

Sexual Misconduct Hearing Officer Training

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Agenda

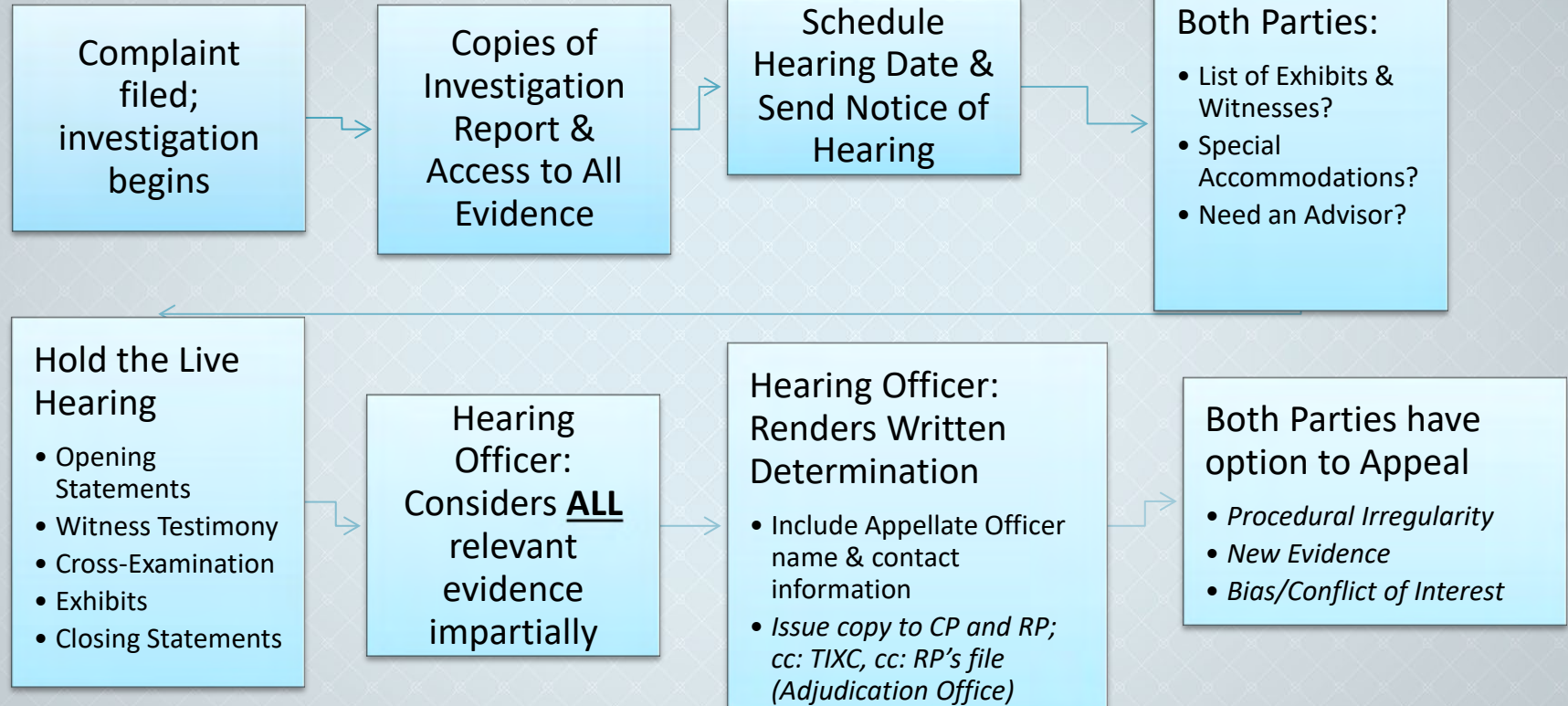
1. Background & Context
2. Distinction between Sexual Harassment Cases & Non-Sexual Harassment Cases
3. Hearing Officer Role
4. Pre-Hearing
5. At the Hearing
6. Special Issues
7. After the Hearing



Background and Context



Live Hearing: Logistics Flowchart



Purpose of Hearing

- It may be required by law
- Due Process
 - Notice
 - Opportunity to be heard
- Determined by Impartial Hearing Officer
- Whether the RP committed a university policy violation.



Distinctions...

Sexual Harassment

VS.

Non-Sexual Harassment

(Ex. Other Inappropriate Sexual Conduct, Retaliation, etc.)



Definition of “Sexual Harassment” Under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the institution’s education program or activity (Hostile Environment); or
3. “**Sexual assault,**” “**dating violence,**” “**domestic violence,**” or “**stalking**” as defined under Clery/VAWA.

*Source: Title IX Regulations (2020);
UT System Model Policy for Sexual Misconduct*

SH #2 Element Examples

- **“Severe”**: The degree to which the conduct was threatening, harmful, or humiliating (using a “reasonable person” standard)
- **“Pervasive”**: Type, frequency, duration of the alleged conduct
- **“Objectively offensive”**: What a reasonable person would find hostile, intimidating, or abusive.
- **“Reasonable person” standard**: An objective test to denote a hypothetical person who exercises average care, skill, and judgment in conduct under similar circumstances as a comparative standard.
- **“Effectively denies a person equal access”**: Conduct that interferes with, limits, or deprives a person from participating in or benefiting from the University’s education or employment programs and/or activities

Definition of “Education Program or Activity” Under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.

Source: Title IX Regulations (2020)

What is not “Sexual Harassment” but may be an issue at a hearing?



Example: Other Inappropriate Sexual Conduct

Important Distinction for Sexual Harassment Cases



If the conduct alleged is
“**sexual harassment**,” then
the advisors will **ask questions**
at the hearing.



Hearing Officer Role

1. Preside over the **hearing**.
2. Listen to the evidence presented at the hearing, (read documentary evidence) to determine if by the **preponderance of the relevant evidence** the Respondent violated institutional policy.
3. Impose remedies & sanctions (if applicable).



Hearing Officer's Responsibilities



Hearing Officer's Role:
You are the Decision-Maker!

Pre-Hearing

Mindset for Decision-Makers

Mindset:

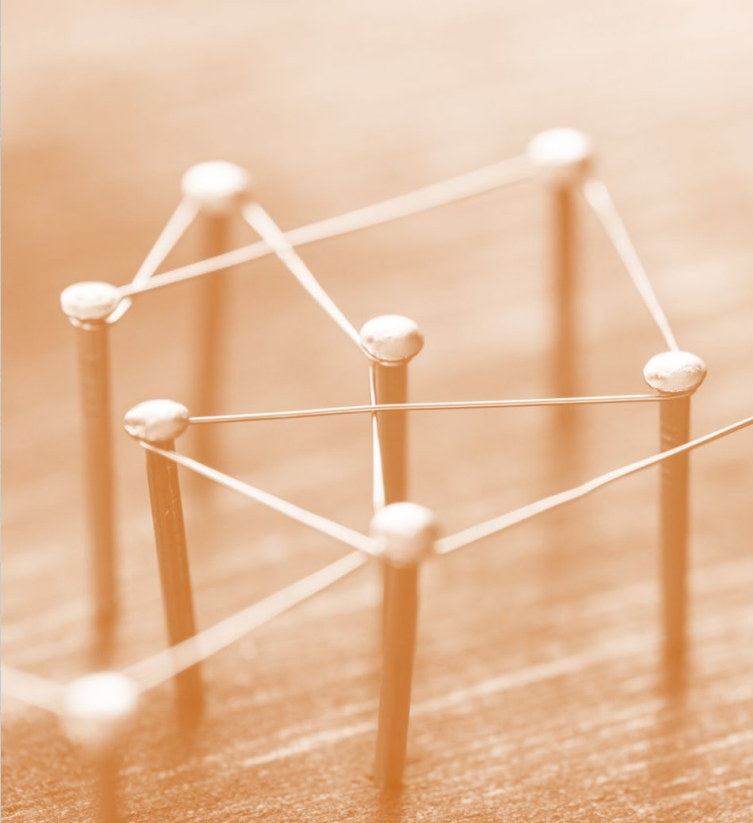
- **Fairness** and **appearance of fair.**
- Parties to **be heard** and **feel heard.**

Remember: This is likely a **major life event** for both the Complainant & Respondent.



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Before the Hearing: Notice of the Hearing

- Must give notice of the **hearing at least 10 days** before hearing date.
- Must include the following:
 - Date, time, and place
 - Name of the Hearing Officer
 - List of participants
 - Purpose of the hearing
 - Statement of charges
 - Summary statement of the evidence

Exchange of Witness Lists & Documents



Before the Hearing: Hearing Office Role

- Review materials.
- Review your institution's policy.
- Review & be familiar with the allegations, & what constitutes a policy violation.
- If you have evidence, review it!

Look at the Provision(s) at Issue:

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



Look at the Provision(s) at Issue:

Engaging in a (1) **course of conduct** (2) **directed at a specific person** that would (3) **cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.**

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No Ex Parte Communications Permitted



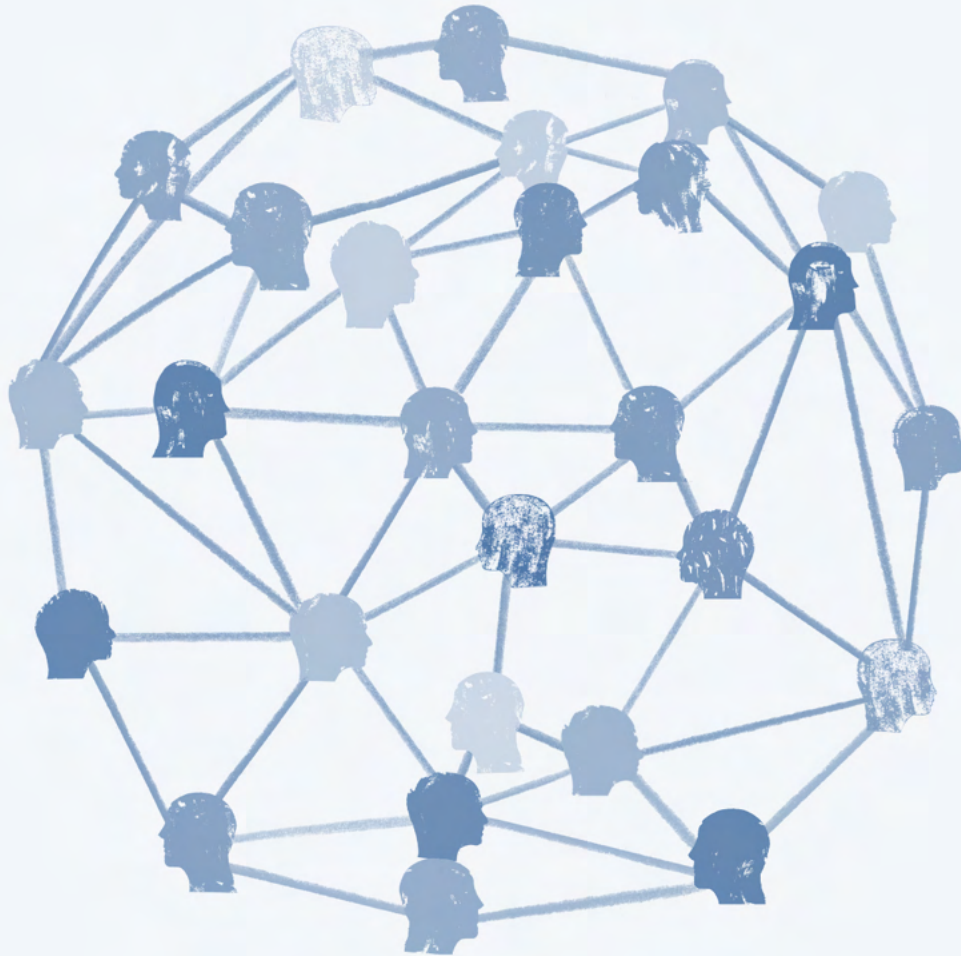
Address the issue:

- CC all parties (& advisors), including Uni. Representative, on all communications (even if emailed by one party)
- Admonish any communications from the parties (& advisors) regarding facts of the case

- The Hearing Officer is the **sole judge** of whether he/she/they is capable of considering the evidence and determining the facts with fairness, impartiality, and objectivity.
- Challenge must be by **written request**.
- May be self-initiated.

