

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**LTTS CHARTER SCHOOL d/b/a
UNIVERSAL ACADEMY**

and

Case 16-CA-170669

KIMBERLY FREE, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF IN SUPPORT OF EXCEPTIONS**

Respectfully Submitted,

Maxie E. Gallardo

David Foley

Counsels for the General Counsel

National Labor Relations Board

Region 16

819 Taylor Street, Room 8A24

Fort Worth, Texas 76102

Telephone: (682) 703-7222

Fax: (817) 978-2928

Email: Maxie.Gallardo@nlrb.gov

I. INTRODUCTION

After a hearing which took place on May 3, 2017, on June 21, 2017, Administrative Law Judge Robert A. Ringler (the ALJ) issued a decision in this matter in which he concluded that Respondent was a political subdivision and thus not an employer subject to the jurisdiction of the Board. In reaching this conclusion, the ALJ erroneously concluded that Respondent was administered by individuals responsible to a public official. Further, the ALJ erred in failing to analyze the merits of the complaint allegations.

In reaching his conclusion that Respondent is a political subdivision, the ALJ relied on Section 12.115 of the Texas Education Code which grants authority to the Education Commissioner (the Commissioner) to reconstitute a charter school's governing body under certain circumstances. As explained below, this statute does not create direct personal accountability to public officials and the ALJ erred in finding that the Board lacks jurisdiction over Respondent. Accordingly, the Board should overrule the ALJ's finding and conclude that Respondent is an employer under Sections 2(2), (6), and (7) of the Act and remand the case to the ALJ to make findings as to the merits.

II. FACTS

a. Texas Charter School Laws

The Texas Legislature first established open-enrollment charter schools in 1995 during the 74th legislature for the purposes of improving student learning, increasing the choice of learning opportunities within the public school system, creating professional opportunities to attract new teachers to the public school system, establishing a new form of accountability for public schools, and encouraging different and innovative learning methods. *See Tex. Educ. Code Ann. §12.001*. The state created four types of charter schools: Home-Rule School Districts,

Campus or Campus Program Charters, Open-Enrollment Charter Schools, and College or University or Junior College Charter Schools. At issue in the instant case is the law governing open-enrollment charter schools.

Open-enrollment charter schools are governed by Chapter 12 of the Texas Education Code (Jt. Exh. 1). Section 12.101 authorizes the Commissioner of Education to grant a charter to an eligible entity for an open-enrollment charter school. Section 12.101 defines an eligible entity as an institution of higher education, a private or independent institution of higher education, a non-profit organization, or a governmental entity. *See Tex. Educ. Code Ann.* §12.101. Further the Commissioner of Education establishes the criteria for granting a charter. Intrinsic to the application for charter is inclusion of the method of appointment and removal of the charter school's governing body and officers as well as how vacancies will be filled and how long members of the governing body may serve. *See Tex. Educ. Code Ann.* §12.111. Except for limited restrictions, the statute does not mandate who may serve on the governing body of a charter school or how members of the governing bodies shall be selected. *See Tex. Educ. Code Ann.* §§12.120; 12.1054-12.1055. *See Tex. Educ. Code Ann.* §12.101(b-6). Additionally, Section 12.101(b-1) limits the amount of charters that can be granted to open-enrollment charter schools through the year 2019.

In 2013, the laws governing open-enrollment charter schools were significantly amended during the 83rd legislative session. During the 83rd session, the legislature introduced Senate Bill 2 to overhaul the “outdated” charter school statutes.¹ Senate Bill 2 overhauled the requirements for approval of charter applications for open-enrollment charter schools in Section 12.111 and of more relevance here, amended Section 12.115 regarding the revocation and denial of renewal

¹ See the Analysis of Senate Bill 2 at <http://www.legis.state.tx.us/tlodocs/83R/analysis/pdf/SB00002F.pdf#navpanes=0>

procedures initially established in 1995. According to the author of Senate Bill 2, the outdated procedures of the charter school statutes were unintentionally allowing continuously underperforming schools to remain open. The author's primary concern was that underperforming schools were taking one of the limited number of charter spots and that those spots should instead be available for entities able to meet the standards required by the state to operate a charter school. Senate Bill 2 was passed to expedite the process of removing failing charter schools by amending the provisions for revoking a charter.

Prior to 2013, the Commissioner could modify, place on probation, revoke, or deny renewal of the charter of an open-enrollment charter school if the Commissioner determined that the charter holder (1) committed a material violation of the charter including failure to satisfy accountability provisions prescribed by the charter; (2) failed to satisfy generally accepted accounting standards of fiscal management; (3) failed to protect the health, safety, or welfare of the students enrolled at the school; or (4) failed to comply with applicable law or rule.² Under Senate Bill 2, the legislature amended Section 12.115 to state in relevant part:

Sec. 12.115. BASIS FOR CHARTER REVOCATION OR MODIFICATION OF GOVERNANCE.

