

**BERNALILLO YOUTH SERVICES CENTER  
ADMINISTRATIVE INVESTIGATIONS TRAINING**

# **Conducting Effective Workplace Investigations: A Step-By-Step Guide**



# **COURSE OBJECTIVE**

**Participants will become familiar with the authority, investigative techniques, evidence collection and documentation relating to investigation of an administrative nature to include employee misconduct, resident misconduct and complaints, Title 7 and discrimination practices.**



# DEFINITIONS

## Criminal

- Is carried out by a commissioned law enforcement law enforcement officer.
- Investigates violation of a federal or state criminal code.
- Is targeted to criminal conviction.
- Carries constitutional protection for the subject.

## Administrative

- Is conducted (hopefully) by a person trained to do so.
- Investigates a violation of agency policy, procedures OR state or federal law.
- Is targeted to obtain information.
- Does not necessarily carry constitutional protection for the subject.
- Results may be used in a criminal trial.

# DEFINITIONS

## Subject

- The person on whom the investigation is centered as committing the act.
- The target of the interview.

## Victim

- The person/entity harmed by the subject's actions.

## Interview

- Personal interaction designed to obtain information, facts, and evidence.

## Interrogation

- Same as above except it is highly subjective in nature



# DEFINITIONS

## Signed Statement

- A statement of facts, observations, and knowledge wherein the author signifies their authorship by signing the document.

## Sworn Statement

- Same as above except the author takes a legal oath as to the veracity of the statement.

## Confession

- When a subject admits to prohibited actions; usually obtained via a sworn statement or signed statement.

## Investigator

- A person assigned to collect facts, information, intelligence, and evidence regarding an event.



# ELEMENTS OF PROOF

Those constituent parts of an action that would tend to prove it occurred and the perpetrator was the individual that did it.

Black's Law Dictionary



# STANDARDS OF PROOF

**Beyond a reasonable doubt:** The facts lie by virtue to establish guilt.

**Probable Cause:** That a cause of action existed based on what a reasonable intelligent man would believe.

**Clear and Convincing:** More than preponderance and less than beyond a reasonable doubt.

**Preponderance of the Evidence:** That degree of proof which is more provable than not.

**Reasonable Belief:** Knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe something has occurred.

Black's Law Dictionary



# **VIOLATION**

- **Elements of Proof**
  - Quantifiable evidence of a violation
- **Standard of Proof**
  - Preponderance of the Evidence
- **Burden of Proof**
  - The challenging authority

# EMPLOYEE MISCONDUCT

## Elements of Proof

- That a violation occurred.
- The employee committed an act in violation of the law.
  - The employee committed an act in violation of policy or procedure.
- The employee refrained from performing an act in accordance with job description.
- Employee acted with reckless disregard for policy, procedure, or common sense.
- ◆ **Standard of Proof**
- ◆ Clear and Convincing\_\_\_\_\_
- ◆ **Burden of Proof**
- ◆ The appointing authority

## Elements of Proof

- The policy/procedure did exist.
  - It was disseminated to staff.
  - Staff were in a position to know about it.
- The subject did violate the policy/procedure.

# QUALITIES OF A GOOD INVESTIGATOR

Excellent interpersonal communications skills.

Extremely confident and resistant to intimidation.

Assertive personality.

Extremely high professional ethics.

Intelligence with common sense.

Wide range of experience outside of specialty area.

Solid liberal arts education.

Inquisitive nature.

Detail oriented.



# BARRIERS TO QUALITY INVESTIGATIONS

Personal agenda on the part of the appointing authority

Professional agenda on the part of the appointing authority

Incompetent investigator

Outside interference



# FIRST, A LITTLE HUMOR...

**Of 500 employees,**

- 29 accused of spousal abuse.
- 7 arrested for fraud.
- 19 accused of passing bad checks.
- 117 bankrupted two or more businesses.
- 3 arrested for assault.
- 71 can't get a credit card because of poor credit.
- 14 arrested on drug-related charges.
- 84 drunk driving cases in the prior year alone.

