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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0158-11
KAREN IRBY,)	
Employee)	
)	Date of Issuance: May 9, 2014
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Thomas Ziehnert, Employee Representative)	
Sara White, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 4, 2011, Karen Irby (“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”) final decision to remove her from her position as a Teacher at Seaton Elementary School. Employee was removed because she received a rating of “Minimally Effective” rating under Agency’s IMPACT program for two consecutive years.¹ Employee’s termination was effective on August 12, 2011.

This matter was assigned to me in April of 2013. On May 20, 2013, I issued an Order rescheduling a prehearing conference to be held on June 24, 2013. During the conference, I determined that an evidentiary hearing was warranted based on the arguments presented by the parties. Therefore, an evidentiary hearing was scheduled to be held on September 19, 2013. On September 11, 2013, Agency submitted a consent request to continue the hearing. Agency’s request was granted, and a hearing was rescheduled for February 6, 2014. On February 24, 2014, I ordered the parties to submit written closing arguments on or before April 4, 2014. 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).

ISSUES

Whether Agency's removal of 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 argues she was terminated in retaliation based on her involvement with the Washington Teacher's Union. According to Employee, Agency's actions of retaliation were in violation of the Collective Bargaining Agreement with DCPS. Employee notes that she was a veteran teacher with nearly twenty (20) years of satisfactory performance ratings with Agency prior to being terminated.

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 her receiving a final IMPACT score of "Minimally Effective" during the 2009-2010 and 2010-2011 school years.

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 in the instant matter. Both Agency and Employee had the opportunity to present documentary and testimonial evidence during the course hearing to support their positions.

Kathryn McMahon-Klosterman (Transcript pages 16-74)

Kathryn McMahon-Klosterman (“McMahon”) is currently the Director of IMPACT operations at D.C. Public Schools (“Agency”). She has held this position for two years. Prior to this position, she was a Coordinator on the IMPACT evaluations team for one year. McMahon was not with the IMPACT team during the 2009-10 school year. Prior to being a Coordinator, McMahon was with a nonprofit called The New Teacher Project; prior to that, she was a teacher. McMahon has been working in education for ten years.

IMPACT started in the 2009-2010 school year. It is Agency’s performance evaluation system for teachers and non-teachers. Employees are evaluated based on their roles, and are placed in different groups. Each group has a unique set of evaluation components, and each component is comprised of several standards. The standards are rated on a scale from 1 to 4. Depending on the component, the assessment can be done multiple times throughout the school year.

Principals were provided training on IMPACT through D.C. Human Capital. They were trained on how to conduct evaluations and were provided materials to share with other staff members. Further, each group had an IMPACT guidebook which outlined the components and rubrics for each standard. Employees were given hard copies of the guidebooks and they were also available online during the 2009-10 and 2010-11 school years. Agency also had a variety of other sources available online through the educator portal.

The guidebooks outlined the nine core teaching standards and what it means to be ineffective, minimally effective, effective, or highly effective. The guidebook also provided very clear guidance on what was expected. For the 2009-10 and 2010-11 school years, employees who were rated ineffective, or received a rating between 100 and 174, were separated after one year; employees who were rated minimally ineffective, or received a rating between 175 and 249, were separated after two years; and Employees who were rated effective, or received a rating between 250 and 349, continued on their normal salary scale. Employees who were rated highly effective, or received a rating between 350 and 400, were eligible for an annual bonus.

Agency’s website is open and available to the general public. However, the educator portal is open to employees only. All employees with an email account and password have access to the educator portal. Currently, when employees are hired, they are provided a username and password.

McMahon knows Karen Irby (“Employee”) through overseeing the IMPACT database. The IMPACT database is where all IMPACT records are stored, including evaluations, observations, other components, as well as IMPACT final reports. McMahon’s team manages the database. The operations team has access to the database.

Employee was a part of Group 2 during the 2009-10 and 2010-11 school years. The guidebook for Group 2 during the 2009-10 school year had five components; four were reflected in a standard pie chart. The five components are: Teaching and Learning Framework (“TLF”), which is the observation rubric; non-value added (“NVA”), which is the student achievement

metric; Commitment to Student Community (“CSC”), which is the employee’s larger contribution to the school; student value added, which is another student achievement metric provided to all employees; and Core Professionalism, which all employees were scored on.

A teacher in Group 2 during the 2009-10 school year received five evaluations. The CSC was evaluated three times. The School Value-Added component was a score that was provided to teachers at the end of the year. An administrator, or a principal or assistant principal, conducted three of the evaluations and a master educator conducted the other two. The master educators are objective, outside observers who are content specific. The master educators use the same rubric as administrators. The administrator’s observations are due December 1st, March 15th, and June 15th; the master educator’s observations are due in February and in June. After the observations, the evaluator meets with the teacher to discuss scores, ratings, and possible suggestions.

During Cycle 1 for the 2009-10 school year, Douglass Rice, the School Administrator, was tasked with observing Employee. Douglass Rice conducted his Cycle 1 observation for Employee on November 5, 2009, and conducted the conference with Employee on November 20, 2009. His last update to the observation records was on November 30, 2009. Rice also conducted an observation of Employee during Cycle 2 and Cycle 3. Sherelle Lowe, a Master Educator, was also tasked with evaluating Employee for Cycle 1. Sherelle Lowe conducted her evaluation on September 23, 2009 and her conference was conducted on September 25, 2009.

Cynthia Robinson, a previous master educator, also conducted one of the master educator observations for Employee. Ms. Robinson was a master educator for two years and then she moved to a position which designed the teacher career ladder. Ms. Robinson is now an Assistant Principal with Agency. After the observations, the observer has 15 days to meet with the employee for the conference. All of Employee’s evaluations and conferences were conducted within the prescribed deadlines.

Once observation records are finalized, the administrator cannot go back in the database and make changes. Employees have access to evaluations as soon as they are finalized. Evaluators only have access to teachers for whom they are responsible for. For example, if an observer opened an observation for an employee in the database, no other administrator can touch it. At the end of the school year, after all assessments are completed, the evaluations are averaged and scored.

Core Professionalism is a measurement of four expectations for employees: attendance, on-time arrival, positive procedures, and respect. If all areas of Core Professionalism are met by the employee, then no points are deducted from the final score; however, if there is a concern in one of the areas of Core Professionalism, points are deducted from the final score. Master educators only review teachers’ performances with respect to the TLF component; only the administrators have the ability to rate Core Professionalism.

During the 2010 school year, changes were made to the observation rubric. Trainings on the changes were provided, and instructional coaches had meetings with staff members. Principals also shared updated expectations, and the educational portal included resources on the TEACH standards. Changes were also made to the structure of the student achievement metrics,

which was previously titled Non-Value-Added during the 2009-10 school year. The title was changed to Teacher Assessed Student Achievement. The weight of Commitment to School Community was changed from 5 percent to 10 percent of the evaluation. The School Value-Added component stayed at 5 percent, but for the Core Professionalism component, the number of deductions one could receive was raised.

Employee's observations for the 2009-10 school were documented in the database. For the 2009-10 school year, Employee received a score of 245, which is considered minimally effective. Employee was notified that she received this rating. She also received a minimally effective rating for the 2010-11 school year. Although Employee's position changed from kindergarten teacher to a head start teacher during the 2010-11 school year, she was rated on the appropriate rubric. As a result of her ratings, Employee was separated.

Cynthia Robinson-Rivers (Transcript pages 75-101)

Cynthia Robinson-Rivers ("Robinson-Rivers") currently works for Agency as an Assistant Principal for Literacy and Seaton Elementary School. Prior to this position, she was the Director of Teacher Retention and Recognition; prior to this position, Robinson-Rivers was working with the Master Educator program.

Master Educators are outside evaluators who observe, provide feedback, and conduct formal evaluations of teachers. The Master Educator Program began in 2009 with about 20 to 32 Master Educators. The Director of the Master Educator Program assigns classrooms for observation. Each master educator is content specific. A Master Educator would travel to different schools throughout the city, observing teachers for a half hour. Then they would type of feedback and meet with the teacher to provide the feedback.

When Robinson-Rivers was a Master Educator, her specific content was early childhood education. She began teaching in 1998, and taught pre-K3, pre-K4, kindergarten, and first grade. As a Master Educator, she observed teachers within the pre-K, pre-K4 and kindergarten classrooms. During the fall of the 2009-10 school year, Robinson-Rivers observed Employee. She had no knowledge of Employee, nor did she meet Employee prior to the observation. She visited Employee's classroom for a half of an hour, took notes, reviewed them according to the IMPACT rubric, and then assigned a score for each of the different rubric indicators.

The TLF T1 standard involved leading a well-organized and objective driven lesson. For the TLF T1 category, Robinson-Rivers gave Employee a score of 2, and suggested that Employee make the objective clearer and make sure the students understood the objective. For TLF T2, Robinson-Rivers gave Employee a score of 2. This standard involves explaining content clearly; it is primarily the teacher's verbal explanations. Employee's score was based on Robinson-Rivers' view that there were very few instructions given to the small groups within Employee's classroom. For TLF T3, Robinson-Rivers gave Employee a score of 2. This standard involves making sure that the students who are far below level are able to access the information. Students who are above level are pushed to learn more. Employee's score for TLF T3 was based on the lack of a good balance of teacher directives versus student centered. Robinson-Rivers noted that the teacher directives should have been shorter. The standard for TLF T4 is that a

student should have lots of different ways to learn whatever objective a teacher has for them. For example, a student may learn better through doing or seeing. Robinson-Rivers notes that Employee received a 2 in this area because she lacked in promoting mastery. For TLF T5, which involved checking for student understanding, Employee received a score of 2 because she did not check often to make sure that students understood. Employee did not receive a score for TLF T6 because there were no apparent student misunderstandings. For TLF T7, which involved developing higher-level understanding through effective questioning, Employee received a 1 because she rarely or never asked these types of questions. For TLF 8 TB, which involved maximizing instruction time, Employee received a 1 because of the time she spent on transitions. Robinson-Rivers noted that she recalled spending a good amount of time talking to Employee about strategies to maximize instruction time. For TLF T9, which involved building a supportive, learning focused, classroom community, Employee received a 2 because there were lots of instances of the students not getting along with one another, and there was evidence of a lack of investment in this area. In the comment area of the scoring, Robinson-Rivers provided Employee with her availability in case she had any questions. Robinson-Rivers also provided Employee with articles on how to incorporate higher level thinking questions and transition songs.

Karen Irby (Transcript pages 102-138)

Karen Irby (“Employee”) worked as an ET-15 Teacher with Agency. She taught kindergarten, pre-kindergarten and a Head Start class. Employee always had a combination of pre-K and kindergarten students, and taught kindergarten from 1990-2010. She taught the Head Start class in 2010. In total, Employee worked for Agency for 21 years. She was terminated in 2011 due to receiving low IMPACT scores.

During the 2009-10 school year, Douglass Rice was the principal. Employee worked with Mr. Rice for nine years. Employee noted that sometimes her relationship with Rice was good, but at other times, their relationship was a little rocky. Over the years, Employee and Mr. Rice had disagreements and issues. Employee noted that she did not agree with all of Rice’s decisions. She did not believe that some of the decisions that Rice made were the best decisions for the children or for the overall school climate. For example, there was a situation where Employee had a student who was placed in her classroom, and the teacher next door to her was having problems with the student and the student’s mother. Without having a conference with Employee, Mr. Rice placed the student in her classroom. Employee disagreed with it and she had to request Union representation over the matter. She explained that the child was not in the appropriate school level.

Another example of Employee disagreeing with Rice’s decisions is when she was moved from a classroom on the first floor to a classroom on the second floor, which was a smaller room. Employee noted that she did not receive a conference on this issue. She was concerned about the space with the new room and the number of children she had in her classroom. Employee noted that she was unable to set up the room appropriately for early childhood. She requested to be moved to a room on the first floor, but the room was given to another teacher. She had to request Union representation on this issue, but there was no resolution. Employee stated that she had to call Clara Canty, Mr. Rice’s supervisor, and she eventually received a bigger room.

During the IMPACT process, Mr. Rice observed and evaluated Employee. She received her first minimally effective rating during the 2009-10 school year and her second minimally effective rating during the 2010-11 school year. Prior to receiving her first minimally effective review, Employee received reviews of Satisfactory and above. She did not receive any reviews below satisfactory. She noted that she had six or seven reviews with Rice before receiving the minimally effective ratings.

Employee was a part of the School Advisory Chapter Committee for the Washington Teachers Union. This committee helped iron out any issues the teachers were having in the building. The committee brought these issues to the Principal. Employee was also on the restructuring committee and was the building representative during the 2010-11 school year. As a building representative, Employee's responsibilities were to make sure that the contract was followed and to provide support to the teachers. Employee believed that her role as a building representative affected her relationship with the Principal. She noted that the atmosphere in the meetings became hostile and Mr. Rice's tone and responses were short and abrupt. Employee felt like this made for very difficult meetings. For example, Employee noted that during one meeting, she was complimenting the staff, and Mr. Rice yelled out "come on Ms. Irby, you are just blabbering at the mouth now." Employee believed that this was rude and unprofessional.

In 2010, while Employee was the building representative, some teachers had brought to her attention some concerns regarding funds. They were concerned because they needed supplies. According to Agency's contract with the Union, teachers were allotted \$250.00 to purchase classroom materials to update the classroom. However, during the time that Mr. Rice was the principal, Employee noted that the teachers did not receive the funds. Employee requested for Mr. Rice to provide her information on how much money was in the student activity fund. She noted that there was ice cream that was being sold every day and there was no evidence of where the money was going. In response to her questions regarding the funds, Mr. Rice replied "oh, the ice cream's not making much money." Employee also asked about the money going into the soda machine, and Mr. Rice gave her the same answer. Mr. Rice explained that he would have to show her the budget. He provided Employee a form that he had filled out. The information on the budget was ultimately not provided to her. She noted that every week she would see a car coming with boxes of ice cream coming into the school and then ice cream boxes piled high in the trash. Employee believed that Mr. Rice was not forthcoming with the money, or where it was going. Eventually, Mr. Rice provided the staff the money for the materials.

Employee was moved to the Head Start Program in the 2010-11 school year. She does not know why she was moved and she did not request to be moved. She questioned the Office of the Superintendent of Education regarding her credentials, but was told that her credentials were okay and that she could work with the younger children. She also had a conversation with Mr. Rice regarding the move. She requested to observe other Head Start teachers. Mr. Rice told her that she could, but he never checked into it.

Employee noted that the Head Start Program is an early intervention program that supports parents and the children with getting children in school and getting them prepared to enter formal education. Employee had three and four year olds in her classroom and stated that their skills and abilities were different than that of the kindergarten-age students. She noted that

her work in the Head Start Program was a lot different than what she had been doing prior to that. She stated that the three year olds needed to move around more and needed interaction with manipulatives. However, sitting down and going through a lesson in a curriculum is expected of kindergarten students. Employee noted that Head Start is geared toward social development.

Employee stated that the move to the Head Start Program was difficult because she was used to teaching five year olds. She received suggestions from her colleague and read through new curriculum to make sure that she understood what needed to be done. Employee further indicated to the Principal that she needed support. Employee also reached out to Ms. Womack, her instructional coach. She also sent in a survey indicating that she needed support.

An instructional coach supports the classroom and makes sure that teachers are doing what they are supposed to do. They observe the classroom pursuant to IMPACT procedures, make sure that the teachers are following the rubric, and provide suggestions. Employee tried to make an appointment with her instructional coach and they communicated via email. Employee's instructional coach was specifically assigned to Employee's school and was present in the building. However, Employee states that her instructional coach never came to her classroom. Employee noted that it is better for an instructional coach to see what someone is doing and where their strengths and weaknesses are so that they can provide better suggestions and strategies. Employee did not find her instructional coach's support to be helpful.

Employee expressed her concerns regarding her instructional coach in a letter addressed to Mr. Rice. In the letter, she stated that she was switched to a new grade, new age group, new curriculum, and new classroom, but was not provided any support. Thereafter, Employee, Mr., Rice, and Employee's Field Representative had a meeting, but Ms. Womack did not come to her classroom. Employee noted that Ms. Womack and Mr. Rice's relationship seemed to be very close. She stated that there were times when she would walk into the office and hear them talking and laughing loud. There were also times when she would go to see Ms. Womack to have a conversation with her, but she could not have the conversation because Mr. Rice would be present. Ms. Womack did not come to any of the Union's meetings. Employee felt that she needed to speak with Dr. Alexander, Mr. Rice's supervisor, regarding her concerns.

During a workshop that Employee attended, she spoke with Ms. Salerno, a person who worked with instructional coaches. Employee asked Ms. Salerno questions concerning the instructional coaches and what was supposed to be going on, and she informed her of what was happening at her school. Thereafter, Ms. Salerno told Employee that she would contact Ms. Sylvia, her supervisor. After a subsequent workshop, Employee and Ms. Sylvia spoke outside and Ms. Sylvia indicated to Employee that they would meet with each other after the workshop. Employee and Ms. Sylvia never met with each other.

Employee stated that she did not receive adequate training on IMPACT. She found the morning workshops to be of no help. She noted that there was very little, if any, training that was geared toward children that were under three, four, and five years of age. Employee received five evaluations and five post-observation conferences during the 2009-10 school year. She received the same for the 2010-11 school year. Based off of the scores she received, Employee was

determined to be minimally effective and was terminated. She understood that after two minimally effective ratings, she could be subject to termination.

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 during the 2009-2010 and 2010-2011 school years. According to the documents of record, Agency conducts annual performance evaluation for all its employees. During the 2009-2010 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.²

The IMPACT process required that all school-based staff receive written feedback regarding their evaluations, in addition to a 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 2009-2010 and 2010-2011 school years, there were twenty (20) IMPACT grouping of DCPS employees. Employee's position, General Education Teacher, was within Group 2. Under IMPACT, Employee was required to be evaluated three (3) times each year. The first assessment cycle ("Cycle 1") occurred on or before December 1st; the second cycle ("Cycle 2") occurred on or before March 1st, and the third assessment cycle ("Cycle 3") occurred on or before June 15th. During an assessment cycle, Employees in Group 2 were observed five (5) times during the course of the year: three observations were conducted by the teacher's principal or supervisor, and two observations were conducted by an expert Master Educator. In this case, Employee was assessed on the following IMPACT components:

- 1) Teaching and Learning Framework ("TLF")—a measure of a teacher's instructional expertise. This component accounted for 80% of the IMPACT score.
- 2) Non-Value-Added Student Achievement Growth ("NVA")—a measure of non-DC CAS-based measure of a teacher's impact on student learning. This component accounted for 10% of the IMPACT score.
- 3) Commitment to the School Community ("CSC")—a measure of the extent to which school-based personnel support their colleagues and their school's local initiatives. This component accounted for 5% of the IMPACT score.

² Agency's Answer and Agency's Brief, *supra*.

- 4) School-Value Added (“SVA”)—a sophisticated statistical measure of a school’s impact on student achievement, as measured by the DC CAST (District-wide assessment given in the spring of each year). This component accounted for 5% of the IMPACT score.
- 5) Core Professionalism (“CP”)—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. If an employee received a “Minimally Effective” rating two (2) consecutive years in a row, then that employee was subject to termination under the IMPACT program. The scoring range is as follows:

- 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.

In this case, I find that Agency followed the relevant 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 a total of ten (10) times during in the 2009-2010 and 2010-2011 school years.

Specifically, during the 2009-2010 school year, Douglass Rice conducted observations of Employee on November 5, 2009, February 18, 2010, and May 24, 2010. Rice also held post-observation conferences with Employee on November 20, 2009, March 3, 2010, and June 3, 2010. Master Educator, Sherelle Lowe, evaluated Employee on September 23, 2009, and held a post-observation conference with Employee on September 25, 2009. In addition, Master Educator, Deanine Moore, observed Employee on March 11, 2010, and held a post-observation conference with Employee on March 26, 2010. During the 2010-2011 school year, Rice observed Employee on November 3, 2010, February 23, 2011, and May 31, 2011. Rice held post-observation conferences with Employee on November 10, 2010, February 28, 2011, and June 13, 2011. Master Educator, Cynthia Robinson, evaluated Employee on November 1, 2010, and held a post-observation conference with her on November 4, 2010. On May 24, 2011, Master Educator, Janine Levin, conducted an observation of Employee. Levin subsequently held a post-observation conference with Employee on May 26, 2011.

The testimony adduced during the hearing further supports a finding that Employee had access to her IMPACT assessments after they were completed in the database. Employee’s 2009-2010 final IMPACT score was 245, which is “Minimally Effective” under the IMPACT scoring rubric. Employee’s 2010-2011 final IMPACT score was 206; which is also “Minimally

Effective.” Employee argues that she did not receive adequate training on IMPACT and that she found the workshops to be unhelpful. Employee also stated that there was very little, if any, training that was geared toward children that were under three, four, and five years of age. However, Employee does not argue that the evaluating Principal’s or Master Educator’s comments were untrue; nor does she proffer any evidence that directly contradicts their factual findings. It should be noted that the D.C. Superior court in *Shaibu v. D.C. Public Schools*³ explained 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.”⁴ 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”⁵ 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 Agency’s witnesses provided testimony that was consistent with the documents submitted pertinent to Employee’s IMPACT scores. 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.⁶ Because performance evaluations are “subjective and individualized in nature” and 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.”⁷ Thus, I find that it was within both the Principal’s and the Master Educators’ discretion to rank and rate Employee’s performance. Moreover, the undersigned Administrative Judge is not in the position to recommend that Employee receive a higher IMPACT rating since the Undersigned is unfamiliar with the nature and details of Employee’s position. Accordingly, I find that Employee was assessed under IMPACT in a fair and unbiased manner. I also find that the evaluators did not abuse their discretion in evaluating Employee’s work performance. Accordingly, there is no credible reason to disturb Employee’s IMPACT scores.

³ Case No. 2012 CA 003606 P (January 29, 2013).

⁴ *Id.* at 6.

⁵ *Id.* Citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

⁶ 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).

⁷ 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).

Employee also argues that she was terminated in retaliation for her involvement with the WTU. Namely, Employee notes that she was on her school's restructuring committee and was the union building representative during the 2010-11 school year. It should be noted that in order to establish a *prima facie* case of retaliation under D.C. Code § 1-2525(a) (2001), an employee must by show: (1) that he or she was engaged in a statutorily protected activity, (2) that his or her employer took an adverse action, and (3) that there was a causal relationship between the protected activity and the adverse action.⁸

Here, Employee states that her role as a building representative affected her relationship with the school principal and that the atmosphere in the meetings with Mr. Rice eventually became hostile. However, Employee has failed to provide any *credible* evidence to prove that her involvement with the union was a substantial contributing factor which led to her termination. Employee's termination was based on her being rated as "Minimally Effective" for two consecutive years under IMPACT. Thus, I find that Agency did not act in retaliation when it terminated Employee.

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

⁸ *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 369 (D.C. 1993).