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No. 072942

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

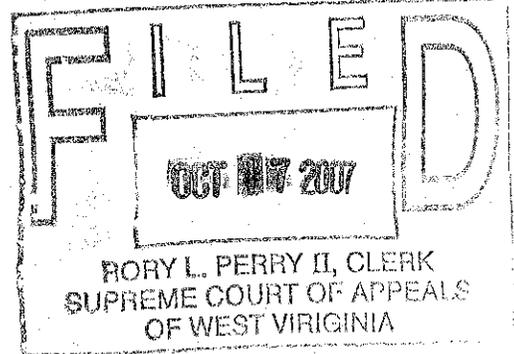
**O. J. MAYO,**

**Plaintiff below/Respondent herein,**

**v.**

**WEST VIRGINIA SECONDARY  
SCHOOL ACTIVITIES COMMISSION,**

**Defendant below/Petitioner herein.**



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**WEST VIRGINIA BOARD OF EDUCATION'S  
BRIEF AS AN AMICUS CURIAE**

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**O. J. MAYO,**

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**WEST VIRGINIA BOARD OF EDUCATION'S  
BRIEF AS AN AMICUS CURIAE**

**I.**

**INTRODUCTION**

Comes now the West Virginia Board of Education, by counsel, Kelli D. Talbott, Deputy Attorney General and Anthony D. Eates II, Assistant Attorney General, and conditionally submits this Brief As An Amicus Curiae with its Motion for Leave to File Brief As An Amicus Curiae

The West Virginia Board of Education has in interest in the appeal filed by the West Virginia Secondary School Activities Commission (hereinafter WVSSAC) in this matter inasmuch as pursuant to Article XII, § 2 of the West Virginia Constitution, the general supervision of the free schools of the State of West Virginia is vested in the West Virginia Board of Education. In addition, pursuant to West Virginia Code § 18-2-25, the Legislature has authorized the WVSSAC to regulate and supervise extracurricular activities in the public schools. However, the WVSSAC's regulation

of such extracurricular activities is subject to the West Virginia Board of Education's authority of general supervision pursuant to Article XII, § 2 of the West Virginia Constitution.

In fact, pursuant to West Virginia Code § 18-2-25, the rules and regulations promulgated by the WVSSAC are subject to final approval by the West Virginia Board of Education. Several of the WVSSAC's rules are the subject of this appeal before the Court. An amicus curiae brief by the West Virginia Board of Education is desirable in this matter because of the Board's interest in participating in the proceedings before this Court wherein rules and regulations that it approves and that its delegee, the WVSSAC, implements and enforces will be the subject of an adjudication.

## II.

### ARGUMENT

**A. THE IMPOSITION OF A TWO-GAME SUSPENSION  
STEMMING FROM A STUDENT-ATHLETE'S EJECTION  
FROM A BASKETBALL GAME WITHOUT A PRIOR  
ADMINISTRATIVE HEARING IS NOT A VIOLATION OF  
DUE PROCESS BECAUSE PARTICIPATION IN INTER-  
SCHOLASTICS ATHLETICS OR OTHER NON-ACADEMIC  
EXTRACURRICULAR ACTIVITIES DOES NOT GIVE RISE  
TO A PROTECTED LIBERTY OR PROPERTY INTEREST.**

As stated in the WVSSAC's Petition for Appeal, the Respondent was ejected from a January 26, 2007 basketball game after receiving his second technical foul. Consistent with WVSSAC Rule 127 C.S.R. 4 § 3.7.3, based on the ejection, the Respondent was suspended from playing in two additional games. WVSSAC Rule 127 C.S.R. 3 § 15.3 provides that "[t]he protest of a contest or ejection will not be allowed." The Respondent claimed that the WVSSAC violated his due process rights by failing to provide an administrative hearing prior to imposing the two-game suspension.

The Circuit Court agreed with the Respondent, holding as follows in Paragraphs 14 and 15 of its May 21, 2007 Amended Order:

14. Rule 127-3-15.3 is inequitable and violates the doctrine of fundamental fairness. 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 multiple-contest suspension against the limited resources necessary to ensure equity and an opportunity for the student-athlete to be heard results in this Court's finding that the appeal process is indeed lacking in fundamental fairness.

15. The Court finds that the WVSSAC's failure to establish an administrative review process to address material, substantive issues prior to imposition of a multiple-game suspension is arbitrary and capricious, and accordingly, held null and void and is hereby struck down.

The Circuit Court's Amended Order is flatly inconsistent with the opinion of this Court in *Bailey v. Truby*, 321 S.E.2d 302 (W. Va. 1984). In *Bailey*, this Court examined, among other things, the constitutionality of a Kanawha County Board of Education rule that prohibited students from engaging in extracurricular activities if the student received a failing grade in any subject area. *Id.* at 313. This requirement was in addition to the State Board of Education's requirement that the student maintain a grade point average of at least 2.0. *Id.*

In *Bailey*, a student at Saint Albans High School maintained the requisite 2.0 grade point average, but received a failing grade in English, making him ineligible for the basketball team. *Id.* The student claimed that Kanawha County's policy violated his due process rights under the state and federal constitutions. *Id.* at 314.

This Court began its analysis by setting forth the rule from *Clarke v. West Virginia Board of Regents*, 279 S.E.2d 169, 175 (W. Va. 1981), which states: "The threshold question in any inquiry into a claim that an individual has been denied procedural due process is whether the interest

asserted by the individual rises to the level of a 'property' or 'liberty' interest protected by Article III, Section 10 of our constitution." This Court in *Bailey* found that an overwhelming majority of decisions from other jurisdictions on the same issue declined to extend due process protections to participation in interscholastic athletics or other extracurricular activities. *Bailey* at 314. This Court sided with this overwhelming majority of courts, holding that:

Because participation in interscholastic athletics or other nonacademic extracurricular activities does not rise to the level of a constitutionally protected 'property' or liberty' interest, the appellant does not meet the threshold requirement under *Clarke, supra*, and therefore is not entitled to any procedural due process protections.

*Id.* at 316.

This Court in *Bailey* also addressed the question of whether a student's right to a thorough and efficient education under Article XII, Section 1 of the West Virginia Constitution creates a fundamental right to participate in extracurricular activities. The Court drew a distinction between academic and nonacademic extracurricular activities, holding that:

Participation in nonacademic extracurricular activities, including interscholastic athletics, does not rise to the level of a fundamental or constitutional right under article XII, § 1 of the West Virginia Constitution. Therefore, its regulation need only be rationally related to legitimate purpose.

*Id.* at 318.

In the present case, the Respondent has no property or liberty interest in playing high school basketball. In addition, his participation on the basketball team is not a fundamental right. Accordingly, the WVSSAC is not required to provide the Respondent with due process prior to imposing the two-game suspension. The Circuit Court's ruling in this regard should be reversed.

**B. THE CIRCUIT COURT ERRED IN ADDRESSING WVSSAC RULE 127 C.S.R. 3 § 8.5 ("THE FORFEITURE RULE") BECAUSE APPLICATION OF THE RULE WAS NEVER AN ISSUE IN THE CASE.**

The "Forfeiture Rule" states that:

8.5 If a student is ineligible according to WVSSAC rules but is permitted to participate in interscholastic competition contrary to such WVSSAC rules but in accordance with the terms of a court restraining order or injunction and said order or injunction is subsequently vacated, stayed, reversed or finally determined by the courts that injunctive relief is/was not justified, any one of the following actions may be taken in the interest of fairness or restitution to the competing schools.

8.5.1. Require that individual or team and performance records achieved during participation by such ineligible student shall be vacated or stricken.

8.5.2. Require that team or individual victories shall be forfeited to opponent(s).

8.5.3. Require that team or individual awards earned by such individual or team be returned to the Commission.

127 C.S.R. 3 § 8.5.

Despite the fact that neither party raised the "Forfeiture Rule" as an issue in this case, the Circuit Court addressed the rule *sua sponte* in paragraphs 16, 17 and 28 of its Amended Order, holding as follows:

16. Although not mentioned in the Plaintiff's Complaint, the Court expressed deep concern about the possibility of Huntington High School being required under Rule 127-3-8 to forfeit basketball games in which the Plaintiff participated in pursuant to the injunction. . . .

18. The threat of forfeiture of contests in cases where the aggrieved parties seek remedy in the courts has a "chilling effect" on the constitutional mandate that the courts shall be open to anyone to seek a remedy by due course of law. Although this Plaintiff has secured the agreement of the WVSSAC not to forfeit contests in which he participated pursuant to the injunction, there is no prohibition against the WVSSAC demanding the forfeiture of contests participated in by the next aggrieved party who seeks his right to a remedy in due course of law in the courts. The final

straw for this rule is that the legislative rule in question is arbitrary and capricious. Jones v. W. Va. Board of Education, 218 W. Va. 52, 622 S.E.2d 289 (2005).

28. Therefore, since it is foreseeable that the issue of the possible application of the forfeiture rule to other parties who seek a remedy in court will arise again, the court finds that the question remains justiciable for future guidance and is appropriate for the Court to rule on this issue. Israel by Israel v. West Virginia Secondary Schools Activities Commission, 182 W. Va. 454, 388 S.E.2d 480 (1989).

As the WVSSAC's Petition for Appeal points out, there is no evidentiary record before the Circuit Court regarding the "Forfeiture Rule." The parties did not raise the issue in their pleadings or in argument. Given the lack of a record, it is difficult to understand how the Circuit Court found that future suspended student-athletes would be "chilled" from seeking injunctive relief to challenge the WVSSAC's invocation of the rule. In fact, aggrieved parties can challenge the forfeiture and consequent change to the win/loss record at the time the WVSSAC chooses to invoke the rule. There was no reason for the Circuit Court to have addressed the issue in the present case in the hypothetical.

In addition, the Circuit Court cited *Israel* as justification for addressing the "Forfeiture Rule." However, *Israel* is a mootness case - it does not stand for the proposition that a court may rule upon issues that are not before it. But even applying the mootness factors set forth in *Israel*, the Circuit Court erred in finding the case justiciable. Whether or not a high school basketball team is forced to forfeit wins based on application of the "Forfeiture Rule" is not an issue of "great public interest", nor is it an issue that escapes review "because of its fleeting and determinate nature." Accordingly, the Circuit Court's reliance on *Israel* as a basis for addressing the "Forfeiture Rule" is in error.

**C. ASSUMING ARGUENDO THAT IT WAS APPROPRIATE FOR THE CIRCUIT COURT TO ADDRESS THE "FORFEITURE RULE," THE CIRCUIT COURT ERRED IN STRIKING DOWN THE RULE AS UNCONSTITUTIONAL.**

In paragraph 21 of its Amended Order, the Circuit Court held:

21. Therefore, Rule 127-3-8.5 is struck down as unconstitutional except as it applies to restraining orders or injunctions that are specifically found by a court not to have been justified. . . .

By its terms, the "Forfeiture Rule" is aimed at achieving a just and fair result in situations where an otherwise ineligible student-athlete obtains a restraining order or an injunction permitting him to play and then that order or injunction is subsequently "vacated, stayed, reversed or finally determined by the courts that injunctive relief is/was not justified." The rule protects the record books. The rule protects the opponents of ineligible student-athletes. Without the "Forfeiture Rule," an ineligible student-athlete could completely undermine the WVSSAC's eligibility rules by simply obtaining an *ex parte* restraining order.

The Circuit Court draws a distinction between injunctions that are subsequently "vacated, stayed or reversed" from those that are determined to be "not justified" - the former being unconstitutional, the latter being permissible. The Circuit Court, without any evidentiary record on which to base its conclusion, found that the WVSSAC could come back after a *justified* injunction was vacated, due to the season ending or the student-athlete's graduation, and demand a forfeiture of games played during the injunction. The Circuit Court's conclusion would be understandable if the record revealed that the WVSSAC had taken such action in the past. However, such a far-fetched possibility should not render the rule unconstitutional. As the WVSSAC's Petition for Appeal states, the "Forfeiture Rule" "has always been interpreted and applied by the WVSSAC in

a manner consistent with the language contained in the Court's Order." (Pet. for Appeal at 11.)

Therefore, the Circuit Court's holding that the "Forfeiture Rule" is unconstitutional should be reversed.

**D. THE CIRCUIT COURT ERRED IN AWARDING ATTORNEY FEES TO THE RESPONDENT.**

The award of attorney fees to the Respondent appears to hinge upon the Circuit Court's finding that the WVSSAC is a state agency or instrumentality of state government. However, the Circuit Court's ruling in this regard ignores the fundamental tenet, known as the "American Rule," which holds that each litigant bears his or her own attorney fees absent a contrary rule of court or express statutory or contractual authority for reimbursement. This tenet, which the West Virginia Supreme Court has adopted as the law of this State, *see, e.g., Syl. Pt. 2, Sally-Mike Properties v. Yokum*, 365 S.E.2d 246 (W. Va. 1986), does not automatically change just because one of the litigants in a case is or is not an agency of the state.

O. J. Mayo brought a petition for injunction in the Circuit Court of Cabell County. There are no rules of court or statutes or contractual provisions which provide for reimbursement of attorney fees to prevailing parties in injunctive proceedings, regardless of whether the non-prevailing party is a state agency, a private citizen, a private organization, a quasi-public organization or any other person or entity.

The Circuit Court's May 21, 2007 Amended Order cites *Nelson v. West Virginia Public Employees Insurance Board*, 300 S.E.2d 86 (W. Va. 1982) and *State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection*, 458 S.E.2d 88 (W. Va. 1995) as supportive of its award of attorney fees to the Respondent. However, both cases were

instituted by the plaintiffs using the vehicle of mandamus. It is well-settled law in West Virginia that the prevailing party *in a mandamus proceeding* may be awarded attorney fees. In *Highlands Conservancy*, the Court held:

[A]ttorney's fees may be awarded to a prevailing petitioner *in a mandamus action* in two general contexts: (1) where a public official has deliberately and knowingly refused to exercise a clear legal duty . . . and (2) where a public official has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command . . . .

In the first context, a presumption exists in favor of an award of attorney's fees; unless extraordinary circumstances indicate an award would be inappropriate, attorney's fees will be allowed. In the second context, there is no presumption in favor of an award of attorney's fees. Rather, the court will weigh the following factors to determine whether it would be fairer to leave the costs of litigation with the private litigant or impose them on the taxpayers: (a) the relative clarity by which the legal duty was established; (b) whether the ruling promoted the general public interest or merely protected the private interest of the petitioner or a small group of individuals; and (c) whether the petitioner has adequate financial resources such that the petitioner can afford to protect his or her own interests in court and as between the government and petitioner.

*Id.* at 92 (emphasis added).

The Respondent's action against the WVSSAC was not a mandamus proceeding, it was an injunctive proceeding. Therefore, in applying *Nelson*, and particularly *Highlands Conservancy*, the Circuit Court grafted the court rule that applies only to the award of attorney fees in mandamus proceedings onto injunctive proceedings. This Court has never held that its attorney fee rule for mandamus applies to injunctive proceedings and indeed, the Circuit Court cited no authority which would permit the application of the mandamus rule to an injunction. There simply is no fee-shifting rule in statute, court rule or decision, or contract that applies to injunctive proceedings, such as that brought by the Respondent, O. J. Mayo.

Assuming arguendo, however, that this Court would find that: a) the WVSSAC is an agency or instrumentality of the state to which the *Highlands Conservancy* analysis applies; and, b) finds that the mandamus rule on attorney fees set forth in *Highlands Conservancy* applies to injunctive proceedings, then the question arises as to how it is that the facts and circumstances of this case warranted an award of attorney fees. The Circuit Court did not find that the WVSSAC deliberately and knowingly refused to exercise some clear legal duty that it had. Indeed, the whole crux of Respondent's case before the Circuit Court was that the WVSSAC had applied its rules to Mr. Mayo's conduct and that Mr. Mayo did not believe that the rules were just or fair.

Moreover, the Circuit Court did not apply the test that this Court set forth in *Highlands Conservancy* for instances wherein there is no willful and knowing disregard of a legal command. The Circuit Court did not weigh any of the factors that this Court determined should be weighed in determining whether or not a government agency should bear the petitioner's costs of litigation in instances where the agency failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command. The Circuit Court merely states that because the "Forfeiture Rule" is unconstitutional and the WVSSAC has not enacted "reasonable" rules regarding the forfeiture issue, such is "sufficient to award to the [Respondent] his court costs and reasonable attorneys' fees." (5/21/07 Amended Order.)

This conclusory statement by the Circuit Court is not sufficient to support an award of attorney fees in this case. It is disingenuous, at best, to suggest that the WVSSAC could have forecasted that its "Forfeiture Rule" would be determined to be unconstitutional in a case in which such rule was not raised as an issue by either party. Therefore, although the Circuit Court may have

ultimately decided that such rule was unconstitutional and that the Respondent had a corresponding right to relief, such a decision does not automatically pave the way for an award of attorney fees:

[T]he showing of a "clear right" to a writ of mandamus "does not automatically shift a petitioner's costs and attorneys' fees onto the public officer involved. Although some disingenuous hindsight rule would be easy to apply, accurate predications of court decisions are not a requirement for" public officers.

*Highlands Conservancy* at 91 (quoting *State ex rel. McGraw v. Zakaib*, 451 S.E.2d 761, 764 (W. Va. 1994)).

**E. THE CIRCUIT COURT ERRED IN DETERMINING THAT THE WVSSAC IS AN AGENCY OR INSTRUMENTALITY OF THE STATE.**

As stated above, the Circuit Court's determination that the WVSSAC is an agency or instrumentality of the State was not necessary to an adjudication of the issues before it. However, assuming arguendo that there was some need to decide whether or not the WVSSAC is a state agency or instrumentality, then the Circuit Court erred in its ruling.

In *Blower v. West Virginia Educational Broadcasting Authority*, 389 S.E.2d 739 (W. Va. 1990), this Court established a test for examining the issue of whether an organization is an agency of the state.

