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Stanley B. Eisenhammer

Christopher M. Hoffman

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CHICAGO MATH AND SCIENCE ACADEMY: ARE CHARTER SCHOOLS PUBLIC OR PRIVATE UNDER THE NLRA, AND DOES IT MATTER?

By Stanley B. Eisenhammer and Christopher M. Hoffmann

Stanley Eisenhammer is a partner with Hodges, Loizzi, Eisenhammer, Rodick & Kohn, LLP and has been practicing law in Illinois since 1973. Much of his practice focuses on public labor relations, and he regularly practices before the Illinois Educational Labor Relations Board. He is a former board member and president of the Board of Education of Northwest Township High School District 214, and he has served as a trustee on the Board of Trustees of the Village of Arlington Heights. Mr. Eisenhammer is also a member of the Advisory Committee to the Illinois Educational Labor Relations Board.

Chris Hoffmann is an associate at Hodges, Loizzi, Eisenhammer, Rodick & Kohn, LLP. He earned his J.D. from IIT Chicago-Kent College of Law in 2011, where he was a member of the IIT Chicago-Kent Law Review *and the* Employee Rights and Employment Policy Journal*. Mr. Hoffmann currently practices in all areas of school and municipal law.*

I. INTRODUCTION

Charter schools are at the forefront of educational reform. Freed of burdensome state regulation and onerous administrative requirements, charter schools are intended to offer parents and their children innovative methods of teaching and learning that have yet to be replicated in traditional public schools. As a result, charter schools have rapidly expanded across the country, experiencing enormous growth and ever increasing enrollment,[1] since the nation's first charter school law was passed in 1991 in Minnesota.[2] Charter schools will also have an increasing impact on labor relations in the public sector as more teachers, who would be employed in often heavily unionized traditional public schools, now find themselves employed at charter schools that either are exempt from state collective bargaining laws or do not have a history of unionization.

Will charter schools' unique status as laboratories for educational change and innovation have the effect of eroding employee participation in unions?[3] If so, will state legislatures respond by changing their labor relations laws and/or charter school laws so that charter schools are treated the same as traditional public schools under their labor relations laws?[4] Or will the recent backlash against public employees and their unions[5] cause state legislatures to avoid the issue?

The answers to these questions depend upon whether state legislatures view the right to collectively bargain as an impediment to educational innovation and change or a fundamental protection for public employees that can coexist with the

educational reform movement. However, the power to decide this important policy question can be taken out of the hands of state legislators if labor relations at charter schools are found to be governed by the National Labor Relations Act ("NLRA").

The National Labor Relations Board ("NLRB") recently found that Illinois charter schools fall with the jurisdiction of the NLRA. Although the opinion is specifically limited to Illinois charter schools and the NLRB declined to establish any "bright-line test," it appears likely that most, if not all, charter schools, by their very nature, will fall under the jurisdiction of the NLRA regardless of whether they are made subject to a state's collective bargaining laws.

Because this case arose in a state where charter schools were not exempted from Illinois' collective bargaining laws, the parties to the case, including the *amici* National Education Association, the American Federation of Teachers and the National Alliance for Public Charter Schools took positions based on the perceived advantage of being governed by the Illinois's Educational Labor Relations Act ("IELRA)" versus the NLRA. Thus, the *amici*, in effect, argued in favor of positions that would be favorable to them in Illinois but against their interests in any state that exempted charter schools from the state's public sector collective bargaining laws or that did not have public sector labor laws. For example, the losing *amici* unions argued that charter schools in Illinois should be exempt from the NLRA ignoring the adverse impact such position would have on unionization in states that either do not make charter schools subject to public sector bargaining laws or do not have public sector labor laws.[6] In essence, unlike Andrew Jackson who won the Battle of New Orleans without realizing that the War of 1812 was over, the unions lost the battle without realizing that they actually won the war.[7]

II. PUBLIC OR PRIVATE?: THE NAGGING QUESTION ABOUT CHARTER SCHOOLS

A. *The* **Hawkins *County*** *Test*

What is a charter school? More specifically, is a charter school a "political subdivision" of the state under the Section 2(2) of the NLRA?[8] That was the question before the NLRB after Chicago Math and Science Academy, a charter school in Chicago, filed an election petition with the NLRB in a roundabout effort to defeat a representation petition filed by the Chicago Alliance of Charter Teachers & Staff, IFT, AFT, AFL–CIO with the Illinois Educational Labor Relations Board ("IELRB").[9] If charter schools are political subdivisions, then they are excluded from the NLRA because they do not meet the definition of "employer."[10] The

NLRAexcludes from its coverage "the United States or any wholly owned Government Corporation, or any Federal Reserve Bank, or any State or political subdivision thereof."[11] However, if charter schools are not political subdivisions, then they are private employers subject to the NLRA.

In *Chicago Math and Science Academy*, the NLRB applied the test for determining whether an entity is a political subdivision set out by the Supreme Court in *NLRB v. Natural Gas Utility District of Hawkins County*.[12] Under the *HawkinsCounty* test, an entity meets the definition of "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.[13]

Hawkins County involved a natural gas utility district organized under Tennessee's Utility District Law of 1937.[14] The pipefitters employed by the utility district petitioned the NLRB for an order directing the utility district to hold a representation election.[15] The utility district argued that it was a political subdivision under the NLRA and, accordingly, was not an employer. Applying the above test, the NLRB found that the utility district was not a political subdivision and ordered that a representation election be held among the pipefitters employed by the utility district.[16]

The pipefitters union won the election and was certified as the pipefitters' representative by the NLRB. However, the utility district refused to bargain with the union, which resulted in the pipefitters' union filing an unfair labor practice charge with the NLRB.[17] The NLRB issued a cease and desist order, but the utility district continued to refuse to bargain with the union.[18] The union then sought an order from the Sixth Circuit Court of Appeals, but the Sixth Circuit found that the utility district was a political subdivision and refused to order the utility district to bargain with the union.[19] The Supreme Court granted certiorari and affirmed the Sixth Circuit's decision.

The Court was confronted with two primary issues in *Hawkins County*. The first issue was whether the Tennessee Supreme Court's finding that utility districts organized under the Utility District Law of 1937 "was an operation for a state governmental or public purpose" should be given preclusive effect on the issue of whether the utility district was a political subdivision.[20] The Sixth Circuit held that the Tennessee Supreme Court's finding was conclusive and binding on the NLRB.[21] However, the Supreme Court disagreed with the Sixth Circuit. The Supreme Court held that such state declarations may be given "careful consideration," but were not controlling.[22] This aspect of the Court's opinion is

important given that state labor laws may expressly state that charter schools fall within their coverage, which is precisely the case in Illinois.[23]

Second, in light of the Court's holding that state declarations are not to be given preclusive effect, the Court had to determine whether the natural gas utility district was a political subdivision under the NLRA. On this issue, the Court applied the NLRB's two-pronged test, under which, an entity is 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.[24]

The Court focused on the second prong of the test, and found that the utility district was a political subdivision. The utility district was administered by a Board of Commissioners appointed by an elected county judge and subject to removal through proceedings that could be initiated by the governor, the county prosecutor, or private citizens. The Court stated, "[p]lainly, commissioners who are beholden to an elected public official for their appointment, and are subject to removal procedures applicable to all public officials, qualify as 'individuals who are responsible to public officials or to the general electorate' within the Board's test."[25]

Additionally, the Court described numerous other factors that indicated the utility district was a political subdivision. The Court noted that the utility district was granted the power of eminent domain, its records were public records subject to inspection, the commission was granted subpoena power, the district's bonds were given tax exempt status under the Internal Revenue Code, and social security benefits were provided to the district's employees through voluntary coverage rather than mandatory coverage because the district was considered a political subdivision under the Social Security Act.[26]

B. *The* Chicago Math and Science Academy *Decision*

In *Chicago Math and Science Academy*, the NLRB addressed the question of whether charter schools are "political subdivisions" under the NLRA for the first time, although NLRB administrative law judges had ruled on the question.[27] In *In Re C.I. Wilson Academy, Inc.*, an NLRB administrative law judge in Arizona ruled that charter schools established under Arizona's charter school law are not political subdivisions under the NLRA.[28] Further, the NLRB itself had ruled that private companies that contract with charter schools to manage the charter school and employ the staff at the schools are also not political subdivisions.[29] However, the NLRB had not squarely addressed the question of whether charter schools fall under the "political subdivision" exemption of the

NLRA. At the time that the NLRB accepted review of this case, the question of whether charter schools should be considered political subdivisions under the NLRA was such an open issue that the NLRB invited the public in January 2011 to submit *amicus* briefs on the issue.[30]

1. **The Illinois *Charter Schools Law***

Under the Illinois Charter Schools Law, Illinois charter schools must be "organized and operated as a nonprofit corporation or other discrete, legal, nonprofit entity authorized under the laws of the State of Illinois."[31] Illinois charter schools must also be "public, nonsectarian, nonreligious, non-home based, and non-profit school[s]."[32] Illinois charter schools are subject to the Illinois Freedom of Information Act and the Illinois Open Meetings Act.[33] Additionally, Illinois charter schools receive the vast majority of their funding from public sources, with the majority of those funds coming from property tax dollars designated for the local school district in which the charter school operates.[34] Currently, the Charter Schools Law limits the number of charter schools that may operate in the state to 120, 75 of which may operate in the City of Chicago.[35]

The Illinois Charter Schools Law exempts charter schools from many of the state laws and regulations that govern the operation of traditional public schools.[36] Under this broad exemption, an Illinois appellate court held that charter schools were not subject to the IELRA.[37] However, just prior to the Appellate Court's decision, the General Assembly amended the Charter Schools Law to expressly make charter schools subject to theIELRA.[38] The General Assembly also amended the IELRA to expressly include "the governing body of a charter school" within the definition of "employer" under the statute.[39]

An application to establish a charter school must be submitted to the local school board within the school district where the charter school will operate and "may be initiated by individuals or organizations that will have majority representation on the board of directors or other governing body of the corporation or other discrete legal entity that is to be established to operate the proposed charter school…."[40] The charter school proposal must be submitted in the form of a proposed contract between the charter school and the local school board.[41] Within forty-five days of its receipt of the charter proposal, the local school board must hold a public meeting to gather information to assist it in its evaluation of the charter proposal.[42] The local school board must vote on whether to approve or deny the proposal within thirty days of the public meeting.[43]

If the local school board votes to approve the charter proposal, the proposal must be certified as complying with the Charter Schools Law by the Illinois State Board of Education.[44] The certified charter constitutes a binding contract between the charter school and the local school board "under the terms of which the local school board authorizes the governing body of the charter school to operate the charter school on the terms specified in the contract."[45] Charter school applicants whose proposals are denied may appeal the local school board's decision to the Illinois State Charter Commission, which may reverse the local school board decision if it finds that the proposal complies with the Charter Schools Law and is in the best interests of the local school district's students.[46]

A charter may be revoked by the local school board if the local school board clearly demonstrates that the charter school did any of the following: (1) committed a material violation of any of the conditions, standards, or procedures set forth in the charter; (2) failed to meet or make reasonable progress toward achievement of the content standards or pupil performance standards identified in the charter; (3) failed to meet generally accepted standards of fiscal management; or (4) violated any provision of law from which the charter school was not exempted.[47] In such cases, the charter school is given up to two years to remedy the problem.[48] Only after the local school board finds that the charter school failed to remedy the problem or follow the proposed timeline for remediation may the local school board revoke the charter.[49]

2. NLRB Holds that Illinois Charter Schools are Not "Political Subdivisions"

In June of 2010, teachers at Chicago Math and Science Academy filed a recognition petition with the IELRB after two-thirds of the teaching staff signed authorization cards designating the Chicago Alliance of Charter Teachers as their exclusive bargaining representative.[50] Under the IELRA, the governing board of charter schools are included within the definition of "employer" and covered by the law.[51] The push to unionization at Chicago Math and Science Academy was part of a larger campaign being waged at charter schools across the city as the Chicago Teachers Union sought to unionize all of the city's charter schools.[52]

Chicago Math and Science Academy, however, refused to recognize the union, arguing that it was a private employer, and thus governed by the NLRA, not the IELRA.[53] In response to the union's representation petition filed with the IELRB, Chicago Math and Science Academy filed a petition with the NLRB on July 29, 2010, contending that it was a private employer covered by the NLRA.[54] The union, meanwhile, argued that Chicago Math and Science Academy was exempt from the NLRA as a "political subdivision" of the State of Illinois.[55] The Acting

Regional Director of Region 13 held that Chicago Math and Science Academy is a political subdivision of the State of Illinois under both prongs of the *Hawkins County* test.[56]

On December 14, 2012, the NLRB handed down its decision holding that Chicago Math and Science Academy Charter School, Inc. was *not* a political subdivision of the State of Illinois. As such, Chicago Math and Science Academy was subject to the NLRA as a private employer.

Under the first prong of the *Hawkins County* test, the NLRB determines first whether the entity "was created directly by the state, such as by a government entity, a legislative act, or a public official."[57] If so, the NLRB then asks "whether the entity was created so as to constitute a department or administrative arm of the government."[58] In this case, Chicago Math and Science Academy was incorporated under the *Illinois Not For Profit Corporation Act of 1986* by five private individuals in 2003. As such, the NLRB found that the first prong of the *Hawkins County* test did not apply because Chicago Math and Science Academy was created by private individuals, not by a government entity, a legislative act, or a public official.[59] To that end, the NLRB stated:

> There is no Illinois statute that directs that charter schools be created or that directly creates charter schools. Indeed, absent the independent initiative of private individuals and the separate authority of the Not-for-Profit Corporation Act, the Charter Schools Law would do nothing to bring charter schools into existence. Rather, the Charter Schools Law provides that if a charter school is to be created, it must be created by private individuals who first must establish a private corporation that in turn creates the charter school. And that is what happened here: private individuals established CMSA first as a nonprofit corporation, and only then did CMSA establish the Academy. The State of Illinois, by enacting its Charter Schools Law, has in essence authorized individuals, acting through private corporations, to establish and operate charter schools, with the Charter Schools Law acting as the "framework" or "roadmap" by which the schools are operated.[60]

The NLRB also found that Chicago Math and Science Academy was not "administered by individuals who are responsible to public officials or to the general electorate" under the second prong of the *Hawkins County* test. On this issue, the NLRB asks whether the individuals responsible for administering the entity are appointed by or subject to removal by public officials.[61] To make this determination, the NLRB looks to "whether the composition, selection and removal of the members of an employer's governing board are determined by law, or solely by the employer's governing documents."[62] Where the majority of the individuals responsible for administering the entity are subject to appointment and removal by private individuals, as opposed to public officials, then the NLRB

will find that the entity is not a political subdivision under the second prong of the *Hawkins County* test.

