

Hearing Panel- Part II

The Hearing-Role of the Chair

Oversee proceedings

Ensure university procedures are substantively and materially followed

Schedule breaks

Address each witness, thank them for participating, and ask them to share information

Ensure Hearing Panel/Decision Makers and the parties are able to ask all relevant and appropriate questions

If appropriate, facilitate questioning between the parties

The Hearing-Role of the Chair

Determine the relevance and appropriateness of each question or information

When necessary, provide directives to the Hearing Panel/Decision Makers to disregard a question or disregard information deemed unfair, inappropriate or prejudicial

Manage Advisors (if necessary)

The Hearing- Beginning the Hearing

Recording is started

Welcome and introductions (scripted)

Allegations and each alleged policy violation is read, and the Respondent agrees or disagrees with each allegation

On the record, indicate that each Decision-Maker has reviewed the investigation report and all relevant evidence provided by the investigator

Panel of Advisors

Expectation of honesty for all parties and witnesses

Hearing Chair will clarify any additional procedural questions

Hearing Testimony – Outline

Decision-Maker may allow Complainant and Respondent to provide a brief opening statement

Investigator summarizes their investigation report

- Review of the report and evidence provided
- Questions from Decision-Maker
- Question from parties Advisors

Complainant provides information

- Questions from the Decision-Maker
- Questions from Respondent either through Decision-Maker or directly from Advisor.

Hearing Testimony- Outline, cont.

Respondent provides information

- Questions from the Decision Maker
- Questions from Complainant, either through Decision-Maker or Complainant's Advisor

Witnesses provide information

- Questions from the Decision Maker, questions from Complainant
- Questions from the Respondent through Advisor
- Questions from Complainant, either through Decision-Maker or Complainant's Advisor

Hearing Panel/Decision Maker Questioning

Goals of Questioning – Before you ask the question – Think:

- What do I want to know?
 - Establish the facts
 - Establish the timeline
 - Understand the Complainant/Respondent/Witnesses perception of what occurred
 - Establish “was what happened – more likely than not?”
- Do I already know the answer? Is it in the investigation report?
- Why do I want to know this?
 - Curiosity – **Not a reason to ask a question**
 - Confirmation bias – I don’t want to find the Respondent responsible, so you are looking for information in the investigation to show they are not responsible

Hearing Panel/Decision Maker Questioning

Goals of Questioning – Before you ask the question – Think:

- What is the best way of asking the question?
- Am I the best person to ask the question?

Hearing Panel/Decision Maker Questioning

TIPS:

Avoid evaluative responses to a party/witness answer

- E.g. “That’s too bad”, “I’m glad you said that” or “Interesting”

Don’t ask “Why?” E.g. “Why didn’t you say ‘no’?” “Why did you drink so much?”

Seek to clarify terms that have different meanings in different contexts. E.g. “hooked-up”, “sex”, “messed around”, “got drunk”.

Know your comfort level with the subject matter and language used

Hearing Panel/Decision Maker Questioning

How to handle difficult situations:

Frame questions in a neutral manner

Handle emotions with sensitivity –

- What do you do when a party starts to cry?

Ask, “Please tell us, who, what when how...”

- Avoid “Yes or No” questions

Be prepared for the attorney advisor who says, “This hearing is a kangaroo court.”

Hearing Panel/Decision Maker Questioning

Anticipate the Difficult Witness

Reasons for resistance? (Nerves, fear, pressure to appear?)

Try to address their resistance or hesitation directly

Hearing Panel/Decision Maker Questioning

The Untruthful “Lying” Witness

Explain why their statement “does not make sense”

Allow the witness to restate their response

Address their motivation for lying

If they continue to lie...explain the university response

Leave the opportunity for them to “cure”

Hearing Panel/Decision Maker Questioning

Miscellaneous

Determine who should ask questions of which party or witness

- Don't want to "gang up" on anyone

Live Hearings

At the live hearing, the Decision-Maker must permit each party's Advisor to ask the other party and any witnesses all relevant questions and follow up questions, including those challenging credibility.

- **ONLY RELEVANT** cross-examination and other questions may be asked of a party or witness.
- Before a Complainant, Respondent or witness answers a cross-examination or any other question, the Decision-Maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

Advisor Required at Hearing

If a party does not have an Advisor present at the live hearing, the university must provide (without fee or charge) an Advisor of the university's choice. The Advisor may, but is not required to be, an attorney. The Advisor is responsible for conducting cross examination of behalf of that party.

- The Advisor may conduct thorough cross-examination
- The Advisor **must** be given the *opportunity* to conduct cross-examination

The Chair may not ask the Advisor to answer questions on behalf of the party.

What if the party refuses to cooperate with their Advisor?

Live Hearing Questioning and Cross Examination

If a party does not submit to cross-examination at the live hearing, the Decision-Maker **must not** rely on any statement of that party or witness in reaching a determination regarding responsibility.

- The Decision-Maker cannot draw an inference about the determination regarding responsibility based **solely** on a party or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- Cross examination questioning during a live hearing **must always** be conducted in real time, orally, and by the party's Advisor. A party **never** engages in cross examination.

What if?

What if the Respondent is a no-show for the hearing?

What if you have a procedural question?

When Questions are Excluded – Determined Not Relevant

The Decision-Maker must explain to the Advisor proposing the question(s) the reasoning why the question lacks relevance and therefore is excluded.

The regulations have prescriptive questioning process:

- The Advisor poses the question to the Decision-Maker.
- The process “pauses” while the Decision-Maker considers the relevance of each question;
- The Decision-Maker decides whether to permit the question.
- If the Decision-Maker excludes the question, they must provide their reasoning.

When Questions are Excluded – Determined Not Relevant

Abusive and unduly repetitious questions are **never** relevant

The Decision-Maker may offer the Advisor posing the question an opportunity to re-frame or re-phrase the question

The Decision-Maker may offer the Advisor posing the question an opportunity to explain the question's relevance

If the Decision-Maker allows one party's Advisor to re-frame or explain a questions' relevance, they must offer the same opportunity to the other party's Advisor

Most questions will be pre-determined relevant or irrelevant during pre-hearing conference

Prior Sexual History - Complainant

Questions and evidence about the Complainant's prior sexual behavior or sexual predisposition **are not relevant**.

Unless the questions and evidence about the Complainant's prior sexual behavior or sexual predisposition are offered to prove:

- Someone other than the Respondent committed the conduct alleged by the Complainant; or
- If the questions and evidence are related to specific incidents of the Complainant's prior sexual behavior with the Respondent and are offered to prove consent.

ALSO The Complainant's supportive measures are not an indication of a policy violation and are not evidence.

Prior Sexual History - Respondent

Evidence as to the Respondent's prior sexual behavior or sexual predisposition **are relevant**. Goes to pattern.

Consent: Force, Incapacity, Consent

Consent is informed, knowing and voluntary; Active; Affirmative through words or actions; Creates a mutually understandable permission regarding the conditions of sexual activity.

Consent cannot be obtained:

By use of force

Threats

Intimidation

Coercion

Incapacitation either physically or mentally

Three Consent Questions

- 1. Did the Respondent use force to obtain sexual or intimate access?
- 2. Was the Complainant incapacitated?
 - Did the Respondent know the Complainant was incapacitated? OR
 - Should the Respondent know the Complainant was incapacitated?
 - **DEFENSE to Policy Violation**
- 3. What *clear* words or actions did the Complainant give to the Respondent indicating permission for each specific or intimate act that took place as it took place?

Consent

NOTE:

- Proof of consent or non- consent and the burden of collecting evidence sufficient to reach a determination regarding responsibility, rests on the University, not the parties.
- The burden remains on the University to determine whether its policy has been violated. The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

Consent

- Consent in relationships must be considered in context. When parties consent to BDSM (Bondage, discipline/dominance, submission/sadism, and masochism) or other forms of kink, non-consent may be shown by the use of a safe word. Resistance, force, violence, or even saying “no” may be part of the kink and thus consensual, so the University’s evaluation of communication in kink situations should be guided by reasonableness, rather than strict adherence to policy that assumes non-kink relationships as a default.

WSU Policy 3.06 addresses kink

Force

Consent cannot be obtained using force

1. Was force used?

2. Types of Force:

- Physical violence
- Threats (threat against reputation, anything that gets the Complainant to do something they would ordinarily do absent the threat)
- Intimidation – implied threat that menaces and/or causes reasonable fear

Coercion

Coercion: The unreasonable pressure for sexual activity. When the complainant makes it clear they do not want the sexual contact, they want to stop, or they do not want to go past a certain point of sexual activity, verbal or physical pressure beyond that point can be coercive.

Consider:

- Frequency
- Intensity
- Duration
- Isolation

Incapacitation

The state where the Complainant cannot consent because they are unable to understand what is happening or is disoriented, helpless, asleep, or unconscious, for any reason, including by alcohol or other drugs.

Incapacitation occurs when someone cannot make rational, reasonable decisions (the inability to understand the “who, what, when, where, why or how” of their sexual interaction)

Incapacity Analysis

- If the Complainant **was not** incapacitated, move on to the Consent Analysis
- If the Complainant **was** incapacitated, BUT:
 - The Respondent did not know, **AND**
 - The Respondent would not have reasonably known = Policy Not Violated.
Move to Consent Analysis
- If the Complainant **was** incapacitated, **AND**
 - The Respondent knew or caused it = Policy Violation and Sanction Accordingly
 - The Respondent should have known = Policy Violation and Sanction Accordingly

The Hearing - Conclusion

Both parties may provide a closing statement. Complainant typically goes first.

The Panel will be handed an envelope (with the Respondent's prior conduct violations – or not). This will keep the process clean.

The hearing will be adjourned. The Decision-Makers will deliberate immediately following the hearing or will schedule a time for deliberations within 24 hours of the hearing.

Deliberations

Not Recorded

Determine what conduct needs to be decided

- The Chair should get a sense as to where the panel members stand on each allegation

Decisions *must* be made based upon the specific policy(ies) alleged to have been violated

Deliberate **ONLY** on the evidence that is relevant to the issue and the applicable policy

Panel speaks with one voice. This isn't the Supreme Court with concurring and dissenting opinions

Deliberations

Separate the finding from the sanction

- Don't look for a lesser offense so you don't have to expel a student

The Complainant should be permitted to deliver an impact statement only if and after there is a finding of responsibility

Whether the Respondent violated policy is distinct from factors that aggravate or mitigate the severity of the violation

Evaluating Evidence

Relevant Evidence: Evidence is relevant if it has the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

Evaluating Evidence

Credibility

- Largely a function of consistency and corroboration
 - Quality of the evidence and how probative is it?
- Credible ≠ Truthful
- Memory errors do not necessarily damage credibility, nor does some evasion or misleading testimony
- Do Not focus on *irrelevant* inaccuracies and inconsistencies

Evaluating Evidence

Credibility – What to Consider

Corroborating evidence

Evidentiary consistency (logic)

- “Does this make sense?”

- Check your individual biases about what you believe is or is not logical

Inherent Plausibility

- Is the evidence more likely than the alternative?

Evaluating Evidence

Credibility

Non-Cooperation

- Did the party/witness refuse to answer or provide short/abrupt answers?

Demeanor (Use Caution)

Consistency with other credible evidence

- Amount of detail provided (facts). Factual detail should be assessed against general allegations, accusations, denials, excuses that have no supporting detail.
- There may be some information to be gained from non-verbal behavior
- The higher level of detail goes to a higher level of credibility

Analyzing the Evidence

Begin with the most serious violation and consider only evidence related to that violation

Consider motivation, attitude and behavior of the Complainant, Respondent and witnesses

Apply the relevant standards

- Force
- Incapacitation
- Consent
- Unwelcomeness, reasonable person standard, and discriminatory effect

Analyzing the Evidence

First, consider and analyze the broadest, most serious violation
Make a determination as to each and every violation alleged
Break the violation down into each of its elements.

When analyzing the information ask:

- Is the question answered with facts?
- Is the question answered with opinions?
- Is the question answered with circumstantial evidence?

Analyzing the Evidence

Wring the rag” Meaning – is there something missing?
What else is there?



Making a Determination

Review the applicable University Policy(ies)

Must be specific finding for each policy and each Respondent (if more than one)

Review the evidence and its relevance

Assess the credibility of the evidence

- Facts
- Opinion
- Circumstantial

Determine whether it is more likely than not a policy violation occurred

Articulate the reasons for your conclusions

Determination of Responsibility

There are two parts:

- **Deliberation:** The Decision-Makers speak with one voice. Their deliberations are not recorded.
 - The Decision-Maker(s) cannot be the same person who investigated the matter, either the Title IX Coordinator or investigator.
 - The Title IX Coordinator may investigate or serve as a hearing facilitator, but not both.
- **Determination** of responsibility (or not) is issued in a written document applying the preponderance of the evidence standard.
- The written determination must be sent/provided to the parties simultaneously.

Written Determinations

The written determination **must** include:

- Identification of the allegations potentially constituting sexual harassment as defined in WSU's policy and Regulations §106.30
- A description of the procedural steps followed from the receipt of the formal complaint through the determination. This includes all notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Findings of fact supporting the determination - Rationale
- Conclusions regarding the application of WSU's policy to the facts

Written Determinations Continued

A statement of and **rationale** for the finding as to each allegation, including:

- Any disciplinary sanctions imposed on the Respondent
- If remedies to the Complainant are issued, whether the remedies are designed to restore or preserve equal access to the recipient's education program or activity.

Bias & Prejudice

Bias is a tendency, inclination, or prejudice toward or against something or someone that usually results in treating some people unfairly.

Prejudice is a preconceived opinion that is not based on reason or actual experience.

Bias & Prejudice

Are we able to be truly “neutral” or “unbiased”?

If not, what can we do to neutralize our biases?

Bias & Prejudice

What are areas of concern?

Sanctioning Under WSU Policy 3.06

Sanctions for violations of sexual harassment and discrimination including sexual assault, dating violence, domestic violence and stalking are not educational or developmental.

The sanctions in these cases are intended to protect the Complainant and the university community.

- Stop – bring an end to the discriminatory conduct
- Prevent – take steps to prevent the future occurrence of the discriminatory conduct
- Remedy – restore the Complainant to their pre-experience status

Sanctioning Under WSU Policy 3.06

Student Sanctions:

- Disciplinary Warning
- Disciplinary Probation
- Suspension
- Expulsion
- Dismissal
- Withholding Transcript or Degree
- Revocation of Admission and/or Degree
- Loss of University Privileges
- No Contact Order/Campus or Building Ban

Sanctioning Under WSU Policy 3.06

Employee Sanctions

- Corrective Actions
- Suspension
- Separation
- Job Reassignment
- Loss of University Privileges
- No Contact Order
- No Trespass Order

WWYD – What Would You Do?

Student A is found responsible for sexually assaulting Student B at a fraternity party. The hearing panel determined Student B was incapacitated, and Student A knew of the incapacity because they provided Student B with significant amounts of alcohol over a three-hour time period.

- The hearing panel found part of the problem was that Student B was sexually inexperienced and had never been drunk before
- Student A is an excellent student, past Student Government President and interns for the University’s president
- Student B told the investigator they “like being popular” and don’t want anything bad to happen to Student A

WWYD – What Would You Do?

The Hearing Panel determined that six members of the men’s lacrosse team (Students A, B, C, D, E and F) engaged in hazing the newest members of the team to a hazing ritual that included “manscaping” the newest members’ genitals while recording and then posting the event to the team’s private Instagram account.

- Students A, B, C, and D engaged in the “manscaping”
- Student E recorded the hazing and posted the video on the team’s private Instagram account
- Student F was in the room while the hazing ritual was occurring. He didn’t participate in the hazing ritual.

Appeals

Either party may submit a Request for Appeal – in writing to the TIXC within 5 days after the delivery of the Notice of Outcome.

TIXC designates a single Appeal Chair.

Appeal Chair determines if the Request for Appeal meets the grounds for appeal. “Standing”

Not a review of the merits of the appeal, but whether the request is timely.

Grounds for Appeals

Appeals are limited to the following grounds:

- Procedural irregularity
 - New evidence
 - TIXC, investigator, Decision-makers had a conflict of interest and specify how the conflict affected the outcome
- If any of the grounds in the Request for Appeal are not met, the request will be denied by the Appeal Chair and the parties and their Advisors will be notified in writing.

Sanctions are stayed during the appeal process.

THE END

QUESTIONS?