STATE OF NEW YORK
SUPREME COURT MONROE COUNTY

AQUINAS INSTITUTE OF ROCHESTER,

Petitioner,

-vs-

RICHARD CERONE, in his capacity as Chairman of Section V Football, et al.,

Index #: 14/11987

Respondents.

DECISION, ORDER AND JUDGMENT

Pending before the Court is Petitioner Aquinas Institute of Rochester's ("Petitioner") Civil Practice Law and Rules ("CPLR") Article 78 Verified Petition seeking to enjoin the enforcement of a football forfeiture and eligibility determination and to also annul the same. Based upon the parties' submissions, and upon extensive and well versed oral argument, this Court hereby **DENIES** the Verified Petition and upholds Respondents' forfeiture decision resulting in Petitioner's Sectional disqualification for the reasons set forth hereinafter.

For the sake of brevity, and given the pressing time constraints, the Court will not engage in an extensive factual background recitation, and will address the facts only as necessary for its legal analysis.

Very briefly, the dispute stems from whether Petitioner's Quarterback, Jake Zembiec ("Jake"), was an eligible participant in 3 regular season contests in order to qualify for sectional participation.

Procedural "Objection"

As a preliminary procedural matter, and as contended by Respondent The New York State Public High School Athletic Association, Inc. ("NYSPHSAA"), the Court must first address the missing necessary party issue concerning the Pittsford football team [NYSPHSAA Memorandum of Law, First Paragraph, Second to Last Page].[1] Concerning the necessary joinder of parties, the CPLR provides that:

> **Parties who should be joined.** Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action ***or who might be inequitably affected by a judgment in the action shall*** be made plaintiffs or defendants.

CPLR 1001 (a) (bold, italicized, and underlined emphasis added). See also Spence v. Cahill, 300 AD2d 992 (4th Dept 2002) (non-named landowners were necessary parties as the possible loss of their royalties qualified as an adverse effect).

This Court agrees with NYSPHSAA that Pittsford is a necessary party which was not named as an additional respondent. A ruling in Petitioner's favor would disqualify Pittsford from tomorrow's Sectional game - a clear negative impact. See e.g. Jim Ludtka Sporting Goods, Inc. v. City of Buffalo School Dist., 48 AD3d 1103, 1104 (4th Dept 2008) (finding that a successful bidder whose contract was sought to be set aside was a necessary party due to the potential nullification of its contract rights).

However, the non-joinder is not fatal to Petitioner's case. See Airco Alloys Div., Airco, Inc. v. Niagara Mohawk Power Corp., 65 AD2d 378, 387 (4th Dept 1978) ("[d]ismissal is not dictated solely by the absence of a necessary party"). The CPLR further provides

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[1] Courtesy notice to the Pittsford Central School District, via its Superintendent and Athletic Director, was directed by the Court as expressly permitted by CPLR 7802 (d).

that:

> Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice **unless the court allows the action to proceed without that party under the provisions of that section**.

CPLR 1003 (emphasis added).

No Respondent has formally moved to dismiss under CPLR 3211 (a) (10) and 7804 (f). Also, CPLR 1001 (b) provides a mechanism to cure a non-joinder. See also Lezette v. Bd. of Ed., Hudson City Sch. Dist., 35 NY2d 272, 282 (1974) ("the court may at any stage of a case and on its own motion determine whether there is a nonjoinder of necessary parties"); Town of Amherst v. Hilger, 106 AD3d 120, 129 (4th Dept 2013), rearg denied, 107 AD3d 1504. This Court procured personal jurisdiction over Pittsford by requiring in the Order to Show Cause service of the pleadings and has thus summoned it to court. See CPLR 1001 (b); Windy Ridge Farm v. Assessor of Town of Shandaken, 11 NY3d 725, 726 (2008). Pittsford did not appear to state a position on the dispute or move to intervene. Accordingly, and given Petitioner's consent, this Court will permit the case to proceed in Pittsford's now voluntary absence. The pre-existing Respondents will not be prejudiced by this action.

Merits Review

Now turning to the merits, the Verified Complaint is grounded in CPLR Article 78, and given the wording associated with the caption under the First Cause of Action, seeks a writ of prohibition per CPLR 7803 (2) and administrative review under CPLR 7803 (3).

A writ of prohibition is meant to restrain an administrative body that acts without, or in excess of, its jurisdiction. See Van Wie v. Kirk, 244 AD2d 13, 24 (4th Dept 1998) (ruling

that a writ of prohibition was not available). The granting of prohibition relief is appropriate only when a petitioner shows a **clear legal right** thereto (see Rush v. Mordue, 68 NY2d 348, 352 (1986)), and such a writ is "generally not available to correct common procedural or substantive errors." Town of Huntington v. New York State Div. of Human Rights, 82 NY2d 783, 786 (1993) (Appellate Division erred in granting writ). See also Niagara Frontier Transp. Auth. v. Nevins, 295 AD2d 887 (4th Dept 2002) (Supreme Court rightfully dismissed prohibition application). Thus, prohibition relief is **rarely granted**, is considered an extraordinary remedy, and is available at best as a matter of judicial discretion and not as a matter of right. See La Rocca v. Lane, 37 NY2d 575, 579 (1975) (upholding prohibition dismissal); Vargason v. Brunetti, 241 AD2d 941 (4th Dept 1997) (sustaining prohibition petition dismissal).

As to subdivision (3), Petitioner alleges that the forfeiture decision was made in violation of lawful procedure, was arbitrary and capricious, and was also an abuse of discretion.

The lawful procedure ground can emanate from either statutorily conferred procedure or constitutional due process considerations. See Solnick v. Whalen, 49 NY2d 224, 231 (1980).

As to purported arbitrary and capricious decisions, the Court of Appeals has decreed that:

> The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified *** and whether the administrative action is **without foundation in fact**.' Arbitrary action is without **sound basis in reason** and is generally taken without regard to the facts. . . . the proper test is **whether there is a rational basis** for the . . . order.

Pell v. Board of Educ., 34 NY2d 222, 231 (1974) (internal citations omitted and emphasis added). See also Henson v City of Syracuse, 119 AD3d 1340 (4th Dept 07-03-2014) (reversing grant of Article 78 relief as courts should not interfere unless there is no rational basis for contested decision).

In reviewing alleged arbitrary and capricious administrative determinations, a reviewing court's function is limited to "whether the record contains sufficient evidence to support the rationality of the . . . determination." Coco v. Zoning Bd. of Appeals, 236 AD2d 826, 828 (4th Dep't 1997) (dismissing Article 78 proceeding). A petitioner bears the **"heavy burden"** of proving that the decision was not grounded upon a rational basis. See Rayle v. Town of Cato Board, 295 AD2d 978, 980 (4th Dep't 2002) (dismissing petition because the petitioners failed to meet their burden of proof), lv denied, ___ AD2d ____, 747 NYS2d 851.

In regard to an allege abuse of discretion, it is the same test as the arbitrary and capricious standard. See Older v. Bd. of Ed. of Union Free School Dist. No. 1, Town of Mamaroneck, 27 NY2d 333, 337 (1971) (in exercising its discretion, the respondent's determination must have a rational basis). In assessing discretionary decisions, a reviewing court's scope of inquiry is "extremely limited." Rochester Colony, Inc. v. Hostetter, 19 AD2d 250, 254 (4th Dept 1963).

In all, "a court may **not substitute its judgment** for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." Diocese of Rochester v. Planning Bd. of Town of Brighton, 1 NY2d 508, 520 (1956).

Moreover, and in regard to school athletics, the Fourth Department has repeatedly indicated that "courts should **not interfere** with the internal affairs, proceedings, rules and orders of a high school athletic association unless there is evidence of acts which are arbitrary, capricious or an abuse of discretion." Section VI of New York State Pub. High Sch. Athletic Ass'n, Inc. v. New York State Pub. High Sch. Athletic Ass'n, Inc., 134 AD2d 819, 820 (4th Dept 1987) (emphasis added).

Under the foregoing narrow and deferential standards, Petitioner's case falters when assessed against the circumscribed review which the Court is required to employ. See e.g. Pena v. New York State Pub. High Sch. Athletic Ass'n, Inc., 118 AD3d 1456 (4th Dept 06-20-2014) (there is a rational basis for the determination denying petitioner's application for extended eligibility). As in Pena, the record here provides a rational basis to support the forfeiture. See also Gerard v. Section III of New York State Pub. High Sch. Athletic Ass'n, Inc., 210 AD2d 938, 939 (4th Dept 1994) (reversing and dismissing petition challenging athlete's ineligibility); Caso v. New York State Pub. High Sch. Athletic Ass'n, Inc., 78 AD2d 41, 48-49 (4th Dept 1980) (affirming denial of Article 78 special proceeding assailing eligibility decision as the respondent adhered to its rules).

