THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Joanne Taylor-Cotten,	)	OEA Matter No. 1601-0072-16
Employee	)	
	)	Date of Issuance: April 7, 2017
v.	)	
	)	Joseph E. Lim, Esq.
D.C. Public Schools,	)	Senior Administrative Judge
Agency	)	

Joanne Taylor-Cotten, Employee *pro se*
Nicole C. Dillard, Esq., Agency Representative

AMENDED INITIAL DECISION[1]

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 1, 2016, Joanne Taylor-Cotten ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") final decision to remove her from her position as a Counselor at Duke Ellington School of the Arts. Employee was removed based on an "Developing" rating for the 2014-2015 school year and a "Minimally Effective" rating for the 2015-2016 school year under Agency's IMPACT program, an effective assessment system for school-based personnel.[2] Employee's termination was effective on August 5, 2016.

This matter was assigned to me in September 9, 2016. On October 3, 2016, I held a prehearing conference for the purpose of assessing the parties' arguments. I then issued a post-status conference order, requiring the parties to submit written briefs. After granting Employee's request for more time, both parties submitted timely responses to the order. After reviewing the record, I concluded that an evidentiary hearing was not in order. The record is now closed.

JURISDICTION

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

[1] This Amended Initial Decision was issued solely to correct the date of issuance from April 6, 2016, to the correct April 7, 2017, as well as the spelling of Employee's last name.
[2] IMPACT is the effectiveness assessment system which the D.C. Public Schools used during the school year to rate the performance of school-based personnel.

ISSUE

Whether Agency's removal of Employee based upon her IMPACT evaluation should be upheld.

Agency's Position

Agency argues that Employee's termination under the IMPACT program was done in accordance with all District of Columbia statutes, regulations, and laws. Agency also argues that OEA's jurisdiction is limited with respect to the instant appeal and that Employee may only challenge whether the evaluation process and tools were properly administered. According to Agency, Employee was properly evaluated under the IMPACT program, which resulted in her receiving a final IMPACT score of a "Developing" rating for the 2014-2015 school year and a "Minimally Effective" rating for the 2015-2016 school year.

Employee's Position[3]

Employee argues that her IMPACT score was invalid because the school principal did not meet with her. Employee also complains about her working conditions.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

D.C. Official Code § 1-617.18 grants DCPS the authority to create and implement its own tools for evaluating employees. IMPACT is the performance evaluation system utilized by DCPS to evaluate its employees during the 2014-2015 and 2015-2016 school years.[4] According to the documents of record, Agency conducts annual performance evaluation for all its employees. During the 2014-2015 and 2015-2016 school years, 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.[5]

In *Brown v. Watts*[6], 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 stated 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."[7] Based on the holding in *Watts*, I find that this Office may only interpret the relevant provisions of the CBA between WTU and DCPS as they relate 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:

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[3] Employee's Briefs submitted September 22, 2016, and December 13, 2016.
[4] Agency's Answer (September 1, 2016) and Agency's Brief (February 27, 2017).
[5] *Id.*
[6] 933 A.2d 529 (April 15, 2010).
[7] 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).

> 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).

Because it is undisputed that Employee is a union member, I am primarily guided by §15.4 of the CBA between WTU and DCPS in reviewing this matter, and I will only address whether or not Agency's termination of Employee pursuant to her 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 required that all staff receive written feedback regarding their evaluation, in addition to a post-evaluation conference with their evaluators. IMPACT evaluations and ratings for each assessment cycle were available online for employees to review by 12:01 a.m., the day after the end of each cycle. If an employee had any issues or concerns about their IMPACT evaluation and rating, they were encouraged to contact DCPS' IMPACT team by telephone or email. 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 the IMPACT program, 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 of 2009. The training included providing information pertinent to the IMPACT process, in addition to the positive and negative impacts associated with the final IMPACT rating. Each staff member was provided with a full IMPACT guidebook that was 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. Since then, IMPACT had been consistently used by DCPS to evaluate the performance of their employees.

During the 2014-2015 and 2015-2016 school years, there were twenty (20) IMPACT groupings of DCPS employees.[8] Employee's position – Counselor, was within Group 10. The IMPACT process for Group 10 employees consisted of two (2) assessment cycles: the first assessment cycle ("Cycle 1"), which ended on February 4 of the relevant schoolyear; and the third assessment cycle ("Cycle 3") which had to occur by June 9 of the relevant schoolyear. Group 10 employees were assessed on a total of three (3) IMPACT components, namely:

1) Counselor Standards—a measure of excellence for Counselors in DCPS. This component accounted for 90% of a Counselor's IMPACT Score.

[8] Agency's Answer, p. 3.

2) Commitment to the School Community—a measure of the extent to which school-based personnel support and collaborate with the school community. This component accounted for 10% of the IMPACT score.

3) Core Professionalism—a measure of four (4) basic professional requirements for all school-based personnel. These requirements are as follows: attendance; on-time arrival; compliance with policies and procedures; and respect. This component was scored differently from the others, as an employee could have additional points subtracted from their score if the rating was "slightly below standard" or "significantly below standard."

School-based personnel assessed through IMPACT, ultimately received a final IMPACT score at the end of the school year of either:[9]

1) Ineffective = 100-199 points (immediate separation from school);
2) Minimally Effective = 200-249 points (given access to additional professional development. If, after two years of support, however, an educator is unable to move beyond the Minimally Effective level, she or he will be subject to separation);
3) Developing = 250-299 points (given access to additional professional development. If, after three years of support, however, an educator is unable to move beyond the Developing level, she or he will be subject to separation);
4) Effective = 300-349 points; and
5) Highly Effective = 350-400 points.

Chapter 5-E of D. C. Municipal Regulation ("DCMR") §§1306.4, 1306.5 gives the superintendent of DCPS the authority to set procedures for evaluating Agency's employees.[10] 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, the IMPACT process detailed above is the evaluation procedure put in place by Agency for the 2014-2015 and 2015-2016 school years.

In this case, Employee was evaluated by the school principal ("evaluator"). Employee received a final evaluation on the above specified components at the end of the 2014-2015 school year, wherein, she received a "Developing" IMPACT rating of 265. According to the documents submitted, a conference occurred on January 29, 2015, and the evaluator made two unsuccessful attempts to have a second conference with Employee.[11]

In her brief, Employee complained that she did not get all the conferences she was entitled to. However, as Agency pointed out, IMPACT policy merely requires the evaluator to

[9] Agency Answer, Tab 5, Group 10 IMPACT Pamphlet, p. 27.
[10] 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
[11] Agency Answer to Petition for Appeal, Tab 3.

make two attempts to arrange a conference with an employee. Thus, even if a conference did not occur, the IMPACT evaluation is still valid.

Employee also received a final evaluation on the above specified components at the end of the 2015-2016 schoolyear, wherein, she received a "Minimally Effective" IMPACT rating of 244. According to the documents submitted, conferences occurred on January 21, 2016, and June 9, 2016.

Employee does not deny that she received a copy of her scores, nor does she deny that the evaluator made attempts to meet with her during one time she did not have a conference regarding her scores.

Employee asked for an evidentiary hearing without offering any rationale or justification. She did not voice any disagreement with the contents of her IMPACT evaluations. Assuming *arguendo* that this Office's jurisdiction in this matter extends to the content or judgment of the evaluation, I find that, while Employee maintains that her scores were supposedly unfair, she did not specifically note in her submissions to this Office that the evaluator's comments were untrue; nor did she proffer any evidence that directly contradicted the evaluator's factual findings. It should be noted that the D.C. Superior court in *Shaibu v. D.C. Public Schools*[12] explained that substantial evidence for a positive evaluation does not establish a lack of substantial evidence for a negative evaluation. The court held that "it would not be enough for [Employee] to proffer to OEA evidence that did not conflict with the factual basis of the [evaluator's] evaluation but that would support a better overall evaluation."[13] The court further stated that if the factual basis of the "principal's evaluation were true, the evaluation was supported by substantial evidence." In addition, the Court in *Shaibu* held that "principals enjoy near total discretion in ranking their teachers"[14] when implementing performance evaluations. The court concluded that since the "factual statements were far more specific than [the employee's] characterization suggests, and none of the evidence proffered to OEA by [the employee] directly controverted [the principal's] specific factual bases for his evaluation of [the employee]…" the employee's petition was denied.

In her two briefs, Employee complained about work conditions, such as cement holes in the parking lot, falling cement in the bathroom, and the presence of rodents in the classroom. She also complained of not being hired for a position she applied for in January 2015. Among other things, she also complained about her five year break in service. None of these are relevant to her IMPACT evaluations, nor are these legal grounds for overturning Agency's action. Rather, these complaints are grievances in nature.

This Office has consistently held that due to changes to the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code § 1-601.1 et seq., OEA lacks jurisdiction to consider grievances since October 21, 1998.[15]

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[12] Case No. 2012 CA 003606 P (January 29, 2013).
[13] *Id.* at 6.
[14] *Id. Citing Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).
[15] *Rebecca Owens v. Department of Mental Health,* OEA Matter No. J-0097-03, Opinion and Order on Petition for Review (January 25, 2006); *Lillian Randolph v. District of Columbia. Water and Sewer Authority,* OEA Matter No.

In conclusion, Employee has not proffered to this Office any credible evidence that controverts any of the evaluator's comments. This Office has consistently held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.[16] As performance evaluations are "subjective and individualized in nature,"[17] this Office will not substitute its judgment for that of an agency; rather, this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."[18] Thus, I find that it was within the evaluator's discretion to rank and rate Employee's performance.

In the instant matter, I find that Employee's work performance was evaluated in accordance with the IMPACT rules. Employee received a copy of her IMPACT scores, in addition to having post-evaluation meetings and attempts for such meetings with her evaluator(s). Because Employee's final IMPACT score resulted in a "Developing" rating one year and a "Minimally Effective" rating the next year, Employee was terminated from her position. Based on the foregoing, I find that Agency properly adhered to the IMPACT process and had cause to terminate Employee. Accordingly, Agency's action must be upheld.

ORDER

It is hereby ORDERED that Agency's action of terminating Employee is UPHELD.

FOR THE OFFICE: Joseph E. Lim, Esq.
Senior Administrative Judge

2401-0085-02, Opinion and Order on Petition for Review (July 16, 2006); and *Mark James v. Office of the Chief Technology Officer*, OEA Matter No. J-0003-08, Opinion and Order on Petition for Review (November 23, 2009).

[16] *See Mavins v. District Department of Transportation*, OEA Matter No. 1601-0202-09, *Opinion and Order on Petition for Review* (March 19, 2013); *Mills v. District Department of Public Works*, OEA Matter No. 1601-0009-09, *Opinion and Order on Petition for Review* (December 12, 2011); *Washington Teachers' Union Local No. 6, American Federation of Teachers, AFL-CIO v. Board of Education of the District of Columbia*, 109 F.3d 774 (D.C. Cir. 1997); *see also Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); and *Hutchinson v. District of Columbia Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

[17] *See also American Federation of Government Employees, AFL-CIO v. Office of Personnel Management*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

[18] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).