

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA, ex rel,
THE WEST VIRGINIA SECONDARY SCHOOL
ACTIVITIES COMMISSION, DAVID COTTRELL,
President, MIKE ARBOGAST, Vice-President,
GARY RAY, Executive Director, RICK JONES,
DAN ERENICH, EDDIE CAMPBELL, GREGORY
PRUDICH, CRAIG LEE LOY, GREG WEBB,
ROBERT DUNLEVEY and RONALD SPENCER,
Members,**

PETITIONERS,

v.

Appeal No. 14-1045

**THE HONORABLE DAVID W. HUMMEL,
Judge of the Circuit Court of Marshall County, and
P.B.F., individually and as parent and legal
guardian of D. W., a minor.**

RESPONDENTS.

PETITION FOR WRIT OF PROHIBITION

**TO THE HONORABLES: THE JUSTICES OF THE WEST VIRGINIA SUPREME
COURT OF APPEALS:**

Your Petitioner, The West Virginia Secondary School Activities Commission (hereinafter SSAC), hereby respectfully petitions this Court for a Writ of Prohibition directed to The Honorable David W. Hummel, Judge of the Circuit Court of Marshall County, prohibiting enforcement of an injunction issued by the said Judge preventing the Petitioner from enforcing WVSSAC Rule 127-2-4.1.

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State ex rel. Hoover v. Berger, 109 W.Va. 12, 483 S.E.2d 12 (1996)5, 9, 11

State ex rel. WVSSAC v. Webster, 228 W.Va. 75, 83, 717 S.E.2d 859, 867 5, 6, 8, 9, 10, 11

QUESTIONS PRESENTED

The primary question presented is the validity of the SSAC rule (127 CSR § 4-3.7.c) which mandates an additional period of suspension, without appeal, for a student athlete who is ejected from a game, match, meet or contest for unsportsmanlike conduct (striking an opponent).

The secondary question presented is whether the issuance of a Writ of Prohibition is appropriate in light of the facts and circumstances of this case.

STATEMENT OF THE CASE

On September 19, 2014 the Respondent D. W. was ejected from a high school football game upon being flagged by an official for committing a flagrant personal foul. According to the official, while lying on his back on the ground D. W. “drew back his right leg and delivered an upward kick striking the helmet /face mask of the Defender”.

WVSSAC Rule §127-4-3.7.c provides that any student athlete ejected from a football game is automatically suspended for one additional game. The decision of a referee to eject an athlete is not subject to appeal. Since the suspension for an additional game is an automatic consequence of the referee’s decision to eject the player, there is no appeal of the suspension

Since D. W. was ejected from the game on September 19th for a flagrant personal foul, pursuant to the WVSSAC Rule §127-4-3.7.c, D. W. was suspended for the next game.

The Respondent filed a Verified Petition for Temporary Injunction and Temporary Restraining Order in the Circuit Court of Marshall County on September 26, 2014. (Appendix, Exhibit 1) Respondent appeared before the Circuit Court, *ex parte*, on September 26, 2014, and obtained a Temporary Restraining Order granting the relief sought by Plaintiff. (Appendix, Exhibit 2)

Notwithstanding the provisions of the West Virginia Rules of Civil Procedure, Respondent made no effort whatsoever to notify the WVSSAC of his application for injunctive relief. Respondent caused notice of the Complaint to be served on the WVSSAC, together with a copy of the Circuit Court's Order granting a Temporary Restraining Order, only after the matter had been heard *ex parte*.

The Complaint dealt with an incident that occurred on September 19, 2006. The Complaint referenced a special report from a game official that was submitted to the WVSSAC within Twenty-four (24) hours of the conclusion of the game played on September 19 – that is, the special report was submitted by the game official on September 20, 2014.

Even though the incident complained of occurred on September 19th, and was reported on September 20th, Respondent did not seek any relief until September 26, 2014, when Respondent filed a "Verified Complaint for Injunctive Relief and Temporary Restraining Order", and appeared, *ex parte*, before the Circuit Court, in clear and direct contravention of the West Virginia Rules of Civil Procedure.

