

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 6

THE PENNSYLVANIA CYBER CHARTER  
SCHOOL

**Employer**

and

Case 06-RC-159861

PA CYBER SPECIAL EDUCATION  
ASSOCIATION, PSEA/NEA

**Petitioner**

**REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

The Employer, a cyber charter school, with offices and a place of business in Midland, Pennsylvania, is engaged in providing kindergarten through 12th grade educational services to students, primarily over the internet. The Employer employs approximately 670 employees. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit, as amended at the hearing, of all full-time and regular part-time special education teachers and reading specialists employed by the Employer through its Midland, Pennsylvania facility; excluding virtual classroom instructors, nonprofessional employees, managerial employees, guards and supervisors as defined in the Act. A hearing officer of the Board held a hearing and the parties filed timely briefs with me.

As evidenced at the hearing and in the briefs, the parties disagree on the single, threshold issue of whether the Employer is exempt from the Board's jurisdiction as a political subdivision.<sup>1</sup>

The Employer contends that it is a public employer as it is a political subdivision of the Commonwealth of Pennsylvania and it is administered by individuals who are responsible to

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<sup>1</sup> The Employer concedes that it meets the applicable monetary jurisdictional standards for educational institutions and schools.

public officials, specifically its Board of Trustees. Thus, the Employer contends that it is not subject to the jurisdiction of the Board and the instant petition must be dismissed. The Petitioner contends that the Employer is not exempt from the Board's jurisdiction as it is a private employer within the meaning of Section 2(2) of the Act.

I have considered the evidence and the arguments presented by the parties on this issue.<sup>2</sup> As discussed below, I have concluded that the Employer does not meet either of the two prongs of the applicable test set forth in *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600, 604-605 (1971). I have therefore determined that the Board has jurisdiction over the Employer and that it is an employer within the meaning of Section 2(2) of the Act. Accordingly, I have directed an election in a unit that consists of approximately 72 employees.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports each of my conclusions on the issue presented.

## **I. FINDINGS OF FACT**

### **A. Overview**

The Employer operates a public cyber charter school that provides educational services over the internet, in virtual classrooms on a traditional schedule, to students who may reside

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<sup>2</sup> On February 24, 2014, the Regional Director for Region Six issued a Decision and Direction of Election in Case 06-RC-120811, which involved the same parties as the instant case, although a different kind of employees. Similar to the instant matter, however, the sole issue to be decided was whether the Board had jurisdiction over the Employer. In that case, the Regional Director determined that the Board had jurisdiction over the Employer, and directed that an election be conducted. The Board denied the Employer's request for review of that Decision on April 9, 2014. The record from the hearing in Case 06-RC-120811 was introduced, in its entirety, at the hearing in the instant case, at which limited additional testimony was presented. There was testimony that neither the state nor federal laws governing the Employer have changed since the previous hearing. The records from both proceedings form the basis of my decision herein.

anywhere in the Commonwealth of Pennsylvania. The Employer presently has an enrollment of over 11,000 students. Students choose the option of internet education over traditional “brick and mortar” schools for a variety of reasons, such as health issues, inadequate service by their resident school district, or that the student’s parents are exercising their right to school choice. The Employer is the largest charter school, cyber or otherwise, in Pennsylvania.

Students do not pay tuition and they receive services similar to those afforded any other public school students, including the opportunity for field trips and special education services. The Employer cannot turn students away as long as they reside in Pennsylvania. Funding for the Employer’s operations is statutorily mandated by the Pennsylvania legislature and the actual funds are provided by the student’s “sending school district,” that being, one of the 500 school districts in Pennsylvania where the student actually resides. A portion of each respective school district’s per pupil cost, currently about 75% - 80% of the total allocation, follows the student and is paid directly by the district to the Employer for each enrolled student. The Employer derives approximately 98% of its funding from “sending school districts.” The remainder of the Employer’s funding comes from sources which include Federal Title I and Title II funds and IDEA (Individuals with Disabilities Education Act) monies.

The overall day-to-day operations of the Employer are the responsibility of its Chief Executive Officer, Michael Conti. Conti has been employed by the Employer for over 15 years. He has a management team which oversees the technological and financial aspects of the Employer’s business, special education services and the Employer’s “academies.” They develop

and maintain the curriculum as well as supervise and evaluate the virtual classrooms.<sup>3</sup> Conti and his management team do not, however, create the Employer's policies. That function is reserved for the Employer's Board of Trustees, to whom Conti reports.

### **B. The Statutory Scheme**

In 1997, the Pennsylvania legislature amended the Public School Code<sup>4</sup> (PSC) to include a provision for the establishment of charter schools. Article XVII, the Charter School Law<sup>5</sup> (CSL), sets forth the process by which a charter school could be established or an existing school could be converted into a charter school.

Schools that operate under a charter in Pennsylvania are divided into three general types - charter schools, regional charter schools, and cyber charter schools. The first two, charter schools and regional charter schools, are authorized to operate through charters granted by a local school district.<sup>6</sup> These schools are "brick-and-mortar" charter schools and focus on teacher-centered instruction, including teacher-led discussion and teacher knowledge imparted to students, through face-to-face interaction at the schools' physical facilities.

As defined by the CSL, a cyber charter school is "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

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<sup>3</sup> At the time of the hearing in Case 06-RC-120811, the Employer utilized the services of a management company for certain aspects of its operations. At the time that this petition was filed, the Employer no longer contracts with a management corporation, but contracts separately for certain services.

<sup>4</sup> P.L. 30, No. 14 (1949).

<sup>5</sup> 24 P.S. sections 17-1700, et seq., contained in the record as Employer Ex.5 in the record of Case 06-RC-120811, a component of Board Ex. 3(b) in the instant matter.

<sup>6</sup> 24 P.S. sections 17-1717-A(c) and 17-1718-A(b) and (c).

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.<sup>7</sup>

In contrast to traditional schools which are created by their local school districts<sup>8</sup>, charters to operate cyber charter schools are issued<sup>9</sup> by the Pennsylvania Department of Education (PDE).<sup>10</sup> A cyber charter school offers structured educational programs in which content and instruction are delivered over the internet without a requirement that the student attend a supervised physical facility, except on a very limited basis, such as for mandatory standardized tests. The PDE is responsible for reviewing and acting upon charter applications for cyber charter schools in Pennsylvania. The PDE also renews and revokes cyber charter schools’ charters as necessary. The PDE is charged with assessing and evaluating cyber charter schools to ensure compliance with their own charters and applicable statutes and regulations.<sup>11</sup>

The Board of Trustees of a charter school has the authority to decide matters related to the operation of the school, including, but not limited to, budgeting, curriculum and operating procedures, subject to that school’s charter. The Board has the authority to employ, discharge, and contract with necessary professional and nonprofessional employees, subject to the school’s

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<sup>7</sup> 24 P.S. section 17-1703-A.

<sup>8</sup> See fn. 6 above.

<sup>9</sup> 24 P.S. section 17-1741-A(a).

<sup>10</sup> The PDE is a Commonwealth agency as defined in the Administrative Agency Law, 2 Pa.C.S. Secs. 101, *et seq.* and the General Rules of Administrative Practice and Procedure, 1 Pa. Code Secs. 31.1, *et seq.*

<sup>11</sup> 24 P.S. sections 17-1741-A through 17-1751-A.

charter and applicable law.<sup>12</sup> The CSL provides that trustees of a charter school shall be public officials and that an “administrator” or CEO shall be a public official as it relates to ethics standards and financial disclosure under prevailing Pennsylvania law.<sup>13</sup> For purposes of tort liability, employees of a charter school are considered public employees and the Board of Trustees is considered a public employer.<sup>14</sup>

Under the CSL, a charter school may be established by an individual; one or more teachers who will teach at the proposed school; parents or guardians of students who will attend the charter school; any nonsectarian college, university or museum located in the Commonwealth; or any nonsectarian corporation, not-for-profit corporation, association, partnership, or other entity.<sup>15</sup> If the applied-for charter is not granted, there is a statutory review process to appeal the denial.

With respect to staffing, the CSL states that the Board of Trustees shall determine the level of compensation and all terms and conditions of employment of the staff. It further provides that employees of a charter school may organize under the Pennsylvania “Public Employee Relations Act.”<sup>16</sup> According to the CSL, collective bargaining units at a charter school shall be separate from any collective bargaining unit of the school district in which the charter school is located and shall be separate from any other collective bargaining unit.<sup>17</sup>

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<sup>12</sup> 24 P.S. section 17-1716-A(a).

<sup>13</sup> 24 P.S. sections 17-1715-A(11) and (12).

<sup>14</sup> 24 P.S. section 17-1727-A.

<sup>15</sup> 24 P.S. section 17-1717-A(a).

<sup>16</sup> P.L. 563, No. 195 (1970).

<sup>17</sup> 24 P.S. section 17-1724-A(a).

Regarding employee benefits, the CSL provides that all employees of a charter school shall be enrolled in the Public School Employees' Retirement System unless at the time of the application for the charter school the sponsoring district or the Board of Trustees of the charter school has a retirement program which covers the employees. The Commonwealth makes contributions on behalf of charter school employees and the charter school makes payments to Social Security for the employees.<sup>18</sup> PDE also publishes "basic education circulars" (BECs) which summarize responsibilities under various Pennsylvania codes and statutes.

Section 17-1745-A of the CSL provides specific details regarding the procedure for the establishment of a cyber charter school, and that Section provides that a cyber charter school may be established by application to the PDE by any individual or interested group, and will be nonsectarian. Section 17-1749-A sets forth the requirements and regulations with which cyber charter schools must be in compliance. These include provisions for health, safety, and academic standards. Cyber charter schools must file an annual report and an annual budget with the Commonwealth and these are subject to audit.<sup>19</sup> Finally, Section 17-1743-A of the CSL lists specific requirements and prohibitions for cyber charter schools regarding its communications with school districts, parents, and students. If a charter school fails to abide by its duties and responsibilities, its charter can be revoked and its assets would be retracted by the Commonwealth for distribution for other educational purposes.

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<sup>18</sup> 24 P.S. section 17-1724-A(c).

<sup>19</sup> A BEC which specifically pertains to cyber charter schools is included in the record of Case 06-RC-120811 as Employer Ex. 10., a component of Board Ex. 3(b) in the instant matter.

### **C. The Employer's Organization**

On October 7, 1999, a founding group of private individuals was issued the initial charter from the Board of Directors of Midland School District to operate a cyber charter school.<sup>20</sup> The original charter is signed by Nick Trombetta as President of the Board of Trustees and Charlotte Freund as Board Secretary. In September 2000, Trombetta, Freund, and Karen Granito, another individual, filed Articles of Incorporation for the Employer as a domestic nonprofit corporation with the Pennsylvania Department of State.<sup>21</sup> The record reveals that in 2005, the Employer's name was changed to its current name by amendment to its Articles of Incorporation, which was signed by Trombetta.

The Employer's initial charter was for the statutory five-year period and was renewed by application in 2005, and again in 2010.<sup>22</sup> However, both the 2005 and 2010 charters were issued by the PDE, due to an amendment in the Pennsylvania law CSL in about 2002, which placed the evaluation, approval and oversight of cyber charter schools with the PDE rather than with any of the individual school districts in Pennsylvania.

Under the Employer's bylaws<sup>23</sup>, the Employer's Board of Trustees is composed of between seven and nine members, who are appointed and are not required to stand for an

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<sup>20</sup> The Employer was originally chartered as "Western Pennsylvania Cyber Charter School."

<sup>21</sup> There is no evidence that Trombetta, Freund, or Granito held any position with any government entity.

<sup>22</sup> At the time of the hearing in the instant matter, the Employer had a renewal application. The application was introduced into the record of the instant case as Employer Ex. 2. There is no evidence that the current recent renewal process differs from the Employer's experience with earlier renewals of its charter.

<sup>23</sup> The bylaws in existence at the time of the hearing in Case 06-RC-120811 have since been amended. In large part, there has been no change to the bylaws. Article 3, Section 9 - "Code of Ethics" - is significantly different in the current bylaws than in the version in effect at the time of the hearing in Case 06-RC-120811; and an additional Article prohibiting nepotism, has been added to the bylaws. There is no

election by the public. Board members appoint other Board members and their respective terms of office are for two or three years in staggered terms. Trustees set wages for the Employer's staff and hire, fire, and discipline its employees. There is an Employee Handbook, created by the Board of Trustees, which sets forth the policies that the Employer's employees must follow. Neither the PDE nor the "sending school district" which provides funding to the Employer has any authority to appoint or remove Trustees or to hire, fire, or discipline the Employer's employees.

