Quasi-Public Agencies

Developments in Union Organization Under State and Federal Law

By Brian H. Leinhauser and John P. McAvoy

Charter schools present unique issues because they have characteristics of both public and private entities. But nursing homes, hospitals, and other quasi-public entities may also continue to muddy the waters.

In recent years, the National Labor Relations Board (NLRB) has taken an expanding view of its enforcement obligations in union and nonunion workplaces alike. The agency has managed to expand its reach into all aspects of employment life, including employee handbook policies, workplace discussions on salary, and even social media postings. Regardless of whether you represent employers with an organized labor force, a nonunion workforce, or some combination of the two, your clients have undoubtedly been affected by the NLRB's concerted efforts to have its say in each and every American workplace.

Recently, the NLRB expanded its reach into the workplaces of quasi-public agencies by exercising jurisdiction over the union-organizing efforts of charter schools. Charter schools are nonprofit entities run by an independent board of trustees with a charter or license from the state or a local school district, depending on the law in your jurisdiction. Charter schools, which are created by state law and permitted to operate in 43 of our nation's 50 states, present a unique environment for employment because they exhibit the characteristics of both public and private entities. In some states, including the five states that forbid their teachers from unionizing, the private entity aspect of charter schools presents an opportunity for unionization. Likewise, in states where teachers' unions are more common, the issue of whether the union is better formed under state law or federal law is taking center stage.

The National Labor Relations Act (NLRA) exempts employees of public state agencies from the statute's union-organizing provisions. Instead, these state agency employees must rely on state law as the basis for organizing. Since charter schools are public schools operated by private entities, this hybrid identity has caused a split among NLRB decisions to emerge about whether charter school employees are public employees exempt from the NLRA, or private employees subject to the NLRA. In two cases involving charter school employees from Pennsylvania and New York, the NLRB determined that employees of charter schools were

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employees of private employers and thus subject to the NLRA. However, an administrative law judge in Texas recently reached the opposite conclusion and held that a disgruntled Texas charter school employee was an employee of a public entity and thus exempt from organizing under the NLRA. The NLRB's inconsistent decisions have created ambiguity for employers trying to navigate the union organizing efforts of their employees.

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Charter schools are not the only quasi-public agencies subject to the NLRB's jurisdiction. Nursing homes, hospitals, and other quasi-public entities, operated by nonprofit boards but beholden to the state for funding, governance rules, and licensure, may continue to muddy the waters concerning where the NLRB's jurisdiction properly lies. If history is the best teacher, the NLRB will likely expand its reach to other types of quasi-public agencies as opportunities for organization grow. Moreover, since the procedures for union organization in state and federal arenas are markedly different from one another, the preference of employers and quasi-public agencies on choice of law can be critical. The state statutes that provide for the organization of employees in public service entities operated by private nonprofits are often more favorable to employers than the NLRA. However, there are states where it is more advantageous for employers if their employees organize under federal law. Under these circumstances, when advising clients, it is important for you to assess the effect that the laws of the state where your clients operate will have on your clients if they face new union organization activities and determine whether federal or state law is more favorable to their interests.

This article summarizes and explains the rationale behind each of the three recent NLRB decisions addressing the union-organizing efforts of charter school employees in Pennsylvania, New York, and Texas. Then, because the NLRB will likely apply the same analysis to the union-organizing efforts of other quasi-public agencies in the future, this article provides guidance on how to identify the likely outcome of organizing under state and federal law. Finally, this article offers guidance about what you should look for when new legislation is proposed in your state to ensure that the employees of your quasi-public agency clients are forced to organize under the preferred statutes.

Recent NLRB Decisions

The hybrid identity of charter schools as public schools operated by private entities has divided the NLRB about whether charter schools are political subdivisions that are exempt from the NLRA, or private entities that are subject to the NLRA. In two different cases decided on August 24, 2016, the NLRB concluded that charter schools in Pennsylvania and New York are not political subdivisions within the meaning of section 2(2) of the NLRA, and they are, therefore, subject to the board's authority. Since section 2(2) is an exclusion provision, entities that fail to satisfy its criteria are subject to the jurisdiction of the NLRB.

While these decisions allowed the employees at both charter schools to unionize under and enjoy the protections of the NLRA, the NLRB expressly stated that it was not announcing a bright-line rule for all charter schools. Rather, the board explained that it would decide the issue of its jurisdiction over a particular charter school on a case-by-case basis. A Texas charter school asked the NLRB to revisit the jurisdictional issue 10 short months later. This time, the board reached the opposite conclusion in its June 21, 2017, decision, when it held that a Texas charter school was a political subdivision of the state and was exempt from the NLRB's jurisdiction.

Pennsylvania: *Pennsylvania Virtual Charter School*

In *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016), the NLRB addressed the issue of its jurisdiction over Pennsylvania Virtual Charter School (PV Charter School), a nonprofit corporation that operates a public, cyber-charter school that provides educational services over the internet to approximately 3,000 students residing in Pennsylvania. The union, PA Virtual School Education Association, PSEA/NEA, filed a petition seeking to represent approximately 83 full-time and part-time teachers and academic support staff. PV Charter School opposed the union's petition, contending that the school was a political subdivision of the Commonwealth of Pennsylvania, and therefore not subject to the NLRB's jurisdiction. After a hearing, the NLRB regional director found that the school was not a political subdivision. The school sought review of the regional director's decision.

On appeal, the board applied the "long-standing test for considering claims of 'political subdivision' status" from *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) (the "*Hawkins County* test). Under the two-pronged *Hawkins County* test, an entity may be considered a political subdivision if the NLRB determines that the entity is either (1) created directly by the state so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or the general electorate.

The NLRB rejected PV Charter School's argument that it satisfied both prongs of the *Hawkins County* test because the Pennsylvania Department of Education directly created it and it was administered by persons who were both public officials themselves and responsible to other public officials in state government. Instead, the NLRB sided with the union. Under prong one of the *Hawkins County* test, the

NLRB held that PV Charter School was not created directly by the state. Under the Pennsylvania Charter School Law, a cyber charter (an online school) receives its charter from the Pennsylvania Department of Education directly, after a successful application. The application is filed by a nonprofit entity operated by a board of directors and must abide by the charter, the Pennsylvania Charter School Law, and state standards that apply to public schools. Additionally, charter school employees may participate in the Public Employees Retirement Program administered by the state for public employees. The Pennsylvania Department of Education also has oversight over PV Charter School, including annual review, re-chartering after a five-year term, and the ability to revoke the charter if the school is not fulfilling its obligations under the charter issued. Even though the school's charter was signed by the Secretary of the Pennsylvania Department of Education, the NLRB found that the school was established by private individuals as a nonprofit corporation. The board also held that PV Charter School was not created to be an administrative arm of government. Accordingly, the NLRB concluded that PV Charter School failed the first prong of the *Hawkins County* test.

Under the second prong of the *Hawkins County* test, the NLRB determined that PV Charter School was not administered by individuals who were responsible to public officials or the general electorate. The board reasoned that the charter school did not qualify as a political subdivision because none of its board members were responsible to public officials or the general electorate, and none of its board members could be selected or removed by public officials under the charter school's bylaws.

For these reasons, the NLRB concluded that PV Charter School was an employer within the meaning of section 2(2) of the NLRA and that the exemption for public employees did not apply. Likening the quasi-public charter school to a government contractor, the NLRB further determined that "policy considerations" favored asserting jurisdiction over the charter school. More specifically, the board reasoned that "declining jurisdiction would deprive [the charter school] and its employees of the benefit of being covered by the [NLRA]." Tellingly, the board largely ignored the fact that the charter school employees, if not covered by the NLRA, would fall under the Pennsylvania Employee Relations Act and would be permitted to organize under state law.

