

**STATE OF MICHIGAN
BUREAU OF EMPLOYMENT RELATIONS
LABOR RELATIONS DIVISIONS**

In the Matter of:

CESAR CHAVEZ ACADEMY,
and THE LEONA GROUP, L.L.C.,
Employers,

Case No. R05 D-070

-and-

MICHIGAN ASSOCIATION OF PUBLIC EMPLOYEES,
Petitioner-Labor Organization.

APPEARANCES:

Keller Thoma, P.C., by Larry E. Powe, Esq., for Cesar Chavez Academy

Pierce, Duke, Farrell & Tafelski, P.L.C., by M. Catherine Farrell, Esq., for the Petitioner

Miller, Canfield, Paddock & Stone, P.L.C., by Charles T. Oxender, Esq., for the Leona Group,
L.L.C.

**DECISION AND ORDER DISMISSING
PETITION FOR REPRESENTATION ELECTION**

Pursuant to Sections 12 and 13 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.212 and 423.213, this matter was assigned to Roy L. Roulhac, Administrative Law Judge for the Michigan Employment Relations Commission (MERC). In lieu of a formal hearing, the parties submitted a stipulation of facts and exhibits on December 19, 2005. Based upon the entire record, including the stipulation, exhibits, and briefs filed on or before February 13, 2006, the Commission finds as follows:

The Petition and Positions of the Parties:

On April 21, 2005, Petitioner Michigan Association of Public Employees (MAPE) filed the instant petition, seeking an election to represent all certified and non-certified teachers, social workers, and school counselors employed at Cesar Chavez Academy (CCA or the Academy). The petition named both CCA and the Leona Group (TLG) as employers. The parties agree that MAPE seeks to represent an appropriate unit. However, TLG and the Academy assert that the National Labor Relations Act (NLRA or the Act) preempts the Commission's jurisdiction and, in addition, argue that the positions at issue do not fall within PERA's definition of "public

employee.” MAPE responds that the parties are within MERC’s jurisdiction because Cesar Chavez Academy is a public school academy and is the employer of the positions MAPE seeks to represent. For the reasons set forth below, we find merit in TLG’s argument and dismiss the petition.

Stipulated Facts:

In lieu of hearing, the parties submitted a factual stipulation, relevant portions of which are set forth below.

The Parties:

MAPE is a Michigan non-profit corporation that was incorporated on March 29, 1984. CCA is a Michigan non-profit corporation that was incorporated on June 28, 1996, and granted a contract by the Board of Control of Saginaw Valley State University to organize and operate a public school academy under part 6A of the Revised School Code, entitled the Public School Academies Act, MCL 380.501, *et seq.* TLG is a private, for-profit school management company engaged in interstate commerce. TLG has contracts with public school academies both within and outside of Michigan, its annual gross receipts from all sources exceed one million dollars, and it annually purchases materials valued in excess of \$50,000 from points outside the state of Michigan.

The Employees:

CCA is housed in three separate facilities: the elementary school, the middle school, and the high school. The school facilities where the teachers and professional staff work are either owned or leased by CCA. In school calendar year 2004-2005, fifty-eight teachers, four social workers, and one school counselor employed by TLG provided services at CCA.

Teachers, social workers, and the school counselor providing services at CCA are certified through the State of Michigan and must be assigned in accordance with that certification. They are excluded, however, from Michigan’s Teacher Tenure Act and the Public School Employee Retirement System. Professional personnel seeking to perform services at CCA fill out a TLG application. When hired by TLG, they are provided with TLG’s Employee Handbook, setting forth the employment practices and guidelines under which they work. TLG supervises the teachers, social workers, and the school counselor on a daily basis. Additionally, TLG assesses the annual performance of each of these individuals.

Teachers, social workers, and the school counselor providing services at CCA enter into annual employment contracts with TLG. The individual employment contracts state that the teachers, social workers, and the school counselor are employed by TLG. TLG sets and provides the annual salary and fringe benefits of teachers, social workers, and the school counselor providing services at CCA. These individuals receive their paychecks from TLG. TLG is responsible for state and federal tax withholdings, worker’s compensation insurance, and unemployment compensation coverage. TLG designates and assigns the days and hours of work

of the teachers, social workers, and the school counselor and provides them with professional development and training.

CCA's Articles of Incorporation:

On November 30, 1999, CCA filed a certificate of amendment to its Articles of Incorporation. The amendments included the following:

Article VI was amended to provide: "The academy is a governmental entity."

Article VII was amended to read: "No part of the net earnings of the academy shall inure to the benefit of or be distributed to its directors, officers or any other private persons, organizations organized and operating for profit (except that the academy shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in the furtherance of the purposes set forth in Article II hereof). Notwithstanding any other provision of these Articles, the academy shall not carry on any other activities not permitted to be carried on by a governmental entity exempt from federal income tax under Section 115 of the IRC, or comparable provision of any successor law."

Article VIII was amended to read: "The academy and its incorporator(s), members of its Board of Directors, officers, employees and volunteers have governmental immunity as provided in Section 7 of Act No 170 of the Public Acts of 1964, being MCL 691.1407."

Article IX was amended to read: "These Articles of Incorporation shall not be amended except by the process provided in the contract executed by the academy and the Saginaw Valley State University Board of Control ("University Board"), allowing the school to operate as a public school academy."

Article X was amended to read: "The Board of Directors shall have all the powers and duties permitted by law to manage the business, property and affairs of the academy."

The Management Agreement Between CCA and TLG:

On June 5, 1996, CCA entered into a management agreement with Michigan Partnership for New Education (MPNE), a non-profit, school management company, incorporated in the state of Michigan. The term of the management agreement was three academic years, from July 1, 1996 to June 30, 1999. MPNE prepared and submitted the initial application to Saginaw Valley State University requesting an operating charter on behalf of CCA with the approval of its Board. In approximately October 1996, TLG succeeded to the interest of MPNE. On October 18, 2000, TLG and CCA amended their agreement to extend the term for five academic years, from July 1, 2001 to June 30, 2006.

Under the terms of the agreement CCA is "a charter school, organized as a public school academy under the Michigan School code." Under the agreement, CCA contracted with MPNE (and later TLG) "to provide educational services." The contract states: "The Academy is therefore authorized by the University Board to supervise and control such academy, and is

vested with all powers necessary or desirable for carrying out the educational program contemplated in this agreement.”

Article III, Section B, entitled “Educational Program” provides that MPNE (and later TLG) is responsible for providing the educational program at CCA. CCA’s role is limited to being consulted prior to any substantial adaptation or modification of the educational program.

Article III, Section C, entitled “Specific Functions” provides that MPNE (and later TLG) is responsible for all of the management, operation, administration, and education at CCA. Such functions include, but are not limited to:

Implementation and administration of education programs, including the selection and acquisition of instructional materials, equipment and supplies, and the administration of any and all extra and co-curricular activities and programs;

Management of all personnel functions, including professional development for the Leader and all instructional personnel;

Operation of the school building and the installation of technology integral to school design;

All aspects of the business administration of the CCA;

Any other function necessary or expedient for the administration of CCA.

Article VI, entitled “Personnel and Training,” sets forth TLG’s rights with respect to employees providing services at CCA, including the teachers, social workers and school counselor. Section A, entitled “Personnel Responsibility,” provides that TLG “shall have the sole responsibility and authority to determine staffing levels and to select, evaluate, assign, discipline, and transfer personnel, consistent with state and federal law.” The CCA board’s role is limited to providing input to help establish the qualifications of the Leader and to be kept apprised of the personnel selection process so that it may refer individuals for TLG’s consideration. TLG has the authority to select and supervise the Leader and to hold him or her accountable for the success of CCA.

Discussion and Conclusions of Law:

TLG maintains that as a private employer which contracts with Caesar Chavez Academy to provide employment services, it is not subject to Commission jurisdiction. TLG and CCA agree that the National Labor Relations Board (NLRB) preempts MERC’s jurisdiction where a controversy is arguably subject to the NLRA’s provisions, citing *Int’l Longshoremen’s Ass’n v Davis*, 476 US 380, 106 SCt 1904 (1986); *AFSCME v Dep’t of Mental Health*, 215 Mich App 1, 545 NW2d 363 (1996).

Petitioner asserts that even though the Academy has contracted with a private entity to provide educational services, we should nonetheless assert jurisdiction in this matter because CCA's Board of Directors is intimately involved in the operation of the Academy and because TLG is merely a tool for implementing the requirements of running the school. As discussed below, we disagree with Petitioner that the Academy's degree of control over its operation is dispositive as to whether the Commission retains jurisdiction over the instant petition.

It is well established that when an activity is arguably subject to the provisions of the NLRA, states must defer to the exclusive competence and jurisdiction of the NLRB. The NLRB initially utilized a "control" test to determine whether the Board would assert jurisdiction. In *Nat'l Transp Serv, Inc*, 240 NLRB 565 (1979), the NLRB held that it would exert jurisdiction in matters where the employer met the statutory definition of employer and "the employer has sufficient control over the employment conditions of employees to enable it to bargain with a labor organization as its representative."

Finding that this test had been applied to employers with close ties to exempt entities in a varied and confusing manner, the Board subsequently altered this legal standard in *Mgmt Training Corp*, 317 NLRB 1355 (1995). In that case, the NLRB enunciated a new test applicable to jurisdictional determinations involving entities purported to be exempt from the Act. It further indicated that henceforth "the Board would only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act and whether such employer meets the applicable monetary jurisdictional standards." *Id* at 1358.

The question concerning TLG's status as an employer under the NLRA is similar to the question raised in *Mosaica Acad of Saginaw v Michigan Ed Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued June 25, 2002 (Docket No. 230332); 2002 WL 1375890. *Mosaica Academy*, a public school academy under Michigan law, contracted with a private entity to provide educational services. The Michigan Education Association filed a petition with the Commission to represent the Academy's professional employees. In *Mosaica Acad*, 2000 MERC Lab Op 281, the Commission determined that the Academy was a public school subject to state regulation and that it exercised ultimate control over all terms and conditions of employment. It therefore concluded that the NLRB's jurisdiction was not arguable and ordered a representation election. The Court of Appeals disagreed. The Court found that because both a public and a private entity were involved in the school's operation and because it was unclear which entity was the actual employer, the case should be deferred to the NLRB. As an unpublished opinion, *Mosaica* does not constitute binding authority. However, in reaching this conclusion, the Court stated that it found the matter governed by *AFSCME v Dep't of Mental Health*, 215 Mich App 1 (1996).

The *AFSCME* case concerned appeals in a number of consolidated cases in which unions had filed representation petitions seeking to represent employees of group home providers with contractual ties to the Michigan Department of Mental Health (DMH). The Commission had determined that the public and private entities were joint employers, found that a question concerning representation existed, and ordered representation elections. The Court of Appeals found that joint employer status was irrelevant. Applying *Mgmt Training*, the Court held that where the NLRB's jurisdiction is arguable and an insufficient showing has been made that the

Board would decline to assert its jurisdiction,¹ the Commission must defer to the NLRB. The Court vacated the Commission's decisions on the ground of preemption.

We find the instant case to be governed by the above precedent. Because both the Academy and TLG are involved in the management and operation of the school, which entity the Board would consider to be the employer under the NLRA is unclear. Consequently, as the Board would arguably exercise jurisdiction in this matter and no showing has been made that the NLRB would decline to assert its jurisdiction, we must defer to the NLRB.

We have considered Petitioner's remaining arguments and find them to be without merit. In accordance with the facts and principles of law set forth above, we issue the following Order:

ORDER DISMISSING PETITION

The petition for a representation election is hereby dismissed without prejudice.²

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch, Commission Chairman

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Date: _____

¹ The Court noted that in previous similar cases in which it affirmed the Commission's jurisdiction, the control test had governed. However because the NLRB had overruled this test in *Mgmt Training*, there was no longer a sufficient showing that the NLRB would decline jurisdiction.

² We dismiss the petition without prejudice in order to preserve jurisdiction in the event the Board concludes that TLG is not the "employer" as defined by the NLRA.