

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**Case 06-RC-152861**

**PENNSYLVANIA INTERSCHOLASTIC  
ATHLETIC ASSOCIATION, INC.**

**Employer,**

**and**

**OFFICE AND PROFESSIONAL EMPLOYEES  
INTERNATIONAL UNION,**

**Petitioner.**

**PETITIONER'S RESPONSE TO AMICUS BRIEF FILED BY  
NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS**

## I. INTRODUCTION.

On March 21, 2016, the Board granted PIAA's Request for Review of the Regional Director's Decision and Direction of Election ("DDE") with respect to one issue: whether the petitioned-for PIAA lacrosse officials are employees or independent contractors.

Petitioner Office and Professional Employees International Union (OPEIU) and PIAA filed briefs on review regarding this issue. On June 1, 2016, the Board granted the motion of the National Federation of State High School Associations ("NFHS") to file a brief *amicus curiae*.<sup>1</sup> This brief is Petitioner's response to the NFHS *amicus* brief ("NFHS Brief").

NFHS is a national organization with a membership consisting of statewide interscholastic activities and athletics associations such as PIAA. NFHS Brief at 2. NFHS purports in its brief to offer the Board insight on how high school officiating may be adversely affected by affirming the Regional Director's finding that the lacrosse officials are PIAA's employees. Much of NFHS's brief is devoted to unsupported claims that the sky will fall on interscholastic sports if officials are allowed to pursue collective bargaining under the Act. *See, e.g.*, NFHS Brief at 4 (the Regional's Director's decision will disrupt high school officiating, thereby threatening the educational mission of high school athletics"). However, employees should not be deprived of their statutory rights simply because the exercise of those rights present inconveniences for their employers or their employers' associates.

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<sup>1</sup> An *amicus* brief was also filed by the Association of Minor League Umpires, OPEIU Guild 322 ("AMLU"). In PIAA's response to the AMLU's *amicus* brief, PIAA argued that the AMLU was not a proper *amicus curiae* because it is affiliated with OPEIU. However, PIAA is affiliated with the National Federation of State High School Associations, and therefore, under PIAA's reasoning, is also not a proper *amicus curiae*.

NFHS repeatedly makes three points throughout its Brief those points are:

1. Part time and intermittent workers should not be treated as employees under the National Labor Relations Act.
2. In references to the Regional Directors Decision and Direction of Election<sup>2</sup> much of the DDE's reasoning is not considered.
3. Treating the officials as employees would impose significant administrative burdens in PIAA.

NFHS, as did PIAA, attempts to rely upon the decision in *Big East Conference*, 282 NLRB 335 (1996), *aff'd sub nom. Collegiate Basketball Officials Ass'n v. NLRB*, 836 F.2d 143 (3d Cir. 1987) in support of its position.

This response brief will address each of the claims of NFHS.

## **II. PART-TIME AND INTERMITTENT WORKERS ARE OFTEN CONSIDERED EMPLOYEES UNDER THE ACT**

NFHS repeatedly points out that the high school officials work “part-time” and that officiating is not most officials’ “career” or a “full-time” pursuit. NFHS Brief at 3, 4, 8. NFHS also points out that many officials pursue other work, that the number of contests in each sport are limited to a specific season, and officials typically work at “odd times” like evenings and weekends. It is well-established that part-time workers may be employees under the NLRA and that working for more than one employer work does not preclude a finding of employee status. For example, in *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1765 (2011), *aff'd* 206 L.R.R.M. 3096, 2016 U.S. App. LEXIS 7007 (April 19, 2016), the Board accorded little weight to the fact musicians can work for other orchestras because “[p]art-time and casual employees

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<sup>2</sup> The Decision and Direction of Election is referred to as “DDE.” The Board’s exhibits are referred to herein as “Bd.” The Transcript is referenced herein as “Tr.” PIAA’s exhibits are referred to as “Co.”

covered by the Act often work for more than one employer.” Intermittent work also does not preclude a finding of employee status under the NLRA. As observed in *Lancaster Symphony Orchestra*, “the Board has repeatedly held that employees in certain industries, such as the entertainment industry, typically have intermittent working patterns, and has accommodated that fact ... rather than excluding such workers from the Act’s coverage as independent contractors.” 357 NLRB at 1765. Obviously, working evenings and weekends does not preclude a finding of employee status under the NLRA – many employers covered by the Act have all manner of various shifts. Several of these facts — such as part-time status, performing other work for other employers, the hours in which work is performed — are not even relevant under the Restatement (Second) of Agency §220. Furthermore, to the extent these facts apply to the petitioned-for lacrosse officials working for PIAA, such facts were appropriately considered and weighed by the Regional Director under the Restatement factors. For instance, the length of time for which a person is employed is a common law factor. Here, although officials are assigned on a per-game basis, they are eligible for games throughout the season, and for continuous seasons, so long as they remain in good standing with PIAA. Tr.150-151; DDE at 47-48.

NFHS also emphasizes the personal devotion of officials to interscholastic athletics. NFHS Brief at 6. Personal dedication and belief in the value of one’s work do not render one an independent contractor, nor do such feelings nullify a desire to have the right to engage in concerted activity regarding one’s terms and conditions of employment. For example, professional musicians have a great personal dedication to their craft, but are covered by the Act’s jurisdiction. See *Lancaster Symphony Orchestra*.

### **III. NFHS REPEATEDLY CONSIDERS ONLY PART OF THE REASONING OF THE REGIONAL DIRECTOR**

NFHS states that the “schools have no real control over how the officiating is performed.” NFHS Brief at 5. This reinforces the Regional Director’s conclusion that *PIAA* exercises extensive control over the officials. Schools pay officials for regular season contests because they are directed to do so by *PIAA*’s comprehensive policies and procedures. *PIAA*’s written policy regarding regular season contest fees provides that host schools must enter into a contract with officials and pay officials’ their fees prior to the beginning of all regular season contests. Co.2, Policies & Procedures at 41; *see also* Petitioner’s Brief on Review at pp. 30-32. The Regional Director concluded that “when member schools directly compensate the officials during the regular season, they act at the behest of the *PIAA*.” DDE at 51. *PIAA* has the ability to modify this payment procedure and could amend its policies to provide for centralized payment through *PIAA*. According to *PIAA*’s Constitution, the *PIAA* Board of Directors has the broad power to “determine the method of and the qualifications for the registration of officials; to determine their powers and duties; and to make and apply necessary policies, procedures, rules, and regulations for such officials.” Co.2, Constitution, at 4.

NFHS ignores the record and the findings of the Regional Director when it asserts that *PIAA* is “limited in its ability to control” its officials. *PIAA* has established a comprehensive structure for controlling officials through its District Committees and local, sport-specific chapters chartered by *PIAA*. NFHS Brief at 5, Co. 4. at 15-20. Contrary to NFHS’s assertions that officials “have asserted in advance their competence” (NFHS Brief at 5), *PIAA* actually determines who is eligible to officiate *PIAA* contests through its application and testing procedure. Co.4 at 1. *PIAA* then requires new officials to join a sport-specific *PIAA* chapter within fifteen days of acceptance, and all officials must attend a minimum of six chapter meetings each season, in addition to an annual *PIAA* rules interpretation meeting for each sport they officiate. Co.4 at 2.

PIAA also determines when officials should be suspended or removed for violating PIAA rules, when officials may be reinstated, which officials should be given post-season assignments, and what uniforms officials must wear (down to the color of their socks). *See* DDE at 40-41; Co.4 at 4-5, 10-13. PIAA sets the dates during which contests may occur for each sport and the maximum number of regular season contests. Co.2 at pages preceding the Constitution; Tr. 64-65; Co.2, By-Laws at 37.

**IV. NFHS IMPROPERLY CLAIMS THAT TREATING OFFICIALS AS EMPLOYEES WOULD IMPOSE AN UNDUE BURDEN ON PIAA.**

PIAA administers approximately 14,000 official positions in the course of a school year, however, those positions are filled by far fewer than 14,000 individuals. Official Charles W. Knoer testified that in his career he has officiated six different sports. Tr. 208. Witness Edmond Guminski testified that he is currently certified to officiate seven sports, and that he was previously certified in two additional sports. Tr. 260. PIAA Executive Director Lombardi testified that the 14,000 positions are filled by a lesser number of individuals because officials work in more than one sport. He was unable to provide an estimate of the actual number of individuals who serve as officials in a single school year. Tr. 61-62. Therefore, the record does not establish how many individuals actually work as officials. However, PIAA already administers the procedures for certifying and continuing eligibility of each individual in each sport which he or she officiates. PIAA also processes the payment of dues each individual must pay for each sport in which they officiate. Co.4 at 3.

NHFS contends that PIAA only monitors officials in a “general way” and that any serious attempt to supervise or control 14,000 officials would be beyond PIAA’s capabilities or budget. NHFS Brief at 6. This claim is refuted by the factual record which demonstrates that PIAA does in fact supervise and control all of its officials, although much of this work is not necessarily done at the PIAA statewide office. PIAA’s District Committees include an “officials’ representative” who

administers the officials' examinations, receives a copy and/or composite of officials' performance evaluations, and assigns officials to district-level championship contests. Co. 4 at 34-35; Tr. 65; 130; 170. The officials' representatives on the District Committees also hear disputes between officials and host schools regarding regular season contests. Co.2, Pols. at 41.

