QUESTIONING SKILLS & CREDIBILITY
Your goal is to ensure that you understand information contained in the report:

- Relevant facts about what happened during the incident
- Any related events
- Any corroborating information

Use your questions to elicit details, eliminate vagueness, fill in the gaps where information seems to be missing.

Your goal is not:

- Satisfying your curiosity
- Chasing the rabbit into Wonderland

Do not expect the “Gotcha” moment. That is not your role. You are not prosecutorial.
IF YOU STILL HAVE TO ASK A QUESTION, ASK YOURSELF

– Is the answer already in the report or documentation I have been provided?
  ▪ If not, why not? (Ask the Investigator this!)
  ▪ You still will need to ask it again but keep the report in mind.

– What do I need to know?
  ▪ Who is the best person to ask this of? Usually it will be the Investigator, first, and then the original source, if available; it may be good to ask the investigator if they asked it already and what answer they got.

– Why do I need to know it?
  ▪ If it is not going to help you decide whether a policy was violated or not and you can explain how, then it is not a good question (though you may not know this until you hear the answer).

– What is the best way to ask the question?

– Are you the best person to ask this question?
ASKING GOOD QUESTIONS

• Generally use open-ended questions (tell us..., who..., what..., how...)
• Try to avoid close-ended questions (Did you..., were you...)
• Don’t ask Compound Questions
  – “I have two questions; First,..., Second,...”
• Don’t ask Multiple Choice Questions
  – Were you a or b?
• Avoid suggesting an answer in your question
QUESTIONING SKILLS

• Listen carefully and adapt follow-up questions.
• Work from your prepared outline but stay flexible.
• Seek to clarify terms (when the report is silent) that can have multiple meanings or a spectrum of meanings such as “hooked up,” “drunk,” “sex,” “acted weird,” “sketchy,” or “had a few drinks.”
• Be cognizant of the difference between what was “heard” (hearsay), what can be assumed (circumstantial), and what was “witnessed” (facts).
• Be aware of your own body language. Stay neutral, even if you hear something you distrust or dislike.
QUESTIONING TIPS

• Restate/summarize what was said. Helps validate that you are listening and helps ensure you understand what is being said.

• Consider using these phrases:
  – “So it sounds like...”
  – “Tell me more...”
  – “Walk me through”
  – “Help me understand”

• Frame questions neutrally.

• Be on the lookout for “cued” responses or rehearsed or memorized answers.

• Handle emotions sensitively and tactfully.

• Observe body language, but don’t read too much into it.
WHAT IS CREDIBILITY?

• Accuracy and reliability of information
• Ultimately the decision-maker’s role to determine the credibility of testimony and evidence, and hence its reliability.
• “Credible” is not synonymous with “truthful”
• Memory errors, evasion, misleading may impact
• Primary factors: corroboration and consistency
• Avoid too much focus on irrelevant inconsistencies
• Source + content + plausibility
• Credibility assessment may not be based on a person’s status as a Complainant, Respondent, or Witness.

"Sexual assault" means an offense classified as a forcible or non-forcible sex offense under the uniform crime reporting system of the FBI."
CREDIBILITY

• Inherent plausibility
  o “Does this make sense?”
  o Be careful of bias influencing sense of “logical.”

• Motive to falsify
  o Do they have a reason to lie?

• Corroboration
  o Aligned testimony and/or physical evidence.

• Past record
  o Is there a history of similar behavior?

• Demeanor
  o Do they seem to be lying or telling the truth?

Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors
EEOC (1999)
Corroborating evidence

- Strongest indicator of credibility.
- Independent, objective authentication.
  - Party says they went to dinner, provides receipt.
  - Party describes text conversation, provides screenshots.
- Corroboration of central vs. environmental facts.
- Not simply alignment with friendly witnesses.
FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating evidence

• Can include contemporaneous witness accounts.
  – More “separate” the witness, greater the credibility boost.

• Outcry witnesses.
  – Does what party said then line up with what they say now?

• Pay attention to allegiances.
  – Friends, roommates, teammates, group membership.
  – This can work both directions (ex. honest roommate).
Inherent plausibility

• Does what the party described make sense?
  – Consideration of environmental factors, trauma, relationships.

• Is it believable on its face?

• “Plausibility” is a function of “likeliness.”
  – Would a reasonable person in the same scenario do the same things? Why or why not?
  – Are there more likely alternatives based on the evidence?
FACTORS TO CONSIDER FOR CREDIBILITY

Inherent plausibility

• Is the party’s statement consistent with the evidence?

• Is their physical location or proximity reasonable?
  – Could they have heard what they said they heard?
  – Were there other impediments? (darkness, obstructions).

• How good is their memory?
  – Temporal proximity based on age of allegations.
  – “I think,” “I’m pretty sure,” “It would make sense”
FACTORS TO CONSIDER FOR CREDIBILITY

Motive to falsify

• Does the party have a reason to lie?

• What’s at stake if the allegations are true?
  – Think academic or career implications.
  – Also personal or relationship consequences.

• What if the allegations are false?
  – Other pressures on the reporting party – failing grades, dramatic changes in social/personal life, other academic implications.

• Reliance on written document during testimony.
FACTORS TO CONSIDER FOR CREDIBILITY

Past record

• Is there evidence or records of past misconduct?

• Are there determinations of responsibility for substantially similar misconduct?

• Check record for past allegations.
  – Even if found “not responsible,” may evidence pattern or proclivity.

• Written/verbal statements, pre-existing relationship.
Demeanor

• Is the party uncomfortable, uncooperative, resistant?
• Certain lines of questioning – agitated, argumentative.

• BE VERY CAREFUL
  – Humans are excellent at picking up non-verbal cues.
  – Human are terrible at spotting liars (roughly equivalent to polygraph).

• Look for indications of discomfort or resistance.
CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

• Under the 2020 regs, investigators may or may not assess credibility with or without rendering conclusions or making findings related to credibility but will help to roadmap where decision-makers should look for information critical to a determination.

• Language in an investigation report may look like this:
  – “Decision-makers will want to carefully review Mary’s testimony as to whether the conduct was welcome, in light of the testimony of W1.”
  – “Decision-makers may wish to focus on reconciling the testimony offered by Joe and by Witness 2 with respect to who engaged in the conduct first.”
CREDIBILITY IN THE HEARING

• Distinguish performance/presentation skills from believability.
  – Make sure key witnesses will be present.
  – Make sure evidence has been verified.

• If any evidence/testimony must be subject to credibility assessment, and the evidence isn’t available or the witness/party does not participate, it may violate due process to consider that evidence/testimony and give it weight.

• 2020 regs are quite clear such evidence may not be considered if it relates to a statement previously made. Other evidence can be considered.

• What will the effect of that be on the process/decision?
CREDIBILITY DETERMINATIONS POST-HEARING

• The decision-maker determines the greater weight of credibility on each key point in which credibility is at issue.

• First, narrow to the contested facts, and then make a credibility analysis (by the standard of proof) for each.

• Then, weight the overall credibility based on the sum total of each contested fact.

• Credibility exists on a 100 point scale.

• When you write the final determination letter, focus on what facts, opinion, and/or circumstantial evidence supports your conclusion. Offer a cogent and detailed rationale.
APPEALS: THE PROCESS

- Request for Appeal
  - Accepted
    - Decision Stands
  - Denied
    - Decision Stands
  - Remand
    - New Investigation
  - Sanction Adjusted
    - New Hearing
    - Sanctions-Only Hearing
• One level of appeal.

• Short window to request an appeal.
  – May always grant an extension if necessary

• Document-based and recording review.
  – NOT de novo
  – In other words, not a “second-bite of the apple.”

• Deference to original hearing authority.
RECORD-KEEPING AND DOCUMENTATION
Certain records must be created, retained, and available to the parties for at least **seven** years:

- Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
- Any appeal and related result(s)
- Any informal resolution implemented
- Any supportive measures implemented
- **For each formal complaint, must document the basis for why the institutional response was not deliberately indifferent**

For each conclusion, must document the rationale for its determination

Must document measures taken to preserve/restore access to education programs/activity
QUESTIONS?
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