Challenge to the Hearing Officer's Impartiality





At the Hearing

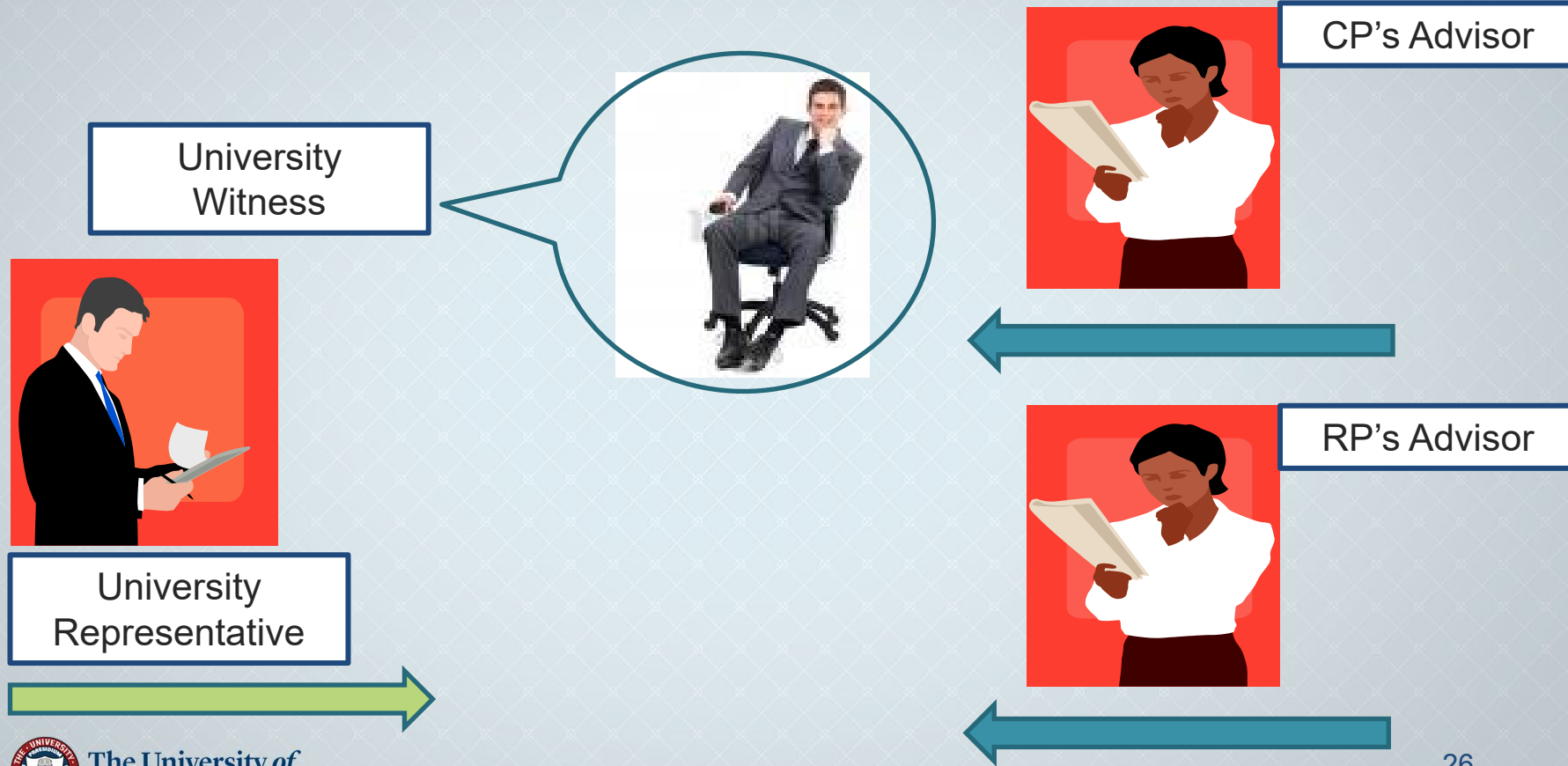
A photograph of a person's hands writing in a notebook with a pen. On the desk, there is a tablet displaying a bar chart and a pair of glasses. The image has an orange overlay.

Overview of Hearing

General outline:

- Opening remarks by Hearing Officer
- Opening Statements
- Questioning of Witnesses
- Closing Statements

Presentation of Witnesses & Exhibits



Remember:
This is **NOT** a legal proceeding.



Presentation of Witnesses and Exhibits

Formal rules of evidence do not apply.



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Procedure for Questioning Participants

Hearing Officer may ask relevant questions during the hearing of any party or witness, and may be the **first** to ask relevant questions.

The parties' advisors and the University Representative may ask relevant questions and follow-up questions of the parties and witnesses that participate in the hearing, including questions that challenge credibility. Questions can be asked directly, orally, and in real time at the hearing.

1. Question is posed for a participant at the hearing.
2. The **Hearing Officer** must deem the question relevant **BEFORE** the participant answers.

Procedure for Questioning Participants (Cont.)

Clarifications: When the Hearing Officer deems a question as unclear, the Hearing Officer may ask the questioner to **clarify or revise** the question before ruling as to whether the question is relevant for answering.

Irrelevant questions will be excluded, and the Hearing Officer will state the **reason** such question is irrelevant.

Absences or Non-responses: When a participant is absent from the hearing or does not respond to relevant questions during the hearing, the Hearing Officer must not draw an inference about whether the alleged conduct occurred based solely on the person's absence or non-response to such questions.

