

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Human Rights Complaint Procedures

NUMBER: 1:18

1. Purpose of Regulations

The South Dakota Board of Regents has a legal obligation to implement federal, state, and local laws and regulations prohibiting discrimination in employment, in the delivery of educational services and in the other activities carried on under its authority. Inherent in its function as constitutional governing board for publicly funded higher education is the additional duty to assure all individuals in its employ or attending institutions under its jurisdiction equal access to the employment and educational opportunities it controls. These human rights complaint procedures have been adopted to afford individuals a means to protect the rights guaranteed to them under federal, state, and local laws and regulations and to vindicate the deprivation of personal dignity that accompanies denials of equal opportunity.

2. Scope of Regulations

These procedures apply to complaints alleging discrimination, other than sexual harassment which is covered by BOR Policy 1:17, on the basis of sex, race, color, creed, religion, national origin, ancestry, citizenship, gender, gender identity, transgender, sexual orientation, age, or disability, genetic information, veteran status, other status that may become protected under law against discrimination. If the accused is a student (as defined in Board Policy 3:4), the application of this Board Policy 1:18 must be done in a way that is consistent with the requirements found in Board Policy 3:4.

3. Discrimination

Discrimination and cognate forms of that term when used in this policy include all violations of rights guaranteed under federal, state, or local antidiscrimination laws and regulations except violations of sexual harassment as defined in BOR Policy 1:17, which violations shall be subject to the provisions contained therein. Also, discrimination includes any allegation, other than allegations constituting sexual harassment under BOR Policy 1:17, that, because of a person's sex, race, color, creed, religion, national origin, ancestry, citizenship, gender, gender identity, transgender, sexual orientation, age, or disability, genetic information, veteran status or any other status that may become protected under law against discrimination, a person has been subjected to disparate treatment in terms and conditions of employment, in the delivery of educational services, programs or activities, or with respect to the participation in the activities of officially recognized organizations. Allegations, reports or complaints involving sexual harassment shall be governed by, and subject to, BOR Policy 1:17.

4. Proof of Discrimination

Except as otherwise provided under federal, state, and local law, proof of discrimination under these regulations will conform to the federal standards employed to prove disparate treatment.

These regulations will neither eliminate nor restrict express exceptions to antidiscrimination laws and regulations provided under federal, state or local law, nor will they prohibit conduct, action or policies based upon such legitimate nondiscriminatory reasons as are recognized under federal antidiscrimination law.

- A. Reasonable directions and admonitions by duly authorized institutional agents as to time, place and manner in which employees or volunteers perform assigned responsibilities, students carry out educational assignments or program participants engage in sponsored activities do not constitute prima facie evidence of discrimination.

5. Complaints

Complaints include all allegations or reports of discrimination by a person, persons, or organization subject to this policy against a person protected under this policy.

- A. All organizations recognized by an institution are subject to this policy, except insofar as the application of the policy would impermissibly invade the members' freedom of intimate association or freedom of expressive association.
 - 1. Challenges to the applicability of these regulations will be referred to an administrative officer designated by the institutional chief executive officer as provided in section 13(A) below. Questions about the applicability of this chapter to organizations will be resolved pursuant to the provisions of section 13 and following.
 - 2. If an organization challenges the application of these policies to it or to its activities, resolution of the challenge must address the following issues:
 - a. Will application of the regulations serve a compelling state interest?
 - i. The Board has determined that it has a compelling interest in applying these regulations to individuals and organizations whose activities affect the ability of others to participate in and to enjoy the benefits of institutional employment, educational services or the activities of officially recognized organizations, so this issue may ordinarily be resolved through reference to sections 1 and 2 above.
 - b. Application of the regulations is unrelated to the suppression of ideas.
 - i. This issue requires a factual inquiry into the purpose of applying the regulations to particular organizations. An institution may not apply the regulations in order to suppress a particular point of view. The mere dissemination of ideas, however offensive to good taste and common decency such ideas may be, does not afford grounds for regulation.
 - c. Can the state's compelling interest be achieved through means significantly less restrictive of associational freedoms?
 - i. This issue requires a two-step analysis. First, it must be determined whether application of the regulations would infringe associational rights of organization members. If so, a determination must be made whether some less intrusive measures might suffice to protect the Board's

compelling interests.

(a) The following principles will be used to determine whether application of the Board's policies to an organization might invade the association rights of organization members:

(1) Freedom of intimate association refers to those relationships that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs, but also distinctively personal aspects of one's life.

