

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Chancelyn Walker)	OEA Matter No. 1601-0359-10
Employee)	
)	Date of Issuance: June 4, 2013
v.)	
)	Joseph E. Lim, Esq.
D.C. Public Schools)	Senior Administrative Judge
Agency)	
_____)	
Chancelyn Walker, Employee <i>pro se</i>		
Carl Turpin, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 10, 2010, Chancelyn Walker (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Public Schools’ (“Agency”) final decision to remove her from her position as an Educational Aide or Behavioral Technician due to poor IMPACT ratings.¹ Employee’s termination was effective on July 16, 2010.

This matter was assigned to me on July 17, 2012. After Employee submitted cause for her failure to appear for a September 28, 2012, conference, I held a Prehearing Conference on November 5, 2012. I scheduled a hearing for November 19, 2012. After a rescheduling request by the parties, the hearing was held on January 18, 2013. The record is closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

ISSUE

Whether Agency’s removal of Employee should be upheld.

CONTENTIONS OF THE PARTIES

¹ IMPACT is the effectiveness assessment system which the D.C. Public Schools used for the 2009-2010 school year to rate the performance of school-based personnel.

The agency contends that, using its IMPACT system, it properly rated Employee as “ineffective” and thus, it properly removed Employee from her position.

Employee asserts that she does not deserve such a rating, and that her poor IMPACT score is the result of retaliation and harassment from the school principal.

SUMMARY OF RELEVANT TESTIMONY

Scott Sugarman (January 18, 2013 transcript, pgs. 9-80).

Sugarman testified that he was the former principal at Hamilton Academy, a special education school for emotionally disturbed students referred to them from other schools in the District. Each class was staffed by a teacher and an instructional aide. He described the Educational Aide/Behavioral Technician position as essential to coping with behavioral challenges in the classroom. When a student gets upset and flees the classroom, the Behavioral Technician follows the student and notifies the appropriate staff.

Sugarman discussed his IMPACT assessment of Employee, explaining the low scores, the personal conferences he held with Employee, and her ultimate “ineffective” rating. (Agency Exhibits 2 and 3). Sugarman added that for Behavior Techs, only two IMPACT evaluations are required, Cycle 1 and Cycle 3. He described Employee’s performance as inconsistent, careless, undependable, disrespectful interaction with students, needing numerous corrections, and a lack of improvement. For example, Sugarman described how Employee ignored her Therapeutic Crisis Intervention (TCI) and Positive Behavior Intervention System (PBIS) training by manhandling unruly students instead of having a dialogue with them, thereby escalating the situation instead of de-escalating the student’s emotional crisis. Part of TCI’s techniques of soothing the upset student is to give them choices and positive reinforcement instead of haranguing them.

Sugarman specified that these ratings arose from his own observations of Employee’s work as well as observations related to him by the vice-principal. Under cross-examination, Sugarman recalled being approached by Employee and her mother about Employee’s IMPACT score and a doctor’s note regarding Employee’s mouth injury from a student inflicted assault. He explained that while he was willing to speak with Employee’s mother, he refused to talk about Employee’s personnel matters with her.

Anna Gregory (January 18, 2013 transcript, pgs. 82-117).

Gregory testified that she is the Chief of Staff in the Office of Human Capital and led the implementation of the web-based IMPACT school-based evaluation program for Agency employees. Before that, she was a public school teacher. Gregory discussed the IMPACT program (Agency Exhibits 4, 5, 6) and how it works. She described “core professionalism” as being comprised of four criteria: attendance, late arrivals, respect, policies and procedures. She explained how employees are rated, with 1 being the lowest and 4 the highest level. An impact score of 100 to 174 gets an “ineffective” rating, while a score of 350 to 400 merits a “highly effective” rating. Employees who receive an “ineffective” rating are separated the first year they receive that score. Those who receive “minimally effective” rating get one year to improve. “Effective” ratings are

solid performers while “highly effective” ratings receive additional compensation.

Gregory explained how Employee received a final rating score of 123 for Cycle 1 and 3. (Agency Exhibit 2 and 3) She stated that IMPACT information packets were distributed to Agency employees but said employees did not have to sign for it.

Patricia Pearson (January 18, 2013 transcript, pgs. 118-127).

Pearson testified that she is Employee’s mother. Pearson related that on December 30, 2009, she accompanied her fearful daughter to drop off a doctor’s note to Mr. Sugarman due to reconstructive surgery of her mouth. Upon seeing them, Mr. Sugarman asked Employee a barrage of questions. Pearson alleged that Sugarman said, “Because you have reported me as a bad principal, I am a poor principal, see, you have put Ms. Walker in a bad position with me. And as her boss and as her employer, you have put her in a bad position with me.” (Transcript pg. 120-121).

