

**SCANNED**

**IN THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA**

**THE BOARD OF EDUCATION OF  
THE COUNTY OF LINCOLN, on behalf of  
LINCOLN COUNTY HIGH SCHOOL,  
A West Virginia Secondary School,**

**Petitioner,**

**v.**

**Civil Action No. 18-C-79  
Judge: Hoke**

**WEST VIRGINIA SECONDARY  
SCHOOLS ACTIVITIES COMMISSION,  
a quasi-public body,**

**Respondent.**

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CIRCUIT CLERK LINCOLN

**ORDER GRANTING INJUNCTION**

This matter came before the Court on the 27<sup>th</sup> day of November, 2018, pursuant to the Petitioner's *Emergency Petition for Injunctive Relief*. On the 20<sup>th</sup> day of November, 2018, the Petitioner, the Board of Education for the County of Lincoln, on behalf of the Lincoln County High School, filed its *Emergency Petition for Injunctive Relief* pursuant to Rule 65 of the West Virginia Rules of Civil Procedure, by and through its counsel, Leslie Tyree. The Petitioner petitioned this Honorable Court for the immediate entry of an order enjoining the Respondent, West Virginia Secondary Schools Activities Commission (hereinafter "the WVSSAC") from imposing a twenty (20) point penalty against the Lincoln County High School Cheerleading Team and from removing said Lincoln County High School Cheerleading Team as Runner-Up in the Class AA, Region 4 Cheer Tournament.

On the 26<sup>th</sup> day of November, 2018, the Respondent filed its *Motion to Dismiss*, by and through counsel, William R. Wooten. Upon review of the Petition, the motion to dismiss, the Court file, all pertinent legal authorities, and upon hearing oral argument from both parties, the Court hereby **FINDS** and **ORDERS** as follows:

#### VENUE & JURISDICTION

1. The Petitioner, the Board of Education of the County of Lincoln, is a West Virginia corporation, with the authority to bring this action pursuant to West Virginia Code § 18-5-5.
2. The Respondent, West Virginia Secondary Schools Activities Commission (hereinafter "the WVSSAC"), is a statutorily recognized, created, and authorized entity pursuant to West Virginia Code § 18-2-25.
3. Pursuant to West Virginia Code § 18-2-25, "[t]he county boards of education [including your Petitioner] are ... granted and shall exercise the control, supervision and regulation of all interscholastic athletic events, and other extracurricular activities of the students in the public secondary schools..."
4. However, "[t]he county board of education may delegate such control, supervision and regulation of interscholastic athletic events and band activities to the 'West Virginia secondary school activities commission,' which is hereby established." West Virginia Code § 18-2-25.
5. The WVSSAC is by statute composed of principals, or their representatives, of those secondary schools whose county boards of education have certified in writing to the State Superintendent of Schools that they have elected to delegate the control, supervision and regulation of their interscholastic athletic events and band activities of the students in the public secondary schools in their respective counties to the WVSSAC.
6. All rules and regulations of the WVSSAC are subject to the approval of the State Board of Education, which has express constitutional authority over the schools of the State of West Virginia.
7. The WVSSAC promulgates rules and regulations providing for the control, supervision and regulation of the interscholastic athletic events and other extracurricular activities of private and parochial secondary schools and such schools delegate to such commission such control,

supervision and regulation, upon the same terms and conditions, subject to the same regulations and requirements and upon the payment of the same fees and charges as those provided for public secondary schools. County boards of education, including your Petitioner, are authorized to expend monies for and pay dues to the WVSSAC, and all moneys paid to the WVSSAC, as well as moneys derived from any contest or other event sponsored by the WVSSAC are paid to the WVSSAC.