New York: *Hyde Leadership Charter School*

The same day that the board decided the Pennsylvania Virtual Charter School case, the NLRB also decided that another charter school was a private corporation subject to the NLRA. In *Hyde Leadership Charter School*, 364 NLRB No. 88 (2016), the NLRB addressed its jurisdiction over Hyde Leadership Charter School (Hyde Charter School). The charter school provides educational services to approximately 330 students in Brooklyn, New York. In this case, the union, the United Federation of Teachers, Local 2, AFT, and the charter school filed competing petitions to represent the same unit of teachers. The union filed its petition seeking to represent Hyde Charter School's 35 teachers under state law with the New York State Public Employment Relations Board. On the same day, Hyde Charter School filed a petition with the NLRB under federal law and sought an election for the same teachers. The regional director found that Hyde Charter School was not a political subdivision, and as a result, the school was not exempt from the NLRB's jurisdiction. The union sought review of the regional director's decision from the NLRB.

On appeal, the NLRB once again applied the *Hawkins County* test. Under prong one of the test, the board concluded that Hyde Charter School was not created directly by any New York government entity, special statute, legislation, or public official. Instead, the charter school was formed by private individuals as a nonprofit corporation. Even though the New York State Board of Regents, the governing body of the New York Department of Education, had to approve the charter, the NLRB found that the New York Board of Regent's involvement was insufficient to demonstrate that the school was created directly by the state.

Under prong one of the *Hawkins County* test, the NLRB next considered whether a majority of Hyde Charter School's governing board members and executive officers were appointed by, or subject to removal by, public officials. If so, the charter school would qualify as a political subdivision that was exempt from the NLRB's jurisdiction. The board determined that Hyde Charter School was a private corporation whose board members were privately appointed and removed, without the input of public officials. In so holding, the board also noted that the method of selection of Hyde Charter School's governing board was dictated by its bylaws, and not by any state law, statute, or governmental regulation. Those bylaws provided that only sitting members may appoint, remove, and fill vacancies on the school's board of trustees, and only board members may appoint and remove the school's executive director. The NLRB further reasoned that the bylaws listed various reasons for which a trustee may be removed, all of which required a majority vote of the board and no action by a state official. Given the method of appointment and removal of Hyde Charter School's board members, the NLRB found that none of the school's trustees were responsible to public officials in their capacities as board members, and therefore, the school was not administered by individuals who were responsible to public officials or the general electorate. Accordingly, the NLRB concluded that Hyde Charter School was not a political subdivision under the second prong of the *Hawkins County* test.

The hybrid identity of charter schools as public schools operated by private entities has divided the NLRB about whether charter schools are political subdivisions that are exempt from the NLRA, or private entities that are subject to the NLRA.

Similar to its decision in *Pennsylvania Virtual Charter School*, the NLRB once again found that the board should assert jurisdiction over Hyde Charter School because "doing so would effectuate the purposes of the [NLRA] and fairly protect the interests of employees." In so holding, the NLRB noted that it routinely asserts jurisdiction over both private and public schools and over nonprofit organizations, even when such entities have some relationship to a state or local government. The decision likened the relationship between the State of New York and its charter schools to that of contractors providing services to the government, over which the NLRB routinely asserted jurisdiction.

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Texas: *LTTS Charter School, Inc.*

In early 2017, and unlike the cases discussed above, an NLRB administrative law judge found that a Texas charter school was a political subdivision of the state, and as a result, the school was exempt from the NLRA. In *LTTS Charter School, Inc. d/b/a Universal Academy and Kimberly Free, an Individual*, No. 16-CA-170669, NLRB, Administrative Law Judge Robert A. Ringler addressed whether the NLRB held jurisdiction over LTTS Charter School, Inc. d/b/a/ Universal Academy (Universal Academy). Universal Academy is a nonprofit entity operating a charter school that provides educational services to students in Coppell and Irving, Texas. In this case, Kimberly Free filed a complaint against Universal Academy, which alleged that it violated section 8(a)(1) of the NLRA. Section 8(a)(1) of the act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the act.

