

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.
WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION,
Defendant Below, Petitioner,

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v.

Docket No.: 24-32
Lower Case No.: 23-P-111

THE HONORABLE JASON FRY,
JUDGE OF THE CIRCUIT COURT OF WAYNE COUNTY,
WEST VIRGINIA, and
TOMA GASAJ,

Plaintiffs Below, Respondents.

**RESPONSE TO PETITIONER'S
VERIFIED PETITION FOR WRIT OF PROHIBITION**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	5
ARGUMENT	5
A. The Lower Court did not exceed its legitimate power and/or commit error because it appropriately conducted a constitutional analysis of said rule as permitted under <i>Mayo</i> .	6
B. The Lower Court did not exceed its legitimate power and/or commit error when it granted a preliminary injunction as that relief was appropriate under the facts and circumstances of this case.	8
C. A Writ of Prohibition is Not Appropriate in this Case.	10
CONCLUSION AND RELIEF REQUESTED	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

DECISIONS OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

<i>Hinkle v. Black</i> , 164 W.Va. 112, 262 S.E.2d 744 (1979)	10
<i>Israel by Israel v. West Virginia Secondary Schools Activities Comm'n</i> , 182 W.Va. 454, 388 S.E.2d 480 (1989)	7
<i>Jefferson County Board of Education v. Jefferson County Education Association</i> , 183 W.Va. 15, 24, 393 S.E.2d 653, 662 (1990)	5, 6, 8
<i>Jones v. State Board of Education</i> , 218 W.Va. 52, 61, 622 S.E.2d 289 (2005) (applying Syl. Pt. 4, <i>Appalachian Power Co. v. State Tax Department</i> , 195 W.Va. 573, 466 S.E.2d 424 (1995))	7
<i>Mayo v. W. Va. Secondary Sch. Activities Comm'n</i> , 672 S.E.2d 224 (2008)	5, 6, 7
<i>State ex rel Suriano v. Gaughen</i> , 198 W.Va. 339, 480 S.E.2d 548 (1996)	10
<i>State ex rel. W. Va. Secondary Sch. Activities Comm'n v. Oakley</i> , 152 W. Va. 533, 164 S.E.2d 775 (1968)	6
<i>State ex rel. W. Va. Secondary Sch. Activities Comm'n v. Webster</i> , 228 W. Va. 75, 80, 717 S.E.2d 859, 864 (1968)	7
<i>Syl. Pt. 2, Woodall v. Laurita</i> , 156 W.Va. 707, 195 S.E.2d 717 (1973)	11

STATUTES AND REGULATIONS

W. Va. Code §53-1-1	10
W. Va. C.S.R. §127-2-2	4
W.Va. C.S.R. §127-2-7	4
W. Va. C.S.R. §127-2-8	4

QUESTIONS PRESENTED

1. Did the Circuit Court of Wayne County, West Virginia exceed its legitimate power and therefore, commit error when it found that a Circuit Court may set aside the manner in which the WVSSAC promulgated and applied its rules?

2. Did the Circuit Court of Wayne County, West Virginia exceed its legitimate power and, therefore, commit error when it issued a preliminary injunction in this matter against the WVSSAC in light of the applicable law and facts?

3. Is a Writ of Prohibition appropriate in light of the facts and circumstances of this case?

STATEMENT OF THE CASE

Toma Gasaj is an eighteen-year-old adult who is an American citizen. He was born in Detroit, Michigan and has a birth certificate issued from that state. He has a Social Security card as well as a passport showing he is an American citizen. Shortly after his birth, Toma moved with his mother, Marija Dujij, who is a Croatian citizen, to her native country. He was raised there but has always maintained his U.S. citizenship. Toma's father still resides in Detroit; however, Toma has never resided with his father.

Toma came to West Virginia in the summer of 2023 and began living with a local family. He intended to enroll at Spring Valley High School for his senior year and play varsity basketball for the men's basketball team. In August 2023, there were issues raised to the school regarding potential eligibility issues for Toma, so the athletic director at Spring Valley contacted the SSAC via email on August 10, 2023 regarding this issue. App. p. 67. In that athletic director's email, the SSAC was made aware that Toma was living with a local family, that his mother was still living in Croatia, and that his father was still living in Michigan. *Id.* On the following day, the SSAC

responded that Toma would be ineligible under the SSAC's Residence/Transfer Rule.¹ On September 13, 2023, Spring Valley's principal sent a letter to the SSAC requesting a ruling that Toma be eligible under the SSAC's Waiver Rule.² App. p. 18. On September 14, 2023, the athletic director provided the requested information for Toma's request for eligibility. App. p. 71.

By letter on October 9, 2023, the SSAC declared Toma ineligible under the Residence Transfer Rule (more specifically, subsection j, which declares that "international students are eligible to participate in junior varsity athletics only). App. p. 20. The SSAC indicated in this letter that this was the only SSAC rule applicable to Toma's case. *Id.* The SSAC advised Toma of his administrative appeal rights, including a hearing on November 16, 2023 in front of the SSAC's Board of Directors, which was after the varsity basketball season started. *Id.* Toma appeared in front of the Board of Directors at the November 16th hearing, and on the next day via email, he was deemed to be eligible under the Waiver Rule. App. p. 27. The SSAC sent Toma a "Student Exception Contract" to sign in order to play varsity basketball. App. p. 28. Interestingly, however, in the same email, the SSAC attached another letter stating that Toma was ineligible based upon the Adoption/Guardianship Rule³, despite no changes in circumstances since the August 10th email from the athletic director to the SSAC. App. p. 29. Toma was again advised that he could appeal this decision to the SSAC's Board of Directors and have a hearing on December 20, 2023. *Id.* Toma filed yet another written appeal, made substantially the same arguments, and again requested a waiver under W. Va. C.S.R. §127-2-2.

Toma again appeared in front of the SSAC's Board of Directors on December 20th, which was a month into the varsity basketball season. However, Toma had been unable to play up to that

¹ W.Va. C.S.R. §127-2-7

² W.Va. C.S.R. §127-2-2

³ W. Va. C.S.R. §127-2-8

point due to a medical issue. Regardless, Toma made the same arguments he did at the November 16th hearing and requested a waiver under the Waiver Rule. The SSAC denied his request by letter dated December 21, 2023 and advised Toma of his right to appeal the decision to the SSAC's Review Board. App. p. 35. He was verbally advised at the hearing on December 20th that if his request was denied, he could have a hearing in front of the Review Board in January 2024.

Toma retained counsel and filed a Petition for Injunctive Relief in the Circuit Court of Wayne County on December 26, 2023. App. p. 8. In said petition, Toma sought an injunction in the lower court based on the Adoption/Guardianship Rule being arbitrary and capricious. Furthermore, he argued that he could meet the four-factor test for a preliminary injunction as stated in *Jefferson County Board of Education v. Jefferson County Education Association*, 183 W.Va. 15, 24, 393 S.E.2d 653, 662 (1990). The SSAC filed a written response in opposition to the petition on or about January 5, 2024. App. p. 42. A hearing was held in the lower court on January 9, 2024, and the lower court granted a preliminary injunction based on the subject SSAC rule being arbitrary and capricious and the four-factor preliminary injunction test being met by the Plaintiff. App. p. 87. This petition follows.

IV. SUMMARY OF ARGUMENT

The Petitioner requests a writ of prohibition by arguing that the lower court exceeded its powers by invading in the province of the SSAC's authority to promulgate and apply its rules. In essence, the Petitioner argues that the lower court substituted its own judgment in place of the SSAC and declared Toma to be eligible. The Petitioner's arguments ignore the authority granted by this Honorable Court to circuit courts as described in *Mayo v. W. Va. Secondary Sch. Activities Comm'n*, 672 S.E.2d 224 (2008), which permits challenges of SSAC rules on grounds that the rules exceed constitutional or statutory authority and for being arbitrary and capricious. That is

precisely what happened in the lower court. Toma did not challenge the manner in which the SSAC promulgated or applied its rules, but instead challenged the constitutionality of the rule.

The lower court also properly analyzed the four-factor test from *Jefferson County Board of Education v. Jefferson County Education Association*, 183 W.Va. 15, 24, 393 S.E.2d 653, 662 (1990) and made detailed findings at both the hearing as well as in its written order. More specifically, the lower court found that the subject SSAC rule is discriminatory to Toma and that it is arbitrary and capricious and not rationally related to a legitimate state purpose.

The lower court's decision was correct considering the facts and circumstances in this case. The lower court clearly had jurisdiction to determine whether the SSAC's rule was arbitrary and capricious. This is the precise holding in *Mayo*. No person, board of directors, or board of review at the SSAC can make any such determination – only a court of law can. The lower court also did not clearly exceed its legitimate power in making this finding because it addressed the facts and circumstances through a constitutional analysis.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Counsel believes that oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure is appropriate in this matter as this case involves constitutional questions regarding the validity of the SSAC's legislative rules.

VII. ARGUMENT

A. The Lower Court Did Not Exceed its Legitimate Power and/or Commit Error Because it Appropriately Conducted a Constitutional Analysis of Said Rule as Permitted Under Mayo.

“As a general rule courts should not interfere with the internal affairs of school activities commissions or associations.” *State ex rel. W. Va. Secondary Sch. Activities Comm'n v. Oakley*, 152 W. Va. 533, 164 S.E.2d 775 (1968). Circuit courts are not permitted to “second guess the

manner in which the SSAC applies its rules.” *State ex rel. W. Va. Secondary Sch. Activities Comm’n v. Webster*, 228 W. Va. 75, 80, 717 S.E.2d 859, 864 (1968).

However, there are limitations on the SSAC’s power with respect to its rules. SSAC rules are subject to challenge, like all properly promulgated legislative rules, on grounds that the rules exceed constitutional or statutory authority and for being arbitrary and capricious. *Jones v. State Board of Education*, 218 W.Va. 52, 61, 622 S.E.2d 289 (2005) (applying Syl. Pt. 4, *Appalachian Power Co. v. State Tax Department*, 195 W.Va. 573, 466 S.E.2d 424 (1995)); *Mayo v. W. Va. Secondary Sch. Activities Comm’n*, 672 S.E.2d 224 (2008). Furthermore, equal protection challenges to SSAC rules are permitted. *Israel by Israel v. West Virginia Secondary Schools Activities Comm’n*, 182 W.Va. 454, 388 S.E.2d 480 (1989).

In this case, there is no dispute that the SSAC has a right to reasonably promulgate, apply and enforce its own rules. However, when the underlying rule is unconstitutional, student athletes are permitted to make constitutional challenges in circuit courts. The entirety of the Petitioner’s petition ignores this Honorable Court’s holding in *Mayo*. The lower court properly analyzed the arguments of the parties and based its decision on the constitutionality of the rule. App. pp. 119-120. The lower court found that the rule was arbitrary and capricious and not rationally related to a legitimate state purpose. It specifically found that the Adoption/Guardianship Rule was arbitrary and capricious “because it does not give consideration to his age of majority” as well as his United States citizenship. App. p. 119. The lower court found that Toma was making a constitutional challenge to the rule and was not required to proceed to the SSAC’s Board of Review. At no point did the lower court substitute its own judgment for the judgment of the SSAC, which, if that did happen, would not be permissible. It is clear that the lower court did not exceed its legitimate power in this case, and thus, the Petitioner’s petition should be denied.

B. The Lower Court Did Not Exceed its Legitimate Power and/or Commit Error When it Granted a Preliminary Injunction as that Relief was Appropriate Under the Facts and Circumstances of this Case.

The test for a preliminary injunction includes four factors: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with the injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest. *Jefferson County Board of Education v. Jefferson County Education Association*, 183 W.Va. 15, 24, 393 S.E.2d 653, 662 (1990).

In this case, the lower court did not exceed its legitimate powers when it granted a preliminary injunction and enjoined the SSAC from enforcing its previous decision that Toma was ineligible for the 2023-2024 high school basketball season. The Petitioner argues that Toma did not exhaust his administrative remedies. Toma disagrees. He properly followed the administrative appeal process on not one occasion but on two occasions. He presented to Parkersburg, West Virginia, which is approximately two hours from his host family's home, on two occasions. Toma presented the same arguments to the SSAC's Board of Directors on two occasions – first on November 16, 2023, after which he was deemed eligible for one day before the SSAC ruled him ineligible under a separate rule after stating that the original rule for which he was ineligible was the only SSAC rule that applied to his case, and the second time on December 20, 2023. The only reasonable explanation for the SSAC's actions in this case is that it did not want Toma to be eligible no matter what, even though he is an American adult and foreign students are permitted to play varsity sports at Spring Valley High School.

