

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ANDREW JOHNSON)	OEA Matter No. 1601-0215-11R20
Employee)	
)	Date of Issuance: October 15, 2020
v.)	
)	JOSEPH E. LIM, ESQ.
D.C. PUBLIC SCHOOLS)	Senior Administrative Judge
Agency)	
_____)	
Lynette Collins, Esq., Agency Representative)	
Andrew Johnson, Employee <i>pro se</i>)	

SECOND INITIAL DECISION ON REMAND¹

PROCEDURAL HISTORY

On September 9, 2011, Andrew Johnson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Public School's ("DCPS" or "Agency") final decision to remove him from his position as a School Psychologist due to two (2) consecutive years of a "Minimally Effective" IMPACT rating.² Employee's termination was effective August 12, 2011. This matter was assigned to the undersigned on June 26, 2013. On May 20, 2014, I issued an Initial Decision ("ID") dismissing the matter for lack of jurisdiction due to Employee's voluntary retirement.³

Employee subsequently filed a Petition for Review with OEA's Board on June 26, 2014. On February 16, 2016, the OEA Board issued an Opinion and Order on Petition for Review denying Employee's petition. It held that OEA had no jurisdiction over his appeal because the evidence supported a finding that Employee's decision to retire was of his own volition and was not a result of incorrect or misleading information on Agency's part.

Thereafter, Employee appealed to the Superior Court of the District of Columbia ("Superior Court"). On February 21, 2017, the Superior Court affirmed OEA's decision and denied Employee's appeal.⁴ Employee's Motion for Reconsideration was also denied on April 11, 2017. Employee then appealed to the District of Columbia Court of Appeals ("CA"). On August 9, 2018, the CA vacated the ID on the issue of jurisdiction and remanded the case to the Superior Court to remand to OEA. The Superior Court then remanded the matter back to OEA on February 8, 2019, with instructions to proceed with the matter. I held a Status Conference on February 11, 2019, and I issued an Initial Decision on Remand upholding Agency's termination of Employee's employment on June 14, 2019.⁵ Employee appealed and on May 19, 2020, the OEA Board upheld the legality of IMPACT but remanded the matter to the undersigned for the purpose of conducting

1 This decision was issued during the District of Columbia's Covid-19 State of Emergency.

2 IMPACT is the effectiveness assessment system Agency uses to rate the performance of school-based personnel.

3 *Andrew Johnson v. D.C. Public Schools*, OEA Matter No. 1601-0215-11 (May 20, 2014).

4 *Johnson v. D.C. Public Schools, et al.*, Case No. 2016 CA 001551 (D.C. Super. Ct. February 21, 2017).

5 *Johnson v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18, *Initial Decision on Remand* (June 14, 2019).

an evidentiary hearing.⁶ Specifically, the Board determined that a hearing was needed to address Employee's allegations of procedural errors in Agency's removal of Employee as it pertained to his IMPACT scores. Subsequently, I held a Prehearing Conference on February 10, 2020, and held an Evidentiary Hearing on July 23, 2020.⁷ The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency's removal of Employee due to IMPACT scores received during the 2009-2010 and 2010-2011 school years should be upheld?

Positions of the Parties

Employee asserts that his termination should be overturned because of Agency's procedural errors. Specifically, he alleges that Agency changed the IMPACT process during the 2009-2010 school year; gave him an erroneous Assessment Timeliness ("AT") score; improperly rated him on the Berry Visual Motor Integration Test, and that Agency issued its termination notice before calculating Employee's AT score.

Agency denies Employee's allegations. Agency asserts that it properly terminated Employee from service based on two consecutive years of subpar IMPACT scores.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Undisputed Facts:⁸

Agency conducts annual performance evaluations for all its employees. IMPACT was the performance evaluation system utilized by DCPS to evaluate its employees during 2009-2010, and 2010-2011 school years. During the 2009-2010 and 2010-2011 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.