Source: UT System Model Policy for Sexual Misconduct

Questioning Witnesses at the Hearing

- Ask open-ended questions.
- Seek clarity with **“Tell me more about that...”** or **“Help me understand...”**
 - Attempt to clarify inconsistencies from **all** parties.
- **“What was your thought process for ...[insert the clarifying part]?”**
 - **...During** the experience?”
 - **...Before** the experience?”
 - **...After** the experience?”
- **“What, if anything, do you remember once you...[insert part part]...?”**
- **What did you mean by [blank]?**
- **“There are differences in your account vs. [blank]...[insert specifics] ...help me understand the reason(s) or rationale for this different account...?”**



Tips for the Hearing Officer

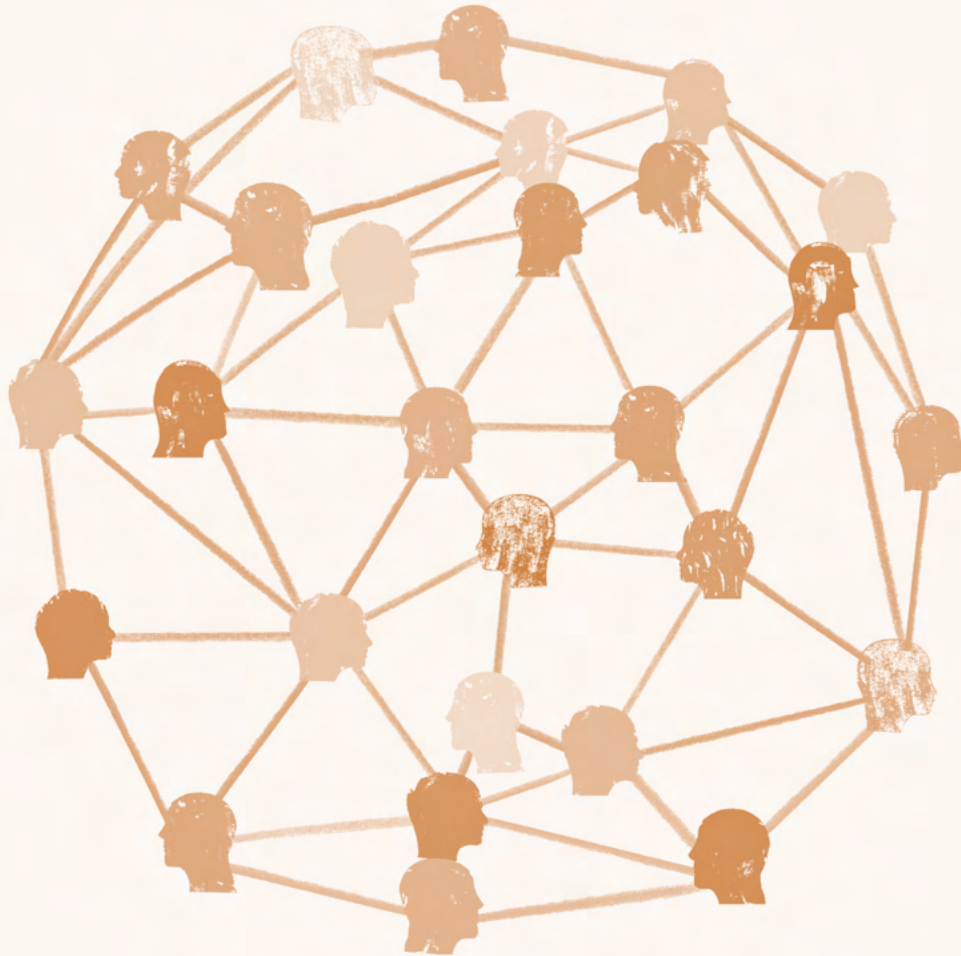


- **Respectful demeanor:**
 - Tone, Volume, Facial Expressions
- **Impartial:** Treat both parties equally
 - Ex: Give same time allotments for opening & closing statements.

Remember the goal:
Fairness and perception of fairness

Reminder: OGC
Advisor Available

- Get a **(free)** advisor from UT System's Office of General Counsel
- Feel free to **take breaks** during the hearing to talk with your OGC advisor as needed.



Special Issues at the Hearing

Preponderance of the Evidence Standard:

Whether the greater weight of the credible evidence establishes that the Respondent engaged in the alleged policy violation.

Note: The Respondent is presumed **not responsible**.

Burden of Proof on the Institution



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Evidence is **relevant** if:

- The evidence has any tendency to make a **fact** more or less probable than it would be without the evidence; **and**
- The **fact** is of consequence in determining the action.



Relevant Evidence Examples

Statements consistent or inconsistent?

- “RP is so annoying. I would never hook up with RP;” or
- “RP is so hot. I am going to hook up tonight.”

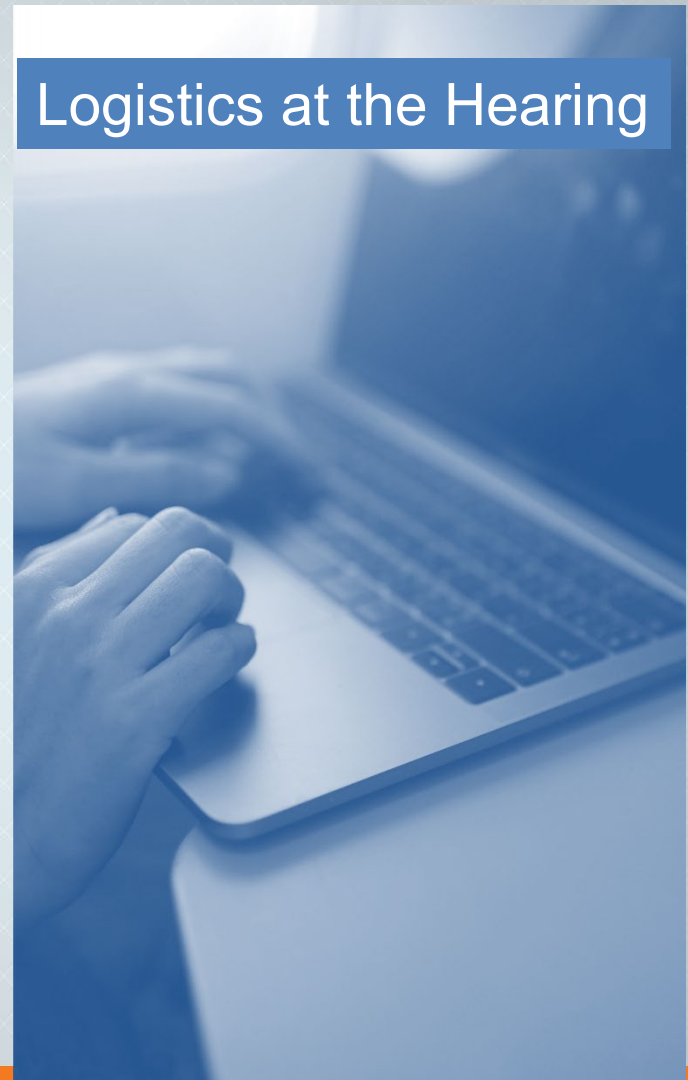


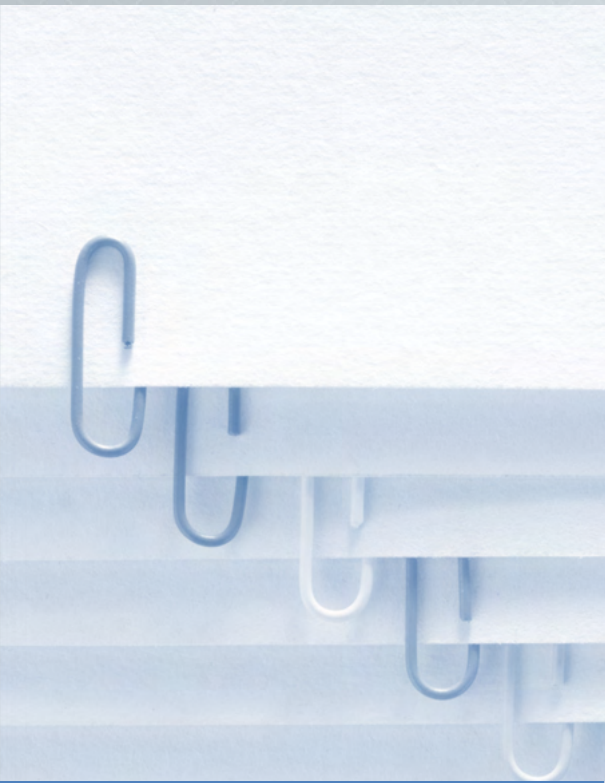
Relevance: Prior Sexual History

A Complainant's sexual predisposition or prior sexual behavior are **not relevant** **except** where questions and evidence about a Complainant's prior sexual behavior are offered to prove that **someone other than the Respondent committed the alleged conduct** charged by the Complainant **or** if the questions or evidence **concern specific incidents of the Complainant's prior sexual behavior with the Respondent and are offered to prove the Complainant's consent** of the alleged conduct.

Logistics at the Hearing

“At the request of either party, the [institution] must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously **see & hear** the party or the witness answering questions.”





Exclusion of Privileged Information Unless Waived

No person will be required to disclose information protected under a legally recognized privilege. The hearing officer must not allow into evidence or rely upon any questions or evidence that may require or seek disclosure of such information, unless the person holding the privilege has waived the privilege. This includes information protected by the attorney-client privilege.

Consent Definition

A **voluntary, mutually understandable agreement** that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.

Incapacitation Definition

Incapacitation is the **inability, temporarily or permanently, to give consent** because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated?
And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

*If the answer to either of these questions is “**YES**,” consent was absent and the conduct is likely a violation of this Policy.*

Note: A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.



- Memory gaps for events that occurred while a person is intoxicated.
- The alcohol consumption for the person is sufficient to block the process of developing memories.
- The amount of alcohol that can trigger “blackouts” can vary from person to person.
- Examples:
 - **Fragmented blackouts:** Spotty memories, missing periods of time in between memories that can be recalled)
 - **Complete amnesia:** Can span hours at a time, where memories didn’t form and typically cannot be recovered later)

Alcohol-Induced Blackouts

*Source:
NIH’s National Institute on
Alcohol Abuse and Alcoholism*

Implicit Bias



- Your **role** as a hearing officer is:
 - **Neutral, impartial, & fair**
- Fairness & the **appearance of fair.**

Goal: To **listen** to both parties equally and that they both leave **feeling heard** by the hearing officer.

Implicit Bias (Cont.)

[T]he Department [of Education] ..cautions that a training approach that encourages Title IX personnel to “**believe**” one party or the other would fail to comply with the requirement that Title IX personnel be trained to serve impartially, and violate § 106.45(b)(1)(ii) precluding credibility determinations based on a party’s status as a complainant or respondent.

Implicit Bias (Cont.)

The Department takes no position on whether “start by believing” should be an approach adopted by non-Title IX personnel affiliated with a recipient, such as counselors who provide services to complainants or respondents. The Department wishes to emphasize that parties should be treated with equal dignity and respect by Title IX personnel, but doing so does not mean that either party is automatically “believed.” The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case; for this reason, the Department cautions against training materials that promote the application of “profiles” or “predictive behaviors” to particular cases. (*Title IX Preamble*, p. 836)

Tips to Avoid Implicit Bias



- Test to address any potential implicit bias.
 - What is the **essence** of potential policy violation?
 - Create **hypothetical** that includes those elements. Then flip or change the genders.
 - You must have **fair & consistent considerations**, regardless of gender.
- When making your decision: List out the evidence favorable to both sides to ensure **evidentiary support** (as opposed to bias).

Serving Impartially in Your Role

- Must avoid **prejudgment** of the facts at issue
- Must avoid **conflicts of interest**
- Must avoid **bias** for CP & RP



Nobody gets a “head start.”

Controlling the Hearing

- Establish & exercise **authority** early & consistently.
- Be familiar with **policies** & the **allegations**.
- Describe **unacceptable** behavior and **warn** accordingly. Warnings usually correct inappropriate behavior.
- A note about **harassing** or **abusive** questions.
- Establish **time limits** for presenting case.
- **Take breaks**.
- **Stop** the hearing.



After the Hearing



- Based solely on the **hearing record**: No *ex parte* discussions or investigations.
- Determine whether a **policy violation** occurred:
Did the RP engage in conduct that violated university policy?



Making a Decision...

- **You** are the decision maker.
- Review the hearing transcript.
- Review the institution's policy.
- Assess witness credibility:
 - Ex: Demeanor, personal knowledge, bias
- Strength of relevant evidence:
 - Credibility of the relevant evidence
 - Weight of each exhibit
 - Persuasiveness of the evidence

Preponderance of the Evidence Standard:

Whether the greater weight of the credible evidence establishes that the Respondent engaged in the alleged policy violation.