Promptly on September 26, shortly after learning of the Respondent's filing seeking injunctive relief, and the issuance by the Circuit Court of Marshall County of a Temporary Restraining Order, the WVSSAC filed a MOTION TO DISOLVE TEMPORARY RESTRAINING ORDER. (Appendix, Exhibit 3)

On the 29th day of September, 2014, the Respondent filed a RESPONSE IN OPPOSITION TO MOTION TO DISOLVE TEMPORARY RESTRAINING ORDER. (Appendix, Exhibit 4)

The matter came on for hearing before the Honorable David W. Hummel, Judge of the Circuit Court of Marshall County, on October 2, 2014. On that date WVSSAC filed DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO DISOLVE TEMPORARY RESTRAINING ORDER (Appendix, Exhibit 5), and the Defendant tendered to the Court an ARGUMENT SUMMARY. (Appendix, Exhibit 6)

Following arguments of the counsel, the Court ruled that the failure of the Respondents to comply with Rule 65 of the Rules of the Civil Procedure was “harmless error”.

The Court also announced that it was not reversing the call made by the referee in a high school football game, and that the rule being challenged was not unconstitutional.

The Court ruled that the Respondents were entitled to a preliminary injunction, because the rule which results in an automatic suspension for a student athlete who is ejected from a football game for a flagrant foul with no review or appeal process is “draconian” and exceeds the statutory grant of authority. (Appendix, Exhibit 7, transcript of portion of hearing)

At the conclusion of the October 2, 2014 hearing, the prevailing party was directed to prepare an Order setting forth the Court’s ruling. As of this date no Order has been submitted.

SUMMARY OF ARGUMENT

The SSAC rule in question, which mandates an additional period of suspension for a player ejected by a referee from a game for unsportsmanlike conduct, with no review or appeal of the referee’s decision to eject, has been considered by this Court in *Mayo v. Secondary Schools Activities Com’n* and in *State ex rel. WVSSAC v. Webster*, and this Court has determined that the rule does not violate the constitution, and likewise that the rule is a reasonable exercise of the grant of the rulemaking authority vested in the SSAC. Notwithstanding this Court’s rulings in *Mayo* and *Webster*, the Circuit Court of Marshall County erroneously ruled that, although the rule at issue is not unconstitutional, nonetheless, the rule exceeds the SSAC’s rule-making authority.

Substantially all of the criteria warranting the issuance of a writ of prohibition listed by this Court in syllabus point 4 of *State ex. Rel. Hoover v Berger* are present in this case; a Writ of Prohibition should issue.

STATEMENT REGARDING ORAL ARGUMENT

The SSAC submits that the dispositive issues have been authoritatively decided in *State ex rel. WVSSAC v. Webster* and in *Mayo v. Secondary Schools Activities Com'n*. In the alternative, the SSAC submits that the facts and legal arguments are adequately presented in the briefs and record below.

ARGUMENT

I

The SSAC rule which mandates an additional period of suspension for a player ejected by a referee from a game for unsportsmanlike conduct, with no review or appeal of the referee's decision to eject, does not violate the constitution, and is a reasonable exercise of the grant of the rulemaking authority vested in the SSAC.

The WVSSAC Rule which the Circuit Court ruled to be invalid - 127 C.S.R §4-3.7.c - provides as follows:

“Any coach, student, or bench personal ejected by an official will be suspended for the remainder of the game, match, meet or contest. They will also face suspension in additional contest(s); the suspension will be assessed based upon ten (10) percent of the allowed regular season contests or post season progression in a playoff tournament for each sport. Any tenth of a percentage from .1 to .4 will be a suspension equal to the whole number of the percent. Any tenth from .5 to .9 will be an additional contest added to the whole number. The suspension will include the number of indicated contests in that sport and at that level and all other sport contests in the interim at any level. A second ejection will result in the doubling of the suspension assessed for the first ejection. If they are ejected for a third time during the same sport season, the individual will be suspended from participating or coaching for 365 calendar days from the date of ejection.”

