

**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 REPLY TO RESPONDENT'S ANSWERING BRIEF**

Respectfully Submitted,

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Respondent fired Charging Party Kimberly Free because she spoke up about group concerns during a staff meeting. Had she been a public sector employee, Free's actions would have been protected by constitutional rights to free speech, free association, and due process. If she had been a private sector employee, Free's actions would have been protected by Section 7 of the National Labor Relations Act (NLRA). The Judge's ruling, that Respondent is a political subdivision, leaves Free stranded with neither the constitutional and statutory rights of a public employee nor the Section 7 rights of private employees.

In reaching his conclusion that Respondent is a political division, the Judge found that the limited and largely hypothetical powers of the State to intervene in the makeup of Respondent's board of directors established that the directors were responsible to public officials, as understood under *Hawkins County*¹. However, as discussed below, the limited power of the

¹*NLRB v. Natural Gas Utility District of Hawkins County*, 402 US 600 (1971)

State here does not create the type of “direct personal accountability” necessary to establish a political subdivision under the NLRA.

In its brief in support of the Judge’s decision, Respondent urges the Board to adopt the Judge’s finding that Respondent is a political subdivision under the second prong of the *Hawkins County* test. As discussed below, both the Judge’s decision and Respondent’s arguments should be rejected.

I. DISCUSSION

a. Respondent is not administered by individuals responsible to public officials.

The Judge erred in determining, and Respondent erroneously asserts, 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). The Board has determined that 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 or a public official of the State. Therefore, the only issue presented is whether the Education Commissioner’s statutory power to reconstitute the governing body of an open-enrollment charter school in certain instances makes the governing body “directly accountable” to public officials.

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 *Hawkins County*, the Supreme Court determined that a utility district’s commissioners were responsible to public officials because they were directly appointed by a county judge and subject to removal proceedings under the Tennessee General Ouster Law applicable to removal of public officials from office. At the time, the General Ouster Law, which removed public officials from office for misfeasance or nonfeasance, provided that “[p]roceedings under the law may be initiated by the Governor, the state attorney general, the county prosecutor, or ten citizens” *Hawkins County* at 607. Additionally, when a vacancy occurred in the utility district, “the county judge appoint[ed] a new commissioner if the remaining two commissioners [could not] agree upon a replacement.” *Id* at 608. The Supreme Court determined that the governance of the utility district was so dependent on public officials that it must be a political subdivision stating, “[p]lainly, commissioners who are beholden to an elected public official for their appointment, and are subject to removal procedures applicable to all public officials, qualify as ‘individuals who are responsible to public officials or to the general electorate’ within the

Board's test.” Id. These officials were determined to have “direct personal accountability” to elected officials and thus the utility district was deemed a political subdivision.

The instant case lacks the type of “direct personal accountability” that the Court found in *Hawkins County*. Public officials in Texas have limited power to intervene in the affairs of charter schools and charter school officials are only indirectly accountable to them. The State of Texas maintains a statute that grants the Education Commissioner authority to reconstitute the governing body of a charter school in limited circumstances where the school either (1) commits material violations of the charter, (2) fails to satisfy generally accepted accounting standards of fiscal management, (3) fails to protect the health, safety, or welfare of the students, (4) fails to comply with Section 12 of the Texas Education Code or other applicable law or rule, (5) fails to satisfy the performance framework standards, or (6) becomes imminently insolvent. *Tex. Ed. Code Ann.* § 12.115. Accordingly, the Commissioner does not maintain full authority to control the inter-workings of the governing body of a charter school. In fact, the state painstakingly defines these limited instances in which the Commissioner may revoke a charter or reconstitute a governing body of a charter school. *Tex. Admin. Code* § 100.1022. 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, contrary to Respondent’s assertion, the Texas Administrative Code provides for a formal review of the Commissioner’s decision to reconstitute a charter holder’s governing body. *Tex. Admin. Code* §157.1133.

Furthermore, unlike the utility district in *Hawkins County*, Respondent in the instant case is a non-profit corporation whose Articles of Incorporation, not a public official, established Respondent’s board of directors (GC Exh. 3, at 76). Further, Respondent’s bylaws determine the

size of the board, the term-length of directors, and the procedure for filling vacancies on the board (GC Exh. 5). Respondent's bylaws further invest the power to remove a board member in a majority of the board of directors (GC Exh. 5). Respondent's officers are also governed by Respondent's bylaws and are selected by, and responsible to, the board of directors (GC Exh. 5). Respondent is clearly established as a private non-profit entity that contracted with the State Board of Education to operate a charter school. As the Board has consistently held, "Section 2(2)'s plain language does not exempt private entities acting as government contractors from the Board's jurisdiction." *Research Foundation*, 337 NLRB 965, 968 (2002); *See also Aramark Corp. v. NLRB*, 179 F.3d 872, 874, 878-79 (10th Cir. 1999) (enforcing Board order finding jurisdiction over private corporation under contract to provide services to a county and a state military college). 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). Accordingly, the fact that the State maintains a statute granting the Commissioner limited authority to reconstitute the governing body of an open-enrollment charter school does not suffice to create "direct personal accountability" as the Supreme Court defined it in *Hawkins County*.

b. Additional factors determine that Texas open-enrollment charter schools are not political subdivisions of the State.

