STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OPTIONS FOR YOUTH-VICTOR VALLEY, INC., Employer, and VICTOR VALLEY OPTIONS FOR YOUTH TEACHERS ASSOCIATION, Petitioner.	CaseNo.LA-RR-1082-E PERB Decision No. 1701 November 5, 2004

Appearances: Silver & Freedman by Andrew B. Kaplan, Attorney, for Options for Youth - Victor Valley, Inc.; California Teachers Association by John F. Kohn, Attorney, for Victor Valley Options for Youth Teachers Association.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Options for Youth-Victor Valley, Inc. (OFY)[1] to the Regional Director's proposed decision (attached). The request for representation by Victor Valley Options for Youth Teachers Association (Association) seeks exclusive representation of approximately 20 full-time teachers employed by OFY.

By letter dated October 16, 2002, the Board advised the parties of its administrative determination that the Association had demonstrated proof of at least majority support in the petitioned-for unit, that no interventions had been filed, and that OFY could lawfully grant voluntary recognition. However, in a letter dated October 24, 2002, OFY stated that it would not grant recognition, and argued that the petition should be dismissed because OFY is a

[1]The original petition listed the employer as Options for Youth Charter.

private, non-profit corporation. Therefore, OFY reasoned, it is a private, not a public employer, and thus subject to the provisions of the National Labor Relations Act (NLRA),[2] and not the Educational Employment Relations Act (EERA).[3]

On October 31, 2002, noting that OFY is registered as a charter school, the Board requested that the parties submit additional information pertaining to OFY's status as a public school employer under Education Code 47611.5(b) and EERA. The case was later heard by the Regional Director, who for reasons discussed below, granted the Association's request.

We have reviewed the entire record in this matter, including the request for recognition, OFY's responses, the Association's rebuttal, OFY's reply, the hearing transcript, exhibits, the Regional Director's proposed decision, and the parties' post-hearing briefs. Subject to the discussion below, the Board adopts the Regional Director's proposed decision as a decision of the Board itself.

BACKGROUND

OFY is both an independent charter school and an independent study charter school. OFY was first chartered in 1993 under the Victor Valley Union High School District (District). The current charter was approved by the District in November 2000 for the period of July 1, 2001 through June 30, 2006.

OFY was incorporated in 1988 as a non-profit 501(c)(3) public benefit corporation. John Hall (Hall), the founder, and OFY's corporate officers were never employed by the District. The board of directors are appointed and may be removed by the directors of Options for Youth - California, Inc., a separate corporate entity whose directors are appointed by Hall.

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[2]The NLRA is found at 29 U.S.C, section 151, et seq.

[3]EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Under Education Code 47604(b) and the provisions of the charter, the District may have a single representative on OFY's board but has never placed a representative on the OFY board. The District's director of pupil services has served as a liaison to OFY and attends some OFY board meetings.

Don Riddell (Riddell), the chief operating officer, and a management team of four individuals direct daily operations. These individuals are employed by OFY except for a director of instruction who is employed by Options for Youth, Inc., another separate corporate entity. The 20 to 25 OFY teachers are employed by OFY, who is also responsible for all personnel functions. These teachers participate in social security but not the State Teachers' Retirement System.

OFY operates six learning centers in the Victor Valley/Hesperia area; not all of these centers are located within the District's boundaries. OFY leases commercial facilities for its learning centers although entitled to use District facilities. OFY has an average daily attendance (ADA) of 1000 students in grades 7 though 12. OFY must comply with State of California (State) standards regarding student attendance, instructional minutes, curriculum, standardized testing, special education programs and independent study although it sets its own curriculum and hours of operation.

OFY relies upon the State for 90 percent of its funding. Its annual operating budget is $3.5 million. Under State finance rules, OFY receives apportionment, property tax and lottery money funding based on its ADA. OFY submits the ADA forms to the District for certification, the District submits the forms to the county office of education (County), which submits them to the State for payment. Most payments come directly payable to OFY but some are routed through the County. Property tax payments are paid to the District and then distributed on a proportionate basis to OFY.

OFY pays the District an amount equal to one (1) percent of its funding for "supervisorial oversight" costs. These costs pay for the District's efforts to ensure compliance with the charter. The District may also inspect classrooms and curriculum, require OFY to provide financial information, demand compliance with charter provisions and demand remediation of any charter violation. Further, the Education Code allows revocation of a charter.

When the charter was amended in November 2000 to reflect the current version, the OFY and the District agreed to further amend and restate the terms and conditions of the charter "to reflect, among other things, additional changes in California's charter school law and to ensure compliance with the District's recently established evaluation criteria." The charter continues to identify OFY's overriding goal as providing "expanded choices for pupils and parents in the types of educational opportunities that are available within the public school system." (Emphasis added.) The charter states that OFY will "employ any modality" to serve its students "in a manner consistent with charter school laws." The charter further references in multiple locations, OFY's obligation to comply with applicable statutes and regulations of the State. The charter in Part I, Paragraph O, also states:

> OFY shall be the exclusive public school employer of all employees working for the Charter School, for all purposes, including but not limited to, collective bargaining.

Riddell explained that this provision was included in the charter because, otherwise, OFY's employees would be considered employees of the District. Part II, Paragraph B of the charter also provides that "to the fullest extent of the law," the charter school "shall be deemed to be a 'school district' for purposes of Section 41302.5 [of the Education Code] and Sections 8 and 8.5 [of] Article XVI of the California Constitution." Part II, Paragraph I of the charter requires that "material revisions" of the charter may be made only with the District's approval but that

such revisions are governed by the criteria in Education Code section 47605. Under Part II, Paragraph P, the District may only revoke the charter pursuant to Education Code section 46707(b) and (c). The waiver provision states that failure of a party to insist on strict compliance with any charter provisions does not waive the rights or duties under that provision at another time. (Charter Part II, Para. O.)

