

Due Process — Employee Code (Faculty)

This policy implements and is consistent with the requirements set out in *Administrative Regulation — Due Process*. In addition, these procedures should be read in conjunction with *Administrative Regulation — Employee Code*.

I. Formal Hearings

A. Hearing Roles and Responsibilities

1. Hearing Clerk

The Provost will appoint a hearing clerk who is responsible for scheduling the hearing, securing the location, ensuring the availability of the hearing panel and hearing officer and all other logistics. The hearing clerk will schedule a University-approved hearing officer.

2. Hearing Officer

The hearing officer will be drawn from a pool of University-approved hearing officers. The hearing officer will be a member in good standing of the Kentucky Bar Association. The hearing officer will preside over the hearing, instruct the hearing panel on legal issues and make decisions as to the admissibility of evidence. However, the hearing panel will be the ultimate decision-maker as to responsibility for a violation.

3. Hearing Panel

As set out in *Administrative Regulation — Due Process*, the Provost will appoint a hearing/appeals board of at least 15 employees. From this board, there will be a randomly selected three (3)-person hearing panel and if an appeal, a randomly selected three (3)-person appeal panel.

B. Pre-Hearing Procedure

1. Notice of Charges

When a formal hearing is required, the University will provide a statement of charges to the accused faculty employee (“respondent”). The statement of charges will detail the circumstances of the alleged violation, including the final investigative report and any probable cause determination. The notice also will provide a hearing date that is at least 21 business days after the notice.

2. Access to Evidence

No later than 14 business days prior to a scheduled hearing, both the University and the respondent will have access to all inculpatory and exculpatory evidence and to the membership of the hearing panel.

3. Submission of Information

No later than 10 business days prior to a scheduled hearing, the University, the respondent and the complainant, if participating, must submit the following to the Provost: (a) challenges to any hearing panel member; (b) any information they wish to present at the hearing; (c) the name(s) of their attorney(s) or advisor(s); (d) a preliminary list of questions or topics they wish to ask of the other party(s); and (e) a list of possible witnesses and the subject(s) on which they are expected to testify.

Except where allowed by the hearing officer, the parties may not submit information for the hearing after this deadline. Upon the receipt of information from all participating parties, the hearing officer will review the information submitted to eliminate any redundant, irrelevant or prejudicial information.

4. Request for Postponement

At any time prior to a scheduled hearing, the University, the respondent or the complainant, if participating, may request to postpone the hearing. The hearing officer may accept or deny the request after considering the nature of the request and the incident at issue. The hearing officer's decision is final and may not be appealed.

5. Pre-Hearing Disclosures to the Parties

No later than three (3) business days prior to a scheduled hearing, the University, the respondent and the complainant, if participating, will receive a copy of the following: (a) a list of witnesses; (b) preliminary questions submitted by parties; and (c) any other related information. These disclosures will be provided by the Provost.

6. Pre-Hearing Materials for the Hearing Panel

No later than three (3) business days prior to a scheduled hearing, the hearing panel will receive a copy of the following: (a) information about the parties; (b) the final investigative report including any appendices; (c) a list of potential witnesses; (d) the charged policy violations; (e) the date and location of the charged violation; and (f) any other related information. These disclosures will be provided by the Provost.

C. Conduct of Hearings

1. Burden of Proof

The respondent is presumed not responsible for a violation. The University has the burden of proving, by preponderance of the evidence, that the respondent committed the violation. Where federal or state law requires a higher standard of proof, the higher standard will be used.

The University will present its case through the General Counsel or attorneys under the direction and control of the General Counsel.

While the complainant's testimony will be an integral part of the University's proof, the complainant has no responsibility other than to appear as a witness.

2. Right to Counsel

The respondent has the right to legal counsel of their choice at their own expense.

3. Right to an Advisor

The respondent has the right to a non-attorney advisor(s) of their choice. Advisors may communicate privately with the individual they are supporting but may not question witnesses or offer oral argument during the hearing.

4. No Obligation to Present a Defense

Because the respondent is presumed not responsible and the burden of proof is on the University, the respondent is not required to present a defense.

5. Witnesses

The University and the respondent may call witnesses and may cross-examine witnesses offered by the other parties. Witnesses other than the respondent and the complainant, if participating, will be excluded from the hearing except for the period of their own testimony.

The University and the respondent are responsible for arranging the attendance of witnesses. The Provost will advise all potential witnesses of their right to be free from retaliation.

6. Evidence

The University and the respondent may present evidence. The Kentucky Rules of Evidence will govern the admission of evidence, but the hearing officer has the discretion to allow hearsay evidence.

7. Right Against Self-Incrimination

Any witness, including the respondent, may refuse to appear and/or exercise the right against self-incrimination. The hearing panel may not draw an inference due to a witness' non-participation or refusal to answer questions.

8. Instructions to the Hearing Panel

At the conclusion of the hearing, the hearing officer will instruct the hearing panel as to (a) the presumption of non-responsibility; (b) standard of evidence required; and (c) any other matter the hearing officer deems necessary for the hearing panel's determination.

9. Record of the Hearing

The Provost will arrange for a video recording and/or transcript of the hearing.

D. Formal Hearing Decisions

1. Determination of Responsibility

The hearing panel will determine whether the respondent is responsible for a violation. Any finding of responsibility must be unanimous. No member of the hearing panel may abstain.

2. Recommendation of Sanctions

If the hearing panel reaches a responsible finding, the hearing panel will convene a supplemental proceeding to determine the recommendation for the sanction(s). The University and the respondent may submit evidence or argument concerning the appropriateness of a particular sanction. The respondent's past violations of University policy may be considered at this time.

3. Decision of the Hearing Panel

The hearing panel will issue a written decision to the parties explaining its finding and accompanying rationale and recommended sanctions. The hearing panel may recommend any sanction up to and including suspension without pay or a recommendation of termination of faculty appointment.

4. Imposition of Sanctions

While the hearing panel's recommendation provides guidance, sanctions will be determined and imposed by the Provost.

The Provost may impose any sanction up to and including recommendation of termination of faculty appointment. Although the Provost may impose a greater or lesser sanction, the Provost cannot overturn a finding of responsibility.

II. Appeals

A. Eligibility for Filing an Appeal

Any respondent who has been found responsible by a hearing panel may appeal either the finding of responsibility, the sanction imposed or both.

The University may not appeal.

B. Grounds for Appeal

A respondent may appeal on any ground including, but not limited to, procedural irregularity, erroneous factual conclusions, incorrect legal conclusions, violations of constitutional rights or the discovery of new evidence not available at the original hearing.

C. Appointment of an Appeal Clerk

The Provost will appoint an appeal clerk who will have responsibility for empaneling the appeals panel, receiving and distributing the briefs, scheduling oral arguments, if requested, and distributing findings.

D. The Notice of Appeal

A respondent may appeal by filing a notice of appeal with the Provost within seven (7) business days of the decision determining the sanction. The notice should simply state the respondent wishes to appeal either the finding of responsibility, the sanction imposed or both.

E. Appeal Record

Upon receipt of a notice of appeal, the Provost will prepare the appeal record. The appeal record consists of the following:

- Pre-hearing materials for the hearing panel.
- The hearing officer's pre-hearing written rulings.
- The hearing panel's written decision and any sanction recommendation.
- The determination and imposition of sanction from the Provost, if any.

- A transcript of the hearing.
- Any other materials admitted into evidence during the hearing.

Upon completion of the appeal record, the Provost will certify the record is complete and will send a copy to all parties.

F. Briefs

1. Respondent's Brief

When the respondent is challenging a finding of responsibility, sanction or both, the respondent's brief is due 10 business days after the Provost certifies the record is complete.

The respondent's brief must not exceed 25 pages, double-spaced, with 12-point type. The respondent's brief will be provided to the University for response.

2. University's Brief

The University's brief is due 10 business days after the brief of the respondent.

The University's brief must not exceed 25 pages, double-spaced, with 12-point type.

3. Reply Brief of the Respondent

The respondent may file a reply brief within 10 business days after the University's brief.

The reply brief must not exceed 10 pages, double-spaced, with 12-point type.

4. Modification to Deadline and Page Limits

Upon request of any party, the respective appeals panel may extend the time for filing a brief and/or the page limits.

G. Appeal Decisions

1. Decision by the Appeals Panel

After reviewing all briefs and the appeal record, the respective appeals panel will make a written decision. The decision must be supported by a majority of the respective appeals panel. No member of the appeals panel may abstain.

2. Standard of Review

In reviewing the decision of the hearing panel, findings of fact are reviewed under the clearly erroneous standard and conclusions of law are reviewed de novo (i.e., reviewing without any deference to the hearing panel).

3. Decision Concerning Responsibility

With respect to the issue of responsibility, the appeals panel may affirm, reverse or reverse and remand for further proceedings.

4. Decision Concerning Sanction

As to the sanction, the respective appeals panel may affirm or impose a lesser sanction. The appeals panel may not increase the sanction.