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Recommendations on the
OPS Workplace Discrimination & Harassment
Prevention Policy & Program

July 9, 2015

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AMAPCEO Recommendations on the OPS Workplace Discrimination & Harassment Prevention Policy and Program

1) Introduction

In previous reviews AMAPCEO has emphasized that, when dealing with harassment and discrimination, the Employer's good intentions are not sufficient. The policy and program need not only be drafted appropriately: they must also be implemented in a manner that ensures effective responses to discrimination and harassment. Currently, the gap between the goals of the policy and the practices in the workplace is large.

To this end, AMAPCEO has compiled a set of detailed recommendations focused on introducing new, substantive measures into the program which we believe will help to bridge this gap. Following internal consultations with AMAPCEO's membership, activists, and staff, it is clear that many areas in the Workplace Discrimination and Harassment Prevention (WDHP) program require amendment and development.

2) General Comments

Before turning to our specific proposals for policy amendment, we will provide general comments regarding the areas of concern that arose out of our internal consultations, and which have informed the substance of our recommendations. AMAPCEO representatives now have a wealth of experience working under the 2010 revisions to the WDHP program. The breadth of feedback we received suggests to us that the WDHP-related processes continue to generate concern amongst our membership. We will review concerns within several of the areas on which the Employer requested comment, in turn.

i. WDHP Awareness, Training and Support Resources

A consistent theme in the responses we received pertained to the level of managerial awareness of the policy and program. Generally, AMAPCEO is concerned that managers may not be receiving specialized training and program support demanded by their heightened responsibilities to recognize, prevent and remedy harassment and discrimination in the workplace. While some individual managers were commended by the participants in our consultation, in general, managerial WDHP understanding and implementation is perceived as lacking. While we appreciate that managers must undergo regular mandatory training, this appears to be insufficient to ensure a consistent and effective response to WDHP complaints. Questions were raised during our consultations regarding the frequency, content and focus of manager's WDHP training.

There also appears to be frequent confusion regarding the processes, protocols, timelines, exclusions and potential remedies that are offered through the policy. We suggest this could in part be ameliorated by the creation of a new package of support materials. Many activists noted that they would find a plain-language version of the policy helpful, in addition to more user-friendly process charts which clearly describe each step in the policy requirements and any related timelines. We would note that these types of products would likely be helpful for managers, as well as employees contemplating a complaint.

Perhaps most importantly, many members expressed concern that they do not have access to appropriate levels of workplace support when dealing with WDHP concerns. While AMAPCEO Workplace Representatives were listed as a frequently-accessed support, it was noted that this resource may be limited given that the WDHP program is complainant driven.

In AMAPCEO's consultations, we also learned that, in some instances, members who alleged a violation under the WDHP were told that they were not entitled to AMAPCEO representation. This direction is not supported by AMAPCEO or the Employer's own policies, which read as follows: "Represented employees may choose to seek advice of their bargaining agent. Employees participating in this process are entitled to bring a union representative as their support person."¹ Special attention needs to be paid to the inclusion of this correct direction in all future publications and, more importantly, future practices. Conversely, WDHP advisors were not described as a valuable resource for complainants. Overall, WDHP advisors were described as having an Employer or "management" focus rather than an employee- or issue-centered approach.

Experiences obtaining confidential counselling through the Employee Assistance Program (EAP) were inconsistent, with both positive and negative interactions described. AMAPCEO notes the Employer's recent communications emphasizing new, WDHP-specialized EAP resources. We look forward to engaging with the Employer regarding this resource in order to strengthen the WDHP supports currently available to our members in the workplace.

