THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SOLOMON EHIEMUA,	)	OEA Matter No. 1601-0337-10
Employee	)	
	)	Date of Issuance: October 28, 2014
D.C. PUBLIC SCHOOLS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Solomon Ehiemua ("Employee") worked as a School Psychologist with D.C. Public Schools ("Agency"). On July 2, 2010, Agency issued a notice to Employee informing him that due to his "Ineffective" performance rating under IMPACT, its performance assessment system, his position was terminated. The effective date of the termination was July 15, 2010.[1]

Employee challenged the termination by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 22, 2010. In it, he argued that Agency used the incorrect evaluation criteria. Therefore, he requested that his benefits be restored.[2]

On August 25, 2010, Agency filed its Answer to Employee's Petition for Appeal. It asserted that Employee's IMPACT evaluation was performed during the 2009-2010 school year. Agency explained that Employee and all related service providers, were evaluated on the same

[1] *Petition for Appeal*, p. 18 (July 22, 2010).
[2] *Id.* at 3.

four components – related service provider standards, individual education plan quality, assessment timeliness, and core professionalism. It claimed that because Employee received a rating of "ineffective" under IMPACT, he was properly terminated.[3]

Prior to holding an evidentiary hearing in this matter, the OEA Administrative Judge ("AJ) requested that both parties file briefs. Agency filed its brief on October 5, 2012, and contended that OEA was limited to only determine if it followed the proper procedures with regard to the IMPACT process.[4] Agency explained that Employee was in Group 12 of IMPACT and that those employees were assessed during Cycles 1 and 3 on the four IMPACT components.[5] As previously provided, the four components were related service provider standards, individual education plan quality, assessment timeliness, and core professionalism. According to Agency, the related service provider standards comprised 70% of Employee's score; individual education plan quality was 15%; and assessment timeliness was 15%. Core professionalism was on a separate rating system which considered an employee's attendance, on-time arrival, compliance with policies and procedures, and respect.[6] However, Agency submitted that in June of 2010, it informed all Group 12 employees that individual education plan quality and assessment timeliness would not be included in the final IMPACT score due to challenges with the data. Therefore, it increased the weight for related service provider standards to absorb the 30% originally allotted for individual education plan quality and assessment timeliness. Because Employee's score fell within the range of 100 to 175, he was in the category

[3] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal,* p. 2 (August 25, 2010).
[4] Agency provided that in accordance with D.C. Official Code § 1-617.18, it was given the authority to develop its own evaluation process and tools for evaluating its employees, and it exercised management prerogative when creating IMPACT.
[5] Cycle 1 was the first assessment cycle which ended on December 1st. Cycle 3, the third assessment cycle, ended on June 15th.
[6] An employee who was rated "meets standard" received no change of their IMPACT score. An employee with a rating of "slightly below standard" had ten points deducted from their final IMPACT score. If an employee was rated "significantly below standard," then twenty points were deducted from their IMPACT score.

of "ineffective" and subsequently terminated.[7]

On October 26, 2012, Employee filed his brief arguing that he was discriminated against by Agency due to his age. He also claimed that Agency's decision to terminate him was arbitrary and capricious. Employee asserted that Agency failed to consider different services offered by various psychologists within D.C. Public Schools.[8] As it relates to his June 2010 assessment, Employee provided that he had no unexcused absences. Hence, he should not have been rated "slightly below standard" because no justification was offered by Agency. Employee also provided that there were several contradictions present in his IMPACT evaluation. Therefore, he requested that he be reinstated to his position.[9]

On March 13 and 18, 2013, the AJ conducted an evidentiary hearing in this matter. On July 1, 2013, she issued her Initial Decision. The AJ found that Employee was trained and received documentation regarding the IMPACT process at the beginning of the school year. However, during the course of the 2009-2010 school year, Agency made changes to the original evaluation process. As a result, the AJ found Agency's changes to be harmful error. She determined that the changes were prejudicial to Employee because he relied on the IMPACT process described at the beginning of the year to develop his plan to allocate adequate time and resources to meet the IMPACT requirements. Based on Agency witness testimony during the hearing, the AJ reasoned that Employee was also prejudiced by Agency's failure to score certain components and its elimination of areas of the MPACT evaluation.[10] Hence, she ordered that

[7] *District of Columbia Public Schools' Brief,* p. 2-4 (October 5, 2012).
[8] Employee offered that the school he serviced was comprised of intellectually-challenged students. Therefore, his duties were different than those of other school psychologists.
[9] *Dr. Soloman Ehimua Brief Requesting Relief from DCPS Action of Termination,* p. 2-4 (October 26, 2012).
[10] As for Employee's discrimination claim, the AJ held that the matter was properly raised by Employee before the District of Columbia Federal Court and that OEA was not the proper venue for such claims because it fell outside of OEA's jurisdiction.