8. The Petitioner has the control and supervision of all public secondary schools located in Lincoln County, West Virginia, including, but not limited to Lincoln County High School and the Lincoln County High School Cheerleading Team.
9. In Lincoln County, West Virginia, The Petitioner delegated its statutorily mandated control, supervision and regulation of interscholastic athletic events and band activities to the WVSSAC pursuant to West Virginia Code § 18-2-25.
10. The Respondent is not a state agency and therefore cannot demand that suits against it be brought in the Circuit Court of Kanawha County, West Virginia. (See *Mayo v. West Virginia Secondary Schools Activities Commission*, 223 W.Va. 88, 672 S.E.2d 224 (2008).
11. The Circuit Court of Lincoln County, West Virginia has personal jurisdiction over the Respondent, in that the Respondent controls, supervises, and regulates interscholastic athletic events and band activities in Lincoln County, West Virginia.
12. The Circuit Court of Lincoln County, West Virginia has jurisdiction over the subject matter in that it involves, in part, the delegation by the Petitioner of the statutory mandate created by West Virginia Code § 18-2-25.
13. The Circuit Court of Lincoln County, West Virginia is the proper venue for this matter in that the cause of action arose, in part, pursuant to the delegation by the Petitioner of the statutory mandate created by West Virginia Code § 18-2-25.

14. Thus, the Court finds that it is the proper venue to hear this matter, and that it has jurisdiction over this matter. Accordingly, the Respondent's motion to dismiss is hereby **ORDERED DENIED**.

#### SERVICE

15. On November 20, 2018, the Petitioner filed its petition with the Circuit Clerk in the Circuit Court of Lincoln County, West Virginia.
16. The Petitioner requested the Clerk of the Court to serve the Respondent, certified mail, return receipt requested, pursuant to Rule 4 of the West Virginia Rules of Civil Procedure.
17. The Petitioner further emailed Mr. Bernie Dolan, Executive Director, of the WVSSAC, a copy of the Petitioner's *Emergency Petition for Injunctive Relief* and a copy of the notice of today's hearing.
18. The Respondent received notice of the hearing on the Petitioner's petition and appeared at the November 27, 2018 hearing in this matter.

#### FACTS

19. On the 3<sup>rd</sup> day of November, 2018, the Lincoln County High School Cheerleading Team, along with the other teams of the Region 4, Class AA competition, competed in the Regional Cheer Tournament. The first and second place teams were to proceed to the State Cheer Tournament on Saturday, December 8, 2018.
20. At the conclusion of the tournament, the Lincoln County High School Cheerleading Team earned enough points to finish in second place of Region 4, and qualify to proceed to the State Tournament. However, the judges operating the timing devices sought out and elicited the opinion of a 4<sup>th</sup> person, a non-judge to the competition, in making the decision whether to count a time penalty of less than one half second. After eliciting the opinion of the non-judge, the Judges ruled that the Lincoln County High School Cheerleading Team exceeded their allotted

- time of two minutes and thirty seconds for the Open portion of their routine by 0.47 hundredths of a second. Thus, the judges deducted twenty (20) points from their total score.
21. The deduction of the twenty (20) points from the Lincoln County High School Cheerleading Team's total score reduced their score from 332.4 points to 312.4 points, dropping them from a second place finish to a fourth place finish, and thus, eliminating them from the State Tournament. A copy of the 2018 Regional Cheer Results are attached hereto as Exhibit A.
  22. No other teams in the competition were subjected to the opinion of an additional person with respect to time or the deduction of points.
  23. Further, West Virginia Code of State Rules § 127-3-2.1 provides as follows: "Rules: Cheerleading rules published by the National Federation of State High School Associations are the official rules for all interscholastic competition unless otherwise provided by Commission modification."
  24. In July of 2018, prior to the Region 4, Class AA, Regional Cheer Tournament, the WVSSAC promulgated the WVSSAC Cheer Manual for the 2018-2019 school year (hereinafter "the Cheer Manual"). A copy of the 2018-2019 WVSSAC Cheer Manual is attached hereto as Exhibit B.
  25. The Cheer Manual contains Competition Policies which govern among other aspects of the competition, the format and the timing of the routines. Specifically, the Cheer Manual, promulgated, enacted, and disseminated by the WVSSAC for the cheer competitions, provides the parameters, limitations, and criteria for each portion of the cheer competition.
  26. The Cheer Manual provides that the Format of the Competition is to be made up of two separate portions, the Technical portion and the Open portion.
  27. Section III (B)(1)(a)(1) of the Cheer Manual provides that the Technical Portion of a team's routine must "[b]e between a minimum of 30 seconds and a maximum of 40 seconds long."

