

Notice: This decision may be formally revised before it is published in the District of Columbia Register and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE ¹ ,)	OEA Matter No. 1601-0066-22R23
)	
v.)	Date of Issuance: June 20, 2023
)	
D.C. PUBLIC SCHOOLS,)	MONICA DOHNJI, Esq.
Agency)	Senior Administrative Judge
)	

Employee, *Pro Se*
Gehrie Bellamy, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On July 15, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public Schools’ (“Agency”) decision to terminate him from his position as a Custodian, effective July 30, 2022. Employee was terminated for having a ‘Minimally Effective’ rating under the D.C. Public Schools’ Effective Assessment System for School-Based Personnel (“IMPACT”), during the 2021-2022 school year; after having received a rating of ‘Developing’ during the 2020-2021 school year. OEA issued a Request for Agency Answer to Petition for Appeal on August 1, 2022. Agency submitted its Answer to Employee’s Petition for Appeal on August 30, 2022. This matter was initially assigned to the undersigned on September 2, 2022.

A Status/Prehearing Conference was held on October 5, 2022, with both parties present.² Thereafter, on October 6, 2022, I issued a Post Status/Prehearing Conference Order requiring the parties to address the issues raised during the October 5, 2022, Conference. Agency’s brief was due on or before October 27, 2022, while Employee’s brief was due on or before November 17,

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

² Agency filed a Prehearing Statement on September 30, 2022. During the October 5, 2022, Status/Prehearing Conference, Agency requested that its Prehearing Statement be considered, in-lieu of a Post-Status/Prehearing Conference brief. Agency also submitted additional documentation in support of its position.

2022. Agency had the option to submit a sur-reply by December 1, 2022. Agency resubmitted its Prehearing Statement on November 1, 2022. Employee filed his brief on November 18, 2022. Agency did not file a sur-reply. On February 21, 2023, I issued an Initial Decision (“ID”) in this matter reversing Agency’s decision to terminate Employee.³

Agency appealed the ID to the OEA Board, which remanded the matter to the undersigned in an Opinion and Order (“O&O”) dated June 1, 2023.⁴ The OEA Board in its O&O stated that: “The Initial Decision did not address whether adjustments – including deadlines, the number of assessments, and type of assessments – could be made by Agency [to the IMPACT process]. Therefore, we remand this matter to the Administrative Judge for further consideration.”⁵ After considering the parties’ arguments as presented in their submissions to this Office, I have decided that there are no material facts in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency can make adjustments such as (1) deadlines, (2) the number of assessments, and (3) type of assessments to the IMPACT process.

BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations (“DCMR”) Ch. 600, et seq (December 27, 2021) states:

The burden of proof for material issues of fact shall be by a preponderance of the evidence. “Preponderance of the evidence” shall mean:

the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.⁶

OEA Rule § 631.2 *id.* states:

For appeals filed under § 604.1, 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.

³ *Employee v. District of Columbia Public Schools*, OEA Matter No: 1601-0066-22, Initial Decision (February 21, 2023).

⁴ *Employee v. District of Columbia Public Schools*, OEA Matter No: 1601-0066-22, Opinion and Order on Petition for Review (June 1, 2023).

⁵ *Id.*

⁶ OEA Rule § 699.1.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW⁷

The following findings of fact, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process before OEA. D.C. Official Code § 1-606.03 (2001) gives this Office the authority to review, *inter alia*, appeals from separations pursuant to a performance rating. Here, Employee was employed as a Custodian with Agency in 2018. Employee was placed at the Bunker Hill Elementary School during the 2020-2021 and the 2021-2022 school years. His performance was assessed using the D.C. Public Schools' Effective Assessment System for School-Based Personnel ("IMPACT"). For the 2020-2021 school year, Employee received an IMPACT rating of "Developing". He subsequently received an IMPACT rating of "Minimally Effective" for the 2021-2022 school year and he was terminated by Agency due to a decline in his scores. Employee was on approved FMLA from April 27, 2022, to June 10, 2022. Employee was also a member of the Teamster Union.

