



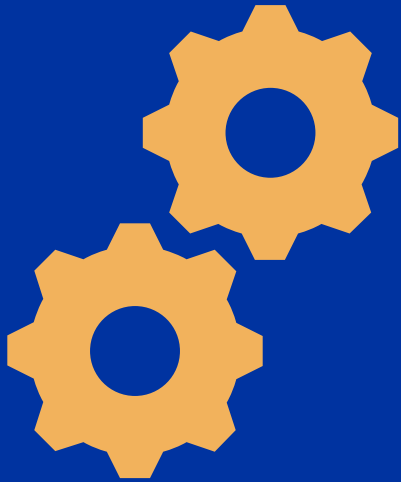
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Johns Hopkins University

Non-Title IX/VAWA Sexual Misconduct Process
Training for Student Resolution Panel Members

October 2022

Group Scenarios



Breakout Groups

- Scenarios discussed in Breakout Groups
- Introduce yourselves and select a spokesperson
- Scenario and questions for each Group
Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Cameras on for breakouts



Agenda

- Applicable policy requirements
- Process for Determining Responsibility
- Hearing Procedures
- Effective Questioning for Hearing Panel Members
- Sanctioning Consideration
- Determination of Responsibility/Notice of Outcomes Writing Considerations





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**Module 1:
Applicable Policy
Requirements**

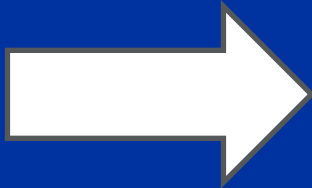


Can other policies apply if sexual misconduct falls outside Title IX?

- Yes, institutions are free to regulate sexual misconduct that falls outside the scope of Title IX through other policies:
 - Student codes of conduct
 - Faculty handbooks
 - Staff handbooks
 - Policies implementing other laws, such as Title VII



Examples of Policies with Related Concepts



Discrimination

- Sexual harassment
- Other non-discrimination statement & policies

Relationships

- Workplace
- Employee - student

Conduct

- Student
- Faculty/Employee

Discipline

- Student
- Faculty
- Employee



JHU Sexual Misconduct Policy and Procedures (“SMPP”)

- **Section IX:** Assessment to Determine Appropriate Procedures
- Title IX Coordinator receives a report of sexual misconduct and determines the appropriate procedures for resolution
 - Procedures for Title IX Sexual Harassment or
 - Procedures for Other Sexual Misconduct



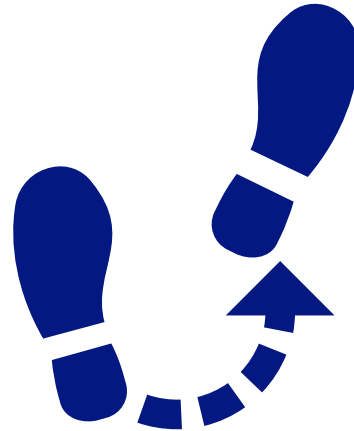
Criteria considered during assessment

- The assessment involves considering the federally-mandated criteria for Title IX Sexual Harassment grievance procedures:
 - Does some or all of the alleged conduct, if found to have occurred as alleged, constitute Title IX Sexual Harassment?
 - Did the alleged conduct occur on or after August 14, 2020?
 - Did the alleged conduct occur within the United States?
 - Did the alleged conduct occur in the University's education program or activity?
 - Has the University received a Formal Complaint?
 - At the time of filing a Formal Complaint signed by the Complainant, was the complainant participating in or attempting to participate in an education program or activity of the university?



May we use another process before Title IX?

- Yes
- Some processes do not require a formal complaint and may be initiated prior to Title IX
- Some may not meet the definitions under Title IX/VAWA
- ***JHU's Appendix H of the Procedures for Other Sexual Misconduct***





May we use another process after Title IX?

- Yes
- Some conduct may not violate Title IX standards but will violate other standards
- Some conduct may merit additional punishment beyond what is merited by Title IX policy

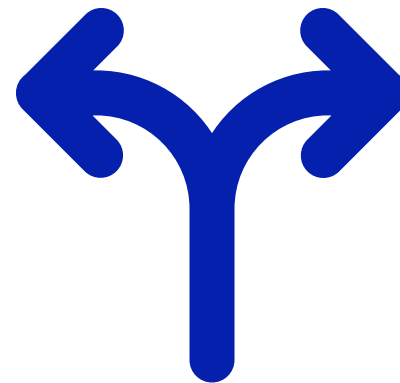




May we use two processes at the same time?



- Yes
- Title IX permits other process to run concurrently
- Important to be clear to parties involved what is happening and how processes differ



Can we use another process to make the same finding we would otherwise make under Title IX policy?

- No
- Title IX regulation requires the use of specific Title IX process for any “sexual harassment” that occurs in institution’s programs and activities





Student code of conduct

- Cases may include conduct outside of the purview of Title IX policy
- Examples:
 - General bullying
 - Uncivil behavior
 - **JHU:** If the facts surrounding a report of Other Sexual Misconduct also involve other alleged violations of University policy, including, but not limited to, student codes of conduct, the Title IX Coordinator or a designee may also investigate such other alleged violations or refer them to the appropriate authority, such as Student Conduct or Human Resources.



Scope of JHU Appx. H

- Non-Title IX Sex-Based Harassment and/or Non-Title IX Sexual Harassment, ***and***
- The alleged conduct falls in the sub-category of conduct that ***“unreasonably creates a work or academic environment that a reasonable person would perceive to be abusive or hostile,”***

→ Triggers a process:

- OIE performs additional assessment to determine the appropriate process:



Pathways under JHU Appx. H

- If the conduct as alleged would be considered ***so severe, pervasive, or persistent*** that it ***unreasonably interfered with, limited, or deprived*** a member of the community of the ability to participate in or to receive benefits, services, or opportunities from the University's education or employment programs and/or activities...
- For all other allegations, OIE will determine whether the allegations should be addressed by OIE, another University office/entity (for example Student Conduct or Human Resources), or a joint collaboration between OIE and another office/entity. Such allegations generally will not result in an OIE investigation under these Procedures, but may lead to other disciplinary, restorative or educational measures.
- Informal resolution may be available in both of the above situations.



What general principles govern the grievance process?

- Fair and equitable treatment of complainants and respondents
- No stereotypes based on a party's status as complainant or respondent
- Conflict and bias-free institutional participants

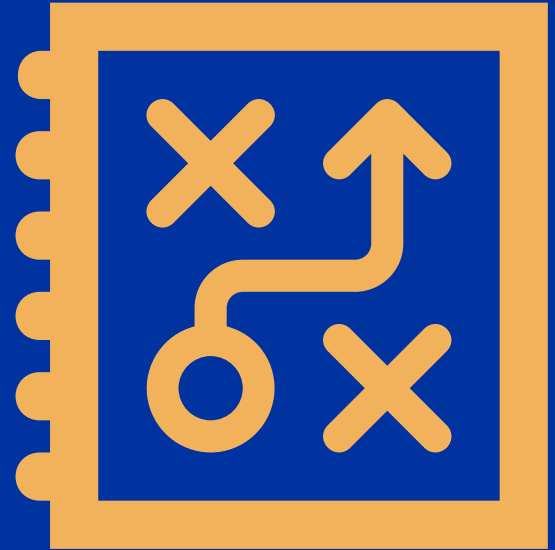


What is a conflict of interest?

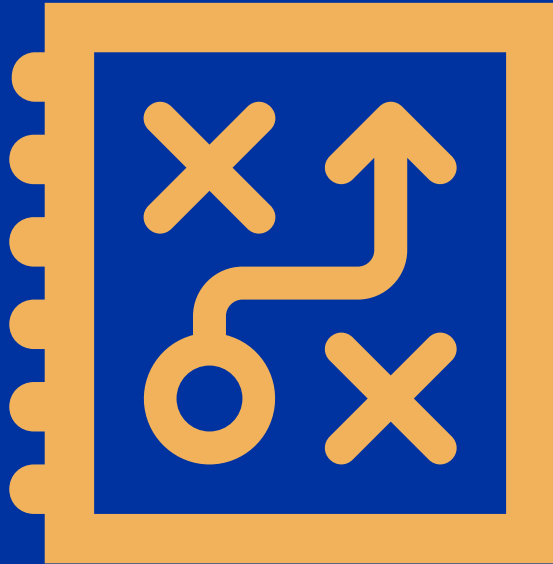
- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position

Example: Conflict of interest

Student Math files a formal complaint of sexual harassment against Student Chemistry. One of the hearing panel members selected is Student Chemistry's faculty advisor who has previously written letters of recommendation for Student Chemistry's application to graduate school in which faculty advisor wrote that Student Chemistry is "honest to a fault."



Example: Conflict of interest



An administrator accuses an employee of an office supply vendor of sexual harassment; matter is investigated. Institution assigns a hearing panel member whose spouse is employed as a manager for the office supply vendor and who directly supervises the accused employee.

Examples of impermissible stereotypes

“Anyone who would go into another’s bedroom drunk must have wanted to have sex.”

“Students can’t be trusted because they will just lie for each other.”

“People who are dating can’t commit sexual assault against each other.”

“There are no false reports of rape. Therefore, every complainant must be believed.”

