Issue: Termination (petit larceny); Hearing Date: 12/17/02; Decision Date: 12/19/02; Agency: DOC; AHO: David J. Latham, Esq.; Case No.: 5426; **Administrative Review: EDR Ruling Requested 12/30/02; EDR Ruling Date: 01/14/03; Outcome: No error by the HO at the hearing or in his decision**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5426

Hearing Date: December 17, 2002
Decision Issued: December 19, 2002

PROCEDURAL HISTORY

On February 26, 2002, grievant filed a grievance regarding his removal from employment effective January 28, 2002.[1] When the parties failed to settle the matter at the third resolution step, the agency initially qualified the grievance for a hearing. Subsequently the qualification for hearing was denied because the issue had been decided in a hearing conducted on March 15, 2002 by another hearing officer. Grievant requested a ruling on whether his grievance was qualified for a hearing. The Director of the Department of Employment Dispute Resolution (EDR) ruled that the grievance did not qualify for a hearing.[2] Grievant appealed that ruling to the circuit court; the court issued an opinion that grievant should be given a hearing.[3] The undersigned was appointed hearing officer for the case on September 17, 2002. The agency filed a Motion to Dismiss on the

[1] Exhibit 3. Grievance Form A, filed February 26, 2002.
[2] Exhibit 6. Qualification Ruling of Director, No. 2002-074, June 5, 2002.
[3] Exhibit 7. Letter opinion, Fifth Judicial Circuit, August 27, 2002.

basis that the matter at issue has been previously adjudicated by another hearing officer and is therefore *res judicata*.

Upon receipt of the agency's Motion to Dismiss, the hearing officer solicited from grievant a written response to the Motion. Following receipt of grievant's October 2, 2002 response, the hearing officer conducted on October 3, 2002 a telephonic pre-hearing conference with grievant's representative and counsel for the agency to give both parties an opportunity to present oral argument on the issue. Grievant's representative was unable to articulate any evidence that he would present if a hearing were held, arguing only that grievant should be entitled to a hearing. The hearing officer thereafter issued a decision granting the agency's Motion to Dismiss. Grievant subsequently requested a compliance ruling from the EDR Director. The Director then issued a compliance ruling directing the hearing officer to conduct a hearing.[4]

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
Attorney for Agency
Warden

ISSUES

Is the doctrine of *res judicata* applicable in an administrative law hearing? If so, is the doctrine applicable in this case? If not, did the grievant's offense warrant the disciplinary action of removal from employment?

FINDINGS OF FACT

On January 23, 2002 grievant received a Group III Written Notice with recommendation for termination of employment for being charged with petit larceny. Grievant filed a grievance on January 28, 2002 in which he stated (just above his signature) that, "The complaint involves termination…."[5] On January 29, 2002, grievant received the warden's letter notifying him that the recommendation for termination had been approved effective February 1, 2002.[6] Grievant filed a second grievance on February 26, 2002 challenging the termination of his employment. In this second grievance, the grievant again states just above his signature that, "The Complaint involves termination." On

[4] EDR *Compliance Ruling of Director*, Number 2002-191, November 13, 2002.
[5] Exhibit 1. Grievance Form A, filed January 28, 2002.
[6] Exhibit 2. Certified letter from warden to grievant, January 28, 2002.

March 4, 2002, the agency responded to the second grievance, advising grievant that, "This matter [termination] is scheduled for a review in a grievance hearing on Friday, March 15, 2002, at 10:00 as a result of your grievance dated 1/28/02."[7]

A hearing officer conducted a hearing on March 15, 2002 at which evidence was taken regarding both the offense that precipitated disciplinary action, and the appropriate level of discipline. The hearing officer subsequently issued a decision that upheld both the Group III disciplinary action and the termination of grievant's employment.[8] The Grievant then requested a reconsideration of the hearing officer's decision. The hearing officer issued a reconsideration decision denying grievant's request.[9] Grievant also requested that the EDR Director review the hearing officer's decision. The EDR Director issued a ruling that the hearing officer's decision was in compliance with the grievance procedure.[10] The hearing officer's decision became final on July 26, 2002 when grievant failed to file either any further request for administrative appeal or an appeal to the circuit court. In the criminal case involving this incident, grievant pleaded guilty, was convicted of petit larceny, and sentenced to six months in jail.[11]

APPLICABLE LAW AND OPINION

Applicability of *res judicata* doctrine in an administrative law hearing

The first issue that must be addressed is whether the doctrine of *res judicata* is applicable to an administrative law hearing. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (superseded by statute on other grounds); see also Astoria Federal Sav. And Loan Ass'n v. Solimino, 501 U.S. 104, 107 (1991). In this case, the Department of Employment Dispute Resolution (EDR) acts in a judicial capacity by conducting grievance hearings pursuant to statute.[12] EDR hearing officers conduct evidentiary hearings that provide due process by allowing parties to be represented and by allowing parties an opportunity to examine and cross-examine witnesses. Accordingly, the doctrine of *res judicata* is applicable in a grievance hearing.

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[7] Agency Response, Second Resolution Step, *Grievance Form A,* filed February 26, 2002.
[8] Exhibit 4. EDR *Decision of Hearing Officer* Case No. 5394, issued April 11, 2002.
[9] Exhibit 5. *Reconsideration Decision*, issued April 29, 2002.
[10] *Compliance Ruling of Director*, Number 2002-081, issued June 26, 2002.
[11] Exhibit 8. Order of Circuit Court, May 31, 2002.
[12] Code of Virginia §§ 2.2-1001 and 2.2-3003ff.

"'*Res judicata* is a judicially created doctrine founded upon the considerations of public policy which favor certainty in the establishment of legal relations, demand an end to litigation, and seek to prevent harassment of parties.'" Highsmith v. Commonwealth, 25 Va. App. 434, 439, 489 S.E.2d 239, 241 (1997) (citation omitted). *Res judicata*, which literally means a "matter adjudged," precludes relitigation of a cause of action once a final determination on the merits has been reached by a court of competent jurisdiction. See id. In the present case, there are identical causes of action, i.e., grievant seeks rescission of the disciplinary action and reinstatement to his position. Accordingly, *res judicata* is the appropriate doctrine to be applied.

Applicability of res judicata in this case

One seeking to assert res judicata as a defense must establish that in both actions there is an identity of: (i) the remedies sought; (ii) the cause of action; (iii) the parties; and (iv) the quality of the persons for or against whom the claim is made. See Commonwealth ex rel. Gray v. Johnson, 7 Va. App. 614, 618, 376 S.E.2d 787, 789 (1989). The asserting party must also establish that "the judgment in the former action [was] rendered on the merits by a court of competent jurisdiction." Simmons v. Commonwealth, 252 Va. 118,120, 475 S.E.2d 806, 807 (1996). Finally, the judgment relied upon must be final, and a judgment is not final for res judicata purposes if it is being appealed. See Faison v. Hudson, 243 Va. 413, 419, 417 S.E.2d 302, 305 (1992).

Here, grievant seeks the same remedy, the cause of action is identical, and the parties are the same. An EDR hearing officer rendered a decision on the merits in the previous grievance hearing. Pursuant to § 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's decision becomes a final hearing decision once all timely requests for administrative review have been decided. The final decision may be appealed to circuit court within 30 calendar days of the final hearing decision. The final date for grievant to appeal to circuit court was July 26, 2002. As grievant did not file an appeal to circuit court, the decision of the hearing officer is now final. Accordingly, all required criteria to establish *res judicata* have been met.

The Supreme Court of Virginia has addressed the rationale for application of the doctrine of *res judicata*:

> The doctrine [of *res judicata*] prevents "relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies." Bates v. Devers, 214 Va. 670-71, 202 S.E.2d at 920-21. A claim which "could have been litigated" is one which "if tried separately, would constitute claim-splitting." Id. at 670 n.4, 202 S.E.2d at 920 n.4. "Claim-splitting" is bringing successive suits on the same cause of action where each suit addresses only a part of the claim. Jones v. Morris Plan Bank of

> Portsmouth, 168 Va. 284, 291, 191 S.E. 608, 610 (1937). Courts have imposed a rule prohibiting claim-splitting based on public policy considerations similar to those underlying the doctrine of res judicata: avoiding a multiplicity of suits, protecting against vexatious litigation, and avoiding the costs and expenses associated with numerous suits on the same cause of action. Id. at 291-92, 191 S.E. at 610.[13]

Typically, in a case involving recommendation of dismissal and a subsequent approval of the termination, the grievant files a grievance after he has been dismissed. Therefore, in such cases, the issues of discipline and termination are heard in one hearing and decided in a single decision. There is no logical reason to hear the issues separately since they are part of the same disciplinary action. Here, the discipline consisted of a Group III Written Notice with termination of employment. There would have been no second grievance filed, but for the issuance of the written notice five days before termination of employment was approved. The fact that the agency issued the written notice five days prematurely does not change the discipline warranted by grievant's offense.

The issues of grievant's offense and the appropriate level of discipline have both been heard by the previous hearing officer. The hearing officer held that grievant committed the offense, and that the offense warranted a Group III Written Notice and removal from employment. Thus, both issues have been adjudicated and are *res judicata* because the decision is now final.

The record available to this hearing officer makes clear that the issue of grievant's dismissal was adjudicated in the hearing conducted on March 15, 2002. First, as noted previously, the agency advised grievant on March 4, 2002 that the question of his termination would be considered in that hearing. Second, the hearing officer's decision demonstrates that he considered this question and issued his ruling upholding the termination. However, even if one could somehow conclude that the issue was not previously adjudicated, it certainly *could have been litigated* in the prior hearing (*see* Greever).

"EDR strongly favors consolidation of grievances and will grant consolidation unless there is a persuasive reason to process grievances individually. EDR may consolidate grievances without a request from either party."[14] In this case, the second grievance was not filed with EDR until after the first grievance hearing had been conducted. If the second grievance had been filed with EDR prior to the first hearing, EDR would have consolidated the grievances on its own motion. The first grievance hearing and the hearing

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[13] Greever Corp. v. Tazewell National Bank, 256 Va. 250, 254 (1998)

[14] § 8.6, EDR *Grievance Procedure Manual*, effective July 1, 2001. Here, while a separate letter was not sent to grievant notifying him of consolidation, the warden advised grievant on March 4, 2002 in the second resolution step response of his grievance that the termination issue was to be heard in the March 15, 2002 hearing.

officer's decision gave full consideration to the termination of grievant's employment and affirmed his dismissal. Thus, the concerns of his second grievance have been fully addressed.

In summary, there are three reasons that persuade this hearing officer that the issue is *res judicata*. First, grievant stated in both grievance forms that he was contesting the issue of his termination. Second, he was notified in writing prior to the March 15, 2002 hearing that the issue of his termination would be addressed in that hearing. Third, grievant's removal from employment was discussed in that hearing and addressed in the hearing officer's decision. Under these circumstances, the question raised by grievant is *res judicata*.

Removal from employment

However, even if a reviewer would conclude that grievant's removal from employment is not *res judicata*, the grievant's removal from employment is upheld for the following reasons.

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[15]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[16] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 defines Group III offenses to include acts and

[15] § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.
[16] Now known as the Department of Human Resource Management (DHRM).

behavior of such a serious nature that a first occurrence should normally warrant removal from employment.

The Department of Corrections, pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct. Group III offenses include acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment.

On November 1, 2001, grievant identified himself to a local retailer as an agency employee and represented that he intended to purchase two cameras on behalf of the agency. He walked to a check-out counter, purchased one camera and placed it in his vehicle. He returned to the store and removed the second camera from the store without paying for it. Because the second camera had not been decoded by a clerk, an alarm was activated and a deputy sheriff was called to the store. A search of grievant's vehicle revealed that he had stolen the second camera. Grievant initially denied taking the camera contending that he had left it on a shelf in the store. He then changed his story and claimed that someone else took the camera.[17]

For three reasons, the grievant's offense is clearly of such a serious nature that the only appropriate discipline is removal from employment. First, grievant was a corrections lieutenant who is sworn to uphold the law. It is wholly inappropriate for grievant to be employed in a law enforcement position at a correctional facility after he has broken the law. Second, as a lieutenant, grievant is expected to set an appropriate example for subordinate officers; stealing merchandise is completely contrary to being in a law enforcement leadership position. Third, grievant committed this offense while identifying himself to the public as an employee of the agency and the Commonwealth. Grievant's action is totally unbecoming of a corrections lieutenant. His action injured the reputation of the facility and the agency in the local community. Retention of grievant in his position would constitute negligence in regard to the agency's duties to the public and to other state employees.

Grievant argues that he should not be removed from employment because his conviction for petit larceny occurred after his dismissal. This argument is not persuasive. While a conviction is one example of a Group III offense, the Standards of Conduct permit discipline for any offense that undermines the effectiveness of the agency's activities.[18] It is not necessary that an employee be convicted to sustain discipline for an offense. If the agency has a preponderance of evidence that an employee committed an offense, it may administer the appropriate level of discipline. Here the warden had sufficient evidence from

[17] This paragraph summarizes the findings of fact from Exhibit 4, *Decision of Hearing Officer*, Case No. 5394.

[18] Section 5-10.7.C, Agency Procedure No. 5-10, Standards of Conduct, June 1, 1999.

both the local police department and the agency's own investigator to reasonably conclude that grievant had committed the offense.

Grievant's argues that he was off duty and not on the work site when he stole the camera. However, when he represented himself as a state employee making a purchase on behalf of the state, his actual work status and location became irrelevant. Grievant alleged inconsistency in his discipline compared to other similar cases. However, this allegation was thoroughly examined in the previous hearing; the hearing officer concluded that the examples provided were not sufficiently similar to his case.

Grievant complains that the warden did not have written evidence at the time he was dismissed. Evidence can be both documentary and testimonial. In this case, the warden had sufficient verbal evidence from both the local police and the agency's own investigator to conclude that grievant was guilty. Moreover, the warden communicated this verbal evidence to grievant on January 23, 2002. The agency's Standards of Conduct provides rules that apply if an employee is suspended during the pendency of an investigation. However, the agency is not required to suspend an employee. Initially, the warden knew only that grievant had been arrested for shoplifting. In grievant's case, rather than suspension, the agency moved him from his highly visible post in charge of the local hospital security unit to a position inside the facility. However, by January 23, 2002, the warden learned that grievant had represented himself to the store clerk as a state employee acting on behalf of the agency.

Conclusion

The grievant's guilt was sufficiently established by January 28, 2002 to warrant his removal from employment. His conviction for petit larceny on May 23, 2002 served only to confirm what the verbal evidence had already established. Grievant compounded his offense initially by denying his guilt and later, by attempting to shift responsibility to someone else. To date, grievant has failed to demonstrate any remorse for his offense.

DECISION

The disciplinary action of the agency is affirmed.

The grievant's removal from employment effective January 28, 2002 is hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[19]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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David J. Latham, Esq.
Hearing Officer

[19] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.