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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 1601-0373-10
EDWARD SHIELDS,	)	
Employee	)	
	)	Date of Issuance: October 21, 2013
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Sommer J. Murphy, Esq.
_____	)	Administrative Judge
Edward Shields, Employee, <i>Pro Se</i>		
Sara White, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On August 19, 2010, Edward Shields (“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”) decision to remove him from his position as an In-School Suspension Coordinator at Hart Middle School. Employee was removed based on an “Ineffective” rating under Agency’s IMPACT program, an effective assessment system for school-based personnel.<sup>1</sup> Employee’s termination was effective on July 30, 2010.

This matter was assigned to me in July of 2012. On September 19, 2012, I held a status conference for the purpose of assessing the parties’ arguments. On October 5, 2012, I issued a post-status conference order, requiring the parties to submit written briefs. Agency submitted a response to the order; however, Employee did not. 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).

<sup>1</sup> IMPACT is the effectiveness assessment system which the D.C. Public Schools used for the 2009-2010 school year to rate the performance of school-based personnel.

## ISSUE

Whether Agency's removal of Employee 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 him receiving a final IMPACT score of "Ineffective" during the 2009-2010 school year.

### ***Employee's Position***

Employee argues that his IMPACT scores are inaccurate and asks this Office to either reinstate him, or to reassign him to another school.<sup>2</sup>

## FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

### **Governing Authority**

Employee was a member of Washington Teachers' Union ("WTU") when he was terminated, therefore the Collective Bargaining Agreement ("CBA") between Agency and WTU applies to this matter. Accordingly, OEA has limited jurisdiction over Employee's appeal. In *Brown v. Watts*<sup>3</sup>, 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."<sup>4</sup> 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:

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).

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<sup>2</sup> Petition for Appeal (August 19, 2010).

<sup>3</sup> 933 A.2d 529 (April 15, 2010).

<sup>4</sup> 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).

Accordingly, 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 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 the 2009-2010 school year.<sup>5</sup> According to the documents of record, Agency conducts annual performance evaluation for all its employees. During the 2009-2010 school year, Agency utilized IMPACT as its evaluation system for all school-based employees. The IMPACT system was designed to provide specific feedback to employees to identify areas of strength, as well as areas in which improvement was needed.<sup>6</sup>

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.

For the 2009-2010 school year, there were twenty (20) IMPACT grouping of DCPS employees. Employee's position – In-School Suspension Coordinator, was within Group 14 ("Program Coordinators and Deans"). The IMPACT process for Group 14 employees consisted of three (3) assessment cycles: the first assessment cycle ("Cycle 1"), which was between September 21st and December 1st; second assessment cycle ("Cycle 2") which was between December 1st and on March 1st; and the third assessment cycle ("Cycle 3") which was between March 1st and June 15th.

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<sup>5</sup> *Id.* at Tab 1.

<sup>6</sup> Agency's Answer and Agency's Brief, *supra*.

- 1) Program Coordinator and Dean Standards—a measure of ten requirements for In-School Suspension Coordinators. This component accounted for 80% of an Educational Therapy Assistant’s IMPACT Score.
  - a. Standard 1: Job Acumen
  - b. Standard 2: Positive Rapport with Students
  - c. Standard 3: Results Orientation
  - d. Standard 4: Initiative
  - e. Standard 5: Data-Driven Decision Making
  - f. Standard 6: Constant Learning
  - g. Standard 7: Dependability
  - h. Standard 8: Adaptability
  - i. Standard 9: Customer Service
  - j. Standard 10: Communication
- 2) Commitment to the School Community—a measure of the extent to which school-based personnel support their colleagues and their school’s local initiatives. This component accounted for 10% of the IMPACT score.
- 3) School-Value Added—a sophisticated statistical measure of a school’s impact on student achievement, as measured by the DC Comprehensive Assessment System (“DC CAS”). This component accounted for 10% of the IMPACT score.
- 4) 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 overall 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:

- 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.

DCMR §§1306.4 – 1306.5 gives the Superintendent the authority to set procedures for evaluating Agency’s employees.<sup>7</sup> The above-referenced DCMR sections provide that each

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<sup>7</sup> 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

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 2009- 2010 school year.

In this case, Employee was evaluated by the school principal. Employee received a final evaluation on the above specified components at the end of the school year, wherein, he received an “Ineffective” IMPACT rating of 169. Employee’s primary argument is that the IMPACT scores are inaccurate; however, he does not expound upon this argument and has not provided any substantive evidence in support of his position. In addition, Employee does not deny that he was evaluated a total of three (3) times by the school principal. Employee also does not deny that he had conferences after the evaluation or that he received the IMPACT training materials. Moreover, Employee has not alleged that Agency did not adhere to the IMPACT process. Accordingly, I find that Agency properly conducted the IMPACT process and had just cause to terminate Employee.

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 his scores are inaccurate, he did not specifically note that the principal’s comments were untrue; nor did he proffer any evidence that directly contradicted the principal’s factual finding. It should be noted that the D.C. Superior court in *Shaibu v. D.C. Public Schools*<sup>8</sup> explained that substantial evidence for a positive evaluation does not establish a lack of substantial evidence for a negative evaluation. The court held that “it would not be enough for [Employee] to proffer to OEA evidence that did not conflict with the factual basis of the [Principal’s] evaluation but that would support a better overall evaluation.”<sup>9</sup> 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”<sup>10</sup> 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 the instant matter, Employee has not proffered to this Office any credible evidence that controverts any of the principal’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.<sup>11</sup> As performance evaluations are “subjective and individualized in nature,”<sup>12</sup>

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<sup>8</sup> Case No. 2012 CA 003606 P (January 29, 2013).

<sup>9</sup> *Id.* at 6.

<sup>10</sup> *Id.* Citing *Washington Teachers' Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

<sup>11</sup> 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).

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.”<sup>13</sup> Thus, I find that it was within the principal’s discretion to rank and rate Employee’s performance. Moreover, the undersigned Administrative Judge is not in the position to recommend that Employee receives a higher rating since the undersigned is unfamiliar with the nature and details of Employee’s job.

Based on the foregoing, I find that Employee was a member of the WTU at the time he was terminated and was he was subject to the terms of the CBA between WTU and Agency. I also find that OEA’s jurisdiction in this matter is limited by the terms of this CBA. Because Agency adhered to the IMPACT process, I conclude that Agency had sufficient cause to terminate Employee based on his ‘Ineffective’ IMPACT rating for the 2009-2010 school year.

Lastly, OEA Rule 621.3 provides that “if a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant.”<sup>14</sup> Failure of a party to prosecute an appeal includes, but is not limited to “a failure to submit required documents after being provided with a deadline for such submission.”<sup>15</sup>

In this case, Employee was warned that the failure to submit a brief could result in sanctions as enumerated in Rule 621.3. Employee failed to submit a written brief in response to the Order issued on October 5, 2012. I find that Employee’s lack of diligence in pursuing an appeal before OEA constitutes a failure to prosecute and serves as alternate grounds for the dismissal of this matter.

Based on the foregoing, I conclude that Agency’s action of abolishing Employee’s position was done so in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in her removal is upheld.

### ORDER

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

FOR THE OFFICE:

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SOMMER J. MURPHY, ESQ.  
ADMINISTRATIVE JUDGE

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<sup>12</sup>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).

<sup>13</sup> See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

<sup>14</sup> 59 DCR 2129 (March 16, 2012).

<sup>15</sup> *Id.*