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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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| _____ |) | |
| In the Matter of: |) | |
| |) | |
| SOLOMON EHIEMUA, |) | |
| Employee |) | OEA Matter No. 1601-0337-10 |
| |) | |
| v. |) | Date of Issuance: July 1, 2013 |
| |) | |
| DISTRICT OF COLUMBIA PUBLIC SCHOOLS, |) | MONICA DOHNJI, Esq. |
| Agency |) | Administrative Judge |
| _____ |) | |
| Olekanma Ekekwe-Kauffman, Esq., Employee Representative |) | |
| Sara White, Esq., Agency Representative |) | |

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 22, 2010, Solomon Ehiemua (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public Schools’ (“DCPS” or “Agency”) decision to terminate him effective July 16, 2010. Employee was a School Psychologist at Mamie D. Lee School at the time of his termination. Employee was terminated for receiving an “Ineffective” rating under the IMPACT, DC Public Schools’ Effective Assessment System for School-Based Personnel (“IMPACT”), during the 2009-2010 school year. On August 23, 2010, Agency filled its Answer to Employee’s Petition for Appeal. On September 8, 2010, Employee filed a Motion for Directed Verdict on Petition.

This matter was assigned to the undersigned Administrative Judge (“AJ”) in July of 2012. Thereafter, on July 27, 2012, I issued an Order Convening a Status Conference for August 15, 2012. On July 31, 2012, the parties submitted a Consent Request to reschedule the August 15, 2012, Status Conference. This request was granted in an Order dated August 1, 2012. The Status Conference was rescheduled for August 29, 2012. Both parties were in attendance. Thereafter, on September 11, 2012, the undersigned AJ issued a Post Status Conference Order requiring the parties to submit briefs. Both parties complied. Because this matter could not be resolved based on the documents on record, the undersigned issued an Order scheduling a Prehearing Conference for November 28, 2012. Following the Prehearing Conference, the undersigned issued an Order scheduling an Evidentiary Hearing for March 13, 2013 and March 18, 2013. Both parties were present for the Evidentiary Hearing. Following the Evidentiary Hearing, I issued an Order dated April 12, 2013, notifying the parties that the transcripts from the Evidentiary Hearing were available. The Order also provided the parties with a schedule for submitting their written closing arguments. Both parties have submitted their written closing arguments. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency's action of separating Employee from service 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, 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.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office. While Agency argues that this Office has limited jurisdiction over this matter, Employee contends that his termination was improper because Agency used the wrong evaluation criteria for his evaluation. Employee also asserts that his termination was based on 1) age discrimination; 2) in retaliation for pursuing his rights as an employee of DCPS; and 3) the decision to terminate him was arbitrary and capricious.

Governing Authority

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. Agency notes that because Employee was a member of Washington Teachers' Union ("WTU") when he was terminated, the Collective Bargaining Agreement ("CBA") between Agency and WTU applies to this matter and as such, OEA has limited jurisdiction over this matter. In *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), the Court of Appeals held that OEA is not jurisdictionally barred from considering claims that a termination violated the express terms of an applicable collective bargaining agreement. The court explained that the Comprehensive Merit Personnel Act ("CMPA") gives this Office broad authority to decide and hear cases involving adverse actions that result in removal, including "matters covered under subchapter [D.C. Code §1-616] that also fall within the coverage

of a negotiated grievance procedure.”¹ In this case, Employee was a member of the Washington Teachers Union (“WTU”) when he was terminated and governed by Agency’s CBA with WTU. Based on the holding in *Watts*, I find that this Office may interpret the relevant provisions of the CBA between WTU and DCPS, as it relates to the adverse action in question in this matter. Section 15.4 of the CBA between WTU and Agency provides in pertinent part as follows:

15.4: 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, I am primarily guided by §15.4 of the CBA between WTU and DCPS in reviewing this matter, and as such, I will only address whether or not Agency’s termination of Employee pursuant to his performance evaluation was supported by just cause. As referenced above, ‘just cause’ is defined as adherence to the *evaluation process only* (emphasis added). Thus, OEA’s jurisdiction over this matter is limited only to Agency’s adherence to the IMPACT process it instituted at the beginning of the school year.

The IMPACT Process

IMPACT is the performance evaluation system utilized by DCPS to evaluate its employees during 2009-2010 school year.² According to the record, Agency conducts annual performance evaluation for all its employees.³ 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.⁴

With the IMPACT system, all staff received written feedback regarding their evaluation, as well as 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 am, the day after the end of each cycle. For the 2009-2010 school year, if employees had any issues or concerns about their IMPACT evaluation and rating, they were encouraged to contact DCPS’ IMPACT team by telephone or email. At the close of the school year, all employees received an email indicating that their final scores were available online. Additionally, a hard copy of the report was mailed to the employees’ home address on file.