Note: The Respondent is presumed **not responsible**.

Burden of Proof on the Institution



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Does some evidence weigh more than other evidence?

(*Is it more persuasive?)

- Plausible—does it make sense?
- Detailed v. vague recollection (*but beware of trauma)
- Direct or circumstantial
- Personal observation/knowledge v. hearsay (what somebody told witness)
- Corroboration? Are there objective facts that can corroborate any testimony? (Texts; Phone log; video evidence; emails, etc.)

Weighing Evidence

Example:

Complainant's testimony was that consent was lacking because Complainant said, "I don't want sex." But Respondent testifies that Complainant said, "Let's have sex."



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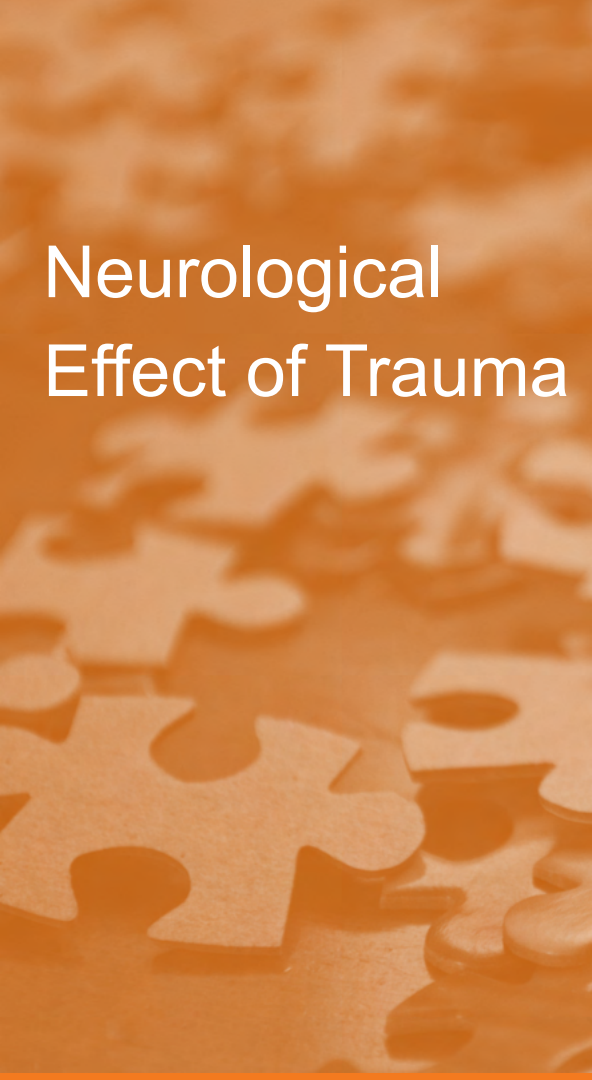


Burden of Proof:
The Greater Weight

Disputed Facts and Credibility

- Are there inconsistencies? Is it corroborated in any way?
- Is an explanation plausible?
- What did the witness do? What did they *not* do?
- Are there motives for the witness to be less than truthful?
- Are there motives for the witness to frame the event in a way more favorable to themselves? Are they lying to themselves?
- Is there an opportunity for a good faith mistake?
- What about demeanor? (How much to weigh/cultural stereotypes?)





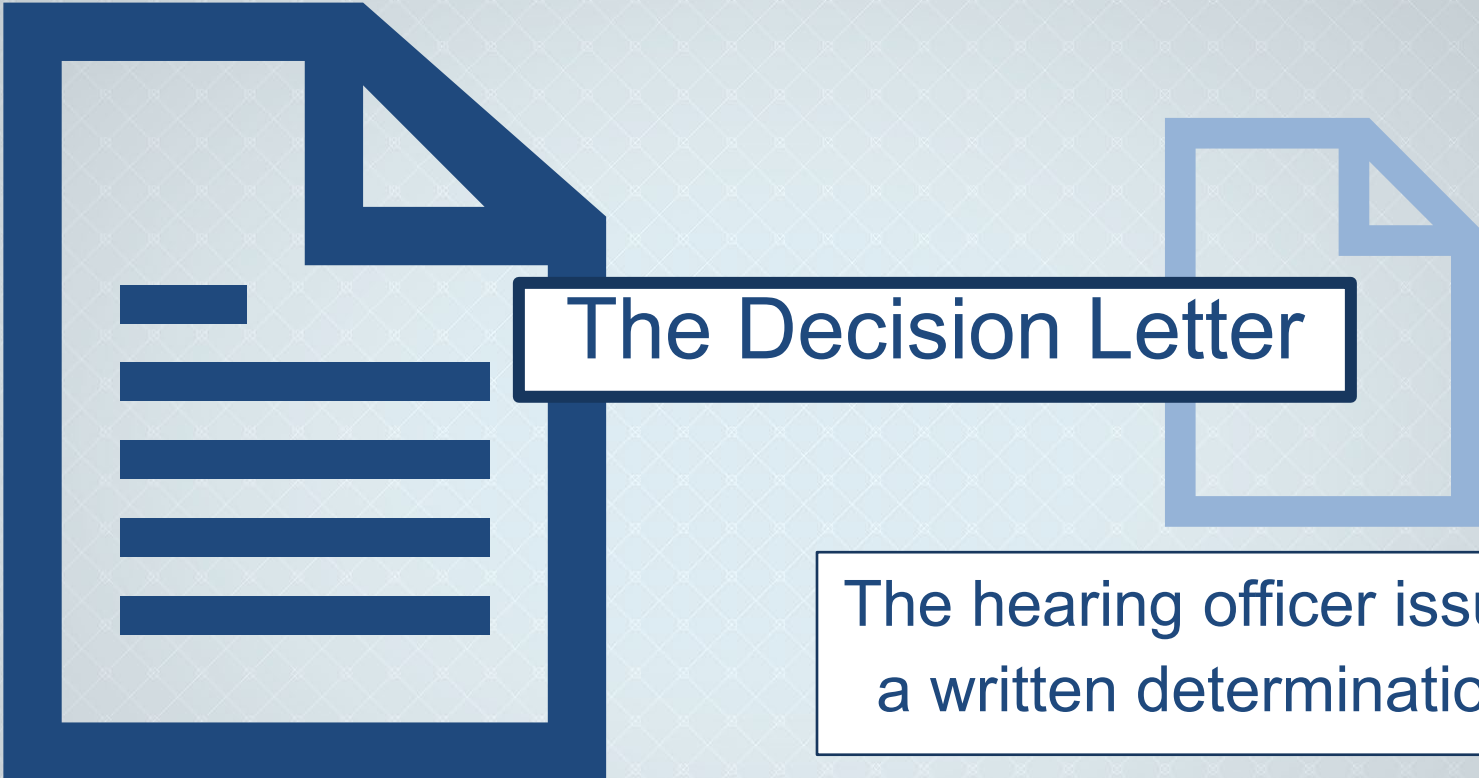
Neurological Effect of Trauma

- A. Traumatic events can affect a person's brain chemistry and functioning, which can impact memory recall, information processing, and communication
- B. Possible effects on memory recall:
 - Flashbacks
 - Delayed recollection
 - Difficulty concentrating
 - Non-linear recollection
 - Self-blame

Potential Pitfalls

- You must let the **evidence** lead you to the **conclusion**, rather than making the evidence “fit” your pre-formed conclusion.
- Focus on the **relevant evidence**.
 - Hint: It's **not** all relevant.





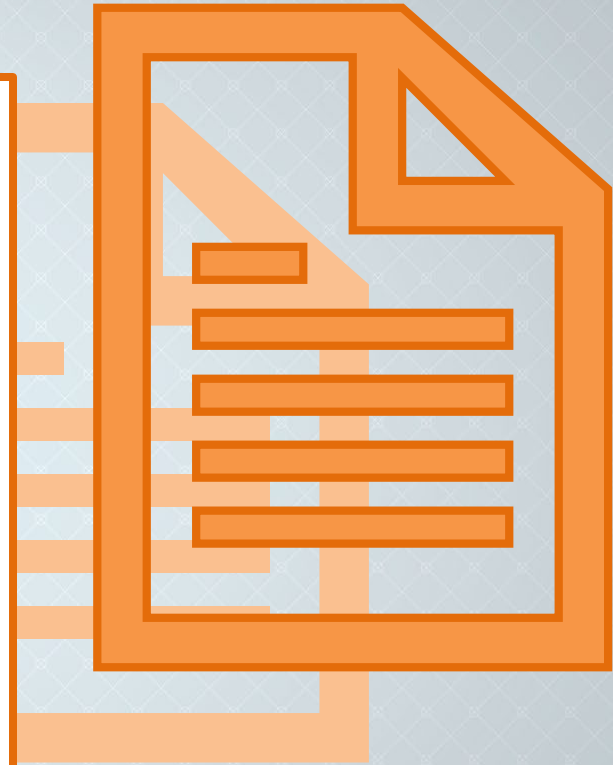
The Decision Letter

The hearing officer issues
a written determination.



A Good Decision Letter:

- Demonstrates the care and attention given to the **factual findings** and **weighing of the evidence**.
- Shows that the institution reached a **reasoned, good faith conclusion**.
 - It's not enough to reach a conclusion. You must be able to **“show your work.”**
- Serves as a **framework** for all future proceedings.



Revision Stage: Focus on Clarity

- Focus on ***relevant facts*** in your factual findings. If it is part of the reasoning, say it. Don't omit it.



Revision Stage: Focus on Clarity

- Look at your draft with a **critical eye**.
- Pretend the person who will be most *unhappy* with your decision is in the room with you reading the draft with you. With each sentence or paragraph, consider:
“What would that person say?”
- Then revise.



Revision Stage: Reminder

Deal with facts **contrary** to your decision:

- If you don't, it looks like you didn't consider or hear the argument, that you weren't paying attention, or that the process is unfair.



Analysis: Stalking Example (*Finding*)

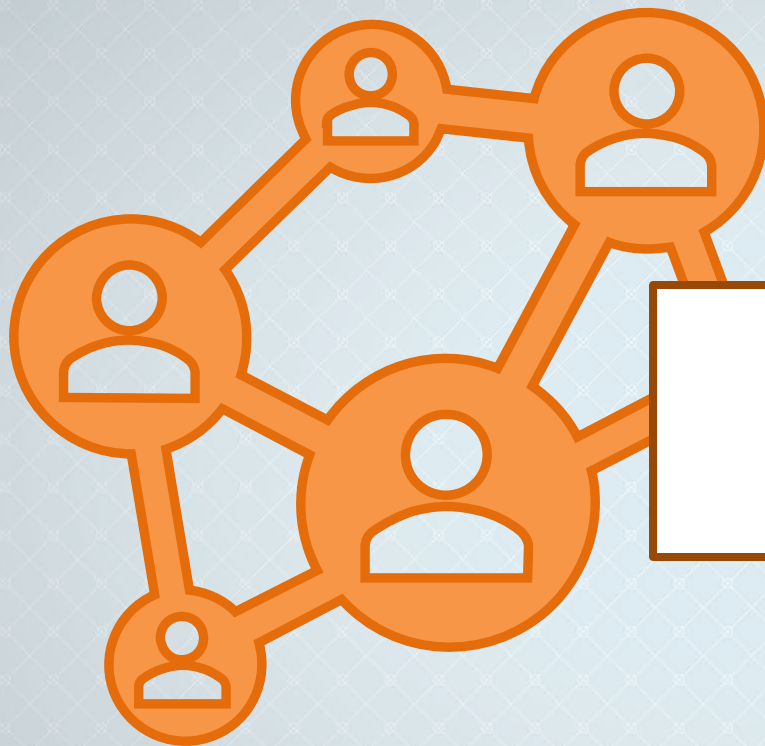
As explained above, for conduct to constitute “stalking” under HOP 123, there must be a (1) a course of conduct, (2) directed at a specific person, and (3) the conduct must cause a reasonable person to fear for his or her safety or the safety of other or suffer substantial emotional distress. Here, because RP followed CP on more than five occasions, RP engaged in a course of conduct directed at a specific person. With respect to the third element, each time the RP followed CP, RP drove erratically behind CP, frequently tailgating by only leaving a few feet between their vehicles and flashing RP’s headlights. On two occasions, RP displayed RP’s handgun and on three occasions RP shook RP’s fists. I find that based on this conduct, a reasonable person would fear for his or her safety or the conduct would cause substantial emotion distress. I find, therefore, by the preponderance of the evidence that RP violated HOP 123’s prohibition on stalking.

