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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0219-12
HOSSAM BASHA,)	
Employee)	
)	Date of Issuance: October 22, 2014
v.)	
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Hossam Basha, Employee, <i>Pro Se</i>		
Sara White, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 23, 2012, Hossam Basha (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) decision to remove him from his position as a Computer Lab Coordinator at Barnard Elementary School (“Barnard”). Employee was removed because he received an “Ineffective” rating under Agency’s IMPACT program for the 2011-2012 school year.¹ Employee’s termination was effective on August 10, 2012.

This matter was assigned to me in November of 2013. On November 25, 2013, I issued an Order convening a Prehearing Conference for the purpose of assessing the parties’ arguments. During the conference, I determined that an Evidentiary Hearing was warranted based on the arguments presented by the parties. The hearing was subsequently scheduled for May 22, 2014. However, Agency requested three continuances of the hearing, each of which was granted. An Evidentiary Hearing was subsequently held on July 30, 2014. On August 14, 2014, I ordered the parties to submit written closing arguments. Both parties responded to the order. The record is now closed.

¹ IMPACT is the effectiveness assessment system used by the D.C. Public School System to rate the performance of school-based personnel.

JURISDICTION

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

ISSUE

Whether Agency's action of terminating Employee should be upheld.

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.

Employee's Position

Employee argues that this Office should reverse Agency's decision to terminate his employment under IMPACT based on the following allegations:

1. Banard's principal, Dr. Reid, purposely awarded Employee low IMPACT scores because of personal differences.
2. Employee had previously received an "Effective" rating from Dr. Reid for the 2010-2011 school year. He also received a Family Literacy Night Appreciation Certificate in 2011, which exhibited his competency and dedication to the student body.
3. Dr. Reid gave Employee a letter of recommendation prior to rating him "Ineffective" for the 2011-2012 school year.
4. Dr. Reid decided to terminate Employee under IMPACT rather than the RIF notice he received on June 18, 2012.

Agency's Position

Agency argues that Employee's termination under the IMPACT program was done in accordance with all District of Columbia statutes, regulations, and laws. Agency also argues that OEA's jurisdiction is limited with respect to the instant appeal and that Employee may only challenge whether the evaluation process and tools were properly administered. According to Agency, Employee was properly evaluated under the IMPACT program, which resulted in him receiving a final IMPACT score of "Ineffective" during the 2011-2012 school year.

SUMMARY OF RELEVANT TESTIMONY

The following represents what I have determined to be the most relevant facts adduced from the transcript generated as a result of the Evidentiary Hearing. Both Agency and Employee had the opportunity to present documentary and testimonial evidence during the course of the hearing to support their positions.

Agency's Case in Chief

Dr. Grace Alwen Reid (Transcript pages 9-46)

Dr. Grace Alwen Reid ("Dr. Reid") has worked for DCPS as the Principal for Barnard Elementary School since 2009. According to Dr. Reid, Employee worked as a Computer Lab Instructor at Barnard Elementary school for three years. Dr. Reid was responsible for evaluating Employee using the IMPACT system two (2) times during the 2011-2012 school year. After each assessment, Dr. Reid conducted a post-evaluation conference with Employee. Dr. Reid recalled that Employee received a final IMPACT rating of "Ineffective" after being evaluated twice that year. Employee was first assessed on December 1, 2011. Employee's post-assessment conference was also held on December 1, 2011. Dr. Reid worked in tandem with Barnard's Assistant Principal on Employee's evaluations to ensure that input was received from more than one person.

The first section of the IMPACT evaluation is "Student Support Professional Standards" or "SSP." There are six (6) sub-categories in this area. SSP1 is Core Job Functions. Employee received a score of two (2) in this category. According to Dr. Reid, Employee was reminded on several occasions about his duties to ensure that computers in the lab were set up before the start of the school year, and updated monthly. Employee was also required to ensure that the students at Barnard had the necessary technology resources to enhance the instructional program. Dr. Reid stated that Employee was not consistently performing his duties as assigned, which is why she only awarded him two points. Employee received a score of two (2) for SSP2, Programmatic Goals. Dr. Reid testified that she awarded that score to Employee because he needed to be more proactive in ensuring that the technology was being used to enhance the students' learning at Barnard. Employee received a score of two (2) for SSP3, Positive Rapport with Students and Families. Dr. Reid reiterated that Employee had built some productive relationships with the students and their families; however, he did not extend his knowledge or abilities to families who faced the greatest challenges at the schools. For example, Barnard had an autism program with

approximately eighty (80) students. Dr. Reid stated that Employee failed to provide support to the program.

