THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MICHELLE ROBINSON,	)	
Employee	)	OEA Matter No. 1601-0128-15
	)	
v.	)	Date of Issuance: April 22, 2016
	)	
D.C. PUBLIC SCHOOLS,	)	Monica Dohnji, Esq.
Agency	)	Senior Administrative Judge
	)	

Wallace H. Carrol, Sr., Employee Representative
Lynette Collins, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 19, 2015, Michelle Robinson ("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 a Data Entry Clerk, effective August 7, 2015. Employee was terminated for having a 'Developing' rating under the IMPACT, DC Public Schools' Effective Assessment System for School-Based Personnel ("IMPACT"), during school years 2012-2013; 2013-2014; and 2014-2015. On September 18, 2015, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") on November 18, 2015. Thereafter, on November 23, 2016, I issued an Order scheduling a Status/Prehearing Conference in this matter for January 19, 2016. Both parties were present for the Status/Prehearing Conference. Thereafter, I issued a Post-Status/Prehearing Conference Order requiring the parties to submit written briefs addressing the issues raised at the Conference. 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 a 'Developing' performance rating under the IMPACT system for school years 2012-2013; 2013-2014; and 2014-2015; 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 Petition for Appeal, Employee submits that "I worked hard I want the Impact to be appealed and the RIF. I came to work everyday did everything I was supposed to do and I have only two years before I retire (sic)."[1] In her Brief, Employee makes the following arguments:[2]

(1) Agency failed to provide her with a copy of her IMPACT ratings for school years 2012-2013; and 2013-2014;
(2) Agency has not provided her with any signed counseling statements informing her of the consequences of three (3) 'Developing' IMPACT ratings; therefore, Employee only has one (1) final 'Developing' IMPACT rating for school year 2014-2015;
(3) As a American Federation of State, County and Municipal Employees ("AFL-CIO") Local 2921 union member, the Collective Bargaining Agreement ("CBA") Article V,

[1] Petition for Appeal at pg. 4 or 6 (August 19, 2015).
[2] Employee's Brief (March 22, 2016).

Sections D, and E, should have applied, however, Employee was not afforded the opportunity;
(4) Her termination should be treated as an adverse action as outlined in District of Columbia Municipal Regulation ("DCMR") section 1401.2(a);
(5) The union should have an opinion on this matter;
(6) Agency has failed to provide an amended Notification of Personnel Action form ("SF-50") correcting the nature of her termination under section 6B of her SF-50 to reflect Separation -IMPACT and not Separation-RIF;
(7) Her termination was a hastily made decision to support cost cutting measures for DCPS in an effort to reduce the personnel budget; and
(8) The termination has greatly impacted her financially.

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.[3] Agency notes that Employee was a member of the AFL-CIO Local 2921. Agency explains that the Collective Bargaining Agreement between AFL-CIO and Agency is silent on the matter of work performance evaluation.

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 DCPS 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 the 2012-2013, 2013-2014, and 2014-2015 school years. Agency contends that it followed the applicable District laws, rules and regulations.

Agency provides that Employee received a 'Developing' IMPACT ratings for the 2012-2013, and the 2013-2014 school years. Agency further provides that during the 2014-2015 school year, Employee was a Data Entry Clerk at Bruce-Monroe Elementary School under IMPACT Group 18, 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 received an IMPACT rating of 'Developing' for three (3) consecutive school years - 2012-2013, 2013-2014, and 2014-2015, school years, her employment was terminated pursuant to the IMPACT procedure.[4]

Agency asserts that during school year 2014-2015, Employee was provided clear notice of work guidelines pursuant to her access to the IMPACT guidebook. Employee's work performance was fairly and accurately evaluated two (2) times, and she received conferences following the evaluation regarding the substantive reasons supporting each score she received.

[3] Agency's Answer (September 18, 2015 and January 22, 2016). *See also* Agency's Brief (February 3, 2016).
[4] *Id.*

Agency states that Employee does not argue that Agency failed to follow the IMPACT timeline and procedures.[5]

Agency notes that IMPACT is designated to improve an employee's work performance and not to correct misconduct. Agency explains that Article V of the CBA between Agency and the AFL-CIO union do not fully apply to IMPACT performance evaluation. It highlights that performance evaluation cannot be viewed as a form of misconduct. Agency states that, it has the right to evaluate its employees, and if they fail to meet certain reasonable work performance standard, the employee maybe terminated.[6] Additionally, Agency contends that Employee has not submitted any evidence to contradict any statement in the IMPACT evaluation or Agency's evaluation of her.[7]

Governing Authority

Employee notes that her termination should be treated as an adverse action as outlined in District of Columbia Municipal Regulation ("DCMR") section 1401.2(a).[8] District of Columbia Municipal Regulation ("DCMR") §§1306.1, 1306.5 gives the Superintendent authority to set procedures for evaluating Agency's employees.[9] 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. Although Employee is correct in stating that her termination should be governed by DCMR § 1401.2, I find that DCMR § 1401.2(c) and not DCMR § 1401.2(a) is the governing authority in this matter. 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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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] DCMR § 1401.2(a) provides in pertinent parts as follows:
> 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:
> (a) Inefficiency;

[9] 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 is the performance evaluation system utilized by DCPS to evaluate its employees during 2012-2013, 2013-2014, and 2014-2015 school years. 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.[10]

Employee worked at the same school for the 2012-2013, 2013-2014, and 2014-2015 school years. Employee's position, Data Entry Clerk, at the Bruce-Monroe Elementary School ("Bruce-Monroe") was within Group 18. According to the IMPACT process, Group 18 employees were assessed during Cycles 1 and 3.

For the 2012-2013, 2013-2014, and 2014-2015 school years, Employee had two (2) conferences. These conferences were held after she was assessed. Employee was assessed on a total of three (3) IMPACT components, namely:

1) Office Staff Standard (OS) – comprised of 90% of Group 18 employees' scores;
2) Commitment to the School Community (CSC) – 10% of Group 18 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

[10] Agency's Answer and Agency's Brief, *supra*.

5) Highly Effective = 350-400 points.

Employee did not receive any deductions under the CP component. Employee received a final IMPACT score of 280, and her rating was 'Developing' for the 2012-2013 school year. For the 2013-2014 school year, Employee received a final IMPACT score of 255, and her rating was 'Developing' for the 2013-2014. And for the 2014-2015 school year, Employee received a final IMPACT score of 250, and her rating was 'Developing' for the 2014-2015 school year.

Analysis

In the instant matter, Employee received a rating of 'Developing" for school years 2012-2013, 2013-2014, and 2014-2015. Employee notes that she was not provided with a copy of her IMPACT ratings for school years 2012-2013; and 2013-2014. Agency on the other hand argues that IMPACT evaluation and ratings for each assessment cycle are available on-line for employee to review by 12:01 a.m. the day after the end of each cycle. Based on the record, Employee had conferences after every IMPACT assessment and she does not dispute this fact. During such conference, the evaluator meets with the employees to review their IMPACT ratings and provide feedback. Moreover, Employee does not argue that Agency did not make the assessments available on-line after each assessment cycle, nor did she assert that she did not have access to the on-line assessment. Consequently, I do not find Employee's argument that she wasn't provided a copy of her IMPACT rating for school years 2012-2013 and 2013-2014 persuasive.

Employee further contends that she was not provided with any signed counseling statements informing her of the consequences of three (3) 'Developing' IMPACT ratings; therefore, Employee only had one (1) final 'Developing' IMPACT rating for school year 2014-2015. Page 3 of Employee's 2012-2013, and 2013-2014 IMPACT Reports clearly states the following:

> **Developing** – This rating signifies performance that is below expectations. Individuals who receive this rating are encouraged to take advantage of the professional development opportunities provided by DCPS. Such individuals will be held at their current salary until they earn a rating of Effective or higher. *Individuals who are unable to move beyond the Developing level for three consecutive years will be subject to separation from the school system* (emphasis added).[11]

Although Employee contends that she did not receive a signed counseling statement about the consequences of having three (3) consecutive ratings of 'Developing', she was made aware of this fact in her IMPACT Report. Furthermore, she also had conferences after each assessment where she received feedback for her performance. Accordingly, I conclude that Employee's assertion is without merit.

Additionally, Employee argues that as an AFL-CIO Local 2921 union member, the CBA Article V, Sections D, and E, should have applied. However, she was not afforded the

[11] Agency's Answer at Tab 12 & 13(September 18, 2015).

opportunity. She also states that the union should have an opinion on this matter. She notes that she is entitled to consult and be represented by her union. Article V §§ D and E of the CBA provides as follows:[12]

> **Section D:**
>
> The DCPS shall not discharge an employee without cause. At the time the action is taken, the employee, and the Union will be notified in writing that the employee is subject to discharge.
>
> **Section E:**
>
> The Union, an employee or an employee through his or her Union, shall have the right to take up a suspension or discharge as a grievance before a hearing official and the matter shall be handled in accordance with this procedure.

According to the Notice of Developing IMPACT Rating and Termination that Employee submitted along with her Petition for Appeal to this Office, Employee was afforded the opportunity to either file a grievance with her Union pursuant to the CBA, or file with OEA, *but not both* (emphasis added). Employee chose to file an appeal with OEA as opposed to filing a grievance with her Union. Thus, I find that, Employee cannot now argue that she was not given such opportunity. Furthermore, the burden/responsibility is on Employee, not on this Office or Agency, to enlist the help of the Union in her efforts to adjudicate this matter. Additionally, Employee was notified of her termination as evidenced in the Notice of Developing IMPACT Rating and Termination she received from Agency.

Employee also states that Agency has failed to provide an amended Notification of Personnel Action form ("SF-50") correcting the nature of her termination under section 6B of her SF-50 to reflect Separation -IMPACT and not Separation-RIF.[13] The SF-50 Employee submitted as proof for this assertion was processed on July 21, 2015, approximately two (2) weeks from the effective date of her termination pursuant to her IMPACT rating. While there is nothing in the record highlighting that Agency has in fact amended Employee's SF-50 to reflect the correct reason for termination, I find that this constitutes harmless error as it caused no substantial harm or prejudice to Employee's rights and it did not significantly affect Agency's final decision to take the adverse action. However, I further find that Agency has a duty to maintain accurate record keeping and as such, it is required to review Employee's SF-50, and make any changes necessary to accurately reflect the correct reason for termination.

Additionally, Employee has not challenged any of the scores she received on the IMPACT Components for both Cycle 1 and Cycle 3, for the 2012-2013, 2013-2014, and 2014-2015 school years. She has not proffered to this Office any credible evidence that controverts any of the Administrator's comments. Employee simply notes that she worked hard; she came to

[12] Agency's Brief, *supra*, at Exhibit 9, page 4.
[13] Employee received a letter dated May 15, 2015, notifying her that her position would be abolished effective August 7, 2015, pursuant to a Reduction-in-Force. Thereafter, Agency informed Employee that she was being termination based on her IMPACT rating. *See* Employee's brief, *supra*, at Tabs 1, 2, & 4.

work every day, and did everything she was supposed to do. The D.C. Superior Court in *Shaibu v. District of Columbia Public Schools*[14] 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."[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.

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] Additionally, OEA is not in the position to recommend that Employee receives a higher rating since the undersigned is unfamiliar with the nature of Employee's job.

Based on the foregoing, I find that Agency had sufficient 'just cause' to terminate Employee, following her 'Developing' IMPACT rating for three (3) consecutive school years.

Grievances

Further, Employee notes the following: (1) her termination was a hastily made decision to support cost cutting measures for DCPS in an effort to reduce the personnel budget; and (2) the termination has greatly impacted her financially. While I do sympathize with Employee, complaints of this nature are grievances, and do not fall within the purview of OEA's scope of

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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).

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 her claims elsewhere, but rather that OEA currently lacks the jurisdiction to hear Employee's other claims.

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