Employee's Position

Employee notes in his Petition for Appeal that he was terminated while he was on approved leave. Employee states that he was on approved medical leave from April 2022 to June 2022. Employee further avers that he was on approved medical leave during the second part of the IMPACT evaluation. He explains that he was not given the opportunity to prove his work ability during that time. Thus, Employee concluded that he was unfairly evaluated. Employee also asserts that he did not receive a conference, meeting or corrective action to warn him of the termination. Employee cites that the principal requested to have a conference with him on June 14, 2022. Employee notes that the last corrective action issued against him was in December of 2021. Employee also explains that he informed the principal that although he was back in school full time, he could not meet with the principal because he was still under medical treatment per orders from his doctor.⁸

Employee avers that although he was aware of the 'Developing' IMPACT rating he received during the 2020-2021 school year, he was not provided with any guidance or training on how to improve his work performance. He maintains that he was required to perform the workload of two (2) people. Employee asserts that he was constantly harassed by the school principal and the school foreman. Employee also avers that he did not have access to his email while he was out on medical leave, thus, he did not receive the principal's email requests for a post assessment conference.⁹

⁷ Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

⁸ Petition for Appeal (July 15, 2022). See also Employee's Brief (November 18, 2022).

⁹ Employee's Brief (November 18, 2022).

Agency's Position

Agency asserts in its August 30, 2022, Answer that in 2005, pursuant to the DC Omnibus Authorization Act, PL 109-356 (D.C. Code §1-617.18), DCPS was granted authority to develop its own evaluation process and tool for evaluating its employees and it exercised this managerial prerogative when it created IMPACT. Agency argues that it followed proper D.C. statutes, regulations, and laws in conducting Employee's performance evaluation. Agency notes that, IMPACT is a performance evaluation system utilized by DCPS to evaluate school-based personnel for the 2018-2019, 2019-2020, 2020-2021, school years.¹⁰

Agency provides that Employee's position, Custodian, was within IMPACT Group 19. Agency further provides that Employee was assessed during two (2) assessment Cycles - Cycles 1 and 3. He was observed and evaluated on all IMPACT components under Group 19, and he received a 'Minimally Effective IMPACT rating during the 2021-2022 school year, after having received a 'Developing' IMPACT ratings for the 2020-2021 school year. Agency states that it properly conducted Employee's performance evaluation using the IMPACT process. Because Employee's IMPACT rating declined between two consecutive school years from 'Developing' to 'Minimally Effective' his employment was terminated pursuant to the IMPACT procedure.¹¹

Agency asserts that although Employee was on FMLA from April 27, 2022, until June 10, 2022; according to the DCPS Office of Equity, an employee may still be rated for IMPACT, so long as they were continuously available for more than half of the school year. Agency maintains that Employee "was only absent the second to last month of the 2021-2022 school year, he was available over seven (7) months in order to be evaluated and thus, was eligible to receive an IMPACT rating."¹² Additionally, Agency cites that it made two (2) attempts to schedule a conference with Employee to discuss his 2021-2022 IMPACT ratings. Agency states that the second attempt was made on June 15, 2022, five (5) days after Employee returned from his FMLA absence.¹³

Governing Authority

District of Columbia Municipal Regulation ("DCMR") 5-E DCMR §§1306.1, and 1306.4-5 gives the Superintendent authority to set procedures for evaluating Agency's employees. The above-referenced DCMR sections provide that each employee shall be evaluated each semester by an appropriate supervisor and rated annually prior to the end of the year, based on procedures established by the Superintendent. 5-E DCMR 1401 provides in pertinent part as follows:

1401.1: Adverse action shall be taken for grounds that will promote the efficiency and discipline of the service and shall not be arbitrary or capricious.

¹⁰ Agency's Answer (August 30, 2022). *See also* Agency's Prehearing Statements (September 30, 2022, and November 1, 2022).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* It should be noted that Agency did not provide this Office with copies of the alleged emails.

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.

Furthermore, the D.C. Code § 1-616.52(d) states, in pertinent part:

Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter for employees in a bargaining unit represented by a labor organization.

