

GUIDELINES FOR UNIVERSITY INVESTIGATIONS AND HEARINGS

From time to time you may be required to conduct an investigation and/or make a recommendation or a decision. These tasks generally involve some investigation to determine facts. The decision or recommendation may arise pursuant to a written agreement (as an example, a collective agreement, the framework agreement, a service contract, etc.) or some other written instrument or established practice (for example, student discipline procedures, etc.). In such cases you have to become familiar with, and respect, the governing protocol. The Board of Governors in its [Policy on Formal Investigations \(Policy #95\)](#) has endorsed a checklist of matters to be considered when University officials commission formal investigations of incidents at UBC. These guidelines, issued by the Office of the University Counsel, are intended to assist officials make decisions under the policy.

General Principles

There are a couple of basic principles to keep in mind. First, the University expects those who conduct investigations on its behalf to do so fairly. Secondly, you must ensure you follow the requirements of the applicable University protocol, policy or statute. The law imposes some basic duties on those who investigate or decide matters ("Decision Maker") in any context where the task affects the legal rights of others whether a student, member of staff or faculty ("Person at Risk"). The obligation of a Decision Maker to act fairly applies prior to and in the application of the task.

The University wishes to fully respect the rights of any Person at Risk. In doing so, however, the University has a concern to try to conduct its affairs promptly and efficiently in order to minimize unnecessary cost (both direct and indirect) to the University and the Person at Risk.

Specific Rules

In order to comply with these general principles, there are some specific rules that you should follow. If a situation you confront raises issues different from those referred to below, and you are unclear as to what you should do, you should not hesitate to obtain advice from my office or from the Department of Human Resources, as appropriate. You should also avoid conflating the stages considered below.

Stage One: Initial Inquiry or Informal Investigation

You hear a rumour or receive a report that something has occurred that may involve a violation of a University rule, agreement or policy. You decide that you are obliged to determine what occurred. That decision will be influenced by the severity of the violation identified in the rumour.

At such an early stage there is no established regime to govern what you do. Some Decision Makers might choose to simply wait to see if someone formally reports the incident. However, some would investigate on the basis of rumour alone before there is a direct complaint.

If as a Decision Maker you decide to investigate or launch an inquiry at this stage, you should:

1. Consider whether you wish to require a complaint or report be put in writing. You may decide that it would be best to have something in writing and may require this but, at this stage, you may also conclude that it is appropriate to investigate on the basis of an oral complaint or report.

2. Conduct your investigation as privately as possible and ask those you talk to to treat your inquiries in confidence.
3. Keep such notes as you determine are appropriate. Notes will remind you of significant events or statements, and even at this stage you may wish to keep notes. However, it is not necessary to take notes.
4. Be careful of the weight you give to second hand reports of incidents, preferring to speak to those personally involved.
5. Make judgments about reliability based upon your own reasonable judgment about what you know about the people and the circumstances.
6. Only undertake the inquiry if you can do *so fairly*. In this context, fairly means being able to investigate impartially and apply your mind to the facts independently of any prior knowledge, experience or background of the Person at Risk (or alleged parties to the event(s)) that you may have. At this stage there is no reason to advise the Person at Risk of your interest and you may properly investigate at this stage without advising the Person at Risk of your investigation.
7. Not disclose the name of the person who reports a matter to you ("Person Reporting") except in the rarest of circumstances, and then only after consulting with my office. If the Person Reporting alleges that the Person Reporting has personally suffered a wrong we call such a person a "Complainant". A Complainant almost necessarily has to be identified at Stage Two: Formal Investigation, as described below. However, other than the identification of a Complainant, the identity of the Person Reporting is generally irrelevant to any substantive issue concerning the Person at Risk and the identity of the Person Reporting should remain confidential. There will be rare instances where the identity of the Person Reporting may be relevant (as an example, alleged animosity between the Person Reporting and the Person at Risk) and in such a case the name of the Person Reporting may be disclosed, but only after receiving the express direction of my office to do so.
8. Generally not disclose the name of the Complainant. If, for any reason, you decide to expressly disclose the name of the Complainant at this stage, you should not do so without the express, written permission of the Complainant. Where an investigation may implicitly involve disclosing the identity of the Complainant (as an example, the complaint involves harm allegedly done to a male student, in a context where there is only one male student) or in any case where you conclude that it is necessary to expressly disclose the identity of the Complainant, you should not proceed and disclose, except with the express written consent of the Complainant or, in very rare instances, after receiving the express direction of my office to do so.
9. The privacy rights of both the Complainant and the Person at Risk should be respected. The matters should be discussed with University officials only on a "needs-to-know basis".

