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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 1601-0374-10
THEODORE MAVRITTE,	)	
Employee	)	
	)	Date of Issuance: October 31, 2013
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Sommer J. Murphy, Esq.
_____	)	Administrative Judge
Theodore Mavritte, Employee, <i>Pro Se</i>		
Carl Turpin, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On August 19, 2010, Theodore Mavritte (“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 him from his position as an Educational Therapy Assistant at Hamilton Center. 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 16, 2010.

This matter was assigned to me in July of 2012. On October 4, 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. 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).

<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 the score he received on his last evaluation did not represent a true representation of his performance, and was not administered within the guidelines established by Agency. Employee asserts that the assistant principal modified his rating to reflect the wishes of the school principal. He also submits that the principal at Hamilton failed to schedule a post-conference meeting with him, as required by the IMPACT procedures. According to Employee, he did not know that his IMPACT scores could be reviewed and discussed with the principal. Employee states that he has received mostly outstanding performance evaluations during his tenure with Agency, and was unaware that he needed to improve upon his performance.

## 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 2009-2010 school year.<sup>2</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>3</sup>

In *Brown v. Watts*<sup>4</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

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<sup>2</sup> *Id.* at Tab 1.

<sup>3</sup> Agency's Answer and Agency's Brief, *supra*.

<sup>4</sup> 933 A.2d 529 (April 15, 2010).

the coverage of a negotiated grievance procedure.”<sup>5</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).

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 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.

During the 2009-2010 school year, there were twenty (20) IMPACT grouping of DCPS employees. Employee’s position – Educational Therapy Assistant, was within Group 17. The IMPACT process for Group 17 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

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<sup>5</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).

assessment cycle (“Cycle 3”) which was between March 1st and June 15th. Group 17 employees were assessed on a total of five (5) IMPACT components, namely:

- 1) Instructional Paraprofessional Standards—a measure of an Educational Therapy Assistant’s job acumen, positive rapport with students, dependability, adaptability, customer service, communication and collaboration. This component accounted for 90% of an Educational Therapy Assistant’s IMPACT Score.
- 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 5% 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 CAS. This component accounted for 5% 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 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 of DCPS the authority to set procedures for evaluating Agency’s employees.<sup>6</sup> 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 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

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<sup>6</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

an “Ineffective” IMPACT rating of 167. Employee’s primary argument is that Agency failed to provide him an opportunity to meet with his evaluator, the school principal, after he received his IMPACT score. However, Employee admits in his Petition for Appeal that he had two evaluation conferences with the principal and assistant principal.<sup>7</sup> According to Agency, the conferences occurred on or around November 24, 2009 and June 7, 2010, respectively.<sup>8</sup> Employee’s contends that he was told that his scores would be changed, however I find there is no credible evidence in the record to support this assertion. The IMPACT rules require that employees be afforded an opportunity to have a post-evaluation conference with their evaluators; an event which occurred in this case. If Employee had any further issues or concerns about his IMPACT evaluation and rating, he could have followed up by contacting DCPS’ IMPACT team by telephone or email, as discussed above. Employee does not deny that he received training regarding the IMPACT program, and does not submit that Agency failed to provide him with a copy of his scores.

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 were supposed to be changed, he did not specifically note in his submissions to this Office that the principal’s comments were untrue; nor did he proffer any evidence that directly contradicted the principal’s factual findings.<sup>9</sup> It should be noted that the D.C. Superior court in *Shaibu v. D.C. Public Schools*<sup>10</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>11</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>12</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.

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>13</sup>

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<sup>7</sup> Petition for Appeal (August 19, 2010).

<sup>8</sup> Agency Answer to Petition for Appeal (September 24, 2010).

<sup>9</sup> This tribunal notes Employee’s submission of several letters of reference highlighting his accomplishments as an educational therapy assistant. However, these letters do not have a bearing on the outcome of the instant appeal, as the principal in this case had discretion to rate his employees.

<sup>10</sup> Case No. 2012 CA 003606 P (January 29, 2013).

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.* Citing *Washington Teachers’ Union, Local # 6 v. Board of Education*, 109 F.3d 774, 780 (D.C. Cir. 1997).

<sup>13</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).

As performance evaluations are “subjective and individualized in nature,”<sup>14</sup> 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>15</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.

With respect to Employee’s argument that he should have been placed on an excess list for reassignment to another school in lieu of termination, I find that this issue is a grievance, and is therefore outside of the purview of OEA’s jurisdiction.

In the instant matter, I find that Employee was evaluated a total of three (3) times by the school principal, in accordance with the IMPACT rules. Employee received a copy of his IMPACT score, in addition to having post-evaluation meetings with his evaluator(s). Because Employee’s final IMPACT score resulted in an “Ineffective” rating, Employee was terminated from his 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:

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SOMMER J. MURPHY, ESQ.  
ADMINISTRATIVE JUDGE

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<sup>14</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>15</sup> See *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).