrast to this well-established precedent.

The Regional Director utilizes federal law in his determination finding NLRB jurisdiction, but he fails to recognize that Pennsylvania charter schools are creatures of state law and the body of Pennsylvania state law regulating charter schools exists. In his Decision, the

Regional Director seems to disregard Pennsylvania state law entirely in reaching his conclusion. This is in error. This Board cannot rely exclusively on federal law to determine if PA Virtual is public school and a political subdivision of Pennsylvania because federal law does not address that issue.

In Hawkins County, the Supreme Court stated that federal law governed the exemption question and applied federal law, but in doing so, it conducted an analysis that was heavily informed by Tennessee's state law. Hawkins County, 402 U.S. at 602-603. Thus, it is ultimately federal law that provides the answer, but it is state law that provides the necessary information that the Board must apply to federal law to consider the jurisdictional question and reach the correct conclusion. The Regional Director failed to do so.

This decisional process is often unarticulated, but plainly implicit in the decisions of federal appellate courts that have applied Hawkins County. In Moir v. Greater Cleveland Regional Transit Authority, 895 F.2d 266, 271 (6th Cir. 1990), the 6th Circuit Court of Appeals applied this process by looking to Ohio state law governing transportation districts, analyzing how the state law affected the creation of transportation districts, and then applying that affect to Section 2(2) of the Act using the Hawkins County test. The Court concluded that a transportation district was a political subdivision of the state. Other circuits have done likewise. See also Hawaii Government Employees Assn., etc., Local 152 v. Martoche, 915 F.2d 718, 1990 U.S. App. LEXIS 17255, 286 U.S. App. D.C. 275, 135 L.R.R.M. 2465, 116 Lab. Cas. (CCH) P10,335 (D.C. Cir. 1990) (considering Hawaii law); Truman Medical Center, Inc. v. NLRB, 641 F.2d 570, 572-573 (8th Cir. 1981) (considering Missouri law); NLRB v. Natchez Trace Elec. Power Ass'n, 476 F.2d 1042, 1045 (5th Cir. 1971) (considering Mississippi law).

The NLRB has applied this same process to decide political subdivision questions under Section 2(2) of the Act. State Bar of New Mexico, 346 NLRB 674 (2006) (considering effective New Mexico law upon the creation of New Mexico state bar); see also Hinds County Human Resource Agency, 331 NLRB 1404 (2000); Assoc. for Developmentally Disabled, 231 NLRB 784 (1977). The Regional Director, as the Board has in the past, should have considered state law, and its effect, in order to make an informed decision on jurisdiction in the instant matter. His failure to do so constitutes a prejudicial error.

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

While the NLRB considered this issue as it related to an Illinois brick-and-mortar charter school in In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc., 359 NLRB 41 (Dec. 14, 2012) (“CMSA”), both 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 notably distinguishable. In CMSA, this Board found that the brick-and-mortar 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. This Board applied the two-part test set out in Hawkins County. Under the Hawkins County 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. Applying these criteria, the NLRB found that the Illinois brick-and-mortar charter school was not a political subdivision under Hawkins County because it was not created directly by any government entity, statute, or public official, and because it was not administered by individuals who were responsible to public officials or the general electorate.

The Board Decision 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 specifically limited to Illinois law. While the Illinois Charter Schools Law, 105 ILCS 5/Art. 27A et seq., and the Pennsylvania CSL, 24 P.S. § 17-1701-A et seq. share provisions similar in substance, important and pertinent distinctions do exist. Rather than consider those differences, the Regional Director appears to utilize CMSA as that prohibited bright-line rule.

(2) The PA Virtual is a Political Subdivision of the Commonwealth under the First Prong of Hawkins County Test

PA Virtual meets the requirements of a political subdivision under the first prong of the Hawkins County test because it was created directly by an administrative department of the Commonwealth of Pennsylvania. 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 “PDE”).” *See* 24 P.S. 17-1703-A.⁸ While Illinois law does permit what it terms “virtual-schooling,” Illinois schools with such programs are chartered by a local school district, which is a critical distinction.

