

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 OPPOSITION TO THE EMPLOYER'S MOTION FOR
RECONSIDERATION OF THE BOARD'S DECISION ON REVIEW
AND ORDER AND REQUEST FOR STAY OF THE ORDER**

I. INTRODUCTION.

On July 11, 2017, the Board issued its Decision On Review And Order in this matter and affirmed the Regional Director's finding that the lacrosse officials at issue are statutory employees under the Act and not independent contractors. *Pennsylvania Interscholastic Athletic Association, Inc.*, 365 NLRB No. 107 ("Decision"). The Board majority's more than eleven (11) page decision was thorough and amply considered all the pertinent factors and arguments of the parties. Now, the Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA") seeks reconsideration of the Board's Decision claiming the existence of extraordinary circumstances sufficient to warrant reconsideration. As Petitioner Office and Professional Employees International Union ("OPEIU") demonstrates below, no such circumstances exist. Rather, PIAA's claim of "extraordinary circumstances" amounts to nothing more than an expression of disagreement with the Decision on the merits and the hope that a change in composition of the Board's membership will yield a different result. Such does not constitute "extraordinary circumstances".

Moreover, PIAA's Motion for Reconsideration of the Board's Decision on Review and Order and Request for Stay of the Order ("Motion") is untimely pursuant to Section 102.65(e) of the Board's Rules and Regulation and should be denied for this reason as well.

II. ARGUMENT.

A. PIAA's Motion Is Untimely and Should Be Denied as Procedurally Defective.

PIAA filed its motion "pursuant to Section 102.48(c) of the Board's Rules and Regulations". Motion at 1. However, Section 102.48(c) has no application here as it applies to unfair labor practice proceedings. The appropriate section of the Board's Rules and Regulations is Section 102.65(e) which applies to representation proceedings such as the instant matter. Under Section 102.65(e)(2) "[a]ny motion for reconsideration ... shall be filed within 14 days, ... after the service of the decision or report." Here, the Board's Decision was served on July 11, 2017

meaning the fourteen (14) day period for PIAA to seek reconsideration expired on July 25, 2017. *McCabe, Hamilton & Renny Co., LTD*, Case 20-RC-175876 (April 3, 2017), 2017 WL 1279573 (N.L.R.B.) (“The Employer’s motion is untimely, as Section 102.65(e)(2) of the Board’s rules and Regulations requires that motions for reconsideration be filed within 14 days of the Board’s Order.”). PIAA did not file its Motion until August 7, 2017, thirteen (13) days too late.¹ Accordingly, PIAA’s Motion is untimely and should be denied for this reason alone.

B. PIAA Fails To Demonstrate The Requisite Extraordinary Circumstances Warranting Reconsideration Of The Board’ Decision.

Section 102.65(e)(1) requires the demonstration of “extraordinary circumstances” to warrant reconsideration of a Board decision. *McCabe, Hamilton & Renny Co., LTD*, Case 20-RC-175876 (April 3, 2017), 2017 WL 1279573 (N.L.R.B.) (“Further, even were the motion timely filed, the Employer has not demonstrated extraordinary circumstances warranting reconsideration under Section 102.65(e)(1) of the Board’s Rules and Regulations.”). Section 102.65(e)(1) further requires that “[a] motion for reconsideration shall state with particularity the material error claimed” PIAA’s Motion utterly fails to establish “extraordinary circumstances” or state any “material error”.

1. A Changed Board Composition Does Not Constitute Extraordinary Circumstances.

PIAA first claims that “extraordinary circumstances exist here because the Decision . . . was issued just prior to the confirmation of at least one (1) and possible (2) new Board members.” Motion at 1 and 2. PIAA nowhere explains why the changing composition of the Board constitutes “extraordinary circumstances” because it cannot. The Board’s composition changes as a matter of regular course when the terms of sitting Board members expire. Such changing

¹ Section 102.65(e)(2) does allow motions for reconsideration to be filed beyond the normal fourteen (14) day period but only upon the granting of a request for extension of time where the “request for an extension of time to file such a motion shall be served promptly on the other parties.” Here, PIAA neither made nor served any such request.

composition is nothing more than the passage of time which is hardly “extraordinary”. What PIAA really wants but is reluctant to state openly, is another bite at the apple before a newly constituted Board with members it hopes are more amenable to its arguments. OPEIU submits that virtually every party appearing before the Board who receives an adverse decision wishes their case could be heard by a Board more disposed to its arguments, but the ubiquity of such a desire underscores the lack of extraordinary circumstances.

PIAA also notes that the Board’s Decision was “made by only three members of the Board on a sharply divided 2-to-1 decision.” Motion at 1. One need not conduct a statistical analysis of the Board’s decision making record to know that the number of 2 to 1 Board decisions are legion. If the Board granted reconsideration of every 2 to 1 decision, its decision making process would be endless and its effectiveness as a functioning agency would end. The divided nature of the Board’s Decision is no evidence of “extraordinary circumstances.”

