

Policy 1-012 Committee Training

*University of Utah
Office of General Counsel
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The Policy 1-012 Committee

- Hearing body for sexual harassment complaints After OEO/AA Investigation and Recommendations
 - Information independently evaluated, no deference
- Committee's decision may be appealed to the Cognizant VP
 - For faculty, appeal to President



The Role of the OEO/AA

- OEO investigates all complaints of discrimination and sexual harassment that state a claim; if doesn't state a claim, dismissed
- A neutral investigations office required by federal law
- Timely investigates facts (parties, witnesses, documents)
- Prepares and provides to parties a summary report of findings and conclusions
- Parties given opportunity to respond/supplement
- If OEO recommends "CAUSE" finding, discipline/sanction by others

What are Hearings

- Adversarial proceedings
- Parties present evidence and arguments to the committee
- A neutral unbiased committee considers the evidence and reaches factual conclusions
- The committee applies the proper legal standard to the facts as found and makes finding of “Cause” or “Insufficient Evidence.”



Bias/Conflict of Interest

- A committee member must recuse him/herself if:
 - He/she has first hand knowledge of the facts and circumstances
 - He/she is unable to consider facts in unbiased fashion (personal circumstances)
 - He/she is biased for/against a party (e.g. best friends with a party)
 - Bias does not include developing an opinion after review of the evidence
- Parties may challenge any member for bias

Due Process

- Students and faculty/staff are entitled to due process
- Due process requires basic fairness (appropriate notice, the right to respond, the right to be heard, no ex-parte communications, sharing of documents, presentation of witnesses, cross-examination (through chair), etc.)
- For students, OCR demands same rights for both parties

Presumption

- The respondent is presumed to not be responsible for the alleged conduct until this Committee has heard all of the evidence presented by the parties and makes its own determination at the conclusion of the grievance process.

The Hearing Process

- Conduct of the hearing is generally within the discretion of the chair and the committee
- Civility is required
- Recommended order
 - Acknowledgement of OEO Report and Recommendation
 - Complainant and Respondent opening statements
 - Presentations on harassment complaint
 - Rebuttal
 - Questions from Committee
 - Sanctioning Authority presents proposed sanctions
 - Complainant and Respondent respond to proposed sanctions
 - Committee deliberations

The Hearing Process (cont.)

- All sexual misconduct complaints now occur virtually (e.g. Zoom) to minimize confrontation and trauma
- No direct cross-examination, rather each party's advisor presents questions through chair
 - Chair must make relevancy determination for each question (relevant, appropriate, repetitive)
 - If question denied, Chair must provide rationale
- Hearing is recorded
 - **Parties and Witnesses must be on-camera.**
- Hearing Coordinator keeps time

Advisors to the Parties

- Parties are entitled to an advisor of their choice (including lawyers)
 - If parties do not have their own advisor, University appoints party an advisor for cross examination
- The parties and/or their advisors may each make a personal/opening statement of their position on the issues, facts and relief sought
- Thereafter, the advisor or the party (not both) may present the remainder of the case
 - University appointed advisor's role is limited to cross examination and opening/closing statements



Evidence

- Parties may submit for consideration any information they consider relevant
- The committee may consider all evidence submitted
 - Hearsay and other less reliable evidence may be considered
 - The committee determines the relevance/import of evidence
- Witnesses excluded except when testifying
- Committee may reject new/late evidence
 - Committee may adjourn so parties can respond to surprising new evidence admitted at a hearing

Questions from the Committee

- The committee may present questions directly to the parties and/or witnesses at any time
 - Time is also set aside for Committee questions
- The parties (and not their advisors) must respond to committee questions
- Questions and answers not counted against party's time



Standard of Proof

- PREPONDERANCE OF THE EVIDENCE: It is more likely than not that the testimony or other evidence on one side of a particular issue is true
 - > 50%
 - Less stringent than the “beyond a reasonable doubt” standard used in criminal cases because, unlike criminal prosecutions, these investigations do not result in incarceration or other criminal penalties
- For Sanctions: Are they reasonable in light of the circumstances
 - If reasonable, the committee should not substitute its judgment for the sanctioning officer



Credibility Factors

- Which account makes more sense?
- Is a party's account general/specific?
- What other evidence supports/contradicts testimony?
- Could individual see/hear what they claim?
- Should individual have seen/heard more than they claim?
- What are the interests/motives of the parties?
- Has one party presented a credible explanation of why the other may be lying?
- Do other witnesses have a special loyalty to/grudge against the other party?

Committee Finding and Decision

- The Committee must determine the truth of the facts and apply the appropriate legal standard
 - “whether the evidence, evaluated under a Preponderance of the Evidence standard, supports a finding that a violation of University nondiscrimination policy occurred”;
 - and, “whether the sanctions are reasonable in light of the circumstances”
- A majority of the committee members must agree on the findings and recommendations
 - Chair’s responsibility to make sure all views are heard

The Committee Report

- The chair typically writes the report and circulates the report for review/comment by the full panel
- Committee OGC advisor will provide input if requested
- The report must be finalized and provided to the Hearing Coordinator within 10 calendar days of the hearing
- The Hearing Coordinator circulates the report to the parties
- Either party may appeal the decision of the Committee to the cognizant VP

Confidentiality

- Hearings are closed to the public
- Committee members should not discuss with anyone the facts/information learned during the committee process
- Committee members should only consider facts as presented in the hearing-no independent investigation
- Committee members should refer media inquiries to University Relations

Committee Member Liability/Indemnification

- Under Utah law, panel members do not have individual liability for participation on hearing committees
- Utah law provides for indemnification/defense in the event a committee member is named in a lawsuit

The Governing Law

● TITLE VII

- Prohibits discrimination in employment on basis of sex, race, color, national origin and religion

● TITLE IX: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

- Applies to all students

University Policy

- **Nondiscrimination & Accessibility Statement**
 - The University of Utah does not discriminate on the basis of race, color, religion, national origin, **sex**, age, status as a disabled individual, sexual orientation, gender identity/expression, genetic information or protected veteran's status, in employment, treatment, admission, access to educational programs and activities, or other University benefits or services.
- **Policy 1-012, Sexual Misconduct**
 - Sexual Misconduct includes a range of behaviors that are sex-based and includes, **sexual harassment, gender-based harassment**, stalking, dating or domestic violence, and sexual violence.

University Policy

● Policy 1-012, Sexual Harassment

- Sexual or Gender-Based Harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature or **based on an individual's sex**, sexual orientation, **gender**, gender identity, or gender expression when:
 - Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, education, living environment or participation in a university activity
 - Submission to or rejection of such conduct by an individual is used as the basis for or a factor in decisions affecting that individual's employment, education, living environment, or participation in a university activity
 - Such conduct has the purpose or effect of unreasonably interfering with an individual's employment or educational performance or creating an intimidating, hostile, or offensive environment for that individual's employment, education, living environment, or participation in a university activity

Sexual/Gender Harassment

- Conduct must:
 - Be sexual in nature
 - Be unwelcome/unwanted
 - Such conduct would be determined by a reasonable person to be:
 - so severe that it effectively denies a person access to the University Programs or Activities; or
 - Sufficiently severe that it has the purpose or effect of interfering with a University activity



Questions?