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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
SHIRLEY WARREN,)	
Employee)	OEA Matter No. 1601-0115-13
)	
v.)	Date of Issuance: August 12, 2014
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	MONICA DOHNJI, Esq.
Shirley Warren, Employee <i>Pro Se</i>)	Administrative Judge
Carl Turpin, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 10, 2013, Shirley Warren (“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 her from her position as a Behavior Technician, effective August 10, 2013. Employee was terminated for having an “Ineffective” rating under DC Public Schools’ Effective Assessment System for School-Based Personnel (“IMPACT”), during school year 2012-2013. On September 9, 2013, Agency submitted its Answer to Employee’s Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge (“AJ”) on May 14, 2014. Thereafter, on May 16, 2014, I issued an Order scheduling a Status Conference in this matter for June 10, 2014. Both parties were present for the Status Conference. Thereafter, 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 an "Ineffective" performance rating under the IMPACT system for school year 2012-2013, 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 both her Petition for Appeal and her Brief, Employee submits that she was not sure of the final decision of her IMPACT score because she was informed that some changes would be made to her score, and a final conference held the next day. Employee explains that this is the first time she has received a low score in any IMPACT cycle. Additionally, Employee notes that she was not aware of the administrative assessment because Mr. Jackson did not share the numbers with her during the meeting on June 6, 2013. Employee admits that she had a conference with Mr. Thompson after the Cycle 1 IMPACT evaluation. Employee notes that she and Mr. Thompson went through the standards and rating, and she was encouraged to work on her attendance. Employee highlights that Mr. Thompson had no issues with her performance. Employee also admits that she had a conference with Mr. Jackson after the Cycle 3 IMPACT evaluation. However, Employee explains that Mr. Jackson did not share the ratings with her. She states that Mr. Jackson informed her that he would make changes to her score and that they would meet again to discuss the changes, but this never happened. Employee maintains that, she was not assessed appropriately or fairly by Mr. Jackson, and thus, she was wrongfully

terminated. Employee avers that although she was counseled about her attendance, she was never counseled about her overall performance.

With regards to her attendance, Employee concedes that she had two (2) unexcused absences and four (4) late arrivals, and she was placed on leave restriction. Employee however notes that, although she submitted a leave request on April 19, 2013, because she did not receive approval, she was not absent on that day. Therefore, she should not have been deducted twenty (20) points under the Core Professionalism IMPACT category for Cycle 3.¹

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.² Agency notes that Employee was a member of the American Federation of State County and Municipal Employees (“AFSCME”) Local 2921. Agency explains that the Collective Bargaining Agreement between AFSCME and Agency is silent on the matter of work performance evaluation.

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 2012-2013 school year. Agency contends that it followed the applicable District laws, rules and regulations. Agency provides that, Employee was a Behavior Technician under IMPACT Group 8, and she 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 an “Ineffective” IMPACT rating during school years 2012-2013, her employment was terminated.³

Governing Authority

District of Columbia Municipal Regulation (“DCMR”) §§1306.4, 1306.5 gives the Superintendent authority to set procedures for evaluating Agency’s employees.⁴ 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 DCMR 1401 provides as follows:

¹ Petition for Appeal (July 10, 2013). *See also* Employee’s Brief (July 17, 2014).

² Agency’s Answer (September 9, 2013). *See also* Agency’s Brief (July 1, 2014).

³ *Id.*

⁴ 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

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 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 is the performance evaluation system utilized by DCPS to evaluate its employees during 2012-2013 school year. According to the record, Agency conducts annual performance evaluations 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 employee feedback to identify areas of strength, as well as areas in which improvement was needed.⁵

For the 2012-2013 school year, Employee’s position – Behavior Technician at Dunbar Senior High School (“Dunbar”) was within Group 8. According to the IMPACT process, Group 8 employees were assessed during Cycles 1 and 3. The first assessment cycle (“Cycle 1”) ended on December 20, 2012; and the third cycle (“Cycle 3”) ended on June 10, 2013. The assessments included being observed two (2) times during the course of the year. Group 8 employees were assessed on a total of Three (3) IMPACT components, namely:

- 1) Student Support Professional Standards (SSP) – comprised of 90% of Group 8 employees’ scores;
- 2) Commitment to the School Community (CSC) – 10% of Group 8 employees’ scores; and
- 3) 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.⁶ These requirements are as follows:

⁵ Agency’s Answer and Agency’s Brief, *supra*.

⁶ Under Core Professionalism, if an individual’s overall performance for this category was slightly below standard for that cycle, ten (10) points were deducted from their final IMPACT score for that cycle. Additionally, if they received a slightly below rating again the next cycle, another ten (10) points were deducted from their final IMPACT score. If an individual received a significantly below standard rating for that cycle, twenty (20) points

- 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);
- 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.

Analysis

In the instant matter, Employee received a rating of 'Ineffective' for school year 2012-2013. Employee notes that she was not aware of the administrator's assessment because Mr. Jackson did not share the numbers with her during the meeting on June 6, 2013. Employee however acknowledges that she met with Mr. Thompson after Cycle 1, and with Mr. Jackson after Cycle 3, to discuss IMPACT. While Mr. Jackson may not have discussed Employee's IMPACT Cycle 3 scores with her, I find that Agency complied with the IMPACT process. Agency observed and/or evaluated Employee twice and an administrator met with Employee after each cycle assessment to discuss the evaluation. Moreover, Employee has not provided this Office with any proof of her assertion that she was informed by Mr. Jackson that he would make changes to her score and that they would meet again. Accordingly, I find that Agency properly conducted the IMPACT process.⁷

Additionally, Employee contends that she was not absent on April 19, 2013. She explained that she was on leave restriction, and her leave request for April 19, 2013 was not approved. Employee further notes that because she was present at work on that day, Agency cannot use that as evidence of a deficiency in her attendance under the CP category of the IMPACT Evaluation. Employee has provided this Office with copies of her leave request slip; however, she did not provide this Office with any evidence to prove that she was actually present at work on April 19, 2013. Nonetheless, since Agency has the burden of proof in this matter, and Agency has not provided this Office with any documentation to contradict Employee's assertion that she was present at work on April 19, 2013, I find that Agency cannot consider this factor in evaluation Employee.

were deducted from their final IMPACT score. Additionally, twenty (20) points were deducted if the individual earned an overall rating of significantly below standard again the next cycle. See Agency's Brief at Exhibit 5, pg. 19.

⁷ *Id.*

A review of Employee's Cycle 3 IMPACT evaluation shows that Agency deducted twenty (20) points from the CP category of Employee's Final IMPACT score because Employee was absent from work on April 19, 2013 (Attendant), and she had two (2) or more unexcused later arrivals (On-Time arrival). According to the IMPACT guidebook, the CP category has four (4) components – Attendance, On-Time Arrival, Compliance with policies and procedures, and Respect. Employee received a rating of 'slightly below standard' for Attendance and a rating of 'significantly below standard' for On-Time Arrival. Additionally, according to the IMPACT process, if an individual received a 'significantly below standard' rating on any of the CP components in a given cycle, twenty (20) points would be deducted from their final IMPACT score. Assuming that Agency was not justified in rating Employee as 'slightly below standard' for Attendance, I find that Agency was still justified in deducting twenty (20) points from Employee's Final CP score. Pursuant to the IMPACT guidebook, a rating of 'significantly below standard' rating for On-Time Arrival is described as having one (1) or more unexcused late arrival. Here, Agency noted that Employee had two (2) or more unexcused later arrivals during IMPACT Cycle 3, and Employee has not provided any evidence to the contrary. Also, Employee has not challenged any other scores in his 2012-2013 IMPACT assessment. Consequently, I conclude that Agency was justified in rating Employee as 'significantly below standard' for this component. I also conclude that, based on this rating alone, Agency was within its right to deduct twenty (20) points from Employee's CP score for Cycle 3.

Additionally, Employee has not challenged any of the scores she received on the other IMPACT Components for both Cycle 1 and Cycle 3, for the 2012-2013 school year. She has not proffered to this Office any credible evidence that controverts any of the Principal's comments. Employee simply notes that this is the first time she has received a low score in any IMPACT cycle. The D.C. Superior Court in *Shaibu v. District of Columbia Public Schools*⁸ 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 Principal's discretion to reach a different conclusion about Employee's performance, as long as the Principal'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."⁹ 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"¹⁰ 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.

⁸ Case No. 2012 CA 003606 P (January 29, 2013).

⁹ *Id.* at 6.

¹⁰ *Id.* Citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

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.¹¹ As performance evaluations are “subjective and individualized in nature,”¹² 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.”¹³ 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.

Based on the foregoing, I find that Agency had sufficient ‘just cause’ to terminate Employee, following her ‘Ineffective’ IMPACT rating for the 2012-2013 school year.

ORDER

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

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

¹¹ 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).

¹² 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).

¹³ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).