In addition, the sport-specific chapters chartered by PIAA monitor their officials and train officials on PIAA-established mechanics and rules. Co.4 at 8-9, 15-20. PIAA requires its chapters to track and report officials' attendance at chapter meetings, hold at least eight meetings for officials, and receive any reports of officials' conduct when requested by the PIAA office. *Id.* Through this organizational structure and its comprehensive rules and policies, PIAA effectively monitors all of its officials, contrary to NFHS's assertion.

The unit petitioned for in this case consists of only approximately 140 officials. However, because PIAA already administers approximately 14,000 official positions as detailed above during the year, it can easily perform whatever additional administrative duties are required by treating some or all of those officials as employees.

**V. BIG EAST SUPPORTS THE REGIONAL DIRECTOR'S FINDING THAT THE OFFICIALS ARE EMPLOYEES.**

NFHS claims, as PIAA has argued in its briefs, that *Big East Conference*, 282 NLRB 335 (1996), dictates the result in this case. While the officials in the instant matter share some commonalities with the college basketball referees in *Big East*, there are significant differences in the way the organizations involved operate. In light of these factual differences, *Big East* actually indicates that employee status should be found here, because PIAA officials share some of the same indicia of employee status without sharing some of the characteristics indicating independent contractor status in that case.

In *Big East*, the union, the Collegiate Basketball Officials Association ("CBOA"), claimed that putative employer the Big East Conference unlawfully refused to bargain with it as the

successor to the Eastern College Basketball Association (“ECBA”). *Big East*, 282 NLRB at 335. The ECBA was a separate entity which provided and supervised a basketball officiating program for members of the Eastern College Athletic Conference, an unincorporated association with over two hundred colleges and universities as members, and for other schools that were not members of the Eastern College Athletic Conference. *Id.*

The CBOA and the ECBA worked together to make qualified officials available for intercollegiate basketball contests. The CBOA, the putative union, only admitted members who passed a written examination promulgated by yet another separate organization, the International Association of Approved Basketball Officials. *Id.* Officials were evaluated and rated jointly each year by the CBOA and the ECBA. 282 NLRB at 336.<sup>3</sup> Based on the joint ratings, the ECBA determined the number and quality of games each official would receive for the following year and assigned officials to particular contests. *Id.*

In contrast, PIAA alone determines the qualifications for officials and which officials are fit to officiate post-season contests. As the Director’s Decision explains, PIAA officials, unlike the *Big East* officials, receive “their training and certifications” from PIAA and not an outside organization. DDE at 46, 54. The *Big East* officials remitted dues to the ECBA in an amount that varied according to the number of their assignments; PIAA officials only pay dues directly to PIAA and PIAA’s chapters. DDE at 54; 282 NLRB at 342. The ECBA assigned officials to regular season games from CBOA’s pool of qualified officials, while PIAA has dictated that PIAA schools obtain their own officials from PIAA’s pool of registered officials. Co.2, By-Laws at 30.

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<sup>3</sup> The officials were rated with 40% of their rating from the ECBA coaches, 40% from fellow officials, 10% from ECBA supervisors and observers, and 5% for attending an ECBA annual clinic and passing a written examination. 282 NLRB at 336.

The ECBA also provided officials to schools outside of its affiliated conference, while PIAA does not provide officials for schools other than PIAA-members. PIAA selects and modifies the rules officials must utilize and is the ultimate arbiter as to whether officials perform their duties in an unbiased and impartial manner. *See* Co.4 at 29-30 (officials may be suspended by the Executive Director if “determined to have been biased and/or palpably unfair in decisions in a Contest”).

Because of these structural and factual differences, the PIAA exerts more control over PIAA lacrosse officials than the putative employer in *Big East* exerted over the college basketball officials. Moreover, both the ALJ and the Third Circuit viewed the decision in *Big East* as a close call. 836 F.2d at 143; 282 NLRB at 342, 345. Therefore, the application of *Big East* to this case must be carefully considered and compared with the elaborate relationship between PIAA and the lacrosse officials. Petitioner submits that the Regional Director properly considered all of these factors—particularly in light of the Board’s recent guidance in *FedEx Home Delivery*, 361 NLRB No. 55 (2014), issued nearly thirty years after *Big East*—and correctly concluded that the lacrosse officials are PIAA’s employees. DDE at 54.

## **VI. CONCLUSION.**

The common law test appropriately focuses on the nature of the relationship between workers and a putative employer in order to determine employee status. The potential effect of employee status on the employer’s operations and a tradition of assuming that workers are independent contractors are not relevant considerations. The Regional Director carefully weighed the evidence in this case and determined that the nature of the relationship between PIAA and its officials establishes that the officials are employees of PIAA within the meaning of the Act.

For the foregoing reasons, and the additional reasons stated in Petitioner’s Brief on Review, OPEIU requests that the Board affirm the Regional Director’s determination that the lacrosse officials are employees under the Act.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2016, an electronic copy of the foregoing Response was electronically filed with the Regional Director for Region Six and was served on the following via email:

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