Factors that suggest that freedom of intimate association is implicated include:

- the relative smallness of the organization;
- a high degree of selectivity in choosing and maintaining members of the organization;
- the personal nature of the organization's purpose; and
- the exclusion of nonmembers from the central activities of the organization.

(2) Freedom of expressive association is implicated where an organization is created for specific expressive purposes and the organization will be significantly inhibited in advocating its desired viewpoints if it cannot restrict its membership based on sex race, color, creed, religion, national origin, ancestry, citizenship, gender, gender identity, transgender, sexual orientation, age, disability, genetic information or veteran status any other status that may become protected under law against discrimination.

6. Complainants

Complainants includes persons who have allegedly been subjected to discrimination, whether they have initiated a complaint with the EEO Coordinator or whether they were identified as victims in a report submitted by a third party to the EEO Coordinator.

7. EEO Coordinator

Each institution will designate a EEO Coordinator who will be responsible for administering a centralized complaint filing system; for analyzing trends revealed by complaints, investigations and enforcement activities; and for monitoring on behalf of the institution overall compliance with this policy and related federal, state or local legislation and regulation.

A. The institution may designate one or more deputy Coordinators to assist the EEO Coordinators. Such deputies will be authorized to receive complaints and will have full power to conduct reviews and investigations as directed by the institutional EEO Coordinator.

B. Whenever the phrase "EEO Coordinator" appears in this policy and other policies in

connection with administering an individual complaint, it will be understood to include both the Coordinator and any deputy Coordinators who may have been assigned responsibilities to administer the matter.

- C. The EEO Coordinator will assure that persons entrusted with the investigation of complaints have been undergone annual training in the conduct of investigations under this policy in a manner that protects the safety of victims and promotes accountability. The EEO Coordinator will also assure that persons entrusted with investigations are unbiased and disinterested.
 - 1. In the event that a complainant or accused alleges that an investigator is biased or has a conflict of interest, the EEO Coordinator will review the evidence of bias or interest, and will reassign responsibility for the investigation when reasonable, well-informed observer of the administrative process would believe that there may be an appearance of bias or conflict, even though none actually exists.
 - a. When determining whether there are reasonable, objective grounds for concluding that an appearance of bias or conflict of interest exists, the EEO Coordinator will consider, without limitation, evidence of
 - i. personal bias or prejudice against the complainant or accused or personal knowledge of the disputed facts
 - ii. prior involvement in the incident or institutional response to the reports,
 - iii. economic interests, including interests of immediate family members, that may be substantially affected by the outcome of the investigation, or
 - iv. close relationships, either directly or indirectly through immediate family members, with a complainant, an accused or witnesses involved in the proceeding.
- D. The EEO Coordinator will assure that persons entrusted with the conduct of disciplinary proceedings have been undergone annual training in the conduct of disciplinary proceedings in a manner that protects the safety of victims and promotes accountability.
 - 1. In the event that a complainant or accused alleges that a person entrusted with the conduct of disciplinary proceedings is biased or has a conflict of interest, the EEO Coordinator will review the evidence of bias or interest, and will submit a recommendation to the institutional chief executive officer whether responsibility for the disciplinary proceeding should be reassigned.
 - 2. In order to discourage abuse of the reassignment process, reassignment will not be routine, but may be proper where reasonable, well-informed observer of the administrative process would believe that there may be an appearance of bias or conflict, even though none actually exists
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- ii. prior involvement in the incident or institutional response to the reports,
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- iv. close relationships, either directly or indirectly through immediate family members, with a complainant, an accused or witnesses involved in the proceeding.

8. Non-retaliation

Persons who bring complaints of discrimination and persons who participate in the investigation and disposition of such complaints will not be subject to harassment, interference, intimidation, or retaliation.

- A. The right to be free from harassment, interference, intimidation or retaliation is ongoing, and the EEO Coordinator will inform the complainant, the accused and all persons involved in the investigation or disposition of complaints of the right and provide them with information detailing how they may report violations.

9. Duty to Cooperate

All students and employees whose assistance is needed in the investigation of a complaint or in the course of disciplinary action will be required to cooperate with the EEO Coordinator and other parties who are duly authorized to investigate or to discipline. Persons who are accused of having engaged in discriminatory conduct will be entitled to such cooperation when necessary to obtain witnesses in any formal disciplinary proceedings that may be initiated. Where necessary, adjustments will be made to work schedules, classroom schedules, and other academic or employment obligations.

10. Confidentiality

Reasonable efforts will be made to maintain the confidentiality of the complaints. Complainants and witnesses must understand that it may become necessary to disclose their identities, either directly or indirectly, in the course of investigation. Institutions are required to respond to and investigate allegations of discrimination.

