THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CYNTHIA MILLER-CARRETTE,	)	
Employee	)	OEA Matter No. 1601-0173-11R14
	)	
v.	)	Date of Issuance: December 23, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Cynthia Miller-Carrette, Esq., Employee *Pro Se*
Sara White, Esq., Agency's Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 15, 2011, Cynthia Miller-Carrette ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Public Schools' ("Agency") decision to terminate her from her position as a Teacher effective August 12, 2011. Employee was terminated for receiving a 'Minimally Effective' rating under the IMPACT Performance Assessment System for the 2009-2010, and 2010-2011 school years. On September 14, 2011, Agency submitted its Answer to Employee's Petition for Appeal.

I was assigned this matter on June 18, 2013. Thereafter, I issued an Order dated June 24, 2013, requiring the parties to attend a Status Conference on July 24, 2013. Both parties attended the Status Conference. Thereafter, I issued a Post Status Conference Order wherein the parties were required to submit briefs addressing the issues raised during the Status Conference. Agency's brief was due on August 14, 2013, while Employee's brief was due on August 28, 2013. Following Agency's failure to submit its brief by the required deadline, on August 19, 2013, I issued an Order for Statement of Good Cause, wherein, Agency was ordered to explain its failure to submit its brief by the required deadline. Agency had until August 28, 2013 to respond. On August 30, 2013, Agency's representative via email noted that she did not receive the July 24, 2013, Post Status Conference Order. Agency's representative further noted that, she would submit her brief by Tuesday, September 3, 2013. Subsequently, the Undersigned responded to Agency's email granting Agency's request to submit its brief by September 3,

2013. Additionally, the Undersigned emailed a PDF copy of the Post Status Conference Order to Agency's representative. However, Agency failed to respond to those Orders. As a result of Agency's failure to respond, the undersigned AJ issued an Initial Decision dated September 6, 2013 in favor of Employee.

On October 4, 2013, Agency filed a Petition for Review with the OEA Board. In its Petition for Review, Agency noted that there were extenuating circumstances that prevented its representative from complying with the terms of the Orders. Therefore, on October 29, 2013, the Board issued an Opinion and Order on Petition for Review ("O&O"), remanding this matter to the undersigned AJ. In effectuating the remand, the Board stated as follows:

> "While this Board recognizes the AJ's authority to dismiss appeals for failure to defend under OEA Rule 621.3, we are confident that if [the AJ] was aware of the circumstances before issuing the Initial Decision, the AJ would have granted an extension in this matter. This Board believes that in the interest of justice and fairness, this matter must be REMANDED to the AJ to consider the merits of Employee's appeal." [1]

In light of the Board's decision, I then issued an Order on October 30, 2013, requiring the parties to submit briefs addressing: 1) whether the Agency followed District of Columbia statutes, regulations and laws when it terminated Employee; 2) summarize the IMPACT process as it pertains to Employee; 3) whether or not Employee was a member of a Union, and if so, state the particular Union; and 4) submit any applicable statutes, case law or other documents in support of the parties' position in this matter. Both parties have complied. 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 two consecutive "Minimally effective" performance ratings 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:

[1] *Miller-Carrete v. District of Columbia Public Schools*, OEA Matter No. 1601-0173-11, *Opinion and Order on Petition for Review*, October 29, 2013.

> 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.

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

Employee argues that while her IMPACT observations were conducted properly, the IMPACT evaluation was not an equal comparison of her performance from one year to the next (2009-2010 and 2010-2011 school years). Employee explained that there was a shift in the percentage awarded to the Teaching and Learning Framework ("TLF") IMPACT category. She further explained that if the percentage for the TLF was not adjusted in 2010-2011 school year, and had she remained in IMPACT Group 2 for the 2010-2011 school year, she would have had a twenty-five percent (25%) increase in her IMPACT score.[2] Additionally, Employee contends that the principal did not follow proper procedure in the removal of the Math teacher from the sixth grade team because the IMPACT cycle had already begun. She maintained that the removal of the Math teacher did not adhere to guidelines which set off a chain of events, to include a shortage of personnel needed to teach all core subjects to sixth grade students, and this affected her Final rating. Employee explained that, had the Math teacher remained in place "it is conceivable that [Employee] would have had two consistent years with equal weightings which would have had more measurable validity."[3] Employee also noted that the unequal weighting at the end of the 2010-201 school year adversely affected her rating, resulting in her termination. Furthermore, Employee stated that she received five (5) observations during the 2010-2011 school year.

Agency's position

Agency asserts that in 2005, pursuant to the DC Omnibus Authorization Act, PL 109-356 (D.C. Code §1-617.18), DCPS was granted authority to develop its own evaluation process and tool for evaluating its employees.[4] Additionally, Agency asserts that OEA has limited jurisdiction to review a termination based on performance. Agency explains that, according to its agreement with the Washington Teachers' Union, to which Employee is a member, OEA's

[2] Petition for Appeal (August 15, 2011).
[3] Employee Brief (November 26, 2013).
[4] Agency's Answer (September 15, 2011). *See also* Agency's Brief (November 13, 2012).

decision on Employee's termination based on performance is limited to whether the evaluation process and tools were properly administered.[5]

Agency argues that Employee's termination was done in accordance with all applicable law. Agency further attests that it used the same procedures for evaluating teachers, including Employee. Furthermore, Agency states that Employee's IMPACT scores reflect appropriate and informed assessments of her performance as a teacher during school years 2009-2010 and 2010-2011. According to Agency, Employee received a final IMPACT rating of "Minimally Effective" for two consecutive school years, under the IMPACT rating system thus warranting her termination.