Pearson stated that before that day, she had never met Mr. Sugarman. She learned about her daughter’s injuries when Employee texted her tooth being knocked out after being assaulted by a group of students. Pearson complained that Sugarman never returned her call.

Employee (January 18, 2013 transcript, pgs. 128-158).

Employee testified that her poor IMPACT rating was a result of Principal Sugarman’s retaliation for her reporting the assault to different school and city officials. However, on cross-examination, she admitted that she received her IMPACT rating before the assault even occurred. She never received any disciplinary or IMPACT documents. Employee also insisted that Sugarman never held an IMPACT conference with her nor did she ever get any feedback or even reprimands from management. She complained about receiving two excessing letters. Employee also testified that Sugarman never accommodated her stated desire to have the TCI training on a day other than a Saturday as she is a Seventh Day Adventist. (See Employee Exhibit 1 for copies of her letters to officials and photos of her mouth injury.)

Employee clarified that the two female students who assaulted her were about 11 or 12 years old. No one assisted her when she was knocked out, and her assailants mocked her as she made her way to the nurse’s office. She described her students as emotionally disturbed youth ranging from 6 to 15 years old who can be very violent or verbally abusive.

Employee admitted that Sugarman applied for worker’s comp for her injury, but insisted that it was only after phone calls from her mother and the union. She also stated that she has not been paid worker’s compensation despite getting a favorable response.

FINDING OF FACTS, ANALYSIS, AND CONCLUSIONS

The 109th Congress of the United States enacted the 2005 District of Columbia Omnibus Authorization Act, P.L. 109-356, which provides:

Notwithstanding any other provision of law, rule, or regulation, during fiscal year 2006 and each succeeding fiscal year, the evaluation process and instruments for evaluating District of Columbia Public School employees shall be a non-negotiable item for collective bargaining purposes. D.C. Code § 1-617.18

Pursuant to this broad authority, DCPS implemented the IMPACT evaluation system beginning with the 2009-2010 school year.

The District of Columbia Public Schools (DCPS or Agency) conducts annual performance evaluations for all of its employees. IMPACT is DCPS' Effectiveness Assessment System for all School-Based Employees, including teachers, principals, and other staff members. IMPACT has been used for the 2009-2010, 2010-2011 and 2011-2012 school years to rate the performance of school-based personnel.

IMPACT was the culmination of over a year's worth of research and stakeholder engagement. The design of the IMPACT system was informed by guidance and feedback from the DCPS community through focus groups, school-based meetings, community meetings, in-person interviews, and surveys, all of which included over one-thousand (1000) participants. These feedback opportunities included school-based personnel – those employees who would be affected by IMPACT.

Prior to instituting IMPACT, all principals and assistant principals at DCPS were provided with training materials, which they then used to conduct a full-day training with all staff members in September 2009. The training detailed the IMPACT process, consequences, and positive and negatives associated with each full final IMPACT rating. Each staff member was provided with a full IMPACT guidebook, unique to their evaluation group. The guidebooks were delivered to the employees' schools and were also available online via the DCPS website. Throughout the year, the IMPACT team visited schools to answer questions, as well as to ensure that the IMPACT hotline was available to all staff members via email and telephone to answer questions and provide clarification.

For the 2009-2010 school year, there were twenty (20) IMPACT groupings of DCPS employees for evaluation purposes, each representing a different category of school-based personnel. The individual groups were created to ensure that the assessments reflect the varying responsibilities of the individuals serving in the schools. Each assessment group includes multiple components, each of which has a unique scoring rubric that outlines clear performance expectations.

Through IMPACT, school-based employees are assessed by their supervisor two to five times per year depending on position. Teachers receive up to five (5) observations. The majority of other staff members are evaluated two (2) times over the course of the year on standards specific to their role and responsibilities.

The IMPACT evaluation tool is designed to provide specific feedback to employees to identify areas of strength as well as areas in which improvement is necessary. As such, all staff members receive written feedback regarding their evaluation as well as a conference with their evaluator. IMPACT evaluations and ratings for each assessment cycle are available on-line for employees to review by 12:01 a.m. the day after the end of each cycle. If employees have any issues or concerns about their IMPACT evaluations and ratings, they are encouraged to contact DCPS' IMPACT team by telephone or electronic mail. At the close of the school year, all employees received an email indicating that their final scores were available online. Additionally, a hard copy of the report was mailed to the employees' home address on file.

The IMPACT Process

With the IMPACT system, all staff received written feedback regarding their evaluation, as well as a post-evaluation conference with their evaluators. For the 2009-2010 school year, if employees had any issues or concerns about their IMPACT evaluation and rating, they were encouraged to contact DCPS' IMPACT team by telephone or email.

For the 2009-2010 school year, there were twenty (20) IMPACT grouping of DCPS employees. Employee's position – Educational Aide, was within Group 20. The IMPACT process for Group 20 employees consisted of two (2) assessment cycles: Cycle 1, which was between September 21st and Cycle 3 which covered the remainder of the school year through June 15th. Employees were also observed by a Master Educator between September 21st and February 1st, and a second time between February 1st and June 15th. Group 20 employees were assessed on a total of two (2) IMPACT components, namely:

- 1) Core Standards (CS) – comprised of 100% of Group 20 employees' scores;
- 2) Core Professionalism (CP) – This component is scored differently from the others. This is a measure of four (4) basic professional requirements for all school-based personnel. These requirements are as follows:
 - 1) Attendance;
 - 2) On-time arrival;
 - 3) Compliance with policies and procedures; and
 - 4) Respect.

School-based personnel assessed through IMPACT, ultimately received a final IMPACT score at the end of the school year of either:

- 1) Ineffective = 100-174 points (immediate separation from school);
- 2) Minimally Effective = 175-249 points (given access to additional professional development);
- 3) Effective = 250-349 points; and
- 4) Highly Effective = 350-400 points.

DCMR §§1306.4, 1306.5 gives the Superintendent the authority to set procedures for

evaluating Agency's employees.² The above-referenced DCMR sections provide that each employee shall be evaluated each semester by an appropriate supervisor and rated annually prior to the end of the year, based on procedures established by the Superintendent. In the instant matter, the IMPACT process detailed above is the evaluation procedure put in place by Agency for the 2009- 2010 school year. Employee was evaluated by the school Principal/Administrator. Employee received a final evaluation on the above specified components at the end of the school year, wherein she received an "ineffective" IMPACT rating.

Governing Authority (IMPACT – WTU Union Members)

Based on the documents submitted by the parties, I note that Employee was a member of Washington Teachers' Union ("WTU") when she was terminated. Thus, the Collective Bargaining Agreement ("CBA") between Agency and WTU applies to this matter and as such, OEA has limited jurisdiction over this matter. In *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), the Court of Appeals held that OEA is not jurisdictionally barred from considering claims that a termination violated the express terms of an applicable collective bargaining agreement. The court explained that the Comprehensive Merit Personnel Act ("CMPA") gives this Office broad authority to decide and hear cases involving adverse actions that result in removal, including "matters covered under subchapter [D.C. Code §1-616] that also fall within the coverage of a negotiated grievance procedure."³ In this case, Employee was a member of the Washington Teachers Union ("WTU") when she was terminated and governed by Agency's CBA with WTU. Based on the holding in *Watts*, I find that this Office may interpret the relevant provisions of the CBA between WTU and DCPS, as it relates to the adverse action in question in this matter.

Section 15.4 of the CBA between WTU and Agency provides in pertinent part as follows:

15.4: The standard for separation under the evaluation process shall be "just cause", which shall be defined as *adherence to the evaluation process only*. (Emphasis added).

Accordingly, I am primarily guided by §15.4 of the CBA between WTU and DCPS in reviewing this matter, and as such, I will only address whether or not Agency's termination of Employee pursuant to her performance evaluation was supported by just cause. As referenced above, 'just cause' is defined as adherence to the *evaluation process only* (emphasis added). Thus, OEA's jurisdiction over this matter is limited only to Agency's adherence to the IMPACT process it instituted at the beginning of the school year.

Based on their testimonies and their demeanor, I find Agency's witnesses Sugarman and Gregory to be highly credible. I find that Employee was evaluated twice by her principal based

² DCMR § 1306 provides in pertinent parts as follows:

1306.4 – Employees in grades ET 6-15 shall be evaluated each semester by the appropriate supervisor and rated annually, prior to the end of the school year, under procedures established by the Superintendent.

1306.5 – The Superintendent shall develop procedures for the evaluation of employees in the B schedule, EG schedule, and ET 2 through 5, except as provided in § 1306.3

³ Pursuant to D.C. Code § 1-616.52(d), "[a]ny system of grievance resolution or review of adverse actions negotiated between the District and a labor organization *shall take precedence* over the procedures of this subchapter for employees in a bargaining unit represented by the labor organization" (emphasis added).

on personal observations and feedback from other school personnel. I also did not find Employee and Pearson to be credible. Thus, I find that Employee had conferences after the evaluation and that she received the IMPACT training materials. Overall, I find that Agency did adhere to the IMPACT process. Accordingly, I find that Agency properly conducted the IMPACT process and had just cause to terminate Employee.

IMPACT Rating

Employee's other contention is that her IMPACT score was the result of retaliation, hostility and discrimination from the principal. Specifically, she claims that her public complaints to school and government officials about the student assault she suffered and Principal Sugarman's response to it accounted for the low score she received. I do not find such claims credible. For one, Employee admits that she received her IMPACT score before the assault occurred.⁴ In addition, her job as an Educational Aide⁵ in a special education school **requires** that she deal with unruly students, most especially the emotionally troubled youth. (Emphasis added.)

