THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
MYLES JOHNSON Employee	OEA Matter No. 1601-0016-07
v.	Date of Issuance: November 8, 2007
UNIVERSITY OF THE DISTRICT OF COLUMBIA Agency	Lois Hochhauser, Esq. Administrative Judge

John Davis, Esq., Employee Representative
Carlynn Fuller, Esq., Agency Representative

ORDER

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition with the Office of Employee Appeals (OEA) on November 17, 2006, appealing Agency's final decision to remove him from his position as International Student Counselor, effective October 31, 2006. At the time of the adverse action, Employee was in permanent career status.

This matter was assigned to me on or about January 11, 2007. The prehearing conference was held on March 9, 2007.[1] The hearing took place on May 18, 2007; June 22, 2007; July 18, 2007 and August 7, 2007. At the hearing, the parties presented testimonial and documentary evidence.[2] Employee was present at the hearing and was represented by John Davis, Esq.. Agency was represented by Carlynn Fuller, Esq., Assistant University Counsel.[3] Following the submission of closing briefs, the record was closed on October 15, 2007.[4]

1 The prehearing conference was originally scheduled for February 13, 2007 but was continued at the request of Employee and with the consent of Agency.

2 Witnesses testified under oath and the hearing was transcribed. The transcript is cited as "Tr" followed by the page number. Exhibits are identified as "A" if introduced by Agency followed by the exhibit number. Those introduced by Employee are identified as "E" followed by the exhibit number.

3 Throughout these proceedings, Ms. Fuller was assisted by Dan Brozovic, paralegal.

4 Employee, with good cause and with Agency's consent, sought and obtained several extensions for

JURISDICTION

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

ISSUES

Did Agency meet its burden of proof that employee engaged in misconduct?
If so, was the penalty appropriate?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On April 14, 2006, Wilhelmina Reuben-Cooke, Provost and Vice President, Academic Affairs, issued a notice to Employee proposing to terminate his employment based on a charge of "mistreatment of the public". (Ex A-9). In the final notice, issued on October 27, 2006, Dr. William Pollard, President, determined that Employee should be removed on the charge of "mistreatment of public", stating, in pertinent part:

> I have determined that the evidence was sufficient to support a finding that you made derisive remarks to the prospective student and other women in her company that were rude and disrespectful. Further, the evidence is sufficient to support a finding that on or about March 3, 2006, during a visit in your office, you kissed the prospective student on the cheeks and during a second office visit you kissed her on the lips as well as on the cheeks. In light of the aforementioned, I find that your conduct toward the prospective student, alone, was of a sufficiently egregious nature to warrant your removal… (Ex A-10).

Positions of the Parties and Summary of Evidence

Agency's position is that Employee was terminated "for cause and mistreatment of the public, more specifically for his violation of [Agency's] sexual harassment policy and for rude and disrespectful statements". (Tr, 10). It contends that Employee engaged in "inappropriate conduct" with Ms. Graciela Lacerda, a prospective student from Brazil, on two occasions. According to Agency, the first took place on March 3, 2006 at her initial meeting with Employee. Ms. Lacerda was accompanied by two friends. Agency alleges that Employee "teased Ms. Lacerda by referring to her two friends as 'bodyguards', chastised Ms. Lacerda for not recording his instructions, and ridiculed her for professing to be a college student, but failing to bring writing materials with her to an important meeting". At the end of the meeting, Agency contends, Employee "kissed Ms. Lacerda on the cheek as she stood to leave." (Tr, 11). Agency maintains that Employee's conduct offended Ms. Lacerda and her friends.

Agency contends the second occasion was on March 7, 2006 , when Ms. Lacerda met with Employee for the second time. Although she was accompanied by a friend, Agency asserts that

---

filing his post-hearing brief.

Employee told her it was not necessary for the friend to be present unless she was going to translate for Ms. Lacerda. Employee and Ms. Lacerda then met alone. Agency alleges that Employee placed his chair so that his knees touched Ms. Lacerda's knees when they sat. Agency further alleges that when the meeting was over, and Ms. Lacerda stood to leave Employee "took both of her hands in his, kissed her on the cheek, saying, as in the first instance 'This is how they say goodbye in Brazil,' and then [he] said 'This is how the Ethiopians say goodbye' and proceeded to kiss Ms. Lacerda on the lips. (Tr, 12-13).

Agency asserts that Ms. Lacerda did not consent to Employee's actions and was offended by it. As a result, she filed a complaint against Agency with the D.C. Office of Human Rights, (DCOHR) alleging sexual harassment and gender discrimination. (Ex A-1). Agency has a sexual harassment policy which states that Agency "has no tolerance for sexual harassment". It maintains that termination is appropriate under these circumstances. (Tr, 13).

LaVerne Hill-Flanagan, Director of Recruitment and Admissions and Acting Registrar, was Employee's supervisor. She explained that there are two International Student Counselors, Employee and Twyla Jones, who advise international students on requirements for admissions, visa requirements, and other matters. She stated that upon hearing of the complaint with DCOHR, she contacted Ms. Lacerda and asked her to provide a statement. Ms. Lacerda and three witnesses went to Agency's Office of General Counsel (OGC) where they provided statements. [Tr, 37, Ex A-2, A-3(a)-(c)]. Ms. Hill-Flanagan stated that after meeting with Employee and the witnesses, she recommended Employee's removal. (Ex A-4).

Ms. Hill-Flanagan testified that on July 28, 2003 she had advised Employee, verbally and in writing, how to act with students because of a prior allegation. (Tr, 42, Ex A-5).The memorandum stated in pertinent part:

> [A]s you strive to maintain professionalism in your counseling sessions with new and prospective students, avoid European gestures, respect the adulthood of your student-customers, keep your office door open whenever a student is present, and never touch a student other than to shake his or her hand. Misunderstandings occur too easily. (Ex A-5).

The only other complaints she had received about Employee were from Ms. Lacerda and the statements from her witnesses. She stated every employee, including Employee, had received a copy of Agency's Sexual Harassment Policy. Employee signed for the document on November 5, 2003. (Exs A-6, A-7).

Wilhelmina Reuben-Cooke, Provost and Vice President for Academic Affairs, is Ms. Hill-Flanagan's supervisor. She testified that she proposed Employee's removal based on Ms. Hill-Flanagan's recommendation. (Ex A-9). Provost Reuben-Cooke stated she did not participate in the investigation and never spoke with the individuals who provided the statements. She found the statements from Ms. Lacerda and the witnesses to be credible, although they were not sworn. [Tr,

140, Exs A-3(b) and 3(c)]. Provost Reuben-Cooke said she was not familiar with the *Douglas* factors. She did not review Employee's personnel file, but was told by Ms. Hill-Flanagan and others that Employee had "been cited previously" and that there was a letter about the inappropriate conduct and touching of students and so forth", but she had never seen the letter. (Tr, 141). She did not know Employee's length of service, but knew he was there when she began in July 2003. She was aware that he made "considerable contributions to the University community". (Tr, 146). Provost Reuben-Cooke stated that because Agency is a public institution, employees have to interact with the members of the public so she was unsure that **"**anything short of termination under these circumstances would have been an appropriate recommendation." (Tr**,** 154).

Graciela Lacerda testified that she is from Brazil and applied to Agency's nursing school in February 2006. She did not speak English at the time. After she submitted the necessary forms, Employee contacted her and told her that the forms had not been filled out correctly. Rosely dos Santos and Kathleen Bouquet accompanied her to the first meeting. At the meeting on March 3, 2006, Employee told her which corrections and documents were needed. When the meeting ended, she and Employee "exchanged kisses on the cheek, that's how in Brazil we do it, and it was no big deal." (Tr, 161). She did not know who initiated the kiss. (Tr, 162). She said that several days later she returned, "this time by herself", with the requested documents. (Tr, 162). She said she asked Employee if she was going to be accepted, and he told her she was "already in, [she] should not worry about it". (Tr, 162). It was her impression that he was responsible for her admission. Ms. Lacerda testified:

> Towards the end, I asked him information to go to the nursing building and he gave me a map. And he sat facing me, our knees like touching, he sat really close, like sitting in front of me. He showed me where the nursing building is, was. And in the end, I stood up, he held my two hands and he gave me a kiss on the lips. (Tr, 163).

Ms. Lacerda could not recall if the door was open or closed during the meeting. She testified that she did not tell Employee that he was sitting too close or that their knees were touching:

> Davis: And did you tell him that you were uncomfortable at any time?
> Lacerda: No, I did not.
> Davis: Were you uncomfortable?
> Lacerda: Well, I thought it was not appropriate, but at that point, he didn't do anything to make me stand up and leave the room. (Tr, 183).

When asked how she felt about the alleged kiss on the lips, she responded:

> I was shocked. I mean honestly, I left without saying a word. I was really shocked, I didn't know what to say. And then as soon as I left, I called my friend Rosely and I told her, and she told me right away, "I should have warned you about him". (Tr, 164).

She said that Ms. dos Santos told her that Employee had "a reputation for being overfriendly with the international students." She decided to file a complaint because "something [needed] to be done. (Tr, 169).

Dr. Pollard, then President of Agency, testified that he made his decision to terminate Employee "on advice of counsel." He believed the alleged conduct violated Agency's sexual harassment policy. (Tr, 269). The witness was not sure if he reviewed any documents prior to making the decision, and was unaware at the time that the Impartial Review Panel had conducted a hearing and issued recommendations. (Tr, 264-265). Dr. Pollard stated that he did not know and did not ask about Employee's professional reputation or the status of his work before issuing the removal letter. (Tr, 271). He did not know if Employee had worked at Agency more or less than ten years. (Tr, 273). He was not aware that faculty, staff and students had written letters in support of Employee. (Tr, 277). He was "probably sure" he met with someone from OGC and/or the Provost before issuing the letter and was "aware" of the circumstances which resulted in the removal. (Tr, 268). He did not draft the notice of termination and did not know who drafted it. (Tr, 268).

Employee's position is that Ms. Lacerda's charges are false, but even if true, the conduct would not constitute sexual harassment. (Tr, 15). He further asserts that Agency prejudged him and that Agency's investigation was incomplete and biased. (Tr, 17). Employee also argues that Agency's sexual harassment policy is "vague and ambiguous." (*Id*). Finally, Employee contends that his 38 years with an "absolutely unblemished record of deportment and accomplishment and achievement" at Agency should have been considered. (Tr, 18).

Employee testified that he worked at Agency and its predecessor institutions for approximately 38 years in a variety of capacities, including English instructor, academic advisor, coordinator of a tutorial lab, program analyst and assistant to the Dean. In 2003, he became an International Admissions Counselor. As part of his duties, he provided potential applicants with admissions requirements, and documentation needed for visa or security purposes. Employee testified that he "mildly" recalled receiving a copy of the sexual harassment policy, but did not recall receiving any training in that area. (Tr, 236).

Employee testified that he never kissed Ms. Lacerda or any student on the mouth, never sexually harassed a student, and never "consciously done anything to any student or member of the public that could be considered disrespectful." (Tr, 221). Employee testified that prior to this incident he had never been disciplined, and had never received a letter of admonishment or warning. The only prior incident he testified occurred in 2003:

> Ms. Flanagan wrote something, and it's a little fuzzy now about keeping the door open when talking with students because someone had made an accusation, but I told her I already did that. And in that particular instance, I was very shocked and surprised when this came up, so I said, could I talk to the person. I was unable to. I wrote a letter of [refutation] and I never heard anything about it anymore. (Tr, 223).

He stated that he was never presented anything in writing and the student was never identified. The letter stated that he should never touch a student other than to shake his or her hand. (Tr, 227-228, Ex A-5). Employee stated that he only kissed students on the cheek, and only did so when the kiss was initiated by the student. (Tr, 229). Employee stated that despite Ms. Hill-Flanagan's instructions, he continued to kiss students on the cheek at times:

> It is my testimony that that would happen from time to time at their initiation. It's part and parcel of what I thought was appropriate to carry out my job and to do what was effective in terms of dealing with the students, yes. (Tr, 234).

Employee stated that he did not think he was violating the directive from Ms. Hill-Flanagan when he continued to kiss students on the cheek after her memorandum:

> I don't think I disregarded what it is she said, because again, I'm particularizing it to the particular lady who made the allegation, even though, as you pointed out very well, it was generic and broad enough to say at any time. I don't believe I consider myself disregarding her, I believe I was looking at some things ancillary to be getting information that would make me effective in my job. (Tr, 243).

Employee stated that he sometimes chastised students who wanted to borrow a writing utensil from him for coming to school without something to write with. He said he considered himself an "elder" who, with the international students, was acting "in the place of parents". (Tr, 225). He could not recall saying anything to Ms. Lacerda about bringing a bodyguard, but said he might use the phrase:

> As an ice-breaker, an adjustment, because I've assessed myself with my voice and my height and maybe my stern-looking demeanor, that people became uneasy with me, so if they came with an entourage of folks, I would say frequently, okay, who's the bodyguard, it's not maybe in a language like that. But it was never as a put-down. It was trying to engender – it may have been a gesture of bad humor, but most people that I did that with, including folks that were around parents, they would start laughing at that. (Tr, 248).

He said if anyone felt insulted by the phrase, they never told him. (Tr, 250).

Employee stated that the factors that he would consider to determine if he would kiss a student on the cheek:

> Okay, factors, to kiss them. Put that in context – mostly if they initiated it. Sometimes as a gesture that they themselves would initiate, say because they're happy or culturally they would do this, in their culture that they were departing from me, or either coming in to see me. It happens in both contexts. (Tr, 232)

Employee described the type of kiss he gave as:

> [B]asically just a brushing of the cheek and coming off very quickly. It is not planting lips, staying there like in the movie fashion. There's a gesture, gesture gesture. (Tr, 233).

Employee stated that when he met with students, he always kept the door open. He said he did not have a desk in his office because he could find one that would fit his "long legs", but had an open space with several chairs so that they sat "in a mild semi-circle". (Tr, 235). He said when he sat with Ms. Lacerda he did not "repeatedly" touch her knees, but when he moved toward her to give her a map of the campus, his knee may have touched her. (Tr, 245). He denied kissing her on the lips or telling her how Ethiopians kissed. (Tr, 246). When asked if he took her hands in his, he replied: "I did not, and have absolutely no memory of that." (Tr, 246).

Twyla Jones, International Student Counselor, worked with Employee from 1999 until his removal. Her office was next to his. She testified that to the best of her knowledge, Employee had never been accused of engaging in conduct with a student that would be considered sexually harassing, and had never been accused of treating any student or member of the public in a disrespectful manner prior to this incident. (Tr, 194). She said she had observed Employee kissing students on the cheek and that "given our population…I don't think it's a problem, unless the student finds it a problem. Students kiss me all the time". (Tr, 200). She stated that she would not initiate kissing a student, but that male and female students have kissed her on the cheek or hugged her. (Tr, 205-206).

Adetole Babatunde Shabi was an international student at Agency who served as the student member on the Board of Trustees for three terms. He first met Employee in 2002. He said he had never seen Employee engage in any behavior that could be considered sexual harassment or disrespectful. No student had ever complained to him about Employee's behavior. (Tr, 208).

Bernell Abney has been employed by Agency for 35 years, and works in the Registrar's Office. He has known Employee for 20 years and worked with him for more than 15 years. He testified that he had seen Employee interacting with students, and had never seen him engage in conduct that could be considered sexual harassment or disrespectful. (Tr, 214). He stated that he never received training in sexual harassment. Mr. Abney testified that although he was never in Employee's office when Employee met with students, he worked worked right outside Employee's office and see into Employee's office. (Tr, 215). He testified that Employee's office door was open when he met with students. (Tr, 216).

Linda Conquest, Admissions Representative, stated she worked with Employee for about 15 years, and did not know of any accusations of sexual harassment made against him. She said she had witnessed Employee's interactions with students and sat in on his meetings with students, and had never observed any disrespectful or inappropriate conduct. She testified that she was close to both Rosely dos Santos and Cindy Agudelo and neither had told her of any problem they had experienced

with Employee. She stated that Employee's comment to students about not bringing a pen or paper to a meeting was not a chastisement; he was merely stating a fact. She said he made the comments to other people essentially asking how they could conduct business without a pen. She said she has made the same comment. She knew that sometimes Employee referred to the individuals accompanying the student to a meeting as "bodyguards" but was not aware that anyone was offended by that reference. (Tr, 304). She testified she saw Employee kiss male and female students on the cheek, and that sometimes he initiated it and other times he did not. (Tr, 305). She stated that she sometimes hugged students and that they hugged her and sometimes kissed her on the cheek. (Tr, 306). She testified that Ms. Hill-Flanagan never advised her that it was "a bad idea" to kiss or embrace students. (Tr, 307).

William Penn had coordinated Agency's EEO[5] Affirmative Action and the Employee Assistance Program out of Agency's Office of Human Relations (EEO Office) during the pertinent time period and had worked at Agency for 39 years before his recent retirement. He said he usually investigated EEO cases, including allegations of sexual harassment. At times, however, particularly when faculty was involved, investigations were conducted by the OGC. He learned of the complaint against Employee when he returned to the EEO Office after attending a workshop and was told that Ms. Lacerda had telephoned and left a message that she had filed a complaint with DCOHR. He said the normal procedure when a complaint is filed with DCOHR is for his office to wait to begin its investigation after DCOHR sends information about the charges to his office. He contacted Ms. Lacerda and told her once he received the DCOHR complaint, he "would act on it". (Tr, 282). Mr. Penn testified he also notified Ms. Flanagan and Ms. Poole of Ms. Lacerda's complaint, and thought he met with Ms. Flanagan and the General Counsel. He said there was no decision made that Agency would conduct its own investigation at that meeting. (Tr, 290).

Mr. Penn stated that he did not conduct an investigation or play any role in this matter because Employee was terminated before he received the information from DCOHR. The information was in the form of a questionnaire, and did not include the complaint filed by Ms. Lacerda. The questionnaire asked about the incident, and Agency's response to DCOHR was to send Employee's dismissal package from the Provost to Employee. (Tr, 294). Mr. Penn testified that was how he learned of Employee's termination.

Analysis, Findings and Conclusions

This Office has jurisdiction of this matter pursuant to Section 101(d) of the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.

Since only Ms. Lacerda and Employee were present during most of the alleged misconduct, and had conflicting testimony, credibility assessments were critical in this matter. In trying to resolve issues of credibility, the Administrative Judge considered the demeanor and character of the witness, the inherent improbability of the witness's version, inconsistent statements of the witness

5 Equal Employment Opportunity

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.

In reaching her decision, the Administrative Judge did not consider the written statements or testimony provided to the Impartial Review Panel by individuals who did not testify at these proceedings. There was no evidence presented that any of those individuals could not attend these proceedings. The hearing dates were scheduled, and often rescheduled, to accommodate the availability of witnesses, and hearing dates would have been scheduled that were convenient for these individuals. Without their presence, the Administrative Judge could not make credibility assessments. In addition, Employee was entitled to cross-examine witnesses. Administrative Judges must conduct hearings "fairly and impartially." OEA Rule 620.2, 46 D.C. Reg. 9317 (1999). Fairness dictated that the statements and prior testimony of these individuals would not be considered in reaching this decision.

The 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 removal. She considers this when assessing an employee's testimony. Even considering these factors the Administrative Judge often found Employee's testimony to be non-responsive and rambling. He rarely offered a direct answer to a question, no matter how simple. For example, during cross-examination, Mr. Davis had to intervene to direct Employee to answer a very simple question posed by Ms. Fuller. (Tr, 237). She had asked Employee if the word "kissing" was included on the third page of the sexual harassment policy:

> Employee: Not in the context that I do that. Sexual touching, brushing up against in a sexual manner.
> Ms. Fuller: Kissing? Do you see kissing?
> Employee: Graphically or sexually suggestive, cornering – I never did anything in the manner I did, trying to coerce sexual favors from any student, ever.
> Ms. Fuller: But you do see kissing as an example?
> Employee: But again, I would say to you, the gesture of brushing up against them that is considered …
> Mr. Davis: The question is, do you see kissing there?
> Employee: I'm sorry.
> Ms. Fuller: Do you see kissing listed as an example?
> Employee: Yeah, I do see that, I didn't –

Ms. Lacerda's answers were more direct, even with the language difficulties. Based on these considerations, and on observations of demeanor, the Administrative Judge found Ms. Lacerda to be more credible than Employee. However, even if some parts of a witness's testimony are discredited, other parts can be accepted as true. *DeSarno, et al., v. Department of Commerce,* 761 F.2d 657, 661 (Fed. Cir.1985). I found that Employee's explanations for some of his actions to be credible particularly in light of the testimony of Ms. Jones, Ms. Conquest and Mr. Abney, all of whom I found to be credible. Employee's explanations of why his knee may have touched Ms. Lacerda and the reasons he kissed the cheeks of students were credible. (Tr, 235).

Findings of Fact:

Upon careful consideration of the record before her, after multiple reviews of the documentary and testimonial evidence, the Administrative Judge makes the following findings of fact:

1. Employee was employed at Agency for approximately 38 years at the time of his removal. From 2003 until his termination, he was an International Admissions Counselor.

2. Effective September 24, 2003, Agency issued its Sexual Harassment Policy (Notice Number 110.620). (Ex A-6). Employee acknowledged receipt of a copy of the policy on November 5, 2003. (Ex A-7).

3. There was insufficient evidence to establish that Agency conducted training for employees regarding sexual harassment**.**

4. The Sexual Harassment Policy has the following provisions that are relevant to this matter:

> Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when (a) submission to such conduct is made either explicitly or implicitly a term or condition of an employee's employment or a student's evaluation; (b) submission to or rejection of such conduct by an individual is used as the basis for employment or evaluation decisions affecting such individual; or (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, hostile, or offensive environment for work, study, or learning.
>
> Definition of Sexual Harassment
> For the purposes of this policy, sexual harassment is defined 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.

Examples of Sexual Harassment

Sexual harassment may take different forms:

Using a person's response to a request for sexual favors as a basis for an academic or employment decision is one form of sexual harassment. Examples of this type of sexual harassment (known as quid pro quo harassment) include, but are not limited to: requesting or demanding sexual favors in exchange for employment or academic opportunities (such as hiring, promotions, grades or recommendations)...or denying training, promotion, or access to any other employment or academic opportunity because of sexual advances have been rejected.

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.

5. When initiated by students, both International Admissions Counselors have hugged students and/or exchanged kisses on the cheeks with international students. There was no evidence of sexual provocation, threats, trading sexual favors for benefits, or sexual harassment in these actions.

6. At times, Employee initiated the exchange of kisses on the cheeks, believing it to be culturally appropriate with international students. He described the kisses as "brushes"

and not sexual in nature. There was no evidence to contradict his statements. It is accepted as fact that his intention was not to be sexually provocative, threaten, trade sexual favors for benefits, harass, degrade or humiliate students.

7. Employee first met with Graciela Lacerda, who was applying for admission as an international student from Brazil, on March 3, 2006. Ms. Lacerda came to see him, accompanied by Ms. Bouquet and Ms. dos Santos. At the end of the meeting, Employee and Ms. Lacerda exchanged kisses on the cheeks. It is uncertain who initiated this exchange, but Ms. Lacerda was not offended by the exchange, noting this was customary in Brazil.

8. Ms. Lacerda met alone with Employee for the second time on March 7, 2006, bringing the required documents with her. Ms. Lacerda did not testify that she brought anyone to the meeting with her.

9. Employee's office was small and had several chairs, but no desk. Employee sat near Ms. Lacerda, and at some point, their knees touched. There was no evidence of sexual provocation, threats or trading sexual favors for benefits or sexual harassment in these actions.

10. At the end of the meeting, Employee took Ms. Lacerda's hands in his hands and kissed her on the cheek, saying "this is how they say good-bye in Brazil". He then stated "this is how Ethiopians say goodbye" and kissed her on the lips. There was no evidence of sexual provocation, threats or trading sexual favors for benefits or sexual harassment in these actions.

11. Ms. Lacerda filed a complaint alleging sexual harassment with the DCOHR. The complaint alleged that during the second meeting with Employee, he had sat close to her, touched her knee several times; held her hands and kissed her cheek at the end of the meeting, and that he then kissed her on the lips. (Ex A-1).

12. The normal procedure is for Agency's EEO Office to investigate complaints, including complaints of sexual harassment. However, when a complaint is first filed with DCOHR, Agency does not begin its investigation until it receives information regarding the allegations from DCOHR. Also when professional staff is charged, Agency OGC may conduct the investigation. OGC led this investigation, obtaining statements from Ms. Lacerda and others.

13. By memorandum dated April 14, 2006, Ms. Hill-Flanagan, Employee's supervisor recommended to the Provost that Employee be terminated (Ex. A-4).

14. Provost Reuben-Cooke issued the advance notice of proposed removal by letter dated on April 14, 2006. (Ex A-9). She was not aware of, and so did not consider, the *Douglas* factors in reaching her decision. She was not certain what she knew about Employee before

determining the penalty, but knew that he had been "cited previously and written a letter about inappropriate conduct and touching of students". (Tr, 141).

15. Employee had never been cited for misconduct prior to this incident. The Provost, in fact, was referring to the July 28, 2003 memorandum from Ms. Hill-Flanagan to Employee which acknowledged receipt of Employee's response concerning the allegations of Claudia Saul. There is no evidence in the record as to the nature of the allegations. In the memorandum, Ms. Hill-Flanagan concluded that "since the accounts were diametrically opposed, she could not corroborate either version. The memorandum did not constitute adverse action or a warning. She did, however, direct Employee:

> [A]s you strive to maintain professionalism in your counseling sessions with new and prospective students, avoid European gestures, respect the adulthood of your student-customers, keep your office door open whenever a student is present, and never touch a student other than to shake his or her hand. Misunderstandings occur too easily. (Ex A-5).

16. On July 1, 2006, an Impartial Review Panel, constituted pursuant to an agreement between Agency and AFSCME, Local 2087, conducted a "non-adversary fact-finding conference" in order to "make recommendations on the disposition of a proposed action to the deciding official". (Ex A-8).

17. On August 21, 2006, the Chairman of the Impartial Review Panel sent a memorandum to Dr. Pollard notifying him of the Panel's unanimous decision that Agency's investigation had not followed normal procedure and was flawed. It determined that Ms. Hill-Flanagan, who was Employee's supervisor, should not have been involved with the investigation. The Panel noted that Employee had no disciplinary record and there was no evidence of a prior incidence of sexual harassment. The Panel recommended that a new investigation be conducted and that until its completion, no adverse action be imposed. It noted that "some appropriate action must be taken [against Employee], as not to do so would set a precedent for accepting and supporting inappropriate behavior on the part of [Agency] or D.C.'s employees." (Ex E-2).

18. By letter dated October 27, 2006, Dr. Pollard notified Employee of his decision to terminate his employment. (Ex A-10). In reaching this decision, Dr. Pollard did not consider the *Douglas* factors, did not independently review any evidence or documents, and was not aware of and therefore did not consider the recommendation of the Impartial Review Panel.

Analysis and Conclusions:

The Investigation: Employee argues that Ms. Hill-Flanagan should not have been involved in the investigation because of her bias against Employee and because she was his supervisor. The Impartial Review Panel found the process to be fatally flawed, in that having to "investigate a direct-

report employee on such an emotionally-laden issue possibly jeopardizes a supervisor's impartiality." The Panel was constituted pursuant to the agreement between AFSCME, Local 2087 and Agency. However, OEA is not governed by this agreement. Rather it is governed by the laws and regulations of the District of Columbia.

The investigatory process which precedes the imposition of an adverse action must be determined on a case-by-case basis. In this matter, the evidence indicates that the investigation was primarily conducted by Agency's OGC. There was insufficient evidence presented that Ms. Hill-Flanagan played a significant role in the investigation or that she was biased against Employee. Further, the evidence established that it was not unusual for OGC to investigate charges against professional staff. The Administrative Judge concludes that there was insufficient evidence presented to support a conclusion that because Ms. Hill-Flanagan had some involvement in the investigatory process and because it was conducted by OGC, it was fatally flawed.

Disciplinary Action: D.C. Code, §1-616.51 (2001) requires, with regard to employees of agencies over which he has jurisdiction, that the Mayor to "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 of 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. Section 1603.3 of the regulations, 46 D.C. Reg. at 7096, which identifies conduct for which disciplinary action may be taken, includes in pertinent part:

> [A]ny on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government.

The charges against Employee of making rude and disrespectful comments and of engaging in sexual harassment are considered "on-duty or employment-related acts that interferes with the efficiency or integrity of government operations". Certainly the allegations, if true, impact on Agency's integrity. The conduct may also be considered "any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious".

Rude and Disrespectful Comments: The Administrative Judge concludes Agency did not meet its burden of proof that Employee made derisive, rude and disrespectful comments. This

charge is largely based on allegations that Employee "rudely" teased Ms. Lacerda by calling her friends "bodyguards" and ridiculed her for not following instructions and not bringing a writing utensil with her. These assertions were in the statements submitted by witnesses and Ms. Lacerda and in the testimony before the Panel. Ms. Lacerda was present at this proceeding and did not testify about these statements. Employee had no specific recollection what, if anything, he said, but testified they were not intended to be rude or disrespectful, but rather to make the students feel comfortable. The Administrative Judge concludes that there was insufficient evidence presented that these statements were made, but that even if they were made, Agency did not meet its burden of proof that the statements constituted misconduct.

Sexual Harassment: The term "sexual harassment" is associated with employment discrimination but can exist in an educational institution. 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.

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 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[6]

The accusations against Employee are not anywhere close to this magnitude. Ms. Lacerda had the option of meeting with Ms. Jones if she was uncomfortable around Employee. She did not do so. She did not testify that she felt obligated to provide sexual favors to Employee in exchange for being admitted as a student and testified he told her before the offensive conduct that she had been admitted. She described the conduct as offensive rather than sexual in nature. The exchange of kisses on the cheek during the first meeting, which Ms. Lacerda did not find offensive; the knees touching on the second meeting, and even the kiss on the lips , 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

6 The quotation marks are taken from the references to the transcript in the decision .

Employee's behavior was not so "severe or pervasive" 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 has held that the 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). Employee's testimony, supported by the testimony of Ms. Jones, was that they exchanged kisses on the cheek with both male and female students.

The Administrative Judge concludes that Employee's actions of kissing Ms. Lacerda on the cheeks and particularly on the lips were inappropriate. The Administrative Judge concludes that Employee had received Agency's Sexual Harassment Policy and of Ms. Hill-Flanagan's memorandum, both of which contained standards of acceptable conduct. However, even if Employee was not familiar with Agency's sexual harassment policy or Ms. Hill-Flanagan's memorandum, and even if he is familiar with other cultures which permit such contact, it is reasonable to conclude that Employee, with his 38 years of experience as a professional and an educator in institutions of higher learning, knew or should have known that it is inappropriate for a member of Agency staff to kiss a student on the lips or on the cheeks, whether the student is male or female, American or foreign. The fact that no one complained before does not make it acceptable, although it may impact on the penalty. The Administrative Judge concludes that this conduct constituted "on-duty or employment-related acts that interferes with the efficiency or integrity of government operations". The conduct also was "on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious".

In *Leonard Garrett v. Department of Employment Services*, OEA Matter No. 1601-0040-02 (June 28, 2004) ____ D.C.Reg. ____ ( ), the employee, accused of sexual harassment, admitted he had solicited sex from a fellow employee by offering her money, but contended he was being "playful". He argued that his conduct did not amount of sexual harassment and the penalty of removal was too severe. Senior Administrative Judge Joseph Lim concluded that the employee's reliance on sexual harassment cases was misplaced, reasoning that the employee's conduct was solicitation for sex which is a crime in the District of Columbia. Therefore Agency had established that employee had engaged in "on duty or employment related act or omission that the employee knew or should have known is a violation of law". In this matter, the Administrative Judge will not reach the issue of whether the kissing on the lips could be considered criminal. The Administrative Judge will conclude only that such conduct is covered by Section 1603.3 of the Regulations, 46 D.C. Reg. at 7096.

Douglas Factors: Employee argues that the penalty should be reversed because Agency failed to utilize *the Douglas* factors. In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the U.S. Merit Systems Protection Board enumerated the following factors that it considered relevant for a federal agency to consider when determining the appropriateness of a penalty, although noting that not all of the factors would be relevant in every case:

i. the nature and seriousness of the offense, and its relation to the employee's duties,

including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;

ii. the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of position;

iii. the employee's past disciplinary record;

iv. the employee's past work record, including the length of service, performance on the job, ability to get along with fellow workers, and dependability;

v. the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

vi. consistency of the penalty with those imposed upon other employees for the same or similar offenses;

vii. consistency of the penalty with any applicable agency table of penalties;

viii. the notoriety of the offense or its impact upon the reputation of the agency;

ix. the clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question;

x. potential for the employee's rehabilitation;

xi. mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

xii. the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The Court of Appeals of the District of Columbia has concluded that there is no statutory requirement that District of Columbia agencies utilize the *Douglas* analysis. *Stevens v. Metropolitan Police Department*, No. 92-CV-1269 (D.C. 1997). Although this Office does not require agencies to engage in a *Douglas* analysis prior to imposing an adverse action, OEA Administrative Judges regularly utilize the *Douglas* factors for assistance in evaluating a penalty. *Employee v. Agency*, OEA Matter No. 1601-0016-81, 29 D.C. Reg. 4565 (1982).

In this case, the Administrative Judge concludes that there were significant factors that should have been considered before determining the penalty. Neither the Provost nor the President was aware of the length of Employee's service. Thirty-eight years is not just a long tenure, it is a career and merits consideration. In addition, neither the proposing official nor the deciding official was aware that in the 38 years he served Agency, Employee had never been disciplined. The Provost incorrectly considered the memorandum from Ms. Hill-Flanagan as a disciplinary letter. Agency did not establish that it was more than a memorandum from a supervisor who had received a complaint about which she could not make a decision. The memorandum certainly provided guidance to Employee on what conduct was appropriate, but it was not disciplinary in nature. Agency should have treated this as a first offense.

The proposing official and the deciding official erroneously concluded that Employee's actions constituted sexual harassment, a more serious charge. Employee's actions were

inappropriate and exhibited poor judgment, but they were not malicious, for gain, or sexual in nature.

Finally, Agency did not consider any lesser penalty or whether Employee could be rehabilitated. There was no requirement that Employee be removed, but there was no evidence that Agency considered any lesser penalty or considered whether Employee could be rehabilitated.

Agency is required to prove its case by a preponderance of evidence". OEA Rule 629.3, 46 D.C. Reg. 9317 (1999). "Preponderance" is defined as "that degree of relevant evidence which the reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue". OEA Rule 629.1, 46 D.C. Reg. 9317 (1999). For the reasons stated above, the Administrative Judge has concluded that Agency did not meet its burden of proof regarding the severity of the misconduct or the appropriateness of the penalty.

This Office recognizes that an agency has the primary responsibility for managing its employees, and that part of the responsibility is determining the appropriate discipline to impose. *See, e.g., Huntley v. Metropolitan Police Department,* OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), ____ D.C.Reg. ____ ( ). This Office will not substitute its judgment when determining if a penalty should be sustained, but rather will limit its review to determining that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia,* 502 A.2d 1006, 1009 (D.C. 1985). A penalty will not be disturbed if it comes "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency,* OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review,* 32 D.C.Reg. 2915 (1985).

An agency must consider relevant factors when imposing a penalty. Our function is not to usurp managerial responsibility in determining a penalty, but rather it is to ensure that the penalty reflects a responsible balancing of relevant factors. *Lovato v. Department of the Air Force*, 48 M.S.P.R. 198 (1991). This Office will not modify or reverse a penalty unless it concludes that an agency has not considered relevant factors or that the imposed penalty constitutes an abuse of discretion." *Employee v. Agency,* OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review,* 30 D.C.Reg. 352 (1985). The Administrative Judge concludes that Agency failed to consider relevant factors when determining the penalty. Managerial discretion was not properly exercised, and Agency did not ensure that the penalty reflected a responsible balancing of relevant factors. Under these circumstances, the matter will be remanded to Agency for review the penalty in light of this decision. *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92, *Opinion and Order on Petition for Review* (Sept. 29, 1995), _____ D.C.Reg. ____( ).

ORDER

The matter is remanded to Agency to determine a penalty based on the conclusion that the misconduct did not amount to sexual harassment. Agency is directed to consider relevant factors when determining the adverse action, including, but not limited to: Employee's length of service (38 years**;** the fact that this is the first sustained charge of misconduct in 38 years**;** the fact that the

conclusion has been reached that the misconduct was not sexual harassment**;** Employee's potential for rehabilitation**;** and the adequacy and effectiveness of alternative sanctions in deterring such conduct in the future by Employee or others.

Agency is directed to submit its revised penalty to OEA and postmark it to Employee no later than 20 calendar days from the date of issuance of this Order. Its submission should include an explanation of its the rationale for deciding upon the penalty. Thereafter, Employee will have 20 calendar days from the date of receipt of Agency's submission, to file its response.[7] The record will reopen to accept these submissions and then will close without further notice.

The findings of fact, analysis and conclusions reached in this Order will not be reviewed or revisited by this Administrative Judge, but rather will be incorporated when the Initial Decision is issued. The parties are cautioned that the only issue that they are being directed to address in their submissions is the penalty proposed by Agency based on the reasons discussed in the previous sections of this Order.

FOR THE OFFICE: LOIS HOCHHAUSER, ESQ.
Administrative Judge

[7] The parties should consider using this time to meet in order to determine if they can agree on a mutually-acceptable penalty. This would certainly expedite the final resolution of this matter and would be in the best interests of both parties.