

EVCC3092P: SUPPLEMENTAL TITLE IX EMPLOYEE DISCIPLINARY HEARING PROCEDURE

Original Date: August 14, 2020

Contact: Vice President of Human Resources

This supplemental 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. Disciplinary proceedings against an employee respondent alleged to have engaged in sexual harassment in violation of Title IX shall be governed by the Everett Community College's administrative hearing practices and procedures and this supplemental hearing procedure. To the extent the supplemental hearing procedure conflicts with provisions set forth in employment contracts, collective bargaining agreements, employee handbooks, and other College employment policies and procedures, this supplemental hearing procedure will take precedence.

Notwithstanding the foregoing, if Respondent is a tenured or probationary faculty member and the Vice President of Human Resources determines that the allegations in the investigation, if true, would warrant Respondent's dismissal from the College, the Vice President of Human Resources will refer the matter to the Tenure Dismissal Committee for a hearing pursuant to RCW 28B.50.863 and applicable procedures set forth in the faculty union Collective Bargaining Agreement (CBA). To the extent the Tenure Dismissal Committee procedures are inconsistent or conflict with Sections II through VII of this Supplemental Procedure, those Supplemental Procedure sections will prevail. At the end of the hearing, the Tenure Dismissal Committee will issue a Recommendation consistent with the provisions set forth in Section VIII. Complainant shall have the same right to appear and participate in the proceedings as the Respondent, including the right to present their position on the Recommendation to the Hearing Board before final action is taken.

II. Prohibited Conduct Under Title IX

Pursuant to Title IX of the Education Act Amendments of 1972, 20 U.S.C. §1681, Everett Community College may impose disciplinary sanctions against an employee who commits, attempts to commit, or aids, abets, incites, encourages, or assists another person to commit, an act(s) of "sexual harassment."

For purposes of this supplemental procedure, "Sexual Harassment" encompasses the following conduct:

- A. **Quid pro quo harassment.** An Everett Community College employee conditioning the provision of an aid, benefit, or service of Everett Community College on an individual's participation in unwelcome sexual conduct.
- B. **Hostile environment.** Unwelcome conduct that a reasonable person would find to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to Everett Community College's educational programs or activities, or employment.
- C. **Sexual assault.** Sexual assault includes the following conduct:
 1. **Nonconsensual sexual intercourse.** Any actual or attempted sexual intercourse (anal, oral, or vaginal), however slight, with any object or body part, by a person upon another person, that is without consent and/or by force. Sexual intercourse includes anal or vaginal penetration by a penis, tongue, finger, or object, or oral copulation by mouth to genital contact or genital to mouth contact.
 2. **Nonconsensual sexual contact.** Any actual or attempted sexual touching, however slight, with any body part or object, by a person upon another person that is without consent and/or by force. Sexual touching includes any bodily contact with the breasts, groin, mouth, or other bodily orifice of another individual, or any other bodily contact in a sexual manner.
 3. **Incest.** Sexual intercourse or sexual contact with a person known to be related to them, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either wholly or half related. Descendant includes stepchildren and adopted children under the age of eighteen (18).
 4. **Statutory rape.** Consensual sexual intercourse between someone who is eighteen (18) years of age or older and someone who is under the age of sixteen (16).

- D. **Domestic violence.** Physical violence, bodily injury, assault, the infliction of fear of imminent physical harm, sexual assault, or stalking committed by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the State of Washington, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the State of Washington, RCW 26.50.010.
- E. **Dating violence.** Physical violence, bodily injury, assault, the infliction of fear of imminent physical harm, sexual assault, or stalking committed by a person (i) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (ii) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - 1. The length of the relationship;
 - 2. The type of relationship; and
 - 3. The frequency of interaction between the persons involved in the relationship.
- F. **Stalking.** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others, or suffer substantial emotional distress.

III. Title IX Jurisdiction

- A. This supplemental procedure applies only if the alleged misconduct:
 - 1. Occurred in the United States;
 - 2. Occurred during an Everett Community College educational program or activity; and
 - 3. Meets the definition of Sexual Harassment as that term is defined in this supplemental procedure.
- B. For purposes of this supplemental procedure, an "educational program or activity" is defined as locations, events, or circumstances over which Everett Community College 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 Everett Community College.
- C. Proceedings under this supplemental procedure must be dismissed if the Hearing Board Chair determines that one or all of the requirements of Section A(1)-(3) have not been met. Dismissal under this supplemental procedure does not prohibit Everett Community College from pursuing disciplinary action against a Respondent based on allegations that the Respondent engaged in other misconduct prohibited by federal or state law, employment contracts or handbooks, or other Everett Community College policies.
- D. If the Vice President of Human Resources determines the facts in the investigation report are not sufficient to support Title IX jurisdiction and/or pursuit of a Title IX violation, the Vice President of Human Resources 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.

IV. Initiation of Discipline

- A. Upon receiving the Title IX investigation report from the Title IX Coordinator, the Vice President of Human Resources 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 Vice President of Human Resources determines that there are sufficient grounds to proceed under these supplemental procedures, the Vice President of Human Resources will initiate a Title IX disciplinary proceeding by filing a written disciplinary notice with the Hearing Board Chair 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. Everett Community College will appoint the Party an Advisor of Everett Community College's choosing at no cost to the Party, if the Party fails to choose an Advisor;
 6. Explain that if a Party fails to appear at the hearing, a decision of responsibility may be made in the Party's absence.
- 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, or by electronic mail to the Party's Everett Community College email address.

