It’s Elementary, My Dear Watson: The Basics of School District Investigations

WASBO Fall Conference
October 3, 2014

Andrew T. Phillips and Christine V. Hamiel, Attorneys
Phillips Borowski, sc

Nick Curran, Superintendent of Business Operations
Kelly Spors, High School Principal
School District of Omro
“It is my business to know what other people don't know.”

- Sherlock Holmes
Overview of Presentation

• Training
• Why you investigate
• Who/what you should investigate
• How to prepare
• Interview process
• Documentation
• Special situations
• Points to remember
Training

“Mediocrity knows nothing higher than itself; but talent instantly recognizes genius.”

- Sherlock Holmes
Training

• Those in supervisory positions must be adequately trained in the psychology and proper approach to receiving an employee complaint and determining the course of action in responding to the complaint.

• Training administrators to listen and respond to employee complaints may prevent litigation by facilitating the identification and correction of problems before the complaining employee retains a lawyer or files a lawsuit.

• Those who will be conducting investigations internally should receive training on psychology and proper approach to investigations and, as well, on the District’s protocol for handling sensitive issues.
Why Investigate?

“The world is full of obvious things which nobody by any chance ever observes.”

- Sherlock Holmes
Triggers to Investigation

- Employee Complaints, whether formal or informal, of harassment, discrimination, or retaliation
  - Be aware of direct reports from co-workers, as well as information gleaned “from the rumor mill”
- Violations of Workplace Rules
- Allegations of misconduct
  - Theft or suspected theft (embezzlement)
  - Drug use or activity
- Supervisor direct witness to conduct
- Student allegations/disclosures
- Workplace accidents
- Demand letters
- Lawsuits or administrative claims
Intake of Complaints

• Incident Focused
  – The key to a thorough and effective intake is to ensure that the intake is incident, rather than individual, focused.
  
  – This allows the individual receiving the complaint to take an objective approach and not prejudge the complaint based on the personalities involved.
  
  – All complaints should be taken seriously, even if the employee making the complaint has a history of making complaints or is regarded as a disgruntled employee. You do not want to be in the position of having to justify why a complaint was dismissed or ignored.
Intake of Complaints, con’t.

• Just The Facts
  – Obtain the facts surrounding the complaint:
  – What happened (the details of the incident)?
  – Who was involved?
  – Where did it occur (was the employee on or off duty)?
  – Was this the first time that the conduct occurred?
  – Were there any witnesses and who are they?
  – Did you report the incident to anyone else and, if so, when?
  – Do you have any e-mails or records relating to or verifying the incident?
To investigate, or not investigate?

“It is a capital mistake to theorize before you have all the evidence. It biases the judgment.”

- Sherlock Holmes
Determining Whether to Investigate...or not?

- Independently determine whether the conduct is prohibited by law or district policy
  - Ask complainant whether the complaint involves some form of illegal discrimination, harassment or conduct
  - Important to have a reasonable basis to believe an employee or student engaged in misconduct
  - Seek out legal assistance if there is any doubt as to whether the conduct described falls within a category of impermissible conduct – this not only provides you with insight, but also cover in the event your own motives are ever questioned
Determining Whether to Investigate...or not?

• Preserve Evidence
  
  – If the complaint or misconduct is based on e-mails, social media, documents or other physical evidence, immediately take steps to ensure that the evidence is adequately preserved.

  – Secure emails, telephone records, cell phones, text messages, internet usage, videotapes – PRIORITY ATTENTION!
Determining Whether to Investigate...or not?

- Evaluate the complaint based on policy and conduct, not on characterizations
  - Employees often use the label of discrimination or harassment to describe a range of perceived wrongdoings
- What may be no more than a personality conflict may be incorrectly labeled as some form of illegal discrimination or conduct by the employee.
Determining Whether to Investigate...or not?

- Investigate without regard to the victim’s wishes
  - The decision to investigate should be based on the facts and whether the conduct is prohibited, not on whether the complainant wants the employer to do anything about it.
  - An employer does not have the luxury of listening to concerns and not acting.
  - NEVER make promises to the complaining party. The only promise you can ever make is that you will listen to what is said and then determine best course of action.
Determining Whether to Investigate...or not?

• Do not delay the decision to investigate
  
  – Commencing an investigation too long after misconduct is reported or discovered suggests the problem is not important, the complaint is not credible or compelling or that the employer may be attempting to “fix” the results of the investigation before it begins.

  – Delay may also subject the victim to further harassment or other illegal conduct.

  – Where issue is misconduct, allows misconduct to continue unfettered
Determining Whether to Investigate…or not?

• If the conduct is wrongful or illegal, take necessary steps to protect the employee or others who may be impacted
  – If there is any risk of ongoing harm to the complainant or other employees, take the necessary steps, such as an administrative suspension, to remove the accused from the workplace until the investigation can be started and completed.
  – The price you will pay for a period of administrative leave is minimal in comparison to the price associated with litigation…
Who Should Investigate?

• Objective, impartial and removed from the dispute.
  – Too often, the parties know each other as colleagues, managers and co-workers and have impressions and personal biases of each other making an objective investigation almost impossible.
• Outside investigator
  – Depends on the level of the employees involved, the complexity of the issues and the skills of the personnel available on staff to conduct the investigation.
  – There may be a desire to bring in an outside investigator in order to ensure the integrity of the investigation process.
Who Should Investigate?

• Ability to judge credibility/common sense critical
• Understands the importance of investigation
• Ability to think on their feet and ask follow-up questions and go with the flow, anticipate defenses
• Ability to be impartial, objective, and non-judgmental
• Ability to determine, understand and stick to the scope of the investigation
• Time to conduct investigation on a relatively prompt timetable
• Effective note taker, organized, analytical thinker
• Knowledge of child development, if student involvement
• Knowledgeable in employment law and the employer’s policies and procedures.
  – Helps focus the investigation on the matters relevant to the complaint and avoid unnecessary interviews.
Objective in Determining Who Should Investigate

- Objective of investigation is to obtain sufficient information upon which to make decisions (or take action), collect reliable evidence and information, document process, and recommend action

- **Investigator does the detective work, but the decision to act is someone else’s – it’s the district’s**
  - Important to rely upon outside legal counsel because it helps to eliminate bias, unfairness, and discrimination claims from being attributed to the a district.
  - Decreases likelihood the employee can rely upon the cat’s paw theory – that is that the investigator’s animus as a non-decision maker influenced the district’s decision
Importance of Investigating Promptly and Fairly

- May be legally required
- Will help establish that district acted reasonably and objectively
- May yield admissions from wrong-doer
- Should establish extent of conduct being complained of by employee to limit later “expansion”
- Will enable District to take appropriate corrective action
- Should help limit claims and potential liability
Defining the Scope of the Investigation

- The nature of the incident/allegation
- Whether the behavior violates a state or federal statute or regulation
- Whether the district is legally obligated to resolve the issue
- What additional information is needed to resolve the issue
- What additional resources are needed to resolve the issue
- Who may have relevant information

Important Note on Scope: Do not artificially limit the scope of an investigation. You never know what you will learn until you start learning. Allow witnesses and documents to lead you as problems or issues are uncovered.
Focus the Investigation

- The investigation should be focused on determining whether there has been a violation of policy or law or whether misconduct has occurred.

- The investigator’s role is to determine whether the behavior or actions occurred, the context of the behavior or actions and other information which would clarify the incident.

- Do not make any assumptions about the truth of the allegations.
Create a Strategic Plan

• Create a plan, including a list of the witnesses to be interviewed, the information you believe that the witnesses will be able to provide and a list of the critical questions that will be asked of each witness.

• Plan the order in which the witnesses will be interviewed and how witnesses will be notified of their interviews
  – Interviews should be ordered so as to ensure that critical witnesses feel free to speak and are not intimidated by the prospect that their supervisor or manager may attempt to influence their testimony
  – Bring the greatest information forth in the most efficient and effective manner
Planning the Investigation

• Identify and review applicable policies, rules and documents; become familiar with the issue(s) to be investigated

• Determine which witnesses should be interviewed and in what order
  – All witnesses identified by the complainant should be interviewed
  – Follow up as needed and as new witnesses are identified in course of the investigation

• Prepare an investigation checklist
  – List of individuals to be interviewed
  – Items/points to be addressed with each witness

• Request and review personnel files of complainant, alleged wrong-doer(s), and possibly key witnesses, as necessary
Investigation Process

• Interview relevant individuals, including (if applicable), the complainant, the alleged wrong-doer, other witnesses
• Document your investigation
• Reach conclusion and prepare investigation report
• Take appropriate corrective action
• Communicate results to complainant and wrongdoer
• Follow up afterwards, as necessary
Interviews

“There is nothing like first hand evidence.”

- Sherlock Holmes
Interview Process

• Determine order of interviews, i.e., complainant, witnesses, individuals identified during interviews, alleged wrong-doer, additional identified witnesses, etc.
  – Allow for flexibility; order need not be set in stone
  – Consider need for follow-up interviews
• Prepare an outline of all questions to be asked and topics to be covered (must be flexible)
• Prepare specific questions - should be open-ended, unbiased questions. Avoid yes/no questions.
  – Review questions with legal counsel
• Give minimal notice of interview to witnesses
• Decide ahead of time how to handle union representation (if applicable)
Interview Process, con’t.

• Put witness at ease – particularly students
  – Inform subject of complaint that investigation could lead to discipline – prior to asking any questions so that complainant can request union representation, if applicable

• Explain how witness’s statement may be used
  – Need to know basis
  – Cannot mandate confidentiality

• Take verbatim notes, or record interview
• Update notes post-interview
Ensure Witness Cooperation and Confidentiality

• Create an atmosphere where employees understand it is in their interest to cooperate and to tell the truth.

• All employees should be told that the investigation is an official investigation, and failure to provide honest and truthful statements or to provide misleading information can lead to discipline.

• Witnesses should be told that the investigation is confidential and they are expected to keep the investigation confidential, and that a breach of confidentiality can lead to discipline.
Ensure Witness Cooperation and Confidentiality, con’t.

• Witnesses should further be instructed to not talk to each other or compare answers to the investigator’s questions

• No guarantees of confidentiality should be provided to the complainant or the accused. The investigator likely will be forced to disclose certain information about the concerns at issue in order to conduct the investigation and the complaining employee and accused should be advised of this fact

• Witnesses should be asked open-ended questions about the incident and any facts leading up to the incident.
Demand Integrity and Secrecy

• No one should have access to the information from the investigation or the status of the investigation unless they have a need to know and providing them with the information advances the investigation.

• Investigators need to resist providing to administrations who feel they are entitled, the details of the investigation.
Interview Process – Witness Interviews

- Interview separately not in a group
- Emphasize need for completeness, accuracy, and truth
- Be mindful of additional conditions and events that need to be documented (witnesses spoke to each other before, threats made if statement given)
- Cover any other similar incidents or the lack thereof
- Be mindful of word choice.
- Ask who, what, when, where, why, and how questions
- Ask for specific detail – probe deeper, as necessary
  - Do not tie yourself to your pre-prepared outline
The Interview Itself

• Identify the context of incident
  – What was going on before

• Take steps to assure that the witness understands the question you are asking
  – Ask witness (particularly students) to restate the question you asked
  – Always remember that what you say may not be what witness hears

• Make sure the answer you are getting is to the question you asked
  – Are you saying...
  – Do you mean...
  – Push until you receive an answer, if necessary
Interview, con’t.

• Ask questions about inconsistencies and gaps in information
  – Prompt with sequence questions – starting with what you know
    • i.e., when did you next have interactions with the individual?
• Ask questions about discrepancies with previous statements
  – Always review and compare to written statements
• Is there a way to corroborate statement
  – Journal
  – Handwritten notes
• Ask who they have told – what have they have heard
Interview, con’t.

• Give multiple opportunities to correct discrepancies and supplement information
• Do not give impression that you have pre-judged allegations
• Do not fill in the gaps for witness
  – Rather, ask sequence questions to probe witness
• Do not finish sentences for witness
  – Silence really is golden
• There is no need to share all information obtained through the investigation with the witness
• Share only those details that are needed to effectively interview the witness
Interview Process – Subject of Complaint/Subject of Misconduct

• Ask about relationship and prior contact with complainant
• Ask if subject of complaint can think of any reason why complaint would have been made
• Try to establish agreement
  – i.e., Is it possible..., Would you agree that...
• Ask for other common witnesses who may have knowledge
• Always close interview by asking if there is any other information individual wants to share
• Direct individual not to discuss the matter with others
An Uncooperative Complainant