In finding that the utility district in *Hawkins County* was a political subdivision, the Supreme Court also evaluated several characteristics of the district. Notably, the Supreme Court placed significant emphasis on the district's eminent domain authority, which could be exercised over other governmental units, as well as the districts broad authority of "all the powers necessary and requisite for the accomplishment of the purpose for which such district is created, capable of being delegated by the legislature." *Hawkins County* at 608. The Court also noted the

district's authority to subpoena and the nominal compensation of its commissioners as characteristics of a public entity. Lastly, the Court considered the district's public records requirement and the right of a public hearing to all users betoken to the state as indicia of a public entity as well.

Respondent argues that because open-enrollment charter schools receive public funds and provide public education, they are political subdivisions of the State.² The Board has consistently held that “an entity is not exempt simply because it receives public funding or operates pursuant to a contract with a government entity[.]” *Pennsylvania Virtual Charter School*, slip op. at 5; *See also, e.g., Research Foundation*, 337 NLRB 965, 968 (Section 2(2)'s plain language does not exempt private entities acting as government contractors from the Board's jurisdiction); *Aramark Corp. v. NLRB*, 179 F.3d 872, 874, 878-79 (10th Cir. 1999) (enforcing Board order finding jurisdiction over private corporation under contract to provide services to a county and a state military college). Moreover, the Board has continually found that the fact that a charter school operates to provide public education is not sufficient to establish a charter school as a political subdivision. *See Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88 (Aug. 24, 2016); *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (Aug. 24, 2016); *Chicago Mathematics*, 359 NLRB No. 41 (2012).

Further, while Respondent's records are public and Respondent is required to have open meetings, Respondent does not have eminent domain authority, its board members are not compensated, and Respondent is not granted broad powers to operate. *See Tex. Ed. Code Ann.* Chapter 12, Subchapter D. Additionally, while Respondent asserts the Texas Supreme Court determined in *LTTTS Charter School, Inc. v. C2 Construction, Inc.*, 342 SW 3d (2011) that charter schools are political subdivisions, Respondent fails to acknowledge that this decision was limited

² See Respondent's Answering Brief at pp. 20-21

to contract agreements made by charter schools and has since been addressed in 2015 by the 84th legislature when it added Section 12.1058 which provided that open-enrollment charter schools are only considered to be political subdivisions when expressly stated in statute. *Tex. Educ. Code Ann. § 12.1058*

Moreover, public school teachers in Texas may only be fired for “good cause” during the term of a contract. *Tex. Educ. Code §§ 21.156(a)*. Prior to discharge, the board of trustees for the school district must notify the teacher in writing of the proposed action and the grounds for the action. *Tex. Educ. Code §§ 21.158*. Once provided with such notice, the teacher may use a grievance procedure to dispute the *proposed* discharge in a hearing. *Tex. Educ. Code §§ 21.159*. The hearing is convened before a hearing examiner who determines whether the school has established good cause. *Tex. Educ. Code §§ 21.251-.260*.

None of the above procedures took place in the instant case. Free was not fired for “good cause,” she was not provided with written notification of her discharge, and there was no grievance process by which to appeal that action. (Tr. 245, LL. 4-10) Thus, unlike public employees, who maintain constitutional and statutory rights, Free was left with no path to appeal her unlawful termination. To uphold the Judge’s ruling would leave employees like Free without any protection from retaliation if they speak up about workplace conditions. Such a result flies in the face of the purpose of the Act.

c. Respondent is not a political subdivision exempt from the Board’s jurisdiction.

Because Respondent has failed to show that it meets either prong of the *Hawkins County* test, the Judge 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 that 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 Judge determined, Respondent was created by private individuals rather than the State. Moreover, because Respondent alone appoints the members of its board of directors and because the Commissioner has only limited authority to reconstitute that board of directors, the directors does not have the type of direct personal accountability requisite to establish Respondent as a political subdivision and to place its employees outside the ambit of the Act's protections.

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.

II. CONCLUSION

For all of the reasons advanced above, Counsel for the General Counsel respectfully requests that the Board grant its Exceptions and remand the case to the Administrative Law Judge for further consideration.

DATED at Fort Worth, Texas this 13th day of September, 2017.



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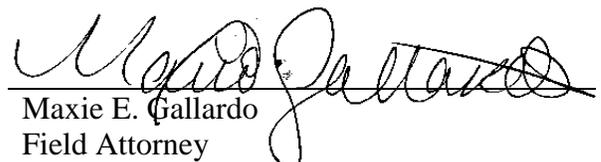
CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Counsel for the General Counsel's Reply Brief to the Respondent's Brief in response to Exceptions the has been served electronically this 13th day of September 2017 on the following:

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