In its answer, Universal Academy denied jurisdiction and substantive liability. The administrative law judge (ALJ) issued his opinion without addressing the merits of the claim and focused exclusively on the question of jurisdiction. Universal Academy contended that as a charter school, it was a political subdivision of Texas exempt from the NLRA's authority.

Applying the *Hawkins County* test, the ALJ concluded that although Universal Academy failed to meet the first prong (in that it was not an entity "created by the state"), it met the second prong. Under prong one, Judge Ringler found that Universal Academy was not created directly by the state because it was created as a nonprofit corporation by private individuals, who drafted and filed its application, operating documents, and bylaws. Citing *Pennsylvania Virtual Charter School*, he further reasoned that although Universal Academy would not exist as a charter school without the approval of the Texas Education Agency, the state agency that oversees education in Texas, this circumstance was insufficient, in isolation, to make an entity a state creation. The ALJ followed the principles applied in the *Pennsylvania Virtual Charter School* decision, noting that privately created nonprofit entities were not exempt entities, and additionally, entities were not exempt simply because they received public funds or operated under a contract with a government entity. The ALJ found, accordingly, that Universal Academy was not directly created by Texas, and as a result, it failed to meet the first prong of the *Hawkins County* test.

Universal Academy nonetheless met the second prong of the *Hawkins County* test because it was administered by individuals responsible to public officials. Under the Texas Charter School statute, board members of a Texas charter school may be removed from the board by an act of the Texas Education Agency. Administrative Law Judge Ringler reasoned that "although [Universal Academy's] Board was appointed by private actors, the TEA [Texas Education Agency], a public agency, retains full authority to reconstitute its Board." More specifically, that agency "can… remove the Board for a host of reasons, including: charter violations; fiscal malfeasance; student health and welfare concerns; violations of applicable laws or rules; breaches of performance standards; and insolvency." In addition, the Texas Education Agency's decision to reconstitute a board is subject to the fairly deferential "arbitrary and capricious or clearly erroneous" standard of judicial review by the Texas State Office of Administrative Hearings. As a result, the NLRB held that the Texas Education Agency's "broad, and practically unreviewable authority to reconstitute the Board" renders [Universal Academy] "a State or political subdivision" under prong two of the *Hawkins County* test, "inasmuch as it is administered by individuals who are responsible to public TEA officials."

For the foregoing reasons, the ALJ concluded that Universal Academy was exempt from the NLRB's jurisdiction and dismissed the complaint in its entirety on jurisdictional grounds.

Determining the Preferred Organization Status in Your State

As noted above, the procedures for union-organizing efforts in the state and the federal arenas are markedly different. The state statutes that create public service entities operated by private nonprofits are equally varied among the states. When advising clients, it is important to consider and to review state union-formation statutes to determine where and under which law union organizations could form. Likewise, whenever possible, guiding clients in formation decisions and operational posture can assist in establishing whether an organization would unionize under state or federal law.

One other issue to consider is whether organizing under the state or the federal law is preferred by your clients or in your jurisdiction. While some may argue that organizing under any statute, state or federal, would be a bad outcome for an employer, if organizing is inevitable, knowing whether an organization formed under state or federal law would benefit employers. If the rules and process in state laws

regarding public-employee organizing are very different from federal law, is an especially important evaluation.

The decisions discussed above demonstrate that the following are the keys to determining under which statute union organizing would occur: (1) the laws of the state forming and creating the entity; (2) the state's control over the makeup of the entity's board; and (3) the control reserved for the entity's board. Additionally, the chosen jurisdiction of the applicant union or employer may affect the decision making. For example, Pennsylvania's Public Employee Relations Act involves a slower and more deliberate process for organizing employees, which can provide an employer with time to react and have a successful campaign if a union is undesirable. In *Pennsylvania Virtual Charter School*, the union filed its petition under the NLRA, and the charter school opposed the petition, contending that it was a political subdivision of the Commonwealth of Pennsylvania, and therefore, it was not subject to the NLRA's jurisdiction. The union filed its petition under federal law, and the charter school attempted to block it so that its teachers would have to rely on state law as the basis for organizing in a union, hoping to avail itself of the Pennsylvania process.

The opposite is true of the New York statutes that allow employees of quasi-public agencies to organize in unions. In *Hyde Leadership Charter School*, the union filed its petition seeking to represent the charter school's 35 teachers under state law, which the school attempted to block by filing a petition with the NLRB under federal law on the same day. Although not expressly stated, the *Hyde Leadership Charter School* decision implies that the school believed that organizing under the NLRA was preferable to the school compared to the New York statutes. Ultimately, Hyde Charter School was "successful" in availing itself of the NLRB's jurisdiction and avoiding organization under New York law.

Advocating for the Preferred Organization Status When New Legislation Is Proposed in Your State

Going forward, it is clear the NLRB will apply the *Hawkins County* test to expand the NLRA's reach over the union organization efforts of other quasi-public agencies. While there is no bright-line rule asserting that the NLRB has jurisdiction over quasi-public agencies nationwide, there are certain things that you can and should do when legislation is introduced in your state to ensure that your quasi-public agency clients are organized under the preferred status.

If you practice in Pennsylvania, Texas, or a similar jurisdiction where the state law tends to be more favorable to employers than the NLRA is, then you would want to ensure that any proposed legislation is drafted to reduce the chances that charter schools will fall within the NLRB's jurisdiction. This would include determining the amount of oversight, if any, that state agencies have over your quasi-public entity clients' boards of trustees. If the state agency with oversight over your clients' organization also has the ability to remove board members or to reconstitute the board of the nonprofit entity, then your entity would likely organize under state law and be exempt from the NLRA under the *Hawkins County* test. Moreover, the express declaration of the ability to organize under state law would also provide some additional protection in this area. In *Pennsylvania Virtual Charter School*, the NLRB did not find determinative the fact that the employees were permitted to participate in the Pennsylvania Employee Retirement System for public employees. Although charter school employees are considered "public employees" for purposes of their participation in the retirement system, the NLRB determined that they remained employees of a private entity governed by a private board of trustees and subject to the rules of employment and the bylaws of the private entity. Under these circumstances, the NLRB concluded that the state did not control enough and the declaration of participation in the retirement system was inadequate to determine public employee status, thus exempting the employees from organization under the NLRA.

Additionally, employers seeking to insulate themselves from union organizations under the NLRA could seek an affirmative declaration of right to organize under state law. These items, if in place in the statutes creating the quasi-public entity, would provide guidance and determination for the NLRB to follow in the future.

Alternatively, if you practice in New York or a similar state, where the requirements of the NLRA are far less taxing on employers than their state law counterparts, then you would want to make certain that any proposed legislation is crafted in such a way that it allows your quasi-public entity clients to be organized under federal law. Further, a lack of control by the state over the board of trustees for the quasi-public entity or public service organization would likely result in the NLRB taking jurisdiction over the organizing efforts of any of the entity's employees. While the first prong of the *Hawkins County* test would be met by the state creating such an entity when a nonprofit entity applies for a license to operate, it appears that the NLRB would view this as the basis for establishing that the entity was not created or controlled by the state and thus did not qualify for the exemption under the NLRA.

The frequency of conflicts between state enacting statutes for quasi-public entities and labor relations laws on union organizing will likely continue to occur.

The frequency of conflicts between state enacting statutes for quasi-public entities and labor relations laws on union organizing will likely continue to occur. Therefore, it is imperative that you prepare your clients for the possibility that the changing climate will affect their companies and ensure that they have strategies in place to protect their interests if and when their employees attempt to organize a union. Knowing how your quasi-public entity or public service agency clients will be treated under the applicable state and federal union-organizing laws, what oversight and control is reserved to a state agency or officer, and how your clients' organizations were formed, are all key components of your preparation. FD