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

_____	)	
In the Matter of:	)	
	)	
Claudette Brown	)	OEA Matter No. 1601-0381-10
Employee	)	
	)	Date of Issuance: August 26, 2013
v.	)	
	)	Joseph E. Lim, Esq.
D.C. Public Schools	)	Senior Administrative Judge
Agency	)	

Sara White, Esq., Agency Representative  
Claudette Brown, Employee *pro se*

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 25, 2010, Claudette Brown (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Public Schools’ (“DCPS” or “Agency”) decision to terminate her from her position as an Administrative Assistant at the Hamilton Center, effective July 30, 2010. Employee was terminated for having an “Ineffective” rating under the IMPACT, DC Public Schools’ Effective Assessment System for School-Based Personnel (“IMPACT”), during school year 2009-2010.

This matter was assigned to the undersigned Administrative Judge (“AJ”) on July 17, 2012. I held a Prehearing Conference on September 28, 2012, and a hearing on July 31, 2013. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency’s action of separating Employee from service pursuant to an “Ineffective” performance rating under the IMPACT system was done in accordance with all applicable laws, rules, or regulations.

## FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA. D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a performance rating.

### ***Employee's Position***

In her Petition for Appeal, Employee alleges wrongful termination, unfair and deceitful labor practices, and procedures inconsistent with the IMPACT guide. Among other things, Employee complained that often she could not access her evaluation on the computer, was not provided IMPACT materials, was improperly evaluated by the principal and assistant principal, never provided written notification of poor performance, and not allowed to rebut negative performance comments. Employee asked for the restoration of her job or a promotion with back pay and for overtime pay for all the extra hours she worked before and beyond her tour of duty. She wrote that she was not rated fairly as the principal never took the time to know her or provide her with needed information.<sup>1</sup> Employee disputed the principal's comments in her IMPACT rating.

### ***Agency's Position***

Agency asserts that in 2005, pursuant to the DC Omnibus Authorization Act, PL 109-356 (D.C. Code §1-617.18), DCPS was granted authority to develop its own evaluation process and tool for evaluating its employees.<sup>2</sup> Agency argues that it followed proper D.C. statutes, regulations and laws in conducting Employee's performance evaluation. Agency maintains that, it was granted authority to develop its own evaluation process and tools for evaluating DCPC employees, and it exercised this managerial prerogative when it created IMPACT. Agency notes that IMPACT is a performance evaluation system utilized by DCPS to evaluate school-based personnel for school year 2009-2010. Agency contends that it followed the laws of the District. Agency provides a detailed description of the 2009-2010 school year IMPACT process and it states that it properly conducted Employee's performance evaluation using the IMPACT process. Since Employee received an "Ineffective" IMPACT rating, her employment was terminated.<sup>3</sup>

## SUMMARY OF RELEVANT TESTIMONY

Michelle Hudacsko (July 31, 2013 transcript, pgs. 9-44).

Hudacsko testified that as the Deputy Chief of Impact, she oversaw the implementation of the web-based IMPACT school-based evaluation program for Agency employees. Before that, she was a teacher and was in the educational field for 17 years. Hudacsko discussed the IMPACT

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<sup>1</sup> Employee's Petition for Appeal (August 25, 2010).

<sup>2</sup> Agency's Answer (September 27, 2010). *See also* Agency's Prehearing Statement (September 21, 2012).

<sup>3</sup> *Id.*

program (Agency Exhibits 1, 3, 4) and how it works.<sup>4</sup> She testified that IMPACT was created to serve three clear goals: One, to ensure that there were very clear expectations of all staff around what is effective performance; secondly, to receive feedback on their performance based on those expectations; and third, provide opportunities for growth. She stated that IMPACT information packets were distributed to Agency employees.

Hudacsko testified that Employee's position as an Administrative Assistant at the Hamilton Center placed her in IMPACT Group 18 of non-instructional paraprofessionals. Each year, an IMPACT guidebook is created for each of the different IMPACT groups and then distributed to each staff through their schools and is always available on the Agency website. For Group 18, the rubric<sup>5</sup> for non-instructional paraprofessional includes five standards: job acumen, dependability, adaptability, customer service, and communication. These comprise 90% of the final score. Other components include a Commitment to the School Community (CSC) and School Value-Added (SVA), each comprising 5% of the total score. The particular scores for those different components were averaged, multiplied by the particular weight for the particular group, and totaled to compile a final IMPACT score. 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.

Hudacsko explained how Employee received a final rating score of 172 (ineffective) for Cycle 1 and 3. (Agency Exhibit 2 and 3) and that because the system is web-based, Employee could always log into the database and re-reference IMPACT policy and their scores. Employee received a minus ten score for her lack of core professionalism. For employees having trouble logging in, there was an IMPACT helpline as well as a correspondence box.

Hudacsko testified that she reviewed Employee's evaluations and found that Agency followed all the procedures and guidelines for IMPACT. After each cycle, Employee received a post-assessment conference.

Scott Sugarman (July 31, 2013 transcript, pgs. 45-95).

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. At the beginning of the school year, he met with all school personnel and explained the IMPACT program and distributed the guidebooks. He 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, 3, and 4). Sugarman added that for Administrative Assistant, only two IMPACT evaluations are required, Cycle 1 and Cycle 3. He described Employee's performance as inconsistent, careless, negligent, and pointed out that the records of student enrollment and attendance that she kept as part of her job duties were

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<sup>4</sup> Agency did not always follow its own labeling of exhibits. For instance, during the hearing, it relabeled its exhibit 5 as exhibit 1.

