

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

DATE: September 27, 2016

TO: Martha E. Kinard, Regional Director
Region 16

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

SUBJECT: LTTS Charter School d/b/a Universal Academy 177-1683-5000
Case 16-CA-170669 280-8290

The Region submitted this case for advice as to whether a Texas public charter school is a political subdivision of the state within the meaning of Section 2(2) of the Act and therefore is exempt from the Board's jurisdiction under *NLRB v. Natural Gas Utility District of Hawkins County*.¹ We conclude that the charter school is not a political subdivision under either prong of the *Hawkins County* test and the school is therefore a Section 2(2) employer that is subject to the Board's jurisdiction.

FACTS

LTTS Charter School ("LTTS" or "the school") is a nonprofit corporation that was established in 1998 by two private individuals. The school's co-founders applied for a charter to operate an "open-enrollment public charter school" pursuant to Section 12 of the Texas Education Code.² The Texas State Board of Education approved the application and executed a charter agreement with LTTS. In 2012, LTTS renewed its agreement for a term of five years.

According to LTTS's bylaws, LTTS has a nine-person board of directors, including five directors who are nominated by the community and approved by the co-founders. The remaining four director positions are held by the two co-founders, LTTS's attorney, and its accountant. The co-founders, who currently serve as chief educational officer and chief administrative officer, are responsible for the day-to-day operations of LTTS and report to the board of directors.

¹ 402 U.S. 600 (1971).

² See Tex. Educ. Code Ann. §12.101 (Vernon 2013).

Under the Texas Education Code, a charter school applicant must describe the method of appointment and removal of a school's governing body as well as how vacancies will be filled and how long members of a governing body may serve.³ Except for certain restrictions concerning convictions for crimes of moral turpitude, conflicts of interest with school management companies, and nepotism, the code does not mandate who may serve on the governing body of a charter school or how members of governing bodies shall be selected.⁴ However, Section 12.115 of the code governing charter revocation and board member removal states that:

[T]he [C]ommissioner [of Education] shall revoke the charter of an open-enrollment charter school or reconstitute the governing body of the charter holder if the [C]ommissioner 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 [elsewhere in the code]; or
- (6) is imminently insolvent as determined by the [C]ommissioner in accordance with [C]ommissioner rule.⁵

Other code sections describe a charter school's ability to appeal the Commissioner's actions and the Commissioner's procedures for appointing a new governing body

³ Tex. Educ. Code Ann. §12.111 (Vernon 2013).

⁴ See Tex. Educ. Code Ann. §§12.120; 12.1054 -12.1055 (Vernon 2013).

⁵ Tex. Educ. Code Ann. §12.115 (Vernon 2013).

under Section 12.115,⁶ as well as other instances where the Commissioner may appoint a management team to oversee a failing school and attempt to rectify its financial and/or academic condition.⁷ We found no recorded cases of the Commissioner “reconstituting” a charter school’s governing body although there are at least two cases in which the Commissioner appointed a management team to oversee charter schools that had recorded dire financial and academic problems for an extended period of time.⁸

ACTION

We conclude that LTTS is not a political subdivision of the state under either prong of the *Hawkins County* test and, therefore, is subject to the Board’s jurisdiction.⁹

Section 2(2) of the Act provides that “any State or political subdivision thereof” is excluded from the definition of “employer.” Under the Board’s long-standing test, examined by the Supreme Court in *Hawkins County*, an entity is a political subdivision if it is either: (1) created directly by the state, so as to constitute a

⁶ See, e.g., Tex. Educ. Code Ann. §§12.115-12.116; 12.1162 (Vernon 2013).

⁷ See Tex. Educ. Code Ann. § 39.102 (Vernon 2015) (“If a school district does not satisfy the accreditation criteria[,]...academic performance standards[,]...or any financial accountability standard as determined by commissioner rule” commissioner may take certain corrective measures including “appoint a management team to direct the operations of the [school]”); see also Tex. Educ. Code Ann. § 39.104 (sanctions apply equally to open-enrollment charter schools); Tex. Educ. Code Ann. § 39.112 (specifying powers and duties of managers appointed by commissioner).

⁸ 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).

⁹ The Region found merit to the underlying charge alleging that LTTS terminated a teacher in retaliation for engaging in protected concerted activity and does not seek advice on that issue.

department or administrative arm of the government; or (2) administered by individuals who are responsible to public officials or the general electorate.¹⁰

Under *Hawkins County* prong one, the Board determines whether the entity was created by an act of the state “in order to discharge a state function.”¹¹ The Board has consistently found that entities created by private individuals as nonprofit corporations are not exempt under the first prong of *Hawkins County*.¹² Thus, “an entity is not exempt simply because it receives public funding or operates pursuant to a contract with a government entity[.]”¹³

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. Thus, 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

¹⁰ 402 U.S. at 604-605.

¹¹ *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 5 (Aug. 24, 2016); *see also 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).

¹² *See, e.g., Regional Medical Center at Memphis*, 343 NLRB 346, 347 (2004) (finding entity created by private individuals as a nonprofit corporation not exempt notwithstanding the county commissioners’ action of dissolving the county hospital’s authority contingent upon the formation of a not-for-profit health care corporation and the execution of a contract providing that the ‘new’ corporation (the employer) would operate the previously-operated hospital facilities); *Research Foundation of the City Univ. of NY*, 337 NLRB 965, 968 (2002) (“creation of the Employer by private individuals as a private corporation, without any state enabling action or intent, clearly leaves the Employer outside the ambit of the Section 2(2) exemption”).

¹³ *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 5; *see also, e.g., Research Foundation*, 337 NLRB at 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).

direct government creation of the school.¹⁴ Additionally, under Board law, a 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.¹⁵

Here, LTTS was created by private individuals as a nonprofit corporation. The fact that the Texas Commissioner of Education had to approve LTTS's charter is immaterial, since prong one is only satisfied where the entity was created *directly* by the state and LTTS was not created directly by the state. Therefore, LTTS is not exempt from the Board's jurisdiction under *Hawkins County* prong one.

Nor is LTTS exempt from the Board's jurisdiction under the second prong of the *Hawkins County* test, where the key inquiry is whether the individuals who administer an entity have "direct personal accountability" to public officials.¹⁶ The dispositive question under prong two 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."¹⁷ To resolve this "dispositive

¹⁴ See e.g., *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88, slip op. at 5 (Aug. 24, 2016) ("it was ... the founding board's preparatory work, including the promulgation of the School's 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"); cf. *University of Vermont*, 297 NLRB 291, 295 (1989) (political subdivision found where, among other things, university was created by special act of state assembly).

¹⁵ See e.g., *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 7.

¹⁶ See, e.g., *Cape Girardeau*, 278 NLRB 1018, 1019 (1986) (quoting *Truman Medical Center v. NLRB*, 641 F.2d 570, 573 (8th Cir. 1981), 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); cf. *Northern Community Mental Health Center*, 241 NLRB 323, 323 (1979) (finding mental health center exempt where 12 of 14 members of board of directors were appointed to represent each of six member counties and reappointment was subject to the approval of their respective counties).

¹⁷ *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

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.”¹⁸ The rationale behind this distinction is that, where these things are determined solely by the employer’s governing documents, ultimate control rests in the employer’s hands, not the government’s, because the employer can change the procedures for selection and removal.¹⁹ Furthermore, the fact that an employer is subject to some regulation by a governmental agency or public official is insufficient to establish that it is accountable to public officials.²⁰ For instance, in *Hyde Leadership Charter School*, the Board recently found that a New York statute permitting a state agency to remove charter school board members for “misconduct, incapacity, neglect of duty, or ... fail[ing] to carry into effect its educational purpose” did not establish that the board members were responsible to public officials under the second prong of *Hawkins County*, since the state’s removal authority was limited and applied to both private and public educational institutions.²¹

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

electorate depends on whether the individuals are appointed by and subject to removal by public officials); *Five CAP, Inc.*, 331 NLRB 1165, 1165 (2000) (concluding that a majority of the governing board was 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 (finding political subdivision under *Hawkins* prong two where 12 of the 21 trustees were selected either by legislative election or gubernatorial appointment).

¹⁸ *Hyde Leadership Charter School*, 364 NLRB No. 88, slip op. at 6-7 & n.20.

¹⁹ *See, e.g., Jefferson Cnty.Cmty. Ctr. v. NLRB*, 732 F.2d 122, 125 n.3 (10th Cir. 1984); *Crestline Mem’l Hosp. Ass’n v. NLRB*, 668 F.2d 243, 245 (6th Cir. 1982) (“the decision to include all citizens as members of the Hospital corporation is entirely the corporation’s ... and is subject to change”).

²⁰ *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”).

²¹ *Hyde Leadership Charter School*, 364 NLRB No. 88, slip op. at 7.

officials or to the general electorate,’ the Board’s analysis properly ends.”²² In reaching that conclusion, the Board acknowledged that although it had, on occasion, referred to additional factors in prior cases, it did so only “after making a political subdivision finding based on its examination of the method of appointment and removal of an entity’s governing board.”²³

Applying those principles here, we conclude that neither LTTS’s board members nor its executive officials are responsible to public officials or the general electorate. Most notably, LTTS’s board was appointed by, and consists entirely of, private citizens: five community members approved by LTTS’s co-founders, LTTS’s accountant and attorney, and LTTS’s co-founders themselves. Like all charter school applicants operating under the Texas statute, LTTS determines the appointment and removal of the members of its governing body; although LTTS’s bylaws are silent as to the method of board member removal, LTTS is permitted by statute to establish its own procedures. Thus, because LTTS retains ultimate control over the composition, selection, and removal of its board members, its board of directors is appointed, and subject to removal by, private citizens and not by public officials or the general electorate.

The Commissioner’s ability to reconstitute the governing body by removing officers, in limited circumstances such as where a school has failed to carry out its basic fiscal and academic responsibilities, does not establish that the school is administered by individuals responsible to public officials or the general electorate. Rather, the Commissioner’s authority to remove LTTS board members is similar to the state’s limited removal authority in *Hyde*, which the Board found was not equivalent to the “direct personal accountability” present in other cases where appointment and removal were necessarily dependent on the actions of public officials or the electorate.²⁴ It is evident that board members are directly and personally

²² *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 9.

²³ *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), and overruling *Rosenberg Library Assn.*, 269 NLRB 1173, 1175 (1984), where the Board found that the employer was a political subdivision, even though public officials did not appoint its trustees and directors, because, *inter alia*, library was answerable to the city and subject to city council approval for its expenditures of city tax revenues).

²⁴ *Hyde Leadership Charter School*, 364 NLRB No. 88, slip op. at 7 & n.21 (fact that state Board of Regents could remove a charter school trustee for “misconduct, incapacity, neglect of duty, or . . . failing or refusing to carry into effect its educational purposes,” was a limited authority insufficient to establish responsibility to public

accountable to LTTS's co-founders because the co-founders are responsible for selecting and/or hiring them and the state has only limited authority to remove them. While the state also has the ability to appoint a management team to oversee a charter school, the recorded cases demonstrate that this extraordinary measure will only be taken after a school has documented severe financial and academic problems for an extended period of time.²⁵ Thus, we conclude that LTTS is not exempt from the Board's jurisdiction under *Hawkins County* prong two.²⁶

Finally, although Texas courts have found some charter schools to be political subdivisions under Texas law,²⁷ those cases are of limited relevance because “[f]ederal, rather than state, law governs the determination” of whether a charter school is a political subdivision under Section 2(2).²⁸ Moreover, those cases expressly

officials; the Board noted that this provision of the statute applied to all educational institutions in the state, including those that were unquestionably private); *cf. Pennsylvania State Assn. of Boroughs*, 267 NLRB 71, 72-73 (1983) (finding exempt association whose board of directors consisted of public officials elected or appointed by boroughs and counties represented by the association).

²⁵ See *Comb v. Benji's Special Educ. Academy*, Civil Action No. H-10-3498, 2011 WL 4074525, at *2-5 (Commissioner appointed an interim superintendent and a board of managers in an attempt to rectify years of dire financial, academic, and governance issues); *Texas Educ. Agency v. Alfonso Crutch Life Support Center, Inc.*, 2013 WL 2368276, *5 (Commissioner appointed a management team to oversee a charter school after several years of documented financial and academic failures).

²⁶ Although it is not necessary to examine additional factors (see, e.g., *Pennsylvania Virtual*, 364 NLRB No. 87 slip op. at 9) we note that LTTS is responsible for its own labor relations and day-to-day operations. With oversight by its board of directors, it hires its own employees, establishes employee pay and benefits, and enters into contracts necessary to operate the school. And, although it is required to conduct and file an annual audit with the state, it is responsible for its own financial management and budget process.

²⁷ See, e.g., *LTTS Charter School, Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 81-82 (Tex. 2011) (finding that LTTS was a “governmental unit” under state tort claims act’s broad definition of “any other institution, agency, or organ of government” derived from state law” and remanding to appeals court to reach merits of Employer’s claim of immunity from breach of contract claim brought by construction company).

²⁸ *Hawkins County*, 402 U.S. at 602-603.

acknowledge that according to Texas law, a charter school is “not considered to be a political subdivision . . . unless the applicable [state] statute specifically states that the statute applies to an open-enrollment charter school.”²⁹

Accordingly, we conclude that LTTS is not an exempt political subdivision and is an employer under Section 2(2) of the Act.

/s/
B.J.K.

ADV.16-CA-170669.Response.LTTS Charter School. (b) (6), (b)

²⁹ Tex. Educ. Code Ann. §12.1058(c) (Vernon 2013); see *Pegasus School of Liberal Arts & Sciences v. Ball-Lowder*, 2013 WL 6063834,*2-5 (Tex. App. 2013) (unpublished) (concluding that open enrollment charter school was a “local government entity” for purposes of state whistleblower protection act); see also *LTTS Charter School, Inc. v. C2 Constr.*, 342 S.W.3d at 78 (“open-enrollment charter schools.... are generally subject to the ‘specifically provided’ provisions of and rules adopted under the Education Code”); Texas Att’y Gen. Op. GA-0446, 2006 WL 2259837, at *13-14 (2006) (examining whether charter schools were covered by a conflict of interest provision of state law and concluding that charter schools are “not a county, municipality, junior college district, or other political subdivision of Texas” and, in absence of express reference to charter schools in applicable statute, were not covered by provision).