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Office of Equity & Inclusion

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# 1B.1 Investigator Training

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Minnesota State

# Overview of 1B.1 Policy and Procedure



# MINNESOTA STATE BOARD POLICY 1B.1

## EQUAL OPPORTUNITY AND NONDISCRIMINATION IN EMPLOYMENT AND EDUCATION

### HARASSMENT AND DISCRIMINATION ARE PROHIBITED BASED ON:

- 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)

# 1B.1 POLICY IMPLEMENTED THROUGH

## 1B.1.1 PROCEDURE

- Applies to all individuals affiliated with Minnesota State, including but not limited to its students, employees, applicants, volunteers, agents, the Board of Trustees, and others as appropriate and protects the rights and privacy of all involved individuals, as well as prevents retaliation.

# 1B.1 PROHIBITS RETALIATION

Retaliation is prohibited at Minnesota State.

Retaliation 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.

# 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.

# SEXUAL VIOLENCE

- Please use Board Policy 1B.3 for sexual violence complaints.
- Procedure 1B.3.1.\*



# DISCRIMINATION

The elements of discrimination include:

- 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



# DISCRIMINATORY HARASSMENT

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

# DISCRIMINATORY HARASSMENT, CONTINUED

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.

# 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** or **is likely to have a negative effect** on the complainant or the workplace or the educational environment.

# SEXUAL HARASSMENT, CONTINUED

The examples of sexual harassment include:

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

# HOSTILE ENVIRONMENT

- The verbal or physical contact was unwelcome
- The hostile action must be **because of** the complainant's protected class
- Sufficiently severe or pervasive to alter the conditions of the individual's work/education and create an abusive work/educational environment (as viewed by a "reasonable person").

# MINN. STATE 1.B.1.1 PROCEDURE

## REPORT/COMPLAINT OF DISCRIMINATION/HARASSMENT INVESTIGATION AND RESOLUTION

- Purpose
  - Provide a process for individuals to pursue allegations of discrimination or harassment
  - Stop complained of behavior - timely and effective
  - Resolve disputes between parties, if possible
  - Fact finding
  - Sanction or discipline individuals for violating Minnesota State's 1B.1 nondiscrimination policy as deemed necessary.

# RESPONSIBILITY FOR MANAGING/ ADMINISTERING PROCESS

**Designated  
Officer**

**Decision-making  
Authority**

**President**

# DESIGNATED OFFICER (INVESTIGATOR)

- Completed investigator training provided by the system office;
- Is designated by the president or chancellor to be primarily responsible for conducting initial inquiry;
- Determines whether to proceed with an investigation under this procedure; and
- Investigates or coordinates the investigation of complaints of discrimination, harassment, retaliation in accordance with the 1B.1.1 Procedure.



# DECISION-MAKING AUTHORITY

- Completed decision-maker training provided by the system office;
- Is designated by the president or chancellor to review investigative reports;
- Determines whether Board Policy 1B.1 has been violated upon the investigation; and
- Determines the appropriate action for the college, university or system office to take based upon the findings.

# PRESIDENT

- **Removed** from initial investigation and decision-making
- Serves as the final decisionmaker (appeal) for the Minnesota State



# SPECIAL CASES

- Complaints against a president
  - Complaints should be filed with the system office's designated officer. The case will be investigated by an investigator appointed by the Chancellor.
  - Campus investigation - If president's role in the incident was limited to a decision on a recommendation made by another administrator, such as tenure, promotion or non-renewal and the president had no other involvement in the matter
- Complaints against system office employees or the Board of Trustees.
  - Complaints that involve allegations against the chancellor or a member of the Board of Trustees must be referred to the board chair or vice chair for processing. Such complaints may be assigned to a Minnesota State investigator or outside investigatory assistance may be designated
- Complaints against college or university vice presidents, deans or provosts are filed at the campus level with the president as decisionmaker

# REPORTING DISCRIMINATION/HARASSMENT

- Encourage report as soon as possible
- Administrators and supervisors must report incidents of discrimination/harassment
- Students, faculty and employees are strongly encouraged to report incidents of discrimination/harassment

# INVESTIGATOR'S ROLE

- Is selected by the Designated Officer to conduct an inquiry, investigate, or coordinate the investigation of complaints of discrimination, harassment, retaliation
- Determines whether to proceed with an investigation under 1B.1.1 (No basis to proceed)
- Ensures timely completion
- Prepares investigative reports, and
- May be the Designated Officer.

# INVESTIGATOR'S ROLE, CONTINUED

- Conduct a fact-finding inquiry or investigation of the complaint by gathering relevant information to the claim
- Facilitate interviews and meetings
- Determines strategies to support resolution
- Makes referrals as necessary
- Consults with Designated Officer if it is believed interim actions are necessary due to health/safety threat (rare)
  - Administrative leave
  - Summary suspension

# INVESTIGATOR'S ROLE

- Writes investigation report as necessary
- Outlines facts in the case report as a result of information collected through the interview process and review of additional documents received
- Primary actor in ensuring process moves forward through the investigation and appeal steps
- Handles all data in accordance with applicable federal and state privacy laws

# THE INVESTIGATION

- Provides enough information for the decisionmaker to make a reasoned decision about whether policy has been violated
- Maintains integrity of process
  - Timely
  - Fair to both parties
  - Provide 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 report

# DECIDING IF MISCONDUCT OCCURS

- Standard of proof in determining a 1.B.1 violation
  - Preponderance of evidence; i.e. more likely to have occurred than not.

# ROLE OF DECISIONMAKER

- May meet with parties or request additional information from the investigator
- Writes reasoned decision based on facts, guidance, and policies
- Decides on discipline (if violation established)

# ROLE OF DECISIONMAKER, CONTINUED

- Written notification to complainant, respondent and investigator of his/her findings of whether a policy violation
- Report to the complainant shall be within 60 days after a complaint is made unless reasonable cause for delay exists

# DECISION FACTORS

- Weigh evidence and judge credibility
- Consider the totality of circumstances
  - History of complaints/grievances
  - Treatment of others (those who are different and those who are similarly situated)
  - Skills/competencies of supervisors demonstrated by past actions

# DETERMINE APPROPRIATE ACTION

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

# DETERMINE APPROPRIATE ACTION, CONTINUED

- Action must be sufficient to:
  - End the inappropriate conduct
  - Send a clear message that policy is meaningful and applies to everyone

# APPROPRIATE ACTIONS

- Factors:
  - Severity of conduct
  - Degree of harm to complainant and others
  - Has the conduct potentially created a class of complainants?
  - Has the offender a history of discipline for same/similar behavior?



# POLICY VIOLATION

- Decisionmaker determines what, if any, discipline is required.
- Decisionmaker may consult with Minnesota State Labor Relations and review personnel record for previous disciplinary action
- Discipline should be progressive and appropriate.

# POSSIBLE ACTIONS

- Progressive Discipline Options
  - Counseling, training, alternative dispute resolution
  - Reassignment or administrative leave
  - Oral reprimand
  - Written reprimand
  - Suspension (with or without pay)
  - Demotion
  - Discharge

# APPEAL PROCESS

- Goal of the appeal
- Complainant and Respondent have the right to appeal the decision of the Decisionmaker
- Appeal timeframe
- Content of the appeal
- Filing an appeal concerning a report against a college/university vice president, provost, or dean
- Filing an appeal concerning a report against a college/university president

# APPEAL PROCESS, CONTINUED

- Additional information
- Appeal decision timeframe
- Decision notification
- The decision on appeal is final under 1.B.1.1 Procedure
- Disciplinary action imposed on a member of a collective bargaining unit is processed in accordance with that agreement

# ROLE OF PRESIDENT ON APPEAL

- Review of investigation report
- Review of any new evidence
- Quality review - consults with:
  - Minnesota State General Counsel and/or AGO
  - Minnesota State Human Resources/Labor Relations
- Notify complainant, respondent and investigator of decision within a reasonable time

# Overview of Data Practices and Other Legal Issues

**OFFICE OF GENERAL COUNSEL**



# Minnesota Government Data Practices Act (MGDPA)

Minnesota Statutes Chapter 13

Minnesota Rules Chapter 1205

- MGDPA: primary state law on privacy and handling of all government data.
  - Government data is: all data created, collected, received or disseminated by government in any physical form.
  - Includes investigators and investigations!

