Investigation Report Writing & Hearing Officer Written Determinations: Best Practices

Sean Flammer, Associate General Counsel

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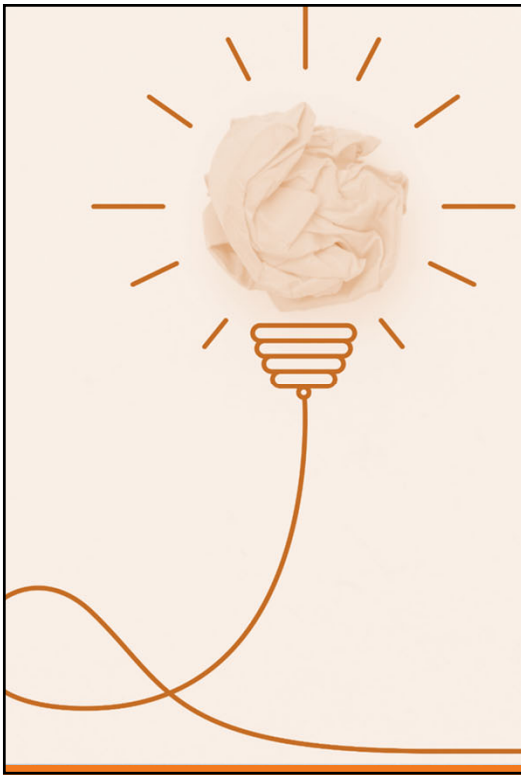

Agenda

1. Background
2. Organization
3. Analysis of a Policy Violation
4. Specific Issues

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Background

What types of Investigation Reports?

- Employment Discrimination and Retaliation
- Research Misconduct
- Title IX/Sexual Misconduct (special considerations may apply)
- Student Conduct

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What about Hearing Officer Written Determinations?

Yes!

- Outline and structure are different because the sexual misconduct policy outlines the various parts. No need to repeat that here. This presentation will focus on the structure/organization of an investigation report. But:

- Analysis techniques and best practices are the same.

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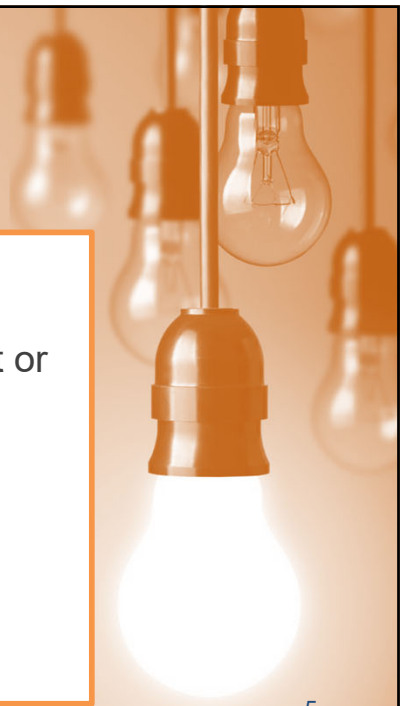
Reminders



- Reasonable minds can **disagree** on an approach.
- There is **no** *"right"* or *"wrong"* way to write a report or determination letter.
- The purpose of writing is to **communicate**.
- **Flexibility** is key: Different cases may lend themselves better to different formats.

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Investigation Report Organization: Format Overview

I. Executive Summary
II. Allegations & Analysis
  A. Allegation 1
    i. Policy at issue
    ii. Describe allegation (e.g. CP's complaint, if there is a CP)
    iii. Response & evidence from witnesses
    iv. Analysis of whether facts demonstrate a policy violation
  B. Allegation 2
  …
III. Conclusion

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Organization: Format Overview if same facts (Example: SH and OISM)

I. Executive Summary
II. Allegations & Analysis
  A. Allegation 1 and Allegation 2 (if same facts)
    i. Policy at issue
    ii. Describe allegation (e.g. CP's complaint, if there is a CP)
    iii. Response & evidence from witnesses
    iv. Analysis of whether facts demonstrate a policy violation for Allegation 1
    v. Analysis of whether facts demonstrate a policy violation for Allegation 2
  B. Allegation 3
  …
III. Conclusion

I. Executive Summary

- Less than one page? A few paragraphs?
  - Identify the basic nature of allegations
  - Identify Respondent (and Complainant (CP), if applicable)
  - Identify the policy & the policy provision(s) at issue.
  - Identify the conclusion/determination (if applicable)

II. Allegations & Analysis: Note

Everything we are talking about now also applies to Hearing Officer Written Determinations

Factual Findings and Analysis

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II. Allegations & Analysis

- Outline the **allegations** and analyze each allegation, one-by-one.
- Describe what **evidence** has been obtained and the **facts** learned through the investigation/hearing.
- Describe **analysis**, including potential **credibility** determinations.

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II. Allegations & Analysis (Cont.)

- Demonstrate that you **heard** all of the individuals interviewed.
- Demonstrate the **care** and **attention** you put into the investigation/hearing.
- Focus only on the **relevant** evidence.
  - Not all evidence is going to be relevant.
  - An "information dump" isn't going to be effective.
  - Investigators: If *potentially* relevant, include in appendix/exhibits. (e.g. *interview notes*)

Framing the Allegations

A. *"Respondent allegedly retaliated against Employee."*
B. *"Respondent allegedly violated HOP 123."*
C. *"Respondent assigned Employee to an undesirable job assignment."*
D. *"Respondent is alleged to have violated the anti-retaliation provision of HOP 123 when Respondent assigned Employee to an undesirable job assignment shortly after Respondent learned that Employee participated in a discrimination investigation against Respondent."*

Allegation Components: Stalking Example

Respondent is alleged to have violated the anti-retaliation provision of HOP 123 when Respondent assigned Employee to an undesirable job assignment shortly after Respondent learned that Employee participated in a discrimination investigation against Respondent.

1. Policy implicated
2. Action taken
3. General theory of how conduct relates to policy

   (e.g. *retaliatory action of assigning an undesirable job duty following protected activity of participating in an investigation*)

Allegation Components: Academic Dishonesty Example

Respondent is alleged to have committed "academic dishonesty" in violation of the Student Code of Conduct by copying several paragraphs from a book and inserting the text into an assignment without citation.

1. Action taken
2. Policy implicated
3. General theory of how conduct relates to policy

   (e.g. *copying paragraphs from a book without citation is a form of academic dishonesty under the policy*)

Framing the Policy at Issue

- After stating the allegation, state the **specific policy at issue:** *"Provision X of HOP 123"*
- **Not** a general description: *"Policy on research misconduct"*
- There should be **no ambiguity** about exactly what section of the policy is at issue.
- You can cite **whole provision** or just the **key part** that is applicable to the allegations and complaint.

Example:

An employee commits retaliation under HOP 123 when that person "takes an adverse action against another employee because that employee… participated in an investigation."

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Describing the Competing Narratives/Evidence

- If there is a Complainant (CP), what is the CP saying?
- If no CP, what is the evidence that a policy violation occurred (e.g. *inculpatory evidence*, if any)?
- What did the RP say? What is the evidence that a policy violation did not occur (e.g. *exculpatory evidence*, if any)?
- What did the witnesses say? Evidence? Texts? Emails?

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Describing the Narratives/Evidence (cont'd)

What to include in the Investigation Report and what not to include? General "rules":

- If **relevant**, **include**. If clearly **irrelevant**, don't include in report.
- If provided by a party but not relevant, include in an **Appendix unless** it is part of defense/complaint.
- If **not sure**, definitely include in the **Appendix**.
- Consider **who** provided the evidence and what is their possible **motivation**?
  - **Important facts** provided by party = **Include** in the report
  - Full party statement = **Appendix**
  - **Explanation provided by RP** but irrelevant = **Include** in the report

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Analysis

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Analysis

- Outline whether the **facts** equate to a policy violation using a **preponderance standard**.
- Note: What about Title IX cases?
- What are the **policy provision elements**? Discuss the **relevant evidence** with respect to **each element**.
- **Credibility determination**: *If credibility is part of the analysis and reasoning, say so.*

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Analysis: Stalking Example (finding)

As explained above, for conduct to constitute "stalking" under HOP 123, there must be a (1) a course of conduct, (2) directed at a specific person, and (3) the conduct must cause a reasonable person to fear for his or her safety or the safety of other or suffer substantial emotional distress. Here, because RP followed CP on more than five occasions, RP engaged in a course of conduct directed at a specific person. With respect to the third element, each time the RP followed CP, RP drove erratically behind CP, frequently tailgating by only leaving a few feet between their vehicles and flashing RP's headlights. On two occasions, RP displayed RP's handgun and on three occasions RP shook RP's fists. I find that based on this conduct, a reasonable person would fear for his or her safety or the conduct would cause substantial emotion distress. I find, therefore, by the preponderance of the evidence that RP violated HOP 123's prohibition on stalking.

