

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0158-13
Aprille Washington,)	
Employee)	
)	Date of Issuance: March 3, 2015
v.)	
)	
D.C. Public Schools,)	Senior Administrative Judge
Agency)	Joseph E. Lim, Esq.
_____)	
Sara White, Esq., Agency Representative)	
Aprille Washington, Employee <i>Pro Se</i>)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 9, 2013, Aprille Washington (“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 Turner Elementary School. Employee was removed based on her “Minimally Effective” ratings under Agency’s IMPACT program, an effective assessment system for school-based personnel.¹ Employee’s termination was effective on August 10, 2013.

This matter was assigned to me in May of 2014. On July 18, 2014, I held a prehearing conference for the purpose of assessing the parties’ arguments. I then held an evidentiary hearing on October 6, 2014, where both parties presented evidence. 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 2011-2013 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 "Minimally Effective" ratings during the 2011-2012 and 2012-2013 school years.

Employee's Position

Employee argues that her IMPACT scores were due to the retaliatory practices and harassment she suffered by the school principal. Employee asserts that the separation was improper due to the principal's failing to meet with her to discuss her performance in post-IMPACT meetings.

Summary of Evidence presented at the hearing

- a. Kathryn McMahon-Klosterman ("Klosterman") testified as follows: (Transcript, Pgs. 7 – 53, 202 - 215)

As the Director of IMPACT operations, Klosterman described the IMPACT process of school employee performance evaluations to be occurring the entire school year's cycles. She testified that Employee received minimally effective IMPACT ratings for two consecutive school years in a row. As a result, in accordance with Agency policy, Employee was separated.² Among the reasons for Employee's subpar ratings are tardiness, unexcused absences, inconsistent support of the classroom teacher, lack of support for local school initiatives and deductions for insufficient core professionalism.

According to Klosterman, ratings are made by a school administrator, typically the school principal or his or her assistant. Klosterman testified that the documents indicated that both Principal Robert Gregory and Assistant Principal Coquette Petrella 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 to contact employees for conferences are required. Employees can access and download their IMPACT reports from the school database at any time.

Klosterman clarified that educational aides and dedicated aides are grouped together for purposes of IMPACT and are evaluated on the same components. She also testified that school administrators can inform personnel of impending IMPACT conferences by phone, email, or in person. Klosterman also pointed out that even if Employee did not have a negative 40 score because of her lack of core professionalism due to absences and tardiness, Employee would still be rated minimally effective at 236 points and thus terminated.

² See Agency Exhibits 1 to 7 for Employee's IMPACT reports.

Klosterman explained that 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 a 300 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. 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.

b. Robert Gregory (“Gregory”) testified as follows: (Transcript, Pgs. 54 – 114)

Robert Gregory was a teacher for Agency for fifteen years. From 2007 to 2013, Gregory served as the Principal for Turner Elementary. During the 2011-2012 school year, he evaluated Employee’s performance as a paraprofessional and held the post-assessment conferences with Employee. He explained the scores that he gave Employee. Gregory testified that an employee had a duty to notify the main office if they were either going to be absent or late, so that the school would have time to make accommodations to insure proper student-staff ratios. He pointed out the time sheets that indicated the instances that Employee was either tardy or absent.³

Gregory described his working relationship with Employee as good. Under cross-examination, he testified that based on the sign-in sheets, Employee was absent on June 6 and 7, 2013.⁴ Some of the days that Employee was absent were excused while other days were unexcused when Employee failed to follow the protocol for requesting leave. Gregory recalled one instance when Employee refused to sign the standard form regarding her absences.

c. Malita Brittany Wright (“Wright”) testified as follows: (Transcript, Pgs. 117 – 140)

Wright, a former paraprofessional at Turner Elementary School, testified that Employee was a dedicated aide. She differentiated a dedicated aide from a paraprofessional by stating that a dedicated aide is assigned to one student the entire work day while a paraprofessional is an assistant to the class teacher. The training is different. A dedicated aide is needed if the student has shown himself or herself to be a danger to others. For example, if a kindergardener has stabbed a classmate with a pencil.

Ms. Wright saw Employee outside of school on April 26, 2013, and walked her inside. She testified that the sign in sheet was not always available and that she would not find out if she was marked absent without leave (“AWOL”) until she saw her paystub.

Ms. Wright admitted that she was also terminated after receiving minimally effective IMPACT scores from Principal Gregory and Assistant Principal Petrella. Wright, Employee, and two others filed a complaint because they did not receive their end of the school year conference and because management kept putting them in places such as the cafeteria where paraprofessionals should not be in. She also testified that Employee was present on June 12, 2013 but absent from May 6 to May 15, 2013.

³ Agency Exhibit 10.

⁴ Agency Exhibit 11.

d. West Bundu-Conteh (“Conteh”) testified as follows: (Transcript, Pgs. 140 - 149)

Conteh, a former paraprofessional at Turner Elementary School until June 1, 2012, testified that during the relevant time period, the sign in sheet was not always available.

e. Geraldine Washington (“Washington”) testified as follows: (Transcript, Pgs. 149 - 161)

Washington, Employee’s sister, testified that she notified Agency beforehand whenever Employee was sick on May 6, 2013, via phone and email. She accompanied Employee when they took a taxi to drop Employee’s child off at school before work. On June 6 or 7, 2013, School Principal Petrella left a message on Employee’s phone.

When confronted with copies of her emails, Washington admitted that she usually called one or two hours beyond Employee’s start of duty.⁵ She said that Employee was too ill to call the school herself.

f. Jacquelyn Pinckney-Hackett testified as follows: (Transcript, Pgs. 162 - 165)

Ms. Hackett, another sister of Employee, testified that Employee was indeed ill starting May 6, 2013, as she was the one who took Employee to the doctors. She also called the doctor on June 7, 2013, when Employee experienced severe pain.

g. Employee testified as follows: (Transcript, Pgs. 170 - 202)

Employee testified that although she was assigned as a kindergarten educational aide, she was used as a pre-K aide, as well as a dedicated aide. She complained that she was listed as AWOL even when she came back with five doctors’ notes, and that her sister notified then-Principal Gregory whenever she was ill. Employee complained that she was placed on annual leave from May 16, 2013 through June 21, 2013, even though she was present. She stated that the only day she was absent was June 7, 2013. She complained about Ms. Petrella emailing her about the post-IMPACT evaluation conference by email instead of notifying her directly. Employee recalled that on June 7, 2013, when Ms. Petrella called her, she was home in pain.

On April 26, 2013, Employee testified that she suffered from vertigo when she arrived at work. Employee opined that her poor IMPACT score stemmed from management’s unfairly listing her as AWOL when she was out sick, making her work as a dedicated aide when she wasn’t trained for it, and that she was a victim of retaliation after filing a harassment complaint with the D.C. Council and DCPS Chancellor Head Kaya Henderson about being saddled with too many children from kindergarten and first grade without supervision.

Employee admitted she was tardy every school day from January 2012 to June 2012 because the Randall Highlands Elementary school principal barred her sister from school. She

⁵ See Employee Exhibits 1 to 4. In addition, these emails pertain to dates when Agency did not charge Employee as absent without leave. Thus, they are irrelevant to her IMPACT rating.

explained that her son is a special needs child and needs either her sister or herself to settle the child in school. Employee declared that Principal Gregory and the Randall Highlands Elementary school principal conspired to bar her sister from the Randall Highlands School.

Employee testified that she was present on June 12, 2013, but absent on June 17, 2013, getting a bone scan. She denied that Principal Gregory had a conference with her on June 15, 2013, as she was out on sick leave. On June 13, 2013, she returned to work but had to go home after feeling ill. Her doctor then placed her on leave for the rest of the school year.

Employee reasoned that she could not be possibly minimally effective if Agency kept assigning her as a dedicated aide to kindergarten, pre-K3, and pre-K4 kids in a single school year. Employee insisted that she always followed protocol each time she was either late or absent, and that she verbally asked Principal Gregory for accommodation when she had to drop her son off at school.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

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 2011-2013 school year.⁶ According to the documents of record, Agency conducts annual performance evaluation for all its employees. During the 2012-2013 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.⁷

In *Brown v. Watts*⁸, 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 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.”⁹ 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).

⁶ Agency Exhibit 9.

⁷ *Id.*

⁸ 933 A.2d 529 (April 15, 2010).

⁹ 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).

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 his/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.

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.

It is undisputed that prior to instituting the IMPACT program, 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 of 2009. The training included providing information pertinent to the IMPACT process, in addition to the positive and negative impacts associated with the final IMPACT rating. Each staff member was provided with a full IMPACT guidebook that was 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.

During the 2011-2013 school year, there were twenty-five (25) IMPACT grouping of DCPS employees.¹⁰ Employee's position – Educational Aide, was within Group 17. The IMPACT process for Group 17 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 had to occur by June 10. Group 17 employees were assessed on a total of five (5) IMPACT components, namely:

- 1) Educational Aide Standards—a measure of an Educational Aide's instructional support, school-wide support, positive rapport with students and families, and adaptability. This component accounted for 90% of an Educational Aide's IMPACT Score.
- 2) Commitment to the School Community—a measure of 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. This component accounted for 10% of the IMPACT score.

¹⁰ Agency's Answer, p. 2.

- 3) Core Professionalism—a measure of four (4) 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.”

School-based personnel assessed through IMPACT, ultimately received a final IMPACT score at the end of the school year of either:¹¹

- 1) Ineffective = 100-199 points (immediate separation from school);
- 2) Minimally Effective = 200-249 points (given access to additional professional development. If, after two years of support, however, an educator is unable to move beyond the Minimally Effective level, she or he will be subject to separation);
- 3) Developing = 250-299 points (given access to additional professional development. If, after three years of support, however, an educator is unable to move beyond the Developing level, she or he will be subject to separation);
- 4) Effective = 300-349 points; and
- 5) Highly Effective = 350-400 points.

DCMR §§1306.4, 1306.5 gives the superintendent of DCPS the authority to set procedures for evaluating Agency’s employees.¹² 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 2011-2013 school years.

In this case, Employee was evaluated by the school administrator (“evaluator”) such as the school principal or the assistant school principal. Employee received a final evaluation on the above specified components at the end of each school year, wherein, she received a “Minimally Effective” IMPACT rating of 239 for School Year 2011-2012¹³ and 216 for School Year 2012-2013. According to the documents submitted, the conferences occurred on December 1, 2011, and June 14, 2012, for School Year 2011-2012¹⁴ and on December 18, 2012, for School Year 2012-2013.¹⁵ The testimony and the documents also show that two attempts at obtaining a conference with Employee were made on June 6, 2013, via email and June 7, 2013, via phone. Employee does not deny that she received a copy of her scores nor does she deny having conferences regarding her scores or that attempts were made to contact her for scheduling the last conference. Instead, Employee gripes about the fact that the 2013 attempts were made via

¹¹ Agency Exhibit 9, Group 17 IMPACT Pamphlet.

¹² 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

¹³ Agency Exhibit 3.

¹⁴ Agency Exhibit 1 and 2

¹⁵ Agency Exhibit 5.

email and phone. She also complains that when Assistant Principal Petrella called her by phone, she was ill. However, Employee does not and cannot show that these methods of scheduling a conference were proscribed by statute, regulation, or even by her union's CBA. Neither did Employee explain her failure to respond to the email and phone message. Thus, I find that Agency did follow the IMPACT process in terminating Employee.

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. It should be noted that the D.C. Superior court in *Shaibu v. D.C. Public Schools*¹⁶ 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."¹⁷ 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"¹⁸ 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.

Agency deducted forty points in Employee's core professionalism scores for unexcused absences on June 11 to 12, 2012, November 23, 2012, November 26, 2012, May 6, 2013, and June 7, 2013.¹⁹ Employee's sisters claimed that they notified Agency about the absences on May 6, 2013, and June 7, 2013. However, contrary to office policy that notification about absences must be made prior to the start of the school day in order for school officials to have time in making other accommodations to ensure proper staffing levels, Employee's sister admitted that the calls were made one or two hours after school has started. Employee also failed to produce any evidence to show that she provided medical documents to school officials on the days that she was ill. Employee does not deny that instead of notifying school officials that she was going to be absent, she relied on her sisters who may not be familiar with the correct procedure for obtaining leave. Based on the evidence presented, these absences were not unexpected events which would have excused the late notification. Rather, these absences were part of several days of absences, most of which were excused by Agency. The evidence showed that Employee did not notify her school officials ahead of time or make some type of arrangement with them regarding her schedule. Thus, the evidence showed that Employee or her agents failed to follow the proscribed policies and procedures of obtaining leave.

¹⁶ Case No. 2012 CA 003606 P (January 29, 2013).

¹⁷ *Id.* at 6.

¹⁸ *Id.* Citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

¹⁹ Although Employee submitted emails to show that her sisters notified school officials about her absences, I find these to be irrelevant as none of them related to the dates that she was charged absent without leave. *See* Employee Exhibits 1 to 4.

Agency also deducted core professionalism points for Employee's unexcused tardiness on June 11 to 12, 2012, November 2, 2012, November 27, 2012, April 19, 2013, and April 26, 2013. Employee admitted her tardiness but explained them away as due to an alleged conspiracy between the school principals of two different schools against one of her sisters, and her need to drop off her son at school at a later time.

Based on the evidence presented, Employee failed to present any credible evidence to substantiate her suspicions that the school principals of two different schools conspired to make her late for work. I also note that Employee's tardiness were not unexpected events which would have excused the late notification. Rather, these instances of tardiness were anticipated as Employee was well aware that she had to drop off her child at a time which would lead to her being late. The evidence showed that Employee never tried to notify her school officials ahead of time or make some type of arrangement with them that would have excused her frequent absences. I also note that although Agency deducted points based on six days of tardiness, Employee admitted that she was late to work every day from January to June 2012.²⁰

Based on their courtroom demeanor and testimony, I find that Agency's witnesses to be more credible than Employee or her witnesses. 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.²¹ As performance evaluations are "subjective and individualized in nature,"²² 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."²³ 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 259 for school year 2011-2012, and 256 for school year 2012-2013. Two consecutive years of being rated "developing" would still have resulted in Employee's removal.²⁴

²⁰ Transcript, Pg. 175.

²¹ 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).

²² 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).

²³ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

²⁴ See Agency Exhibit 9.

I find that Employee's final argument that because she has worked for Agency for many years before she received any bad IMPACT ratings is not a legal ground for overturning Agency's action.

In the instant matter, I find that Employee was evaluated a total of four (4) times by the school administrator, in accordance with the IMPACT rules. I also find that Agency tried to contact Employee twice in order to schedule her final IMPACT conference. Employee received a copy of her IMPACT score, in addition to having post-evaluation meetings with her evaluator(s). Because Employee's final IMPACT score resulted in two consecutive years of a "Minimally Effective" rating, Employee was terminated from her position. Based on the 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