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NLRB takes new look at charter schools

Charter schools are a modern phenomenon that has progressed quicker than governing labor laws and labor case decisions.

Under National Labor Relations Board precedent, charter schools are treated the same as private-sector employers — governed by the National Labor Relations Act and subject to the jurisdiction of the NLRB. In stark contrast, Illinois public school districts are subject to the Illinois Educational Labor Relations Act and under the jurisdiction of the Illinois Educational Labor Relations Board.

However, on Feb. 4, the NLRB entered an order in *KIPP Academy Charter School* (02-RD-191760) granting review of a regional director's decision and inviting the parties and amicus curiae to file briefs addressing the issue of whether charter schools are subject to NLRB jurisdiction.

The concept of a charter school may be foreign to those not in the education sector. A charter school generally refers to a public school that operates through a contract with an agency (a charter) and is governed by an independent board of directors. The specific rules governing any given charter vary from state to state.

Article 27A of the Illinois School Code governs the establishment and administration of charter schools in Illinois. Article 27A sets forth, "A charter school shall be a public, nonsectarian, nonreligious, non-home-based and nonprofit school. A charter school shall be organized and operated as nonprofit corporation or other discrete, legal, nonprofit entity authorized under the laws of the state of Illinois." There are

BY KEVIN P. NOLL

Kevin P. Noll is an associate at Robbins Schwartz. He primarily advises school districts and community colleges on aspects of labor and employment law, including employee discipline, labor relations and discrimination claims.

currently 141 charter school campuses in Illinois.

In August 2016, the NLRB reviewed two regional director decisions that found a New York charter school and a Pennsylvania charter school to be within the purview of NLRB jurisdiction. In both cases, the NLRB affirmed the decisions of the regional directors.

In the 2016 decisions at issue, the NLRB determined the charter schools to be an "employer," as the term is defined in Section 2(2) of the NLRA (29 U.S.C. Section 152(2)).

The NLRB maintains jurisdiction over entities that fit the NLRA's definition of "employer." That term, however, excludes, among other entities, "any state or political subdivision thereof." Illinois public school districts are political subdivisions of the state and, therefore, are not under the jurisdiction of the NLRB but rather the Illinois Educational Labor Relations Act.

In addition, both decisions applied the long-standing, two-prong *Hawkins County* test to determine whether the charter schools were political subdivisions and, thus, exempt from NLRB jurisdiction.

Under that test, an entity may be considered a political subdivision if it is either created directly by the state so as to constitute a department or administrative arm of the government

or administered by individuals who are responsible to public officials or the general electorate. *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971).

After examining the creation, structure and leadership of the New York and Pennsylvania charter schools, the NLRB affirmed the regional directors' decisions and ruled that the charter schools were not political subdivisions and, therefore, were subject to NLRB jurisdiction.

In deciding to revisit whether charter schools are subject to its jurisdiction, the NLRB will not review its 2016 holdings that the specific New York and Pennsylvania charters are not political subdivisions under the *Hawkins County* test.

Instead, the NLRB will assess whether to invoke Section 14(c)(1) of the NLRA — a provision allowing the NLRB to use its discretion to decline jurisdiction over any labor dispute involving any class or category of employers.

If the NLRB invokes Section 14(c) and declines to exercise jurisdiction over charter schools as a category of employers, then Illinois charter schools will be subject to the jurisdiction of the Illinois Educational Labor Relations Act and governed by the same provisions as Illinois public school districts concerning collective bargaining rights, impasse procedures, mediation, strikes and unfair labor practices.

Briefs from the parties were due last week. Any amicus briefs must be filed by March 6. It is important to keep an eye on this issue as the decision will affect the 141 charter school campuses in Illinois.