

# What CBOs need to know about Effective and Defensible Workplace Investigations

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# Agenda



When To Investigate

Who Should Investigate

How To Investigate

How To Draft The Report

Importance of a Solid Investigation & Report

Pitfalls & Mistakes To Avoid

# When To Investigate

Duty arises when there is:

- Formal or informal complaint
- Actual or constructive notice of possible misconduct
  - Even when the complainant/victim does not want to participate
  - Notice by third party

# When To Investigate

Examples:

Harassment/discrimination/retaliation

Fraud

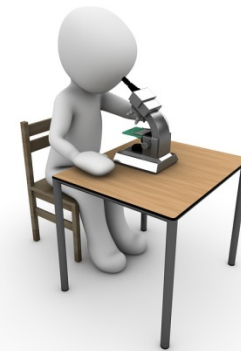
Unauthorized outside employment

Ethics

Abusive or excessive absenteeism/leave

Influence of alcohol/drugs

Neglect of duty



# When To Investigate

Examples con't:

Discourteous treatment of the public

Misuse of public property/resources

Dishonesty

Conduct unbecoming/discrediting the district

Improper political activity

Assault/stalking/threats/bullying

# Selecting an Investigator

Who Should Investigate?



# Who Investigates

You

Other Internal Personnel

Outside Investigator

Attorney

# Who Investigates

## In-house vs. Outside

### – Pros

- Familiar with agency and parties involved
- Familiar with district policies and procedures to be followed
- Ability to commence right away
- Onsite access to witnesses/documents

### – Cons

- Reporting relationships, biases and personal relationships must be examined
- Must possess training and experience to investigate
- Availability if the investigation will be extensive



# Select an Investigator Guidelines

Employment level of investigator

Credibility of investigator

Training experience

Time constraints

Political concerns (e.g. public visibility of accused)

Personality/strengths of investigator

Impartiality

Report-writing ability

Location and hourly rates (if outside)

# Who Should Investigate

## When To Use Outside Investigator

Real or Perceived Conflict

Multiple Complaints By Individual

Multiple Complaints Against Individual

Campus Investigator Not Available

Highly Complex Investigation

Highly Political Investigation

Specific Expertise Needed

# Who Should Investigate

**With outside counsel clearly determine who makes conclusions of law/policy**

Clearly delegate this responsibility

Outside investigators: generally should not

In-house investigators: may if

trained/knowledgeable and specifically directed  
**(but there are risks!)**

Report is discoverable

Better practice: delegate to legal counsel

# How to Investigate

## STEP ONE: PREPARE A BINDER

Complaints

Rules

Documents

Witness Statements

Research

Witness Questions

Notes of Witness Interviews

Report



# How to Investigate

**STEP TWO: READ & FOLLOW THE APPLICABLE RULES, POLICIES AND PROCEDURES**

**STEP THREE: GATHER, REVIEW & RESEARCH**

Gather & Review:

- All Written Complaints
- All Relevant Documents
- All Witness Statements

Research:

- Verifiable Relevant Information
- Verifiable Factual Assertions

# How To Investigate

## **STEP FOUR: IDENTIFY THE SCOPE OF THE INVESTIGATION**

Identify & List The Allegations

Identify & List Facts That Would Support The Allegations

Identify & List Facts That Would Counter The Allegations

Identify & List Facts That Would Qualify As A Defense To The Allegations

# How To Investigate

## **STEP FIVE: PREPARE WITNESS INTERVIEW OUTLINES**

### **Substance of Witness Outlines**

#### **Basic Background**

Who is Who

Context

Allegations

Facts That Would Counter the Allegation

Facts That Would Qualify as a Defense to the Allegations

# How To Investigate

## **STEP FIVE: PREPARE WITNESS INTERVIEW OUTLINES**

### **Options for Drafting Witness Outlines:**

**Write out List of Questions**

**Write out Areas to Cover**

**Write out Areas to Cover/Some Specific Questions**



# How To Investigate

## **STEP SIX: INTERVIEW THE WITNESSES**

### **Order of Witness Interviews:**

**Interview The Complainant/Alleged Victim**

**Interview Witnesses**

**Interview The Alleged Wrongdoer**

**Possible Supplemental Interviews**

**Required (and best practice) Under Certain Circumstances**

# How To Investigate

## STEP SIX: INTERVIEW THE WITNESSES

Employee Rights in Interviews

“Gag” Orders

Los Angeles CCD, PERB Dec. 2404

Banner Health System, 358 N.L.R.B. No. 93 (July 30, 2012)

Weingarten Revisited

*SEIU v. Sonoma Co. Superior Court*, PERB Dec. 2409-C.

# How To Investigate

## STEP SIX: INTERVIEW THE WITNESSES

### Waltzburger Admonition

Do you understand you are being questioned re: performance?

May have criminal implications

Right to remain silent

Silence may be insubordination and cause for discipline

Statements may be basis for discipline but not criminal prosecution

Do you understand?

Will you answer?

# How To Investigate

## **STEP SIX: INTERVIEW THE WITNESSES**

Set the Right Tone - Welcoming, Respectful and Professional

Focus, Connect & Listen

Give Introduction “Admonitions”

Ask if Questions

Use Outlines As Question Guide

Listen Very Carefully to Ask Follow Up & Drill Down

Take Detailed Notes or Have Note Taker

# How To Investigate

## STEP SIX: INTERVIEW THE WITNESSES

Allegations

Facts That Would  
Counter The  
Allegation

Facts That Would  
Qualify as a  
Defense To the  
Allegation

Stick to Facts – e.g., Who, What, When, Where, Why

Ask Open-Ended Questions

Avoid Leading Questions

Don't Forget – the Wrap Up Questions

“Have you told me everything?”

“Is there anything else you wish to add?”

“Is there a question you were expecting which I haven't asked?”

# How To Investigate

## STEP SIX: INTERVIEW THE WITNESSES

***ALWAYS ASK FOR TEXTS***

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# How to Investigate

## What Ground Rules Can You Set for Union Reps?

Can't object to questions

Can't obstruct

Can't demand information/conduct "discovery"

May clarify

# How To Investigate

## STEP SIX: INTERVIEW THE WITNESSES

### Identifying the Difficult Witness:

Reluctant

Combative

Demands to Tape

Will Not Directly Answer Questions

Obviously Untruthful



# How To Write The Report

## STEP ONE: EVALUATING THE EVIDENCE

What is Evidence

Documents

- E-Mails, Social Media Posts, Notes, Texts, Timesheets, Letters, Personnel & Student Records

Eyewitness Testimony

Physical Evidence



# How To Write the Report

## STEP ONE: EVALUATING THE EVIDENCE

What is NOT Evidence:

General Statements that Cannot Be Supported

Rumors, Gossip

Opinions, Speculation, Impressions

- But do follow up to determine facts

# Relevance Guidelines

## Does the Document:

Indicate bias on the part of a witness?

Corroborate an allegation?

Provide motive/justification for an allegation?

Provide witness leads?

Provide evidence that might exonerate accused?

# How To Write The Report

## STEP TWO: ASSESSING CREDIBILITY

- |                           |                               |
|---------------------------|-------------------------------|
| Bias                      | • No Eye Contact              |
| Motive                    | • “I Don’t Recall”            |
| Evasiveness/Vague Answers | • Inconsistencies             |
| Defensiveness             | • Inconsistent with Documents |
| Recollection of Details   | • Implausibility              |
|                           | • Sequence of Events          |

# How To Write The Report

## STEP THREE: COMPONENTS OF THE REPORT

Introduction

Investigative Process: Methodology

Who: Persons interviewed

What: Documents reviewed

When: Interviews occurred

Where: Documents obtained, interviews conducted

Executive Summary

- Allegations

- Findings



# How To Write The Report

## STEP THREE: COMPONENTS OF THE REPORT

Detailed Description of the Evidence Considered

- Background Facts
- Chronology

Allegations

Preponderance of the Evidence Standard

Findings of Fact

# How To Write The Report

## STEP THREE: COMPONENTS OF THE REPORT

For Each Allegation:

Determine Whether the Respondent Commit the Alleged Act

Set Forth the Factual Basis Supporting the Finding

Determine Whether Respondent's Conduct Violated the Executive Order or Rule of Conduct?

Conclusions If Executive Order or Conduct Rule Violated  
(If so Directed)

Attachments: Exhibits and Documents

# Pitfalls & Mistakes To Avoid

Avoid Procedural Errors in Documentation

Make Sure Factual Statements in  
Investigation are 100% Consistent with  
Investigation Notes, Statements, &  
Documents

Follow Timelines



# Communicate With Complainant

Advise investigation is completed

Summarize factual findings & conclusions

Inform re: internal appeal rights & external complaint procedures

Advise protected from retaliation

Comply with Title 5/Title IX notice where applicable

If charges are sustained:

- That appropriate remedial action will be taken
- Balance remedial action v. privacy

If not sustained/unfounded:

- Matter closed

# Communicate With Accused

Advise investigation is completed

Summarize factual findings & conclusions

No retaliation admonition

If charges are sustained:

- That District is determining appropriate remedial action
- Employee will receive separate notice
- Employee will receive all procedural due process rights to which entitled.

If not sustained/unfounded:

- Matter closed
- Nothing will appear in personnel file, including closure letter

**Questions?**

Thank You

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