THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ANDREW JOHNSON, Employee	
v.	OEA Matter No.: 1601-0215-11R18
D.C. PUBLIC SCHOOLS, Agency	Date of Issuance: May 19, 2020

OPINION AND ORDER
ON
REMAND

This matter was previously before the Board. Andrew Johnson ("Employee") worked as a School Psychologist with D.C. Public Schools ("Agency"). On July 15, 2011, Employee was notified that he would be terminated because he received a final IMPACT rating of "Minimally Effective" for the 2009-2010 and 2010-2011 school years.[1] The effective date of his termination was August 12, 2011.[2]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 9, 2011. He disagreed with Agency's termination action and requested that OEA reinstate him to his previous position.[3] Agency filed its Answer on October 12, 2011. It provided

[1] IMPACT is the effectiveness assessment system Agency uses to rate the performance of school-based personnel.
[2] *Petition for Appeal* (September 9, 2011).
[3] *Id.* at 3.

that Employee received a final rating of "Minimally Effective" for two consecutive years, and was; therefore, subject to termination.[4]

The OEA Administrative Judge ("AJ") issued an Initial Decision on May 20, 2014. He held that OEA lacked jurisdiction over Employee's wrongful termination claims because he elected to retire in lieu of being terminated. The AJ concluded that there was no evidence in the record to prove that Employee's retirement was procured through misrepresentation, fraud, or coercion. As a result, Employee's Petition for Appeal was dismissed.[5]

Employee filed a Petition for Review with OEA's Board on June 26, 2014. On February 16, 2016, the Board issued its Opinion and Order on Petition for Review. It held that Employee's decision to retire was of his own volition and was not a result of incorrect or misleading information on Agency's part. The Board noted that Employee was afforded an opportunity to consult with an attorney, union representative, or other advisor regarding the implications that retiring would have on his right to pursue an appeal before OEA. Additionally, it held that the AJ's decision to dismiss Employee's Petition for Appeal for lack of jurisdiction was based on substantial evidence. Consequently, Employee's Petition for Review was denied.[6]

Employee subsequently filed an appeal with the Superior Court of the District of Columbia. On February 21, 2017, the Court affirmed the Board's findings.[7] Thereafter, Employee sought review with the D.C. Court of Appeals. The appellate Court disagreed with the Superior Court's finding that Employee's retirement was voluntary and determined that he was not precluded from challenging Agency's termination action. Therefore, on August 9, 2018, the Court vacated OEA's findings and remanded the matter to .the Superior Court of the District of

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[4] *Id.*
[5] *Initial Decision* (May 20, 2014).
[6] *Opinion and Order on Petition for Review* (February 16, 2016).
[7] *See Johnson v. D.C. Public Schools, et al.* Case No. 2016 CA 01551 (D.C. Super. Ct. February 21, 2017).

Columbia with instructions to remand the matter to OEA.[8]

On February 11, 2019, the AJ issued an order directing the parties to submit written legal briefs addressing whether Agency's termination action should be upheld.[9] In his brief Employee argued that the IMPACT rating system was illegal because it conflicted with District laws that were implemented prior to IMPACT. According to Employee, Agency committed ten procedural violations under IMPACT during the 2009-2010 school year. Of relevance, Employee contended that Agency adjusted the IMPACT standards that were established at the start of the school year, which substantially prejudiced his performance rating. Employee explained that his Assessment Timeliness ("AT") score, which accounted for twenty-five percent of his performance rating, was improperly calculated based on a late assessment for a student who was not on his caseload.[10]

Additionally, Employee claimed that Agency violated District law by failing to include customer satisfaction as an evaluation factor in his assessment; failing to objectively evaluate his performance with criteria made known to him; and failing to rate him on a five-point scale. He also argued that his performance rater, Dr. Jamila Mitchell ("Dr. Mitchell"), did not observe his work as required under IMPACT and that the evaluations that were completed by Dr. Mitchell were not objective. Moreover, Employee stated that his termination was arbitrary and capricious because Agency issued its termination notice prior to calculating his AT score. Therefore, he requested that OEA reverse Agency's termination action.[11]

In its brief, Agency argued that it followed the IMPACT process in accordance with all applicable laws, rules, and regulations. According to Agency, Chapter 5-E of the D.C. Municipal

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[8] *Johnson v. D.C. Public Schools*, 191 A.3d 293, 294 (D.C. 2018).
[9] *Post-Conference Order* (February 11, 2019).
[10] *Employee's Brief* (March 11, 2019).
[11] *Id.*

Regulations ("DCMR"), Sections 1306.4 and 1306.5 authorized the Superintendent to implement procedures for evaluating its employees under IMPACT. Agency stated that Employee was provided with an explanation of how he would be scored and that he was evaluated each semester by an appropriate supervisor. It disagreed with Employee's contention that he was improperly evaluated by Dr. Mitchell. Agency further opined that Employee's AT score was calculated correctly for the 2009-2010 school year. In the alternative, Agency stated that even if Employee received the maximum score for AT quality and timeliness, he would have still received an IMPACT rating of "Minimally Effective." Lastly, it claimed that Employee waived any arguments concerning his 2009-2010 IMPACT evaluation because he failed to file a grievance with the Chancellor in order to preserve his appeal. As a result, Agency requested that Employee's appeal be dismissed.[12]

In his reply brief, Employee disagreed with Agency's argument that he failed to file a grievance contesting his 2009-2010 IMPACT rating. He stated that Agency did not provide him with an IMPACT guidebook because there were not enough in supply when they were distributed at the beginning of the school year. According to Employee, the process for evaluating psychologists was changed mid-year; thereby, resulting in a harmful procedural error. Additionally, he reasoned that Dr. Mitchell's assessments regarding his performance were not credible because she intentionally misrepresented facts in his evaluations. Employee contended that Agency failed to base his AT score on all of his assessments because it only considered three students when calculating his score. Therefore, he believed that Agency's adverse action was arbitrary and capricious. Consequently, Employee, again, requested that OEA reverse his termination.[13]

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[12] *Agency's Response to Post-Conference Order* (March 11, 2019).
[13] *Id.*

The AJ issued an Initial Decision on Remand on June 14, 2019. He held that the 2005 District of Columbia Omnibus Authorization Act, PL-109-356, provided Agency with broad authority to conduct annual performance evaluations for all of its employees and that the Act specifically overrode any prior laws that conflicted with Agency's IMPACT system.[14] The AJ explained that School Psychologists were classified as Group 12 "Related Service Providers." Under IMPACT, Group 12 employees were required to undergo two assessment cycles, including a post-assessment conference with a Program Manager or a Special Education Coordinator.

In reviewing the documents of record, the AJ concluded that Employee received a "Minimally Effective" IMPACT rating during both the 2009-2010 and the 2010-2011 school years, which subjected him to termination. Moreover, the AJ determined that nothing in the record supported a finding that Employee's IMPACT scores were incorrect or that Agency committed a procedural error in completing Employee's assessments. Therefore, he found Employee's argument that Agency used flawed, subjective, and contradictory rating criteria in its evaluation process to be without merit.[15] The AJ also found Employee's arguments related to Agency improperly changing the IMPACT standards during the school year to be unpersuasive. As a result, he held that Agency adhered to the IMPACT process, and because Employee received a rating of "Minimally Effective" for two consecutive school years, Agency established sufficient cause to terminate him. Therefore, Employee's termination was upheld.[16]

Employee subsequently filed a Petition for Review with OEA's Board. He argues that Agency violated the IMPACT process by failing to provide him with a copy of the Guidebook at the beginning of the school year. According to Employee, Agency's utilization of IMPACT as an

[14] *Initial Decision on Remand* (June 14, 2019).
[15] *Id.*
[16] *Id.*

evaluation tool is illegal because it conflicts with District of Columbia laws that were already in place prior the establishment of IMPACT. Employee also submits that the rating system violated District law because it failed to include customer satisfaction as an evaluation factor, in violation of D.C. Official Code § 1-613.51; failed to objectively evaluate his performance with criteria made known to him, in violation of D.C. Official Code § 1-613.51(3); and failed to rate Employee on a five-point scale, in violation of 5 DCMR § 1306.6.[17]

He also asserts that the AJ failed to address his argument that he did not use the Berry Visual Motor Integration Test but was rated on its use. Regarding his AT score, Employee contests Agency's determination that he submitted an untimely psychological assessment, which resulted in an erroneous calculation of his score. He also states that Agency committed a procedural error by calculating his AT score after issuing its termination letter. Employee disagrees with the AJ's conclusion that Dr. Mitchell observed and evaluated his work as required under IMPACT. He also echoes his previous sentiment that the IMPACT process was not followed because the standards for evaluation were changed during the 2009-2010 school year. Therefore, Employee requests that this Board grant his Petition for Review.[18]

In response, Agency argues that the AJ correctly concluded that the District of Columbia Omnibus Authorization Act specifically overrides any prior laws that conflict with the IMPACT rating system. Agency contests Employee's claim that flawed, subjective, and contradictory rating criteria were used to evaluate him. It believes that the record supports a finding that Dr. Mitchell properly evaluated Employee during the 2009-2010 school year. According to Agency, Employee failed to follow the proper psychological report procedures outlined in the IMPACT Guidebook and report template. Lastly, it claims that the AJ addressed each of Employee's

[17] *Employee's Petition for Review* (July 8, 2019).
[18] *Id.* Employee subsequently filed a document with OEA on March 9, 2019 in which he requested that the Board note that his School Psychologist and Licensed Professional Counselor credentials are current.

arguments raised on appeal. Consequently, Agency requests that the Board deny Employee's Petition for Review.[19]

Legality of the IMPACT Rating System

Employee argues that the Initial Decision on Remand is based on an erroneous interpretation of statute because the IMPACT rating system conflicts with District laws that existed prior to the implementation of the system. Specifically, he claims that the IMPACT failed to include customer satisfaction as an evaluation factor, in violation of D.C. Official Code § 1-613.51(6)[20]; failed to objectively evaluate his performance with criteria made known to him, in violation of D.C. Official Code § 1-613.51(3); and failed to rate Employee on a five-point scale, in violation of 5 DCMR 1306.6.[21] For the same reasons stated by the AJ, this Board finds Employee's arguments to be unpersuasive.

Regarding the implementation of the IMPACT rating system, in 2005, the 109th Congress of the United States enacted the District of Columbia Omnibus Authorization Act, P.L. 109-356. The Act, which is codified in D.C. Official Code § 1-617.18, states the following:

> Notwithstanding any other provision of law, rule, or regulation, during fiscal year 2006 and each succeeding fiscal year, the evaluation process and instruments for evaluating District of Columbia Public School employees shall be a non-negotiable item

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[19] *Agency's Response to Employee's Petition for Review* (August 5, 2019).

[20] D.C. Official Code § 1-613.51 provides that performance management systems under the CMPA should be designed to:

> (1) Inform employees of work expectations; (2) Hold employees accountable for their performance, which shall include a direct relationship between the rating received pursuant to § 1-613.52 and the receipt of any periodic step increase or of any performance based increase that may be established under the compensation system authorized by subchapter XI; (3) Objectively evaluate employees' work performance based on criteria that have been made known to the employees; (4) Improve employee performance through training; (5) Recognize employee accomplishment; and (6) Include customer satisfaction as an evaluation factor.

[21] 5-E DCMR § 1306.6 provides that each performance rating plan shall provide for the following ratings: (a) Outstanding performance; (b) Above-average performance; (c) Average performance; (d) Below-average performance; and (e) Unsatisfactory performance.

for collective bargaining purposes.

The use of the term 'notwithstanding' carries special significance in statutes and is used to "override conflicting provisions of any other section."[22] Further, "[i]t is well established that the use of such a 'notwithstanding clause' clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other sections."[23] In *Jones v. D.C. Public Schools*, Case No. 2015 CA 005054 P(MPA) (D.C. Super. Ct. August 31, 2016), the Superior Court of the District of Columbia addressed the legality of Agency's IMPACT rating system. Similar to Employee in this case, the employee in *Jones* argued that IMPACT violated portions of the District of Columbia Comprehensive Merit Personnel Act ("CMPA"), specifically D.C. Official Code Sections 1-613.51, 1-613.52, and 5-E DCMR § 1306.6. The Court held that Agency retained the authority to implement its own tools for evaluating employees. It explained that D.C. Official Code § 1-617.18 preempted any rules or regulations concerning the evaluation process for D.C. Public School employees. Therefore, the Court in *Jones* concluded that the employee could not challenge the IMPACT system based on prior or existing District of Columbia laws or regulations to the contrary.[24] Accordingly, the promulgation of P.L. 109-356 and the enactment of D.C. Official Code § 1-617.18 authorized Agency to implement its own process for evaluating employees by way of IMPACT. Consequently, this Board finds Employee's argument to the contrary to be without merit.

Additional Arguments

In his Petition Review, Employee raises several arguments that he opines to be procedural violations of the IMPACT process. Although not an exhaustive list, Employee contends that Agency changed the IMPACT process during the 2009-2010 school year; thereby,

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[22] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[23] *Id. See also Cisneros v. Alpine Ridge Group,* 508 U.S. 10, 18, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993).
[24] *Jones* at 9.

resulting in a harmful procedural error. Employee contests Agency's determination that he submitted psychological assessments late, which resulted in him receiving an erroneous AT score. He also states that Agency committed a procedural error by issuing its termination notice prior to calculating his AT score. Additionally, Employee submits that he did not use the Berry Visual Motor Integration Test but was rated on its use. The AJ determined that each of Employee's contentions lacked merit; however, the aforementioned arguments constitute contested, material issues of fact which could not be decided on the record alone. As a result, we cannot reasonably conclude that the Initial Decision on Remand is based on substantial evidence.[26] Consequently, this matter must be remanded to the AJ for the purpose of conducting an evidentiary hearing.

[26] The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge for further consideration.

FOR THE BOARD:

Clarence Labor, Chair

Patricia Hobson Wilson

Jelani Freeman

Peter Rosenstein

Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.