THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CHESTER MCKINLEY,	)	
Employee	)	OEA Matter No. 1601-0371-10
	)	
v.	)	Date of Issuance: May 6, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Chester McKinley, Employee *Pro Se*
W. Iris Barber, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 18, 2010, Chester McKinley ("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 him from his position as a Music Teacher at Bancroft Elementary School, effective August 13, 2010. Employee was terminated for having an "Ineffective" rating under the IMPACT, DC Public Schools' Effective Assessment System for School-Based Personnel ("IMPACT"), during school year 2009-2010. On September 23, 2010, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") on July 17, 2012. Thereafter, on July 27, 2012, I issued an Order scheduling a Status Conference in this matter for August 15, 2012. Both parties were present for the Status Conference. On September 11, 2012, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. On September 25, 2012, the undersigned received Agency's Motion for extension of time to file brief. The Motion was granted in an Order dated October 1, 2012. Thereafter, on November 2, 2012, Employee filed a Request for Extension of Time. This request was granted in an Order dated November 6, 2012. Subsequently, on November 23, 2012, Employee filed a second Request for Extension of Time. This Motion was granted in an Order dated November 26, 2012. Both parties have now submitted their written briefs. 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 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 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 his Petition for Appeal, Employee submits that his dismissal was unfair because it was based primarily on only a few half (1/2) hour classroom evaluations under the newly instituted 2009-2010 IMPACT standard. Employee explained that the IMPACT standards were new and were applied by a new first year principal. Employee also notes that, his "ineffective" IMPACT rating and his subsequent termination precludes him from teaching. Employee request that his 2009-2010 IMPACT rating be raised to reflect an overall rating of "Effective". Specifically, Employee contests his June 2, 2010 IMPACT evaluations. Noting that he should have received a score of four (4) in the following IMPACT categories: Teach 5A; Teach 5B; Teach 5C; Teach 6; Teach 7; Teach 8; Teach 9A; Teach 9B; Teach 9C; Non-Value-Added Student Achievement Growth 1 ("NVA"); Support of the Local School Initiative ("CSC 1"); Core Professionalism

("CP")1; and CP2.[1] Employee either provided an explanation or rebuttal to the principal's comments in support for his request for a higher score in these sections. Employee also notes that due to a malfunctioning computer, he was not receiving crucial emails from the principal regarding IMPACT. He further maintains that although he met with colleagues several times a month, he still missed certain important information regarding the timely submission of assessment reports. Employee contends that, it wasn't until the end of the school year that he was informed that he had to submit reports regarding the NVA portion of the IMPACT assessment System.[2] Employee also provides a detailed description of how the study of music in his class during 2009-2010 school year, helped raise the student standardized test scores by the end of that school year.[3] Employee submits that he had no unexcused absences (CP1); and that he was on-time the entire second part of the year (CP2).[4] Employee contends that the IMPACT can only be fair if the school principals are open to ensuring that a teacher gets the information required to meet the expectations in a timely manner.[5] While Employee notes in his Petition for Appeal to this Office that he was not a Union member, on March 4, 2013, via email, Employee concedes that he was a member of the Washington Teachers' Union during the 2009-2010 school year.[6]

In his Brief, Employee also makes the following contentions:

1) Former Chancellor Rhee was unqualified to head a school system and because she did not have the background in education, she could not be a Superintendent, so a new title was created for her;
2) The District aggressively insisted that every teacher sign a new contract that did not include clear and concise evidence of the new evaluation system being a critical factor in the firing process;
3) During his eighteen (18) years at DCPS, Employee never had a negative evaluation – with the new evaluation in place, teachers should have been given a year or two to get used to the new IMPACT system;
4) If teachers were made aware of these new developments, they could have made informed decisions in the process, when they signed a document that was otherwise misleading;
5) DCPS engaged in age discrimination as a vast majority of the teachers who were fired under Chancellor Rhee were over fifty (50) years of age, and of African American descent;
6) There have been recent and serious questions raised in the news regarding the test scores that were submitted under Chancellor Rhee's tenure, including dishonesty or actual cheating on the parts of the teachers administering the tests;
7) Employee did not have a computer in his classroom for the first half of the year, while every other teacher in the building had at least two (2) computers in their classrooms, including the Custodians in their offices;

[1] Employee's Petition for Appeal (August 18, 2010).
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] See email from Employee to the undersigned dated March 4, 2013.

8) Employee was treated unfairly on the IMPACT evaluation because his submission of his contribution to the students' success on the test was untimely due to his computer problems, and as such, this information does not reflect in his NVA. He explained that if he had received credit for that portion, he would have passed the evaluation; and
9) Employee was offered a teaching job at another school and he needed three (3) points to be reinstated, but the principal at Bancroft refused to give him credit for the work he did that was relevant to the NVA.[7]

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.[8] 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.[9]

Agency argues that it followed proper D.C. statutes, regulations and laws in conducting Employee's performance evaluation. Agency maintains that, it was granted authority to develop its own evaluation process and tools for evaluating DCPC employees, and it exercised this managerial prerogative when it created IMPACT. Agency notes that, IMPACT is a performance evaluation system utilized by DCPS to evaluate school-based personnel for school year 2009-2010. Agency contends that it followed the laws of the District. Agency provides a detailed description of the 2009-2010 school year IMPACT process and it states that it properly conducted Employee's performance evaluation using the IMPACT process. Since Employee received an "Ineffective" IMPACT rating his employment was terminated.[10]

Governing Authority (IMPACT – WTU Union Members)

Agency notes that because Employee was a member of Washington Teachers' Union ("WTU") when he 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.[11] 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

[7] Employee's Brief (January 28, 2013).
[8] Agency's Answer (September 23, 2010). *See also* Agency's Brief (October 19, 2012).
[9] *See* Agency's Brief.
[10] *Id.*
[11] In an email dated March 4, 2013, Employee conceded that he was a member of the WTU at the time of his termination.

procedure."[12] In this case, Employee was a member of the Washington Teachers Union ("WTU") when he 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 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 2009-2010 school year.[13] According to the record, Agency conducts annual performance evaluation for all its employees. 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.[14]

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. 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.

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[12] 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).
[13] *Id.* at Tab 1.
[14] Agency's Answer and Agency's Brief, *supra*.

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.

For the 2009-2010 school year, there were twenty (20) IMPACT grouping of DCPS employees. Employee's position – Music Teacher, was within Group 2. 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. Employees were also observed by a Master Educator between September 21st and February 1st, and a second time between February 1st and June 15th. Group 2 employees were assessed on a total of five (5) IMPACT components, namely:

1) Teaching and Learning Framework (TLF) – comprised of 80% of Group 2 employees' scores;
2) Non-Value-Added Student Achievement Growth (NVA) – 10% of Group 2 employees' scores;
3) Commitment to the School Community (CSC) – 5% of Group 2 employees' scores;
4) School Value-Added (SVA) – 5% of Group 2 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:

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.

DCMR §§1306.4, 1306.5 gives the Superintendent the authority to set procedures for evaluating Agency's employees.[15] 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

[15] 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

matter, the IMPACT process detailed above is the evaluation procedure put in place by Agency for the 2009- 2010 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, he received an "Ineffective" IMPACT rating. Employee does not deny that he was evaluated a total of five (5) times by his principal and the Master Educator. Employee also does not deny that he had conferences after the evaluation or that he 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.

Employee's contention is that the IMPACT standards were new and were applied by a new first year principal. Employee, however, does not deny that he was trained on the IMPACT system or that he had the opportunity to ask questions via telephone or email. In fact, Employee notes that he had conversations with his colleagues about the IMPACT standard. Employee only disagrees with the final section of his IMPACT evaluation, which covers Cycle 3 of the IMPACT process. Employee provides rebuttals and/or explanations to the comments made by the Principal during his Cycle 3 IMPACT evaluation.[16]

Assuming *arguendo* that this Office's jurisdiction in this matter extends to the content or judgment of the evaluation, I find that, while Employee maintains that he should have received a score of four (4) in several of the IMPACT components, he did not specifically note that the Principal's comments were untrue; nor did he proffer any evidence that directly contradicted the Principal's factual finding. Employee simply provided explanations to the Principal's comments, and requested that he be given a score of four (4). The principal's comments in this evaluation are quite specific, for example:

> "At the beginning of the lesson, most of the students were engaged. During the latter half of the lesson, ½ of the students were engaged."
>
> "Students were asked to name the instruments Mr. McKinley held up. This was far too easy for students and part of a strand, not the objective."
>
> "Mr. McKinley addressed talking by asking numerous times for students to stop talking and put their "hands up".
>
> "Mr. McKinley leaves the building without prior approval on a regular basis."
>
> "Mr. McKinley is consistently late for work. We often have to look for him."[17]

None of the evidence offered by Employee contradicted any of the specific facts above. For instance, Employee did not provide any evidence that he was never observed by the Principal; that the students were not asked to name instruments as he held them up; that he

[16] *See* Agency's Answer.
[17] *Id.* The Principal noted in all three evaluation cycles under CP-2 that Employee was frequently late for work.

always has prior approval before leaving the building; or that the students were not talking and he never asked them to put their "hands up." Employee simply explains he "was on time the *entire second part of the year*" (emphasis added).[18] He further explains that the Principal's comment that "Mr. McKinley spends an exorbitant amount of time focusing on students that were not on task, rather than praising the students that were on-task" is inconsistent with the Principals' other comment stating that "Mr. McKinley did respond to students that were off-task. However, he did not address all off-task behavior." I do not find that this is a contradiction. The Principal's comments simply highlights that, while Employee does allocate a lot of time on off-task students, he does not address all off-task behaviors. There is a difference between allotting time to off-task students, and addressing all off-task behaviors.

Moreover, the D.C. Superior court in *Shaibu v. District of Columbia Public Schools*[19] 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."[20] 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"[21] 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. Instead, Employee made general statements; offered rebuttals or provided explanations to 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.[22] As performance evaluations are "subjective and individualized in nature,"[23] 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."[24] Thus, I find that as his direct supervisor, it was within the Principal's discretion to rank and rate Employee's performance. Moreover, the undersigned is not in the

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[18] *See* Employee's Petition for Appeal.
[19] Case No. 2012 CA 003606 P (January 29, 2013).
[20] *Id.* at 6.
[21] *Id. Citing Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).
[22] *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).
[23] *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).
[24] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

position to recommend that Employee receives a higher rating since the undersigned is unfamiliar with the nature of Employee's job.

Employee also asserts that during his eighteen (18) years at DCPS, he never had a negative evaluation. The court in *Shaibu v. District of Columbia Public Schools* 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 Employee's new Principal's discretion to reach a different conclusion about Employee's performance, as long as the Principal's opinion is supported by substantial evidence. Additionally, the prior evaluations were based on an entirely different evaluation process other than the IMPACT process, and Employee has not demonstrated that his prior Principals and the current Principal based their respective evaluations on materially identical information.

Employee additionally argues that because he had a malfunctioning computer during the first two months of the school year, he could not access his IMPACT information, and he only learned at the end of the school year that he should have submitted reports regarding the NVA portion of IMPACT. The 2009-2010 school year commenced in August 2009, and Employee's first observation was conducted by the Principal on November 10, 2009. Two (2) months from August puts the Employee in October. Thus, it can be reasonably assumed that Employee had access to a working computer before his Cycle 1 evaluation was conducted on November 10, 2009. Also, according to the documents on record, the IMPACT information was made available to all staff via the DCPS website. Thus, it can again be reasonable assumed that Employee could have accessed this information from any computer in the school. Further, Employee has not provided this Office with any evidence to prove that he could not access his IMPACT information from any other computer in the school. Therefore, I find that Employee received proper notification and should have been aware of the NVA portion and the other requirements of the IMPACT evaluation. Moreover, it was Employee's responsibility to timely submit documentation of all the information that he wanted reconsidered in the evaluation. Consequently, I conclude that this argument is without merit.

Based on the foregoing, I find that because Employee is a member of the WTU, he 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 his 'Ineffective' IMPACT rating for the 2009-2010 school year.

Discrimination

Employee makes a blanket assertion that DCPS engaged in age discrimination as a vast majority of the teachers who were fired under Chancellor Rhee were over fifty (50) years of age, and of African American decent. 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 Right Act.[25] In addition, District Personnel Manual ("DPM") §

[25] D.C. Code §§ 1-2501 *et seq.*

1631.1(q) also reserves allegations of unlawful discrimination to Office of Human Rights. Consequently, I find that Employee's claim falls outside the scope of OEA's jurisdiction. Moreover, Employee has failed to provide any credible evidence to substantiate this assertion.

Grievances

Employee submits that while he did not have a computer in his office during the first half of the year, other teachers in the building had at least two (2) computers in their classrooms, including the Custodians in their offices. He further submits that (1) Former Chancellor Rhee was unqualified to head a school system; (2) the District aggressively insisted that every teacher signed a new contract that did not include clear and concise evidence of the new evaluation system being a critical factor in the firing process; (3) teachers should have been given a year or two to get used to the new IMPACT system; (4) there have been recent and serious questions raised in the news regarding the test scores that were submitted under Chancellor Rhee's tenure, including dishonesty or actual cheating on the parts of the teachers administering the tests; and (5) he was offered a teaching job at another school and he needed three (3) points to be reinstated, but the principal at Bancroft refused to give him credit for the work he did that was relevant to the NVA.

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

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