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Analysis: Stalking Example (no finding)

As explained above, for conduct to constitute "stalking" under HOP 123, there must be a (1) a course of conduct, (2) directed at a specific person, and (3) the conduct must cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress. Here, because RP walked behind CP from the classroom to the bus stop outside the humanities building two times, RP engaged in a course of conduct. With respect to the second element, there is no evidence that RP "directed" RP's conduct towards CP. Instead, the evidence is that RP and CP take the same class and ride the same bus home. After class, both CP and RP would walk towards the bus stop and then board the bus. But there is no evidence that CP's boarding the bus was "directed" towards CP. Further, with respect to the third element, RP did not threaten CP or do anything that would make "a reasonable person fear for his or her safety or the safety of others or cause substantial emotional distress." In particular, RP was the first person to get off the bus because RP's apartment complex is the first stop. This fact is consistent with RP's explanation that RP was just going home and was not following CP. I do not find, therefore, by the preponderance of the evidence that RP violated HOP 123's prohibition on stalking.

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Analysis: Connecting policy to conduct (Ex. Retaliation)

- The policy says "**adverse action**" is required for a policy violation of Retaliation.
- The employee says RP assigned to an "undesirable job duty."
- The Investigation Report/Written Determination Letter must attempt to **explain** whether an "undesirable job duty" is an "adverse action."
- One sentence may do it. But whether the job duty identified is an adverse action may have to be explained…

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Analysis: Retaliation/Adverse Action Example (Cont.)

Example:

Employee at grade 9-12 charter school assigned lunch duty Monday through Friday.

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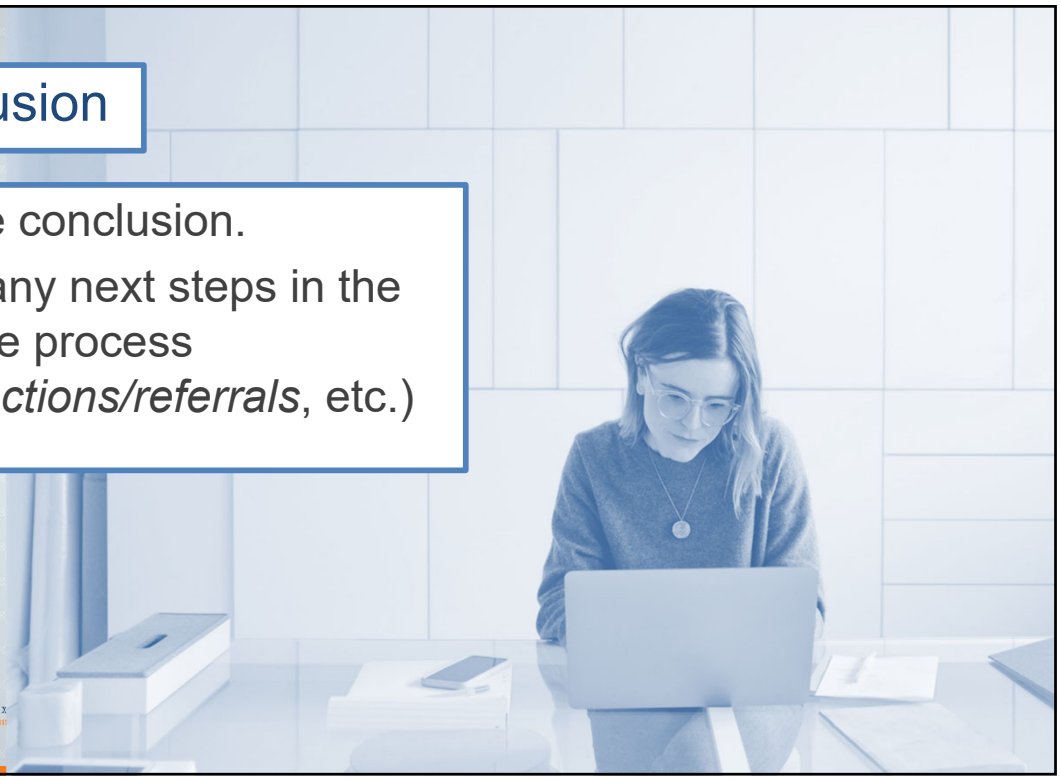
III. Conclusion

- State the conclusion.
- Include any next steps in the grievance process (e.g. *sanctions/referrals*, etc.)



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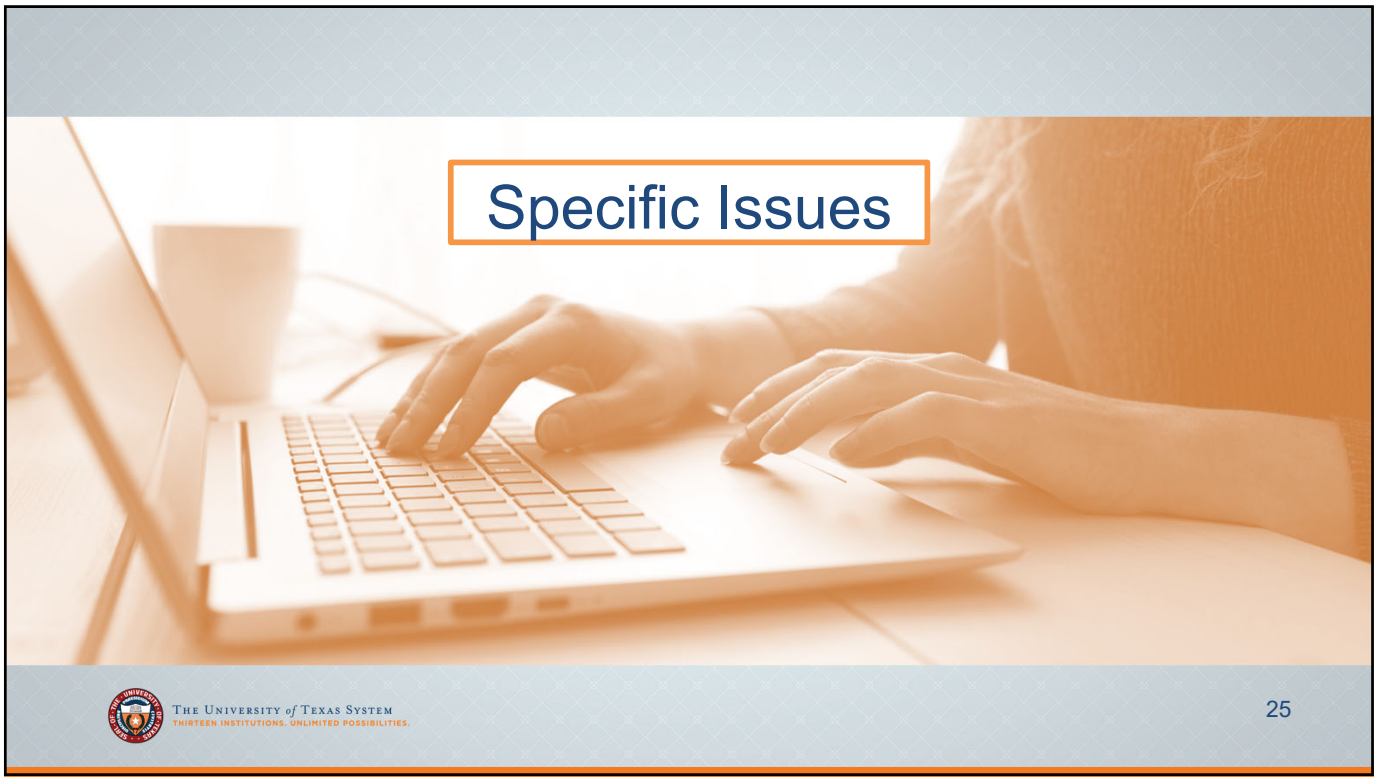

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Issue #1: Counter-Arguments and Contrary Evidence

Example #1:

RP broke up with CP and one-month later CP encounters RP with new girlfriend at bar. Next day, CP files a Title IX "sexual assault" complaint alleging one of sexual encounters during their six-month relationship was non-consensual. RP says that CP's motivation for filing complaint was "retaliation" for RP having a new girlfriend.

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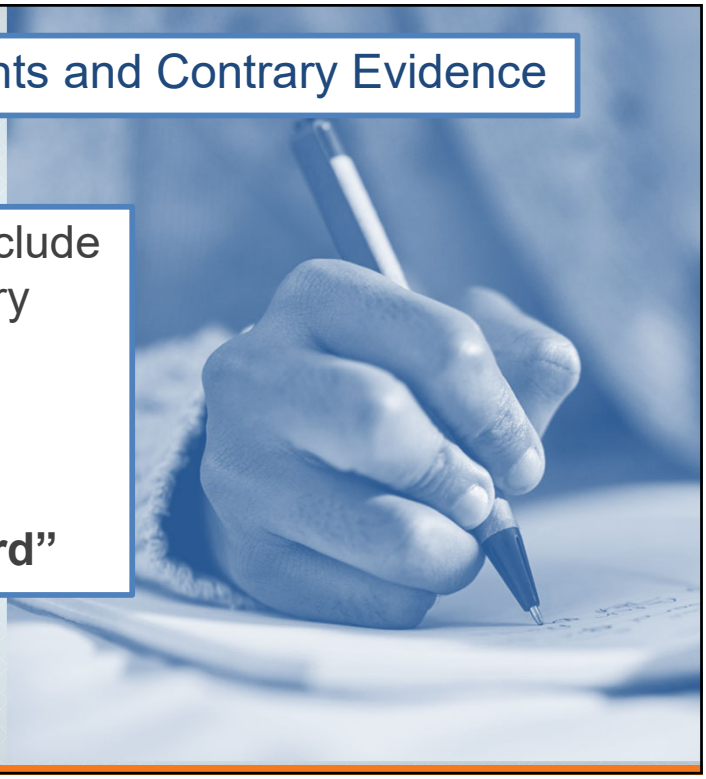
Issue #1: Counter-Arguments and Contrary Evidence

Example #2:

RP says she assigned Employee lunch duty M-F because students have been having a lot of fights and Employee is the only teacher physically capable of restraining students if a fight breaks out. RP also says she provided Employee an extra five minutes each day to eat lunch.

Issue #1 : Counter-Arguments and Contrary Evidence



What happens if you don't include counter-arguments or contrary evidence?

- Allegations of **bias**
- Process seems **"unfair"**
- Participants feel **"not heard"**

Issue #2: Summarize Each Interview?

Example:

Investigators: You interview 25 witnesses.

Hearing Officers: 12 people testify.

Do you include a summary of each person's statement?

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Issue #3: Credibility Determinations

Sometimes credibility is an issue. Sometimes it is not. If it is, explain why you made the determination you did.

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Issue #4: Your Words Matter

Example #1: *I find there is insufficient evidence—based on the preponderance of the evidence standard—to conclude that RP violated HOP 123's prohibition of sexual assault. This does not mean that a sexual assault did not occur or that CP did not experience the encounter as a sexual assault. It means that I cannot find under the evidentiary standard that RP sexually assaulted CP."*

Example #2: *Under the preponderance of the evidence standard, I do not believe that CP was the victim of sexual assault….*

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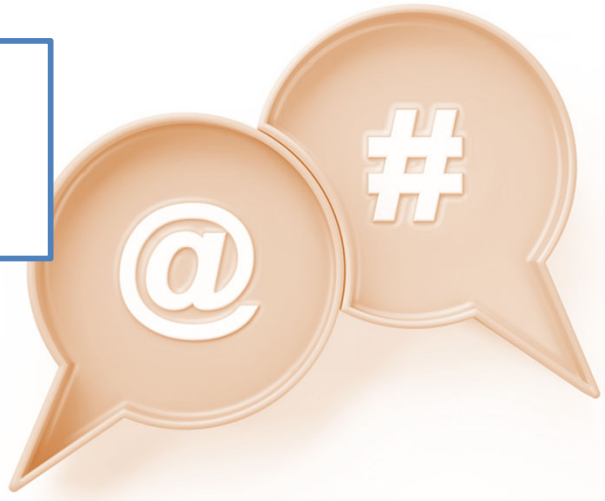
Issue #5: Use Accurate Terminology

Example #1: *"nether regions"*

Example #2: *"private parts"*



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Issue #6: Demonstrate Care and Attention

- Proofread
- Revise, if unclear
- Pretend person who is going to be most unhappy is there with you as you review. *What would they say?* Then, revise to incorporate and explain why you made your decision.

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Contact Information

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Associate General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu

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