

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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| _____ |) | |
| In the Matter of: |) | |
| |) | |
| ANDREW JOHNSON, |) | OEA Matter No. 1601-0215-11R18 |
| Employee |) | |
| |) | |
| v. |) | Date of Issuance: June 14, 2019 |
| |) | |
| DISTRICT OF COLUMBIA PUBLIC SCHOOLS, |) | JOSEPH E. LIM, ESQ. |
| Agency |) | Senior Administrative Judge |
| _____ |) | |
| Andrew Johnson, Employee <i>pro se</i> | | |
| Andria Bagwell, Esq., Agency Representative ¹ | | |

INITIAL DECISION ON REMAND

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 me 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 retirement.

Employee subsequently filed a Petition for Review with OEA's Board on June 26, 2014. On February 16, 2016, the OEA's 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 supports 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.³ Employee’s Motion for Reconsideration was 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 for further 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 ordered the parties to submit their legal briefs. Both parties have complied. The record is closed.

¹ Carl Turpin was the agency representative at the onset until Ms. Bagwell was assigned to this matter.

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

³ *Johnson v. District of Columbia Public Schools, et al.*, Case No. 2016 CA 001551 (D.C. Super. Ct. February 21, 2017).

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 two consecutive 'Minimally Effective' performance ratings under the IMPACT system was done in accordance with all applicable laws, rules, or regulations.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of fact, analysis and conclusions of law are based on the documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

The Parties' Arguments:

Agency argues that this Office has limited jurisdiction over this matter and that its IMPACT process separating Employee was properly done. Employee opposes his separation on several grounds. For ease of discussion, the following findings of fact, analysis and conclusions will be centered around each of Employee's arguments.

Illegal Performance Rating Scheme

First, Employee argues that Agency's use of IMPACT as an evaluation tool for his performance was illegal. He argues that this rating system conflicts with District of Columbia laws already in place before IMPACT was established. Agency asserts that IMPACT was properly placed into law by the District of Columbia.

Governing Authority:

With regard to Employee's IMPACT rating, I note that the 109th Congress of the United States enacted the 2005 District of Columbia Omnibus Authorization Act, P.L. 109-356, which provides:

Notwithstanding any other provision of law, rule, or regulation, during fiscal year 2006 and each succeeding fiscal year, the evaluation process and instruments for evaluating District of Columbia Public School employees shall be a non-negotiable item for collective bargaining purposes. D.C. Code § 1-617.18

Pursuant to this broad authority, DCPS implemented the IMPACT evaluation system beginning with the 2009-2010 school year.

DCPS conducts annual performance evaluations for all of its employees. IMPACT is DCPS' Effectiveness Assessment System for all School-Based Employees, including teachers, principals, and

other staff members. IMPACT has been used for the 2009-2010, and subsequent school years to rate the performance of school-based personnel.

IMPACT was the culmination of over a year's worth of research and stakeholder engagement. The design of the IMPACT system was informed by guidance and feedback from the DCPS community through focus groups, school-based meetings, community meetings, in-person interviews, and surveys, all of which included over one-thousand (1000) participants. These feedback opportunities included school-based personnel – those employees who would be affected by IMPACT.

During September 2009, all principals and assistant principals were provided a full set of training materials which each then used to conduct a full day training with all staff members. This training detailed the IMPACT components and rubrics for each group, as well as the overall IMPACT process and consequences, positive and negative, associated with each final rating. Each staff member was sent a full IMPACT guidebook unique to their evaluation group. These guidebooks were delivered to the employee's school and were also all available online via the DCPS website. Throughout the year, the IMPACT team visited schools to answer questions as well as ensured the IMPACT helpline was available to all staff members via email and telephone at all times to answer questions or provide clarification.

Based on the legislative history, it is clear that Employee's contention that IMPACT is illegal has no merit. The 2005 District of Columbia Omnibus Authorization Act, P.L. 109-356, specifically overrides any prior laws that conflict with IMPACT. Therefore, I find that the IMPACT evaluation process is legal.

Procedural Errors, Biased Evaluation, Improper Evaluation Criteria

Employee also asserts that DCPS committed many procedural errors. Specifically, Employee argues that he was rated on something other than the "Standard." Instead, Employee argues, he was rated on "classroom observation," "teacher interview," and "review of the relevant background information." Employee explains that his ratings were "indiscriminant" (sic) and untrue. Employee stated that he did not use the Berry Visual Motor Integration Test but was rated on its use, and he asserts that this is inherently a procedural violation.

Additionally, Employee states that his supervisor/performance rater was not objective and misrepresented the facts related to his performance and that his termination was arbitrary and capricious. He states that DCPS incorrectly determined that his psychological assessment was submitted late, resulting in an erroneous Assessment Timeliness ("AT") score of 1 instead of 4. Employee states that it was in fact the only reason for his termination.

The IMPACT Process⁴

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

⁴ Agency's Answer (October 12, 2011). *See also* Agency's Briefs (March 11, 2019, and March 25, 2019).

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 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 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."⁵ 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

⁵ 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).

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. For the 2009-2010 school year, Group 12 employees were assessed on the following three (3) IMPACT components, namely:⁶

- 1) Related Service Provider Standards: these standards define excellence for related service providers in DCPS and make up 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 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 makes up 15% of the School Psychologist IMPACT score.

For the 2010-2011 school year, Group 12 employees were assessed on the following three (3) IMPACT components, namely:⁷

- 1) Related Service Provider Standards: these standards define excellence for related service providers in DCPS and make up 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 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 10 points were subtracted from the employee’s final IMPACT score. An additional 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 20 points were deducted from the employee’s final IMPACT score. An

⁶ 2009-2010 Group 12 IMPACT Assessment Handbook - Agency’s Tab 2.

⁷ 2010-2011 Group 12 IMPACT Assessment Handbook - Agency’s Tab 3.

additional 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. 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) Effective = 250-349 points; and
- 4) Highly Effective = 350-400 points.⁸

Employee’s duties were to conduct assessments, evaluation, observation, consultation, facilitate IEP meetings, 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.

Dr. Jamila Mitchell was the Program Manager who rated Employee for the 2009-2010 and 2010-2011 school years.⁹ A School Psychologist herself, Dr. Mitchell completed Employee’s Cycle 1 and Cycle 3 IMPACT evaluations and held post assessment conferences; one at the end of the first Cycle and one at the end of the second Cycle, to provide feedback to Employee and outlined a growth plan. In response to Employee’s complaint about his IMPACT scores, Dr. Mitchell provided a detailed rebuttal.¹⁰ She provided detailed comments that explained the basis for the scores. Dr. Mitchell said that Employee failed to adequately follow the proper psychological report procedures as outlined in the IMPACT Guidebook and report template. On several occasions, school leaders had complained that Employee failed to timely prepare reports, missed scheduled meetings, and failed to effectively collaborate with local school staff.

Alain Cantave, Director of IMPACT Operations for DCPS, explained the scoring and subsequent termination of Employee in his affidavit.¹¹ He explained in detail the factors that led to Employee’s two years of Minimally Effective scores. I also note that due to Employee’s numerous complaints at the Agency level about his IMPACT scores, several DCPS officials apart from Dr. Mitchell, including the DCPS Chancellor, have examined the matter and have found everything to be in order.

The Core Professionalism standards came into account only if there was a deduction. If an employee was below standard or significantly below standard, points were subtracted from the evaluation. For both the 2009-2010 school year and the 2010-2011 school year, Employee received a minus ten (10) in Core Professionalism, which was subtracted from his score. I note that even if, for the sake of argument, we restore Employee’s ten points for Core Professionalism to each of his final scores, his IMPACT scores

⁸ *Id.*

⁹ DCPS Response to Post Conference Order, Exhibit A.

¹⁰ DCPS’ Opposition to Employee’s Motion for Dispositive Dismissal, Tab 14.

¹¹ DCPS Response to Post Conference Order, Exhibit B.

would still be in the minimally effective range and thus, under the IMPACT guidelines, he would still be separated from service.

Employee asserts that Agency used flawed, subjective and contradictory rating criteria to evaluate Employee. However, Employee has not proffered to this Office any credible evidence that controverts any of Dr. Mitchell's evaluation methods. I have reviewed every document in the record concerning Employee's IMPACT scores and find no credible basis for Employee's complaints. Employee failed to provide proof that his evaluations were wrong. Every assessment made by Dr. Mitchell regarding Employee's performance was authorized by the IMPACT handbook and was within her discretion. I also find that Dr. Mitchell scrupulously followed the procedures outlined in the IMPACT assessment handbook. Consequently, I conclude that this argument is without merit.

Changed IMPACT Standards

Lastly, Employee claims that DCPS changed the IMPACT standards set out at the beginning of the year. He attaches prior IDs issued by this Office in other matters without any explanation as to how these are relevant or similar to his appeal. Employee offers no discussion or support for his allegation. Accordingly, this claim will not be considered.

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.¹² As performance evaluations are "subjective and individualized in nature,"¹³ 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."¹⁴ The Agency's discretion to implement its own evaluation system, coupled with its showing of compliance with the procedures set forth in that evaluation system, are entitled to substantial deference and that OEA should not substitute its own judgment for that of the agency's absent a showing of arbitrary and capricious action by the Agency.¹⁵

I have reviewed the IMPACT documents submitted and considered the parties' arguments. My perusal of the documents, plus Employee's lack of specific complaints about the IMPACT process, led me to conclude that Employee's rating was proper and conducted in accordance with the IMPACT process. I find that Agency adhered to the IMPACT process and as a result, I conclude that Agency had

¹² 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).

¹³ 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).

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

¹⁵ *Id.* ("Although OEA has a 'marginally greater latitude of review' than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate.") (*Douglas v. Veterans Administration*, *supra*, 5 M.S.P.B. at 327-328, 5 M.S.P.R. at 300.)

sufficient 'just cause' to terminate Employee, following his two consecutive years of 'Minimally Effective' IMPACT ratings.

ORDER

It is hereby **ORDERED** that Agency's termination of Employee is **UPHELD**.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge