NIGEL MAXEY

v. Docket No. 93-HHR-227

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES

DECISION

The grievant, Nigel Maxey, is employed by the West Virginia Department of Health and Human Resources (HHR) as an Economic Service Worker III in its Wyoming County office. He filed a grievance at Level I February 26, 1993, protesting HHR's practice of disseminating summaries of Level IV decisions issued by the Education and State Employees Grievance Board (hereinafter Board) to its supervisory staff. His supervisor and the Level II evaluator were without authority to grant relief and the grievance was denied at Level III. (See footnote 1) Appeal to Level IV was made June 18, 1993.

In order to assess the need for an evidentiary hearing, the undersigned subsequently requested that the parties submit proposed findings of fact. The grievant submitted fact proposals which included statements regarding his legal position. The agency declined to submit proposals. In a hearing held June 23, 1994 (See footnote 2), counsel for the agency agreed that the grievant's assertions regarding the facts of the case were generally accurate. Accordingly, the findings herein are based on those proposals. (See footnote 3)

There is no dispute that HHR has an established statewide practice of providing its supervisory staff short summaries of final decisions issued by the Board which include the names of the grievants in the cases. (See footnote 4) Apparently, the purpose of disseminating the summaries is to provide supervisors with knowledge of the Board's holdings on various personnel policies applicable to HHREmployees. Since the grievant herein has been the complainant in a number of cases which have reached Level IV, his name appears in those summaries. (See footnote 5)

The grievant does not assert that the practice is violative of any statute or rule of law. Instead, he contends that it is "unfair and totally unconscionable" for an employee to "bear the negative impact" of having supervisors and perhaps other employees learn that he or she has filed a grievance. HHR

maintains that per W.Va. Code §§29A-2-2 and 29A-2-3, the decisions of the Board are public documents and for that reason, the summaries based on those documents do not infringe on the grievant's "right to privacy." For the reasons hereinafter discussed, the undersigned concludes that HHR must prevail.

Code §29A-2-2, (See footnote 6) in pertinent part, provides,

> There is hereby created in the office of the secretary of state, a public record to be known and denominated as the state register, to be established, compiled, indexed and copied, and such copies offered for subscription and distribution, in accordance with the provisions of this article.

W.Va. Code §29A-2-3 provides,

> The secretary of state shall receive and file in the state register:
>
> (c) Every determination of fact or judgment rendered by an agency for inclusion therein and every notice of submission to the Legislature or its rule-making review committee made in conformity with this chapter.

HHR is correct in its assertion that these provisions mandate that the Board's final decisions be made public. More conclusive, however, is W.Va. Code §29A-2-9 which provides,

> Every agency shall file in the state register all final orders, decisions and opinions in the adjudication of contested cases except those required for good cause to be held confidential and not cited as precedent. Except as otherwise required by statute, matters of official record shall be made available for public inspection pursuant to rules adopted in accordance with the provisions of this chapter.

Further, no exceptions to these provisions are found in the remaining portions of Code §29A-1-1 et. seq or Code §29-6A-1 et. seq, which sets forth the grievance procedure for state employees. (See footnote 7) Thus, it is clear that the grievant is seeking to prohibit HHR from circulating public information. He has articulated no theory of law and the undersigned is unaware of any which gives rise to such a prohibition.

Accordingly, the grievance is **DENIED.**

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-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.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: September 30, 1994

Footnote: 1It appears that the parties were not in dispute over the facts of the case and that no Level III hearing was held. Without making findings of fact and conclusions of law, the Level III evaluator granted a motion to dismiss made by the agency's representative. The motion was essentially an assertion that to grant the relief sought would be contrary to W.Va. Code §29A-2-2.

Footnote: 2This hearing was held to address other grievances filed by Mr. Maxey. At that time, the undersigned preliminarily ruled that the grievance was without merit. Upon closer review of the facts and applicable law, that decision is herein affirmed.

Footnote: 3The parties' legal positions are drawn from a motion to dismiss filed by the agency at Level III and the argument made by the grievant in his fact proposals. It is noted that in the grievant's original filing, he implies that the circulation of the summaries in issue was part of an effort on the agency's part to discredit him. His proposed findings of fact, however, are phrased in terms of the effect the circulation might have on a worker and do not allege as fact that the agency only began dissemination of the summaries after he had exercised his rights under the grievance procedure. The undersigned finds it implausible that HHR's sole purpose for its statewide dissemination of the synopses was to publicize the grievant's participation in that process.

Footnote: 4Notice is taken that the Board prepares synopses of decisions issued in a given month and, upon request, provides copies for research purposes to various employers, employee organizations, and other interested parties. The record does not reflect whether these synopses are the same summaries in dispute herein.

Footnote: 5See, Maxey v. HHR, Docket No. 90-DHS-151 (April 10, 1991); Maxey v. HHR, Docket No. 91-DHS-209,

(June 26, 1992); Maxey v. HHR, Docket No. 92-HHR-504, (February 4, 1993); Maxey v. HHR, Docket No. 92-HHR-088/224 (August 16, 1993).

Footnote: 6W.Va. Code §29A-1-1 et. seq, is entitled "State Administrative Procedures Act."

Footnote: 7W.Va. Code §29-6A-3(u) provides that, "No less than one year following resolution of a grievance at any level, the grievant may by request in writing have removed any record of the grievant's identity from any file kept by the employer." While this language cannot be construed as an exception to the provisions of Code §29A-2-2, it appears that it is broad enough to encompass a request by the grievant to have his name deleted from the agency's summaries after one year following the issuance of the Level IV decision. Since the grievant makes no assertion that he has ever made such a request, the issue need not be addressed further. Of course, there is also nothing in the statutes that would prohibit HHR from deleting the names of the grievants prior to its circulation of the summaries and it appears that from a personnel-management standpoint, such action would be prudent.