

## PROCEDURE

Effective Date: August 14, 2020

Approved By: Executive Director, CRTC

Authority: [POL-U1600.04](#)

### **PRO-U1600.04B SUPPLEMENTAL TITLE IX EMPLOYEE DISCIPLINARY HEARING PROCEDURE**

*This employee discipline procedure applies to allegations of sexual harassment, subject to Title IX jurisdiction pursuant to regulations promulgated by the United States Department of Education. See 34 C.F.R. § 106 and University policy on Preventing and Responding to Sexual harassment, POL-U1600.04*

#### **Preamble:**

Disciplinary proceedings against an employee respondent alleged to have engaged in sexual harassment in violation of Title IX shall be governed by Western Washington University's (University) administrative hearing practices and procedures, Chapter WAC 516-108, and this supplemental hearing procedure. To the extent the supplemental hearing procedure conflicts with WAC 516-108, and/or provisions set forth in employment contracts, collective bargaining agreements, employee handbooks, and other University employment policies and procedures, this supplemental hearing procedure will take precedence

#### **1. Title IX Jurisdiction**

- A) This supplemental procedure applies only if the alleged misconduct:
1. Occurred in the United States;
  2. Occurred during a University educational program or activity; and
  3. Meets the definition of Sexual Harassment as that term as defined in [POL-U1600.04](#)
- B) For purposes of this supplemental procedure, an "educational program or activity" is defined as locations, events, or circumstances over which the University exercised substantial control over both the Respondent and the context in which the alleged Sexual Harassment occurred. This definition includes any building owned or controlled by a student organization that is officially recognized by the University.
- C) Proceedings under this supplemental procedure must be dismissed if the Decision Maker determines that one or more of this Section A (1)-(3) have not been met. Dismissal under this supplemental procedure does not prohibit the University from pursuing disciplinary action against a Respondent based on allegations that the Respondent engaged in misconduct prohibited by other federal or state law(s), collective bargaining agreements, employment contracts or handbooks, or other provisions of University policy.

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- D) If the Title IX Coordinator determines the facts in the investigation report are not sufficient to support Title IX jurisdiction and/or pursuit of a Title IX violation, the Title IX Coordinator will issue a notice of dismissal in whole or part to both parties explaining why some or all of the Title IX claims have been dismissed.

### **2. Initiation of Discipline**

- A) Upon receiving the Title IX investigation report from the Title IX Coordinator, the Employee Disciplinary Officer will independently review the report to determine whether there are sufficient grounds to pursue a disciplinary action against the Respondent for engaging in prohibited conduct under Title IX.
- B) If the Employee Disciplinary Officer determines that there are sufficient grounds to proceed under these supplemental procedures, the Employee Disciplinary Officer will initiate a Title IX disciplinary proceeding by filing a written disciplinary notice with the Decision Maker and by serving the notice on the Respondent and the Complainant, and their respective advisors. The notice must:
1. Set forth the basis for Title IX jurisdiction;
  2. Identify the alleged Title IX violation(s);
  3. Set forth the facts underlying the allegation(s);
  4. Identify the range of possible sanctions that may be imposed if the Respondent is found responsible for the alleged violation(s);
  5. Explain that each Party is entitled to be accompanied by an Advisor of their own choosing during the hearing and that:
    - a. Advisors will be responsible for questioning all witnesses on the Party's behalf;
    - b. An Advisor may be an attorney and/or, if the Party is a represented employee, a union representative;
    - c. A represented employee who chooses an Advisor who is not a union representative must submit a signed waiver of union representation that includes consent from the union; and
    - d. The University will appoint the Party an Advisor of the University's choosing at no cost to the Party, if the Party fails to choose an Advisor; and
  6. Explain that if a Party fails to appear at the hearing, a decision of responsibility may be made in the Party's absence.

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- C. Service of the disciplinary notice or any other document required to be served under this supplemental procedure may be done personally or by first class, registered, or certified mail, obey electronic mail to the Party's university email address.

### **3) Pre-Hearing Procedure**

- A. Upon receiving the disciplinary notice, the Decision Maker will send a hearing notice to all parties in compliance with WAC 10-08-040. In no event will the hearing date be set less than ten (10) days after the Title IX Coordinator provided the Final Investigation Report to the Employee Disciplinary Officer.
- B. A Party is entitled to be accompanied by an Advisor of their choice during the disciplinary process at the party's own expense.
1. If the Advisor is an attorney, the Advisor must file a notice of appearance with the Decision Maker with copies to all parties and the Employee Disciplinary Officer at least five (5) days before the hearing. If a notice of appearance is not filed within this timeframe, the Party will be deemed to have waived their right to have an attorney as an Advisor.
  2. If a Party is a represented employee who chooses not to use a union-provided Advisor, the Party must provide the Decision Maker with a signed waiver of union representation, including written consent from the union.
- C) In preparation for the hearing, the Parties will have equal access to all evidence gathered by the investigator during the investigation, regardless of whether the University intends to offer the evidence at the hearing.

### **4) Rights of Parties**

- A. The provisions of this supplemental procedure shall apply equally to both parties.
- B. The University bears the burden of offering and presenting sufficient testimony and evidence to establish that the Respondent is responsible for a Title IX violation by a preponderance of the evidence.
- C. The Respondent will be presumed not responsible until such time as the disciplinary process has been finally resolved.
- D. During the hearing, each Party shall be represented by an Advisor. The Parties are entitled to an Advisor of their own choosing and the Advisor may be an attorney or, if the Respondent holds a represented position, a union representative. If a party does not choose an Advisor, then the University will appoint an Advisor of the University's choosing on the Party's behalf at no expense to the Party.

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### 5) **Evidence**

The introduction and consideration of evidence during the hearing is subject to the following procedures and restrictions:

- A. **Relevance:** The Decision Maker shall review all questions for relevance and shall explain on the record their reasons for excluding any question based on lack of relevance.
- B. **Relevance means that information elicited by the question makes a fact is dispute more or less likely to be true.**
- C. **Questions or evidence about a Complainant's sexual predisposition or prior sexual behavior are not relevant and must be excluded, unless such question or evidence:**
  - 1. Is asked or offered to prove someone other than the Respondent committed the alleged misconduct; or
  - 2. Concerns specific incidents of prior sexual behavior between the Complainant and the Respondent, which are asked or offered on the issue of consent.
- D. **Cross-examination required:** If a Party or witness does not submit to cross-examination during the live hearing, the Decision Maker must not rely on any statement by that Party or witness in reaching a determination of responsibility.
- E. **No negative inference:** The Decision Maker may not make an inference regarding responsibility solely on a witness's or party's absence from the hearing or refusal to answer questions.
- F. **Privileged evidence:** The Decision Maker shall not consider legally privileged information unless the holder has effectively waived the privilege. Privileged information includes, but is not limited to, information protected by the following:
  - 1. Spousal/domestic partner privilege;
  - 2. Attorney-Client and attorney work product privileges;
  - 3. Privileges applicable to members of the clergy and priests;
  - 4. Privileges applicable to medical providers, mental health therapists, and counsellors;
  - 5. Privileges applicable to sexual assault and domestic violence advocates; and
  - 6. Other legal privileges identified in RCW 5.60.060.

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### 6). Initial Order

A. The Decision Maker will be responsible for drafting an Initial Order that:

1. Identifies the allegations of sexual harassment;
2. Describes the grievance and disciplinary procedures, starting with filing of the formal complaint through the determination of responsibility, including notices to parties, interview with witnesses and parties, site visits, methods used to gather evidence, and hearings held;
3. Makes findings of fact supporting the determination of responsibility;
4. Reaches conclusions as to whether the facts establish whether the Respondent is responsible for engaging in Sexual Harassment in violation of Title IX;
5. Contains a statement of, and rationale for, the Committee's determination of responsibility for each allegation;
6. Describes any disciplinary sanction or conditions imposed against the Respondent, if any;
7. Describes to what extent, if any, Complainant is entitled to remedies designed to restore or preserve Complainant's equal access to the University's education programs or activities; and
8. Describes the process for appealing the Initial Order.

B. The Decision Maker will serve the Initial Order on the Parties simultaneously.

### 7. Appeals

- A. The Parties have the right to appeal from the determination of responsibility and/or from a Title IX dismissal, in whole or part, of a formal complaint, as set forth in the Initial Order. To the extent they are consistent with the provisions of this Procedure, the right to appeal is subject to the same procedures and timeframes set forth in WAC 516-108-010.
- B. The President or the President's designee will determine whether the grounds for appeal have merit, provide the rationale for this conclusion, and state whether the disciplinary sanctions and conditions imposed in the Initial Order are affirmed, vacated, or amended, and, if amended, set forth the new disciplinary sanctions and conditions.
- C. The President's Office or their delegate shall serve the Final Decision on the parties simultaneously.

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- D. All decisions reached through this process are final. No decisions or recommendations arising from this disciplinary procedure will be subject to grievance pursuant to any Collective Bargaining Agreement.