**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| TANYA WRIGHT-NELSON, | ) | |
| Employee | ) | OEA Matter No. 1601-0210-12 |
| | ) | |
| v. | ) | Date of Issuance: August 21, 2015 |
| | ) | |
| D.C. PUBLIC SCHOOLS, | ) | |
| Agency | ) | MONICA DOHNJI, Esq. |
| | ) | Administrative Judge |

Torrance Colvin, Esq., Employee Representative
Carl K Turpin, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 17, 2012, Tanya Wright-Nelson ("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 an Early Childhood Teacher at West Education Campus, 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 September 20, 2012, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was originally assigned to Administrative Judge ("AJ") Harris. AJ Harris held several Conferences in this matter. An Evidentiary Hearing was scheduled in this matter for June 3, 2015. However, this proceeding was cancelled because Employee's representative failed to appear for the scheduled Evidentiary Hearing. Following AJ Harris' departure from OEA, this matter was reassigned to the undersigned AJ. Upon review of the case file, and 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 during school years 2010-2011 and 2011-2012 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 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 her submissions to this Office, Employee submits that Agency's actions were improper. Employee stated that she worked in a hostile environment. She explains that Agency did not utilize impartial, third party observers as called for on page ten (10) of the IMPACT Guidebook of 2011-2012, with regards to her evaluation. Employee further explains that one of the third party observers had detailed discussion with Employee's principal, both before and after Employee's evaluation. According to Employee, the Master Educator who was a third party observer was surprised that Employee was "effective" despite the information she received about Employee from her principal. Employee argues that, the communication between the principal and the Master Educator tainted Employee's evaluation process.

Additionally, Employee asserts that she did not have a conference with the principal within fifteen (15) days following the evaluation, as stated in page 12 of the IMPACT Guidebook. Employee states that the principal's blatant failure to provide timely feedback to Employee is a violation of the procedure used during the IMPACT process. Employee also notes

that when she finally met with the principal on January 10, 2012, the principal informed her that she had no intention of having a Post-Conference with Employee, following the November 2011 observation. According to Employee, she was perplexed by the principal's rating of "ineffective" as the Master Educator rated her "effective".

In addition, Employee highlights she called in sick on the morning of November 18, 2011. However, the principal sent her an email dated November 18, 2011, where she informed Employee at 7:59 a.m. that her Cycle 1 observation conference was scheduled for the same day at 12:25 p.m. and that it would not be rescheduled. Employee contends that rescheduling the post observation conference for November 21, 2011, was not sufficient. Employee contends that her observation was conducted on November 3, 2011, and the principal provided her overall score and comments on December 9, 2011.[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] Additionally, Agency asserts that OEA has limited jurisdiction to review a termination based on performance. Agency explains that, according to its agreement with the Washington Teachers' Union, to which Employee is a member, OEA's decision on Employee's termination based on performance is limited to whether the evaluation process and tools were properly administered.[3]

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 used by to evaluate school-based personnel for school years 2010-2011; and 2011-2012. Agency contends that it followed the laws of the District. Agency provides a detailed description of the 2011-2012 school year IMPACT process and it states that it properly conducted Employee's performance evaluation using the IMPACT process. Since Employee received a "Minimally Effective" IMPACT rating for two (2) consecutive school years, her employment was terminated.[4]

Agency further argues that it followed proper D.C. statutes, regulations and laws in conducting Employee's performance evaluation. Agency notes that Employee was an Early Childhood Education teacher under IMPACT Group 2a, and she was assessed during all three (3) IMPACT Cycles. Agency explains that Employee's assessment included five (5) observations during the course of the year. Three (3) of the five (5) observations were conducted by the principal or supervisor; while two (2) of the five (5) were conducted by a Master Educator. Employee was observed five (5) times and rated "Minimally Effective" for her final IMPACT 2011-2012 rating. And because Employee was also rated "Minimally Effective: for 2010-2011

[1] Petition for Appeal (August 17, 2012); *See also* Prehearing Statement (September 24, 2014); Employee's Post Prehearing Statement (January 30, 2015).
[2] Agency's Answer (September 20, 2012). *See also* Agency's Prehearing Statement (May 13, 2014); Agency's Post Prehearing Brief (December 23, 2014).
[3] *Id.*
[4] *Id.*

school year, she was terminated. Agency highlights that Employee was observed a total of ten (10) times in a two (2) years period pursuant to IMPACT, and she was evaluated on five components.