Prior to instituting IMPACT, all principals and assistant principals at DCPS were provided with training materials, which they then used to conduct a full-day training with all staff members in September 2009. The training detailed the IMPACT process, consequences, and positive and negatives associated with each full final IMPACT rating. Each staff member was provided with a full IMPACT guidebook, unique to their evaluation group. The guidebooks were delivered to the employees’ schools and were also available online via the DCPS website. Throughout the year, the IMPACT team visited schools to answer questions as well as to ensure that the IMPACT hotline was available to all staff members via email and/or telephone to answer questions and provide clarification.

¹ Pursuant to D.C. Code § 1-616.52(d), “[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” (emphasis added).

² Agency’s Answer (August 25, 2010). *See also* Agency’s Brief (October 5, 2012).

³ *Id.*

⁴ *Id.*

For the 2009-2010 school year, there were twenty (20) IMPACT grouping of DCPS employees. For the 2009-2010 IMPACT evaluation, School Psychologists were classified as “Related Service Providers”. Employee’s position – School Psychologist, was within Group 12. The IMPACT process for Group 12 employees consisted of two (2) assessment cycles: the first assessment cycle (“Cycle 1”), had to occur by February 1st; and the second assessment cycle (“Cycle 2”) had to occur by June 15th. As part of each assessment cycle, Group 12 employees were also entitled to have a conference with their Program Manager/Special Education Coordinator from the DCPS Office of Special Education, wherein, the employees receive written feedback based on the Related Service Provider Standards rubric, along with a discussion of the next steps for professional growth.⁵ According to the Group 12 IMPACT Assessment Handbook distributed to Group 12 employees at the beginning of the 2009 – 2010 school year, these employees were assessed on the following four (4) IMPACT components, namely:

1) Related Service Provider Standards

1) Domain 1: Assessment

- Standard 1: Standard Assessment Battery
- Standard 2: Assessment Report Format
- Standard 3: Assessment Report Content

2) Domain 2: Service Delivery

- Standard 1: Skill Building
- Standard 2: Due Diligence
- Standard 3: Productivity

3) Domain 3: Documentation

- Standard 1: Documentation Format
- Standard 2: Intervention Activity
- Standard 3: Missed Sessions
- Standard 4: IEP Report Cards

2) IEP Quality (IEPQ)

- 1) Present Levels of Performance
- 2) Goals
- 3) Service and Supplemental Aides
- 4) Least Restrictive Environment
- 5) Extended School Year Services

3) Assessment Timeliness (AT) – (Scored once a year, and tracked in the Special Education Data System – SEDS)

4) 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:

- 1) Attendance;
- 2) On-time arrival;
- 3) Compliance with policies and procedures; and
- 4) Respect.

⁵ Group 12 IMPACT Assessment Handbook - See Agency’s Exhibit 9.

Group 12 employees were also provided with an explanation of how they would be scored. School-based personnel assessed through IMPACT, ultimately received a final IMPACT score at the end of the school year of either:

- 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.⁶

On March 4, 2010, Agency's Director of Teacher Human Capital Jason Kamras sent out a letter to all DCPS Related Service Providers in an attempt to clarify the IMPACT process for Group 12 employees. Specifically, Agency sent this letter as an attempt to explain the Group 12 IMPACT process in the event that one of the components listed above does not apply to a particular Group 12 employee. To address this problem, Agency noted that it had established four subgroups within Group 12 to include:

1. Group 12a: RSPs who write IEPs and conduct student assessments – These individuals were assessed using the following IMPACT Assessment Components; 1) RSP Standards (70%); 2) IEP Quality (15%); and 3) Assessment Timeliness (15%).
2. Group 12b: RSPs who do not write IEPs but do conduct student assessments - These individuals were assessed using the following IMPACT Assessment Components; 1) RSP Standards (85%); and 2) Assessment Timeliness (15%).
3. Group 12c: RSPs who write IEPs but do not conduct student assessments - These individuals were assessed using the following IMPACT Assessment Components; 1) RSP Standards (85%); and 2) IEP Quality (15%).
4. Group 12d: RSPs who do not write IEPs and do not conduct student assessments - These individuals were assessed using the IMPACT Assessment Component RSP Standards (100%).

The March 4, 2010 letter also informed the Related Service Providers that the IEP Quality component will be eliminated and will not be counted for Cycle 1 final IMPACT scores. The letter noted that only IEPs written on March 25, 2010 or later will be eligible for assessment. The Letter further noted that if an employee did not have any IEPs left to complete for the remainder of the year, they will be moved to either Group 12b or Group 12d, depending on whether they also conducted assessments.⁷

Again on June 2, 2010, Jason Kamras sent out another letter to DCPS Related Service Providers informing them of yet another adjustment to the Group 12, 2009 – 2010 IMPACT Assessment. This letter highlighted the following changes to the Group 12, 2009 – 2010 IMPACT Assessment components:

1. Adjustment 1: IEPQ weight decreased from 15% to 0%
2. Adjustment 2: AT weight decreased from 15% to 0%
3. Adjustment 3: RSP weight increased from 70% to 100%.

⁶ *Id.*

⁷ March 4, 2010 Letter to All DCPS Related Service Providers – *See* Agency's Exhibit 8.

In addition, the Letter noted that the Productivity Standard under the RSP component would not be included in the RSP Standard score calculation.⁸

SUMMARY OF MATERIAL TESTIMONY

Agency's Case in Chief

1. Maria Turner-Turner-Wingate (Transcript pgs. 18-154)

Dr. Maria Turner-Wingate (“Dr. Turner-Wingate”) has worked with DCPS for about seven (7) years. For school year 2009-2010, she was a Program Manager. She became the Program Manager in September of 2009. As a Program Manager, she supervised school psychologists and the school psychology program. Prior to 2009, Dr. Turner-Wingate was a school Psychologist. Employee was one of the Psychologists she supervised during the 2009-2010 school year. Dr. Turner-Wingate testified that she used the IMPACT evaluation system which was introduced that year to evaluate Psychologists and provide them direct feedback about their performance. (Tr. pg. 20). According to Dr. Turner-Wingate, she evaluated Employee twice during the 2009-2010 school year. She explained that as part of the evaluation process, she looked at Employee’s assessment reports; she got attendance, performance, as well as families/student and faculty interaction feedback from the Principal at the school where Employee was based; and IEP documentation and progress notes. (Tr. pgs. 20-21). Dr. Turner-Wingate stated that, because IMPACT was new, she held meetings with the School Psychologists at the beginning of the school year during the open staff meeting, and in their case conferences in October and subsequent months. (Tr. pg. 22). Dr. Turner-Wingate testified that they went over the IMPACT rubric specifying to the Psychologists specifically what they needed to do to earn a point of 4, 3, 2, or 1 according to the impact rubric. (Tr. pg. 22). Dr. Turner-Wingate also testified that all the Psychologists she supervised were invited to the case conferences, and she went over what they would be evaluated under the IMPACT Process. (Tr. pgs. 22-23).

Additionally, Dr. Turner-Wingate testified that she completed Employee’s first IMPACT evaluation at the end of January 2010, and she had a conference with him at the beginning of February 2010, to provide him with feedback on his IMPACT score. (Tr. pg. 25). According to Dr. Turner-Wingate, Employee had some concerns about his scores. She stated that Employee expressed that the IMPACT tool as a whole was not appropriate to evaluate him based on the work that he did at Mamie D. Lee. Dr. Turner-Wingate explained that Mamie D. Lee’s population used to be called “mental retardation” (“MR”) because most of the students there had that disability classification. However, it is now called “intellectual disability” since most of the students have at minimum a moderate degree of disability, and as such, it is a unique population within the school system. (Tr. pgs. 25-26). Dr. Turner-Wingate testified that the IMPACT tool was appropriate as it was the tool used to evaluate all related service personnel such as Social Workers and Psychologists. (Tr. pg. 26). Dr. Turner-Wingate testified that Employee was evaluated a second time and she again had a conference with him. She noted that during this conference, Employee stated again that he did not believe the IMPACT tool was fair and he requested to speak with Dr. Turner-Wingate’s direct supervisor to discuss it further. (Tr. pg. 27). Dr. Turner-Wingate stated that Employee’s final IMPACT rating for school year 2009-2010 was “Ineffective” which meant he was subject to be separated. (Tr. pg. 27).

Dr. Turner-Wingate testified that in addition to assessments, Employee also conducted behavioral support services, which include counseling intervention services with the students at Mamie D. Lee. Dr. Turner-Wingate stated that DCPS has specific guidelines on what information needed to be documented with

⁸ *Id.*

regards to the services delivered, when they are delivered, and the student's progress on delivery. She explained that Employee was evaluated on all of these as she reviewed the documentations for these services. (Tr. pg. 28). Dr. Turner-Wingate also testified that the reason Employee got an "Ineffective" was because he did not follow the guidelines that were set forth during the 2009-2010 school year regarding how things should be documented and how reports should be written. (Tr. pg. 30). According to Dr. Turner-Wingate, employees had explicit instructions on how to do their jobs during the monthly staff meetings and case conferences. Reports were done every month during the case conferences. She stated that they also went over the reports and aligned them with the templates found in the guidebook and the related service provider handbook which were both given to school Psychologists, including Employee, at the beginning of the school year. (Tr. pgs. 30 & 32-33). Dr. Turner-Wingate also testified that they had professional development sessions that were always focused around topics used for School Psychologists in terms of what they did in schools. (Tr. pg. 31).

According to Dr. Turner-Wingate, she held mandatory case conferences on a monthly basis which were open to all School Psychologists. She tracked attendance through the use of a sign-in sheet. She testified that Employee missed the first few case conferences. (Tr. pgs. 33-34). She explained that Employee attended three (3) out of the seven (7) case conferences. (Tr. pg. 35). Dr. Turner-Wingate noted that although she had office hours for School Psychologists, Employee never availed himself of this opportunity. However, he attended the professional development meetings offered. (Tr. pgs. 36-37). Dr. Turner-Wingate, is not physically located at the school, she does conduct observations of school Psychologists. She explained that she actually observed Employee conducting an IEP meeting, and she met with him a couple of times just to check in with him. (Tr. pg. 37). Dr. Turner-Wingate received feedback on Employee's performance from Dr. Grillo, the school principal. (Tr. pg. 37). She stated that Dr. Grillo was not completely happy with Employee, specifically regarding his interaction with the other Mamie D. Lee Psychologists. She stated that she discussed Dr. Grillo's concerns with Employee. (Tr. pg. 38). Dr. Turner-Wingate testified that she informed her supervisor Dr. Fener via email about Employee's dissatisfaction with his IMPACT scores at the conclusion of both the first and second cycle, along with Employee's request to meet with her. (Tr. pgs. 42-43). Dr. Turner-Wingate stated that she never informed Employee that she could not really evaluate him because his duties were significantly different from the others as Employee claimed in his June 16, 2010, email to her. (Tr. pgs. 44-45).

Dr. Turner-Wingate explained the IMPACT tool utilized in evaluating Employee and the score Employee received in each section. She used the operational rubric which was given to all Psychologists in evaluating Employee. For the first cycle, she testified that the Related Service Provider ("RSP") section of the evaluation is made up of the assessment reports and the service delivery of the school Psychologist. She noted that the standard assessment battery included the cognitive assessment, review of educational rating, as well as whatever other measures necessary. Dr. Turner-Wingate testified that Employee did not follow the required report template format explicitly. (Tr. pgs. 48-51). Dr. Turner-Wingate also testified that although the Due Diligence component was part of the IMPACT tool for evaluating employees for the 2009-2010 school year, employees were not rated on the Due Diligence component because the guidelines were developed too late. (Tr. pg. 54). Additionally, Dr. Turner-Wingate testified that the employees did not receive a score for the Productivity component of the IMPACT tool because there were issues with the database tracking mechanism. According to Dr. Turner-Wingate, because school Psychologists, including Employee only did assessments; they did not receive a score on the Documentation format component of the IMPACT tool. She further explained that although Employee was one of two Psychologists who did interventions, she was concerned that he did not receive the guidelines needed to appropriately document the service, thus she did not score him for this component. However, Dr. Turner-Wingate testified that Employee received a score of one (1) for the Intervention Activity component because the information was not

appropriately documented. (Tr. pgs. 55-57). Under the Missed Session component of the IMPACT tool, Dr. Turner-Wingate testified that Employee documented when a session was missed, however, he did not provide how the service would be made up. (Tr. pg. 57). Dr. Turner-Wingate additionally noted that Employee received a score of one (1) under the IEP component because there were no IEP report cards to document student progress. (Tr. pgs. 57-58). She stated that while the related service providers were responsible for entering the IEP report cards into the database, she is unsure as to who presents them to the parents. (Tr. pg. 137).

According to Dr. Turner-Wingate, Employee was scored in the Individual Education Plan Quality (“IEPQ”) section, but this score was not reflected in the final IMPACT calculation because there were lots of complaints across the school system regarding the IEP quality section, and the fact that they had not received sufficient training in that section. She stated that the entire IEPQ section was thrown out completely and not included in the first or second assessment rating. (Tr. pgs. 58-60). Dr. Turner-Wingate testified that under the Core Professionalism (“CP”) section which takes into account the employee’s attendance, timeliness, whether or not they followed policies and guidelines, and respect for others, Employee received a minus twenty (-20). She explained that this section is based on observation and feedback received from the principal in terms of attendance, timeliness, respect, if they participated in monthly case conferences, professional development, and staff meetings. (Tr. pgs. 61-62). Dr. Turner-Wingate further explained that under the CP section, a ‘Meets Standard’ gets a zero (0) point deduction from the total IMPACT score for the particular cycle; a ‘Slightly Below Standard’ (one incident) gets a ten (10) points deduction; whereas a ‘Significantly Below Standard’ (two or more incidents) gets a twenty (20) point deduction. Dr. Turner-Wingate also explained that, during the 2009-2010 school year, an employee could only lose a total of twenty (20) CP points for both the first and second cycle. (Tr. pgs. 61-63). As it pertained to Employee, Dr. Turner-Wingate noted that per her observation during the first cycle, while Employee attended staff meetings and professional development, he did not attend mandatory case conferences. She further noted that Dr. Grillo also had some concerns regarding Employee’s attendance during the first cycle assessment. Dr. Turner-Wingate later noted that the service provider handbook does not state that case conferences are mandatory, however, she explained that it does highlight that the Psychologists’ participation will be included in annual performance reviews. (Tr. pgs. 147-149). She testified that although she did not discuss Dr. Grillo’s concerns with Employee because her conference with Employee did not go well, Employee had Dr. Grillo’s evaluation of him. (Tr. pg. 101). Dr. Turner-Wingate also testified that she provided Employee with a feedback/growth plan at the end of the first cycle assessment. She also went over the growth plan with Employee when she met with him to try and help him perform better during the next cycle assessment. Dr. Turner-Wingate stated that because Employee was upset during the meeting, she had to bring in another program manager to assist her in explaining everything to Employee. (Tr. pgs. 65-66).