REGIONAL DIRECTOR'S PROPOSED DECISION

The Regional Director found OFY to be a "public school employer" under EERA section 3540.1(k) and noted that OFY did not contest this fact. OFY asserts that this factor is not controlling since OFY is not a "political subdivision" under the NLRA and thus the Board may not accept jurisdiction over OFY. Under the Supreme Court's decision in National Labor Relations Board v. Natural Gas Utility District of Hawkins County, Tennessee (1971) 402 U.S. 600 [77 LRRM 2348] (Hawkins), federal law, not state law, governs the determination as to whether a party is a "political subdivision" under the NLRA and thus exempt from the NLRA. The Hawkins court established a test for defining "political subdivision": (1) entities created directly by the state, so as to comprise a department or administrative arm of government; or (2) entities administered by individuals who are responsible to public officials or to the general electorate. Although not controlling, the Hawkins court relied upon the description under Tennessee law of the "actual operations and characteristics" of the utility district in making its determination that the district was exempt from the NLRA.

The Regional Director noted that this case arose because OFY submitted a charter petition to operate a California public charter school and the District approved it. Both actions occurred within "state enabling action or intent" under the Charter Schools Act (CSA). (See Research Foundation of the City University of New York (2002) 337 NLRB 152 [171 LRRM 1360].) OFY further agreed to adhere to the provisions of the CSA. The Regional Director

thus concluded that the charter school operated by OFY could only be authorized pursuant to the CSA;[4] that the charter's renewal or revocation is subject to the CSA; that the charter school is obliged to comply with the CSA; that the District's governing board was required to hold a public hearing before approving the petition; that the educational functions carried on by OFY are pursuant to a delegation of the Legislature under the CSA; and the appropriation of public monies to OFY is only lawful if the charter school is "under the exclusive control of the officers of the public schools." (Cal. Const. Art. IX, section 8; Ed. Code sec. 47615(a); Wilson.) The Regional Director thus concluded that the first prong of the Hawkins test was met in this case, that OFY's charter school is a "political subdivision" because it was created by the State and is an administrative arm of government.

The Regional Director found even more compelling evidence that the OFY charter school met the second prong of Hawkins, i.e., that it is administered by individuals responsible to public officials or the general electorate. Here, the chartering authority is the District. OFY pays the District one percent of its funding for supervisorial oversight. The District may insist on representation to OFY's board. The District's failure to provide a representative does not waive its right to do so under the waiver provision in the charter and under its responsibilities under the CSA. The Wilson court expressly held that charter schools must remain under the control of the officers of the public schools and must never stray from control of the chartering authority. Therefore, to find that OFY is not a public school employer or political subdivision of the State would require a finding that OFY is not complying with the dictates of the CSA. This is consistent with federal precedent that an entity can be both a nonprofit corporation and a public school. (King v. United States (1999) 53 F.Supp. 2nd 1056.)

[4]The CSA is codified under Education Code section 47600, et seq. See also Wilson v. State Board of Education (1999) 75 Cal. App. 4th 1125 [89 Cal. Rptr. 2d 745] (Wilson), which upheld the constitutionality of the CSA.

The Regional Director thus concluded that a unit of full-time OFY teachers, excluding supervisory, managerial, and confidential employees, is an appropriate unit under EERA.

DISCUSSION

Section 3540.1(k) provides, in part:

> As used in this chapter:
>
> (k) 'Public school employer' or 'employer' means the governing board of a school district, a school district, a county board of education, a county superintendent of schools, or a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code. (Emphasis added.)

OFY does not dispute the Regional Director's findings of fact or its status as a public school employer under Section 3540.1(k). It is clear that OFY has declared under the charter that it is a public school employer pursuant to Education Code section 47611.5.[5]

OFY states that this designation is irrelevant given its status as an employer under Section 2(2) of the NLRA and concludes that this status must preempt the Board's jurisdiction over OFY under EERA. In opposition, the Association argues that the Board may not refuse to enforce the provisions of EERA on the grounds that it is preempted by federal law; only a state or federal appellate court may render that direction. The rule of law on this issue supports the Association's argument.

California Constitution Article 3, section 3.5 provides:

> Sec. 3.5. An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

[5]Education Code section 47611.5 states, in pertinent part:

> (f) By March 31, 2000, all existing charter schools must declare whether or not they shall be deemed a public school employer in accordance with subdivision (b), and such declaration shall not be materially inconsistent with the charter.

> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations. [Emphasis added.]

In Regents of the University of California v. Public Employment Relations Bd. (1983) 139 Cal. App. 3d 1037 [189 Cal. Rptr. 298] (Regents), an individual employee and the union filed an unfair practice charge against the University for its refusal to allow the union to distribute organizational literature to the University's custodial employees through the intercampus mail system. The University's refusal was based upon its fear of violating federal postal laws. The Board had concluded that it was unable to resolve the conflict between the Higher Education Employer-Employee Relations Act (HEERA)[6] and federal postal laws and regulations. The court stated that the Board appropriately did not decide the federal preemption question under Cal. Constit. Art. 3, section 3.5. The court explained:

> The recently enacted constitutional proviso, adopted by the electorate ... explicitly precludes any administrative agency (which by definition includes the PERB) from declaring a statute unenforceable or refusing to enforce a statute on grounds of federal prohibition in the absent of a reviewing court's determination. [Citations.] In view of such constitutional compulsion, we agree that the PERB properly declined to decide the question whether the claimed statutory right to use the internal mail system is unenforceable by reason of preemptive federal postal law. Unquestionably, that decision rests solely within the province of the judiciary [citation] and in this instance within the jurisdiction of an appellate court. (Cal. Const, art. III. $ 3.5. subd. (c).) [Emphasis added; Regents, at p. 1042.]

