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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0112-15
VINCENT SWANN,)	
Employee)	
)	Date of Issuance: June 10, 2016
v.)	
)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,)	
Agency)	
)	
)	
)	Arien P. Cannon, Esq.
)	Administrative Judge
_____)	
Vincent Swann, Employee, <i>Pro se</i>		
Nicole Dillard, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Vincent Swann (“Employee”), filed a Petition for Appeal on July 27, 2015, with the Office of Employee Appeals (“OEA”), challenging the District of Columbia Public Schools’ (“Agency” or “DCPS”) decision to remove him from his position as an Educational Aide. Employee was terminated for having an “Ineffective” rating under the 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. Upon consideration of the arguments presented at the Prehearing Conference, it was determined that an evidentiary hearing was warranted. A Post Prehearing Conference Order was subsequently issued which scheduled this matter for an evidentiary hearing. This hearing was held on February 26, 2016. Subsequently, the parties were ordered to submit written closing arguments. Both parties submitted their closing arguments accordingly. 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 removing Employee from his position as an Educational Aide 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.¹ "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.²

SUMMARY OF TESTIMONY

The following represents a summary of the relevant testimony given during the Evidentiary Hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding.

Agency's Case-in-Chief

Charlotte Spann ("Spann") Tr. 8-50

Spann is currently employed by Agency as the Principal of Langley Elementary School ("Langley") and has held this position since the Fall of 2013. Spann first encountered Employee when he came to interview for a position in the Fall of 2014. Employee was an Educational Aide ("EA") at Langley while Spann was the Principal. Employee's responsibilities included supporting teachers with instructions, collect data as necessary, supporting with the transition of students to breakfast, lunch, their specialist classes, and during dismissal.

Spann used Agency's IMPACT evaluation tool to evaluate Employee during the 2014-2015 school year. IMPACT divides the educational aides' job into two components. Ninety percent of the evaluation goes toward educational aide standards related to job duties and

¹ 59 DCR 2129 (March 16, 2012).

² OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

responsibilities, and ten (10) percent goes toward “Commitment to School Community,” which is also divided into subdivisions. Educational Aides are evaluated during two cycles throughout the school year; Cycle 1 and Cycle 3. These categories are then combined and calculated in the IMPACT database with an overall number between 100 and 400. This number can be reduced if a staff member loses points under “Core Professionalism.” Staff members may only lose points under “Core Professionalism” if they do not meet the core professionalism standards.

Spann testified about Agency’s Exhibit 2, which summarizes the components of the IMPACT evaluation. It also illustrates how the overall evaluation number is calculated. Spann testified that an evaluation was done with Employee on February 5, 2015, which is included with Agency’s Exhibit 2.³ Spann generally conducts employee conferences during the end of a cycle to allow enough time to collect data on employees. Spann held a conference with Employee after his evaluation for Cycle 1.

Spann also testified regarding Agency’s Exhibit 6, which addresses Employee’s tardiness issues, which speaks to Employee’s Core Professionalism component of his evaluation. Employee’s assigned tour of duty was from 8:00 a.m. to 3:30 p.m. as set forth in the Langley Elementary School Staff Handbook.⁴ Spann testified that if a staff member is repeatedly tardy then it is reflected in their IMPACT evaluation under Core Professionalism and may result in corrective discipline.⁵

Spann stated that she held a conference with Employee regarding his cycle 3 evaluation on June 11, 2015. During this conference, Spann stated that she only talked about the Educational Aide standards in Employee’s evaluation report, and not the “Core professionalism” or “Commitment to School Community” standards. She stated that these two portions of the evaluation are optional for the principal to address in a conference.

Spann also testified about Agency’s Exhibit 3, which is the IMPACT guidebook for the Education Aides Group which provides an explanation of the IMPACT evaluation, how the scores are calculated, and the expectations for when a conference happens. The handbook explains to employees that “[a]s part of each assessment cycle, you will conference with your administrator. At this conference, you will receive feedback based upon the educational aide standards rubric and discuss next steps for professional growth.”⁶ Spann also read from the handbook which states, “While a conference to discuss your Commitment to the School Community rating is not required, you are encouraged to reach out to your administrator with any questions or concerns.”⁷

Spann stated that she normally sends out an e-mail before she has conferences with staff asking them to submit anything additional that she should consider prior to meeting with them. In this case, she recalled that Employee sent her some e-mails after the June 11, 2015, Conference. One of the e-mails was an appeal of Employee’s score based on additional

³ Tr. at 15.

⁴ Agency’s Exhibit 4, p. 31.

⁵ Tr. at 29.

⁶ Agency’s Exhibit 3, p. 6.

⁷ Agency’s Exhibit 2, p. 12.

information that Employee had provided.

Michelle Hudacsko (“Hudacsko”) Tr. 51-71

Hudacsko has been with Agency since August 2011 and is currently the Deputy Chief of IMPACT. In this capacity, she oversees the implementation of Agency’s evaluation system for school-based staff and school teachers.

Hudacsko also testified regarding Agency’s Exhibit 3, which is the guidebook pertaining to Educational Aides, which outlines the policies and procedures each school year for respective staff member’s evaluation. The IMPACT evaluation system is for school-based employees. The guidebook outlines the expectations for individuals within a particular type of role. It also provides opportunity for feedback from an evaluator about how an individual is meeting those expectations and to receive suggestions for professional growth. She testified that the IMPACT evaluation is not a one-size-fits all evaluation system and that there are over 20 different IMPACT groups which outline specific rules and responsibilities for individuals in particular roles. Group 17 is the IMPACT group for all educational aides.

Each school year the guidebooks are made available to all Agency employees. It is posted on Agency’s website and a copy is sent to each school and may be made available to staff members. An IMPACT evaluation for Education Aides is composed of 90 percent of Educational Aides (“EA”) standards, which are specific to their role as an EA. The other component on which they are evaluated is “Commitment to School Community,” which makes up ten (10) percent of the evaluation. Principals are responsible for evaluating EAs.

EAs are assessed two times throughout the year; generally around the midway point and then again at the end of the school year. At the end of the year, the two assessment scores are averaged together for the final IMPACT rating. Based on Employee’s IMPACT score, his final rating was “Ineffective.” Hudacsko described the process that allows for an Employee to make an appeal to the Chancellor if they disagree with their score or about the process of the IMPACT evaluation. She stated that a process violation of an IMPACT evaluation for an educational aide could be if a conference did not occur between an employee and the evaluator.⁸

The primary way that employees are informed of their final IMPACT score is by making the evaluation available through an Agency database. An e-mail is also sent to employees notifying them about their IMPACT evaluations. If an employee’s evaluation results in termination, they would be notified via regular mail, such as was the case here. Hudacsko testified that evaluators are not required to have an actual printed copy of an employee’s IMPACT evaluation at the time that they meet with employees for conferences.

⁸ Tr. at 61-62

Employee's Case-in-Chief***Labita Staton ("Staton")*** Tr.73-84

Staton is an assistant to Principal Spann. Staton stated that the procedures for meeting with Principal Spann regarding anything, including IMPACT evaluations, require that an appointment be set up through her, unless Principal Spann directly schedules a meeting.

Staton could not recall specifically if she was in the office on June 11, 2015, when Spann met with Employee regarding his IMPACT evaluation.⁹

Vincent Swann ("Employee") Tr. 84-102

Employee was an Educational Aide with Agency. He testified that he did not meet with Spann regarding his IMPACT evaluation in accordance with the IMPACT guidebook for Cycle 3, on June 11, 2015. Employee stated that because Spann's computer was experiencing issues on the day of the scheduled conference, she did not present him with the information in the IMPACT evaluation. Employee also asserts that he did not see the content of his IMPACT evaluation until he was mailed his termination letter as a result of an "Ineffective" rating.

Employee testified that there were a few dates (January 20 and 30, 2015) throughout the school year where he was marked tardy when he actually had approved leave slips from Principal Spann.¹⁰

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 17 (Educational Aides) which was evaluated during two cycles: Cycle 1 and Cycle 3. The conference for the first assessment cycle, Cycle 1, occurred on February 5, 2015. The conference for the second assessment cycle, Cycle 3, and when and if it actually occurred is in dispute. Agency contends that it occurred on June 12, 2015, while Employee maintains that he did not have a conference for Cycle 3. The IMPACT evaluation system used for Employee and Group 17 consisted of three components, namely:

(1) Education Aides Standards (CUST)—comprised of 90% of the Group 17 employees' scores;

⁹ Tr. at 83-84.

¹⁰ Tr. at 101.

(2) Contribution to the School Community—comprised of 10% of Group 17 employees’ scores

(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.¹¹

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 185.¹² An “Ineffective” rating subjects an employee to an immediate separation from their position with Agency.¹³

Governing Authority

DCMR §§1306.4 and 1306.5 gives the Superintendent authority to set procedures for evaluating Agency’s employees.¹⁴ 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 DCMR § 1401 provides as follows:

¹¹ See Agency’s Exhibit 2.

¹² Agency’s Exhibit 2.

¹³ See Agency’s Exhibit 3, at 28.

¹⁴ 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

1401.1: 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.*

The Collective Bargaining Agreement (CBA) between Agency and AFSME, Local 2921, the CBA under which Employee was a part of, does not contain language addressing performance evaluations.¹⁵ Furthermore, the 109th 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 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 IMPACT.

Accordingly, in reviewing this matter, I will address whether Agency followed the procedures it developed in evaluating its employee; 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 perform satisfactorily the duties of their position of employment.

Analysis

The D.C. Superior court in *Shaibu v. District of Columbia Public Schools*¹⁶ 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.”¹⁷ Additionally, it highlighted that “principals enjoy near total discretion in ranking their [employees]”¹⁸ when

¹⁵ See Agency’s Exhibit 5.

¹⁶ Case No. 2012 CA 003606 P (January 29, 2013).

¹⁷ *Id.* at 6.

¹⁸ *Shaibu*, (citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997)).

implementing performance evaluations.

Here, Spann testified credibly regarding Employee's IMPACT evaluations for cycles one and three for the 2014-2015 school year. Spann explained the two main components of Employee's evaluation, "Educational Aide Standards" and "Commitment to School Community," and her consideration of both in calculating Employee's score. Spann further testified regarding Employee's tardiness issues, which is also reflected in Agency's Exhibit 6. The tardiness issues resulted in Employee having points deducted under the evaluations "Core Professionalism" standard. Although Employee stated that he had approved leave for some of the dates he was marked tardy, there are numerous occasions illustrated in Agency's Exhibit 6 that demonstrate that Employee arrived for his tour of duty beyond the 8:00 a.m. start time for educational aides. Employee also asserts that he provided medical documents to support some of the days he was late for work. Despite Employee's assertions and documents submitted to support his position that he notified Agency that he was going to be tardy on a few occasions, these assertions do not cover every time Employee was unexpectedly tardy for his tour of duty. Employee was notified that excessive tardiness will be reflected in his IMPACT evaluation. "Excessive Tardiness" is defined as signing in after 8:00 am more than three times per month and/or signing in after 8:30 am at any time.¹⁹

Hudacsko, the Deputy Chief of IMPACT, also testified regarding the procedures and policies for carrying out an evaluation. Hudacsko credibly testified that IMPACT guidebooks for Group 17 employees, the group in which Employee belonged, was made available on Agency's website and also sent to the schools and made available upon request of an employee. She also stated that the primary way for an employee to get informed of their final IMPACT ratings is on Agency's database.

Both Spann and Hudacsko testified regarding the details and process of assessing an employee under the IMPACT evaluation system. They addressed the various components of calculating an IMPACT score and the conference requirement to be held between an employee and the evaluator. Hudacsko made it clear that based on the language in the IMPACT guidebook, that "a conference to discuss your Commitment to the School Community rating is not required, [however, employees] are encouraged to reach out to [their] administrator with any questions or concerns."²⁰ "Core Professionalism" is also not required to be addressed at this conference. However, the conference requirement does require that an evaluator, in this case, Spann, meet with Employee regarding the Educational Aide standards of the evaluation process.

Here, Employee testified that he did not have a conference with Spann on June 11, 2015, as indicated in his final IMPACT report²¹ Spann testified that she did have a conference with Employee on February 5, 2015, for Cycle 1, and June 11, 2015, for Cycle 3. Agency highlighted that "[w]hile a conference to discuss [an employee's] Commitment to the School Community rating is not required, [they] are encouraged to reach out to [their] administrator with any questions or concerns."²² This component, as set forth in the IMPACT guidebook, supports

¹⁹ Agency Exhibit 4, p. 31.

²⁰ Agency's Exhibit 3, p. 12.

²¹ Agency's Exhibit 2

²² Agency's Exhibit 3, p. 12.

Spann's contention that during a conference the educational aide standards are the only items that are required to be addressed. I find Spann's testimony that she held a conference addressing Employee's "Educational Aide Standards" under IMPACT credible. Although she may not have had the actual printout of the evaluation report due to computer issues, as asserted by Employee, I do find that Spann met the conference requirements of addressing Educational Aide Standards as part of the evaluation process with Employee.

Based on the aforementioned, I find that Agency followed the procedures it developed in evaluating its employees and that the "Ineffective" rating was supported by just cause. Accordingly, I must uphold Agency's decision to remove Employee from his position for failure to satisfactorily perform the duties of his position.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's decision to remove Employee from his position is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge