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Sexual Harassment on Campus and a Union's Dilemma

Cover Page Footnote

A paper presented by Rachel Hendrickson, Organizational Specialist, National Education Association, at the 1993 National Center Conference. it is one of ?five? National Center Conference proceedings papers dealing with sexual harassment over the past 50 years.

**DISCRIMINATION AT THE ACADEMY:
SEXUAL HARASSMENT**

**A. SEXUAL HARASSMENT ON CAMPUS
AND A UNION'S DILEMMA**

Rachel Hendrickson, Organizational Specialist
National Education Association

Sexual harassment is illegal discrimination and, as such, may already be prohibited by non-discrimination or equal opportunity clauses in higher education bargaining agreements. Institutions of higher education have developed extensive policies covering various aspects of reporting alleged incidents of harassment, providing confidentiality for accused and accuser, and setting up investigation and discipline procedures. However, where a collective bargaining agreement exists, such procedures may come into direct conflict with contractual due process standards, information disclosure requirements, and disciplinary clauses.

Sexual harassment cases provide dilemmas for the union and its advocates. The first dilemma a union faces is whether to include a section on sexual harassment in its contract, to leave one out but influence the development of campus policies, or to allow those policies to be developed and implemented with the contract functioning as a court of last appeals through its grievance and arbitration process in any disciplinary action that might be taken against a unit member.

On the one hand, a union is charged with the responsibility of advocating for all its members and, under most contracts, ensuring standards of due process are followed. On the other hand, as we understand more about the damages caused by sexual harassment, as we see stories featured in The Chronicle of Higher Education about cases on campus, about attempts to prohibit all sorts of consensual relationships, about recent decisions such as Franklin defining the potential liability of institutions that do not take adequate care to protect their students or employees, unions need to consider whether they should develop protections and language within their contracts both to ensure their members are protected during complaint procedures and to ensure that there are no reprisals taken against either the complainant or the accused.

Dr. Henrickson is a staff member of the National Education Association in its Office of Higher Education, Constituent Group Relations. This paper reflects the view of the writer and not that of the NEA or of the NCSBHEP. Where NEA policy is mentioned, it is identified as such.

As part of its Academic Justice and Excellence series, the NEA has recently published a monograph by Louise Fitzgerald, "Sexual Harassment in Higher Education: Concepts and Issues." In addition, NEA is preparing an edited book on various aspects of sexual harassment on the campus. Research is also being conducted into contract clauses and language in higher education bargaining agreements. Those contracts provide information on how some units have approached the issues raised in the previous paragraphs.

There are very few higher education contracts in the data base that address the issue of sexual harassment in any great detail. While there are institutions with effective complaint and investigation procedures, some of which are contained in the "Appendix" of the previously mentioned monograph, not many are translated into contractual language. Those that have attempted to handle the issue within the contract have some elements in common: They follow the definitions of Meritor and the EEOC; they appear to attempt to keep the issue on campus by providing a forum there, instead of through the EEOC, state agencies, or the courts.

The following examples of contractual provisions provide a good sample of the definitions and procedures available.

Among those contracts that handle the issue of sexual harassment, some provide extensive clauses and procedures, but the majority provide only limited mention of the issue usually by adding a brief section on discipline.

Oakland Community College's 1990-92 contract had, at the end of a routine equal opportunity section, the clause "nor will sexual harassment be tolerated, in its employment practices." The 1992-95 contract maintains that and adds "and/or educational programs or activities." This clause has the effect of including both Title VII and Title IX protections in the contract.

The McHenry County College states,

The Board shall adopt a progressive discipline standard and denote which infractions are subject to which penalties. Except as specifically noted (e.g., assault, theft, inebriation on the job, sexual harassment, etc.), warnings shall be given and an opportunity rendered to remediate any deficiency noted.

Thus, at McHenry, sexual harassment appears to be a capital offense.

An example of a policy section comes from Shawnee State University: It is the policy of Shawnee State University and the Association to maintain an educational and employment environment that is free from sexual harassment and hostility. If there is a complaint of sexual harassment against a faculty member, the provisions in the Agreement shall be followed. (Sec. 7) (The provisions referred to are those concerning discipline).

Skagit Valley College simply references the college policy: "Sexual harassment matters shall be handled in accordance with the Sexual Harassment Policy ... and applicable terms of this Agreement." The Clark College agreement is much more comprehensive in its coverage of the issue. The Agreement first covers the issue of due process and representation for the accused. For general "offenses," there is a statute of limitations on records of the event or reprimand -- three years. After three years, the personnel file is purged of all information on complaints. The two exceptions are for instances of drug/alcohol abuse and sexual harassment.

Clark College also includes a fairly extensive section on the definition of sexual harassment and procedures for filing a complaint. The initial language of the contract defining sexual harassment basically follows Meritor or the EEOC guidelines, but links the problem directly to the academic setting.

Defining the issue as a situation that "involves the inappropriate introduction of sexual activities or comments that demean or otherwise diminish one's self-worth on the basis of gender into the work or learning situation," the contract adds academic relationships to the EEOC language; that is, when the implicit or explicit submission or rejection to conduct affects academic standing or when the hostile or intimidating environment creates an offensive working or educational environment.

The contract combines in its definitions both discriminatory relationships involving faculty and students, and faculty and other faculty or peers:

Sexual harassment often involves relationships of unequal power and contains elements of coercion -- as when compliance with requests for sexual favors becomes a criterion for granting work, study, or grading benefits. However, sexual harassment may also involve relationships among equals, as when repeated sexual advances or demeaning verbal behavior have a harmful effect on a person's ability to study or work.

Thus, the contract combines both Title IX and Title VII issues, defining as inappropriate discrimination against faculty and students. Faculty are allowed to elect which complaint procedure to follow - either the college's sexual harassment grievance procedure or the contractual grievance procedure. Fitzgerald notes the importance of multiple

channels for complaint (p. 41). Here is an instance where the faculty member may avail herself/himself of a choice of two.

The final section in the harassment portion of the contract provides for confidentiality for both the accused and the complainant, although it provides no further guidance than the warning that it must be maintained.

Because of the college's strong policy on due process rights, under the contract, the burden of proof in any discipline case rests with the college. The college has an additional responsibility -- that of pursuing the issue "in a timely manner." Once any complaint about any potential disciplinary concern is brought forward, the college is required to call it to the attention of the faculty member in a timely manner or it may not be used as the basis for any disciplinary action. A college that ignores complaints cannot later use them.

The Youngstown University Professional Staff agreement provides for reporting all allegations of discrimination to the Affirmative Action Office. It limits the extent of the processing of the allegations to the third step of the grievance procedure. Thus, it appears that no binding resolution exists under the agreement.

The Florida State University System (FSU) has one of the most extensive sections on sexual harassment found in the data base. It covers intent, policy, definition, investigation and election of remedies.

The FSU sexual harassment policy is contained within its non-discrimination article. The "Statement of Intent" within the article expresses a firm commitment on the part of both union and university:

They desire to assure equal employment opportunities within the SUS and recognize that the purpose of affirmative action is to provide equal opportunity to women, minorities and other affected groups to achieve equality in the SUS. The implementation of affirmative action programs will require positive actions that will affect terms and conditions of employment and to this end the parties have, in this Agreement and elsewhere, undertaken programs to ensure equitable opportunities for employees to receive salary adjustments, tenure promotion, sabbaticals and other benefits.

The policy section first defines its non-discrimination thrust, then moves to a specific discussion of sexual harassment from a legal and precedential view and then a philosophical view. Sexual harassment is defined by incorporating into the contract sections of the Meritor decision, citing both quid pro quo and hostile environment harassment.

The agreement next explores the issue of consensual relations within the academic context:

In addition to the parties' concern with respect to sexual harassment in the employment context, the parties also recognize the potential for this form of illegal discrimination against students. Relationships between employees and students, even if consensual, may become exploitive and especially so when academic or athletic endeavors are supervised or evaluated by the employee... These relationships may also involve a conflict of interest.

Thus, while consensual relationships are not forbidden, the warning is clear that such relationships might result in a violation of other sections of the contract.

The issue of consensual relations is, indeed, a thorny one, as exemplified by the recent controversy on the campus of the University of Virginia. The NEA has established policy on personal relationships that it encourages its units to follow:

The National Education Association recognizes that in institutions of higher education adult students and educators may establish personal relationships. However, such relationships should be voluntary and not be used to coerce or influence others for personal advantage. Thus, the Association believes that sexual relationships between a faculty member and student currently enrolled in the faculty member's course, or under the supervision or direction of the faculty member are unprofessional. The Association urges its affiliates in institutions of higher education to establish strong policies declaring such relationships unprofessional.

The FSU contract provides for access to all relevant documents except for those protected by law. It also provides for an election of remedies. The parties express their intent to resolve any complaints under the grievance procedure of the contract rather than through the courts or under other procedures. The Union agrees "not to process cases arising under this Article when alternative procedures to Article 20 (the Grievance Article) are initiated by the grievant." Thus, a grievant must elect either to use the grievance process in the contract or court, but cannot immediately do both. Presumably, once a person alleging sexual harassment has completed the grievance procedure under the contract, he/she is not barred from then seeking redress through the courts if not satisfied with the outcome otherwise, since the Supreme Court ruled in Alexander v. Gardner-Denver that in cases of discrimination, a complainant may have two bites of the apple this section could not foreclose that.

Should a bargaining unit decide to include provisions concerning sexual harassment within its contract, what are the elements that need to be considered for inclusion in the collective bargaining agreement?

1. I like the concept of a statement of intent or of philosophy. If sexual harassment is to be eradicated on the

campus, both parties to an agreement should affirm clearly their belief that harassment is wrong. Both should make a statement, similar to that of FSU's concerning their determination not to tolerate harassment.

2. What constitutes sexual harassment needs to be defined within the contract for two reasons. First, faculty and staff need to know the boundaries of acceptable conduct and understand when those boundaries have been breached, either when it is pointed out to them through a disciplinary process or informal consultation, or when they believe they have been harassed. Second, where arbitration processes exist, there are inherent problems in asking an arbitrator to define a situation as harassment if the parties themselves have not done so or are unable to do so. Parties need to be able to weed out inappropriate over-reaction. While definitions and parameters of sexual harassment are still evolving, the parties need to ensure that rude or obnoxious behavior is addressed as such and not as sexual harassment.

3. Standards of due process need to be defined. Since sexual harassment is illegal discrimination under external law, some of the more traditional due process clauses where there is no concern about self-incrimination may not fit the situation.

Confidentiality is an issue -- both for the accused and the complainant, particularly in a campus environment where gossip is part of the culture. While it is not a contractual issue but an internal union issue, when both parties are members of the bargaining unit, great care must be taken to ensure that the rights of both members are protected. It might be appropriate to define the standards to be used during an investigation and both the burden and quantum of proof. Care in the investigation will assure that a harasser will not later be returned to the educational community by an arbitrator because of a defective procedure, will assure that false claims are weeded out and will assure that the person being harassed also has protections.

Where a separate investigation process exists under a faculty handbook, the union should consider how limited or defined in scope any campus hearing arising out of an investigation should be. It would be a travesty of due process if a faculty member were to be haled before one tribunal in which no standards of evidence or process, as we understand them, are used, found "guilty," terminated or disciplined, then to have to go through another whole grievance and arbitration process where the administration might use evidence or testimony from the first hearing against him/her. A union should consider very carefully if or under what limitations it is willing to agree to alternate or additional hearing processes.

4. I have the personal belief that there should be no clause providing for election of remedies or delay of filing. Sexual harassment is covered under external law and under any contract that has a non-discrimination clause, whether it is explicitly mentioned or not. There are different standards of proof in arbitration than in a federal agency or courtroom.

There may be different definitions of what constitutes sexual harassment on a campus. There clearly are different remedies available from the courts than from the arbitration process. Arbitrators are seldom permitted to award damages beyond a make whole in a contract. The recent Franklin decision increased the potential liability for institutions that fail in their responsibility to their students. What should be clear in the contract are the standards an arbitrator is to use in ruling on the presence or absence of harassment. Some arbitrators use EEOC standards in their decisions; some may use a "reasonable woman" standard; some may be left to flounder. It is up to the parties to craft the standards by which an accusation should be judged, discipline imposed, or redress offered.

Also to be considered is the type of information that may be entered into the hearing. For instance, there is some evidence that some arbitrators do take the complainant's sexual activities into consideration. The parties should also agree on the parameters of discipline or redress involved, so an arbitrator has good guidance in crafting a remedy.

5. Along with no election of remedies, a union might want to consider having multiple channels of complaint available to its members. If we assume that most victims of harassment simply wish it to stop and not to be subject to retaliation, then alternatives to an immediate formal grievance or complaint procedure might have the desired effect before positions become hardened in hearings. The affirmative action officer or campus committee charged with investigation of mediation, a campus ombudsperson, a committee constituted by the union or some other form of a joint committee are all potential channels.

6. The parties should be clear on what the actual offense is and how it fits into contractual traditions of tenure or just cause. It might be appropriate to class offenses accordingly. Is the offense to be considered sexual harassment, a legal term? Is it to be considered exploitation of students? An abuse of authority? Unprofessional behavior? Simple rudeness? Is it considered an offense warranting institution of proceedings for removal under tenure or one for lesser disciplinary action?

7. Most of the above observations revolve around the assumption that a faculty member has been accused of harassment. Provisions need to be made to protect a faculty member who is being harassed -- either by another faculty or staff member or by a student. If the institution and union have both agreed to actively eliminate harassment, both have a responsibility to protect the victim. Another option to explore is, if the institution does not take steps to protect the faculty member, the availability of a procedure within the contract for the union to file a grievance against the institution and its administration on behalf of a faculty or unit member who is being harassed.

8. I suggest that the parties keep in mind that one of their most important goals is to ensure that sexual harassment does not occur in the first place. Therefore, my final

suggestion is that the parties agree to institute training for all current supervisors and faculty and to provide it on an on-going basis. While the institution of training does not necessarily have to appear in a contract, its presence signals to the academic community that union and administration are serious about their responsibilities.

In the NEA President Keith Geiger's Preface to Fitzgerald's sexual harassment monograph, he states,

Sexual harassment is a matter of particular concern to the academic community. Students, faculty and staff must rely on bonds of intellectual trust and dependence. Sexual harassment can damage careers, negatively impact the educational experience of those harassed, and upset the well-being of the faculty, staff and students. It ... damages the integrity of the academic enterprise.

I suggest that it is crucial for union and administration to work together, through collective bargaining, to ensure that integrity remains intact.