

**UNITED STATES OF AMERICA**  
**BEFORE THE**  
**NATIONAL LABOR RELATIONS BOARD**

CHICAGO MATHEMATICS & SCIENCE )  
ACADEMY CHARTER SCHOOL, )  
INCORPORATED, )

Petitioner- Employer )

and )

CHICAGO ALLIANCE OF CHARTER )  
TEACHERS & STAFF, IFT, AFL-CIO, )

Respondent-Union )

Case No.: 13-RM-1768

**AMICUS BRIEF OF**  
**THE NEVADA LOCAL GOVERNMENT EMPLOYEE-**  
**MANAGEMENT RELATIONS BOARD IN SUPPORT OF**  
**RESPONDENT**

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Nevada Local Government-Employee Management Relations Board (“EMRB”) is an administrative agency of the state of Nevada. The EMRB is charged with jurisdiction over collective bargaining and labor relations issues involving political subdivisions of the state under Nevada state law. The EMRB’s jurisdiction includes charter schools. See NEV. REV. STAT. 288.060.

The EMRB was modeled after the National Labor Relations Board (“Board”) and intended to fulfill the same functions as the NLRB for local government employers and employees within Nevada who are exempted from NLRB jurisdiction by the “political subdivision” exemption of § 2(2) of the National Labor Relations Act (“Act”). See *Rosequist v. International Ass’n of Firefighters Local 1908*, 118 Nev. 444, 449, 49 P.3d 651, 654 (Nev. 2002).

The Board has indicated that this case may provide further guidance as to when charter schools fall under NLRB jurisdiction. The EMRB has an interest in this issue because of the EMRB’s jurisdiction over charter schools within Nevada.

This amicus brief in support of the decision of Acting Regional Director Eggersten is filed pursuant to the Notice and Invitation to File Briefs issued in this case on January 10, 2011.

## SUMMARY OF ARGUMENT

Charter schools have no existence outside of the particular state law which authorizes their creation, their continued existence and often their funding. When considering whether or not these entities are exempt from NLRB jurisdiction under the “political subdivision” exemption of § 2(2) of the Act, the Board evaluates (1) whether the entity is created directly by the state so as to constitute a department or administrative arm of the state; or (2) if it is administered by individuals who are responsible to public officials or to the general electorate. *NLRB v. Natural Gas Utility Dist. of Hawkins County*, 402 U.S. 600 (1971).

Any answer to this question must, out of necessity, be informed by state law.

In order to apply the first prong of the *Hawkins County* test the Board can neither completely disregard nor defer to state law. Instead, the Board must carefully consider, analyze and possibly even construe state law in order to properly ascertain the actual effect of state law on an entity and whether or not that effect rises to the level of creating a department or administrative arm of the state.

Because the Board must carefully consider state law to determine whether or not it has jurisdiction over charter schools, a reasonable first step in this analysis is to look for any declarations in state labor law addressing the jurisdiction question. If there is such a declaration in state law, it should be given significant weight in the analysis of whether or not charter schools are intended

to satisfy the “political subdivision” exemption of § 2(2) of the Act because it is the means by which the state can speak directly to the issue.

Any such declarations may serve as clear signposts to guide the Board in its analysis. If the Board were to give significant weight to this factor, it would also help to clarify a potentially unsettled area of the law. It would provide guidance to states that seek to meet the “political subdivision” exemption by providing a bright-line standard that states could rely upon when crafting their own state law.

The Illinois statutes which specify that charter schools are “educational employers” are such a clear signpost that charter schools are “political subdivisions” and therefore jurisdiction lies with the state. These Illinois statutes are labor statutes and thus speak directly to the jurisdictional issue presented in this case.

