UNITED STATES GOVERMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHICAGO MATHEMATICS AND SCIENCE ACADEMY CHARTER SCHOOL, INC.,	)	
Petitioner-Employer,	)	
- and -	)	Case No. 13-RM-1768
CHICAGO ALLIANCE OF CHARTER TEACHERS AND STAFF, IFT, AFT, AFL-CIO,	)	
Respondent-Union.	)	

PETITIONER-EMPLOYER'S RESPONSE BRIEF

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SUBJECT INDEX

ALPHABETICAL TABLE OF AUTHORITIES

Cases

Statutes

Secondary Authority

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PETITIONER-EMPLOYER'S RESPONSE BRIEF

Pursuant to the National Labor Relations Board's ("NLRB" or "Board") January 10, 2011 Notice and Invitation to File Briefs, the Chicago Mathematics and Science Academy Charter School, Inc. ("CMSA"), hereby submits this Response Brief for the Board's consideration in the above-captioned matter.

I. CMSA's Existence As A Corporation Is Not Dependent On Its "Charter"

The AFL-CIO and American Federation of Teachers erroneously allege on brief that CMSA "came into existence as a School through the grant of a charter by the Chicago Board of Education exercising the Board's authority under the Illinois Charter School Law." AFL-CIO Brief at 3. With this allegation, the *amici* confuse the existence of CMSA as a *corporation* and its status as a *state contractor*. While CMSA's existence as a *contractor* may have begun when its charter was approved, CMSA's existence as a *corporation* began

long before the charter was ever awarded, and will continue to exist long after the charter is revoked (*if* the charter is ever revoked).

In this respect, the record indisputably shows that in October 2003, a group of private individuals formed CMSA as an Illinois private not-for-profit corporation (Tr. 14-15; E. Ex. 1).[1] The initial registered agent for CMSA was Taner Ertekin (Tr. 15; E. Ex. 1 at p. 1-2). In October 2003, Ertekin filed with the Illinois Secretary of State's office an application for CMSA's incorporation pursuant to the Illinois General Not for Profit Corporation Act (805 ILCS 105/101.01 *et seq.*) (Tr. 14-15; E. Ex. 1). The Secretary of State's office subsequently confirmed the creation of CMSA in an October 8, 2003 letter (Tr. 16; E. Ex. 1 at p.1).[2]

After CMSA's incorporation, it applied for, and was granted, the first of its two "charters" from CPS. According to the Illinois Charter Schools Law, a "charter" is simply a "binding contract and agreement between the charter school and a local school board." 105 ILCS 5/27A-6(a). CMSA's first charter contract with CPS began on July 23, 2004 and ended on June 30, 2009, at which time it was renewed for another five-year term (E. Ex. 8 at pp.1-2). Thus, CMSA existed as a corporate entity for over seven months before it entered into a charter contract with CPS.

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[1] The hearing transcript from the proceeding below will be referenced as (Tr. ___). Employer and Union exhibits will be referenced as (E. Ex. ___) and (U. Ex. ___), respectively.

[2] The NLRB has regularly exerted jurisdiction over Illinois not-for-profit corporations. *See, e.g., Catholic Social Services*, 355 N.L.R.B. No. 167 (2010); *Abbott Ambulance of Ill.*, 349 N.L.R.B. No. 43 (2007); *Beverly Farm Found., Inc.*, 323 N.L.R.B. 787 (1997).

By the same token, if CMSA's charter contract is ever revoked or terminated, CMSA will still exist as a corporate entity. As provided by the Illinois General Not for Profit Corporation Act, a corporation that is created thereunder generally can be dissolved only by a formal vote of its board of directors. *See* 805 ILCS 105/112.05. Thus, upon the revocation of its charter, CMSA will still exist, complete with its own school building, property, desks, chairs, teaching tools and an employee workforce of approximately 50 teachers and staff (Tr. 37-38, 55-56). Granted, the revocation of CMSA's charter likely would mean the cancelation of the receipt of CPS operating funds (a risk that all federal, state and local government contractors face). However, nothing would prevent CMSA from then creating a new business model by offering educational services to students on a tuition-fee basis, similar to other private schools over which the NLRB has exerted jurisdiction. *See, e.g., Suffield Academy*, 336 N.L.R.B. 659 (2001).

These facts highlight the absurdity of contending that CMSA is a "political subdivision" within the meaning of Section 2(2) of the National Labor Relations Act ("Act" or "NLRA"). Taking the Union's and *amici*'s arguments to their logical extreme, CMSA literally would qualify as a "political subdivision" only during the term of its charter contract with CPS. The Union and *amici* cannot avoid this logical conclusion, based on their extensive reliance on the "regulations" to which CMSA is subject by virtue of its charter, and the fact that the Illinois Educational Labor Relations Act defines an "educational employer" as a "charter school." *See* 115 ILCS 5/2(a). Logic dictates that

when the "charter" no longer exists, CMSA no longer is a "political subdivision."

