NIGEL MAXEY

v. Docket No. 93-HHR-007

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 II in its Pineville office. He filed a grievance at Level IV January 5, 1993, protesting his thirty-day suspension without pay for insubordination. A hearing was held June 23, 1994, (See footnote 1) and the parties submitted proposed findings of fact and conclusions of law on July 26, 1994. (See footnote 2)

I.

There is little if any dispute over the facts of the case. On November 20, 1992, the grievant appeared at a Level IV hearing in Beckley, West Virginia, in the case of Maxey v. W.Va. Dept. of Health and Human Resources, Docket No. 92-HHR-088 (hereinafter "Maxey I"). (See footnote 3) Among other things, the case involved charges against the grievant that he had failed to timely process certain applications for financial assistance. During the hearing, the grievant, in an effort to show that other Eligibility Specialists in his unit were similarly deficient, produced a large box of copies of documents taken from active client files in his office. HHR Regional Administrator Louis Palma was present at the hearing and expressed concern that the documents contained confidential information and should not have been taken from the office without supervisory approval. A recess in the hearing was taken during which Mr. Palma contacted HHR's Pineville office and determined that no such approval had been given. He subsequently confrontedthe grievant who confirmed that he had not received authorization from his supervisor, Anita Adkins. The grievant then complied with Mr. Palma's direction to turn over the documents to him.

Mr. Palma subsequently determined that the documents contained the names and addresses of recipients of public assistance, their social security numbers, and other identifying information. He also determined that the grievant had attempted to redact some of this information by taping small

strips of paper over names and other indicators of the clients' identities but that much of the information was still readily discernible. (See footnote 4) Mr. Palma ultimately concluded that the grievant had violated Section 240 of Chapter 200 of HHR's "Common Chapters Manual" which, among other things, provides that, "A case record must never be taken from the Area or Satellite office without the supervisor's permission." He further concluded that the grievant had violated several federal regulations relating to the confidentiality of information on persons receiving public assistance.

On December 10, 1992, at Mr. Palma's direction, Ms. Adkins met with the grievant to discern whether he was aware of the referenced policies. During their discussion, the grievant conceded that he was aware of the agency's confidentiality regulations and confirmed again that he had not obtained authorization to take the documents in issue to the hearing. The grievant would not, however, admit any wrongdoing.

On December 21, 1992, Ruth Panepinto, HHR Commissioner, Bureau of Human Resources, suspended the grievant via the following letter.

> In accordance with Section 13.30 of the Division of Personnel Rules and Regulations of West Virginia, you are hereby suspended without pay from your duties as an Economic Service Worker II in the Pineville office for a period of 30 calendar days.
>
> The period of suspension will begin December 29, 1992 and be through and including January 27, 1993. You should report back to work at your regular time on January 28, 1993.
>
> The charge for your suspension is your continued unacceptable behavior of ignoring established rules, regulations, and policies. Specifically, on November 20, 1992 you had in your possession, outside of the Pineville office, numerous copies of case record material of specific clients as well as printouts and registers containing information about specific clients without the authorization or knowledge of your supervisor. Clients, like any other citizens, have certain constitutional rights. Protection of confidential information regarding clients is the most basic among these rights. Your actions violated and caused the agency to violate these rights. Government agencies who have access to confidential information regarding clients must adhere to a strict level of protection. Your actions violated and caused the agency to violate these rights. Your continued employment puts these constitutional rights in jeopardy. The responsibility for protecting the confidentiality of all our clients is fundamental to all who work in Income Maintenance. Use of information gathered for the purpose of determining eligibility forvarious programs for any other reasons violates the rights of those we serve. You have stated you did not receive proper authorization from your supervisor, nor your coordinator, nor is there evidence that you received permission from individual clients. This resulted in the agency being out of compliance with