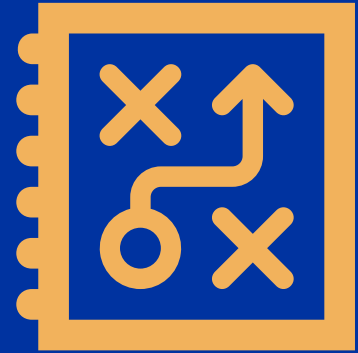
Example: Bias

An employee in the gender studies department who is chosen to serve on a hearing panel also chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault. I firmly believe a person accused of sexual assault must prove their innocence."



Example: Bias

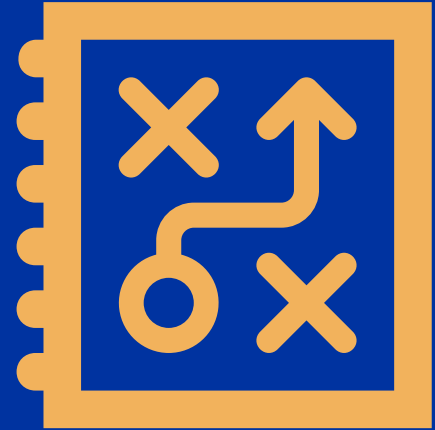
Investigator assigned to investigate a formal complaint of sexual assault has repeatedly told colleagues that the investigator believes most complainants just “regret that they got drunk.” Investigator tells a co-investigator: “I just don’t think it’s ever fair to hold anyone responsible when both parties are drinking.”



For Discussion

Do the following circumstances or relationships constitute conflicts of interest?

- Respondent faculty member and the hearing officer previously disagreed about a curriculum matter
- Complainant is currently a student in a hearing panel member's class
- Respondent is a staff member in the OIE





Resource for consideration: Harvard Implicit Bias Test

<https://implicit.harvard.edu/implicit/takeatest.html>



What is the definition of trauma?



Merriam-Webster: A very difficult or unpleasant experience that causes someone to have mental or emotional problems usually for a long time



English Oxford: Deeply distressing or disturbing experience



Wikipedia: Is a type of damage to the psyche that occurs as a result of a severely distressing event. Trauma is often the result of an overwhelming amount of stress that exceeds one's ability to cope, or integrate the emotions involved with that experience



What is trauma's impact on the brain?



- Brain senses threat and sets off alarm
- Thinking brain assesses
- Thinking brain shuts down
- Emotional brain
 - Fight, flight, freeze
- Thinking brain comes back online, turns off alarm, helps calm down
- Emotional brain may continue to sound the alarm, and overwhelming the system going forward



How do we approach trauma in a sexual misconduct cases?

- Balance
 - “Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”

- Candace Jackson, Acting Asst. Secretary of ED (2017)



When does trauma affect a person?

- Not in every case
- Never *assume* anyone participating has suffered any trauma
- Trauma may arise before, during, or after alleged misconduct, and may impact an individual's response during proceedings
- Not just complainant

Possible trauma impact

People who have suffered trauma may, but may not, experience any or a mix of the following:

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame

Physical reaction



- Brain—Trauma triggers chemical reaction which impacts
 - Perception
 - Ability to React
 - Memory
- Everyone reacts differently



Trauma & Credibility

- Don't assume information is not credible due to the manner delivered
- Understand memory may be clarified in time
- Address inconsistencies
- Ascertain fair and impartial assessment of the facts and give appropriate weight to party and witness statements

Applicable disabilities statutes



- The Americans With Disabilities Act
- Section 504 of the Rehabilitation Act



Section 504 of the Rehabilitation Act

- The first statute to require disability accommodation (1973)
- Makes it illegal for the federal government, federal contractors, and any entity receiving federal assistance to discriminate on the basis of disability
- “No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity”



ADA – Title II and III

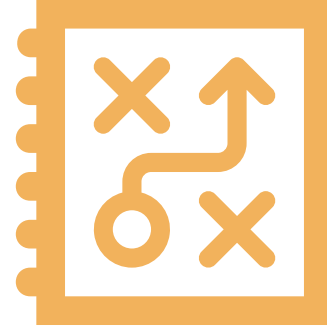
- Title II: Prohibits disability-based discrimination in state and local government programs, services, and activities (including public education)
- Title III: Prohibits privately-owned “places of public accommodation” from discriminating “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation”
- Colleges and universities must make reasonable accommodations in policies, practices, and procedures

Is sexual history considered?

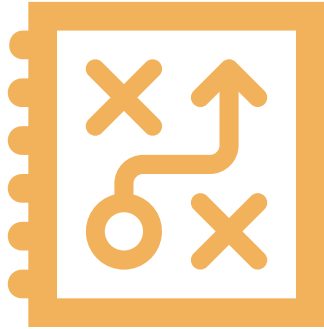
- Generally, no –
- Appx H: Evidence of a complainant's prior sexual behavior is relevant only if:
 - Information concerning the parties' shared romantic or sexual history that the investigators ***deem relevant***, or
 - Information concerning a party's prior sexual history ***with someone other than the other party*** if deemed relevant to prove the source of injury or prior sexual misconduct, to show that an individual has an ulterior motive, or to impeach an individual's credibility after this individual has put their own prior sexual conduct at issue.
- Compare to typical exceptions under Title IX
 - Offered to prove that someone other than the respondent committed the conduct, or
 - If evidence of specific incidents of the complainant's prior sexual behavior with the respondent are offered to prove consent

SH Example (impermissible)

Law student has accused a faculty member of sexual harassment.
Witness asserts: “Law student slept with a number of individuals in the month before the claim.”

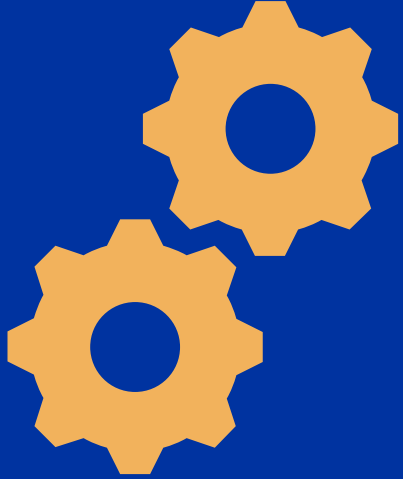


SH Example (permissible)



Engineering student has accused Fine Arts student of sexual assault. Engineer states that Artist had intercourse with Engineer without using a condom without Engineer's agreement--Engineer always requires protection. Witness provides "Engineer had unprotected sex with Artist a week prior?"

Group Scenario



Student A reports that Student B sexually harassed Student A by installing a program on Student A's computer that caused pornography to play when Student A logged on. This occurred only once, after which Student A had the program removed from Student A's computer. Student A makes a complaint to OIE.



QUESTIONS

- What other policies might be implicated by this report?
- Would the institution have an obligation to take action in the absence of a formal complaint?
- Will this constitute sexual harassment under Title IX? What about under some other standard?

Questions





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Module 2: Process for Determining Responsibility





Case processing under Appx. H

- Investigators to gather facts and pertinent documents and other evidence
- Parties have the right to submit evidence, suggest witnesses
- Evidentiary Protocols
 - Sexual History (Exceptions above)
 - Prior conduct violations (generally excluded)
 - No solicitation of mental health information, unless the party consents to use of that information



Appx. H. – Investigative Report

- Findings of Fact
- Assessment of Credibility
- Recommended determination on responsibility
- *Shared with parties, and allows for 7 calendar days to submit comments
- → Report and comments sent to resolution panel and parties



Standard of Evidence

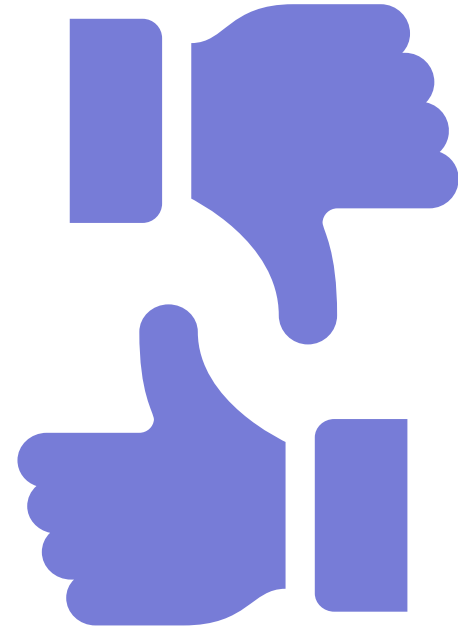
Preponderance of the evidence

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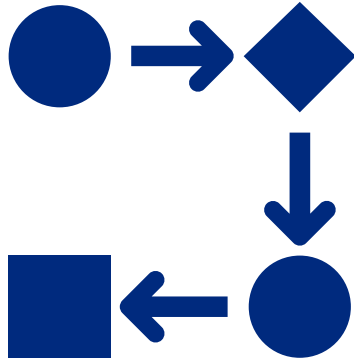
“more likely than not”

What is a determination?

- The decision as to whether or not prohibited misconduct occurred
- Results in a finding of “violation” or a finding of “no violation” as determined under standard of proof



Purpose of a determination



- Moves matter to next procedural step
- Record of following process
- Documents fair process
- Provides parties and subsequent decision-makers with information

How do(es) the decision-maker(s) decide a case?