# 1B.1.1 Investigation Records are *Government Data*

- Records that you collect, create and maintain for an investigation – in any tangible form – are *government data* under the Minnesota Government Data Practices Act (MGDPA).
- Records on individual students are also subject to the federal Family Educational Rights and Privacy Act (FERPA), including as part of employee investigation.



# Data About Individuals

- Data about individual students and employees are presumed *private*.
  - Personally identifiable data collected from employee/student witnesses can be “about” the speaker, others or both.

# Private Data Access

- Private data are available to:
  - Subject (if more than one may withhold);
  - C/U officials, others working on behalf of C/U if “need-to-know”;
  - Others authorized in writing by subject;
  - Others as permitted by law.

# Treat Active Investigational Data as *Confidential*

- May share with other school officials who have legitimate business “need-to-know” about specific information;
- **Not available to subject employee** (may be available to student subject);
- May NOT share with third parties (including union reps) unless
  - Specifically legally authorized.

Always seek assistance before disclosing!

# Caveat: Due Process

- Respondent must be informed about charges in order to defend BUT
  - Not the same as access to active investigation data
- Complainants/respondents must receive sufficient information to be able to appeal initial 1B.1.1 decision.

# Employee Issues Under MGDPA

- ID of harassment complainant or other witnesses NOT available to employee respondent if
  - Access would threaten their safety or subject them to further harassment
- Existence and status of a complaint are always PUBLIC, i.e., “there is a complaint and it is under investigation”
  - NOT the nature of the complaint!
  - *The context of a question matters . . .*

# Discipline

- **Default rule:** treat decision as “private” unless/until applicable law permits disclosure.
- Disclosure rules for employee and student discipline are different.
- Notice of a no-contact order must be provided to affected individuals for enforcement.

# Discipline: Employees

(see chart in materials)

- FINAL discipline (action taken and basis) is PUBLIC
  - After all CBA process exhausted; or
  - Employee with no CBA rights has been notified.
- If no discipline: all remains private.
  - But sex harassment victims entitled to certain remedial action information.
- Investigation of *public official* (president and other high level administrators) is public regardless of disciplinary decision.

# Student *Crimes of Violence*

- Discipline and investigation data about students almost always remains private. Exceptions for *crimes of violence*:
  - If 1B.1.1 investigation includes a charge of **assault, intimidation or forcible sex offense\*** certain information becomes available to:
    - The victim regardless of the result,
    - The public upon request if the charge is sustained.

Consultation is required before releasing student discipline information.

\* Not a complete list of *crimes of violence*.



# Avoid Inadvertent Mistakes

- Don't disclose private data to others during investigation interviews or correspondence;
- Employee administrative leave during investigation is not “suspension”
  - Implies discipline
- Refer media requests to campus communications or public affairs.

# Use Good Privacy and Security Practices, e.g.

- Get consent for others to be present during interview.
- Don't permit unauthorized viewing of paper or electronic records;
- Label report as "Private;"
- Store investigation records securely;
- Follow IT procedures about maintaining electronic security when storing or transmitting data; watch that laptop! (device/phone/etc.)
- Dispose of not public data securely;
- Use email carefully.

# Provide Data Privacy Notice\*

- When interviewing individuals that includes private data “about” themselves, must inform:
    - How information will be used; who will have access; whether individual may legally refuse; consequences of providing or refusing to provide requested information.
- (\*This is sometimes referred to as the “Tennessee Warning.”)

Tip: If Notice is given orally, retain a copy for records. Use template notices. Don’t promise “confidentiality” or access; just reinforce we follow the law.