In this case, the NLRB found it dispositive that none of the individuals on the governing board of Chicago Math and Science Academy were appointed by or subject to removal by any public official. The process for removing and selecting board members was set forth in Chicago Math and Science Academy's bylaws, not by statute or regulation. The bylaws provided that only sitting board members could appoint or remove other board members. As the NLRB stated, "no person affiliated with Chicago Public Schools, the Chicago or State Boards of Education, the Illinois Department of Education, or any other local or state official has any involvement in the selection or removal of any members of CMSA's governing board."[63]

The NLRB declined to even consider "additional factors" that it had discussed in prior cases, such as whether the entity is subject to the state's Freedom of Information Act and Open Meetings Act. The NLRB stated that these factors are relevant only after the NLRB makes its political subdivision determination. The NLRB stated that the additional factors are relevant only to support or reinforce the NLRB's determination,[64] which basically renders the additional factors meaningless in the analysis.

Still, under Section 14(c)(1) of the NLRA, the NLRB has the discretion to "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."[65] Thus, the final issue before the NLRB was whether it should, nevertheless, decline jurisdiction over Chicago Math and Science Academy. The National Education Association, in an *amicus* brief,argued that the NLRB should so decline to assert jurisdiction over Chicago Math and Science Academy under Section 14(c)(1). The National Education Association argued that the state's obligation to provide public schools was a local concern and that its regulation of charter schools created a "special relationship" between the charter schools and the state.[66] However, the NLRB rejected this argument, finding that the state does not assert sufficient control over the charter school's finances so as to create a "unique relationship" between the charter schools and the state under NLRB precedent.[67]

In so holding, the NLRB distinguished a 1972 decision in which it declined to assert jurisdiction over Temple University due to the "unique relationship" between Temple and the Commonwealth of Pennsylvania.[68] In that case, the NLRB

found that Temple University had been designated as an "instrumentality" of Pennsylvania and that Pennsylvania exercised substantial control over the university's finances.[69] Further, 12 of the 36 board members were appointed by the governor, the president p*ro tempore* of the senate, and the speaker of the house of representatives who were each authorized to appoint four of the trustees to staggered 4-year terms.[70] In declining to assert jurisdiction over Temple University, the NLRB stated, "[a]lthough the University is in form a private, nonprofit institution . . . [u]nder the special circumstances of this case, we find that it would not effectuate the policies of the Act to assert jurisdiction over the University."[71]

The NLRB distinguished *Temple University* on the basis that Illinois exercises far less control over Chicago Math and Science Academy's finances than Pennsylvania exercised over Temple University's finances.[72] Further, the NLRB noted that neither the State of Illinois nor any other governmental entity appoints any members to the Chicago Math and Science Academy board of directors.[73]

The NLRB's holding in *Chicago Math and Science Academy* answers the question of whether a charter school should be considered a political subdivision or a private employer under the NLRA (at least with respect to charter schools established under Illinois law). Under the *Hawkins County* test, as applied in this case, a charter school will not be considered a political subdivision if it is organized as a private corporation and governed by individuals, a majority of whom, are not appointed and may not be removed by a public official. As such, unless a state's charter school law directly establishes the charter school, or provides a mechanism for public officials to appoint or remove charter school board members, the charter school will likely be found to be a private employer subject to the NLRA.

The NLRB's decision exhibits a cramped view of the structure and organization of charter schools and ignores the very purpose for creating charter schools in the first place. Charter schools are formed and operate much like Tennessee utility districts in *Hawkins County*. Although the Chicago Math and Science Academy was organized under the Illinois Not For Profit Corporation Act, a charter school does not need to be a not-for-profit corporation,[74] and being a not-for-profit corporation does not make it a charter school. Rather, similar to the utility District in *Hawkins County*, a charter school must seek a charter from an arm of the state.[75] Once established, charter schools are funded like public school districts, [76] and unlike private schools, they cannot exist without such public funding. [77]

Additionally, the very nature of charter schools should qualify them as a political subdivision of the state. As stated by the Illinois General Assembly:

> In authorizing charter schools, it is the intent of the General Assembly to create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating children within the public school system. The General Assembly seeks to create opportunities within the public school system of Illinois for development of innovative and accountable teaching techniques. The provisions of this Article should be interpreted liberally to support the findings and goals of this Section and to advance a renewed commitment by the State of Illinois to the mission, goals, and diversity of public education.[78]

Charter schools are intended to be public schools, open to all,[79] to carry out a public mission of providing a better education not only for the students they serve but also for the students of the state's other public schools that will be able to adopt the proven educational innovations of the charter schools. The Illinois Constitution's mandate that the state "provide for an efficient system of high quality public educational institutions and services." [80] empowers the Legislature to fulfill the mandate by creating entities that are not necessarily limited to school districts.[81] As such, charter schools are not mere government contractors.

More importantly, the NLRB's decision ignores the reasons behind the NLRA's exemption for states and their political subdivisions. As the Court stated in *Hawkins County*:

> The legislative history does reveal, however, that Congress enacted the § 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike. In the light of that purpose, the Board, according to its Brief, p. 11, 'has limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.'[82]

The decision to afford charter school employees the protection of the state collective bargaining laws and grant them the right to strike turns on the purpose of charter schools to be laboratories of educational innovation, free from the constraints that bind traditional public schools. This core mission can be frustrated just as surely by restrictions contained in a collective bargaining agreement or the collective bargaining process itself, as it can by excessive governmental regulation.[83]

Education is and has been a primary concern of the states. Accordingly, the NLRB must give at least some deference to the state's intent in creating charter schools.

Although the NLRB acknowledged Illinois' characterization of charter schools as being within the public school system as "worthy of careful consideration,"[84] it is clear that the NLRB gave it no consideration at all. At the very least, in light of the strict oversight of charter schools provided for in the chartering process, the NLRB should have exercised its discretion and declined to assert jurisdiction under section 14(c)(1) of the NLRA.[85]

The NLRB's attempt to distinguish *Temple University* amounts to "not seeing the forest for the trees" because it focuses too much on the amount of control that the state asserts over the charter school's finances and whether the state can appoint members to the school's board of directors, while ignoring other important considerations. For example, the NLRB ignored the fact that almost all of the financing for Illinois charter schools comes from local funding generated by property tax dollars.[86] The NLRB also gave short shrift to the fact that educational issues are traditionally within the sovereign powers of the states.[87] In essence, the NLRB applied a variant of the *Hawkins County* analysis to the question of whether it should decline to assert jurisdiction over Chicago Math and Science Academy under Section 14(c)(1), making the amount of control the state exerts of the charter school the focus of the analysis. As such, it would appear that entities that do not qualify as political subdivisions under *Hawkins County* also would not enjoy a "unique relationship" with the state under *Temple University*. Factors such as the tradition of state control over public education, whether the charter school is subject to the state's FOIA and OMA laws, and the source of the charter school's funding become irrelevant.

