

# Hearing Board Practice for Sexual Misconduct Proceedings

August 2023

# Content Advisory

This training will involve discussion of sex- and gender-based harassment, domestic and dating violence, stalking, and sexual assault. These topics can elicit strong feelings. Please excuse yourself from the training if needed, and consider contacting CARE for support:

**Center for Advocacy, Response, and Education**

<https://care.unl.edu>

(402) 472-3553

# Agenda

Phase 1: Review simulated investigation report.

Phase 2: Analysis of Charges

Phase 3: Question Drafting

Phase 4: Hearing Simulation

Phase 5: Deliberation

Phase 6: Decision Drafting

# Read (or Review) the Investigation Report

Phase 1

# Analysis of Charges

Phase 2

# Recommended Steps

You must determine whether all elements of the applicable sexual misconduct definitions are established by a preponderance of the evidence.

- Study the definitions carefully;
- Break the definitions down into separate components (elements);
- Review the investigation report and make notes about what facts tend to make each element more or less likely to be established.

# Conflict of Interest Questionnaire



<https://go.unl.edu/coiq>

# Question Drafting

Phase 3

# Questioning

At the hearing, ask questions to clarify disputed facts or help you determine credibility or weight to be afforded to information so that you can decide whether or not each element is established by a preponderance of the evidence.

Prepare questions for:

1. Investigator
2. Complainant
3. Respondent
4. Witnesses

# Questioning/Cross-Examination by Hearing Board

First, consider: Is the answer to my question already in the investigation report?

- If yes, it is okay to ask the investigator about it if you need to clarify.
  - The goal is not to repeat everything in the report during the hearing. Focus on matters that are unclear, disputed, or depend on credibility.
- If no, proceed to the next step. (You can also ask the investigator why that information is not available.)

# Questioning/Cross-Examination by Hearing Board 2

Second, consider: Why do I want to know this information?

- If the information is not going to help you determine whether an element of a misconduct charge is more or less likely true, it is probably not a question to ask.

# Questioning/Cross-Examination by Hearing Board 3

Questioning tips:

- Check your biases. If you are interrogating one party or witness aggressively but not another (or using different tones with different parties), it gives the appearance of bias.
- Avoid compound questions and questions that lead the party or witness to a specific answer.
- Prepare questions in advance.
- Do not assume you and a party/witness think certain terms mean the same thing.

# Simulated Hearing

Phase 4

# Hearing Participants

The people attending the hearing will typically be:

1. The investigator
2. Complainant / advisor(s)
3. Respondent / advisors(s)
4. Hearing Board and Chair
5. Witnesses
6. University Presenter
7. Hearing Facilitator
8. TIXC
9. General Counsel

# Hearing Logistics

Chair directs the course of the hearing and covers basic logistical issues.

- Video must remain on. Ensure no unauthorized persons are present.
- Introduce participants.
- Do conflict of interest check / allow parties to challenge board members.
- Review procedures.

# Hearing Procedures

- Rules of decorum enforced.
- One designated advisor conducts cross-examination; no objections to questions permitted.
- Investigator called first, followed by Complainant and Respondent and witnesses (in that order).
- Hearing is not intended to review everything in the investigation report; rather, the purpose is to focus on facts in dispute and issues of credibility.
- Chair determines if questions are relevant before answer is given.

# The Presentation of the Complaint and Evidence

- University presenter reads complaint; Hearing Board chair asks Respondent if they admit to the complaint. Assuming no admission:
- Presentation of evidence
  - Opening statement by Complainant
  - Opening statement by Respondent
  - Order of witnesses called by University Presenter:
    - Investigator
    - Complainant
    - Respondent
    - Other witnesses
  - Order of questioning of each witness: Hearing Board, Complainant, Respondent
  - Additional witnesses called by Complainant
  - Additional witnesses called by Respondent

# The Presentation of the Complaint and Evidence 2

- University presenter reads complaint; Hearing Board chair asks Respondent if they admit to the complaint. Assuming no admission:
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  - Order of witnesses called by University Presenter:
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    - Complainant
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    - Other witnesses
  - **Order of questioning of each witness: Hearing Board, Complainant, Respondent**
  - Additional witnesses called by Complainant
  - Additional witnesses called by Respondent

# After Presentation of Evidence

Closing statement by Complainant.

Closing statement by Respondent.

Hearing concludes.

# Deliberation

Phase 5

# Considering the Evidence

The decision-maker cannot draw an inference about responsibility solely because a party or witness is absent.

Nor can a decision-maker draw an inference about responsibility solely because a party or witness refuses to answer a specific question.

# Considering the Evidence 2

Apply facts to the definitions and explain why each element of each charge is met or not met by a preponderance of the evidence, citing the facts for each.

To do this, you may need to assign weight to the evidence and/or determine credibility of parties or witnesses.

# Weighing the Evidence

Evidence can be relevant, but that does not mean you must rely on it.

What factors make evidence reliable?

- Consistency with other evidence.
- Supporting documents, electronic evidence, or physical evidence.
- Information from eyewitness (consider potential biases).
- Circumstantial evidence.
- Is the evidence conveying a fact or an opinion?

# Determining Credibility

Decision-makers must determine who / what to believe.

Credibility must not be based on party's status as a Complainant, Respondent, or witness.

Consider:

- Does this information make sense?
- Does this person (or the creator of this document) have a bias?
- Is this information consistent with other evidence/testimony?
- Although credibility is for the Board to determine, you can ask the investigator the foregoing questions.
- Being a polished speaker or skilled presenter should be separated from believability.

# Deliberations

Decision must be:

- impartial,
- based on policy,
- made in good faith (not biased)
- based on the evidence

Decision cannot be arbitrary or capricious

# Deliberations 2

Focus on the question of responsibility first; focus on sanctions and remedies after determining responsibility.

Chair must ensure that all Board members' voices are heard. Power imbalances should be equalized (e.g., student voices should not count any less than employee voices).

Make notes to help you draft decision (we will stay in same groups for that).

# Drafting

Phase 6

# Decision Drafting

Requirements of the written decision (due 7 University Days after the hearing):

1. Identify the allegations potentially constituting sexual misconduct.
2. Describe procedural steps taken from the receipt of the formal complaint through the determination, including notifications to parties, interviews with parties and witnesses, methods used to gather evidence, and hearings held.
3. **Findings of fact supporting the determination.**
4. **Conclusions regarding the application of the University's Student Code of Conduct to the facts.**
5. **A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the Hearing Board imposes on the Respondent, and whether remedies designed to restore or preserve equal access to the University's education program or activity will be provided by the University to the Complainant.**
6. The University's procedures and permissible bases for the Complainant and Respondent to appeal.

# Debriefing