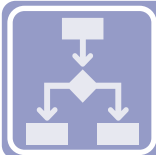
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



Resolve disputed issues of fact under the standard of evidence adopted by the institution



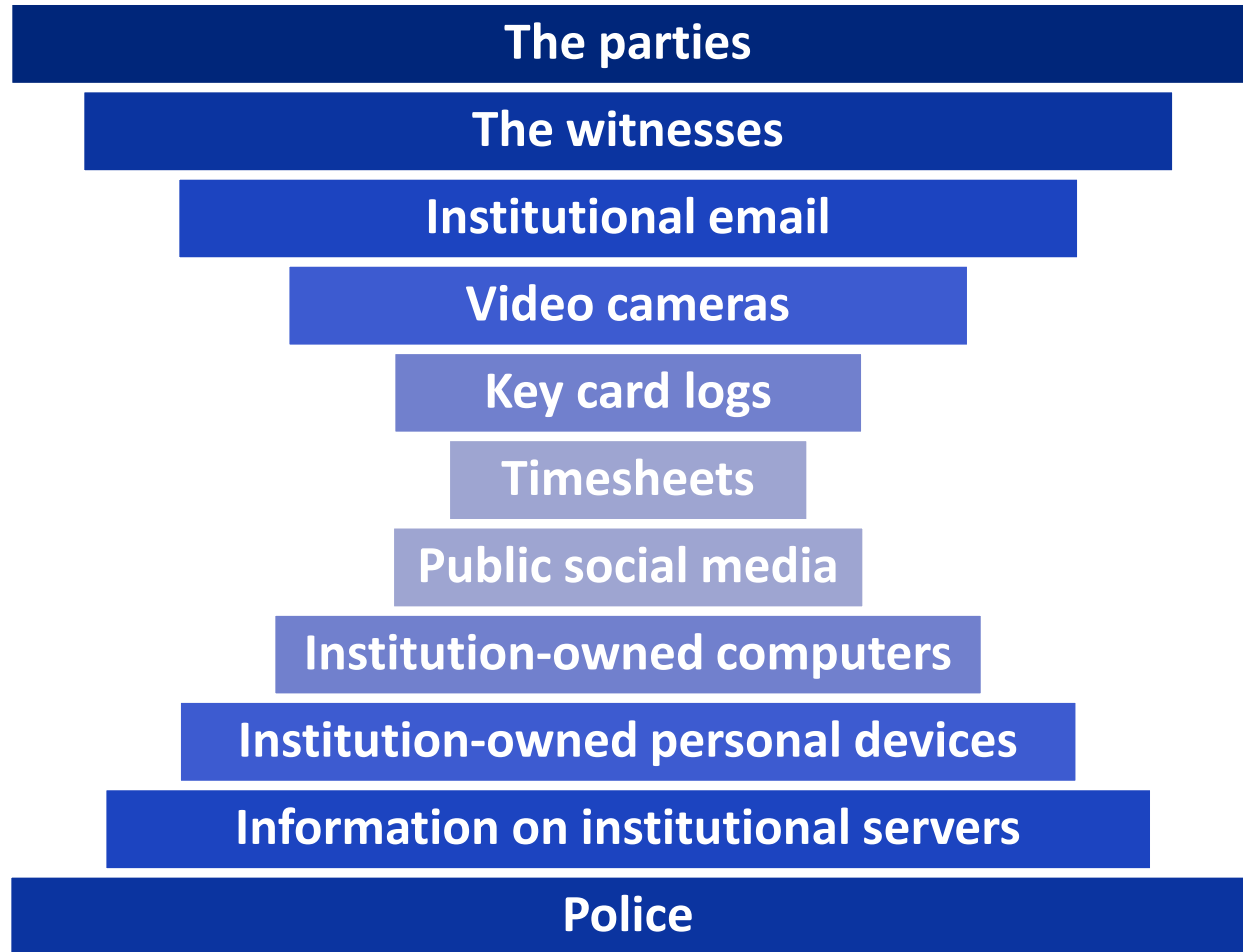
Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred



How do(es) the decision-maker(s) issue a decision?

- In a written document, provided contemporaneously to the parties that:
 - Identifies the allegations of sexual harassment
 - Describes the various procedural steps taken from the time the formal complaint was made
 - States findings of facts supporting the determination
 - Reaches conclusions regarding application of relevant policy definitions to the facts
 - Includes a rationale for each finding for each allegation
 - States the disciplinary sanctions and remedies, if implicated by the determination made, and
 - Explains the procedures and grounds for appeal

**Example:
Sources of
Non-
Testimonial
Evidence**





Key Legal Principles

- Direct vs. circumstantial
 - Hearsay
- Weight of evidence
- Assessment of credibility



Direct vs. Circumstantial (Direct)

- Direct — Actual evidence of a fact, circumstance, or occurrence; proves a fact in question without presumption or inference
 - E.g.: testimony of a witness who actually observed and perceived event in question (see, hear, touch)



Direct vs. Circumstantial (Circumstantial)



- Circumstantial (indirect) — Information which, based on logic or reason, is so closely associated with the fact to be provided that proof may be inferred
 - E.g., witness testimony saw student alleged to have hit someone with bat, with bloody bat an hour after the assault



Hearsay

- **Hearsay** — Statement (written or oral) made by a non-available witness offered to prove fact in question
- Longstanding evidentiary principle of when courts can rely on hearsay
- Some hearsay is more reliable
 - Statement contemporaneous with the event in question
 - Excitable statement uttered in the moment being perceived

What is inculpatory evidence?

- Evidence tending to support the proposition a respondent committed sexual harassment as alleged
- Example: A text message sent the day after an incident from the respondent stating: “I never should have forced you to have sex with me after you said ‘no.’ I’m so sorry for what I did.”



What is exculpatory evidence?

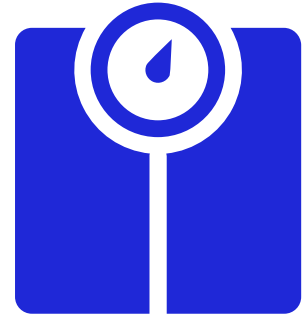


- Evidence tending to support that the respondent did not commit sexual harassment as alleged
- Example: A text message sent the day after an incident from the complainant stating: “I know that I said ‘yes’ at the time. And I knew what I was doing. But now I feel like you just used me as a one-night-stand.”



What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative than other evidence
- Weight may vary depending on a range of factors, such as credibility; corroboration; consistency; level of detail; expertise of the witness; whether a witness is disinterested, etc.





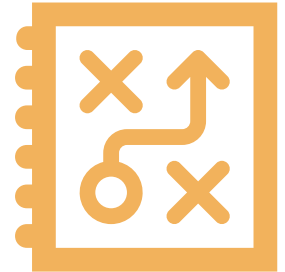
Weight - Considerations

- Believability/probability/plausibility
- Apparently honest and sincere
- Consistent
- Unrefuted
- Corroboration
- Lacking motive/disinterested
- Expertise
- Level of detail
- Unbiased
- Direct vs. circumstantial
- Personal observation vs. general knowledge or hearsay

Example of considerable weight

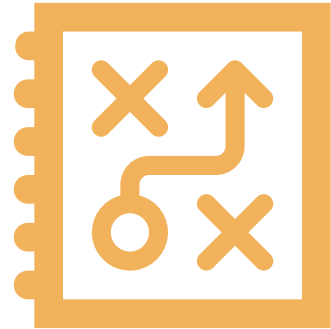
—

Witness testified he saw complainant and respondent leave the bar at 11:05 pm as witness was arriving. Witness states he clearly saw their faces and remarked to a friend about a particular t-shirt the complainant was wearing and how respondent had a nose ring. Witness testified he knows the time was exactly 11:05 pm because witness remembers receiving a phone call right as witness entered the bar, and witness's call log indicates the call was received at 11:05 pm.