Ultimately, the impact of *Chicago Math and Science Academy* will depend on several factors, including, the statutory process other states follow to establish charter schools, whether the state has a public labor relations law, and if so, how the state's public labor relations law compares with the NLRA.

III. CHICAGO MATH AND SCIENCE ACADEMY'S IMPACT

The key question is how the *Chicago Math and Science Academy* decision will impact labor relations moving forward.[88] Will the decision make it more difficult for charter school employees to unionize? Will the decision open up opportunities to employees who previously had no mechanism for unionization? Or will the decision have little or no impact? Depending on the state we are examining, the answer to each of these questions could be "Yes."

A. Other States

The NLRB's decision in *Chicago Math and Science Academy* will have the greatest impact, not on Illinois charter schools, but rather on the charter schools in states that either do not have a public sector labor law or exempt charter schools from such laws. Despite those states' clear intent to not grant collective bargaining rights to charter school employees, their employees now gain these rights under the NLRA through the NLRB's decision. Based upon the NLRB's reasoning and the great lengths it took to find that charter schools are not political subdivisions, it is doubtful that the results will be different in other states. As such, in these states, charter school employees who previously did not have the ability to organize will now be able to form unions and bargain collectively under the NLRA.

Of course, there is an easy way out for states that do not want their charter schools covered by the NLRA. Under *Hawkins County*, charter schools would be considered political subdivisions if they are either created directly by the state, or "administered by individuals who are responsible to public officials or to the general electorate."[89] Thus, in Illinois, the Charter Schools Law could be amended to allow the local school district or state entity which granted the charter not only the power to revoke the charter, but also the power to remove those who administer the charter school if the charter school fails to meet the Law's requirements. The Charter Schools Law could also be amended to allow citizens the right to remove charter school board members by referendum. Amending the Charter Schools Law to allow the state or citizens to remove board members, however, may be contrary to the general purpose of charter schools, which is to provide a greater degree of flexibility to experiment with educational programming. If charter school board members could be removed by the state or the electorate, fewer individuals may be willing to start a charter school in the first place or experiment with less traditional educational programming.

B. Illinois

It would appear that one of the primary reasons Chicago Math and Science Academy sought to be designated as a private employer by the NLRA was to avoid the "card check" process under Illinois law. Under the IELRA, "an educational employer shall voluntarily recognize a labor organization for collective bargaining purposes if that organization appears to represent a majority of employees in the unit."[90] If there is a dispute as to whether the union represents a majority of the proposed bargaining unit, the dispute is resolved by the IELRB.[91] Elections are held only if two or more employee organizations seek to represent the same group of employees.[92] The "card check" process simply requires an employee to sign an authorization card indicating that he or she authorizes the union to be his or

her representative. Once a majority of employees have signed the authorization card, under the IELRA, the employer must recognize the union.

Under the NLRA, however, union representation is generally decided through an election by secret ballot ordered by the NLRB.[93] Usually, the employer and union engage in campaigning for weeks prior to the election. During the campaign process, the employer may distribute information opposing the union and require employees to attend meetings on the question of union representation where the employer presents a one-sided argument against the union, also known as "captive audience speeches.[94] Employers also often hire outside consultants to manage the campaign and encourage fellow employees to vote against the union.[95] Union organizers contend that NLRB election "procedures fails to protect employees' rights to organize, and forces unions to compete against a stacked deck that unfairly favors employers."[96] Indeed, studies have shown that the level of union support at the beginning of the campaign drops off significantly by the election.[97] One such study found that "even where 70 percent or more of employees signed authorization cards asking for a Board-run representation election, the union won less than two-thirds of those elections."[98]

Given the hurdles that the NLRB election process places in front of union organizing efforts when compared with the efficiency of "card check," it may be expected that the NLRB's decision in *Chicago Math and Science Academy* will make it significantly more difficult for unions to organize teachers employed at charter schools in Illinois. However, the impact may be less significant than it initially appears, at least in states like Illinois that have strong teachers' unions. As a practical matter, public school employees, whether teachers or custodians, have not had a difficult time organizing even before the card check process was adopted. Employer campaigns have been remarkably unsuccessful. Over ninety percent of Illinois public school teachers are unionized, and teachers have a long history of organizing in the state.[99] As a result, despite the apparent collapse of the union organizing campaign at *Chicago Math and Science Academy* after the NLRB decision, there is little reason to believe that the NLRB election process will have a detrimental impact on the unionization of charter school employees in Illinois and other states that have a strong teachers union and long history of organizing.[100]

One other possible motivation for management's desire to be covered by the NLRA is the belief that the scope of bargaining is narrower under the NLRA than it is under the IELRA, but that does not appear to be the case. Both acts define the scope of bargaining similarly, and the Illinois Supreme Court has followed federal precedent with respect to the scope of bargaining in Illinois.[101]

In Illinois, these mandatory subjects of bargaining include: class size; individual student learning plans; teacher planning time; reductions in force; and employee performance incentives.[102] The mandatory subjects in the educational field are similar, if not broader under the NLRA. They include such subjects as: faculty evaluation for the purpose of probation, rank and tenure,[103] and curriculum development, degree requirements, selection of department and admission requirements for job responsibilities.[104] As such, the NLRB's decision, at least in Illinois, may not have much impact on the scope of bargaining for charter school employees. However, in states that have a limited scope of bargaining for educational employees, organizing under the NLRA may give charter school employees greater opportunity to bargain over their terms and conditions of employment.

IV. CONCLUSION

Who was the winner?

The winner in this case appears to be the NLRB itself, which now can bootstrap this decision to assert jurisdiction over virtually all charter schools.

Chicago Math and Science Academy is a clear winner and the Chicago Teachers Union is a clear loser. After the decision, the union withdrew its representation petition.

Illinois charter schools and their unions appear to have fought to a draw. The practical impact of the differences between coverage under the IELRA and the NLRA on employee relations is fairly minimal. And while charter schools are spared dealing with unions not strong enough to win representation elections, unions are also spared the problem of representing employee groups too weak to win an election.

For unions seeking to organize charter schools in states that do not have public sector collective bargaining laws, this case is a big win. They can now organize charter school employees under the NLRA where previously these employees had no opportunity to organize. Likewise, this case is a win for unions in states where charter schools are exempted from public sector labor laws. Additionally, this case may be a victory for charter school employees in states that narrowly define the scope of bargaining for educational employees under their public sector collective bargaining laws because the NLRA may provide a broader range of mandatory bargaining subjects.

