

Notice: This decision is subject to formal revision before publication in the District of Columbia Register. Parties are requested to notify the Office Manager of any formal errors in order that corrections be made prior to publication. This is not intended to provide an opportunity of a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
NAVELLE THOMPSON,)	
Employee)	OEA Matter No. 1601-0249-12
)	
v.)	Date of Issuance: April 2, 2014
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	MONICA DOHNJI, Esq.
)	Administrative Judge

Diana Bardes, Esq., Employee Representative
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 10, 2012, Navelle Thompson (“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 him from his position as a Custodian, effective August 10, 2012. Employee was terminated for having a “Minimally Effective” rating under the IMPACT, DC Public Schools’ Effective Assessment System for School-Based Personnel (“IMPACT”), during school year 2010-2011, and 2011-2012. On October 12, 2012, Agency submitted its Answer to Employee’s Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge (“AJ”) on December 9, 2013. Thereafter, on December 31, 2013, I issued an Order scheduling a Status Conference in this matter for January 29, 2014. Both parties were present for the Status Conference. On January 30, 2014, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Both parties have now submitted their written briefs. After 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

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 a "Minimally Effective" performance rating under the IMPACT system for school years 2010-2011 and 2011-2012, was done in accordance with all applicable laws, rules, or regulations.

BURDEN OF PROOF

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.

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 his Brief, Employee submits that because he was terminated, Agency cannot merely stand on its pro-forma procedural argument, claiming that it provided Employee appropriate notice and followed the correct procedures set forth under IMPACT. Citing D.C. *Department of Public Works v. Colbert*¹, Employee states that termination decisions must be supported by substantial evidence, and in the instant matter, there is no evidence to prove that the termination decision was reasonable and that deference is warranted. Additionally, Employee argues that Agency's attempt to defend the termination by focusing solely on Employee's IMPACT evaluation must be rejected. Employee explains that by relying on Title 5 of the District of Columbia Municipal Regulations ("DCMR") § E1401 as authority for terminating Employee, Agency has failed to provide credible evidence to satisfy the 'just cause' and 'cannot be

¹ 874 A.2d 353 (D.C. 2005).

arbitrary or capricious' concepts of DCMR Title 5 and as such, Agency has failed to meet this evidentiary burden.²

Employee further contends that, detailed records kept by his supervisor shows that Employee was completing his various tasks in an efficient and effective manner. Employee maintains that his supervisor described him as a hard and dedicated worker who always completed his work in a timely manner. Employee also notes that, he has a record of satisfactory work performance and he received a low IMPACT rating due to his diabetes. Employee explains that, as a diabetic, he was often forced to use his leave when he was unable to work. He asserts that, he never had any complaints from teachers or staff members about his work ethic. Employee also highlights that his co-worker reported that Employee always did a good job cleaning his assigned areas and did not note any of the issues that the principal identified in his IMPACT evaluation. Employee avers that, the principal felt a transition of floors was necessary due to Employee being diabetic.³

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.⁴ Additionally, Agency asserts that OEA has limited jurisdiction to review a termination based on performance.

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 DCPS 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 the 2010-2011 and 2011-2012 school years. Agency contends that it followed the applicable District laws, rules and regulations. Agency provides that, Employee was a Custodian under IMPACT Group 19, and he was assessed during Cycles 1 and 3. Agency states that it properly conducted Employee's performance evaluation using the IMPACT process and because Employee received a "Minimally Effective" IMPACT rating during school years 2010-2011 and 2011-2012, his employment was terminated.⁵

Governing Authority

DCMR §§1306.4, 1306.5 gives the Superintendent authority to set procedures for evaluating Agency's employees.⁶ The above-referenced DCMR sections provide that each

² Employee's Brief (March 12, 2014).

³ *Id.*

⁴ Agency's Answer (October 12, 2012). *See also* Agency's Brief (February 20, 2014).

⁵ *Id.*

⁶ 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.

1306.5 - 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

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 DCMR 1401 provides 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.

Accordingly, in reviewing this matter, I will address whether Agency followed the procedures it developed in evaluating its employee; and whether or not Agency’s termination of Employee pursuant to his 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 is the performance evaluation system utilized by DCPS to evaluate its employees during 2010-2011 and 2011-2012 school years. According to the record, Agency conducts annual performance evaluations for all its employees. During the 2010-2011 and 2011-2012 school years, Agency utilized IMPACT as its evaluation system for all school-based employees. The IMPACT system was designed to provide specific employee feedback to identify areas of strength, as well as areas in which improvement was needed.⁷

For the 2011-2012 school year, there were twenty-six (26) IMPACT grouping of DCPS employees. Employee’s position – Custodian, was within Group 19. The IMPACT process for Group 19 employees were assessed during Cycles 1 and 3. The first assessment cycle (“Cycle 1”), which ended on December 1; and the third Cycle (“Cycle 3”) ended on June 14. Group 19 employees were assessed on a total of four (4) IMPACT components, namely:

- 1) Custodian Standards (CUST) – comprised of 85% of Group 19 employees’ scores;
- 2) Commitment to the School Community (CSC) – 10% of Group 19 employees’ scores;
- 3) School Value-Added (SVA) – 5% of Group 19 employees’ scores;
- 4) Core Professionalism – 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;

⁷ Agency’s Answer and Agency’s Brief, *supra*.

- 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 = 100-174 points (immediate separation from school);
- 2) Minimally Effective = 175-249 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) Effective = 250-349 points; and
- 4) Highly Effective = 350-400 points.

In the instant matter, Employee received a rating of 'Minimally Effective' for school years 2010-2011, and school year 2011-2012. Moreover, Employee has not challenged Agency's assertion that it complied with the above-referenced IMPACT process, nor has he alleged that Agency did not adhere to the IMPACT process. Accordingly, I find that Agency properly conducted the IMPACT process.⁸

Employee however contends that, Agency has not provided any credible evidence to demonstrate that its decision to terminate Employee satisfies the concept of 'just cause' and is not 'arbitrary or capricious'. Employee provides rebuttals and/or explanations as to why he believes his termination was not supported by substantial evidence.⁹ However, I find that, while Employee has provided statements in support of his position that 1) he was a hard worker; 2) he always completed his work in an efficient, effective and timely manner; 3) he never had any complaints from teachers, staff members about his work ethics; and 4) his co-workers reported that he always did a good job cleaning his assigned areas and did not note any issues that the principal identified, Employee did not specifically note that the Principal's comments in the IMPACT evaluation were untrue; nor did he proffer any evidence that directly contradicted the Principal's factual finding. The principal's comments in this evaluation are quite specific, for example:

"Custodian does not hold the school in high regards as it relates to the building being extremely clean each day, especially his third floor. I see improvements, but the floor needs more damp mopping each night, stairs cleaned, and individual classroom floors need more attention."

"...complains often about the first floor being to [sic] much for him to clean. When the office call [sic] for first floor needs and for quick repairs or for a custodian for spills or accidents, he does not respond promptly. The head custodian must be called, or another custodian from another floor."

⁸ *Id.*

⁹ See Agency's Answer at Tab 2.

“Custodian rarely or never cleans and maintains common area, including school grounds, hall-ways, all-purpose rooms, cafeterias, gymnasiums, and stairwells, in a timely manner....”.

“...his maintenance closet is locked each night. However, I have concerns about outsiders in the building at night without permission assisting you with cleaning. I have written you up about this, however, it continued during this cycle. This is a safety and security issue.”

“Individual demonstrates a pattern of failing to follow DCPS and local school policies and procedures (for example, does not call in in a timely manner when not reporting to work, has other staff members in the building walking with him when the building is closed, have outsiders in the building cleaning who are not members nor cleared by security working in classrooms).”¹⁰

None of the evidence offered by Employee contradicted any of the specific facts above. For instance, Employee did not provide any evidence that he never had outsiders in the building without permission helping him clean; that he was written-up for the security and safety issues; that he cleaned the common areas and that he responded promptly when needed.¹¹ Moreover, the D.C. Superior court in *Shaibu v. District of Columbia Public Schools*¹² 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.”¹³ 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”¹⁴ 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 explanations to the Principal’s comments. For example, Employee attempted to justify his low IMPACT score with his health issues. He explained that his termination was based on challenges related to his health. However, Employee has not provided this Office with any evidence to demonstrate that he informed Agency about his health condition nor that he made a request to Agency to accommodate him. Moreover, this Office has consistently held that the primary responsibility for managing and disciplining Agency's work

¹⁰ *Id.*

¹¹ See Employee’s Brief.

¹² Case No. 2012 CA 003606 P (January 29, 2013).

¹³ *Id.* at 6.

¹⁴ *Id.* Citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

force is a matter entrusted to the Agency, not to OEA.¹⁵ As performance evaluations are “subjective and individualized in nature,”¹⁶ 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.”¹⁷ Thus, I find that as his direct supervisor, it was within the Principal’s discretion to rank and rate Employee’s performance. Additionally, OEA 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.

Employee also asserts that he has satisfactory work performance and that he received a low IMPACT score due to his health condition. The court in *Shaibu v. District of Columbia Public Schools* 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 Employee’s Principal’s discretion to reach a different conclusion about Employee’s performance, as long as the Principal’s opinion is supported by substantial evidence. Additionally, Employee received a ‘Minimally Effective’ rating for the 2010-2011, as well as the 2011-2012 school years.

Based on the foregoing, I find that Agency had sufficient ‘just cause’ to terminate Employee, following his ‘Minimally Effective’ IMPACT rating for the 2010-2011, and 2011-2012 school years.

ORDER

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

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

¹⁵ 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).

¹⁶ 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).

¹⁷ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).