

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 11, 2016

TO: John J. Walsh, Jr., Regional Director
Region 1

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The Woodstock Academy
Case 01-CA-172457

177-1683-5000-0000

530-6050-5700-0000

and

530-6067-2070-6717

554-1450-5700-0000

AFSCME Council 4 (The Woodstock Academy)
Case 01-CB-169525

725-8375-5000-0000

The Region submitted these 8(a)(5) and 8(b)(3) cases for advice on whether the Woodstock Academy (“WA”), a non-profit corporation that operates a high school for private tuition-paying students but also serves as the public high school for several surrounding towns, is a Section 2(2) employer or an exempt political subdivision under *NLRB v. Natural Gas Utility District of Hawkins County (Hawkins County)*.¹ If the Board has jurisdiction, additional issues submitted for advice are whether WA violated Section 8(a)(5) and (1) of the Act by refusing to submit the parties’ unresolved bargaining issues to interest arbitration, and whether the Union violated Section 8(b)(3) by insisting that the parties proceed to interest arbitration and refusing to resume bargaining with WA.

We first conclude that WA is not an exempt political subdivision under *Hawkins County* and is therefore a Section 2(2) employer that is subject to the Board’s jurisdiction. Second, we conclude that the parties had a binding agreement to submit their unresolved issues to interest arbitration, that the agreement was a mandatory subject of bargaining because it was intertwined with mandatory subjects negotiated during bargaining for a successor contract, and that WA violated the Act by refusing to honor that agreement. We therefore further conclude that the Union did not violate the Act by refusing to resume bargaining and insisting that WA abide by the parties’ agreement to submit their contract dispute to interest arbitration.

¹ 402 U.S. 600, 604-05 (1971).

Accordingly, the Region should issue complaint, absent settlement, alleging that WA violated Section 8(a)(1) and (5), and dismiss the Section 8(b)(3) charge, absent withdrawal.

FACTS

Woodstock Academy's establishment and present operations

In February 1802, a reverend, an attorney, and members of the First Ecclesiastical Society (collectively, “the Proprietors”) opened the Woodstock Academy in Woodstock, Connecticut. In May of that year, the Proprietors presented WA’s charter to the Connecticut General Assembly, which passed the charter, officially establishing WA’s corporate existence. WA’s current charter, which was amended in 1933, provides that WA’s sole purpose is to “maintain and operate a school and engage in educational enterprises” for the benefit of the town of Woodstock and vicinity. The charter also provides that WA has the rights to: sue, be sued, and complain in any court; own, purchase, sell and convey real and personal property; elect and appoint officials and agents and fix their compensation and duties; make by-laws for the governance of its affairs; and wind up and dissolve.

WA currently operates as a private, nonprofit, coeducational high school and also serves as the high school for six Connecticut towns that are not large enough to support their own public high school. WA’s headmaster and the deans for its various departments run WA’s day-to-day operations. They each have individual employment contracts with WA’s Board of Trustees (BOT), which set forth their wages, benefits, and other terms and conditions of employment. In addition to the headmaster and department deans, there are three other categories of WA employees: teachers, paraprofessionals, and custodians. The instant case involves a bargaining dispute between WA and AFSCME Council 4, Local 1303 (Union), which has represented WA’s custodians since 1991.

Pursuant to state statute, the Connecticut State Board of Education has approved of WA and two other incorporated and endowed academies as schools that a local school district can designate as its high school (“designated high schools”).² Currently, the respective boards of education for six towns —Woodstock, Brooklyn, Canterbury, Eastford, Pomfret, and Union — have designated WA as their high

² See Conn. Gen. Stat. § 164-10-34 (providing that if the State Board of Education determines that an incorporated or endowed academy satisfies its standards for public high schools, it may approve of that academy serving as a high school for any town that does not maintain its own high school).

school, and are therefore statutorily-required to pay the tuition for each student who resides in their town and attends WA.³ Each town has a separate contract with WA that sets forth the parties' rights and obligations, including provisions regarding tuition payments, transportation for students to and from WA, the right of the board of education to receive and inspect certain WA records, and education for students with special needs.⁴ The expired contract with the Town of Woodstock and the Town of Eastford's current contract provide that their boards of education may nominate two of their members to serve on WA's BOT and that the BOT agrees to permit one of those members to serve on the BOT's Executive Committee and the other to serve on the BOT's Finance Committee during the contract's term.

WA's current enrollment is approximately 1,025 students, about 88% of whom come from the six towns that have designated WA as their high school. WA accepts the remainder of its students based on application, and those students come from a larger geographic area. During the prior school year, private day students paid \$13,500 for tuition, and boarding students paid \$47,000 for tuition, room, and board. Private students accounted for 12% of WA's student population and 33% of its tuition revenue. Additionally, unlike public schools, WA is permitted to have tuition-paying international students and accepts and currently enrolls post-graduate students.

