THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
OSCAR HARP, III, Employee	
v.	OEA Matter No.: 1601-0356-10
D.C. PUBLIC SCHOOLS, Agency	Date of Issuance: February 16, 2016

OPINION AND ORDER
ON
PETITION FOR REVIEW

Dr. Oscar Harp ("Employee") worked as a School Psychologist with the D.C. Public Schools ("Agency" or "DCPS"). On July 2, 2010, Agency issued written notice to Employee informing him that he would be terminated because he received a final rating of "Ineffective" under IMPACT, Agency's performance assessment system. The effective date of the termination was July 16, 2010.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on August 3, 2010. In his petition, Employee argued that Agency unfairly terminated him based on improper evaluation procedures.[2] Employee requested that this Office reinstate him with back pay.[3] Agency filed its Answer to the Petition for Appeal on September 7, 2010, asserting that Employee received

[1] *Petition for Appeal* (August 3, 2010).
[2] *Id*. at 2.
[3] *Id*.

assessments during Cycles 1 and 3 of the 2009-2010 school year as required under IMPACT procedures.[4] According to Agency, Employee received a final IMPACT score of "Ineffective" and was therefore subject to termination.

After conducting an Evidentiary Hearing, the OEA Administrative Judge ("AJ") issued an Initial Decision ("ID") on May 12, 2014. The AJ noted that Employee properly received evaluations during Cycle 1 and 3 during the 2009-2010 school year. However, the AJ determined that Agency failed to comply with the IMPACT process because: 1) Group 12 employees relied on the IMPACT process that was communicated to them at the beginning of the school year as a guide for developing their duties; 2) changes were made to the IMPACT scoring process in March and June of 2010; 3) Group 12 members, including Employee, were prejudiced by the changes in scoring because they were denied adequate notice of the new scoring standards and had no opportunity to adjust their duty plans; and 4) but for the adjustments to the scoring rubric, Employee would likely not have received an IMPACT rating of "Ineffective" for the 2009-2010 school year.[5] In addition, the AJ held that Agency violated D.C. Municipal Regulation ("DCMR") § 1306.2, which requires performance ratings to reflect the level of competence of employees who have worked for the same supervisor for at least ninety (90) days. The AJ stated that the acting supervisor, Dr. Ramona Rich, only supervised Employee's work performance for six (6) weeks during the 2009-2010 school year.[6] As a result, Agency's action of terminating Employee was reversed because Agency failed to establish that he was terminated for "just cause" as required under the terms of the Collective Bargaining Agreement ("CBA") between Employee's union and

[4] District of Columbia Public Schools' Answer to Employee's Petition for Appeal, p.2 (September 7, 2010).
[5] *Initial Decision* at 20.
[6] *Id*.

Agency.[7] Accordingly, Agency was ordered to reinstate Employee to his last position of record with back-pay and benefits lost as a result of his termination.[8]

On June 16, 2014, Agency filed a Petition for Review with the OEA Board. Agency argues that the AJ's findings were not based on substantial evidence and that the decision to reverse Employee's termination was based on an erroneous interpretation of the law.[9] Specifically, Agency contends that the AJ's reference to changes to the IMPACT scoring rubric in March and June of 2010 were sua sponte and that Employee has not argued that DCPS committed harmful error in instituting changes to the scoring process.[10] Agency further states that the AJ should have reopened the record so that it could have been given an opportunity to explain the changes in scoring criteria during the 2009-2010 school year. According to Agency, even if it did err, Employee was not substantially harmed by the application of its procedures and would have still received a final IMPACT score of "Ineffective."[11] Employee did not submit a response to Agency's Petition for Review.

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
>
> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
>
> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;

[7] *Id*.
[8] *Id*. at 21.
[9] *Amended Petition for Review*, p. 2 (June 16, 2014).
[10] *Id*.
[11] *Id*. at 3.

(c) The findings of the Administrative Judge are not based on substantial evidence; or

(d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

IMPACT Process

Regarding the IMPACT process, this Board is guided by D.C. Official Code § 1-617.18 and Section 15.4 of the Collective Bargaining Agreement ("CBA") between Agency and the Washington Teachers Union ("WTU"). The 109th Congress of the United States enacted the 2005 District of Columbia Omnibus Authorization Act, P.L. 109-356, which 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 for collective bargaining purposes.

Moreover, section 15.4 of the CBA provides that "the standard for separation under the evaluation process shall be "just cause", which shall be defined as *adherence to the evaluation process only*. (Emphasis added). Accordingly, the Board must determine whether Employee's termination under IMPACT was supported by just cause. As referenced above, 'just cause' is defined as adherence to the *evaluation process only* (emphasis added).

During the 2009-2010 school year, there were twenty (20) IMPACT groups of DCPS employees. Group 12 employees consisted of School Psychologists, who were classified as Related Service Providers ("RSPs"). Under IMPACT, Group 12 employees were required to be assessed during Cycle 1 and Cycle 3 of the school year.[12] Each RSP was further entitled to a post-assessment conference with their evaluating Program Manager or Special Education Coordinator. At the beginning of the 2009-2010 school year, Group 12 employees were given an IMPACT Assessment Guidebook that outlined the criteria for assessing work performance. RSPs were assessed on the following IMPACT components: 1)

[12] The Cycle 1 assessment ended on December 1st and the Cycle 3 assessment cycle ended on June 15th of the school year.

Related Service Provider Standards ("RSP"); 2) IEP Quality ("IEPQ"); 3) Assessment Timeliness ("AT"); and Core Professionalism ("CP").[13]

According to the 2009-2010 IMPACT Guidebook for Group 12, the RSP standard initially accounted for 70% of Employee's score. IEPQ was weighted at 15%; and AT was weighted at 15%.[14] As discussed herein, subsequent changes to the scoring rubric during the school year resulted in the Related Service Provider Standard accounting for 100% of Employee's final IMPACT score. School-based personnel assessed through IMPACT received a final score at the end of the school year. If an employee received a final rating of "Ineffective," then that employee was subject to termination. [15]

Whether the AJ's Findings Were Based on an Erroneous Interpretation of Statute

In its Amended Petition for Review, Agency asserts that the AJ's Initial Decision was based on an erroneous interpretation of regulation. According to Agency, the AJ incorrectly determined that it committed 'harmful error' when it adjusted the IMPACT process in March and June of 2010."[16] In support thereof, Agency states that there is no evidence in the record pertaining to changes in the IMPACT scoring process during March and June of 2010. However, Agency's argument is belied by the record. Employee received a final IMPACT score of 119 for the 2009-2010 school year and was terminated because he received a rating of "Ineffective."[17] On the first page of Employee's final IMPACT report, DCPS included the following notice to Group 12 employees:

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[13] Core Professionalism was scored differently from the other standards. CP scores were a measure of four (4) basic professional requirements for all school-based personnel: on-time arrival, compliance with policies and procedures, attendance, and respect. An employee's scores were rated as either "Meets Standards," "Slightly Below Standard," or "Significantly Below Standard." If an employee received a "Meets Standard," then there was no change in his or her final score. If an employee received a "Slightly Below Standard" on any part of the CP rubric during a cycle, and no ratings of "Significantly Below Standard" for that cycle, then ten (10) points are deducted from the teacher's final evaluation score. A "Significantly Below Standard" in any CP category resulted in twenty (20) points being deducted from the final IMPACT score.

[14] *D.C. Public Schools' Pre-hearing Statement* (September 14, 2012).

[15] The scoring range was as follows: Ineffective = 100-174 points; Minimally Effective = 175-249 points; Effective = 250-349 points; and Highly Effective = 350-400 points.

[16] *D.C. Public Schools' Amended Petition for Review*, p. 2 (June 16, 2014).

[17] *Id*.

> "In June, we communicated that IEP Quality (IEPQ) and Assessment Timeliness (AT) were not going to be included in your IMPACT assessment due to challenges with the data. The weight for Related Service Provider Standards (RSP) has increased to absorb the 30 percent that originally went to IEPQ and AT…."[18]

Thus, by Agency's own written admission, the IMPACT scoring rubric for Group 12 employees was changed in June of 2010 for the purpose of correcting problems with the data for IEPQ and AT components. Although the actual document that memorialized the aforementioned changes to scoring was not produced by either party, this Board finds that there is credible evidence in the record to support a finding that Agency unilaterally altered the IMPACT process for Group 12 employees at least once during the 2009-2010 school year. Accordingly, the AJ did not render his decision based on an erroneous interpretation of statute, regulation or law.

Whether the AJ's Findings Were Based on Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[19] In *Baumgartner v. Police and Firemen's Retirement and Relief Board*, the D.C. Court of Appeals 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.[20]

Agency argues that it was not given an opportunity to present an explanation about why the IMPACT scoring rubric was adjusted for Group 12 employees during the 2009-2010 school year.[21] According to Agency, the AJ could have reopened the record and required the parties to submit briefs on this issue. It is also Agency's contention that the AJ made no determination as to how the change in

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[18] *Id*. at Tab 1. *See* Final 2009-10 IMPACT Report for Oscar J. Harp, III, Group 12.
[19] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).
[20] 527 A.2d 313 (D.C. 1987).
[21] *D.C. Public Schools' Amended Petition for Review*, p. 3.

scoring had an effect on Employee's final IMPACT score. This Board finds that Agency's arguments lack merit, as this Office has previously adjudicated the issue of whether DCPS properly adhered to the IMPACT process for Group 12 School Psychologists during the 2009-2010 school year.

In *Bates v. D.C. Public Schools*, OEA overturned Agency's decision to terminate a School Psychologist who received a final IMPACT rating of "Ineffective" for the 2009-2010 school year.[22] The AJ in *Bates* held that DCPS failed to properly adhere to the IMPACT process for Group 12 employees because the scoring rubric was altered in March and June of 2010; thereby, prejudicing employees who detrimentally relied on the guidebook that was distributed to them at the beginning of the school year.[23] The AJ further determined that DCPS' failure to follow the correct IMPACT procedures constituted a harmful error and ordered that employee be reinstated with back pay.[24]

It should be noted that in *Bates*, Agency produced two letters during the Evidentiary Hearing regarding changes to the IMPACT process for RSPs during the 2009-2010 school year.[25] On March 4, 2010, Director of Teacher Human Capital, Jason Kamras, issued a letter to all Group 12 employees. The notice was issued for the purpose of clarifying the IMPACT process for RSPs and stated that the IEPQ component would be eliminated for Cycle 1 of the school year. On June 2, 2010, Kamras issued a second notice to Group 12 employees, informing them that the RSP component was going to be weighted at 100% of their IMPACT score.[26] In both *Bates* and the instant case, Dr. Turner-Wingate was the supervising Program Manager and was responsible for evaluating all DCPS School Psychologists.

[22] OEA Matter No. 1601-0339-10 (November 12, 2013).
[23] *Id*. at 12.
[24] Agency did not file a Petition for Review with this Board or with the District of Columbia Superior Court.
[25] *Id*. at 5-6. *See* Agency's Exhibit 2, March 4, 2010 letter to all DCPS Related Service Providers; Agency Exhibit 3, June 2, 2010 Letter to all DCPS Related Service Providers.
[26] *Id*.

Moreover, in *Ehiemua v. D.C. Public Schools*, this Board denied Agency's Petition for Review and upheld the AJ's finding that DCPS failed to adhere to the IMPACT process for Group 12 employees during the 2009-2010 school year.[27] The employee in *Eheinmua* also worked as a School Psychologist and was terminated after receiving a final IMPACT score of "Ineffective." The AJ in that case held that Agency improperly altered certain IMPACT scoring components that were communicated to the School Psychologists at the beginning of the school year.[28] In addition, the AJ stated that the changes to the process constituted harmful error because Ehiemua, as well as other psychologists, relied on the standards for performance that were communicated to them at the beginning of the school year. OEA's Board agreed with the Initial Decision and ordered DCPS to reinstate Ehiemua to his previous position and reimburse him for all back pay and benefits lost as a result of his termination. Agency did not appeal this Board's decision.

Agency implies that any changes to the scoring rubric were diminutive and that it did not err in its application of the IMPACT process. This Board disagrees. Employee was evaluated during Cycle 1 and Cycle 3 of the 2009-2010 school year; however, Agency did not adhere to the IMPACT process in this case. Pursuant to Section 15.4 of the CBA, "the standard for separation under the evaluation process shall be 'just cause,' which shall be adherence to the evaluation process only." In June of 2010, Agency implemented changes to the IMPACT process, which was a deviation from the guidelines that were originally communicated to Group 12 employees at the beginning of the school year. In his Initial Decision, the AJ highlighted several reasons why Employee was prejudiced by these changes and why Agency failed to establish that he was terminated for cause.[29] Moreover, it is clear from the record that Agency was afforded several opportunities to present evidence to justify why it made modifications to

[27] *Opinion and Order on Petition for Review*, OEA Matter No. 1601-0337-10 (October 28, 2014).
[28] *Id*. at 2. Ehiemua and other Group 12 employees were informed that the IEPQ and AT components would not be included in the final IMPACT score because of challenges with the data.
[29] *Initial Decision*, 20-21.

the IMPACT process. After reviewing the documentary and testimonial evidence from both parties, the AJ in this case determined that Agency failed to properly adhere to the IMPACT process. This Board believes that the AJ performed a comprehensive analysis of the relevant material and finds that the Initial Decision was based on substantial evidence.