**What Company is this?**

**IT'S THE *UNITED STATES CONGRESS*—  
YOUR TAX DOLLARS AT WORK!**



# **EVENTS THAT CAN TRIGGER AN EMPLOYER INVESTIGATION**

**Employee complaints of harassment or discrimination**

**Employee complaints of retaliation**

**Allegations of misconduct, theft, etc.**

**Resident/Family Members complaints**

**OSHA/Safety issues, workplace injuries and accidents**

**Whistleblower complaints or reports**

**Lawsuits or administrative claims**



# WHY SHOULD WE CARE?

Federal/state discrimination/harassment laws impose a duty on employers to investigate employee-related complaints

Federal/state OSHA laws impose a duty on employers to investigate accidents, safety violations

Various whistleblower statutes impose a duty on employers to investigate

Provisions in written employment agreements may impose a duty to investigate



## **WHY SHOULD WE CARE? (CONT'D)**

**Failure to promptly investigate may be used as a separate basis of liability**

**May create an inference of malice, leading to punitive damages**

**Under Federal law, a good investigation can be used by the County to limit or avoid liability for harassment where the employee suffered no adverse employment action**



## **WHY SHOULD WE CARE? (CONT'D)**

**Under state law, the County is still strictly liable for a supervisor's harassment, but it can rely on a good investigation to limit the damages recoverable**

**Under state law, a good investigation can be used to establish that the County had a "good faith belief" that an employee engaged in misconduct to justify a termination**



## **WHY SHOULD WE CARE? (CONT'D)**

**Finally, plaintiff's attorneys are focusing on the adequacy of employer investigations to justify additional claims against the employer and to make the employer "look bad"**

- **"Employee complained but the County did nothing"**

# WHAT CONSTITUTES A “COMPLAINT”?

## Easy to recognize

- Written or verbal communication from employee specifically complaining of harassment or other objectionable conduct.
- Employee verbally states he/she has been treated badly or unfairly
- Supervisor reports that inappropriate acts or misconduct have occurred
- **DOES NOT HAVE TO BE IN WRITING, AND CANNOT BE REQUIRED TO BE IN WRITING**

# **LEGITIMATE GOALS OF AN INVESTIGATION**

**To determine if a problem exists**

**To protect the County**

**Opportunity to demonstrate fairness by the  
County**

**To encourage employees to report problems to  
management and to use the County's internal  
dispute resolution system.**



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# QUESTION PHRASEOLOGY

Short and confined to one topic.

Should be clear and easily understood.

Watch phraseology and language. Not everyone speaks the same language.

Ask precise questions.

- Calls for specific answer.
- What did you do?
- Where were you?
- What did you observe?

Use discerning questions.

- Should be relevant to the subject.

# TYPES OF QUESTIONS

Extended answer questions.

- Soliciting a “yes” or “no” restricts information.

Leading questions.

- Not really good as it influences the response. Is a trait of incompetent investigators. Can be used to confirm and clarify information.

Double or triple negatives.

- Didn't you try to calm the student before restraint?
- Didn't you know you had to report a staff member having inappropriate actions with a resident?

Complex questions.

- Cover more than one topic.
- Require more than one answer.
- Require a complicated answer.

Attitude questions.

- Designed to influence the mood of the subject.



# DIRECTING THE INTERVIEW

- **Free Narrative**
  - Orderly continuous account of something.
  - Interviewer must control and direct subject.
- **Direct Examination**
  - Brings out a connected account of something.
  - Begin with non threatening questions.
  - Ask questions in manner to develop facts in the order of occurrence.
  - Ask only one question at a time.
  - Give subject ample time to answer.
- **Cross Examination**
  - Confirm and “fill in the blanks”.
    - Detect evasion, conflicting information, vague answers etc.

# THE PHYSIOLOGY OF DECEPTION

You first need to establish a “base line” of kinesic behavior in order to evaluate the subject in an interview.

It helps to have a second interviewer just to watch the subject.

7% of communication is via words.

38% of communication is via tone and timbre.

55% of communication is via facial expression and body movement.

Deception causes physical and mental stress.

Stress will be demonstrated by the body.

This is the principal of the polygraph.

- Heart Rate
- Breathing Rate
- Skin Salinity
- Blood Pressure

# PROXEMICS

**The amount of space and types of objects among interviewer and subject:**

- Never interview the subject in their office or classroom.
- Make them come to you.
- With some subjects a barrier works best.
- You may want to put the subject in a covertly uncomfortable chair.
- Avoid an overt “Gestapo” environment.
- Dominate the interview unless you want to go for a “trap” situation.

**Distance communicates intimacy:**

- 0-18”: intimate space reserved for family and friends.
- 08-24”: Personal space for most interpersonal interaction.
- 4-12’.: Social/consultative distance



# BODY

## Indicators of deception

- Sitting in a slouched manner. Particularly when combined with crossed arms and looking to the right.
  - Standing too far away for the situation.
  - Appearance/Dress/Department
  - Leaning away
  - Tightly crossed arms-discomfort/deception
  - Loosely crossed arms-defiance/possible deception.
  - Hands on hips is an attempt to establish dominance.
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# EYES

## Indicators:

- Rolling Eyes: Frustration or aggression
- Avoidance of eye contact (Careful it may be cultural such as Oriental, Hispanic, Indian)
- Staring often means an attempt to establish dominance
- Wide open eyes will indicate surprise or a sensitive question has been asked.
- Lidded eyes indicate deception or confidence.
- The blink rate may dramatically increase during deception.
- Pupils will dialate during deception.
- Looking to the left indicates recalling factual information.
- Looking the right indicates the mental construction of something. May be deception.

# FACE

**Furrowing Brow:** Not happy with statement may indicate deception.

**Frown:** Concentrating or uncomfortable;

**Grimace:** Doesn't like what you're saying or you just hit a sensitive point.

**Lip Biting:** Nervous or feeling pressured.

**Pursed lips**

**Covering mouth**

**Rubbing nose/animated gestures**

**Tight facial muscles or lips-Deception**

**Licking lips**

**Throat Clearing**



# BEHAVIOR

Wringing hands: Uncomfortable with topic/question.

Exaggerated gestures.

Hands on hips: Attempt at dominance

Playing with objects (Pen clicking, car keys, et al.)

Pointing: Aggression possible attempt to intimidate.

+YSC Policy Mandates disciplinary action for residents engaged in serious or violent acts.

Mandates all employees report.

Violent acts are so cited in the text.

# WELL (AND NOT SO) MEANING PEOPLE

The person that just wants to let you know someone doesn't have a reason to lie.

The person that doesn't want to get involved but just wants you to know.....

The person who had similar problems yet didn't report them.

The person who is investigator, judge, jury, and executioner.

The person who tells you what your findings will be.

The person who intimates what your findings should be.



# CONDUCTING EMPLOYEE INTERVIEWS

## Determine the order of witnesses

- Case by case determination
- Ideally, we want to be able to fully confront the accused
- Are there any witness tampering issues?
- Are there confidentiality issues?
- Is the element of surprise important?

## Usual order of witnesses:

- Complainant (victim), witnesses, the accused, additional witnesses

# CONDUCTING EMPLOYEE INTERVIEWS

## Interview Techniques

- Use a new page for each witness
- Keep notes on separate paper regarding the witness' credibility (body language, gestures, eye contact, etc).

## Basics

- Date
  - Location
  - People present
  - Interviewers identity and initials
  - Items for follow up
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# CONDUCTING EMPLOYEE INTERVIEWS

## Suggested Script

- Why interview is taking place
- Seriousness of investigation
- Role interviewee plays in investigation
- Truthful cooperation and completeness required
- How information relayed may be used by the County
- Confidentiality will be maintained, **to the extent possible consistent with the County and Youth Services Center's obligation to conduct a thorough investigation**

# CONDUCTING EMPLOYEE INTERVIEWS

## Suggested Script (Cont'd)

- Interviewee should not discuss interview or events leading to investigation with others, without advance direction from the YSC Director or his/ her designee
- Explain that there will be no retaliation for the interviewee's good faith reports and statements
- If asked, the Youth Service Center/County is unsure about the final outcome of the investigation at this point

# CONDUCTING EMPLOYEE INTERVIEWS

## Interview Techniques

- Slow the interviewee down
  - Use direct quotes sparingly
  - If the interviewee reports something as rumor or speculation, note it as such
  - Avoid compound questions (K.I.S.S. Rule)
  - Easy questions first, hard questions later
  - Avoid legalese and legal jargon
  - Try to get a chronological explanation of events
  - Re-tell the story, and confirm chronology as necessary
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# CONDUCTING EMPLOYEE INTERVIEWS

## Interview Techniques (Cont'd)

- Record **objective** observations, not conclusions
    - YES: “Blushed,” “raised voice,” “no eye contact”
    - NO: “Appears to be lying” or “evasive”
  - Do not make legal conclusions (that’s my job)
    - YES: “Inappropriate” or “unprofessional”
    - NO: “Harassment” or “discrimination”
  - Tape recorders are usually a bad idea.
  - Don’t discuss theories or speculation with interviewee
- 

# CONDUCTING EMPLOYEE INTERVIEWS

## Things to watch out for

- “Do I need a lawyer”
- “I do not want to be involved”
- “What will happen next?”
- Follow up emails and statements by interviewees that their comments are “off the record”
  - **Tip: NOTHING is “off the record”**

## Concluding the interview

- Always carefully review your notes before ending the interview and ask, “Is there anything else I should know?”

# INTERVIEWING THE COMPLAINANT

Who, what, when, where, why, how

Details, details, details

Obtain a signed statement

Identify specific conduct involved

Are there others with similar complaints?

Has the complainant complained to anyone else?

Remember, this could be your future plaintiff

# INTERVIEWING THE COMPLAINANT (CONT'D)

Does the conduct occur at any particular time or location so that you could observe it?

Frequency of conduct (especially important for harassment complaints)

Identity of witnesses

“Anything else I should know?”



# **INTERVIEWING OTHER WITNESSES**

**Interview every single witness identified by the Complainant**

**Challenge responses that are too agreeable**

**If witnesses are former employees, make whatever efforts necessary to reach out to them (meet at Starbucks, after hours, etc.)**



# INTERVIEWING THE ACCUSED

Who, what, when, where, why, how

Get a response to *each and every individual allegation*

Details, details, details

“Any reason for Sally/Bob to lie or exaggerate?”

Identify any witnesses who support the accused, *and interview them*

“Anything else I should know?”



# **INTERVIEW THE COMPLAINANT'S SUPERVISOR**

**What did he/she know about Complainant's complaint?**

**If he/she did know about it, what, if anything, did the supervisor do about it.**

- **If nothing, consider discipline for the supervisor**

**Does the Complainant have any discipline or performance problems**

**Has Complainant recently been put on notice regarding his/her performance?**



# INTERVIEWING THE ACCUSED

Is generally confrontative in nature.

Affords the opportunity to confess.

Can be cathartic in nature.

Know your subject.

Non-Compliant behavior is ALWAYS a choice the student consciously and willfully makes.



# MAKE DECISION AND WRITE A FINAL REPORT

**Avoid creating causes of action for the accused (i.e., defamation)**

- Keep all related conversations private and confidential

**Destroy all drafts and proofread carefully**

**This report may end up in court**