Chapter 200 of the Common Chapters Manual. Specifically, your action violated Section 240 of the Common Chapters Manual (removing case record material from the office without supervisory approval), and violates Section 272.1 of the Code of Federal Regulations, Chapter 11 (1/1/87 Edition), Section 205.50 of 45 Code of Federal Regulations, Chapter 11 (10/1/87) Edition and 431.300 of 42 Code of Federal Regulations, Chapter IV (10/1/89 Edition) regarding use of client information. When questioned by the Economic Service Coordinator regarding your knowledge of confidentiality and Chapter 200 of the Common Chapters Manual, you stated you were well aware of the policies. This infraction is compounded by the fact you recently received a written reprimand yet chose to engage in more activity contrary to law and policy to meet your own needs. These actions contribute to a pattern of behavior which demonstrates blatant insubordination.

Your latest infraction of removing copies of case record material from the office is a gross abuse of the authority and discretion vested in the position of Economic Service Worker II and constitutes gross misconduct. Your actions cause the agency to be in violation of the aforementioned federal regulations and policies. Clients have reason to expect this agency and its agents to utilize information it gathers for the purpose if is intended. Your actions cause doubt to be cast on the agency's ability to gather, maintain, and use client information securely and appropriately.

On October 23, 1992, a written reprimand was issued to you regarding poor performance and ignoring supervisory inquiries/directives. On October 16, 1991, you were issued a written reprimand for similar infractions. Your PO-32 (Professional Service Rating) for 1992 indicated similar problems. Your response to these reprimands and evaluations has been that of denial, resentment, and unwillingness to work toward improvement as you felt none was needed. Your response further indicates there is little likelihood of rehabilitation even though your supervisors (three) and a coordinator have made attempts to alter your performance and behavior. Your reactions to these attempts demonstrate your inability and/or unwillingness to adapt to meet the responsibility of your assignment and/or your resistance to attempt corrective actions. Upon completion of this suspension, correctiveaction and necessary change are mandatory. Behavior similar to that demonstrated and outlined in this letter is not acceptable.

I regret the necessity of taking this action but, under the circumstances, you have left me with little choice but to suspend you from employment with the West Virginia Department of Health and Human Resources for your failure to meet a reasonable standard of conduct for an Economic Service Worker II.

If for any reason during this period of suspension you should have a need to utilize the facilities of the Department of Health and Human Resources, please contact Anita Adkins for an appointment and she will take the appropriate action with your request.

You shall be given the opportunity to either meet with me in person or to present me

> with an explanation of the reason why you may think the facts and grounds contained in this letter are in error and why you may think this action is inappropriate, providing you do so during this notice period. If you choose to either meet with me or to write, please contact my secretary or deliver to me your written explanation on or before December 28, 1992.
>
> Finally, I wish to emphasize the fact that further infractions of the rules, whether they are the same as the present circumstances or different, will result in more severe disciplinary actions and may finally result in your dismissal.
>
> Any questions you might have regarding this suspension should be directed to Anita Adkins, Economic Service Coordinator. Pursuant to West Virginia Code Chapter 29.6A, you may file a grievance within 10 working days of the effective date of this action.

On January 23, 1993, the grievant made application for unemployment compensation for the suspension period and was initially denied benefits on the grounds that he had been suspended for "simple misconduct." He appealed the rejection and, following a hearing held March 22, 1993, (See footnote 5) West Virginia Department of Employment Security Administrative Law Judge Charles Cunninghamfound that HHR had failed to show that the grievant's conduct constituted misconduct as that term is used in W.Va. Code §21A-6-3(2). HHR appealed this decision to the Employment Security Board of Review where it was affirmed by decision dated June 7, 1993. Apparently, HHR made no further appeals.

It is undisputed that the grievant, as indicated in the suspension letter, was issued October 16, 1991 and October 23, 1992 written reprimands for insubordinate conduct. The first reprimand was sustained in Maxey I (See footnote 6) and the second was upheld in Maxey v. W.Va. Dept. of Health and Human Resources, 93-HHR-424 (February 28, 1995) ("Maxey II").