The lower court properly considered the four-factor preliminary injunctive relief test and weighed those in favor of Toma. It is undisputed that at the time of the lower court's ruling, Toma was a senior in his last year of high school. This is his last and only opportunity to play high school

basketball in the United States, and he had already missed at least two games due to the constitutionality of the Adoption/Guardianship Rule. Without the lower court's ruling, Toma, who had already suffered irreparable harm, would suffer additional irreparable harm if forced to present to the SSAC's Board of Review in January 2024. The lower court further found that irreparable harm to Toma could result in the form of his future prospect of college athletics and the resulting financial ramifications from that. App. p. 120. The SSAC provided no evidence or arguments to the lower court to dispute that Toma would be irreparably harmed without the preliminary injunction being granted.

With regard to harm to the SSAC, the lower court correctly found that there would be minimal harm to the SSAC if the preliminary injunction was granted. The SSAC argues in its petition that it has recently experienced an onslaught of efforts by student athletes to disregard and circumvent the rulings of the SSAC with the aid of the Circuit Courts of West Virginia. The SSAC had not pointed to any evidence that any of those previous cases harmed the SSAC or any other student athlete in West Virginia. All other high school varsity sporting season has continued and completed without effect, except for the COVID pandemic. Simply put, there is no evidence that the SSAC was or would be harmed by the granting of the preliminary injunction. The SSAC argues that it would be harmed because an ineligible player would play against other teams and further, players on his own team would suffer decreased playing time. The SSAC's argument fails to consider that if the rule itself was not arbitrary and capricious, Toma would not be ineligible.

With regard to the likelihood of success, the lower court correctly determined that Toma was likely to succeed on the merits. The SSAC argues that absent a finding that the rule itself is arbitrary and capricious then his claims fail. The lower court plainly ruled that the rule was arbitrary and capricious. This finding is specifically made in both the written order (App. p. 88) as

well as verbally from the bench (App. p. 119). The lower court also made detailed findings concerning the facts and conclusions of law in support of its decision.

Lastly, with regard to public harm, the lower court correctly found that there would be minimal harm to the public in granting the preliminary injunction. The lower court actually found that there would be benefit to the public because an American citizen would be permitted to play high school varsity athletics. As such, the lower court gave its rationale for its finding which was certainly reasonable under the facts and circumstances of this case.

C. A Writ of Prohibition is Not Appropriate in this Case.

West Virginia Code §53-1-1 states that a writ of prohibition lies as a matter of right in cases in which a lower court does not have subject matter jurisdiction or, having such jurisdiction, exceeds its legitimate power. W. Va. Code §53-1-1. A writ of prohibition is an extraordinary remedy and should only be issued for extraordinary causes. *State ex rel Suriano v. Gaughen*, 198 W.Va. 339, 480 S.E.2d 548 (1996).

In determining whether to issue a writ of prohibition, “this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

"Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only

if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue." *Syl. Pt. 2, Woodall v. Laurita*, 156 W.Va. 707, 195 S.E.2d 717 (1973).

Here, an extraordinary remedy is not appropriate as this is not an extraordinary cause. The SSAC has other potential remedies, including a final hearing in the lower court as well as an appeal to this Honorable Court. Furthermore, even if those potential remedies are not practicable given the varsity basketball season ending in approximately three to four weeks, this Honorable Court must still make a finding that the lower court's abuse of power by granting the preliminary injunction was so flagrant and violative of the SSAC's rights that a writ of prohibition is appropriate. The facts and circumstances of this case do not support any such finding. The only party that has had his rights violated is Toma Gasaj, which has been remedied, in part, by the lower court's decision that permitted him to play varsity basketball in his last year of high school.

VIII. CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for all the reasons set forth above, the Respondent prays that this Honorable Court affirm the lower court's decision; to deny the Petitioner's Petition for Writ of Prohibition; and to grant any and all further relief that it deems necessary.

TOMA GASAJ

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CERTIFICATE OF SERVICE

I, Juston H. Moore, Esq., hereby certify that on the 12th day of February, 2024, I served a true and correct copy of the Response to Petitioner’s Verified Petition for Writ of Prohibition on the following:

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