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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
EMPLOYEE ¹ ,)	OEA Matter No. 1601-0062-22
)	
v.)	Date of Issuance: February 21, 2023
)	
D.C. PUBLIC SCHOOLS,)	MONICA DOHNJI, Esq.
Agency)	Senior Administrative Judge
_____)	
Employee, <i>Pro Se</i>)	
Gehrie Bellamy, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On July 11, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public Schools’ (“Agency”) decision to terminate her from her position as an Educational Aide, effective July 30, 2022. Employee was terminated for having a ‘Minimally Effective’ rating under the D.C. Public Schools’ Effective Assessment System for School-Based Personnel (“IMPACT”), during the 2021-2022 school year; after having received a rating of “Developing” during the 2020-2021 school year. OEA issued a Request for Agency Answer to Petition for Appeal on August 1, 2022. Agency submitted its Answer to Employee’s Petition for Appeal on August 20, 2022. This matter was initially assigned to the undersigned on September 2, 2022.

A Status/Prehearing Conference was held on October 5, 2022, with both parties present.² Thereafter, on October 6, 2022, I issued a Post Status/Prehearing Conference Order requiring the parties to address the issues raised during the October 5, 2022, Conference. Agency’s brief was due on or before October 27, 2022, while Employee’s brief was due on or before November 17, 2022. Agency had the option to submit a sur-reply by December 1, 2022. Agency resubmitted its Prehearing Statement on November 2, 2022. Employee filed her brief on November 4, 2022. Agency did not file a sur-reply. Upon review of the record and

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

² Agency filed a Prehearing Statement on September 30, 2022. During the October 5, 2022, Status/Prehearing Conference, Agency requested that its Prehearing Statement be considered, in-lieu of a Post-Status/Prehearing Conference brief. Agency also submitted additional documentation in support of its position on October 5, 2022.

considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material facts in dispute, and as such, an Evidentiary Hearing is not required. 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 action of separating Employee from service pursuant to a decline in her IMPACT rating from 'Developing' during the 2020-2021 school year, to 'Minimally Effective' during the 2021-2022 school year was done in accordance with all applicable laws, rules, or regulations.

BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021) states:

The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.³

OEA Rule § 631.2 *id.* states:

For appeals filed under § 604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW⁴

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. Here, Employee was employed as an Educational Aide with Agency in 2008. Employee was placed at the Harriet Tubman Elementary School during the 2020-2021 school year and the 2021-2022 school year. Her performance was assessed using the D.C. Public Schools' Effective Assessment System for School-Based Personnel ("IMPACT"). For the 2020-2021 school year, Employee received an IMPACT rating of "Developing". She subsequently received an IMPACT rating of "Minimally

³ OEA Rule § 699.1.

⁴ Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

Effective” for the 2021-2022 school year and she was terminated by Agency due to a decline in her scores. Employee was a member of the American Federation of State, County and Municipal Employees Local 2921 (“AFSCME”) Union.

Employee’s Position

Employee notes in her Petition for Appeal that she was unjustly terminated because her performance evaluation was manipulated, and not investigated. She asserts that her evaluation was based on numbers without facts. She avers that her score was based on what the head teacher and principal wrote, and that her report was not taken into consideration. Employee argues that she was given a low score to tarnish her integrity. Employee submits she was not placed on probation, nor did she receive the IMPACT rating separation letter.⁵

Employee also asserts that in the two (2) years that she was at Harriett Tubman Elementary (“Harriett Tubman”), she had a total of four (4) short meeting, each lasting about five (5) minutes with the principal.⁶ She explains that her IMPACT score did not match the work she put in at the school. Employee notes that she wants to be reassigned to another school and she requested that she be given a fair reference letter if Agency no longer wants her services. She also wants an apology from Agency for the emotional damage she suffered following her termination. Employee asserts that the principal at Harriett Tubman – Amanda Delabar (“Delabar”), subjected her to discrimination and harassment. She cites that Delabar’s conduct towards her was not professional.⁷ Employee also notes that she received recognitions and compliments from her former principal and co-workers, but not from Principal Delabar. Employee states that Principal Delabar did not help her in her professional growth, despite Employee’s request for help.⁸

Employee contends that Principal Delabar gave her low scores to achieve her goal of harassing and firing Employee. According to Employee, she was harassed for four (4) years by Principal Delabar because she requested Family and Medical Leave (“FMLA”) due to job stress. She also asserts that she was moved to different classrooms for no reason. Employee explains that she was moved to a different level – Pre-K, with Ms. Cathy Erlich as the teacher. Employee avers that Principal Delabar and Ms. Erlich worked together to slander, harass and ultimately terminate her, since the IMPACT scores contained input/comments from the teacher and school principal. Employee provides justification to the comments made in her IMPACT evaluation.⁹

Agency’s Position

Agency asserts in its August 30, 2022, Answer 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 and it exercised this managerial prerogative when it created IMPACT. Agency argues that it followed proper D.C. statutes, regulations, and laws in conducting Employee’s performance evaluation. Agency notes that, IMPACT is a performance evaluation system

⁵ Petition for Appeal (July 11, 2022). See also Employee’s Brief (November 4, 2022).

⁶ Employee’s Brief (November 4, 2022).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

utilized by DCPS to evaluate school-based personnel for the 2018-2019, 2019-2020, 2020-2021, school years.¹⁰

Agency provides that Employee's position was within IMPACT Group 17, and she received a 'Minimally Effective IMPACT rating during the 2021-2022 school year, after having received a 'Developing' IMPACT ratings for the 2020-2021 school year. Agency further provides that during the 2017-2018 school year, Employee was an Educational Aide under IMPACT Group 17, and she was assessed during Cycles 1 and 3. Agency states that it properly conducted Employee's performance evaluation using the IMPACT process. Because Employee's IMPACT rating declined between two consecutive school years from 'Developing' to 'Minimally Effective' her employment was terminated pursuant to the IMPACT procedure.¹¹

Governing Authority

District of Columbia Municipal Regulation ("DCMR") 5-E DCMR §§1306.1, and 1306.4-5 gives the Superintendent 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. 5-E DCMR 1401 provides in pertinent part as follows:

1401.1: Adverse action shall be taken for grounds that will promote the efficiency and discipline of the service and shall not be arbitrary or capricious.

1401.2: For purposes of this section, "just cause for adverse action" may include, but is not necessarily limited to, one (1) or more of the following grounds:

(c) Incompetence, including either inability or failure to perform satisfactorily the duties of the position of employment.

Furthermore, the D.C. Code § 1-616.52(d) states, in pertinent part:

Any 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 a labor organization.

¹⁰ Agency's Answer (August 30, 2022).

¹¹ *Id.*

¹² DCMR § 1306 provides in pertinent parts as follows:

1306.1 - Official performance evaluation ratings for all employees of the Board of Education shall be inclusive of work performed through June 30th, unless otherwise specified in this section.

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.

The 109th Congress of the United States enacted the 2005 District of Columbia Omnibus Authorization Act, PL 109-356, which states in part:

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

Thus, Agency was granted the authority to develop its own evaluation process and tool for evaluating Agency employees and exercised this management prerogative when it created the IMPACT evaluation system.

Accordingly, in reviewing this matter, I will address whether Agency followed the procedures it developed in evaluating its employee; and whether Agency's termination of Employee pursuant to her IMPACT rating was supported by just cause. As referenced above, 'just cause' for adverse actions includes incompetence – an employee's inability or failure to perform satisfactorily the duties of their position of employment.

The IMPACT Process

IMPACT was the performance evaluation system utilized by DCPS to evaluate its employees during 2021-2022 school year. According to the record, Agency conducts annual performance evaluations for all its employees. Agency utilized IMPACT as its evaluation system for all school-based employees.¹³

Employee's position, Educational Aide at Harriett Tubman Elementary School, was within Group 17. According to the IMPACT process, Group 17 employees had two (2) assessment cycles – typically in January and June of each year. Here, Employee was assessed during Cycle 1 and Cycle 3 for the 2020-2021 and 2021-2022 school years.

Employee was assessed on a total of three (3) IMPACT components, namely:

- 1) Educational Aide Standard (EA) – comprised of 90% of Group 17 employees' scores;
- 2) Commitment to the School Community (CSC) – 10% of Group 17 employees' scores; and
- 3) 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 = 100-199 points (immediate separation from school);

¹³ Agency's Answer, *supra*.

- 2) Minimally Effective = 200-249 points (given access to additional professional development - Individuals who receive a rating of 'Minimally Effective' for two (2) consecutive years are subject to separation from the school system);
- 3) Developing = 250-299 points (Individuals who receive a rating of 'Developing' for three (3) consecutive years are subject to separation from the school system);
- 4) Effective = 300-349 points; and
- 5) Highly Effective = 350-400 points.

IMPACT process also provides that employees are entitled to a conference with the administrator as part of each assessment cycle. It further notes that if the administrator makes at least two attempts to schedule a conference with the employee prior to the Cycle deadline and the employee is unable to meet or unresponsive, the assessment will be valid without the conference. Valid attempt methods include, but are not limited to, phone calls, text messages, emails, notes in your school inbox, and/or in-person conversations.

Analysis

In the instant matter, Employee received no deductions under the CP component for the 2021-2022 school year. Employee received a final IMPACT score of 239, and her rating was 'Minimally Effective' for the 2021-2022 school year. For the 2020-2021 school year, Employee received a final IMPACT score of 289, with no deduction for the CP component, and a final IMPACT rating of 'Developing'. Pursuant to the IMPACT process, if an employee's performance declines from 'Developing' to 'Minimally Effective', the employee will be subject to separation.¹⁴ Applying this to the instant matter, because Employee's IMPACT rating declined from a 'Developing' during the 2020-2021 school year to a 'Minimally Effective' rating during the 2021-2022 school year, I find that Agency was justified in terminating Employee.

For the 2021 -2022 school year, Employee was entitled to two (2) conferences which were to be held after she was assessed. Employee had one (1) conference on February 14, 2022, and another conference on May 26, 2022. For the 2020-2021 school year, Employee had a conference on January 25, 2021, and another conference on June 8, 2021. Therefore, I find that Agency complied with this IMPACT process.

Employee further noted that her principal and teacher harassed and eventually terminated her by low scoring her IMPACT assessments. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment...for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Rights Act.¹⁵ Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. Accordingly, I find that Employee's discrimination claims fall outside the scope of OEA's jurisdiction.

Employee disagreed with her IMPACT scores and comments on her IMPACT evaluation. She provided justifications/explanations for her performance as listed in the comment section of the various IMPACT components she was evaluated on. Employee also explained that she got recognitions and compliments from her former principal and co-workers, but not from the current principal - Principal

¹⁴ *Id.* at Tab 13 page 21.

¹⁵ D.C. Code §§ 1-2501 *et seq.*

Delabar. The D.C. Superior Court in *Shaibu v. District of Columbia Public Schools*¹⁶ explained that “[d]ifferent supervisors may disagree about an employee’s performance and each of their opinions may be supported by substantial evidence.” Similar to the facts in *Shaibu*, I find that it is within the Administrator’s discretion to reach a different conclusion about Employee’s performance, as long as the Administrator’s opinion is supported by substantial evidence. Further, 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.”¹⁷ 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”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.

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.¹⁹ As performance evaluations are “subjective and individualized in nature,”²⁰ 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.”²¹

Based on the foregoing, I find that Agency had sufficient ‘just cause’ to terminate Employee, following the decline of her IMPACT rating from ‘Developing’ during the 2020-2021 school year, to ‘Minimally Effective’ during the 2021-2022 school year.

ORDER

It is hereby **ORDERED** that Agency’s action of removing Employee is **UPHELD**.

FOR THE OFFICE:

/s/ Monica N. Dohnji
MONICA DOHNJI, Esq.
Senior Administrative Judge

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 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).

²⁰ 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).

²¹ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).