The Woodstock Academy Foundation (Foundation) is a separately maintained, independent corporation with its own board of directors, overseen by WA's BOT, that manages all fundraising efforts and then transfers donations to the endowment or the appropriate WA operating fund or project fund. WA's private endowment is approximately \$2.7 million. The Foundation's fundraising campaigns provide approximately \$150,000-\$500,000 annually, and assist WA in meeting its annual operating costs and/or capital projects. WA does not receive any federal or state funds beyond the tuition payments from the six towns, and is not eligible for certain grant funds such as title grants or free- and reduced-lunch reimbursement. Due in part to the efforts of WA's lobbyist, WA has received state grant funds for building projects.⁵

In addition to having the right to own, purchase, and sell property, WA maintains independent lines of credit and has loans with lending institutions—actions that public schools cannot take. WA is also subject to land-use restrictions,

³ See Conn. Gen. Stat. § 164-10-33.

⁴ The contract with the Town of Woodstock has expired, and the parties are negotiating a new agreement.

⁵ See Conn. Gen. Stat. § 173-10-285b.

which are not applicable to public schools. Additionally, WA is a member of several societies and organizations that only private schools can join. And the IRS recognizes it as a 501(c)(3) tax-exempt organization.

Connecticut's State Board of Education requires that WA abide by some of its directives and recommendations, but not others, such as those pertaining to Common Core Standards, standardized tests, and reports. State statute provides that teachers at designated high schools are subject to the state's Teacher's Retirement Act, and the state retirement board classifies designated schools as public schools.⁶ State law further provides that all state laws concerning teachers also apply to teachers at designated high schools.⁷ Notably, state statute provides that such teachers must be certified by the State Board of Education, and that the Teacher Negotiation Act applies to all certified professional employees at a designated high school.⁸ The Woodstock Teachers Association, which is affiliated with the Connecticut Teachers Association and National Education Association, has represented WA's teachers since approximately 1969.

Additionally, pursuant to a 1980 Connecticut Supreme Court decision, WA is subject to Connecticut's Freedom of Information Act (FOIA), and thereby required to permit members of the public to attend certain meetings and to make certain records available to the public.⁹

WA's governing bodies

WA's charter states that all of WA's property and affairs "shall be under the management and control of a Board of Trustees consisting of not more than thirty and not less than five persons," that WA's bylaws shall set forth the exact number of aforementioned trustees and their terms, that no more than two-thirds of the trustees may be persons who are not WA alumni, and that the "the by-laws may provide the method of election of said trustees, whether by vote of the [alumni], or by vote of the trustees, or both." A private nominating committee from the BOT independently meets and interviews individuals applying for or recommended for trustee positions.

⁶ Conn. Gen. Stat. §167A-10-183b(20).

⁷ Conn. Gen. Stat. §164-10-15(e).

⁸ Conn. Gen. Stat §166-10-153k.

⁹ See *Board of Trustees of Woodstock Academy v. Freedom of Information Commission*, 436 A.2d 266, 181 Conn. 544, 554-55 (1980).

That committee has the authority to reject individual trustee applicants, and has rejected applicants for a variety of reasons.

Currently, WA's BOT has thirty members, divided among three different classifications: ten alumni trustees, eleven trustees-at-large, and nine ex-officio trustees, each of whom has the same voting rights and powers. Under WA's current bylaws, each town that has designated WA as its high school can nominate up to two members of its board of education to serve as ex-officio trustees.¹⁰ Currently, four of the six towns have ex-officio members serving on the BOT, for a total of eight. The ninth ex-officio trustee is the President of the Alumni Association. An ex-officio trustee representative from the municipal boards of education serves until his or her term on the board of education expires, whereas alumni and at-large trustees serve six-year terms, renewable upon the nominating committee's recommendation.

Pursuant to WA's bylaws, a nine-member Executive Committee manages and sets the agenda for the BOT. The Executive Committee members are drawn from and elected by the BOT. The bylaws further provide that at least half of the Executive Committee, exclusive of the President, must be ex-officio trustees. This provision enables WA to receive state building project grants.¹¹ Although each sending town has the right under WA's bylaws to have one of its ex-officio trustees selected to serve on the Executive Committee, currently only four have done so.

WA's bargaining history with the Union

Following an election, in January 1991 the Connecticut State Board of Labor Relations (SBLR) certified the Union as the WA custodians' collective-bargaining representative.¹² The most recent collective-bargaining agreement between the parties was effective by its terms from July 1, 2012 through June 30, 2015. That

¹⁰ No party provided a copy of WA's bylaws during the investigation. Therefore, all facts in this memo pertaining to the bylaws were obtained through other evidence that WA provided. (b) (5)

¹¹ See Conn. Gen. Stat. § 173-10-285b(c) (an academy may receive school building project grants if "at least half of the governing board ... exclusive of the chairman of such board" are representatives of the boards of education designating the academy as their high school).

¹² Since November 2009, the Union has also represented a unit of paraprofessionals and campus supervisors, based upon a SBLR decision and certification.

contract's grievance procedure provided for grievance arbitration before the State Board of Mediation and Arbitration (SBMA).¹³ There is no reference to interest arbitration in the collective-bargaining agreement.

The parties began successor contract negotiations¹⁴ around early July 2015.¹⁵ They first negotiated ground rules governing the presentation of proposals and scheduling of meetings. On August 19, the parties electronically exchanged their proposals. WA's primary proposed change—which was also the item to which the Union primarily objected during bargaining—was a modification to the management rights clause that would give WA the right to unilaterally subcontract unit work. The parties met on August 24 and signed some tentative agreements, but did not discuss the subcontracting issue. The Union's negotiator cancelled the parties' September session, and the parties next met on September 28.

During the September 28 session, the Union presented an “off-the-record global settlement offer” to WA to resolve all issues, including the subcontracting issue. With respect to that issue, the Union proposed maintaining the current contract language.¹⁶ In addition to subcontracting, other open issues included: the disciplinary procedure, annual wage increases, retirement contributions for current employees, paid holiday and vacation days, overtime assignments, overtime pay, and the grievance procedure.¹⁷

WA's negotiator did not make any counteroffer at this meeting, and instead declared that the parties were at impasse. The Union's negotiator asked WA's

¹³ It is unclear whether, prior to 2011, the parties utilized the SBMA's arbitration process. Since 2011, the Union has filed a total of three grievances, none of which went beyond Step 2.

¹⁴ Neither party provided the notices required by Section 8(d) of the NLRA.

¹⁵ All dates hereinafter are in 2015 until otherwise indicated.

¹⁶ The Union frequently makes its proposals off-the-record so that the SBMA will not consider such proposals in making an interest arbitration determination.

¹⁷ WA proposed eliminating step 3, which permitted the Union to submit unresolved step-2 grievances to the SBMA, and replacing it with the following language: “Either the Union or the Academy shall have the right to transfer the grievance to the American Arbitration Association. The transferring party shall be responsible for all costs related to said transfer.”

negotiator whether (b) (6), (b) (7) wanted (b) (6), (b) (7) to contact the Federal Mediation and Conciliation Service for mediation services, and (b) (6) replied “I’ll take care of it.”

According to the parties, under Connecticut state law, either party can declare impasse at any time, which sends the matter to the SBMA for interest arbitration.¹⁸ But an employer cannot implement proposals after a legitimate declaration of impasse.

On October 19, WA’s chief negotiator sent the SBMA a letter requesting interest arbitration. Shortly thereafter, the Union’s negotiator called WA’s chief negotiator and asked (b) (6), (b) (7) why (b) (6) had contacted the SBMA, explaining that (b) (6), (b) (7) thought that the parties had agreed to utilize mediation rather than arbitration. WA’s negotiator replied that WA was proceeding to interest arbitration rather than mediation, that the SBMA rather than the NLRB had jurisdiction over the matter, and that (b) (6) would send (b) (6), (b) (7) a legal memo establishing that the SBMA had jurisdiction. WA’s negotiator emailed the Union’s negotiator that memo on November 20.

Meanwhile, by letter dated November 5, the Union sent the SBMA the name of the arbitrator that it had selected to serve as the Union’s designated arbitrator on the three-member arbitration panel. Shortly thereafter, WA’s negotiator notified the SBMA that WA had selected (b) (6), (b) (7) father as its arbitrator. And by letter dated December 4, the parties’ designated arbitrators advised the SBMA of their selection of the neutral arbitrator. Four days later, the Union’s negotiator emailed WA’s negotiator and asked (b) (6), (b) (7) again if (b) (6) would consider mediation rather than arbitration, but (b) (6) did not respond. By emails exchanged on December 8, the parties and the neutral arbitrator agreed to schedule the interest arbitration for February 25, 2016.¹⁹

On January 8, WA’s negotiator called the Union’s negotiator and told (b) (6), (b) (7) that (b) (6) had been incorrect about the State Board’s jurisdiction and (b) (6) would send (b) (6), (b) (7) a new memo on the jurisdictional issue. Three days later, the Union’s negotiator received the second memo, which concluded that WA was subject to the NLRA. Thereafter, WA’s negotiator called the Union’s negotiator and asked whether (b) (6), (b) (7) had read the memo yet, and (b) (6), (b) (7) replied that the memo was irrelevant because the parties had already agreed to resolve the matter through interest arbitration. On January 26, the neutral arbitrator emailed the Union’s negotiator stating that WA’s negotiator had

¹⁸ Although very little is known about the parties’ bargaining history prior to 2011, WA asserts that they did not previously utilize interest arbitration.

¹⁹ All dates hereinafter are in 2016 unless otherwise indicated.

requested cancellation of the February 25 date, and requested other dates for interest arbitration. On January 29, WA's negotiator rescinded WA's position that the parties had bargained to impasse, and requested that the parties resume bargaining on February 10 or 12. That same day, the Union's negotiator sent WA's negotiator a letter stating that the Union did not agree with WA's position, that the parties were at impasse, and that the Union still wanted to proceed with interest arbitration in accordance with the parties' agreement.