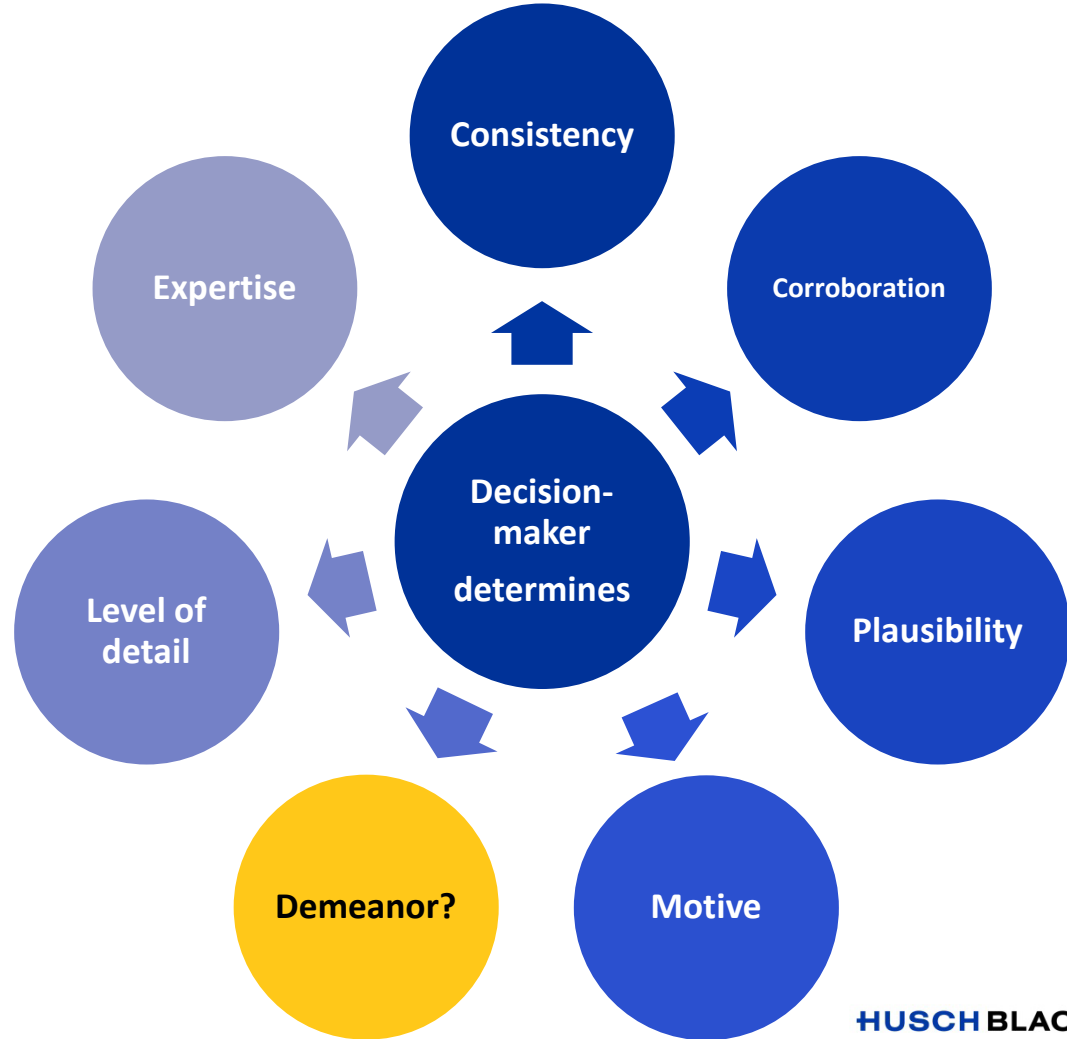
Example of less weight

Witness says he saw a couple leaving the bar “sometime after ten but before midnight” but witness is not “sure exactly” when. Witness testified they “sort of looked” like complainant and respondent and witness is “pretty sure” it was them. But witness also says witness had spent two hours at a different bar before that and was “pretty drunk at the time I saw them.”



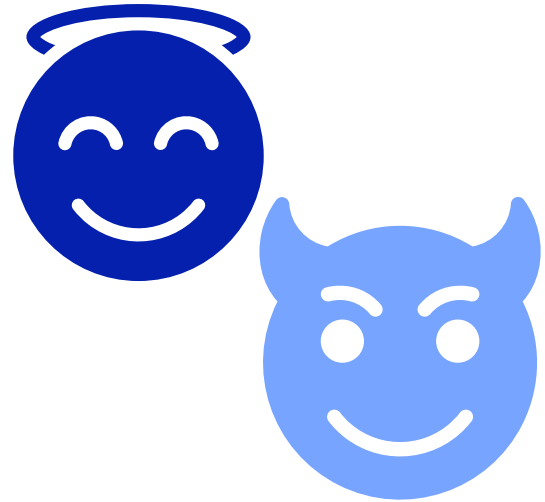
Credibility

To be determined by hearing panel, following hearing and examination of investigative report, evidence and hearing testimony



Assessing Credibility

- Plausibility—Believable?
- Corroboration—Other evidence?
- Consistency
- Demeanor
- Motive to Falsify
- Contemporaneous
- First-hand knowledge
- Influence of others
- Bias (overt/unconscious)
- Behavior after the report



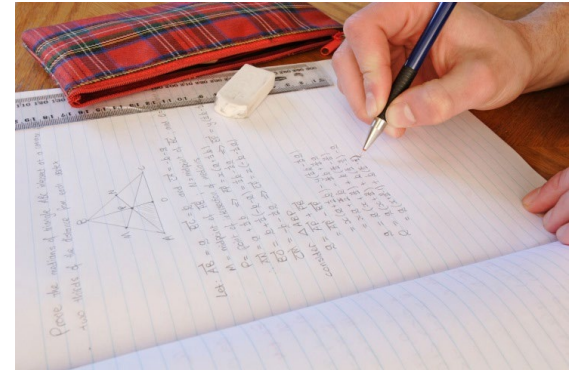
Incapacitation & Weight/Credibility

- Incapacitation alone ≠ unreliable or lack of credibility as to facts



Pre-Hearing Homework

- Know who's coming (parties, witnesses, support persons)
- Consider potential conflicts of interest
- Review relevant policies
- Know the elements of the offense(s)
- Review investigative report
- Review hearing procedures
- Review any responses to report by parties
- Prepare “must ask” questions
- Anticipate questions and issues



Questions





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Module 3: Hearings Procedures

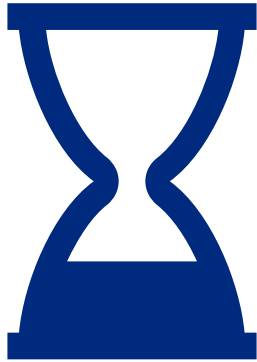




What is the purpose of the hearing?

- To hear testimony and receive non-testimonial evidence so that
- The decision-maker can determine facts and credibility under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the complaint and imposing discipline/remedial measures as necessary

How long does a hearing last?



- Decision-maker(s) have the ability to set reasonable time limits on the hearing and its constituent parts
- Decision-maker(s) should set an overall scope and length to the hearing in advance and keep parties on schedule



Who attends a hearing?

- The decision-maker(s)
- Other necessary institutional personnel or institutional advisors (i.e., attorneys)
- The parties
- Each party's advisor/support person
- Witnesses as they are called to testify
- Other support persons for parties, if permitted by institution (i.e., accommodations)



May parties have a support person/ advisor during the hearing?

- Yes – parties may be accompanied to a hearing by an advisor of their choice
- Advisor may be an attorney, but does not have to be
- Institution may confine advisor to a passive role





What if the advisor breaks the rules?

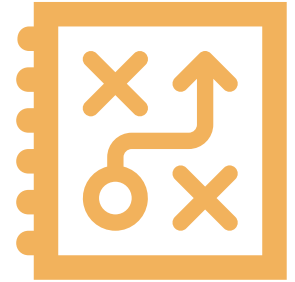


- Institution may impose limits on the advisor's role and certain behavior standards
- Must be applied equally for both parties
- Institution may exclude advisor who violates rules, but ***may consider*** pausing the relevant interview, meeting, or interaction until the party has a new advisor



Example of advisor breaking the rules (#1)

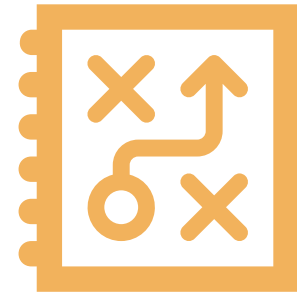
A dining service student-employee brings an aggressive representative as an advisor to a hearing. The institution's policy states that advisors are to remain passive and not argue on behalf of the parties they are advising. During the hearing, the representative repeatedly interrupts the Resolution Panel members, objects to questions, argues that the Resolution Panel members should ask different questions, and attempts to present legal arguments citing caselaw.





Example of advisor breaking the rules (#2)

Psychology student names the student's mother as advisor. The institution's policy states that advisors may not obstruct communications between the institution and a party. The mother tells the investigator that the investigator is to communicate solely through the mother and not send any emails directly to the student. When the investigator emails the student directly to schedule an interview, the mother calls and verbally attacks the investigator.





JHU Appx H. Do we record?

- The University will make an audio and/or video recording of the hearing for the use of the Resolution Panel, for sanctioning, and for purposes of appeal.
- The Resolution Panelists, the Title IX Coordinator, and/or the Vice Provost for Student Affairs may request a transcript and recording of the hearing.





Do parties/witnesses have a right to record themselves?

- No.
- ***JHU. Appx H.*** The parties may not record any part of the investigation or hearing
- (Notetaking is generally allowable).



Typical Hearing Structure

- Chair/leader provides opening remarks
- Consider investigation report/summary, if needed
- Presentation of the parties' relevant **written questions** to other party and witnesses by the Panel
- Parties and witnesses have opportunity to respond to questions by the Panel
- Deliberation





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Module 4: Effective Questioning for Resolution Panel Members





JHU Appx H: Questioning

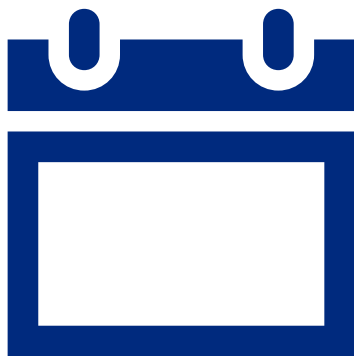
- Only the resolution panel may ask questions of the parties and any witnesses.
- Both parties may propose questions of the other party and witnesses ***by submitting questions to the panel in writing at any time during the proceeding.***
- The resolution panel is encouraged to include all relevant questions, but may, in its discretion, ask, alter or omit any or all submitted questions.



