

NLRB Affirms Decision Finding Charter Schools Subject To NLRA

November 23, 2016 | [National Labor Relations Board, Labor And Employment](#)

In a recent union election, two units of teachers and staff members at a Pennsylvania charter school overwhelmingly voted in favor of representation. See *Agora Cyber Charter School*, Case Nos. 04-RC-170767, 04-RC-179402 (NLRB, Nov. 16, 2016). The case offers an interesting look at the National Labor Relations Board's jurisdictional limit to only private employers.

Section 2(2) of the National Labor Relations Act provides that the term "employer" shall not include any state or political subdivision, and the employer in *Agora Cyber* unsuccessfully argued that it was a political subdivision. *Agora Cyber Charter School* is a K-12 tuition-free charter school offering online classes and virtual classrooms. Funding for the school's operations is governed by statute and derived from individual school districts. The school also operates under a charter granted by the Pennsylvania Department of Education and the school's board of trustees includes members who are public officials.

This was not the first time the NLRB has considered whether it has jurisdiction over a virtual charter school. Interpreting the same Pennsylvania statutes earlier this year, the Board issued a decision in *The Pennsylvania Virtual Charter School (PVCS)*, 364 NLRB No. 87 (Aug. 24, 2016). In *PVCS*, the Board noted the various provisions in Pennsylvania state law governing charter schools. For example, the state's charter school law gives charter school employees the right to organize under the state's employee relations law, but they must do so in bargaining units separate from public school employees' bargaining units. However, a charter school employee must receive the same healthcare benefits as public school workers and must enroll in the state's public school retirement plan. Both provisions indicate the government has significant control over the operation of the school.

In *Agora Cyber*, the Board relied on its decision in *PVCS* to find the school covered by the Act. The Board in *PVCS* applied long-standing precedent to determine whether the schools would be considered political subdivisions exempt from the Act. 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 to the general electorate.

Applying the test in *PVCS*, the Board held that the school was not actually "created by" the government despite the governing statutes, because a collection of private individuals, not the state itself, organized to apply for the charter. The Board said, "No doubt many private entities would not exist but for the public contracts they carry out; they nevertheless are not administrative arms of the government." Going further, although it noted the

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presence of public officials on the school's board of trustees, the Board said that members were not appointed or overseen by public officials or the general electorate.

Considering the general decline in union membership, it is not surprising that the Board would decline to limit its jurisdiction in these cases. However, as the Pennsylvania cases suggest, governance of these unions may involve interesting intersections between state and federal law governing employee organization. The Board considered several charter school cases this year, and most charter school decisions have been issued during President Obama's Administration. Which presents another interesting question: Will this be another issue subject to change under new leadership? We will keep you informed of new developments.