Thus, from our prior cases determining whether a particular organization is a state agency, we have examined its legislative framework. In particular, we look to see if its powers are substantially created by the legislature, and whether its governing board's composition is prescribed by the legislature. Other significant factors are whether it can operate on a statewide basis, whether it is financially dependent on public funds, and whether it is required to deposit its funds in the state treasury.

*Id.* at 741.

As noted by the WVSSAC in its Petition for Appeal, the WVSSAC pre-existed any mention of it in a statute. The WVSSAC was established in 1916 as an unincorporated association, long

before the Legislature determined to enact a statute in 1967 which recognized its existence. This Court recognized this fact in *Manchin v. West Virginia Secondary School Activities Commission*, 364 S.E.2d 25 (W. Va. 1987):

The Court, in *State ex rel. West Virginia Secondary School Activities Commission v. Oakley*, 152 W. Va. 533, 164 S.E.2d 775 (1968), noted that the incorporation of the SSAC (for a brief period of time) was accomplished by formation under the general corporation law, not by the “hereby established language of *W. Va. Code, 18-2-25* [1967]. The SSAC was already established as a corporation when the statute was enacted. Therefore, the statute only accorded statutory recognition to the preexistent organization. *Id.* 152 W. Va. at 535, 537, 164 S.E.2d at 777, 778.

*Manchin* at 28 n. 9.

This Court has also addressed another issue that the *Blower* test found to be important. In *Manchin*, this Court examined the funding of the WVSSAC and held that the funds of the organization are “quasi-public” funds which are not required to be deposited in the state treasury. In fact, the WVSSAC receives no legislative appropriation to fund its operations. Instead, the WVSSAC relies upon the receipt of dues from member schools and event fees for its support.

The only item of the *Blower* test that the WVSSAC appears to meet is the “statewide” operation prong. Of course, because a large number of state schools have chosen to become members of the WVSSAC, it operates statewide. However, as discussed above, it does not meet the other items listed in *Blower* which would point toward a conclusion that the WVSSAC is an agency or instrumentality of the state.

The Circuit Court failed to undertake any of the analysis set forth in *Blower* in deciding that the WVSSAC is a state agency or instrumentality. Instead, the Circuit Court relied on dicta in *Hamilton v. West Virginia Secondary Schools Activities Commission*, 386 S.E.2d 656, 658 (W. Va.

1989). This Court's decision in *Hamilton*, however, was not dependent upon a determination of the WVSSAC's status as a state agency. Instead, *Hamilton* dealt with whether or not a rule that the WVSSAC had enacted a rule to prevent "red-shirting" was reasonably applied to a student who was held back in school for legitimate academic reasons. Merely because this Court may have referred in passing to the WVSSAC in *Hamilton* as "a statutorily-created agency of government," *Hamilton* at 658, does not mean, as the Circuit Court would have it, that this Court has definitively decided that the WVSSAC is a state agency. To the contrary, to the extent that this Court has addressed aspects of this issue in the past, it has decided that the WVSSAC does not bear the attributes of a state agency.

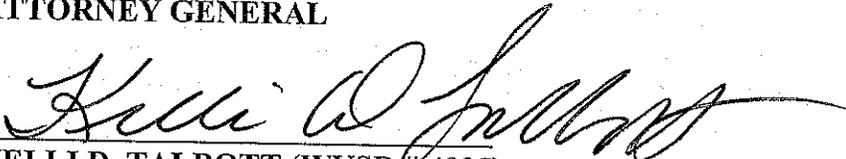
III.

CONCLUSION

WHEREFORE, based upon the foregoing, the West Virginia Board of Education respectfully requests that this Court grant the WVSSAC's Petition for Appeal in this case.

**WEST VIRGINIA BOARD OF EDUCATION**  
By counsel

**DARRELL V. McGRAW, JR.**  
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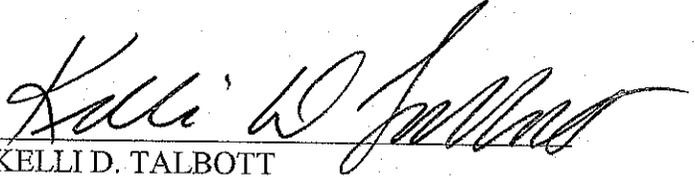
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CERTIFICATE OF SERVICE

I, Kelli D. Talbott, Deputy Attorney General for the State of West Virginia, do hereby certify that true and exact copies of the foregoing West Virginia Board of Education's Motion for Leave to File Brief as an Amicus Curiae and West Virginia Board of Education's Brief as an Amicus Curiae was served by depositing the same postage prepaid in the United States Mail, this 17<sup>th</sup> day of October, 2007, addressed as follows:

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