UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KIPP ACADEMY CHARTER SCHOOL
Employer

and Case 02-RD-191760

NICOLE MANGIERE AND CHRISTOPHER DIAZ
Petitioner

and

UNITED FEDERATION OF TEACHERS, LOCAL 2
AFT, AFL-CIO
Union

ORDER GRANTING REVIEW IN PART AND INVITATION TO FILE BRIEFS

The Union's Request for Review of the Regional Director's Decision and Direction of Election is granted as it raises substantial issues whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) of the Act and, therefore, modify or overrule *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88, slip op. at 6 fn. 15, 7-9 (2016), and *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 7, 9-10 (2016). The parties and interested *amici* are invited to file briefs addressing the issue.

The Request for Review is denied in all other respects.[1]

Briefs by the parties not exceeding 50 pages in length and conforming to the requirements of Board Rule 102.67(i) and briefs by *amici* not exceeding 20 pages shall be filed with the Board in Washington, D.C., on or before February 19 and March 6, 2019, respectively.

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[1] We find that the Regional Director correctly applied the test in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), in finding that the Employer KIPP Academy Charter School is not exempt as a political subdivision under Sec. 2(2) of the National Labor Relations Act because the Employer was not created directly by the state so as to constitute a department or administrative arm of the government.

In granting review, we emphasize that we have made no judgments about the ultimate merits but choose to review the briefs before arriving at any conclusions. As for our decision to invite public briefing here on whether to overrule precedent, we adhere to the view that doing so is a matter of discretionary choice on a case-by-case basis and is not mandated by the Act, any Board rule or past practice, or by the Administrative Procedure Act. Finally, we join our dissenting colleague's pledge to keep an open mind with respect to final disposition of the issues presented here.

The parties may file responsive briefs on or before March 20, 2019, which may not exceed 25 pages in length. The parties and *amici* shall file briefs electronically by going to www.nlrb.gov and clicking on "eFiling." Parties and *amici* are reminded to serve all case participants. A list of case participants may be found at http://www.nlrb.gov/case/02-RC-191760 under the heading "Service Documents." If assistance is needed in E-Filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or the Executive Secretary Roxanne Rothschild at 202-273-2917.

Dated, Washington, D.C., February 4, 2019

JOHN F. RING, CHAIRMAN

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

MEMBER McFERRAN, dissenting.

Unlike my colleagues, I would deny the Union's Request for Review, as the Regional Director correctly decided the jurisdictional question here under well-settled law. As the majority concedes, the charter school at issue in this case clearly is not a "political subdivision" under the test set out decades ago in *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 400 (1971) ("*Hawkins County*") and consistently applied by the Board to charter schools.[2] That should be the beginning and end of our inquiry, and the Board should properly assert jurisdiction.

Even though it admits that the *Hawkins County* test has been correctly applied in this case, the majority nevertheless claims that the Union's Request for Review "raises substantial issues" as to whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) of the National Labor Relations Act.[3] I disagree.

The Board has carefully considered -- and rejected -- the argument that it should decline to exercise its discretionary jurisdiction over charter schools that, like the school here, are *not* political subdivisions. See *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016); *Hyde Leadership Charter School -Brooklyn*, 364 NLRB No. 88 (2016). There are no new policy justifications or legal grounds to revisit the Board's approach to analyzing jurisdictional

[2] That straightforward test states that an entity may be considered a political subdivision if it 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 to the general electorate.

[3] Sec. 14(c)(1) of the Act provides in relevant part that the "Board, in its discretion, may by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction…." 29 U.S.C. §164(1).

questions involving charter schools. Indeed, the majority identifies no specific reasons at all for granting review here. Certainly, a change in the composition of the Board is not a reason for revisiting precedent, as the Board itself has made clear.[4]

Under the plain language of Section 14(c)(1) of the Act, meanwhile, the Board may decline to exercise jurisdiction only where "the effect of [a] labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." It seems highly doubtful that labor disputes involving charter schools as a class have an insubstantial effect on commerce, at least as understood today. As a statutory matter, of course, there can be no other reason for the Board to decline jurisdiction. Today's step suggests that the majority is looking for a reason not to apply the *Hawkins County* test to charter schools, without confronting either the merits of the test itself or the statutory constraints of Section 14(c)(1).

Although the Board may appropriately revisit precedent when there is a compelling reason to do so, the majority's notice is a solution in search of a problem. The *Hawkins County* test is longstanding and clear. It appropriately allows for fact-specific application in each case that comes before the Board. Proceeding case by case, in turn, helps ensure that employees and employers who are covered by the Act (as the majority concedes is the case here) are not unfairly deprived of the Act's protections. The Board's application of the *Hawkins County* test in a variety of contexts has been routinely upheld by federal appellate courts, including recently in a case examining charter schools specifically.[5] And because the *Hawkins County* test is clear, states that want to make sure that charter schools fall outside the Board's jurisdiction can easily do so, by providing that charter schools be administered by individuals who are responsible to public officials or to the general electorate.

But given that the majority is nevertheless determined to proceed, I welcome the majority's return (at least in this case) to the Board's sound, traditional practice of seeking public participation before reconsidering significant precedent. I will therefore fully consider with an open mind whatever evidence and public input might result from the majority's request for briefing. I trust that my colleagues will, in turn, also remain equally open to adhering to current law.

Dated, Washington, D.C. February 4, 2019

LAUREN MCFERRAN, MEMBER

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[4] See *Brown & Root Power & Mfg, Inc.*, 2014 WL 4302554 (Aug. 29, 2014); *UFCW, Local No. 1996 (Visiting Nurse Health System, Inc.),* 338 NLRB 1074, 1074 (2003) (full Board) (citing cases).

[5] *See Voices for International Business and Education, Incorporated v. National Labor Relations Board***,** 905 F.3d 770 (5th Cir. 2018).