On February 12, WA filed a complaint in Connecticut superior court against the SBMA, asserting that it had no jurisdiction over the matter because WA is not an employer under the Municipal Employees Relations Act²⁰ and requesting the court to enjoin proceedings before the SBMA until the NLRB determined whether it has jurisdiction over WA. On April 4, the Union and the Connecticut Attorney General, on behalf of the SBMA, filed separate motions to dismiss WA's complaint. The Attorney General's accompanying memorandum of law asserted, *inter alia*, that injunctive relief was inappropriate because WA had initiated proceedings with the SBMA and therefore waived the right to assert that it did not have jurisdiction over the dispute, and that, in any event, the parties could present the jurisdictional issue to the SBMA arbitration panel and/or the SBLR for resolution.²¹

In late March, the Union filed the instant CA charge alleging that WA's refusal to abide by the parties' agreement to submit unresolved issues to the tripartite-arbitration panel violated Section 8(a)(5) and (1) of the Act. Thereafter, WA filed the instant CB charge alleging that the Union violated Section 8(b)(3) by insisting that the parties continue proceedings before the tripartite panel and refusing to resume bargaining.

ACTION

We conclude that the Employer is not an exempt political subdivision under *Hawkins County* and its progeny and is therefore an "employer" under Section 2(2) of the Act. We further conclude that WA violated Section 8(a)(5) and (1) by refusing to proceed to interest arbitration because the parties had agreed to submit their unresolved disputes to interest arbitration and that agreement was a mandatory rather than permissive subject of bargaining. Finally, in light of the parties' agreement to submit their contract dispute to interest arbitration, we conclude that the Union did not violate Section 8(b)(3) by insisting that WA abide by that

²⁰ Conn. Gen. Stat. § 7-467, et seq.

²¹ The current state of the state-court proceeding is unknown.

agreement and refusing to resume bargaining. Therefore, the Region should issue complaint, absent settlement, alleging that WA violated Section 8(a)(5) and (1), and dismiss the Section 8(b)(3) charge, absent withdrawal.

I. WA Is Not an Exempt Political Subdivision Under *Hawkins County*.

Section 2(2) of the Act expressly provides that “any State or political subdivision thereof” is excluded from the definition of “employer.” The Board applies the test set forth in *Hawkins County* to determine whether an employer is a private entity acting as a government contractor subject to the Act or a political subdivision exempt from the Board’s jurisdiction.²² Under that test, any entity is 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 the general electorate.²³

A. WA was not created directly by the state so as to constitute a department or administrative arm of the government.

Under *Hawkins County* prong one, the Board determines whether the entity was created by an act of the state, such as a legislative act, an act of a state-level department, or an act of the state supreme court,²⁴ “in order to discharge a state function.”²⁵ The requirement that the entity be created by a state can also be satisfied where a local government entity creates the employer pursuant to a state

²² See, e.g., *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88, slip op. at 5 (Aug. 24, 2016) (charter school was not an exempt political subdivision because private individuals created it by submitting a charter under the state’s charter school act’s provisions, and its governing board’s membership was dictated by its bylaws rather than any law or government regulation); *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 5 (Aug. 24, 2016) (same).

²³ 402 U.S. at 604-05.

²⁴ See *State Bar of New Mexico*, 346 NLRB 674, 676 (2000) (created by state supreme court rule); *University of Vermont*, 297 NLRB 291, 295 (1989) (special legislative act); *Northampton Center for Children & Families*, 257 NLRB 870, 872 (1981) (state department of mental health).

²⁵ See, e.g., *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 5.

enabling statute.²⁶ The Board has, however, consistently found that entities created by private individuals as nonprofit corporations are not exempt under the first prong of *Hawkins County*.²⁷ Thus, “an entity is not exempt simply because it receives public funding or operates pursuant to a contract with a government entity[.]”²⁸ The Board recently noted that it has routinely asserted jurisdiction over private employers that have agreements with government entities to provide certain types of services.²⁹

Moreover, the fact that a state, locality, or a branch thereof had to approve a charter is immaterial; prong one is only satisfied where the entity was “created *directly* by the state.”³⁰ Accordingly, in cases involving charter schools, the Board has found that where a private individual or group files an application for a charter with a public school district or for non-profit corporate status with the state, the fact that state or local government entities were required to approve the application does not equate to direct government creation of the school.³¹ Additionally, under Board law, a

²⁶ See, e.g., *Hinds County Human Resources Agency*, 331 NLRB 1404, 1405-06 (2000). See also *Prairie Home Cemetery*, 266 NLRB 678 (1983) (employer exempt where city created its board, apparently in the absence of any state enabling statute).

²⁷ See, e.g., *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 5 & n.13 (citing *Regional Medical Center at Memphis*, 343 NLRB 346, 358 (2004) and explaining that, in that case, notwithstanding the county commissioners’ action of dissolving “the county hospital’s authority contingent upon the formation of a not-for-profit health care corporation (the employer) and the execution of a contract providing that the ‘new’ corporation would operate the previously-operated hospital facilities,” the Board found that private individuals created the employer rather than the county).

²⁸ *Id.*, slip op. at 5. See also, e.g., *Research Foundation of the City Univ. of NY*, 337 NLRB 965, 968 (2002) (Section 2(2)’s plain language does not exempt private entities acting as government contractors from the Board’s jurisdiction).

²⁹ *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 5 and cases cited in n.14. See, e.g., *Connecticut Conference State Board, Amalgamated Transit Union*, 339 NLRB 760 (2003) (private employer that had a contract with the state to provide public bus service); *Jefferson County Community Center, Inc.*, 259 NLRB 186 (1981) (employer that contracted with or was licensed by the state to perform services for citizens with special needs), *enforced*, 732 F.2d 122 (10th Cir. 1984).

³⁰ *Hawkins County*, 402 U.S. at 604 (emphasis added).

³¹ See e.g., *Hyde Leadership Charter School*, 364 NLRB No. 88, slip op. at 5 (“it was ... the founding board’s preparatory work, including the promulgation of the School’s

state's authority to revoke a school's charter is analogous to a state's decision to cease subcontracting with a private employer rather than evidence that the state "created" the school.³²

If the Board determines that an entity is state-created, then the Board next "considers whether the entity was created so as to constitute a department or administrative arm of the government."³³ But if the entity was not created directly by the state, then it is unnecessary to move to the second inquiry, because "[b]oth of these criteria need to be met for the employer to be exempt under this prong."³⁴

Applying those principles here, we conclude that WA fails the first prong of the *Hawkins County* test. Here, a group of private individuals, the Proprietors, rather than the state, organized and submitted a charter to create WA. The state legislature's approval of that charter, and of the amended charter in 1933, did not create the school. Accordingly, since the state did not create WA, WA cannot be exempt under *Hawkins* prong one, and it is unnecessary to assess whether WA acts as an arm of the state.

B. WA is not administered by individuals responsible to public officials or the general electorate.

Under *Hawkins County* prong two, the key inquiry in determining whether individuals responsible to public officials administer an entity is whether those individuals have "direct personal accountability" to public officials.³⁵ The Board

governing and operating documents, that 'created' the School, not the Board of Regents' approval of the charter and incorporation of the School"); *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 6 ("[n]or ... is the Department of Education's involvement in the subsequent renewals of the School's charter significant").

³² See e.g., *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 7.

³³ *Hyde Leadership Charter School*, 364 NLRB No. 88, slip op. at 5; *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 5.

³⁴ *Hyde Leadership Charter School*, 364 NLRB No. 88, slip op. at 5.

³⁵ See, e.g., *Cape Girardeau*, 278 NLRB 1018, 1019 (1986) (finding that employer was not exempt under *Hawkins* prong two because its directors were not appointed or removed by the county and therefore did not have "direct personal accountability" to public officials).

recently made clear that “the dispositive question is whether a majority of the individuals who administer the entity—[its] governing board members and executive officers—are appointed by or subject to removal by public officials.”³⁶ And while the Board usually assesses both appointment and removal, appointment alone can be sufficient to demonstrate control.³⁷

To resolve this “dispositive question,” the Board examines whether “the composition, selection, and removal of the members of an employer’s governing board are determined by law, or solely by the employer’s governing documents.”³⁸ Thus, even where public officials are represented on an entity’s governing board, if their appointment is not mandated by law, but rather is voluntarily established by the entity itself in its bylaws or other corporate documents, their involvement is insufficient to satisfy an exemption under the second prong of *Hawkins County*.³⁹

³⁶ *Hyde Leadership Charter School*, 364 NLRB No. 88, slip op. at 6; see also *Regional Medical Center at Memphis*, 343 NLRB at 358-59 (reiterating that whether an entity is “administered” by individuals responsible to public officials or the general electorate depends on whether the individuals are appointed by and subject to removal by public officials); *FiveCAP*, 331 NLRB 1165, 1165 (2000) (a majority of the governing board were not responsible to public officials or the electorate where one-third were public officials, one-third were from the private sector, and one-third were representatives of the poor in the area served), *enforced in relevant part*, 294 F.3d 768 (6th Cir. 2002). Cf. *University of Vermont*, 297 NLRB at 295 (political subdivision found where, among other things, 12 of the 21 trustees were selected either by legislative election or gubernatorial appointment).

³⁷ See *Economic Security Corp.*, 299 NLRB 562, 565 (1990) (public control over removal unnecessary if appointment is so controlled; removal is a factor, but not a “critical factor”), *overruled on other grounds*, *Enrichment Services Program, Inc.*, 325 NLRB 818 (1998); *University of Vermont*, 297 NLRB at 295, n.23 (exemption can be found even if evidence of removal is inconclusive or absent).

³⁸ *Hyde Leadership Charter School*, 364 NLRB No. 88, slip op. at 6-7 & n.20 (fact that school’s charter permitted the State Board of Regents or Board of Education to remove trustees on limited grounds was not sufficient to establish responsibility to public officials because the removal authority was based on the school’s own governing documents rather than a requirement of state law).

³⁹ See, e.g., *Research Foundation*, 337 NLRB at 969 (membership of city university chancellor, president of the graduate school, and the college presidents on employer’s board was determined solely by employer’s by-laws and not by any statutory or other legal mandate). See also *Jefferson County Cmty. Ctr. v. NLRB*, 732 F.2d 122, 125 n.3

The rationale behind this distinction is that ultimate control rests in the employer's hands, not the government's, because the employer can change the procedures for selection and removal.⁴⁰ Moreover, the fact that an employer is subject to regulation by a governmental agency or public official is insufficient to establish that the employer is accountable to public officials.⁴¹

Recently, in *Pennsylvania Virtual Charter School*, the Board stated that “[w]here a determination of the appointment-and-removal method yields a clear answer to whether an entity is ‘administered by individuals who are responsible to public officials or to the general electorate,’ the Board’s analysis properly ends.”⁴² In so doing, the Board acknowledged that although the Board had, on occasion, referred to additional factors in prior cases, the Board only did so “after making a political subdivision finding based on its examination of the method of appointment and removal of an entity’s governing board.”⁴³

(10th Cir. 1984) (“to the extent the Directors are accountable to public officials, they are accountable by choice rather than by law”), *overruled on other grounds, Aramark Corp. v. NLRB*, 179 F.3d 872 (10th Cir. 1999). *Accord Crestline Mem’l Hosp. Ass’n. v. NLRB*, 668 F.2d 243, 245 (6th Cir. 1982). *But see NLRB v. Princeton Health Care Ctr.*, 939 F.2d 174, 178 (4th Cir. 1991) (rejecting the “distinction between responsibility imposed externally by force of law and responsibility that may arise due to internal decision”).

⁴⁰ *See, e.g., Jefferson County*, 732 F.2d at 125 n.3; *Crestline Mem’l*, 668 F.2d at 245 (“the decision to include all citizens as members of the Hospital corporation is entirely the corporation’s ... and is subject to change.”).

⁴¹ *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 8 (“that the School is subject to oversight and regulation by the Secretary of Education is insufficient to find that the School is accountable to a public official”).

⁴² *Id.*, slip op. at 9.

⁴³ *Id.*, slip op. at 8-9 & n.22 (adopting the rationale from *Charter School Administration Services*, 353 NLRB 394, 397-98 (2008) (2-member Board), further relying on *Research Foundation*, 337 NLRB at 969, and overruling *Rosenberg Library Assn.*, 269 NLRB 1173 (1984), where the Board found that the employer was a political subdivision even though public officials did not appoint its trustees and directors, to the extent that *Rosenberg* could be read to conflict with the Board’s decision).

Applying those principles here, we conclude that neither a majority of WA's BOT nor its Executive Committee is responsible to public officials or the general electorate. Currently, eight out of thirty BOT members and four of the nine members of the BOT's Executive Committee are members of municipal boards of education. Although these ex-officio trustees are elected officials, they have only the same voting rights as other members and do not constitute a majority of either governing body.⁴⁴ Additionally, neither public officials nor the general electorate ultimately select a majority of the members of the BOT or its Executive Committee. Instead, the BOT's private nominating committee meets and interviews individuals applying for or recommended for BOT positions, has the authority to reject individual applicants (which it has exercised), and ultimately recommends to the full BOT whether an individual should be selected as a trustee. Similarly, the BOT elects each individual member who serves on the Executive Committee and is the only entity with the power to elect and remove members.

Furthermore, WA has voluntarily chosen to allow municipal board of education members to serve on the BOT and its Executive Committee. That is, their representation on WA's governing boards is not statutorily mandated but rather is set forth in WA's charter, bylaws, or in contracts between WA and the towns that have designated WA as their high school.⁴⁵ Although WA's bylaws providing that half of the Executive Committee, exclusive of the president, must be ex-officio trustees, WA voluntarily chose to give these public officials seats on the Executive Committee through its bylaws, presumably to make WA eligible for state building project grants.⁴⁶

⁴⁴ See, e.g., *Truman Med. Ctr., Inc. v. NLRB*, 641 F.2d 570, 573 (8th Cir. 1981) (where 18 of 49 directors were associated with the city, county, or university, the Court noted that "the directors determine policy by a majority vote and the votes of the government directors are no more significant than the votes of the other directors"), *discussed with approval in Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 7.

⁴⁵ See, e.g., *Hyde Leadership Charter School*, 364 NLRB No. 88, slip. op. at 7 (where the school's charter, rather than a state statute or regulation, set forth the limited grounds for removing trustees, the school was not an exempt political subdivision under *Hawkins* prong two because the removal authority was based on the school's own governing documents rather than a requirement of state law), citing *Truman Med. Ctr. v. NLRB*, 641 F.2d at 573.

⁴⁶ See *Truman Med. Ctr. v. NLRB*, 641 F.2d at 572-73 (where employer assumed the statutory duties of Kansas City and Jackson County to provide care to indigents through a series of contracts with those governments, rather than through any

Moreover, the statutory requirements that WA's teachers be certified and that the Connecticut Board of Education assess WA to ensure that it satisfies its standards for public high schools in order to serve as a designated high school do not make WA "responsible to public officials" within the meaning of prong two.⁴⁷

Accordingly, WA is not a political subdivision but rather a Section 2(2) employer.⁴⁸

statutory duty imposed on the employer itself, the employer's board of directors' responsibility to the city, county, and university, "while undoubtedly heavy, derives from contractual relationships between [the employer] and these political subdivisions, and is not the sort of direct personal accountability to public officials or to the general public required to support a claim of exemption under §2(2).", *discussed with approval in Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 7, and *cited with approval in Hyde Leadership Charter School*, 364 NLRB No. 88, slip op. at 7.

⁴⁷ *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 8 ("that the School is subject to oversight and regulation by the Secretary of Education is insufficient to find that the School is accountable to a public official"). *See also Pennsylvania Cyber Charter School*, Case 06-RC-120811, 2014 WL 1390806, at *2, n.4 (2014) (unpublished opinion) (State Secretary of Education's renewal of a school's charter is not evidence that trustees are responsible to public officials "any more than renewal of a government contract converts a private contractor into a public agency.").

⁴⁸ Although an examination of additional factors mentioned in prior Board cases is unnecessary here in light of the clear answer that WA is not a political subdivision under the second *Hawkins County* prong, we note that the following factors further support our finding that WA is not an exempt political subdivision: it has independent lines of credit with various lending institutions; has the power to buy and sell property; is subject to land-use and zoning restrictions that are inapplicable to public schools; has a private endowment; accepts tuition-paying students, post-graduate students, and international students, who collectively pay 33% of WA's tuition revenue; establishes its employees' terms and conditions of employment; employs a lobbyist; belongs to various societies and organizations for which membership is only available to private schools; is recognized by the IRS as a 501(c)(3) organization; and independently controls its day-to-day operations. Further, it is immaterial that WA's teachers are subject to state laws governing teachers and that WA is covered by Connecticut's FOIA. *See Pennsylvania Cyber Charter School*, Case 06-RC-120811, 2014 WL 1390806, at *2 (finding it immaterial that Pennsylvania had subjected charter school employer to various state laws).

II. WA Unlawfully Reneged on an Agreement to Proceed to Interest Arbitration.

Where the parties agree during negotiations to submit mandatory subjects to interest arbitration, their agreement is so intertwined with those mandatory subjects as to convert the interest arbitration agreement itself into a mandatory subject of bargaining, and a refusal to abide by that agreement is a violation of the duty to bargain in good faith.⁴⁹ Thus, in *Sea Bay Manor Home for Adults*, the Board determined that an employer violated Section 8(a)(5) when it refused to abide by its agreement, made in the course of ongoing contract negotiations, to submit all unresolved bargaining issues regarding wages, hours, and terms and conditions of employment to interest arbitration.⁵⁰ The Board recognized that a contract clause requiring arbitration of future terms and conditions for a subsequent contract is a permissive subject of bargaining because that “type of interest arbitration clause is too remote from the terms and conditions at issue between the parties at the time to be considered itself a mandatory subject of bargaining.”⁵¹ The Board held, however, that where, after bargaining over mandatory subjects, the parties voluntarily enter into an agreement to resolve their differences through binding interest arbitration, that agreement has “an immediate and significant effect on the unit employees” and is “so intertwined with and inseparable from the mandatory terms and conditions for the contract currently being negotiated as to take on the characteristics of the mandatory subjects themselves.”⁵² In such circumstances, the employer’s repudiation

⁴⁹ *Sea Bay Manor Home for Adults*, 253 NLRB 739, 740-41 (1980), *enforced mem.*, 685 F.2d 425 (2d Cir. 1982).

⁵⁰ *Id.* at 740-41.

⁵¹ *Id.* at 740. *See also, e.g., Sheet Metal Workers, Local 59*, 227 NLRB 520, 520 (1976) (union’s proposed interest arbitration clause was a permissive subject because the clause “did not directly relate to wages, hours, and terms and conditions of employment, but instead applied only to the processes available to the parties in the event they could not reach agreement as to the terms of a future contract.”).

⁵² 253 NLRB at 740. *See also Columbia University*, 298 NLRB 941, 941 (1990) (concluding that the parties’ agreement during negotiations to submit the issue of wages to interest arbitration took on the characteristics of that mandatory subject, and therefore the employer violated Section 8(a)(5) by refusing to provide information the union requested for use during the interest arbitration proceeding).

of the agreement to go to interest arbitration is a violation of its duty to bargain in good faith.⁵³

Here also, the parties had an express agreement, albeit unwritten, to submit to a tripartite interest-arbitration panel their unresolved issues. Those issues included WA's proposed subcontracting clause, disciplinary procedure provisions, annual wage increases, retirement contributions for current employees, paid holiday and vacation days, overtime assignments, overtime pay, and grievance procedure provisions—all of which are mandatory subjects of bargaining.⁵⁴ Thus, although there was some initial confusion regarding the terms of their agreement, i.e., whether to invoke mediation or interest arbitration, the parties subsequently agreed on interest arbitration. Notably, the parties' negotiators, through email and phone calls, agreed to submit their unresolved issues to the tripartite panel, selected their respective arbitrators and a neutral arbitrator, and scheduled a date for the interest arbitration. The parties were not relying upon an interest-arbitration provision from an expired contract or a soon-to-expire contract.⁵⁵ Therefore, as in *Sea Bay Manor*, WA had a duty under Section

⁵³ 253 NLRB at 740.

