

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Angela Jordan ,)	OEA Matter No. 1601-0078-17
Employee)	
)	Date of Issuance: March 9, 2018
v.)	
)	Joseph E. Lim, Esq.
D.C. Public Schools,)	Senior Administrative Judge
Agency)	
_____)	
Angela Jordan, Employee <i>pro se</i>)	
Lynette Collins, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 28, 2017, Angela Jordan (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) final decision to remove her from her position as an Educational Aide at Ludlow Taylor Elementary School. Employee was removed based on her “Developing” rating for 2015-2016 school year and “Minimally Effective” rating for the 2016-2017 school year under Agency’s IMPACT program.¹ Employee’s termination was effective on July 29, 2017.

This matter was assigned to me on November 3, 2017. On January 22, 2018, I held a Prehearing Conference for the purpose of assessing the parties’ arguments. I then ordered legal briefs to which both parties complied. The record is now 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.

¹ IMPACT is the effectiveness assessment system which the D.C. Public Schools used for the 2015-2017 school years to rate the performance of school-based personnel.

Agency's Position

Agency argues that Employee's termination under the IMPACT program was done in accordance with all District of Columbia statutes, regulations, and laws. Agency also argues that OEA's jurisdiction is limited with respect to the instant appeal and that Employee may only challenge whether the evaluation process and tools were properly administered. According to Agency, Employee was properly evaluated under the IMPACT program, which resulted in her receiving a final IMPACT score of a "Developing" rating for 2015-2016 school year and a "Minimally Effective" rating for the 2016-2017 school year.

Employee's Position

Employee argues that her separation was unfair as she was on medical leave and did not get an IMPACT conference meeting. Employee also disagrees with the IMPACT ratings she received. She disagrees with the assessment that she had problems during fire alarms and student emergencies. Employee argues that the assessment was unfair as she had no assistance getting a student in a wheelchair from the second floor to the first floor. Employee also disagreed with a rating she received which said that she sometimes built positive and productive relationships with students and their families.

FINDINGS OF FACT², ANALYSIS, AND CONCLUSIONS OF LAW

1. Employee was an Educational Aide at Ludlow Taylor Elementary School during the 2015 to 2017 school years.

2. As part of D.C. public school personnel, Employee was a member of the Washington Teachers' Union ("WTU"), and is thus bound to its Collective Bargaining Agreement ("CBA") with Agency.

3. Employee was evaluated under the IMPACT program, which resulted in her receiving a final IMPACT score of a "Developing" rating for 2015-2016 school year and a "Minimally Effective" rating for the 2016-2017 school year.

4. As a result, in accordance with Agency policy and IMPACT guidelines³ regarding any employee whose final IMPACT ratings decline for two consecutive years from Developing to Minimally Effective, Employee was separated on July 29, 2017.⁴

5. Among the reasons cited for Employee's subpar ratings are deficiencies in adaptability, tardiness, unexcused absences, lack of understanding of the day's goals, and deductions for insufficient core professionalism.⁵

6. Employee's ratings were made by a school administrator, typically the school principal or his or her assistant.

7. The documents indicated that School Principal Smith and Assistant Principal Bell conducted Employee's assessments and held evaluations with Employee or attempted to hold post-assessment conferences. For an assessment to be valid without a conference, two attempts

² Derived from the parties' uncontested documents.

³ See Agency Legal Brief Exhibits 18 to 19.

⁴ See Agency Legal Brief Exhibits 1.

⁵ See Agency Legal Brief Exhibits 2 to 12 for Employee's IMPACT reports.

to contact employees for conferences are required. Employees can access and download their IMPACT reports from the school database at any time.

8. There are twenty-four IMPACT groupings of DCPS employees for evaluation purposes, each representing a different category of school-base personnel. The individual groups were created to ensure that the assessments reflected the varying responsibilities of the individuals serving in the schools.

9. Educational aides and dedicated aides are grouped together for purposes of IMPACT and are evaluated on the same components.

10. Group 17 employees were evaluated on three components: Educational Aides Standards (90% of total IMPACT score), Commitment to the School Community (90% of total IMPACT score), and Core Professionalism (a deficit here will reduce the employee's total IMPACT score).

11. The Educational Aides Standards is a measure of the standards that define excellence for educational aides. It measures an Educational Aide's instructional support, school-wide support, positive rapport with students and families, and adaptability.

12. The Commitment to the School Community is a measure of the extent to which school-based personnel support and collaborate with their colleagues and their school's community. It measures the extent to which school-based personnel support their school's local initiatives, support the Special Education and English Language Learner Programs at their schools and make efforts to promote high academic and behavioral expectations.

13. Core Professionalism is a measure of four basic professional requirements for all school-based personnel. These requirements are as follows: attendance; on-time arrival; compliance with policies and procedures; and respect. This component was scored differently from the others, as an employee could have additional points subtracted from their score if the rating was "slightly below standard" or "significantly below standard."

14. School-based personnel assessed through IMPACT, ultimately received five possible final IMPACT scores at the end of the school year.

15. An Ineffective score of 100-199 points results in immediate separation from school.

16. A Minimally Effective score is 200-249 points. In this case, an employee is given access to additional professional development. After two years of support, however, if an employee is unable to move beyond the Minimally Effective level, she or he will be subject to separation.

17. A Developing score of 250-299 points results in an employee given access to additional professional development. After three years of support, however, if the employee is unable to move beyond the Developing level, she or he will be subject to separation.

18. An Effective score is 300-349 points means the employee will progress normally on their pay scales.

19. A Highly Effective of 350-400 points makes an employee eligible for additional compensation.

20. An employee who receives a minimally effective IMPACT score one school year and then progresses to developing the next school year will get another school year to improve to an effective IMPACT score. However, an employee who receives a developing IMPACT score one school year and then declines to minimally effective the next school year will be terminated as that shows a deterioration in performance.

21. With regards to tardiness or absences, the Collective Bargaining Agreement between Agency and the union governs the time period and procedure for asking for leave. Depending on

the school, notifying the school when an employee is going to be late or absent can be done by phone or email.

22. IMPACT for Educational Aides (Group 17) consists of two assessment cycles. For the 2016-2017 school year, the first assessment cycle ended on February 2 and the second cycle ended on June 8. For the 2015-2016 school year, the first assessment cycle ended on February 4 and the second cycle ended on June 9.⁶

23. The IMPACT process required that all staff receive written feedback regarding their evaluation, in addition to a post-evaluation conference with their evaluators. IMPACT evaluations and ratings for each assessment cycle were available online for employees to review by 12:01 a.m., the day after the end of each cycle. If an employee had any issues or concerns about their IMPACT evaluation and rating, they were encouraged to contact DCPS' IMPACT team by telephone or email. 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.

24. According to the documents submitted, Employee's conferences occurred on January 29, 2016, and May 18, 2016, for School Year 2015-2016⁷ and on February 2, 2017, and May 22, 2017, for School Year 2016-2017.⁸

25. However, the May 22, 2017, conference was not convened due to Employee's medical absence.⁹

26. For the May 22, 2017, conference for School Year 2016-2017, the documents show that Employee was on approved Family Medical Leave from April 19, 2017, through the end of the school year June 14, 2017.¹⁰ Moreover, Employee was not medically cleared to return to work until July 19, 2017.¹¹

27. Employee was separated for obtaining IMPACT scores of 289 for school year 2015-2016, and 235 for school year 2016-2017.

D.C. Official Code § 1-617.18 grants DCPS the authority to create and implement its own tools for evaluating employees. IMPACT is the performance evaluation system utilized by DCPS to evaluate its employees during the 2015-2017 school years.¹² According to the documents of record, Agency conducts annual performance evaluation for all its employees. During the 2015-2017 school years, Agency utilized IMPACT as its evaluation system for all school-based employees. The IMPACT system was designed to provide specific feedback to employees to identify areas of strength, as well as areas in which improvement was needed.¹³

In *Brown v. Watts*¹⁴, 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

⁶ Agency Legal Brief Exhibits 18 to 19.

⁷ Agency Exhibit 8 and 9.

⁸ Agency Exhibit 3 and 4.

⁹ Agency acknowledges in its brief that Agency Exhibit 4 was marked incorrectly that a May 22, 2017, conference was held.

¹⁰ Agency Exhibit 15.

¹¹ Agency Exhibit 16.

¹² Agency Legal Brief Exhibits 18 to 19.

¹³ *Id.*

¹⁴ 933 A.2d 529 (April 15, 2010).

bargaining agreement. The court stated 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.”¹⁵ Based on the holding in *Watts*, I find that this Office may only interpret the relevant provisions of the CBA between WTU and DCPS as they relate 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 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.

DCMR §§1306.4, 1306.5 gives the superintendent of DCPS the authority to set procedures for evaluating Agency’s employees.¹⁶ 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 2015-2017 school years.

In this case, Employee was evaluated by the school administrator (“evaluator”) such as School Principal Smith and Assistant Principal Bell. Employee received a final evaluation on the above specified components at the end of each school year, wherein, she received a “Developing” rating for 2015-2016 school year and a “Minimally Effective” rating for the 2016-2017 school year. According to the documents submitted, the conferences occurred on February 2, 2017, for School Year 2016-2017¹⁷ and on January 29, 2016, and May 18, 2016, for School

¹⁵ 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).

¹⁶ 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

¹⁷ Agency Exhibit 3 and 4.

Year 2015-2016.¹⁸ The May 22, 2017, conference for School Year 2016-2017, did not occur as Employee was on approved Family Medical Leave at that time.¹⁹

According to a notarized affidavit of Alain Cantave, Manager of IMPACT Operations, while IMPACT policy states generally that two attempts to schedule a conference with an employee must be made, school administrators are not required to convene a post-observation conference for employees on extended medical leave because the employee is presumed unavailable for any conference.²⁰

Employee does not deny that she received a copy of her scores nor does she deny having conferences regarding her scores or that she was on medical leave for the period covering her May 22, 2017, conference. Neither did Employee deny that she was aware of, and had access to, the IMPACT team via telephone or electronic mail. In fact, Employee did file an appeal of her IMPACT score to the DCPS Chancellor on July 24, 2016.²¹ Her scores were reviewed by an impartial review board and subsequently denied by the chancellor.²²

Although Employee complains about the one conference she did not receive, she does not and cannot show that the procedure followed by Agency were not in accordance with the IMPACT policy nor was it proscribed by statute, regulation, or even by her union's CBA. Thus, I find that Agency did follow the IMPACT process in terminating Employee.

Employee's other complaints with her IMPACT assessments stem solely from a disagreement with the scores given to her by her evaluators. 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 her scores were supposedly unfair, she did not specifically note in her submissions to this Office that the evaluator's comments were untrue; nor did she proffer any evidence that directly contradicted the evaluator's factual findings. Although Employee claimed she was never absent without leave, she did not submit the pay stub that she claimed would support her assertion.

It should be noted that the D.C. Superior court in *Shaibu v. D.C. Public Schools*²³ explained that substantial evidence for a positive evaluation does not establish a lack of substantial evidence for a negative evaluation. The court held that "it would not be enough for [Employee] to proffer to OEA evidence that did not conflict with the factual basis of the [evaluator's] evaluation but that would support a better overall evaluation."²⁴ The court further stated that if the factual basis of the "principal's evaluation were true, the evaluation was supported by substantial evidence." In addition, the Court in *Shaibu* held that "principals enjoy near total discretion in ranking their teachers"²⁵ when implementing performance evaluations. The court concluded that since the "factual statements were far more specific than [the

¹⁸ Agency Exhibit 8 and 9.

¹⁹ Agency Exhibit 15.

²⁰ Agency Exhibit 17.

²¹ Agency Exhibit 13.

²² Agency Exhibit 14.

²³ Case No. 2012 CA 003606 P (January 29, 2013).

²⁴ *Id.* at 6.

²⁵ *Id. Citing Washington Teachers' Union, Local #6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

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.

Agency deducted ten points in Employee's Core Professionalism scores during cycle 1 of school year 2016-2017 and twenty points during cycle 3 of school year 2016-2017 for unexcused absences on January 24, 2017, and February 14, 2017.²⁶ Employee also failed to produce any evidence to show that she was ill on those days. Employee failed to follow the prescribed policies and procedures for obtaining leave.

Agency also deducted Core Professionalism points for Employee's unexcused tardiness on September 13 and 21, 2016, January 17, 2017, and January 25, 2017.²⁷ Employee did not deny her tardiness on the aforementioned dates.

Employee has not proffered to this Office any credible evidence that controverts any of the evaluator's comments. 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.²⁸ As performance evaluations are "subjective and individualized in nature,"²⁹ 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."³⁰ Thus, I find that it was within the evaluator's discretion to rank and rate Employee's performance. Moreover, the undersigned Administrative Judge is not in the position to recommend that Employee receives a higher rating since the undersigned is unfamiliar with the nature and details of Employee's job. I would also note that even if no points were deducted for core professionalism, Employee would still have been separated for obtaining IMPACT scores of 289 for school year 2015-2016, and 235 for school year 2016-2017. Two consecutive years of declining subpar ratings would still have resulted in Employee's removal.³¹

In the instant matter, I find that Employee was evaluated a total of three (3) times by the school administrator, in accordance with the IMPACT rules. I also find that the one instance that Agency did not conduct an IMPACT conference with Employee was due to her medical leave status. Employee received a copy of her IMPACT scores, in addition to having post-evaluation meetings with her evaluator(s). Because Employee's final IMPACT score resulted in two consecutive years of poor ratings, Employee was terminated from her position. Based on the

²⁶ Agency Exhibits 5 and 6.

²⁷ *Id.*

²⁸ 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).

²⁹ 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).

³⁰ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

³¹ See Agency Exhibit 18 and 19.

foregoing, I find that Agency properly adhered to the IMPACT process and had cause to terminate Employee. Accordingly, Agency's action must be upheld.

ORDER

It is hereby ORDERED that Agency's action of terminating Employee is UPHELD.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge