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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
LATISHA GOLDSMITH,	)	
Employee	)	OEA Matter No. 1601-0086-18
	)	
v.	)	Date of Issuance: March 20, 2019
	)	
D.C. PUBLIC SCHOOLS,	)	Monica Dohnji, Esq.
Agency	)	Senior Administrative Judge
_____	)	
Latisha Goldsmith, Employee, <i>Pro Se</i>	)	
Lynette Collins, Esq., Agency Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On August 27, 2018, Latisha Goldsmith (“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 an Educational Aide, effective July 27, 2018. Employee was terminated for having a ‘Minimally Effective’ rating under the IMPACT, D.C. Public Schools’ Effective Assessment System for School-Based Personnel (“IMPACT”), during the 2017-2018 school year; after having received a rating of “Developing” during the 2016-2017 school year. On September 19, 2018, Agency filed its Answer to Employee’s Petition for Appeal.

I was assigned this matter on October 3, 2018. A Status/Prehearing Conference was held on January 8, 2019, with both parties present. Thereafter, on January 9, 2019, I issued a Post Status/Prehearing Conference Order requiring the parties to address the issues raised at the January 8, 2019, Conference. Agency’s brief was due on or before January 30, 2019, while Employee’s brief was due on or before February 20, 2019. While Agency timely submitted its brief, Employee did not comply with the January 9, 2019, Order. Subsequently, on February 26, 2019, I issued an Order for Statement of Good Cause, wherein, Employee was ordered to explain her failure to submit a response to the January 9, 2019, Order, on or before March 12, 2019. As of the date of this decision, Employee has not responded to either Order. The record is closed.

## JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

## ISSUE

- 1) Whether Agency's action of separating Employee from service pursuant to a decline in her IMPACT rating from 'Developing' during the 2016-2017 school year, to 'Minimally Effective' during the 2017-2018 school year was done in accordance with all applicable laws, rules, or regulations.
- 2) Whether this appeal should be dismissed for failure to prosecute.

## 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.

## 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 Petition for Appeal, Employee submits that "I was wrongfully impacted out of the system from a principal who had racial issues with me. I provided documentation before to labor management in reference to my issues... I am submitting evidence to you for review." Employee included emails to justify her absence from work between October 18 through October 24, 2017. Employee also included emails referencing a meeting between her union and DCPS after she was notified that she would be terminated due to a decline in her IMPACT score. Additionally, Employee attached what appears to be an undated Educational Aide performance assessment form.<sup>1</sup> During the

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<sup>1</sup> See Petition for Appeal (August 27, 2018).

Status/Prehearing Conference, Employee disputed the authenticity of some of her signatures on the daily sign-in log.

### ***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 and it exercised this managerial prerogative when it created IMPACT. Agency argues that it followed proper D.C. statutes, regulations, and laws in conducting Employee's performance evaluation. Agency notes that, IMPACT is a performance evaluation system utilized by DCPS to evaluate school-based personnel for the 2017-2018, school years.<sup>2</sup>

Agency provides that Employee received a 'Minimally Effective IMPACT rating during the 2017-20128 school year, after having received a 'Developing' IMPACT ratings for the 2016-2017 school year. Agency further provides that during the 2017-2018 school year, Employee was an Educational Aide under IMPACT Group 17, and she was assessed during Cycles 1 and 3. Agency states that it properly conducted Employee's performance evaluation using the IMPACT process. Because Employee's IMPACT rating declined between two consecutive school years from 'Developing' to 'Minimally Effective' her employment was terminated pursuant to the IMPACT procedure.<sup>3</sup>

### **Governing Authority**

District of Columbia Municipal Regulation ("DCMR") §§1306.1, 1306.5 gives the Superintendent authority to set procedures for evaluating Agency's employees.<sup>4</sup> The above-referenced DCMR sections provide that each employee shall be evaluated each semester by an appropriate supervisor and rated annually prior to the end of the year, based on procedures established by the Superintendent. 5 DCMR 1401 provides in pertinent part as follows:

1401.1: Adverse action shall be taken for grounds that will promote the efficiency and discipline of the service and shall not be arbitrary or capricious.

1401.2: For purposes of this section, "just cause for adverse action" may include, but is not necessarily limited to, one (1) or more of the following grounds:

(c) Incompetence, including either inability or failure to perform satisfactorily the duties of the position of employment.

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<sup>2</sup> Agency's Answer (September 19, 2018).

<sup>3</sup> *Id.*

<sup>4</sup> DCMR § 1306 provides in pertinent parts as follows:

1306.1 - Official performance evaluation ratings for all employees of the Board of Education shall be inclusive of work performed through June 30th, unless otherwise specified in this section.

1306.5 – The Superintendent shall develop procedures for the evaluation of employees in the B schedule, EG schedule, and ET 2 through 5, except as provided in § 1306.3.

Accordingly, in reviewing this matter, I will address whether Agency followed the procedures it developed in evaluating its employee; and whether Agency's termination of Employee pursuant to her IMPACT rating was supported by just cause. As referenced above, 'just cause' for adverse actions includes incompetence – an employee's inability or failure to perform satisfactorily the duties of their position of employment.

### **The IMPACT Process**

IMPACT was the performance evaluation system utilized by DCPS to evaluate its employees during 2017-2018 school year. According to the record, Agency conducts annual performance evaluations for all its employees. Agency utilized IMPACT as its evaluation system for all school-based employees. The IMPACT system was designed to provide specific employee feedback to identify areas of strength, as well as areas in which improvement was needed.<sup>5</sup>

Employee's position, Paraprofessional/Educational Aide at Garrison Elementary School ("Garrison") was within Group 17. According to the IMPACT process, Group 17 employees were assessed during Cycles 1 and 3.

For the 2017-2018 school year, employees were entitled to two (2) conferences which were to be held after the employee was assessed. Employee had one (1) conference on January 8, 2018. Agency made two (2) failed attempts to schedule a second conference with Employee on May 30, 2018, and June 1, 2018. on June 7, 2018. Employee was assessed on a total of three (3) IMPACT components, namely:

- 1) Educational Aide Standard (EA) – comprised of 90% of Group 17 employees' scores;
- 2) Commitment to the School Community (CSC) – 10% of Group 17 employees' scores; and
- 3) Core Professionalism (CP) – 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:

- 1) Ineffective = 100-199 points (immediate separation from school);
- 2) Minimally Effective = 200-249 points (given access to additional professional development - Individuals who receive a rating of 'Minimally Effective' for two (2) consecutive years are subject to separation from the school system);
- 3) Developing = 250-299 points (Individuals who receive a rating of 'Developing' for three (3) consecutive years are subject to separation from the school system);
- 4) Effective = 300-349 points; and
- 5) Highly Effective = 350-400 points.

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<sup>5</sup> Agency's Answer, *supra*.

Employee receive a total of forty (40) points deductions under the CP component. Employee received a final IMPACT score of 249, and her rating was ‘Minimally Effective’ for the 2017-2018 school year. For the 2016-2017 school year, Employee received a final IMPACT rating of ‘Developing’.

### Analysis

In the instant matter, Employee received a rating of ‘Minimally Effective’ for school year 2017-2018, and a rating of ‘Developing’ for school year 2016-2017. Pursuant to the IMPACT process, if an employee’s performance declines from ‘Developing’ to ‘Minimally Effective’, the employee will be subject to separation.<sup>6</sup> Applying this to the current matter, because Employee’s IMPACT rating declined from a ‘Developing’ during the 2016-2017 school year to a ‘Minimally Effective’ rating during the 2017-2018 school year, I find that Agency was justified in terminating Employee.

Employee was deducted forty (40) points for CP. She was rated significantly below standard and deducted points for On-Time Arrival (October 11, 2017 and October 12, 2017), and significantly below standard for Policies and Procedures. Agency noted that Employee did not follow proper protocol to inform school personnel of her late arrival on October 12 and 31; and on November 1 and 8, 2017. Employee noted during the January 8, 2019, Status/Prehearing Conference that some of the signatures on the Tardy-Sign-In-Sheets (specifically the signature on October 11, October 12, and October 31, 2017), were not hers. Agency has submitted documentary evidence to include an affidavit from the school’s Time Keeper, Ms. Anita Bailey, indicating that she was responsible for maintaining the Tardy-Sign-In-Sheet. Ms. Bailey further noted that she personally observed Employee sign the Tardy-Sign-In-Sheet on October 11, 2017. She explained that on October 11, 2017, Employee indicated on the Tardy-Sign-In-Sheet that she arrived work at 8:10 a.m., and she, Ms. Bailey changed the time to reflect the correct time that Employee arrived at work, which was 9:21 am.<sup>7</sup> Ms. Bailey also asserted that she personally observed Employee sign the Tardy-Sign-In-Sheet on October 12, and 31, 2017. She again explained that on November 1, 2017, she observed Employee arrive to work at 8:15 am, but Employee signed in that she reported to work at 8:03 am. In response, she, Ms. Bailey crossed out the :03 and wrote the correct time of arrival as :15. According to Ms. Bailey, she witnessed Employee sign her name in the following manners: Goldsmith, L. Goldsmith or Latisha Goldsmith. However, as of the date of this decision, Employee has not submitted any evidence to contradict Agency’s position or in support of her own position.

Apart from her CP deductions, Employee has not challenged any of the scores she received on the IMPACT Components for both Cycle 1 and Cycle 3. Employee simply notes that she was terminated by a principal who had racial issues with her. With regards to Employee’s racial discrimination claim, D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights (“OHR”). Per this statute, the purpose of the OHR is to “secure an end to unlawful discrimination in employment...for any reason other than that of individual merit.” Complaints classified as unlawful discrimination are described in the District of Columbia Human Rights Act.<sup>8</sup> Additionally, District Personnel Manual (“DPM”) § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. However, it should be

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<sup>6</sup> *Id.* at Tab 5 page 27.

<sup>7</sup> Agency’s Brief at Tab 20 (January 30, 2019).

<sup>8</sup> D.C. Code §§ 1-2501 *et seq.*

noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*<sup>9</sup> stated that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is “contending that he was targeted for whistle blowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation...”<sup>10</sup> In the instant case, Employee simply alleges that the principal had racial issues with her, but fails to provide any evidence in support of this assertion. Moreover, Employee’s claim as described in her submissions to this Office do not allege any whistle blowing activities as defined under the Whistleblower Protection Act nor does it appear to be retaliatory in nature. Accordingly, I find that Employee’s discrimination claim falls outside the scope of OEA’s jurisdiction.

Moreover, the D.C. Superior Court in *Shaibu v. District of Columbia Public Schools*<sup>11</sup> explained that, “[d]ifferent supervisors may disagree about an employee’s performance and each of their opinions may be supported by substantial evidence.” Similar to the facts in *Shaibu*, I find that it is within the Administrator’s discretion to reach a different conclusion about Employee’s performance, as long as the Administrator’s opinion is supported by substantial evidence. Further, substantial evidence for a positive evaluation does not establish a lack of substantial evidence for a negative evaluation. This court noted that, “it would not be enough for [Employee] to proffer to OEA evidence that did not conflict with the factual basis of the [Principal’s] evaluation but that would support a better overall evaluation.”<sup>12</sup> 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”<sup>13</sup> 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.

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.<sup>14</sup> As performance evaluations are “subjective and individualized in nature,”<sup>15</sup> 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.”<sup>16</sup>

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<sup>9</sup> 730 A.2d 164 (May 27, 1999).

<sup>10</sup> *El-Amin*; citing *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

<sup>11</sup> Case No. 2012 CA 003606 P (January 29, 2013).

<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.* Citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

<sup>14</sup> 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).

<sup>15</sup> 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).

<sup>16</sup> See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

Based on the foregoing, I find that Agency had sufficient 'just cause' to terminate Employee, following the decline of her IMPACT rating from 'Developing' during the 2016-2017 school year, to 'Minimally Effective' during the 2017-2018 school year.

Additionally, OEA Rule 621.3, 59 DCR 2129 (March 16, 2012) grants an Administrative Judge ("AJ") the authority to impose sanctions upon the parties as necessary to serve the ends of justice. The AJ "in the exercise of sound discretion may dismiss the action or rule for the appellant" if a party fails to take reasonable steps to prosecute or defend an appeal.<sup>17</sup> Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to:

- (a) Appear at a scheduled proceeding after receiving notice;
- (b) *Submit required documents after being provided with a deadline for such submission* (emphasis added); or
- (c) Inform this Office of a change of address which results in correspondence being returned.

This Office has consistently held that, failure to prosecute an appeal includes a failure to submit required documents after being provided with a deadline for such submission.<sup>18</sup> Here, Employee was warned in the January 9, 2019, and February 26, 2019, Orders that failure to comply could result in sanctions, including dismissal. Employee did not provide a written response to these Orders. These were required for a proper resolution of this matter on its merits. I find that Employee's failure to prosecute her appeal is a violation of OEA Rule 621 and serves as an alternate reason to dismiss Employee's Petition for Appeal. Accordingly, I further find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office. Therefore, this matter should be dismissed for her failure to prosecute.

#### ORDER

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

FOR THE OFFICE:

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MONICA DOHNJI, Esq.  
Senior Administrative Judge

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<sup>17</sup> OEA Rule 621.3.

<sup>18</sup> *Williams v. D.C. Public Schools*, OEA Matter No. 2401-0244-09 (December 13, 2010); *Brady v. Office of Public Education Facilities Modernization*, OEA Matter No. 2401-0219-09 (November 1, 2010).