# Know Your Resources

- Campus Data Practices Compliance Official (first responder for questions or receipt of any legal process request);
- Campus policies on referring requests
  - Public
  - Subjects
    - Employees
    - Students
  - Copy costs
- <http://www.minnstate.edu/system/ogc/index.html>
- System Office personnel

# Education Data

- Also subject to federal law: Family Educational Rights and Privacy Act (FERPA)
- Many FERPA provisions incorporated into Minn. Stat. 13.32, but state law provides broader rights in some cases, e.g. applicants.
- Private unless specifically public, i.e.:
  - **Directory information** (unless student objects). Institution defines.
- Private educational data accessible to “school officials” with “legitimate educational interest,” as those terms defined by each school’s policy.

# What is Status of Investigative Data on Students?

- Unlike employee discipline, student disciplinary actions generally remain private, along with all investigative materials.
- Exception: Under very limited circumstances, the victim of a “crime of violence”\* may obtain data about the discipline of a perpetrator who is a student.
- \* “Crime of violence” is defined in privacy laws. Seek legal assistance in termination application of this exception.

# Data Collection Notice (“Tennessen Warning”)

|              |  |
|--------------|--|
| <b>When?</b> | <b>Individual asked for private or confidential data about self</b>  |
| What?        | Why collected; how used; legally required to provide; consequences of not providing; ID of others authorized to access.              |
| How?         | Oral or written<br>Department of Administration position:<br>Data may only be used in accordance with notice, or subsequent consent. |

# Procedural Due Process

- Government must provide fair process before depriving employee or student of significant life, liberty or property interest.
- CBA/other reviewed disciplinary procedures incorporate legally adequate due process. Follow them. Consult AGO checklists provided.



# Procedural Due Process, continued

Investigations are:

- Thorough
- Impartial
  - Not one-sided
  - Respondent has
    - Notice of allegations (consistent with MGDPA)
    - Opportunity to respond
- All parties should feel confident of fair treatment in process.

# Is Immediate Action Warranted?

Under 1B.1.1: President or designee decides based on:

- Continuing danger to self or others, or
- An ongoing threat of disrupting workplace or academic process.

Investigator should assist in developing facts to assist decision maker *before* acting.

# Immediate Action Factors

- Balance risk of harm with effect of penalty and stigma.
- Seek assistance from AGO, OGC and/or Labor Relations to assess conduct and plan process.
- Consult CBA for employee process.
- Students must have opportunity to respond *prior to* taking action (1B.1.1, Part 5, subp. G.2.).

# Options for Immediate Action

- Employees (1.B.1.1, Part 5, Subpart G.1)
  - Administrative leave
  - Reassignment
  - Other – e.g., “no contact”
  - Suspension not to exceed nine (9) days under 1.B.1.1
- Students (1.B.1.1, Part 5, Subpart G.2)
  - Suspension not to exceed nine (9) days under 1.B.1.1
  - Other temporary measure.

# Minnesota State Policy 1.B.1

## Nondiscrimination in Employment or Educational Opportunity

- Directed at conduct that is discrimination/harassment under state and federal law.
- Not every offensive act constitutes discrimination or harassment.

# What is Discrimination

- Differential treatment
- Because of protected class:
  - Race, color, national origin
  - Creed, religion
  - Sex, sexual orientation (real or perceived)
  - Marital status
  - Status re: receipt of public assistance
  - Disability
  - Age
  - Membership in a local human rights commission
- That results in some adverse action like denial of a benefit, service, condition, etc. (need not be purely economic).

# Discrimination also includes:

- Aiding/abetting discrimination (individuals)
- Reprisal against one who participates in protected conduct or otherwise opposes protected conduct  
e.g., changes in responsibilities, demotion, less opportunity, threats, changed performance evaluation, etc.
- Discriminating or retaliating against person who associates with persons in protected class

# Liability for Discrimination

- Individuals may be liable under state law
- Employers/institutions may be liable
  - For supervisor conduct
    - If “tangible employment action”
  - For non-supervisor conduct if
    - Knew or should have known
    - Failed to take effective action



# Employers may have Defense to Claim of Discrimination/Harassment if:

- Exercised reasonable care to prevent/correct; and
- Employee unreasonably failed to use preventative opportunities (established complaint procedure).

