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Public Report of DPS Oversight Committee on Grievance of Andrei Borisov

On September 4, 2008, Dr. Andrei Borisov met with the Chair of the Department of Pediatrics ("the Department"), with which he was then employed. Among other persons, two DPS officers were present. The Chair gave Dr. Borisov the choice of resigning or being terminated from his employment with the Department. Ultimately, in the presence of the officers but not of the Chair, he signed a resignation letter. He believed that it would not be effective until September 12, but the officers told him he had to clean out his office immediately. During that process, an altercation between Dr. Borisov and the officers occurred. Dr. Borisov was arrested. Ultimately, he was tried on criminal charges related to the incident, but he was acquitted. He later brought a grievance before this Committee. The Committee has issued a unanimous report on the grievance to appropriate officials of the University and to Dr. Borisov.

The Procedures of the Committee contemplate in addition that in certain cases the Committee will issue a public report on a grievance, so long as that report does not include confidential information. A majority of the Committee (composed of members Egler, Friedman, Moore, and Steele) believes that such a report is appropriate in this case. First, the Committee has given University officials and Dr. Borisov an opportunity to identify confidential information in its initial report, and no one has suggested that any of the information contained in it is in fact confidential. Second, the Committee has made policy recommendations that would govern in a type of situation like this that has potential for conflict and that is likely to recur. Third, the incident involved in this grievance has gained a substantial degree of public attention; the Committee believes that this report may contribute to accurate public understanding of the incident. The Committee believes it can best perform its function in the setting of this case by offering a dispassionate view of the facts and considerations for developing future policy and protocols to govern similar settings. (Two members of the Committee (Elder and Nichols) disagree with this conclusion. They believe that the Committee has served its function by issuing its report to appropriate University officials and to Dr. Borisov, and that issuing a public report may tend to be detrimental to the future functioning of the Committee.) The Committee majority takes note of the fact that, as we understand it, since the issuance of our report to University officials and to Dr. Borisov, Dr. Borisov's civil action against the University and certain officials has been settled, and part of the settlement required Dr. Borisov to withdraw all grievances against the University. It may well be that, if a grievance is withdrawn before the Committee has issued a report, the Committee remains empowered to serve the public interest by reporting on the matter. But that is a question we need not address here. The Committee reported on the matter before the parties entered the settlement agreement, and any purported withdrawal of the grievance cannot alter that fact; we do not believe that our authority to make public conclusions that we previously drew is open to serious question.

As more fully described below, we conclude that in some respects the conduct of the officers was inappropriate. Part of the problem was that they exceeded their proper role. Decisions they made on the spot were a contributing factor. But we also conclude that they were placed in a situation in which they were asked to perform some functions that lie outside the authority of DPS and that belonged more properly either to the Department or to University Human Resources (UHR). In future situations of this sort, participating officers need more guidance from established DPS policies and from senior DPS command officers. It is also important to ensure that the units involved and UHR perform their proper function and that these are not left to DPS. It seems clear to us that DPS needs better support, information, and lead time from administrative and academic units for matters of this nature. Ultimately, the responsibility for ensuring steps of this nature are taken lies with the central administration of the University.

We recognize that our statutory mandate is to exercise oversight over DPS. Our purpose is not to exercise a roving commission to examine the performance of other parts of the University. Rather, we are stating ways in which we believe that the operations of DPS may be improved – which in this case means limiting DPS to its proper function. Especially given that our Procedures provide that we shall issue reports to the Chief Financial Officer of the University, who has broad authority over its operations, we believe it is an appropriate exercise of our statutorily mandated responsibility to include in this report ways in which other parts of the University may appropriately support and cooperate with DPS. Indeed, CFO Slottow has specifically indicated that he welcomes comments from this Committee on such inter-unit cooperation.

We emphasize that we do not mean in the comments below to be critical of the performance of those other parts of the University. We recognize that our comments benefit from the perspective of hindsight, but hindsight with respect to past events can offer foresight with respect to future ones.

The discussion below is organized around ways in which we believe the performance of DPS could be improved in matters like this one. Except as it bears on that issue, we do not attempt to assess Dr. Borisov's behavior. Our responsibility is to address grievances against DPS. We take it as a given that some people with whom DPS interacts will conduct themselves in a difficult or wrongful manner; the question for us, and for DPS, is how DPS might best act in such circumstances.

1. *Presence of the officers in the meeting room.* The two officers were present in the room when the Chair met with Dr. Borisov, and they were introduced to him at the start as security officers. The presence of officers at a meeting of this sort can have an intimidating effect. At the same time, we appreciate that the first duty of DPS is to ensure that everyone in the university community is safe, and that DPS may not be able to evaluate the level of risk.

There is no doubt that, given that the Department Chair asked for officers to be present at the meeting, DPS should have complied, at least to the extent of having officers stand

immediately outside the room. It is less clear that the officers should have been in the room itself.