Exhibit B at Page 25. It then further describes what must be contained in the Technical Portion of the routine.

28. Section III (B)(2)(a)(1) of the Cheer Manual, related to the Open portion, provides that "[i]f music is used, a quality copy (with back-up) must be available, edited for the whole 3 minutes." (Emphasis added). Exhibit B at Page 26.
29. Thus, the Cheer Manual promulgated and distributed by the Commission indicated that the Open portion of the Cheer routine may last up to three (3) minutes.
30. Nonetheless, the judges penalized the Lincoln County High School Cheerleading Team's twenty [20] points because their Open routine lasted 2:30-47.
31. The Cheer Manual states, in the section related to the Open portion of the routine, that "[i]f music is used, a quality copy (with back-up) must be available, edited for the whole three minutes."
32. The Cheer Manual does not provide any other time limitation on the Open portion of the cheer routines.

#### INJUNCTION

33. The West Virginia Supreme Court has repeatedly held:

"[t]he customary standard applied in West Virginia for issuing a preliminary injunction is that a party seeking the temporary relief must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: "(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985)); *State ex rel. McGraw v. Imperial Mktg.*, 196 W. Va. 346, 352 n.8, 472 S.E.2d 792, 798 n.8 (1996). See also *Hechler v. Casey*, 175 W. Va. 434, 440, 333 S.E.2d 799, 805 (1985) ("injunctive relief, like other equitable or extraordinary relief, is inappropriate when there is an adequate remedy at law."); *Syl. pt. 2, Severt v. Beckley Coals, Inc.*, 153 W. Va. 600, 170 S.E.2d 577 (1969) (recognizing the necessity of a balancing of the comparative hardship or convenience test in light

of all the circumstances involved); Syl. pt. 4, in part, *R.R. Kitchen & Co. v. Local Union No. 141, Int'l Bhd. of Elec. Workers*, 91 W. Va. 65, 112 S.E. 198 (1922) (party must demonstrate the presence of irreparable injury as grounds for a preliminary injunction). *Markwest Liberty Midstream & Res. v. Nutt* (W. Va., 2018).

*Markwest Liberty Midstream & Resources LLC v. James T. Nutt*, No. 17-0138 (W. Va., 2018).

34. The Court FINDS that the actions of the Respondents will cause the Petitioner, on behalf of the Lincoln County High School and the Lincoln County High School Cheerleading Team, to suffer immediate and irreparable harm by disqualifying them from the December 8, 2018 State Cheer Tournament.
35. The 2018-2019 Lincoln County High School Cheerleading Team will be forever barred and denied the opportunity to participate in the 2018 West Virginia State Tournament, if this injunction is denied. The Lincoln County High School Cheerleading Team, absent the improper twenty (20) point deduction, scored sufficient points to qualify for the December 8, 2018 State Tournament. Thus, if this injunction is not granted, the 2018-2019 Lincoln County High School Cheerleading Team will be forever irreparably harmed.
36. The second issue for this Court to consider is the likelihood of harm to the Respondent if the injunction is entered. The likelihood of harm is minimal. If the injunction is granted, the Respondent will proceed with the State Cheer Tournament on December 8, 2018, just as currently planned. The field of participants will simply contain one additional team. The Respondent will suffer no harm. Thus, the second prong of the test also weighs in favor of granting the injunction.
37. Furthermore, not only will the Respondent not likely be harmed if the injunction is granted, the WVSSAC will likely incur a financial benefit from the Lincoln County High School Cheerleading team being included in the State Tournament. The inclusion of the Lincoln County High School

Cheerleading team will cause more spectators to attend the tournament, increasing the fees collected at the gate as well as the monies earned via concessions.

38. The third issue for this Court to consider is the plaintiff's likelihood of success on the merits. The Court finds that the likelihood of success on the merits of the Petitioner's claims is high.
39. The assessment by the WVSSAC of a twenty (20) point penalty against the Lincoln County High School Cheerleading Team appears to have been clearly wrong, in that the WVSSAC penalized and punished the Petitioner for an Open routine that by all indications abided by and complied with the Cheer Manual promulgated, enacted, and disseminated by the WVSSAC for the cheer competition. Furthermore, the Judges invited, consulted with, and relied upon the opinion of an additional individual in making the decision whether to count a time penalty of less than one half second.
40. The Lincoln County High School Cheerleading Team relied upon the Cheer Manual, as it is written, to its detriment when it properly performed the Open portion of its routine.
41. That as a direct and proximate result of the detrimental reliance by the Lincoln County High School Cheerleading Team on the Cheer Manual, a twenty (20) point penalty was assessed against the Lincoln County High School Cheerleading Team and the Lincoln County High School Cheerleading Team will suffer irreparable harm by disqualifying them from the December 8, 2018 State Cheer Tournament. Thus, the Petitioner has met the first prong of the injunction test.
42. The factual basis upon which action is taken and decisions made by the Respondent, a quasi-public body, must be subject to review under a clearly wrong standard, where the sole authority by which the Respondent is authorized to act is by and through the delegation of authority statutorily mandated to the Petitioner.



43. This Court FINDS that as a direct and proximate result of the clearly wrong findings and the conclusions, as well as the lack of authority by the WVSSAC to invoke the opinion of a fourth person only as it related to the Petitioner, the Lincoln County High School Cheerleading Team will likely be successful on the merits of its claims.
44. The Court further finds that a WVSSAC rule is subject to challenge, like all properly promulgated legislative rules, on grounds that it exceeds constitutional or statutory authority and for being arbitrary and capricious. See *Mayo v. West Virginia Secondary Schools Activities Commission*, 223 W.Va. 88, 672 S.E.2d 224 (2008); *Jones v. Board of Education*, 218 W.Va. 52, 61, 622 S.E.2d 289, 298 (2005)(applying Syl. Pt. 4, *Appalachian Power Co., v. State Tax Dept.*, 195 W.Va. 573, 466 S.E.2d 424 (1995)).
45. On January 5, 2010, the Honorable James H. Young, Jr., of the Circuit Court of Wayne County did heretofore issue an injunction against the WVSSAC, in the case styled *The Board of Education of the County of Wayne, on behalf of Taisia High School, a West Virginia Secondary School v. West Virginia Secondary School Activities Commission*, Civil Action No. 09-P-070, when the WVSSC attempted to arbitrarily and capriciously impose a penalty against the Taisia High School Cheerleading Team to prevent said Team from competing in the 2009 Class AA State Cheer Competition under similar circumstances.
46. For each of the aforementioned reasons, the Court finds the Petition will likely be successful on the merits.
47. The Fourth and final elements for this Court to consider in determining whether to grant a temporary injunction is the public interest involved.
48. The public interest involved in this matter is to ensure that the Respondent's rules and regulations are fairly and evenly applied to all participants and to ensure that no participant

receive an unfair advantage or alternatively, that no participant was adversely placed at a disadvantage in an athletic competition.

