Conducting Effective Investigations

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Agenda

- When to Investigate
- Who Should Investigate
- How to Investigate
- Evaluating Evidence
- Making Findings and Conclusions
- Post Investigation Actions
When to Investigate

- Suspected Violation of Rules or Regulations
- Reasonable Suspicion of Employee Misconduct
- Whistleblower Complaint
- Notification of Investigation by Third Party
Duty to Investigate

- Under Federal and State Laws and Regulations
- Pursuant to CSU Policy and Executive Orders
  - Executive Order 813
  - Executive Order 822 and 929

***Promptly investigate allegations of wrongdoing
Who Investigates

☐ You
☐ Other Internal Personnel
☐ Outside Investigator or Attorney
Selecting the Investigator

Factors to consider:

- Experience
  - Conducting investigations
  - With subject matter
- Neutrality vs. Bias
- Time Commitment
- Threat of Litigation
- Scope of the Investigation (strictly fact-finding vs. fact-finding with conclusions)
Attorney-Client Privilege

- Use of attorney as investigator does not necessarily result in attorney-client privilege
- Alternative ways to invoke A/C privilege – use legal counsel to advise investigator
How to Investigate

Golden Rules for Conducting Investigations:

- Be Prepared
- Stay Focused on Issues at Hand
- Stay Organized
- Maintain Confidentiality, to extent possible
- Know the Rules and Follow Procedures
Step 1: Develop a Game Plan

- Identify Objective
- Determine Scope of Investigation
  - Strictly fact-finding or fact-finding with conclusions
- Be Aware of Procedural Requirements
  - Review Rules, Policies and Regulations
  - Review CBAs
  - Review Executive Orders
- Take any necessary interim steps
  - Administrative leave, temporary suspension with pay, transfers, schedule changes, halting any related processes currently in motion if it can affect investigation
Step 2: Gather Relevant Evidence

- Documentary Evidence
  - Personnel Files
  - Emails, Memos, Disciplinary Documents
- Physical Evidence
- Statements and Interviews

***Be aware of limitations relating to administrative searches (reasonable expectation of privacy, “wiretap” rules, etc.)
Step 2: Gather Relevant Evidence (continued)

Don’t forget to properly document your investigation:

- Create a file or binder
  - Keep file separate from Official Personnel Files
  - Keep in confidential location
- Maintaining evidence
- Maintaining interview notes
- Copies of rules, regulations, applicable E.O.’s, etc.
Step 3: Identify Potential Witnesses

- Complainant (if there is one)
- Accused
- Bystanders
- Persons with knowledge
- Credibility witnesses

*** Establish general order of witnesses prior to starting interviews, but be flexible. In general, want to give accused last word.
Step 4: Conducting Interviews

PREPARE, PREPARE, PREPARE

- Preparation is the most important part of the interview
- Review policies/laws/guidelines that form the basis of the issue
- Understand what facts are necessary for you to reach any conclusions or make resolutions
- Prepare an outline of questions
Step 4: Conducting Interviews (continued)

Starting the interview:

- Introductions and Admonitions/Ground Rules
- Employee’s Right to Representation
- Confidentiality/ No Retaliation
- No conclusion has been reached
- Interviewee must answer questions truthfully – dishonesty is a basis for discipline
- Ground Rules for representatives
- Optional – Have employee sign Interview Disclosure/Acknowledgement Form
Step 4: Conducting Interviews (continued)

General tips for conducting interviews

- Put the interviewee at ease
- Ask open-ended questions first, then move to more narrow questions
- Ask who, what, when, where, why, and how
  - Remember not to focus on just asking what happened – need to ask who, when, where, how and why to get the full picture
- Don’t ask leading questions
- Have a general outline of the questions that you need to ask
Step 4: Conducting Interviews (continued)

General tips for conducting interviews

- Move chronologically through the facts
- Try to stay on track but it is okay to go off-track on occasion – just make sure that you get your questions answered
- Keep tough questions until the end
- Commit interviewee to a story/chronology
- Don’t forget to ask the wrap-up questions
  - “Have you told me everything?”, “Is there anything else you want to add?”
Step 4: Conducting Interviews (continued)

Interviewing the Accused

- Reasonable Notice
- Right to Representation (Weingarten Rights)
- The Right Against Self-Incrimination (Lybarger Admonition)
Step 4: Conducting Interviews (continued)

Documenting the Interview

- Note-taking
  - Keep notes objective; don’t add your own opinions
  - Use of a note-taker
- Should you record?
  - What if employee asks to record interview?
Step 4: Conducting Interviews (continued)

Concluding the Interview

- Briefly review story/chronology
- Can contact you if they have additional information/documents
- Any other people who they believe have relevant information
- Remind them of confidentiality/no retaliation policy
- Remind them to refrain from discussing the issue and the substance of the interview with anyone who does not have a legitimate business need to know. (Can contact you if they aren’t sure.)
- Answer any questions that they have
Assessing Witness Credibility

- Bias
- Motive
- Evasiveness/Vague Answers
- Defensiveness
- Recollection of details/ “I don’t recall”
- Eye contact/Body Language
- Chronology
- Does story make sense? Is it logical?
- Corroborating and circumstantial evidence
Evaluating the Evidence

- Look at all of the evidence
  - What isn’t evidence? Rumors, gossip, unsupported statements, opinions, etc.
- Assess credibility and weight of evidence
  - Direct vs. circumstantial evidence
  - How reliable is the evidence or the person?
Evaluating the Evidence (continued)

Burden of Proof

- Beyond a reasonable doubt
- Clear and convincing evidence
- Preponderance of the Evidence
- Good faith basis
Findings of Fact

- Review CSU policies and rules
- Analyze each allegation in light of evidence and applicable policies/rules
- Don’t be afraid to rely on your own experience
- Don’t be afraid to be wrong – just make sure that your findings/conclusions are based on facts supported by credible evidence and that your conclusion is logical
Writing the Investigative Report

- Introduction
- Summary of Investigation
- Allegations
- Relevant Policies/Procedures
- Chronology/Timeline
- Key Factual Findings
- Conclusions/Recommendations (not always part of the report)
- Attachments

***Be brief, objective and neutral***
What If Allegations Are Supported By The Findings?

- Make sure to communicate Findings with appropriate people
  - University President, Human Resources, CFO, Chancellor’s Office, General Counsel

- Take necessary steps to remedy wrongdoing

- Start discipline process, if appropriate
  - Involve the appropriate people in discipline

- Take steps to prevent similar problems in the future
Communicating Findings

- Communicating with the Accused
  - Specific findings and recommended actions
  - Appeal rights (if any)
  - If discipline, Skelly notice, investigative report, supporting data

- Communicating with Others
  - Only as appropriate
  - Privacy rights
Successful Investigations in Summary

- Promptly investigate
- Choose the right investigator
- Prepare and Plan
- Follow rules, regulations, guidelines
- Confidential, thorough, objective
- Make sure to wrap up the investigation
Questions?