



INVESTIGATING EMPLOYEE MISCONDUCT



IASPA: HR ESSENTIALS WORKSHOP

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- This presentation is made available for educational purposes only as well as to give you general information and a general understanding of the law, not to provide specific legal advice.

- **This presentation is not legal advice or a substitute for legal counsel.**



WHAT WE WILL COVER TODAY

- Introduction to Effective Investigations
- The 5 Phases of Effective Investigations
- Employee Discipline Considerations



INTRODUCTION TO EFFECTIVE INVESTIGATIONS



What is an Investigation?

- An investigation is a detailed *process* used to discover facts and findings that can be reasonably relied upon for decision making.

Why Investigate?

- To ensure we *consistently* make *informed decisions* based on *credible evidence* rather than making arbitrary decisions based on unreliable information.

Investigation Balancing Act

Employee's Rights

SOME EXAMPLES

- Right to privacy
- Right to be free from:
 - unreasonable searches and seizures
 - unlawful detention
 - intimidation or coercion
- Contractual rights

Employer's Obligations

SOME EXAMPLES

- Complying with ethics laws
- Financial accounting
- Preventing harassment
- Safeguarding public funds
- Protecting confidentiality
- Safeguarding public trust
- Ensuring public safety



HIGH PROFILE CASES

- What happened?
 - Something about the offense garners additional scrutiny
- Who did it?
 - Something about the person who engaged in the misconduct garners additional scrutiny
- Who did it happen to?
 - Something about the identity of the victim garners additional scrutiny
- How did we (mis)handle it?
 - Something about the way in which the employer responded to allegations garners additional scrutiny



THE 5 PHASES OF EFFECTIVE INVESTIGATIONS



THE 5 PHASES OF INVESTIGATION

1. Initiation Phase
2. Planning Phase
3. Collection Phase
4. Reporting Phase
5. Decision Phase



PHASE 1: INITIATION PHASE

1. Consider if allegation is criminal or abuse/neglect in nature.
If criminal, STOP! Contact police and/or DCFS.
2. Review applicable policies.
3. Document the “initiation of the investigation”
4. Consider if there are any “interim measures” that should be adopted to temporarily remedy the situation during the investigation.
5. Consider if there are any “interim measures” that should be adopted to secure evidence that might be lost.



PHASE 1: THE INVESTIGATION TEAM

1. Avoid attempting to conduct an investigation alone.
Always have a note-taker or “*prover*”
2. Choosing the right investigators is essential.
 - a) Training and Experience
 - b) Professionalism and Demeanor
 - c) Propensity for Analytical Reasoning
3. Remember practical considerations:
 - a) Other work requirements
 - b) Personal obligations
 - c) Pre-planned vacations



PHASE 2: THE PLANNING PHASE

Investigations fail when the investigators neglect to take steps up front to plan out their investigation.

1. Don't just bring in the accused and start asking questions.
2. Be deliberate.
3. Start broad and methodically get narrower.



PHASE 2: THE INVESTIGATION PLAN

1. A written plan that forms the outline or checklist for the investigation that follows.
2. An effective Investigation Plan will:
 - a) Define the scope of the investigation
 - b) Identify time constraints or procedural obligations
 - c) List all relevant issues to be addressed
 - d) Ensure that investigation is complete only after all issues have been addressed
3. Investigation Plans are often “works in progress.”



PHASE 2: DEFINING THE SCOPE

1. *(Did something happen?)*
2. What happened?
3. Who did it?
4. Where did it happen?
5. How did they do it?
6. When did it happen?
7. Why did it happen?
8. *(How could it have been prevented?)*



PHASE 3: COLLECTION PHASE

1. Document your collection efforts.
2. Two step process:
 - a) Physical Evidence (emails, photos, video, objects, etc.)
 - b) Testimonial Evidence (witness interviews and statements)
3. If possible, review all relevant physical evidence before conducting witness interviews.
4. Schedule interviews with time to prepare and time to review what witnesses tell you.



PHASE 3: STANDARD WITNESS ORDER

1. Technical Experts or Background witnesses, if applicable
2. Accuser/Victim
3. Witnesses identified by accuser/victim
4. Other witnesses
5. Witnesses identified by other witnesses
6. Accused
7. Witnesses identified by the accused
8. Anyone that needs to be interviewed again



PHASE 3 INTERVIEWING WITNESSES

1. Gather documents and schedule interviews.
2. Review documents before the interviews.
3. Conduct interviews promptly.
4. Each witness should be interviewed individually.
5. Conduct interviews at a respectful location and time.
6. Give applicable notices (*Weingarten*, *Upjohn*, or *Atwell/Garrity*)
7. Ensure privacy for interviews.
8. Explain the purpose of the interview.
9. Explain the process – and explain what comes next.
10. Ask for additional witnesses and documents.
11. Remind the witness about confidentiality obligations, if any.



PHASE 3: INTERVIEWING THE ACCUSED

1. Respect any rights to counsel or union representation.
2. Read any applicable rights warnings (esp. *Atwell*).
3. Advise the accused of the purpose of the meeting.
4. Advise that full, truthful cooperation is expected.
5. Don't reveal what you already know.
6. Don't be argumentative or defensive.
7. Avoid compound questions.
8. Ask if they know why they're here & if they have spoken with anyone.
9. First get their full and complete side of the story, then go back and iron out all the details again.
10. Ask the tough questions.



PHASE 3: THE TOUGH QUESTIONS

1. Did you do it?
2. What did you do?
3. Have you ever thought about doing this?
4. Who do you think did it?
5. Would someone say you did it?
6. Is there any reason you can think of why someone would say *you* did it?
7. Is there any reason you can think that [accuser or other witnesses] would lie about you?
8. *Don't neglect to ask, even if a sensitive/awkward subject*



PHASE 3: COMMON RESPONSES

1. I don't remember.
2. It wasn't me.
3. It didn't happen.
4. It's not against the rules.
5. It wasn't that bad.
6. I had a good reason.
7. I didn't know it was against the rules.
8. Your rules are wrong / unfair.
9. He/She/They did it too.
10. It wasn't my fault.
11. It was their fault.
12. I won't do it again.
13. I'm a good employee.
14. This happened a longtime ago.



PHASE 3: TAKING STATEMENTS

1. Notes maintained by investigators with questions and answers
2. Notes maintained by investigators without questions
3. Statement typed by investigators but initialed by witness after opportunity to correct errors or add information*
4. Handwritten statement

(Note that statements aren't automatically confidential. Be careful about over-promising on this.)

**** Keep a copy of all drafts***



PHASE 3: WHEN IS IT OVER?

The investigation is over when the investigation team reasonably concludes that no additional investigative techniques and methods are expected to uncover additional evidence or find additional facts.

1. *Has everyone we believe or expect would have relevant information been afforded an opportunity to provide evidence?*
2. *Have we closed the gaps or explained the inconsistencies?*
3. *Have we given the accused the opportunity to tell their side of the story?*
4. *Have we followed up on any potential alternatives?*
5. *Have we answered the questions in our investigation plan?*



PHASE 4: DRAFTING THE REPORT

First, confirm whether a written report or an oral report is expected.

1. Review all information.
2. Summarize the investigation succinctly and clearly.
3. Make sure facts and findings are supported by the evidence.
4. Draw reasonable inferences, but avoid “inference stacking.”
5. Document any “obstacles” encountered during the investigation.
6. Record if anyone was represented by an attorney.
7. Include a chronology of events.
8. Include a list of witnesses.
9. Include a timeline of your investigation.
10. Include exhibits or attachments, if any.
11. Plan for the ability to comply with any due process requirements.



PHASE 4: DRAWING INFERENCES

An inference is a “conclusion reached by considering other facts and deducing a logical consequence from them.”

– *Black’s Law Dictionary*

Inferences must be reasonable.



PHASE 4: FACTS V. FINDINGS

Facts: A fact is an event, occurrence, or state of affairs known to have happened. *Opinions or conclusions drawn from the evidence are not facts.* Facts are derived from objective observation as opposed to subjective analysis.

Example: Tom is a custodian at the middle school.

Findings: Findings are the investigators' factual statements which are supported by a preponderance of the evidence. Findings of fact must be as specific as possible as to times, places, persons, and events.

Example: Tom cleaned the middle school cafeteria after lunch on 10/2/19.



PHASE 4: HIGH QUALITY REPORTS

Draft the report with the expectation that someone, someday, years from now, will review it without the benefit of:

1. Background information.
2. Context.
3. Personalities involved.
4. Broader considerations for the employer.
5. Undocumented aggravating factors.
6. Undocumented mitigating factors.

Does the report tell the whole story?



PHASE 5: DECISION PHASE

1. Once the investigation is complete, decision-makers should be able to rely on the investigation to make decisions.
 - a) Decision makers are more likely to rely on the investigation if the investigation was conducted objectively, fairly, methodically, and in accordance with a defined procedure.
 - b) Deviations from investigating procedure detract from the credibility of findings and conclusions of the investigation.
 - c) If the investigation will be relied on for employee discipline, the investigation must have adhered to procedural due process rights.



PHASE 5: DECISION PHASE

1. The outcome of a DCFS and/or police investigation **DOES NOT** necessarily dictate your decision/action as the employer.
2. Make a decision! Don't leave a matter lingering.
3. Communicate the decision to the complainant.
4. Let the facts, not the emotions of the parties, dictate your decision.

PHASE 5: DUE PROCESS

1. Due process is “notice and the opportunity to be heard.”
2. Due process may require multiple rounds of evidence collection, analysis, and proposed decision-making before reaching a decision.





EMPLOYEE DISCIPLINE



EMPLOYEES COVERED BY CBA

- The level and type of discipline may depend on whether the employee is covered by a collective bargaining agreement or an employment agreement.
- Before issuing any discipline, review an applicable contract and Board policies!



PRE-DISCIPLINE RISK ASSESSMENT

1. Will the employee be surprised by the discipline?
2. Has employee complained of discrimination, harassment, unethical conduct, unfair or unsafe working conditions?
3. Has employee participated in any other investigations?
4. Is employee member of / perceived to be in a protected group?
5. Has employee disclosed a medical condition or participated in FMLA or disability leave?
6. Is employee pregnant or recently returned from pregnancy?
7. Was the rule the employee violated written down?
8. Was the employee aware of the rule before they violated it?



7 FACTORS OF JUST CAUSE (WHEN APPLICABLE)

1. Employee was on notice of the rule they violated
2. The rule was reasonable
3. There was an investigation
4. The investigation was fair and objective
5. Substantial evidence that the employee violated the rule
6. The rule was consistently applied
7. The discipline was reasonable and proportionate



AFTER THE INVESTIGATION

1. Prepare for the “investigation of the investigation.”
2. Maintain all of your documents to ensure you comply with document retention obligations, i.e., Local Records Act
3. *Consider your obligations under FOIA, 5 ILCS 140/1, et seq.
4. *Comply with the Personnel Records Review Act, 820 ILCS 40/0.01, et seq., before releasing disciplinary records.
5. *Comply with any applicable CBA
6. If an investigation identified problems, make sure there is a process or plan in place to correct those problems, especially if the investigation included recommendations.



BOTTOM LINE

At every stage of the investigatory and employee disciplinary process, you must be able to explain:

- What you would normally do.
- What you did.
- Why you did it.



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