CONDUCTING IN-HOUSE INVESTIGATIONS

M U S I C K ,  P E E L E R  &  G A R R E T T  L L P

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AGENDA

- When to investigate?
- Conducting an “adequate” investigation
- Protecting the district from legal action
Employer has good faith belief that a worker engaged in misconduct establishes “good cause” of terminating their employment.

Good Cause: “reasoned conclusion … supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.”
EVALUATE – WHEN IS AN INVESTIGATION APPROPRIATE?

- When disciplinary action is being considered (CBA?)
- When the incident exposes the District to potential liability
- When it is required by Board policy
- When it is required by law (UCP 5 CCR 4600)
WHEN IS AN INVESTIGATION APPROPRIATE?

Other considerations:

• Severity of alleged conduct
• Frequency of alleged conduct
• Complainant’s credibility
• Identity of the accused
• Similar complaints against accused
• Impact of alleged conduct on others
• Whether immediate action is required (i.e., report to police/CPS)
SELECTING AN INVESTIGATOR

• CBA, BPs/ARs – designated employees?
• Individual v. team
• Who?
  • School administrator
  • Independent outside investigator
  • Legal counsel
  • Police
• Characteristics (e.g. neutral, sound judgment, experience, gender, personality)
CREATE INVESTIGATIVE PLAN

• List all witnesses to interview
  • Identified in complaint
  • Personal knowledge
• Be flexible; list may change
• Match up facts to verify with appropriate witness
  • Who can provide what information?
CREATE INVESTIGATIVE PLAN

• Prepare interview questions
  • Subjects to cover in interview
  • Avoid leading and compound questions
  • Open-ended and non-judgmental questions
  • Expand inquiries beyond “four corners” of the complaint
CREATE INVESTIGATIVE PLAN

• Separate complainant from accused
• Mandatory vs. optional leave of absence offense
• Administrative leave?
  • In writing and non-disciplinary
CREATE INVESTIGATIVE PLAN

• Prepare memo
  • Brief, general description of investigation
  • Identify investigative policy and/or procedure (attach copy)
  • Introduce investigator
  • Warn of prohibition against retaliation
  • Instruct but don’t promise confidentiality
REVIEW DOCUMENTS BEFORE INTERVIEWS

- Personnel/Site files
- Job descriptions
- Previous complaints or grievances
- Organization chart and roster of employees
- Other sources of institutional memory
- Relevant policies and/or procedures
INTERVIEW – INITIAL
CONSIDERATIONS

- Order of witnesses
  - (Almost always) start with the complainant, or
  - Most knowledgeable person (if no complaint filed)
- Take copious notes
- Tape recording interviews (check Board policy)
- Representation
  - Be unbiased, open and direct
  - No group interviews
- Interviewing students (age, number)
- Interviewing parents (translator)
CONDUCTING INTERVIEWS

Location and Time of Interview:
• Memo to individual re: interview
• Private office or conference room
• Come and go without raising comments/suspicion
• Remove distractions (i.e. cell phones)
• Allow interviewee easy access to exit
• Clear visual of the interviewee
CONDUCTING INTERVIEWS

- Explain/provide copies of process, policies and/or procedures
- Explain investigator’s role
- Report perceived retaliation
- Don’t promise confidentiality
- Acknowledge potential disclosure of complaint; assure sensitivity
- Request confidentiality of interview
CONDUCTING INTERVIEWS

Getting the Facts:
- Ask open-ended questions
- Verify facts and probe for details
- No leading or compound questions
- Ask questions repeatedly if not answered
- Be thorough – get story from start to finish
CONDUCTING INTERVIEWS

Getting the Facts:

• Listen
• No judgmental comments
• Do not insinuate blame or suggest that the complainant deserved it
• Be sensitive, but don’t empathize
• Assess interviewee’s demeanor (cooperative, nervous, angry, forthcoming)
CONDUCTING INTERVIEWS

Getting the Facts:
• Seek written statement/complaint
• Ask for supportive documentation/names of other witnesses
• Notes should capture:
  • Gist of questions
  • Content of responses
  • Credibility/demeanor notations
• Repeat significant points
• Confirm no more allegations
CONDUCTING INTERVIEWS - COMPLAINANT

**Getting the Facts:**

- Gather background information
- Gather details
- Take alleged incidents in order and ask specifics about each incident:
  - When did it occur
  - How often did it occur
  - What was said or done
  - Who was present
- Anyone complainant told prior to filing complaint?
CONDUCTING INTERVIEWS - COMPLAINANT

- Unlawful discrimination investigations
  - Why complainant believes conduct was based upon their protected status
  - Examples of differential treatment
- How conduct made them feel
- Negative impact on the work environment
CONDUCTING INTERVIEWS - COMPLAINANT

- Remedy sought?
- Additional information?
- Repeat significant points of interview; ask for confirmation
- Remind interviewee of retaliation prohibition and confidentiality instructions
- Confirmation of interview
CONDUCTING INTERVIEWS - COMPLAINANT

Reluctant/seeking anonymity:
• Ascertain reasons
• Reassure protection against retaliation
• Reassure that investigation will be discrete
• Consider duty to investigate despite requests
CONDUCTING INTERVIEWS - ACCUSED

Explain:

• Process
• Although neutral, acting on behalf of employer
• Each allegation
• Seriousness of allegations
• Possibility of disciplinary action
CONDUCTING INTERVIEWS - ACCUSED

- Provide employee
  - Copies of procedures
  - Written complaint?
  - Witness statements?
  - Summary of allegations?
- Check CBA, BPs/ARs
- Offer representation? Allow if requested
- No retaliation
- Confidentiality instructions
CONDUCTING INTERVIEWS - ACCUSED

- Identify individual making allegation?
- Opportunity to respond to each allegation
- Review details of each allegation – admit or deny?
- Any documentation or witnesses supporting accused employee’s version
- Basis of employee’s belief that others are lying
- Confirming memorandum of interview?
- Anything else to add?
CONDUCTING INTERVIEWS

Taking the Fifth. . .

• Spielbauer v. County of Santa Clara
  California Supreme Court 2/9/09:
  Public employer acted lawfully in dismissing employee for refusing to answer questions with possible criminal implications as part of an internal, noncriminal investigation.
CONDUCTING INTERVIEWS - WITNESSES

- **Eye witnesses** – who, what, when, why, where, and how
- **Corroborating witnesses** – ask specific details about what they were told or witnessed
- **Credibility witnesses** – ask questions about the credibility of the person they are vouching for
THE SITE INSPECTION

• Visit the site
• Better image of how and where the events may have occurred
• Opportunity to confirm credibility of allegations (i.e., could other individuals have actually overheard or seen events)
VISIT THE SITE

• Search and seizure issues
  • Always ask for permission first
  • Reasonable expectation of privacy?
  • Police search – “probable cause”; District search – “reasonable suspicion”
  • No searches of sensitive body areas or removal or rearrangement of clothing (Education Code §49050)
FOLLOW-UP INTERVIEWS

- Resolve ambiguities or disputed evidence
- Allow accused or suspected employee the opportunity to respond to new allegations
- To question the complainant’s motive when credibility has been put in dispute
- Create new investigative plan
Good documentation throughout the entire process is key! It will:
- Support personnel decisions
- Evidence corrective discipline
- Ensure consistent and fair discipline
Remember:

• Thorough notes
• Tape record interviews?
• Draft comprehensive reports of interviews as soon as possible
• Maintain separate investigation file
EXAMINE (AND REPORT) AFTER INTERVIEWS

- Review – complaint, notes, evidence
- Ambiguities? Gaps? How to reconcile?
- Make a new list of witnesses to interview
- New list of facts and questions
- Re-interview complainant and/or accused?
AFTER INTERVIEWS

- Weigh the evidence for each factual allegation
- Explain persuasiveness of evidence
- Determine witness credibility
- Determine whether violation of law or policy?
INVESTIGATIVE REPORT

- Date complaint received
- Name of investigator
- Names and positions of witnesses interviewed
INVESTIGATIVE REPORT

• Note all documents and evidence reviewed
• Describe complaint investigated
• Note that all interviewees warned about retaliation and confidentiality
• Exclude irrelevant evidence
• Attach documentation/evidence
INVESTIGATIVE REPORT

- Keep audience in mind... Third-party
  - Jury, employee, public
- Organize logically – chronological/topical
- Make a decision
- Separate out and describe each allegation
- Recite the relevant evidence for each allegation
- Note credibility determinations
- Make a factual finding regarding each allegation (sustained/denied/inconclusive)
INVESTIGATIVE REPORT

Facts v. opinions v. conclusions
• Conclusions/opinions without facts = useless
• Explain discounted evidence
• State conclusions in terms of objective fact rather than legal conclusion
• Recommendations for corrective action at conclusion of report?
• Do not include a final disciplinary decision
TAKING ACTION

Take corrective action, as appropriate:
• Stop the misconduct
• Prevent recurrence
CORRECTIVE ACTION

What form of discipline?
• Verbal Reprimand
• Written Reprimand
• Notice of Unprofessional Conduct
• Notice of Unsatisfactory Performance
• Demotion
• Involuntary Transfer
• Suspension
• Dismissal
CORRECTIVE ACTION – FORM OF DISCIPLINE?

Considerations:
• Employee’s status
• CBA (e.g., progressive discipline policy)
• Seriousness and frequency of offense
• Treatment of others for similar offenses
• Grounds for discipline (CBA, BPs/ARs, Ed. Code § 44932)
• Consult legal counsel
CORRECTIVE ACTION – NOTICE OF COMPLAINANT

- Result of investigation
- Explain conclusion
- “Appropriate action was taken” – no specifics
- Thank complainant for coming forward and immediately report any future misconduct
- Copy of report to complainant? Depends (CBA, BPs/ARs)
CORRECTIVE ACTION – NOTICE TO ACCUSED

• Conclusion and result of investigation
• Invite employee back from any leave
• Provide directives where appropriate
• Contain in written reprimand, dismissal charges, etc…
• Copy of report? Depends (CBA, BPs/ARs)