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**LTTS Charter School, Inc. d/b/a Universal Academy
and Kimberly Free. Case 16–CA–170669**

March 15, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE
AND EMANUEL

On June 21, 2017, Administrative Law Judge Robert A. Ringler issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and the complaint is dismissed.

Dated, Washington, D.C. March 15, 2018

Marvin E. Kaplan, Chairman

¹ We affirm the judge’s finding that the Respondent is a political subdivision exempt from the Board’s jurisdiction under Sec. 2(2) of the Act because its governing body is responsible to public officials. In doing so, we note that the Texas Education Code Sec. 12.115(d) explicitly grants the Texas Commissioner of Education the authority, in reconstituting the governing body of an open-enrollment charter school, to appoint the new members and retain any of the incumbent members. Moreover, although Texas Education Code Sec. 12.116, cited by the judge, does not explicitly reference review of the Commissioner’s decision to reconstitute the governing body, Title 19, Sec. 157.1181(2) and 157.1184 of the Texas Administrative Code provide that the Commissioner’s decision must be upheld by a judge from the State Office of Administrative Hearings unless it is arbitrary and capricious or clearly erroneous. Lastly, we distinguish the statutory authority in this case from the statutory authority considered in *Hyde Leadership Charter School – Brooklyn*, 364 NLRB No. 88, slip op. at 7 (2016), in which the Board found that the respondent’s governing body was not responsible to public officials. The Texas Education Code specifically grants the Texas Commissioner of Education the authority to reconstitute the governing body of an open-enrollment charter school under certain conditions. In contrast, the statute at issue in *Hyde* permitted the New York Board of Regents to remove for malfeasance a trustee of any corporation it created, which included private educational institutions that clearly fall under the Act’s jurisdiction.

Mark Gaston Pearce, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

David A. Foley and Maxie E. Gallardo, Esqs., for the General Counsel.

Evan B. Lange, Esq. (Rob Wiley, P.C.), for the Charging Party.
Thomas Fuller, Esq. (The Fuller Law Group, PLLC), for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This hearing was held in Fort Worth, Texas, on May 3, 2017. The complaint alleged that LTTS Charter School, Inc. d/b/a Universal Academy (the Academy) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Academy’s answer denied jurisdiction and substantive liability. Regarding jurisdiction, it contended that, as a charter school, it is a political subdivision of Texas, and, as a result, exempt from the Act’s jurisdiction. This contention is valid.

On the entire record, including my observation of the witnesses’ demeanors, and after considering posthearing briefs, I make the following

FINDINGS ON JURISDICTION¹

1. “State or Political Subdivision[s]” Test

Under §2(2) of the Act, a “State or a political subdivision” is an excluded “employer.” *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). The Supreme Court has defined a “State or political subdivision” as an entity: (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.* In order to gauge the Academy’s status, the Texas Education Code (TEC) must first be explored.

2. Texas Charter School Law²

Charter operators are entities, which have been awarded a contract by Texas to operate a charter school. TEX. EDUC. CODE, §12.001 *et seq.* Entities seeking charters apply via a competitive process. *Id.* Charter operators are generally non-profit corporations. *Id.*

¹ Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

² Judicial notice has been taken of the TEC. *San Manuel Indian Bingo and Casino*, 341 NLRB 1055, 1055 fn. 3 (2004).

a. Applications and Charter Amendments

A charter is a contract with the Texas Education Agency (TEA), and can be amended, subject to the approval of the Commissioner of Education (the Commissioner). TEX. ADMIN. CODE, §100.1001 et seq. Charters may be amended to add a campus, grade or enrollment.

b. School Boards

Unlike elected independent school district boards, charter boards are appointed. *Id.* Charters publicize their boards in an annual governance report, and on their website. *Id.* They must comply with the Public Information Act, and hold public board meetings. *Id.*

c. Funding and Student Enrollment

Charters are funded by state and federal funds.³ TEX. EDUC. CODE, §12.106 et seq. They serve students living within a school district's boundaries, but, lack taxing authority. They cannot charge tuition, with the narrow exception of pre-K programs. *Id.* at §11.158(a). They charge the same limited fees that traditional public schools charge. *Id.* They are open enrollment, which means that they must accept any applicant, as long as they are in the appropriate grade and geographic boundary. In order to receive full funding, charters, like public schools, must provide a minimum total amount of instruction time. They are not, unlike public schools, subject to minimum student-teacher ratios, and class-size caps. TEX. EDUC. CODE, §§25.111, 25.112. Their charters, instead, set student-teacher ratios, and class-size caps.

d. Educators

Open-enrollment charter teachers possess bachelor's degrees, unless they hold special education, bilingual, or ESL slots.⁴ They also hold state certifications.⁵

e. Charter Revocation and Discharging Board Members

The TEA can revoke a charter, or replace its governing board, as follows:

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 . . . if the commissioner determines that the charter holder:
 - (1) committed a material violation of the charter . . .;
 - (2) failed to satisfy generally accepted accounting standards . . .;
 - (3) failed to protect the health, safety, or welfare of the students . . .;
 - (4) failed to comply . . . [an] applicable law or rule;
 - (5) failed to satisfy . . . performance . . . standards . . .; or

³ They are funded by per-pupil allotments from Texas' general fund, which represents their sole revenue stream.