Stage Two: Formal Investigation

If, after the above investigation, you conclude that the rumour was unfounded or that, as an example, the incident can reasonably be considered a trifle, then that is the end of the matter. If your investigation confirms that something occurred which merits a more formal investigation and there is no body (for example, the Equity Office) specifically assigned to perform this task, you should proceed to conduct an enquiry keeping in mind all applicable protocols or policies that might govern the situation. Alternatively, the matter might initially start with a formal complaint

to you from a student, a colleague, or a member of staff, which, after an initial informal investigation, leads you to conclude that a more formal investigation is needed.

If you decide to pursue a formal investigation you must be careful to ensure you are aware of your mandate and the general principle previously mentioned. At a minimum, the following rules should be followed:

1. Except in the rarest of circumstances, and only after consulting with my office, should you disclose the name of the Person Reporting. As noted earlier, a Complainant almost necessarily has to be identified at some stage. However, other than this, the identity of the Person Reporting is generally irrelevant to any substantive issue concerning the Person at Risk and the identity of the Person Reporting should remain confidential. There will be rare instances as noted above, where the identity of the Person Reporting may be relevant and in those cases the name of the Person Reporting may be disclosed, but only after receiving the express direction of my office to do so.
2. At this stage it is necessary to disclose the name of the Complainant. It is important, however, to understand that there need not necessarily be a personal Complainant in each and every formal investigation. In some cases the Complainant will be the only person who is alleged to be harmed by what has occurred. However, in some cases as a result of your Informal Investigation you may well determine that the problem is general and directed to a number of people, all of whom have been adversely effected (as an example, an allegation that an instructor makes offensive racist or sexist statements directed to an entire class). In such an instance, you may well determine that the appropriate thing to do is for some institutional person (a Head, Dean, Chair of a Committee, etc.) other than the Decision Maker to notionally complain and so become the "Institutional Complainant". The students in the class, to continue my example, would simply give evidence of the conduct. If you decide that the matter may proceed in this manner you need not identify any individual Complainant (who becomes, in effect, a Person Reporting) but only the Institutional Complainant. Where there is an individual Complainant, as noted above, you will have to disclose the name of the Complainant, but you should not do so without the express, written permission of the Complainant. **In the event that the Complainant refuses to be identified, this will generally mean that the investigation cannot proceed except in very rare instances, and then only after receiving the express direction of my office to do so.**
3. No investigation should proceed to a Formal Investigation unless either you have a clear written complaint signed by either the Complainant (in which the Complainant acknowledges that the Complainant understands that the Complainant's identity will be disclosed to the Person at Risk), signed similarly by the Institutional Complainant or you have the express direction of my office to proceed in some other manner (which permission will only be given in rare cases on a careful analysis of the reasons and justification for anonymity).
4. At this stage you must keep notes. It is important that you maintain as accurate a record as you reasonably can. It may even make sense to have another person with you during your investigation (a member of staff or a colleague). Make the notes contemporaneously with the events occurring. At some point in the future, a third party might want to look at the notes that have been made at this stage to determine the extent to which you adequately considered certain issues. You may prepare rough notes from which you subsequently dictate minutes (you may find it easier to add the detail while it is still fresh in your mind, but subsequent to having taken the initial notes). If you do this, generally speaking, you should not clutter up your file with the rough notes but should discard them. If you are going to take notes of any conversation you have with someone (and this is particularly relevant for telephone conversations) you should be careful to advise that you are taking notes and why. If a

member of staff or colleague makes the notes you should review them promptly, make any changes you think appropriate and initial them to indicate your adoption of them.