II.

The grievant first asserts that the doctrine of res judicata precludes HHR from "relitigating" the case. He argues that deference must be afforded the decision of the Employment Security Administrative Law Judge on the issue of whether he committed wrongdoing. Second, citing Oakes v. W.Va. Dept. of Finance and Administration, 264 S.E.2d 151 (W.Va. 1980), the grievant contends that

his actions at best constituted a "technical violation" of policy which did not directly harm the public and the discipline was, therefore, unwarranted. Finally, the grievant asserts that in levying the suspension, the agency improperly considered past charges of misconduct against him which had been overturned in Maxey I.

The agency asserts that the evidence supports that the grievant intentionally ignored its long-standing and clearly communicated policy regarding the confidentiality of client information by making copies of client records without supervisory approval and producing them at a public hearing. HHR contends the grievant's conduct was not merely a "technical" violation of the policy in that his actions had the potential of revealing highly personal information on its clients to the public and subjecting the agency to litigation and federal sanctions. HHR urges that the doctrine of res judicata be found inapplicable on the grounds that the legal issues addressed in the proceedings before Employment Security are substantially different from those before the Education and State Employees Grievance Board. For the reasons set forth below, the undersigned concludes that the agency must prevail.

III.

Res judicata is an equitable doctrine which, when applied, bars the litigation of factual and legal issues on which a final judgment has previously been rendered. Wolfe v. Forbes, 217 S.E.2d 899 (W.Va. 1975). (See footnote 7) The inquiry into the applicability of the doctrine is necessarily focused on whether the cause of action in the second suit is the same as in the first suit. Mellon-Stuart v.Hall, 359 S.E.2d 124 (W.Va. 1987). Generally, the party seeking to invoke the doctrine must show identity in the thing sued for; identity of the cause of action; identity of persons, and of parties to the action; and identity of the quality in the persons for or against whom the claim is made. Wolfe, supra; Hannah v. Beasley, 53 S.E.2d 729 (W.Va. 1949).

Clearly, the parties and their legal capacities are the same in both actions. There are significant differences, however, in the nature of the issues raised in the two cases and the remedies available from the two agencies which compel a finding that there is no identity of "the cause of action" or "the thing sued for."

It is apparent from the transcript of the Employment Security hearing and the Administrative Law Judge's subsequent decision that the focus of that agency's inquiry was whether the agency had proven that the grievant engaged in conduct which would justify a denial of benefits. As indicated by

the findings in his decision, the Employment Security ALJ narrowly confined the inquiry to whether the agency had proven the grievant had engaged in "misconduct" which was defined as,

> Conduct evincing such willful and wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer had the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or the employee's duties and obligations to his employer. (See footnote 8)

It is also clear from the ALJ's decision that Employment Security is not concerned with, and by statute was not required to address, the issues of whether the suspension violated or contradicted the agency's personnel policies and practices; whether the punishment imposed was too harsh; whether the employee was afforded procedural and substantive due process; or whether the employer consistently levied like discipline for like offenses. Further, it appears that the Employment Security ALJ was constrained by statute to provide only one remedy, i.e., a determination that the employee should not be penalized via a denial of benefits for the separation in employment.

The scope of the review conducted by the Education and State Employees Grievance Board in such cases is much broader. Essentially, the Grievance Board is authorized by a substantially different statute (See footnote 9) to examine many aspects of a particular disciplinary action, including those listed above. In disciplinary cases involving tenured state employees, the Grievance Board must ultimately address whether the employer proved that the employee engaged in the conduct for which he was disciplined and whether that conduct was "of a substantial nature directly affecting the rights and interests of the public." Oakes v. W.Va. Dept. of Finance and Administration, 264 S.E.2d 151 (W.Va. 1980). Obviously, one issue with which the Grievance Board is notconcerned is whether the grievant should receive unemployment benefits.

The remedies available from the Grievance Board are also dissimilar to that provided by Employment Security. Pursuant to W.Va. Code §29-6A-5(b) (See footnote 10), the Grievance Board may order the employee reinstated with reimbursement for lost wages and benefits; the punishment reduced or reassessed; and\or the employee's records expunged. In short, the Grievance Board conducts a rather broad assessment of the propriety of the disciplinary action itself while Employment Security makes determinations regarding the effect of the action on the employee's eligibility for benefits. For the foregoing reasons, it is concluded that the cause of action litigated before

Employment Security is sufficiently different from that litigated before the Grievance Board to preclude the application of the doctrine of res judicata.

Further, the undersigned finds the doctrine inapplicable for other reasons. The decision of the Employment Security ALJ reflects that he placed considerable weight on the grievant'stestimony that he had removed confidential records from his office on June 1, 1990, for production at an earlier Level IV hearing and that he had not been disciplined for doing so. From this testimony the ALJ concluded, "Apparently, it was common for such information to be utilized at employee grievance hearings" and "Though there was a prohibition against removing confidential client documents from the office the claimant had reason to believe that the action he took at his own grievance hearing in November, 1992, was not contrary to that policy."

A thorough review of the record upon which these conclusions were made reflects that there was little if any evidence to support the determination that use of the records in question was a common practice within HHR. There was only testimony to the effect that the grievant had produced such records at a previous Level IV hearing without supervisory approval and that HHR had used records in defending itself at the hearing. More importantly, there is no evidence whatsoever in that record which establishes that the HHR administrators were aware that the grievant had used records on a prior occasion. The conclusion that the grievant, therefore, had reason to believe that his subsequent use of records was not a violation of policy is wholly unfounded. (See footnote 11)

Res judicata need not be recognized as valid "where there is manifest error in the record of the prior administrativeproceeding." Harrah v. Richardson, 446 F.2d 1, 2 (4th Cir. 1971). The undersigned concludes that the findings discussed above constitute "manifest error" in the Employment Security decision.

IV.

At the Level IV hearing, the grievant acknowledged that he was aware of the policy in question and that during previous service in a supervisory capacity he had instructed other employees on its provisions. When asked why he did not seek supervisory approval to use the records, the grievant provided a number of reasons. At one point he explained, "I didn't see a problem so I didn't ask." Again asserting that he had used records in previous hearings without approval and implying that the agency knew or should have known that he did, the grievant also asserted, "I had no basis upon

which to presume that there was anything that existed that would keep me from using those documents to defend myself."

In response to inquiries regarding the viability of obtaining a subpoena duces tecum for the records in question, the grievant responded that he declined to do so because it would have required that he name agency clients in his request for the subpoena. He asserted that such a request would have been a violation of the policy in issue. The grievant at least implied several times during his testimony that because he had only used copies of client records and not the records themselves, he had not violated the policy in question.

The grievant further asserted during his Level IV testimony that the agency had used client records in grievance proceedingsbefore and those records had not been redacted. Essentially, he contended that if the agency were free to use unredacted records then he was free to use records which were to some extent redacted.

Mr. Palma testified regarding the process by which the decision to suspend was made. He represented that prior to reaching that decision, he reviewed the grievant's personnel file, examined the agency's disciplinary guidelines and conferred with Ms. Adkins and a representative with the West Virginia Division of Personnel. Mr. Palma also testified that he directed Ms. Adkins to confer with the grievant to determine whether he fully understood the agency's stance on the confidentiality of client records. According to Mr. Palma, his decision to suspend was predicated on his conclusion that the grievant's conduct was insubordinate; it evinced a willful disregard for one of the most important policies of the agency; and the grievant had been disciplined twice for insubordination since October 1991. Mr. Palma also testified that prior to the grievant's testimony at the Employment Security hearing, he had no knowledge that the grievant had ever used client records in a grievance proceeding without supervisory approval. He confirmed that the agency had produced records in its defense at such proceedings but asserted that since a supervisor or administrator was present when they were compiled and produced, there was no violation of the policy.

To the extent that the grievant makes the assertion that because he removed copies of parts of client records and not the original documents he did not violate the policy, the argument isrejected. A thorough review of the policy reveals that its prohibitions are aimed at preventing the unauthorized release and use of information on clients, regardless of the manner in which the information was recorded and maintained. To find that the grievant, by reproducing the records, avoided the policy's

prohibitions would be an overly technical and unwarranted interpretation of the policy. Accordingly, it is concluded that the policy encompasses the use of copies of client records and that its proscriptions against their unauthorized use were applicable to the copies made by the grievant.

The grievant's argument that he should be found blameless because the agency had also used client records in litigation requires little discussion. The grievant produced no evidence to rebut Mr. Palma's assertion that a supervisor\and or administrator was always involved when the agency sought to use those records and that testimony is accepted. Obviously, there is a substantial difference between the grievant's use of the records and the agency's. The grievant seeks to make a comparison where there is none.

The grievant's assertion that he had no reason to believe that "there would be a problem" with his use of the documents is entirely inconsistent with the remainder of his testimony, and that of Mr. Palma and Ms. Adkins which establishes in clear and convincing fashion that he was fully aware of the policy at issue. The grievant's own testimony reflects that during his previous service with HHR as a supervisor, he counseled subordinates who hadcommitted violations of the policy. The clear inference to be drawn from the testimony and the policy is that the agency takes a very serious approach to the confidentiality of client records and that its employees, including the grievant, are instructed on the ramifications of a breach on a continuing basis. A review of the applicable federal regulations, with which the grievant was also familiar, reflects that he violated the mandate therein that client information not be used for any purpose other than determining initial and on-going eligibility for various benefits and services. (See footnote 12) Accordingly, it is concluded that the grievant knew all too well that his use of records without supervisory approval would be a violation of policy. It follows that his decision to do so was a deliberate one.

Intentional disregard for clearly-communicated policies of an employer constitutes willful neglect of duty. Grooms v. Raleigh County Bd. of Educ., Docket No. 90-41-482 (April 30, 1991); Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991). Such conduct can also be characterized as insubordination in that the policies constitute "standing orders." Grooms.

There are few legally recognized defenses to a charge of insubordination. Essentially, the employee must either show that the person giving the order was without authority to do so or thatthe directive required exposure to unreasonable risk. Thompson. (See footnote 13) The grievant has done neither. His "I didn't see the harm" assertion is neither credible nor compelling and does not

constitute a defense to the charge. Further, it is of considerable significance that compliance with the policy in issue would have been a simple matter requiring little time or effort. Similarly, a subpoena duces tecum compelling production of the documents at hearing could have been easily obtained. The grievant's explanation as to why he did not pursue that alternative appeared contrived.

The grievant's claim that the offense was merely "technical" and did not affect the rights of the public must also be rejected. As previously noted, the grievant had previously been reprimanded twice for insubordinate conduct. The "technicality" of the charge at issue herein is, therefore, not merely limited to whether the unauthorized use of client records affected the public's rights. As indicated in Ms. Panepinto's letter, the issue is whether the grievant's documented insubordinate behavior had a cumulative effect on those rights. The undersigned agrees with Ms. Panepinto that it did. Clearly, the public has a right to expect its employees to obey their superiors and abide by lawfully promulgated rules.

Moreover, the use of the records, in and of itself, was no technical violation of policy. As noted, the record reflects that HHR and various federal authorities, for good reason, have taken a very serious approach to the confidentiality of information on clients. The grievant's knowledge of the policies and his decision to violate them are indicative of willfulness and not oversight. That no disclosure of confidential information to the public actually occurred is irrelevant. While the policies involved are primarily aimed at preventing the release of information on clients, they also provide for regulation by persons in authority in those instances where the release is permitted. Simply stated, the grievant was suspended for failing to get supervisory approval, not for releasing information.

Finally, the undersigned finds that the suspension was not violative of HHR's personnel policies and that it was not otherwise based on improper considerations. Contrary to the grievant's assertions, the record establishes that the agency has not bound itself to take any particular disciplinary action in a given case. Rather, it has established a series of guidelines which suggest certain punishments for certain offenses and sets forth the considerations entailed in levying any discipline. The policy contain an unambiguous provision to the effect that they are only guidelines. Nevertheless, to the extent that it can be argued that they are not, the grievant has proved no violation thereof.

Mr. Palma's testimony and the record as a whole reflect that the factors considered prior to making the decision to suspend werethose contained in the suspension letter, namely the seriousness of the unauthorized use of records and the previous two reprimands. The guidelines

clearly provide for a suspension for the third offense of insubordination. The record will not support that HHR impermissibly relied on disciplinary actions which were later invalidated in Maxey I or that the agency otherwise acted arbitrarily in the matter. As indicated, the previous charges of insubordination referenced in the suspension letter were ones which had been appealed and affirmed.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1) The grievant, an Eligibility Specialist in the respondent's Pineville office, made and removed copies of active client files for production at a November 20, 1992 Level IV grievance hearing.

2) Regional Administrator Louis Palma was present at the hearing and inquired whether the grievant had obtained supervisory approval to use the documents. The grievant responded that he had not.

3) After determining that the grievant was aware of the agency's prohibitions against the use of client information without supervisory approval and that he had been twice disciplined for failing to follow policy and/or the orders of a superior, Mr. Palma decided to suspend the grievant for thirty days without pay effective December 29, 1992. The grievant timely appealed to LevelIV. He also prevailed in a claim before the Division of Employment Security for unemployment benefits for the period of suspension.

4) In effect at all pertinent times were agency and federal regulations which prohibited the use of confidential client information for any purpose other than determining a client's eligibility for benefits unless supervisory approval was granted.

5) The grievant was disciplined on two prior occasions for insubordinate conduct. On appeal to the Grievance Board, those actions were sustained.

6) Agency guidelines on disciplinary actions against employees provide for a suspension on the third offense of insubordination. The guidelines are not mandatory.

CONCLUSIONS OF LAW

1) In disciplinary matters the employer bears the burden of proving by a preponderance of the evidence that the employee committed the acts for which he was disciplined and that the conduct

effected the rights and interests of the public. W.Va. Code §29-6A-6; Thompson v. W.Va. Dept. of Health and Human Resources, Docket No. 94-HHR-254 (Jan. 20, 1995).

2) A refusal to abide by an employer's properly promulgated policies which have been clearly communicated to the employee constitutes either willful neglect of duty or insubordination. Grooms, supra.

3) The respondent has met its burden in the case and has shown that the grievant was guilty of willful neglect of duty and/or insubordination. The grievant failed to prove that theaction was taken arbitrarily or was otherwise violative of any policy, statute, regulation or theory of law.

4) The grievant has failed to show the elements necessary for the applicability of the doctrine of res judicata. The issues and relief sought before Employment Security were substantially different from those before the Education and State Employees Grievance Board.

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: February 28, 1995

Footnote: 1At least three prior hearings were continued upon the joint motions of the parties. The motions were primarily based on a belief that a decision in several other grievances initiated by the grievant herein styled Maxey v. W.Va. Dept. of Health and Human Services, Docket No. 92-HHR-088, and which had been heard at Level IV, would have bearing on the manner in which the parties would proceed in the present dispute. The decision in that case was not issued until August 16, 1993. Further, at least three of the grievant's West Virginia State Employees Union representatives assigned to the case withdrew, citing their impending transfers to other states. On August 29, 1994, representative Dave Bielski, requested a continuance of the hearing scheduled for August 30, 1994. The undersigned denied this request on the

grounds that both sides had unnecessarily delayed the proceedings. WVSEU representative Steve Wade appeared at the hearing.

Footnote: 2At the conclusion of the Level IV hearing, the undersigned ruled that HHR had proven by a preponderance of the evidence thatthe grievant had engaged in the conduct for which he was suspended and that the conduct amounted to insubordination. It was also ruled that the grievant had failed to establish a legally recognized defense to the charge. Since, as hereinafter discussed, the grievant raised the issue of res judicata, the parties were directed to confine their written legal argument to the applicability of that doctrine to the facts of the case. Nevertheless, the grievant forwarded proposals which addressed all aspects of the case, including whether the agency met its evidentiary burden. The undersigned, in reassessing the rulings made at the hearing, has carefully reviewed those proposals. Since the agency submitted proposals as requested, its responses to issues other than res judicata have been anticipated.

Footnote: 3The hearing was conducted by Administrative Law Judge Albert C. Dunn, Jr.

Footnote: 4A detailed description of the types of documents and the information contained in them is not set forth herein. The record contains a list, compiled by an employee of the West Virginia Division of Personnel, (Agency Exhibit 1), which describes the 659 copies brought to the hearing. The grievant testified, and it is accepted, that he actually brought two "sets" of copies to the hearing and intended to only submit into evidence copies on which confidential information had been completely redacted with ink. The second set, in which he had merely taped pieces of paper over the information, was to be retained and later destroyed. According to the grievant, the latter group would have only been submitted in the event that the agency challenged the validity of the copies submitted. As hereinafter discussed, however, it is largely irrelevant whether all copies contained identifying data. It is sufficient that a significant portion of the 659 documents contained such information.

Footnote: 5The transcript of this hearing is part of the record herein.

Footnote: 6Two other disciplinary charges in the case were reversed due to a lack of evidence or a finding that the agency had engaged in favoritism.

Footnote: 7The doctrine is applicable to administrative proceedings when the decisions in issue are rendered pursuant to the agencies' adjudicatory authority and its procedures are substantially similar to those used in a court of law. Liller v. W.Va. Human Rights Comm'n, 376 S.E.2d 639 (W.Va. 1988). The parties do not dispute that these requirements are met in the present case.

Footnote: 8This definition is apparently taken from holdings in Federoff v. Rutledge, 332 S.E.2d 855 (W.Va. 1985).

Footnote: 9W.Va. Code §§29-6A-1 et seq.

Footnote: 10"Hearing examiners are hereby authorized and shall have the power to consolidate grievances, allocate costs among the parties in accordance with section eight of this article, subpoena witnesses and documents in accordance with

the provisions of section one [§ 29A-5-1], article five, chapter twenty-nine-a of this code, provide such relief as is deemed fair and equitable in accordance with the provisions of this article, and such other powers as will provide for the effective resolution of grievances not inconsistent with any rules and regulations of the board or the provisions of this article: Provided, That in all cases the hearing examiner shall have the authority to provide appropriate remedies including, but not limited to making the employee whole." See, Graf v. West Virginia University, 429 S.E.2d 496 (W.Va. 1992) for a discussion regarding the scope of these provisions.

Footnote: 11Even if the evidence supported that the grievant had committed a prior similar offense which became known to HHR and had not been punished, the conclusion that HHR's failure to take action constituted an implicit approval of the grievant's conduct would still seem unreasonable.

Footnote: 12The regulations contain narrowly-defined exceptions to this rule which are not relevant to the case. The federal regulations appear to be more stringent than HHR's policy in that they do not even permit the release of information for use in legal proceedings unless a subpoena duces tecum has been issued.

Footnote: 13Arguably, a showing of preferential treatment of similarly-situated employees might be considered a defense to the charge. A finding of favoritism, however, is best characterized as a basis for "estopping" the employer from levying discipline. It is not a finding that the employee did not engage in the conduct for which he was charged. In any event, the grievant herein has made no such showing.