We accept that, assuming satisfactory procedures are followed, DPS should comply with a request for presence of officers in the meeting room made by the person who asked for standby in conjunction with a meeting. Nevertheless, we believe that DPS policy should lay out procedures to govern – absent exigent circumstances – when officers should stand by in the room where a meeting is taking place. We recommend that DPS policy should include the following principles:

- (1) The officers should offer to stay immediately outside the room and should agree to stay inside only if specifically requested to do so.
- (2) The person making the request should articulate a reason why that is necessary.
- (3) The person should state the request and the reason in writing.
- (4) The written request should be made only after an officer advises the person making the request of the possible intimidating effect that the officers' presence may have.

We emphasize that these procedures would apply only absent exigent circumstances. In the absence of such an exigency, there is no reason to suppose that this procedure would be impractical or particularly burdensome, nor does it place on DPS the burden of assessing the risk.

In this particular case, there was no exigency that would have made this procedure (had it previously been established as DPS policy) difficult or impractical. We do not say that the result would have been different had the officers followed this procedure. But this procedure provides some assurance that the decision to have officers in the room will be both (a) well considered, taking into account the potential negative consequences, and (b) contemporaneously documented to have been considered.

2. *Participation of the officers in the meeting.* At least as a general matter, when DPS officers are present at a meeting on a civil standby – whether in the meeting room itself or immediately outside – they are there for security purposes only. Accordingly, they should not participate in the meeting unless there is an immediate security need for them to do so.

In this case, the officers intervened repeatedly. We believe this was inappropriate.

a. *The no-contact discussion.* In the first intervention, one of the officers asked that Dr. Borisov have no contact with his supervisor, and suggested that if he did he could be arrested for stalking. Obviously, this is an appropriate subject of conversation between DPS and Dr. Borisov, but it is nevertheless troublesome in two respects.

First, assuming that the circumstances justified DPS in making this statement to Dr. Borisov, then the officer had all the information he needed to make it before the meeting began. The statement should have been made separately, not as part of a departmental meeting that the officers were attending simply to provide security. Again, we believe it is important that DPS officers understand the limited nature of their function on a civil standby, and that they not mix functions.

Second, although the statement was phrased at first as a request, it clearly seems to have been more. It appears that in effect it was an order being crafted by the officer on the spot; we are unaware of any basis on which he would have been authorized to issue such an order. Alternatively, it may have been advice and a prediction (in effect, "I am telling you what conduct is acceptable under the law in this circumstance, and if you violate the law I predict you will be subject to arrest"). If so, even assuming that it is appropriate in a setting like this for an officer to give accurate advice, we doubt whether this advice was accurate; there are various forms of "contact" that Dr. Borisov might have had with his supervisor that, notwithstanding the supervisor's asserted concern for his safety, probably would not have constituted stalking.

b. *Urging Dr. Borisov to resign, and to decide quickly.* At one point the same officer told the Chair that she should terminate Dr. Borisov, because he was not going to sign the letter. The officers continued to play a role in urging Dr. Borisov to resign, and in any event urging him to decide quickly.

These interventions were plainly improper. No valid reason occurs to us for the officers to urge Dr. Borisov to resign, or even to decide quickly, and the potential for intimidation is obvious.

3. *Confusion and misunderstanding.* This was obviously a difficult situation for all concerned, and a traumatic one for Dr. Borisov. It seems clear that the potential for an unfortunate outcome was increased by misunderstanding and confusion in two respects.

a. *Confusion about the two choices.* The Chair offered Dr. Borisov a choice between termination and resignation. He repeatedly expressed confusion about the comparative consequences of the two choices. Nobody present was able to offer him advice on this matter, though he asked for it repeatedly.

Obviously, it is not DPS's responsibility to explain to an employee the possible consequences of termination and resignation. But we believe that DPS's protocol for situations of this sort should include a provision that might lower the probability of the type of confusion under which Dr. Borisov was laboring. The confusion about consequences suggests that in a meeting of this sort – in which the University decides (perhaps for its own interests) to give an employee the choice between termination and resignation – the employee should have immediate access to advice on the consequences of each of the choices. Such advice – and the sense that someone in the room is protecting his interests – might help defuse the situation. Arguably, even if the employee is simply terminated without being given a choice, or otherwise informed of an adverse employment change, he or she should have immediate access to such advice, for similar

reasons. DPS cannot provide UHR personnel for meetings of this sort. DPS does, however, presumably have greater experience with such meetings than do most units, because it is called rather regularly to provide civil standbys for them. We believe, therefore, that in such situations DPS should give strong advice to the unit requesting the standby that the unit should also request the presence of a knowledgeable UHR professional, preferably from outside the unit, to be there for no reason other than to advise the employee.

b. *Confusion about rights and the terms of resignation.* Much of the difficulty of the encounter was attributable to confusion about Dr Borisov's rights after he resigned. The Chair laid out terms on which she would accept a resignation, but Dr. Borisov resisted those terms. Eventually, he signed a simple resignation letter that did not incorporate those terms. So far as he was concerned, he was still a full employee of the university until September 12. The understanding of everyone else was that the terms laid out by the Chair were incorporated into the resignation.

We think Dr. Borisov has the better of this argument. He never accepted the Chair's terms, and ultimately the Department prepared, and he signed, a letter that made no reference to those terms and simply made the resignation effective September 12, as he had insisted.

In the view of Dr. Borisov, as expressed through counsel, it follows that the University had no right as of September 4 to exclude him from the workplace. The University takes a much different view. It believes that, because the Chair supervised the workplace, she was entitled, if she felt it necessary, to exclude Dr. Borisov from it – irrespective of resignation or termination. We do not think it necessary for us to try to resolve this difference. At the very least, the timing of such an exclusion and the reasons for it need to be explained very clearly to an employee being excluded from his or her workplace.

Assuming that the Chair was indeed authorized to exclude Dr. Borisov from the workplace, irrespective of his employment status, when Dr. Borisov said repeatedly that he was employed until September 12, the proper response by the officers would probably have been something on the order of "Perhaps you are, but you have been excluded from the workplace after today." Instead, one officer told Dr. Borisov that the employer could fire him without a "legal reason." That is probably true, but was not quite the point. Again, it was not the job of DPS to advise Dr. Borisov on employment matters. But DPS officers should know why they are excluding someone from the workplace – the reason in this case being that (in the University's view), irrespective of the employment relation, the employer has the authority to do so. The difference may appear subtle, but it seems to us that it can be explained to DPS officers, and perhaps confusion in similar circumstances in the future would then be minimized.

Furthermore, before DPS enforces a supervisor's wish that an employee be excluded from the workplace, it should make sure (at least absent exigent circumstances) that the supervisor has clearly articulated an exclusion order, to the employee as well as to DPS. It may diminish confusion if, except in exigent circumstances, such an order is set out in writing before DPS acts on it. One possible approach is to provide that, when a DPS officer attends a meeting in which it appears plausible that a supervisor will want to issue an exclusion order, the officer should carry

a blank form for such an order. Had such a practice been in place in this case, the Chair could have signed an explicit exclusion order in a few minutes, and much of the confusion, and perhaps Dr. Borisov's perceived need to engage the officers in conversation, would likely have been obviated.

4. *The clean-out operation and the physical altercation.* We will assume for purposes of discussion that, even if Dr. Borisov's understanding of the resignation was correct (that the resignation was not effective in any respect until September 12), the Chair had the authority to insist that Dr. Borisov clean out his office that day; Dr. Borisov was soon to be excluded from the workplace in any event and the Chair had concerns about Dr. Borisov's behavior. It seems clear to us that when Dr. Borisov began to take property that the officers were unsure belonged to him they acted properly in restraining him, by force if that became necessary. But in at least three respects, we believe the role played by the officers during this procedure may have increased the probability of an unfortunate outcome.

First, the process should have been supervised not by DPS officers but by someone from the Department; as before, the role of DPS should have been to stand by silently and to intervene only if necessary to protect the security of those present. We believe that the written policies or protocol to be adopted by DPS to govern such situations in the future should make this principle clear.

In this case, the fact that the officers played a role for which they were not suited may have had serious consequences. The officers were obviously not in a position to determine what belonged to Dr. Borisov and what did not, and that uncertainty led to the climactic physical altercation. Had the operation been supervised by an employee of the Department who was qualified to recognize what belonged to the Department and what belonged to Dr. Borisov, the problem may have been averted.

Second, the Chair did not impose any time constraint on when the clean-out had to occur beyond saying it should be that day, and she affirmatively indicated Dr. Borisov could do it later in the day. It is not clear to us, therefore, on what basis the officers announced a 20-minute limit for the clean-out. (We do note that the officers had spent over an hour with Dr. Borisov at this time, and that they offered to plan another time for him to come back to clear out the rest of his personal belongings with an escort.) Obviously, this was a highly confusing and emotionally wrenching situation for Dr. Borisov. Imposition of the time limit very likely exacerbated the situation. Had the officers confined themselves to the role that appears to us to be professionally proper – standing by to assure security – presumably no such limit would have been set. We note in this context that earlier one of the officers had said, “[W]e need to go home.” In future operations of this sort, DPS command should ensure that the end of an officer's shift does not place a time constraint on the operation.

Third, even before the twenty minutes had expired, one of the officers read the trespass warning to Dr. Borisov. This decision does not appear to have been justified. However slow Dr. Borisov's progress may have been, and however frustrating this may have been to the officers, he had not violated any orders to that point. Resolving this situation in an acceptable manner

required a degree of patience that the officers did not demonstrate.

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The incident addressed by this report has created considerable contention and even litigation. The Committee hopes that this fact will not prevent the University and DPS from using this experience to improve the response of DPS to similar situations in the future. We have been encouraged by the reception that the Chief Financial Officer and DPS have given to the report previously made to them. We are glad to note that DPS is in the process of adopting policies for addressing civil standbys. We hope that these new policies will take into account the recommendations set forth in this report.