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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

|                            |   |                                  |
|----------------------------|---|----------------------------------|
| _____                      | ) |                                  |
| In the Matter of:          | ) |                                  |
|                            | ) |                                  |
| DAVID STEWART,             | ) |                                  |
| Employee                   | ) |                                  |
|                            | ) | OEA Matter No.: 1601-0084-12     |
| v.                         | ) |                                  |
|                            | ) | Date of Issuance: March 29, 2016 |
| DISTRICT OF COLUMBIA       | ) |                                  |
| DEPARTMENT TRANSPORTATION, | ) |                                  |
| Agency                     | ) |                                  |
| _____                      | ) |                                  |

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

David Stewart (“Employee”) worked as a Traffic Systems Operator with the D.C. Department of Transportation (“Agency” or “DDOT”). On November 4, 2011, Agency issued an Advance Written Notice of Proposed Removal, charging Employee with “[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty.”<sup>1</sup> The notice provided that Employee was officially banned from the District of Columbia, Homeland Security Emergency Management Administration (HSEMA) Unified Command Center (UCC) for threatening behavior during an August 8, 2010 incident that was “deemed to have created an environment of intimidation and

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<sup>1</sup> See Agency Exhibit 4. According to HSEMA staff, on August 8, 2010, Employee was overheard stating “that when he dog them out, he know that he will lose his job...” and that Employee “had a list of people that he will check off and deal with before he leaves DDPT to go to another job.”

unease among [Employee's] coworkers.<sup>2</sup> On March 14, 2012, Agency issued a Notice of Final Decision, sustaining Employee's proposed removal. The effective date of his termination was March 16, 2012.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 28, 2012. In his appeal, Employee denied the allegations against him and requested that Agency reinstate him to his previous position.<sup>3</sup> Agency filed its Answer to the Petition for Appeal on May 21, 2012. It argued that Employee was terminated for cause as required under Chapter 6B, Section § 1603.3 of the D.C. Municipal Regulations ("DCMR").<sup>4</sup> According to Agency, Employee was temporarily re-assigned to the Traffic Management Center ("TMC") in the Reeves Center while DDOT attempted to get his access to the UCC facility reinstated.<sup>5</sup> However, HSEMA refused to reinstate Employee's access because of the seriousness of his misconduct on August 8, 2010. Agency stated that the TMC the Reeves Center was closed in November of 2011 and all that transportation management operations were transferred to the UCC. Employee's access to the UCC was revoked; therefore, Agency concluded that he was unable to perform the essential duties of a Traffic Systems Operator. As a result, Agency requested that Employee's termination be sustained.

The matter was assigned to an Administrative Judge ("AJ") for adjudication on September 19, 2013. On September 27, 2013, the AJ issued an Order Convening a Prehearing Conference for the purpose of assessing the parties' arguments. The parties were subsequently

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<sup>2</sup> *Petition for Appeal* (March 28, 2012). The UCC is located at 2720 Martin Luther King Jr. Avenue in the District of Columbia and houses the District's Joint All Homeland Security Operations Center ("JAHOC"). DDOT's Traffic Management Center is located at JAHOC.

<sup>3</sup> *Petition for Appeal* at 4.

<sup>4</sup> *Answer to Petition for Appeal* at 5.

<sup>5</sup> *Id.* at 3. See also Affidavit of Lasharn Hamilton, Agency Exhibit 7. Ms. Hamilton stated that she attempted to have Employee's access to HESMA UCC reinstated, but was informed by the Chief of Operations, Timothy Spriggs, that he could not reinstate access because Employee posed a threat to the safety and well-being of the UCC staff.

ordered to submit written briefs addressing whether Employee was removed from service based on a cause of action that Agency had previously disciplined him for.<sup>6</sup> Both parties submitted responses to the AJ's order.<sup>7</sup>

An Initial Decision ("ID") was issued on September 8, 2014. The AJ held that Agency did not violate the principal of issue preclusion when it sought to remove Employee.<sup>8</sup> According to the AJ, Agency met its burden of proof in establishing that the circumstances surrounding Employee's termination was not based on the August 8, 2010 incident; rather, his removal was based on the inability to obtain access to enter the JAHOC facility. After reviewing the parties' submissions, the AJ concluded that the job functions of a Traffic Systems Operator could only be performed at the JAHOC facility.<sup>9</sup> Thus, HSEMA's decision to revoke Employee's access to the UCC rendered him unable to satisfactorily perform the essential duties of his job. Employee's termination was therefore upheld.

Employee disagreed with the AJ's decision and filed a Petition for Review with OEA's Board on October 14, 2014. In his petition, Employee contends that the Initial Decision was based on an erroneous interpretation of the law and that the AJ's conclusions of law were not based on substantial evidence. Employee believes that the AJ should have conducted an evidentiary hearing to determine: 1) whether he was required to have a security clearance for the UCC as a Traffic Systems Operator; and 2) whether his security clearance was properly revoked as a basis for cause to terminate him.<sup>10</sup> Agency did not submit a response to the petition.

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

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<sup>6</sup> *Order* (November 8, 2012).

<sup>7</sup> Agency's December 12, 2013 submission included a Motion for Summary Disposition.

<sup>8</sup> *Initial Decision*, p. 3 (September 8, 2014).

<sup>9</sup> *Id.*

<sup>10</sup> *Petition for Review*, p 2 (October 14, 2014).

The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

- (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
- (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
- (c) The findings of the Administrative Judge are not based on substantial evidence; or
- (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

In accordance with Section 1651 (1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. Section 1603.3 of the District Personnel Manual (“DPM”) defines cause to include “[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations.”<sup>11</sup> Employee contends that an evidentiary hearing should have been held to determine if he was required to have a security clearance for his position as a Traffic Systems Operator, and whether the security clearance was properly revoked. However, this Board believes that the AJ correctly determined that OEA lacks the authority to review HSEMA’s decision to revoke Employee’s security clearance for access to the JAHOC facility.

In *Department of Navy v. Egan*, an employee was terminated from his position at a Naval Refit Facility because his security clearance was revoked.<sup>12</sup> Without a security clearance, Egan was not eligible for the job for which he had been hired. Egan sought an administrative review with the Merit Systems Protection Board (“MSPB”). The Supreme Court of the United States held that the MSPB did not have authority to “review the substance of an underlying security-

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<sup>11</sup> Chapter 16 DPM § 1603.3.

<sup>12</sup> 484 U.S. 518 (1998).

clearance determination in the course of reviewing an adverse action.”<sup>13</sup> The Court stated that a security denial was not one of the statutory adverse actions that were subject to MSPB review. In addition, the Court noted that the denial of a security clearance is a “sensitive and inherently discretionary judgment call that is committed by law to the appropriate...agency having the necessary expertise in protecting classified information.”<sup>14</sup>

While HSEMA is not a federal agency, under D.C. Official Code § 7-2201 (2012), its primary function is to coordinate and prepare all of the District’s civil defense units in anticipation of all emergencies that may arise.<sup>15</sup> Here, Employee has failed prove that HSEMA’s decision to ban him from its JAHOC (UCC) facility was an unlawful exercise of its duty to provide emergency response services and to protect national security. Moreover, there is no evidence in the record to support a finding that the revocation of Employee’s security clearance constituted an adverse action. Under D.C. Official Code § 1-606.03 provides that “[a]n employee may appeal a final agency decision affecting a performance rating which results in removal of the employee, an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more, or a reduction-in-force. The revocation of a security clearance does not fall within the purview of the aforementioned adverse actions that are subject to review by OEA. HSEMA provided DDOT with a detailed written explanation regarding why Employee’s actions on August 8, 2010 resulted in him being banned from JAHOC.<sup>16</sup> Consistent with the holding in *Egan*, this office lacks jurisdiction to address the merits of a security-clearance determination underlying a removal action.

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See also *Memorandum in Support of Agency’s Motion for Summary Disposition*, p.9 (December 12, 2013).

<sup>16</sup> *Agency Answer to Petition for Appeal*, Exhibit 5 (May 21, 2012).

## Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.<sup>17</sup> In *Baumgartner v. Police and Firemen's Retirement and Relief Board*, the D.C. Court of Appeals held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.<sup>18</sup> Employee was banned from the UCC facility as a preventative measure because of the seriousness of his threatening conduct on August 8, 2010 while on duty. DDOT temporarily re-assigned Employee to the TMC Center located in the Reeves Center while it (unsuccessfully) attempted to have his access reinstated; however, the Center was closed in 2011. As a result, all of DDOT's transportation management operations were transferred to the JAHOC facility. Therefore, Employee could not access the UCC to perform many of the functions of a Traffic Systems Operator, which included the following duties:

1. Provide essential Traffic System Operator service at multiple locations;
2. Work shifts that include evenings and weekends;
3. Maintain and establish contacts with responders and stakeholders at the UCC; and
4. Be fully available to DDOT management in the event of an emergency, which is identified as a significant factor of this position.<sup>19</sup>

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<sup>17</sup> *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

<sup>18</sup> 527 A.2d 313 (D.C. 1987).

<sup>19</sup> *Advance Written Notice of Proposed Removal*, Exhibit 1.

The District's personnel regulations provide, in part, that there is a neglect of duty in the following instances: (1) failure to follow instructions or observe precautions regarding safety; (2) failure to carry out assigned tasks; or (3) careless or negligent work habits.<sup>20</sup> Employee was unable to perform any of his assigned as a Traffic Systems Operator because his security access to the UCC was revoked.<sup>21</sup> Consequently, Agency's ability to successfully operate its Transportation Management Operations was hindered. Employee's inability to carry out his duties as a Traffic Systems Operated constituted an employment-related act or omission that interfered with the efficiency and integrity of Agency's operations.<sup>22</sup> Based on the foregoing, this Board finds that the AJ's findings were based on substantial evidence and that Agency established cause to take adverse action against Employee.

### **Issue Preclusion**

In *Taylor v. Sturgell*, the U.S. Supreme Court stated that claim preclusion and issue preclusion are collectively referred to as "res judicata."<sup>23</sup> Under the doctrine of claim preclusion, a final judgment bars "successive litigation of the very same claim, whether or not re-litigation of the claim raises the same issues as the earlier suit."<sup>24</sup> "Issue preclusion, in contrast, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the issue recurs in the context of a different claim.<sup>25</sup> By precluding the parties from contesting matters that they have had a full and fair opportunity to litigate, these two doctrines protect against "the expense and vexation

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<sup>20</sup> See D.C. Mun. Regs. tit. 16 § 1619.1(6)(c). Table of Appropriate Penalties.

<sup>21</sup> Agency concedes that Employee termination was not based on a lack of diligence or the absence of intelligence required to perform his job.

<sup>22</sup> See also *Finnegan v. Miller*, 38 A.2d 854, 855 (N.J. 1944) (holding that the failure to perform a duty does not need to be willful).

<sup>23</sup> 553 U.S. 880, 892, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008).

<sup>24</sup> *New Hampshire v. Maine*, 532 U.S. 742, 748, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

<sup>25</sup> *Id.*, at 748–749, 121 S.Ct. 1808.

attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions.”<sup>26</sup> In this case, the AJ correctly concluded that the revocation of Employee’s access to JAHOC was not a re-litigation of the August 8, 2010 incident. Employee was previously disciplined for the underlying conduct by way of an Official Reprimand in 2010.<sup>27</sup> However, Employee’s actual termination was based on HESEMA’s decision to ban him from the JAHOC (UCC), rendering incapable of performing the required duties of his position. In reviewing the record, this Board finds that the Initial Decision was based on substantial evidence and the AJ did not err in upholding Agency’s decision to terminate Employee. For this reason, Employee’s Petition for Review must be denied.

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<sup>26</sup> *Taylor* at 893 (citing *Montana v. United States*, 440 U.S. 147, 153–154, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)).

<sup>27</sup> Notice of Final Decision for Proposed Corrective Suspension, *Agency Answer to Petition for Appeal*, Exhibit 12. Agency originally proposed a Corrective Suspension of nine (9) days. (May 21, 2012).



**ORDER**

Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

**FOR THE BOARD:**

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.