

A Review of Duke University's Grievance and Complaint Procedures for Fairness and Related Requirements for Contractors

BACKGROUND

The Charge

Duke University President Richard H. Brodhead engaged the undersigned to do an independent review of Duke's procedures for staff grievances. Specifically, he asked for a review of the "grievance and complaint procedures for Duke staff in order to assess their fairness and effectiveness," and a review of the "guidelines for contractors and their employees to ensure the guidelines reflect Duke's core values of civility, fairness and respect."

Statement of the Issues

Given the charge from President Brodhead, there are two separate issues for review. They are as follows:

1. Does Duke University provide its staff employees access to procedures for raising concerns and grievances in a manner that affords the employees an opportunity to be heard and to have their complaints reviewed fairly?
2. Does the university set standards and expectations for contractors to provide fair and accessible complaint mechanisms for their employees who are providing direct services on the university's campus? Further, do the University's "guidelines for contractors and their employees" ensure that their employment practices and employees' conduct reflect Duke's core values of civility, fairness and respect?

Methodology

The review included the following procedures:

1. Dispute Resolution Procedure for "any claim arising out of or relating to employment policies."
2. Discrimination Grievance Procedure for "complaints alleging discrimination based on race, color, sex, religion, age, disability, genetic information, national origin, sexual orientation, or gender identity."
3. Harassment Policy and Procedures for complaints of "discrimination or harassment not involving sexual misconduct by a student."

This review also included the following contracts:

1. Master Agreement for Security Services
2. Duke University Dining Services Operator's Agreement

Additionally, the undersigned discussed each of the above procedures and contracts with the respective Duke University administrator(s) responsible for its implementation. Discussions occurred on Wednesday, August 24, 2016, with the following university administrators:

- Jane Pleasants, Director of Procurement
- Kate Hendricks, Deputy Counsel
- Denise Evans, Assistant Vice President of Human Resources for Staff & Labor Relations
- Benjamin Reese, Vice President for Institutional Equity
- Cynthia Clinton, Director, Harassment and Discrimination Prevention and Compliance
- Howard Kallem, Director of Title IX Compliance
- Kyle Cavanaugh, Vice President for Administration

Follow-up questions were addressed via e-mail from Jane Pleasants, Cynthia Clinton, and Kate Hendricks within a few days immediately following the campus visit.

THE STANDARD OF REVIEW: WHAT IS “FAIR”?

Beyond simply being heard, employees who are challenging a management decision typically expect a “fair” hearing and, ultimately, an opportunity to be heard by an impartial party, who will consider all of the evidence and offer an independent review of the facts. At the end of the process, the disputants expect, at a minimum, to understand the issues and the rationale for the final decision. These expectations in the public university setting are all elements of due process—substantive and procedural, which is designed to protect the rights of individuals who are facing the imposition of penalties by a governmental entity and to limit the government’s ability to act arbitrarily.¹ In the private university setting, “fairness” is the standard which most employees view as synonymous with the constitutionally derived right to due process.

Public universities as governmental entities are required to provide employees with due process when imposing a disciplinary action. There is no similar requirement for private institutions. As a private university, Duke is not required by law to provide its employees due process when meting out any disciplinary action, including a termination of employment. In fact, North Carolina is an at-will employment state, which means that theoretically a private university like Duke, which is located in the State of North Carolina, may terminate the employment of any of its employees for any reason (except an unlawful one) or no reason at all. Likewise, the employee may decide to end the employment relationship for any reason or no reason at all.

¹ The Fifth and Fourteenth Amendments to the US Constitution are the bases for the individual’s right to due process of law. The Fifth Amendment declares that “[n]o person shall be...deprived of life, liberty, or property, [by the government] without *due process* of law [emphasis added].” The Fourteenth Amendment states, “[n]or shall any state deprive any person of life, liberty, or property, without due process of law.”

This is true for both parties unless those rights are limited by a contract between the parties or university policy, which is in fact the case here.²

Duke has established and communicated university policies that govern the standards of conduct and performance for staff employees, and it has adopted procedures for employees to challenge the validity of a management action as a violation of law or university policy. Duke must abide by such policies and procedures, because even as a private university the law will hold it accountable for doing so in a way that is fair and reasonable—a standard that suggests that Duke University will provide a fair process to each employee who challenges its disciplinary action. Therefore, fair process is the measure by which we may reasonably determine whether Duke’s complaint procedures provide employees with an adequate opportunity to be heard and have their complaints reviewed.