The charter schools in other states are neither winners nor losers. They may now have to deal with unionization of their workforce and the practical problems of dealing with unions, but unions are not an insurmountable obstacle to providing a quality education. Public schools have done so and charter schools will continue doing so. If anything, this decision will provide an incentive to charter schools to adopt practices and policies that eliminate the reasons that employees seek the protections offered by unions.

The biggest losers are the states that have viewed collective barraging as a threat to their charter schools' unique status as laboratories for educational change and innovation. The NLRB has usurped these states' power to make this decision.

In light of the possible results of the case, the only questions that remain are why did the parties take the positions they took and why was this case fought at all? For the Chicago Math and Science Academy and the Chicago Teachers Union the answer is obvious. Both parties correctly realized that, in this case, the union did not have the organizational strength to win an election under the NLRA. For the *amici* the answer to these questions may not be so simple," Despite the national impact of this case, the *amici* may have focused only on the impact this decision would have on the Chicago charter schools. Or it may be simply that the public sector unions (the NEA and AFT) may just feel more comfortable before a state public labor relations board, and the National Alliance for Public Charter Schools whose member charter schools, are generally governed by individuals from the private sector, likely feel more comfortable under the NLRA.

In the end, it may not really matter because under the *Hawkins County* test, the states have the power to make charter schools political subdivisions, and thus exempt from the NLRA, either because they prefer charter schools to be under state labor laws or exempt for all such laws. All the states need to do is make those who administer charter schools responsible to the state or the electorate. As such, parties unhappy with the NLRB's decision should lobby the General Assembly for an amendment to the Charter Schools Law. The question, in the end, will be whether the legislators who must change the law to ensure that the state's charter schools are exempt from the NLRA will be willing to tackle the issue at all. In Illinois, the General Assembly has just recently shown a willingness to confront charter schools head on.[105] Whether the General Assembly is willing to wade into this labor relations battle, however, is yet to be seen.

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[1] *See* Motoko Rich, *Enrollment in Charter Schools is Increasing*, N.Y. TIMES, Nov. 14, 2012, http://www.nytimes.com/2012/11/14/us/charter-schools-

growing-fast-new-report-finds. html?_r=0 ("Between 2010-11 and 2011-12, the number of students in charter schools increased close to 13 percent, to just over two million.").

[2] *See Origins of Chartering Timeline*, EDUC. EVOLVING, http://www.educationevolving.org/system/chartering/history-and-origins-of-chartering (last visited May 6, 2013) (providing a timeline for the evolution of charter schools).

[3] Public employees participate in unions at a rate of approximately 35.9%, while private sector workers participation rate is only 6.6%. Union Members Summary, Bureau of Labor Statistics (Jan. 23, 2013, 10:00am) http://www.bls.gov/news.release/union2.nr0.htm.

[4] *See, e.g.*, Illinois Public Act 96-104 (amending the *Illinois Charter Schools Law* (105 ILCS 5/27A-1 *et seq*.) just prior to an Illinois Appellate Court determination in *N. Kane Educ. Corp. v. Cambridge Lakes Educ. Ass'n, IEA-NEA*, 394 Ill. App. 3d 755, 759, 914 N.E.2d 1286, 1289 (4th Dist. 2009) that charter schools were not subject to the *Illinois Educational Labor Relations Act* (5 ILCS 315/1 *et seq*.)).

[5] James Surowiecki, *State of the Unions*, THE NEW YORKER, (Jan. 17, 2011), http://www.newyorker.com/talk/financial/2011/01/17/110117ta_talk_surowiecki ("In 2009, for the first time ever, support for unions in the Gallup poll dipped below fifty per cent. A 2010 Pew Research poll offered even worse numbers, with just forty-one per cent of respondents saying they had a favorable view of unions, the lowest level of support in the history of that poll.").

[6] Further, how charter schools are treated under the NLRA will impact the working conditions of thousands of employees employed at charter schools. In states that do not have public labor relations laws, the NLRA is the only potential source of collective bargaining rights for employees employed by charter schools. *See* Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship*?, 30 HARV. J.L. & PUB. POL'Y 885, 931 (2007).

[7] The Treaty of Ghent, which was the peace treaty that ended the War of 1812, was signed on December 24, 1814. However, due to unusually bad weather over the Atlantic, news that the war was over did not reach the generals out in the field before the Battle of New Orleans, which was fought on January 8, 1815. *See* James A. Carr, *The Battle of New Orleans and the Treaty of Ghent*, DIPLOMATIC HISTORY, July 1979, at 273, 273.

[8] 29 U.S.C. § 152(2) (2006) ("The term 'employer' . . . shall not include . . . any State or political subdivision thereof.").

[9] *Chicago Mathematics & Sci. Acad. Charter Sch., Inc.*, 359 N.L.R.B. No. 41 (Dec. 14, 2012).

[10] 29 U.S.C. § 152(2) (2006).

[11] *Id.*

[12] 402 U.S. 600 (1971).

[13] *Id.* at 604–605.

[14] *Id.* at 602.

[15] *Id.* at 601.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 602.

[19] *Id.*

[20] *Id.* at 602-03.

[21] *Id.* at 602.

[22] *Id.* at 602-03.

[23] *See* Illinois Educational Labor Relations Act, 115 ILCS 5/2(a) ("Educational employer" or "employer" means the governing body of a public school district, including the governing body of a charter school. . . .").

[24] *Hawkins Cnty.*, 402 U.S. at 604-05.

[25] *Id.* at 608.

[26] *Id.* at 608-9.

[27] *See C.I. Wilson Acad., Inc.*, 28-CA-16809, 2002 WL 1880478 (N.L.R.B. Div. of Judges July 31, 2002) (finding that charter schools organized under Arizona Law were not "political subdivisions.").

[28] *Id.*

[29] *Charter School Administration Services, Inc.*, 353 N.L.R.B. 394 2008).

[30] *NLRB Invites Briefs Regarding Charter School Jurisdiction*, NATIONAL LABOR RELATIONS BOARD (Jan. 10, 2011), http://www.nlrb.gov/news-outreach/news-releases/nlrb-invites-briefs-regarding-charter-school-jurisdiction.

[31] 105 ILCS 5/27A-5(a).

[32] *Id.*

[33] 105 ILCS 5/27A-5(c).

[34] *See* 105 ILCS 5/27A-11; 27A-11.52.

[35] 105 ILCS 5/27A-4(b).

[36] 105 ILCS 5/27A-5(g)("A charter school is exempt from all other State laws and regulations in the School Code governing public schools and local school board policies. . . .").

[37] *N. Kane Educ. Corp. v. Cambridge Lakes Educ. Ass'n, IEA-NEA*, 394 Ill. App. 3d 755, 759, 914 N.E.2d 1286, 1289 (4th Dist. 2009).

[38] *See* Illinois Public Act 96-104.

[39] 115 ILCS 5/2.

[40] 105 ILCS 5/27A-7(b).

[41] 105 ILCS 5/27A-7(a).

[42] 105 ILCS 5/27A-8(c).

[43] 105 ILCS 5/27A-8(e).

[44] 105 ILCS 5/27A-8(f).

[45] 105 ILCS 5/27A-6(a).

[46] 105 ILCS 5/27A-8(g)-(h).

[47] 105 ILCS 5/27A-9(c).

[48] *Id.*

[49] *Id.*

[50] American Federation of Teachers, *Teachers at Chicago Math and Science Academy Form Union*, http://www.aft.org/newspubs/news/2010/062410chicagomsa.cfm (last visited May 1, 2013).

[51] 115 ILCS 5/2.

[52] Rebecca Vevea, *Unions Move In at Chicago Charter Schools, and Resistance Is Swift*, NY TIMES (Apr. 7, 2011), http://www.nytimes.com/2011/04/08/us/08cncharter.html?pagewanted=all.

[53] *Id.*

[54] *Chicago Mathematics & Sci. Acad.,* 359 NLRB No. 41 at 1.

[55] *Id.* at 5.

[56] *Id.* at 4-5.

[57] *Id.* at 6.

[58] *Id.*

[59] *Id.* at 7.

[60] *Id.*

[61] *Id.* at 7-8.

[62] *Id.* at 8.

[63] *Id.* at 9.

[64] *Id.* at 9-10.

[65] 29 U.S.C.A. § 164(c)(1) (2006).

[66] *ChicagoMathematics and Sci Acad.,* 359 N.L.R.B. No. 41 at 10.

[67] *Id.* at 10-11.

[68] *Temple University*, 194 N.L.R.B. 1160, 1161 (1972).

[69] *Id.* at 1160.

[70] *Id.*

[71] *Id.* at 2.

[72] *Chicago Mathematics & Sci. Acad.*, 359 NLRB No. 41 at 11.

[73] *Id.*

[74] 105 ILCS 5/27A-5(a) ("A charter school shall be organized and operated as a nonprofit corporation *or other discrete, legal, nonprofit entity* authorized under the laws of the State of Illinois.") (emphasis added).

[75] *See* 105 ILCS 5/27A-7.

[76] 105 ILCS 5/27A-11.

[77] *Id.*

[78] 105 ILCS 5/27A-2(c).

[79] 105 ILCS 5/27A-4(d) ("Enrollment in a charter school shall be open to any pupil who resides within the geographic boundaries of the area served by the local school board. . . .").

[80] ILCS Const. Art. 10, § 1.

[81] *See generally Keime v. Community High School No. 296*, 348 Ill. 228, 234, 180 N.E. 858, 860 (1932) ("There is no constitutional restriction or limitation placed upon the Legislature with reference to the formation of school districts *or the agencies* which the Legislature shall adopt to provide the system of free schools. . . .") (Emphasis added).

[82] *Hawkins* Cnty, 402 U.S. at 604-05.

[83] As Governor Wilson of California acknowledges in his veto against a bill that would have mandated collective bargaining in charter schools, "[Collective bargaining] will not allow a fair test of [the] experimental approach…The essential elements of the charter school concept are freedom from state regulation and employee organizational control, and choice on the part of parents, pupils, teachers and administrators." *See United Educators of San Francisco v. San Francisco Unified Sch. Dist.*, 25 P.E.R.Cal. ¶32027 (Cal.P.E.R.B. A.L.J. Feb. 16, 2001).

[84] *Chicago Mathematics & Sci. Acad.*, 359 NLRB No. 41 at 7.

[85] Even though Illinois makes charter schools subject to its collective bargaining laws, the General Assembly recognized that the unique status of educational institutions by requiring that they be treated differently from other public employers. As a result, public educational institutions, including charter schools, are governed by a separate collective bargaining law, administered by a separate agency. *Compare* Illinois Educational Labor Relations Act (115 ILCS 5/1*et seq*.) *with* Illinois Public Labor Relations Act (5 ILCS 315/1 *et seq*.).

[86] *See* 105 ICLS 5/27A-11.

[87] *See U.S. v. Lopez*, 514 U.S. 549, 564 (1995) ("Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.") (striking down the Gun-Free School Zones Act because Congress failed to demonstrate a sufficient connection to interstate commerce).

[88] *See* Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL'Y 885, 931 (2007).

[89] *Hawkins Cnty*, 402 U.S. at 604-05.

[90] 115 ILCS 5/7(b).

[91] *Id.*

[92] 115 ILCS 5/7(c).

[93] 29 U.S.C. § 159 (2006).

[94] Rafael Gely & Timothy D. Chandler, *Card Check Recognition: New House Rules for Union Organizing?*, 35 FORDHAM URB. L.J. 247, 251 (2008).

[95] *Id.* at 252.

[96] *Id.* at 247.

[97] Raja Raghunath, *Stacking the Deck: Privileging "Employer Free Choice" over Industrial Democracy in the Card-Check Debate*, 87 NEB. L. REV. 329, 334 (2008).

[98] *Id.* at 334-35 (citing Laura Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's Gissel Decision*, 79 NW U. LAW REV. 87, 118 (1984)).

[99] Ginger Wheeler, *Love/hate relationship: Unions drive school leaders crazy*, ILL. SCH. BD. J. (July/Aug. 2009), *available at* http://www.iasb.com/journal/j070809_02.cfm.

[100] However, in states that do not have public sector labor laws, teachers will not have the long history of unionization and the organizing experience that comes with it. In these states, the campaign process may have a substantial impact on the ability of unions to organize teachers at charter schools. Nonetheless, *Chicago Math and Science Academy* should be seen as a victory for union supporters in states that have no public sector labor law, even if it may prove difficult to organize the teachers since there was no mechanism to organize these employers prior to the NLRB's decision.

[101]*See Cent. City Educ. Ass'n, IEA/NEA v. IELRB*, 149 Ill. 2d 496, 515, 599 N.E.2d 892, 901 (Ill. 1992) ("[I]t is also useful to analyze labor relations law in the private sector, as this is a well-developed field of law that helped to influence the legislature when it enacted the Act. Private sector labor relations is governed by the National Labor Relations Act (NLRA). Like the Act, the NLRA has a provision requiring that employers bargain with employees concerning wages, hours and terms and conditions of employment.").

[102] *See*, *Decatur Bd.* of *Educ.*, *Dist. No. 61 v. IELRB*, 180 III.App.3d 770, 536 N.E.2d 743, 129 III. Dec. 693 (4th Dist. 1993) (class size); *Rockford Educ. Ass'n, IEA-NEA v. Rockford Sch. Dist. No. 205*, 22 PERI ¶ 45 (IELRB 2006) (individual learning plans for underperforming students); *Mundelein Elem. Educ. Ass'n v. Mundelein Elem. Sch. Dist. No. 75*, 3 PERI ¶1120 (IELRB 1987) (teacher planning time); *see also Bd. of Educ. Sesser-Valier Cmty. Unit Sch. Dist. No. 196 v. IELRB*, 250 Ill.App.3d 878, 620 N.E.2d 418, 189 Ill. Dec. 450 (4th Dist. 1993) (district committed unfair labor practice when it provided individual employees with specific incentives without bargaining with the employees' association.)

[103] *Puerto Rico Junior Coll.*, 265 N.L.R.B. 72, 77 (1982).