[6]HEERA is codified at Government Code section 3560, et seq.

The issue in the case before us, whether the NLRA preempts the Board's jurisdiction under EERA pertaining to the definition of "employer," is analogous to the issue before the Board in Regents and therefore, must be left to the appellate courts for determination. We know of no appellate court decisions in which this application of EERA was declared to be unenforceable. However, OFY is not precluded from raising the federal preemption issue before PERB in order to preserve the issue for review in State court. (See Delta Dental Plan of California. Inc. v. Mendoza (9th Cir. 1998) 139 F. 3d 1289 1296 [98 Daily Journal D.A.R. 3098]; Southern Pacific Transportation Co. v. Public Utilities Commission of the State of Cal. (9th Cir. 1983) 716 F. 2d. 1285, 1291, cert, denied, 466 U.S. 936 [104 S. Ct. 1908.)

The Board therefore finds the unit of certificated employees employed by OFY to be an appropriate unit for purposes of EERA.

ORDER

It is hereby ORDERED that a unit including the full-time teachers employed by Options for Youth - Victor Valley, Inc. (OFY), at the charter school operated under a charter petition approved by the Victor Valley Union High School District, is an appropriate unit for purposes of meeting and negotiating under the Educational Employment Relations Act, provided an employee organization becomes the exclusive representative. The unit shall exclude all other employees, including management, supervisory and confidential employees.

Pursuant to California Code of Regulations, title 8, section 33450, within 10 days following issuance of this decision, the Options for Youth - Victor Valley, Inc. shall post on all employee bulletin boards a copy of the Notice of Decision attached hereto as an Appendix. The Notice of Decision shall remain posted for a minimum of 15 workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

The Board hereby ORDERS that Case No. LA-RR-1082-E be REMANDED to the Sacramento Regional Director for proceedings consistent with this decision.

Chairman Duncan and Member Neima joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

CASE: Options for Youth-Victor Valley, Inc. and Victor Valley Options for Youth Teachers Association
Case No. LA-RR-1082-E

EMPLOYER: Options for Youth - Victor Valley, Inc.
16932 Bear Valley Road
Victorville, CA 92392

EMPLOYEE ORGANIZATION
PARTY TO PROCEEDING:

Victor Valley Options for Youth Teachers Association
12437 Basswood Lane
Victorville, CA 92392

FINDINGS:

The Board finds the following unit is appropriate for meeting and negotiating, provided an employee organization becomes the exclusive representative:

Unit Title: Certificated

Shall Include: All full-time teachers employed by Options for Youth - Victor Valley, Inc. at the charter school operated under a charter petition approved by the Victor Valley Union High School District.

Shall Exclude: All other employees, including management, supervisory and confidential employees.

Pursuant to the California Code of Regulations, title 8, section 33450, within 10 days following issuance of this Notice of Decision, the Options for Youth - Victor Valley, Inc. shall post on all employee bulletin boards a copy of the Notice of Decision. The Notice of Decision shall remain posted for a minimum of 15 workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

Dated:_____ OPTIONS FOR YOUTH - VICTOR VALLEY, INC.

By_____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR A MINIMUM OF FIFTEEN (15) WORKDAYS. REASONABLE STEPS SHALL BE TAKEN TO ENSURE THAT THIS NOTICE IS NOT REDUCED IN SIZE, ALTERED, DEFACED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

OPTIONS FOR YOUTH-VICTOR VALLEY, INC., Employer, and VICTOR VALLEY OPTIONS FOR YOUTH TEACHERS ASSOCIATION, Petitioner.	REPRESENTATION CASE NO. LA-RR-1082-E PROPOSED DECISION (7/31/2003)

Appearances: Silver & Freedman, by Andrew B. Kaplan, Attorney, for Options for Youth - Victor Valley, Inc.; John F. Kohn, Attorney, for Victor Valley Options for Youth Teachers Association.

Before Les Chisholm, Regional Director.

PROCEDURAL HISTORY

On August 19, 2002, the Victor Valley Options for Youth Teachers Association (Association or Petitioner) filed a request for recognition with Options for Youth - Victor Valley, Inc. (OFY or Employer[1]) and the Public Employment Relations Board (PERB or Board). The Association's petition seeks exclusive representation for approximately 20 full-time teachers employed by OFY.

By letter dated October 16, 2002, PERB advised the parties of its administrative determination that the Association had demonstrated proof of at least majority support in the petitioned-for unit, that no interventions had been filed, and that the Employer could lawfully grant voluntary recognition. However, by letter dated October 24, 2002, OFY advised that recognition would not be granted and, argued that the petition should be dismissed as OFY is a

[1] The Employer was identified on the face of the petition as Options for Youth Charter School.

private, non-profit corporation; a private, not public, employer; and subject to the provisions of the National Labor Relations Act (NLRA).[2]

On October 31, 2002, noting that OFY is registered as a charter school, PERB requested that the parties submit additional information relating to the status of OFY as a public school employer pursuant to Education Code section 47611.5 (b) and the Educational Employment Relations Act (EERA).[3] Following receipt of responses from both OFY and the Association, PERB issued a Notice of Hearing and requested pre-hearing briefs. The Association submitted a pre-hearing brief and OFY relied on its previous submissions dated November 14 and December 12,2002.

A formal hearing was conducted by the undersigned on February 7, 2003. Following the receipt of briefs from both parties, the matter was submitted for decision on April 30, 2003.

FINDINGS OF FACT

OFY is both an independent charter school[4] and an independent study charter school.[5] OFY is sponsored by the Victor Valley Union High School District (District) and was first chartered in 1993. The current charter was approved by the District in November 2000 for the period July 1, 2001 through June 30, 2006.

OFY itself was incorporated in 1988 as a non-profit, 501(c)(3), public benefit corporation. John Hall, the founder and incorporator, has never been employed by or affiliated

[2] The NLRA is found at 29 United States Code section 151 et seq.

[3] EERA is codified at Government Code section 3540 et seq.

[4] An independent charter school is one started by persons outside the school district.

[5] "Independent study" refers to the type of educational program offered and is a form of nonclassroom-based instruction.

with the District. Likewise, none of OFY's corporate officers, who are appointed and may be removed by its Board of Directors, have been employees of or affiliated with the District. Under OFY's current bylaws, OFY's directors are appointed and removed by the directors of Options for Youth - California, Inc., a separate corporate entity whose directors are appointed by John Hall. The District, pursuant to Education Code section 47604(b) and the provisions of the charter, is entitled to a single representative on OFY's Board of Directors but has never placed a member on the OFY board. The District has designated its Director of Pupil Services as a liaison to OFY and that person sometimes attends OFY board meetings.

OFY's day-to-day operations are administered by Don Riddell, Chief Operating Officer, and a management team of four persons. These managers are employed by OFY, except for a Director of Instruction who is employed by Options for Youth, Inc., another separate corporate entity.

OFY employs between 20 and 25 teachers, none of whom have been employed by the District. The OFY management team is responsible for hiring, evaluating, disciplining and terminating all certificated and non-certificated employees of OFY; assigning work; establishing personnel policies; and setting the wages, benefits, hours and working conditions of its employees. OFY's teachers participate in Social Security but not the State Teachers' Retirement System.

OFY operates six learning centers in the Victor Valley/Hesperia area, not all of which are within the District's boundaries. Though entitled to use District facilities, OFY's learning centers are all in commercially leased space.

OFY has an average daily attendance (ADA) of approximately 1,000 students in grades 7 through 12. Though OFY establishes its own curriculum and hours of operation, OFY is

required to comply with standards set by the State of California (State) with regard to student attendance days, instructional minutes, curriculum, standardized testing, special education programs, and independent study.

OFY has an annual operating budget of approximately $3.5 million, with over 90 percent of its funding derived from the State.[6] Pursuant to California public school finance provisions, OFY receives apportionment, property tax and lottery money funding based on its ADA. OFY submits ADA forms to the District for certification; the District then submits the forms to the county office of education which submits them to the State for payment. Most payments come directly payable to OFY, though routed through the county office of education, but property tax payments are actually paid to the District and then distributed, on a proportionate basis, to OFY.

OFY pays the District an amount equal to 1 percent of its funding for supervisorial oversight costs. "Supervisorial oversight" refers generally to the District's efforts to ensure that charter provisions are satisfied. While there is no evidence of the District doing so, the District can inspect OFY classroom sites and OFY's curriculum, require OFY to provide financial information, demand compliance with charter provisions and demand remediation of any violation of the charter. There are specified conditions under the Education Code for the revocation of a charter.

The Charter

In June 2000, the District's Governing Board voted to renew the OFY charter for an additional five year term, effective July 1, 2001 through June 30, 2006. hi November 2000,

[6] None of the funding is derived from pupil tuition or fees. The non-State funds received by OFY result from eligibility for federal funds, and grants obtained by OFY.

the OFY and District agreed to further amend and restate the terms and conditions of the charter "to reflect, among other things, additional changes in California's charter school law and to ensure compliance with the District's recently established evaluation criteria."

As amended and restated, the charter continues to identify the "overriding goal" of OFY as providing "expanded choices for pupils and parents in the types of educational opportunities that are available within the public school system." (Emphasis added.) The California public charter school operated by OFY is established to serve at-risk students. The charter indicates that OFY will "employ any modality," including but not limited to independent study, home study, seat-time programs and school-to-work programs, "in a manner consistent with charter school laws."

The charter, in multiple provisions, references the obligation of OFY and the charter school it operates to comply with applicable statutes and regulations of the State. The charter also states, in Part I, Paragraph O, that

> OFY shall be the exclusive public school employer of all employees working for the Charter School, for all purposes, including but not limited to, collective bargaining.

Don Riddell testified that this provision was included in the charter petition because otherwise, as he understood it, OFY's employees would be considered employees of the District.

Under Part II, Paragraph B, the charter provides that to "the fullest extent of the law," the charter school "shall be deemed to be a 'school district' for purposes of Section 41302.5 [of the Education Code] and Sections 8 and 8.5 [of] Article XVI of the California Constitution."

Pursuant to Part II, Paragraph I, "material revisions " of the charter may only be made with the approval of the District but such revisions are governed by the standards and criteria in Education Code section 47605. Likewise, the District may only revoke the charter "in

compliance with and based upon the required findings set forth in Education Code section 47607(b) & (c)." (Part II, Paragraph P.)

The charter's waiver provision (Part II, Paragraph O) reads:

> The failure of either party to insist on strict compliance by the other party with any of the terms, conditions, or covenants of this Petition, shall not be deemed a waiver of that term, covenant, or condition, nor shall any waiver or relinquishment of any right or power at any one time or times be deemed a waiver or relinquishment of that right or power for any other time.

ISSUE

Is OFY a public school employer within the meaning of EERA and subject to PERB's jurisdiction?

POSITIONS OF THE PARTIES

Employer

OFY argues that, as a private, non-profit corporation and independent charter school, it falls within the NLRA's definition of "employer" and thus State law, including EERA, is preempted and unenforceable. (San Diego Building Trades Council v. Gannon (1959) 359 U.S. 236 [43 LRRM 2838].) The NLRA defines "employer" as "any person acting as an agent of an employer, directly or indirectly," but also excludes from this definition, in relevant part, "any State or political subdivision thereof." (29 U.S.C. 152(2).)

Under the test approved by the U.S. Supreme Court in National Labor Relations Board v. Natural Gas Utility District of Hawkins County, Tennessee (1971) 402 U.S. 600 [77 LRRM 2348] (Hawkins), OFY contends it is neither "directly established" by the State nor is it a constituent department or administrative arm of the government, each of which must be established in order for OFY to be deemed a "political subdivision" exempt from the NLRA. OFY's argument also rests in part on the conclusion, based on the record in this case, that OFY

is not administered by individuals responsible to the general electorate, and the District's responsibilities under the Education Code and the charter provisions are insufficient to make OFY a "political subdivision." (Kentucky River Community Care, Inc. v. NLRB (6th Cir. 1999) 193 F.3d 444 [162 LRRM 2449].)

OFY also cites with approval a decision issued in 2002 by an administrative law judge of the National Labor Relations Board (NLRB), C.I. Wilson Academy and William E. Safriet, NLRB Case No. 28-CA-16809, concluding that an Arizona charter school was not a "political subdivision" of that state, even though deemed to be a "public body" under Arizona law by that state's attorney general.

Association

The Association articulates three reasons why OFY is exempt under the NLRA and subject to PERB's jurisdiction rather than that of the NLRB. First, the Association asserts that it is well settled under NLRB and federal court precedent that public school employers are exempt from the NLRA. (The Children's Village, Inc. (1972) 197 NLRB 1218 [80 LRRM 1747]; International Brotherhood of Electrical Workers (1949) 87 NLRB 99 [25 LRRM 1077]; Soy City Bus Services (1980) 249 NLRB 1169 [104 LRRM 1269]; Mitchell School Incorporated (1976) 224 NLRB 1017 [92 LRRM 1464]; Krebs School Foundation (1979) 243 NLRB 514 [101 LRRM 1491]; New York Institute for the Education of the Blind (1981) 254 NLRB 664 [106 LRRM 1113]; Police Department of Chicago v. Mosley (1972) 408 U.S. 92 [33 L.Ed.2d 212]; King v. United States (1999) 53 F.Supp.2d 1056.) Thus, continues the Association's argument, OFY, as a public school, public school employer and public school district, is exempt from the NLRA.

Second, while disputing that Hawkins sets forth the sole and controlling test, the Association argues that OFY is exempt from the NLRA under that test, as it was created directly by the state and is an administrative arm of the government. The Association here compares the Education Code provisions for the establishment of charter schools to the facts considered in Moir v. Greater Cleveland Regional Transit Authority (6th Cir. 1990) 895 F.2d 266 [133 LRRM 2528] and Hinds County Human Resources Agency (2000) 331 NLRB 1404 [165 LRRM 1172].

Finally, the Association contends that OFY is administered by individuals responsible to public officials. This argument relies in large part on the oversight provisions of the charter school law, the OFY charter itself and the legal conclusions of Wilson v. State Board of Education (1999) 75 Cal.App.4th 1125 [89 Cal.Rptr.2d 745] (Wilson).

RULE OF LAW

The Charter Schools Act of 1992 (Education Code section 47600 et seq.)

This case arises because OFY operates a charter school established under the provisions of California's Charter Schools Act. In enacting this statute, including various amendments since 1992, the California Legislature declared its intent, inter alia, to provide parents and pupils with "expanded choices in the types of educational opportunities that are available within the public school system" (Ed. Code, sec. 47601(e); emphasis added); to hold "schools established under this part accountable" (Ed. Code, sec. 4760l(f)); and to provide "vigorous competition within the public school system (Ed. Code, sec. 47601(g); emphasis added).

The statute expressly provides that charter schools may operate as, or be operated by, a nonprofit public benefit corporation. (Ed. Code, sec. 47604.) Under Education Code section 47604.3, a charter school is required to respond promptly to "all reasonable inquiries,

including, but not limited to, inquiries regarding its financial records" from either its chartering authority or the Superintendent of Public Instruction. The statute grants authority to the State Board of Education, based on the recommendation of the Superintendent of Public Instruction, to seek revocation of a charter on specified grounds. (Ed. Code, sec. 47604.5.)

The requirements for a petition to establish a charter school, and the standards for approval of such petitions, are set forth beginning at Education Code section 47605. A school district receiving a charter petition is required to hold a public hearing. Among the findings that a school district governing board could make to deny a petition is that the petition failed to contain a "declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for the purposes of the [EERA]." (Ed. Code, sec. 47605(b)(5)(O).)[7]

Charters may be granted or renewed for a period not to exceed five years. (Ed. Code, sec. 47607.) Material revisions to a charter petition may only be made with approval of the same authority (e.g., school district) that granted it. The authority granting a charter may inspect or observe any part of the charter school at any time. Lawful grounds for revoking a charter are set forth in Education Code section 47607(b).

Under Education Code section 47612, a charter school is "deemed to be under the exclusive control of the officers of the public schools for purposes of Section 8 of Article IX of the California Constitution, with regard to the appropriation of public moneys to be apportioned to any charter school, including, but not limited to, appropriations made for the

[7] The Charter Schools Act does not require that the charter school declare it will be the public school employer; only that it declare one way or the other. Education Code section 47611.5(b) specifies that if the charter school is not deemed to be a public school employer, the school district where the charter is located shall be deemed the public school employer for purposes of the EERA.

purposes of this chapter." (Subdivision (a).) Further, under subdivision (c) of the same section, a charter school is deemed to be a "school district" for purposes of specified provisions of state law.

Though exempt from many laws governing school districts, charter schools are subject to many statutory requirements applicable to other public schools, including statewide standards and pupil assessments (Ed. Code, sec. 47605(c)) and minimum numbers of minutes of instruction for appropriate grade levels (Ed. Code, sec. 47612.5(a)). Charter schools are also required to be nonsectarian, are prohibited from discriminating against any pupil on specified grounds such as ethnicity or gender, and may not charge tuition. (Ed. Code, sec. 47605(d).)

Under Education Code section 47613, a chartering agency may charge for "the actual costs of supervisorial oversight of a charter school not to exceed 1 percent of the revenue of the charter school," or 3 percent if the charter school obtains "substantially rent free facilities" from the chartering agency.

Education Code section 47615(a) contains the following legislative findings and declarations:

> (1) Charter schools are part of the Public School System, as defined in Article IX of the California Constitution.
>
> (2) Charter schools are under the jurisdiction of the Public School System and the exclusive control of the officers of the public schools, as provided in this part.
>
> (3) Charter schools shall be entitled to full and fair funding, as provided in this part.

Wilson v. State Board of Education

In Wilson, the courts considered a challenge to the constitutionality of the Charter Schools Act, as amended in 1998. The appellate court, finding the Charter Schools Act "rests on solid constitutional ground," affirmed the lower court judgment dismissing the petition, and the California Supreme Court denied appellants' petition for review on January 25, 2000.

The Wilson analysis begins with recognition and discussion of the plenary power of the State Legislature over the public school system, quoting Article IX, Section 5 of the California Constitution:

> The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

The Wilson court observed that the California Constitution "vests the Legislature with sweeping and comprehensive powers in relation to [the] public schools." (Hall v. City of Taft (1956) 47 Cal.2d 177 [302 P.2d 574]; California Teachers Association v. Hayes (1992) 5 Cal.App.4th 1513 [7 Cal.Rptr.2d 699].)

In rejecting the claim that the Charter Schools Act amendments abdicated state control over "essential educational functions," the court discussed delegation within the Legislature's discretion as follows:

> The Charter Schools Act represents a valid exercise of legislative discretion aimed at furthering the purposes of education. Indeed, it bears underscoring that charter schools are *strictly* creatures of statute. From how charter schools come into being, to who attends and who can teach, to how they are governed and structured, to funding, accountability and evaluation - the Legislature has plotted all aspects of their existence. Having created the charter school approach, the Legislature can refine it and expand, reduce or abolish charter schools altogether. (See §§ 47602, subd. (a)(2), 47616.5.) hi the meantime the Legislature

> retains ultimate responsibility for all aspects of education, including charter schools. [Wilson; emphasis in original.]

The Wilson court also rejected the contention that amendments to the Charter Schools Act had "spun off a separate system of charter public schools that has administrative and operational independence from the existing school district structure," in violation of the constitutional requirement that the Legislature provide a "system of common schools." The court found "it is apparent that charter schools are part of California's single, statewide public school system." (Ibid.) This finding relied in part on the legislative findings within the statute themselves, but the court also considered specific statutory provisions, including the requirement that charter schools be free, nonsectarian and open to all students; the prohibition of discrimination against students on the basis of ethnicity, national origin, gender or disability; the requirements that charter schools meet statewide standards and conduct pupil assessments as are required in other public schools; the requirements that charter schools hire credentialed teachers and offer the same minimum duration of instruction as in other public schools; the fact that charter schools are subject to state and local supervision and inspection; the prohibition against conversion of private schools to charter schools; the prohibition against receiving public funds for any pupil whose family is charged tuition; and the assurance in law that charter schools will receive funding comparable to other public schools. (Ibid.)

The Wilson court also found "no problem" with respect to the constitutional prohibition against "public money [being] appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools." (Cal. Const., art. IX, sec. 8.) Citing again both the broad legislative findings as well as specific provisions of law, the court questioned

> what level of control could be more complete than where, as here, the very destiny of charter schools lies solely in the hands of public agencies and offices, from the local to the state level: school districts, county boards of education, the [Superintendent of Public Instruction] and the [State Board of Education]. [Ibid.]

Further, the court held that the "requisite constitutional control" is

> in place whether a school elects to "operate as, or be operated by, a nonprofit public benefit corporation" (§ 47604, subd. (a)), or whether it remains strictly under the legal umbrella of the chartering authority. In other words, even a school operated by a nonprofit could never stray from under the wings of the chartering authority, the [Board of Education], and the Superintendent. [Ibid.[8]]

Finally, rejecting a challenge to the statute under the jurisdictional requirement of Article IX, section 6 of the California Constitution,[9] the Wilson court stated:

> Charter schools are under the jurisdiction of chartering authorities; chartering authorities are authorities "within the Public School System," and hence no violation of article IX, section 6 can be stated.

The "Political Subdivision" Exemption under the NLRA

As correctly noted by the Employer, the controlling test applied by the NLRB and federal courts in determining whether an entity is exempt from the NLRA as a "political subdivision" is found in Hawkins, hi Hawkins, the U.S. Supreme Court considered a case arising from a representation petition filed for employees of a utility district established under

[8] The Wilson court also noted, citing Corporations Code section 5140(j), that its findings with regard to the "locus of control with the public school system rather than the nonprofit" is not incompatible with laws governing nonprofit public benefit corporations.

[9] Article IX, section 6, in relevant part, reads:

> No school or college or any other part of the Public School System shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System.

Tennessee's Utility District Law of 1937. The respondent district challenged the NLRB's jurisdiction. The Court of Appeals refused to enforce the NLRB's bargaining order, relying at least in part on a Tennessee Supreme Court ruling that a district organized under the utility district law was established for a state governmental or public purpose, which ruling the lower court deemed of controlling importance. The Hawkins court, though affirming the Court of Appeals decision, disagreed as to the "controlling importance" of the state court's ruling.

Thus, in Hawkins, the court reaffirmed prior decisions to the effect that federal law, not state law, governs the determination whether an entity is a "political subdivision" and exempt from the NLRA. Quoting NLRB v. Randolph Electric Membership Corp. (1965) 343 F.2d 60 [58 LRRM 2704], the Hawkins court made clear that it is the "actual operations and characteristics" that must be considered in determining whether an entity is a "political subdivision."

However, acknowledging that the NLRA does not define the term "political subdivision" and unable to ascertain from the NLRA's legislative history any consideration of the meaning of the term, the Hawkins court relied on the NLRB's analytic framework flowing from the premise that the exemption was intended to exclude federal, state and municipal governments from the NLRB's jurisdiction. The test, thus, is whether an 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. (Ibid.)

Significant in the court's analysis, in which the district is held to be exempt from the NLRA, is the reliance on provisions of the Tennessee utility district law.[10] Expressly rejecting the NLRB's reading of that statute, the court's opinion in part states:

> [T]he Tennessee statute makes crystal clear that respondent is administered by a Board of Commissioners appointed by an elected county judge, and subject to removal proceedings at the instance of the Governor, the county prosecutor, or private citizens. Therefore, in the light of other 'actual operations and characteristics' under that administration, the [NLRB's] holding that respondent 'exists as an essentially private venture, with insufficient identity with or relationship to the [state] has no 'warrant in the record' and no 'reasonable basis in law.' [Citation.]

Among the "actual operations and characteristics" considered in Hawkins were the process for incorporation of a utility district, including a citizen petition, public hearing and finding by an elected official that "public convenience and necessity requires the creation of the district"; delegation of powers to the district by the state legislature that are "necessary and requisite for the accomplishment of the purpose" for which it is created; and the fact that the district's records are public records and open for inspection. (Ibid.)

DISCUSSION

PERB's Jurisdiction

EERA charges PERB with broad powers and duties with respect to the collective bargaining rights and responsibilities of public school employers, employees and employee organizations. (See, especially, EERA sec. 3540.1.) PERB is empowered, inter alia, to decide contested matters pertaining to all aspects of the selection and certification of employee

[10] While reaffirming that federal law governs the determination of whether an entity created under state law is a "political subdivision," the court in Moir v. Greater Cleveland Regional Transit Authority, supra. 895 F.2d 266 [133 LRRM 2528] also held state law declarations of an entity's public purpose, while not controlling, do "weigh heavily."

organizations. (San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800].)

Under EERA section 3540.1(k), an entity is a "public school employer," and subject to PERB's jurisdiction, if it is "the governing board of a school district, a school district, a county board of education, a county superintendent of schools, or a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code."

The Board has long acknowledged that its authority does not encompass the authority to declare statutes unconstitutional. (San Dieguito Union High School District (1977) EERB[11] Decision No. 22; Association of California State Attorneys and Administrative Law Judges (Mayer) (1987) PERB Decision No. 637-S.) Nor may the Board refuse to enforce a statute under its jurisdiction, absent an appellate court decision holding the statute in question unconstitutional. (Ventura Unified School District (1989) PERB Decision No. 757; San Ramon Valley Unified School District (1989) PERB Decision No. 751.)

While PERB may interpret the Education Code as required to carry out its duty to administer the EERA (Wilmar Union Elementary School District (2000) PERB Decision No. 1371), such authority does not empower the Board to ignore appellate court decisions, such as Wilson, that precede the Board's deliberations. Thus, in considering whether OFY is a public school employer within the meaning of EERA, and subject to PERB jurisdiction, it is necessary and appropriate to accept the findings of the Wilson court.

[11] Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

Status as Public School Employer

While disputing that such status is controlling in this matter, OFY "does not contest that it is a public school employer, a public school and a public school district, as defined by relevant portions of California statute." (Reporter's Transcript, Vol. I, p. 8.) As earlier noted, the OFY Charter School Petition approved by the District states that "OFY shall be the exclusive public school employer of all employees working for the Charter School, for all purposes, including but not limited to, collective bargaining."

Given the above, as well as the testimonial and documentary evidence in this proceeding, the inescapable conclusion is that OFY is the employer of the employees of the charter school and a public school employer within the meaning of EERA section 3540.l(k).

Remaining, nevertheless, is OFY's contention that it is not a "political subdivision," as defined under the NLRA, and that PERB must eschew any exercise of jurisdiction over OFY and dismiss the Association's petition.

Application of Hawkins

While PERB lacks statutory authority to determine jurisdictional questions for the NLRB, it is nevertheless appropriate here to address OFY's argument and objections to PERB's exercise of jurisdiction based on the theory of federal preemption.

As previously discussed, federal law, not state law, governs the determination by the NLRB and federal courts whether an entity is an employer within the meaning of the NLRA or is exempt as a "political subdivision." However, in considering the "actual operations and characteristics" of an entity, it is appropriate to consider both whether there is "any state enabling action or intent" (Research Foundation of the City University of New York (2002) 337 NLRB 152 [171 LRRM 1360]) as well as what the specific statutes provide (Hawkins;

Moir v. Greater Cleveland Regional Transit Authority, supra, 895 F.2d 266 [133 LRRM 2528]; King v. United States, supra, 53 F.Supp.2d 1056.)

Fundamental to the analysis is recognition that this case arises because OFY submitted a charter petition to operate a California public charter school and the District approved it. Both actions occurred within "state enabling action or intent" established by the Charter Schools Act. Not only does OFY declare within its petition that it shall be the exclusive public school employer but more generally OFY states its educational program goals as being, for example, to "provide expanded choices . . . within the public school system."

The various provisions of the Charter Schools Act, which OFY has agreed to adhere to, and the Wilson court's interpretation of the Charter Schools Act, "makes crystal clear" (Hawkins) that the charter school operated by OFY could only be authorized pursuant to provisions of the Charter Schools Act; that the charter's renewal or revocation is subject to conditions established by the State Legislature; that the charter school is obliged to comply with the standards and requirements set out by the statute; that the District's governing board was required to hold a public hearing prior to approving the petition; that the educational functions carried out by OFY are pursuant to a delegation at the Legislature's discretion; and that the appropriation to OFY of apportionment and other public moneys is only lawful if the charter school is "under the exclusive control of the officers of the public schools."

For these reasons, and based on the entire record of this proceeding, it is necessary to conclude that the first prong of the Hawkins test is met; that is, OFY's charter school is a "political subdivision" because it was created directly by the State and is an administrative arm of the government. Further, there is an even more compelling case that the OFY charter school meets the second, alternative prong under Hawkins, providing that an entity is a "political

subdivision" if administered by individuals who are responsible to public officials or the general electorate.

The chartering authority here is the District. OFY pays 1 percent of its funding to the District for "supervisorial oversight" and is required to open records and facilities to the District's inspection. The District can also insist on the appointment of one member to OFY's board. OFY's reliance on the District's inaction with regard to its rights and responsibilities is not persuasive, both because such inaction does not constitute a waiver of such rights or responsibilities under the specific terms of the charter petition and, more important, because such inaction does not negate the provisions of the Charter Schools Act.

In upholding the constitutionality of the "state enabling action" that controlled approval of OFY's charter petition, the Wilson court expressly held that any charter school, even one operated by a nonprofit corporation, is "under the exclusive control of the officers of the public schools" and that a charter school "could never stray" from such control by the chartering authority, State Board of Education and Superintendent of Public Instruction.

To paraphrase Hawkins, and in consideration of the "actual operations and characteristics" of OFY, to find that OFY exists as an essentially private employer, with insufficient relationship to the State to constitute a "political subdivision," has no "warrant in the record" and no "reasonable basis in law." Rather, the conclusion here is that OFY is a public school employer and a "political subdivision" of the State, exempt from the jurisdiction of the NLRA. To find otherwise would require finding that OFY is out of compliance with the Charter Schools Act.

This conclusion is also consistent with the NLRB's observation, in Soy City Bus Services, supra, 249 NLRB 1169 [104 LRRM 1269], that it regularly asserts jurisdiction over

educational institutions "unless they are part of a state public school system or otherwise exempt." (Emphasis added.) The Arizona case decided by a NLRB administrative law judge, rather than the national board itself, does not require a different result. More persuasive is the court's decision in King, though not focussed on the same ultimate issue as this case, that concludes based on provisions of state law including the purpose of charter schools, that an entity can be both a nonprofit corporation and a public school.

PROPOSED ORDER

For the reasons discussed above, and in consideration of the entire record of this proceeding, it is hereby ORDERED that a unit including the full-time teachers employed by Options for Youth - Victor Valley, Inc., at the charter school operated under a charter petition approved by the Victor Valley Union High School District, is an appropriate unit for purposes of meeting and negotiating under the Educational Employment Relations Act, provided an employee organization becomes the exclusive representative. The unit shall exclude all other employees, including management, supervisory and confidential employees.

Pursuant to California Code of Regulations, title 8, sections 33470, 33480 and 33490, the Public Employment Relations Board (PERB or Board) shall conduct an election to determine whether the employees in the above unit wish to be represented by the Victor Valley Options for Youth Teachers Association, unless the Employer chooses to grant voluntary recognition.[12] A Board agent will contact the parties upon issuance of a final decision in this matter to discuss the further processing of this case. Should this proposed decision become

[12]The District may forego an election since the Petitioner evidenced majority support and no timely intervention was filed.

final, the parties shall be served with a copy of the decision and a notice of decision which must be posted by the Employer pursuant to PERB Regulation 33450.

Right of Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Les Chisholm
Regional Director