Our central concern regarding this new resource is that it has appeared in the workplace with no prior consultation with or disclosure to AMAPCEO. Any potential benefit that could be realized through this additional resource needs to be couched with a concern that the orientation or ultimate value of this resource is unknown. One potential concern is that these EAP specialists may approach their work through an Employer's lens which could defend or diffuse the Employer's position or actions in an alleged WDHP complaint. The effect of this approach could ultimately be seen as being more harmful than helpful to the situation regarding an ostensible complaint.

ii. Filing of WDHP Complaints and Preliminary Assessments

The most consistent feedback received by AMAPCEO was in respect to the preliminary assessment of complaints, including the long periods of time that assessments take, questions related to the transparency of the process, and an insufficient tracking/case management system for WDHP advisors. However, the primary concern raised by our activists is that many – likely the majority – of complaints are returned by WDHP advisors as "out of scope," without any substantial explanation regarding the rationale or reasoning for this, or any indication of other steps that could or would be taken to resolve the issues raised in the complaint.

For our membership, the act of filing a complaint is significant, and members generally feel that they are incurring some degree of risk of reprisal from managers or co-workers, or both. The "out of scope" label has been seen as a dismissal of the members' complaints without an adequate explanation. In turn, this fosters a perception of the WDHP program as opaque, biased and ineffective. While we appreciate the necessity of an expedient preliminary response to complaints, the status quo falls well short of what our

¹ Workplace Discrimination and Harassment Prevention (WDHP) Program, External Investigations Guide for OPS Employees, Centre for Employee Health, Safety and Wellness, Ministry of Government Services, p. 11, June 2010.

members expect and require from the program. Below, we will suggest a number of measures to improve the preliminary assessment process and the responses employees receive following an assessment.

A separate, but related, concern relates to whether the program is adequately capturing more harmful forms of workplace conduct. This conduct may fall below more obvious policy thresholds, but over time can give rise to dysfunctional or poisoned work environments. Our members have consistently expressed the concern that, while the WDHP policy is more appropriately geared to egregious episodes of harassment and discrimination, it does not do a good job of responding to more subtle or covert patterns of vexatious behavior. In our recommendations below, we will suggest measures to address this as a possible root cause for the large volume of “out of scope” assessments identified by our members. These proposals include broadening the policy’s definition of harassment and instituting an “early warning” system, which would act as a mechanism for the resolution of workplace issues and could potentially reduce the number of WDHP complaints filed.

iii. WDHP Investigations

A number of issues were raised with respect to investigations under the policy. Of particular concern to AMAPCEO was the consistency with which complainants report feeling re-victimized by the investigation process. Not only can investigations be intrusive, but various forms of reprisal in the workplace – be they formal or informal – are still very much a concern for complainants and witnesses in WDHP investigations.

The conduct of internal investigations received very poor feedback. Perceptions that internal investigations are subject to a management bias were prevalent. Members also raised questions related to how the Employer determined when an internal versus external investigation was determined to be appropriate. Many of those consulted suggested that the Employer adopt more of an arm’s-length approach to internal investigations, perhaps by utilizing senior management resources located in ministries not involved in the complaint.

We received mixed feedback regarding members’ experiences with external investigators. Some were described in positive terms as bringing professionalism, objectivity and rigour to their investigations. However, we also received many negative reports describing specific external investigations as biased, inappropriately conducted and ineffectual. In AMAPCEO’s view, this points to a need for measures which would bring consistency and transparency to the manner in which external investigators are appointed.

In respect of both internal and external investigations, many responses described a lack of clarity regarding the protocols which apply to investigators, and what procedural rights and protections are afforded to parties to the process (i.e., complainants, respondents, representatives and witnesses). Further, the resolution of complaints within the policy’s timelines remains an issue. Here, concerns were raised regarding the extension of timelines without adequate – or apparent – reasons and the lack of consultation with or consent of the complainant. Below, we will suggest improvements to the procedural rights of all parties involved in a WDHP complaint.

iv. WDHP Complaint Resolution/Workplace Restoration

Complaint resolution and workplace restoration are, in general, seen as weak links in the program. While AMAPCEO is cognizant that the trauma experienced by victims of discrimination and harassment can be difficult to remedy, there are steps the Employer could take to move towards what should be the ultimate

goal of the policy: resolutions which would “make whole” any affected parties. This is an area of the policy that would seem to require a creative approach that is sensitive to local workplace realities.

Our members have consistently expressed concern that complainants find themselves stigmatized following substantiated complaints and workplace restoration efforts. Too often, the only resolution presented to a member who has made a substantiated complaint is transfer to another work unit. One component of this issue is a perceived unwillingness to seriously confront and discipline managers found to have infringed on the policy. In fact, the single example provided to AMAPCEO of a positive resolution to a WDHP complaint described a mediated session where a neutral third party took creative and unorthodox steps to hold several members within the senior management cadre accountable for actions that infringed on the WDHP policy.

A related issue is the typical “menu” of restoration options available to managers to implement. These measures are not limited to, but in practice are often confined to, actions such as the issuance of communiqués, various conflict resolution/team-building exercises, and workplace reviews. In many cases, these approaches simply are not sufficient to restore workplaces where discrimination or harassment has occurred. AMAPCEO believes that the Employer needs to embrace a more holistic approach to workplace restoration. This should include – but not be limited to – the provision of monetary compensation for employees affected by discrimination or harassment.

Other concerns expressed to us during our consultation relate to various issues with the administrative implementation of restoration measures. These include situations where management fails to adequately communicate what steps have been or will be taken. In addition, the length of time spent implementing restoration measures is a significant issue. In this area particularly, all parties to a WDHP complaint require the timely and transparent execution of whatever remedial steps are deemed necessary.

v. WDHP Disputes

WDHP disputes under the AMAPCEO Collective Agreement are widely perceived as having serious advantages over complaints under the existing WDHP program. There are many reasons for this. The negotiated language of the Collective Agreement is perceived as stronger than the language contained in the policy. The dispute resolution process is seen by members as bringing a greater degree of objectivity and procedural protection to the situation. In addition, members are afforded specific representational rights under the Collective Agreement,² and the bargaining agent becomes a formal party to the complaint and resolution process. Finally, – and perhaps most importantly – in many situations, AMAPCEO members feel that a dispute needs to be filed alongside a WDHP complaint in order to achieve any prospect of substantive redress.

There is, however, an awareness, that proceedings at the GSB can be lengthy, especially given that they are regularly deferred pending the conclusion of the Employer’s WDHP process. In this respect, complaints under the policy may be of assistance in achieving a more expedient resolution to some workplace issues – even if the resolution is only a partial answer to the problem. Of course, the reality of having to endure multiple proceedings in order to obtain an adequate remedy is not ideal for most members. In our proposals below, we will make suggestions which would help to improve the disparity between the various proceedings.

² See s. 2.2.3 and 2.2.4 of the AMAPCEO Collective Agreement, 2014 – 2018.

3) Specific Recommendations

This section sets out, with reference to the current WDHP policy language, proposals aimed at improving some of the issues outlined above.

i. Section 6: Application and Scope

Definition of Harassment:

It is appropriate that the policy apply to workplace harassment as prohibited under the OHRC, the OHSA and AMAPCEO's Collective Agreement. The feedback we have received, however, indicates that, for the purposes of the Employer's policy, this definition of harassment does not sufficiently capture some forms of harassing conduct. A more detailed definition of harassment, such as those employed in other provincial jurisdictions,³ may help remedy this problem.

In 2008, AMAPCEO and the Employer jointly recommended a working definition of psychological harassment to the Public Service Commission and ACERC. This definition used the language found in the current policy, but specified that "a single incidence of such behaviour that has a lasting harmful effect on an employee may also constitute a violation of this policy."⁴ In addition, the working definition included a non-exhaustive list of examples illustrating conduct that does, and does not, constitute harassment. This definition and list is attached as "Appendix A" to these recommendations. Several of these examples are now included in the program guide for employees and managers.

