

Investigations 101

NH Municipal Association

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Agenda



- When to Investigate
- Planning Your Investigation
- Interview Basics
- Accessing Credibility
- Writing Your Report

Regardless of the remote work environment, harassment and discrimination are alive and well.



[Image](#)

When is there a Duty to Investigate?

Formal Investigation of Complaints

- The duty to investigate *may* arise:
- for formal complaints;
- for informal complaints;
- when a supervisor/manager observes or hears about inappropriate comments/conduct; or
- when there's general knowledge of harassing behavior or a "culture problem" in the municipality

Scenario

- An anonymous group of individuals started an online petition calling for an investigation into the Town's workplace culture. The individuals, who claim to be former employees, state that "gender bias incidents" occur frequently, but the petition does not contain any specifics. The petition is making its way across social media, and someone tags the Town's Facebook page in a post, putting the Town on notice.
- Do you have a duty to investigate?
- If so, what's the scope of your investigation?
- Same scenario, but now, current employees are commenting on the post with their own "bias-based" experiences.
 - Do you have a duty to investigate now?
 - If so, what's the scope of your investigation?

Planning Your Investigation

Scenario

Marcia works as a receptionist at the Water District. Marcia's direct supervisor, Bailey, frequently comments on her appearance, openly discusses her own sex life, or asks other co-workers about their sex lives. At one point, Marcia tells Bailey that she doesn't want to discuss this part of her life in a professional setting. After this, Marcia feels like Bailey goes out of her way to not speak with her. Marcia also notices that her assignments and shifts have been changed to less desirable ones. Marcia comes to you, the HR Director for guidance only, and asks you not to take any action.

Initial decisions to be made

- Preliminary inquiry/assessment
- Supportive or interim measures
 - Suspension w/ or w/o pay?
 - Temporary assignment to new manager?
- Determine the scope of investigation
- Assign an investigator
 - Internal investigator
 - External investigator (consultant, lawyer, etc.)

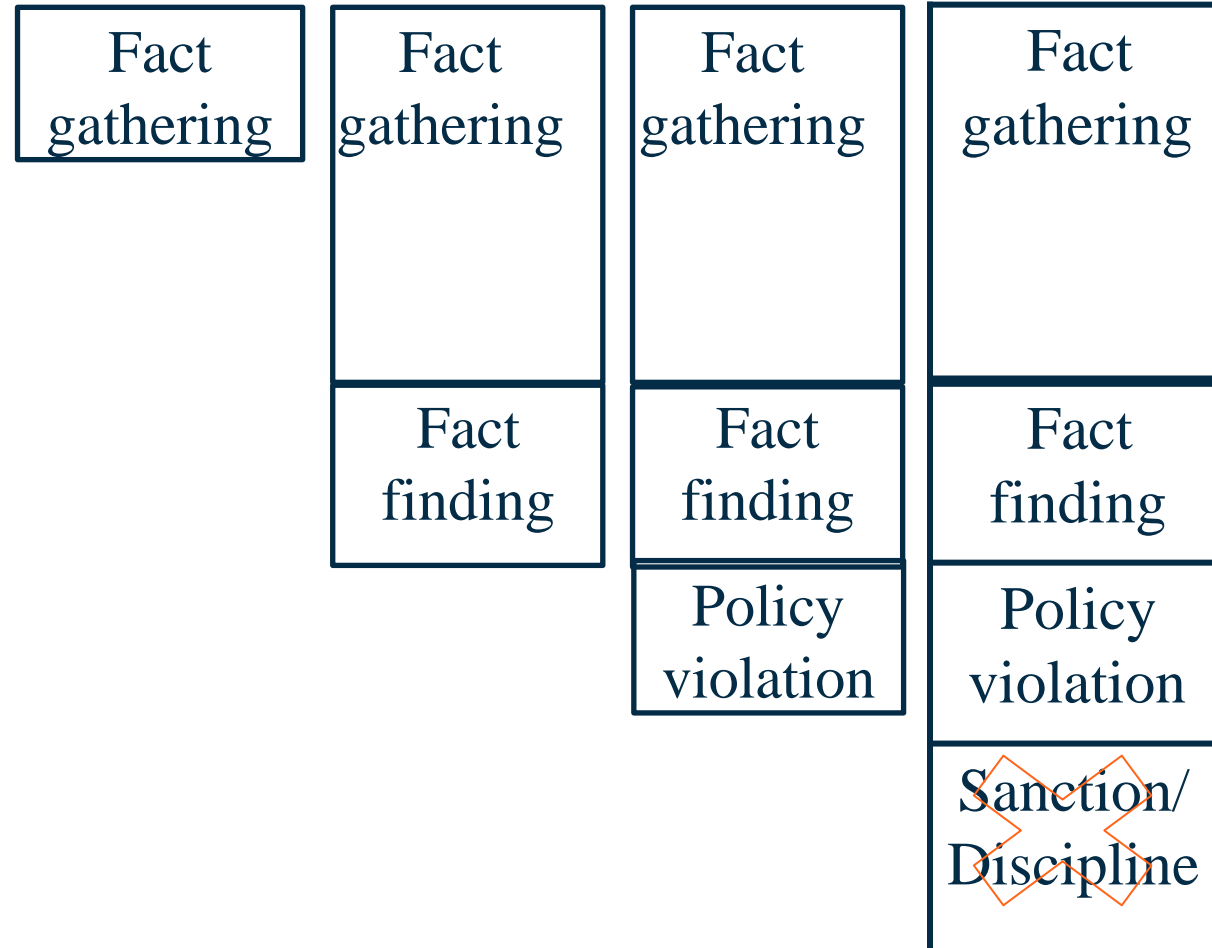
Assess the Likely Scope of the Investigation

- Identify issues arising from the complaint – there may be several.
- Analyze applicable policies and determine which apply.
- Understand the scope of investigation may change as investigation proceeds.
 - Does investigation reveal other wrongdoing?
 - Does investigation identify other potential complainants?
- Investigate cross-complaints simultaneously.

Assigning the Investigator

- Consider seriousness of allegations and training, experience and skillset of investigator
- Bias/conflicts of interest: actual or perceived
- Resources and availability
- Gender/race make-up
- One investigator? Two?
- External or internal

Be Clear on the Investigator's Role



Investigation Planning

- Identify roles
 - “Point person” for coordinating interviews.
 - Conducting interviews
 - Note taking
- Determine location of the party/ witness interviews and provide notice to parties
- Consider timing of the interviews and allow sufficient time in between.
- Who will be present during interviews?
 - Advisors? (Union reps, lawyers, etc.)

Investigation Preparation & Information Gathering

- Obtain relevant policies.
- Consider known facts and identify potential sources of information.
- Incident report/ disclosures, witnesses, electronic evidence (emails, texts, social media), phone records, documents, security video, card swipe records, physical site visit, forensic evidence (must be reviewed by trained forensic examiner).
- Publicly available evidence (e.g. social media)
- Develop a working timeline of events and prepare outline of questions for parties/witnesses



Interview Basics

Scenario

Marcia works as a receptionist at the Water District. Marcia's direct supervisor, Bailey, frequently comments on her appearance, openly discusses her own sex life, or asks other co-workers about their sex lives. At one point, Marcia tells Bailey that she doesn't want to discuss this part of her life in a professional setting. After this, Marcia feels like Bailey goes out of her way to not speak with her. Marcia also notices that her assignments and shifts have been changed to less desirable ones. Marcia comes to you, the HR Director for guidance only, and asks you not to take any action.

Basic Interviewing Techniques

- **Build a rapport—don't interrogate.**
- **Be sympathetic in neutral manner.**
- **Listen to understand and do not assume!!!**
- **Be comfortable with silence.**
- **Plan out questions, but let conversation evolve naturally.**
- **What are you able to tell me about your experience → Who, what, where, when, how?**
- **Avoid “leading” questions (*i.e.* questions that presume an answer).**
- **Establish a timeline.**
- **Make sure to ask the difficult questions!**
- **Get clarification.**
- **Ask: Anything else?**
- **Opportunity for follow-up.**
- **Avoid asking for opinions, speculation, or character evidence.**


Interview Opening Statement

- Thank the person for coming.
- Brief explanation of matter
- Mention note taking/recording.
- Explain process of the investigation.
- All information only disclosed on a “need to know” basis
- Expectations of confidentiality, candor, cooperation, no contact.
- Discuss prohibition of retaliation.
- Explain amnesty policy (if applicable)
- Explain guidelines regarding advisor’s participation (if applicable)
- Ask: Questions?