2. PIAA Fails To Demonstrate That The Board Committed Material Error.

PIAA next argues that the Board committed “material error” in refusing to review what PIAA claims are “significant jurisdictional issues” and in concluding that the lacrosse officials are statutory employees. Motion at 2. Neither argument carries any weight.

Regarding jurisdiction, PIAA first argues that the Board committed “material error” in not accepting for review the issue of whether PIAA is a statutory employer or an excluded political subdivision. Motion at 2-4. As an initial matter, the appropriate time for PIAA to raise this alleged material error would have been shortly after the Board denied review on this issue back on March 21, 2016. Moreover, PIAA had the opportunity to fully argue this matter to the Board in its August 13, 2015 Request For Review. PIAA’s Request For Review at 20-24. On this point, PIAA’s Motion merely encapsulates the arguments made to the Board over two years ago. PIAA nowhere identifies with “particularity” any material error the Board made in denying review on

this issue or claims there is some newly discovered evidence. Rather, PIAA baldly asserts the Board made a “material error”; presumably because PIAA disagrees with the Board’s decision not to accept review on this issue. Such disagreement does not rise to the level of “extraordinary circumstances”.

PIAA next claims the Board erred in failing “to consider whether jurisdiction should be declined pursuant to Section 14(c)(1) of the National Labor Relations Act.” Motion at 4. Incongruently, PIAA’s very next sentence admits that Chairman Miscimarra did raise this issue in his dissent thus demonstrating that the Board did indeed consider this issue. *Id.* Accordingly, it is evident that PIAA’s true complaint is not that the Board “failed to consider” this issue (because a fully functioning Board quorum did so), but simply that PIAA is unhappy the Board did not rule in its favor.² Again, PIAA’s displeasure with the Board’s Decision on this issue does not constitute an extraordinary circumstance warranting reconsideration.

PIAA’s Motion next takes the Board to task for deciding that the lacrosse officials are employees and not independent contractors. Motion at 5. In doing so, PIAA first complains that the Board expressly declined to follow the *FedEx* decisions of the United States Court of Appeals for the District of Columbia on the employee versus independent contractor issue. *Id.* However, the D.C. Circuit itself has recognized that the Board has every right to stand fast with its own analysis even in light of circuit court disapproval. *Enloe Med. Ctr. v. N.L.R.B.*, 433 F.3d 834, 838 (D.C. Cir. 2005)(“The Board refuses to acquiesce in our analysis of this issue—as it has every right to do ...”), cited by the Board in the Decision at fn.3. Accordingly, the Board violates no statute or court order in adhering to its own employee versus independent contractor analysis. PIAA therefore fails to establish material error.

² For purposes of this Opposition only, OPEIU concedes that PIAA’s Section 14 (c)(1) argument may be one of subject matter jurisdiction which can be raised at any time. Nonetheless, it is still instructive to note that this argument was not made in PIAA’s Request For Review despite PIAA having the opportunity to do so. This omission further demonstrates that PIAA simply seeks another bite at the apple.

PIAA next claims the Board “ignored its own precedent” by not following its decision in *Big East Conference*, 282 NLRB 335 (1986), *enf’d sub nom Collegiate Basketball Officials Assn. v. NLRB*, 836 F2d 143 (3rd Cir. 1987). Motion at 5. A review of the Decision demonstrates that PIAA is simply wrong in stating the Board “ignore[d]” the *Big East* decision. Rather, the Board extensively analyzed *Big East* (Decision at 10-11) and concluded that “there are decisive differences in the relationship between the officials and the putative employer in *Big East* as compared to the lacrosse officials and PIAA.” Decision at 10. Further, as the Board recognized, its “analysis of independent contractor status has evolved considerably in the 30 years since *Big East* was decided.” Decision at 11. Accordingly, the Board committed no error, material or otherwise, in its treatment of its *Big East* precedent.

3. PIAA’s Requested Stay Is Completely Misplaced Given The Election Was Concluded Nearly Two Years Ago.

Finally, PIAA’s Motion inexplicably requests “a stay of election and/or impoundment of the ballots.” Motion at 5. This request is completely misplaced given the election has long been held, the ballots counted, and a certification issued. To the extent PIAA’s Motion seeks a stay of any related proceedings pending in Region 6, OPEIU submits that no stay should be issued given the lack of merit to PIAA’s Motion as demonstrated above.

III. CONCLUSION.

For the foregoing reasons, PIAA’s Motion should be denied as being both untimely and failing to meet the requisite “extraordinary circumstances” test. PIAA’s request for a stay should

also be denied and the Regional's Director's now nearly two years old September 25, 2015
Certification should be allowed to finally take effect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2017, an electronic copy of the foregoing Petitioner's Opposition To The Employer's Motion For Reconsideration Of The Board's Decision On Review And Order And Request For Stay Of The Order Statement in Opposition was served on the below listed PIAA Counsel by e-mail at the below listed e-mail addresses and was electronically forwarded by e-mail to the Regional Director for Region Six:

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