With the IMPACT system, all staff received written feedback regarding their evaluation, along with 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 and 2010-2011 school years, 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

⁶ *Johnson v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18, *Opinion and Order on Remand* (May 19, 2020).

⁷ Due to the District of Columbia's Covid-19 State of Emergency, the Evidentiary Hearing was held virtually via WebEx.

⁸ Parties' February 18, 2020, Stipulation of Facts and prior undisputed findings of fact from the June 14, 2019, Initial Decision on Remand.

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.

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."⁹ In this case, Employee was a member of the 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 Section 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.

For the 2009-2010 and 2010-2011 school years, there were twenty (20) IMPACT groupings of DCPS employees. For the 2009-2010 and 2010-2011 IMPACT evaluations, 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 would receive written feedback based on the Related Service Provider Standards rubric, along with a discussion of the next steps for professional growth. For the 2009-2010 school year, Group 12 employees were assessed on the following three (3) IMPACT components, namely:¹⁰

⁹ 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).

¹⁰ OEA July 23, 2020, Hearing Agency Exhibit 10 (2009-2010 Group 12 IMPACT Assessment Handbook)

1) Related Service Provider Standards (RSP) - these standards define excellence for related service providers in DCPS and make up seventy percent (70%) of the School Psychologist IMPACT score.

2) Assessment Timeliness (AT) - this is a measure of the extent to which the related service provider completes the related service assessments for the students on their caseload within the timeframe, and in accordance with the rules, established by the DCPS Office of Special Education. This component makes up fifteen percent (15%) of the School Psychologist IMPACT score.

3) Individual Education Plan Quality (IEPQ) - this is a measure of how well the employee writes their students' Individual Education Plans. This component was to make up 15% of the School Psychologist IMPACT score. However, Agency found that the third component, IEPQ, could not be applied to school psychologists, and so they were never rated on this component.

For the 2010-2011 school year, Group 12 employees were assessed on the following three (3) IMPACT components, namely:¹¹

1) Related Service Provider Standards (RSP): these standards define excellence for related service providers in DCPS and make up seventy-five percent (75%) of the School Psychologist IMPACT score.

2) Assessment Timeliness (AT) - this is a measure of the extent to which the related service provider completes the related service assessments for the students on their caseload within the timeframe, and in accordance with the rules, established by the DCPS Office of Special Education. This component makes up twenty-five percent (25%) of the School Psychologist IMPACT score.

3) Core Professionalism - This is a measure of four (4) basic professional requirements for all school-based personnel. These requirements are as follows:

- a. Attendance;
- b. On-time arrival;
- c. Compliance with policies and procedures; and
- d. Respect.

This component is scored differently from the others. If an employee's rating for this component was "meets standard," then the employee's total score is unchanged. If an employee received an overall rating of "slightly below standard," on any part of the Core Professionalism rubric during the cycle, and no ratings of "significantly below standard," the employee received an overall rating of "slightly below standard" for that cycle and ten (10) points were subtracted from the employee's final IMPACT score. An additional ten (10) points were subtracted if the employee earned an overall rating of "slightly below standard" again the next cycle. If an employee received a rating of "significantly below standard" on any part of the Core Professionalism rubric during the cycle, the employee received an overall rating of "slightly below standard" for that cycle, and

11 OEA July 23, 2020, Hearing Agency Exhibit 5 and Employee Exhibit 7 (2010-2011 Group 12 IMPACT Assessment Handbook)

twenty (20) points were deducted from the employee's final IMPACT score. An additional twenty (20) points were subtracted if the employee earned an overall rating of "significantly below standard" again the next cycle.

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. However, if after two (2) years of support, an educator is unable to move beyond the Minimally Effective level, she or he will be subject to separation);
- 3) Effective = 250-349 points; or
- 4) Highly Effective = 350-400 points.

As a school psychologist, Employee's duties were to conduct assessments, evaluation, observation, consultation, facilitate Individual Education Plan meetings,¹² consult with parents and write reports. At the end of the 2009-2010 school year, Employee received a Minimum Effective rating of 184. He filed a Chancellor's appeal, but this was denied. Employee did not file a grievance contesting the 2009-2010 minimally effective rating. As a result of Employee's 2010-2011 Minimum Effective IMPACT rating of 181, he was terminated on August 12, 2011.