- A. Even if the complainant requests confidentiality or asks the complaint not be pursued, institutions will; 1) take all reasonable steps to investigate and respond to the complaint to the extent possible consistent with the alleged victim's wishes; 2) notify the alleged victim that the failure of the alleged victim to pursue a complaint may limit the institutions' ability to fully address the matter; and 3) report the incident to local law enforcement authorities if it appears to involve a crime that is required to be reported or a health or safety emergency as defined by state or federal law requires such reporting.
- B. Where formal disciplinary proceedings are instituted, the party alleged to have engaged in the conduct will be given the names of the complaining party and the witnesses whose testimony will be used to support the complaint, together with the substance of their allegations.
- C. Disciplinary hearings at the institutional level ordinarily are not open to the public,

but, in some instances, persons accused of misconduct may have appeal rights that could result in a public hearing. The EEO Coordinator will inform complainants whether the accused has a right to a public hearing under South Dakota law and at what point that hearing may occur. In the event of a public hearing, the pleadings, motions, documents and recorded testimony assembled at or incidental to the hearing will be public records.

- D. Where complaint results in a formal disciplinary action, the complainant will be informed in writing whether the institutional procedures resulted in a finding of discrimination.

11. Reports to Law Enforcement

In keeping with the requirements of SDCL § 22-11-12, once the EEO Coordinator acquires knowledge, that is not privileged, of the commission of a felony, the Coordinator will immediately disclose the felony, including the name of the perpetrator, if known, and all of the other relevant known facts to appropriate law enforcement authorities.

- A. The EEO Coordinator, in consultation with appropriate institutional officials, will analyze each report of sexual assault, domestic violence or stalking to determine if the circumstances require a report under SDCL § 22-11-12 or present health or safety emergency. In such case, information relating to the complaint may be disclosed to appropriate persons including law enforcement personnel.
- B. Reports of crimes may be filed with law enforcement with or without the assistance of the institutions. The EEO Coordinator will report complaints of sexual violence to law enforcement agencies when requested to do so by an alleged victim.
- C. A campus EEO Coordinator may disclose the fact and nature of sexual assault, domestic violence or stalking to local law enforcement officials in accordance with local law enforcement agreements.
- D. Timely warnings or emergency notifications issued under the Clery Act related to sexual assault will also be sent to local law enforcement agencies.

12. Timing Requirements

Timing requirements contained in this policy fix standards for the investigation and preliminary phases of complaint management. Where an investigation results in the initiation of formal disciplinary procedures, the timelines set forth in those procedures will govern.

Deadlines stipulated for action may be relaxed where, in the judgment of the EEO Coordinator or other administrative officer having responsibility for the complaint, this will help to achieve the purposes of the regulations. Investigation and responses related to allegations of stalking or conduct constituting a crime of violence may be delayed to the extent required for law enforcement to investigate the facts of the case.

Deadlines may also be extended upon the mutual agreement of the parties.

Deadlines will be extended if necessary to accommodate holidays and vacation periods that form part of the academic calendar or days on which an institution is closed for weather or other emergency purposes. Working days are those on which the offices of the institution or Board are open for business.

Extensions will not exceed the bounds allowed by applicable law and regulations.

13. Initiation of Complaint

- A. All inquiries, allegations, reports, or complaints relating to discriminatory conduct, will be forwarded to the EEO Coordinator for response or investigation.
1. Persons who believe that they have been subjected to discrimination may bring complaints under these procedures by contacting the EEO Coordinator. Collective bargaining agents may also initiate complaints hereunder, but only where they would have standing to do so under state or federal law. Collective bargaining agents will not be entitled to exercise procedural rights granted to complainants.
 2. A person who believes that he or she has been the victim of discrimination may also lodge a complaint with any administrator or, in the case of students, also with any faculty member. Complaints lodged with such individuals will be referred to the EEO Coordinator for investigation. This provision will not be interpreted to require individuals to refer to the EEO Coordinator accusations addressed to them directly by aggrieved persons.
 3. Third party reports of discrimination and conduct observed directly that may be discriminatory should be investigated as provided herein.
 4. Any campus employee informed of an allegation of sexual abuse, domestic violence or stalking with a clear connection to institutional programs, personnel or students must promptly notify the EEO Coordinator.

Employees serving in certain professional roles which enjoy a statutory privilege are required to disclose information only in accordance with applicable statutory authority.

- B. Upon receipt of inquiries, allegations, reports, or complaints relating to discriminatory conduct the EEO Coordinator will respond or investigate. If the accused is a student (as defined in Board Policy 3:4), the investigation must be done consistent with the requirements found in Section 4.A.b. of Board Policy 3:4.
1. The EEO Coordinator will have the responsibility to advise the individual or group of the procedures for investigating and taking action upon the complaint.
 - a. The EEO Coordinator will advise the complainant of any counseling or support groups that are available for persons who feel that they have been subjected to discriminatory conduct and their options to avoid contact with the alleged perpetrator pending the results of the investigation and any related proceedings.
 - b. The complainant will also be informed of the right to file other applicable administrative or criminal complaints and will not be dissuaded from doing so.
 - c. Complainants will be informed that the EEO Coordinator will investigate allegations and take appropriate action, even if the complainant does not wish to pursue the disciplinary process, but that any response by the University may be hindered by the complainant's wishes for anonymity or inaction or both.

2. Having provided this information to the complainant, the EEO Coordinator will record the factual basis for the complaint.
- C. If the complaint is referred to the EEO Coordinator by another administrator or faculty member, the EEO Coordinator will contact the complainant within five working days to provide information about procedures and resources and to record an initial statement of the factual basis for complaint.
- D. Upon obtaining a statement of the factual basis of the complaint, the EEO Coordinator will initiate an investigation of the complaint to determine whether there is a reasonable basis to believe that the complainant was subjected to discrimination or sexual violence. The investigation will be completed in a timely manner.
- E. The EEO Coordinator will determine what, if any, interim measures may be available and appropriate to protect the interests of the complainant and the accused during the investigation. If the accused is a student (as defined in Board Policy 3:4), any interim measures must be done consistent with the requirements found in Section 4.B. of Board Policy 3:4.
 1. In concert with the senior institutional officer whose administrative responsibilities include supervision of the person accused of misconduct, the EEO Coordinator will take action to assure that (a) the complainant is protected from retaliation for having made a complaint or responded to inquiries initiated in response to a complaint, (b) necessary or appropriate interim measures are taken to guard against a recurrence of the conduct that gave rise to the complaint, (c) requests for the complainant's academic, living, transportation, and working situation are reviewed case by case through an interactive process and granted if they are reasonably available and (d) the complainant is informed of the options to request protection or accommodation and how to request such assistance.
 2. When selecting interim measures, the EEO Coordinator and senior institutional officer will consider nature and circumstances of the misconduct alleged, together with the strength of prima facie evidence and any indications relative to the risk of recurrence, and will prefer measures that minimize the relative inconvenience to the complainant.
 3. The EEO Coordinator will meet with the complainant or victim within three working days after receipt of the complaint or after meeting with the victim to discuss the proposed interim measures that. Any interim measures will be put into place in a timely manner.

14. Procedure Where EEO Coordinator Determines That There is Not a Reasonable Basis to Proceed

- A. If the EEO Coordinator determines that there is not a reasonable basis for believing that complainant has been subjected to discrimination, the EEO Coordinator will inform the complainant of the conclusion.
- B. If the complainant believes that the EEO Coordinator erred in concluding that the complaint did not have a reasonable basis, the complainant may petition the institutional chief executive officer for a review of that determination. The petition

must be received within fifteen working days after the complainant has been notified that the EEO Coordinator has determined that there is no reasonable basis to believe that the complainant was subjected to discrimination. The institutional chief executive officer, either personally or through a delegatee, will review the investigation file to determine whether the conclusions of the EEO Coordinator are based upon substantial evidence. The chief executive officer will respond in writing to the complainant and the accused at the conclusion of this review. If the chief executive officer concludes that the evidence supports the conclusions of the EEO Coordinator, the response will summarize the findings that lead to that conclusion to the extent that this may be done without compromising the privacy of third parties, persons accused of misconduct or the complainant.

- C. The decision of the chief executive officer is not subject to an appeal as a matter of right. If the complainant remains dissatisfied with the determination, the complainant may request that the Executive Director review the conclusions reached by the chief executive officer and to advise the Board pursuant Board Policy 1:6.C.5. The request for such a review should identify with specificity the factual findings that the complainant believes to be erroneous or the conclusions that the complainant believes mistake or misapply the requirements of Board Policy or governing law.

15. Procedures Where EEO Coordinator Determines That There is a Reasonable Basis to Proceed

- A. If the EEO Coordinator concludes that there is a reasonable basis for the complaint, the EEO Coordinator will notify the vice president or comparable chief administrative officer or their appropriate designee, having supervisory responsibility over the person or persons alleged to have engaged in discriminatory conduct. The EEO Coordinator will provide copies of all investigatory materials to that administrative officer. Thereupon, that administrative officer will participate in resolution of the matter. If the complaint is lodged against officially recognized organizations or against members of such entities who are not otherwise affiliated with the institution, the institutional chief executive officer will designate a person to carry out the responsibilities established hereunder.
- B. The EEO Coordinator and the administrative officer may attempt an informal resolution of the dispute.
 - 1. If the matter appears to them to lend itself to informal resolution, they will meet with the complainant to determine whether the complainant is willing to pursue an informal resolution and how the necessary discussion with the person accused of misconduct may be structured.
 - 2. If an informal resolution is effected, the terms of the resolution will be reduced to writing and signed by the complainant. The University will document the administration of any agreed upon discipline or remedial action through such means as are appropriate and customary under the relevant disciplinary procedures or are in keeping with other relevant administrative practices. Copies of the signed document will be preserved in the complaint file and as otherwise necessary to give effect to the terms of the resolution.

- C. If the EEO Coordinator and administrative officer elect not to attempt an informal resolution or an informal resolution is not effected, the administrative officer will initiate disciplinary proceedings against the person alleged to have engaged in discriminatory conduct.
- D. The administrative officer will institute formal disciplinary proceedings within fifteen working days from the time that the file has been submitted to the officer, unless an informal resolution has been effected or the complainant and the person alleged to have engaged in discriminatory conduct or sexual violence have agreed in writing to extend the time allowed to attempt an informal resolution.
- E. The disciplinary procedures followed will be those designated for persons in the classification to which the person or persons alleged to have engaged in discriminatory conduct belong. CSA employees will be subject to discipline under CSA regulations. Exempt staff will be subject to discipline under exempt regulations. Students will be subject to discipline under the institutional student disciplinary code. If no disciplinary procedures otherwise exist, the institutional chief executive officer will appoint a hearing examiner to conduct a hearing to determine the facts and to recommend to the institutional chief executive officer what disposition should be made of the matter.

16. Procedures for Disciplining Persons Found to Have Committed Acts of Discrimination

- A. Discipline of persons found to have committed acts of discrimination will be determined and carried out in accordance with the relevant disciplinary procedures.

17. Disciplinary Action

- A. If the discriminatory conduct is admitted or, as a result of the disciplinary proceedings, proven, the administrative officer who initiated the disciplinary procedures will determine what disciplinary action, if any, will be taken to remedy the effects of the discriminatory conduct. In selecting a discipline or action, the administrative officer will consider (1) the extent to which the party charged exercised undue influence over the complainant by virtue of the office and authority entrusted to the party charged or otherwise, (2) the gravity of the offense established, and (3) the likelihood that the discipline or action selected will be effective to avoid a recurrence of the conduct. The discipline may include suspension or termination of an individual's employment, enrollment or right to enter institutional grounds or facilities or to attend or participate in institutional activities.
- B. Once the administrative office has selected a proposed discipline or action, the party charged will be notified of the proposed discipline or action at such time and in such a manner as provided under the applicable grievance procedures. The complainant will be notified of the proposed discipline at the same time. The discipline or action will not become finalized if the complainant timely petitions the institutional chief executive officer for a review.
- C. If the complainant is dissatisfied with the discipline or action selected, the complainant may petition the institutional chief executive officer for a review of that determination. The petition must be received within five working days after the complainant has been notified of the proposed discipline. The institutional chief executive officer, either personally or through a delegate, will review the investigation files, hearing records

and findings, and other documents relating to the matter to determine whether a discipline provided is commensurate with the gravity of the offense established, considering the relation to the parties, and whether it may reasonably be thought to assure that the conduct will not recur. The determination of the institutional chief executive officer will not be subject to further review.

1. Disciplinary measures themselves may involve, depending upon the specific facts and circumstances, separating the parties, placing limitations on contact between the parties, making alternative academic, working or housing arrangements, warnings or reprimands, required training or current substance abuse treatment, suspension from classes, suspension from duties with or without pay, reassignment, demotion or discharge from employment or expulsion from the university system.

18. Preservation of Records

All records and writings developed in the course of the formal disciplinary hearings will be preserved in the complaint file and in other records as required under related grievance policies.

SOURCE:

BOR October 1991; BOR October 1992; BOR January 1995; BOR March-April 2011; BOR December 2013; BOR June 2015; BOR August 2015; BOR December 2017; BOR August 2020; September 2020 (Clerical).