

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

PENNSYLVANIA INTERSCHOLASTIC	:	
ATHLETIC ASSOCIATION, INC. (PIAA),	:	
Employer	:	
	:	
AND	:	Case 6-RC-152861
	:	
OFFICE AND PROFESSIONAL EMPLOYEES	:	
INTERNATIONAL UNION,	:	
Petitioner	:	

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

I. INTRODUCTION

The Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA"), pursuant to Section 102.48(c) of the Board's Rules and Regulations, respectfully submits this Motion for Reconsideration of the Board's Decision on Review and Order, dated July 11, 2017 ("Decision and Order"), at 365 NLRB No. 107. Extraordinary circumstances exist, such that reconsideration is appropriate. Specifically, the Board was inappropriately deprived of the opportunity to review issues of significant importance to the Board's own jurisdiction. The decision not to review the jurisdictional issue was material error. Further, the decision that certain lacrosse officials were employees rather than independent contractors was material error.

The Decision and Order was decided by only three members of the Board on a sharply divided 2-to-1 decision. Shortly after the Decision and Order was issued, one (1) new Board Member was confirmed by the United States Senate. The confirmation of a second Board member is imminent. The Board's decision to not review the conclusion of the Regional Director regarding the Board's jurisdiction in this matter was material error, and the fully constituted Board should be permitted the opportunity to correct this error. Furthermore, given the criticality of the underlying legal questions, the fully constituted Board should be afforded the opportunity to review the Decision and Order.

II. GROUNDS FOR SEEKING RECONSIDERATION

Pursuant to Section 102.48(d) of the Board's Rules and Regulations, the grant of a motion for reconsideration is appropriate if extraordinary circumstances exist. 29 CFR § 102.48(d). Further, a motion for reconsideration must state with particularity the material error

claimed. 29 CFR § 102.48(d). Extraordinary circumstances exist here because the Decision and Order was issued just prior to the confirmation of at least one (1) and possibly two (2) new Board members. The material errors on review are (1) the Board's refusal to review the significant jurisdictional issues in this matter; and (2) the conclusion that the Pittsburgh area lacrosse officials are employees under the National Labor Relations Act.

A. It was Error for the Board to Deny Review of the Jurisdictional Issues

"Extraordinary circumstances" exist under Section 102.48(d) "if there has been some occurrence or decision that prevented a matter which should have been presented to the Board from having been presented at the proper time." Nat'l Book Consolidators, Inc. v Nat'l Labor Relations Bd., 672 F.2d 323 (1982) (analyzing predecessor rule and quoting Nat'l Labor Relations Bd. v. Allied Products Corp., 629 F.2d 1167, 1171 (6th Cir. 1980)). The jurisdictional questions in this case should have been presented to the Board. Further, the fact that one new Board member has been appointed, and a second appointment is imminent are further extraordinary circumstances that justify reconsideration. A fully constituted Board should be afforded the opportunity to consider and address the significant jurisdictional questions presented in this case. The subsequent appointment of additional Board members shortly after the issuance of the Decision and Order and the significance of the issue to be decided are extraordinary circumstances that justify the grant of the Motion for Reconsideration.

Moreover, the Decision and Order contains a material error. Wal-Mart Stores, Inc., 351 NLRB 130, 136 (2017) (stating material error is an extraordinary circumstance which warrants granting of motion for reconsideration). Over the dissent of Chairman Miscimarra, the Board incorrectly denied review of whether the Board has jurisdiction over the PIAA, an

instrumentality of the Commonwealth of Pennsylvania. Instead, the Board adopted the findings of the Regional Director, who held that the Board had such jurisdiction, despite the clear record evidence that the PIAA is a political subdivision of the Commonwealth of Pennsylvania. The Board committed material error by failing to review the important jurisdictional issues in the case and, thereby exercising jurisdiction over PIAA, a political subdivision of the Commonwealth of Pennsylvania.

The PIAA is not an "employer" within the meaning of Section 2(2) of the Act, and as a result, the Board does not have jurisdiction in this matter. PIAA satisfies both elements of the test established by the United States Supreme Court for determining whether an entity is a political subdivision of a state, and thus not subject to the jurisdiction of the Board. NLRB v. National Gas Utility District of Hawkins County, 402 U.S. 600 (1971). First, the current iteration of the PIAA was created by the Commonwealth of Pennsylvania. Second, it is administered by individuals responsible to state legislators. Therefore, PIAA is not covered by the Act, because it is a "political subdivision" as defined by Section 2(2) of the Act.

The Pennsylvania General Assembly amended the Public School Code in 2000 by enacting the Interscholastic Athletics Accountability Act (Act 91), 24 P.S. § 1601, which effectively created a new PIAA and made it an arm of state government. Act 91 created a new Board of Directors. It sets forth the size of the PIAA Board of Directors, and sets forth how Board Members will be selected. 24 P.S. § 1605-A. There are thirty-one members of the Board, each of whom represents a specific constituency, most of which are public entities. In fact, most of the Board Members are themselves employed by public employers (the exceptions being representatives of officials, parents and private schools, all of whom are required by Act 91 to be represented on the Board).

Act 91 also created the Pennsylvania Athletic Oversight Committee, which consists of three (3) senators and three (3) members of the Pennsylvania House of Representatives, to oversee PIAA. PIAA's Executive Director testifies annually before this Committee. Effectively, the Executive Director is responsible to the Committee, which is group of elected officials. Stated another way, PIAA's obligation to report to a panel of state legislators demonstrates that the PIAA is responsible to state elected officials.

Subsequent to the adoption of Act 91, the Pennsylvania General Assembly further articulated PIAA's connection to the government in its adoption of the Right To Know Law, 65 P.S. § 67.101, et seq. The General Assembly made clear that the PIAA is covered by the Right to Know Law, because it is an instrumentality of the Commonwealth. That statute provides the following definition:

“State-affiliated entity.” A Commonwealth authority or Commonwealth entity. The term includes the . . . Pennsylvania Interscholastic Athletic Association.

The Board also failed to consider whether jurisdiction should be declined pursuant to Section 14(c)(1) of the National Labor Relations Act. As recognized by Chairman Miscimarra in his dissent, the Board should have reviewed whether it was appropriate to decline jurisdiction over state interscholastic sports governing bodies, pursuant to Section 14(c)(1) of the Act. 29 U.S.C. § 164(c). This is an issue of national importance, and given that the Board is now or soon will be fully constituted, it should be afforded the opportunity to review this critical issue. The extent to which the Board chooses to exercise its jurisdiction is an important matter of administrative policy, and the Board should be permitted to consider this important question in the first instance.

B. It was Material Error to Conclude that the Officials Are Employees Under the Act.

It was also error to conclude that the Pittsburgh-area lacrosse officials are employees and not independent contractors. In reaching this conclusion, the Board expressly declined to adhere to precedent established by the Court of Appeals for the District of Columbia Circuit.¹ See Decision and Order at n.3. The Board also ignored its own precedent regarding the independent contractor status of sports officials, established by the Board in The Big East Conference, 282 NLRB 335, aff'd sub nom. Collegiate Basketball Officials Ass'n v. NLRB, 836 F.2d 143, 127 LRRM 2279 (3rd Cir. 1987). Instead, the Board relied upon its own analytical framework, which was previously rejected by the D.C. Circuit Court of Appeals in FedEx Home Delivery, 361 NLRB No. 55 (2014), enforcement denied, 849 F.3d 1123 (D.C. Cir. 2017). By directing an election in a unit consisting solely of PIAA-registered lacrosse officials, the Board has erroneously directed an election in a unit where there are no employees. Such a conclusion was material error and requires reconsideration.

III. GROUNDS FOR SEEKING STAY OF ORDER

Pursuant to Section 102.67(j) of the Board's Rules and Regulations, a party requesting review may also move for a stay of election and/or impoundment of the ballots, upon a clear showing that it is necessary under the particular circumstances of the case. It is respectfully submitted that this is such a case, for reasons addressed above.

¹ Board decision footnote 3.

IV. CONCLUSION

PIAA respectfully requests that the Board grant its Motion for Reconsideration, as the Board should have the opportunity to review the critical jurisdictional issues raised by this case. As set forth above, and in the dissent of Chairman Miscimarra, there is a substantial question regarding the Board's jurisdiction that remains unanswered. The evidence establishes that the PIAA is not a statutory employer, and therefore, the Board lacks jurisdiction to direct an election in this matter. Furthermore, it was material error to conclude that the officials were employees rather than independent contractors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, an electronic copy of the foregoing Motion for Reconsideration of the Board's Decision on Review and Order and Request for Stay of the Board's Order was served on Petitioner's Counsel by e-mail at the following e-mail address and was electronically filed with the Regional Director for Region Six:

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