### **ARGUMENT**

#### **I. NLRB Jurisdiction Does Not Extend to Political Subdivisions of the States**

“The National Labor Relations Act leaves states free to regulate their labor relationships with their public employees.” *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 181 (2007). This statement, which was accepted as the foundational premise for the Supreme Court’s analysis in *Davenport*, is based on § 2(2) of the Act, which excludes states and political subdivisions thereof from the definition of “employer,” and therefore renders them exempt from NLRB jurisdiction. 29 U.S.C. § 152(2). As an administrative agency, the NLRB’s jurisdictional reach is limited by statute and the Board cannot exercise jurisdiction

beyond the bounds of the Act. *E.g. Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 918 (3d. Cir. 1981)

## **II. Determining the Issue of Charter School Jurisdiction Necessitates that the Board Consider State Law**

Regional Director Eggersten correctly acknowledged that the determination of NLRB jurisdiction depends upon federal law, rather than state law. But the fact remains that charter schools are creatures of state law and a body of Illinois state law governing charter schools exists.

The Board has three options for dealing with this body of state law. It can either (1) disregard it entirely; (2) defer to it entirely; or (3) neither disregard nor defer to it, but consider it and weigh it in any analysis that applies the “political subdivision” exemption.

The first option, to disregard state law entirely, is advocated by the employer in this case, but presents a practical impossibility. Without state law, the Board would be deprived of the information necessary to conduct a meaningful analysis. The Board cannot rely exclusively on federal law to determine if the Chicago Mathematics and Science Academy is a political subdivision of the State of Illinois because federal law does not address that issue. It contains no information that the Board could apply to conduct a “political subdivision” analysis. Any resulting Board decision would be arbitrary.

This “disregard state law” approach is also problematic because it could conceivably be used to assert jurisdiction over the City of Chicago itself, as federal law also takes no position on the question of whether or not Chicago is a “political subdivision” of Illinois. It is only state law that provides that answer. If

state law on that issue is entirely disregarded then Chicago could not meet the political subdivision exemption and would be subject to NLRB jurisdiction. Such a result plainly nullifies the “political subdivision” exemption in § 2(2) of the Act that Congress intended. This result is not proper and reveals why state law cannot be summarily disregarded in any “political subdivision” case.

The second option, to defer to state law, is foreclosed by the Supreme Court’s statement in *Hawkins County*, as recognized by Regional Director Eggersten, that “[f]ederal, rather than state, law governs the determination, under § 2(2)...” *Hawkins County*, 402 U.S. at 602-603.

This leaves the third option - considering state law and applying it to a § 2(2) analysis- as the only viable approach.

The propriety of this approach is plainly evident in the *Hawkins County* decision. In *Hawkins County*, the Supreme Court stated that federal law governed the exemption question and applied federal law, but in doing so it conducted an analysis that was heavily informed by Tennessee state law. *Hawkins County*, 402 U.S. at 602-603. The majority opinion in *Hawkins County* occupies 8 pages in the United States Reports, half of which are devoted to an analysis of Tennessee state law. *Id.* at 605-609. Thus, it is ultimately federal law that provides the answer, but it is state law that provides the necessary information that the Board applies to federal law to consider the question and reach a correct conclusion.

This decisional process is often unarticulated, but plainly implicit in the decisions of federal appellate courts that have applied *Hawkins County*. In *Moir*

*v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266, 271 (6th Cir. 1990), the Sixth Circuit Court of Appeals applied this process by looking to Ohio state law governing transportation districts, analyzing how Ohio law affected the creation of transportation districts, and then applying that effect to § 2(2) of the Act using the *Hawkins County* test to conclude that a transportation district was a political subdivision of the state of Ohio.

The Sixth Circuit is not alone in this approach. *E.g. Hawaii Government Employees Ass'n, American Federation of State, County and Mun. Employees, Local 152 v. Martoche* 915 F.2d 718 (D.C. Cir. 1990) (considering effects of Hawaii state law when applying “political subdivision” exemption); *Truman Medical Center, Inc. v. NLRB*, 641 F.2d 570, 572-573 (8th Cir. 1981) (considering Missouri law); *NLRB v. Natchez Trace Elec. Power Ass'n*, 476 F.2d 1042, 1045 (5th Cir. 1973) (considering Mississippi law).

The NLRB has also applied this same process to decide “political subdivision” questions under § 2(2) of the Act. *State Bar of New Mexico*, 346 N.L.R.B. 674 (2006) (considering effect of New Mexico law upon creation of New Mexico State Bar); *Hinds County Human Resource Agency*, 331 N.L.R.B. 1404 (2000); *Assoc. for Developmentally Disabled*, 231 N.L.R.B. 784 (1977) (effect of County Board resolution on entity); see also *Rosenberg Library Assoc.* 269 N.L.R.B. 1173 (1984).

When this Board considers and applies state law to reach an informed decision it does not mean that the Board is “held hostage by parochial designations of ‘political subdivision’ status” as the employer in this case argues.

If that were true, then all judicial and administrative decisions that considered and applied state law, including the Supreme Court's decision in *Hawkins County*, would be wrong. Rather, it only means that the Board is correctly considering state law in order to make an informed decision.

### **III. Illinois Law Provides Clear Indications that Charter Schools Are Intended to Satisfy the Political Subdivision Exemption**

Under Illinois law, a charter school is established when its proposal is formally granted by the local school board and certified by the State Board of Education. 105 ILCS 5/27A-8. Prior to local board approval, a charter school simply does not exist even though some non-charter-school entity might. The focus should nonetheless remain on the entity's status as a charter school. Its creation as a charter school can only be done directly by the school board. *Id.*

As noted above, state law is not controlling, but, at a minimum, it should be given careful consideration by the Board. *E.g. Hinds County*. In doing so, the Board should give significant weight to the fact that Illinois has designated charter schools as "educational employers" because this designation is a clear indication that Illinois charter schools were intended to satisfy the "political subdivision" exemption under § 2(2) of the Act. See 115 ILCS 5/2(a).

Illinois has specified that labor relations issues involving "educational employers" fall under the exclusive jurisdiction of the Illinois Educational Labor Relations Board. 115 ILCS 5/7; *Board of Educ. of Warren Tp. High School Dist. 121 v. Warren Tp. High School Federation of Teachers, Local 504, IFT/AFL-CIO*, 128 Ill.2d 155, 166, 538 N.E.2d 524, 529 (Ill. 1989). The principal effect of

the designation of charter schools as “educational employers” is that jurisdiction over charter school labor relations is vested at the state level.

When Illinois designated charter schools as “educational employers” it was addressing the question of jurisdiction over labor relations issues involving charter schools. This is the same question presented to the Board in this review.

Because the Act “leaves states free to regulate labor relationships” with these employees, *Davenport, supra*, the only sound inference from a state law which exercises that right to regulate labor relationships at the state level is that in doing so the state intends to meet the Act’s “political subdivision” exemption.

Under the Act, “political subdivisions” are not subject to NLRB jurisdiction. 29 U.S.C. § 152(2). Illinois law holds that “educational employers” are not subject to NLRB jurisdiction. 115 ILCS 5/1, *et seq.* The term “educational employer” includes charter schools. 115 ILCS 5/2(a). Thus, it follows that under Illinois law charter schools are intended to be “political subdivisions” under the National Labor Relations Act.

This point was not lost upon Regional Director Eggersten who noted the effects of the Illinois Educational Labor Relations Act in the decision to dismiss the petition. pp.7-9. The “educational employer” designation likewise presents a clear indication to the Board of Illinois’ intent and warrants careful consideration.

Because the “political subdivision” exemption arises in the context of a federal labor statute, any corresponding state labor statutes that assert state jurisdiction are especially relevant to the question of whether a state intends to create an entity that is exempt from NLRB jurisdiction. When a state legislature

expressly declares that labor relations issues are vested at the state level, it is indicating that those affected entities are intended to satisfy the “political subdivision” exemption of the National Labor Relations Act.

### CONCLUSION

In this case, Illinois state law directly addresses the question of jurisdiction over labor issues involving state charter schools. In order to reach an informed decision under the “political subdivision” exemption of the Act, the Board can neither defer entirely to state law, nor can the Board disregard it. The Board should follow the process in its previous decisions such as *Hinds County* and *New Mexico State Bar* and carefully consider state law and apply it to the appropriate federal standard in § 2(2) of the Act.

The Act leaves the states free to regulate labor relations with their political subdivisions. The Illinois Educational Labor Relations Act provides the richest and most informative information available to the Board on the question of whether or not Illinois charter schools satisfy the “political subdivision” exemption.

Respectfully Submitted,

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Dated: March 10, 2011