• Encourage participation by explaining the investigation process, answering any questions the witness has, and reiterating the prohibition against retaliation (if applicable)
• An employee can be compelled to cooperate in an investigation and it is appropriate to discipline employees who refuse to cooperate
• Follow through on directive to answer questions and cooperate
Written Statements

- Should not serve as a substitute to oral interviews
- If requiring a written statement – tell witness up front
- Have witness write statement – with direction/not coaching
- If you have a written statement clarify origin and purpose
- Determine if statement is a recorded recollection of highlights or a detailed account
- Make sure all statements are signed, dated and legible
Confidentiality of the Interview Process

- When interviewing, always ask the witnesses to treat the information discussed during the interview confidential.

- Explain that the information provided during the interview will be shared on a need to know basis and not necessarily held in strict confidence.

- State any policy prohibiting retaliation.
“It has long been an axiom of mine that the little things are infinitely the most important.”

- Sherlock Holmes
Documenting the Interview

• Record all interviews using a tape recorder or other device and/or take detailed notes
• Prepare interview summaries
  – Record only the facts without speculation, spin, option, or subjective comments interjected into the notes.
  – If creating a first person statement, use the exact words used by the witness.
  – If providing quotes, assure that the information in quotes is in the witness’s exact words.
  – Utilize prepared summaries to assess credibility of witnesses, recording thoughts, impressions, and objective observations and beliefs based on the interview
• Date all documents and notes and maintain written records of the interviews conducted
Documentation

• Create a separate file for the investigation
• The file should include all documents and other information gathered during the investigation
  – The allegation/complaint
  – Notes
  – Evidence of all contacts or attempts to contact witnesses
  – Documents and physical evidence
  – Pertinent policies, rules, laws, contracts
  – Final report
  – Disciplinary documents, if any
Investigation Next Steps

• Review all information gathered and determine whether to conduct follow-up interviews
• Ensure documentation is complete
  – Obtain any pertinent documents from all sources
• Ensure you have a clear understanding of the facts
  – If you do not, follow-up interviews and document gathering are a must
• Consult legal counsel, as necessary regarding legal obligations and requirements
Concluding the Investigation

“Eliminate all other factors, and the one which remains must be the truth.”

- Sherlock Holmes
Concluding the Investigation

• Review all of the evidence, including witness interviews
• Consider and weigh all the evidence
• If evidence conflicts, assess credibility
• Conclusions should be drawn based on facts and information from the investigative report, with appropriate advice and guidance of counsel
Concluding the Investigation, con’t.

• If tasked with making recommendations:
  – Ensure you have discovered substantial evidence or proof for taking action
    • Always consider polices and practices
  – Remediation
    • Determine what, if any, corrective action or remedial measures are necessary
  – Discipline
    • ie: Disciplinary letters, documents for files, letters to parents in the case of students, etc.
    • Clearly identify the disciplinary document
    • Warn of future consequences
    • State document will be put in personnel file
Interim Measures

• Assess and implement, if necessary, short-term resolution
  – Paid leave, paid/unpaid suspension, temporary transfer of position, etc.
• CAUTION!!
  – Taking interim measures towards complainant may be perceived as retaliation. However, immediate action may be required to prevent further liability.
  – Consulting with legal counsel on interim measures before determining the most appropriate interim measures
The Investigative Report

“Having gathered these facts, Watson, I smoked several pipes over them, trying to separate those which were crucial from others which were merely incidental.”

- Sherlock Holmes
The Investigative Report

• Report should include:
  – Summary of all facts, allegations, and testimony
  – How the investigation was carried out
  – Witnesses interviewed, dates of interviews, and assessment of credibility of each individual interviewed
    • Include basis for credibility assessment
    • Describe objective/observable criteria
  – Documentary evidence reviewed
  – Applicable guidelines, policies, laws, and regulations which apply
  – Key findings and the rationale for those findings
  – Conclusions regarding each allegation
    • Substantiated, misconduct occurred, did not occur, inconclusive
  – Recommendations for discipline and follow-up
Special Considerations

“I never make exceptions. An exception disproves the rule.”

- Sherlock Holmes
Requiring Employee Participation

• An employee may be required to participate in an investigatory interview
  – Insubordination for an employee to decline to participate
• An employer may discharge an employee who refuses to participate
  – An employer is justified in terminating an uncooperative employee – regardless of the employee’s rationale for failing to cooperate.

• Policy Pointer
  – The “cooperate or face discharge” choice is even easier to justify where the employer has a policy clearly providing that employees are expected to participate in investigations and that the refusal to do so will jeopardize employees' continued employment.
“I want a Lawyer (or union rep)!”

• Does an employee have a “right” to representation during an interview?
  – Depends on who is being interviewed and for what purpose.
• Weingarten rights
  – Representation during **investigatory interview** where there is a reasonable likelihood of discipline
  – Right to attend ≠ Right to speak
• Garrity Rights
  – Representation where criminal charges are possible
• Legal Counsel
  – No right to counsel for employer interviews
  – Should not be allowed
• But may an employee ever have a friend or co-worker present during an interview?
Special Considerations for Student Investigations

• Right to Lawyer
  – Generally, the same legal rights apply to students as to employees – a student does not have an unfettered right to have legal counsel present

• Parent presence
  – Because a district stands in loco parentis (that is, in the place of a parent), there is no legal right for a student to be questioned in the presence of his/her parent
  – Wisconsin Attorney General – no legal authority that a district must notify a parent(s) prior to interviewing a minor. OAG 9-90 (March 8, 1990).
Student Investigations, con’t.

• School Liaison Law Enforcement Officers
  – *Miranda* warning
  – Districts have the authority to regulate the time in which
    law enforcement officers will be permitted to interview
    students on school property during the school day in
    order to minimize disruption in the school
  – Districts have legal custody of students during the school
    day and during hours of approved extra-curricular
    activities. It is the responsibility of administration to
    make an effort to protect each student’s rights with
    respect to interrogations by law enforcement officials
Wisconsin’s Social Media Protection Act

• Must have “reasonable cause” to review private social media content when investigating allegations of employee workplace misconduct

• Once reasonable cause is established to review an employee’s personal internet account, the permitted parameters of the employer’s investigation are still limited
  – May only request employee to login to the employee’s account for the employer to review or for the employer to observe while the employee navigates the account
  – May not ask for login and password information to the account

• Must document basis for search

• Limit search to only information related to alleged misconduct
The Public Records Concern

- Current Investigation Records
  - Employee personnel record may not be disclosed if the record contains “information relating to the **current** investigation **prior to disposition** of the investigation
  - An authority’s investigation achieves its “disposition” when the authority acts to impose discipline on an employee as a result of the investigation, regardless of whether an employee files a grievance
- Notice to Record Subject
  - Record is the result of an investigation into a disciplinary matter involving the employee or a possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy
Common Mistakes

• Failing to remain unbiased and objective
• Promising confidentiality
• Failure to properly document
• Failure to thoroughly analyze
• The lazy investigator
• Failure to conclude the investigation
• Failure to interview all relevant witnesses
The School District of Omro Investigates

"It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts."

- Sherlock Holmes
Omro Twice Investigates

Employee Misconduct

• Concern over excessive internet usage
  – Thought the District could easily terminate based on internet usage
• BUT...
  – IT reports were not as credible as initially believed
  – Totality of other evidence was substantial

Student Disciplinary Investigation

• Drug deals by students on mobile devices through text messages and Facebook
• Included threats against the high school principal
Utilizing Legal Counsel

- It is good practice to be in contact with legal counsel throughout the investigation.

- An attorney can assist you in identifying legal issues, planning the investigation, concluding the investigation and determining the level of discipline, if any, that should be imposed.

- Legal Coverage – protect the District from legal liability

- **Political Coverage – Legal counsel has a duty to represent the entire District – not just the individual making a decision at the end of an investigation**
“Let me run over the principal steps. We approached the case, you remember, with an absolutely blank mind, which is always an advantage. We had formed no theories. We were simply there to observe and to draw inferences from our observations.”

- Sherlock Holmes
Andy Phillips, atp@phillipsborowski.com
Chrissy Hamiel, cvh@phillipsborowski.com
Phillips Borowski, sc
www.phillipsborowski.com, (262) 241-7788

Nick Curran, ncurr@omro.k12.wi.us
School District of Omro