The rule that the Circuit Court deemed invalid has been considered by this Court. During the 2007-2008 academic year Huntington High School basketball player O.J. Mayo was ejected from a basketball game. The automatic suspension rule at issue in this case actually requires a suspension for ten percent (10%) of the games. In this case, involving a high school football player, the suspension is one game. But basketball season involves significantly more games; O.J. Mayo was automatically suspended for three games.

Mayo's suspension was challenged in the Circuit Court of Cabell County. On appeal, the Supreme Court of Appeals held:

"As an initial matter, we address the trial court's reasoning that the absence of certain due process protections from the SSAC rules impels the conclusion that the rules lack fundamental fairness and therefore run afoul of the constitution. Of specific concern to the trial court was the lack of an opportunity for administrative review before a multi-game suspension is imposed as a sanction for violating an SSAC rule. Observing that the SSAC rules do not permit the "protest of a contest or ejection,"^(fn11) the trial court ruled that:

'The failure of the WVSSAC to establish an appeal process available before enforcement of the punishment is clearly wrong. *The current regulations are repugnant to any notion of due process.* Balancing the mandatory, unreviewable sanction of a multi-contest suspension against the limited resources necessary to ensure equity and an opportunity for a student-athlete to be heard results in this Court's finding that the appeal process is indeed lacking in fundamental fairness.' (emphasis supplied).

After making this finding, the trial court purportedly attempted to strike the rule down.^(fn12)

Not only do we find it unwise to proceed down the path suggested by the trial court -- inviting courts to review an official's judgment call in assessing technical fouls -- but the foundational underpinnings upon which the trial court based its rulings on the issue of due process are fatally flawed. In making its ruling, the lower court overlooked this Court's recognition over twenty years ago that "[p]articipation in interscholastic athletics or other nonacademic extracurricular activities does not rise to the level of a constitutionally protected 'property' or 'liberty' interest." *Bailey v. Truby*, 174 W.Va. 8, 21, 321 S.E.2d 302, 316 (1984) (quoting *Clarke v. Board of Regents*, 166 W.Va. 702, 279 S.E.2d 169 (1981)). Because there is no property or liberty interest that attaches to extracurricular activities, "procedural due process protections" do not apply. *Truby*, 174 W.Va. at 21, 321 S.E.2d at 316. As this Court made clear in *Truby*, the absence of a constitutionally protected interest attached to participation in interscholastic sports obviates the necessary predicate for requiring procedural due process protections before instituting SSAC sanctions. Because the due process protections that the trial court found lacking were inapplicable, it follows that the

rulings which were premised on the lack of such protections are not sustainable. Thus, the circuit court's attempt (fn13) to declare SSAC Rule 127-3-15.3 unconstitutional for lacking an administrative review process before imposing a multi-game suspension sanction is without any basis in the law. Similarly, because the justification for amending the SSAC rules was improper, the trial court's directive to the SSAC to "take steps to amend its rules to conform to this Order" is also set aside." *Mayo v. Secondary Schools Activities Com'n*, 223 W.Va. 88, 92, 672 S.E.2d 224, 228 (W.Va. 2008).

The Circuit Court of Marshall County acknowledged that in *Mayo* this Court had considered the SSAC rule which mandates an additional suspension for a player ejected from a game, without the possibility of appeal, and had determined that the rule was not unconstitutional.

However, the Circuit Court determined that the *Mayo* decision did not hold that the rule in question was not in excess of statutory authority.

In reaching that conclusion the Circuit Court relied upon language in *State ex. Rel. WVSSAC v. Webster*, and in particular, the following:

While there are limited occasions where review is permitted, such as a well-founded challenge to a legislative rule promulgated by the SSAC

Relying on the quoted language from *Webster*, the Circuit Court concluded that, while in *Mayo* this Court had determined the rule at issue was not unconstitutional, this Court in *Mayo* did not consider whether the rule exceeded the grant of statutory authority. The Circuit Court then proceeded to conclude that the rule was in excess of statutory authority and therefore invalid, and issued a preliminary injunction prohibiting the SSAC from enforcing the mandatory suspension in this case.

