Conducting Administrative Investigations

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OVERVIEW AND WORKSHOP

OBJECTIVES

• The basics on conducting an administrative investigation for misconduct cases. Criminal cases are handled by OIG and OGC or other investigatory organizations.

• Goal—to gather facts and evidence through unsworn statements or affidavits

• How to notify employees of requirements

• Tips on conducting interviews

• Credibility is key to the Report of Findings.

• How to close out the investigation with all parties
Quick Action is Required

• Harassment and workplace violence complaints need to be conducted quickly.

• Coordination is important: Pulling together an investigative team, management cooperation, scheduling a room, planning the investigation in order of witnesses, and developing questions, taking affidavits, and making conclusions takes focused effort.

• Evidence requirements: Good agency actions on misconduct may depend on evidence obtained through interviews and Affidavits
AUTHORITIES TO CONDUCT INVESTIGATIONS TO LABOR AND EMPLOYEE RELATIONS

• HHS OHR Anti-Harassment Policy and Procedures 4/17/17 delegated to management to consult with the Labor and Employee Relations staff

• HHS Instruction 752: Discipline and Adverse Actions delegates to the supervisor with assistance from the Human Resources Offices or Centers. Management is obligated to investigate facts to prevent workplace harassment and misconduct.

• 28 U.S. Code 1746- Unsworn declarations under penalty of perjury have the same force as sworn declarations in administrative actions, if the statement is used: “I declare under…..” in the Statute.
HHS Office of Inspector General and Office of General Counsel assistance

- Conducts criminal, civil and administrative investigations of fraud and misconduct related to HHS programs, operations and beneficiaries.
- Can obtain information from law enforcement quickly.
- Agent Anissa Andrews 202-260-0696
- Agency Derrick Franklin 404-823-2172

- OGC provides advice on any Kalkines warnings—if an employee will not agree to be interviewed without a Kalkines warning.
- OGC must advise if management would agree to criminal immunity in an internal investigation.
Interim Protection of Witnesses, Complainant, and Accused

To guard against continued harassment or to prevent retaliation, options include use of temporary:

• Investigative Leave
• Physical separation of employees
• Telework
• No retaliation
• Employee Assistance Program
Select the Investigation Team

• Recommend a team approach
• Diverse skills
• Good interpersonal skills, unbiased, no stake in the outcome, attention to detail, temperament (serious yet flexible)
• Rotate servicing LER Specialists to conduct the investigation if needed
Legal Rights and Notices-- Appendix A

• Charging Document- IMPORTANT authority to interview and require statements
• Administrative Warning—confidentiality and obligations during interviews
• Notices to Witness and Weingarten rights advisory

**Note: employees can be disciplined for failing to cooperate in an investigation or for lying**
Developing Questions—Appendix B

• Find out basic employment information.
• Questions should start out open-ended and general.
• Later ask more specific questions with “yes” or “no” responses;
• Work to put people at ease;
• Be prepared to adjust and add questions during the interview or for additional witnesses.
Tips for Effective Fact-Finding

• Focus on being impartial and objective and open to new facts;
• Never offer an opinion or make a statement that would hurt the impartiality;
• Look for inconsistencies;
• Look for more witnesses;
• Observe for credibility (inherent plausibility, demeanor, motive, motive to falsify, corroboration of facts).
• During the investigation, do not jump to conclusions until all the facts are gathered.
Conducting Interviews

• Best practice: Two persons in the interview—teams are best.
• Have one person typing notes of interview, and one asking questions and writing notes. No tape recording.
• Note credibility factors during or immediately after the interview.
• Do not let employee have a copy of the questions or the affidavit.
Obtaining Affidavits—Appendix C

• Have the witness wait in a room, or come back that day, while typed notes are put into affidavit format.

• Have employee review affidavit/declaration. Minor changes (not facts) are allowed in tracked changes. Witnesses are not be allowed to change testimony in a material way. If witness insists, keep both versions to include in a credibility analysis or for a lack of candor charge against the employee.

• Employee should initial the bottom of each page of their affidavit.

• Do not release statements to employees until after the investigation is over.
Credibility: **Hillen factors** (Hillen vs. Dept of Army and OSC, 2016)

1) Witness opportunity and capacity to observe the event or act. The personal knowledge of place/time/proximity.
2) Character—prior misconduct or history of veracity
3) Prior inconsistent statement-causes doubt to the truthfulness
4) Bias- certain relationships and circumstances can impair the impartiality of the witness/human reaction
5) Contradiction by or consistency with other evidence
6) Inherent improbability
7) Demeanor-observation of carriage, behavior, manner and appearance
Report of Findings should include --Appendix D

• Allegations and Witness summaries
• Investigation process
• Factual Analysis and Credibility Analysis
• Agency policies and other Evidence gathered
• Conclusions
• Unresolved issues and the reasons
• Employer actions taken to date
• *Optional*: Recommendations for LER Actions
Closing Out Investigation—Appendix E

• Notify the complaining employee(s), witnesses, and the accused of the outcome (findings or no findings)

• Do this even if the complainant is not happy with the outcome. Ask for confidentiality;

• Do not disclose the type of discipline action taken, if any; state that the “matter has been addressed.”

• Ensure no retaliation occurs.

• Investigator should follow up with the complainant to see if there are any other issues.
Alternative Short Investigations

1) Collect signed, dated statements from witnesses. Ask for specific details and dates. Include the “penalty of perjury language”

2) Email questions, with notice of confidentiality, and ask for a quick return. Allow time to obtain a union representative.

3) Phone interviews followed by an email. Send the witness notes of the interview for confirmation, and ask for revisions in tracked changes.
Key Takeaways

• HR can create good evidence for an Agency action and is critical to a strong discipline case.
• Affidavits provide a judge stronger weight in evidence, when weighing facts and credibility.
• Administrative investigations gather preponderant evidence and can be obtained by skilled HR investigators.
• Train or rotate investigators so that neutral teams can be formed.
• Notify your EEO office when handling any investigations concerning sexual harassment.
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