⁴ "ESL" means "English as a Second Language."

⁵ A charter's board can set their teacher qualifications beyond Texas' threshold standards.

(6) is imminently insolvent . . .

- (b) The action . . . take[n] . . . under Subsection (a) shall be based on the best interest of the . . . students, the severity of the violation, any previous violation[s] . . . , and . . . accreditation status . . .
- (c) The commissioner shall revoke the charter . . . if:
 - (1) the charter holder has been assigned an unacceptable performance rating . . . , for the three preceding school years;
 - (2) the charter holder has been assigned a financial accountability performance rating . . . , indicating financial performance lower than satisfactory for the three preceding school years; or
 - (3) the charter holder has been assigned any combination of the ratings described by Subdivision (1) or (2) for the three preceding school years. . .

TEX. EDUC. CODE, §12.115. The Commissioner's decision to revoke a charter, or reconstitute its board, is subject to review by the State Office of Administrative Hearings under an "arbitrary and capricious or clearly erroneous" standard. *Id.* at §12.116.

3. Academy Operations

In 1997, the Academy was incorporated as a nonprofit corporation.⁶ (Jt. Exh. 1; GC Exh. 2). In 1998, it applied to become a charter school; it was sponsored by the Unity Church of Christianity. (Jt. Exh. 1; GC Exh. 3). On May 18, 1998, it entered into a *Contract for Charter for an Open-Enrollment Charter School* with the TEA.⁷ (Jt. Exh. 1). It now has two campuses, i.e. in Coppell and Irving, Texas. (Jt. Exh. 1).

The Academy holds periodic meetings with parents and other stakeholders. (GC Exh. 3). Students, who come from varied backgrounds, undergo interviews, and are admitted on a first-come, first-served basis.⁸ (*Id.*).

The Academy's founding co-administrators are CEO Dianne Harris and CAO Megan Doren. (GC Exh. 3). It is governed by a 9-person Board (the Board) consisting of: Harris; Doren; 2 parents; 2 Unity Church of Christianity Board members; legal counsel; financial counsel; and a local banker.⁹ (Jt. Exh. 1; GC Exh. 3). Board members are selected by a review committee. (GC Exh. 3 at 4). The Board makes staffing decisions. (GC Exh. 3 at 5). Staff is hired by, and reports to, Harris and Doren. (GC Exh. 3 at 5). Teachers hold Texas teaching licenses, and participate in Texas' Teacher Retirement System. (GC Exh. 3; Jt. Exh. 1).

4. Analysis

The Academy is a "State or a political subdivision," which is

⁶ It is exempt under I.R.C., §501(c)(3). (GC Exh. 3.)

⁷ Its Contract for Charter was renewed in 2012, and is effective until July 31, 2022. (Jt. Exh. 1; GC Exh. 6.)

⁸ Students live within the confines of the Coppell and Irving Independent School Districts. Those with documented criminal histories are excluded from consideration. (GC Exh. 3.)

⁹ The Board has three voting members: Harris, Doren and their appointee. (GC Exh. 3 at 4.)

exempt from the Act's definition of a covered §2(2) "employer." An entity is a "State or political subdivision," when it is either (1) created directly by the State to constitute a department or administrative arm of the Government, or (2) administered by individuals responsible to public officials or the general public. *Hawkins*, supra. Although the Academy fails to meet the first "created directly by the State" prong, it meets the second prong because its Board can be removed by the TEA.

a. The Academy was not "Created Directly by the State"

It does not satisfy the first prong of the *Hawkins* test. The Board has held that:

In order to determine whether an entity is a political subdivision under the first prong of the *Hawkins* ... test, [it must first be assessed] ... whether the entity was created directly by the state, such as by a government entity, a legislative act, or a public official. If it was, [it must then be evaluated] ... whether the entity was created so as to constitute a department or administrative arm of the government. Both ... subparts need to be met for the employer to be exempt

[E]mploying entities [are routinely found] to be exempt political subdivisions where they were created by legislation ... to discharge a state function The ... first prong of *Hawkins* ... [is also] satisfied where the ... entity was created by an act of the judiciary [E]ntities created by private individuals as nonprofit corporations are not exempt under the first prong Furthermore, an entity is not exempt simply because it receives public funding or operates pursuant to a contract with a governmental entity The Board routinely asserts jurisdiction over [such] private employers

Pennsylvania Virtual Charter School, 364 NLRB No. 87, slip op. at 8 (2016) (citations and footnotes omitted).

The Academy is not exempt under the first *Hawkins* prong. It was created as a nonprofit corporation by private individuals, who filed and drafted applications, operating documents and by-laws.¹⁰ Although the Academy would not exist without TEA approval, the Board has found that this circumstance is insufficient, in isolation, to make an entity a state creation. *Pennsylvania Virtual Charter School*, supra, 364 NLRB No. 87, slip op. at 9; *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88, slip op. at 8 (2016). I find, accordingly, that the Academy was not directly created by Texas,¹¹ and fails the first *Hawkins* prong.¹²

¹⁰ There is no evidence that Texas ever sought to amend its charter or otherwise rejected its formation plan.

¹¹ Although the Academy contends that Texas' authority to revoke its charter makes it a state entity, the Board has rejected this contention. *Pennsylvania Virtual Charter School*, supra, 364 NLRB No. 87, slip op. at 10 ("power to revoke a charter is analogous to a state's decision to cease subcontracting [and] does not convert the contractor into a state entity."); *Research Foundation of the City Univ. of New York*, 337 NLRB 965, 968 (2002).

¹² Given that the Academy was not created directly by Texas, it is unnecessary to also assess whether it is an administrative arm or government department. *Pennsylvania Virtual Charter School*, supra, slip op. at 9 (upon finding that employer was not created by the State, it can only be exempt under the second *Hawkins* prong, i.e., "only if officials

b. The Academy is Administered by Individuals Responsible to Public Officials

The Academy meets the second *Hawkins* prong, inasmuch as it is administered by individuals responsible to public officials. Under the second *Hawkins* prong, the controlling inquiry is whether an entity's administrators are appointed, and subject to removal, by public officials or the electorate.¹³ If the "appointment-and-removal method yields a clear answer" as to the second *Hawkins* prong, the "analysis properly ends." *Id.*, slip op. at 13.

In the instant case, although the Academy's Board was appointed by private actors, the TEA, a public agency, retains full authority to reconstitute its Board. TEX. EDUC. CODE, §12.115. The TEA can, as a result, remove the Board for a host of reasons, including: charter violations; fiscal malfeasance; student health and welfare concerns; violations of applicable laws or rules;¹⁴ breaches of performance standards; and insolvency. *Id.* In addition, the TEA's decision to reconstitute a board is subject to a fairly deferential standard of judicial review by the State Office of Administrative Hearings. *Id.* at §12.116 ("arbitrary and capricious or clearly erroneous" standard).¹⁵ I find, as a result, that the TEA's broad, and practically unreviewable, authority to reconstitute the Board renders the Academy a "State or political subdivision" under the second *Hawkins* prong, inasmuch as it is administered by individuals who are responsible to public TEA officials.¹⁶ See, e.g., *Regional Medical Center at Memphis*, supra (no jurisdiction under second

who are responsible to public officials or to the general electorate administer it").

¹³ See, e.g., *Pennsylvania Virtual Charter School*, supra, slip op. at 13 ("Where an examination 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 the general electorate' the Board's analysis properly ends"); *Regional Medical Center at Memphis*, 343 NLRB 346, 358–359 (2004) (reiterating that an entity is "administered" by individuals responsible to the general electorate when the individuals are appointed, and subject to removal, by public officials). Cf. *Cape Girardeau Care Center*, 278 NLRB 1018, 1019 (1986) (employer not exempt under the second *Hawkins* prong because its directors were not appointed or removed by the county).

¹⁴ Given the extensive regulation of public and charter schools, this standard is, for practical purposes, quite broad, and grants the TEA a wide array of valid justifications to reconstitute its Board.

¹⁵ *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (scope of review under the "arbitrary and capricious" standard is narrow, and a court cannot substitute its judgment for that of the agency).

¹⁶ Although the General Counsel's brief states that the TEA's removal authority should be discounted as a "rarely exercised emergency power ... to intervene where a charter school has wantonly failed in its responsibility," this argument is unpersuasive. First, it is conjecture, given that there is no record evidence that it is solely a "rarely exercised emergency power." Second, the TEA's authority to reconstitute a board is not just an "emergency power." In truth, it is a broad and practically unreviewable power to discharge the Board for a host of nonemergencies. Finally, even assuming arguendo that this removal power is "rarely exercised," the infrequent exercise of a valid power does not make it illusory. On the contrary, many state powers are rarely utilized (e.g., capital punishment, impeachment, eminent domain), but remain vital. In sum, counsel's contention is invalid.

prong where employer was administered by publicly removable officials); *Oklahoma Zoological Trust*, 325 NLRB 171, 172 (1997). Cf. *Pennsylvania Virtual Charter School*, supra. (jurisdiction where board was not appointed or subject to removal by public officials); *Research Foundation*, supra, 337 NLRB 969–70; *St. Paul Ramsey Medical Center*, 291 NLRB 755 (1988).

CONCLUSION OF LAW

The Academy is not an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act. It is, therefore, not subject to the Board’s jurisdiction.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁷

ORDER

The complaint is dismissed in its entirety on jurisdictional grounds.

Dated Washington, D.C. June 21, 2017

¹⁷ If no exceptions are filed as provided by §102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.