49. The issuance of this injunction will serve the public interest of ensuring to the Lincoln County student athletes, as well as student athletes and citizens throughout the State, that the rules of the WVSSAC are applied fairly and justly. Protection of the public's trust in the WVSSAC's fair, competent, and just application of its rules and regulations is crucial to our student athletes' continued participation in interscholastic athletic events and other extracurricular activities.
50. The Court finds that such public's confidence that the WVSSAC will fairly and justly apply its rules and regulations to all participants weighs heavily in favor of granting the injunction.
51. The Respondent attempts to rely upon *State ex rel., The West Virginia Secondary School Activities Commission et al. v. the Honorable David W. Hummel, et al.*, 234 W.Va. 731, 769 S.E.2d 881 (2015) to argue that this Court lacks the authority to review the internal affairs of the WVSSAC, such as calls or rulings made by game officials. However, the Respondent's argument is misplaced. This Court makes clear that it is not sitting as a cheer judge to determine whether a particular routine exceeded the allotted time for the said routine. The concern of this Court is whether the process utilized by the judges in assessing the twenty (20) point penalty was improper, and whether such process violated the rules and regulations of the WVSSAC, thereby exceeding its applicable statutory authority. In reviewing the process, the Court specifically does not question any rules or regulations promulgated by the WVSSAC. It is within the purview of the WVSSAC to develop and adopt any rules and regulations that it deems appropriate for the sport of cheerleading. However, the Court points out that once the WVSSAC adopts said rules and it sees fit, it is required by law to follow its own rules and regulations. The Court concludes that the WVSSAC is prohibited from violating the rules and regulations, and from acting in an arbitrary and capricious manner with respect thereto. See *State ex rel. W.Va. Secondary School*

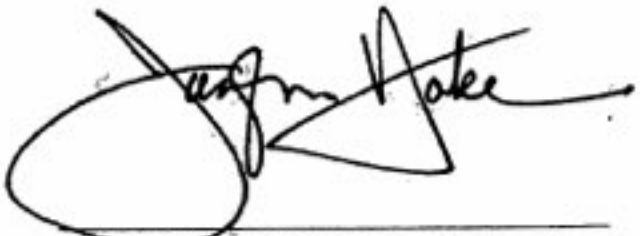
*Activity Comm'n v. Webster*, 228 W.Va. 75, 84, 717 S.E.2d 859, 868 (2011)(holding "the authority of a court to inject itself into an SSAC matter arises when that body exceeds its legitimate rule-making authority," and judicial review of an SSAC matter is permitted with there is a 'well-founded challenge to a legislative rule promulgated by the SSAC.'" ) *Hummel*, 234 W.Va. at 735, 769 S.E.2d at 885. See also *Mayo v. W.Va. Secondary Schools Activities Comm'n*, 223 W.Va. 88, 672 S.E.2d 224 (2008); *Hamilton v. W.Va. Secondary School Activities Comm'n*, 182 W.Va. 158, 386 S.E.2d 656 (1989).

Wherefore, the Court hereby FINDS that based upon the facts presented, it clearly appears that an immediate and irreparable injury, loss or damage will result to the Petitioner before the Respondent or his attorney could be heard in opposition; that there exists a low likelihood of harm to the Respondent if the injunction is granted; that the Petitioner is likely to ultimately succeed on the merits of this matter; and that the public interest weighs in favor of granting the injunction. Thus, for each of the aforementioned reasons, the Court hereby **ORDERS GRANTED** the Petitioner's *Emergency Petition for Injunctive Relief* and further **ORDERS** the Respondent, the West Virginia Schools Activities Commission, be enjoined and estopped from imposing a twenty (20) point penalty against the Lincoln County High School Cheerleading Team in the Class AA, Region 4 Regional Competition, thereby qualifying the Lincoln County High School Cheerleading Team for the Class AA State Cheer Competition on December 8, 2018. The Court FINDS that the Respondent will not be harmed by the issuance of this injunction, and thus **ORDERS** no bond is necessary.

For the above stated reasons, the Respondent's motion to dismiss is hereby **ORDERED DENIED**.

The Clerk of the Court is ORDERED to send certified copies of this ORDER to the parties of record.

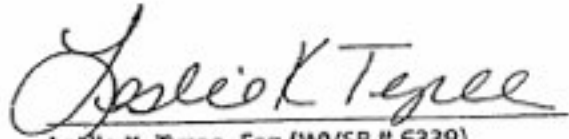
ENTERED this the 30<sup>th</sup> day of November, 2018



Honorable Judge Hale  
Chief Judge

Prepared by:

ENTERED  
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