⁵⁴ See, e.g., *Fibreboard Paper Prod. v. NLRB*, 379 U.S. 203, 211-15 (1964) (employer's subcontracting of its maintenance work, in such a way that it merely replaced existing employees with those of an independent contractor who did the same work under similar conditions of employment, was a mandatory subject of bargaining); *Electrical Workers UE (Star Expansion Indus.) v. NLRB*, 409 F.2d 150, 156 (D.C. Cir. 1969) (contractual grievance and arbitration proposals are mandatory subjects of bargaining), *enforcing* 164 NLRB 563 (1967); *Toledo Blade Co.*, 343 NLRB 385, 387 (2004) (employer's disciplinary system) (citing cases); *Legal Aid Bureau*, 319 NLRB 159, 167-68 (1995) (holidays); *Equitable Resources Energy Co.*, 307 NLRB 730, 733 (1992) (overtime), *enforced mem.*, 989 F.2d 492 (4th Cir. 1993); *Columbia University*, 298 NLRB at 941 (wages); *Inland Steel Co.*, 77 NLRB 1, 7 (1948) (retirement benefits), *enforced*, 170 F.2d 247 (7th Cir. 1948).

⁵⁵ Cf. *Hope Electrical*, 339 NLRB 933, 933 (2003) (holding that the employer did not violate the Act by repudiating a collective-bargaining agreement imposed by an interest arbitration panel after the union unilaterally submitted issues to the panel pursuant to a clause in the parties soon-to-expire contract, notwithstanding that a federal court had already ordered enforcement of the interest arbitration award); *Tampa Sheet Metal Co.*, 288 NLRB 322, 325-26 (1988) (employer's refusal to execute an agreement imposed by an interest-arbitration panel pursuant to a clause in the parties' soon-to-expire contract did not violate the Act, because an interest-arbitration clause is a permissive subject of bargaining and an aggrieved party's remedy for the

8(a)(5) to follow through on its submission of the parties' contractual dispute to final and binding arbitration before the tripartite arbitration panel.⁵⁶

In reaching this conclusion, we reject WA's argument that the parties' agreement was not binding because of a mistake regarding the State of Connecticut's jurisdiction over WA. Although a party may be excused from a contract by showing that either a mutual mistake or unilateral mistake prevented a "meeting of the minds" on the terms of the agreement,⁵⁷ here there was no mistake about the terms of the agreement. When parties make a mutual mistake "where one person offers a thing and the other accepts it and the parties have in mind different things, there can be no agreement[.]"⁵⁸ Alternatively, there can be no contract where there is a unilateral mistake about the terms of the agreement, if "the mistake is obvious on the face of the contract" and the mistake "is so palpable as to put a person of reasonable intelligence on his guard[.]"⁵⁹ But we are unaware of any case where the Board has excused a party from a contractual term because of its misunderstanding of its legal obligations, i.e., a mistake that undermined the party's *reason* for reaching agreement, where there clearly was a meeting of the minds on the terms of the agreement.⁶⁰ While WA's mistake regarding jurisdiction may have undermined its *reason* for reaching the

breach of a collective-bargaining agreement's interest-arbitration provision is a breach of contract lawsuit).

⁵⁶ The Region has confirmed with the State of Connecticut (including both the State Board of Labor Relations and the Assistant Attorney General for Connecticut who is handling the Union's efforts to compel interest arbitration) that the selected interest arbitration panel is still in place and that the parties can proceed with interest arbitration even if the NLRB asserts jurisdiction in this case.

⁵⁷ See, e.g., *Apache Powder Co.* 223 NLRB 191, 191 (1976) (holding employer did not unlawfully refuse to execute a collective-bargaining agreement where a unilateral mistake—a typographical error regarding the relevant dates for computing pension benefits—was so obvious as to put the union on notice of the error and prevented a meeting of the minds).

⁵⁸ *Id.* at 195 (citation omitted).

⁵⁹ *Id.* (citation omitted).

⁶⁰ See *Space Needle, LLC*, Case 19-CA-098936, Advice memorandum dated July 1, 2013, (b) (7)(A)

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agreement with the Union, there was no mistake regarding the agreement's terms. Thus, that agreement is binding upon WA.

In light of the parties' binding agreement to submit their contract dispute to interest arbitration, we conclude that the Union did not violate Section 8(b)(3) by refusing to resume bargaining and insisting that WA abide by that agreement.⁶¹

In sum, the Region should issue a Section 8(a)(1) and (5) complaint against the Woodstock Academy, absent settlement, and dismiss the Section 8(b)(3) charge, absent withdrawal.

/s/
B.J.K.

ADV.01-CA-172457.Response.WoodstockAcademy (b) (6), (b) (7)(C)

⁶¹ Cf. *Electrical Workers IBEW Local 13 (Collier Electric)*, 296 NLRB 1095, 1098-1100 (1989) (Board held that since the parties' multi-employer bargaining agreement arguably bound the employer to interest arbitration even after the employer timely and properly withdrew from the multi-employer bargaining association, and the union had engaged in good-faith bargaining, the union did not violate Section 8(b)(3) or 8(b)(1)(A) by submitting the unresolved issues to interest arbitration) (relying on *Bill Johnson's Rest. v. NLRB*, 461 U.S. 731 (1983)).