As to Petitioner's generic allegation that the forfeiture determination was made in violation of lawful procedure, that claim was not supported by any legal authority in its original Memorandum of Law. In fact, such an assertion does not appear anywhere except in a caption to the First Cause of Action [Verified Petition, p. 2]. In Petitioner's Reply Memorandum of Law, Petitioner for the first time specifically correlates a procedural violation of Rule 19 (e) which requires an eligibility infraction to be reported **in writing**

[Reply Memorandum of Law, p. 8]. The genesis of this dispute arose from a telephone call to NYSPHSAA that NYSPHSAA elects to keep anonymous, although it knows the identity of the individual [Thomas Affidavit, Exhibit C]. The identity of the tipster is not crucial in this due process analysis, but what is important is that Petitioner was advised of the nature of the allegations and had an opportunity to be heard. Therefore, and even if Petitioner preserved this procedural issue at the Hearing, this Court fails to perceive an actionable due process violation. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 US 319, 333 (1976). See also Kaur v. New York State Urban Dev. Corp., 15 NY3d 235, 260 (2010) (finding sufficient due process); State v. Farnsworth, 75 AD3d 14, 20 (4th Dept 2010) (same). The due process analysis is flexible and calls for such procedural protections as the particular situation demands. See Morrissey v. Brewer, 408 US 471, 481 (1972); Curiale v. Ardra Ins. Co., Ltd., 88 NY2d 268, 274 (1996); Niagara Falls Mem. Med. Ctr. v. Axelrod, 88 AD2d 777 (4th Dept 1982). In this case, Petitioner was promptly notified of the Hearing and sufficiently notified of the nature of the complaint, *i.e.,* the Hearing was regarding Jake's eligibility [Thomas Affidavit]. Most importantly, Petitioner attended the Hearing with the aid of legal counsel, and was permitted to make a formal presentation on its behalf [Store Affidavit, ¶ 10]. This is ample due process in the administrative context of this expedited case. See e.g. Mental Hygiene Legal Services ex rel. Aliza K. v. Ford, 92 NY2d 500, 507 (1998) (due process concerns were complied with); Swartz v. City of Corning, 46 AD3d 1364, 1366 (4th Dept 2007).

Next, the Court turns to the substance of Respondents' eligibility and forfeiture findings. Petitioner assails the ineligibility conclusion as unsupported by any governing rule

or the facts because Jake was medically clear and was also a viable participant on the sidelines during the October 18th game. Respondents respond that the conclusion was consistent with their guiding principles, and was properly based on Jake's medical disqualification, as well as his lack of eligible participation given that he could not "participate" because he was not dressed according to the National Federation of State High School Associations' ("NFHS") guidelines for actual play [Thomas Affidavit, Exhibit D {Section 5, Article 1, "Player Equipment" listing mandatory equipment to participate in football}]. As Respondents have jointly offered two viable rationales for the decision, there need only be a rational basis for one in order to sustain the ruling.[2] See Kilgus v. Bd. of Estimate of City of New York, 308 NY 620, 627 (1955) ("The judicial function is exhausted when there is found to be **a** rational basis for the conclusions approved by the administrative body.").

This case presents much more complex issues than would appear to the casual observer, and this Court has taken great pains to thoroughly vet and review the issues, especially due to what is at stake in this case - an important consideration that this Court by no means trivializes. Based upon that vetting and review, this Court finds the medical eligibility determination against Petitioner had a rationale basis and thus was not arbitrary and capricious or an abuse of discretion, nor was it rendered in excess of Respondents'

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[2] No objection was lodged against Section V withdrawing its Verified Answer submission admitting the existence of medical clearance. Further, the rational basis was nevertheless also advanced by NYSPHSAA; therefore, the matter is still properly before the Court, and runs contrary to Petitioner's submission that medical status is not in dispute.

jurisdiction.[3]

In making this conclusion, this Court takes pause to acknowledge Petitioner's objection to the lack of a certified transcript of record. See CPLR 7804 (e). The Court is mindful of the time constraints associated with this case and the potential difficulty in compiling a record, but in any event, what is not in dispute concerning the scope of the Hearing record is that Respondents were not provided with any contemporaneous pre-October 18th proof that Jake was medically cleared by his treating physician before the last regular season contest. See Eck v. City of Kingston Zoning Bd. of Appeals, 302 AD2d 831, 832 (3d Dept 2003). Regardless of the precise scope of the Hearing proof, Petitioner conceded at oral argument that no written medical clearance letter was provided to the Athletic Director prior to the October 18th last regular season contest, or later shown to Respondents at the Hearing. Further, no proof has been presented to the Court substantiating the hearsay information from Petitioner's Trainer who allegedly had contact with the Jake's treating physician that Jake was clear to resume sports activities, nor was there proof of approval from the school physician. See NYSPHSAA Rule 10. Moreover, Jake's treating physician's October 27th writing that was supplied after the Hearing in an attempt to clarify that Jake's medical clearance dated back to October 13th, is inconsistent with an October 21st medical clearance letter from the treating physician's assistant after a follow-up visit that day wherein she states "[t]his is to certify that Jake Zembiec is under the care of our office for the management of left wrist fracture. He may return to gym class