Issue #1: Does Duke University provide its staff employees access to procedures for raising concerns and grievances in a manner that affords the employees an opportunity to be heard and to have their complaints reviewed fairly?

THE PROCEDURES

1. Dispute Resolution Procedure³

Step 1 of the Dispute Resolution Procedure provides the employee and manager an opportunity to discuss the dispute in the presence of a representative from Staff and Labor Relations. The Staff and Labor Relations representative is there only to facilitate the discussion, and is not a mediator. If both parties agree, they may seek to resolve their differences through mediation. If the dispute remains unresolved, the employee (or “Disputant”) may elect instead to move the dispute forward to Step 2.

At Step 2, the employee, the manager and the same Staff and Labor Relations Representative⁴ as in Step 1 meet with the Department Head to attempt to resolve the complaint. The employee may request witnesses for the hearing, but witness appearance is at the discretion of the Department Head. At this step, the Department Head renders a decision. If the employee disagrees with the Department Head’s decision, the employee may appeal to a Dispute Review Panel at Step 3 of the procedure.

The Dispute Review Panel at Step 3 is appointed by the Office of Staff and Labor Relations from a list of Duke University staff employees in departments other than that employing the Disputant. The Office of Staff and Labor Relations trains panel members for the role, and it seeks to appoint panelists who are “diverse in race, gender, job classification and employment level.” Panel members may not be members of the same department as the complaining staff

² There are federal and state laws that limit a private university’s ability to discipline an employee. Examples of these include laws prohibiting discrimination based on membership in a protected class or whistle-blower laws.

³See, <https://www.hr.duke.edu/policies/expectations/dispute.php>. Issues related to an employee’s job classification or performance review are excluded from this process.

⁴ The Staff and Labor Relations representative facilitating each step of the Dispute Resolution Procedure is more likely than not the same person who advised the manager prior to issuance of any disciplinary action.

member. At this step, the Disputant and/or the Department Head may introduce witnesses and/or documents to support their respective positions. The parties to the dispute may also engage the support of another Duke University employee at this stage. The support person is a non-participatory observer in the hearing before the panel.

The Dispute Review Panel's recommendations are submitted to the administrative leader to whom the Department Head reports, who is, for example, "the vice president, vice chancellor, or senior associate operating officer, as appropriate, and to the director of Staff and Labor Relations." In cases other than involuntary separations and claims of harassment or discrimination, the administrative leader to whom the Department Head reports makes the final decision "in consultation with the director of Staff and Labor Relations."

In cases of involuntary separation or claims of harassment or discrimination, the Dispute Review Panel's recommendations are also provided for review to the Executive Vice President of Duke University, the corresponding Health System entity's Chief Operating Officer or the Provost, as appropriate, and the Vice President for Institutional Equity. The decision at this step is final unless the Disputant elects to appeal to arbitration.

Step 4 of the procedure, Arbitration, is generally reserved for Disputants who are challenging an involuntary separation or complaining of harassment and/or discrimination. This is the only step of the procedure permitting the Disputant to engage legal representation during the hearing. If the Disputant decides to use an attorney in the arbitration, only then (but not necessarily) may the university engage legal counsel. The arbitration is administered by the American Arbitration Association (AAA). AAA provides a list of arbitrators from which the Disputant may make a first and second choice. The university's management will accept the Disputant's choices unless the chosen arbitrators' disclosure statements reveal a conflict of interest—either personal or financial—to which the university objects.

The arbitrator conducts a hearing to determine the facts of the case and the appropriateness of management's actions. Staff and Labor Relations offers support to both the Department Head and the Disputant, providing them detailed information about how to proceed in an arbitration with opening statements, witness preparation, and the presentation of documents, among other things, and offering to coach them through practice sessions in preparation for the arbitration. The responding Department Head most often takes advantage of the assistance offered by Staff and Labor Relations, but Ms. Denise Evans, the Assistant Vice President for Staff and Labor Relations, indicated that it is difficult to get the Disputant to accept Human Resources' offer. Staff and Labor Relations tries to make it clear to both parties that the Staff and Labor Relations representative serves as a resource on policy and procedure and is neutral with respect to the merits of the parties' respective substantive claims.

The arbitrator's decision is final and, where university management has violated law or university policy, the arbitrator may award reinstatement and/or back pay to the Disputant. If the university does not want the Disputant to return to work or the Disputant does not want to return, either party may ask that the arbitrator make a supplemental award, which grants pay in lieu of reinstatement. The Dispute Resolution Procedure provides guidance for the calculation of pay in lieu of reinstatement and the arbitrator's award must be consistent with that guidance.

Duke University pays the administrative costs for arbitration, unless the Disputant desires to split the cost in order to mitigate the risk of bias on the part of the arbitrator.⁵ If the Disputant decides to employ counsel for the arbitration, the Disputant bears the cost of his or her legal representation. Costs incurred as a result of a delay in the arbitration are borne solely by the party causing the delay, “unless such postponement is reasonably unavoidable as a result of illness, death or natural disaster.”

Analysis: The Dispute Resolution Procedure is clearly intended to meet the expectations of university employees that Duke University will not take a disciplinary action against its employees or otherwise negatively impact their conditions of employment without providing the employees an opportunity to be heard in a forum that provides a fair process.

It is in the interest of all parties to have complaints resolved at the lowest level possible. To encourage this, the Dispute Resolution Procedure appropriately begins with a face-to-face conversation between the employee and the supervisor. The university also offers mediation as a tool for resolving the issue at this stage, but employees rarely avail themselves of the service. If the issue is unresolved, the dispute appropriately moves through the department’s hierarchy to a dispute resolution panel, the final step for issues other than involuntary separation, harassment and/or unlawful discrimination. The fact that the panel’s recommendations are presented to yet another administrative leader in the department’s hierarchy for a final decision suggests a fair process, but the employee may not perceive it that way, since the Disputant might reasonably assume that the action had already been reviewed by the department’s leadership prior to the supervisor’s action. If that is indeed the case, then it would not likely meet the standard for an impartial review.

The situation is quite different in the case of an involuntary termination, or allegations of harassment or unlawful discrimination. In these cases, the Disputant has the opportunity to present his or her case before an arbitrator chosen by the Disputant—clearly a neutral third party. The neutrality of the hearing officer clearly supports the argument that the Disputant is provided a fair process—the opportunity to present evidence to and be heard by an impartial third party. Yet, the process may be tainted by the fact that the only resource available to support the Disputant in his or her preparation of the case is the same resource supporting the manager against whom the Disputant has filed the claim. This may leave the Disputant to conclude that the process is still unfair.

2. Discrimination Grievance Procedure

At Duke, complaints of discrimination on the basis of race, color, sex, religion, age, disability, national origin, genetic information, sexual orientation, or gender identity in employment practices may be filed with the Vice President for Institutional Equity. The requirements are that the complainant file within one year of the alleged discrimination with (1) his or her name and address; and, (2) a description of the “specific” facts supporting the claim of discrimination.

⁵ It should be noted that, not surprisingly, the Assistant Vice President for Staff and Labor Relations could not recall a single instance of an employee electing to share the cost of arbitration with the university.

Cynthia Clinton, Director, Harassment and Discrimination Prevention and Compliance in the Office of Institutional Equity, reviews the allegations to determine if an investigation is warranted. If the conclusion is that an investigation is warranted, Ms. Clinton conducts the investigation and is the only resource available to do so. Findings of discrimination must be supported by a preponderance of the evidence, and any resulting disciplinary action may be reviewed under the Dispute Resolution Procedure, which is analyzed above. The university's procedure makes a commitment to complete the inquiry and/or investigation process within 45 working days, absent "exigent, unforeseen or unavoidable circumstances."

Analysis: The procedure requires timely review of all complaints of discrimination. Any negative consequences to staff that flow from a subsequent investigation of the claims may be reviewed under the Dispute Resolution Procedure. Assuming that OIE conducts a thorough investigation, giving both parties to the complaint an opportunity to respond to any allegations by the other and an opportunity to present evidence to support their positions, the question of fairness then shifts attention to the Dispute Resolution Procedure and the analysis above.

3. Procedures for Evaluation and Resolution of Claims of Harassment⁶

An employee may file a complaint of harassment orally or in writing with the Office of Institutional Equity, Human Resources Staff and Labor Relations or with any member of the employee's supervisory chain of authority. Additionally, the Office of Institutional Equity may file a complaint of harassment against any individual it has "a compelling reason to believe has engaged in harassment." In complaints filed by OIE, the "Chancellor, Provost, or Executive Vice President," as appropriate, functions in the role typically filled by OIE in the formal process for managing complaints for harassment.

The complainant initiates the complaint in the same manner as that initiated by complainants of discrimination. OIE requires the name and address of the complainant and a detailed account of the facts supporting the allegation of harassment. OIE reviews the complaint and may request a written response from the respondent. Within five days after receiving the response, or if no response was requested within five days of receiving the complaint, OIE will consult with the complainant to determine whether to process the complaint along the informal or formal tracks of the process.

A. Informal Complaint Procedure for Resolving Complaints of Harassment

In the informal process, OIE or the department's management may conduct an investigation of the allegations made in the complaint and attempt to resolve informally the issues raised. The parties are afforded the opportunity to provide information to aid in the investigation and to review any information provided by other parties. The parties may accomplish resolution via one-on-one meetings between the parties; mediation; direct supervisory intervention; or, education and/or training. If there is an investigation and a violation of university policy is

⁶ See, https://web.duke.edu/equity/resources/documents/harassment_policy_and_procedures.pdf.

found, OIE makes a recommendation to the responsible official for discipline or corrective action.

In addition to the recommended discipline or corrective action, the responsible officer also exams the possibility of any actions that might remedy any negative consequences caused by the policy violation as well as review possible actions to minimize the recurrence of the violation in the future. All parties to the complaint are notified of the outcomes of the complaint, including findings, sanctions and any other remedial actions within 15 days of completion of the investigation.

B. Formal Complaint Procedure for Resolving Complaints of Harassment

The university uses a 28-member Harassment Grievance Board to staff the review panel for formal complaints of harassment. If the complainant chooses the formal process, OIE appoints a three- to five-member panel from the Board to review the facts surrounding the harassment complaint. The panel members will include 2 members of the employee category of each party to the complaint and one member from an employee group not represented by the complainant or the respondent. If the complainant and respondent are in the same employee category, a three-member panel is appointed. While OIE appoints the review panel, the parties to the complaint may object to a particular panel member if there is even a perception of a conflict of interest, bias or prejudice.

The panel meets to appoint a Review Panel Chair and to determine if the complaint is before them appropriately or whether it should be remanded to OIE for informal resolution. The decision to forego a formal hearing may be appealed by the parties.

The procedure promises “fairness” as it offers the complainant timely review of the complaint; the right to one representative; the right to present evidence and to question witnesses. The standard of proof is a preponderance of the evidence, just as is the case with complaints of discrimination.

A majority vote of the panel determines whether a violation of policy has occurred. With a determination of a violation, the panel then recommends the appropriate disciplinary or corrective action. The responsible official also determines if there are any corrective actions to be taken as a remedy for any consequences of the violation and whether there is anything that can be done to minimize the risk of the conduct ever occurring again. Within 10 business days, the Panel will submit its report to OIE. OIE will then provide the complainant and respondent with a summary of findings (but not the recommended corrective actions, if any), and a copy of the findings and recommended corrective actions to the official responsible for implementation. While the findings of fact by the panel are not subject to review by the official responsible for implementation, that official may accept in whole or in part the recommendations of the panel; alternatively, he or she may impose any other sanctions that are deemed appropriate given the findings of the panel. If the responsible official decides to impose a sanction that is different from that recommended by the panel, he or she needs only to explain it in writing and submit the explanation to OIE. That explanation is treated as confidential information by OIE and may be shared with the members of the panel only.

The staff respondent or complainant has the right to appeal the panel's findings under the Dispute Resolution Procedure within ten (10) days of receiving the panel's report.

Analysis: Interestingly, the Procedures for Evaluation and Resolution of Claims of Harassment give individuals and the Office of Institutional Equity the standing to file a complaint of harassment. When OIE is the complaining party, responsibility for implementing the procedures shifts to the Chancellor, Provost or Executive Vice President as appropriate. The effect of this shifting responsibility is that you are likely to have individuals without the expertise required to analyze complicated claims of harassment doing just that. OIE is staffed to provide that expertise, and it would be advisable to have procedures that ensure that the university does not substitute a lay opinion for expert opinion in these cases.

As is the case with complaints of discrimination, any consequences flowing from an investigation under the informal procedure may be reviewed under the Dispute Resolution Procedure. Assuming again that OIE conducts a thorough investigation, giving both parties to the complaint an opportunity to respond to any allegations by the other and an opportunity to present evidence to support their positions, the question of fairness then shifts attention to the Dispute Resolution Procedure and the analysis above.

Under the formal procedure, allegations of harassment are viewed by a Hearing Panel that is appointed by OIE. The fact that parties to the complaint may object to any particular member of the Panel on the basis of a perceived conflict of interest, bias or prejudice goes a long way toward ensuring the impartiality of the panel—a critical factor for determining whether the university provided the employees with a fair hearing. The other elements of fairness are also present, given the fact that the parties have the right to support their positions by presenting evidence and questioning witnesses in the case. Further the Panel's findings are based upon the evidence presented in the hearing and those findings are not subject to review by anyone outside of the Panel—another strong factor in a determination of fairness. And, finally, as is the case with the other complaint procedures, any disciplinary action imposed as a result of the findings is subject to review under the Dispute Resolution Procedure at the request of the disciplined employee.

Conclusions and Recommendations

Duke University has gone to great lengths in an effort to ensure that employees are treated fairly. It has given up its right to terminate employees at will and without cause during an employee's term of appointment; and, with the appropriate exception of decisions regarding employee job classifications and performance reviews, the university has made a commitment to subject any decisions with negative consequences to any employee to an impartial review. In all cases properly filed under the Dispute Resolution Procedure, employees have the right to request a review of their complaints by an employee review panel.

Staff and Labor Relations makes an effort to appoint a panel with diverse demographics and staff employment levels in order to provide a variety of perspectives when the panel is considering the facts. In cases where the employee is challenging a termination or alleging harassment

and/or discrimination, the final review is conducted by an arbitrator chosen by the employee. This is a practice that is rare outside of union negotiated labor contracts.⁷ Not only does Duke use an arbitrator, the University also pays all of the expenses related to the arbitration with the exception of attorney's fees if the employee decides to hire legal counsel, and permits the employee to choose the arbitrator⁸.

While Duke has gone to such lengths to try to ensure access and fairness, there are several points in the Dispute Resolution Procedure where employees might perceive a failure of fairness.

1. The first is that disciplinary actions that fall short of termination and/or do not involve claims of harassment or discrimination end with the final decision by a leader in the supervisor's immediate hierarchy. In such cases, the Disputant might assume that the leader was a participant in the original decision making and therefore is incapable of reviewing the facts of the case anew. The consequence then is that the Disputant does not feel that he or she had the benefits of an impartial review.

Recommendation 1: The University should consider revising the procedure to move the final decision in these cases to an officer in central administration, who makes the decision after reviewing findings of an impartial hearing panel of the Disputant's peers.

2. The second point that might cast doubt on the university's effort to provide a fair process is that in cases that are heard by an arbitrator, the Office of Staff and Labor Relations provides the same Staff and Labor Relations consultant to assist both the manager and Disputant with the preparation of their cases before the arbitrator. While they make every effort to assure both parties of their neutrality, it is not surprising that the Disputant does not trust the Staff and Labor Relations consultant to assist with his or her case. This perception of unfairness might reasonably be helped by establishing a mechanism for ensuring that the person coaching or supporting the manager at each step of the procedure is NOT the same person who coaches or supports the Disputant.

Recommendation 2: There are several potential ways to address this issue.

Staff Ombudsperson Office: Some have suggested that employees who feel that the complaint procedures at Duke are not fair would benefit from the creation of an Ombudsperson Office to help the employees navigate administrative systems when seeking solutions to their workplace problems. Some universities have used that model successfully. One that stands out among its peers is the Office of the Ombudsperson at the University of Iowa.⁹ The services provided by the office include "informal conflict

⁷ An informal survey of the other members of the Association of American Universities (AAU) (Duke was excluded from the survey and multiple campuses of a university system were counted as one) found that only two of the 26 universities responding to the survey permit arbitration as the final step of their non-union employee complaint procedure. The two universities permitting arbitration are both public universities.

⁸ The typical labor union contract arbitration clause includes a striking process for selecting the arbitrator. In those contracts, management and the employee use an alternate strike method to select the arbitrator from a list presented by the arbitrators' governing organization.

⁹ <https://uiowa.edu/ombuds/>.

resolution, mediation services, and advocacy for fair treatment and fair process.” The office promises the employee that its services are “confidential, neutral, informal and independent.” The success of an Ombudsperson Office depends greatly on the individual providing the services. Too often the person in that role loses sight of the need to remain neutral, and slips into an advocacy role. That creates conflicts and confusion with other administrative offices like Human Resources, which is also charged with providing many (if not all) of the same services. During times of increasing regulatory demands and unrelenting economic stress on budgets, the university’s limited resources are best spent on ensuring that the existing Human Resources Office is staffed and organized appropriately to provide the services it promises to university employees in a way that the employee can trust the advice it receives.

Assign Local HR Representatives: In some large universities, there is a local HR representative assigned to assist department management with day-to-day employee relations issues. The local representative relies on the services of a senior level employee relations specialist in central administration for support and guidance. Additionally, there is someone in the center available to assist the employee with any policy or procedural issues. The fact that the central HR consultant is not engaged with departmental management on a day-to-day basis increases the chances that the Disputant will perceive the central consultant as an impartial participant in the process. This option would require a significant investment of additional resources and may not be feasible.

Institute a Division of Labor as a Matter of Course: Staff and Labor Relations at Duke will honor an employee’s request to work with a representative who is not also working with management in a dispute. In other universities, where Human Resources’ Business Partners and/or consultants are centralized, as a matter of course, HR’s standard operating procedures provide that the centralized person advising management on any particular case is not also providing support to the employee. Duke should consider revising the procedure to include a similar division of labor as a matter of course.

3. The Discrimination Grievance Procedure and the Procedures for Resolving Complaints of Harassment both provide for investigations by the Office of Institutional Equity. As indicated above, assuming that OIE conducts thorough investigations, giving both parties an opportunity to respond to any allegations by the other and an opportunity to present evidence to support their positions, the procedures are fair on their face. The fact that the procedures also set the expectation for timely review at each step supports the conclusion of fairness. In complaints of Harassment, it is awkward and inefficient to permit OIE standing to file a complaint against an individual when it has “a compelling reason to believe” that the individual has harassed another.

Recommendation 3: While OIE may initiate investigations in circumstances where it has “a compelling reason to believe” that an individual has engaged in harassment, Duke should empower OIE to initiate such an investigation without requiring it to file a complaint, unless the complaint is against a member of the OIE staff. The need must indeed be compelling in order to reduce the risk of criticism from the community that such a procedural revision would enable an abuse of power by OIE. The elimination of the requirement for OIE to file a

complaint, should in turn eliminate the need to shift OIE's responsibilities to senior leaders in the university who may or may not have the expertise to manage such matters. If the alleged harassment occurs in the Office of Institutional Equity or by a member of the OIE staff, the employee alleging harassment should logically file the complaint with the Office of the Executive Vice President.

Other Observations for Future Consideration (outside of the current scope)

Without the benefit of information from employees regarding their specific complaints, it is impossible to assess the validity of their concerns around fairness. There are several thoughts that come to mind with respect to these procedures that might cause employees to distrust the process. These include the following:

1. Cynthia Clinton is the only investigator in OIE. At an institution the size of Duke, it is conceivable that she might get behind in her effort to investigate complaints. That has the potential to cause deadlines to slip and a backlog of complaints. The quality of the investigation might also suffer as a result. A review of trend data related to this issue would provide Duke's leadership with the kind of data required to assess the need for additional resources in OIE.¹⁰
2. Cynthia Clinton's investigation of complaints of harassment is part of the informal procedure. The formal procedure is a hearing before a Hearing Review Panel comprised of employees. The panel review might well have a chilling effect on complainants. Issues related to harassment are often sensitive and may be embarrassing. It is conceivable that employees could find it uncomfortable to recount the facts before a review panel; yet, it is almost impossible to determine how many complainants are actually chilled by that notion.
3. The Hearing Review Panel is made up of employees who are trained by OIE to review cases of harassment, but they are not experts in the field. Allegations of harassment may present a complex set of facts and circumstances, which require the application of legal standards and laws. Given the presentation of technical legal questions, the university might be better served by placing the responsibility for formal fact finding and ultimate conclusions in the hands of a trained investigator, who specializes in this area and conducts these investigations on a regular basis. This is additional support for considering a revision of the procedures and adding additional investigators to the team in OIE.

Issue #2: Does the university set standards and expectations for contractors to provide fair and accessible complaint mechanisms for their employees who are providing direct

¹⁰ I understand that two Title IX investigators are moving from Student Affairs to OIE and will be reporting to Howard Kallem, Director of Title IX Compliance. The expectation is that these investigators will assist Cynthia Clinton with investigations. The number of Title IX cases on campuses across the country has exploded. Unless Duke has been spared this trend, it is not likely that these investigators will be able to manage the Title IX caseload effectively and assist OIE with other investigations.

services on the university's campus? Further, do the University's "guidelines for contractors and their employees" ensure that their employment practices and employees' conduct reflect Duke's core values of civility, fairness and respect?

Duke University has a practice of including provisions in contracts for service that require contractors and their employees to adhere to particular standards of conduct and to provide specific service levels. For example, both contracts reviewed by the undersigned include provisions for the contractor to commit to non-discrimination in employment; require its employees to secure Duke University identification cards; and, require background checks on all employees working onsite. The contracts also dictate basic terms and conditions of employment, setting, for example, in the dining services agreement requirements for a minimum wage beyond that legally required, regular wage increases consistent with Duke's increases, and health care coverage comparable to that offered by Duke to its employees. (Duke University Dining Services Operator's Agreement, paragraph 9, Personnel.)

Paragraph 32 of the dining services contract sets a "Standard of Performance," including a requirement that the contractor, its employees and subcontractors adhere to Duke University policies. Specifically, paragraph 32B states:

While on DU's premises, MERCHANT, its employees and subcontractors will adhere to DU's policies and regulations including but not limited to parking, traffic and security regulations and with all other ordinances, laws, regulations that may be required by Federal, State, and Local Governments or Insurance and Health Agencies while performing work and supplying goods under this Agreement.

The identical Standard of Performance is provided in Section 11 of the Security Services agreement. Paragraph III.B.3 goes even further, delineating the Contractor's responsibilities related to its employees adherence to Duke University policy. This provision requires the Contractor to:

Ensure personnel assigned to work on Duke Property understand and adhere to applicable Duke and DUPD [Duke University Police Department] policy, such as:

The Duke Harassment – Policy 03.04
Confidentiality - Policy 04.12
Protected Health Information and Patient Privacy – Policy 04.16
Personal Appearance – DUPD GO 600-01
Wearing the Uniform and Equipment – DUPD GO 600-02
Unbiased Policing/Delivery of Department Services – DUPD GO 1500-12
Authorities of Security Personnel – DUPD GO 1500-3-1

Duke Medicine clearly sets the expectation that every individual providing services onsite, including contractors, vendors and consultants, will complete Duke Medicine's employee orientation program, which includes a module on the code of conduct, "Duke Integrity in Action." Section One, page 13, of the Code states:

Consultants, service providers, vendors, and independent contractors (“vendors”) are an integral part of Duke Medicines’ performance of its activities, and it is a priority of ours to ensure that vendors, along with us, participate in the Compliance Program and uphold the Code of Conduct, Duke Medicine policies, applicable laws and regulations, and Joint Commission standards when providing services to and for us.

Vendors are required to participate in the Duke Medicine Compliance Program as demonstrated by vendors’ review and acknowledgment of the Code of Conduct. To ensure vendors’ participation, all vendor staff are required to register and complete the necessary training prior to entering one of our facilities.

In Section Two of the Code of Conduct, Duke Medicine specifically refers employees and other service providers to the Human Resources policies, including the Duke University Guiding Principles and Workforce rules. When describing the work environment, the Code states clearly that members of the Duke Medicine community adhere to the Duke University Guiding Principles¹¹ and Workforce Rules and that Duke Medicine strives “to resolve conflict through mediation and [Duke’s] dispute-resolution process.”

Conclusions and Recommendations

Duke appropriately sets standards for the performance of services and employee conduct on university property when negotiating agreements with contractors and vendors. The terms of these agreements do not specifically address the need for contractors to provide employees access to a procedure for resolving disputes. Nor do they contain a specific requirement for contractors’ employees to adhere to the university’s guiding principles.

¹¹ https://www.hr.duke.edu/jobs/duke_durham/principles/DukeGuidingPrinciples.pdf

Duke Medicine sets a great example for ensuring that all individuals performing direct services onsite understand the university's expectations for the work environment. Contractors receive a copy of the Code of Conduct and the Guiding Principles. Individual employees of the contractor are required to join Duke Medicine employees in an orientation program that then covers these and other expectations.

Recommendation 1: Future University contracts should include a specific reference to the need for the employees of contractors to abide by the Duke University Guiding Principles.

Recommendation 2: The University should also add to its list of terms under the personnel-related provisions a requirement that contractors provide employees with access to a mechanism for resolving complaints that gives the employee an opportunity to be heard and treated fairly in the process.

Respectfully submitted,



Charlene Moore Hayes

September 13, 2016