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OEI, LR and OGC Divisions

Analyzing the Investigative Report

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Minnesota State

What is a Decisionmaker deciding?

The two broad categories of decisions :

- **Was there a violation of the 1B.1 policy?**
 - Protected class harassment/discrimination (including sexual harassment)
 - Retaliation
- **Was there a violation of the 1B.3 policy?**
 - Sexual violence (sexual assault, non-forcible sex acts, stalking, relationship violence)
 - Attempted acts of sexual violence
 - Aiding acts of sexual violence

Analyzing a 1B.1 Investigation Report

First -- What is alleged?

- Discrimination**
- Harassment**
- Retaliation**

Analyzing a 1B.1 Investigation Report, continued

SECOND – WHAT IS THE BASIS FOR THE ALLEGATION(S)?

- Race
- Creed
- Age
- Disability
- Sexual Orientation
- Gender Expression
- Familial Status
- Sex (including pregnancy, child birth, and related medical conditions)
- Status with regard to Public Assistance
- Membership or activity in a local human rights commission
- Color
- Religion
- National Origin
- Marital Status
- Gender Identity
- Veteran Status
- Genetic Information (employees)

Analyzing a 1B.1 Investigation Report, multi-part

- NOTE: An investigation may concern more than one allegation. Each allegation may have more than one basis.

What is discrimination?

Note: Familiarize yourself with the elements of discrimination before you read the facts/analysis.

The elements of discrimination:

- Someone was treated **differently**;
- The different treatment was **based on** the individual's protected status or perceived protected class status; **and**
- **Interfered** with or limited the ability of that person to participate in, or benefit from, the services, activities or privileges provided by Minnesota State **or**
- Otherwise **adversely affected** that person's employment or educational experience of the college/university

What is discriminatory harassment?

Note: Familiarize yourself with the elements of discriminatory harassment before you read the facts/analysis.

- **Unwelcome** conduct or communication;
- **Based on** actual or perceived protected class;
- That has a **negative effect** or **is likely to** have a negative effect on the complainant or the workplace or the educational environment

What does discriminatory harassment include?

The examples of discriminatory harassment include:

- Oral or written conduct such as jokes, innuendo, slurs, name calling, negative comments about cultural norms, circulating rumors;
- Physical conduct, battery, blocking movement;
- Non-verbal derogatory gestures, stalking, interference with work performance;
- Visual displays.

What is sexual harassment?

- **Unwelcome** sexual advances, requests for sexual favors, sexually motivated physical conduct, and other verbal or physical conduct of a sexual nature; and
- The conduct has a **negative effect or is likely to have a negative effect** on the complainant or the workplace or the educational environment.

What does sexual harassment include?

The examples of sexual harassment include:

- Unwelcome conduct;
- Preferential treatment;
- Negative treatment or threats;
- Sexual exploitation.

Key elements of Sexual Harassment (quid pro quo)

- The complainant must be a member or a protected class
- He/she was subject to **unwelcome** harassment in the form of sexual advances or requests for sexual favors
- Submission to unwelcome sexual advances was an express or implied **condition** for receiving job benefits or his/her refusal resulted in a tangible job detriment.

What is retaliation?

Note: Familiarize yourself with the elements of retaliation before you read the facts/analysis.

Retaliations includes, but is not limited to, engaging in any form of intimidation, reprisal or harassment against an individual because the person:

- Made a complaint or other communication under 1B.1 or 1B.3;
- Assisted or participated in an investigation or process under these policies, regardless of whether a claim of discrimination or harassment was substantiated (or other applicable laws and policies); or
- Associated with a person or group of persons who are members of a protected class; or
- Made a complaint or assisted or participated in any manner in an investigation or process with the EEOC, the U.S. Department of Education (OCR), the MN Dept of Human Rights or other enforcement agencies, under any federal or state non discrimination law.

Key elements of Discrimination

- Is there evidence that the behavior was based on a protected class? (*i.e.*, race, gender, religion, age, etc.)
- How were other similarly-situated individuals treated?
- Was there a legitimate, non-discriminatory reason for the action or behavior?

Key elements of Harassment (hostile environment)

- The complainant must establish that they are a member of a protected class;
- That they have been subject to **unwelcome** conduct that the harassment was directed to Complainant **because of their protected status**;
- That the behavior results in an **adverse affect** or terms and condition or privilege of employment or education; and
- That the conduct had a **negative effect or is likely to have a negative effect** on the complainant or the workplace or the educational environment.

Factors to consider to determine if conduct had a negative effect or is likely to have a negative effect on complainant?

- Whether the conduct was verbal, physical or both
- How frequently it was repeated
- Whether the conduct was hostile or offensive
- Whether the alleged harasser was a fellow student, a faculty member, a co-worker, supervisor, or third party
- Whether others joined in perpetrating the harassment
- Whether the harassment was directed at more than one individual

Unwelcome Conduct Defined

- Unwelcome Conduct
 - The complaining student or employee did not request or invite conduct
 - The complainant student or employee regarded the conduct as undesirable or offensive

Consensual Relationships

- An employee of Minnesota State **shall not** enter into a consensual relationship with a student or an employee over whom the person exercises direct or otherwise significant academic, administrative, supervisory, evaluative, counseling, or extracurricular authority or influence.

Key topics for sexual assault

- What happened? (Actual, attempted or threatened)
- Did Complainant give affirmative consent (for each sexual act)?
 - Was the Complainant able to consent?
 - Intoxication versus Incapacitation
 - Other forms of Incapacitation
 - Minor (If a minor, the consent inquiry ends here)
 - What did the consent look like?
 - Was it verbal or non-verbal?
- Was there force or threat of force used? Note: This is not a required element, but may be important when considering possible sanctions.
- Also includes “offensive sexual behavior” that is directed at another such as indecent exposure or voyeurism (this may also fall under non-forcible sex acts)

Roles

Designated Officer or Title IX Coordinator's Role

- An individual designated by the president or chancellor to be primarily responsible for conducting an initial inquiry.
- Determines whether to proceed with an investigation under the 1B.1 or 1B.3;
- Can investigate and write investigation report; or
- Coordinate the investigation of reports and complaints of discrimination/harassment in accordance with the 1B.1 policy, 1B.1.1 procedure, 1B.3 policy and 1B.1.1 procedure.

Investigator's Role

- Carefully documents all information gathered in the complaint
- Determines strategies to support resolution
- Makes referrals necessary
- Consults with the Title IX Coordinator/Designated Officer if it is believed interim steps are necessary due to the health/safety concerns
- Writes investigation report

The Investigation

- Gathers all available information for the decisionmaker to make a reasoned decision about whether policy has been violated
- Maintains the integrity of the process
 - Timely
 - Fair to both parties
 - Provides confidentiality as required by law
 - Thorough
 - Tailored to individual circumstances

Role of the Decisionmaker

- Determine whether there is any real or perceived conflict of interest
- Make sure the investigator has complied with Minnesota State procedures
- Receives and reviews the investigation report
- Decides whether policy has been violated based on information provided in the report.

Role of the Process Advisor

- Provide information by helping students understand their rights and responsibilities under the policy, procedure, and student code of conduct.
- Provide assistance by aiding students in organizing their information to be used during an investigation and reviewing materials shared through the investigation process.
- Provide support by helping students find resources and counseling services that may benefit them and by being present/sitting with the student when they participate in the investigation and resolution process if the student wants them to be there.

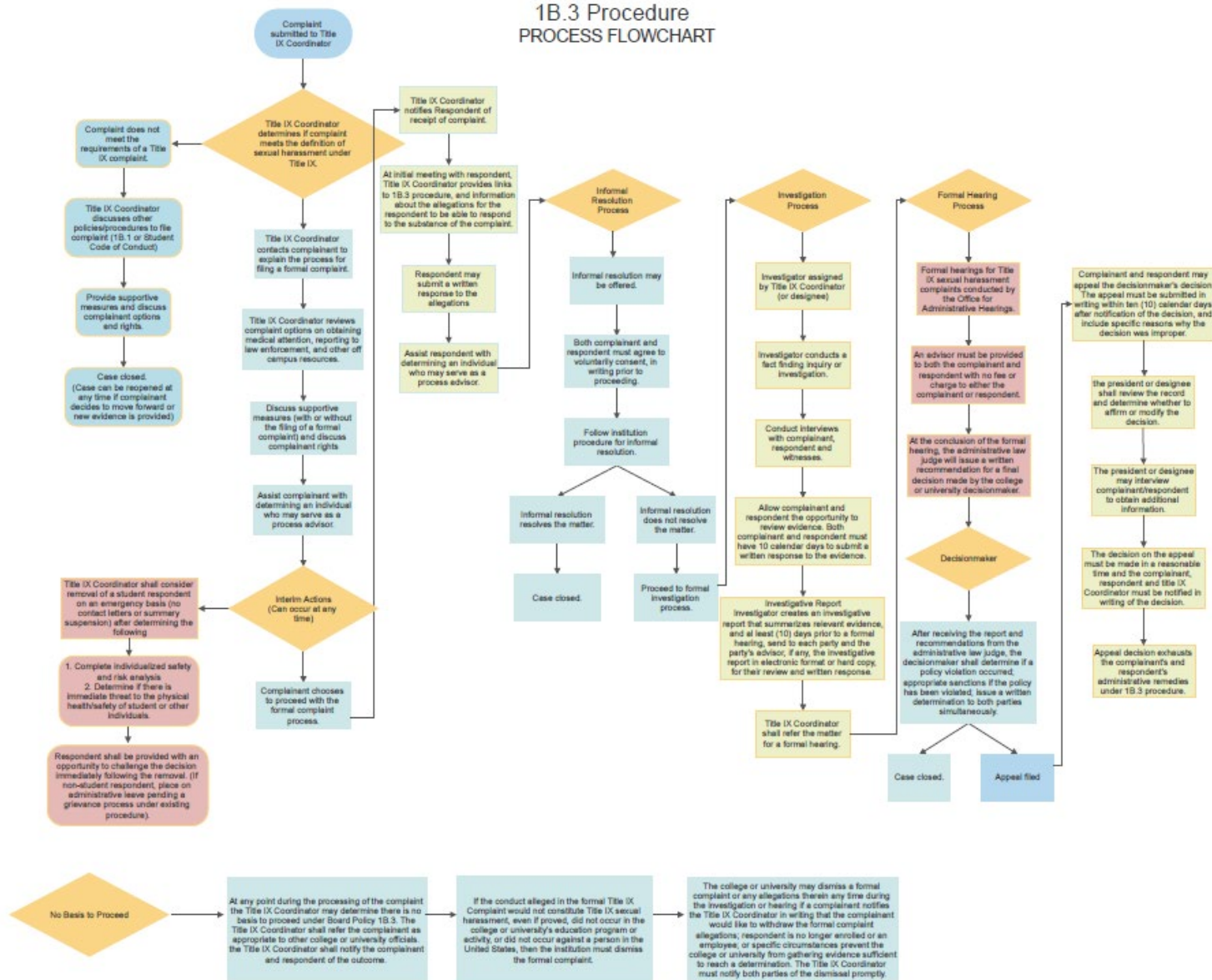
Reporting

- Faculty, staff and student employees who receive complaints of sexual harassment or sexual misconduct are obligated to report complaints to the Title IX Coordinator

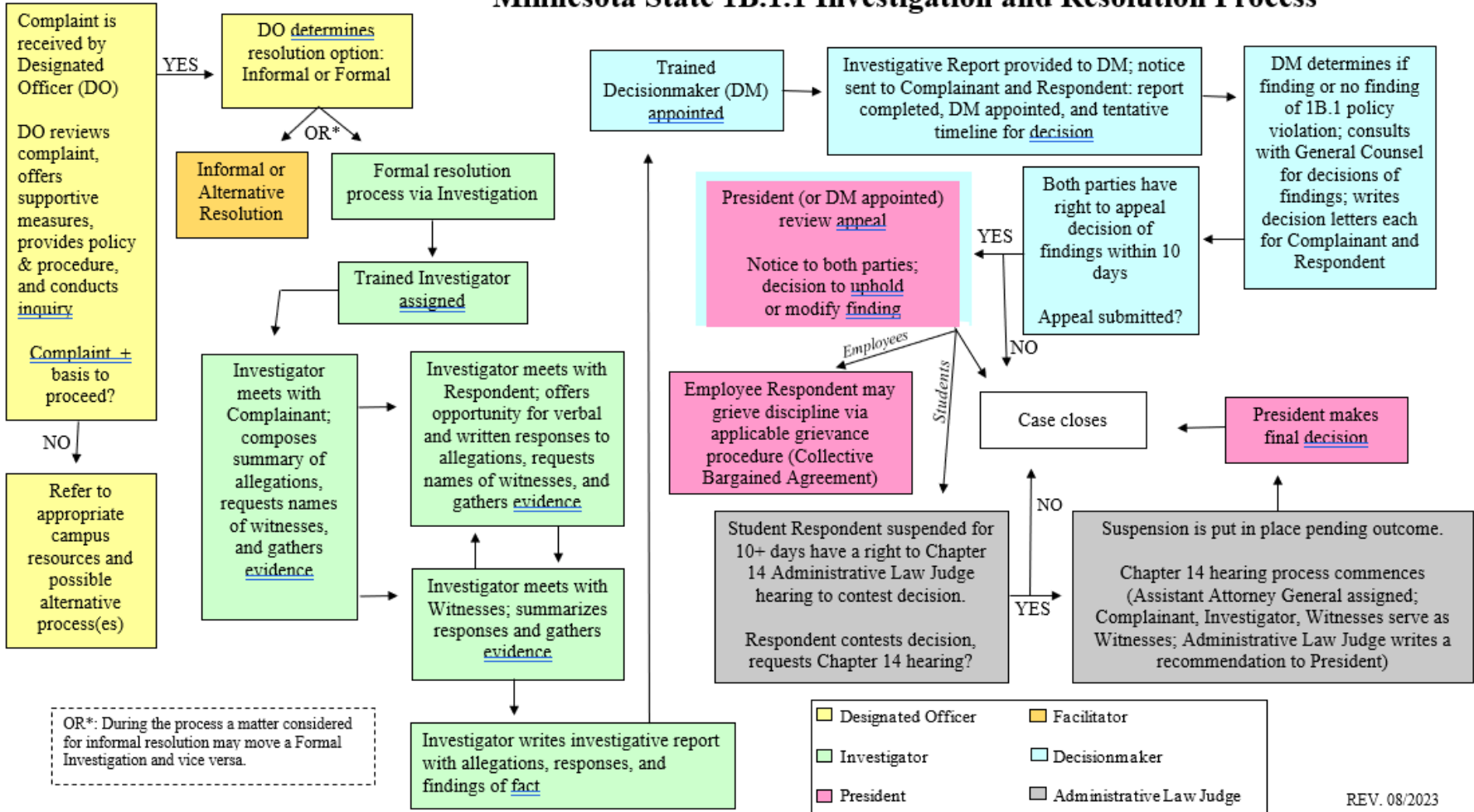
Why is it so important to report to the Title IX Coordinator?

- The University has a duty to promptly respond to all complaints of sexual harassment and sexual misconduct; whether on or off campus incidents.
- If a student does not wish to report to law enforcement, we will respect that. However, we should encourage the student to seek medical attention/emotional support.
- The purpose is to prevent sex discrimination on campus, promptly address reported incidents, limit the effects of harassment on the educational environment, and prevent its recurrence
- Role is to **Stop behavior**
 - Prevent reoccurrences and
 - Remedy effects

1B.3 Procedure PROCESS FLOWCHART



Minnesota State 1B.1 Investigation and Resolution Process



Affirmative Consent

Affirmative Consent – 1B.3 Policy Language

What is Affirmative Consent?

- Consent is **informed, freely given, and mutually understood** willingness to participate in sexual activity that is expressed by **clear, unambiguous, and affirmative words or actions**.
- A lack of protest, absence of resistance, or silence alone does not constitute consent, and past consent to sexual activities does not imply ongoing future consent. The existence of a dating relationship between the people involved or the existence of a past sexual relationship does not prove the presence of, or otherwise provide the basis for, an assumption of consent. Whether the respondent has taken advantage of a position of influence over the complainant may be a factor in determining consent.

Affirmative Consent Questions Answered

- Who has the responsibility to obtain affirmative consent?
- Can affirmative consent be revoked?
- Who can give affirmative consent?

Intoxication versus Incapacitation

Incapacitation is ...

- A state where a person cannot make an informed and rational decision to engage in sexual activity.
- A person who was incapacitated due to the influence of drugs, alcohol, and/or medication and could not understand the fact, nature or extent of the sexual activity.

What is the investigator evaluating?

- Whether the complainant was incapacitated and, therefore, unable to give consent to sexual activity.

Assessment of Knowledge

- If the investigator finds complainant was incapacitated, investigator must evaluate respondent's level of knowledge of the level of incapacitation.
- Assess whether the respondent knew or reasonably should have known that the complainant was unable to consent to the sexual activity.

--Keith Rohman, 2017

Assessment of Knowledge, continued

- Respondent observed Complainant asleep or unconscious
- Respondent observed Complainant unable to communicate due to physical or mental condition
- Respondent observed Complainant ingest alcohol and/or drugs, rate of ingestion, time of consumption
- Respondent observed Complainant's physical and verbal behaviors
- Respondent was told about the amount of alcohol and/or drugs Complainant ingested
- Respondent's actions like assisting Complainant after Complainant threw up
- Respondent's comments to others about Complainant's state

--Keith Rohman, 2017

Analysis

- 1. What is the evidence that the complainant was under the influence of alcohol and/or drugs?
- 2. Did the alcohol and/or drugs cause the complainant to be incapacitated?
- 3. What did the respondent know, or what should the respondent have known, about the complainant's level of intoxication and/or incapacitation?

Other Types of Sexual Violence Under the 1B.3 Policy



Stalking

- Unwanted Phone Calls
- Unwanted Voicemails
- Unwanted Text Messages
- Spying
- Sending unwanted gifts
- Letters
- E-mails
- Social media use
- Showing up at a location

Dating/Relationship Violence

- Physical harm or abuse (or threats of physical harm or abuse);
- Arising out of a personal intimate relationship.

Note: While this is called dating/relationship violence, this category includes more casual intimate relationships.

Non-forcible Sex Acts

- Statutory Rape
- Invasions of sexual privacy
 - Shower/bathroom peeping (technology assisted or otherwise)
 - Distribution/posting of sexual images (may be sexual harassment)
- Catch all

Assessing Credibility



Information that may be helpful in decisionmaking

- Evidence about the credibility of the Complainant and harasser
- Evidence that the Respondent has been found to have harassed others
- Evidence that the Complainant has made false allegations against others
- Evidence of the Complainant's reaction or behavior after the harassment
- Evidence about whether the Complainant filed a complaint, told others, or wrote about the conduct soon after it occurred (noting possible trauma)

Check Your Bias as a Decisionmaker

Types of Bias

- Protected Category Biases (non-exhaustive list)
 - Race
 - Gender
 - Sexual Orientation
 - Gender Identity
 - Religion
 - Class
 - Age
 - National Origin
 - Disability
- Investigator-Specific Biases
- Title IX-Specific Biases

Implicit Bias

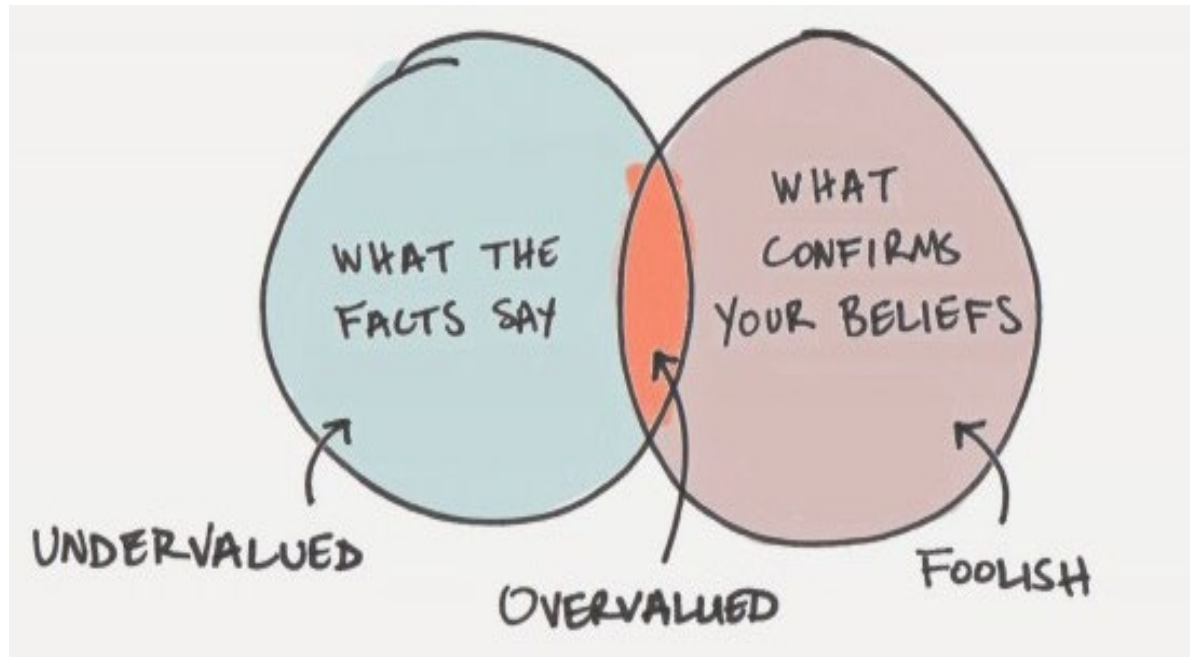
- What is it?
 - Attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner
- Who has it?
 - Implicit biases are pervasive. Everyone possess them
 - The implicit associations a person has do not necessarily align with their declared beliefs or even reflect stances they would explicitly endorse
 - A person generally tends to hold implicit biases that favor their own “in” group (although research shows that people can hold biases against their own “in” group too)

Kirwan Institute for the Study of Race and Ethnicity

Implicit Bias, continued

- What can we do to counteract it?
 - Implicit biases are malleable and can be unlearned
 - Be conscious of the reality of implicit bias
 - Be aware of our own implicit bias
 - Educate yourself – Consider taking the Implicit Association Test (IAT) at implicit.harvard.edu
 - Check ourselves in our work – Be accountable
 - When confronted with bias, take the time to examine your action or beliefs. Think of how you would explicitly justify them to other people.

Confirmation Bias



--JamesClear.com

Sexual Violence Case Specific Biases

- The subject matter of these cases is often personal and very intimate
- Most of us hold our own conscious beliefs and practices when it comes to this content area and it is important not to intentionally or unintentionally cast your lens on the matters you investigate
 - Your own sexual experiences
 - Moral or religious views about sex
 - Comfort level in using terms – subject matter

Alcohol and Drug Use Biases

- You may have your own views on and experiences with:
 - Alcohol use
 - Drug use
- These things may have impacted your life

Final Report Structure

- Disclosure Notice
- Investigation report cover page
 - Date, Report for, Report by, Nature of investigation, Complainant(s), Respondent(s)
- Table of Contents (If lengthy report or many exhibits)
- Rationale or basis for investigation
- Methodology for the investigation
- Summary of complainant(s) allegation(s)
- Summary of witness statement(s)
- Summary of respondent(s) statement(s)
- Assessments of credibility
- Findings of fact
- Investigative analysis
- Conclusion



Discipline

- Prompt
- Equitable
- Stop (as well as prevent and remedy – might be more global and less-case specific pieces for the college or university to consider)



Labor Relations

Implementing the 1B.1 Decision

Jim Jorstad

MINNESOTA STATE

Decision-maker's Responsibilities

- Reviews investigative report
- Decides if misconduct occurred
- Determines appropriate action
- Implements appropriate action
- Participates in appeal and/or grievance process

Who Makes the Disciplinary Decision?

- Someone who:
 - Has the authority (direct or delegated)
 - Accepts the responsibility
 - Will be able to testify and is a good witness
 - Lacks bias or ill-will

Analyzing the Report: First Review

- Read the allegations or complaint to see what the report should cover
- Review the elements of the offense
- Read the report thoroughly to identify gaps or unanswered questions
- Do the facts in the report completely address each element of the offense? (If not, send it back)

Analyzing the Report: Reasons to Pause

- Is there anything missing? E.g., relevant information (If yes, send it back)
- Are there inappropriate conclusions in the report (If yes, send it back)
- Was the subject offered a union representative?

Analyzing the Report: Right to Respond

- Did the investigator give the subject an opportunity to respond to each specific charge?

The right of an employee to tell their "side of the story" is central to the concept of industrial due process in the workplace. Without such information, it is nearly impossible for those assigned the task to make a well-reasoned judgment concerning the most appropriate action to be taken. Such an exercise in common sense allows for a fair determination of whether of the charges being leveled against the employee are accurate and support the proposed action.

IFO and Minnesota State, Arb. Fogelberg (1/15/18)

Analyzing the Report: Closer Look

- Scrutinize the disruptive conduct
- What was the cause of the behavior?
- Was the behavior unknowingly disruptive?
- Were there factors beyond the employee's control that contributed to the behavior?
- Does the employee have the skills and training to refrain from the behavior?
- Is the employee willing and likely to change?
- What objective steps need to happen to help the employee change the behavior?

Analyzing the Investigation Report

- Are the witnesses, complainant, and the accused credible? Is there corroborating evidence for their accounts?
- How did they react or behave after the incident?
- Did they talk to others or write about the conduct soon after it occurred?
- Has the accused been found to have engaged in similar behavior?

Reviewing the Investigative Report

- Determine if additional steps should be taken before making a decision
- Additional investigative measures
- Request additional information, e.g., written response from complainant and/or respondent
- Meeting complainant, respondent or other involved individuals

Meeting Complainant, Respondent or Others

- Data Practices Act Notice
 - Non-Bargaining Unit Employee Representation Rights
- May be accompanied by a support person
- Bargaining Unit Employee Representation (aka Weingarten Rights)
 - per Collective Bargaining Agreement (CBA)

Meeting Complainant, Respondent or Others, continued

- Weingarten Rights
- Is the bargaining unit employee being questioned in connection with an investigation which could lead to discipline of that employee?
- If so, the employee has a right to union representation
- Check CBA representation rights provisions

Deciding if Misconduct Occurred

- Did the discrimination or harassment occur in violation of Policy 1B.1?
- Did other misconduct occur?

Deciding if Misconduct Occurred: Proof

Burden of Proof

- 99% beyond a reasonable doubt (criminal court matters)
- 75% clear and convincing evidence (civil court matters)
- 51% preponderance of evidence; e.g., more likely than not (most public institutions)
- <51% good faith in investigation/reasonable conclusion (most private employers)

- *Check the relevant CBA

Deciding if Misconduct Occurred: Totality of Facts

- Gather all information and highlight the important points
- What do the important points show or prove?
 - If not relevant, put it aside.
 - If relevant, is it credible?

Determining Appropriate Action

- Take corrective action for 1B.1 violations
- Refer non-1B.1 work problems or student misconduct to appropriate resource
- Complainant's preference is informative but not controlling

Determining Appropriate Action: Framework

- Action must be sufficient to:
 - Ensure harassment/discrimination will stop and not recur
 - Send clear messages that policy is meaningful and applies to everyone
- Factors
 - Severity of conduct
 - Degree of harm to complainant and others
 - Has the conduct potentially created a class of complainants?
 - Does offender have a history of alleged behavior?

Determining Appropriate Action: Considerations

- Progressive (or corrective) discipline is designed to correct an employee's behavior so that the misconduct does not occur or is not repeated
- For egregious acts of misconduct, progressive discipline need not be strictly followed
- Review CBA disciplinary provisions

Determining Appropriate Action: Elements

- Just Cause
- Did the employee know and understand there would be consequences for violating the rule or standard?
- Was the violated rule or standard reasonable?
- Was the pre-disciplinary investigation fair and objective?
- Did the investigation result in sufficient proof of violation of the rule or standard?
- Was employee treated consistently with similarly situated employees?
- Was the penalty appropriate for the offense?

Determining Appropriate Action: Additional Considerations

- Penalty Assessment Form
- Aggravating Circumstances
- Mitigating Circumstances

Risk Assessment Prior to Taking Disciplinary Action

- Has the employee engaged in protected or concerted activity?
- Is the employee on (or recently taken) a job protected leave?
- Did any aspect of the subject's identity appear to influence investigative/disciplinary outcomes?
- Has the decision maker made inappropriate statements about the employee?
- Is the employee alleging illegal conduct?

Determine Appropriate Action **Employee**

- Non-disciplinary options
- Informal process (supervisory coaching, training, letter of expectation, alternative dispute resolution)
- Reassignment?

- Types of progressive discipline*
- Oral reprimand
- Written reprimand
- Suspension (with or without pay)
- Vacation reduction per CBA (e.g., MAPE, MMA, MSUAASF)
- Demotion
- Discharge
- *Check the relevant CBA

Determine Appropriate Action Student Conduct Sanctions

- All possible conduct code sanctions available (Dean of Students can be a resource). For example:
 - Warning
 - Probation
 - Loss of privileges (e.g., removal from residence life; restriction from campus for other than class, etc.)
 - Required training
 - No contact
 - Suspension
 - Expulsion
- More than one sanction available in any scenario (e.g., probation and required training)

Implement Appropriate Action

- Components of Disciplinary Letter
- Level of discipline
- Reason(s) for discipline
- Past warnings and/or discipline the employee has received
- Opportunity for Loudermill meeting, when appropriate

Implement Appropriate Action, continued

- Components of Disciplinary Letter – cont'd
- Corrective action required of employee
- Referral to EAP, if your practice
- Consequences of failure to measurably improve
- Employee's appeal rights

Implement Appropriate Action, internal steps

- Distribution of disciplinary letter
- Employee
- Personnel file
- Union? Check CBA
- Service of disciplinary letter in person or via mail
- Check CBA if certified mail required
- Move It Securely with the delivery receipt box checked

Implement Appropriate Action: Next Steps

- Follow up to Discipline (by supervisor)
- Work with employee to correct deficiencies
- Give employee a written plan of correction? It should be specific and include a timetable for improvement.
- Monitor employee's progress
- Document changes or continued problems
- Follow up with EAP referral, if your practice

Available Appeal Processes

- Procedure 1B.1.1 Part 7 Subpart C
 - and/or
- Collective Bargaining Agreement
 - and/or
- Veteran's Preference Hearing (classified discharge and demotion only)



Office Of General Counsel

Decision-Making in Student Respondent Cases

Kevin Finnerty
Assistant General Counsel

Duty

- If a school knows or reasonably should know about student-on-student discrimination or harassment that creates a hostile environment, the school must take action to eliminate the discrimination or harassment, prevent its recurrence, and address its effects.

Board Policy 1B.1 and System Procedure 1B.1.1

- One system-wide Policy and Procedure.
 - Students and employees.
- Investigator/Decision-Maker Model.
 - Investigator.
 - Decision-Maker.
 - Appeal.
 - Ch. 14 or CBA.



Thoughts for Decision-Makers

- Analytical Order.
 1. Policy Violation.
 2. If yes to 1, then sanction.
- Look for corroborating information.
- Articulate a succinct statement of the facts supporting the decision and the rationale for the sanction.

Sanctions

- Remember Basic Duty.
 - Eliminate discrimination/harassment, prevent its recurrence, and address its effects.
- All possible conduct code sanctions available (Dean of Students can be a resource).
- Factors
 - Seriousness of Behavior.
 - Previous Disciplinary History.
 - On-going threat?
 - Remorse.
 - Similarity to past discipline.
 - Other factors?

Examples of Typical Student Conduct Sanctions (see your conduct policy; Dean of Students)

- Warning.
- Probation.
- Loss of Privileges (for example, removal from residence life; restriction from campus other than for class).
- Required training.
- No contact.
- Suspension.
- Expulsion.

More than one sanction available if any scenario (for example, probation and required training).

Decision Letters

- Process map at your campus.
 - Each letter sets up the next letter (i.e., decision letter sets up internal appeal; appeal decision sets up Ch. 14 if applicable).
- Some rationale for:
 - Finding on policy violation.
 - Sanction.
- No retaliation; appeal.
- Refer to services available to parties?

Board Policy 1B.3 and System Procedure 1B.3.1

- One system-wide Policy and Procedure.
 - Students and employees.
- Previously the same as 1B.1.1 but now modified because of new Title IX regulations.
- Modified Investigator/Decision-Maker Model.
 - Investigator.
 - Ch. 14 Hearing and then report and recommendation to Decision-Maker.
 - Decision-Maker.
 - Appeal or CBA.

1B.3.1 Decision-Maker Responsibilities

- See System Procedure 1B.3.1, Part 7, Subpart D, 3.
- Receive and review ALJ report and recommendation.
- Consult with assigned AAG or OCR representative.
- Issue written determination with 6 required elements.
 - Identify allegations potentially violating the policy.
 - Description of procedural steps.
 - Findings of fact.
 - Conclusions regarding application of the policy to the facts.
 - Results as to each allegation (responsible; not responsible, and sanctions if responsible).
 - Procedures and bases for appeal.
- KEY – Written determination may satisfy these elements by **ADOPTING** the report and recommendation.

Final Thoughts

- Think about how your campus can support decision-makers especially on sanctions.
- Student complainants with a complaint that involves a grade or academic issue (typically this is a 1B.1).
 - Coordinate with grade appeal or other academic process.
- OGC Assistance.
 - Student Respondent – Scott Goings.
 - Employee Respondent – Kevin Finnerty.

Contact Information
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