Dr. Turner-Wingate testified that the second cycle for related services providers spanned from February 2, through June 15, 2010. She stated that she did not fill out the IEPQ rating for this cycle because it was completely thrown out. She testified that for this cycle, Employee was evaluated on the RSP and CP. She also stated that the same components used under RSP and CP sections for the first cycle were used for the second cycle to evaluate Employee; however, different samplings were used for the second cycle assessment, which had to be dated between February 2 and June 15. She explained that while it was not necessary for her to observe Employee, she gave him an ‘NA’ for Skill Building since she was not able to observe Employee because she missed the session. (Tr. pgs. 69-73). According to Dr. Turner-Wingate, Employee did not get a score under the due diligence component for the second cycle because he did not have any missed services to document, and as such did not have to implement any due diligence guidelines. (Tr. pgs. 74-75). Dr. Turner-Wingate testified that the Productivity component was also thrown out during the second cycle. (Tr. pg. 75). She also stated that Employee scored a four (4) for Documentation Format

component; a four (4) for Missed Session component; and a one (1) for Intervention Activity component because he did not appropriately document the parameters in the IEP. Dr. Turner-Wingate also asserted that Employee received a three (3) for Individual Education Plan (“IEP”) report cards because most of the required components were in the IEP report cards. (Tr. pgs. 76-77). She testified that for CP, Employee received a ‘Slightly Below Standard’ for attendance; ‘Significantly Below Standard’ for policy and procedure, and respect. For the growth plan, she stated that she did a repeat of the first cycle, then for the second cycle, indicated that he had shown improvement in some aspects, but that there were still some concerns, and provided recommendations. (Tr. pgs. 80-83). Dr. Turner-Wingate also noted that Employee likely missed February’s case conference because he was on leave. (Tr. pg. 139). She also testified that the IMPACT office tallies up the final IMPACT scores.

Furthermore, Dr. Turner-Wingate testified that Employee was evaluated under group 12, which constituted related service providers. She explained that CP is a separate standard and not part of the standards for group 12. Thus, once the scores are tallied for all the components under the group 12 standard, CP is subtracted after the fact. (Tr. pgs. 85-86). According to Dr. Turner-Wingate, group 12 employees were notified of the components that would not be included in the final IMPACT rating via email on June 2, 2010. The June 2, 2010 letter explained the percentage adjustments made to each cycle. (Tr. pgs. 87-90). However, she also testified that she cannot guarantee that Employee actually got the email. Although the email did not bounce back saying Employee did not get the email. (Tr. pgs. 135-136). Dr. Turner-Wingate also testified that group 12 employees were given information about IMPACT at the beginning of the school year to explain what IMPACT was, along with the IMPACT guidebook which explained the different components and tools. (Tr. pgs. 92-94).

Dr. Turner-Wingate testified that she met with Employee more than once prior to the IMPACT assessment to discuss Dr. Grillo’s concerns. (Tr. pgs. 101-102). She also testified that Employee’s case conference was scheduled for the first Tuesday of the month at 8:30 am. Dr. Turner-Wingate explained that while a substitute is not provided to Employee to cover his time during case conferences, the case conference schedules are given to the principal at the beginning of the school year so that they are aware that their employees will be out of the building during those times. She explained that she had never received an email from Dr. Grillo stating that Employee could not be released from the building due to coverage issues. (Tr. pgs. 102-104). Additionally, she noted that Employee never set up any individual time to meet with Dr. Turner-Wingate nor did he ever advise her that he was going to miss a case conference or provide her with the reason he was absent from case conferences. (Tr. pgs. 151-152).

According to Dr. Turner-Wingate, the students at Mamie D. Lee receive related services on their IEP. The Psychologists and Social Workers only do behavior support services. She testified that compared to the regular school, psychological services provided at Mamie D. Lee are based on what each child’s IEP states. She further testified that the entire student body at Mamie D. Lee differs from the regular DCPS in that, they all have a classification of ‘intellectual disability’. Dr. Turner-Wingate explained that most of the students at Mamie D. Lee are at least moderate, and would have a difficult time functioning and navigating the general population, which is why this school is solely for that level of students. (Tr. pgs. 105-107). According to Dr. Turner-Wingate, outside from the formal testing (assessments), observation, and interviews that are done, Psychologists are supposed to use their best judgment in terms of what they observe and the information learned from the interviews. (Tr. pg. 110). She testified that because the students at Mamie D. Lee already came with a mental retardation (“MR”) classification, they did not need a new evaluation; they only had to be re-evaluated. Dr. Turner-Wingate testified that the number of batteries used for testing during the re-evaluation process depends on the referral question. (Tr. pg. 113). She stated that interviews and observation by the school Psychologists, as well as other people is important when conducting a re-evaluation. (Tr. pg.