Under Pennsylvania law, a public cyber charter school is established when its charter is granted and signed by the Department. 24 P.S. §17-1745-A. Prior to PDE approval of the charter, a charter school does not exist. In Pennsylvania, a charter school is not established unless or until the Department grants a charter. “**The charter, when duly signed, shall act as legal authorization of the establishment of a cyber charter school.**” 24 P.S. § 17-1745-

⁸ As aforementioned, PA Virtual’s current charter, issued in 2010, was issued directly from the Commonwealth of Pennsylvania, Department of Education. *See* Er. Ex. 6, 7.

A(f)(3). Absent the approval and affirmative action of the Department, private individuals cannot establish a charter or cyber charter school in Pennsylvania. To state that a charter is established by private individuals and therefore is a private employer is: (1) in direct contrast to the express intent of the legislators within the Commonwealth; and (2) directly contradicts the explicit language within the CSL.⁹

Despite the ministerial requirement that Pennsylvania's cyber charter schools be incorporated as nonprofit corporations, 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 receipt of a signed charter, *only* a cyber charter school applicant exists and not a cyber charter school itself. It was only **after** applying for the initial charter that PA Virtual filed for and was granted incorporation as a public non-profit entity. 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 and all school assets would revert to 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 nonprofit corporation was created for one sole reason: operation of the public cyber charter school in the Commonwealth. Er. 2.

Furthermore, the NLRB has previously declined to assert jurisdiction over a public non-profit university because the state control of that entity was so extensive as to make it a quasi-public institution. Temple University, 194 NLRB 1160, 1161, 79 LRRM 1196 (1972). Here, PA Virtual is a public school that, similar to Temple University, is extensively controlled by the

⁹ By way of further example, in 2001 the Department commissioned a report of cyber charter schools to establish a defined and robust accountability system, to verify the governance structure, and to analyze the costs and funding associated with public cyber charter schools. See October 30, 2001 KPMG Consulting, Cyber Charter Schools Review. The entire purpose of this report was to review public cyber charter schools and how they operate as part of the public education system. If cyber charter schools were not public schools, or an arm of the Department, PDE would not have commissioned this extensive and costly review.

Commonwealth through the Department. The NLRB, in Temple University, concluded that, because of the University's unique relationship with the Commonwealth of Pennsylvania, the policies of the Act were best effectuated by the NLRB's declining jurisdiction over the University. See Temple University, 6 PPER 127 (Order and Notice of Election, 1975). Similar to the Department's involvement with and distribution of funding to PA Virtual here, the Commonwealth's involvement in the University's financial affairs was substantial; for example, Commonwealth funds were used to upgrade the University's facilities. Id. Here, the vast majority—at least 90 percent--of PA Virtual's funding is comprised of taxpayer monies from the Commonwealth (with the remaining monies being public federal funding or federal grant monies). Transcript 28:13-23, 52:14-23. In other words, PA Virtual also utilizes the Commonwealth's funds for its facilities and offices. In Temple University, the Commonwealth also had oversight of the members of the University's Board of Trustees. Id. In this case, the Department has oversight of the members of the Board through approval of the Board member selection process (that must be outlined in the charter application) and through continued and ongoing oversight as discussed herein. Similar to how Temple University was interrelated to the Commonwealth, PA Virtual is a part of the Department via its charter.

In this case, the public cyber charter school here would not exist without a charter. If there was no public school in existence then there would be no need for teachers. Without teachers, there would be no potential members of the proposed bargaining unit as all unit members here are teachers. Transcript at 6:15-19. Even if it were possible to conclude that a non-profit entity could exist here without a charter (and it is not), there would be no need for teachers in the non-profit entity because a public cyber charter school cannot exist or operate

without a charter from the Department. 24 P.S. §17-1701-A et seq. Without a charter, there would be no public school, no teachers and no proposed bargaining unit.

The focus should remain on the entity's status as a cyber charter school that can only be established directly by the Department. As noted in Hinds County, 331 NLRB 1404 (2000), while state law is not controlling, it must be given careful consideration by the Board. The Regional Director failed to do this. In doing so, the Board should give significant weight to the fact that Pennsylvania law dictates cyber charter schools to be public schools and therefore public employers under PERA. 24 P.S. 17-1745-A(f)(1)(v); 43 P.S. § 1101.301.

Moreover, the CSL expressly provides that charter school staff may organize under PERA and that the Board of Trustees of a charter school shall be considered an employer for those purposes, implicitly meaning that PA Virtual is a public employer under state law. Because the Act "leaves states free to regulate labor relations" with its employees, Davenport, supra, the only sound inference from a state law which exercises a right to regulate labor relations at the state level is that, in doing so, the state intends to meet the Act's political subdivision exemption. Therefore, a Pennsylvania public cyber charter school is a political subdivision and not subject to the NLRB jurisdiction, 29 U.S.C. §152(2).

The Regional Director discounts any relevance on a Pennsylvania labor statute that asserts state jurisdiction when such jurisdiction is intended to only apply to state public employers. This is an indication that Pennsylvania's state legislature was expressly declaring that labor relations' issues as they relate to charter schools should be vested at the state level.

This conclusion is supported by Pennsylvania's Commonwealth Court that, in the seminal case of Warner v. Lawrence, 900 A.2d 980 (June 2, 2006), affirmed a lower court's ruling that stated in part, "charter schools are the creation of the legislature." The impact of the

Warner decision should not be lessened by the Third Circuit’s unpublished and therefore non-precedential ruling in *Pocono Mountain Charter Sch. v. Pocono Mountain 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 Mountain*, 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. See also *Slippery Rock Area Sch. Dist. v. Pennsylvania Cyber Charter Sch.*, 612 Pa. 486, 490, 31 A.3d 657, 659 (2011) (“[Cyber charter school] is an independent public school operating under a charter granted by the [Department]...” In *Warner*, a minor brought a negligence action against a Pennsylvania charter school for personal injuries 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 of the Pennsylvania Constitution. Under this same reasoning, PA Virtual would be considered a creation of the Pennsylvania state legislature that is overseen by the Department and entitled to the same immunity as the charter school in *Warner*. PA Virtual meets the first prong of the *Hawkins County* test because it is a political subdivision.

(3) Under Appropriate Application of the Second Prong of the *Hawkins County* Test, PA Virtual is Administered by Individuals who are *Responsible to Public Officials or to the General Electorate.*

The Regional Director’s Decision erred in concluding that neither the Board nor PA Virtual’s Administration are accountable to any state or local public officials.

In Hawkins County, the utility board in question in that case was “neither directly created by the state, nor administered by State-appointed or elected officials.” Hawkins County, 402 U.S. at 605 (quoting Natural Gas Utility District of Hawkins County, 167 NLRB 691, 691-92 (1967)). Nonetheless, the Supreme Court held that the utility district was a political subdivision of the State. Id. In Hawkins County, the Supreme Court disagreed with the Board on two points critical points:

First, the Court faulted the Board for failing to properly apply the second prong of its own test, as articulated in the Board's own brief to the Court: “[T]he Board test is not whether the entity is administered by 'State-appointed or elected officials.' **Rather, alternative (2) of the test is whether the entity is 'administered by individuals who are responsible to public officials or the general electorate.'**” (citations omitted).

Second, the Court held that the Board had erred in its reading of [the Tennessee utility-district enabling statute] in light of that test. Instead of focusing narrowly on whether the utility district's governing board was composed of "State-appointed or elected officials' –as the Board had done—the **Court engaged in a more global analysis of the ‘operations and characteristics’ of the entity pursuant to its enabling legislation.**

In Hawkins County, the Supreme Court concluded that the utility board was “administered by individuals who are responsible to public officials or the general public” based upon a **totality of the facts and circumstances involved.** Hawkins County at 13. Therefore,

Hawkins County thus establishes two critical propositions: **(1) whether an entity ‘is administered by individuals who are responsible to public officials or the general electorate’ turns on a fact-intensive and case-specific analysis** of the degree of public accountability to which the entity is subject; and **(2) that analysis turns in large measure on the relevant state law governing the entity's operations.**

Id. at 13

In the instant matter, under these two propositions, PA Virtual is both administered and governed by individuals responsible to public officials and/or the general electorate, and Pennsylvania

state law supports a finding that it is not subject to jurisdiction under the Act. The Regional Director failed to perform this analysis.

In order to sufficiently understand and appropriately apply the Hawkins County test, it is critical to apply the second prong as a fact-intensive inquiry that must be done on a case-by-case basis. As outlined in Hawkins County, “State declarations and interpretations,” including those as whether a charter school is a public or private employer, must be given “careful consideration.” Hawkins County, 402 U.S. at 604. In Pennsylvania, the CSL is unequivocal in stating that charter schools—including cyber charters—are **public** schools; charter schools were statutorily created to be an intrinsic element of the Pennsylvania public school system. See 24 P.S. § 17-1703-A¹⁰; see also Er. 1; Er. 4; Er. 5; Er. 6; Er. 8; Er. 10.

While the Regional Director cited the fact that PA Virtual was founded by “private individuals” as a basis for the Decision in this matter, the Supreme Court precedent indicates this application by private individuals does not justify a finding against PA Virtual. In Hawkins County, the utility in question was created in a similar manner to cyber charters in Pennsylvania, including PA Virtual; private individuals submitted an applications to public officials (*i.e.* the board of directors of the local school district and subsequently the Department). Hawkins County, 402 U.S. at 606. Here, 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 directly overseen and accountable to other public officials, primarily the Secretary of Education, under Pennsylvania law.

¹⁰ The Charter School Law uses the word “public” in reference to charter schools over seventy (70) times in the statute. 24 P.S. § 17-1701-A, et seq.

As aforementioned, the Board of Trustees of PA Virtual consists of public officials who administer the Charter School. While PA Virtual is similar to the utility district in Hawkins County, the public cyber charter school also operates in a similar manner to the traditional public school districts in Pennsylvania and is subjected—with some specific exemptions outlined in the CSL—to the same regulations. 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. 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.

Thereafter, this role of the Department as authorizer of PA Virtual is not complete upon signing the charter agreement. For example, cyber charter schools are also subjected to:

- (1) the imposition of financial and audit reporting obligations. See 24 P.S. § 17-1749-A; see also 24 P.S. § 17-1725-A.
- (2) the obligation to comply with the Pennsylvania open meetings laws and specifically the Sunshine Act. See 24 P.S. § 17-1749-A; see also 24 P.S. § 17-1716-A.
- (3) permitting access to its records under the Right-to-Know Act. See Zager v. Chester Community Charter School, 934 A.2d 1227, 594 Pa. 166 (Pa. 2007).
- (4) empowerment from the chartering entity (for cyber charter schools this is the Department) to revoke or not renew a charter.
- (5) tort liability in the same manner as political subdivisions or local agencies. See 24 P.S. § 17-1749-A; see also 24 P.S. § 17-1727-A.

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 report, and obligation to allow the Department to conduct on-site visits and have open access to school records. 24 P.S. § 17-1743-A(f); 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, comes to PA Virtual's offices and conducts an onsite visitation and review to ensure compliance with state laws and regulations. Transcript 23: 19-24:3. As discussed in the BEC, Er. 11, the onsite visits from the Department include:

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***

The continuous responsibility to and oversight by public officials is further exemplified by PA Virtual being required to submit a mandated annual report to the Department. 24 P.S. § 17-1743-A(f); 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 traditional 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 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. The entirety of the Charter School's funding or monies consists of public state and federal revenue, so PA Virtual is obligated to provide the public access to its budget.. Transcript 28:13-23, 52:14-23. PA Virtual must publically post its annual budget on the school website per mandates by the Department. Transcript at 37:6-17, 50:3-9.

Not only does the Department require these annual financial and operations reports, the Department directly controls the distribution of funding to charter schools. Typically in Pennsylvania, funding is distributed by the local school districts to charter schools. When there is a dispute as to the funding payments owed to a charter school, Section 1725-A of the Charter School Law, authorizes the Secretary to withhold charter school payments when school districts refuse to make such payments. Under the CSL, the school districts must pay charter schools a per pupil amount based on the statutory formula. 24 P.S. § 17-1725-A. If a school district fails to make such payment, the Secretary must deduct the amount from the state's payment to that district. Slippery Rock Area Sch. Dist. v. Pa. Cyber Charter Sch., 975 A.2d 1221, 1222, 2009 Pa. Commw. LEXIS 453, 2 (Pa. Commw. Ct. 2009). "If a school district fails to make a payment to a charter school as prescribed in this clause, the Secretary shall deduct the amount, as documented by the charter school, from any and all State payments made to the district after receipt of documentation from the charter school." Pa. Sch. Bds. Ass'n v. Zogby, 802 A.2d 6, 10, 2002 Pa. Commw. LEXIS 505, 13 (Pa. Commw. Ct. 2002)(citing 24 P.S. § 17-1725-A).

Furthermore, Department can initiate legal action against public cyber charter schools for misuse of that public funding. In relation to other cyber charter schools, the Department has taken action to stop providing cyber charter schools with taxpayer monies; in response to an audit of one cyber charter school, the Department stopped providing public state funding pending the outcome of fraud charges against a school administrator. United States v. Brown, 2014 U.S. Dist. LEXIS 106054, 16, 2014 WL 3797201 *16 (E.D. Pa. July 31, 2014); see also Commonwealth of Pennsylvania, Department of Education v. Agora Cyber Charter School, Case No.: 243 MD 2009 (Pa. Commw. Ct. 2009).

Aside from the above, 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; 24 P.S. §§ 2070.1a to 2070.18a. In Pennsylvania, cyber charter schools are also subjected various regulations for its staff. See 24 P.S. § 17-1749-A; see also 24 P.S. § 17-1724-A. Specifically, a Pennsylvania public cyber charter school is subject to the Commonwealth’s labor statutes. Id. As a result, there would be no risk of disenfranchising any employees in the Commonwealth from their right to organize as the state statute would provide for and control such right. By statute, cyber charter schools must comply with the state collective bargaining laws. Id. Not only are cyber charter employees protected by state labor laws, but the cyber charter school employees also participate in the Pennsylvania Public School Employee’s Retirement Systems (“PSERS”). See 24 P.S. §§ 17-1749-A, 17-1724-A(c). The protection under state labor law and the participation in the state public retirement systems further evidence that the PA Virtual is a public employer. Rosenberg Library Ass’n, 269 NLRB at 1175 (“public body’s promulgation of employee qualifications and standards for staffing, hours and funding to govern entity supports conclusion that entity is a political subdivision.”); Hinds County Resource Agency, 331 NLRB 1404, 1405 n.12 (2000)(“[T]he fact that the employees participated in the state retirement system’ suggests political subdivision status.”); St. Paul Ramsey Medical Center, 291 NLRB 755, 758 (1988)(“finding it ‘[s]ignificant’ that the entity’s employees are ‘excluded from coverage under the state public employment labor relations act and the state public employees retirement act’ when determining that the hospital is not a political subdivision.”).

As discussed above, cyber charter school enroll students from throughout the Commonwealth of Pennsylvania and, therefore, oversight by the Department of public cyber charter schools has become extremely extensive. The extent of this oversight is further 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 BECs. 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. 11.¹¹ 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 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.¹²

¹¹ This unqualified statement confirms PA Virtual’s status as a political subdivision under the first prong of the Hawkins County test.

¹² 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.

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 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 P.S. § 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 charter 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. These controls are much more stringent than those in the CMSA matter.

Importantly, in addition to the Board consisting of public officials, PA Virtual meets the second prong of Hawkins County because it is also responsible to report to the PDE as aforementioned.

For example, the Department shall also:

(1) **Annually assess** whether each cyber charter school is meeting the goals of its charter and is in compliance with the provisions of the charter and **conduct a comprehensive review prior to granting a five-year renewal of the charter.**

(2) **Annually review** each cyber charter school's performance on the Pennsylvania System of School Assessment test, standardized tests and other performance indicators to ensure compliance with 22 Pa. Code Ch. 4 (relating to academic standards and assessment) or subsequent regulations promulgated to replace 22 Pa. Code Ch. 4.

(3) Have **ongoing access** to all records, instructional materials and student and staff records of each cyber charter school and to every cyber charter school facility to ensure the cyber charter school is in compliance with its charter and this subdivision.

24 P.S. § 17-1742-A; See also Er.10.

While PA Virtual is subject to the direct oversight of the Department, PA Virtual is also subject to oversight from the Pennsylvania Auditor General (an elected official); PA Virtual has been audited previously by the Auditor General, including most recently in 2008. Transcript at 30:4-8; see also Auditor General Report, Employer Exhibit 9 (“Er. 9”). When complete, the Audit Report is 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; Er. 9. PA Virtual is accountable to the Department for the findings of the Auditor General in the Audit Report. Er. 9. The Regional Director also overlooked the fact that the Auditor General, by his act of auditing PA Virtual, recognizes the public cyber charter school as a political subdivision known as a Local Education Agency (LEA).

While there are numerous provisions under Pennsylvania’s CSL evidencing a cyber charter school’s responsibilities to the PDE, such schools must also comply with a plethora of other laws similarly applicable to Pennsylvania’s traditional public school districts and public employers. These laws include, but are not limited to, the public bidding statute,¹³ Public Works

¹³ 24 P.S. §§ 7-751 and 7-751.1.

Contractors' Bond Law,¹⁴ the Pennsylvania Prevailing Wage Act,¹⁵ the Steel Products Procurement Act,¹⁶ the Right-to-Know Act,¹⁷ the Sunshine Act¹⁸ and the Ethics Act.¹⁹

Aside from Department oversight, there is also evidence within Pennsylvania state law indicating that the legislative intent was for any union activity within public cyber charter schools to fall under state jurisdiction. Several state statutory provisions specifically address union activity. For example, under Pennsylvania law, unions are limited to two strikes during a given school year. 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. 24 P.S. § 11-1125-A(b). Finally, Pennsylvania’s Secretary of Education may seek an injunction when the union has been on strike long enough that the school entity will not be able to provide 180 days of education by June 30. 24 P.S. § 11-1161-A. Under federal law, there is no limitation on the number or length of strikes and other methods, incorporated into Pennsylvania’s Public School Code, to promote student success are likewise lacking. Subjecting a public cyber charter school Pennsylvania to the NLRB’s jurisdiction would grant the federal government power to control at least a substantive portion of Pennsylvania’s educational system.

¹⁴ 8 P.S. § 191 et seq.

¹⁵ 43 P.S. § 165-1 et seq.

¹⁶ 73 P.S. § 1881 et seq.

¹⁷ 65 P.S. § 67.101 et seq.

¹⁸ 65 Pa.C.S.A. § 701 et seq.

¹⁹ 65 Pa.C.S.A. § 1101 et seq.

(4) Additional Responsibility to Public Officials: the Board of Trustees Controls and Administers the Charter School’s Operations and Employees

PA Virtual additionally meets the second prong of the Hawkins County test because the School is administered by individuals who are not only responsible to public officials but are themselves public officials. Pennsylvania CSL clearly states that “**trustees of a charter school shall be public officials.**” 24 P.S. 17-1715-A(11).²⁰ *No such provision exists in Illinois Charter Schools Law.* In addition, members of the Board of Trustees have legal obligations under the Charter School Law and the Public School Code. Er. 8; Er. 10.

While PA Virtual has a provision in its by-laws similar to the charter school in CMSA whereby its board of trustees elects its own members, the critical distinction is that in Pennsylvania, such new members are being elected or removed by other trustees in their capacity and statute as public officials. In addition, as outlined herein, the Board—compromised entirely of public officials—also provides oversight and guidance to the PA Virtual’s Administration. Therefore, the School’s day-to-day operations are managed and administrated by individuals who are *responsible to* public officials. See Transcript at 12:3-12; see also 24 P.S. § 17-1703-A.

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. Transcript at 69:20-70:1; 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

²⁰ PA Virtual’s board members, 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.” See 65 P.S. § 1102.

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; 24 P.S. § 17-1716-A.

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 financial 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 must require an affirmative vote of the majority of the quorum of Board members, at a public meeting, on all business Er. 7; 24 P.S. § 17-1749-A; 24 P.S. § 17-1716-A.

Although Counsel for the Petitioner attempted to differentiate between the Board of Trustees of PA Virtual and the Board of a traditional public school district, Counsel's assertions are both inaccurate and based on form without substance. 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 herein, 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 public vote that occurs at an advertised public meeting. 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.

Here, it is evident that the administration of the public cyber charter school is conducted by individuals who are *responsible to* public officials. Not only are members of the Board defined by state law as public officials, but the Board and Administration are responsible to public officials within the Commonwealth. The Decision of the Regional Director failed to consider the totality of the circumstances and instead inexplicably decided that state law’s definition of public officials was insufficient to establish that PA Virtual is responsible to public officials. The failure of the Regional Director to appropriately analyze this issue in the totality of the circumstances warrants the Board overturning the Decision by the Regional Director.

B. 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 Proposed 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 7-8 (“PA Cyber”). However, the Department does in fact have the power to discipline and/or terminate the employees in the proposed bargaining unit here. Transcript 73:18-74:6; 24 P.S. §§ 2070.1a to 2070.18a. The Professional Practices and Standards Commission (consisting of members appointed by the State Governor and approved by consent of the State Senate) under the Professional 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 employee was reversed or determined to be unfounded. 24 P.S. §§ 2070.9b, 2070.9c, 2070.9d. An educator is defined by the Professional 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. Here, 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 percent of the teachers are certified; Dr. Barnett testified that “100 percent” of PA Virtual’s teachers have a Pennsylvania certificate. Transcript 74:22-24. Therefore, the Department does have express legal authority to discipline, suspend and/or terminate (through revocation of employment eligibility) all of the employees or potential bargaining unit members at issue here. As a result, the instant matter is distinguishable from the PA Cyber case (where the Department

did not have such explicit and direct authority to discipline and terminate the unit members because of the composition of the proposed bargaining unit in that 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 non-profit 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. 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"). "**The charter, when duly signed, shall act as legal authorization of the establishment of a cyber charter school.**" 24 P.S. § 17-1745-A(f)(3).

As previously mentioned, PA Virtual submitted its charter application in November of 2000, which was months before it incorporated the non-profit entity (in January of 2001). Transcript at 78:15-17. Therefore, private individuals did not "create" PA Virtual. PA Virtual was "created" upon issuance of the initial charter agreement. PA Virtual would not exist today separate and apart from the Department of Education. Instead, PA Virtual would dissolve immediately if its 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 cease to exist and all asserts would revert to another public school entity or district.. Transcript at 18:17-19:1.; see also 24 P.S. § 17-1729-A(i).

Furthermore, as acknowledged within the dissent in the PA Cyber case, there is a basis to conclude that a public cyber charter school is created by the state. Member Johnson noted in the dissent that issuance of a charter *before* the private entity was created resulted in “creation by the state.” The Department “act[s] on applications for the *creation* of a cyber charter school.” PA Cyber, April 9, 2014 Order, at 3 (2014)(citing 24 P.S. § 17-1741-A).

In short, PA Virtual is a creation of and exists within the Commonwealth’s public school system via the Department. PA Virtual did not exist until it was established by the Department and would not exist, in any form, upon dissolution of the public cyber charter school by 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 herein, the Department not only functioned as the authorizer of PA Virtual when 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 at least 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 above. The Regional Director’s Decision that the Department does nothing more than “grant a charter” is inaccurate, erroneous and prejudicial. For this reason, the Board should review the Decision of the Regional Director.

The NLRB has previously declined to assert jurisdiction over a public non-profit university because state control of that entity was so extensive so as to make it a quasi-public institution. Temple University, 194 NLRB 1160, 1161, 79 LRRM 1196 (1972). Here, PA Virtual is a public cyber charter school that, similar to Temple University, is extensively controlled by the Commonwealth through the Department. For this reason, the Board should overturn the Decision by the Regional Director in this matter.

(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). 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 above, 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. 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 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:

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; see also 24 P.S. § 17-1743-A(f).

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 PA Cyber and CMSA, 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.

For all of the aforementioned reasons, the Decision in PA Cyber is distinguishable from the instant matter.

C. Denial of Jurisdiction Would Have Only Minimal Impact on Pennsylvania Non-Public Cyber Schools, Brick and Mortar Charter Schools, Government Contractors and Their Respective Employees

While it is evident that PA Virtual is exempt from jurisdiction of the Board, even if the Board disagrees, the Board should nonetheless exercise its discretion and decline jurisdiction. As aforementioned, PAVirtual is different from any other government licensee or contractor in that the charter issued to it, directly by the PDE, limits the entity's operation to that of a public cyber charter school. Because of this limitation, PA Virtual would have no ability to do any business outside of operating a public cyber charter school within the boundaries of Pennsylvania; the nonprofit corporation was formed after the charter was issued and solely for the purpose of operating the cyber charter school within the Commonwealth of Pennsylvania.

The scope of services that PA Virtual is authorized to provide is very limited and focused; the Charter School may only provide educational services to students within the Commonwealth of Pennsylvania. As a result, the Board should not assert jurisdiction over the

instant matter. As there are only fourteen (14) cyber charter schools in Pennsylvania, there would be little, if any, impact on other government entities, contractors, licensees or employees, a denial of jurisdiction would be in line with Board precedent. Transcript at 22:10-11.

The Board has previously declined jurisdiction where it determined that the employer's business had an insubstantial impact upon commerce or was local in character, and where the exercise in jurisdiction would not affect the policies behind the Act. See Guss v. Utah Labor Relations Board, 353 U.S. 1, 3 (1957); Clayton-Dorris Co., 78 NLRB 859 (1948); Duke Power Co., 77 NLRB 652 (1948); F. G. Congdon, 74 NLRB 1081 (1947); Johns-Manville Corp., 61 NLRB 1 (1945); Brown & Root, Inc., 51 NLRB 820 (1943).

Furthermore, per amendments to the Act, the Board's discretion to deny jurisdiction has also been codified:

The Board, in its discretion, may, by rule of decision or by published rules ... **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.

29 U.S.C. § 164(c)(1).

In situations where the Board declines jurisdiction, the States are free to regulate labor relations without being subject to federal pre-emption. Id. In addition, the Act leaves states free to regulate their labor relationships with their public employees. See Davenport v. Washington Educ. Ass'n., 551 U.S. 177, 181 (2007). This statement, accepted as the foundational premise in the Supreme Court's analysis in Davenport, is based on §2(2) of the Act, which excludes states and political subdivisions thereof from the definition of "employer," and therefore renders them exempt from NLRB jurisdiction. 29 U.S.C. §152(2). As an administrative agency, the NLRB's

jurisdictional reach is limited by statute and the Board cannot exercise jurisdiction beyond the bounds of the Act. Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 918 (3rd Cir. 1981).

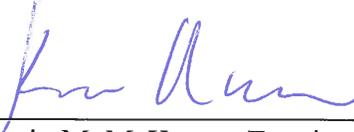
As discussed above, the Board's denial of jurisdiction would permit Pennsylvania to regulate labor unions including the proposed collective bargaining unit in this case. Here, denial would permit Pennsylvania to retain control over its own state educational system, and specifically its school staffing. If the Board asserts jurisdiction over the proposed unit, as the Regional Director's Decisions concluded, it would effectively remove the state's control over critical aspects of its own state public education system. In previous cases, the Board has declined to assert jurisdiction because of the public purpose served by schools and because state education agencies exercised control over their own school systems, which included asserting control through regulation and approval of the school education programs. For example, the Board has previously declined jurisdiction over *private* nonprofit schools that state and local governments contracted with to provide various special education services. Overbrook Sch. For the Blind, 213 NLRB 511 (1974); see also Laurel Haven Sch. for Exceptional Children, Inc., 230 NLRB 1197 (1977)). This decision was based upon the fact that the schools ". . . operate as 'adjunct[s] of the [states'] public school systems.'" Id. In the instant matter, PA Virtual operates as part of the public school educational system in Pennsylvania; per the Charter School Law, it is a part of the statewide public education system. 24 P.S. § 17-1701-A et seq.; Er. 5.

In summary, the Board possesses very broad discretion for decline jurisdiction under the Act. As a result, PA Virtual respectfully requests that the Board deny jurisdiction in this matter and issue an Order addressing this very important issue that has significant impact on the employer but limited impact on Pennsylvania brick and mortar charter schools, government contractors, and their respective employees.

Respectfully submitted,

LATSHA DAVIS & McKENNA, P.C.

Dated: April 8, 2015



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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.	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Employer's Brief in Support of Request for Review filed by the Pennsylvania Virtual Charter School, was served on April 8, 2015, upon the following individuals via Electronic and First Class Mail:

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