THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Herman Vilmenay	)	OEA Matter No. 1601-0047-09
Employee	)	
	)	Date of Issuance: March 24, 2010
v.	)	
	)	Senior Administrative Judge
D.C. Public Schools (DOT)	)	Joseph E. Lim, Esq.
Agency	)	
	)	

Frank McDougald, Esq., Agency Representative
Robert Epstein, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition with the Office of Employee Appeals (OEA) on November 19, 2008, appealing Agency's final decision to remove him from his position as a Bus Attendant, RW 3/6, $13.76/hour, effective November 10, 2008, due to a single instance of sexual harassment. At the time of the adverse action, Employee was in permanent career status.

This matter was reassigned to me on October 14, 2009, after previously being assigned to Judge Aikens-Arnold. The status conference took place on October 26, 2009. The hearing was held on March 3, 2010, with Employee's daughter acting as his interpreter.[1] The record closed at the conclusion of the hearing.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUE

Did Agency meet its burden of proof that employee engaged in sexual harassment?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

[1] Employee came from Haiti and his native language is French.

On October 27, 2008, Keith Pettigrew, Chief Operating Officer, issued a notice to Employee proposing to terminate his employment based on a charge of "sexual harassment." The notice stated, in pertinent part:

> On Tuesday, October 14, 2008, you hugged and kissed the parent of a student you transport without the parents (sic) approval. She deemed your actions offensive and unwarranted. The alleged actions were witnessed and confirmed by your driver that day, Mr. Matthew Johnson. Based on the findings of an investigation conducted by the Office of Investigations, your behavior has been deemed "offensive, inappropriate and constitutes sexual harassment." Such behavior is a serious offense and will not be tolerated. Thus, based on the above, you are being terminated.

In the final notice, issued on November 10, 2008, Transportation Administrator David Gilmore, determined that Employee should be removed on the charge of "sexual harassment."

Positions of the Parties and Summary of Evidence

Agency's position is that Employee was terminated for cause, more specifically, for sexual harassment that it defined as "inappropriately touching and kissing a parent without permission." (Agency's Response to Petition for Appeal, page 2). According to Agency, the said parent, Ms. Brenda Bailey, had made a complaint to Agency. Employee flatly denied the allegation.

Brenda Senn testified (transcript pgs. 5-31) that she was the mother of Danielle Bailey, a student who rode the school bus that Employee worked on as a bus attendant. She stated that on October 14, 2008, she was at the bus stop waiting for her daughter. When the school bus dropped off her daughter, the bus attendant approached her in view of the bus driver and her daughter and proceeded to pull her towards him and kissed her on her neck and cheek. Ms. Sean identified Employee as the bus attendant who kissed her. Ms. Sean said she has never met Employee before. She protested and admonished Employee for his behavior. She then reported the incident to the parent call center. She added that whenever the bus failed to pick up her daughter, she would call the parent call center to complain.

Matthew Johnson testified (transcript pgs. 36-51) that he was the bus driver while Employee was his bus attendant on October 14, 2008. The bus attendant's job is to make sure the child gets on or off the bus safely. He added that it was the only time he and Employee worked together. That day, they were running late. After student Dainelle Bailey got on the bus, Employee disembarked to talk to Ms. Sean. After a brief conversation, he witnessed Employee giving Ms. Sean what appeared to him to be a social hug and kiss. He thought nothing of it, and indeed, thought the two knew each other as Ms. Sean did not show any sign of being upset by the encounter.

Employee (transcript pgs. 51-66) denied ever hugging or kissing Ms. Senn and said such familiarity with those of the opposite sex was not a custom in Haiti. Employee testified that Ms. Senn had a history of getting upset and yelling at them whenever the bus was late. When asked to explain

why Mr. Matthews, his own driver, testified that Employee did in fact, hug and kiss Ms. Senn, Employee speculated that the driver did not want to drive with him because he complained to management about the fact that the driver had not shown up early. Employee insisted that in fact it was Mr. Matthews who was conversing with Ms. Senn, not him. In short, Employee's testimony contradicted that of Mr. Matthews and Ms. Senn.

Anelus Francois testified (transcript pgs. 66-72) that he was a bus driver and had known Employee for seven years. He said Employee was quiet and a good worker who never gave any trouble. Francois also said that Employee had complained to him before about Ms. Senn's yelling and cursing at him for being late on another occasion.

Findings of Fact

Since only Ms. Senn, Mr. Matthews, and Employee were present during the alleged misconduct, and had conflicting testimony, credibility assessments were critical in this matter. In trying to resolve issues of credibility, I considered the demeanor and character of the witnesses, any inherent improbability of each witness's version, any inconsistent statements of each witness and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). The District of Columbia Court of Appeals emphasized the importance of credibility evaluations by the individual who sees the witness "first hand". *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d at 440-450 (D.C. 1985). These "first-hand" observations are critical in cases, such as this, where serious accusations have been made, where testimony is in conflict, and where a career is at stake. This Administrative Judge has been called upon to assess credibility for many years, and that experience and expertise was called upon and utilized in this case.

This Administrative Judge recognizes that employees are often nervous when they give testimony because of the formality of the proceeding, the seriousness of the allegations, and the consequences of the adverse action, particularly in a case involving the termination of employment. I considered this when assessing Employee's testimony. Even factoring in these considerations, I often found Employee's testimony to be non-responsive and incredible. His speculations as to why his fellow employee, Mr. Matthews, would lie about seeing him hug and kiss Ms. Senn made little sense. That Mr. Matthews was supposedly upset about driving his bus route did not made sense as it was his daily job. In addition, Mr. Matthews testified that he was under probation at the time of the incident and thus had all the incentive to perform his job without complaint. In addition, Mr. Matthews testified in a forthright and credible manner and had no demonstrated rationale to lie about what he witnessed. Mr. Matthews worked only once with Employee and had no animus towards him.

Employee's speculation as to why Ms. Senn would lie was even less credible. Employee posited that Ms. Senn was angry with him for often being late. He could not, and did not, explain why Ms. Senn would blame him, a mere bus attendant, and not the bus driver, for being late in picking up her daughter. I also found Ms. Senn to be a credible witness.

Based upon careful consideration of the testimonial evidence, I make the following findings of fact:

1. Employee was employed at Agency since 2001 as a bus attendant. Prior to this incident, he had no disciplinary record.

2. On October 14, 2008, Employee did accost Ms. Senn by hugging her and kissing her on the cheek without her consent.

3. At the hearing, Agency did not produce any policy, regulation or statute that would define what it considered as "sexual harassment**."**

4. In its notices to Employee, Agency never cited any regulation or statute that Employee supposedly violated. Instead, in its notice, Agency simply stated its allegation against Employee and then declared it as "sexual harassment."

Analysis and Conclusions

Disciplinary Action: D.C. Code, §1-616.51 (2001) requires, with regard to employees of agencies over which he has jurisdiction, that the Mayor "issue rules and regulations to establish a disciplinary system that includes…1) A provision that disciplinary actions may only be taken for cause [and] 2) A definition of the causes for which disciplinary action may be taken." The Mayor has personnel authority over the Agency. The D.C. Office of Personnel (DCOP), the Mayor's designee for personnel matters, published regulations entitled "General Discipline and Grievances" that meet the mandate of §1-616.51 and applies to all employees in permanent status. *See* 47 D.C. Reg. 7094 *et seq*. (2000). Employee is therefore covered by these regulations.

Employee can only be disciplined for cause. Cause is defined by 6 D.C.M.R. §1603.3 (2008) as:

> §1603.3 For the purposes of this chapter, except as provided in section 1603.5 of this section, cause for disciplinary action for all employees covered under this chapter is defined as follows:
>
> (a) Conviction of a felony;
>
> (b) Conviction of a misdemeanor based on conduct relevant to an employee's position, job duties, or job activities;
>
> (c) Any knowing or negligent material misrepresentation on an employment application;
>
> (d) Any knowing or negligent material misrepresentation on other document given to a government agency;

(e) Any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law;

(f) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include:

(1) Unauthorized absence;

(2) Absence without official leave;

(3) Neglect of duty;

(4) Insubordination;

(5) Incompetence;

(6) Misfeasance;

(7) Malfeasance;

(8) Unreasonable failure to assist a fellow government employee in carrying out assigned duties; and

(9) Unreasonable failure to give assistance to the public;

(g) Any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious;

(h) Any act which constitutes a criminal offense whether or not the act results in a conviction; and

(i) Use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result.

Agency's charge of sexual harassment against Employee is not specifically cited as a cause. Likewise, Agency failed to specify which of the above enumerated cause they are citing against Employee. As the disciplining body, Agency had the duty to specify under which cause they are using to justify their removal of Employee. Absent a cited cause, Agency cannot legally discipline an employee nor can Agency delegate this duty to someone else to find a cause that would fit its charge.

Sexual Harassment

Since Agency failed to provide a definition of sexual harassment, we must look elsewhere to determine whether Employee's actions fit the charge of sexual harassment. Black's Law Dictionary, eighth edition, defines sexual harassment as "a type of employment discrimination consisting in verbal or physical abuse of a sexual nature." It goes on to elaborate that there are two types of sexual harassment: a hostile-environment sexual harassment and a *quid pro quo* sexual harassment. The first is defined as harassment in which "a work environment is created where an employee is subject to unwelcome verbal or physical sexual behavior that is either severe or pervasive;" while the latter

is defined as harassment in which "the satisfaction of a sexual demand is used as the basis of an employment decision." An example of the first type would occur if a group of coworkers repeatedly e-mailed pornographic pictures to a colleague who found the pictures offensive. An example of the latter type would occur if a boss fired or demoted an employee who refused to go on a date with the boss.

Although the term "sexual harassment" is usually considered in an employment context, it applies in an educational setting where there is almost always a significant disparity in the ages and power of the accused and accusers. In *Harris v. Forklift Systems,* 510 U.S. 17 (1993), the Supreme Court held that in order to establish sexual harassment, the accuser must prove that "the workplace is permeated with discriminatory intimidation, ridicule and insult...that is sufficiently severe or pervasive to ...create an abusive working environment". The Court stated the frequency of the discriminatory conduct, its severity, any physically threatening conduct, and its interference in work performance must all be examined.

At another District agency situated in an educational setting, the University of the District of Columbia, defined sexual harassment[2] as unwelcome sexual advances, requests for sexual favors, and other oral or written communications or physical conduct of a sexual nature when:

> (1) submission to such conduct is made either explicitly or implicitly a term or condition or an individual's employment or academic standing;
> (2) submission to or rejection of such conduct by an individual is used as a basis for employment or academic decisions affecting such individual;
> (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, hostile or abusive work or academic environment.

Other types of unwelcome conduct of a sexual nature can also constitute sexual harassment, if sufficiently severe or the target does find, and a reasonable person would find, that an intimidating, hostile or abusive work or academic environment has been created. Examples of this kind of sexual harassment (known as hostile environment harassment) include, but are not limited to:

- sexual comments, teasing, or jokes, sexual slurs, demeaning epithets, derogatory statements, or other verbal abuse;
- graphic or sexually suggestive comments about an individual's attire or body;
- inquiries or discussions about sexual activities
- pressure to accept social invitations to meet privately, to date, or to have sexual relations;
- sexually suggestive letters or other written materials
- sexual touching, brushing up against another in a sexual manner, graphic or sexually suggestive gestures, cornering, pinching, grabbing, kissing, or fondling, coerced sexual intercourse or sexual assault.

[2] Sexual Harassment Policy (Notice Number 110.620).

The closest case the Administrative Judge could find that was not exclusively employment, was *Humphrey v. Henderson, Postmaster General, U.S. Postal Service,* EEOC No. 01965238), 99 FEOR 3090 (October 16, 1998). In that matter the Equal Employment Opportunity Commission determined that a driving instructor's conduct constituted sexual harassment. In that case, both the driving instructor and Ms. Humphrey, the employee, worked for the agency and the instructor was giving Ms. Humphrey a driving test. The instructor first commented that Ms. Humphrey had "big old hairy legs". He then touched her thigh and pulled her shorts back to "look at all that hair". He pointed to her "private parts" and made a comment. He then unbuckled her seat belt and told her to lean over him to look at the outside mirror on his side. He told her to put her arm and hand on his leg, and indicated an area near his "private parts." As he was instructing her on how to drive, he touched and pinched her breast. Ms. Humphrey felt "very uncomfortable, nervous [and] intimidated, because he was hollering at her, touching her and talking "dirty and nasty" to her. She started shaking and trembling, and as a result failed the driving test which caused her to lose her job.[3]

Humphrey presents a blatant case of sexual harassment, the type of case that would result in a finding of harassment even for one incident of misconduct. Although the extreme of Humphrey is not required for such a finding to be made, the type of misconduct alleged for this one-time incident is at the opposite end on a continuum. Ms. Senn indicated that she was offended by being hugged and kissed on the check by Employee. However, she was neither an employee of the Agency, neither was she a co-worker of Employee. She did not testify that she felt obligated to provide sexual favors to Employee in exchange for having her daughter transported to school. Of significant importance to the Administrative Judge, is that Ms. Senn described the charged conduct as offensive rather than sexual in nature.

I conclude that the unwelcomed hug and kiss on her cheek, do not support a *quid pro quo* sexual harassment claim. *Stone-Clark v. Blackhawk Security,* 134 D.W.L.R.225, p. 2823. (November 20, 2006). Using the standard of a "reasonable person," the Administrative Judge, concludes that a reasonable person would not consider Employee's behavior to be so "severe or pervasive" so as to create an abusive environment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). *See also, Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982). The Court of Appeals for the District of Columbia has held that conduct must not only be "sufficiently patterned or pervasive," but also must be conduct that would not occur but for the individual's gender. *McKinney v. Dole,* 765 F.2d 1129 (D.C. Cir. 1985).

Ms. Senn's testimony, supported by the testimony of Mr. Matthews, was that Employee hugged and kissed her on the cheek openly in full view of both his fellow employee and of Ms. Senn's daughter, supporting the conclusion that the exchanges were not sexual in nature. Employee's action did not create a hostile work environment for Ms. Senn as she was not an employee. Neither was there any allegation of a *quid pro quo.*

[3] The quotation marks are taken from the references to the transcript in the decision.

The Administrative Judge finds that Employee did hug and kiss Ms. Senn without consent and concludes that such actions were inappropriate. However, this conduct was not sexual harassment. Accordingly, I find that Agency failed to prove its charge. I therefore conclude that Agency's termination of Employee was not supported by its stated cause and must therefore be overturned.

ORDER

It is hereby,

ORDERED: Agency is directed to reinstate Employee, issue him the back pay to which he is entitled and restore any benefits he lost as a result of the removal, no later than 30 calendar days from the date of issuance of this Decision.

ORDERED: Agency is directed to document its compliance no later than 45 calendar days from the date of issuance of this Decision.

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