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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
MABEL BATES,)	
Employee)	OEA Matter No. 1601-0339-10
)	
v.)	Date of Issuance: November 12, 2013
)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,)	MONICA DOHNJI, Esq.
Agency)	Administrative Judge
_____)	
Olekanma Ekekwe-Kauffman, Esq., Employee Representative)	
Sara White, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 23, 2010, Mabel Bates (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public Schools’ (“DCPS” or “Agency”) decision to terminate her effective July 16, 2010. Employee was a School Psychologist at two schools within the District of Columbia. Employee was terminated for receiving an “Ineffective” rating under the DC Public Schools’ Effective Assessment System for School-Based Personnel (“IMPACT”), during the 2009-2010 school year. On August 25, 2010, Agency filed its Answer to Employee’s Petition for Appeal. On September 2, 2010, Employee filed a motion requesting that this Office rule in favor of Employee as a result of Agency’s failure to submit a timely Answer. On October 1, 2010, Agency filed a response to Employee’s September 2, 2010, motion.

This matter was assigned to the undersigned Administrative Judge (“AJ”) in July of 2012. Thereafter, on July 27, 2012, I issued an Order Convening a Status Conference for August 15, 2012. On July 31, 2012, the parties submitted a Consent Request to reschedule the August 15, 2012, Status Conference. This request was granted in an Order dated August 1, 2012. The Status Conference was rescheduled for August 29, 2012. Both parties were in attendance. Thereafter, on September 11, 2012, the undersigned AJ issued a Post Status Conference Order requiring the parties to submit briefs. On September 21, 2012, Agency filed a Motion for Extension of Time to file its Brief. This request was granted in an Order dated September 25, 2012. Both parties complied. Because this matter could not be resolved based on the documents on record, the undersigned issued an Order scheduling a Prehearing Conference for November 28, 2012. Following the Prehearing Conference, the undersigned issued an Order scheduling an Evidentiary Hearing for March 20, 2013. The Evidentiary Hearing was rescheduled for August 28, 2013. Both parties were present for the Evidentiary Hearing. Following the Evidentiary Hearing, I issued an Order dated August 29, 2013, notifying Employee to submit a signed and notarized consent letter from a student’s parents, consenting to the use of

the information in their child's psychological evaluation in this matter. In that Order Agency was also notified to submit a reply or note any objections in regards to the use of the psychological evaluation. Thereafter, in an Order dated September 30, 2013, the parties were notified that the transcripts from the Evidentiary Hearing were available. The Order also provided the parties with a schedule for submitting their written closing arguments. Both parties have submitted their written closing arguments. The record is closed.

JURISDICTION

The 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 an "Ineffective" performance rating under the IMPACT system 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 CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office. While Agency argues that this Office has limited jurisdiction over this matter and that Employee was properly terminated, Employee on the other hand contends that her termination was improper because Agency used improper rating criteria to evaluate Employee. Employee also asserts that her termination was wrongful because it was arbitrary and capricious.

Governing Authority

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. Agency notes that because Employee was a member of Washington Teachers' Union ("WTU") when she was terminated, the Collective Bargaining Agreement ("CBA") between Agency and WTU applies to this matter and as such, OEA has limited jurisdiction over this matter. In *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), the Court of Appeals held that OEA is not

jurisdictionally barred from considering claims that a termination violated the express terms of an applicable collective bargaining agreement. The court explained that the Comprehensive Merit Personnel Act (“CMPA”) gives this Office broad authority to decide and hear cases involving adverse actions that result in removal, including “matters covered under subchapter [D.C. Code §1-616] that also fall within the coverage of a negotiated grievance procedure.”¹ In this case, Employee was a member of the Washington Teachers Union (“WTU”) when she was terminated and governed by Agency’s CBA with WTU. Based on the holding in *Watts*, I find that this Office may interpret the relevant provisions of the CBA between WTU and DCPS, as it relates to the adverse action in question in this matter. Section 15.4 of the CBA between WTU and Agency provides in pertinent part as follows:

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).

Accordingly, I am primarily guided by §15.4 of the CBA between WTU and DCPS in reviewing this matter, and as such, I will only address whether or not Agency’s termination of Employee pursuant to her performance evaluation was supported by just cause. As referenced above, ‘just cause’ is defined as adherence to the *evaluation process only* (emphasis added). Thus, OEA’s jurisdiction over this matter is limited only to Agency’s adherence to the IMPACT process it instituted at the beginning of the school year.

The IMPACT Process

IMPACT is the performance evaluation system utilized by DCPS to evaluate its employees during 2009-2010 school year.² According to the record, Agency conducts annual performance evaluation for all its employees.³ During the 2009-2010 school year, 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.⁴

With the IMPACT system, all staff received written feedback regarding their evaluation, as well as 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 am, the day after the end of each cycle. For the 2009-2010 school year, if employees had any issues or concerns about their IMPACT evaluation and rating, they were encouraged to contact DCPS’ IMPACT team by telephone or email. At the close of the school year, all employees received an email indicating that their final scores were available online. Additionally, a hard copy of the report was mailed to the employees’ home address on file.

Prior to instituting IMPACT, all principals and assistant principals at DCPS were provided with training materials, which they then used to conduct a full-day training with all staff members in September 2009. The training detailed the IMPACT process, consequences, and positive and negatives associated with each full final IMPACT rating. Each staff member was provided with a full IMPACT guidebook, unique to their evaluation group. The guidebooks were delivered to the employees’ schools and were also available online via the DCPS website. Throughout the year, the IMPACT team visited schools to answer questions as

¹ Pursuant to D.C. Code § 1-616.52(d), “[a]ny 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 the labor organization” (emphasis added).

² Agency’s Answer (August 25, 2010). *See also* Agency’s Brief (October 5, 2012).

³ *Id.*

⁴ *Id.*

well as to ensure that the IMPACT hotline was available to all staff members via email and/or telephone to answer questions and provide clarification.

For the 2009-2010 school year, there were twenty (20) IMPACT grouping of DCPS employees. For the 2009-2010 IMPACT evaluation, School Psychologists were classified as “Related Service Providers”. Employee’s position – School Psychologist, was within Group 12. The IMPACT process for Group 12 employees consisted of two (2) assessment cycles: the first assessment cycle (“Cycle 1”), had to occur by February 1st; and the second assessment cycle (“Cycle 2”) had to occur by June 15th. As part of each assessment cycle, Group 12 employees were also entitled to have a conference with their Program Manager/Special Education Coordinator from the DCPS Office of Special Education, wherein, the employees receive written feedback based on the Related Service Provider Standards rubric, along with a discussion of the next steps for professional growth.⁵ According to the Group 12 IMPACT Assessment Handbook distributed to Group 12 employees at the beginning of the 2009 – 2010 school year, these employees were assessed on the following four (4) IMPACT components, namely:

1) Related Service Provider Standards

1) Domain 1: Assessment

- Standard 1: Standard Assessment Battery
- Standard 2: Assessment Report Format
- Standard 3: Assessment Report Content

2) Domain 2: Service Delivery

- Standard 1: Skill Building
- Standard 2: Due Diligence
- Standard 3: Productivity

3) Domain 3: Documentation

- Standard 1: Documentation Format
- Standard 2: Intervention Activity
- Standard 3: Missed Sessions
- Standard 4: IEP Report Cards

2) IEP Quality (IEPQ)

- 1) Present Levels of Performance
- 2) Goals
- 3) Service and Supplemental Aides
- 4) Least Restrictive Environment
- 5) Extended School Year Services

3) Assessment Timeliness (AT) – (Scored once a year, and tracked in the Special Education Data System – SEDS)

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;

⁵ Group 12 IMPACT Assessment Handbook - See Agency’s Exhibit 1.

- 2) On-time arrival;
- 3) Compliance with policies and procedures; and
- 4) Respect.

Group 12 employees were also provided with an explanation of how they would be scored. 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);
- 3) Effective = 250-349 points; and
- 4) Highly Effective = 350-400 points.⁶

On March 4, 2010, Agency's Director of Teacher Human Capital Jason Kamras sent out a letter to all DCPS Related Service Providers in an attempt to clarify the IMPACT process for Group 12 employees. Specifically, Agency sent this letter as an attempt to explain the Group 12 IMPACT process in the event that one of the components listed above does not apply to a particular Group 12 employee. To address this problem, Agency noted that it had established four subgroups within Group 12 to include:

1. Group 12a: RSPs who write IEPs and conduct student assessments – These individuals were assessed using the following IMPACT Assessment Components; 1) RSP Standards (70%); 2) IEP Quality (15%); and 3) Assessment Timeliness (15%).
2. Group 12b: RSPs who do not write IEPs but do conduct student assessments - These individuals were assessed using the following IMPACT Assessment Components; 1) RSP Standards (85%); and 2) Assessment Timeliness (15%).
3. Group 12c: RSPs who write IEPs but do not conduct student assessments - These individuals were assessed using the following IMPACT Assessment Components; 1) RSP Standards (85%); and 2) IEP Quality (15%).
4. Group 12d: RSPs who do not write IEPs and do not conduct student assessments - These individuals were assessed using the IMPACT Assessment Component RSP Standards (100%).

