

Are Charter Schools Covered by the National Labor Relations Act? NLRB to Reconsider Its Jurisdiction over Charter Schools

Article By:

Mark Theodore

Joshua S. Fox

On February 4, the NLRB granted United Federation of Teachers, Local 2, AFT, AFL-CIO's (the "Union") [request for review](#) of the [Regional Director's Decision and Direction of Election](#) concerning a decertification petition filed by several teachers at a charter school. In so doing, the Board invited filing of briefs regarding whether the Board should decline jurisdiction over charter schools as a class under Section 14(c)(1) of the Act and modify or overrule its prior precedent on this issue [Hyde Leadership Charter School-Brooklyn](#), 364 NLRB No. 88, (2016) and [Pennsylvania Virtual Charter School](#), 364 NLRB No. 87 (2016) – which held that the Board *should* exercise jurisdiction over charter schools.

In a sharp dissent, Member McFerran argued that a change in the composition of the Board is not a reason for revisiting precedent, which she observed was the only basis for the Board's departure here. Member McFerran [recently complained](#) in a separate dissent about overturning precedent.

Briefs will be filed over the next several weeks, and it appears the Board is seriously considering the Union's petition requesting that the Board decline to exercise jurisdiction as to all charter schools, which would have serious ramifications for employees at these institutions.

Background

The Kipp Academy Charter School ("KIPP Academy") serves elementary and middle school students in Bronx, New York. On January 25, 2017, two teachers filed a decertification petition seeking to decertify the Union as the collective bargaining representative for all full-time and regular part-time teachers, deans, counselors, social workers, teaching fellows, team leaders, specialists, and the director of support services, excluding all other employees, including substitute teachers, clerical, maintenance, supervisors, managers, and guards. The Union moved to dismiss the petition on three grounds:

- KIPP Academy is not an "employer" under the NLRA;

- the petitioned-for bargaining unit is not appropriate because the group shares a community of interest with Department of Education teachers; and
- the NLRB should exercise discretion and decline to assert jurisdiction in the matter.

The Regional Director directed an election in the petitioned-for bargaining unit after ruling against the Union on all three issues.

- First, he found KIPP Academy was an “employer” under Section 2(2) of the Act and not an exempt state or political subdivision because the charter school failed each prong of the Supreme Court-established test for this inquiry: (1) whether the employer was created directly by the state, so as to constitute departments or administrative arms of the government or (2) administered by individuals who are responsible to public officials or to the general electorate. See *NLRB v. National Gas Utility District of Hawkins County*, [402 U.S. 600](#) (1971). The Regional Director found that KIPP Academy failed both prongs of the test.
- Second, applying the community-of-interest factors, the Regional Director found the petitioned-for bargaining unit was appropriate.
- Third, he found asserting jurisdiction was supported by policy reasons that far outweighed those supporting the Union’s argument that jurisdiction should be declined under Section 14(c)(1). Section 14(c)(1) of the NLRA provides the Board may decline to assert jurisdiction over labor disputes involving any class or category of employees where the effect of the dispute on commerce is not sufficiently substantial to warrant jurisdiction. The Union argued jurisdiction should not be asserted because the New York State Public Employment Relations Board (“PERB”) asserted jurisdiction over KIPP Academy in the past and KIPP Academy is heavily regulated by the Board of Regents and the Department of Education, analogizing charter schools to state-regulated industries, such as horse racing and dog racing (the majority in *Hyde Leadership* found this argument unavailing). However, the Regional Director found that since *Hyde Leadership* was decided, PERB has uniformly declined jurisdiction over New York State charter schools, which has left the KIPP Academy employees in “jurisdictional limbo.”

Three-Member Board Majority Grants Review

In its February 4 Order, the majority first acknowledged the Regional Director correctly applied the two-pronged test established in *National Gas Utility District of Hawkins County*, as described above.

However, the majority found review was warranted by simply stating the case raised “substantial issues whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1).” In a footnote, the majority pledged to “keep an open mind with respect to final disposition of the issues presented here,” an acknowledgement of the charge made by the dissent that the Board’s conclusion essentially was essentially predetermined.

The Dissent Argues there is No Need to Disturb Precedent

In her dissent, Member McFerran stated she would deny the Union’s request for review, as the jurisdictional question was correctly decided under well-settled Board law, which is rooted in the Supreme Court’s *Hawkins County* decision. Stating the *Hawkins County* test was straight-forward and had been consistently applied by the Board to charter schools, the Board should properly assert jurisdiction. The dissent stated there was no new policy justifications or legal grounds to revisit the Board’s approach to analyzing jurisdictional questions involving charter schools and efforts to not apply *Hawkins County* were inappropriate in this instance. Further illustrating her opposition to the

majority's ruling, she continued to say "a change in the composition of the Board is not a reason for revisiting precedent" and "the majority's notice is a solution in search of a problem" – a strong admonition of the concerns the majority expresses, as well as the veracity of its motivations.

Hyde Leadership Charter School—Brooklyn and Pennsylvania Virtual Charter School Decisions

On August 24, 2016, in two separate cases, *Hyde Leadership Charter School-Brooklyn* and *Pennsylvania Virtual Charter School*, the NLRB relied on the *Hawkins County* test to hold charter schools in New York and Pennsylvania, respectively, were not political subdivisions within the meaning of Section 2(2) of the NLRA and were subject to the Board's jurisdiction. The Board found the entities were founded by private individuals, despite the fact that the Board of Regents approved the Hyde Leadership Charter School charter and the Pennsylvania Secretary of the Department of Education signed the Pennsylvania Virtual Charter School charter. Stating that the *Pennsylvania Virtual Charter School* decision "was based on the facts of this case," the Board made it clear that a bright-line rule over jurisdiction over charter schools nationwide was **not** created from its decision.

Takeaways

Charter schools have been in the press a great deal lately. The Board's potential consideration of its jurisdiction over charter schools on a class-wide basis has significant consequences. If the Board ultimately declines to exercise jurisdiction over charter schools, then unionized employees would fall outside of the protection of the Act, which, unlike many state laws, allows for employee choice of union representation through a government supervised secret ballot election. Under many state laws governing public schools, such safeguards are not present.

However, as the Regional Director observed, in the event the Board declines to exercise jurisdiction, then charter schools like KIPP Academy may be left in "jurisdictional limbo" if PERB (or another corollary to the NLRB at the state or public employer level) also declines to exercise jurisdiction, which apparently has been the case for several years.

While the Board's Order was brief, Member McFerran's dissent stands as a clear rebuke of the majority's efforts to revisit precedent in the lack of new policy justifications, which has been a consistent theme of Member McFerran's recent dissents.

Briefs by the parties are to be filed with the Board by February 19 and briefs by *amici* by March 6, 2019. The parties will then have until March 20, 2019 to file responsive briefs. The case is *KIPP Academy Charter School*, 02-RD-191760. A copy of the Board's announcement can be found [here](#). We will keep you posted as the Board revisits this issue.

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