5. You may very well decide to talk to people without the Person at Risk being present. You are entitled to do so.
6. Notwithstanding paragraph 5 above, at some point in the investigation the Person at Risk should be told clearly the nature of the concern and disclose the material reported to the Decision Maker. The purpose here is to enable the Person at Risk to understand that concern and be given an opportunity to explain to the Decision Maker, including an opportunity to meet with the Decision Maker. It is important to note that under various collective agreements the presence of a Faculty Association or Union representative may be required during any meeting with the Person at Risk.
7. Any time there is a meeting between the Decision Maker and the Person at Risk in the course of an investigation, the meeting is essentially private. If you conclude that others should be present (and this may be required (as noted above) or may make sense for a variety of practical reasons) they should be told they must treat what transpires as being confidential.
8. Conduct the investigation *fairly*. In this context, "fairly" means being able to investigate impartially and apply your mind to the facts independently of any prior knowledge, experience or background concerning the Person at Risk.
9. Different Decision Makers may decide to handle such matters differently, but it may be appropriate for the Person at Risk to attend any meeting along with someone who can offer moral support to the Person at Risk. Any investigative meeting should not be turned into a hearing - accordingly evidence should not be called, people should not be brought forward to testify as to what they say occurred, etc. The Person at Risk should be told what the Decision Maker has been told, when appropriate copies of statements should be provided, and the Decision Maker should listen to the explanation given by the Person at Risk as to what occurred. If the Decision Maker has material relevant to the issue being investigated which the Decision Maker decides ought to be withheld from the Person at Risk for some reason, such material should only be withheld if this is expressly approved by my office.
10. The Person at Risk is entitled to elect to obtain legal advice. However, generally lawyers should not be permitted to participate in any such investigation at this point. Permitting lawyers to participate at this point dramatically increases both cost (as the University generally provides counsel to a Decision Maker whenever a Person at Risk has counsel) and time spent. The University does permit lawyers to participate in most hearings and appeals and wishes to avoid these additional costs at this investigative stage. Where an employee is entitled to seek or is required to have representation under an agreement or collective agreement only the Union's/Association's lawyer (and not that of the Person at Risk) may be present in addition to Union/Association representatives. You may also in these circumstances wish to have an unbiased observer sit in the room as a witness to the proceedings.
11. The privacy rights of the Complainant and the Person at Risk should be respected. The matters should be discussed with University officials only on a "needs-to-know basis".

At the end of an investigation the task for the Decision Maker is to make two initial determinations. Did the behaviour occur and, if it did, did it go beyond what reasonably could be described as trifling? Can the behaviour be characterized as misconduct? If the Decision

Maker answers both questions in the affirmative then the Decision Maker must consider which of the following is the appropriate option:

- a) refer the matter to the appropriate person or body charged with the responsibility to deal with the matter (see, for instance, Findings and Recommendations of Investigative Committee in the Policy on Scholarly Integrity);
- b) for misconduct of University staff or faculty, make a decision on the appropriate disciplinary action, if any. The Decision Maker should consult with Human Resources. No further steps outlined in these Guidelines are applicable. The Person at Risk may have a grievance initiated by his/her Union or Association at which time the grievance procedure outlined in the appropriate agreement or collective agreement will apply;
- c) for contract matters, make a decision based on the terms of the agreements (for example, residence contracts);
- d) for the University's Policy on Discrimination and Harassment refer the matter to the Panel established under section (35);
- e) where the facts are unclear (see stage 3 below) refer matter to a Hearing.