Agency further states that, in the 2010-2011 school year, Employee's group was titled Group 2. However, in the 2011-2012 school year, it was divided into two (2) groups – Group 2 and Group 2a. Employee was placed in Group 2a.

With regards to the post observation conference, the principal asserts in her affidavit that she held conferences after each assessment.[5] However, on January 15, 2015, Agency filed a Motion for Leave to file Amended Affidavit, wherein, the principal stated that, with regards to the Cycle one (1) post observation conference for 2011-2012, school year, she scheduled a post observation conference with Employee for November 18, 2011, but the conference did not occur because on the morning of the conference, Employee reported off from work. A second post conference was scheduled for November 21, 2011, however, Employee was unavailable. Agency maintains that after two attempts to schedule a post observation conference are unsuccessful, the observation remains valid.[6]

**Governing Authority (IMPACT – WTU Union Members)**

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.[7] Employee does not deny that she was a member of the WTU at the time of her termination. 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."[8] 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).

[5] Agency's Post Prehearing Brief at Exhibit 18.
[6] Agency's Motion for Leave to File Amended Affidavit (January 15, 2015).
[7] In an email dated March 4, 2013, Employee conceded that he was a member of the WTU at the time of his termination.
[8] 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).

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 his 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 2010-2011, and 2011- 2012 school years. According to the record, Agency conducts annual performance evaluation 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 feedback to employees to identify areas of strength, as well as areas in which improvement was needed.[9]

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 12:01am, the day after the end of each cycle. 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.

There were several different types of IMPACT grouping of school-based DCPS employees, each representing a different category of school-based personnel. Individualized groups were developed to reflect the varying responsibilities of employees. For school year 2010-2011, Employee was a teacher in Group 2 (General Education Teacher), and for school year 2011-2012, Group 2 was divided into two groups (Group 2 and Group 2a). Employee was a teacher in Group 2a (Early Childhood Education Teacher).

The IMPACT process for Group 2 employees consisted of three (3) assessment cycles: the first assessment cycle ("Cycle 1"), which was between September 21st and December 1st; second assessment cycle ("Cycle 2") which was between December 1st and on March 1st; and the third assessment cycle ("Cycle 3") which was between March 1st and June 15th. Employee was observed by a Master Educator twice (2) during the 2010-2011 school year, and three (3) times by her principal during this school year. Employee received an IMPACT rating of "Minimally Effective" during this school.

The IMPACT process for Group 2a employees consisted of three (3) assessment cycles: the first assessment cycle ("Cycle 1"), which was between September 21st and December 1st; second assessment cycle ("Cycle 2") which was between December 1st and on March 1st; and the third assessment cycle ("Cycle 3") which was between March 1st and June 15th. Employee was also observed by a Master Educator twice (2) during the 2011-2012 school year, and three

[9] Agency's Answer and Agency's Post Prehearing Brief, *supra*.

(3) times by her principal during this school year. Employee also received an IMPACT rating of "Minimally Effective" during this school.

For 2011-2012 school year, Group 2a employees were assessed on a total of five (5) IMPACT components, namely:

1) Teaching and Learning Framework (TLF) – comprised of 75% of Group 2a teacher's IMPACT score;
2) Teacher-Assessed Student Achievement Data – comprised of 10 % of Group 2a teacher's IMPACT score;
3) Commitment to the School Community (CSC) – 10% of Group 2a teacher's score;
4) School Value-Added (SVA) – 5% of Group 2a employees' scores;
5) 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;
    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:[10]

1) Ineffective = 100-174 points (immediate separation from school);
2) Minimally Effective = 175-249 points (given access to additional professional development);[11]
3) Effective = 250-349 points; and
4) Highly Effective = 350-400 points.