V. Pre-Hearing Procedure

- A. Upon receiving the disciplinary notice, the Hearing Board Chair will send a hearing notice to all parties in compliance with WAC 10-08-040. The hearing date may not be scheduled less than ten (10) days after the Title IX Coordinator provided the Final Investigation Report to the Parties.
- B. A Party is entitled to be accompanied by an Advisor of their choice during the disciplinary process at the party's own expense. The Advisor may be an attorney and/or, if the Party is a represented employee, a union representative.
 1. If the Advisor is an attorney, the Advisor must file a notice of appearance with the Hearing Board Chair with copies to all parties and the Vice President of Human Resources 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 Hearing Board Chair 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 Everett Community College intends to offer the evidence at the hearing.

VI. Rights of Parties

- A. The provisions of this supplemental procedure shall apply equally to both parties.
- B. Everett Community College 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 Title IX Coordinator will appoint an Advisor of the Everett Community College's choosing on the Party's behalf at no expense to the Party.

VII. Evidence

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

- A. Relevance: The Committee Chair 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 in 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 Hearing Board must not rely on any statement by that Party or witness in reaching a determination of responsibility.
- E. No negative inference: The Hearing Board 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 Hearing Board 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.

VIII. Initial Order

- A. The Hearing Board 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, interviews 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 Everett Community College's education programs or activities; and
 8. Describes the process for appealing the Initial Order to Everett Community College's President.

- B. The Hearing Board Chair will serve the Initial Order on the Parties simultaneously.

IX. 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.
- B. The President or the President's delegate 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. If a request for reconsideration is received, the Title IX Coordinator shall respond within seven (7) business days. The Title IX Coordinator shall either deny the request or, if the Title IX Coordinator determines that the request for reconsideration has merit, issue amended findings.
- D. If any of the grounds in the Request for Appeal do not meet the grounds in this Policy, that request will be denied and the parties and their Advisors will be notified in writing of the denial and the rationale.
- E. If any of the grounds in the Request for Appeal meet the grounds in this Policy, then the other party(ies) and their Advisors, and, when appropriate, the Investigators and/or the original Decision-maker(s) will be notified of the decision.
- F. The other party(ies) and their Advisors, and, when appropriate, the Investigators and/or the original Decision-maker(s) will be mailed, emailed, and/or provided a hard copy of the request with the approved grounds and be provided seven (7) business days to submit a response to the portion of the appeal that was approved and involves them. All responses will be forwarded by the Appeal Decision-maker(s) to all parties for review and comment.
- G. The non-appealing party (if any) may also choose to raise a new ground for appeal at this time. If so, that will be reviewed for standing by the Appeal Decision-maker(s) and either denied or approved. If approved, it will be forwarded to the party who initially requested an appeal, the Investigator(s) and/or original Decision-maker(s), as necessary, who will submit their responses in seven (7) business days, which will be circulated for review and comment by all parties.
- H. Neither party may submit any new requests for appeal after this time period. The Appeal Decision-maker(s) will collect any additional information needed and all documentation regarding the approved grounds and the subsequent responses and will render a decision in no more than seven (7) business days, barring exigent circumstances. All decisions apply the preponderance of the evidence standard.
- I. A Notice of Appeal Outcome will be sent to all parties simultaneously including the decision on each approved ground and rationale for each decision. The Notice of Appeal Outcome will specify the finding on each ground for appeal, any specific instructions for remand or reconsideration, any sanctions that may result which the Recipient is permitted to share according to state or federal law, and the rationale supporting the essential findings to the extent the Recipient is permitted to share under state or federal law.
- J. Notification will be made in writing and may be delivered by one or more of the following methods: in person, mailed to the local or permanent address of the parties as indicated in official institutional records, or emailed to the parties' Recipient-issued email or otherwise approved account. Once mailed, emailed and/or received in-person, notice will be presumptively delivered.
- K. The grounds for appeal are as follows:
 - 1. Procedural irregularity that affected the outcome of the matter;

2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 3. The Title IX Coordinator, Investigator(s), or Decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the specific Complainant or Respondent that affected the outcome of the matter.
- L. 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.
- M. If no request for reconsideration is received within seven (7) days, the findings become final.
- N. Decisions on appeal are to be deferential to the original decision, making changes to the finding only when there is clear error and to the sanction(s)/responsive action(s) only if there is a compelling justification to do so.
- O. Appeals are not intended to provide for a full re-hearing of the allegation(s). In most cases, appeals are confined to a review of the written documentation or record of the original hearing and pertinent documentation regarding the specific grounds for appeal.
- P. An appeal is not an opportunity for Appeal Decision-maker(s) to substitute their judgment for that of the original Decision-maker(s) merely because they disagree with the finding and/or sanction(s).
- Q. Once an appeal is decided, the outcome is final. Further appeals are not permitted, even if a decision or sanction is changed on remand except in the case of a new hearing.
- R. Any amended findings are final and no further reconsideration is available.

RELEVANT LAWS AND OTHER RELATED INFORMATION

[EvCC3100: Staff Relationships Policy](#)

[EvCC3100P: Staff Relationships Procedure](#)

[EvCC6020: Statement of Jurisdiction Policy](#)

[EvCC3090P: Everett Community College Title IX Policy and Grievance Procedure](#)

[EvCC3090: Title IX Policy](#)

[EvCC3090P: Title IX Procedure](#)

[EvCC3091: Discrimination and Harassment Policy](#)

[EvCC3091P: Supplemental Title IX Employee Disciplinary Hearing Procedure](#)

REVISION HISTORY

Original Date: August 14, 2020

APPROVED BY

President

Board of Trustees