

IN THE STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

At Charleston

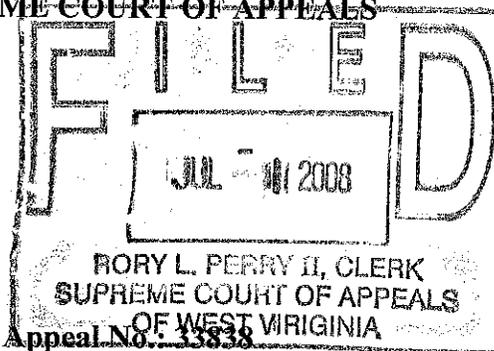
O.J. MAYO,

Plaintiff/Appellee,

v.

WEST VIRGINIA SECONDARY
SCHOOL ACTIVITIES COMMISSION,

Defendant/Appellant.



**REPLY BRIEF OF THE WEST VIRGINIA SECONDARY
SCHOOL ACTIVITIES COMMISSION**

Participation in Interscholastic Athletics is a Privilege and not a Right

The Statement of Facts contained in Appellee's Brief perfectly illustrates the reason underlying this Court's determination that participation in interscholastic athletics is a privilege, and not a right, with all the attendant constitutional protections accompanying a "right".

Appellee urges this Court to review videotape recordings of a high school basketball game and determine whether a referee in that game made an error in judgment when he assessed O.J. Mayo with an individual *technical* foul, instead of a *personal* foul for "delay of game/interference with the ball following a goal".

Far be it from the WVSSAC to argue that interscholastic athletics are not important. Obviously high school athletics are the sole reason for the existence of the WVSSAC. Notwithstanding the importance it places on interscholastic athletics, the

WVSSAC would be the first to recognize that the importance of high school sports pales in comparison to the importance of the right to vote, to freedom of speech, freedom of religion, or a host of other rights guaranteed citizens by our Constitutions, or by the law.

This nation is governed by the rule of law. The majesty of the law, and the respect for the rule of law held by our citizenry are at the core of what makes us a nation.

To suggest that this august body should review a videotape of a high school basketball game to determine whether a referee's judgment that conduct by O.J. Mayo amounted to a *technical* foul, rather than a less severe *personal* foul, is to denigrate the importance of the rule of law in our society.

And if, under the rules governing high school basketball in West Virginia, ejection from a game triggers a two game suspension, that sanction alone does not justify the Court's stooping to review the judgment calls of basketball officials

The WVSSAC is a Private, Voluntary Association

Appellee cites *State ex rel Manchin v. WVSSAC*, 178 W.Va. 699, 364 S.E. 2d 25 (1987) for the proposition that the WVSSAC is a "quasi-public agency". That assertion by Appellee is not supported by this Court's holding in *Manchin*. Instead, *Manchin* held that the *funds* of the WVSSAC are "quasi-public funds", analogous to the funds of a parent-teacher association. The Court did not hold that the WVSSAC was a "quasi-public agency".

In *West Virginia Secondary School Activities Commission v. Wagner* this Court, in an opinion by Judge Haymond, clearly recognized that the WVSSAC is a voluntary, unincorporated organization.¹ The opinion states:

¹ *WVSSAC v. Wagner* is of interest because the case was reportedly financed by the father of noted author Homer Hickam. The case is mentioned in one of his books.

"The West Virginia Secondary School Activities Commission is a voluntary unincorporated organization and it operates under its regularly adopted constitution and bylaws. The objects of the commission are to supervise and control, through its authorized instrumentalities, inter-scholastic athletic and other specified contests and such other interscholastic activities as may be properly regulated by it. Its membership is composed of public tax supported first class secondary schools which adopt its constitution and by-laws, pay annual dues, and are duly accepted as members. The activities of the commission are administered by the principals of its member schools. Each principal may cast one vote and the commission regulates inter-scholastic activities among its members. Its officers are a president, a vice president, and a treasurer, who constitute a board of appeals which is authorized to administer the by-laws governing interscholastic athletics; to appoint deputy board members to serve during the will and pleasure of the board, and an executive secretary; to fill vacancies in its membership; to decide all cases of the eligibility of athletes and participants in other activities whose cases are not specifically covered by the constitution and by-laws; and to investigate, by a deputy board member, or otherwise, matters of eligibility and violation of rules. The decision of the deputy board member in matters investigated by him is final until reversed by the board. The executive secretary is authorized to receive and investigate complaints concerning the eligibility of athletes and participants in interscholastic activities and violations of the rules of the commission, and to render decisions and impose penalties which are subject to review by the board." *WVSSAC vs. Wagoner*, 143 W.Va. 508, 511, 364 S.E.2d 901, 905 (1958).

And this Court in *State ex rel v. Oakley, Judge*, recited the history of the

WVSSAC thus:

"It appears that since 1916 the Association dealing with West Virginia Secondary School Activities has been in existence in this State. It was an entirely voluntary Association until January, 1967, at which time it was incorporated under the name of the West Virginia Secondary School Activities Commission, Incorporated, continuing to allow eligible secondary schools to become members thereof and be governed by its rules and regulations. Later, the West Virginia Legislature passed an act which became effective March 11, 1967, and is found in Code, 18-2-25, as amended, providing for

such incorporation of the Association which had formerly been a purely voluntary Association without any statutory status. Under the charter obtained in January, 1967, before the act was passed, a five member Board of Appeals was provided for who were also the officers and directors of the corporation and the charter also provided for an executive secretary. The member schools were to elect the Board from their principals who were to have full supervision over extracurricular activities of the member schools. The corporation was a non-stock, non-profit organization. The statute later passed placed in the hands of the local county boards of education the power of supervision over all interscholastic athletic events and other extracurricular activities and provided that the local boards could delegate the power with regard to interscholastic athletic events and band activities to the West Virginia Secondary Schools Activities Commission which was to be composed of principals of secondary schools which the local boards of education had elected to place under the Commission for the purposes stated above." 152 W.Va. 533, 535, 164 S.E.2d 775, 820 (1968).

Clearly, whenever the legal status of the WVSSAC has been an issue, this Court has recognized that it is a voluntary, unincorporated association. *School Activities Commission v. Wagner, State ex rel WVSSAC v. Oakley, Manchin v. WVSSAC.*

When the legal status of the WVSSAC was not germane to the issue before this Court there are opinions which, in passing, refer to the SSAC in language which is not reflective of its actual legal status, including *Hamilton v. WVSSAC* cited by Appellee.

West Virginia's Method of Regulating Interscholastic Athletics is Not Broke, and Should Not Be "Fixed"

As Judge Berry observed in *State ex rel WVSSAC v. Oakley*, W.Va. Code § 18-2-25, which was enacted in 1967, "placed in the hands of the local county boards of education the power of supervision over all interscholastic athletic events and other extracurricular activities and provided that the local boards could delegate the power with

regard to interscholastic athletic events and band activities to the West Virginia Secondary School Activities Commission....” 152 W.Va. at 535, 164 S.E.2d at 820..

In addition to authorizing County Boards of Education to delegate the regulation of interscholastic athletics and band activities to the WVSSAC, W.Va. Code § 18-2-25 also provides that the rules of the WVSSAC be subject to the prior approval to the State Board of Education.

The method by which high school athletics are regulated in West Virginia is ideally suited to the needs of the public. The rules are initially proposed by a majority of the principals of West Virginia’s secondary schools. And the rules are then considered by the State Board of Education, using a methodology prescribed by the Administrative Procedures Act, which assures an opportunity for public comment and input. If the State Board of Education approves a rule, it is then enforced by the WVSSAC. The fact that the rules being enforced by the WVSSAC were actually promulgated by the West Virginia State Board of Education, rather than a private association (the WVSSAC) means that there is sufficient “state action” to warrant a judicial proceeding challenging the application of a rule to a student athlete. And the fact that the WVSSAC is not a state agency means that venue challenging its enforcement of a rule is not limited to the Circuit Court of Kanawha County.

Conclusion

For the reasons stated herein, and for the reasons stated in its initial brief, the Appellant WVSSAC urges the Supreme Court of Appeals to reverse the decision of the Circuit Court of Cabell County and (1) to hold that there is no “right” to a judicial review of the judgment call of an official in a high school athletic contest, even if the

consequence of that judgment call is suspension in a subsequent game, (2) to reaffirm this Court's prior holdings that the WVSSAC is a private, voluntary association of public, private and parochial secondary schools, (3) to uphold the constitutionality of the "forfeiture rule," or, in the alternative, to reverse the Circuit Court's ruling that the "forfeiture rule" is unconstitutional, and (4) to rule that there is no legal authority for the award of attorney fees under the facts in this case.

Respectfully Submitted,

**WEST VIRGINIA SECONDARY
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By Counsel**



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