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[3] Petitioner did not fully analyze the prohibition claim in any of its papers, and instead focuses on subdivision (3) relief. As such, a clear right to prohibition relief was not established. See Town of Huntington, 82 NY2d at 786; Niagara Frontier Transp. Auth., 295 AD2d 887.

or **sports on 10/21/14** with use of a brace." [Cerone Affidavit, Exhibit A {emphasis added}]. This medical clearance letter is dated and obtained 3 days after the last regular season game.[4] In the glaring absence of medical clearance prior to the October 18th game, Respondents had a rational basis on which to rule against Petitioner on the issue of medical eligibility. See e.g. Alexis v. City of Niagara Falls, 106 AD3d 1501 (4th Dept 2013) (Supreme Court erred in granting Article 78 petition when there was a foundation in fact for the decision). It bears repeating that it is not the proper role of this Court to second-guess such discretionary administrative decisions. See Diocese of Rochester, 1 NY2d at 520; Pena, 118 AD3d 1456; Gerard, 210 AD2d 938; Caso, 78 AD2d 41. This is especially true concerning interpretation of regulations by the agencies responsible for their administration. See New York City Health and Hospitals Corp. v. McBarnette, 84 NY2d 194, 205 (1994); Howard v. Wyman, 28 NY2d 434, 438 (1971). Respondent's application of the medical/health criteria was not unreasonable.

Having found a rational basis for the medical ineligibility outcome, this Court need not also find a rational basis for the other proffered rationale, namely the charge that Jake was not an "eligible participant" per NYSPHSAA's Bylaws and Eligibility Standards Representation Rule 25 (a) because he was not in full pads for the last regular season game. In the alternative, this Court is unpersuaded that Respondents erred in applying Representation Rule 25, or deciding that it was violated.

As to Petitioner's complaint concerning the lack of a waiver process, it is incorrect. In Petitioner's own submission is the NYSPHSAA's Bylaws and Eligibility Standards which

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[4] The Court is not assailing Jake's treating physicians veracity, or Petitioner's, but instead is merely highlighting the lack of contemporaneous and consistent proof in any form.

provide in full, and in conjunction with Representation Rule 25, that:

> *School districts may submit a written request to the Section for adjustment of contests for **individual participant** based on medical documentation that confirms the individual was **not able to participate in the required number of contests**.*

Thomas Affidavit, Exhibit B, p. 123 (italics in original, bold emphasis added). Compare with Petitioner's Reply Memorandum of Law, p. 7.

Under a plain reading of this provision (see generally Tall Trees Const. Corp. v Zoning Bd. of Appeals of Town of Huntington, 97 NY2d 86, 91 (2001)), Petitioner had a viable option to cure any ineligibility, and it failed to take advantage of the same. This Court is not convinced by Petitioner's oral argument statement that this waiver allowance is not applicable.

To avoid the repercussions of not having secured a waiver, or not dressing Jake for the last game of the regular season due to "strategy" so as not to tip its sectional opponent off as to Jake's "eligibility," Petitioner argues that they justifiably relied on a pre-October 18th telephone conversation between Mr. Bianchi [Petitioner's Athletic Director] and Mr. Cerone [Chairman of Section V Football] regarding Jake's eligibility to play in the Sectional Tournament. By this justifiable reliance argument, Petitioner invokes the doctrine of equitable estoppel. See Nassau Trust Co. v. Montrose Concrete Products Corp., 56 NY2d 175 (1982); Marshall v. Pittsford Cent. Sch. Dist., 100 AD3d 1498, 1499 (4th Dept 2012), lv denied, 20 NY3d 859 (2013). As unchanged from questioning at oral argument, this Court remains unswayed that Mr. Bianchi and Mr. Cerone ever had a meeting of the minds concerning the underlying information necessary for Mr. Cerone to make a knowing and intelligent recommendation. Based upon the facts presented, Mr. Cerone's advice to Mr.

Bianchi was factually correct, but was given without a full understanding of Petitioner's strategic decision not dress Jake for the final contest. Consequently, Mr. Cerone's advice does not bind Respondents, or relieve Petitioner of its independent obligation to adhere to the rules and request a medical waiver as allowed in Representation Rule 25.

Lastly, and as no party voiced any opposition to the Attorney General's Office's application, the New York State Education Department's request to be dismissed from the case is granted.

In sum, both the parties and the public should appreciate that this was not an easy decision, nor one which the Court relished having to make given the consequences involved.

CONCLUSION

Based upon all of the foregoing, it is the Decision, Order, and Judgment of this Court that the Verified Petition **DENIED**; therefore, Respondent's determination is confirmed and no future injunctive relief is awarded. See CPLR 7806.

Signed at Rochester, New York on October 31, 2014.

Honorable J. Scott Odorisi
Supreme Court Justice