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 addition, Employee also noted in her brief that she was a member of the WTU from 2002 until 2011, when she was terminated. 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."[6] 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.

---

[5] *See* Agency's Brief.

[6] 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).

The IMPACT Process

IMPACT is the performance evaluation system utilized by DCPS to evaluate its employees during 2009-2010 and 2010-2011 school years.[7] According to the record, Agency conducts annual performance evaluation for all its employees.[8] During the 2009-2010 and 2010-2011school years, Agency utilized IMPACT as its evaluation system for all school-based employees.

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 and 2010-2011 school years, 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 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.

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 2009-2010, Employee was a teacher in Group 2 (she taught Geography and Science), and for school year 2010-2011, Employee was a teacher in Group 1 (she taught Math and Geography). Both Groups 1 and 2 consisted of teachers.[9]

The IMPACT process for Group 1 employees consisted of three (3) assessment cycles: the first assessment cycle ("Cycle 1"), which ended on or around December 1st; second assessment cycle ("Cycle 2") which ended on or around March 1st; and the third assessment cycle ("Cycle 3") which ended on or around June 15th. Employees were also observed by a Master Educator. Group 1 employees were assessed on a total of five (5) IMPACT components, namely:

1) Individual Value-Added (IVA) – comprised of 50% of Group 1 employees' scores;
2) Teaching and Learning Framework (TLF) – comprised of 35% of Group 1 employees' scores;

[7] Agency's Answer (September 15, 2011). *See also* Agency's Brief (November 13, 2013).
[8] *Id.*
[9] Because Employee only filed a Petition for Appeal after receiving her 2010-2011 IMPACT rating, only the 2010-2011 IMPACT process for Group 1 IMPACT will be considered in deciding this matter.

3) Commitment to the School Community (CSC) – 5% of Group 1 employees' scores;
4) School Value-Added (SVA) – 5% of Group 1 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 2010-2011 school year. Employee was evaluated by the school Principal and a Master Educator. Employee received a final evaluation on the above specified components at the end of the school year, wherein, she received a "Minimally Effective" IMPACT rating. Employee concedes that she received five (5) observations during the 2010-2011 school year, and that the observations were properly conducted. Employee also does not allege that she did not have conferences after the evaluation nor does she deny that she received the IMPACT training materials. Moreover, Employee has not alleged that Agency did not adhere to the IMPACT process. Accordingly, I find that Agency properly conducted the IMPACT process and had just cause to terminate Employee after she was rated "Minimally Effective" for two consecutive school years.

[10] *See* Agency's Answer at TAB 2.
[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

Employee's contention is that she was improperly rated under a different IMPACT rubric, which changed the calculation of her final IMPACT score. She also asserts that had she remained in Group 1 and had Agency not adjusted the percentage of the TLF in the 2010-2011 school year, she would have receive a twenty-five percent 25% increase in her IMPACT score, putting her at two hundred and fifty-three (253). Based on the record, during the 2009-2010 school year, Employee was placed in IMPACT Group 2 because she taught Geography and Science to sixth grade students. However, for the 2010-2011 school year, Employee was placed in IMPACT Group 1 where she taught Math and Geography to sixth grade students. Employee explains that moving her from Group 2 to Group 1 adversely impacted her IMPACT rating for 2010-2011, as she was not afforded an equal comparison of her performance from school year 2009-2010 to school year 2010-2011. I disagree with these assertions. Employee herself noted in her Petition for Appeal that based on her certificate, if required by the principal, she must teach any one of the core subjects – Math, Language Arts, Science, or Social Studies. She further explained that the subject matter she taught could vary from year to year. Therefore, I conclude that the School Principal was within his discretion to require Employee to teach Math (which is one of the core subjects) during the 2010-2011 school year. Moreover, I find that, Agency has the discretion to adjust the weight given to the different IMPACT categories, as long as it is done at the beginning of the school year and the employees are put on notice about such changes. Employee has not provided any evidence to the contrary and I further find that, Agency is justified in reassigning Employee to another IMPACT Group that corresponded with her current duties at the beginning of the 2010-2011 school year.

Employee additionally maintains that the principal improperly removed another Math teacher from the sixth grade team. She explained that the principal did not follow proper procedure in the removal of the Math teacher because the principal did not adhere to the guidelines set forth by the D.C. Department of Human Resources Performance Management Personnel Manual, and this set off a chain of events that affected Employee's final IMPACT rating. Complaints of this nature are grievances, and do not fall within the purview of OEA's scope of review. Moreover, 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 argument is best characterized as grievances and outside of OEA's jurisdiction to adjudicate. 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.

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 IMPACT evaluation categories. Moreover, none of the evidence offered by Employee challenged or contradicted any of the comments listed in her 2010-2011 IMPACT evaluation.

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 2009-2010 and 2010-2011 school years.

ORDER

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

FOR THE OFFICE:

_____

MONICA DOHNJI, Esq.
Administrative Judge