How do I know what questions to ask?

- Will vary depending on role
- Review the nature of the allegations
- Review the definition of the particular type of misconduct alleged
- Consider facts that would tend to establish a given element of the misconduct
- Consider questions that will bear on credibility

Practical Considerations

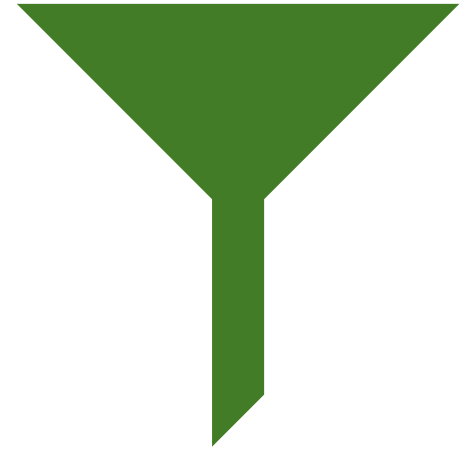


- Prioritize
- Create list of must-ask questions in advance
- Focus on elements of alleged violation and disputed facts
- Consider appropriate ways to guide off-track witnesses



Questioning Techniques

- Open-ended and non-suggestive invitations
- Use facilitator words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Utilize “recognition prompts” to unpack details
- Avoid suggestive or leading questions



Examples of Open Invitations



“Please tell me what happened that night.”



“Can you walk me through what happened?”



“In your own words, tell me what occurred.”



“Can you tell me everything that happened after you got to the party?”

Examples of Facilitators



Examples of Cued Invitations

“You mentioned that . . .
. . . Can you tell me more?”

“You said that Can you elaborate?”

“You said they ‘coerced’ you. Can you tell me specifically what they did?”

“If I understood you right, you said that after Can you tell me what happened in between?”

Examples of Recognition Prompts



“What did she say?” (directive)



“What day did that happen?” (directive)



“Did it hurt?” (option choosing)



“Was he slurring words?” (option choosing)

Active listening

- Active listening – “the most effective tool that exists for demonstrating understanding and reducing misunderstanding”
Gerald Goodman, *The Talk Book*
- When engaging active listening skills, you will hear both factual content, and the **feeling** accompanying that that content
- Active listening requires a set of skills that you can employ; focus on employing the same skills you would apply when trying to understand information in an emergency situation

Active listening

Adapted with permission
from “Essentials of Active
Listening” – Written by Dean
of University of Missouri
Kansas City Law School

- Why listen?
 - To gain information, perspectives, and to understand emotions.
 - To encourage speaker.
 - To build rapport.
- Why listen actively?
 - To facilitate communication.
 - To diffuse emotions.
 - To translate content.
 - To ensure accuracy.



Active listening

- Feedback Loops
 - Paraphrase factual content
 - To check your understanding of the ideas, information, or suggestions of others, state the speaker's idea in your own words or give an example that shows what you think the speaker is talking about.
 - Check Perceived Emotions
 - To check your perception of the feelings of someone else, state what you perceive that person to be feeling.

*Adapted with permission from "Essentials of Active Listening" – Written by
Dean of University of Missouri Kansas City Law School*



Ineffective	Effective
NON VERBAL BEHAVIOR	
Listener looks bored, uninterested or judgmental; avoids eye contact; displays distracting mannerisms (doodles, etc.)	Listener maintains positive posture; avoids distracting mannerisms; keeps attention focused on speaker; maintains eye contact; nods and smiles when appropriate.
FOCUS OF ATTENTION	
Listener shifts focus of attention to self: “When something like that happened to me, I....” (attention may focus internally, as when thinking about how you would feel, respond, etc.)	Listener keeps focus on speaker: “When that happened, what did you do?”
ACCEPTANCE	
Listener fails to accept speaker’s ideas and feelings: “I think it would have been better to...”	Listener accepts ideas and feelings: “That’s an interesting idea, can you say more about it?”
EMPATHY	
Listener fails to empathize: “I don’t see why you felt that...” (or, more commonly, simply silence or ignoring feelings)	Listener empathizes, “So when that happened, you felt angry.”

PROBING	
Listener fails to probe into an area, to follow up on an idea or feeling	Listener probes in a helpful way (but does not cross examine) “Could you tell me more about that? Why did you feel that way?” “A few minutes ago you said...”
PARAPHRASING	
Listener fails to check the accuracy of communication by restating in his own words important statements made by the speaker	Listener paraphrases at the appropriate time.
SUMMARIZING	
Listener fails to summarize	Listener summarizes the progress of the conversation from time to time
ADVISE	
Listener narrows the range of alternatives by suggesting the “Solution”	Listener broadens the range of ideas by suggesting (or asking the speaker for) a number of alternatives



What are the hallmarks of effective questioning?

- Questions should be clear and precise
- Questions should relate to one or more elements of the sexual harassment alleged
- Questions should be asked in a purposeful order
- Questions should be prioritized and edited for greatest effect



General Questioning Guidelines

- Open-ended questions generate more information while closed-ended questions will clarify specifics.
- Close-ended questions result in yes/no responses that often don't offer much additional information. Use close-ended questions to obtain specifics and clarify information you have already received.
- Silence is ok: Give the witness time to answer.





General Questioning Guidelines (more)

- **Credibility:** If you have concerns that a witness is not providing complete and accurate testimony, respectfully explain the reason for your concern and indicate that you are interested in hearing the individual's response to your concern (e.g., "Help me understand...") and address inconsistencies.
- **Be professional and respectful:** Keep in mind that questioning, while sometimes necessary, may put a party or witness on the defensive.
- **Ask the difficult but relevant questions:** Give both parties an opportunity to address your concerns.



When Asking Questions . . .


- **Non-verbal communication**
 - Convey care, concern, and interest to both sides
 - Make eye-contact
- **Verbal communication**
 - Avoid questions that imply the alleged conduct occurred or did not occur
 - Avoid questions that blame or judge the complainant
 - Avoid question that blame or presume violation by respondent
 - Use medical terms for clarification

How do I know what questions to ask?


Review the nature of the allegations

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Review the definition of the particular type of sexual misconduct alleged

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Consider facts that would help determine whether a particular element of the alleged violation is satisfied

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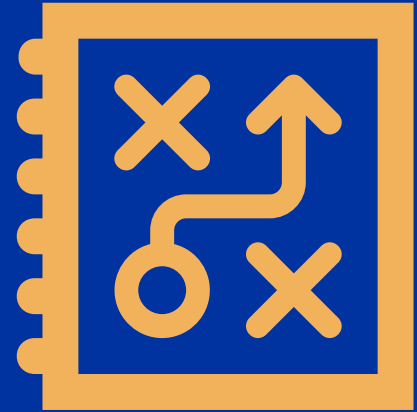
Focus on relevant evidence (tending to make a *disputed* fact more/less true) and (for investigators) other evidence directly related to allegations

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Consider questions that will bear on credibility

Example – Discussion

Complainant has accused respondent of sexual misconduct. Respondent admits to the alleged conduct but asserts it “wasn’t that bad.” Complainant alleges being so affected by the conduct that complainant stopped attending class at the institution.



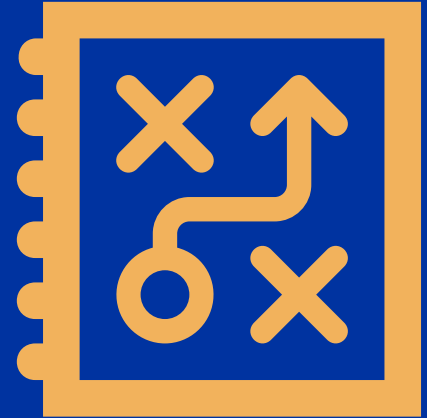


Example Questions (Effective Denial of Access)

- For witnesses
 - What did complainant say about their class?
 - What did you observe about complainant's attitude towards going to class?
 - Before the respondent's conduct, did complainant go to class?
 - Did you notice any changes in complainant's behavior after the respondent's conduct?
 - After the respondent's conduct, did complainant still go to class?
 - Are there any records that would show when complainant went to class before and after the conduct?

Example -- Discussion

Respondent is accused of lurking around complainant's car following a breakup. Respondent denies the act. Complainant first reported clearly seeing the respondent's face at the car, but later said the person was not as clearly in sight.





Example Questions (Complainant)

- **Single act**
 - Tell me more about what you saw at the car? Did you actually see the respondent's face? What else do you remember about the person's appearance or attire?
 - Could it have been someone else?
 - Do you actually *know* it was respondent at the car?
 - How do you explain your confidence in the siting at first, but later saying you thought it was Respondent?
- **Directed at a specific person**
 - Why do you believe this conduct is directed at you?
 - Do you know why was respondent at the car? Was there anything suggesting respondent went there to see you? Could there have been other reasons for Respondent's presence?
 - What did respondent do at the car? What did you do? Did either of you say anything?
- **Fear/distress**
 - What day/time did this happen?
 - Where did it happen?
 - How far was respondent from you?
 - Was there anyone else around?
 - What has the impact of this been on you? Did you tell anyone about it?