Whether Agency changed the IMPACT process during the 2009-2010 school year that negatively impacted Employee

Dr. Jamila Mitchell ("Mitchell") testified (Transcript pgs. Tr. 7- 53) that as Program Manager for the DCPS, she was responsible for hiring, policy development, and oversaw the program at large. Mitchell said that she was Employee's direct supervisor for the 2009-2011 school years. She explained that Agency used IMPACT to evaluate providers on their reports and their adherence to policies and procedures. During the 2009-2010 school year, IMPACT was utilized to assess the timeliness of the providers, their core professionalism, as well as the metric of the report quality.

Mitchell testified that during the 2009-2010 school year, Group 12 employees, with the exception of school psychologists, were assessed in three areas: Related Service Provider Standards ("RSP"), Assessment Timeliness ("AT"), and IEP Quality ("IEPQ").¹³ During the 2009-2010 school year, School Psychologist were only rated on two areas: Related Provider Standards

¹² An IEP (Individualized Education Program) is the DCPS document that is created as a result of the student's psycho-educational, speech and language, and/or other related services evaluation that indicates that the student will need more help than usually thought necessary to access a free and appropriate education that most other students can access without special intervention. The IEP identifies how and why the student actually qualifies for the DCPS Special Education program. The IEP meeting is where the related service people come together, present their findings, and confirm or disconfirm the student's eligibility for the Special Education Program.

¹³ *Supra* Agency's Exhibit 10.

and Assessment Timeliness. She testified that School Psychologists were never rated on the IEPQ standard because they do not provide direct services. She emphasized that School Psychologists were never rated on the IEPQ standard and that did not change during the entire 2009-2010 school year.

Employee (Tr. 79-104) testified that for sixteen (16) years, he worked as a School Psychologist with Agency. His responsibilities included psychoeducational evaluations for students, and counseling and crisis intervention. Employee stated that Agency changed the IMPACT process during the 2009-2010 academic year, but he presented no evidence to support his contention.¹⁴

However, Agency's own Exhibit 10, the 2009-2010 Group 12 IMPACT Assessment Handbook, revealed that in the beginning of the school year, Group 12 employees, which includes school psychologists such as Employee, were to be assessed in three areas: RSP, AT, and IEPQ. RSP was supposed to comprise seventy percent (70%), AT fifteen percent (15%), and IEPQ the remaining fifteen percent (15%) of a school psychologist's IMPACT score. Mitchell testified that because school psychologists did not provide direct services, they were rated only on RSP and AT. The IMPACT scoring was changed as well. RSP weight increased from 70% to 100% and both AT and IEPQ weights decreased from 15% to 0%.¹⁵

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.¹⁶ 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, during the course of the school year, Agency made changes to the initial evaluation process. While Employee concedes that he was evaluated a total of two (2) times, and does not deny that he had conferences to review the evaluation or that he received the IMPACT training materials, I find that Agency committed harmful error when it adjusted the IMPACT process during the 2009 - 2010 school year.

6-B DCMR § 631.3 provides 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 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

14 Employee introduced OEA cases as his evidence. Employee Exhibits 1, 2, 3. As I informed him during the hearing, case law is not evidence. I cannot attribute facts found in other cases and impute them to this matter.

15 See Agency Exhibit 7 (Employee's Final 2009-10 IMPACT Report.)

16 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

provided Group 12 employees with the IMPACT process it would use to evaluate them. Yet Mitchell testified that school psychologists, including Employee, were only evaluated on the RSP standards.

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. Consequently, I find that, by failing to score two components, and adjusting the IMPACT process during the 2009-2010 school year, 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. Furthermore, because the adjustments were made during the school year, it is reasonable to find that these employees did not have sufficient notice nor were they granted the opportunity to adjust their duty plan. During the Evidentiary Hearing, Agency attempted to justify its decision by asserting that it was consistent throughout the year in evaluating Employee by pointing out that he was rated on the same criteria in both Cycles one and two.

In similar IMPACT cases involving school psychologists during the 2009-2010 school year, this Office has found that Agency's unilaterally changing the evaluation from several categories to one is a major change to the process. These changes caused substantial harm because such changes during the school year leaves Employee in no position to switch gears to adjust his plans.¹⁷

Based on the foregoing, I conclude that Agency did not adhere to the IMPACT process specifically because it changed the IMPACT assessment rubric during the 2009-2010 school year, which substantially prejudiced Employee and thus constitutes harmful error. Accordingly, I find that Agency's failure to meet the "just cause" standard did not warrant giving Employee an IMPACT rating of "Minimally Effective" for the school year 2009-10 under the evaluation process. Consequently, I find that Agency improperly conducted the IMPACT process and did not have "just cause" to terminate Employee under the CBA.

Whether Agency gave Employee an erroneous AT score

Mitchell testified (Tr. pgs. Tr. 7- 53) that she completed the IMPACT report for Employee during the 2009-2011 academic years. To her knowledge, the reports were accurate. Mitchell testified that the IMPACT reports were retrieved by Agency's operations team. The team randomly selected evaluations and provided them to Mitchell and her colleagues to review for quality. The reports were retrieved from Agency's database, the Special Education Data System ("SEDS").¹⁸ However, the substantive information came from the report component.

Alain Cantave ("Cantave"), Agency's Director of IMPACT, testified (Tr. 54-75) that prior to becoming director, he worked as a coordinator and a manager for the IMPACT Operations

¹⁷ *Solomon Ehiemua vs. DCPS*, OEA Matter No. 1601-337-10, *Opinion and Order on Petition for Review* (October 28, 2014), and *Oscar Harp III vs. DCPS*, OEA Matter No. 1601-356-10, *Opinion and Order on Petition for Review* (February 16, 2016).

¹⁸ The Special Education Data System (SEDS) is a comprehensive data system designed to support service delivery for children with disabilities.

Team. As director, he was responsible for the IMPACT database and all of the information related to individuals who received IMPACT evaluations throughout the years. He also ensured that individuals who were employed received timely evaluations.

Cantave testified that DCPS used IMPACT as the performance assessment system for all school-based staff during the 2009-2010 school year. He further explained that IMPACT was the way that Agency identified the effectiveness of the staff in their various roles. Cantave stated that each group had different components of their evaluation that are related to their specific role in the school. Then they get evaluated on those components and that evaluation turns into a final score and a final rating.

During the 2010-2011 school year Group 12 employees, including school psychologists, were assessed on Service Providers Standards, which was their primary rubric. It was the component that spoke to the task of being a psychologist and how well they met those requirements. Additionally, they were assessed on their timeliness. After their program managers evaluated the school psychologists, the evaluation is translated into a final score and a final rating.

According to Cantave, the expectation is that psychologists complete an assessment within forty-five (45) days of the consent date. They were also assessed on their assessment timeliness, called AT. All the IMPACT components need to be completed before an IMPACT evaluation is finalized. IMPACT evaluations are finalized in this manner: Each component has a weight attached to it. Each individual receives a score. The score is then multiplied by the weight for that component. The scores are then tallied together to develop a final rating. A score cannot be finalized until all of the information has been tabulated. An IMPACT evaluation is finalized by the evaluator.

Regarding Employee, the consent date for a particular matter was due on October 4, 2010; however, the assessment for one of the students was not completed until the end of February 2011. Cantave recalled Employee submitting another report of a student late. He stated that he was able to download the assessments and indicate which date the parent's consent was given and the date the assessments were uploaded. This allowed Cantave to view and verify which reports were timely as well as determine when the letters in the database were generated and finalized.

Cantave testified that Agency retrieved information from SEDS and uploaded it onto the program manger's caseload. The program manager reviewed the cases and flagged any problem cases if necessary. Cantave recalled that a program manager flagged Employee's case for a student with the initials MH. The program manager checked the database that they had access to in SEDS and confirmed the date of assignment that was completed untimely. With respect to the date that was listed on the caseload confirmation page, Employee would have been able to flag the case and inform his superiors that the date of assignment was incorrect.

Mitchell testified that school psychologists were given a 45-day turn-around to complete an evaluation from the date that it was assigned. They were then required to upload the report for submission. She testified that Employee received a score of one (1) during the 2010-2011 IMPACT evaluation, Cycle 1. She explained that Employee received that score based on two reports that were uploaded late. Mitchell knew that the reports were late because of the lack of documentation and the communication log indicating the untimeliness. *Tr. pg. 17-18.*

Mitchell testified that school psychologists were responsible for uploading their own reports on SEDS unless there was an issue where the psychologists were unable to upload it. If there was an issue, the psychologists were responsible for notifying their program manager and informing them of any barriers that prevented the upload of reports. Mitchell explained that during the 2009-2011 academic school years, the assessments were faxed in, which was why the program managers requested that an email be sent for cases not uploaded, so that there would be documentation if there was an issue faxing the report. *Tr. pg. 48-49.*

Mitchell stated that once a student is assigned to a school psychologist, it becomes part of their caseload, even when it may not fall on their SEDS caseload. She recalled only one email inquiring about Employee's assignment. She asked her staff on the prior day of an assignment due date if Employee had completed his assignment, and at the time she asked, it had not yet been completed. Mitchell testified that she was not responsible for recording whether assessments are late. With regard to the IMPACT score report, she could not speak to Employee's assessment timeliness. She explained that assessment timelines were evaluated by other individuals. *Tr. pg. 35.*

Initially, Employee testified (*Tr. 79-104*) that he did not submit any late assessments and that he was falsely accused of untimely submitting student reports, which led to the erroneous AT score. Employee provided that according to Cantave's affidavit, he would have received an AT score of four (4) for the 2010-2011 academic year if a student report for JF had not been considered in calculating his AT score for the year. Employee explained that an AT score of four (4) would have resulted in Employee receiving an IMPACT rating effective for that school year. Further, he opined that he would not have been subject to termination as a result of the IMPACT evaluation process.

As it relates to the AT portion of the Employee's Final 2010-2011 IMPACT evaluation, Cantave said IMPACT data identified at least two cases in which Employee submitted late psychological assessments. Cantave said he was familiar with the Employee's IMPACT records because he personally reviewed them. Specifically, Cantave testified that he reviewed documents relating to the Employee's submission of untimely assessments and according to the IMPACT database there were two late assessments that were completed by the Employee. Cantave stated that he was able to substantiate the existence of the documents because he was able to access them within the Agency's database, known as SEDS. As such, Cantave was able to download the reports.

In the first case involving student MH, Cantave stated that the assessment was ordered on October 4, 2010, but was not completed by Employee until the end of February 2011. Cantave testified that the expectation is that psychologists are to complete assessments within forty-five days of the consent date.¹⁹ According to Cantave, the second student's whose evaluation was completed late was JF.

When confronted with SEDS data showing that he submitted two late student reports, one for a student with the initials JF and another for MH, Employee said these should have never been included in his caseload. Employee claimed that he sent an email to Mitchell on November 4,

¹⁹ "Consent date" is defined as the date when a parent provides the school authorization to conduct the evaluation.

2010, providing that he had not completed the written review for an outside evaluation since the student with the initial JF was deleted from his caseload.

Employee stated that Agency should have reviewed at least sixteen to twenty students; however, he stated that Agency only reviewed three students reports when calculating his AT score. Employee maintained that one of the students should not have been included in his caseload. Additionally, he opined that Agency ignored eighty-eight percent of the students that he evaluated, and Agency did not base his AT score on all of his assessments, which he claimed was procedural error.

Chapter 5-E of the District of Columbia Municipal Regulation (“DCMR”) §§1306.4, 1306.5 governing IMPACT provides DCPS with considerable leeway in evaluating their personnel. For the AT score, DCPS randomly samples Employee’s required student reports and found two late reports recorded on the SEDS database. DCPS also relies on its employees correctly confirming their caseload as per Casement Confirmation Guideline instructions.²⁰ Employee’s own Casement Confirmation Report identifies only three (3) students on his caseload.²¹ Thus, Employee cannot blame DCPS for not including other students in his AT sample.

Based on the undisputed accuracy of the SEDS data, I do not find Employee credible on this issue. I note that Employee’s own Exhibit 8 shows at least one case that IMPACT identified as being untimely. I also note that the November 4, 2010, emails between Employee and Mitchell made it clear that these students were indeed on Employee’s caseload.²² This fact is further buttressed by Mitchell’s July 15, 2014, deposition where she explained why the student JF was still part of Employee’s caseload even after the student transferred to a different school.²³ Other 2010 emails show timeliness problems with Employee’s case reports on other students.²⁴ Employee’s own Exhibit 8 also outlines at least one case that IMPACT identified as being untimely.²⁵ The evidence presented showed that Employee’s AT score of one (1) resulted from his untimely report of one student. However, a review of SEDS revealed that Employee was actually late in submitting reports of two students, not one. This gives even more support for Employee receiving an AT score of one (1). Therefore, I find by a preponderance of the evidence that Employee was indeed untimely on two student reports he was assigned to complete, and that DCPS was justified in reducing Employee’s AT score. Therefore, his AT score is not erroneous.

Whether Agency improperly rated Employee on the Berry Visual Motor Integration Test

Employee argues that he was evaluated on an assessment, the Berry Visual Motor Integration test, that he did not use during the 2010-2011 school year. Mitchell testified (Tr. 7-53) that she completed Employee’s 2010-2011 IMPACT evaluation. Mitchell stated that both Bender and the Berry tests are both standard and are known to measure the same component. She further testified that Employee was not evaluated on a specific assessment such as the Berry Visual

20 OEA July 23, 2020, Hearing Employee Exhibit 17 (Cantave Supplemental Declaration)

21 OEA July 23, 2020, Hearing Employee Exhibit 8 (Case Confirmation Document).

22 OEA July 23, 2020, Hearing Employee Exhibits 9 (Mitchell 11/4/2010 Emails) and 21 (2011 Emails)

23 OEA July 23, 2020, Hearing Employee Exhibit 6 (Mitchell 7/15/2014 Deposition)

24 OEA July 23, 2020, Hearing Employee Exhibit 16 (Assorted Emails. Employee also included irrelevant 2018 emails, so these were not considered)

25 *supra* Employee’s Exhibit 8

Motor Integration test. She recalled that Employee was informed that Agency did not use the visual motor integration unless there was concern in the area of visual motor integration. Mitchell stressed that Employee's 2010-2010 IMPACT evaluation did not include him being assessed on Berry Visual Motor Integration Test.

The Employee's 2010-2011 IMPACT evaluation corroborates Dr. Mitchell's assertion.²⁶ During the 2010-2011 school year, Group 12 employees, including Employee, were evaluated on two components: RSP (comprising 75% of Group 12 employee's IMPACT score) and AT (comprising 25% of Group 25 employee's IMPACT score). The 2010-2011 Cycle 1 assessment does not mention the Berry Visual Motor Integration Test. Neither does Cycle 3. I find Mitchell to be more credible than Employee. Based on the evidence presented, I find that Agency did not rate Employee on the Berry Visual Motor Integration test.

Whether Agency issued its termination notice before calculating Employee's AT score.

Employee alleges that the Agency committed a procedural error during the 2010-2011 school year by issuing him a termination notice prior to the calculation of his AT score. Employee testified that Agency issued its termination notice before calculating Employee's AT score. To support his assertion, he submits a July 18, 2010, email from Mitchell to Kate McMahon asking why Employee would receive a letter of separation when it appears that no AT score has yet been configured for him.²⁷ However, Employee did not provide the full picture. While the initial email query was about a missing AT score, subsequent emails clarified that there was indeed an AT score already calculated before Employee's separation letter came out.²⁸

Cantave testified (Tr. 54-75) that IMPACT evaluations were finalized by the evaluator or program manager. He explained that the individual would log on to an IMPACT database and see a list of staff persons whom they were assigned to evaluate. The program manager would evaluate the individual and compare it to the rubric with the components and provide the individual with a score between one (1) and four (4). After the score was provided, it was saved on the IMPACT database. Cantave stated that in order for the final score to be calculated, all of the components would have a weight attached to it to receive a final rating. While individual components could be finalized prior to the final weighting, the final score itself could not be finalized until all of the information was tabulated.

During the 2010-2011 school year, Group 12 members, including Employee, were assessed on two components. Related Service Providers Standards ("RSP") was the first primary rubric. This component assessed how well school psychologists managed the responsibilities of being a psychologist. This component was completed by their program managers. In this case, Mitchell completed this portion of Employee's evaluation. As outlined in Employee's Final 2010-2011 IMPACT Report, Cycles One and Two were averaged together which produce an overall average score of 2.21. Thereafter, the overall average was multiple by the weight for that component, which was 75. This combination yielded a weighted score of 166.²⁹

26 OEA July 23, 2020, Hearing Agency's Exhibits 2 (Final 2010-2011 IMPACT Report), 3 (2010-2011 Cycle 1), 4 (2010-2011 Cycle 3)

27 Employee Exhibit 14 (7/15/2011 Emails.)

28 Employee Exhibit 15 (7/18/2011 Emails.)

29 See Agency Exhibit 2. 2010-2011 (Employee Final IMPACT Report.)

Cantave testified that Employee's AT score was finalized before he was separated from his position. Cantave testified that a final IMPACT score cannot be calculated until all of the IMPACT information has been tabulated. He explained that he knew it was finalized before his separation because the database indicated the date that it was finalized, and stated that Employee would not have received any information related to his final IMPACT score rating that would have triggered his termination until the information was finalized in the database.

Cantave outlined that the way in which IMPACT works is that each group has different components of their evaluation that are related to their specific role within the school. The employee is then evaluated and given a score on those different components. Thereafter, each component has a weight attached to it. The score that the employee receives is then multiplied by the weight for that component. Finally, the scores are then tallied together to develop a final rating. Mr. Cantave outlined that all of the IMPACT components need to be completed before an IMPACT evaluation is finalized.³⁰

Employee's overall AT score was multiplied by the weight for that component, which yielded a weighted score of 25. Thereafter, the RSP and the AT scores were combined. Next, the Core Professionalism score was factored into the IMPACT calculation, which generated a Final IMPACT score of 181.³¹ After the calculations were made, Employee was provided notice that he was being separated as a result of his IMPACT scores. Based upon the evidence, I find that Agency had calculated all of Employee's IMPACT scores, including his AT score, before issuing him his separation notice.

To summarize, I find by a preponderance of the evidence that DCPS committed procedural error when it changed its IMPACT scoring rubric during the 2009-2010 school year and gave Employee an IMPACT score of "Minimally Effective" for the 2009-2010 school year. I also find by a preponderance of the evidence that DCPS did not commit procedural error in giving Employee an IMPACT score of "Minimally Effective" for the 2010-2011 school year. Accordingly, I find that Employee's removal should be reversed and that he be given another school year to be evaluated under the IMPACT system.

ORDER

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

1. Agency's action of separating Employee for receiving a "Minimally effective" IMPACT rating for two consecutive school years is **REVERSED**; but with his "Minimally effective" IMPACT score for school year 2010-2011 **UPHELD**; 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 and benefits lost as a result of the separation less any retirement benefits he has received; and

30 Tr. pg. 59-60.

31 *Supra.* Agency Exhibit 2.

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:

Joseph E. Lim, Esq.
Senior Administrative Judge