<sup>5</sup> In education terminology, rubric means a standard of performance for a defined population.

frequently inaccurate or not up to date. Sugarman also noted the complaints he received about Employee's disrespectful interaction with parents, staff, and outside personnel. Under cross-examination, he described the argumentative and disrespectful tone he received from Employee. Sugarman described the numerous conversations he had with Employee regarding deficiencies in her work performance.

Employee (July 31, 2013 transcript, pgs. 97-141).

Employee vigorously disagreed with Principal Sugarman's assessment of her work, citing that she often went beyond the call of duty and that she did her job as well as she understood it to be done through the years. She admitted that she was aware of her school email address, but claimed there was a mix-up with another employee with the same name until it was fixed in the middle of 2009. As for her work, Employee insisted that her record-keeping was always accurate and timely. When asked about Principal Sugarman's contrary opinion, she blamed the office manager who logged in under her name and made the mistakes.

Employee denied ever being disrespectful towards anyone, but she recalled hanging up on a parent who used profanity and did not listen to anything she was saying. Employee said that Sugarman simply laughed when she related what happened. She stated that often she had to do all the work and admitted that there were times her attitude suffered. However, Employee insisted it was never to the point that she ever deserved being marked down considerably for it.

Employee testified that she was never told she had to attend the IMPACT orientation sessions. She claimed that she was told she could not get a copy of her evaluation and that she could not go to her union. Employee admitted having meetings with Sugarman but she insisted that she did not know those meetings had anything to do with her IMPACT scores. Under cross-examination, Employee admitted asking an administrator named Mr. Pierre and later Principal Sugarman about her low IMPACT scores at the end of each rating cycle.

### **The IMPACT Process**

IMPACT is the performance evaluation system utilized by DCPS to evaluate its employees during 2009-2010 school year.<sup>6</sup> According to the record, Agency conducts annual performance evaluation for all its employees. During the 2009-2010 school year, 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.<sup>7</sup>

With the IMPACT system, all staff received written feedback regarding their evaluation, as well as a post-evaluation conference with their evaluators. IMPACT evaluations and ratings for each assessment cycle were available online for employees to review by 12:01am, the day after the end of each cycle. 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. At the close of the school year, all employees received an

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<sup>6</sup> *Id.* at Tab 1.

<sup>7</sup> Agency's Answer and Agency's Brief, *supra*.

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.

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/or telephone to answer questions and provide clarification.

For the 2009-2010 school year, there were twenty (20) IMPACT grouping of DCPS employees. Employee's position – Administrative Assistant, was within Group 18. The IMPACT process for Group 18 employees consisted of two (2) assessment cycles: the first assessment cycle ("Cycle 1"), which was between September 21st and December 1st; and the third assessment cycle ("Cycle 3") which was between March 1st and June 15th. Group 18 employees were assessed on a total of three (3) IMPACT components, namely:

- 1) Non-instructional Paraprofessional Standards (NIP) - comprised of 90% of Group 18 employees' scores;
- 2) Commitment to the School Community (CSC) – comprised of 5% of Group 18 employees' scores;
- 3) School Value-Added (SVA) – comprised of 5% of Group 18 employees' scores.

The NIP standards above have five (5) components: Job Acumen, Dependability, Adaptability, Customer Service, and Communication.

The CSC standards above three (3) components: Support of the Local School Initiatives, Support of the Special Education and ELL Programs, Instructional Collaboration (for Instructional Staff Only). Since Employee was non-instructional, her CSC components consist only the first two above.

The SVA standard above measures the impact Employee's school had on its students' learning during the past school year.

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.<sup>8</sup> 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. Employees were evaluated by the school Principal. Employee received a final evaluation on the above specified components at the end of the school year, wherein, she received an "Ineffective" IMPACT rating.

Based on their testimonies and their demeanor, I find Agency's witnesses Sugarman and Hudacsko to be highly credible. I find that Employee was evaluated twice by her principal based on personal observations and feedback from other school personnel. Employee disagrees with her IMPACT evaluation scores and disputes Principal Sugarman's observations of her work performance. However, I did not find Employee to be credible. Moreover, the D.C. Superior court in *Shaibu v. District of Columbia Public Schools*<sup>9</sup> explained that, substantial evidence for a positive evaluation does not establish a lack of substantial evidence for 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."<sup>10</sup> 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"<sup>11</sup> 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 general statements; offered rebuttals or provided excuses to the Principal'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.<sup>12</sup> As performance evaluations are "subjective and

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<sup>8</sup> 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

<sup>9</sup> Case No. 2012 CA 003606 P (January 29, 2013).

<sup>10</sup> *Id.* at 6.

<sup>11</sup> *Id.* Citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

<sup>12</sup> 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).

individualized in nature,”<sup>13</sup> 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.”<sup>14</sup> 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.

Thus, I find that Employee was properly evaluated by the school principal, that she had conferences after the evaluations and that she was given notice and the opportunity to receive 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.

### Grievances

Although Employee did not mention them during the hearing, she mentions in her petition for appeal numerous complaints: that she was told her position would be downgraded to Data Entry Clerk; that she would have to reapply for her job; that she would be excessed; that the principal never took the time to know her; etc.<sup>15</sup>

Complaints of this nature are grievances, and do not fall within the purview of OEA’s scope of review. Further, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. Employee’s other ancillary arguments are best characterized as grievances and outside of OEA’s jurisdiction to adjudicate. That is not to say that Employee may not press her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee’s other claims.

### ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE:

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Joseph E. Lim, Esq.  
Senior Administrative Judge

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<sup>13</sup>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).

<sup>14</sup>See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

<sup>15</sup>Petition for Appeal, no. 17.