Issue: Group III Written Notice with demotion and pay reduction (lying during an investigation); Hearing Date: 09/04/02; Decision Date: 09/06/02; Agency: Virginia Polytechnic Institute & State University; AHO: David J. Latham, Esq.; Case No.: 5513; **Judicial Review: Appealed to the Circuit Court in the County of Montgomery on 10/01/02; Outcome pending**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5513

Hearing Date: September 4, 2002
Decision Issued: September 6, 2002

PROCEDURAL ISSUES

Grievant proffered, and the hearing officer accepted as evidence, the Decision of Hearing Officer issued in a prior grievance hearing.[1] However, this hearing officer does not consider the Decision of another hearing officer to be binding in the instant case. The Decision was accepted as evidence in this case because it contains relevant background information.

Grievant argued that the prior hearing officer's decision, which found that grievant was not scheduled to teach on April 12, 2002 acts as an estoppel on this hearing officer. A prior judgment between the same parties, which is not strictly res judicata because it is based on a different cause of action, operates as an "estoppel" only as to matters actually in issue or points controverted.[2] Generally, collateral estoppel is applicable to any adjudicatory administrative hearing provided that (i) the same ultimate issue underlying the first action is involved in

---

[1] Exhibit 11. Decision of Hearing Officer, Case No: 5479, Issued July 24, 2002.
[2] See Aetna Life Ins. Co. of Hartford, CT v. Martin, 108 F.2d 824, 827.

the second action, and (ii) the parties have had a full opportunity to litigate the ultimate issues in the first action.[3] The evidence in this case reflected no disagreement between the parties with regard to April 12, 2002 – both parties agree that grievant was not scheduled to teach on that date. Since this issue was not controverted, the question of whether estoppel applies to this issue is moot.[4]

Because the previous disciplinary action and the instant disciplinary action have their genesis in the same set of facts, this decision will necessarily discuss the same set of facts through April 19, 2002. However, the Findings of Fact below are educed only from the testimony and evidence admitted into the record on September 4, 2002.

APPEARANCES

Grievant
Attorney for Grievant
Chief of Police
Attorney for Agency
Five witnesses for Agency

ISSUES

Did the grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued for deliberately lying during an investigation.[5] As part of the disciplinary action, the grievant was demoted and his pay was reduced by five percent.[6] Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

Virginia Polytechnic Institute and State University (Virginia Tech) (hereinafter referred to as "agency") has employed grievant for nine years. Prior to his demotion to police officer, grievant was a sergeant. Grievant has one prior

---

[3] VanDeventer v. Michigan Nat'l Bank, 172 Mich App 456, 463; 432 NW2 (1988).
[4] It is interesting to observe that, if estoppel does apply to the prior decision, that decision held that grievant did make the two telephone calls that he denies.
[5] Exhibit 9. *Grievance Form A*, filed June 28, 2002.
[6] Exhibit 5. Written Notice, issued May 30, 2002.

active disciplinary action – a Group I Written Notice issued on April 18, 2002 for failure to teach a scheduled class.[7]

The Cardinal Criminal Justice Academy provides training for police officers from 30 law enforcement organizations located in the southwestern part of the Commonwealth. The Virginia Tech Police Department has utilized the Academy's services for several years. In the past, grievant has been both a student and an instructor at the Academy. Whenever the Academy needed an instructor with grievant's skills (defensive tactics), its practice had been to call grievant and determine whether he would be available on the anticipated class date. If he was available, the Academy would then contact the agency's Chief of Police to formally ask permission for grievant to teach a class.[8]

In January 2002, the Academy sought permission to have grievant teach for seven days beginning on Thursday, April 11, 2002 and ending on Friday, April 19, 2002. Grievant's supervisor responded to the Academy granting tentative approval for all dates except Friday, April 12, 2002.[9] The supervisor further noted that the approval might have to be changed due to manpower and other events. At some point shortly thereafter, the Academy's secretary sent a green postcard to grievant as a reminder of the dates he was scheduled to teach.[10]

Approximately two weeks prior to April 11, 2002, grievant telephoned the academy's administrative coordinator seeking to verify the exact dates he was scheduled to teach. He also reminded her that he was not approved to teach on April 12, 2002. The coordinator told grievant he was to teach on April 11 and from April 15 to 19, 2002. Approximately one week prior to April 11, 2002, grievant telephoned the Academy's secretary and asked her to check his teaching schedule. The secretary pulled out the Academy's copy of the green postcard that had been mailed to grievant in January 2002 and told grievant the same dates. The coordinator was on vacation April 15-19, 2002. When she returned, she and the secretary discussed grievant's failure to teach on April 11 and 15, 2002.[11] The secretary mentioned that grievant had called her to verify his teaching schedule. The coordinator remarked that it was unusual that grievant had called about this twice in a two-week period.

---

[7] The Group I Written Notice was upheld by a Decision of Hearing Officer (See Exhibit 11, *Ibid.*). That Decision affirmed that grievant had been scheduled to teach at the Academy on April 15, 2002 but that he had (i) failed to teach the class, and (ii) failed to notify the Academy that he could not teach on that date.

[8] This process changed during the spring of 2002. Now the Academy no longer calls the prospective instructor but instead calls the instructor's Chief of Police to ascertain whether the instructor is available.

[9] Exhibit 4. Memorandum from lieutenant to another lieutenant, January 15, 2002.

[10] Exhibit 1. E-mail from Academy Director to Chief of Police, May 27, 2002.

[11] When grievant failed to teach on April 15, 2002, the Academy contacted the agency to notify them about the grievant's failure. The Academy arranged for a substitute instructor for April 15, 16 & 17, 2002; grievant taught the class on April 18 & 19, 2002.

A captain issued the Group I Written Notice to grievant on April 18, 2002 for his failure to teach the class on April 11 and April 15, 2002. Following issuance of the first disciplinary action, grievant filed a grievance. By May 24, 2002 that grievance had reached the resolution step at which the Chief of Police met with grievant to discuss the matter.[12] The Chief asked grievant whether he had contacted the Academy at any time from January up to the date he was scheduled to teach in April; grievant responded "No." She asked him a second time, adding that she was asking him whether he had contacted the Academy about his teaching assignment; grievant again answered "No."[13] Grievant added that he never contacts the Academy and that all communications are made through the training unit.

On May 30, 2002, the Chief of Police met again with grievant to issue the Group III Written Notice. During this meeting, grievant denied contacting the Academy prior to April 11, 2002. Grievant met with the Assistant to the Vice President on June 6, 2002 and, in response to her questions, again denied contacting the Academy at any time prior to his scheduled teaching dates. Grievant has subsequently recalled that he did telephone the Academy's secretary shortly after March 5, 2002 in response an email message from the Academy training coordinator. The email notified grievant of a meeting of instructors and was unrelated to the April teaching assignment.[14]

The grievant has had no prior adverse interactions with the Chief of Police, the Academy Director, the Academy secretary or the Academy program coordinator.

APPLICABLE LAW AND OPINION

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).

---

[12] The date on which this meeting occurred is disputed. The Chief of Police recalls that it was May 25, 2002. Grievant avers that he was on a fishing trip on May 25th and that the meeting actually occurred on the evening of May 24, 2002. The actual date is moot because both agree that the meeting occurred, and that it was either May 24 or May 25, 2002.
[13] Exhibit 5. Memorandum prepared by Chief of Police regarding conversation of May 25, 2002.
[14] Exhibit 10. Email from training coordinator to grievant, March 5, 2002.

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

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 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally warrants removal from employment. One example of a Group III offense is falsifying any records or official state documents.[17] The agency has incorporated the same policy in its Classified Employee Handbook.[18]

The offenses listed in the Unacceptable Standards of Conduct are not all-inclusive but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense that, in the judgment of the department head, undermines the effectiveness of the departmental activities, may be considered unacceptable and treated in a manner consistent with the provisions of the Standards of Conduct policy.[19]

Grievant admitted during the hearing that he told the Chief of Police that he had not contacted the Academy. The agency produced two witnesses who

---

[15] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.
[16] Now known as the Department of Human Resource Management (DHRM).
[17] Section V.B.1.e, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.
[18] Section F.6.c, Classified Employee Handbook, *Standards of Conduct and Performance*.
[19] Section V.A, DHRM Policy 1.60, Standards of Conduct, September 16, 1993.

confirmed that grievant had, in fact, telephoned each of them to inquire about the dates of his teaching assignment. Their testimony was further corroborated by the Academy Director who learned of grievant's telephone calls from his two employees. Grievant correctly observes that the Academy Director's testimony was in some respects inconsistent with the testimony of his employees. However, even if the hearing officer discounts entirely the Director's testimony, the grievant's denial is outweighed by the testimony of the two Academy employees who received grievant's telephone calls. Grievant has failed to suggest any reason that these two witnesses would falsify their testimony. Their testimony was consistent and credible. Accordingly, the agency has demonstrated, by a preponderance of the evidence, that grievant falsely stated he had not contacted the Academy about his teaching assignments.

The hearing officer can only speculate as to why grievant did not admit to making the two telephone calls. Grievant may have believed that making the calls violated the instruction that individual officers and supervisors are not to call the Academy.[20] Alternatively, he may have felt that admitting to the calls would be in direct contradiction of his statement to the Chief that his supervisor told him in late January that grievant could take the teaching assignment.[21] Regardless of grievant's motivation, the fact remains that he made the calls and subsequently lied about doing so. This constitutes an offense that merits disciplinary action.

Grievant contends that the Chief of Police had at one time made a statement during a meeting with police officers to the effect that she would embarrass officers who took their problems to human resources before first consulting with her. The Chief said she had requested that, if officers have a problem, they first give her an opportunity to resolve it before going to human resources. Despite the fact that there were several police officers in the meeting who could have testified about this statement, neither the agency nor grievant proffered a witness to support their version. Accordingly, the evidence on this point is inconclusive. Therefore, grievant has not borne the burden of persuasion to show that this disciplinary action was retaliatory.

Grievant asserts that his supervisor (a lieutenant) had told him in either late January or early February that the approval for grievant to teach in April would have to be rescinded. If true, grievant would have had no reason to call the Academy in late March/early April to check the dates of his teaching assignment. However, grievant neither requested his supervisor to testify nor presented an affidavit from the supervisor to corroborate this assertion. Since grievant could have requested an Order from the Hearing Officer for this witness's appearance, it is concluded that this witness's testimony would not have been favorable to grievant.

[20] Exhibit 3. Department Staff Meeting minutes, November 14, 2001.
[21] Exhibit 5. Italicized paragraph in Attachment to Chief's letter of May 30, 2002.

Grievant suggests that the inability of the Academy secretary and program coordinator to recall the exact dates and times of grievant's telephone calls casts doubt on their testimony. However, the two Academy employees testified credibly that they receive a large number of telephone calls and that a written log of such calls is not maintained. Without such documentation, it is not realistic to expect such employees to be able to remember the exact time and date of each telephone call.

In the attachment to his grievance form, grievant avers that, "I have documentation from January 29th, stating that I would not be available to go to the Academy." Grievant did not proffer this alleged documentation during the hearing. As grievant did not offer what might have been key evidence, it is presumed that such evidence does not exist. Accordingly, grievant's statement that such a document was extant, and his failure during the hearing to explain why it was not proferred, taint his credibility.

Grievant suggests that the Academy secretary may have mistaken his telephone call in early March regarding the meeting of instructors for the call in early April regarding the April teaching assignment. This argument is not persuasive because the secretary credibly testified that she recalls pulling out the Academy's copy of the green postcard to respond to grievant's inquiry about the April teaching assignment. No postcard was mailed out about the March meeting of instructors. Thus, the secretary would have pulled out the green postcard only to check dates on the April teaching assignment.

The agency correctly observes that employees in supervisory positions are role models for subordinates. Accordingly, supervisors are expected to set high standards by acting ethically, and by being trustworthy and credible. Being truthful at all times is particularly important for police officers because they are often required to testify in court. The credibility of an entire department can be significantly and adversely affected when an officer is found to have provided false testimony. While this case did not involve court testimony, police officers should be expected to be truthful at all times.

While lying is not specifically listed as an example of a Group III offense, the department head made a judgement that grievant's offense undermined the effectiveness of departmental activities and is therefore unacceptable. The agency concluded that the seriousness of the offense was sufficient to warrant a Group III Written Notice and demotion. Given the grievant's position as a supervisor, his role as a police officer who is expected to be truthful, and that lying to a department head is equivalent to falsifying a document, the hearing officer finds no reason to question the agency's disciplinary action.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued on May 30, 2002 for deliberately lying, the demotion, and the reduction in pay are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in Section F.4.A of the Standards of Conduct.

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.[22]

[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]

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

____
David J. Latham, Esq.
Hearing Officer