115). According to Dr. Turner-Wingate's testimony, the Stanford Binet is not a full battery evaluation for an MR student. It is an IQ test that tests the cognitive, does not have the educational component as part of the test, and its only one test. (Tr. pgs. 145-146).

Dr. Turner-Wingate testified that she has observed Employee in an IEP meeting at least once. (Tr. pgs. 118-119). She testified that the primary duties of a Psychologist are assessments and evaluations, and these duties are listed in the guidebook. She stated that Employee participated in IEP meetings, did evaluations, and provided behavioral support services to students, to include dealing with crisis (crisis intervention and behavioral tech); however, the IMPACT tool did not evaluate him for crisis intervention and behavioral tech since that was not part of his job responsibility as a School Psychologist. (Tr. pgs. 128-130).

2. Kathryn McMahon-Klosterman (Tr. pgs. 156 -194)

Kathryn McMahon-Klosterman ("Ms. McMahon-Klosterman") is the Director of IMPACT Operations at Agency. She has been in this position for about a year. Ms. McMahon-Klosterman has been on the DCPS IMPACT team since October 2010. She was not employed with Agency for the 2009-2010 school year. (Tr. pg. 157). When asked why she would be able to testify as to IMPACT for the school year 2009-2010, Ms. McMahon-Klosterman testified that as the Director of IMPACT Operations, it is her job to know how the IMPACT system was created, how it works, as well as what it looked like each year. (Tr. pgs. 163). Ms. McMahon-Klosterman explained the authority of the IMPACT tool, how the tool was designed, along with how the IMPACT system for related service providers (Group 12) was implemented during the school year of 2009-2010. (Tr. pgs. 168-169 & 172-175). According to Ms. McMahon-Klosterman, she reviewed Employee's IMPACT assessment prior to testifying at this Evidentiary Hearing. She stated that an IMPACT guidebook was created for each IMPACT group, and was distributed to schools and to employee. (Tr. pg. 171).

Employee's Case in Chief

1. Solomon Ehiemua (Tr. pgs. 209 – 416).

Solomon Ehiemua ("Employee") is a former DCPS employee. He worked for Agency from 1999, through 2010 when he was terminated. He testified that the entire population of Mamie D. Lee School had a Mental Retardation ("MR") classification. Mamie D. Lee houses handicap students with mild, moderate or profound mental retardation and borderline health impairments. He noted that the students ranged from six (6) to twenty-two (22) years of age. (Tr. pgs. 217 - 218). Employee provided an account of his typical day at Mamie D. Lee. He testified that he was the only psychologist at Mamie D. Lee, and his primary job was crisis intervention. (Tr. pgs. 219-227). Employee stated that while he did not conduct evaluations at Mamie D. Lee, he did conduct re-evaluations. He explained that evaluations are done at regular DC schools after a student has been referred by a teacher to the principal for a behavioral issue. (Tr. pg. 227). He also stated that unlike a regular DC school Psychologists who were assigned to multiple schools, he was only assigned to one school – Mamie D. Lee. He further explained that while multiple tools are used to conduct an evaluation, this is not the case with a reevaluation since every student coming to Mamie D. Lee has already been diagnosed as having a MR, and this status does not change. (Tr. pgs. 229-230). According to Employee, the Stanford Binet, which is a full battery assessment test, is used in 99% of reevaluation cases. Employee noted that he used the Stanford Binet assessment battery to conduct reevaluations because it covers every area – and is a complete battery. (Tr. pg. 303). He explained that the only instrument DCPS bought and provided to him for assessing the students was the Stanford Binet instrument. (Tr. pgs. 305-306). Employee further

explained that the Stanford Binet assessment was the best assessment for the Mamie D. Lee school population. (Tr. pg. 349).

According to Employee, he conducts class observations due to the nature of Mamie D. Lee. He wrote behavioral plans almost every day for Mamie D. Lee students. (Tr. pg. 234). He also testified that during the 2009-2010 school year, there were no complaints about the services he provided to the students at Mamie D. Lee by their parents, principal or the teachers. (Tr. pgs. 235-236). Employee noted that as a psychologist, he attended IEP and clinical meetings while at Mamie D. Lee almost every day. (Tr. pgs. 237-238). According to Employee, he did not miss any school days during the 2009-2010 school year. He stated that he applied, and was granted a vacation which he took in December of 2009. (Tr. pgs. 238-239). According to Employee, he had a cordial and professional interaction with Dr. Grillo, the school principal. He explained that while he has had a couple of disagreements with Dr. Grillo regarding her specific directives, he would not call it a conflict. (Tr. pg. 40). Employee testified that he used the reevaluation template on his DCPS computer to complete a student reevaluation. He filled in all the required information in the template. He also testified that when he provided service to a student, he filled out a tracker form which is the student's IEP. (Tr. pgs. 275-277, 293 & 315). Employee stated that at some point during the 2009-2010 school year he had make-up sessions for any student who did not receive services. He explained that he noted this information on the computer. (Tr. pg. 279).