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 of District of Columbia Public School employees shall be a non-negotiable item for collective bargaining purposes. D.C. Code § 1-617.18.

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

Pursuant to the OEA Board’s directive in the June 1, 2023, O&O, I will address whether Agency could make adjustments such as (1) deadlines, (2) the number of assessments, and (3) type of assessments to the IMPACT process.

The IMPACT Process

IMPACT was the performance evaluation system utilized by DCPS to evaluate its employees during 2021-2022 school year. According to the record, Agency conducts annual performance evaluations for all its employees. Agency utilized IMPACT as its evaluation system for all school-based employees.¹⁴

Employee’s position, Custodian at Bunker Hill Elementary School was within Group 19. According to the IMPACT process, Group 19 employees had two (2) assessment cycles – typically in January and June of each year. Here, Employee was assessed during Cycle 1 and Cycle 3 for the 2020-2021 and 2021-2022 school years.

Employee was assessed on a total of three (3) IMPACT components, namely:

¹⁴ Agency’s Answer, *supra*.

- 1) Custodian Standard (CUST) – comprised of 90% of Group 19 employees’ scores;
- 2) Commitment to the School Community (CSC) – 10% of Group 19 employees’ scores; and
- 3) Core Professionalism (CP) – 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:
 - 1) Attendance;
 - 2) On-time arrival;
 - 3) Compliance with policies and procedures; and
 - 4) Respect.

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 (Individuals who receive a rating of ‘Developing’ for three (3) consecutive years are subject to separation from the school system);
- 4) Effective = 300-349 points; and
- 5) Highly Effective = 350-400 points.

IMPACT process also provides that employees are entitled to a conference with the administrator as part of each assessment cycle. It further notes that if the administrator makes at least two attempts to schedule a conference with the employee prior to the Cycle deadline and the employee is unable to meet or unresponsive, the assessment will be valid without the conference. Valid attempt methods include, but are not limited to, phone calls, text messages, emails, notes in your school inbox, and/or in-person conversations.

Analysis

In the instant matter, Employee received thirty (30) points deductions under the CP component for the 2021-2022 school year. Employee received a final IMPACT score of 238, and his rating was ‘Minimally Effective’ for the 2021-2022 school year. For the 2020-2021 school year, Employee received a final IMPACT score of 253, after a ten (10) points deduction for the CP component, and a final IMPACT rating of ‘Developing’. Pursuant to the IMPACT process, if an employee’s performance declines from ‘Developing’ to ‘Minimally Effective’, the employee will be subject to separation.¹⁵ Applying this to the instant matter, because Employee’s IMPACT rating declined from a ‘Developing’ during the 2020-2021 school year to a ‘Minimally Effective’ rating during the 2021-2022 school year, Employee would have been subject to termination.

For the 2021-2022 school year, Employee was entitled to two (2) conferences which were to be held after he was assessed. Employee had one (1) conference on February 11, 2022. He asserts that he did not receive a conference, meeting or corrective action to warn him of the

¹⁵ *Id.* at Tab 11 pg. 21.

termination. However, Employee conceded that the principal requested to have a conference with him on June 14, 2022, after he returned to work from FMLA on June 13, 2022. He claimed that he was out on FMLA and did not have access to his work email. The IMPACT process provides that “[a]s part of each assessment cycle, [the employee] *will have a conference with [their] administrator*. At this conference [the employee] will receive feedback based on the Custodian Standards rubric and discuss next steps for professional growth. If the administrator *makes at least two attempts to schedule a conference with the employee prior to the Cycle deadline and the employee is unable to meet or unresponsive, the assessment will be valid without the conference...* Valid attempt methods include, but are not limited to, phone calls, text messages, emails, notes in your school inbox, and/or in-person conversations.”¹⁶ (Emphasis added). Additionally, the IMPACT 2021-2022 Custodian- Holistic Evaluation provided by Agency specifically stated that “... In order for an assessment to be valid without a conference, an evaluator must make two attempts.”¹⁷ (Emphasis added).

Additionally, pursuant to the 2020-2021 and 2021-2022 District of Columbia Public Schools Effectiveness Assessment System for School-Based Personnel, Group 19 Custodial Staff guide:

Note: ... if, while employed by DCPS, you have an absence which causes you to miss one or more of your assessments, DCPS may at its discretion make adjustments to the IMPACT system to ensure that you receive a final IMPACT score for the year. These adjustments may include, among other things, changing deadlines, changing the number of assessments, and changing the type of assessment. Also, if unexpected circumstances interfere with the completion of one or more of your assessments, DCPS may nevertheless issue a final IMPACT score and consequences based on the remaining assessments. Finally, DCPS reserves the right to make any additional modifications to the IMPACT system during the school year. DCPS will provide notice of any such modifications prior to their implementation. (For the purposes above, “assessments” refers to observations, conferences, holistic reviews, data, and other means of measuring performance.) (Emphasis added).¹⁸

According to the above-referenced provision, if an employee’s absence causes them to miss one or more assessment, it is within Agency’s discretion to adjust the IMPACT system to ensure that an employee receives a final IMPACT score. These adjustments include making *changes to deadlines, number of assessments, and the type of assessment*. This section further provides that assessments include conferences. Here, the Cycle 3, deadline for the 2021-2022 school year was June 9, 2022.¹⁹ The record shows that Employee was still out on approved leave on June 9, 2022. Agency’s first attempt to schedule a conference with Employee

¹⁶ *Id.* at Tab 11, pg. 6.

¹⁷ Agency’s Answer, *supra*, at Tab 3, pg. 1.

¹⁸ *District of Columbia Public Schools’ Answer to Employee’s Petition for Appeal*, Tabs # 11, pg. 21 and 12, pg. 21 (August 30, 2022).

¹⁹https://dcps.dc.gov/sites/default/files/dc/sites/dcps/page_content/attachments/IMPACT2021-AnnualGuide_updated9-16-v2.pdf, at pg. 9. Retrieved on February 8, 2022.

after the Cycle 3 evaluation was on June 8, 2022. Because Employee's absence prevented Agency from conducting the required IMPACT post-assessment conference prior to the Cycle deadline, I find that Agency was within its rights to change the deadline to complete the conference.

Furthermore, the IMPACT process requires Agency to make two (2) post-assessment conference attempts prior to the Cycle deadline. Since I have found that it is within Agency's managerial discretion to change deadlines for an assessment such as the post-assessment conference, I further find that Agency was not restricted as to when it could make the required two (2) post-assessment conference attempts. In this instance, Agency attempted to schedule a post-assessment conference with Employee via an email dated June 8, 2022, however, Employee was out on FMLA. Agency made a second attempt to schedule a post-assessment conference via email dated June 15, 2022. As noted above, the IMPACT process provides in relevant parts that "...If the administrator *makes at least two attempts to schedule a conference with the employee* prior to the Cycle deadline *and the employee is unable to meet or unresponsive, the assessment will be valid without the conference...* Valid attempt methods include, but are not limited to, phone calls, text messages, emails, notes in your school inbox, and/or in-person conversations."²⁰ Because Employee's absence caused him to miss the post-assessment conference, it was within Agency's discretion to change the deadline for the post-assessment conference to ensure he received a final IMPACT score. Moreover, in March of 2019, Agency's Office of Equity issued an 'IMPACT Conference FAQ'. This document provides in pertinent part that, "if a staff member goes out on long-term continuous leave such that it is impossible to conference (e.g., FMLA . . .), you may finalize the conference without making two attempts."²¹ Based on the foregoing, I find that it was within Agency's discretion to adjust the IMPACT system because Employee was out on extended leave (FMLA), and thus, unable to meet with Agency. Accordingly, I further conclude that Employee's Cycle 3 assessment is valid without a post-assessment conference since Agency made two (2) attempts to schedule the conference.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE:

/s/ Monica N. Dohnji
MONICA DOHNJI, Esq.
Senior Administrative Judge

²⁰ *Id.* at Tab 11, pg. 6.

²¹ Agency attached the March 2019 IMPACT Conference FAQ to its Petition for Review.