

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

**PENNSYLVANIA INTERSCHOLASTIC  
ATHLETIC ASSOCIATION, INC. (PIAA)**

**AND**

**OFFICE AND PROFESSIONAL EMPLOYEES  
INTERNATIONAL UNION**

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**Case 6-RC-152861**

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**PIAA'S RESPONSE TO AMICUS BRIEF FILED BY  
ASSOCIATION OF MINOR LEAGUE UMPIRES, OPEIU GUILD 322**

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I. **Introduction**

On March 21, 2016, the Board granted PIAA's Request For Review of the Regional Director's Decision and Direction of Election dated July 30, 2015. Review was limited by the Board to one issue, whether the Regional Director had properly determined certain PIAA-registered lacrosse officials to be employees and not independent contractors.<sup>1</sup>

PIAA and Petitioner OPEIU have both filed briefs with the Board in support of their respective positions. Thereafter Association of Minor League Umpires, OPEIU Guild 322, filed a brief with the Board as an amicus curiae, as did the National Federation of State High School Associations. This brief is filed in response to the amicus brief filed by OPEIU Guild 322.<sup>2</sup>

II. **OPEIU Guild 322's Brief Does Not Support the Conclusion That PIAA-Registered Lacrosse Officials Are Statutory Employees.**

OPEIU Guild 322 initially argues in its brief that there have been professional sports officials, e.g., major and minor league baseball umpires and NFL football officials, who have without contest been considered by their employers to be statutory employees. From there OPEIU asserts "To be sure, in none of these cases was the issue of independent contractor

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<sup>1</sup> Board Member Miscimarra would have also granted review with respect to the Regional Director's determination that PIAA is an "employer" and not an exempt "political subdivision" within the meaning of Section 2(2) of the Act.

<sup>2</sup> OPEIU Guild 322 is affiliated with Petitioner OPEIU. As such it is not an unrelated party and therefore is not a proper amicus curiae in this matter. See the definitions of amicus curiae at Black's Law Dictionary Free Online Legal Dictionary 2<sup>nd</sup> Ed., <http://thelawdictionary.org/amicus-curiae/> and Merriam Webster Online Dictionary, <http://dictionary.findlaw.com/definition/amicus-curiae.html>.

litigated; stated another way, in none of these cases did the employer assert that sports officials were anything but statutory employees.” OPEIU Brief at p.2.

Apparently OPEIU asserts that the independent contractor issue raised by PIAA is not even a legitimate bona fide issue, on the basis that certain professional sports leagues did not raise such an issue when their officials sought to unionize. One can only presume that the factual circumstances and indicia of employee status for NFL officials or MLB umpires were decidedly different than those for PIAA-registered lacrosse officials. Put another way, that Major League Baseball or the National Football League did not seek to assert that their officials were independent contractors, is of no assistance to OPEIU in its contention that PIAA-registered sports officials are employees. Nor frankly is it of any assistance to the Board as it reviews the Regional Director’s Decision finding employee status.

Perhaps it is the case that MLB umpires are not permitted to freely decline their game assignments in order to officiate for other entities, as PIAA-registered officials are free to decline their assignments. Perhaps it is the case that NFL officials have income tax and FICA withholdings from their pay checks, unlike PIAA-registered sports officials. No doubt it is the case that neither MLB umpires nor NFL officials sign agreements acknowledging independent contractor status, as do PIAA-registered sports officials.

In any event, OPEIU’s attempt to compare the lacrosse officials at issue with actual employees of professional sports leagues is misguided. It would be like a union asserting that all Fed Ex drivers must be employees rather than independent contractors, because there are some employers in the trucking industry who clearly employ drivers. OPEIU’s

faulty analogy to employer/employee relationships in the professional sports industry sheds no light whatsoever on the status of PIAA-registered sports officials, and it is respectfully submitted that the Board should summarily reject this initial OPEIU argument.

OPEIU next attempts to distinguish the instant matter from Big East Conference, 282 NLRB 335, aff'd. sub. nom. Collegiate Basketball Officials Assn v. NLRB, 836 F.2d 143 (3d. Cir. 1987), where the Administrative Law Judge, the Board, and the Third Circuit Court of Appeals all found collegiate basketball officials to be independent contractors. Indeed, it is interesting to note that OPEIU's Brief concentrates most of its firepower on Big East, thereby lending additional credence to PIAA's contention that Big East strongly supports its independent contractor position, and that it is Big East that the Board should consider as controlling precedent herein.

OPEIU points to several minor factual differences between Big East basketball officials and the lacrosse officials at issue herein, noting that the latter receive training and certification from PIAA while the basketball officials had already passed an exam generated by another organization prior to contracting with ECBA. OPEIU Brief at p. 3. OPEIU suggests that this evidences "employer control" by PIAA. Yet OPEIU has ignored the fact that the Big East basketball officials themselves also received training and also had to pass exams after becoming ECBA referees.

Thus the Big East officials were provided a manual and rules and regulations published by NCAA, were tested yearly concerning basketball rules and floor procedures,<sup>3</sup>

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<sup>3</sup> PIAA tests only one time on initial registration; there are no annual tests.

were expected to attend a one day clinic before the beginning of each season, and received periodic bulletins during the season regarding rule changes and points of emphasis in the rules. Big East, 282 NLRB at 337-338. The distinction OPEIU seeks to draw regarding training and certification is non-existent. The Board in Big East did not consider such factors indicative of “employer control” by the ECBA, nor should it consider similar factors in the instant matter indicative of “employer control” by PIAA.