*Complaint process critical.*

# Keep Your Eyes On the Prize

Focus investigation on essential information needed to evaluate the complaint. For example, on discrimination:

- Was the individual treated differently from others in same circumstances without the protected characteristic?
  - Are there documents or statements to support this claim?
- What is the offered explanation for this conduct?
  - Is it reasonable?

# Retaliation – Focus On:

- What is the conduct alleged to be retaliatory? By whom?
  - What is the supervisory relationship?
- When did the conduct occur?
- Was the respondent aware of the protected conduct at the time of the alleged retaliation?
  - Any supporting documents or statements?
  - How soon did the alleged retaliation occur after the protected conduct?

# What is Sufficiently Severe or Pervasive to Constitute a Hostile Environment?

Depends on the facts.

- Occasionally, a single event will be sufficiently severe
- More usual: is totality of conduct
  - That permeates workplace/educational environment with discriminatory intimidation, ridicule, or insult
  - Sufficiently severe or pervasive to have altered the victim's conditions of employment/education.
- Remember that under 1.B.1, must be based on protected class, not personal "hostility".

# What if Investigation Reveals Potential Crime?

- See Board Policy 1.C.2
- Seek legal advice before disclosing to law enforcement.
  - May provide nonpublic personnel data to law enforcement for investigation;
  - Providing private student data to law enforcement generally requires subpoena or court order.

# Disability Discrimination: ADA/MHRA

- Cannot harass or discriminate because of “disability”
- “Disabled defined as:
  - Physical or mental impairment that materially limits one or more major life activity, OR
  - Has a record of such impairment; OR
  - Is regarded as having such impairment.(not illegal drug use/alcohol use that actively impairs performance).

# “Disability” Is Not The Same As

- Diagnosis
- On-going treatment

Campus Disabilities Service/HR generally determine “disabled” status.

# Need Not Consider “Retroactive” Disabilities

Generally, individual must raise issue and request reasonable accommodation – no “negligent” non-discovery of disability.



# “Disabled” Students/Employees/Public

Who are “otherwise qualified” are entitled to:

- “Reasonable accommodations” to enable them to perform essential functions of job/educational opportunities or have public access.

Interactive dialogue is usual process.

Reasonable accommodation disputes generally not subject to 1.B.1.1 investigation procedure.

Refer to campus appeal process required by:

- System Procedures 1.B.0.1 – Employment
- Board Policy 1.B.4 – Student and Public Access

# Analysis of Disability Discrimination Claim

- Is individual “disabled”?
- Was disability known to respondent?
- What evidence supports (or refutes) a finding that the conduct was because of the disability?
  - Different treatment, not reasonable or justified.
- Was accommodation requested?
- Did interactive process occur?

# Parallel Proceedings

- Administrative Complaints
  - MHRD
  - EEOC
- Lawsuits
- If school is notified that a claim has been filed with an outside agency while investigation is active, contact the OGC and AGO *immediately*.

# MHRA Enforcement Procedures

One year statute of limitations

- Direct to court or
- Optional administrative review

## Federal Administrative Procedure

300 days limitations period

- Filing with EEOC *required* before court filing allowed.

# Parallel Criminal Proceedings

Institution's responsibilities *not* extinguished.

- But likely to be difficult to investigate.
  - Prosecutors may discourage “interference”
  - Criminal defendants will probably be advised not to give statement.
  - Information compelled from employee cannot be used in criminal proceeding. (Garrity.)

May choose to delay until criminal action completed. *Seek legal advice.*

# Parallel Criminal Proceedings (cont'd)

- Institution must cooperate with criminal investigators *consistent with other legal obligations, e.g., data privacy.*

\*Be sure to consult with AGO or OGC if you receive any subpoena/court order.



# CASE STUDIES

# BIAS RELATED INCIDENT ADVISORY TEAMS

- For use when there are campus wide issues requiring immediate response.
- Can be used along with Behavioral Incident Team (BIT)
- Allows for cross functions to come together for planning response



# MINNESOTA STATE CONTACT INFORMATION

Office of Equity and Inclusion (OEI)

<http://www.minnstate.edu/system/equity/>

Office of General Counsel (OGC)

<http://www.minnstate.edu/system/ogc/>