All teachers in Pennsylvania public schools are required to have a "teaching certificate" in their area of expertise which is issued by the PDE or they cannot be in a classroom providing direct education. In contrast and according to the CSL, only 75% of the Employer's teachers or any other charter school's teachers are required to attain a teaching certificate from the PDE.<sup>24</sup> The Pennsylvania Educator Discipline Act polices all of the Commonwealth's teachers who hold such certificates and may revoke them if necessary.

Certain provisions of the Pennsylvania School Code (PSC)<sup>25</sup> relate to personnel policies and involve due process concerns and procedures for furloughing employees. These provisions are not binding upon the Employer, although they are required of traditional public schools in

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evidence that these changes in the bylaws were required by law, however, and I find that the differences in the code of ethics section, and the addition of the article concerning nepotism, do not affect my conclusion that the Employer is an employer within the meaning of Section 2(2) of the Act, and therefore subject to the Board's jurisdiction.

<sup>24</sup> The Employer introduced evidence that 100% of its teachers are certified, stating at the hearing in the instant matter that this was required for federal funding. The Employer also presented testimony, however, stating that there had been no change in federal law since the hearing in Case 06-RC-120811. As there has been no change in the legal requirements, I do not find significant the fact that 100% of the employers teachers are certified.

<sup>25</sup> *Supra*, at fn. 4.

Pennsylvania. It appears that cyber charter schools are not required to abide by all provisions of the PSC unless the CSL has specifically so stated.<sup>26</sup>

While the record indicates that the duties of the Employer's Board of Trustees and those of the school boards of Pennsylvania's 500 school districts are similar administratively, key differences exist. The duties and responsibilities of elected school board members are set forth in detail in the PSC but these were not all incorporated into the CSL so as to be binding upon the Employer's Trustees.

Under the PSC, a school board member must live within his or her school district. There is no residency requirement for the Employer's Trustees. A public school board must be composed of nine members and all must be elected by the voters in the school district for terms of four years. If vacancies occur between elections, a school board member may be appointed by other board members but the appointed member must stand for election at the next election opportunity. To participate in an election, the candidate must gather a requisite number of signatures from the community, register, and file a petition. Both public school board candidates and the Employer's Trustees must file annual financial disclosures with Pennsylvania.

The operation of the Employer's Board of Trustees are subject to different requirements from those which apply to traditional school boards. Such matters as the manner of voting, the constitution of a quorum, and the time, duration, and regularity of meetings are within the discretion of the Employer's Board of Trustees, but not for traditional school boards whose procedures are mandated by the PSC.

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<sup>26</sup> 24 P.S. section 17-1732(A).

Like traditional school boards, the Employer's Board is subject to the Pennsylvania Sunshine Act and its Trustees must take all official action in public meetings. The Employer's officers are also subject to Pennsylvania's Public Official and Employee Ethics Act, and the Employer must provide documents upon request pursuant to the Right to Know Act. In addition to the requirement of an annual audit by a private concern, the Employer is subject to audit by the Pennsylvania Auditor General. The record reflects that the Employer has been the subject of at least two audits by the Pennsylvania Auditor General's office during its fifteen year history.<sup>27</sup>

According to the PSC, public schools in Pennsylvania are funded by a combination of local property taxes and State educational funding. The school boards of the local school districts have been given the authority by the legislature to levy taxes and they can set their own millage rates up to the maximum permitted by State law. The Employer's Board of Trustees cannot levy or raise taxes and has no authority to fund its own operations. There is no requirement in the PSC or the CSL that the funding received by the Employer or any other charter school be disbursed in any specific manner although, as mentioned above, all expenditures are subject to audit. Further, there is no requirement that the Employer's budget must be submitted to any government entity for approval.

## **II. ANALYSIS**

The Supreme Court has "consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause."<sup>28</sup> The language of Section 2(2) of the

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<sup>27</sup> The record reflects that while the "special education area" of the PDE visited the site earlier this year in connection with the Employer's recent application for renewal of its charter, there has not been a full audit for five or six years.

<sup>28</sup> *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963).

Act “vests jurisdiction in the Board over any ‘employer’ doing business in this country save those Congress excepted with careful particularity.”<sup>29</sup>

During its history, the Board has declined to exercise jurisdiction over certain classes and categories of employers, including non-profits and charitable organizations, small intrastate firms, and the horseracing and dogracing industries. The Board has generally relied on findings that an employer was small, local, and did not significantly affect commerce<sup>30</sup> or that a state or foreign entity exerted significant control or regulation over an employer.<sup>31</sup> In the unique situation of the horseracing and dogracing industries, the Board relied heavily on the fact that the industry was characterized by temporary and sporadic employment, making administration of the Act difficult and the effect of a labor dispute on commerce slight.<sup>32</sup>

Almost all of the Board’s historical declinations have been either more recently reversed by the Board<sup>33</sup> or significantly narrowed.<sup>34</sup> The Board no longer generally declines jurisdiction

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<sup>29</sup> *State Bank of India v. NLRB*, 808 F.2d 526, 531 (7th Cir. 1986), cert. den. 483 U.S. 1005 (1987).

<sup>30</sup> See, e.g., *Evans & Kunz, Ltd.* 194 NLRB 1216 (1972) (declining to assert jurisdiction over a law firm composed of some four to six attorneys where the firm confined most of its activities to the practice of law solely within Arizona). While the Employer argues in its post-hearing brief that the Board should choose not to assert jurisdiction in this matter because exercising such discretion would have a minimal effect on interstate commerce, I do not find this argument persuasive. While the Employer admittedly serves only students residing in Pennsylvania, the Employer admits that it meets the Board’s requirements for participation in interstate commerce. In addition, there has been no change in the Employer’s commerce status since my decision in Case 06-RC-112081, and I see no reason to alter my findings in this regard.

<sup>31</sup> See, e.g., *Horsereading and Dogracing Industries, Declination of Assertion of Jurisdiction*, 38 Fed. Reg. 9537 (April 17, 1973) (codified at 29 CFR 103.3).

<sup>32</sup> See *Id.*; *Empire City at Yonkers Raceway*, 355 NLRB 225, 227 (2010) (holding that combined racetrack and casino operation was primarily a casino and therefore jurisdiction would be asserted).

<sup>33</sup> See, e.g., *St. Aloysius Home*, 224 NLRB 1344, 1345 (1976) (“the only basis for declining jurisdiction over a charitable organization is a finding that its activities do not have a sufficient impact on interstate commerce to warrant the exercise of the Board’s jurisdiction”); *Lighthouse for the Blind of Houston*, 244 NLRB 1144, 1145 (1979) (Board will not distinguish between profit and nonprofit organizations for

where a state or foreign entity exerts significant control.<sup>35</sup> Further, the Board has rejected multiple efforts to apply this type of exclusion in a variety of situations where there is significant state regulation or control.<sup>36</sup>

Section 2(2) of the Act provides that an “employer” shall not include any state or political subdivision thereof. However, “political subdivision” is not defined in the Act and the legislative history of the Act is silent as to the meaning intended to this terminology by Congress.

In *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), the Supreme Court set forth the criteria to be used to determine whether an entity is a political subdivision. In *Hawkins*, the Supreme Court found that federal, not state, law is controlling in determining whether an entity is a political subdivision and thus not an “employer” subject to the

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jurisdictional purposes); *Foley, Hoag & Eliot*, 229 NLRB 456, 456-457 (1977) (overruling Board’s previous determination that it should decline to exercise jurisdiction over certain law firms); *Kansas AFL-CIO*, 341 NLRB 1015, 1018-1019 (2004) (adopting ALJ decision rejecting respondent’s argument that because it was engaged primarily in state lobbying activities the Board should decline jurisdiction).

<sup>34</sup> See, e.g., *Delaware Park*, 325 NLRB 156, 156 (1997) (finding that workers involved with a slot machine operation at a racetrack were not in the horseracing industry).

<sup>35</sup> See, e.g., *Management Training Corp.*, 317 NLRB 1355, 1357-1358 (1995) (in determining whether the Board should assert jurisdiction over an employer with close ties to an exempt government entity, the Board will only consider whether the employer meets the definition of “employer” under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards); *StateBank of India*, 229 NLRB 838, 842 (1977) (holding that there is no public policy or policy of the Act which justifies the Board to continue to decline jurisdiction on the ground that the employer is an “agency” or “instrumentality” of a foreign state); cf. *Temple University*, 194 NLRB 1160, 1161 (1972) (Board declining jurisdiction where direct state control of a non-profit university was so extensive as to make it a quasi-public institution).

<sup>36</sup> *Volusia Jai Ala, Inc.*, 221 NLRB 1280, 1282 (1975) (rejecting argument that the Board should use its discretion to decline jurisdiction over the Jai Alai industry where the state required that all employees be licensed and that 85% be state residents, retained power to approve all managerial employees, and directly employed people on site in order to maintain the integrity of the game and the betting procedures, as well as to guarantee that the game was being played according to the rules).

Act. The Court stressed that the Board should examine the entity's actual operations and characteristics when assessing its Section 2(2) status. *Id.*, at 603-604, adopting *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 62-63 (4th Cir. 1965), as correct law.

The Board has since applied the test described in *Hawkins* to limit the political subdivision exemption to entities that are either (i) created by the state, so as to constitute departments or administrative arms of the government, or (ii) administered by individuals who are responsible to public officials or to the general electorate. 402 U.S. at 604-605. An entity need only meet one prong of the *Hawkins* test to be found exempt from the Act.

Applying the principles of *Hawkins*, the Board decided *Chicago Mathematics & Science Academy Charter School*, (CMSA) 359 NLRB No. 41 (2012). In that case, which involved a charter school created under Illinois state law, the Board rejected an argument that it should discretionarily decline jurisdiction over charter schools because of extensive state involvement. In *CMSA*, the Illinois employer received a majority of public funding, teachers were required to be certified under the state school code, and the employer was mandated to participate in the same assessments required of public school teachers, as well as was subject to a variety of state statutes. Although *CMSA* involved a charter school but not a cyber charter school, I find its analysis to be persuasive in application to the instant case, although differences in the applicable state law exist.<sup>37</sup>

The Employer argues that it should be exempt from the Board's jurisdiction under both prongs of the *Hawkins* test, and differentiates its situation from *CMSA* based on certain factual

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<sup>37</sup> In so stating I recognize that the Board in *CMSA* declined to establish a "bright-line" rule with respect to the Board's jurisdiction over entities which operate as charter schools, and I note that my determinations herein are based on the unique facts of the instant case.

contentions. The Employer asserts that it was created directly by Pennsylvania so as to be a political subdivision because its charter has been renewed by the PDE, which is a department of the Commonwealth of Pennsylvania. It cites the fact that *CMSA* was chartered by an Illinois school district, a local government entity, as a critical distinction.

The Employer further argues that the second prong of *Hawkins* is met because the Employer is administered by public officials [the CEO and his management staff] who are themselves appointed by public officials [the Employer's Trustees]. In this regard, the Employer relies on the plain language of 24 P.S. 17-1715-A(11) which states that "Trustees of a charter school shall be public officials." The Employer also argues that the PDE oversight of its operations and its various reporting requirements which are mandated by Pennsylvania is evidence that it is responsible to and controlled by public officials so as to be deemed a political subdivision of government. For the reasons that follow, I do not agree with the Employer's assertions that certain facts cited sufficiently differentiate the instant case from the Board's analysis in *CMSA*.

The key inquiry to determine if an entity is a political subdivision under the first prong of the *Hawkins* test is whether the entity was created by the state so as to create a state department or an arm of government. I do not find that the Employer was created directly by Pennsylvania although the Employer is correct in its assertion that, in accordance with the applicable statute, the Employer's charter has been twice renewed by the PDE.

The record is clear that several private individuals originally applied for and were issued a charter by the Midland School District to operate the Employer. After being granted the initial charter, essentially the same individuals then filed for nonprofit corporate status with the Pennsylvania Department of State to comply with the requirements of the CSL that a charter

school must be a public, nonprofit corporation. Neither the granting of the charter by the Midland School District nor the filing of incorporation papers with the Department of State created the Employer. The individuals involved, who were private individuals and not public officials, undertook this action.

It is axiomatic that had only the charter been granted and articles of incorporation filed, the Employer would be only an empty corporate shell and no charter school or cyber charter school would be in existence today. The Board has consistently held that entities created by private individuals as nonprofit corporations are not exempt under the first prong of the *Hawkins* test. *CMSA*, slip op. at 6, and cases cited at footnote 14. The Employer here is a corporate entity which holds a charter to function as an independent public school, in a manner more like a subcontractor than an actual department of government.