(a) Except as provided by Subsection (c), the commissioner shall revoke the charter of an open-enrollment charter school or reconstitute the governing body of the charter holder if the commissioner determines that the charter holder:

- (1) committed a material violation of the charter, including failure to satisfy accountability provisions prescribed by the charter;
- (2) failed to satisfy generally accepted accounting standards of fiscal management;
- (3) failed to protect the health, safety, or welfare of the students enrolled at the school;
- (4) failed to comply with this subchapter or another applicable law or rule;
- (5) failed to satisfy the performance framework standards adopted under Section 12.1181; or

² See the text of Senate Bill 2 at: <http://www.legis.state.tx.us/tlodocs/83R/billtext/pdf/SB00002I.pdf#navpanes=0>

(6) is imminently insolvent as determined by the commissioner in accordance with commissioner rule.

(b) The action the commissioner takes under Subsection (a) shall be based on the best interest of the open-enrollment charter school's students, the severity of the violation, any previous violation the school has committed, and the accreditation status of the school...

(d) In reconstituting the governing body of a charter holder under this section, the commissioner shall appoint members to the governing body. In appointing members under this subsection the commissioner:

(1) shall consider:

(A) local input from community members and parents; and

(B) appropriate credentials and expertise for membership, including financial expertise, whether the person lives in the geographic area the charter holder serves, and whether the person is an educator; and

(2) may reappoint current members of the governing body.

Tex. Educ. Code Ann. §12.115. The statute also allows for an appeal process through the State Administrative Offices of any determination made by the Commissioner concerning the revocation of a charter or reconstitution of its governing body. *See, e.g., Tex. Educ. Code Ann. §§12.115-12.116; 12.1162; See also Tex. Educ. Code Ann. § 39.102; See also Tex. Educ. Code Ann. § 39.104.* As stated by the author of Senate Bill 2, the purpose of amending this section was to expedite the process of revoking charters from poor performing charter schools so other entities could have the opportunity to receive a charter and operate an open-enrollment charter school in the state.

Under the new statute, there are no recorded cases of the Commissioner invoking this power to “reconstitute” a charter school’s governing body. In two cases, the Commissioner appointed a management team to oversee charter schools that had recorded dire financial and academic problems for an extended period of time. *See Comb v. Benji’s Special Educ. Academy*, Civil Action No. H-10-3498, 2011 WL 4074525, at *2-5 (S.D. Tex. 2011) (unpublished) (parents of students brought due process action challenging closing of charter school after Commissioner

had appointed an interim superintendent and a board of managers in an attempt to rectify years of dire financial, academic, and governance issues identified by the state); *Texas Educ. Agency v. Alfonso Crutch Life Support Center, Inc.*, 2013 WL 2368276, *5 (Tex. State Office of Admin. Hearings 2013) (Commissioner appointed a management team to oversee a charter school for seven months after several years of documented financial and academic failures).

In 2015, during the 84th legislative session, the legislature again amended the statute relating to open-enrollment charter schools by introducing House Bill 1170. House Bill 1170 sought to improve charter school's abilities to control costs by defining them as local governments for the purposes of inter-local cooperation contracts, self-insurance, and group benefits agreements.³ In adding Section 12.1058 to the statute, the legislature also included language in House Bill 1170 limiting the instances in which an open-enrollment charter school could be defined as a local government or political subdivision. Section 12.1058 states:

Sec. 12.1058. APPLICABILITY OF OTHER LAWS.

(a) An open-enrollment charter school is considered to be:

- (1) a local government for purposes of Chapter 791, Government Code;
- (2) a local government for purposes of Chapter 2259, Government Code, except that an open-enrollment charter school may not issue public securities as provided by Section 2259.031(b), Government Code;
- (3) a political subdivision for purposes of Chapter 172, Local Government Code; and
- (4) a local governmental entity for purposes of Subchapter I, Chapter 271, Local Government Code.

(b) An open-enrollment charter school may elect to extend workers' compensation benefits to employees of the school through any method available to a political subdivision under Chapter 504, Labor Code. An open-enrollment charter school that elects to extend workers' compensation benefits as permitted under this subsection is considered to be a political subdivision for all purposes under Chapter 504, Labor Code. An open-enrollment charter school that self-insures either individually or collectively under Chapter 504, Labor Code, is

³ See Bill Analysis for House Bill 1170 at <http://www.legis.state.tx.us/tlodocs/84R/analysis/pdf/HB01170E.pdf#navpanes=0>

considered to be an insurance carrier for purposes of Subtitle A, Title 5, Labor Code.

(c) Notwithstanding Subsection (a) or (b), an open-enrollment charter school operated by a tax exempt entity as described by Section 12.101(a)(3) is not considered to be a political subdivision, local government, or local governmental entity unless the applicable statute specifically states that the statute applies to an open-enrollment charter school.

Tex. Educ. Code Ann. § 12.1058. As noted in subsection (c), the legislature stressed that an open-enrollment charter school operated by a non-profit corporation would only be considered a political subdivision or local government when expressly stated in statute.

b. Respondent's Contract for Charter

Chief Educational Officer Diane Harris and Chief Administration Officer Megan Doren, two private individuals who had no connection to the state, founded Respondent in 1997 as a non-profit corporation (GC Exh. 3, at 4). Later, in January 1998, with the Unity Church of Christianity as their sponsor, Respondent's co-founders applied for a charter with the Texas Education Agency to operate an open-enrollment charter school pursuant to Section 12 of the Texas Education Code. (GC Exh. 3 at 1). Respondent subsequently submitted a second application for a charter which removed the Unity Church of Christianity as a sponsoring entity. The Texas State Board of Education approved the subsequent application and executed a charter agreement with Respondent in May 1998 (GC Exh. 4). In 2012, Respondent renewed its charter agreement for a term of five years (Jt. Exh. 1). In submitting its application for charter, Respondent established its governing body to consist of a seven member board of directors, pre-selected by Respondent, and a Chief Educational Officer as the sole operating officer (GC Exh. 3, pg. 107-109).

c. Respondent's Bylaws

Following incorporation and charter approval, Respondent established its Bylaws as its governing document (GC Exh. 5, p. 1). Article 3 of the Bylaws states that the board of directors shall manage the affairs of Respondent. Article 4 establishes the officers tasked with running the day-to-day operations of Respondent.

i. Respondent's Board of Directors

The board of directors was initially established in Respondent's Articles of Incorporation and consisted solely of Chief Educational Officer and Founder Diane Harris (GC Exh. 3, at 76). The board was then expanded to seven members during the application for charter and the application provided that the board members were to be nominated by a three member nominating committee appointed by the board (GC Exh. 1, at 108). Following approval of the application by the Commissioner, the appointment and removal process of board members was revised in Respondent's Bylaws.

Article 3 of the Bylaws establishes the board of directors as Respondent's governing body. It sets out the number of board members, the process for appointing new board members and filling vacancies, the process for removing board members, and the duties of the board. Article 3 states that the number of members of the board of directors shall be determined by the board of directors, except that it must maintain a minimum of three members to include the Chief Educational Officer/Superintendent, Chief Administrator, and Chief Business and Community Partnership Administrator (GC Exh. 5, at 1). In addition, Article 3 establishes a nominating committee consisting of at least three members of the board of directors to consider nominees for the board (GC Exh. 5, at 2) and states that any vacancy in the board which occurs due to an increase in the number of directors shall be filled by the Chief Educational

Officer/Superintendent (GC Exh. 5, at 2). Article 3 further provides that Respondent's board of directors may vote to remove a director at any time for good cause and a director may be removed by an affirmative vote of a majority of the board of directors. The board of directors also maintains authority to amend, repeal, or replace the Bylaws with a majority vote of the members (GC Exh. 5, at 15). No provision in Respondent's Bylaws assigns the state of Texas any role in the selection or retention of board members.

ii. Respondent's Officers

Article 4 of Respondent's Bylaws establishes the officers of the corporation which include the Chief Educational Officer/Superintendent, Chief Administrator, and Chief Business and Community Partnership Administrator (GC Exh. 5, at 5). Article 4 further provides that the board of directors may establish additional officer positions, define the authority and duties of said positions, and elect or appoint persons to fill officer positions (GC Exh. 5, at 5). According to Article 4, officers are elected by a majority vote of the board of directors and hold their positions until the board of directors elects a successor. Furthermore, officers report to the board of directors and the board of directors retains the sole authority to remove an officer for good cause (GC Exh. 5, at 6). Article 4 also provides that the Chief Educational Officer/Superintendent may fill any officer vacancy (GC Exh. 5, at 6).

The officers are responsible for the day-to-day operations of Respondent. Section 4.05 of the Bylaws sets forth the job duties of the Chief Educational Officer/Superintendent, which include: holding the position of Chairman of the board of directors and supervising and controlling all business and affairs of Respondent (GC Exh. 5, at 6). The duties of the Chief Administrator, established in Section 4.06 of the Bylaws, include all duties of the Chief Educational Officer when the Chief Educational Officer is absent, unable to act, or refuses to act; as well as

maintaining the financial aspects of Respondent's operations (GC Exh. 5, at 6-7). Lastly the duties of the Chief Business and Community Partnership Administrator, established in Section 4.09 of the Bylaws, include maintaining business and community relationships and raising funds for Respondent's operations (GC Exh. 5, at 7). Respondent currently operates with a Chief Educational Officer/Superintendent, a Director of Administrative Services, and a Business Manager. The State of Texas has no role in the selection or retention of Respondent's officers.

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ examined whether Respondent is a "state or political subdivision" under §2(2) of the Act using the two-prong test established in *Natural Gas Utility District of Hawkins County*, 167 NLRB 691 (1967), *enfd.* 427 F.2d 312 (6th Cir. 1970), *affd.* as to applicable standard only 402 U.S. 600 (1971). Thus, he examined whether Respondent was (1) created directly by the state to be a department or administrative government arm; or (2) administered by individuals who are responsible to public officials or to the general public. *Id.*

Addressing the first prong, the ALJ found that because Respondent was created as a non-profit corporation by private individuals, it could not have been "created directly by the state" and thus Respondent is not a political subdivision by virtue of that prong. (ALJD, p. 5-6) However, in examining the second prong, the ALJ concluded that Respondent's governing body is administered by individuals responsible to public officials and is therefore a political subdivision of the state (ALJD, p. 5-6).

In making this determination, the ALJ relied on Sections 12.115 and 12.116 of the Texas Education Code which, as described above, grant the Education Commissioner authority to reconstitute the governing body of an open-enrollment charter school (ALJD, p. 5, LL. 19-26).

The ALJ determined that this limited, emergency authority constitutes “full authority” to reconstitute the board of a charter school (ALJD, p. 5, L. 20). The ALJ based his “full authority” conclusion on the state’s ability to reconstitute the governing body of a charter school in the event of charter violations, fiscal malfeasance, student health and welfare concerns, violations of applicable laws or rules, breaches of performance standards, and insolvency (ALJD, p. 5, LL. 20-25). Although such actions by the state may be appealed to the State Office of Administrative Hearings, the ALJ viewed the state’s actions as “practically unreviewable” (ALJD, p. 5, L. 26).

IV. ARGUMENT

a. The ALJ erred in finding that Respondent is not an employer engaged in commerce under Sections 2(2), (6), and (7) of the Act.

i. The ALJ should not have determined Respondent is administered by individuals responsible to public officials.

In applying the two-prong test established in *Hawkins County*, supra, the ALJ correctly found that Respondent was not created directly by the State as an administrative arm of the government. However, the ALJ erred in determining that Respondent met the second prong of the *Hawkins County* test which establishes that an employer is a political subdivision of the State if it is administered by individuals responsible to public officials.

The key inquiry to determine if an entity is administered by individuals responsible to public officials is whether those individuals have “direct personal accountability” to public officials. *Cape Girardeau Care Center*, 278 NLRB 1018, 1019 (1986). Accountability is usually established by showing that members of the board of directors, or other administrators, are appointed by and subject to removal by public officials. See, e.g., *Research Foundation*, 337 NLRB 965, 969 (2002). In the instant case, none of the board of directors has ever been

appointed by the state. Therefore, the only issue presented is whether the state’s statutory power to reconstitute the board of directors makes its members “subject to removal” such that they are “directly accountable” to public officials.

The fact that an entity is “subject to oversight and regulation” is not sufficient to make its administering individuals “subject to removal.” *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016). Rather, the Board and the courts have found administering individuals to be sufficiently “subject to removal” only where well defined powers of removal were invested in public officials. See e.g. *Hawkins County*, supra (Statute gave several elected officials power to institute removal proceedings for commissioners of a county board), *Regional Medical Center at Memphis*, 343 NLRB 346, 358 (2004)(Board of Directors subject to removal by mayor). However, where a statute provided public officials with only limited and rarely exercised authority to remove administering individuals, the Board has not found the administering individuals to be “responsible to public officials.” *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88 (Aug. 24, 2016).

In *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88 (Aug. 24, 2016), the Board found that a New York law empowering the State to remove board members was too limited to create the type of direct accountability necessary to establish a political subdivision. There, New York law gave the state board of regents the power to remove board members of any educational institute in the state of New York for “misconduct, incapacity, neglect of duty, or...fail[ing] to carry into effect its educational purposes.” *N.Y. Educ. Law § 226*. The Board viewed such limited and rarely exercised power to remove as creating less than the “direct accountability” contemplated by *Hawkins*.

Like the statute in *Hyde Leadership*, the State of Texas maintains a statute that grants the Education Commissioner authority to reconstitute the governing body of a charter school in limited, emergency circumstances. The ALJ determined that this limited, emergency authority constitutes “full authority” to reconstitute the board of a charter school (ALJD, p. 5, Ln. 20). This analysis is mistaken. The fact that the state maintains a statute granting the Commissioner limited ability to reconstitute the governing body, such as where a school has failed to carry out basic fiscal and academic responsibilities, does not suffice to create “direct personal accountability” as the Board has required. *Hyde Leadership*, slip op. at 7.

While the ALJ viewed the Commissioner’s ability to reconstitute the governing body of a charter school as “broad and practically unreviewable,” in reality, the Commissioner’s authority to reconstitute a governing body of a charter school is limited in scope, has never been exercised, and is subject to review under the administrative procedures of the State Office of Administrative Hearings. *Tex. Ed. Code Ann.* § 12.116. The Commissioner is authorized to revoke a charter or reconstitute a charter school’s governing body only in instances where there is fiscal or academic mismanagement or where the health and welfare of the students is at risk. *Tex. Ed. Code Ann.* § 12.115. Moreover, the charter holder has the right to appeal the Commissioner’s decision to the State Office of Administrative Hearings which has the authority to overturn the Commissioner’s decision if it is arbitrary and capricious or clearly erroneous. *Tex. Ed. Code Ann.* § 12.116.

Thus, like the New York law at issue in *Hyde Leadership*, the statute at issue in the instant case provides public officials with only limited and unused power to alter the composition of Respondent’s board of directors. The individuals administering Respondent’s affairs are not subject to removal by public officials to the degree necessary to create “direct personal accountability.”

ii. The ALJ should not have found that Respondent is political subdivision exempt from the Board's jurisdiction.

Because Respondent has not shown that it meets either prong of the *Hawkins County* test, the ALJ erred in determining that Respondent is not subject to the Board's jurisdiction. Under *Hawkins County*, an employer is exempt from the Board's jurisdiction only if it establishes that it was created by the state as a political arm of the government or it is administered by individuals responsible to public officials or the general electorate. Here, Respondent failed to provide sufficient evidence to prove that it was created by the state or administered by individuals responsible to public officials.

As the ALJ determined, Respondent was created by private individuals rather than the state. Moreover, contrary to the ALJD, Respondent appointed the members of its board of directors and its officers according to its application for charter and its Bylaws and the Commissioner's limited authority to reconstitute Respondent's governing body does not meet the Board's standard that the governing body maintain direct personal accountability to the Commissioner. Accordingly, Respondent is an employer engaged in commerce under Sections 2(2), (6), and (7) of the Act and the Board maintains jurisdiction over Respondent.

b. The ALJ erred in failing to evaluate the merits of the allegations raised in the complaint

In the instant case, the Complaint alleges that Respondent promulgated and maintained unlawfully overbroad work rules and that Respondent terminated the Charging Party because she engaged in protected concerted activity. Counsel for the General Counsel requests that the Board remand the case to the ALJ to make findings with respect to the merits of those allegations.

V. CONCLUSION

For all of the reasons advanced above, Counsel for the General Counsel respectfully requests that the Board grant its Exceptions, modify the Administrative Law Judge's Decision, and remand the case to him for further deliberation.

DATED at Fort Worth, Texas this 16th day of August 2017.

/s/

Maxie E. Gallardo
David A. Foley
Counsels for the General Counsel
National Labor Relations Board
Region 16
819 Taylor Street, RM 8A24
Fort Worth, Texas 76102
maxie.gallardo@nrb.gov

CERTIFICATE OF SERVICE

I hereby certify that, on August 16, 2017, a copy of the *Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge* was electronically served upon each of the following:

Gary Shinnars
Office of the Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570-0001
(electronic filing)

Tommy Fuller
The Fuller Law Group
2000 East Lamar Blvd, Suite 600
Arlington, Texas 76006
(Counsel for Respondent – tommy@fullerlaw.com)

Evan Lange
Rob Wiley P.C.
2613 Thomas Ave.
Dallas, Texas 75204
(Counsel for the Charging Party – elange@robwiley.com)

Kimberly Free
10710 N. MacArthur Blvd, #169
Irving, Texas 75063
(Charging Party – kimfree1953@gmail.com)



Maxie E. Gallardo
Counsel for the General Counsel
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102