1. *Harmless Error*

Under OEA Rule 631.3, harmless procedural error is defined as "an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action." Agency argues that the testimony adduced during the evidentiary hearing illustrates that Employee's supervisors, Dr. Turner-Wingage and Dr. Ramonia Rich, believed that his overall work performance during the 2009-2010 school was ineffective.[30] Agency notes that the highest score Employee could have received would have still been "Ineffective" using the original IMPACT scoring rubric.

The original weights for Group 12 employees were: 70% Primary Rubric, 15% Assessment Timeliness, and 15% IEPQ. According to Agency, the IEPQ component was never going to be scored for Psychologists because they were not case managers.[31] Agency states that the Primary Rubric would have absorbed the IEPQ weight of 15%; thus, giving the Primary Rubric a new weight of 85% and the Assessment Timeliness would be weighted at 15%. Utilizing this model, Agency proffers that the maximum score Employee could have received was 158.15 and that he would still have been terminated based on an "Ineffective" IMPACT score.[32]

Agency's argument fails for several reasons. In accordance with the CBA, the AJ was limited to determining whether the IMPACT evaluation process was followed. If Agency in fact adhered to the evaluation process, then it can establish grounds for Employee's termination. However, Agency did not

[30] *D.C. Public Schools' Amended Petition for Review*, p. 4.
[31] *Id*.
[32] *Id*.

follow the IMPACT process in this case, and it has not provided any credible justification for failing to do so. Reducing the scoring rubric from multiple categories to one category during the course of the school year was a substantial variation to the IMPACT process. In *Ehiemua*, this Board stated that "Agency cannot be allowed to tamper with the process it set once it was in place. The more prudent thing to do would have been for Agency to wait until the following school year to implement any changes to the evaluation process."[33] Notwithstanding Agency's contention that Employee was an ineffective psychologist, there is no reasonable explanation to vindicate its actions. Accordingly, this Board believes that Agency committed harmful error when it changed the IMPACT process and grading rubric for Group 12 employees during the 2009-2010 school year.

Whether Agency Violated Chapter Section 1306 of the D.C. Municipal Regulations

Lastly, Agency argues that the AJ erred by concluding that it violated DCMR § 1306 because Employee was not supervised by the same supervisor for at least ninety (90) days. Section 1306.5 of the DCMR gives the District of Columbia Superintendent the authority to establish procedures for evaluating DCPS employees. Official performance evaluation ratings for all employees of the Board of Education are required to be inclusive of work performed through June 30th, unless otherwise specified.[34] Under DCMR § 1306.2, all performance ratings must reflect the level of competence of employees who have worked for the same supervisor for at least ninety (90) days without change in position prior to the end of rating the period.

During the OEA evidentiary hearing, Program Manager, Dr. Rich, testified that she supervised Employee from the end of August 2009 until approximately the end of September 2009.[35] Dr. Rich began supervising Employee again in May of 2010, in order to help balance the case load among

[33] *Opinion and Order on Petition for Review* at 8.
[34] DCMR § 1306.1.
[35] Transcript, Volume 2, p. 249.

Program Managers.[36] On June 10, 2010, Employee had a post-assessment conference for Cycle 3 with Dr. Rich, the last assessment of the school year. Therefore, Dr. Rich only served as Employee's supervisor for approximately seventy (70) days during the relevant rating period. This amount of time is below the required ninety (90) period; therefore, the AJ correctly determined that Agency violated DCMR § 1306.2.[37]

This Board finds that the Initial Decision was not based on an erroneous interpretation of the law. In addition, we find that the AJ's decision was supported by substantial evidence in the record. Based on the foregoing, Agency's Petition for Review must be denied.

[36] Transcript, Volume 1, p. 173-174; 207; Employee Exhibit 3.

[37] Agency cites to D.C. Official Code § 1-616.52(d), which states that "[a]ny 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 the labor organization." According to Agency, the CBA precedes the D.C. Official Code and does not address a ninety (90) day supervision requirement. The Board finds this argument to be without merit, as Agency does not argue that the language of the CBA conflicts with D.C. Code.

ORDER

Agency's Petition for Review is **DENIED**. Therefore, Agency's termination action is **REVERSED**. Accordingly, Agency shall reinstate Employee to his last position of record or a comparable position. Additionally, it must reimburse Employee all back-pay and benefits lost as a result of the termination action. Agency shall file with this Board within thirty (30) days from the date upon which this decision is final, documents evidencing compliance with the terms of this Order.

FOR THE BOARD:

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.