



THE UNIVERSITY OF  
NEW MEXICO

# HEARING PROCEDURE FOR OEO INVESTIGATIONS

AUGUST 14, 2020

## INTERIM MODEL HEARING PROCEDURE FOR ADJUDICATION OF OEO INVESTIGATIONS

### ARTICLE 1. INTRODUCTION

1.1 General. This document provides a standard operating procedure for formal hearings arising from investigations performed by the University of New Mexico Office of Equal Opportunity (OEO). This procedure may be incorporated in another procedure by reference, either as is or with appropriate modifications consistent with the other procedure. This procedure may also be used on an ad hoc basis to handle individual situations where a University official authorized to make policy decisions for the University determines that a formal hearing is an appropriate means to resolve the issue in question or where policy otherwise mandates. In such a case, a University official will inform the parties in writing that this procedure will be followed and will specify any modifications to this procedure. Certain policies may require that a hearing will be held only after the involved parties have attempted to resolve the dispute informally.

#### 1.2 Definitions Common to All Hearings.

1.2.1 Complainant: the person or persons filing a formal complaint pursuant to [UAP 2720, 2740, 3110](#), and the Office of Equal Opportunity (OEO) [Discrimination Grievance Procedure \(DGP\)](#).

1.2.2 Respondent: the person responding to formal complaint filed by the Complainant, OEO, or by the UNM Title IX Coordinator.

1.2.3 Parties: the Complainant and Respondent collectively.

1.2.4 Decisionmaker: the Decisionmaker or panel appointed or constituted pursuant to policy, procedure, or by order of the Board of Regents or the President to hear the evidence presented by the parties at the hearing and to decide whether to uphold the decision being challenged.

1.2.5 Hearing Coordinator: the office or individual assigned to facilitate the hearing by providing administrative assistance to the Decisionmaker. The Hearing Coordinator has no substantive decision-making authority regarding the issues to be decided at the hearing or the outcome thereof.

1.2.6 Advisor: the designated individual for the purpose of cross-examination on behalf of a party during the live hearing. The Advisor is only permitted to cross-examine the other party and opposing witnesses. Such cross-examination must be conducted directly, orally, and in real time by the party's Advisor and never by a party personally. An Advisor may also serve as a party's Advisor throughout the entire grievance process, as agreed upon by the Advisor and the party.

1.2.7 Sanctioner: The individual responsible for deciding the appropriate sanction. Sanctioning authority is determined by the policy that has jurisdiction over the Respondent.

1.3 Calculation of Time and Time Limits. Unless otherwise specified herein, the term “days” refers to regularly recognized University business days, and does not include weekends, holidays, or other University closures. For good cause, the Decisionmaker shall extend any time limit set forth in these rules. Good cause shall include the fact that a time limit includes finals week or periods such as vacations, holidays, or intersessions if parties, the Decisionmaker, or members of a decision-making body are absent from the institution. Any time extension shall be communicated in writing to all parties along with a new written schedule.

1.4 Burden of Proof. The burden of proof is met when a preponderance of the evidence supports a finding of a policy violation. A preponderance of the evidence means that, based on the relevant, reliable evidence submitted, it is more likely than not that a policy violation occurred.

1.5 Decisionmaker Training. The Decisionmaker shall be required to complete specific training prior to the hearing. Such training will be prescribed by OEO, the Title IX Coordinator, University policy, procedure, or by order of the Board of Regents or the President. If so prescribed or ordered, the Hearing Coordinator will work with the appropriate University Department to obtain and provide the required training to the Decisionmaker prior to the hearing.

1.6 Sanctioner Training. Sanctioners shall be required to complete specific training prior to the sanctioning phase. Such training will be prescribed by OEO, the Title IX Coordinator, University policy, procedure, or by order of the Board of Regents or the President.

1.7 Provision of Remedies. To be provided to a Complainant when a Respondent is found responsible for violating a University policy(ies). Any remedy must be designed to maintain the Complainant’s equal access to the working/learning environment and may include the same individualized services described in the OEO Discrimination Grievance Procedure as supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent.

1.8 Accommodations for Disabilities. This Policy does not alter any institutional obligations under federal disability laws including the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. Parties may request reasonable accommodations for disclosed disabilities to the Hearing Coordinator at any point before or during the hearing process. The Hearing Coordinator shall work with University personnel including the Accessibility Resource Center (ARC), pursuant to University Administrative Policy 2310, or the ADA Coordinator or their designee to provide accommodation, as appropriate. Neither the ADA Coordinator nor ARC shall be required to provide the Hearing Coordinator, Decisionmaker, or other hearing participant the exact medical reason for the exception or accommodation.

1.9 Advisor Role. Each party will be accompanied to the hearing by an Advisor of their choice. If a party does not have an Advisor, UNM will provide that party with a University-appointed Advisor of the University’s choosing, free of charge. The role of the Advisor is to assist and

advise the party. During a hearing, the Advisor shall be allowed to cross-examine the other party and any witnesses, as well as ask all relevant questions and follow-up questions as permitted by the Decisionmaker, including those challenging credibility. Such cross-examination at the hearing must be conducted directly, orally, and in real time by the party's Advisor and never by the party personally. A party's Advisor may appear and conduct cross-examination even when the party whom they are advising does not appear. Where one party does not appear and that party's Advisor does appear, the Advisor must still cross-examine the other appearing party on behalf of the non-appearing party. The Decisionmaker shall consider the appearing party's statement, but not the non-appearing party's statements (without any inference drawn based on the non-appearance).

Advisors shall not be allowed to answer questions posed to the parties or witnesses by the Decisionmaker or the other party's Advisor. Parties shall be allowed to make personal opening or closing statements at the discretion of the Decisionmaker. If the Decisionmaker allows one party this option, each party will have the same option.

A party must identify their Advisor five (5) business days before the hearing by contacting the Hearing Coordinator. A party must also disclose whether their Advisor is an attorney. If a party appears at the hearing without an Advisor, the hearing must be stopped as necessary to permit the University time to assign an Advisor to that party. A party cannot decline the assigned Advisor. If a party correctly asserts that an Advisor refuses to engage in cross-examination on the party's behalf, the University will provide an Advisor who will conduct cross-examination. If a party refuses to work with an Advisor who is willing to conduct cross-examination on the party's behalf, that party has no right to self-representation.

1.10 Decorum. The hearings that arise out of OEO investigations are not civil or criminal proceedings and are not designed to mimic formal trial proceedings. As such, the University has adopted rules of decorum that prohibit any party, witness, Advisor, or Decisionmaker from questioning witnesses or parties in an abusive, intimidating, or disrespectful manner. These rules may be enforced through the removal of any participant who refuses to comply with said rules.

The rules and standards apply equally to all participants regardless of sex, gender, or other protected class, and regardless of whether they are in the role of Advisor, Complainant, Respondent, Witness, or other participant.

The following Rules of Decorum are to be observed in the hearing:

1. Questions must be conveyed in a neutral tone;
2. Parties will not answer questions until the Decisionmaker determines the relevance of the question;
3. Parties and Advisors will refer to other parties, witnesses, Advisors, and institutional staff using the name and gender used by the person and shall not intentionally misname or misgender any person in communication or questioning;
4. No party may act abusively or disrespectfully during the hearing toward any other party or to witnesses, Advisors, or the Decisionmaker, or any other individual participating in the hearing;

5. Advisors may not yell, scream, badger, or physically “lean in” to a party or witness’s personal space. Advisors may not approach the other party or witnesses without first obtaining permission from the Decisionmaker;
6. Advisors may not use profanity or make irrelevant personal attacks upon a party or witness. Questions are meant to be interrogative statements used to test knowledge or understand a fact; they may not include accusations within the text of the question;
7. Parties and Advisors may take no action at the hearing that a reasonable person would see as intended to intimidate or coerce a party, witness, Decisionmaker, or any other participant.

1.11 Warning and Removal Process. The Decisionmaker shall have sole discretion to determine if the Rules of Decorum have been violated. The Decisionmaker will notify the offending person of any violation of the Rules.

Upon a second or further violation of the Rules, the Decisionmaker shall have discretion to remove the offending person or allow them to continue participating in the hearing or other part of the process. Where the Decisionmaker removes a party’s Advisor, the party may select a different Advisor of their choice, or accept an Advisor provided by the University for the limited purpose of cross-examination at the hearing. Reasonable delays, including the temporary adjournment of the hearing, may be anticipated should an Advisor be removed. A party cannot serve as their own Advisor in this circumstance.

The Decisionmaker shall document any decision to remove an Advisor in the written determination regarding responsibility.

## **ARTICLE 2. PREHEARING MATTERS**

2.1 Notice of Hearing. Upon completion of its investigative report, OEO will submit the investigative file in its entirety to the Hearing Coordinator. Upon receipt of the file, the Hearing Coordinator will schedule the date of the hearing. The Hearing Coordinator will send the parties notice of the hearing no less than ten (10) business days before the hearing date. The notice of hearing will include the following:

- A description of the alleged violation(s), a list of all policies allegedly violated, a description of the applicable procedures, and a statement of the potential sanctions/responsive actions that could result;
- Burden of Proof Standard;
- The time, date, and location of the pre-hearing conference (described in Section 2.2);
- The time, date, and location of the hearing, and whether the hearing will be held in-person or via virtual means;
- Any technology that will be used to facilitate/record the hearing;
- Information about the option for the live hearing to occur with the parties located in separate rooms using technology that enables the Decisionmaker(s) and parties to see and hear a party or witness answering questions. Such a request must be raised with the Hearing Coordinator at least five (5) business days prior to the hearing;
- A list of all those who will attend the hearing;

- Information on how the hearing will be recorded and on access to the recording for the parties after the hearing;
- A statement that if any party or witness does not appear at the scheduled hearing, the hearing may be held in their absence, and the party's testimony and any statements given prior to the hearing will not be considered by the Decisionmaker and no inference will be drawn from the absence of a party;
- Notification that the parties may have the assistance of an Advisor at the hearing and will be required to have one present to conduct cross-examination;
- Notification that if a party does not secure an Advisor of their choice, the University will appoint one free of charge;
- A copy of all the materials provided to the Decisionmaker(s) about the matter;
- An invitation to contact the Hearing Coordinator to arrange any disability accommodations, language assistance, and/or interpretation services that may be needed at the hearing, at least five (5) business days prior to the hearing;
- Identification of which electronic devices are prohibited from being brought into the hearing.

2.2 Pre-Hearing Conference. After receipt of the information specified in Section 2.3, the Decisionmaker will meet with the parties and/or their Advisors to consider clarifying or simplifying the issues to be heard by the Decisionmaker, answering any procedural questions, limiting the number of witnesses, or considering any other matters which may aid the conduct of the hearing. The Decisionmaker will also consider the submission of new, previously undiscovered evidence submitted by the parties, as described in Section 2.3.2.

### 2.3. Preparation of Evidence.

2.3.1 All relevant evidence from the parties should have been submitted during the investigation preceding the hearing. The investigative file that is submitted to the Hearing Coordinator at the conclusion of an OEO investigation is contains the same evidence and documents that were provided to the parties during the investigation.

2.3.2 The parties may present any new, previously undiscovered evidence for use at the hearing two (2) business days prior to the pre-hearing conference, as described in Section 2.2. The Decisionmaker has sole discretion to determine whether the new evidence will be considered at the hearing. Approval of the Decisionmaker shall depend on the importance of the document, whether the party could have obtained it earlier, the time remaining until the hearing, and the degree of prejudice to the other party.

2.3.3 All members of the University community shall cooperate with the parties' reasonable requests to provide evidence and to appear at the hearing as witnesses. If a party is having difficulty getting cooperation from a potential witness or source of evidence, they may file a request for assistance with the Hearing Coordinator, who shall forward it to the Decisionmaker. If the Decisionmaker determines that the request is reasonable, it shall assist the party in gaining the necessary cooperation within the University community.

2.4 Notice Requirements for Parties. At least two (2) business days before the pre-hearing conference, each party shall provide the Hearing Coordinator with electronic copies of the following information, copies of which the Hearing Coordinator shall distribute to the other party(ies) and to the Decisionmaker:

2.4.1 A list of intended witnesses, or a statement that no witnesses will be called. If the parties present a list of intended witnesses, they shall provide a brief statement summarizing each witness' anticipated testimony. The Decisionmaker may place reasonable limitations on the number of witnesses, either before or after the list is submitted, but in no event more than two (2) business days prior to the hearing. The Decisionmaker may exclude witness testimony that is cumulative or irrelevant to the issue presented. No witnesses other than those on the list may testify without the consent of the Decisionmaker.

2.4.2 The name of any Advisor appearing with the party at the hearing and whether the Advisor is an attorney.

2.4.3 Electronic copies of any new, previously undiscovered evidence that the parties wish to be considered at the hearing. The Decisionmaker has sole discretion to determine whether the new evidence will be considered at the hearing.

### **ARTICLE 3. HEARINGS**

3.1 Evidence. The parties may testify, may present testimony of other witnesses, and/or introduce and explain documents and other evidence at the hearing. The Decisionmaker may exclude cumulative, unfair, or irrelevant evidence, but is not required to follow judicial rules of evidence.

3.2 Irrelevant Evidence. The Decisionmaker may exclude any evidence that is irrelevant, which includes but is not limited to:

- A Complainant's prior sexual history is irrelevant unless offered to prove consent with respect to Respondent, or to prove that someone other than Respondent committed the alleged conduct;
- Information protected by a legally recognized privilege cannot be used (i.e. attorney-client privilege);
- Statements not subject to cross-examination;
- Duplicative evidence;
- Parties' HIPAA-protected treatment records unless a party gives written consent.

3.3 Determination of a Question as Relevant. Before a party or witness answers a cross-examination or other question, the Decisionmaker must first determine if the question is relevant and explain any decision to exclude a question as irrelevant.

3.4 Order of Evidence. The Decisionmaker may, pursuant to Section 2.3, determine the order of evidence. The Decisionmaker may ask questions any time during the hearing.

3.5 Witnesses. The parties may present the testimony of witnesses in support of their case. The parties are responsible for ensuring that their witnesses appear to testify at a hearing. The parties and the Decisionmaker shall have the right, within reasonable limits set by the Decisionmaker, to question the parties and all witnesses who testify orally. The Decisionmaker will require all witnesses to affirm the truth of the testimony they present.

3.6 Modified examinations. Reasonable limits may include any modifications the Decisionmaker deems appropriate under the circumstances, including but not limited to allowing a party or witness to testify remotely. Requests for modifications to the method a party's or witness' testimony is elicited or presented must be included in the witness list submitted by the party seeking the modification pursuant to Section 2.2.1.

3.7 Record of Hearing. The Hearing Coordinator shall make a digital audio recording of the proceedings. The parties may request a copy of the recording. Such requests shall be made to the Hearing Coordinator. The Hearing Coordinator shall provide the party with a digital copy of the recording.

The record of the hearing shall consist of the digital recording and an electronic copy of all documents introduced as evidence. The record shall be kept by the Hearing Coordinator for five years after all appeals have been concluded or after the time for appeal has expired, whichever comes first.

3.8 Written Argument. After hearing the evidence, the parties have the option of submitting written arguments to the Decisionmaker. Parties must submit their arguments to the Hearing Coordinator no later than two (2) business days following the hearing.

3.9 Closing the Hearing. No new evidence may be submitted after the hearing, except for the parties' written arguments, if they choose. The hearing is deemed fully and finally closed for purposes of appeal pursuant to Section 4.0 herein upon the issuance of the Decisionmaker's determination, unless the Decisionmaker expressly leaves the proceedings open pending some later action to be taken by the Decisionmaker, a party, or another person or entity specifically identified in the Decisionmaker's express instruction that the hearing remain open pending the later action occurring.

3.10 Sanctioner. Sanctioners will work with the Decisionmaker to include an appropriate sanctioning determination in the final report. The Sanctioner may attend the hearing or review the hearing record, in order to issue the proposed discipline contemporaneous to the finding.



3.11 Remedies. Subsequent to a finding of responsibility by the Respondent, OEO or the Title IX Coordinator may provide remedies to the Complainant. Remedies are confidential and will be provided only to Complainant, and their Advisor if given permission by the Complainant.

#### **ARTICLE 4. APPEALS**

4.0 Appeal. No appeal of the Decisionmaker's decision may be taken until the hearing is fully and finally closed as provided in Section 3.9 herein. Any subsequent appeal must be submitted pursuant to the timelines provided in the policy, procedure, or order authorizing the appeal.