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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 1601-0107-15
SAMUEL JACKSON, JR.,	)	
Employee	)	
	)	Date of Issuance: September 2, 2016
v.	)	
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
Agency	)	
	)	
	)	Arien P. Cannon, Esq.
	)	Administrative Judge
_____	)	
Diana M. Bardes, Esq., Employee Representative	)	
Nicole Dillard, Esq., Agency Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

Samuel Jackson, Jr. (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on July 17, 2016, challenging the District of Columbia Public Schools’ (“Agency”) decision to remove him from his position as a Custodian, effective August 7, 2015. Employee was terminated for having an “Ineffective” rating under his IMPACT Evaluation during the 2014-2015 school year. On September 10, 2015, Agency filed its Answer to Employee’s Petition for Appeal.

I was assigned this matter on October 7, 2015. A Prehearing Conference was convened on December 11, 2015. A Post Prehearing Conference Order was subsequently issued which required the parties to submit briefs addressing the legal issues in this matter. Both parties submitted their briefs accordingly.<sup>1</sup> Upon consideration of the briefs, it was determined that an evidentiary hearing was not warranted. The record is now closed.

<sup>1</sup> Agency submitted its brief on January 27, 2016. Although it is captioned “Answer to Employee’s Petition for Appeal,” it is actually a brief in response to the undersigned’s December 14, 2015 Post Prehearing Conference Order.

## JURISDICTION

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

## ISSUES

Whether Agency's action of removing Employee from his position as a Custodian 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 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.<sup>2</sup> "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.

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.<sup>3</sup>

## FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

### The IMPACT Process

IMPACT is the performance evaluation system utilized by DCPS to evaluate its employees. According to the record, Agency conducts annual performance evaluations for all its employees. During the 2014-2015 school year, Agency utilized IMPACT as its evaluation system for all school-based employees.

For the 2014-2015 school year, Employee's position was classified with Group 19 (Custodians) which was evaluated during two cycles: Cycle 1 and Cycle 3. The first assessment cycle, Cycle 1, ended on February 5, 2015. The second assessment cycle, Cycle 3, ended on June 11, 2015.<sup>4</sup> The IMPACT evaluation system used for Employee and Group 19 consisted of three components, namely:

- (1) Custodian Standards (CUST)—comprised of 90% of the Group 19 employees' scores;
- (2) Contribution to the School Community—comprised of 10% of Group 19 employees' scores;

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<sup>2</sup> 59 DCR 2129 (March 16, 2012).

<sup>3</sup> OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

<sup>4</sup> See Agency's Brief, Exhibit 3 (January 27, 2016).

(3) 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:

- (a) Attendance;
- (b) On-time arrival;
- (c) Compliance with policies and procedures; and
- (d) Respect.

Employees did not receive a weighted score for Core Professionalism; rather this was an area where employees could receive a deduction for lack of professionalism in one of these areas.

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
- 4) Effective = 300-349 points; and
- 5) Highly Effective = 350-400 points.

In the instant matter, Employee received an "Ineffective" rating for the 2014-2015 school year. Employee's Final IMPACT score for the 2014-2015 school year was 173.<sup>5</sup> An "Ineffective" rating subjects an employee to an immediate separation from their position with Agency.

### **Governing Authority**

5-E DCMR §§1306.4 and 1306.5 gives the Superintendent authority to set procedures for evaluating Agency's employees.<sup>6</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-E DCMR 1401 provides 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.

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<sup>5</sup> See Agency's Brief, Exhibit 3 (January 27, 2016).

<sup>6</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

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.*

The 109<sup>th</sup> Congress of the United States enacted the 2005 District of Columbia Omnibus Authorization Act, PL 109-356, which states in part:

Notwithstanding any other provision of law, rule, or regulation, during fiscal year 2006 and each succeeding fiscal year, the evaluation process and instruments for evaluation of District of Columbia Public School employees shall be a non-negotiable item for collective bargaining purposes. D.C. Code § 1-617.18.

Thus, Agency was granted the authority to develop its own evaluation process and tool for evaluating Agency employees and exercised this management prerogative when it created the IMPACT evaluation system.

Accordingly, in reviewing this matter, I will address whether Agency followed the procedures it developed in evaluating its employees; and whether or not Agency’s termination of Employee pursuant to his IMPACT rating was supported by just cause. As referenced above, ‘just cause’ for adverse actions includes incompetence – an employee’s inability or failure to satisfactorily perform the duties of their position of employment.

### **Analysis**

The D.C. Superior Court in *Shaibu v. District of Columbia Public Schools*<sup>7</sup> explained that, substantial evidence for a positive evaluation does not establish a lack of substantial evidence for a negative evaluation. The Court in *Shaibu* 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>8</sup> Additionally, it highlighted that “principals enjoy near total discretion in ranking their [employees]”<sup>9</sup> when implementing performance evaluations.

Here, Employee was provided notice of the work guidelines for the 2014-2015 school year in the IMPACT guidebook as it relates to Custodians. Employee’s work performance was evaluated on two separate occasions throughout the school year and a conference was held with his evaluator at the conclusion of both evaluation cycles.<sup>10</sup> Employee does not allege that

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<sup>7</sup> Case No. 2012 CA 003606 P (January 29, 2013).

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Shaibu*, (citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997)).

<sup>10</sup> See Employee’s Brief, Exhibits 3 & 4 (January 27, 2016).

Agency failed to provide him the guidelines associated with the IMPACT evaluations or that Agency did not hold a conference with him at the end of each evaluation cycle. Thus, I find that Agency followed its procedures in evaluating Employee's performance.

However, Employee disagrees with Agency's assessment of his work. One area that was negatively reflected in Employee's 2014-2015 IMPACT evaluation was Employee's tardiness issues. "On-time arrival" is a component of the Core Professionalism standards in IMPACT evaluations. Employees do not gain points in this category; rather points are deducted if an employee does not meet the expectations of "core professionalism." Employee does not dispute that he had on-time arrival issues and attributes this to medication he was taking that caused him to urinate frequently. Employee asserts that he had to take two buses during his morning commute, and sometimes would have to find a place to urinate which caused him to be tardy or miss work because of his illness. Several of these instances are documented by leave slips.<sup>11</sup> Many of the hours requested off by Employee are made on the same day as the requested time off. The record is not clear whether Agency was aware of Employee's medical issues surrounding his reasons for being tardy, as set forth in his brief.<sup>12</sup> Nonetheless, Employee does not deny the tardiness issues. As a result of Employee's tardiness issues, twenty points were deducted for both evaluation cycles (total of 40 points) under "Core Professionalism."

Employee maintains that Agency must provide credible evidence to support the information contained in his IMPACT evaluation that led to an "ineffective" rating and subsequently to his termination. Employee further argues that Agency cannot merely rely on its pro-forma procedural argument claiming that it provided Employee appropriate notice and followed the correct procedure set forth under IMPACT. The seminal argument advanced by Employee is that Agency should be required to substantiate the allegations in his evaluation which provides that he: "rarely or never cleans and maintains classrooms and office space in a timely and efficient manner," "rarely or never cleans and maintains common areas, including school grounds, hallways, all-purpose rooms, cafeterias, gymnasiums and stairwells in a timely and efficient manner," and that he "rarely or never cleans and maintains restrooms in a timely manner." The IMPACT evaluation measures Employee's overall performance and not specific instances, although some instances may reflect negatively on an employee's overall evaluation numbers.

Employee provides statements from other employees who also worked at Cardozo Education Campus that contradict Employee's overall performance evaluation. However, these individuals were not in a position of authority to evaluate Employee for purposes of his IMPACT evaluation. Although these statements from fellow employees may show that Employee deserved a more positive evaluation, the Court in *Shaibu* made clear that positive statements such as these do not establish that there is a lack of substantial evidence to support a negative evaluation.

Employee requests an evidentiary hearing to develop the factual issues in this matter. The Court has held that a hearing is warranted on the factual basis of the principal's evaluation *only* if

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<sup>11</sup> See Agency Brief, Exhibit 10.

<sup>12</sup> Filed February 22, 2016.

the employee can proffer evidence that directly contradicts the statements in the IMPACT report.<sup>13</sup> Even if Employee can produce evidence that would warrant a higher performance score, it does not automatically mean the assessment was wrong or unsupported by substantial evidence.<sup>14</sup> Courts in this jurisdiction have consistently held that “principals enjoy near total discretion in ranking their teachers” when implementing performance evaluations.<sup>15</sup> Here, Agency followed its IMPACT process and evaluated Employee on two separate occasions and afforded him post-evaluation conferences for the 2014-15 school year. Employee does not offer any evidence to contradict that Agency followed this process. Given the principle that substantial evidence for a positive evaluation does not establish a lack of substantial evidence for a positive evaluation, it is not enough for Employee to offer the positive statements from his co-workers to substantiate a better overall evaluation.<sup>16</sup>

Accordingly, I find Agency had sufficient “just cause” to remove Employee following his “Ineffective” IMPACT rating for the 2015-2015 school year. Furthermore, I find that Agency properly conducted the IMPACT evaluation process.

### **ORDER**

Based on the aforementioned, it is hereby **ORDERED** that Agency’s decision to remove Employee from his position is **UPHELD**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.  
Administrative Judge

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<sup>13</sup> *Shaibu v. District of Columbia Public Schools*, Case No. 2012 CA 003606 P (D.C. Super. Ct. January 29, 2013).

<sup>14</sup> *Id.*

<sup>15</sup> See e.g., *Washington Teachers’ Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997); *Shaibu v. District of Columbia Public Schools*, Case No. 2012 CA 003606 (D.C. Super. Ct. January 29, 2013).

<sup>16</sup> See *Id.*