The March 4, 2010 letter also informed the Related Service Providers that the IEP Quality component will be eliminated and will not be counted for Cycle 1 final IMPACT scores. The letter noted that only IEPs written on March 25, 2010 or later will be eligible for assessment. The letter further noted that if an employee did not have any IEPs left to complete for the remainder of the year, they will be moved to either Group 12b or Group 12d, depending on whether they also conducted assessments.⁷

Again on June 2, 2010, Jason Kamras sent out another letter to DCPS Related Service Providers informing them of yet another adjustment to the Group 12, 2009 – 2010 IMPACT Assessment. This letter highlighted the following changes to the Group 12, 2009 – 2010 IMPACT Assessment components:

1. Adjustment 1: IEPQ weight decreased from 15% to 0%

⁶ *Id.*

⁷ March 4, 2010 letter to All DCPS Related Service Providers – *See* Agency's Exhibit 2.

2. Adjustment 2: AT weight decreased from 15% to 0%
3. Adjustment 3: RSP weight increased from 70% to 100%.

In addition, the letter noted that the Productivity Standard under the RSP component would not be included in the RSP Standard score calculation.⁸

SUMMARY OF MATERIAL TESTIMONY

Agency's Case in Chief

1. Anna Gregory (Transcript pgs. 21-86).

Anna Gregory ("Ms. Gregory") is currently the Chief of Staff at the Office of Human Capital and has held this position for two (2) years. (Tr. pgs. 21-22). Prior to that, Ms. Gregory was the Director of the IMPACT Operations Team. She took up this role in June of 2012. As the Director of the IMPACT Operation Team during the 2010-2011 school year, she was responsible for preparing reports, maintaining the IMPACT database and calculating the metrics that are not given by the evaluators, principals and master educators. (Tr. pg. 22).

Ms. Gregory attested that every school based staff was assigned a group and each group had different criteria to evaluate based on the type of job the staff performed. (Tr. pg. 28). Ms. Gregory further testified that Ms. Mabel Bates ("Employee") was in Group twelve (12), which was for Related Service Providers ("RSP"). (Tr. pg. 28). According to Ms. Gregory, RSPs consisted of Psychologists, Social Workers, and Speech Pathologists. (Tr. pg. 28). Ms. Gregory testified that the Group twelve (12) guidebooks had three components that Group twelve (12) employees would be evaluated on. (Tr. pg. 37). The first standard was the RSP standard, which accounted for seventy (70) percent of the evaluation. (Tr. pg. 37). She then testified that the second standard was the Individualized Education Plan ("IEP") Quality, which accounted for fifteen (15) percent of the evaluation and the third standard was the Assessment of Timeliness, which accounted for fifteen (15) percent of the evaluation. (Tr. pg. 37). Next, Ms. Gregory attested that the fourth component was Core Professionalism. (Tr. pg. 45). She explained that unlike the other components, the fourth component is different because an employee did not receive credit if they met the standards on Core Professionalism. (Tr. pg. 46). However, an employee who failed to meet the standards may have points deducted from the evaluation. (Tr. pg. 46).

Ms. Gregory stated that each IMPACT component was scored on a rubric of one (1) to four (4), one (1) being ineffective, two (2) being minimally effective, three (3) being effective, and four (4) being the most effective. (Tr. pg. 37). She continued to testify that an evaluator would evaluate each component and give each employee mix scores of one (1) to four (4). (Tr. pg. 37). She testified that those scores would be averaged for the total RSP standards for that cycle. (Tr. pg. 37). Ms. Gregory stated that the Core Professionalism standards came into account only if there was a deduction. (Tr. pg. 46 & 47). She stated that if an employee was below standard or significantly below standard, points were subtracted from the evaluation. (Tr. pg. 47). She further declared that Employee received a minus twenty (20) in Core Professionalism, which was subtracted from her real score. (Tr. pg. 54).

⁸ June 2, 2010 Letter to ALL DCPS Related Service Providers – See Agency's Exhibit 3.

Ms. Gregory stated that because Employee's final IMPACT score was one hundred (100) she was determined ineffective. (Tr. pg. 48). And employees who were determined to be ineffective were terminated. (Tr. pg. 48). She further testified that RSPs were only evaluated on the RSP standards because DCPS was unable to calculate a score for Assessment Timeliness and IEP Quality. (Tr. pg. 48). Ms. Gregory reviewed Employee's IMPACT assessment. (Tr. pg. 49). She asserted that even if Employee had been evaluated on the other two components, which are worth fifteen (15) percent respectively, she still would have been rated ineffective in fifteen (15) out of the possible sixteen (16) scenarios. (Tr. pg. 49). She explained that the only combination where Employee would have been effective was if she had received a four (4), which is the highest score, on both the Assessment Timeliness and IEP Quality. (Tr. pg. 50). Ms. Gregory concluded that, based on the RSP rating Employee received, even if Employee had received the highest scores on Assessment Timeliness and IEP Quality, she would still be only marginally effective. (Tr. pg. 50).

2. Dr. Maria Turner-Wingate (Transcript pgs. 88 -155)

Dr. Maria Turner-Wingate ("Dr. Turner") is currently employed as a School Psychologist for DCPS. (Tr. pg. 88). As a School Psychologist she consults and collaborates with teachers, participate in IEP/MDT meetings, participate in team meetings, complete assessment reports and any other tasks as directed. (Tr. pg. 122). Prior to that, she was a Psychology Program Manager for four years. (Tr. pg. 89). As the Program Manager she oversaw the District psychology program and supervised all of the school psychologists, including Employee. (Tr. pg. 89-90).

Dr. Turner testified that she used the IMPACT assessment tool to evaluate school psychologists. (Tr. pg. 90). She further testified that the tool was a rubric with different areas of a psychologist's duties and responsibilities which were to be assessed. (Tr. pg. 91). Dr. Turner attested that she assessed Employee twice during school year 2009-2010. (Tr. pg. 91). She further stated that she held two post-assessments conferences with Employee, one at the end of the first Cycle and one at the end of the second Cycle. (Tr. pg. 92). Additionally, Dr. Turner declared that she held case conferences with School Psychologists monthly. (Tr. pg. 92-93). Dr. Turner noted that she also had staff meetings and professional development days with school psychologists. (Tr. pg. 92-93). Dr. Turner testified that IMPACT was discussed at some of those meetings. (Tr. pg. 93). Dr. Turner also stated that during the first week of the school year, Dr. Fener, the Director of Related Services spoke about the new IMPACT evaluation tool during the opening session of professional development. (Tr. pg. 94). According to Dr. Turner, Dr. Fener met with RSPs including Employee. (Tr. pg. 94-95).

Dr. Turner testified that during the post-assessment conference with Employee, she presented her evaluation to Employee and reviewed the evaluation. (Tr. pg. 97). She further testified that she emailed Employee the IMPACT assessment for Cycle one (1). (Tr. pg. 97-98). Dr. Turner testified that during the post-assessment conference, Employee never complained about having problems accessing the Cycle one (1) IMPACT assessment. (Tr. pg. 99). Dr. Turner stated that she pulled reports from the system where they were maintained to conduct the assessment. (Tr. pg. 100). Dr. Turner testified that she was given five reports by the Operations Team, if the psychologists had five reports available, and she would then assess each report to verify that it met the standards. (Tr. pg. 100-101). Dr. Turner declared that although Employee had five reports, she only used three of those reports because she did not think it was fair to use reports that Employee had written prior to making it clear about the requirements for IMPACT. (Tr. pg. 154, 100-101 & 133).

Dr. Turner stated that the operations team pulled the reports for the RSPs. (Tr. pg. 101). After reading from the record, Dr. Turner testified that the first component for RSP ratings was Standard Battery

Assessment. (Tr. pg. 103). She further testified that school psychologists were required to utilize a measure of intellectual functioning, as well as a measure of educational functioning and any other measures that were needed based on the referral question. (Tr. pg. 103). Dr. Turner further declared that she gave Employee a score of one (1) for Standard Assessment battery because Employee did not consistently use the standard battery. (Tr. pg. 105). In addition, she testified that she placed extensive notes under RSP A-1 comments because she wanted to highlight the specific areas of concerns and to explain what the problems were. (Tr. pg. 105). Dr. Turner testified that for Assessment Report Format, which required psychologists to utilize a report template as a model, Employee received a score of one (1) because she did not follow the template explicitly. (Tr. pg. 106). She stated that the next component for RSP was the Assessment Report Content which dealt with whether all of the information requested for each heading was present. (Tr. pg. 106). Under that component, Dr. Turner testified that there were three different scores. (Tr. pg. 107). Dr. Turner averred that Employee received a one (1) for Assessment Report Content. (Tr. pg. 108). She stated that the next component for RSP standards was skill building which dealt with the delivery of intervention services, however at the time school psychologists were not required to provide those services. (Tr. pg. 107).

Dr. Turner attested that Employee received a score of one (1) for Assessment Report Format. (Tr. pg. 108). The final component of RSP standards was Core Professionalism. (Tr. pg. 100). Dr. Turner stated that she deducted twenty (20) points from Employee because there was more than one occurrence or failure to meet the standard. (Tr. pg. 109). When asked why Employee was significantly below the standard for attendance, Dr. Turner testified that the ratings were based on the sign-in sheets she received from Employee's school. (Tr. pg. 109). She further attested that under the Policies and Procedures, when guidelines were not adhered to, it resulted in a significantly below the standard mark. (Tr. pg. 110). Further, she testified that at the bottom of the assessment for Cycle one (1) she included a growth plan because she wanted to highlight the areas Employee did well in and the areas that needed improvement. (Tr. pg. 110). Dr. Turner testified that although she was only required to construct a growth plan for those who scored really low, she created a growth plan for everyone she evaluated because she wanted to highlight their strengths and weaknesses. (Tr. pg. 111). Dr. Turner noted that she remembered typing all of the comments into the IMPACT database after the assessment was completed and she then submitted it. (Tr. pg. 111-112).

Dr. Turner further testified that she recalled conducting a post-assessment conference with Employee for Cycle one (1). (Tr. pg. 113). She also testified that Employee did not report any problems with her scores or problems accessing the database. (Tr. pg. 113). Furthermore, Dr. Turner testified that she explicitly reviewed the comments she made on the assessment with Employee. (Tr. pg. 113). According to Dr. Turner, Employee fully understood what she needed to improve on, however; Employee still had questions about what she needed to do to make improvements for Cycle three (3). (Tr. pg. 113-114).

Dr. Turner testified that she conducted Employee's Cycle three (3) IMPACT assessments at the end of the school year. (Tr. pg. 114). She testified that she held a meeting with Employee after the assessment was completed. (Tr. pg. 115). She further mentioned that she emailed a copy of the assessment to Employee. (Tr. pg. 115). According to Dr. Turner, during the meeting with Employee, Dr. Turner had a written narrative, as well as the reports and everything needed to review and have a discussion during the course of the meeting. (Tr. pg. 115-116).

Dr. Turner stated that for Cycle three (3), someone from the operations team pulled the reports that she used to evaluate Employee. (Tr. pg. 116). She attested that for Cycle three (3), under Standard Battery Assessment, Employee received a score of two (2). She explained that although Employee made some improvements, based on the reports, everything that was required for standard battery was not consistent across all reports. (Tr. pg. 116-117). She further testified that she made comments and gave examples to

Employee because she wanted to clarify to Employee what was required and what was missing so that the mistakes would not be repeated. (Tr. pg. 117-118). Under Assessment Report Format, Dr. Turner testified that she gave Employee a score of one (1) because the report format was not explicitly followed for every report. (Tr. pg. 118). She stated that for Assessment Report Content, Employee received a score of one (1). (Tr. pg. 118-119). Under Core Professionalism, Dr. Turner stated that Employee improved which she noted on her assessment. (Tr. pg. 119). She further testified that she gave Employee a growth plan for Cycle three (3). (Tr. pg. 119). Dr. Turner affirmed that she could not recall sitting down with Employee to discuss the growth plan but she remembered writing it out explicitly and giving it to her. (Tr. pg. 120). According to Dr. Turner, she met with Employee after the assessment was completed and went over everything with her. (Tr. pg. 120). She further testified that she held a post-assessment conference with Employee for both Cycle one (1) and Cycle three (3). (Tr. pg. 120-121).

Dr. Turner testified that Employee was stationed in more than one school. (Tr. pg. 123). When asked if she noted which school she received Employee's attendance from, she testified that she could not recall, although she was sure that there was a copy in the IMPACT folder that she kept for every provider. (Tr. pg. 123). Dr. Turner testified that she relied on the information provided by the school's sign-in sheets to evaluate Employee's attendance, however she did not indicate on her report which days Employee was actually absent. (Tr. pg. 124).

Dr. Turner denied telling Employee that she would receive low scores in the first Cycle. (Tr. pg. 147). She admitted to writing a narrative based on the reports she reviewed before finalizing the IMPACT evaluation. (Tr. pg. 147). She further testified that she wrote comments all over the reports she reviewed, typed up notes in the narrative and went over the information with Employee when they met. (Tr. pg. 148). Dr. Turner testified that she did not finalize the assessment because she wanted to give Employee an opportunity to show her if she had made any mistakes. (Tr. pg. 148). Moreover, she testified that during the conference, Employee did not mention any mistakes or provided proof that contradicted her evaluation. (Tr. pg. 148-149). Dr. Turner stated that because Employee failed to provide proof that her evaluation was wrong she locked the information in the database. (Tr. pg. 148). She also testified that she emailed all of the comments about the reports and the ratings to Employee before she locked it in. (Tr. pg. 148-149). Finally, Dr. Turner declared that Employee was evaluated on the same standards from the first Cycle to the third Cycle. (Tr. pg. 153).

Employee's Case in Chief

1. Mable Bates (Transcript 157-215 pgs.).

Mabel Bates ("Employee") is a former psychologist for DCPS. (Tr. pg. 158). She began working for DCPS in 1999 as a specialty teacher and later became a school psychologist in 2005. (Tr. pg. 158). As a School Psychologist, she conducted assessments, wrote reports, met with parents, teachers, and principals to determine if a child was eligible for special education. (Tr. pg. 159). During the 2009-2010 school year, Employee was stationed at two elementary schools. (Tr. pg. 159).

Employee testified that she received an IMPACT assessment in December 2009. (Tr. pg. 159). She stated that during the IMPACT assessment with Dr. Turner, she complained that the scores did not make sense and that they were too low. (Tr. pg. 160 & 162). Employee claimed that she questioned Dr. Turner's ability to evaluate her because Dr. Turner had only started working about a month or month and a half before Employee's first IMPACT meeting. (Tr. pg. 165). According to Employee, Dr. Turner told Employee that she should not be concerned because the Program Managers were instructed by Dr. Fener to give low scores.

(Tr. pg. 160 & 162). However, she testified that she did not have any evidence in support of this testimony. (Tr. pg. 204). Employee further asserted that after the IMPACT assessment, most of the Psychologists, Social Workers and Speech Therapists she investigated received low scores. (Tr. pg. 165). Employee testified that Dr. Turner told her that only about twenty (20) percent of those she evaluated received high scores. (Tr. pg. 165). She later testified that only ten (10) percent of employees under RSP were given a high score. (Tr. pg. 205). Furthermore, Employee affirmed that Dr. Turner assured her that the next time she would give Employee higher scores. (Tr. pg. 160). She further testified that when she met with Dr. Turner, the IMPACT assessment was already completed. (Tr. pg. 162-163). When Employee was asked if she received anything during the meeting with Dr. Turner, Employee stated that she received nothing. (Tr. pg. 163). She further testified that Dr. Turner did not present a copy of the evaluation during the meeting. (Tr. pg. 163). Employee stated that Dr. Turner did not present a narrative of her review of Employee's evaluation or gave her a copy of the report. (Tr. pg. 163). Employee stated that Dr. Turner instead told her that the report was available on the computer. (Tr. pg. 163). Employee further noted that she had access to the report through her email. (Tr. pg. 163-164).

Employee attested that after the IMPACT was completed, she could access the report by checking her email. (Tr. pg. 163-164). (Tr. pg. 164). Employee testified that she never attempted to access the IMPACT database. (Tr. pg. 214). Employee explained that she did receive the IMPACT assessment for the first Cycle, and she met with Dr. Turner while Dr. Turner was doing the IMPACT assessment, not afterward. She further explained that she had a conference with Dr. Turner. (Tr. pg. 203-204).

Employee testified that she thought she received a copy of her job description in 2008 which was prior to IMPACT. (Tr. pg. 166). She asserted that she fully complied with the requirements stated in her job description. (Tr. pg. 167). As part of her job description, she testified that her duties were to conduct assessments, evaluation, observation, consultation, facilitate IEP meetings, consult with parents and write reports. (Tr. pg. 169). She further testified that during school year 2009-2010, she performed the same job duties. (Tr. pg. 169).

Employee further testified that although Dr. Turner promised to show up at her school to observe her performing an evaluation, she never did. (Tr. pg. 171). Prior to Cycle one (1), Employee testified that Dr. Turner never met with her concerning her work performance. (Tr. pg. 171). Furthermore, she testified that prior to Cycle one (1), she never received any complaints regarding her work performance from parents, teacher or the schools. (Tr. pg. 171). In addition, she testified that she only used the standard battery provided by the school to perform psychological evaluations. (Tr. pg. 171-172). She further avowed that after evaluating a student, she tabulated the scores using DCPS's software. (Tr. pg. 175-176). Employee testified that she followed the same procedure for both schools. (Tr. pg. 176).

Employee averred that during the final IMPACT assessment, the reception in the building was poor so Dr. Turner used her laptop to take notes during the conference and stated that she would later transfer her notations to the IMPACT computer. (Tr. pg. 181). Employee asserted that Dr. Turner wrote the scores in ink on the paper form and kept crossing and deleting her final scores. (Tr. pg. 181-182, 189 & 212). Employee testified that she asked Dr. Turner if she would be able to recall the changes and Dr. Turner assured her that she would. (Tr. pg. 182). Employee stated that she asked Dr. Turner if she should remind her about inputting the correct scores into the IMPACT system but Dr. Turner told Employee not to worry about it. (Tr. pg. 182). According to Employee, Dr. Turner complained during the conference that she, Dr. Turner, was stressed with her job and she thought she would be terminated. (Tr. pg. 182-183). Employee testified that she was concerned that Dr. Turner would not remember to change her IMPACT scores due to the stress she was under. (Tr. pg. 183). As such, Employee stated that she sent Dr. Turner an email asking her to change the

scores as promised. (Tr. pg. 183). Employee asserted that after she sent Dr. Turner the email, Dr. Turner responded to her email by stating that Employee wanted her to falsify reports which she refused to do. (Tr. pg. 183). Employee asserted that in the email, Dr. Turner told Employee that although she made some improvements, her scores did not justify changing. (Tr. pg. 184). Employee went on to testify that Dr. Turner stated in the email that since Employee worked in the summer, she would show Employee how to write reports. (Tr. pg. 184).

Employee testified that although she was concerned about her low scores, she did not contact Dr. Turner because her concern at the time was to ensure that Dr. Turner did not change her scores. (Tr. pg. 194). According to Employee, although she was depressed about her low scores, she did not force the issue with Dr. Turner because Dr. Turner never mentioned that Employee would be terminated. (Tr. pg. 194). Employee stated that the IMPACT evaluation was not reflective of her job performance. (Tr. pg. 195). She mentioned that Dr. Turner never reviewed a growth plan with her and did not observe her performing her duties. (Tr. pg. 196). Employee testified that she followed the standard battery assessment and did not understand why she received such low scores because she did all that she was required to do. (Tr. pg. 201-202). Employee affirmed that for Cycle three (3), Dr. Turner met with her while she was doing the assessment not after. (Tr. pg. 209). Employee appealed her final IMPACT scores to the Chancellor and received a response. (Tr. pg. 211).

Analysis

Chapter 5-E of D. C. Municipal Regulation (“DCMR”) §§1306.4, 1306.5 gives the Superintendent the authority to set procedures for evaluating Agency’s employees.⁹ 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. In the instant matter, Agency developed the IMPACT process detailed above as its evaluation procedure for Group 12 – Related Service Providers for the School year 2009 - 2010. Employees were trained and received documentation describing the IMPACT process at the beginning of the school year. However, Agency, during the course of the school year, made changes to the initial evaluation process. While Employee does not deny that she was evaluated a total of two (2) times, nor does she deny that she had conferences to review the evaluation or that she received the IMPACT training materials, I find that Agency committed harmful error when it adjusted the IMPACT process at the middle and end of the 2009 - 2010 school year.

6-B DCMR § 631.3 provide that “... [OEA] shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action.” Additionally, 8-A DCMR § 1803 highlights that “harmful error shall mean an error of such magnitude that in its absence the employee would not have been released...” In the instant matter, at the beginning of the school year, Agency provided Group 12 employees with the IMPACT process it would use to evaluate them. Moreover, Dr. Turner testified that Dr. Fener, the Director of Related Services met with the RSPs at the beginning of the school year to discussed the new IMPACT evaluation. (Tr.pg. 94-95). Anna Gregory (“Ms. Gregory”) testified that RSPs, including Employee were only evaluated on the RSP

⁹ 5-E DCMR § 1306 provides in pertinent parts as follows:

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

standards because DCSP was unable to calculate a score for Assessment Timeliness and Individualized Education Plan Quality. (Tr.pg. 48).

Thus, it is thereby highly probative that these Group 12 employees, including Employee in this matter, relied on the IMPACT process they received at the beginning of the school year as a guide in developing their duty plan for the school year. Furthermore, it can be reasonably assumed that upon receiving the IMPACT material at the beginning of the school year, these employees allocated time and resources accordingly, to meet the requirements of the IMPACT process. Consequently, I find that, by failing to score two components, and adjusting the IMPACT process during the school year, Group 12 employees were prejudiced because the time and resources they devoted to the other components that were thrown out may have negatively affected the scores they received on the components Agency eventually decided to retain. And because the adjustments were made during the school year, these employees did not have sufficient notice nor were they granted the opportunity to adjust their duty plan. During the Evidentiary Hearing, Agency attempted to justify its decision by asserting that, even if Employee had been evaluated on the original process, she still would have been rated ineffective in fifteen (15) out of the possible sixteen (16) scenarios. (Tr. pg. 49). Ms. Gregory explained that the only combination where Employee would have been effective was if she had received a four (4), which is the highest score, on both the Assessment Timeliness and IEP Quality. (Tr. pg. 50). According to Agency's own witness (Ms. Gregory) as well as Agency's submission to this Office, absent these adjustments, there is a probability, however slight, that Employee would not have received an "Ineffective" IMPACT rating.

Based on the foregoing, I conclude that Agency did not adhere to the IMPACT process specifically because it changed the IMPACT assessment rubric during the 2009-2010 school year, which substantially prejudiced Employee and thus constitutes harmful error. For such reasons, I find that Agency's failure to meet the "just cause" standard did not warrant separating Employee under the evaluation process. Accordingly, I find that Agency improperly conducted the IMPACT process and did not have "just cause" to terminate Employee under the CBA.

Improper Evaluation Criteria

Employee asserts that Agency used flawed, subjective and contradictory rating criteria to evaluate Employee. However, in the instant matter, Employee has not proffered to this Office any credible evidence that controverts any of Dr. Turner's evaluation methods. Instead, Employee made allegations that she was terminated for reasons unrelated to her actual work performance without offering any credible proof of such. Consequently, I conclude that this argument is without merit.

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 As performance evaluations are

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).

“subjective and individualized in nature,”¹¹ 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.”¹² Thus, I find that as her direct supervisor, it was within Dr. Turner’s discretion to rank and rate Employee’s performance. Moreover, the undersigned 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.

Termination was arbitrary and capricious

Employee also alleges that Agency’s termination of Employee was arbitrary and capricious. Once more, Employee makes accusations without proffering evidence to support her allegations. To support her claim that Agency’s termination of Employee was arbitrary and capricious, Employee argues that according to Dr. Turner, employees were to receive low IMPACT scores for the first evaluation. However, Dr. Turner denied that allegation during the Evidentiary Hearing. Employee further argues that because Dr. Turner purportedly crossed out her scores during the evaluation, there is a probability that the scores transmitted to the evaluation were not reflective of Employee’s actual scores. However, Dr. Turner refuted Employee’s allegation during the Evidentiary Hearing. Furthermore, Employee has not presented any tangible evidence to this Office that would substantiate her allegations. Accordingly, Employee’s conjecture that her termination was arbitrary and capricious is without merit. Rather, I find that Agency’s failure to adhere to the original IMPACT evaluation prejudiced Employee making her termination invalid.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency’s action of separating Employee for receiving an “Ineffective” IMPACT rating during the 2009 – 2010 school year is **REVERSED**; and
2. Agency shall reinstate Employee to her last position of record; or a comparable position; and
3. Agency shall reimburse Employee all back-pay, benefits lost as a result of the separation; costs and reasonable attorney’s fee; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

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).

¹²See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).