

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Tricia Bowling-Bryant,)	OEA Matter No. 1601-0090-16
Employee)	
)	Date of Issuance: May 30, 2017
v.)	
)	Joseph E. Lim, Esq.
D.C. Public Schools,)	Senior Administrative Judge
Agency)	
_____)	
Tricia Bowling-Bryant, Employee <i>pro se</i>)	
Nicole Dillard, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 2, 2016, Tricia Bowling-Bryant (“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 Early Childhood Teacher at Malcolm X Elementary School. Employee was removed because she received a rating of “Developing” for 2014-2016 school years and “Minimally Effective” for the 2013-2014 school year under Agency’s IMPACT program.¹ Employee’s termination was effective on August 5, 2016.

This matter was assigned to me in October 18, 2016. On November 7, 2016, I issued an Order scheduling a prehearing conference to be held on December 20, 2016. During the conference, I determined that an evidentiary hearing was not warranted based on the arguments presented by the parties. Therefore, I ordered the parties to submit legal briefs. Both parties responded to the Order. On February 7, 2017, Agency submitted a Motion to Dismiss for Lack of Jurisdiction. Employee failed to respond. The record is now closed.

JURISDICTION

Jurisdiction in this matter was not established.

ISSUE

¹ IMPACT is the effectiveness assessment system used by the D.C. Public School System to rate the performance of school-based personnel.

Whether Employee's appeal should be dismissed for lack of jurisdiction.

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 was the performance evaluation system utilized by DCPS to evaluate its employees during the 2013-2014, 2014-2015, and 2015-2016 school years. According to the documents of record, Agency conducts annual performance evaluation for all its employees. During these 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.²

The IMPACT process required that all school-based staff receive written feedback regarding their evaluations, in addition to a having 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. Employees also received an email indicating that their final scores were available online. Additionally, a hard copy of the report was mailed to the employees' address of record.

During the 2013-2014, 2014-2015, and 2015-2016 school years, there were twenty (20) IMPACT grouping of DCPS employees. Employee's position, Early Childhood Teacher, was within Group 2a. Under IMPACT, Employee was required to be evaluated three (3) times each year. The first assessment cycle ("Cycle 1") occurred on or before December 17; the second cycle ("Cycle 2") occurred on or before March 3, and the third assessment cycle ("Cycle 3") occurred on or before June 9. During an assessment cycle, Employees in Group 2 were observed five (5) times during the course of the year: three observations were conducted by the teacher's principal or supervisor, and two observations were conducted by an expert practitioner called a Master Educator. Upon conclusion of each assessment, within 15 days of the observation, the employee will meet with the evaluator for a post assessment conference.

Once observation records are finalized, the administrator cannot go back in the database and make changes. Employees have access to evaluations as soon as they are finalized. Evaluators only have access to teachers for whom they are responsible for. For example, if an observer opened an observation for an employee in the database, no other administrator can touch it. At the end of the school year, after all assessments are completed, the evaluations are averaged and scored.

In this case, Employee was assessed on the following IMPACT components:

² Agency's Answer and Agency's Brief, *supra*.

- 1) Teaching and Learning Framework-Early Childhood Education (“TLF-ECE”)—a measure of a teacher’s instructional expertise. This component accounted for 75% of the IMPACT score.
- 2) Early Childhood Teacher-Assessed Student Achievement Data (“TAS”)—a measure of a teacher’s impact on student learning throughout the school year, as evidenced by rigorous assessments. This component accounted for 15% of the IMPACT score.
- 3) Commitment to the School Community (“CSC”)—a measure of the extent to which school-based personnel support and collaborate with their colleagues and their school’s community. This component accounted for 10% of the IMPACT score.
- 4) Core Professionalism (“CP”)—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.” If all areas of Core Professionalism are met by the employee, then no points are deducted from the final score; however, if there is a concern in one of the areas of Core Professionalism, points are deducted from the final score. Master educators only review teachers’ performances with respect to the TLF component; only the administrators have the ability to rate Core Professionalism.

School-based personnel assessed through IMPACT ultimately received a final IMPACT score at the end of the school year. If an employee received a “Minimally Effective” rating two (2) consecutive years in a row, then that employee was subject to termination under the IMPACT program. The scoring range is as follows:

- 1) Ineffective = 100-199 points (immediate separation from school);
- 2) Minimally Effective = 200-249 points (given access to additional professional development);
- 3) Developing = 250-299 points
- 4) Effective = 300-349 points; and
- 5) Highly Effective = 350-400 points.

IMPACT evaluations and ratings for each assessment cycle were available on-line for employees to review by 12:01 a.m. the day after the end of the each cycle. If employees had any issues or concerns about their IMPACT evaluations and ratings, they were encouraged to contact Agency’s IMPACT team by telephone or electronic mail.

The IMPACT database is where all IMPACT records are stored, including evaluations, observations, other components, as well as IMPACT final reports. Agency’s website is open and available to the general public. However, the educator portal is open to employees only. All employees with an email account and password have access to the educator portal. Currently, when employees are hired, they are provided a username and password.

Employee's observations for her school were documented in the database. For the 2013-2014 school year, Employee received a score of 245, which is considered Minimally Effective. Employee was notified in a June 27, 2014, letter of her rating and was warned that should she receive a rating of Minimally Effective or Ineffective at the conclusion of the next school year, she would be subject to separation from Agency. She received a Developing rating for the 2014-15 school year. Employee was informed that individuals whose final IMPACT rating either remains below Effective for three years or declines from Developing to either Minimally Effective or Ineffective, will be subject to separation from Agency. Employee again received a Developing rating for the 2015-16 school year. As a result of her ratings, Employee was separated effective August 5, 2016.

Employee argues she was wrongly deducted 20 points from her IMPACT rating in the area of Core Professionalism due to her late arrivals. According to Employee, her tardiness were due to her daughters' illness, a car accident, her major depression, her Attention Deficit Disorder, her actions being misinterpreted in a negative way, and Agency's failure to provide workplace accommodation for her.

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, and that her poor IMPACT scores for three consecutive school years justified her removal.

Lastly, Agency points out that at the time Employee was hired, she was informed that she must obtain a teaching license within 30 days as mandated by law.³ Subsequent to that notice, Employee received periodic notices that stated that she had until March 31, 2016, to obtain a teaching license.⁴ On December 15, 2016, Employee received a notice stating that she would be terminated after the 2015-2016 school year should she fail to obtain a license by March 31, 2016.⁵ On April 5, 2016, Employee received a Notice of Termination Due to Non-Licensure stating that she would be terminated effective July 9, 2016.⁶

Employee failed to respond to Agency's Motion to Dismiss.

The Collective Bargaining Agreement ("CBA") between the Washington Early Childhood teachers' Union, Local #6 of the American Federation of Early Childhood teachers, AFL-CIO and DCPS provides as follows with respect to the evaluation process:

15.3 DCPS's compliance with the evaluation process, and not the evaluation judgment, shall be subject to the grievance and arbitration procedure.

³ DCPS Motion to Dismiss for Lack of Jurisdiction, tab 1.

⁴ *Id.*, tab 3.

⁵ *Id.*

⁶ *Id.*, tab 2.

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].

D.C. Code § 1-616.52(d) provides:

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. [Emphasis added].

Employee’s arguments pertain more to the content and substance of her IMPACT evaluation judgments, and not to the IMPACT evaluation process. Thus, based on the CBA and the above statute, they cannot be considered. Based on the documents submitted, I find that Employee had access to her IMPACT assessments after they were completed in the database, and that her unsatisfactory IMPACT scores for three consecutive school years justify her removal.

I also note that Employee does not argue that the evaluating Principal’s or Master Educator’s comments were untrue; she simply offers excuses and reasons for her IMPACT ratings. It should be noted that the D.C. Superior court in *Shaibu v. D.C. Public Schools*⁷ 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 [Principal’s] evaluation but that would support a better overall evaluation.”⁸ 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”⁹ when implementing performance evaluations. The Court denied the employee’s petition, finding that 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]....”

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.¹⁰ Because performance evaluations are “subjective and individualized in nature” and this Office will not substitute its judgment for that of an agency; rather, this Office limits its review to determining if

⁷ Case No. 2012 CA 003606 P (January 29, 2013).

⁸ *Id.* at 6.

⁹ *Id.* Citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

¹⁰ 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).

“managerial discretion has been legitimately invoked and properly exercised.”¹¹ Thus, I find that it was within both the Principal’s and the Master Educators’ discretion to rank and rate Employee’s performance. Moreover, the undersigned Administrative Judge is not in the position to recommend that Employee receive a higher IMPACT rating since the Undersigned is unfamiliar with the nature and details of Employee’s position. Accordingly, I find that Employee was assessed under IMPACT in a fair and unbiased manner. I also find that the evaluators did not abuse their discretion in evaluating Employee’s work performance. Accordingly, there is no credible reason to disturb Employee’s IMPACT scores.

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.

Motion to Dismiss for Lack of Jurisdiction

In the alternative, this matter will not be determined by the parties’ arguments. Instead, it will be determined by whether or not this Office has jurisdiction over this matter. OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. “Preponderance of the evidence” shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *Id.* states:

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.

In *Linda Ellis, et. al. v. D.C. Department of Consumer and Regulatory Affairs*,¹² the D.C. Superior Court held that when an employee fails to acquire a required certification or license, such an employee is automatically converted to “at-will” status.¹³

¹¹See 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). See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

¹² 2011 CA 001529 P(MPA), 2011 CA 001533 P(MPA), 2011 CA 001534 P(MPA), 2011 CA 001557 P(MPA), 2011 CA 001560 P(MPA), 2011 CA 001561 P(MPA), 2011 CA 001562 P(MPA), and 2011 CA 001567 P(MPA) D.C. Super. Ct. (November 28, 2011)

¹³ See also *Michael Brown, et. al. vs. DC Dept. of Consumer and Regulatory Affairs*, OEA Matter Nos. 1601-0012-09 to 1601-0027-09, 1601-0052-09 to 1601-0054-09, *Opinion and Order on Petition for Review* (January 26, 2011); and *Gizachew Wubishet v. District of Columbia Public Schools*, OEA Matter No. 1601-0106-06, (March 26, 2007).

In *Ellis*, the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) reorganized and changed the position descriptions of its employees. DCRA created new staff positions called Neighborhood Stabilization Specialists (NSS) and Code Compliance Specialist (CSS), which required its current employees to become International Code Council (ICC) certified.¹⁴

The Superior Court noted that the OEA Administrative Judge (AJ) in *Ellis* had found that: (a) the ICC certification was a significant requirement of the Employees' respective positions; (b) that the DCRA went to considerable expense to provide Employees with opportunities to become certified; (c) that Employees' continued failure to obtain certification converted them to "at-will" employees; and (d) their status as at-will employees subjected them to termination at any time, for any reason.

The Superior Court agreed with the AJ's ultimate conclusion that if an employee neglects to obtain proper licensure or certification by the effective date of their removal, then they are deemed at-will employees, and thus OEA must dismiss the appeals as it lacks jurisdiction over "at-will" employees.

Here, it is undisputed that Employee has not acquired the required teaching license. Based on this fact, I find that her status was converted to an "at-will" employee. Accordingly, I conclude that I must grant Agency's Motion to Dismiss and conclude that this matter must be dismissed for lack of jurisdiction.

ORDER

It is hereby ORDERED that this appeal is DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

¹⁴ International Code Council (ICC) is a membership organization that develops codes and standards used to direct the building of residential and commercial properties. According to DCRA's brief, fifty states and D.C. have adopted the I-Codes, as well as multiple federal agencies.