What does this mean in practical terms for Illinois charter schools like CMSA? For example, does jurisdiction then switch back to the NLRB from the Illinois Educational Labor Relations Board ("IELRB") once a charter has been revoked? Then, if CMSA decides after a hiatus to reapply and obtain another charter, does jurisdiction bounce back to the IELRB? CMSA respectfully submits that such a jurisdictional game of "ping pong" cannot have been envisioned by the drafters of the NLRA. Put another way, NLRB jurisdiction cannot be so easily gained or lost by the mere execution of a government contract (or the creation and/or amendment of a state statute that declares an entity to be "public"). As a practical matter, such a result could wreak havoc with a charter school's labor relations, with different labor laws applying at different times, all based on the existence of a government contract. *See* AFL-CIO Brief at pp.8-9 (conceding the significant differences between the NLRA and the IELRA).

From a legal perspective, such a result strongly supports a narrow interpretation and application of the first prong of the *Hawkins County* test. Instead of allowing the existence of a "charter" to dictate whether the NLRB has jurisdiction over a not-for-profit corporation, the Board should follow its well-established precedent by requiring proof that a corporation was literally *created* by a state entity before it qualifies as a "political subdivision." *See Research Found. of the City Univ. of N.Y.*, 337 N.L.R.B. 965, 965 (2002) (entity was not a "political subdivision," where a group of private individuals requested

incorporation as a not-for-profit entity). This bright line standard can be easily applied by the NLRB (and not so easily modified by a state legislature). Thus, the Board should follow its precedent by continuing to require proof that an employer was literally "created" by the state before "political subdivision" status will be found.

II. *Charter Sch. Admin. Services* Is Still Persuasive Authority Despite Its Two-Member Panel

Several *amici* suggest the NLRB should disregard the analysis contained in *Charter Sch. Admin. Services*, 353 N.L.R.B. 394 (2008), because it was decided by a two-member panel, which according to the U.S. Supreme Court lacks the statutory authority to take action. *See New Process Steel v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010). However, the *amici* overlook the well-established principle that even vacated decisions can still be cited as persuasive authority. *See, e.g., Orhorhaghe v. INS*, 38 F.3d 488, 493 n.4 (9th Cir. 1994) (vacated decision was "still persuasive authority"); *Action Alliance of Senior Citizens v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991) (same). Therefore, whether *Charter Sch. Admin. Services* is "binding" authority or simply "persuasive" authority, the fact remains that the current Board can take notice of how its current Chairman and a former Member applied prior NLRB precedent.

III. The Board's Approach In *Charter Sch. Admin. Services* Is Consistent With The Second Prong Of The *Hawkins County* Test

The National Education Association and several *amici* argue that the NLRB has wrongly applied the second prong of the *Hawkins County* test by declaring that the "sole

focus" should be on whether an employer's governing board is appointed or subject to removal by a government entity or the general electorate. The *amici* misinterpret the U.S. Supreme Court's analysis in *Hawkins County*, however. As an initial matter, the *amici* overlook the fact that the Court simply was demanding that the NLRB honor its own self-created test. *See NLRB v. Natural Gas Utility Dist. of Hawkins County*, 402 U.S. 600, 604 (1971). Needless to say, if the NLRB wishes to modify that test, it is free to do so. *See Epilepsy Found. of N.E. Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (deference shown to changed *Weingarten* test), *cert. denied*, 536 U.S. 904 (2002).

Second, the *amici* overlook the fact that the Supreme Court in *Hawkins County* indeed based its decision on the fact that the employer's governing board was "appointed by an elected county judge, and subject to removal proceedings at the instance of the Governor." *Hawkins County*, 402 U.S. at 605. Only after the Court reached the conclusion that the employer was a "political subdivision" did it then examine other secondary factors, such as the employer's compliance with "sunshine laws," and its power of eminent domain. At the end of its majority opinion, the Court declared that "Respondent is therefore an entity administered by individuals [the commissioners] who are responsible to public officials [an elected county judge] and this *together with the other factors* mentioned satisfies us that its relationship to the State is such that respondent is a 'political subdivision.'" *Id.* at 609 (quotation marks omitted) (emphasis added). With this sentence, the Court very clearly relied on the appointment and removal authority of

a government official in the first instance, with "other factors" merely supporting the ultimate conclusion of "political subdivision" status.

The NLRB followed this approach in *Charter Sch. Admin. Services,* where it first examined how members of the employer's governing board are appointed and removed. Then, in a footnote, the NLRB mentioned that other factors also supported its conclusion. Thus, the *amici* are wrong that the Board has deviated from the Court's analytical approach in *Hawkins County*.

In any event, the *amici's* recommendation that the Board rely on a variety of factors that go beyond the appointment and removal of governing bodies risks creating the very same inconsistencies seen in the NLRB's long abandoned "right-of-control" and "intimate connection" tests. *See Management Training Corp.*, 317 N.L.R.B. 1355, 1356-58 (1995) (setting forth inconsistencies in the "right-of-control" test). The same goal of avoiding unnecessary litigation that was articulated by the Board in *Management Training Corp.* is just as applicable today. *See id.* at 1359. In this respect, a return to a multi-factored analysis will only lead to more confusion and litigation, as demonstrated by the various Regional Director and Administrative Law Judge decisions in recent years that have struggled in their attempts to weigh the various factors favored by the *amici*. *Compare Excalibur Charter Sch., Inc.*, 2011 NLRB LEXIS 23 at *8 - *9 (NLRB ALJ 2011) *with Los Angeles Leadership Academy*, Case No. 31-RM-1281 (2006). In order to avoid further inconsistencies, the Board should retain the bright-line rule that it announced in *Charter*

Sch. Admin. Services, i.e., the "sole focus" of the second prong of the *Hawkins County* test is whether an employer's governing board has been appointed or is subject to removal by a government entity or the general electorate.

IV. The Board Should Not Decline Jurisdiction Over Charter Schools

Finally, the NEA and its fellow *amici* argue on brief that even if the NLRB concludes that CMSA is not a "political subdivision," the Board nevertheless should decline to exercise jurisdiction over CMSA and similar charter schools. While the NLRB indeed has the discretion to decline jurisdiction in matters such as these, such an abdication of authority flies in the face of the Board's recent efforts at *expanding* its jurisdiction. *See, e.g., Management Training Corp.*, 317 N.L.R.B. 1355 (1995) (abandoning "right of control" test for determining political subdivision status because it was "unworkable and unrealistic"); *Firstline Transp. Security*, 347 N.L.R.B. 447 (2006) (rejecting national security concerns to exercise jurisdiction over private sector airport screeners); *Prairie Meadows Racetrack*, 324 N.L.R.B. 550, 551 (1997) (narrowing scope of race track jurisdiction when revenue from casino operations overshadowed that of the race track itself).

Some *amici* also argue that the "manner in which a state government discharges its duty to provide a system [of] free and unrestricted public education is obviously a matter of largely state and local concern." NEA Brief at 29. The U.S. Supreme Court and the Board, however, have disagreed that there is something inherently special about the provision of educational services that would justify avoiding federal jurisdiction. *See*

Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (the provision of educational services to "maladjusted students" was not the "exclusive province of the State"); *Charter Sch. Admin. Services*, 353 N.L.R.B. at 399 n.21 ("the provision of education is not a unique state function").

The NEA and several *amici* also appear to suggest on brief that the Board should decline jurisdiction in this matter, because it "will not leave the labor relations of [Illinois] charter schools unregulated." NEA Brief at 30. CMSA submits that this argument is extremely short-sighted, and overlooks the fact that many states lack a public sector collective bargaining "safety net."

For consistency, the NLRB presumably must exercise or decline jurisdiction over charter schools without regard to the state in which they reside. This means that if the NLRB declines jurisdiction over charter schools in Illinois (which has a comprehensive public sector labor relations statute), the NLRB also must decline jurisdiction over similar charter schools in states without public sector collective bargaining laws. Yet, if an unfair labor practice case arose in connection with a North Carolina charter school, for example, charter school teachers in that state essentially would be deprived of any collective bargaining rights using the *amici's* rationale.[3]

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[3] According to the Center for Education Reform, North Carolina had 102 charter schools in November 2009. *See* THE CENTER FOR EDUCATION REFORM, ANNUAL SURVEY OF AMERICA'S CHARTER SCHOOLS at 8 (Jan. 2010) (available at www.edreform.com). In North Carolina, public employers are legally prohibited from entering into collective bargaining agreements. *See* N.C. GEN. STAT. § 95-98.

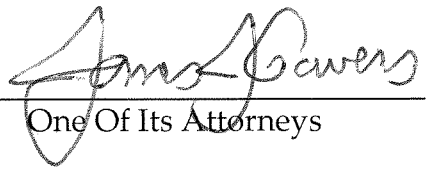
Even assuming *arguendo* that the NLRB was willing to "play favorites" by declining jurisdiction only in those states with comprehensive public sector collective bargaining laws, recent events in Wisconsin demonstrate why such an approach is risky. *See* Karen Tumulty, *Wisconsin Governor Wins his Battle with Unions on Collective Bargaining*, WASH. POST, Mar. 11, 2011. If the Board's presumed goal is to maximize employee protections under the NLRA, it must exercise jurisdiction over charter schools without regard to the states in which they reside.

CONCLUSION

CMSA respectfully requests that the Board reverse the Acting Regional Director's decision, and find that CMSA is an "employer" within the meaning of Section 2(2) of the Act.

Respectfully submitted,

CHICAGO MATHEMATICS AND SCIENCE ACADEMY CHARTER SCHOOL, INC.

By: 
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a true and correct copy of the PETITIONER-EMPLOYER'S RESPONSE BRIEF to be served upon the following individuals by electronic service on this 25th day of March, 2011.

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