Stage Three: Hearing

Where the facts are in dispute and not reasonably clear to the Decision Maker, or where the responsibility for a decision on the penalty rests with another authority, the Decision Maker (and almost invariably this will not be the same Decision Maker who conducted the investigation) may conduct a hearing. There may be a description of the type of hearing in the applicable regime. In conducting any hearing the Decision Maker must, at a minimum, follow the University's approved rules of natural justice which involve ensuring that the following principles are observed.

1. The Person at Risk should be given written notice of the issue that has been raised.
2. The Person at Risk must be given notice of the time and place of the hearing. The time must be reasonable in the sense that the Person at Risk can appear (normally the Decision Maker would contact the Person at Risk and the person's availability would be a critical determinant in scheduling the hearing)*.

**Only in exceptional (e.g. intimidation or safety of witnesses, is an issue) should evidence be taken from a witness in the absence of the Person at Risk.*

3. If there are good reasons why a Person at Risk cannot proceed with the hearing on the scheduled date then the hearing should be adjourned to attempt to ensure that the Person at Risk has an opportunity to participate in the hearing. A Decision Maker need not be pulverized into inaction by repeated and disingenuous requests for an adjournment but, if the Decision Maker concludes that the application for an adjournment is for a good reason then an adjournment should be given.
4. The Decision Maker conducting the hearing should not, as regards the Person at Risk, be subject to any bias or perception of bias. We all know generally what "bias" means. An obvious example is financial bias - that is if the Person at Risk is alleged to have stolen \$100.00 from the Dean and the ultimate result of the discipline may be an order for repayment, then the Dean should not be the Decision Maker who conducts the hearing.

Sometimes interpreting bias can be more difficult. Even so, it should be understood that bias is generally not construed broadly. As an example, it is not bias simply because the Dean investigating a Person at Risk had previously disciplined the Person at Risk.

In the case of a hearing involving a number of Decision Makers this means that each of the members (and the chair) must be free from bias. If there is a concern about whether a bias exists, you should check with my office.

5. In a University hearing involving any sensitive matters the University is concerned that information about the Person at Risk is not unnecessarily disseminated. At the same time the University is concerned to ensure the regularity of its procedures. Accordingly, while a University hearing involving sensitive personal matters is generally closed (in fact, hearings concerning personnel or disciplinary matters would be closed), the Person at Risk is permitted to bring a close friend (or a parent), but not a cheering section, to the hearing. While good arguments can be made for entirely open hearings, this paragraph expresses the University's present considered policy.
6. The Decision Maker must make available to the Person at Risk a copy of any relevant written material that the Decision Maker has (any report, documents constituting evidence, notes of evidence where applicable, etc.). A Decision Maker cannot rely upon (or use in any other way) any material or evidence of any nature relevant to the issue under consideration unless that material or evidence has been disclosed to the Person at Risk and the Person at Risk has had an opportunity to deal with it. If the Decision Maker is going to hear evidence in the context of conducting a hearing, the Decision Maker will generally want to listen to people who have first hand evidence of what occurred and those people will testify before the Decision Maker. The Person at Risk must be present during the hearing. In exceptional circumstances this may be varied on advice from the Office of University Counsel.
7. The University discourages any practice where witnesses are sworn (or affirmed) or their evidence is tape recorded or transcribed.
8. At this stage you must keep notes. It is important that you have as accurate a record as you reasonably can of what those people you listen to, particularly the Complainant and the Person at Risk, have said. Make the notes contemporaneously with the events. At some point in the future, a third party might want to look at your notes to determine the extent to which you adequately considered certain issues. You may prepare rough notes from which you subsequently dictate minutes (you may find it easier to add the detail while it is still fresh in your mind, but subsequently to having taken the initial notes). If you do this, generally speaking, you should not clutter up your file with the rough notes but should discard them.
9. Generally, the Person at Risk may introduce any evidence that the Person at Risk wishes to introduce after all other evidence has been presented. The Person at Risk should be given every opportunity to give explanations.
10. The Person at Risk has the right to an opportunity to controvert or question the case against the Person at Risk. This means that the Person at Risk has the right to ask questions and to some extent conduct a cross-examination (that is to ask pointed questions that question the accuracy or truthfulness of the witnesses who give testimony). The Decision Maker should encourage that this be done without aggressive tone or gesture. Administrative hearings are very different from trials. One of the critical ways in which they are different is that the University has no subpoena power and therefore cannot force anyone to appear on such hearings. Accordingly, while a Person at Risk has a right to question a witness on such hearing, if the witness finds the process uncomfortable and decides to leave, the fact that the

witness refuses to participate or to continue to participate, while something that the Decision Maker will want to consider carefully, does not automatically mean that the Decision Maker cannot proceed to make a decision.

11. When a hearing is held the Person at Risk may, depending upon the decision of the Decision Maker, have an advisor or advisors present (or someone to offer moral support). Obviously, the Person at Risk may have legal advice. In some cases the practice has developed in the University that the Person at Risk can have a lawyer at a hearing. Where this is the practice, this practice should be respected. Where there is an established practice within the University that the Person at Risk is not entitled to have a lawyer at a hearing, that practice should be followed. Where there is no established practice as to lawyers participating, before a Decision Maker agrees to permit a person to have a lawyer at a hearing, the matter should be discussed directly with my office so that a reasoned decision might be made. If the Person at Risk has a lawyer present, the University will generally ensure a lawyer is available to the Decision Maker.
12. A Decision Maker conducting a hearing is not subject to the legal rules of evidence, but should try to ensure that the most reliable, available evidence is used. A Decision Maker should consider the reliability of the evidence in deciding how much weight to give it. As an example, if there is both non-hearsay evidence ("I saw it") and hearsay evidence ("John told me he saw it") generally, the non-hearsay evidence would be given more weight.
13. The Person at Risk has a right to be present throughout the hearing, both when evidence is being heard and submissions are being made.
14. When all the evidence has been heard the Person at Risk is entitled to make submissions to the Decision Maker.
15. The decision following a hearing should generally be in writing and should contain reasons (although they should be brief) why the Decision Maker reached the decision.
16. The privacy rights of the Complainant and the Person at Risk should be respected. The matters should be discussed with University officials only on a "needs-to-know basis".

Stage Four: Appeal

The decision made by the Decision Maker on the hearing is only subject to a right of appeal in favour of the Person at Risk where the controlling University policy, protocol or statute establishes a right of appeal. In such cases, the controlling University policy, protocol or statute generally provides a description concerning the conduct of the appeal.

The principal issue governing the conduct of any appeal is which one of two general procedures will govern. Will the appeal be conducted as a re-hearing or as a review? A re-hearing is an entirely new, or in part a new, hearing. A re-hearing means that the various witnesses and their evidence will be re-considered by a new Decision Maker who will re-decide matters in making a determination. Alternatively, the new Decision Maker may only conduct a review, that is to say, accept the facts determined at the original hearing, and decide whether that body of material supports the decision of the previous Decision Maker, and whether the original Decision Maker acted without bias, and whether the proceedings were fair.

While the University wishes to make available to Persons at Risk a fair process, the University's preference is that having provided one full hearing, appeals should only in exceptional situations be conducted as a re-hearing rather than as a review. A Decision Maker should only conduct a re-

hearing on an appeal where an established regime clearly requires a re-hearing; or where new, compelling evidence was not available during the original hearing; or where clear bias has been evident.

If the Decision Maker does conduct a re-hearing then the Decision Maker would follow the rules set out at "Stage Three: Hearing" (above).

If, on the other hand, the Decision Maker conducts a review then the new Decision Maker should consider only the evidence as found by the Decision Maker appealed from and submissions from either the University or the Person at Risk concerning the correctness of the decision (including inferences drawn from the facts; the weight assigned to the evidence; the appropriateness, in the light of the unaltered evidence, of the disposition reached by the original Decision Maker; and whether the rules were materially observed). The Decision Maker should then determine whether the original decision under appeal should be confirmed, varied in some respect or set aside and what result should follow from a decision to confirm, vary or set aside.