**Analysis**

Chapter 5-E of District of Columbia Municipal Regulation ("DCMR") §§1306.4, 1306.5 gives the Superintendent the authority to set procedures for evaluating Agency's employees.[12] The above-referenced DCMR sections provide that each employee shall be evaluated each semester by an appropriate supervisor and rated annually prior to the end of the year, based on procedures established by the Superintendent. In the instant matter, the IMPACT process detailed above is the evaluation procedure put in place by Agency for the 2011-2012 school year. Employee was evaluated by the school principal and a Master Educator. Employee received a final evaluation

[10] *See* Agency's Answer.
[11] IMPACT procedures provide that employees who receive a rating of "Minimally Effective" for two consecutive years are subject to separation. *See* Agency's Answer.
[12] 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.

on the above specified components at the end of the school year, wherein, she received a "Minimally Effective" IMPACT rating. Employee does not contest the 2010-2011 IMPACT evaluation process. She also concedes that she received five (5) observations during the 2011-2012 school year. Employee's contention is that she did not receive a timely post observation conference after her 2011-2012 school year Cycle one (1) observation. Additionally, she argues that Agency failed to use an impartial third party Master Educator during her 2011-2012 IMPACT evaluation.

***2011-2012 Cycle One (1) Post Observation Conference***

Employee asserts that she did not receive a timely post observation conference after her Cycle 1 observation. She explains that Agency had fifteen (15) days from the date of her IMPACT observation to hold a post observation conference, and it failed to comply, thereby, violating the IMPACT process. Employee also notes that Agency attempted to schedule a post observation conference on November 18, 2011; although the principal was aware that Employee was out sick on that day. Employee further maintains that, Agency's attempt to reschedule the post observation conference on November 21, 2011, was not sufficient. Agency on the other hand argues that the principal initially scheduled the post observation conference for November 18, 2011, the fifteenth (15) day from the date of the observation; however, Employee was not available. Agency also notes that the attempted to reschedule the post observation conference on November 21, 2011, again, Employee was unavailable. According to Agency, because it made two attempts to schedule the post observation conference, the observation was valid.

A review of page 12 of the 2011-2012 IMPACT guidebook for Group 2a highlights the following:

**Question**: Will there be a conference after the formal observation?

**Answer**: Yes. Within 15 calendar days following the observation, the observer (administrator or master educator) *will* meet with you to share his/her ratings, provide feedback, and discuss next step for professional growth. (Emphasis added).

Please note that your final post-observation conferences (Cycle 2 for master educator observations and Cycle 3 for administrator) *must* be completed by June 14. (Emphasis added).

Based on above-referenced provision, I agree with Employee's assertion that she was entitled to a post observation conference within fifteen (15) days from the date of her November 3, 2011, observation. However, I also find that Agency attempted to meet with Employee for the post observation conference within the fifteen calendar days. Employee acknowledged in her submissions to this Office that she was informed by the principal on November 17, 2011, that she would have her post observation conference on November 18, 2011, at 12:00. Further, according to the record, Employee called in sick on the morning of November 18, 2011. November 18, 2011, was the 15$^{th}$ day from when the observation was held. In scheduling the post observation conference for the 15$^{th}$ day, Agency had no way of knowing that Employee would call in sick on that particular day. Accordingly, I find that Agency's failure to comply with this process was not its doing.

Additionally, Agency attempted to reschedule the post observation conference for November 21, 2011, but Employee was unavailable. Employee argues that Agency's attempt to reschedule the post observation conference on November 21, 2011, was not sufficient. I disagree with Employee's argument. While Agency was required to hold a post observation conference within fifteen (15) days from the date of the observation, I find that its failure to do so was not its doing. Agency made an attempt to hold the Cycle 1 post observation conference within the fifteen (15) days period; however, Employee called in sick on that day. In an effort to accommodate Employee, Agency rescheduled the conference for November 21, 2011. While this is outside the fifteen (15) days window, I find that Agency took reasonable steps to accommodate Employee. The IMPACT guidebook does not specify how many attempts an observer may make in order to hold and complete a post observation conference. Moreover, Employee was also unavailable for the November 21, 2011 post observation conference. Based on the record, Agency made two (2) attempts to hold a post observation conference with Employee; however, Employee was unavailable both times. Accordingly, I find that because Agency's failure to comply with this process was not its doing but rather as a result of Employee's absence, Agency was justified in not complying with this process.

***Impartial Third Party (Master Educator)***

Employee asserts that Agency did not utilize impartial, third party observers as called for on page ten (10) of the IMPACT Guidebook of 2011-2012, with regards to her evaluation.[13]Page 11 of the 2011-2012 IMPACT guidebook provides in pertinent parts that, a Master Educator is an expert practitioner in a particular content area who will serve as an impartial observer of your practice. It goes further to explain that master educators are not school-based. Instead they travel from school to school to conduct their observations. Employee has failed to provide any credible evidence to prove that the Master Educator in her case was not an expert in her particular content area or that the Master Educator was not an impartial observer of her practice. Instead, Employee stated that one of the third party observers (Master Educator) had detailed discussion with her principal, both before and after Employee's evaluation. According to Employee, the Master Educator who was a third party observer was surprised that Employee was "effective" despite the information she received about Employee from her principal. Employee argues that, the communication between the principal and the Master Educator tainted Employee's evaluation process. I disagree with Employee's assertions. There is nothing in the IMPACT guidebook that states that the Master Educators cannot communicate with the school principal about their employees. Moreover, based on Employee's own statement, that the Master Educator rated her "effective" despite the information she received from the principal about Employee, I find that the Master Educator in the instant matter was impartial. Therefore, I find that whatever communication the Master Educator and the principal had about Employee clearly did not taint Employee's evaluation process as the Master Educator was impartial and rated her "effective".

Furthermore, assuming *arguendo* that this Office's jurisdiction in this matter extends to the content or judgment of the evaluation, I find that Employee has not challenged the scores she received in any of the 2010-2011 and 2011-2012 IMPACT evaluation categories. None of the

[13] It should be noted that the discussion of a third party/master educator in on page 11 and not page 10 of the 2011-2012, IMPACT guidebook.

evidence offered by Employee challenged or contradicted any of the comments listed in her 2010-2011 and 2011-2012 IMPACT evaluation.

Moreover, the D.C. Superior court in *Shaibu v. District of Columbia Public Schools*[14] 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."[15] 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"[16] 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. 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.[17] As performance evaluations are "subjective and individualized in nature,"[18] 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."[19] Thus, I find that as her direct supervisor, it was within the principal's discretion to rank and rate Employee's performance.

***Grievances***

Employee highlights that she worked in a hostile environment. However, she has not provided this Office with any credible or specific evidence in support of this assertion. Moreover, complaints of this nature are grievances, and do not fall within the purview of OEA's scope of review. Further, it is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals. Employee's other ancillary arguments are best characterized as grievances and outside of OEA's jurisdiction to adjudicate.

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[14] Case No. 2012 CA 003606 P (January 29, 2013).
[15] *Id.* at 6.
[16] *Id. Citing Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).
[17] *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).
[18] *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).
[19] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

That is not to say that Employee may not press her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

Based on the foregoing, I find that because Employee is a member of the WTU, she is subject to the terms of the CBA between WTU and Agency. I also find that OEA's jurisdiction in this matter is limited by the terms of this CBA. And because Agency adhered to the IMPACT process, I conclude that Agency had sufficient 'just cause' to terminate Employee, following her 'Minimally Effective' IMPACT rating for the 2010-2011 and 2011-2012 school years.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD.**

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge