

Human Resources Investigations

April 23, 2026

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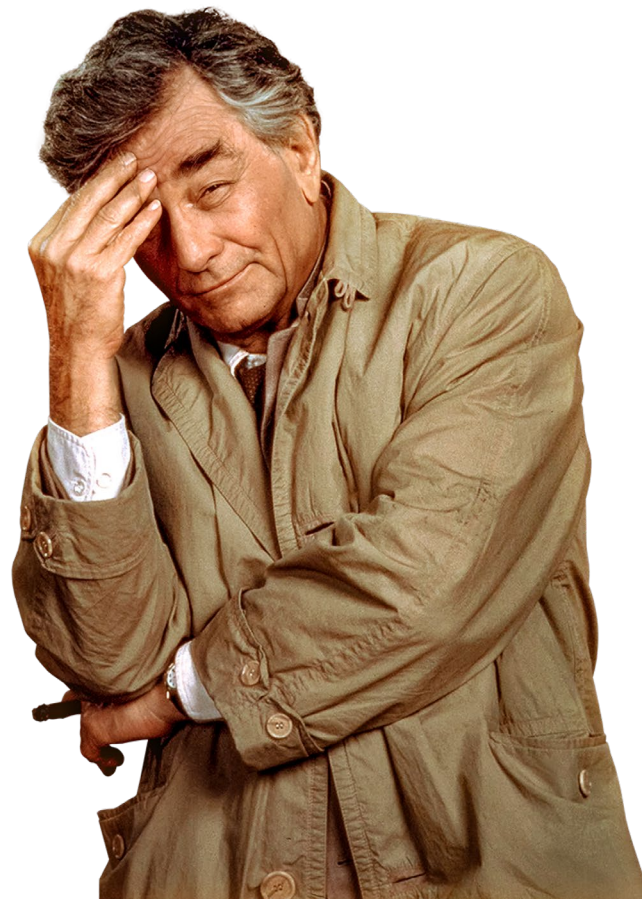


These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations.

Future legal developments may affect these topics.

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Why and How to Investigate Allegations of Misconduct



Legal Duty to Investigate

- Legal duty under Due Process Clause of 14th Amendment, various civil rights statutes, including Titles VII & IX, as well as board policy
- Failure to investigate alleged misconduct may result in
 - School district liability
 - Personal liability if no qualified immunity

Investigation Purpose

Objective: determine what happened and discover/obtain evidence of accountability for alleged misconduct

Key components:

- Prompt
- Thorough
- Objective
- Fair



Full & Fair Investigation

- Suspend judgment until investigation complete
 - Purpose of investigation is to discern what happened, not to prove what is alleged
- Interview all persons with knowledge of events
- Consider any tangible evidence
- Make credibility determinations

Investigation Plan & Strategy

- What do you already “know”? What are you investigating?
- What do you need to learn to determine whether the employee engaged in misconduct?
- What questions do you need answered?
- Who should conduct the investigation/interviews?
- Who will need to be interviewed?
- What documents or evidence do you need to review?

Who Should Conduct the Investigation?

- Immediate supervisor
- Administrator
- HR department personnel
- Outside licensed investigator
- Independent legal counsel
- Law enforcement

Accused's Status During Invest.

Will employee's continued presence at work interfere with investigation?

- Non-Disciplinary Paid Administrative Leave
- Reassignment, without adverse effect (i.e., wages, hours)
- Issue "no communication" directive as necessary

Investigation Basics

- Secure evidence
 - Physical
 - Documentary
 - Electronic
 - Surveillance cameras
 - Screen Shots or Pictures
- Interview witnesses while memories are fresh
- Identify disputed facts and follow up
- Review police records if available

Investigation Plan: Context

Review applicable

- Contracts
 - collective bargaining agreement
 - individual contract
- Employee handbooks
- Board policies (professional staff/support staff)
 - staff discipline
 - staff ethics
 - student supervision & welfare

Investigation Plan:

Context cont.

Review Applicable

- Personnel file
 - Warnings/reprimands
 - Evaluations
 - IDPs/assistance plans

Understand impact on

- investigative procedures and standards,
- any resulting potential discipline

Investigation Plan – Order of Interviews

- Complainant – Person who reported alleged misconduct
- Witnesses identified by Complainant
- Other relevant witnesses identified by the witnesses
- The accused
- Any witnesses identified by accused that you have not yet interviewed

Interview Considerations

Before interview

- Outline *general* questions to be asked
- Use same central questions for each witness

During interview

- Present directive to be honest and forthright
- Take notes, which may be discoverable
- Avoid leading questions (i.e., those which suggest answer)

Interview Notes

- Include date, time, location, as well as names of witness and others present
- Accurately quote responses “_____”
- Stick to the facts; no conclusions or impressions
- **Remember:** notes may be disclosed through FOIA, PERA, or subpoena

Conducting the Interview

- Try to neutralize any anxiety and apprehension
- Briefly explain what is going on and expected of witness – why they are being interviewed
- Have a standard set of instructions that you state before conducting the interview –
 - ❖ Honest/truthful
- Avoid leading questions (i.e., those which suggest answer)

Conducting the Interview – Ask Open-Ended Questions

- ✓ What happened? When did it happen?
- ✓ Where did it happen?
- ✓ Who was involved? Who was there?
- ✓ Why do you think it happen? (speculation on motivation)
- ✓ Who did you tell about it? When did you tell them ?
- ✓ What notes, pictures, videos, or evidence do you have?
- ✓ Who else has relevant information about what happened?

Conducting the Interview – Direct vs Leading Questions

- Goal: obtain information (including what you may not know or suspect)
- “Stepped” direct questions preferred
 - Where were you on Monday morning?*
 - Who was with you?*
 - What were you doing?*
- Leading questions suggest answer and minimize interaction
 - What color was the shirt? (direct)
 - Was the shirt blue? (leading)

Conducting the Interview – Always Ask Accused

- ❑ Awareness of
 - ✓ Relevant Board policy
 - ✓ Related rules
 - ✓ Prior directives
- ❑ Seek input about other
 - ✓ Information that should be considered
 - ✓ Persons who should be interviewed

Concluding the Interview

- Inform accused that notice of determination will be provided
- Maintain paid leave if necessary for employee
- Give Directive: no retaliation
- Follow up on any new and relevant information
- Superintendent or designee can determine if discipline will be issued, if authorized by Board Policy

Accused's Rights

- **Due Process Rights**
 - Explanation of allegations
 - Opportunity to respond, rebut, and defend against charges
 - Receive copy of relevant policies and procedures and anything specified by policy and contract
- *Weingarten* Rights
- *Garrity* Rights

Weingarten Rights

NLRB v
Weingarten

420 US 251
(1975)

- Employee has right to union representation at **investigatory interview which might reasonably result in discipline**
- MERC: Same standard
- Violation constitutes ULP, which may invalidate investigation and negate disciplinary consequences

Weingarten Rights – Will Discipline Result?

“If there is not an objectively reasonable basis to believe that discipline might result for a supervisory meeting, union officials may not interfere with legitimate employer efforts to communicate with employee in the context of an investigation.”

*AFSCME Local 574 v City of Troy,
185 Mich App 739 (1990)*

Weingarten Rights – Accused Request for Union Rep

- One request suffices
- Employer may not choose union representative, but must make one available
- Unless CBA provides otherwise, do not have to wait for the union representative of the employee's choice
- Employee's silence may waive union representation right

Weingarten Rights – **Interview Accused not Union Rep**

“The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee’s own account of the matter under investigation.”

City of Saline, 29 MPER 53 (2016)

Garrity Rights Rights

Garrity v
New Jersey

385 US 493
(1976)

Public employees have the right to be free from self-incrimination in related criminal matter

- can be directed to truthfully answer questions that are “*specifically, directly, and narrowly*” related to official duties
- refusal to answer questions can lead to discharge
- statements cannot be used in related criminal proceedings

Employee Refusal to Participate in Investigation?

Examples

- Refusal to answer questions
- Failing to produce documents for investigation

Consequences

- ✓ Discipline for insubordination
- ✓ Loss of opportunity to be heard

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Consider Other Actions

Duty to Report to

- ✓ CPS
- ✓ Local Law Enforcement and Statewide School Safety Information Policy

Disclosure to others?

- ✓ Parents
- ✓ Staff
- ✓ Community/Media

Evaluate the Evidence

- Review all witness statements, interview notes, documentary evidence, other tangible evidence
- Make credibility assessments if necessary
 - Why is one witness more credible than another?
 - Does the documentary/tangible evidence corroborate a person's statements?
- In your judgment, what does a “preponderance of the evidence” show?

Prepare Report

*Know your **audience***

- Employee
- Other administrators
- Future decision makers
- FOIA requesters

*Know your **purpose?***

- Inform
- Provide basis for discipline
- Defend in litigation

Prepare Report

- Summarize allegation and EE response
- Consider chronology
- Substantiate facts
 - Evidence reviewed
 - Witnesses interviewed
- Note any factual disputes
- Apply policy/legal standards
- Note any previous issues

Disciplinary Memo

- Identify consequences
- Describe assistance
- Warn about future conduct and retaliation
- Acknowledgment

I have received a copy of this memorandum and understand that it will be placed in my personnel or file. This acknowledgement does not indicate my agreement with the memorandum's content.

- Copy to personnel file
- Put memo in personnel file

QUESTIONS