Additionally, assuming *arguendo* that this Office's jurisdiction in this matter extends to the content or judgment of the evaluation, I find that, while Employee maintains that she should have received a much higher score in the IMPACT components, she did not specifically note that the Principal's comments were untrue; nor did she proffer any evidence that directly contradicted the Principal's factual finding. Employee simply made a blanket assertion that her score was motivated by the Principal's hostility towards her. The principal's comments in this evaluation are quite specific, for example:⁶

"There is little evidence that the individual has a positive rapport with students, as demonstrated by displays of positive effect, evidence of relationship building, and no instances of disrespect by the individual."

"Individual rarely responds to a student, parent/guardian, school staff, and community member inquiries and requests in a timely and solutions-oriented manner OR does so with disrespect."

"Para-professional gets into verbal arguments with students and responds to students' behavior in an appropriate manner that often escalates behavior." (sic)

None of the evidence offered by Employee contradicted any of the specific facts above.

Moreover, the D.C. Superior court in *Shaibu v. D.C. Public Schools*⁷ explained that, substantial evidence for a positive evaluation does not establish a lack of substantial evidence for

⁴ In Employee's Exhibit 1, Employee wrote letters to school officials complaining about the hazards of her job in dealing with unruly young students and asking to be transferred.

⁵ In her testimony and appeal forms, Employee describes herself as a Behavior Tech.

⁶ Agency Exhibit 2 and 3.

⁷ Case No. 2012 CA 003606 P (January 29, 2013).

a negative evaluation. This court noted that, “it would not be enough for [Employee] to proffer to OEA evidence that did not conflict with the factual basis of the [Principal’s] evaluation but that would support a better overall evaluation.”⁸ The court further opined that if the factual basis of the “Principal’s evaluation were true, the evaluation was supported by substantial evidence.” Additionally, it highlighted that “principals enjoy near total discretion in ranking their teachers”⁹ when implementing performance evaluations. The court concluded that since the “factual statements were far more specific than [the employee’s] characterization suggests, and none of the evidence proffered to OEA by [the employee] directly controverted [the principal’s] specific factual bases for his evaluation of [the employee]...” the employee’s petition was denied.

In the instant matter, Employee has not proffered to this Office any credible evidence that controverts any of the Principal’s comments. Instead, Employee made accusations that she was a victim of the school principal’s hostility and discrimination without offering any credible proof of such. Consequently, I conclude that this argument is without merit.

This Office has consistently held that the primary responsibility for managing and disciplining Agency’s work force is a matter entrusted to the Agency, not to OEA.¹⁰ As performance evaluations are “subjective and individualized in nature,”¹¹ this Office will not substitute its judgment for that of an agency; rather, this Office limits its review to determining if “managerial discretion has been legitimately invoked and properly exercised.”¹² Thus, I find that as her direct supervisor, it was within the Principal’s discretion to rank and rate Employee’s performance. Moreover, the undersigned is not in the position to recommend that Employee receives a higher rating since the undersigned is unfamiliar with the nature of Employee’s job.

Based on the foregoing, I find that because Employee is a member of the WTU, she is subject to the terms of the CBA between WTU and Agency. I also find that OEA’s jurisdiction in this matter is limited by the terms of this CBA. And because Agency adhered to the IMPACT process, I conclude that Agency had sufficient ‘just cause’ to terminate Employee, following her ‘Ineffective’ IMPACT rating for the 2009-2010 school year. Accordingly, I find that Agency properly conducted the IMPACT process and had just cause to terminate Employee.

The Agency’s discretion to implement its own evaluation system, coupled with its showing of compliance with the procedures set forth in that evaluation system, are entitled to substantial deference and that OEA should not substitute its own judgment for that of the agency’s absent a showing of arbitrary and capricious action by the Agency. *Stokes v. District of*

⁸ *Id.* at 6.

⁹ *Id.* Citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

¹⁰ See *Mavins v. District Department of Transportation*, OEA Matter No. 1601-0202-09, *Opinion and Order on Petition for Review* (March 19, 2013); *Mills v. District Department of Public Works*, OEA Matter No. 1601-0009-09, *Opinion and Order on Petition for Review* (December 12, 2011); *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997); see also *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

¹¹ See also *American Federation of Government Employees, AFL-CIO v. Office of Personnel Management*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

¹² See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

Columbia, 502 A.2d 1006, 1011 (1985) (“Although OEA has a ‘marginally greater latitude of review’ than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate.”) (*Douglas v. Veterans Administration, supra*, 5 M.S.P.B. at 327-328, 5 M.S.P.R. at 300.)

ORDER

It is hereby ORDERED that Agency’s termination of Employee is upheld.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge