

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

No.: 33838

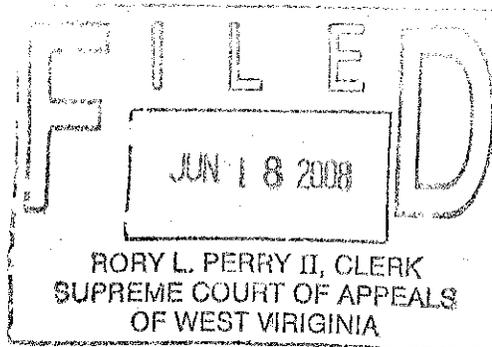
O.J. MAYO,

Appellee – Plaintiff below,

v.

WEST VIRGINIA SECONDARY  
SCHOOL ACTIVITIES COMMISSION,

Appellant – Defendant below.



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O.J. MAYO'S RESPONSE TO BRIEF OF APPELLANT WEST VIRGINIA  
SECONDARY SCHOOL ACTIVITIES COMMISSION

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**STATEMENT OF FACTS**

The facts set forth in Appellant's brief are not in dispute. However, it is submitted that additional facts are relevant.

Since the Circuit Court Order was entered, O.J. Mayo has graduated from Huntington High School and completed his freshman year, as a dean's list student, at the University of Southern California. Mayo has declared himself available for the National Basketball Association's 2008 Draft and has entered into a contract with a licensed sports agent thereby relinquishing his amateur status. Mayo bears no ill-will toward former Executive Secretary Michael Hayden, Executive Secretary Gary Ray nor any other party participating in these proceedings.

Appellee urges the Honorable Justices to examine the Record by viewing the videotapes of the Huntington vs. Capital boys high school basketball contest which serves as the genesis of this litigation.

Videotape recordings depicting the events of January 26, 2007, are available to be reviewed in the Record. These films will support the contention that a technical foul for "taunting another player" was mistakenly assessed Mayo when no "taunting" occurred. The referee misapplied the official rules and assessed Mayo with an individual technical foul instead of calling "delay of game/interference with the ball following a goal" per 2006-2007 NFHS Basketball Rules Rule 5-1 Article 3, Rule 10-1 Article 3(d) (previously adopted by WVSSAC and included in the Record). Had a fifteen minute review hearing been convened pursuant to Mayo's request for a pre-punishment review of relevant facts:

- A. The Rule would have properly been applied to the actual events;
- B. The official's error in application of the Rule would have been corrected;
- C. Huntington would have been assessed a team technical foul;
- D. Mayo would have been assessed only a single technical foul, no ejection would have occurred nor would any 2 game resulting suspension have been imposed.

## POINTS AND AUTHORITIES

### CASE LAW

*State ex rel. Manchin v. West Virginia Secondary School Activities Commission*, 178 W. Va. 699, 700, 364 S.E.2d 25 (1987).

*Hamilton v. West Virginia Secondary Schools Activities Commission*, 182 W. Va. 158, 386 S.E.2d 656 (1989).

*Rowe v. Department of Corrections*, 170 W. Va. 230, 292 S.E.2d 650 (1982).

### STATUTE

*W. Va. Code §18-2-25*

### REGULATIONS

*WVSSAC Rule §127-3-8.5*

*WVSSAC Rule §127-3-15.3*

*WVSSAC Rule §127-4-3.10*

*WVSSAC Rule §127-6-5.1*

*WVSSAC Rule §127-6-5.6*

*NFHS Basketball Rules Rule 5-1 Article 3*

*NFHS Basketball Rules Rule 10-1 Article 3(d)*

## ANALYSIS

At the conclusion of these proceedings, the trial judge's rulings as to the constitutionality of Rule §127-3-8.5 and Rule §127-6-5.6 will be fully and appropriately addressed. It is submitted that the legal reasoning applied to the facts of this case is sound.

With respect to Judge O'Hanlon's opinion that the Appellant is, in effect, a state agency, this Court has previously recognized the Appellant's funds as "quasi-public" and held that the WVSSAC, accordingly, is a quasi-public agency. *State ex rel. Manchin v. West Virginia Secondary Schools Activities Commission*, 178 W. Va. 699, 364 S.E.2d 25 (1987).

Perhaps the term "state commission" or "statutorily-created agency of the government" will be deemed the more appropriate designation. *Hamilton v. West Virginia Secondary Schools Activities Commission*, 182 W. Va. 158, 386 S.E.2d 656 (1989).

Regardless, it is clear that the Appellant organization must act in a fair and reasonable manner and operate under a set of reasonable rules which assure fundamental fairness to those over whom it exercises jurisdiction.

Judge O'Hanlon recognized that under the circumstances, the denial of a student's minimal pre-punishment opportunity to be heard is contrary to the notion of fundamental fairness and, as such, equates to arbitrary and capricious action by a body created by the legislature.

WVSSAC regulations prevent any form of protest, review, appeal or pre-punishment opportunity to be heard as to a 2 game suspension as was assessed Mayo - regardless of the merits of the same.

On the one hand, Rule §127 -3-8.5 Provides in pertinent part, "Any... student... ejected by an official will be suspended...in additional contest(s)... assessed based upon ten (10) percent of the allowed regular season contests for each sport" and Rule §127- 3-15.3 provides a "protest of a contest or ejection will not be allowed."

To the contrary, however, "...Rule §127-4-3.10 provides that all cases involving disciplinary action against a student can be protested..." Further, Rule §127-6-5.1 provides that, "An aggrieved party may file a protest to the WVSSAC by filing a meaningful petition..." and Rule §127-6- 5.6 provides for the right of a hearing on the appeal with notice of at least seven (7) days in advance of the time set for hearing.

Appellee asserted that he violated neither the letter nor the spirit of the "two technical fouls in one contest" ejection/suspension Rules and immediately requested an opportunity to be heard on the matter prior to the imposition of any disciplinary action. His request was summarily denied by then Executive Secretary Hayden. The trial court found Rule §127-3-15.3 to be inequitable and violitive of the doctrine of fundamental fairness. The failure of the WVSSAC to establish an appeal process available to a student prior to imposition of severe punishment was deemed clearly wrong. Judge O'Hanlon recognized that an unreviewable sanction of a multiple-game suspension weighed against the minimal allocation of resources necessary to insure equity and an opportunity for a student to be heard as proof that current regulations are repugnant to any notion reasonableness and fairness.

The trial court further cited and applied relevant precedent:

“An Administrative agency has a duty to promulgate reasonable rules and regulations. With respect to legislative rules, the Supreme Court has held, it is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.” Syllabus Point 3, *Rowe v. Department of Corrections*, 170 W. Va. 230, 292 S.E.2d 650 (1982). (Amended Order p.4, par. 6) *W. Va. Code* §18-2-25 provides that “... rules and regulations of the West Virginia Secondary School Activities Commission shall contain a provision for a proper review procedure and review board and be promulgated in accordance with the provisions of chapter twenty-nine-a [§§29A-1-1 et seq.] of this Code...” (Amended Order p.4, par. 7)

W.Va. Code §18-2-25 mandates that the WVSSAC shall promulgate “reasonable rules and regulations” providing for the regulation of interscholastic athletic events.

It is the position of Appellee, O.J. Mayo, that Judge O’Hanlon acted properly in applying relevant Code provisions, regulations and precedent to the facts and circumstances existent herein.

The Circuit Court’s findings of fact, conclusions of law and Order are each supported by the record as a whole, are fair, just, equitable and serve to promote the interests of justice.

Accordingly, the trial Court’s Order ought to be affirmed.

## RESPONSE TO AMICI CURIAE BRIEFS

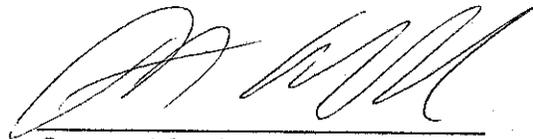
Examination of the briefs filed on behalf of the Roman Catholic Diocese of Wheeling-Charleston and several Catholic High Schools imply that Judge O'Hanlon's<sup>1</sup> Amended Order is akin, in heretical character, to Martin Luther's Ninety- Five Theses.<sup>2</sup>

While these arguments are well researched and keenly written, it is submitted that the mission of these exemplary spiritual and educational institutions will be unaffected by the relief granted Mayo.<sup>3</sup>

### RELIEF REQUESTED

Based on the foregoing and the record as a whole, Appellee Mayo requests that the Order of the Circuit Court be affirmed.

Respectfully Submitted,



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<sup>1</sup> Judge O'Hanlon has enjoyed the benefit of sixteen years of Roman Catholic education.

<sup>2</sup> In Wittenburg, Germany, October 15, 1517, Martin Luther affixed to the castle Church door, which served as the "black board" of the University, his Ninety-Five Theses. These documents contained the monk's view of perceived injustices existant within the Roman Catholic Church on orthodox positions, including the issue of mercantilism of indulgences.

<sup>3</sup> Twenty Woelfels are graduates of St. Joseph Central Catholic High School. Some participated in interscholastic sporting events prior to its acceptance into the WVSSAC. Others have so participated subsequent to its admission.

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**CERTIFICATE OF SERVICE**

The undersigned, of counsel for plaintiff/appellee O.J. Mayo, does hereby certify that the foregoing RESPONSE TO BRIEF OF APPELLANT WEST VIRGINIA SECONDARY SCHOOL ACTIVITES COMMISSION has been served upon all counsel of record via first class mail, postage prepaid, to the following on this 17<sup>th</sup> day of June, 2008:

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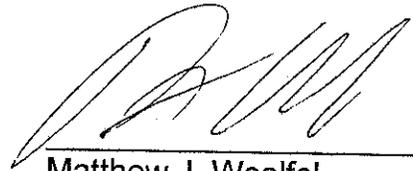
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