

## **Hearing Officer Cases:**

### Case 1: The Rowing Club

Complainant reported to the Sexual Assault Response Team that she had been sexually assaulted by Respondent. The College investigated, and has now convened a disciplinary hearing.

#### **A. Respondent's Version of the Events.**

R claims that on the night of February 18, he was at a rowing team party on campus where he saw Complainant, a fellow rowing teammate. R was supposed to meet Student B, another teammate with whom he had previously had an "intimate" relationship. At the rowing party, R and Complainant consumed alcohol and began talking to each other. The two left the party and went to The Hangout, a social venue on campus. According to R, Complainant did not require assistance walking; "to the contrary, [she] placed her arm around [his] shoulders as a sign of intimacy."

At The Hangout, R and Complainant kissed "for a while." R asked Complainant if she wanted to have sex and she agreed. Complainant then called her roommate to inquire about the "availability" of her dorm room. Complainant could not get in touch with her roommate so the two went to R's dorm instead. Complainant and R then walked to R's dorm with her arms again "placed ... around [him]." At this time, Student B and another rowing team member, Student A, observed Complainant walking with R. During the walk, Complainant asked R if he wanted to have breakfast or dinner the next day, to which he responded, "no."

Upon arriving at R's room, Complainant went to use the bathroom before returning to R's room. R then left to use the bathroom himself while Complainant waited in his room. When he returned, he told Complainant that it was his "first time" and she responded "it's okay, I know what to do." Complainant then undressed herself while R, with Complainant's assistance, did the same. They then kissed and Complainant began to perform oral sex on R, stating, "I know how to do this; I have done this before." Complainant picked up the condom next to the bed, and using her hand and her teeth, ripped it open and placed it on R. R then began performing oral sex on Complainant while she instructed him on where and how to do so. They then

began engaging in sexual intercourse while kissing. At one point, Complainant changed positions and got on top of R.

While in the act, R's roommate entered the room and R asked him to leave. Following the interruption, R and Complainant did not resume sexual intercourse. Complainant began talking about her ex-boyfriend and stated that she was not ready for "anything new." Complainant then got dressed and commented on how she "took R virginity."

Shortly after Complainant left, R's student fellow/resident advisor (the "Student Fellow"), knocked on the door and asked R to step out into the hallway. The Student Fellow questioned R about his "party habits" while R noticed Student A standing at the doorway of his room. R later learned that Student A had coordinated with the Student Fellow so that she could enter R's dorm to search for Complainant while the Student Fellow distracted R in the hallway. The next morning, the Student Fellow advised R that two students, later determined to be Student A and Student B, had observed R walking with Complainant, who appeared to be drunk, and tried to alert campus security. Campus security never visited R.

## **B. Complainant's Version of Events.**

C's version of events, is very different. C is the daughter of a well-known faculty member at University. She claims that she tried to avoid R at the rowing team party, where he was "hitting" on her. At the party, she consumed several glasses of punch without knowing what type of alcohol it contained and became intoxicated. She initially turned down an offer by R to go to The Hangout, but eventually ended up leaving the party and going there with him. She stated that she did not remember walking to or spending time at The Hangout. She did remember, however, R asking for a kiss and her reply being "I only kiss people I am in a relationship with."

At some point in the evening, either on the way to The Hangout or on the way to his dorm, R said he wanted to have sex with Complainant and/or asked if she wanted to go to his room, to which she either said nothing or said "no." In her statement to the investigators, she said that she "remember[ed] feeling helpless, like [she] couldn't talk" and "had to do whatever he said." She eventually found herself in R's room, where she said that events were "fuzzy" to her. C believed that R removed all of her clothing. R then pushed Complainant's face into his crotch area

for her to perform oral sex on him, stating, “you should like it. She tried to resist but was unable to do so. She felt, she said, “physical[ly] entrap[ped].”

The next thing C remembered was being on her back with R on top of her and forcibly engaging in sexual intercourse. She tried to push him off but was unable to. After what seemed like a long time to her, R stopped and C got up, got dressed, and left R's room.

### **C. The Facebook Messages.**

On February 19, the day after the incident, R sent a Facebook message to C, saying “Hey, wish you didn't have a really bad hangover. I was really drunk last night and I feel maybe i was way too forward. I'd be more shy if i was more sober. I just want to make sure that you are okay.”

C replied: I was really drunk as well, don't worry I actually don't have a bad hang over today how about you? I realized I just am way too close to my previous relationship which was really serious so I can't date any one yet. I'm really sorry I led you on last night I should have known better then to let myself drink yet, I really don't want this to affect our team dynamic or friendship. I don't think any less of you at all I had a wonderful time last night I'm just too close to my previous relationship to be in one right now.

R responded, saying “I totally understand you and i'm glad we are still friends. Apparently, somebody called security on me last night cuz they thought i might be potentially hurting somebody and my student fellow went nuts on me today haha:[.]” C replied, “oh I'm really sorry! also did they write you up? ... I will stand up for you because you were not [.]” R then said “don't worry i i didn't even see the securities, it's just my student fellow is overreacting and he told me that somebody called security haha:[.]” C replied, “oh okay good I just wanted to make sure you didn't get in trouble[.]”

Approximately one month later, on March 20, C sent R another Facebook message, saying:

I wanted to write to you to apologize for that night about two months ago, I have not been trying to avoid you since then. I am really sorry, it

was very irresponsible of me to get drunk and do that with you. I really don't want it to effect our friendship or team dynamic.... I did not treat you very well, and it was disrespectful on my part to do what I did because I was drunk. I would really like to be your friend I think you are a really cool guy and I don't want this to get in the way! ... If you want to try to be friends I would really like that because you are also my team mate and I care about you and I never ever meant to hurt you and we were both drunk. I hope we can both put it behind us as a memory and learn from it....

R responded by saying:

thanks for the concern. I am totally fine and I was honestly surprised by this extremely long message. Thanks anyway for being so considerate. I say we should just forget about it. I was so drunk I didn't know what i was doing. I am sure that's the case for you as well.... Just curious tho, what made you so concerned all the sudden?

C responded:

honestly I have been feeling guilty about it for awhile and after we went on spring break and during spring break I felt worse because I hadn't said I was sorry and then when everyone was saying how much closer to the team they had gotten over spring break and stuff at the dinner last night at the team dinner, I just felt really bad.

R and C continued communicating over Facebook sporadically in May and October

#### **D. The Investigation.**

After Complainant reported that R had assaulted her, Investigator began his Title IX investigation. The investigation involved interviewing R, C, and the students who witnessed R and C together on the night in question.

At the conclusion of Investigator's investigation, he drafted a written summary (the "Investigator Report"). Regarding the two witnesses who had seen R and Complainant walking to R's room, Student A and Student B, Investigator wrote that

they “became concerned and made an effort to intervene due to concern. [Complainant's] apparent high level of intoxication was noted by both witnesses and was one, if not the primary, source of concern and motivation to intervene.” Student A's also stated that R was involved in a prior ‘sexual assault’ but provided no other information. The Investigator Report also quoted from the Facebook exchanges and mentioned that Complainant had stated that “she said these things at the time because she was ‘in denial,’ ‘extremely scared’ and in a state of ‘shock and disbelief’ ” and that “the exchange did not correctly reflect her feelings.”

After the conclusion of the investigation, Investigator sent an email to Dean Brown letting him know that R had asked for two additional students to serve as witnesses. One was Complainant's roommate, who “might be able to confirm whether or not [Complainant] tried to call her on that evening.” The other was R's roommate, who could “confirm that he walked in on the two and quickly closed the door and left.” The Dean replied that it was ultimately up to Investigator whether to call the two witnesses but that it would “probably [be] ok if it appears helpful for the hearing officer in making a decision.”

Investigator reached out to both potential witnesses but neither was able to attend the interview. Accordingly, he invited them to provide written statements. As to Complainant's roommate, she told Investigator over email that she could not remember missing a phone call from a year ago and that she could not check her call log because she no longer had the same phone. R's roommate told Investigator over email that he opened the door, “saw R in bed with someone else and he asked me to leave.... I left after I walked in on R and this other person. I was fairly sure that R and/or the other person may have been intoxicated because of the unusually forceful way R told me to leave, but I can't be sure of that for a fact. That's all that I witnessed. This happened within the span of probably 30 seconds, so I didn't witness very much besides what I just said....”

Upon further questioning by Investigator regarding his comment about intoxication, R's roommate stated: “By that I mean that R was typically not very aggressive/assertive when it came to talking with me, on basically anything. But when I walked in on him and the other person, he was forceful and very quick to tell me to leave, which lent me to assuming that he was intoxicated (and maybe the other person, but I can't be sure of that.)”

Investigator then asked whether R could have been forceful and quick simply because he had someone in bed with him. R's roommate agreed, saying “as you said, given the circumstances, how he acted doesn't necessarily mean he was intoxicated.” Investigator informed R that neither of his proposed witnesses could attend the hearing, but that he had asked for written statements.

## **E. The Hearing**

Dean Brown has appointed you the Hearing Officer and has scheduled the hearing for 8 days from your appointment.

- How should the Hearing be convened?
- What Notice should be issued to R?
- When should the Notice be issued?
- What information should be contained in the Hearing file given to R?
- How should the Hearing be conducted?
- Do the witnesses need to be sworn?
- Can R question the witnesses directly?
- R, C, Investigator, Student A, Student B, and the Student Fellow are available to testify. Can they all testify?
- The roommates are not available. How do you handle their testimony?
- What are the main issues you need to deal with?

## Case 2: The Sternum Adjustment

In the spring semester, Coed was enrolled in two classes taught by Professor, a faculty member, at College. Coed alleges that during that time Professor touched her inappropriately without her consent on multiple occasions, made numerous sexual comments, some in front of her peers, and others while they were alone.

In the investigation, Professor admitted to having made comments about the size of Coed's breasts on three or four separate occasions, but denied a number of Coed's other allegations: she said that she did not look down her pants or her blouse; that she did not tell her about any sexual dreams; that she did not slap her buttocks; that she did not tell her sexual jokes; that she did not tell her that she wanted to fondle her breasts. She admitted to giving Coed a "sternum adjustment" while lifting up her shirt, in her office with the door locked, but testified that she did not touch her breasts during the adjustment incident, and that Coed consented to whatever contact occurred. (explaining that a "sternum adjustment" "can realign your ribs on the front side of the sternum" by applying pressure to the sternum and the shoulders).

Thomas, Coed's debate partner and close friend, told the investigator about incidents that he had witnessed between Coed and Professor: he had heard Professor make a number of comments about Coed and her breasts, and had also seen Professor pull her shirt so that she could look down her blouse. Thomas also stated that Professor sometimes had given massages and adjustments to other students, including himself, and that Coed twice had gone to Professor's office to give Professor a back massage. Thomas told the investigator that he had seen Coed show tattoos to Professor that required her to lift part of her clothing. He said that, after hearing about the sexual harassment claims, he had been "furious" and that he had told a friend that he believed "whatever happened was as much Coed's fault as the Professor's."

During the investigation, Coed described instances of inappropriate contact, and maintained that during the sternum adjustment, Professor had fondled her breasts. She also described instances of Professor pulling down her shirt, making "jokes" and comments, Professor looking down her pants and moaning, and fondling her breasts in her office during the sternum adjustment. She admitted that she had sent Professor a Valentine's Day card, that she did not object to the sternum adjustment, had voluntarily laid on the floor of her office, and that after the sternum-

adjustment incident in her office, she had remained in her office and smoked a cigarette with her.

The details of the relationship came out shortly after the sternum adjustment incident. Coed told her father about the relationship. Father and Coed met with College President a few days later. Coed was concerned that her allegations remain confidential. She was concerned because another student had already told Professor that Coed was planning to report the relationship. Coed's roommate later reported to the investigator that Professor had gone to the dormitory to find Coed on the day she and her father met with College President. The day after the meeting with College President, college officials met with Professor, and no further contacts occurred. The College also permitted Coed to transfer out of Professor's class and into one that was substantially similar; it allowed her to stop taking Professor's debate class and take her grade as of that time, mid-way through the semester.

College has been aware of other sexual incidents involving Professor and students. Seventeen (17) years ago, two students had lodged sexual harassment complaints against Professor. One student reported that she had called her "butch" on multiple occasions and another alleged that she had touched her buttocks once while she boarded a bus. In response to these two students' allegations, President had verbally reprimanded Professor and referred the matters to a dean at the college. Professor admitted to calling one student "butch" and promised to stop, but she stated that he had only touched the other student by accident with her elbow while boarding a crowded college bus.

About 10 years ago, President had received an anonymous letter that reported that Professor had dated an unnamed student. When confronted, Professor told President that the student had been an older, non-traditional student who had not been in any of Professor's classes. During the recent investigation, Professor also admitted to a second relationship with another older, non-traditional student who had been in one of her classes.

You have been appointed as the hearing officer to make a recommendation on what, if any, action the college should take against Professor.

Make all evidentiary and witness credibility decisions.

### Case 3: City Police Involvement.

As students at the University, John Doe became friends with a woman, referred to in this case under the pseudonym Jane Roe. The two had a relationship over a year-and-a-half where they would often kiss. During this time, two instances occurred that lead Roe to file a report with the City Police Department.

The first was in the spring of 2018. John Doe and Roe were drinking and, when alone, John Doe playfully pinned Roe's arms over her head and moved his hand down Roe's body towards her genitals. Roe said “no” and John Doe stopped. The two continued their friendship.

The second incident was in July 2019. John Doe and Roe engaged in sexual intercourse, which John Doe states he “stopped because he felt guilty about cheating on his girlfriend at the time, who was also [Roe's] close friend. The next day, Roe stated that she did not remember the encounter, which surprised John Doe. The two did not speak until January 2020 when Roe accused John Doe of rape regarding the July 2019 encounter. Days after, Roe filed the report with the City Police Department.

The University's Office of Institutional Equity and Compliance (“OIEC”) discovered the allegations made to the City Police Department. OIEC assigned Investigators to investigate Roe's allegations against John Doe. The Investigators were charged with determining whether John Doe, by touching Roe's genitals without her consent in the incident in the spring of 2018, violated the terms of Student Conduct Code. That code instituted a “preponderance of information” standard regarding the evaluation of complaints that a student violated its terms. Additionally, the Investigators were tasked with determining whether John Doe violated OIEC's Sexual Misconduct Policy concerning the alleged sexual assault in July 2019.

On January 27, 2020, the Investigators observed the City Police Department's interview with Roe. The Investigators did not observe the City Police Department's January 28 interview with John Doe, but viewed a recording of the interview on March 24. The same day as John Doe's interview, OIEC sent John Doe a notice of investigation. The notice of investigation read that if John Doe did not respond as directed, OIEC was authorized to make conclusions without his participation. The

notice of investigation gave John Doe two business days to find an advisor and to call and schedule a meeting with the Investigators. Roe was notified that her participation was optional and she could confer with the Investigators at any time convenient to her.

The next day, Roe met with her and John Doe's mutual friends—some of which were involved in the investigations—and relayed her side of the story to them.

On February 3, with his mother as his advisor, John Doe met with the Investigators. From February 8 to 15, the Investigators conducted three witness interviews and reviewed those witnesses' statements with the City Police Department.

On February 22, John Doe requested access to his OIEC investigative file which was denied. The next day, OIEC informed John Doe that it would notify him when fact-gathering was complete and that he could review the summary of his interview in person at the OIEC office.

On March 1, the Investigators again met with Roe and on March 21, she was again interviewed by the City Police Department. Also, on March 21, the Investigators notified John Doe that he could review his OIEC investigative file for a two-hour period on March 28. They added that they wanted to ask John Doe follow-up questions after his review of the file and that they were drafting a written evidence summary to be issued the following week.

On March 22, John Doe disputed the fairness of the process because the Investigators “planned to issue the written evidence summary prior to his review of the investigative file and response to any follow up questions.” John Doe asked for the Investigators' follow-up questions to be provided in advance.

On March 28, John Doe's counsel asked to review John Doe's file the first week in April, but OIEC requested additional time. On April 1, the Investigators issued a written evidence summary. This was before John Doe reviewed the investigation file or answered follow-up questions. He was informed he had seven days to review and respond to the summary. The Investigators emailed the summary to Roe, who was informed to not share it with anyone besides her advisor, “as sharing

it with any witnesses or participants in the investigation could be viewed as retaliatory.” Roe shared the summary with the City Police Department.

On April 13, John Doe and his attorney reviewed his file for two hours with an OIEC administrator present. John Doe was not allowed to make copies of any documents in the file. The file consisted of 55 pages of investigative reports, and the evaluations and conclusions of the investigators. The Investigators’ opinions were that John Doe was responsible for non-consensual sexual contact for the allegation in spring 2019, but that he was found not responsible for the alleged sexual assault in 2018.

On April 18, the City Police Department issued a second report concerning the investigation. On May 2, the Investigators issued an amended written evidence summary. Three days later, John Doe's counsel objected to the OIEC investigation. The next day, John Doe and his counsel reviewed his case file under the same circumstances as the prior review.

You have been appointed as the hearing officer. Jane Roe has chosen to be represented at the hearing by the City Police Department’s Victim Rights’ Advocate. John Doe’s lawyer has raised due process objections to the investigation, the involvement of the City Police Department in the University’s Title IX process, and the lack of evidence that his client is guilty of any wrong doing.

What do you need to know, who will you call as witnesses? How do you respond to John Doe’s lawyer?

#### Case 4: The Storm of Public Opinion

You have been appointed as the Hearing Officer. The facts are simple. AA, a female student at the University has accused SH of sexually assaulting her on the night of June 26<sup>th</sup>. There was no alcohol or drugs involved. AA and SH had been in a dating relationship. SH claims the encounter was consensual. AA claims she clearly made her refusal known to SH, but that he proceeded against her will. A rape kit was inconclusive, sexual relations had occurred, but there were no evidence or indication of force or unwanted physical contact. The dorms were mostly empty because most of the students were away. There are no witnesses to the encounter.

As part of his defense, SH wants to submit the following facts:

1. SH and AA have been regular lovers for several months. Like he said to the investigator, “Friday night is the night I like. We have been getting together every Friday night since the Winter Formal in February. June 26<sup>th</sup> was no different. I bring her flowers, we go to dinner, and back to my place where I put on Celine Dion. It’s her jam.”

2. The investigator who conducted the investigation spoke to AA’s sorority sisters about the incident. The sorority President sister reported that the sisters had taken the pledge to abstain from sexual activities “until the men on campus start giving women the respect they deserve.” They reportedly got the idea from a women’s strike in Iceland, in which women refused all work and conjugal relations, until the laws in their country were changed to grant women equality. The investigator concluded her report saying “there is no way that AA would have agreed to SH’s advances on June 26<sup>th</sup>.” SH objects to this information. He also alleges that the investigator is an alumna of the sorority.

3. The investigator is also a member of the University’s Gender Equity Task Force, and she has written a number of academic papers in which she stated that the student culture at the University “encourages heterosexual gender roles of male entitlement and conquest” and that sexual aggression was one of the largest issues facing its female students. SH alleges that the investigator was biased against males.

4. Recently, a number of news articles in the City News have raised the profile of sexual issues on campus. The articles, written by a female University student

intern at the paper, have fomented an anti-male atmosphere on campus. The articles accuse the University of failing to implement best practices in training investigators, hearing officers, and decision makers in sexual assault allegations cases. The articles call for a no tolerance policy and for “the maximum sentence – expulsion, for any allegation of sexual misconduct.” The University president has made public statement supporting a zero-tolerance policy. The University President has called on the University community to become the shining example of no tolerance that will be an example to the other universities in the state, “including that ethically challenged university up north.” University leaders, including Deans, Provosts, and faculty leaders, have been conducting a sexual assault awareness campaign on campus, putting intolerable pressure on hearing officers. University leaders have been quoted as saying that any university member not supporting this campaign should be fired. SH claims that you, the hearing officer, is subject to these bias inducing pressures, and that you may not properly decide this case.

5. SH has demanded, as part of his defense, to be given access to all emails generated between AA and the investigator, between AA and her sorority sisters, and between the investigator and the sorority sisters regarding the accusation and the investigation. SH has also demanded that the investigator make available her notes of the investigation, and all recording of interviews between the investigator, AA, and the sorority sisters. He argues he should have access to these records because they may contain exculpatory evidence.