Our experience has shown that the inclusion of all of these specific examples may be helpful in guiding those charged with the implementation of the policy to more appropriate assessments of what is deemed in and out of policy. With this in mind, AMAPCEO recommends the following:

- a. An amendment to the definition of harassment that uses the 2008 Joint Working Group definition of harassment, with the examples set out in that report incorporated as a new appendix to the policy.

ii. Section 7: Principles

As set out above, the policy does not work to consistently provide sufficient remedies and restoration to employees with substantiated WDHP complaints. Further, employees continue to describe a fear of

³ For example, the prohibition on "psychological harassment" in s.81.18 of Quebec's *Labour Standards Act*, defines psychological harassment as the following:

"For the purposes of this Act, 'psychological harassment' means any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee.

A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment."

⁴ See the *Joint Working Group Report on Employee Protection from Psychological Harassment in the Workplace to the Public Service Commission and ACERC*. 2008. Accessible at: https://www.amapceo.on.ca/_files/file.php?fileid=fileFHmJEDUWXY&filename=file_2_Psychological_Harassment_Final_Joint_Report.pdf

reprisals, both formal and informal, when considering participation in the complaint process. These issues erode employee confidence and participation in the policy.

AMAPCEO recommends that the policy renew its focus on these concerns via the inclusion of two new principles to the policy:

- a. Under 7.10, the inclusion of a new concept indicating that responses to discrimination and harassment: “will be holistic in approach and will, to the greatest extent possible, make whole any employees affected by discrimination or harassment.”
- b. After the current 7.10, the addition of a new section indicating that the Employer is committed to protecting all employees from any formal or informal reprisals for exercising their rights and responsibilities under this policy.

iii. Section 9: Mandatory Requirements

Prevention

Currently, not enough work is being done on the prevention side of the policy. This leads to several of the consequences noted above, including increased complaints for issues that may be more minor in scope, and a seemingly large volume of “out of scope” assessments. AMAPCEO views this issue as at least partially indicative of workplace issues that require restoration, but are not easily detected by the policy.

In addition, our members voiced concern over the depth and consistency with which managers understand and apply the policy. Therefore, AMAPCEO recommends the following:

- a. An amendment of section 9.3 to require training be undertaken every two (from the current three) years by managers.
- b. An amendment of section 9.3 to require specialized managerial training, including training in detecting discrimination and harassment and appropriate and effective workplace restoration strategies. This training should be conducted in person by professionals with experience implementing the WDHP program, in addition to any online training modules that are made available.
- c. The inclusion of a policy requirement that provides employees with an opportunity to engage in an annual anonymous review of their direct supervisor and, more specifically, any WDHP concerns that may be present in the workplace.
- d. We further recommend that any employee review be taken into account during a supervisor’s/manager’s annual performance evaluation.

This review would act as an “early warning system” allowing employees to alert senior management without requiring the WDHP policy be triggered. In AMAPCEO’s view, the institution of this practice may help management to identify factors which individually may not rise to the level of a substantiated complaint, but collectively may demonstrate the types of insidious conduct which can lead to poisoned workplaces. This will not only help reduce the overall level of complaints (and the number of “out of scope” assessments), but would lessen the risk of issues festering and leading to more egregious WDHP concerns over time.

Consequences for Policy Violation

As noted above, Employee concerns regarding reprisals for participants under the policy are endemic. We recommend that the Employer refocus the policy to include the prevention of reprisals by amending the following:

- e. The current section 9.17 to include the following (addition in **bold**):

“Employees, including managers, found to have violated this policy may be subject to discipline up to and including dismissal. Managers who fail to take appropriate action to resolve complaints, or who fail to act appropriately on findings of discrimination or harassment, **or who are found to have engaged in any kind of reprisal against an employee exercising a right or responsibility under the policy will** be subject to discipline up to and including dismissal.”

- f. The current section 9.18 to include the following (addition in **bold**):

Managers must:

- o Consider providing appropriate remedial education or training to employees who are found to have violated this policy;
- o Monitor future behaviour within the scope of the performance management program; **and**
- o **Ensure, to the greatest extent possible, that no employee suffers any form of reprisal for participating in the WDHP program.**

Timeframes

The maintenance of timeframes under the policy continues to be an issue. In particular, our members have voiced concerns that the Employer’s ability to extend timeframes in extenuating circumstances (which are often perceived as unilateral and ambiguous reasons) is detrimental to the program. AMAPCEO recommends the following:

- g. The addition of an appendix using plain-language to detail each step of the process and any attendant timelines, and that this document be delivered in hard copy to all managers.
- h. The amendment of section 9.19 to include the following: “Timelines under the program will be strictly enforced. Those responsible for administering the policy who fail to meet timelines without a reasonable explanation will be subject to discipline.”
- i. The amendment of section 9.22 to include the following: “In any event, no timelines will be extended without notification to the complainant and respondent of the circumstances requiring an extension, or without an attempt to achieve their mutual consent to the extension is made.”

Measurement and Review

Given some of the concerns listed above, AMAPCEO recommends the following:

- j. The inclusion of increased transparency measures to the policy in order to promote employee confidence in the policy and encourage performance improvements.
- k. The amendment of section 9.24 to read (addition in **bold**):

“Workplace Discrimination and Harassment Prevention policy and program measures, **including the number of complaints filed at the preliminary assessment stage, the number of investigations, and the number of substantiated complaints**, must be established and collected by MGCS. Policy and program performance results must be evaluated by MGCS annually, and reported to the Public Service Commission and bargaining agents every two years.”

Preliminary Assessment

In our comments above, we noted the extent to which employees’ complaints are returned as “out of scope” and the corrosive effect this has on program confidence. AMAPCEO recommends the following:

- l. The inclusion of a new section requiring that, when a complaint is determined by WDHP advisors to be out of scope, a written rationale is included detailing the rationale underlying the assessment. This response document should also include a series of next steps and other actions a complainant may take.
- m. The inclusion of a mechanism within the policy for senior management’s reconsideration of “out of scope” assessments by the WDHP advisor.

Resolution Mechanisms

As noted above, complaint resolution mechanisms are not adequate and must be strengthened. There are many issues with the content and transparency of the investigation protocols currently in place. We recommend the following amendments:

- n. Under the subheading “Alternate Dispute Resolution,” (ADR) the inclusion of a point indicating that ADR will never be proposed as an option in cases where sexual harassment is alleged, unless specifically requested by the complainant.
- o. Under the subheading “Alternate Dispute Resolution,” the addition of a point indicating that all participants to ADR, including any bargaining agent representatives, will be asked for feedback by the Employer and that this feedback will be included in the two-year program performance measurement exercise.
- p. Under section 9.50, the inclusion of the criteria used by the Employer in determining whether an internal or external investigation is appropriate.
- q. The creation of a revised protocol governing internal and external investigations, in consultation with bargaining agents, and included as an appendix to the policy. Under section 5 of the WDHP Policy, a new bullet point should be added referencing the new appendix.
- r. Under section 5, the addition of a point indicating that all participants to an investigation, including any bargaining agent representative, will be asked for feedback by the Employer and that this feedback will be included in the two-year program performance measurement exercise.
- s. Under the subheading “Internal Investigations,” the addition of a point indicating that internal investigations will be carried out by an internal resource that is at arm’s length from the basis for the complaint.

- t. Under the subheading “External Investigations,” the addition of a point indicating that third-party investigators will be selected from a vendor-of-record list shared with all bargaining agents. This list, and any feedback received by parties following a completed investigation, should be subject to review during the two-year program performance management exercise.

Workplace Restoration

The remedial measures available to managers are currently lacking. As recommended above, managers should be required to undergo training in appropriate and effective workplace restoration strategies and remedial measures. In addition to this, the recommendations below are aimed at fostering more creative, holistic and sensitive approaches to workplace restoration. AMAPCEO recommends the following:

- u. The amendment of section 9.57 of the policy to include a reference to the necessity of “making whole” any employees affected by discrimination or harassment.
- v. Assurance that managers implementing workplace restoration measures are explicitly empowered under the policy to provide forms of restitution to employees, including monetary payments and the provision of leaves from the workplace with pay. Any days missed by a complainant as the result of substantiated discrimination or harassment should be exempted from consideration as an absence or occurrence under the Attendance Support Management Program.
- w. Assurance that, in situations where it is determined that employees can no longer co-exist in a workplace together, complainants are to be provided with the option of choosing to stay or accepting a transfer.

iv. Section 10: Responsibilities

In order to address some of the concerns regarding the consistency of quality in external investigations, AMAPCEO recommends the following:

- a. The addition of the new subsection “External Investigators,” which outlines the expectations and responsibilities for any third-party investigation service providers. Responsibilities should include a duty to act free from bias, the signing of a conflict of interest declaration prior to undertaking an investigation, and adherence to all relevant investigatory protocols.

4) Conclusion

AMAPCEO extends its appreciation for its inclusion in this review process. We are confident that, in the spirit of the parties’ past collaborations on these issues, our proposals will be considered seriously and with an open mind. The intent of our comments is to ensure that all employees in the OPS are guaranteed the ability to make public contributions in workplaces that are free from discrimination and harassment. We will continue to make ourselves available to the Employer for any further consultation, as well as for any clarification with respect to the comments and recommendations outlined above.

Appendix A

From the Joint Working Group Report on Employee Protection from Psychological Harassment in the Workplace to the Public Service Commission and ACERC

Psychological Harassment

Every employee has the right to a work environment free from psychological harassment.

Definition

A course of vexatious⁵ comment or conduct, that is known or ought reasonably to be known, to be unwelcome. A single incidence of such behaviour that has a lasting harmful effect on an employee(s) may also constitute a violation of this policy.

The following lists are not intended to be exhaustive, they are merely illustrations.

What It Is

- Exercising authority in an abusive manner, which negatively disrupts or prevents the performance of workplace duties.
- Arbitrarily denying applications for training leave or promotion, or repeated threats to withdraw advancement opportunities for reasons unrelated to performance, operational or budgetary needs.
- Any objectionable or offensive behaviour, remark, joke or gesture, that is known or ought reasonably to be known to be unwelcome.
- Repeated rude, degrading, or offensive remarks, such as teasing about a person's physical characteristics or appearance, putdowns or insults.
- Bullying, threats, intimidation or retaliation against an employee, including, but not limited to one who has expressed concerns about perceived unethical workplace behaviours.
- Discrediting a person, spreading damaging gossip or rumours.
- Objectionable conduct, comment or display that: belittles, demeans, patronizes, causes personal humiliation or embarrassment.
- Inappropriately withholding information, undermining work performance.
- Ostracizing or isolating a person, or excluding a person for no valid business purpose, no longer speaking to the person, preventing the person from expressing themselves, depriving the person of a means of communication.
- Intruding on a person's privacy, or tampering with a person's personal belongings or work equipment.

⁵ Vexatious: without reasonable or probable cause or excuse.

What It Is Not

- Normal exercise of management rights, including the day-to-day assignment of tasks and general work allocation, performance and attendance management, or discipline for just cause, does not constitute psychological harassment, provided that the employer does not exercise these rights in an abusive manner.
- A conflict does not, in itself, constitute psychological harassment. Conflicts at work, if they are managed wisely, may lead to the clarification of responsibilities and the evolution of relations among staff. Conversely, if conflicts are managed poorly or left unresolved, they can give rise to psychological harassment.
- Work-related stress may have other origins than psychological harassment.
- Professional constraints and organizational change, that affect personnel in a non-arbitrary manner, when justified from an economic, operational or technological standpoint, do not constitute psychological harassment.
- Exclusion of individuals for a particular job based on specific occupational requirements necessary to accomplish the safe and efficient performance of the job.