

Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals’ website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE ¹)	
)	OEA Matter No. 1601-0066-22
)	
v.)	
)	Date of Issuance: June 1, 2023
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Custodian with D.C. Public Schools (“Agency”). On July 1, 2022, Agency issued a notice of termination to Employee. The notice provided that under IMPACT, Agency’s assessment system for school-based personnel, an employee whose final IMPACT rating declines between two consecutive years from “Developing” to “Minimally Effective,” was subject to separation. Employee was rated “Developing” for the 2020-2021 school year, and his final IMPACT rating for the 2021-2022 school year was “Minimally Effective.” As a result, Agency terminated Employee, and he was separated effective July 30, 2022.²

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

² *Petition for Appeal*, p. 6-7 (July 15, 2022).

July 15, 2022. He argued that he was unaware of his low IMPACT rating because he was on approved Family and Medical Leave Act (“FMLA”) from April 27, 2022, until June 10, 2022. Moreover, he alleged that he was not aware of the scheduled June 12, 2022, IMPACT conference with his principal. Employee explained that because of his absence from work, he was not able to prove his work ability during the period in question. Accordingly, he requested that he be reinstated to his position because of Agency’s unfair practices related to his IMPACT evaluations.³

Agency filed its Answer to Employee’s Petition for Appeal on August 30, 2022. It asserted that it properly followed the IMPACT process. Agency explained that Employee was terminated because of a “Developing” rating for the 2020-2021 school year and a “Minimally Effective” rating for the 2021-2022 school year. As for Employee’s FMLA claim, Agency argued that pursuant to its Office of Equity policy, an employee may still be rated for IMPACT, if they were continuously available for more than half of the school year. It contended that Employee was only absent during the second to last month of the 2021-2022 school year; thus, he was available to be evaluated for over seven months in order to receive an IMPACT rating. Moreover, Agency asserted that two attempts were made to schedule the post-evaluation conference, with the second attempt occurring on June 15, 2022, five days after Employee returned from his FMLA absence. Therefore, it opined that Employee was properly terminated under IMPACT.⁴

On February 21, 2023, the AJ issued an Initial Decision. She explained that according to the IMPACT process, as a Custodian, Employee had two assessment cycles, which were to occur in January and June of each school year. Additionally, the AJ noted that as part of the IMPACT process, employees are entitled to a conference with an administrator as part of each assessment cycle. However, she found that Agency did not comply with the IMPACT process and held that a

³ *Id.*, 2-3.

⁴ *District of Columbia Public Schools’ Answer to Employee’s Petition for Appeal*, p. 2-4 (August 30, 2022).

portion of Employee's 2021-2022 evaluation was invalid.⁵

The AJ determined that Employee worked in an on-duty status for more than half of 2021-2022 school year; thus, he could be evaluated.⁶ However, she held that although Employee's IMPACT assessment was valid, Agency committed a procedural error by failing to provide him with a post-assessment conference and did not make two attempts prior to the cycle deadline to schedule a conference, as required under IMPACT. The AJ determined that Employee had one conference on February 11, 2022. According to her, the deadline for the second assessment was June 9, 2022. The AJ found that Agency first attempted to schedule the conference on June 8, 2022. However, Employee was on FMLA on June 9, 2022. As a result, the AJ held that because Employee was not in duty status on the day of the scheduled conference, Agency could not hold it against him. The AJ found that Agency made a second attempt to schedule the conference on June 15, 2022. However, because both conference attempts were to happen before the June 9, 2022, cycle deadline, she ruled that Employee's assessment was invalid. Consequently, the AJ concluded that Agency lacked cause to terminate Employee. As a result, Agency was ordered to reinstate Employee to his last position of record; or a comparable position; and reimburse Employee all back-pay and benefits lost because of the termination action.⁷

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on March 17, 2022. It argues that the Initial Decision is not supported by substantial evidence. Specifically, Agency contends that the AJ erred in concluding that its two scheduling

⁵ *Initial Decision*, p. 5-6 (February 21, 2023).

⁶ According to the AJ, there were a total of 133 calendar days in the assessment period, which ran from January 28, 2022, through June 9, 2022. Employee was on FMLA for forty-four (44) calendar days. Therefore, he was on duty for eighty-eight (88) days, which was more than half of the assessment period. She also held that Agency's evaluation observations were conducted prior to him going on FMLA on April 27, 2022. Therefore, Employee's IMPACT assessment was deemed valid.

⁷ *Initial Decision*, p. 6-9 (February 21, 2023). As it related to his complaints regarding discrimination and harassment, the AJ ruled that the District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to the Office of Human Rights; therefore, Employee's claims fell out of the scope of OEA's jurisdiction.

attempts were invalid without granting Agency an opportunity to resolve the discrepancy. Agency explains that its IMPACT policy provides that if an employee is on extended leave at the time of scheduling the conference, there does not need to be any attempt to schedule the conference. Thus, its attempt to schedule the conference was a courtesy, not a requirement. Therefore, Agency requests that the Board reverse the Initial Decision or in the alternative, remand the matter to the AJ to address whether Agency was required to attempt to schedule a post-assessment conference with Employee.⁸

On May 2, 2023, Employee filed his Reply to Agency's Petition for Review. He contends that Agency's attempts to schedule a post-assessment conference should not be considered because he did not have access to his work email while he was out on FMLA. Moreover, Employee asserts that while he was provided an opportunity to discuss his "Developing" rating for the 2020-2021 school year with an administrator, he was not offered the same opportunity to review the "Minimally Effective" rating he received for the 2021-2022 school year. Therefore, he argues that Agency failed to comply with the IMPACT process by not providing the required post-assessment conference.⁹

The IMPACT Custodian Standard provides that "as part of each assessment cycle, you will have a conference with your administrator. At this conference you will receive feedback based on the Custodian Standards rubric and discuss next steps." In both guides for the 2020-2021 and 2021-2022 District of Columbia Public Schools Effectiveness Assessment System for School-Based Personnel, Group 19 Custodial Staff, there is a section that addresses assessments. It provides the following:

Note: . . . if, while employed by DCPS, you have an absence which causes you to miss one or more of your assessments, DCPS may at its

⁸ *District of Columbia Public Schools' Petition for Review*, p. 2-3 (March 17, 2023).

⁹ *Matthew Cook's Rebuttal to DCPS Petition for Review*, p. 2 (May 2, 2023).

*discretion make adjustments to the IMPACT system to ensure that you receive a final IMPACT score for the year. These adjustments may include, among other things, changing deadlines, changing the number of assessments, and changing the type of assessment. Also, if unexpected circumstances interfere with the completion of one or more of your assessments, DCPS may nevertheless issue a final IMPACT score and consequences based on the remaining assessments. Finally, DCPS reserves the right to make any additional modifications to the IMPACT system during the school year. DCPS will provide notice of any such modifications prior to their implementation. (For the purposes above, “assessments” refers to observations, conferences, holistic reviews, data, and other means of measuring performance.) (Emphasis added).*¹⁰

The aforementioned section provides that assessments include conferences. It is undisputed that Employee was on FMLA on June 8, 2022, for the first scheduled conference. Additionally, the AJ held that the June 15th attempt was past the deadline to complete the cycle.¹¹ However, the AJ did not address that it is within Agency’s discretion to make adjustments to deadlines, the number of assessments, and the type of assessment. The 2020-2021 and 2021-2022 sections provide that if an employee’s absence causes them to miss one or more assessments, it is within Agency’s discretion to make adjustments to the IMPACT process to ensure that they receive a final IMPACT score.¹² The Initial Decision did not address whether adjustments – including deadlines, the number of assessments, and type of assessments – could be made by Agency. Therefore, we remand this matter to the Administrative Judge for further consideration.

¹⁰ *District of Columbia Public Schools’ Answer to Employee’s Petition for Appeal*, Tabs # 11 and 12 (August 30, 2022).

¹¹ *Initial Decision*, p. 6-7 (February 21, 2023).

¹² This Board notes that Agency failed to provide its March 2019 IMPACT Conference FAQ to the AJ prior to her closing the record; it was provided on Petition for Review. However, it appears from its Petition for Review that Agency believes that it was not given the opportunity to submit evidence of its policy on scheduling conferences when an employee is on extended leave. The 2019 IMPACT Conference FAQ language does not conflict with the 2020-2021 and 2021-2022 IMPACT section regarding Agency’s discretion to adjust the IMPACT process if an employee is absent. The 2019 language provides that “if a staff member goes out on long-term continuous leave such that it is impossible to conference (e.g., FMLA . . .), you may finalize the conference without making two attempts.”

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED**, and this matter is **REMANDED** to the Administrative Judge for further consideration.

FOR THE BOARD:

Clarence Labor, Jr., Chair

Jelani Freeman

Peter Rosenstein

Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.