In this regard, I am not persuaded by the Employer's argument that the involvement of the PDE in the periodic renewal of the Employer's charter is significant. There was no enabling action by the State present in the establishment of the Employer where the initiative was undertaken by private individuals, as noted above. While the CSL has been amended such that the initial charter that was issued by the Midland School District would today be issued by the PDE (which is why the Employer's subsequent renewals were granted by the PDE), I would come to the same conclusion if the Employer's charter had been originally issued by the PDE. Again, the record is clear that it was the instigation and initiation of action by private individuals which resulted in the establishment of the Employer, not any mandate, affirmative action, or direct intervention by a government entity.<sup>38</sup>

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<sup>38</sup> Compare *CMSA*, slip op. at 7 (no exemption under the first *Hawkins* prong because it was not created pursuant to state statute, but rather by private individuals as a nonprofit corporation) with *University of*

Accordingly, I find that the Employer does not meet the test to be deemed a political subdivision as having been created directly by a government entity, a legislative act, or a public official under the first prong of *Hawkins*.

For an entity to be exempt from the Act's coverage under the second prong of *Hawkins*, it must be administered by individuals who are responsible to public officials or to the general electorate. 402 U.S. at 605. The key inquiry is to determine if an entity is "administered by" individuals responsible to public officials or to the general electorate so as to ascertain whether those individuals are appointed by and subject to removal by public officials. The Board has consistently asserted jurisdiction in cases where public officials have no role in the selection and removal of an employer's officers or directors.<sup>39</sup> The Board has held that whether an employer's governing board is subject solely to private appointment and removal is the critical and determinative factor in the second prong analysis. *CMSA*, slip op. at 9-10.

As noted above, the Employer argues that the Trustees are public officials based on certain language found in the CSL to the effect that the administrators of a charter school are "public officials." The Board has held that "while such State law declarations and interpretations are given careful consideration. . . , they are not necessarily controlling." *Natural Gas Utility Dist.*

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*Vermont*, 297 NLRB 291, 295 (1989) (finding the University of Vermont exempt under the first *Hawkins* prong where the University was created by a special act of the Vermont legislature).

<sup>39</sup> See, e.g., *Research Foundation of City Univ. of NY*, 337 NLRB 965, 969-970 (2002) (Board asserted jurisdiction where none of the employer's board members was appointed or subject to removal by public officials); *Cape Girardeau Care Center*, 278 NLRB 1018, 1019-1020 (1986) (Board asserted jurisdiction where the county's approval of the employer's board was "purely ministerial" and the county had "no greater authority to remove one of the [e]mployer's board members than to remove a board member of any other nonprofit corporation"). Compare *Regional Medical Center at Memphis*, 343 NLRB 346, 358-360 (2004) (no jurisdiction where employer was administered by publicly appointed and removable officials); *Oklahoma Zoological Trust*, 325 NLRB 171, 172 (1997) (same).

of *Hawkins County*, 167 NLRB 691 (1967), quoted in *Hawkins*, 402 U.S. at 602.<sup>40</sup> The Supreme Court has also held that federal law, not state law, governs the determination under Section 2(2) of the Act whether an entity created under state law is a “political subdivision” and not an employer subject to the jurisdiction of the Board. *Id.* at 603.

The record contains no evidence that any local or state official has had any involvement in the selection or removal of any members of the Employer’s governing Board of Trustees, or in the hiring of the Employer’s staff, including its CEO. Neither does the record support a conclusion that either the Employer’s Trustees or its CEO have any direct personal accountability to any state or local public officials, or to the general electorate.

Rather, under the facts present here, the CEO is appointed by the Employer’s Board of Trustees and he reports exclusively to the Board of Trustees. The Employer’s Board of Trustees has the sole authority to appoint and remove other Trustees, in accordance with the Employer’s bylaws. The Trustees do not report to any individual who holds any elected office, or to the general electorate, as they are not required to stand for an election. Thus, the Employer’s administrators are subject to appointment and removal only by private individuals and not to any public officials. As such, the Board’s analysis ends. *CMSA*, slip op. at 10.

The Employer also argues, however, that the PDE oversight of its operations and the reporting requirements, of which are mandated by Pennsylvania, show that it is responsible to and controlled by public officials. I do not agree. I find the instant situation to be similar to that found in *CMSA* in that the Illinois school involved had reporting requirements and academic guidelines which were mandated under Illinois law, as well as statutory obligations under

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<sup>40</sup> See also *CMSA*, slip op. at 7.

applicable state and Federal laws for educational institutions. That employer was also required to make contributions to the Chicago Teachers' Pension Fund for its instructors and adopt and enforce the Chicago Public Schools' disciplinary code. The presence of these factors was not sufficient, in the Board's opinion, to exempt CMSA from the Board's jurisdiction. The record here does not support a conclusion that Pennsylvania's oversight or reporting requirements for charter schools are more demanding than those of Illinois so as to justify a contrary result.

