

FRANCZEKRADELET

ATTORNEYS & COUNSELORS

The **Do's** and **Don'ts** of Conducting Employee Investigations

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Shelli Anderson
Franczek Radelet PC



AGENDA

- **Investigation Phases**
- **Interviewing Techniques**
- **Documentation**
- **Questions**

Investigation Warranted?

➤ Observe misconduct?

➤ Complaint regarding misconduct?

- ✓ Does complaint/grievance have processing procedures required by law?

- ✓ Title VII

- ✓ Title IX

- ✓ Disability Discrimination Laws

- ✓ Bullying, Harassment, and Hazing Laws

- ✓ Sexual Abuse

➤ Anonymous tip?

- ✓ Does sufficient information exist to identify accused and alleged misconduct?

➤ Outside information? (Rumors)

- ✓ Is there enough information to substantiate

Principal Thomas and Mr. Jones

- Principal Thomas received an anonymous complaint from a parent about an inappropriate relationship between a student and tenured teacher Mr. Jones.
- The parent said several students were at her home discussing rumored sexual text messages between Mr. Jones and a student.
- The parent did not want to give her name or her child's name for fear of backlash.

Do or Don't?

Principal Thomas, feeling unsure the complaint is legitimate, tells the parent there is nothing he can do without the student's name or more information.

Gather Preliminary Information

- Promptly review documents relevant to the employee in question.
- Retain video, audio, electronic information relevant to alleged incident (if available at this point).
- Refresh familiarity with CBA and policy language.

Formal Investigation Needed?

- **Based on preliminary information**
 - How serious are allegations?
 - Does the alleged conduct violate policies?
 - What policies/interests are at issue?
- **Make a **timely** decision as to whether a formal investigation is warranted**

Formal Investigation Preparation

- **Always review policies and procedures**
- **Discuss with other investigators or supervisors or counsel**
- **Conflict of interest**
 - **Personal conflicts/bias**
 - **Other job responsibilities can also create a conflict of interest**
 - **Delegate responsibilities where potential conflicts arise**

The Role of an Investigator

- **Neutral** Fact-Finder
 - ✓ Impartial
 - ✓ Fair
 - ✓ Thorough
 - ✓ Trusted
- Privilege?
 - Most investigations themselves - **NOT privileged**
 - Create **investigation notes/reports** with expectation they **WILL BE EVIDENCE**

Determine Nature & Scope of Investigation

- ✓ Is the alleged misconduct also **criminal** conduct?
- ✓ Who are the **necessary parties** to the investigation?
- ✓ How do policies and procedures come into play?
- ✓ Does the employee have a constitutionally protected “property interest” in his employment?
- ✓ Is a third party independent investigator necessary?

The Saga Continues

- Principal Thomas, remembering his many years as a high school teacher, feels terrible for Mr. Jones.
- Mr. Jones is a beloved teacher and knows false claims can destroy credibility and reputation.
- Principal Thomas also worries about the negative publicity this will shine on both Mr. Jones, the student and possibly himself.

Do or Don't?

Principal Thomas decides to “put himself in Mr. Jones’ shoes” as he investigates.

Interview Techniques

- **Do** listen carefully—follow up on hints or contradictions
- **Don't** discuss theories or assessment of evidence
- **Don't** begin with hostile or embarrassing questions
- **Do** move through events chronologically
- **Do** pin down facts: what did he see, hear, do, smell, feel, or say
- **Don't** conjure Perry Mason/Johnny Cochran

Interview Techniques

- **Do** distinguish between personal knowledge and hearsay
- **Do** ask open ended questions
- **Don't** reveal explicit or implicit judgments
- **Do** review notes at conclusion of interview
- **Don't** take “personal” notes
- **Do** ask if the interviewee has anything else to add before concluding

Interview Questions

- For each block of time ask:
 - What occurred?
 - When did it occur?
 - Where did it occur?
 - How did it occur?
 - Who was involved?
 - Who witnesses occurrence?
 - Who else may have information?
 - Who did or said what?

Interview Questions

- Why did event occur?
- Could it have been avoided?
- How could it have been avoided?
- Was this an isolated event or part of a pattern?
- With whom did you discuss the event?
- Are there any notes, recordings, photos, physical evidence, or other documentation of the event?

Interviewing the **Complainant**

- Explain and provide:
 - Written copy of policy
 - Confidentiality **options**
 - Availability of interim measures
 - What to expect about future contact
 - Right to be free from retaliation

Interviewing the **Complainant**

- **Don't** “react” → act and speak with a purpose
 - Open-ended questions, THEN follow up on issues raised
- **Do** listen carefully and take good notes
 - Narrative must come from witness
- **Don't** jump to conclusions
- **Do** assess credibility in “baby steps”

Interviewing the **Complainant**

- **Do** allow AMPLE TIME
- **Don't** interrupt
 - “Flag” system for follow-up questions
- **Do** ask:
 - Is there anything else?
 - About other witnesses
 - About texts, emails, posts, etc.

No Complainant

- What if you don't have an identified complainant?
 - Are there allegations that don't need a complainant to investigate?
 - Look for guidance from the substance of the complaint.

Making a PLAN

- **Do** reassess after complainant interview
- **Do** review policies
- **Don't** share information with anyone who doesn't need to know
- **Do** be mindful of how you communicate
- **Don't** delay on time-sensitive issues

Making a **PLAN**

- **Set the scope (be flexible)**
 - What issues?
 - Multiple complainants?
 - Build in time for unexpected delays

- **Review other sources of information**
 - Voicemails, texts, logs (building entry/exit)
 - Searches (physical places, electronic devices)

Making a PLAN

- Deliberately set order of interviews
- Note-taking:
 - tape-recording?
 - review notes at the end with interviewees?
- Build timelines/logs along the way

Making a PLAN

- Communications about the investigation
 - In writing (email)- have documentation
 - Provide times to meet
 - Usually avoid “ambush” meeting
- Actual interviews
 - Meet in person
 - Can make exceptions

General Principles for Conducting Employee interviews

- **Explain purpose** of the interview
- Stress importance of learning all the facts surrounding the allegations
- Inform employee answers should be truthful and complete → failure could result in discipline
- Discuss confidentiality*
- Explain that outcome **MAY** be confidential
- Ensure employee has necessary representation

Do or Don't?

- Principal Thomas has reviewed Mr. Jones' records and teaching evaluations and decides to speak with Mr. Jones first to ensure he gets a fair chance.
- In an effort not to “blow the investigation out of proportion,” he pulls Mr. Jones from his 4th period World History class for the interview.

Interviewing Mr. Jones

- **Notify ASAP**
 - Two separate events
 - Limited information until face-to-face
- **Carefully outline questions**
 - Eliminate judgmental phrasing
 - List specific subjects that requires answers and potentially specific questions
 - Prepare questions that test “credibility”
 - Ask for witnesses and any relevant documents
- **What if accused refuses?**

Interviewing Mr. Jones

- What else do YOU have to say?
 - Estimated timeline for investigation
 - Preservation instruction
 - Confidentiality and retaliation (repeatedly)
- What are YOU doing?
 - Assess credibility—again, in baby steps
 - Take excellent, OBJECTIVE notes
 - Listen with open mind

Interviewing Mr. Jones

- Consider *Garrity/Atwell* Warning
 - The meeting is fact finding in nature and will assist in determining whether disciplinary action is warranted. You have the right not to answer my questions. However, refusal to answer my questions will likely result in discipline, up to and including adoption of a notice to remedy or dismissal. If you answer my questions, your answers cannot be used against you in any criminal proceeding. Such answers may, however, be used against you in relation to subsequent discipline. Refusal to participate in the meeting will also likely result in disciplinary action for insubordination.

Principal Thomas' Plan

Although Mr. Jones denied everything, Principal Thomas decides to interview 4 students who may have it out for Mr. Jones and could be behind the allegations.

Student Witnesses

- **Do** treat interview documentation as student records
- **Do** prepare for students to graduate and become unavailable
- **Don't** assume what the student knows
- **Do** include parents where appropriate
- **Do** invite known staff member if possible
- **Don't** promise confidentiality
- **Do** explain importance of truth
- **Don't** expect the whole truth

Difficult Witnesses

- **Do** explain interview is opportunity to discuss his version of events AND clear up misinformation
- **Don't** forget to seek union assistance
- **Don't** show frustration
- **Do** inform that refusal to cooperate may result in discipline
- **Do** continue asking open ended questions
- **Don't** assume why he is being difficult

Making a Determination

- Did a policy violation occur?
- Did the employee otherwise engage in misconduct?
- Consider appropriate next steps/discipline
- Involve others if appropriate

Documenting the Investigation

- **Extremely important**
 - Direct communication to agency, judge, or jury
 - Follow process and document decision making
 - Be objective → **no unfiltered “inner thoughts”**
- **Specific steps**
 - Interview notes (emails setting up interviews)
 - Documents collected (email, texts, social media posts)
 - Timelines/logs
 - Report

Investigation Report

- Goal: Document issues, scope of investigation, findings, and recommendations/outcome
- For whom?
 - Internal decision makers
 - External reviewers (courts, agencies)
 - Historical record (e.g. if future accusations)
 - Note: Different from notice of outcome to complainant/accused

Investigation Report

- Conclusions:
 - Be specific but succinct about the factual findings
 - Deliberately and carefully make judgments
 - Credibility Evaluations
 - Make them
 - Explicitly identify when applicable

Investigation Report: Common Mistakes

- Euphemisms/passive voice
 - Don't shy away from stating what investigation found
- Excessive use of adverbs and adjectives → keep it factual
- Conclusory language
 - “Show your work”

Notice of Outcome

- Less detail than report
- Still outline allegations, steps of investigation
- Conclusions
 - Sanctions imposed?
 - Rationale for finding and sanctions?

Documentation Top 10 tips

1. **Name and Date**
 - Date of interview
 - Date of document memorializing interview
 - Names and titles of everyone present
2. Include a clear summary of the allegations, questions, and responses, and sum up with next steps (further investigation, discipline, directives)
3. Use quotation marks to note word-for-word witness statements only
4. Record any specific dates, times, places provided by witness.
5. Record full name and title of any person referenced during interview.

Documentation Top 10 tips

6. Do NOT include student names
7. Copy appropriate individuals
8. Reference policies/procedures
9. PROOFREAD and make corrections before distribution
10. Be timely in distributing documentation

Do or Don't?

Mr. Jones

5/10

- Denies having inappropriate relationship with sophomore Ashley Lee
- Says Ashley is struggling in class "among other things"
- "Not the brightest bulb out there" and he offered support for class only
- Says he sent her text messages each night in an effort to help her - says because she is "slower," he needed to send many
 - (- He did not give a specific number)
- Says Ashley tends to imagine things
 - (He sounds like he is lying)
- Follow up but he is likely lying

Questions