While the Circuit Court relied upon language in the *Webster* decision as its authority to consider whether the rule in question exceeded the legislative grant of authority, the Circuit Court chose to disregard the language in *Webster* immediately following that portion of *Webster* quoted above.

More specifically, in *Webster* this Court stated:

Critically, no one has suggested that the SSAC rules, which permit suspensions for unsportsmanlike conduct and striking an opponent, are an unreasonable exercise of the legislative grant of rulemaking authority to the SSAC.

D. W. was ejected by a referee from a football game for kicking an opposing player in the face. SSAC rules mandate that D. W. be suspended an additional game because of his ejection, without the possibility of an appeal. The rule challenged in this case was considered by this Court in *Mayo v. Secondary Schools Activities Com'n.*, and the Court determined the rule to be valid and enforceable. And while in *Mayo* the Court opinion primarily addressed the constitutionality of the challenged rule, as that was to be basis of the challenge, this Court commented on the same rule in *State ex rel. WVSSAC v. Webster*, and clearly opined that the rule was a reasonable exercise of the legislative grant of rulemaking authority to the SSAC.

With all due respect, the ruling of the Circuit Court of Marshall County is directly contrary to two recent rulings of this Court on precisely the same issue.

II

A Writ of Prohibition is appropriate in light of the facts and circumstances of this case.

In syllabus point 4 of *State ex. Rel. Hoover v Berger*, this Court adopted the following guidelines when considering an application for a Writ of Prohibition:

4. In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or

issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight. 199 W. Va. 12, 483 S. E. 2nd 12(1996)

This case involves a high school football player who was ejected from a game for kicking an opponent in the face. Because of his ejection, SSAC rules mandate that the offending player be suspended for one additional game. With respect to whether the SSAC has other adequate means, clearly there is no other alternative that can produce relief prior to the end of high school football season. The TRO was issued on September 26, the preliminary injunction was issued on October 2, and as of this date the Court has not entered an Order memorializing that injunction. Clearly no remedy other than a writ of prohibition will be able to address this issue prior to the conclusion of high school football season.

With respect to whether the SSAC will be damaged or prejudiced in a way that is not correctable on appeal, the SSAC submits that literally thousands of West Virginia high school athletes engage in numerous athletic contests, secure in the knowledge that the rules are fairly and uniformly enforced throughout the state. To allow a high school football player who was ejected for kicking another player in the face to avoid the one game suspension mandated by the rules will serve to undermine the confidence of all student athletes in the fair and impartial administration of these rules.

With respect to whether the lower tribunal's order is clearly erroneous as a matter of law, as discussed above, the Circuit Court's ruling that the SSAC rule mandating an additional suspension for a high school football player ejected from a game for unsportsmanlike conduct, without the possibility of an appeal, is invalid because it exceeds the statutory authorization, is directly contrary to rulings of this Court announced in 2008 and in 2010 in *Mayo* and *Webster*.

The Circuit Court's permitting the Respondent's to proceed *ex parte* without any effort to provide notice to the adverse party, and without any recitation of efforts made to provide notice

to the adverse party might well be considered disregard for procedural law, and in particular Rule 65 of the Rules of Civil Procedure. Likewise, the ruling by the Circuit Court diametrically contrary to the holding of this Court in its recent decisions in *Mayo* and *Webster* arguably exhibits disregard for substantive law.

The SSAC does not contend that the lower tribunal's order is an oft-repeated error, and likewise does not contend that the lower tribunal's order raises new and important issues of law.

