

IMPORTANT LEGAL UPDATE

The section entitled, “Introduction to Charter School Employee Rights When There Is a Union In, or Trying to Get Into, Your Charter School,” discusses a decision by the National Labor Relations Board (“NLRB”) entitled *Chicago Mathematics & Science Academy Charter School Inc.*, 359 N.L.R.B. No. 41 (2012). However, that decision was rendered void by the United States Supreme Court’s decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which struck down several of President Obama’s purported “recess appointments” to the NLRB.

On August 24, 2016, the NLRB issued two decisions to answer the question of whether the charter school employer involved was a private- or public-sector employer for purposes of coverage under the National Labor Relations Act, 29 U.S.C. §§ 151-169. These two decisions are: (1) *The Pennsylvania Virtual Charter School & PA Virtual Charter Education Association*, PSEA/NEA, 364 NLRB No. 87; and (2) *Hyde Leadership Charter School–Brooklyn & United Federation of Teachers, Local 2, AFT, AFL-CIO*, 364 NLRB No. 88.¹

The NLRB found in both cases that the charter school employers were private, and therefore subject to the NLRB’s jurisdiction, because they: (1) were not created directly by the State [or Commonwealth] and (2) did not have a governing board that was “administered by

¹ The charter schools in these two cases were start-up schools, not conversion. The NLRB has yet to consider a case involving a conversion charter school.

individuals who are responsible to public officials or to the general electorate.” In so holding, the NLRB did not return to its analysis in *Chicago Mathematics*.

Although *Pennsylvania Virtual* and *Hyde Leadership* are limited to the parties involved, the NLRB likely will classify similar Pennsylvania and New York charter schools as private employers. In fact, using the analysis in *Pennsylvania Virtual* and *Hyde Leadership*, the NLRB found two other New York charter schools,² another Pennsylvania charter school,³ and a California charter school to be private employers.⁴

According to the NLRB’s analysis in *Pennsylvania Virtual* and *Hyde Leadership*, a charter school likely will be considered a private employer if private individuals, on their own initiative, prepared and filed a comprehensive application to establish a charter school—regardless of whether the charter school existed as a legal entity before the application was submitted.

Additionally, a charter school likely will be considered a private employer if the charter school’s governing board is selected and composed of primarily private

² *Evergreen Charter Sch. & Alison Greene & Evergreen Charter Staff Ass’n*, NYSUT, AFT, Case No. 29-RD-175250 (NLRB Order Oct. 27, 2016) (unpublished); *Riverhead Charter Sch. & Jessica Farmer & Riverhead Charter Sch. Emps.’ Ass’n, Local #22170*, 29-RD-132061 (NLRB Order Oct. 7, 2016) (unpublished).

³ *The Penn. Cyber Charter Sch. & PA Cyber Special Educ. Ass’n*, PSEA/NEA, 06-RC-159861 (NLRB Order Oct. 19, 2016) (unpublished).

⁴ *Farmworker Inst. of Educ. and Leadership Dev., Inc. & Int’l Bhd. of Boilermakers*, 31-RC-164338 (NLRB Order Nov. 7, 2016) (unpublished).

individuals, with little to no involvement by public officials or the general electorate, and the selection and removal process of the governing board is determined by the school's governing documents rather than state law or public officials. Thus, under these circumstances, charter school teachers and employees likely will be considered private employees subject to the NLRB's jurisdiction.

Conversely, if public officials or a government entity initiated the application to establish a charter school; were actively involved in the preparation and filing of the application; and/or made significant amendments to or rejected the application, the charter school employer will likely be considered public. However, the mere fact that a public entity approves a charter application should not make the school a public employer.

Similarly, if the majority of a charter school's governing board is selected and composed of individuals who are historically considered public officials or are selected by the general electorate; and/or if the selection and removal process for the charter school's governing board is determined by state law, public officials or a government entity, then the charter school will likely be considered public. However, a government entity's limited selection/removal powers may be insufficient to categorize the charter school as a public employer.

Thus, under these circumstances, teachers and employees working for the charter school likely will be considered public employees exempt from the NLRB's

jurisdiction.

Because charter school laws vary in each state, as do the factors surrounding each charter school's establishment, the classification of a charter school teacher or employee depends on the applicable law and facts specific to the charter school. If you have questions about applicability of the *Pennsylvania Virtual* and *Hyde Leadership* decisions, and how your rights may be affected, please contact a Foundation staff attorney for assistance at (800) 336-3600, at legal@nrtw.org, or visit the Foundation's website at <http://www.nrtw.org/en/legal.htm>.