OPEIU further suggests, also incorrectly, that “PIAA controls the assignment of officials from its staff.” OPEIU Brief at p.3. PIAA does assign lacrosse officials for the very limited post-regular season championship playoff games (only a small number of which come from Districts 7 and 8, i.e., from the voting unit herein), but PIAA does not assign officials during the regular season, when officials are assigned to games by schools or the “assigners” who contract with the schools to make the assignments on behalf of the schools. See PIAA’s Brief on Review of Regional Director’s Decision, pp. 7-8, 12-13.

OPEIU also attempts to distinguish Big East on the basis that the lacrosse officials pay fees directly to PIAA, while the basketball officials paid fees to a third party. OPEIU Brief at p. 3. Such distinction would seem entirely irrelevant. Big East ALJ Robert Gianassi held it was the fact that basketball officials were required to pay a fee in order to work which was indicative of independent contractor status. Whether they paid the fee directly to ECBA was of no apparent consequence. Big East, 282 NLRB at 343.

The minor factual distinctions proffered by OPEIU do not detract from the overwhelming similarities between the lacrosse officials herein and the Big East basketball officials, as detailed in PIAA’s Brief on Review, pp. 25-28. Those factors will not be

repeated verbatim herein, but include that both sets of officials were paid by the individual schools, no deductions were made for tax withholding and FICA contributions, both officials could refuse assignments without repercussion, both officials knowingly signed agreements reciting their independent contractor status, both officials could officiate for other organizations, both officials paid for their own equipment and uniforms, etc. In short, OPEIU's attempt to distinguish Big East factually can only be described as underwhelming at best.

Given its apparent inability to meaningfully distinguish Big East on its facts, OPEIU then asserts that even if the lessons of Big East are applied, the lacrosse officials should nevertheless be viewed as employees. OPEIU Brief at p. 4. Thus OPEIU cites Big East when it argues that (1) the lack of "on-the-spot" discipline of sports officials by PIAA does not tend to show independent contractor status; (2) the lacrosse officials may bring expertise to the job but it is expertise learned on the job while Big East basketball officials were already trained and certified; and (3) that the lacrosse officials cannot be said to understand and accept the import of their contractual agreement to officiate as independent contractors merely because they sign such agreements, for "such a contract is not a contract at all, its terms are not negotiated between the parties, it is boilerplate, and signing is required in order to obtain work." OPEIU Brief at p. 5.

First, the fact that lacrosse officials do not receive "on the spot" discipline is very much a factor supporting independent contractor status. The Big East Board stated the following:

“In the absence of any evidence of mid-season or on-the-sport discipline, it appears that the ECBA’s supervision does not amount to the type of control over the means and manner of the official’s work that an employer would normally exercise.” Big East, 282 NLRB at 344.

Thus, contrary to OPEIU’s contention, under Big East the lack of on-the-spot discipline does favor independent contractor status.

Secondly, the fact that the lacrosse officials may receive training after becoming PIAA-registered does not at all detract from their independent contractor status under Big East analysis. As noted above, the Big East basketball officials also received training and had to pass annual exams after becoming ECBA officials. The Board nevertheless found the basketball officials to be independent contractors. See also, North American Van Lines, Inc. v. NLRB, 869 F.2d 596, 599 (D.C. Cir. 1989) (“Employer efforts to monitor, educate, and improve the results of ends of the worker’s performance do not make the worker an employee.”)

Thirdly, the Big East Board expressly rejected the argument that signing an independent contractor argument was like not signing a contract at all, holding that those who sign such agreements “must be presumed to know what they are signing in the absence of fraud or misrepresentation, neither of which is present in this case.” 282 NLRB 345 at fn. 18. Indeed the Petitioner’s witnesses at the representation case hearing below indicated they knew the significance of independent contractor language in their individual contracts, including witnesses Ed Guminski, a retired NLRB Region Six senior field

examiner, and Mario Seneca, who in addition to officiating baseball and football is an attorney employed by Petitioner. See PIAA's Brief on Review at pp. 15-16, 28.

When an individual signs an agreement acknowledging independent contractor status, that agreement is strong evidence of the parties' intent to create a contractor relationship. Crew One Productions, Inc. v. NLRB, 205 LRRM 3347, 3351 (11<sup>th</sup> Cir. 2016); Fed Ex Home Delivery v. NLRB, 186 LRRM 2292, 2295-2296 (D.C. Cir. 2009). Nor were the agreements signed by lacrosse officials and the schools not negotiated between the parties. The record below is replete with voluminous testimony of negotiations between school Athletic Directors and lacrosse officials regarding the amount of the fee officials would receive per contest and how many officials would be assigned per game. See PIAA's Brief on Review at pp. 15-18.

It is readily apparent that, just as OPEIU could not factually distinguish Big East from the instant matter in any meaningful way, OPEIU also fails in its effort to show that application of Big East should convince the Board to find in OPEIU's favor.

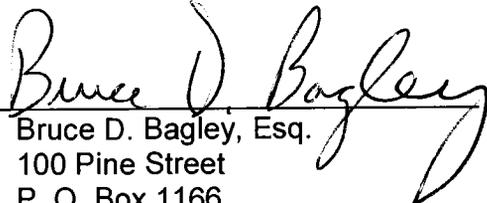
### **III. Conclusion**

OPEIU Guild 322's substantive arguments are of no validity and should be rejected by the Board in favor of reversing the Regional Director's Decision, for the reasons already suggested in PIAA's Brief on Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2016, electronic copies of the foregoing Brief were served on OPEIU Guild 322's Counsel, Petitioner's Counsel, and Counsel for Amicus National Federation of State High School Associations, by e-mail at the following e-mail addresses, and also electronically filed with the Regional Director for Region Six:

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