Accordingly, I find that the Employer fails to meet the jurisdictional exemption test under the second prong of *Hawkins*. The record establishes that the Employer is not "administered by" public officials as no individual involved in the Employer's administration is responsible or has accountability to public officials, or to the general electorate.

I also note indications from Pennsylvania governmental agencies that do not support the Employer's position that it is a governmental entity. The most recent Pennsylvania Auditor General's report, which was based on a 2012 Performance Audit of the Employer's operations, states:

" .charter schools are not treated as governmental units because they are not 'operated, supervised, or controlled by a governmental unit.' In Pennsylvania, charter schools operate under a contract (i.e., a charter) with a governmental unit (i.e., a local school district, or PDE if a cyber charter school), but the governmental unit does not elect or appoint the charter school's board of trustees or control the operations or finances of the charter school. In fact, the Charter School Law defines a charter school as "an independent public school" As such the Cyber Charter School is an independent public charter school organized as a Pennsylvania nonprofit corporation and may not be considered a governmental unit or affiliate of a governmental unit under state law. "

Case 06-RC-120811, Employer Ex. 11, pp. 13-14 [a component of Employer Ex. 3(b) in the instant matter] (emphasis in original).

In addition, in two 2013 determinations, the Pennsylvania Labor Relations Board, which has jurisdiction over public employers within the Commonwealth, has declined to assert jurisdiction in cases involving a charter school and a cyber charter school. *New Media Technology Charter School*, 45 PPER 8 (2013); *Agora Cyber Charter School*, 45 PPER 6 (2013).

Upon the entire record in this proceeding and in consideration of all of the above, I find that the Employer is not a political subdivision of the Commonwealth of Pennsylvania so as to be exempt from the Board's jurisdiction. The record reveals that the Employer meets the appropriate standard for the Board's jurisdiction and, therefore, I find that the Employer is an employer within the meaning of Section 2(2) of the Act. Accordingly, I have directed an election to be held among the Employer's employees in an appropriate unit as set forth below.

### **III. FINDINGS AND CONCLUSIONS**

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter<sup>41</sup>
3. The Petitioner claims to represent certain employees of the Employer.

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<sup>41</sup> The Employer operates a non-profit cyber charter school in the Commonwealth of Pennsylvania. During the preceding twelve months, the Employer in conducting its business operations, derived gross revenues in excess of \$ 1,000,000, and purchased and received goods and materials valued in excess of \$ 50,000 directly from points outside the Commonwealth of Pennsylvania.th of Pennsylvania.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time special education teachers and reading specialists employed by the Employer through its Midland, Pennsylvania facility; excluding virtual classroom instructors, nonprofessional employees, managerial employees, guards and supervisors as defined in the Act.

#### **IV. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret mail ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by PA Cyber Special Education Association, PSEA/NEA.

##### **A. Election Details**

The election will be conducted by mail. The National Labor Relations Board, Region Six, will mail secret ballots to the employees employed in the above-described unit by 5:00 p.m. on Monday, October 26, 2015, from the National Labor Relations Board, Region Six, William S. Moorhead Federal Building, 1000 Liberty Avenue, Room 904, Pittsburgh, PA 15222. A stamped return envelope will be included with each ballot. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Voters must return their mail ballots to the Region Six office by close of business on Monday, November 16, 2015. All mail ballots will be commingled and counted at the Region

Six office on Tuesday, November 17, 2015, at 10:00 a.m. or at such other time that the Regional Director determines following consultation with the parties. In order to be valid and counted, the returned ballots must be received in the Regional Office, prior to the counting of the ballots.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region Six office at 412-394-4400, by no later than 5:00 p.m. on November 2, 2015, in order to arrange for a duplicate mail ballot kit to be sent to that employee

**B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending September 30, 2015, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

**C. Voter List**

To be timely filed and served, the list must be *received* by the regional director and the parties by October 13, 2015. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

**D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

**V. RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it

did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: October 8, 2015



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NANCY WILSON  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 06  
1000 Liberty Ave Rm 904  
Pittsburgh, PA 15222-4111