Agency reinstate Employee with back pay and benefits.[11]

In response to the Initial Decision, Agency filed a Petition for Review with the OEA Board.[12] It argued that it did not err in the application of IMPACT. Agency contends that on March 4, 2010, it sent a letter to inform Group 12 employees that the individual education plan quality component would not count toward their cycle 1 rating. It claims that the follow-up June 2, 2010 letter provided that the individual education plan quality component was too difficult to quantify and would not count in the Group 12 assessments or final IMPACT rating for the school year. Agency contends that the changes to the scoring were diminutive.[13] In its Amended Petition for Review, Agency further argues that the AJ's decision was not based on substantial evidence. Additionally, it took issue that the AJ's ruling was made sua sponte because Employee did not argue that it committed harmful error.[14] Therefore, it requested that the Board dismiss Employee's appeal and declare that it did not err in its IMPACT rating.

Employee filed an Opposition to Agency's Amended Petition for Review on August 28, 2013. He provides that the Petition for Review was untimely filed and that he was not properly served by Agency. Employee offered many of the same arguments previously provided in his brief and requested that the Board deny Agency's Petition for Review.[15]

Filing Deadline

Employee contends that Agency's Petition for Review was not timely filed. OEA Rules 632.1 and 632.2 provide guidance on the filing deadlines for Petitions for Review. OEA Rule 632.1 provides that "the initial decision shall become final thirty-five (35) calendar days after

[11] *Initial Decision,* p. 12-14 (July 1, 2013).
[12] The Petition for Review was filed on August 5, 2013. An amended petition was filed on August 9, 2013.
[13] *District of Columbia Public Schools' Petition for Review,* p. 2 (August 5, 2013).
[14] Agency argues that because Employee testified to not reading the IMPACT handbook, then the AJ should not have concluded that he relied on IMPACT to develop his plan for the school year.
[15] *Dr. Solomon Ehuemua Opposition to District of Columbia Public Schools' Amended Petition for Review,* p. 6-8 (August 28, 2013).

issuance." Rule 632.2 goes on to provide that "the initial decision shall not become final if any party files a petition for review or if the Board reopens the case on its own motion within thirty-five (35) calendar days after issuance of the initial decision." In this case, the Initial Decision was filed on July 1, 2013. Agency had thirty-five days from that date to file a petition with the Board. Agency's petition was filed on August 5, 2013, which is exactly thirty-five days from the date of the Initial Decision. Therefore, despite Employee's contention, Agency's Petition for Review was filed within the deadline.

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[16] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. This Board believes that the AJ's thorough assessment of the IMPACT process was based on substantial evidence.

IMPACT Process

As it relates to the IMPACT process, this Board is guided by D.C. Official Code § 1-617.18 and Section 15.4 of the Collective Bargaining Agreement between Agency and the Washington Teachers Union. D.C. Official Code § 1-617.18 provides the following:

> Notwithstanding any other provision of law, rule, or regulation, during fiscal year 2006 and each succeeding fiscal year the evaluation process and instruments for evaluating District of Columbia Public Schools employees shall be a non-negotiable

[16] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

item for collective bargaining purposes.

Section 15.4 of the Collective Bargaining Agreement provides that "the standard for separation under the evaluation process shall be 'just cause,' which shall be defined as adherence to the evaluation process only." This Board believes that the plain language of this agreement means that Agency has just cause to remove an employee if it adhered to the evaluation process. However, this Board does not believe that Agency adhered to the process in this matter.

Harmless Error

The AJ found that harmful error was committed in this case. She reasoned that Employee was prejudiced because of Agency's failure to score certain components and its elimination of areas of the IMPACT evaluation. She held that absent these adjustments, Employee may not have received an "ineffective" rating, and accordingly, Agency did not adhere to the IMPACT process.[17] In response to the AJ's ruling, Agency claims that its changes to scoring were diminutive. However, it argued that if it was determined that its changes resulted in a flawed application, then the error must have caused substantial harm and significantly affected its final decision to take action.[18]

Agency also took issue with what it alleged was a sua sponte consideration by the AJ of harmful error. In accordance with the collective bargaining agreement, the AJ could only determine if the evaluation process was followed. Following the evaluation process constitutes cause for removal under the IMPACT evaluation. Therefore, it would reasonably flow that if the process was not properly followed, then the AJ must determine if Agency's failure was deemed harmless to adequately render a judgment in this matter. The AJ's decision addressed if cause existed to remove Employee from his position. Agency had several opportunities to submit if

[17] *Initial Decision,* p. 13 (July 1, 2013).
[18] *District of Columbia Public Schools' Amended Petition for Review,* p. 3-4 (August 9, 2013).

cause existed as it related to the evaluation process and the changes made to the process; however, it chose not to.

OEA Rule 631.3 defines harmless procedural error as "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." The AJ spent a great deal of the Initial Decision highlighting several ways that Agency's changes to the IMPACT process caused substantial harm or prejudice to Employee. This Board agrees with her assessment and believes that it was based on substantial evidence. The changes to the IMPACT evaluation are discussed in further detail below.

I. Substantial Harm/Prejudice

At the start of the 2009-2010 school year, Agency informed Employee that he would be evaluated under four categories of the IMPACT process -- the related service provider standards comprised 70% of Employee's score; individual education plan quality was 15%; assessment timeliness was 15%; and core professionalism. However, on March 4, 2010 and June 2, 2010, Employee was informed by Agency that two of the four categories on which he was to be assessed were eliminated.[19] During the evidentiary hearing, Dr. Turner-Wingate testified that some sections were eliminated because Agency determined that it did not adequately train employees or there were glitches in the database.[20] This resulted in related service provider standards making up 100% of Employee's score with the potential to have his score decreased depending on his core professionalism score.

Having the evaluation changed from several categories to one is a major change to the process. It should also be noted that subcategories were even eliminated under the remaining

[19] *OEA Evidentiary Hearing,* Exhibit #8 (March 13, 2013).
[20] *Id.*, 55-60 and75.

category of related service provider standards because of development and database issues. According to Dr. Turner-Wingate, the "Due Diligence," "Productivity," and "Document Format" standards were eliminated from the related service provider category.[21] Additionally, Dr. Turner-Wingate admitted to not scoring Employee in the standard of "Skill Building," also within the related service provider category, because she was unable to attend a session to observe him.[22] Therefore, not only were two categories and three subcategories eliminated by Agency completely, but Agency chose not to score Employee because it failed to observe him.

Equally as egregious as these actions was that Agency made the changes to IMPACT with only three months left in Employee's evaluation cycle 3. Making such drastic changes in the middle of the cycle of the second assessment is the epitome of prejudice to Employee. Those changes caused substantial harm because with three months left, Employee was in no position to switch gears to adjust his plans.

Agency's argument on review seems to suggest that if it were just allowed to explain why it made changes to IMPACT, then the AJ would arrive at a different outcome. It is not of any consequence to the AJ or this Board as to why Agency changed the evaluations toward the end of the school year. What matters most is that it made substantive changes to the process. Affidavits and testimony from Agency employees regarding why the changes were made would not change the fact that Agency altered the process. Agency cannot be allowed to tamper with the process it set once it was in place. The more prudent thing to do would have been for Agency to wait until the following school year to implement any changes to the evaluation process.

[21] *Id.*, 54 -55 and 75.
[22] *Id.*, 69-73.

II. Significantly Affected Agency's Decision

There are a litany of issues present in the record that highlight Agency's failure to adhere to the IMPACT process. Moreover, Agency does not provide any evidence to contradict the AJ's assertion that but for Agency's changes, there is a high probability that Employee would not have received an ineffective rating. Additionally, Agency does not offer any evidence to counter Employee's claims that he did not have attendance issues, as it claimed. As the AJ provided, there are clear contradictions in the record regarding those claims. For example, Dr. Turner-Wingate testified that Employee was deducted twenty points on his core professionalism score because of his attendance and because he failed to attend mandatory case conferences. However, Dr. Turner-Wingate also provided that one of Employee's key strengths was his daily attendance at work.[23] Moreover, under cross examination, it was determined that case conferences were not mandatory and that Employee only missed one conference because he was on approved leave.[24] This Board believes that the changes rendered by Agency did significantly affect its decision to terminate Employee. As a result, we must deny Agency's Petition for Review.

[23] *Id.*, 61-65.
[24] *Id.*, 138-139 and 147-149.

ORDER

Accordingly, it is hereby ordered that Agency's Petition for Review is denied. Agency is ordered to reinstate Employee to his position with back pay and benefits within thirty calendar days from the date this decision becomes final. Evidence documenting Agency's compliance shall be provided to the OEA General Counsel's Office.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

_____
Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.