[104] *New York Univ.*, 205 N.L.R.B. 4, 12 (1973).

[105] *See* Illinois Public Act 98-0016. P.A. 98-0016 (effective May 24, 2013),which places a one-year moratorium on the establishment of virtual charter schools in the state.

RECENT DEVELOPMENTS

By, Student Editorial Board:

Marco Berrios, Kelly Carson, Alec Hausermann, and Stephanie Ridella

Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes and the equal employment opportunity laws.

I. IELRA DEVELOPMENTS

A. Subcontracting

In *AFSCME, Council 31 v. McLean County Unit Dist. 5*, Case No. 2012-CA-0043-S (IELRB 2013), the IELRB affirmed the rulings of the ALJ finding that McLean County Unit Dist. 5 (McLean) had violated sections 14(a)(1), 14(a)(3), and 14(a)(5) of the Illinois Education Labor Relations Act "by entering into a contract for transportation services with a [private company] and discharging [American Federation of State, County and Municipal Employees, Council 31's ("AFSCME")] members in retaliation for their union activity" and "by unilaterally entering into a contract to subcontract all of its transportation services." The 14(a)(3) charge alleged that McLean subcontracted the employees' jobs in retaliation for their having selected AFSCME as their exclusive bargaining representative. The IELRB stated that all elements of the *prima facie* case for a section 14(a)(3) violation had been met, based on the timing of McLean's choice to subcontract in relation to AFSCME being elected the exclusive bargaining representative. Essentially, McLean caused the bargaining unit, that had just elected AFSCME, to cease to exist by subcontracting the jobs of the members of the bargaining unit. It was determined that this created a significant hindrance upon the employees' right to organize.

The establishment of the prima facie case normally would shift the burden to the employer to show a legitimate business reason for its actions, but the Board agreed with the ALJ in finding that in cases where the retaliatory action is inherently destructive of employees' statutory rights, even a legitimate business reason may not remove the inference that McLean intended to discourage employees from exercising their statutory rights.

The IELRB also agreed with the ALJ's findings of a section 14(a)(5), refusal to bargain, violation. The IELRB found that the ALJ correctly applied the standards that it is a violation to unilaterally change the status quo of a mandatory subject of bargaining without providing the exclusive representative with notice and the ability to bargain or not bargaining to an impasse with that exclusive bargaining representative.

McLean's also excepted to the ALJ's remedy, which ordered McLean to rescind its agreement with the private transportation company, reinstate terminated bargaining unit members, make whole any bargaining unit members that were effected, and bargain with AFSCME in good faith. McLean argued that having to rescind its contract with the private transportation company would be unduly burdensome, but the IELRB did not agree, pointing out that rescission of the agreement is the standard remedy in such instances in such circumstances.

II. IPLRA DEVELOPMENTS

A. *Duty to Bargain*

In *International Brotherhood of Teamsters, Local 700 and Lake County Circuit Clerk*, 29 PERI ¶ 179 (ILRB State Panel 2013), the State Panel reversed the recommendation of the administrative law judge and found that the County bargained in good faith over a fair share clause in the collective bargaining agreement (CBA). The Union claimed that the County engaged in surface bargaining in violation of sections 10(a)(4) and 10(a)(1) of the IPLRA while negotiating an initial CBA. The basis for the Union's claim was the County's refusal to agree to a fair share clause in the CBA. The parties were able to tentatively agree to a number of items after the Union's first proposal, but the County omitted the fair share clause in its proposal.

In the course of nine months, the parties reached tentative agreement on a number of issues, but the County refused to make concessions on the fair share clause. The Union filed an unfair labor practice charge, alleging, among other charges, that the County engaged in surface bargaining. Negotiations continued for six months after the charge was filed, but the County continued to reject modified proposals regarding the fair share clause.

Looking at the totality of the circumstances, the ALJ did not accept the County's position that it had engaged in hard bargaining but in not surface bargaining . Because the County refused to consider a fair share clause at all, the ALJ found that it did not have the required intent to reach an agreement. The County argued that under Section 7 of the IPLRA it was not obliged to agree to a proposal or make

concessions. The County pointed to the many other issues agreed upon over the course of numerous bargaining sessions, and said that it had considered the proposed fair share clause, but rejected it because it would impose economic hardship upon its employees and not be in all of the employees' best interests.

The State Panel, dismissing the charge, reiterated the principle that the Panel is not empowered to force a party to make a concession on any particular issue, despite the obligation to bargain in good faith with the intent to reach an agreement. The Panel agreed that the ALJ had articulated the correct standard, looking at the totality of the circumstances, but that the ALJ's conclusion was based solely on the refusal to negotiate a fair share clause, and ignored the fact that the parties engaged in meaningful negotiations over many issues, reaching a number of tentative agreements. Besides the County's alleged unreasonableness over fair share, no other evidence of bad faith could be found in the record.

The Panel conceded that the subject of fair share is significant, and exactly the type of issue an employer might exploit to avoid agreement, clothed in the guise of hard bargaining. For that reason, the Panel stated that an employer's intransigence on such an issue should "draw particular scrutiny." However, in the absence of other evidence of bad faith, the Panel refused to find surface bargaining solely because the County refused to make a concession on this one issue. While the County's position on fair share might be pretextual, the Panel would not find the County's refusal to consider fair share *per se* unreasonable absent other evidence of bad faith. To find surface bargaining based solely on a refusal to negotiate this one issue would be "tantamount to creating a *per se* rule requiring employers to make concessions on fair share proposals," would be contrary to legislative intent and Board precedent. Because the parties were negotiating an initial agreement, the Panel distinguished the instant case from cases where a party's position was inconsistent with the position taken in other negotiations.

B. Supervisors

In *Service Employees International Union, Local 73 v. ILRB, Local Panel, and City of Chicago,* 2013 IL App (1st) 120279, the Fist District Appellate Court affirmed a decision by the Illinois Labor Relations Board, Local Panel, denying the representation-certification petition brought by the Union to represent supervising investigators employed by the City of Chicago's Independent Police Review Authority (IPRA). The Paenl had reversed an administrative law judge's conclusion that the supervising investigators were supervisors within the meaning of section 3(r) of the IPLRA.

The ALJ found testimony by the IPRA's chief administrator, Ilana Rosenzweig, was reliable and credible and concluded that the supervising investigators' work was different form the work of the investigators because: (1) supervising investigators retain and exercise discretion in the reporting of misconduct and recommendation of discipline; and (2) supervising investigators have the authority to process grievances and reward subordinate employees for their performance. However, the ALJ ordered that the Union be certified as the exclusive representatives of the supervising investigators because the (1) supervising investigators were not engaged in supervisory functions a preponderance of the time, and the (2) supervising investigators did not have managerial status under the Act, as they did not implement sufficiently broad policy determinations.

The Local Panel disagreed with the ALJ's recommendation and dismissed the Union's petition, finding that the supervising investigators spent most of their time reviewing reports and giving instructions that went unchallenged in the vast majority of cases. The Board, therefore, disagreed with the ALJ's finding that the supervising investigators do not "direct" employees within the meaning of the Act; the Board found that the supervising investigators spent a preponderance of the time performing supervisory tasks.