Interview Techniques

- Pay attention to emotional cues and responses.
- Look for any evidence of motive/bias/interest, even where not immediately apparent.
- Listen for “ring of truth” answers.
- Rely upon maps, photos, electronic evidence where available.
- Create running timeline.
- Be open minded, do not fill in gaps with assumptions, use language of witness, and LISTEN.
- Reflexive questioning
- Do not paraphrase or summarize

Capturing of Interviews

- Identify date, everyone in room, name of interviewer, start and finish times
 - Collect as much detail as possible
 - Legibility of notes
 - Recording of interviews
 - Confirming your notes, recording, transcript are accurate
 - Maintaining notes, recordings
 - Verbatim quotes and capture questions where asking for clarification
- 

Interview of Complainant

Obtain	Obtain confirmation of issues/allegations in the complaint
Details	Get details of complaint – who, what, where, when, how, why (but ask another way)
Documents	Get documents
Identify	Identify witnesses
Prepare	Be prepared to address requests for confidentiality/anonymity
Outcome	Make no promises as to outcome
Retaliation	Discuss retaliation and address any concerns of complainant

After Collecting the Complainant's Experience:

- Seek clarification of facts and information to help determine elements of the alleged violation or other additional evidence (who, what, where, when, how).
- Seek information about Respondent's behavior and communication.
- Exhaustive search for corroboration (even minor details)
- Explore motive, bias, interest.
- Explore circumstances of disclosure.
- Identify witnesses, electronic evidence, other sources of evidence.

Respondent Interview

- Acknowledge difficulty of conversation, importance of being accurate/truthful
- Allow Respondent to give statement in their own words, uninterrupted (patience)
- Seeks facts and information regarding possible elements of policy violation
- Seek exculpatory evidence, information and/or leads, other witnesses, etc.
- Who, what, where, when, how and why (but ask in a different way)
- Interview for clarification, don't interrogate – we want to get it right and give Respondent full and fair opportunity to present their side
- Ask Respondent to explain inconsistencies with known evidence & provide opportunity for Respondent to explain/refute evidence disclosed by Complainant (isolate disputed v. undisputed facts)
- Understand defenses – including motives

Witness Interviews

- Explain process, including confidentiality and retaliation
- Do not reveal more than witness needs to know
- Explore witness's relationship to the parties
- Get details and ascertain the source of the witness's knowledge
- Get documents/materials
- Learn about any motives/history between parties
- Explore if any coordination/tampering
- How has this affected complainant/respondent?
Demeanor, performance?

Addressing Witness Concerns

- What does your policy say about participation?
- How do you seek voluntary participation and cooperation?
- What do you do with witness “retractions”?
- How do you address retaliation concerns?
- How do you handle witness’s request for anonymity?

Conclusion of Interviews with Parties

- Opportunity/need for follow-up
- Safety planning/interim actions/supportive measures
- Next steps, manage expectations
- Exchange contact information, details.
- Explain parameters of no contact and retaliation.
- Questions?

Assessing Credibility

How is Credibility Assessed?

- Credibility assessments are necessary to resolve material issues in dispute between parties' accounts.
- Credibility is different than "honesty."
- Evaluation of source, content, and plausibility of evidence presented.
- Specificity v. vagueness in accounts.
- Corroboration through witness testimony and evidence
- Evaluate motive and bias and apply common sense.
- Inconsistencies



Corroboration

= Sufficient independent evidence to support the facts at issue

Corroboration \neq second witness who agrees with the first.

Corroboration = evidentiary support for what a witness contends after evaluating source, content, and plausibility.

- Corroboration through:
 - Witnesses, electronic evidence, physical/medical evidence, etc.
 - Timeline
- Be aware of subtle bias of which witnesses may not even be aware (victim blaming attitudes, group defensiveness, fear of getting in trouble).

Inculpatory / Exculpatory Evidence

- Communications between parties (pre and post incident)
- Behavior of the parties (pre and post incident)
- Statements against interest/ admissions
- Disclosures about the incident

Consider any explanations and fairly weigh.

Motive / Bias

- Understand parties and witnesses' relationship(s) to one another.
- Understand Complainant's decision to disclose/report when they did.
- Be curious and explore theories of potential motive (those offered by the parties and those revealed by the evidence).
- Understand the difference between a false report v. good faith report that is not supported by evidence.
 - What does your policy say re: false reports?

Demeanor

- Trauma, shame, blame, fear, etc.
- **Cultural/background differences**
- Disability
- High Emotions
- Demeanor should not be the sole factor that “tips the scales.”

Biases - Keep An Open Mind

- Constantly check your implicit biases throughout the investigation
- If you cannot be impartial, or it may appear that way to others, you should not be the one investigating
- Do not allow preconceived notions to influence your opinion about a particular case – each case must be considered on its own merits.
- Follow the facts to their logical conclusion



Top 10 Common Errors Made During Investigations

1. Making an automatic assumption about the veracity of a Complainant's account or Respondent's responsibility
2. Drawing conclusions from evidence/testimony without allowing party/witness chance to explain
3. Allowing confirmation bias to influence the direction of your investigation
4. Allowing the pressure that a party or an involved person putting on you sway your decision or timeline
5. Not asking detailed/specific questions in addition to open ended questions
6. Not conducting thorough follow up/ "reconciliation" interviews
7. Going outside of your ascribed role (e.g. making recommendations)
8. Making credibility determinations based on assumptions or stereotypes
9. Failing to interview potential witnesses / follow up about available information
10. Believing you can't make a finding in word v. word accounts

Writing Your Report

Before You Begin Writing the Report

- Understand who will see report.
- Know your policies and procedures and write a report that is consistent with them.
- Decide whether to consolidate multiple complaints arising from the same incident in a single investigative report
- Confirm that both parties had an opportunity to test/explain all information relied upon in report?
- Document efforts to obtain information/interview witnesses that were unsuccessful.
- Document delays.
- Spoon-feed factual information.
- Think about how you can make the report understandable to someone who is entirely familiar with process/parties (explain acronyms and/or uncommon terms).
- Your report must stand on its own in the event of an internal/external review.

Report Contents

- Summary of allegations
- Procedural history
- Applicable policies and procedures
- List of persons interviewed and evidence received
- Evidentiary standard
- Summary of relevant evidence through findings of fact (chronological)
- Credibility Assessments, Rationale and Conclusion
- Attachments

Evidentiary Standard

- Preponderance of the Evidence: 51% or 50 plus a feather.
- Presume an employee is not responsible for misconduct unless proven responsible by a preponderance of the evidence.
- Preponderance of the evidence weighs the balance of probabilities. The standard is met if it is more likely than not that the alleged misconduct occurred.



Factual Findings

- Chronological
- Include timeline of parties' relationship/interactions up through disclosure of incident
- Relevant and material facts only
- Include both exculpatory and inculpatory evidence
- Use verbatim quotes
- Include source
- Use headings and bullet points
- Identify undisputed/disputed facts

Findings and Credibility Assessments

- Articulate the policy elements at issue and analyze the key inculpatory/exculpatory evidence that relates to each policy element
- Outline the credibility determinations made and the basis on which they were made
 - *Evaluate credibility of evidence not general credibility of people*
- Explain how relevant evidence was weighed and assessed in determining what most likely happened

Rationale and Conclusion

- Clearly articulates the policy elements at issue
- Clearly articulates how a determination of responsibility/ no responsibility was reached
- Clearly identifies the evidence in support of the determination
- Clearly outlines the credibility determinations made and the basis on which they were made
 - Credibility of evidence (not persons)
- Fairly weighs the evidence, assesses credibility and explains the investigator's rationale in a neutral and professional manner.

The Final Product

- **Your report should be:**
- Easy to read (e.g., use the active voice, good grammar, etc.)
- No typos
- Use consistent terminology
- Look professional (e.g., professional font, formatting, etc.)
- Consistent with other reports issued by your office
- **Able to stand on its own**



Top Ten Workplace Investigation Fails

#10: Not investigating complaints because. . . .

- It's not urgent;
- It's not reported to the right person;
- It's not in writing; or
- Complaint does not use the right words.

Duty to Investigate (once reported to HR/Supervisor/Management).

- Policy violations
- Health and safety issues
- Human rights violations
- Other violations of law

Don't make Complainant jump through hoops

Look for buzzwords

- Harassment
- Retaliation
- Discrimination
- Bullying
- Hostile work environment

But don't get hung up on precise terms.

#9. Not Clearly Defining the Scope of the Investigation

- Consider the allegations and the potential consequences
- Factual investigation only?
- Conclusion regarding policy violation?
- Recommended discipline?



[Image](#)

#8. Failure to Document Appropriately

Common Mistakes

- Not maintaining notes or records of interviews
- Not keeping copies of important documents
- Summarizing impressions, vague words (“he appeared nervous” vs. “his face was red and his hands shook”)

Report Should Include

- Details about the investigation procedures.
- What the investigator tells the witness/participant (i.e., nonretaliation)
- Detailed analysis
- Conclusion and findings (credibility, whether allegation is/not supported by evidence)

#7. Not Closing the Loop

- Follow through on the SCOPE of the investigation
- Follow up with the complainant/alleged victim and respondent/alleged perpetrator
- State conclusions clearly and precisely
- No matter what the finding, be compassionate
- Institute remedial measures, including discipline, training, policy changes



[Image](#)

#6. Not considering past discipline/past practice

- Each investigation and outcome is very fact dependent, BUT....
- Consider past discipline and past practice for similar conduct
- If you deviate from past practice, make sure you have an objective, non-discriminatory reason and document the reason



#5. Not Knowing your Internal Complaint or Disciplinary Policies or Procedures

- Make sure supervisors, management and HR know what to do!
 - Collective Bargaining Agreement?
 - Internal Complaint Procedure
 - Personnel Policy Requirements
- Due Process requirements?
- Fair, timely and thorough investigation, at a minimum
- Non-retaliation
- Confidentiality?



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#4. Choosing the Wrong Investigator

Internal v. External Considerations:

- Timeliness, degree of urgency
- Real or perceived objectivity, neutrality
- Potential conflict of interest
- Whether special expertise is required
- Nature of allegations and degree of sensitivity of the matter
- Potential for legal challenge/litigation



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#3. Tainted Evidence, Tainted Investigation

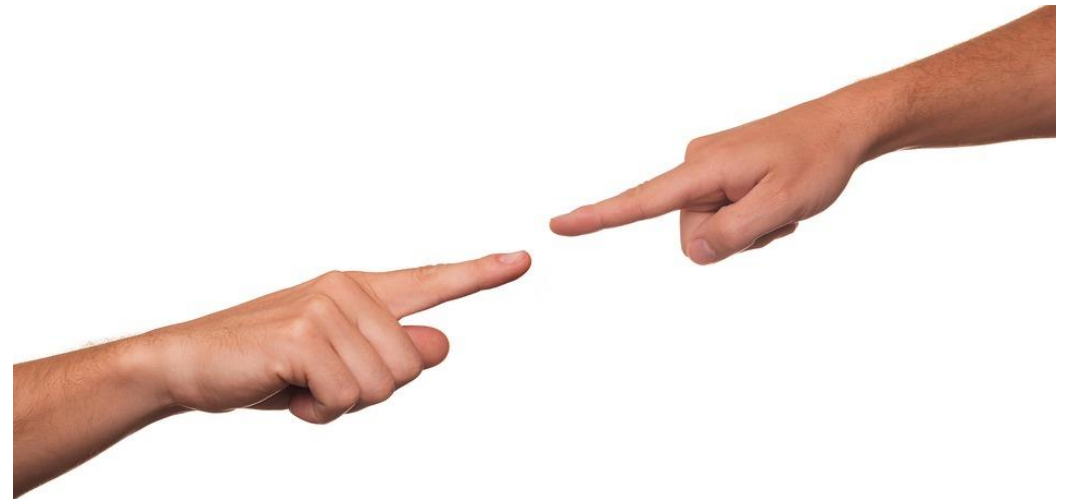
- Office computers, computer use policies, right to access certain information
- Be mindful of privacy rights and state law
- Ask for the evidence



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#2. The Ole “He-Said, She-Said” Cop Out

- Conflicting accounts does not equal “inconclusive”
- What does the evidence say beyond “he-said, she-said?”
- Factors to consider when assessing **credibility**:
 - Inherent plausibility
 - Timeline of events
 - Corroboration of evidence
 - Motive to lie
 - Specificity of testimony
 - Consistency with other statements or evidence
 - Lack of co-operation → adverse inference
 - “Objective” factors including performance and disciplinary history of parties
- Does the party/witness have:
 - Any self-interest or interest in the outcome of the investigation?
 - A relationship to any party?



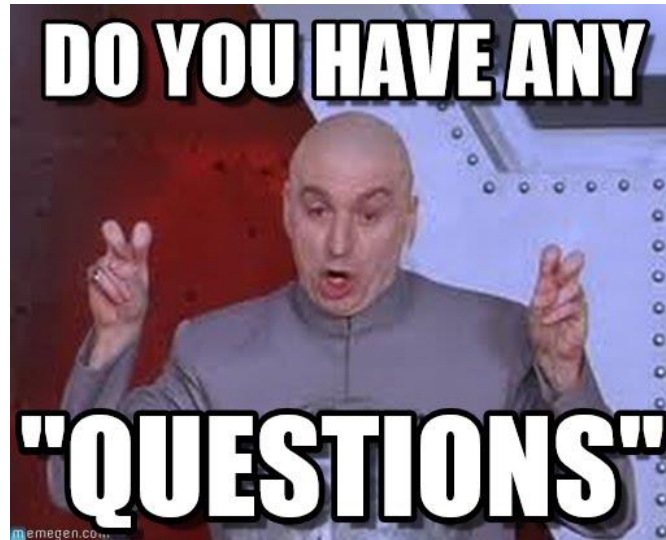
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#1. Not Asking the Question

- Ask **the question!**
- Interview **all** important witnesses, particularly those suggested by the parties to the complaint
- Generally interview the respondent/ alleged perpetrator **last**
- Clarify **vague** descriptions



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Thank you.

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