

CONDUCTING IN-HOUSE INVESTIGATIONS

KRISTINE E. KWONG, ESQ.
MUSICK, PEELER & GARRETT LLP

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AGENDA

- When to investigate?
- Conducting an “adequate” investigation
- Protecting the district from legal action



COTRAN DECISION

- 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

DOCUMENT, DOCUMENT, DOCUMENT

- Good documentation throughout the entire process is key!

It will:

- Support personnel decisions
- Evidence corrective discipline
- Ensure consistent and fair discipline



DOCUMENT, DOCUMENT, DOCUMENT

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)