SHARON JERDEN, .

.

Grievant, .

.

v. . DOCKET NO. 93-21-349 .

LEWIS COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by Sharon Jerden (Grievant) alleging a violation of W. Va. Code §§ 18A-2-6 and 18A-2-7 in regard to the actions of the Lewis County Board of Education (LCBE) in allegedly failing to give proper notice before vacating and reposting her extracurricular position as Head Cheerleading Coach at Lewis County High School (LCHS). This grievance was initiated on July 21, 1993. After Level I was waived, LCBE's Superintendent waived his decision and a hearing was conducted before LCBE at Level III on August 10, 1993. LCBE thereafter requested an opinion from the State Superintendent of Schools, advising the Grievant of this action by letter dated August 13, 1993. Following receipt of the requested opinion, LCBE formally denied this grievance at Level III on September 21, 1993 and Grievant timely appealed to Level IV. Ultimately, the parties agreed to submit this matter for decision on the record and, upon receipt of extensive written briefs fromboth parties, this matter became mature for decision on March 30, 1994.

Initially, Grievant contends that she became entitled to a "default" judgment by operation of W. Va. Code § 18-29-3(a). (See footnote 1) This so-called "default" provision in the grievance procedure for education employees states:

> If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly by sickness or illness, the grievant shall prevail by default. Within five days of such default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the

> remedy, the hearing examiner shall presume the employee prevailed upon the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted so as to comply with the law and to make the grievant whole.

In Smith v. Board of Directors/West Liberty State College, Docket No. 93-BOD-051 (Feb. 17, 1993), this Board ruled that it is not empowered under W. Va. Code § 18-29-4 to enforce a default which may have occurred at the lower grievance levels. That decision noted that the Grievance Board is limited by § 18-29-3(a) to acting on default cases submitted to Level IV by the employer. Grievants who contend their employer has failed to comply with thetime limits are authorized to pursue a remedy through a mandamus proceeding in accordance with W. Va. Code § 18-29-9. Smith, supra, at 3. Accordingly, the Grievant's allegation of a default at Level III involves a claim upon which the Grievance Board has no authority to act and which is not grievable at Level IV. Morrone v. Wayne County Bd. of Educ., Docket No. 92-50-389 (Aug. 31, 1993); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-419 (Aug. 20, 1993); Smith, supra.

Having addressed the foregoing procedural matter, the merits of Grievant's claims may now be considered. When the previous Head Cheerleading Coach at Lewis County High School resigned in January 1993, Grievant bid upon and was awarded the position for the remainder of the 1992-93 school year. Grievant entered into a written "Contract of Employment for Extracurricular Duty Assignment" with LCBE which included the following terms and conditions:

> 1. The period of this assignment shall be for the 1992
>
> [-]1993 school year only.
>
> 2. This contract shall terminate at the end of the designated school year or shall be terminated at any time for just cause pursuant to W. Va. Code §18A-2-8 or by mutual consent of the parties.
>
> 3. The parties to this contract hereby acknowledge that this assignment agreement is entered into pursuant to West Virginia Code §18A-4-16.

> The employee shall perform . . . duties as Head Cheerleading Coach at Lewis County High School for a sum of $1,450.00 for the remainder of 1992-93[.]

At the time Grievant entered into this position, she was employed as an Aide III, a school service personnel position as defined in W. Va. Code § 18A-4-8. Thereafter, LCBE did not issue any formal notice to Grievant providing an opportunity for a hearing on its decision to terminate her extracurricular contractand not renew her contract as Head Cheerleading Coach for the 1993-94 school year. On or about July 12, 1993, Grievant was advised that the Head Cheerleading Coach position for the 1993-94 school year at LCHS had been posted. Grievant filed an application for the position but LCBE awarded the position to M. Rosalie Allman, a certified teacher employed by LCBE. (See footnote 2)

After Grievant initiated her grievance, the matter was essentially waived to Level III where a hearing was conducted before the Board on August 10, 1993. Thereafter, the Board requested a legal interpretation from the State Superintendent of Schools and so advised Grievant by letter dated August 13, 1993. On August 27, 1993, the Board received the following response from State Superintendent of Schools Henry Marockie:

> This is in reply to your letter of August 12, 1993, concerning non-professionals who have received authorization to coach by completing the training program offered for coaches by the SSAC.

Your question is:

> "Do service personnel, employed as seasonal coaches with an extra-curricular contract specifically stating that they were hired for one year, have the right to procedural termination including notification in writing and a hearing with the local board of education?"

> Enclosed herewith are copies of Superintendent's Interpretations issued October 8, 1991, and October 6, 1992 which answer your question "no".

The attached October 8, 1991 opinion provided as follows:

> You have asked about coaching of athletics or other extracurricular activities by a person who is not a certified professional educator:
>
> 1. After a job has been posted and no regular employee has applied for the job, and a parent applies and is given the job, can a regular employee come back and "bump" the parent out of the coaching position?

No. The coach keeps the job for that school year.

> 2. What is the tenure of parents when coaching? Does that job have to be RIF'd and reposted each year or, once the parent has been employed, can that person remain in that position until they resign or a mutual agreement for resignation is reached?
>
> The coaching job has to be rebid for the next year, and for each subsequent year that it is not filled by a certified professional educator.
>
> A coach does not earn tenure regardless of whether she (he) is a certified professional educator.
>
> For further information, please refer to Policy 5202-10-A3f, page 54, of the Minimum Requirements for the Licensure of Educational Personnel and Advanced Salary Classifications (enclosed). See also W.Va. Code 18A-3-2a(4).

The October 6, 1992 opinion states:

> You have asked:
>
> If, for example, a bus driver or a cook is hired to coach an athletic team in February for a spring sport, when does the position have to be re-bid? According to your

> answer in State Ed, (citation omitted) I would take it to mean that the position would have to be re-bid prior to February of the next season.
>
> You are correct in your answer. (citation omitted) A coach who is a professional educator does not acquire tenure and so his or her coaching assignment can be changed each year; whereas, a coach who is not a professional educator does not really have an assignment in terms of the school law (W.Va. Code 18A-2-7 and 18A-4-16) but simply has a seasonal contract for the sports which he or she coaches, according to state educational policy(citation omitted) and the school law (citing W. Va. Code § 18A-3-2a(4)). (emphasis in original)

In Smith v. Board of Education, 341 S.E.2d 685 (W. Va. 1985), a case involving a high school football coaching position, the West Virginia Supreme Court of Appeals determined that the protections of W. Va. Code §§ 18A-2-7 and 18A-2-8 apply to all school personnel positions, including contracts relating to extracurricular assignments under W. Va. Code § 18A-4-16. This decision was reaffirmed in a subsequent holding, Hosaflook v. Nestor, 346 S.E.2d 798 (W. Va. 1986), which also involved an extracurricular assignment to a football coaching position.

This Grievance Board followed Smith in holding that extracurricular assignments for school service personnel (bus operators) need not be vacated and posted each year. Lambert v. Logan County Bd. of Educ., Docket No. 91-23-199 (June 24, 1991). Similarly, this Board held that an extracurricular contract of employment for a bus operator may not be terminated or modified without resort to the procedural requirements of W. Va. Code §§ 18A-2-6 or 18A-2-7. Garvin v. Webster County Bd. of Educ., Docket No. 92-51-407 (Jan. 7, 1993); Black v. Cabell County Bd. of Educ., Docket No. 92-06-114 (June 22, 1992). See McDowell v. Marion County Bd. of Educ., Docket No. 92-24-286 (Aug. 31, 1992). Indeed, this Board has extended the Smith rationale to extra-duty assignments for school service personnel. Mayle v. Barbour County Bd. of Educ., Docket No. 01-89-039 (Dec. 21, 1989).

W. Va. Code § 18A-2-6 applies to service personnel who have a continuing contract of employment based upon three years ofacceptable service. W. Va. Code § 18A-2-7 covers such matters as transfers, suspensions and dismissals of school personnel. Grievant did not establish her entitlement to 18A-2-6 protection beyond the rationale of Smith and Hosaflook. As to applying 18A-2-7, the action at issue here does not appear to constitute a transfer, suspension or dismissal as those terms are normally defined.

LCBE notes that, subsequent to the Smith and Hosaflook decisions, the legislature enacted in 1990 and amended in 1992 W. Va. Code § 18A-3-2a(4), which provides as follows:

> (4) Other certificates; permits. - Other certificates and permits may be issued, subject to the approval of the state board, to persons who do not qualify for the professional or paraprofessional certificate. Such certificates or permits shall not be given permanent status and persons holding such shall meet renewal requirements provided by law and by regulation, unless the state board declares certain of these certificates to be the equivalent of the professional certificate.
>
> Within the category of other certificates and permits, the state superintendent may issue certificates for persons to serve in the public schools as athletic coaches or other extracurricular activities coaches whose duties may include the supervision of students, subject to the following limitations: (A) Such person shall be employed under a contract with the county board of education which specifies the duties to be performed, which specifies a rate of pay equivalent to the rate of pay for professional educators in the district who accept similar duties as extra duty assignments and which provides for liability insurance associated with the activity: Provided, That such persons shall not be considered employees of the board for salary and benefit purposes other than as specified in the contract; (B) a currently employed certified professional educator has not applied for the position; and (C) such person completes an orientation program designed and approved in accordance with state board rules which shall be adopted no later than the first of January, one thousand nine hundred ninety-one.

Grievant submits that these provisions only serve to give preference to a "currently employed certified professional educator" over a school service employee when the position has been properly vacated by mutual consent or pursuant to the procedures set forth in W. Va. Code §§ 18A-2-6 or 18A-2-7. LCBE contends that § 18A-3-2a(4) reflects a legislative intent to establish at least a limited exception to the Court's rulings in Smith and Hosaflook. LCBE's position is bolstered by the August 27, 1993 opinion of the State Superintendent of Schools to the effect that service personnel employed as seasonal coaches with an extracurricular contract specifying that they were hired for one year do not have the right to procedural termination, including notification in writing and a hearing before the local board of education. W. Va. Code § 18-3-6 provides specific authority for such opinions in the following terms: "At the request in writing of any citizen, teacher, school official, county or state officer, the state superintendent of schools shall give his interpretation of the meaning of any part of the school law or of the rules of the state board of education." Under the West Virginia Supreme Court of Appeals' well-settled doctrine regarding interpretation of statutes by bodies charged with their administration, a State Superintendent's opinion is entitled to great weight unless it

is clearly erroneous. Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E. 2d 775 (1992); Smith, supra, at 689-690. See Chafin v. Boone County Bd. of Educ., Docket No. 93-03-034 (July 7, 1993);Skeens v. Lincoln County Bd. of Educ., Docket No. 89-22-496 (Oct. 24, 1989).

Although the prior opinions which the State Superintendent referenced in his opinion of August 27th may be factually distinguishable from the instant situation, that does not render the current opinion "clearly erroneous." Even if the Superintendent's pronouncement with regard to the tenure of professional educators employed as coaches is clearly wrong, and that need not be decided given the facts at issue here, such an error would not render the remainder of the opinion clearly wrong since that conclusion is not an essential premise to the Superintendent's ultimate opinion. Moreover, the State Superintendent's opinions in question follow a consistent theme; where someone other than a professional educator holds a coaching position, whether that individual is a parent not otherwise employed by the local board of education or a school service employee, such an individual does not acquire any form of "tenure" or a "continuing contract." The Superintendent's October 8, 1991 and October 6, 1992 opinions both make reference to W. Va. Code § 18A-3-2a(4). Inasmuch as this provision was adopted subsequent to the Supreme Court of Appeals' controversial rulings in Smith and Hosaflook, and both of those decisions involved professional educators (teachers) holding extracurricular assignments, the undersigned is persuaded that the State Superintendent's opinion of August 27, 1993 is not clearly erroneous. Likewise, the facts in this matter are distinguishable from the prior decisions of this Board cited previously in that none of those cases involvedservice personnel holding an extracurricular assignment normally held by professional educators.

Accordingly, where Grievant, a school service employee, was hired as the Head Cheerleading Coach at LCHS and given a contract specifying that it was "for the remainder of 1992-93" and "[t]he period of this assignment shall be for the 1992 1993 school year only," LCBE acted properly in re-bidding her position following the end of the 1992-93 school year without affording Grievant prior notice under W. Va. Code §§ 18A-2-6 or 18A-2-7. Such a result is consistent with the provisions of W. Va. Code § 18A-3-2A(4) which, at least insofar as coaching positions held by school service personnel are concerned, provides a limited exemption from the application of W. Va. Code §§ 18A-2-6 and 18A-2-7 to a school board's decision not to renew such an extracurricular assignment. Likewise, Grievant has not demonstrated that, in the circumstances present here, LCBE's decision not to renew her contract and ultimately award the position to a professional educator was arbitrary

and capricious. See Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986).

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter:

FINDINGS OF FACT

1. Grievant is employed by Lewis County Board of Education (LCBE) as an Aide III, a school service personnel position.

2. Following the resignation of the previous Head Cheerleading Coach at Lewis County High School (LCHS), Grievant bid upon the vacancy and was awarded the position for the remainder of the 1992-93 school year, effective January 4, 1993.

3. Grievant's "Contract of Employment for Extracurricular Duty Assignment specified:

(1) "The period of this assignment shall be for the 1992 1993 school year only."

(2) "This contract shall terminate at the end of the designated school year . . . ."

(3) ". . . The employee shall perform the following duties . . . for the remainder of 1992-93 . . . ."

4. LCBE posted the position of Head Cheerleading Coach at LCHS sometime during June or July 1993 without affording Grievant notice that her extracurricular contract would not be renewed.

5. Grievant submitted a timely application for the Head Cheerleading Coach position but the position was awarded to another applicant, M. Rosalie Allman, a professional educator.

6. Subsequent to Grievant's submission of a timely grievance and elevation of her grievance to Level III, LCBE requested and obtained a written opinion from the State Superintendent of Schools dated August 27, 1993 and indicating that service personnel employed as seasonal coaches with an extra-curricular contract stating that they were hired for one year do not have the right to "procedural termination" including notification in writing and a hearing with the local board of education.

CONCLUSIONS OF LAW

1. Under W. Va. Code § 18-29-3(a) this Grievance Board has no authority to act upon a Grievant's claim of entitlement to a default judgement at Level III. Morrone v. Wayne County Bd. of

Educ., Docket No. 92-50-389 (Aug. 31, 1993); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-419 (Aug. 20, 1993); Smith v. Bd. of Directors/West Liberty State College, Docket No. 93-BOD-051 (Feb. 17, 1993).

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986).

3. An opinion of the State Superintendent of Schools interpreting a provision of the laws applicable to the West Virginia schools is entitled to great weight unless it is clearly erroneous. Lincoln County Bd. of Educ. v. Adkins, 424 S.E.2d 775, 188 W. Va. 430 (1992); Smith v. Board of Education, 341 S.E.2d 685 (W. Va. 1985). See Security Nat'l Bank v. First W. Va. Bancorp, 277 S.E.2d 613 (W. Va. 1981).

4. The August 27, 1993 opinion of the State Superintendent of Schools to the effect that school service personnel employed as seasonal coaches under an extra-curricular contract specifying that they were hired for one year do not have a right to procedural termination including notification in writing and a hearing withthe local board of education is not clearly erroneous. See Lincoln County Bd. of Educ. v. Adkins, 424 S.E.2d 775, 188 W. Va. 430 (1992); Chafin v. Boone County Bd. of Educ., Docket No. 93-03-034 (July 7, 1993).

5. Language in W. Va. Code § 18A-3-2a(4) providing that persons employed as "athletic coaches or other extracurricular activities coaches" are "subject to the following limitations" including ". . . shall not be considered employees of the board for salary and benefit purposes other than as specified in the contract" and "[provided that] a currently employed certified professional educator has not applied for the position," allowed LCBE not to renew Grievant's extracurricular assignment as Head Cheerleading Coach without providing notice and the procedural protections afforded by either W. Va. Code §§ 18A-2-6 or 18A-2-7.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Lewis County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any

appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: August 19, 1994

Footnote: 1Grievant's appeal to Level IV stated: "The Grievant also alleges the board of education failed to respond to the grievance at Level III as required by W. Va. Code §18-29-4(c) and §18-29-3(a)." Although Grievant's Proposed Findings of Fact and Conclusions of Law do not address this issue, in the absence of a specific waiver of this issue, the undersigned has elected to rule on this question.

Footnote: 2There was evidence that LCBE's Business Manager, Paul Derico, prepared a new contract for Grievant as Head Cheerleading Coach for the 1993-94 school year on the assumption that she would be continuing in that position. However, that contract was never approved by LCBE and this activity by Mr. Derico has no bearing on the outcome of this case.