As this Court held in *State ex. Rel. Hoover v Berger*, all five factors need not be satisfied. Clearly most of the factors listed are present in this case, and in particular, the third factor - clear error as a matter of law - is present in this case and should be given substantial weight. The award of a Writ of Prohibition in this case is consistent with this Court's holding in *State ex. Rel. Hoover v Berger*.

CONCLUSION

The standard by which this Court determines whether to entertain and issue a writ of prohibition where it is claimed that a trial court exceeded its legitimate powers is set forth in syllabus point four of *State ex rel. Hoover v. Berger*, 109 W.Va. 12, 483 S.E.2d 12 (1996).

With respect to that standard, the SSAC submits:

1. Direct appeal does not provide the SSAC with an adequate means of obtaining relief; the high school football season will be completed, or substantially completed before this matter could be heard on appeal.

2. The quality of interscholastic sports (football) competition will be materially altered if the Circuit Court's injunction is permitted to stand; the SSAC and its member schools throughout West Virginia will be damaged in a manner that is not correctable on appeal.

3. Most importantly, the lower tribunal's order is clearly erroneous as a matter of law, for the reasons set forth in this petition.

WHEREFORE, your Petitioners pray that this petition be filed; that a rule do issue, directed to the Respondents, requiring them to show cause, if any they can, why a preemptory

Writ of Prohibition should not issue against them prohibiting enforcement of the Preliminary Injunction issued by the Circuit Court of Marshall County, David W. Hummel, Judge; that this matter be set down for a hearing in this Honorable Court as quickly as the parties might reasonably be accommodated; and for such other relief as to this Honorable Court seems meet and just, and as the nature of this case may require.

**Respectfully submitted,
STATE OF WEST VIRGINIA, ex rel,
THE WEST VIRGINIA SECONDARY SCHOOL
ACTIVITIES COMMISSION, DAVID COTTRELL,
President, MIKE ARBOGAST, Vice-President,
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ROBERT DUNLEVEY and RONALD SPENCER,
Members.**

By Counsel,


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Appeal No.

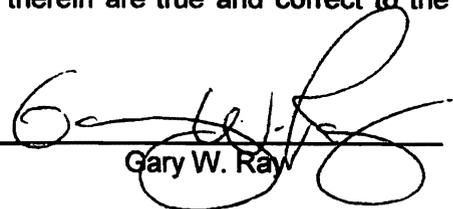
THE HONORABLE DAVID W. HUMMEL,
Judge of the Circuit Court of Marshall County, and
P.B.F., individually and as parent and legal
guardian of D. W., a minor.

RESPONDENTS.

VERIFICATION

State of West Virginia,
County of Wood, To Wit:

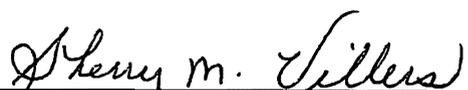
This day personally appeared before me, the undersigned authority, Gary W. Ray, Executive Director, West Virginia Secondary School Activities Commission, and first being duly sworn, upon his oath deposes and says: I have read the foregoing Petition for Writ of Prohibition and hereby certify that the facts and allegations contained therein are true and correct to the best of my knowledge and belief.



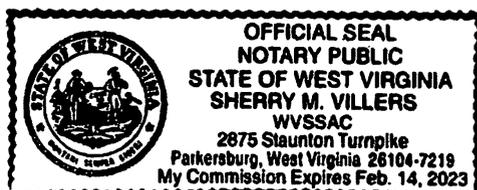
Gary W. Ray

Taken, subscribed and sworn to before me this 20 day of October, 2014.

My commission expires Feb. 14, 2023



Notary Public



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RESPONDENTS.

CERTIFICATE OF SERVICE

I, William R. Wooton, counsel for the Petitioners, do hereby certify that the foregoing
Petition for Writ of Prohibition was served via first class mail, postage prepaid,, this 20th day
October 2014, to the following:

The Honorable David W. Hummel
Judge of the Circuit Court of Marshall County
Marshall County Courthouse
600 Seventh Street
Moundsville, WV 26041

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William R. Wooton (WVSB #4139)