Section 3(r) of the IPLRA defines "Supervisor" as:

> [A]n employee whose principal work is substantially different than that of his or her subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of those actions, if the exercise of the that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment. Except with respect to police employment, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising that authority.

The critical issue on appeal was whether the supervising investigators "directed" employees within the meaning of the Act, given the reasoning of the Board's decision and Rosenzweig's testimony that supervising investigators spent 95.5 percent of their time assigning and supervising cases. According to the court, one indicium of supervisory authority accompanied by independent judgment is sufficient to indicate supervisory status. The court observed that an analysis of whether supervising investigators were supervisory under the Act required a consideration not only of whether they "direct" their employees, but also whether they exercise significant discretionary authority that affects wages, discipline and other working conditions.

The Union likened supervising investigators' case reviews to "mere proofreading" or quality control on an assembly line; the Union also compared case review to the direction which lieutenants give to firefighters at a fire scene, which is derived from their superior skill and technical expertise, and does not require the use of independent judgment in the interest of the employer as required by the Act. The court, however, relied on Rosenzweig's testimony which demonstrated that supervising investigators gave their subordinate investigators feedback and written notes during investigations, and that they ensured that their subordinates obtained supplemental police reports, forensic test results and other type of supplemental information. The court acknowledged that the Board did not focus on the nature of these activities, but concluded that the record indicated that the work involved more than proof reading or mere quality control. Assigning and monitoring the investigators' work was the most important and predominant tasks performed by supervising investigators. According to the court, case law established that these tasks are considered "direction" under the Act.

The Union argued that supervising investigators did not have the authority to reward subordinates because superiors, and not supervising investigators, make suggestions regarding employees' evaluations. But the court quickly side stepped that argument stating that the mere fact that a superior is involved in the decision making process does not exclude the supervising investigator from supervisory status under the Act. Rosenzweig testified that she never rejected a supervising investigator's evaluation, which led the court to conclude that supervising investigators' evaluations were at least effective recommendations where performance evaluations were, in turn, used when considering promotions under the collection bargaining agreement.

The Union also argued that the supervising investigators had no authority to discipline subordinates because they not consistently exercise discretion regarding discipline and the discretion to report misconduct did not rise to the level of supervisory authority. However, the court found the record indicated otherwise, where Rosenzweig identified a variety of notices of progressive discipline imposed by supervising investigators. The court also mentioned that just because one supervising investigator had never issued an oral or written reprimand did not mean that she lacked that authority to do so.

III. EEO DEVELOPMENTS

A. ***Retaliation***

In *University of Texas Southwestern Medical Center v. Nassar,* 133 S.Ct 2517 (2013), the Supreme Court held that Title VII retaliation claims must be proved

according to traditional principles of but-for causation, not the motivating-factor standard for other Title VII discrimination claims (what the Court called "status-based discrimination" – discrimination on the basis of race, color, religion, sex, or national origin). For status-based discrimination claims, the Civil Rights Act of 1991 codified a lesser causation standard, where "[i]t suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision."

The Court looked to its decision in *Gross* v. *FBL Financial Services, Inc.*, 557 U. S. 167 (2009), where it decided that the ADEA requires proof that the prohibited criterion was the but-for cause of the prohibited conduct, to determine the causation standard for Title VII retaliation claims. In *Gross,* the Court refused to apply the motivating-factor standard to age based discrimination claims, emphasizing that Congress failed to amend the ADEA when it amended Title VII in 1991, despite the two statutes' similar wording.

The Court reasoned that the 1991 Civil Rights Act language incorporating the motivating-factor standard addressed only status-based discrimination, not retaliation. Additionally, the structure of the statute was instructive. Congress inserted the motivating-factor provision as a subsection of the ban on status-based discrimination. The Court presumed that Congress's choices of words and structure indicated that it did not intend to address retaliation claims.

The Court emphasized the importance of correctly interpreting the causation standard because of the need to efficiently allocate judicial resources, especially in light of the increasing frequency of retaliation claims. Lessening the causation standard would increase frivolous claims, and "[i]t would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent."

Justice Ginsburg, dissenting, lamented the Court's decision, which "drives a wedge between the twin safeguards [of discrimination and retaliation claims] in so-called 'mixed motive' cases." "In so reining in retaliation claims, the Court misapprehends what our decisions teach: Retaliation for complaining about discrimination is tightly bonded to the core prohibition and cannot be disassociated from it." The Court's decision, making retaliation a discrete category from status-based discrimination, "runs up against precedent," and diverges from what the Court has previously viewed retaliation as – "a manifestation of status-based discrimination."

Given that Congress's stated purpose in passing the Civil Rights Act of 1991 was to "restore and strengthen . . . laws that ban discrimination in employment," the dissent could not fathom that Congress meant to exclude retaliation claims from the motivating-factor standard. Furthermore, from its codification, the EEOC Guidance has interpreted the amendment to include retaliation, and the agency guidelines should be accorded respect.

The dissent also criticized the Court's decision as risking confusing juries by requiring separate standards for discrimination and retaliation. Furthermore, the dissent considered "a strict but-for test is particularly ill suited to employment discrimination cases," as assessing multiple motives requires guessing what would have happened if an employer's thoughts were different.

B. Sexual Harassment

In *Vance v. Ball State University,* 133 S.Ct. 2734 (2013), the Court decided who qualifies as a supervisor under the standard articulated in *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742 (1998), and *Faragher* v. *Boca Raton*, 524 U. S. 775 (1998) governing employer liability for sexual harassment. The Court held "that an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim," adopting the Seventh Circuit's definition. The Court rejected the EEOC's Guidance, and defined tangible employment action as the power "to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

The Court acknowledged the varying colloquial and legal definitions of "supervisor," and turned to the "highly-structured" *Ellerth/Faragher* framework to define the term. The Court said that the "authority to take tangible employment actions is the defining characteristic of a supervisor, not simply a characteristic of a subset of an ill-defined class of employees who qualify as supervisors." The Court emphasized that the Seventh Circuit's standard is workable, avoids confusing juries, and is more efficient, because often supervisor status would be determined as a matter of law before trial. Parties would be able to focus on other issues at bar, and jury instructions would be simplified.

The Court said that employees will not be left unprotected from co-worker harassment, because the *Ellerth/Faragher* framework holds employers liable when they negligently fail to stop harassment. While a test assessing the varying degrees of authority an employee has over other employees is too unwieldy and inefficient when determining supervisor status to establish an employer's vicarious

liability, under a negligence standard juries should be instructed that the nature and degree of authority wielded by the harasser is an important factor.

Justice Ginsburg, dissenting, would have adopted the EEOC Guidance, which asks: "Has the employer given the alleged harasser authority to take tangible employment actions *or* to control the conditions under which subordinates do their daily work?" The dissent said that the decision of the Court diminishes the force of *Ellerth/Faragher*, ignores the realities of the modern workplace, and disserves the objective of Title VII. The Court's lauding of "simplicity and administrability" serves to weaken workplace protections against harassment.