According to Employee, between September 2009 and January 2010, he had a professional relationship with Dr. Turner-Wingate, and she did not observe him providing services to any student. He additionally noted that during that same period, he did not receive any feedback from Dr. Grillo or Dr. Turner-Wingate stating that the service he provided was deficient. (Tr. pgs. 282-283 & 313). Employee explained that although he had expressed some concerns to Dr. Turner-Wingate with regards to his first IMPACT evaluation, he thought their interaction between January 2010 and June 2010 was cordial. (Tr. pg. 283). He also noted that Dr. Turner-Wingate did not observe him perform evaluations between January 2010 and June 2010. (Tr. pg. 285). Employee further testified that he attended case conferences when he could. He highlighted that case conferences were not mandatory, and were not part of his job, and because he was often occupied with problems/crises in his school, he did not have the luxury to just leave and attend case conferences. He also noted that Dr. Grillo, on about two (2) occasions had refused to let Employee leave the building. According to Employee, when he did attend case conferences, he had to make up his scheduled sessions. (Tr. pgs. 287 & 374). He further noted that although case conferences were included as part of the duties and responsibilities of an ET-11 school psychologists like himself, he never informed Dr. Turner-Wingate that he was not going to attend a case conference because it was not mandatory. (Tr. pgs. 373-376).

Employee stated that he was concerned that the first IMPACT evaluation (first cycle) was done while he was on vacation, and that information about the IEP report cards were inaccurate and the tools used to evaluate him were not representative of his duties. He shared his concerns with the Director, Dr. Fener, who stated that she would have a meeting with Employee and Dr. Turner-Wingate to discuss Employee's concerns. However, the meeting never took place because Dr. Turner-Wingate canceled both appointments. Employee explained that when he told Dr. Turner-Wingate that he was going to carry his concerns further to Dr. Fener, Dr. Turner-Wingate was angry, nervous and outraged, asking Employee if he wanted her job. (Tr. pg. 289 & 326-329). Employee testified that he did not miss any days during the IMPACT evaluation period, and that he was given a 'Significantly Below' score just for justification purposes. He explained that he was on a one month approved vacation (approved by Dr. Turner-Wingate) during the first IMPACT cycle. (Tr. pgs. 294-295 & 356-357). Employee also stated that he conducted reevaluations during the second IMPACT evaluation (second cycle) following the authorized format on the school system computer. (Tr. pgs. 301 & 306).

Employee asserted that at the end of the school year, parents of students at Mamie D. Lee received report cards, to include behavioral progress from him. He explained that he created an IEP report card for the students, printed it out and gave the hard copy to the parent before saving it. He testified that he submitted his progress report at the end of the 2009-2010 school year. (Tr. pgs. 315-316 & 325-326). Employee testified that he scheduled a meeting with Dr. Turner-Wingate to visit his school and observe him; however, she showed up late, after the IEP meeting was over. (Tr. pgs. 330-331). According to Employee, after he received his final IMPACT report, he met with Dr. Turner-Wingate who stated that she did not really know how to assess Employee, and that Employee should speak to her supervisor, Dr. Fener. (Tr. pgs. 337 & 384). Employee testified that he was not informed that his job description was under the related service provides even though he was an ET-11, that the IMPACT assessment was for evaluation and not reevaluation. (Tr. pg. 238).

Employee testified that after being terminated from DCPS, he worked from July 2010 to August 2012. (Tr. pg. 341). He stated that he never reviewed the IMPACT Group 12 guidebook. (Tr. pgs. 351-352). He also stated that after he saw Dr. Turner-Wingate's recommendation after the first IMPACT evaluation, he decided that there was nothing for him to change, and he invited Dr. Turner-Wingate to visit his school to see how psychologists function. (Tr. pg. 352). Employee noted that Dr. Turner-Wingate provided him with his IMPACT assessment for the first IMPACT cycle. He also stated that he requested a meeting with Dr. Turner-Wingate after this assessment; however, he was not aware that Dr. Turner-Wingate scheduled a meeting with him while he was on vacation. (Tr. pg. 369). He testified that he received two written IMPACT assessments with Dr. Turner-Wingate, as well as two meetings following each assessment. (Tr. pgs. 372-378). Employee testified that he should have received a score of four (4) on all his IMPACT assessments because in all his assessments at DCPS for the past nine (9) to ten (10) years, he has never scored below beyond expectation. (Tr. pg. 383).

Analysis

Chapter 5-E of D. C. Municipal Regulation ("DCMR") §§1306.4, 1306.5 gives the Superintendent the authority to set procedures for evaluating Agency's employees.⁹ 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. In the instant matter, Agency developed the IMPACT process detailed above as its evaluation procedure for Group 12 – Related Service Providers for the School year 2009- 2010. Employees were trained and received documentation describing the IMPACT process at the beginning of the school year. However, Agency, during the course of the school year, made changes to the initial evaluation process. While Employee does not deny that he was evaluated a total of two (2) times, nor does he deny that he had conferences after the evaluation or that he received the IMPACT training materials, I find that Agency committed harmful error when it adjusted the IMPACT process at the middle and end of the 2009 - 2010 school year.

6-B DCMR § 631.3 provide that "... [OEA] shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean 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

⁹ 5-E DCMR § 1306 provides in pertinent parts as follows:

1306.4 – Employees in grades ET 6-15 shall be evaluated each semester by the appropriate supervisor and rated annually, prior to the end of the school year, under procedures established by the Superintendent.

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

decision to take the action.” Additionally, 8-A DCMR § 1803 highlights that “harmful error shall mean an error of such magnitude that in its absence the employee would not have been released...” In the instant matter, at the beginning of the school year, Agency provided Group 12 employees with the IMPACT process it would use to evaluate them. Moreover, Dr. Turner-Wingate testified that at the beginning of the school year, she went over the IMPACT rubric specifying to the Psychologists specifically what they needed to do to earn a point of 4, 3, 2, or 1 according to the impact rubric. (Tr. pg. 22). Dr. Turner-Wingate also testified that although the Due Diligence component was part of the IMPACT tool for evaluating employees for the 2009-2010 school year, employees were not rated on the Due Diligence component because the guidelines were developed late. (Tr. pg. 54). Additionally, Dr. Turner-Wingate testified that employees did not receive a score for the Productivity component of the IMPACT tool because there were issues with the database tracking mechanism. According to Dr. Turner-Wingate, because school Psychologists, including Employee only did assessments; they did not receive a score on the Documentation Format component of the IMPACT tool. She further explained that although Employee was one of two Psychologists who did interventions, she was concerned that he did not receive the guidelines needed to appropriately document the Intervention service, thus she did not score him for this component. However, Dr. Turner-Wingate contradicts herself when she testified that she relied on the same Intervention documentation used under the Documentation Format component that she did not score in giving Employee a score of one (1) for the Intervention Activity component. (Tr. pgs. 55-57). Further, Dr. Turner-Wingate stated that Employee was scored in the IEPQ rating section, but this score was not reflected in the final IMPACT calculation because there were lots of complaints across the school system regarding the IEPQ section, and the fact that they hadn’t received sufficient training in that section. She stated that the entire IEPQ section was thrown out completely and not included in the first or second assessment rating. (Tr. pgs. 58-60).

Thus, it is thereby highly probative that these Group 12 employees, including Employee in this matter, relied on the IMPACT process they received at the beginning of the school year as a guide in developing their duty plan for the school year. Furthermore, it can be reasonably assumed that upon receiving the IMPACT material at the beginning of the school year, these employees allocated time and resources accordingly, to meet the requirements of the IMPACT process. In addition, Dr. Wingate-Turner explained that while it was not necessary for her to observe Employee, she gave him an ‘NA’ for Skill Building since she was not able to observe Employee because she missed the session. (Tr. pgs. 69-73). Consequently, I find that, by not scoring certain components, and adjusting the IMPACT process in March and June of 2010, Group 12 employees were prejudiced because the time and resources they devoted to the other components that were thrown out may have negatively affected the scores they received on the components Agency eventually decided to retain. And because the adjustments were made in the middle and end of the school year, these employees did not have sufficient notice nor were they granted the opportunity to adjust their duty plan. Absent these adjustments, there is a high probability that Employee would not have received an “Ineffective” IMPACT rating. Accordingly, I conclude that Agency did not adhere to the IMPACT process specifically because it changed the IMPACT assessment rubric in the middle, and at the end of the 2009 – 2010 school year and this constitutes harmful error. For the above reasons, I further conclude that Agency did not meet the “just cause” standard for separating an employee under the evaluation process as per the CBA.

Discrimination

Employee also asserts that his termination was based on age discrimination and in retaliation for pursuing his rights as an employee of DCPS. As noted during the Evidentiary Hearing, because these claims have already been raised in another forum - the District of Columbia Federal court, these claims will not be heard by this Office. Moreover, D.C. Code § 2-1411.02, specifically reserves complaints of unlawful

discrimination to the Office of Human Rights (“OHR”). Per this statute, the purpose of the OHR is to “secure an end to unlawful discrimination in employment...for any reason other than that of individual merit.” Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.¹⁰ In addition, District Personnel Manual (“DPM”) § 1631.1(q) also reserves allegations of unlawful discrimination to Office of Human Rights. Consequently, I find that Employee’s claim falls outside the scope of OEA’s jurisdiction.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency’s action of separating Employee for receiving an “Ineffective” IMPACT rating during the 2009 – 2010 school year is **REVERSED**; and
2. Agency shall reinstate Employee to his last position of record; or a comparable position; and
3. Agency shall reimburse Employee all back-pay, benefits lost as a result of the separation; costs and attorney’s fee; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

¹⁰ D.C. Code §§ 1-2501 *et seq.*