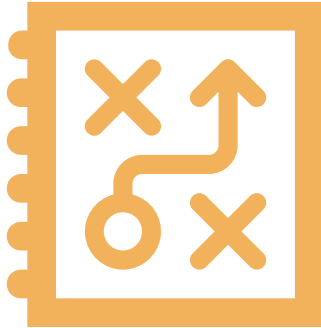


What is relevance?

Evidence is relevant if:

- It has a 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

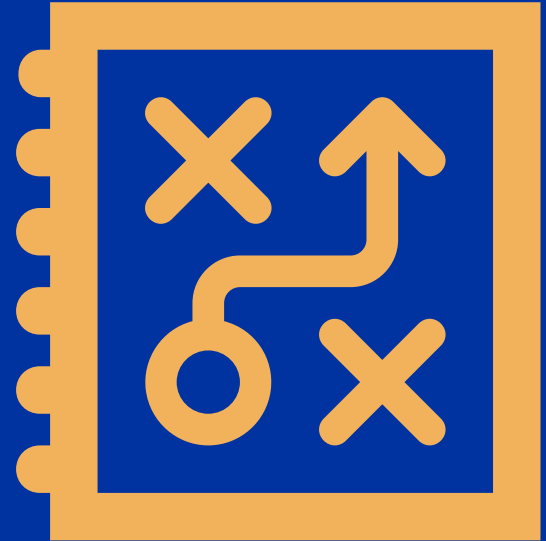
Example (relevant)



Coach is accused of sexually propositioning Player in exchange for more playing time. Witness states that: “One of the trainers heard Coach say that Player is ‘extremely attractive.’”

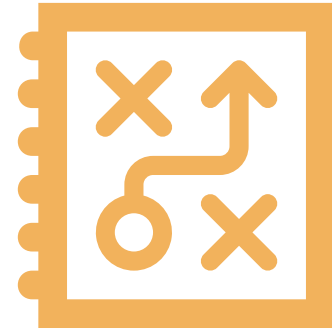
Example: Relevant

One student has accused another of stalking. Investigator asks, “Did Respondent ever threaten to harm you physically?”

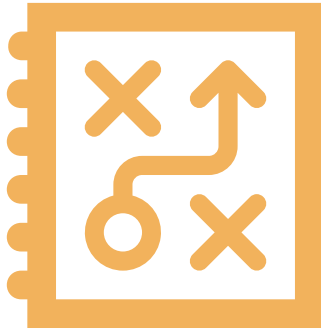


Example (not relevant) (#1)

Complainant alleges Significant Other engaged in dating violence by kicking complainant during an argument. Witness asserts: “Complainant is only dating Significant Other because of the Other family’s money?”



Example (not relevant) (#2)



Journalism student has accused Professor of sexual harassment. Witness says: “Student was convicted for driving under the influence when they were a sophomore in high school.”

Incapacity – Sample Question Topics

Physical coordination

- Walking, dancing, running, maneuvering (e.g., stairs)
- Speech
- Dexterity (phone/computer usage, using keys/key cards)
- Dressing/undressing

Ability to understand

- Topics of conversation
- What was said and tracking conversation
- Knowing the who/when/where of the situation
- Understanding what is happening generally and with regard to the conduct at issue

Other

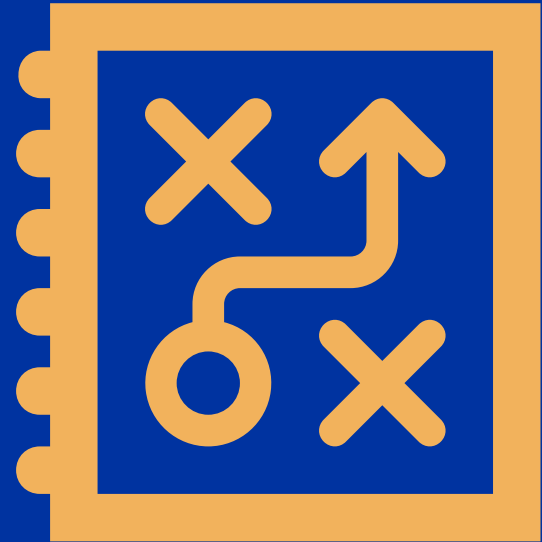
- Quantity consumed (not determinative)
- Vomiting
- Passing out/blacking out
- Sleep
- Disability/age

Respondent's reasonable knowledge of capacity

- What was respondent able to observe with respect to the above
- What should respondent have known based on the above

Capacity Example

Respondent is accused of having sex with the complainant when complainant was incapacitated due to alcohol off campus at a private residence. Investigator asks questions that may demonstrate whether complainant was able to function and fully understand the nature of sexual activity.





Example questions

- How did you get upstairs to the respondent's apartment?
- Before the sex started, did you discuss using a condom? Did you get a condom? Where was it in relation to you and the Respondent at that time?
- Did you send any text messages immediately before or after the sex concluded?
- Did you speak with anyone on your phone immediately before or after the sex concluded?



What do we do with awkward silences?



- Give the witness time to answer
- Before answering, witnesses should pause to allow for relevance rulings

Questions





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Module 5: Sanctioning Considerations





Who determines discipline and remediation?

- This is a question of institutional choice
- Some institutions will have the decision-maker(s) also impose discipline
- Others may refer a disciplinary authority with jurisdiction over the respondent (i.e., Dean of Students, Provost, Director of Human Resources, etc.)
- Faculty and Staff – may have different process than students
- If referred to someone else, that must occur before the written determination is issued



What principles do we use to determine discipline?

- Discipline should vary depending on the nature of the violation found considering aggravating and mitigating factors
- All things being equal, like violations should have like punishments
- Discipline has educational, punitive, and protective elements



What principles do we use to determine remediation?

- If a violation is found, institution must take steps to restore or preserve the complainant's access to education
- Various types of supportive measures may be utilized after the determination to restore or preserve access
- Institution is not required to provide the exact remedy requested, but must provide a remedy that is not clearly unreasonable



What principles do we use to determine discipline?

- Discipline should vary depending on the nature of the violation found considering aggravating and mitigating factors
- All things being equal, like violations should have like punishments
- Discipline has educational, punitive, and protective elements



Disciplinary Philosophy

- Violations of the policy by an individual will be addressed in accordance with applicable university policies and procedures, which may include disciplinary actions up to and including expulsion or termination from the university.
- When determining appropriate sanctions, the university may consider prior findings of misconduct.
- Violations of law will be addressed by law enforcement and may result in criminal penalties.



Sanctioning Goals

- Punitive
- Safety
- Reduce recidivism / recurrence
- Advance educational and developmental growth of offender (learning from one's mistake)
- Appropriate fit for circumstances



Determining Sanctions

- When determining the appropriate sanctions, consideration shall be given to the nature and severity of the behavior and the existence of any prior incidents or violations
- ***JHU Appx H:***
 - Determinations of responsibility by the resolution panel are made ***by majority vote***
 - Determinations as to the sanction are also made by majority vote, ***except where the sanction in question is expulsion or a revocation of a degree, for which unanimity is required.***
- ***List of possible sanctions (see Appx. H, Sect. 3)***



Avoid Sanctioning Problems

- Common problems:
 - Ambiguity in sanction
 - Lack of clear explanation (and written record) of why sanctions should differ in similar circumstances
 - Failure to address expectations for returning students and/or employees following disciplinary action (e.g., participation in athletics/extracurriculars)



Aggravating and Mitigating Factors

- ***JHU Appx. H*** Factors for Consideration:
 - The specific misconduct at issue;
 - The circumstances accompanying any lack of consent (e.g., force, threat, coercion, intentional incapacitation, etc.);
 - The Respondent's state of mind (bias-motivated, reckless, negligent, etc.);
 - The Respondent's prior disciplinary history;
 - The safety of the University community;
 - Impact or mitigation statement by one or both parties;
 - The Respondent's conduct during the investigation and resolution process; and
 - Such other factors as the resolution panel deems appropriate.





JHU Appx. H: Ongoing/Additional Accommodations

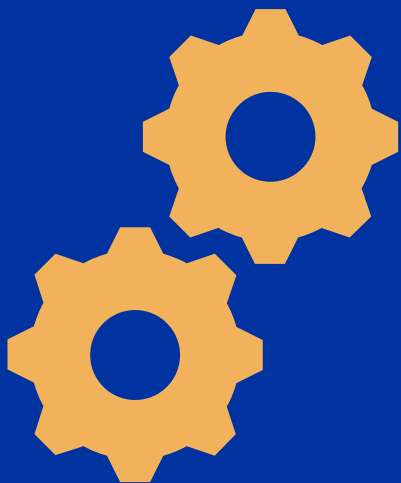
- TBD by Title IX Coordinator, irrespective of the outcome of, either party may request, e.g.,:
 - (1) a security escort;
 - (2) assistance with moving residences;
 - (3) changing academic schedules;
 - (4) adjusting work schedules;
 - (5) allowing withdrawal from or re-taking a class without penalty;
 - (6) providing access to tutoring or other academic support, such as extra time to complete or re-take an examination; and
 - (7) directing that the parties have no contact with one another.



JHU Appx. H: Remediation

- The administrator/panel/board may also recommend, and the Title IX Coordinator may implement, additional measures to remedy the effects of the sexual misconduct on the Complainant.
 - Providing an escort for passage between classes and activities;
 - Ensuring the Complainant and Respondent do not share classes or extracurricular activities;
 - Moving the Respondent or Complainant (if the Complainant requests to be moved) to a different on-campus residence hall;
 - Providing victim focused services including medical, counseling and academic support services, such as tutoring; and
 - Arranging for the Complainant to have extra time to complete or re-take a class or withdraw from a class without an academic or financial penalty.

Group Scenario



Athlete reports that Chemist verbally abused Athlete on three occasions off campus following their break-up. The first incident involved several evenings where Chemist followed Athlete to the grocery store and pharmacy, tailgated his car back to his apartment, then stood outside for hours watching through the window while Athlete undressed. The second incident consisted of Chemist changing work schedules at her job—the ice cream shop frequently visited by Athlete’s teammates—to be near Athlete in attempt to rekindle the relationship.

In hearing, Chemist explains “friendly signals” by Athlete that support that she did not know her conduct was unwelcome. Athlete presents evidence that Chemist talked to others that she wanted to hurt athlete for reporting.



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Module 6: Notice of Outcomes Writing Considerations



Preponderance... as to what?

Carefully consider elements of alleged violation

What needs to be shown to establish a violation?

Documenting the Decision

- Each decision should be explained in writing in as careful detail as a finding of responsibility. Why?
 - The act of documenting helps a decision-maker consider all relevant issues
 - Demonstrates that the decision was informed and not based on actual or perceived bias
 - Demonstrates that the decision was not without thought, arbitrary, or capricious
 - Demonstrates alignment with institution's disciplinary philosophy
 - Provides appeals official and any reviewing court with a reason to grant the sanctioning official discretion in his/her decision
- The decision need not be lengthy
- The decision clearly explains reasoning for accepting or rejecting investigator recommendation



Critical Elements

- **May incorporate investigative report for some or much of the following:**
 - Preliminary case information
 - History of the case
 - Allegations
 - Applicable policies/procedures
 - Standard of evidence
 - Evidence considered
 - Factual findings
 - Analysis and conclusion
 - Sanctions

Periodic Table of the Elements

1																	18				
H Hydrogen 1.008																	He Helium 4.002				
3	4											5	6	7	8	9	10				
Li Lithium 6.941	Be Beryllium 9.012											B Boron 10.811	C Carbon 12.011	N Nitrogen 14.007	O Oxygen 15.999	F Fluorine 18.998	Ne Neon 20.180				
11	12											13	14	15	16	17	18				
Na Sodium 22.990	Mg Magnesium 24.305											Al Aluminum 26.982	Si Silicon 28.086	P Phosphorus 30.974	S Sulfur 32.065	Cl Chlorine 35.453	Ar Argon 39.948				
19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36				
K Potassium 39.098	Ca Calcium 40.078	Sc Scandium 44.956	Ti Titanium 47.867	V Vanadium 50.942	Cr Chromium 51.996	Mn Manganese 54.938	Fe Iron 55.845	Co Cobalt 58.933	Ni Nickel 58.693	Cu Copper 63.546	Zn Zinc 65.38	Ga Gallium 69.723	Ge Germanium 72.631	As Arsenic 74.922	Se Selenium 78.971	Br Bromine 79.904	Kr Krypton 84.36				
37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54				
Rb Rubidium 84.468	Sr Strontium 87.62	Y Yttrium 88.906	Zr Zirconium 91.224	Nb Niobium 92.906	Mo Molybdenum 95.94	Tc Technetium 98.906	Ru Ruthenium 101.07	Rh Rhodium 101.07	Pd Palladium 106.42	Ag Silver 107.868	Cd Cadmium 112.414	In Indium 114.818	Sn Tin 118.710	Sb Antimony 121.760	Te Tellurium 127.6	I Iodine 126.905	Xe Xenon 131.294				
55	56	57-71					72	73	74	75	76	77	78	79	80	81	82	83	84	85	86
Cs Cesium 132.905	Ba Barium 137.327	Lanthanides					Hf Hafnium 178.49	Ta Tantalum 180.948	W Tungsten 183.84	Re Rhenium 186.207	Os Osmium 190.23	Ir Iridium 192.222	Pt Platinum 195.084	Au Gold 196.967	Hg Mercury 200.59	Tl Thallium 204.38	Pb Lead 207.2	Bi Bismuth 208.980	Po Polonium 209	At Astatine 210	Rn Radon 222
87	88	89-103					104	105	106	107	108	109	110	111	112	113	114	115	116	117	118
Fr Francium 223	Ra Radium 226	Actinides					Rf Rutherfordium 261	Db Dubnium 262	Sg Seaborgium 266	Bh Bohrium 264	Hs Hassium 265	Mt Meitnerium 268	Ds Darmstadtium 288	Rg Roentgenium 272	Cn Copernicium 285	Uut Ununtrium 288	Fl Flerovium 289	Uup Ununpentium 288	Lv Livermorium 293	Uus Ununseptium 289	Uuo Ununoctium 294
89	90	91	92	93	94	95	96	97	98	99	100	101	102	103							
Ac Actinium 227	Th Thorium 232	Pa Protactinium 231	U Uranium 238	Np Neptunium 237	Pu Plutonium 244	Am Americium 243	Cm Curium 247	Bk Berkelium 247	Cf Californium 251	Es Einsteinium 252	Fm Fermium 257	Md Mendelevium 258	Lr Lawrencium 262								
Alkali Metals Alkaline Earth Transition Metals Basic Metals Semimetals Nonmetals Halogens Noble Gas Lanthanide Actinide																					



Preliminary Case Information

- Names of the parties
- Investigators name(s)
- Adjudicator(s) names
- When and how the case was received and assigned
- Key dates



History of the Case

- How did the institution respond to the report?
 - E.g., rights and options provided, notification of respondent
- Investigation
 - ***JHU Appx H:*** What was the recommendation?
- When, how, and where were parties and witnesses participate in a hearing?
- Explain procedural issues; delays

Summarizing Allegations

Goal: Identify and articulate what part of complainant's story, if true, is a violation of the institution's policy

- Focus on who, what where, when, how.
- Should match notice!



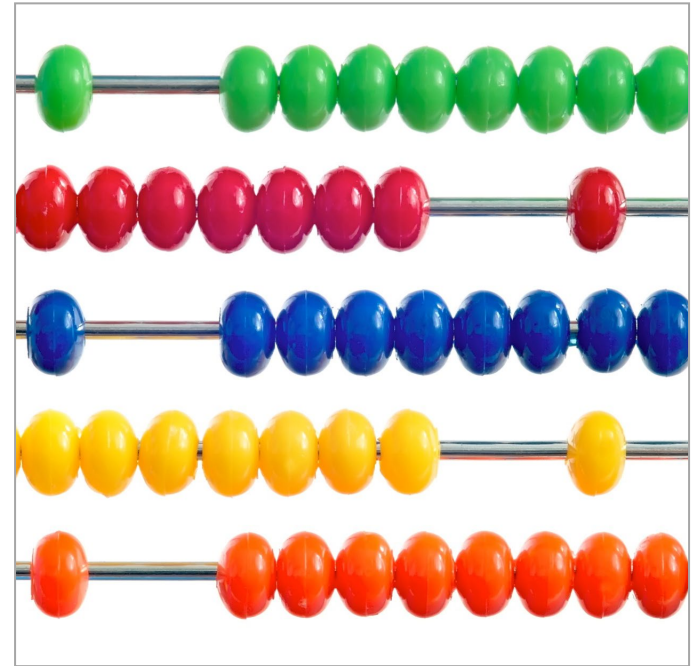
Factual Findings

- Acceptance of factual findings?
- **Goal:** Reach conclusion of disputed facts
 - Relevant?
 - Weight?
 - Persuasive?
 - Show your work
 - Explain your decisions



Factual Findings (cont.)

- Resolving credibility
 - Is there **corroborating** evidence?
 - Are there **inconsistencies**?
 - Insufficient explanation of inconsistencies?
 - Consider the logic of a person's narrative (**plausibility**)
 - Consider the impact of the trauma
 - Don't assume that a delay in reporting detracts from credibility





Important Language Considerations

- Use objective terms
 - “Complainant” and “respondent” rather than “victim” and “perpetrator”
 - “Violation of policy” not “guilty” or violation of “law”
 - Generally, credibility of **facts**, not **witnesses** as a whole, but-for specific circumstances
- Do not include speculation
- Do not include irrelevant points and discussion
- Be thoughtful about pronouns
- Avoid vague phrasing like “had sex”



Be Specific

“Jane alleges that Sara had sex with her without her consent.”

vs.

“Jane alleges that Sara laid on top of her, pulled her underwear down with one hand, while pressing her elbow on her other hand, penetrated her vagina with a vibrator, and held her down so she could not move.”

Analysis and Conclusion

- Put everything together
- Analyzing whether a violation of policy occurred (not the law)
- Discuss each allegation and your decision on each
- Explain your reasoning
- Deal with inconvenient facts and inconsistencies
- Phone a (need-to-know) friend if necessary





Language for Findings

- Adjudicator’s task is to determine if preponderance of the evidence supports a finding
- Unless there is an assertion of bad faith or clear error, task is not to determine that conduct did not occur
- Absent clear evidence an allegation is false, **avoid** language such as:
 - “No violation”
 - “Innocent”

Sample language:

“The preponderance of the evidence does not support a finding of a policy violation.”

“The preponderance of the evidence falls short of demonstrating that it is more likely than not the alleged conduct occurred.”

Check Your Work

- The decision must be able to stand on its own
- Spelling and punctuation matter – have proofread
- Double check that the allegations decided match the notice
- Include the good, the bad and the ugly
 - Procedural errors (inconsequential or corrected)
 - Delays





Documenting Sanction: Rules of Thumb



- Should generally address the following factors, where applicable:
 - Impact statement of complainant and respondent, if any
 - Acknowledgment of wrongdoing or impact of conduct by respondent
 - Alignment of sanction to institution's disciplinary philosophy
 - Potential ongoing safety risk to community (or not)
 - Any continuation of no-contact directive, and duration and parameters of that directive

Example

Writing about
credibility points –
Investigative reports

- “Respondent was not reliable when recounting what happened.”

vs.

- “Though Respondent initially said that Respondent could not remember what happened in Complainant room, Respondent later reported recalling X.

Respondent told the Dean that Complainant actively pursued a relationship with Respondent after the night in question through text messages.

Complainant provided a text message string with Respondent in which Respondent asked Complainant to meet Respondent at the library, join Respondent at a restaurant, and come to Respondent’s apartment on three different occasions; in each instance, Complainant’s text messages to Respondent decline the invitations. (See Exhibit A.) Complainant denied deleting any portion of the text messages from the string, and the Investigator observed them on Complainant’s phone, showing Respondent’s phone number.”



Example

Writing about
credibility points –
Determinations



- “The Resolution Panel find that Witness is not credible.”
- vs.
- “Witness reported arriving at the office at 7 a.m. every morning and never observing Respondent speaking to Complainant before the 9 a.m. meeting. However, key card records of the apartment building show that Witness did not arrive at the office until 9 a.m. on 23 occasions between March and June, and that, on 18 of those occasions, Complainant and Respondent had both entered the building. Complainant reported that Respondent often harassed Complainant early in the morning, when no one else was present. As such, there were multiple occasions on which Witness was not present to observe whether the parties were not interacting.”

INVEST. Example

Be specific



- “Complainant alleges that Respondent had sex with Complainant without consent.”

vs.

- “Complainant alleges that Respondent laid on top of Complainant, pulled Complainant’s underwear down with one hand, while pinning Complainant’s arms with Respondent’s other arm, penetrated Complainant’s vagina with a vibrator, while pushing Complainant against the wall next to the bed so Complainant could not move.”

INVEST. Example

Be specific



- “Evidence includes a recording of Pat and Dre in which Pat was drunk”

vs.

- “Pat provided a recording of a discussion between Pat and Dre that Pat reported recording at the Bar. In the recording, Pat states loudly, ‘I’m so wasted;’ in the remainder of the two-minute recording, though individual words can be heard, Pat’s speech is unintelligible. Pat stated this was slurring due to intoxication. Dre agreed the recording was of Pat and Dre.”

HEARING Example

(for context)

Be specific



- “Complainant is credible.”

vs.

- “At the hearing, Respondent emphasized that Complainant sent a text saying, ‘Yeah, tonight was good,’ within an hour of the alleged sexual assault. On its face, the text could be construed as inconsistent with Complainant’s report that the sexual activity that occurred the hour before the text was not consensual.

However, Complainant said that, after Respondent drove Complainant home, Complainant was in shock and sent the text in response to Respondent so Respondent would not come searching for Complainant. Complainant explained engaging in the sexual activity despite it being unwelcome by saying Complainant feared for Complainant’s safety. Complainant reported that Respondent had slapped Complainant, creating a red mark, after Complainant refused to kiss Respondent; Complainant said this occurred about 30 minutes before the sexual activity Other than the text message, Complainant’s account is consistent with Complainant’s prior statements and the witness account about overhearing the early stages of the fight over the phone. It is also plausible that one who had just experienced sexual assault would send a text to appease one’s assailant.

In contrast, Respondent’s statements have changed repeatedly since the Complaint...

As such, the Resolution Panel finds Complainant’s account more credible than Respondent’s as to what occurred before the sexual activity.”



Common “Mistakes” in Report-Writing

- Chronology of events is hard to follow
- Failing to spell out the allegations and relevant policies
- General lack of clarity/coherence
- Including too much information about irrelevant details
- Insufficient information on important issues
- Speculation

Appeals Summary



What is the purpose of the appeal?

- Appeal permits challenge of a dismissal or determination on certain limited grounds
- Appeals are not an opportunity to re-argue an outcome or seek “de novo” review





Can an institution set a time limit to appeal?

- Yes – an institution can and should require an appeal to be filed within a reasonable number of days after a dismissal or determination
- Institution may set a secondary deadline for the non-appealing party to elect to file a cross-appeal *after* the first party has appealed



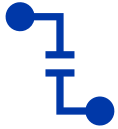


JHU Appx. H: Who can appeal? How?



- Both parties
- 7 calendar days to file appeal with Vice Provost for Student Affairs or designee

JHU Appx H. What are grounds for appeal?



Procedural error that could have affected the outcome/sanction;



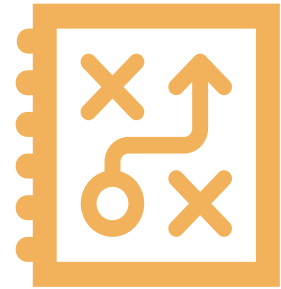
New info that was not available at the time that could have affected the outcome/sanction; or



Excessiveness or insufficiency of sanctions

Example (procedural irregularity)

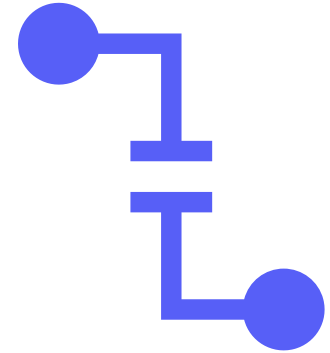
During a hearing, the hearing panel denies the respondent's advisor the right to submit written questions to the witnesses. The respondent appeals, citing this procedural irregularity, and argues that key witness testimony relied on by the hearing panel must be excluded because the witness was not subjected to questioning by the advisor, as required by the policy. And without such testimony, the outcome cannot be supported.





Are all procedural errors appealable?

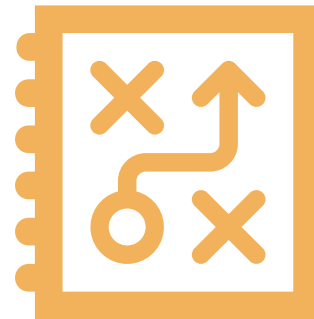
- No – the procedural irregularity must be one that “affected the outcome of the matter”
- Errors that affect the outcome may be referred to as “prejudicial” errors
- Errors that do not affect the outcome may be called “non-prejudicial” or “harmless” errors



Example (harmless error)

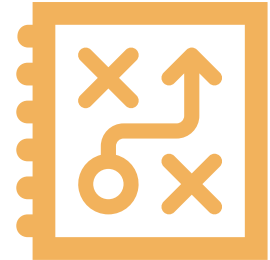
Policy required hearing to be held within 60 days of submission of Complaint.

Hearing was held 61 days after submission of Complaint due to a counting error. The evidence would have been the same if the hearing were held a day earlier.



Example (new evidence)

After determination is made that respondent did not commit sexual misconduct, complainant secures a previously unknown video made by a bystander at a party that depicts respondent groping complainant and complainant attempting to pull away from respondent. The bystander has been out of the country and only learned of the hearing after returning a few days ago.





Should we ever dismiss an appeal?

- Yes – dismissal is appropriate if:
 - Appeal is filed after the reasonable deadline set in the policy
 - Appealing party does not articulate one of the three grounds for appeal



May the institution appeal if the parties don't?

- No – the institution does not take appeals of its own determinations





How does the appeal officer make its decision?

- Appellate officer review is limited in scope to the grounds stated for appeal
- Appeal officer does not hold a new hearing
- Appeal officer must review the appeal, response, and hearing record (to the extent necessary, depending on the grounds for appeal)
- Appeal officer must then draft a written decision that states the outcome of the appeal and rationale

What are the potential outcomes of an appeal?



Appeal is denied and determination is made final



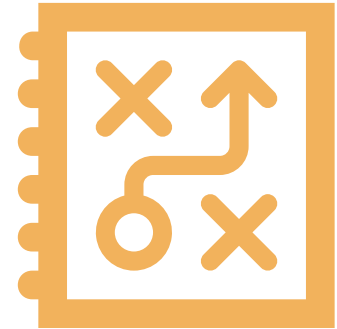
Appeal is granted and determination is changed by the appeal officer (revised determination)



Appeal is granted, determination is “vacated”, and appeal officer sends matter back for a new investigation and/or hearing as appropriate, depending on the nature of the error the appeals officer found

Example (procedural error)

Appeals officer finds there was a prejudicial procedural error because the hearing officer failed to send notices requesting several of the respondent's key witnesses appear. Appeals officer vacates the adverse finding against the respondent and directs that a new hearing take place after appropriate notices to appear have been issued.





Is there further review after appeal?

No. Further appeals are not permitted (student cases).



Wrap Up



Day 2 Take Aways

HUSCH
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