Employee received a score of one (1) for SSP4 (Collaboration) because, according to Dr. Reid, he rarely assisted his colleagues address their technological challenges in a timely and effective manner. Employee also received a score of one (1) for SSP5 (Adaptability). Employee was asked on several occasions to adapt to last minute changes in the computer lab, but would often tell Dr. Reid that the requests were beyond his job description. Employee received one (1) point for SSP6 (Use of Data). According to Dr. Reid, there were several programs that were being utilized in the computer lab, such as Imagine Learning, wherein Employee was required to report data back to administration about the efficacy of the program. Employee did not report the data as requested by the administrators.

The next section of the IMPACT assessment is entitled Commitment to School Community ("CSC"). There are three (3) CSC subsections. Employee received a score of two (2) for CSC1 (Support of the Local School Initiatives). Dr. Reid testified that Employee supported the school initiatives on occasion by developing a school web site and prepared the technology for various school-based events. Employee received a score of two (2) for CSC2 (Support of the Special Education and English Language Learner Programs). Dr. Reid stated that Employee could have tutored a child, or offered helpful websites to assist the children in areas that they were struggling in, but did not. Employee received a score of three (3) for CSC3 (High Expectations).

Core Professionalism (CP) is the next standard that Employee was scored on. Employee received a "Meets Standards" for CP1 (Attendance) and CP2 (On-Time Arrival). Dr. Reid did not recall why she gave Employee a score of "Slightly Below Standard" for CP3 (Policies and Procedures), but did note that she had to give him a letter concerning leaving the job without permission. Employee received a score of "Significantly Below Standard" for CP4 (Respect). According to Dr. Reid, Employee had a pattern of being very disrespectful to his colleagues and was not open to constructive criticism.

Dr. Reid also rated Employee a second time during the 2011-2012 school year. Employee's post-evaluation conference was held on June 14, 2012. Dr. Reid stated that Employee's performance did not improve during Cycle 3 of the school year. Dr. Reid reiterated to Employee that he needed to ensure that the computers were ready for instruction, but the changes were not made.

Regarding training on the IMPACT tool, Dr. Reid stated that the teachers received information about the program prior to the school year. Each school employee was also given an IMPACT booklet, which could also be retrieved online. Dr. Reid testified that Employee did a good job when he first began working at Barnard; however, she noticed a change in his attitude and job performance over time. Employee communicated to Dr. Reid that he was unhappy working for the school and wanted to transfer. Dr. Reid wrote Employee a letter of recommendation on June 22, 2012 because he had approached her and indicated that he wanted to work for another school. The principal from the other school contacted Dr. Reid and asked about Employee coming to work for him. Dr. Reid told the other principal that Employee had a

superior knowledge of computers, but she had other concerns about Employee's work performance.

On Cross Examination, Dr. Reid testified that she wrote the recommendation because of Employee's in depth knowledge about computers. She stated that the final calculation of Employee's IMPACT score was also based on Barnard's overall school performance, and that the overall school performance information was not calculated until the end of the school year.

Kathryn McMahon-Klosterman (Transcript pages 46-63)

Kathryn McMahon-Klosterman ("Klosterman") is the current Director of IMPACT operations for DCPS. She is responsible for overseeing the day-to-day implementation of Agency's evaluation system. Klosterman explained that IMPACT is the staff evaluation for DCPS for school-based staff. IMPACT was first implemented during the 2009-2010 school year. Employee was a member of IMPACT Group 8 during the 2011-2012 school year. Each group had a unique guidebook and set of evaluation components. According to Klosterman, each employee in Group 8 had to be evaluated a total of two (2) times, once by December 1st, and once by June 14th. An employee is able to retrieve their final score through the IMPACT database using a username and password. The scores are available to employees as soon as the data is finalized by the evaluator. In addition all of the IMPACT guidebooks are available online to the public. Hard copies were mailed to each school, and the school principal. If an employee or evaluator had questions about IMPACT, they had the option of emailing the IMPACT team, or contacting a dedicated phone line. IMPACT training sessions are held throughout the course of the school year. Klosterman further stated the following:

"A Group 8 employee would be evaluated twice on the student's professional standards. There were six standards, so a score from one to four on each of those six standards twice over the course of the year. That makes up 80 percent of their evaluation, the average of all those standards. 10 percent then is commitment to school community, which is also evaluated twice over the course of the year. Three standards there. All rated on a scale from one to four. And then additionally, school value-added, which was a component for all employees in the building. And that is calculated actually by our technical partner Mathematica and my team uploads that into a database to combine it with all the other information for an employee. So the Impact database then puts all of that together, in addition to any core professionalism deductions, which is something that all the employees are evaluated on as well to produce...a final score and rating for each employee."²

² Tr. pgs. 56-57.

Klosterman stated that Core Professionalism is not evaluated in the same way as the other standards. This standard is comprised of four (4) components: 1) attendance, 2) on-time arrival, 3) respect; and 4) policies and procedures. If there are no issues with an employee's performance in these areas, then that employee's final IMPACT score will not be altered. However, if an employee is deficient in one of the areas, then either ten (10) or twenty (20) points could be deducted from their final score. For example, an employee may have a twenty (20) point deduction during Cycle 1, and a twenty (20) point deduction during Cycle 3, totaling a forty (40) point deduction over the course of a school year. Based on a review of Agency's documents, Klosterman concluded that Employee received a twenty (20) point deduction for Core Professionalism during the 2011-2012 school year. According to Klosterman, any employee who received a final IMPACT score of "Ineffective" at the end of the school year was subject to termination because they did not meet the expectations necessary for their position.

Regarding the School Value Added ("SVA") score, this number is calculated based on Agency's DC-CAS results. It is a measure of how well a teacher performed in comparison to other teachers in the District. The individual totals are added together into a score which reflects a measure of how well a particular school is performing. Klosterman testified that principals do not find out what their SVA scores are until after the school year is over.

On cross examination, Klosterman stated that principals rated employees based on the evidence before them and that they were not able to fully calculate an IMPACT score without having the SVA information.

Employee's Case in Chief

Michael Anderson (Transcript pages 63-73)

Michael Anderson ("Anderson"), who worked as a building supervisor during the 2011-2012 school year, described Employee as a kind-hearted and good person. Anderson testified that Employee transformed Barnard's computer lab by upgrading the old computers and organizing the lab. He also stated that Employee had a good relationship with the students and that the teachers loved him. Anderson described an instance wherein he heard Dr. Reid tell Employee that there was "a long line waiting [to take his] job."

On cross examination, Anderson stated he worked at Barnard for nine (9) years, but was never Employee's supervisor and never evaluated his work performance.

Hossam Basha (Transcript pages 73-83)

Hossam Basha ("Employee") testified that he did not file the instant appeal to contest his IMPACT score. However, Employee stated that Dr. Reid intentionally gave him low score because she knew that Employee would receive an "Ineffective" rating at the end of the 2011-2012 school year. Employee also stated that Dr. Reid gave him low scores because of her personal problems with him. According to Employee, there is nothing in his personnel file to show that he was unprofessional. He also stated that he received a certificate of accomplishment

for two years. In addition, Employee testified that his termination was done in retaliation for filing a grievance in January of 2012 with his union about Dr. Reid.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

D.C. Official Code § 1-617.18 grants DCPS the authority to create and implement its own tools for evaluating employees. IMPACT was the performance evaluation system utilized by DCPS to evaluate its employees starting during the 2009-2010 school year. According to the documents of record, Agency conducts annual performance evaluation for all its employees. During the 2011-2012 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.³

The IMPACT process required that all school-based staff receive written feedback regarding their evaluations, in addition to having a post-evaluation conference with their evaluators. IMPACT evaluations and ratings for each assessment cycle were available online for employees to review by 12:01 a.m. the day after the end of each cycle. If an employee had any issues or concerns about their IMPACT evaluation and rating, they were encouraged to contact DCPS' IMPACT team by telephone or email. Employees also received an email indicating that their final scores were available online. Additionally, a hard copy of the report was mailed to the employees' address of record.

During the 2011-2012 school year, there were twenty-six (26) IMPACT grouping of DCPS employees. Employee's position, Computer Lab Coordinator, was within Group 8 (Student Support Professionals). Under IMPACT, Employee was required to be evaluated two (2) times during the school year. The first assessment cycle ("Cycle 1") occurred between September 21st and December 1st; and the third assessment cycle ("Cycle 3"), occurred between March 1st and June 15th. Employee was assessed on the following IMPACT components:

- 1) Student Support Professional Standards (SSP)—these standards define excellence for student support professionals in DCPS. This component accounted for 80% of the IMPACT Score.
- 2) Commitment to the School Community—a measure of the extent to which an employee supports and collaborates with their school community. This component accounted for 10% of the IMPACT score.
- 3) School-Value Added—a measure of the impact the school has on student learning over the course of the school year, as measured by the DC CAS (District-wide assessment given in the spring of each year). This component accounted for 10% of the IMPACT score.

³ Agency's Answer and Agency's Brief, *supra*.

- 4) Core Professionalism—a measure of four (4) basic professional requirements for all school-based personnel. These requirements are as follows: attendance; on-time arrival; compliance with policies and procedures; and respect. This component was scored differently from the others, as an employee could have additional points subtracted from their score if the rating was “Slightly Below Standard” or “Significantly Below Standard.”

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.

District of Columbia Municipal Regulations (“DCMR”) §§1306.4-1306.5 give the District Superintendent authority to set procedures for evaluating Agency’s employees.⁴ The aforementioned sections of the DCMR 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. Employees in Group 8, Student Support Professionals, were required to be evaluated during Cycle 1 and Cycle 3 of the 2011-2012 school year. Each employee in Group 8 was also required to have a post-evaluation conference with their evaluator. If an employee received a rating of “Ineffective” for one school year, then he or she was subject to termination under IMPACT.

In this case, I find that Agency followed the proper procedures in evaluating Employee under IMPACT. The documents of record, in addition to the testimonial evidence provided during the Evidentiary Hearing, support a finding that Employee was evaluated during Cycle 1 and Cycle 3 in the 2011-2012 school year. Moreover, Employee had two post-evaluation conferences regarding his assessments on December 1, 2011 and June 14, 2012, respectively. I find that Dr. Reid provided credible testimony regarding the discussions she had with Employee about his work performance. In addition, Employee testified that he did not file a Petition for Appeal with this Office because of his final IMPACT score. Based on the foregoing, I find that Agency followed the proper procedures in evaluating Employee under the IMPACT system.

Employee argues that Dr. Reid purposely gave him low IMPACT scores in an effort to ensure that Employee received an “Ineffective” rating at the end of the 2011-2012 school year. However, Employee does not proffer any evidence that directly contradicts the Principal’s factual findings in her evaluations. It should be noted that the D.C. Superior court in *Shaibu v.*

⁴ 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

*D.C. Public Schools*⁵ held that substantial evidence for a positive evaluation does not establish a lack of substantial evidence for a negative evaluation. The court held 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.”⁶ The court further stated that if the factual basis of the “principal’s evaluation were true, the evaluation was supported by substantial evidence.” In addition, the Court in *Shaibu* held that “principals enjoy near total discretion in ranking their teachers”⁷ when implementing performance evaluations. The Court denied the employee’s petition, finding that 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]....”

I find that Dr. Reid offered credible and consistent testimony with respect to the scores that she awarded Employee during Cycle 1 and Cycle 3 of the 2011-2012 school year. This is not to say that Employee and Dr. Reid did not have verbal confrontations or disagreements. The Undersigned finds that Dr. Reid provided credible testimony regarding the interpersonal issues that she had with Employee. Dr. Reid explained that Employee was effective at working with computers; however, his work performance declined over time. She further testified that she wrote a recommendation letter for Employee based on his knowledge of computers, and not his work ethic. There is no *credible* evidence in the record to support a finding that Dr. Reid purposefully gave Employee low scores in each IMPACT category to ensure that he would be terminated at the end of the school year.

Moreover, 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.⁸ Because performance evaluations are “subjective and individualized in nature,” 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.”⁹ Thus, I find that it was within the principal’s discretion to rate Employee’s performance. Moreover, the Undersigned Administrative Judge is not in the position to recommend that Employee receive a higher rating since the Undersigned is unfamiliar with the nature and details of Employee’s position. Accordingly, I find that Dr. Reid evaluated Employee in a fair manner based on her personal observations of Employee’s work performance. I also find that Dr. Reid did not abuse

⁵ Case No. 2012 CA 003606 P (January 29, 2013).

⁶ *Id.* at 6.

⁷ *Id.* Citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

⁸ 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).

⁹ 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). See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

her discretion in evaluating Employee under IMPACT. Thus, I find no credible reason to disturb Employee's final IMPACT score.¹⁰

In the instant matter, Employee was evaluated a total of two times during the 2011-2012 school year, in accordance with the IMPACT rules. After the scores were calculated, Employee received a final IMPACT score of 157, which is considered ineffective. Employee received a copy of his IMPACT score, in addition to having post-evaluation meetings with his evaluator. Because Employee received a rating of "Ineffective," he was subject to termination from his position. Based on the foregoing, I find that Agency properly adhered to the IMPACT process and had cause to terminate Employee. Accordingly, Agency's action must be upheld.

ORDER

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

FOR THE OFFICE:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

¹⁰ Employee's other arguments regarding any grievances filed with his union are outside the scope of OEA's jurisdiction and will therefore not be addressed. The Undersigned will also not address allegations of harassment contained within Employee's September 5, 2014 submission to this Office, as they are also beyond the purview of OEA's jurisdiction. It should be noted that Employee received notice on June 18, 2012 that his position was going to be abolished pursuant to a Reduction-In-Force ("RIF"), effective August 10, 2012. However, the RIF notice was rescinded in Employee's July 27, 2012 Notice of Ineffective IMPACT Rating and Termination.