Analysis: Stalking Example (*No Finding*)

As explained above, for conduct to constitute “stalking” under HOP 123, there must be a (1) a course of conduct, (2) directed at a specific person, and (3) the conduct must cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress. Here, because RP walked behind CP from the classroom to the bus stop outside the humanities building two times, RP engaged in a course of conduct.

With respect to the second element, there is no evidence that RP “directed” RP’s conduct towards CP. Instead, the evidence is that RP and CP take the same class and ride the same bus home. After class, both CP and RP would walk towards the bus stop and then board the bus. But there is no evidence that RP’s boarding the bus was “directed” towards CP. Further, with respect to the third element, RP did not threaten CP or do anything that would make “a reasonable person fear for his or her safety or the safety of others or cause substantial emotional distress.” In particular, RP was the first person to get off the bus because RP’s apartment complex is the first stop. This fact is consistent with RP’s explanation that RP was just going home and was not following CP. I cannot find, therefore, by the preponderance of the evidence that RP violated HOP 123’s prohibition on stalking.





Hearing Hypos



Hypothetical 1

CP and RP are acquaintances and drink heavily at a party, though you believe CP was not incapacitated. After the party, they engage in penetrative sex. CP says it was not consensual and CP said “no.” RP says it was consensual, that RP asked for consent, and that CP said, “yes.”

What do you do?

Hypothetical 2

You preside over a hearing. At the hearing, the investigator testifies. When the CP's advisor—a sexual assault advocate and employee at the university—asks questions, the investigator is very open and friendly.

The RP has hired a lawyer to be the RP's advisor. When the RP's advisor asks questions of the investigator, the investigator is clearly agitated, defensive, and short (sometimes even combative). You think that you can tell that the investigator does not like the RP or the RP's advisor. How should this impact your decision-making and credibility determinations? Should you take into account that the RP hired a lawyer?

Hypothetical 3

You preside over a hearing. You have a lot of empathy for the RP but you believe the RP did violate the institution's policy. The RP was intoxicated at the time and you believe that if the RP was sober, the RP would not have engaged in the conduct.

What do you do?

Q & A



Written Determination Required Components

- The **allegation(s)** that potentially constitutes prohibited conduct;
- A description of all of the **procedural steps** of the Grievance Process:
 - From receipt of a Formal Complaint to the determination regarding responsibility of the Respondent, including any notifications of the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.
- The **findings of fact** supporting the hearing officer's determination;

Written Determination Required Components (Cont.)

- The **conclusion(s)** and a **rationale** as to whether the Respondent is responsible for each allegation;
- The disciplinary **sanctions**, if applicable;
- The **remedies**, if applicable, designed to restore the Complainant's access to the education program or activity; and
- The institution's procedures and permissible bases for the parties to **appeal**, if applicable.



Breakdown of the Components



1. Allegation(s) & Applicable Policies & Procedures

- List the **allegation(s)** and the applicable policies & procedures. You can attach documents as exhibits.
- “A description of the **procedural steps** taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held” (Title IX Regulations, 2020)

2. Evidence Considered

- Remember the **seriousness** of these matters & the consequences that may come from them.
- You must be able to show that you were **fair, impartial, and thorough** in your examinations.
- Include a **summary** of what you heard, saw & reviewed.
- **Don't** fill the letter with irrelevant facts. But when in doubt, **include it.**

3. Evidentiary Standard



- **Preponderance Standard:**

Greater weight of the credible evidence:

- “More likely than not”
- 50% “plus a feather”
- Think of the scales of justice: You need to get beyond the 50-yard-line
- “Some evidence” doesn’t do it. One side of the scale needs to be heavier.
- No head starts.



4. Undisputed Facts

- What material and relevant facts are **undisputed**?
 - **How** do we know these facts? Who told us? How were the facts gathered (texts, emails, social media, etc.)?
 - **Why** are we including these facts? What **point** (regarding the allegation(s)) do they help us **resolve**?
 - Are they really **UNDISPUTED**?

4. Undisputed Facts

- Use witness **quotes** as much as possible. Don't take statements out of the vernacular.
- Easiest way to make an undisputed fact disputed is to mischaracterize it by trying to summarize.

Examples:

- 👍 **Quote:** Witness 3 stated that the parties “were friends but had been casually hooking up for a few weeks.”
- 👎 **Summary:** The parties were previously in a complicated “friend” relationship.

5. Factual Findings: Resolution of Disputed Facts



- Go point by point on the disputed facts:
 - What do you think happened and why?
 - On what **evidence** do you base your conclusion?
 - You **MUST** make **credibility** determinations of witnesses. Basis for someone being more credible than someone else?
 - a. Corroborating evidence?
 - b. Inconsistencies?
 - c. Motives?
 - d. Other factors?
- If you have critical corroborating evidence:
Cite the evidence in your findings.

6. Fact Analysis & Conclusions

- Take factual findings & analyze using the applicable policy. Looking for violations of **policy**.
- Address all allegation(s), one by one.
- Explain your reasoning: **How** did you get to each of your conclusions?
- Use the terms “**responsible**” or “**not responsible**”.

Do **not** use the words “innocent,” “guilty,” or “not guilty.”

7. Sanctions & Remedies



- It is important to take an action sufficient to abate the behavior & improve the learning environment.
- Act consistently with other actions taken by the institution for **similar conduct**.
- Consider the wants or concerns of the Complainant, but that's not determinative.

7. Assessing Sanctions (Cont.)

- The institution looks, in part, to past punishment for similar conduct & violations when recommending sanctions
- Consider mitigating circumstances:
 - Accepting responsibility
 - Remorse



7. Thinking Outside the Box with Sanctions

- **Educational**, not criminal process
- Common disciplinary sanctions:
 - Probation
 - Suspension
 - Expulsion
- “Other sanctions as deemed appropriate”
 - Counseling
 - Anger management
 - Training
 - Reflective papers & projects



Contact Information

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