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CONDUCTING A FAIR INVESTIGATION

Why would an organization conduct an investigation? Most of us would respond: “To find out the truth.” But the “truth” is rarely self-evident. What an investigation can do is *fact finding*. Unfortunately, there is little guidance available on how to conduct a thorough, fair, non-criminal investigation. Let me suggest some guidelines that can serve as the basis for a discussion within the dispute resolution community of what we should expect from a competently conducted investigation.

With some frequency, organizations must conduct investigations of accidents and other incidents. These are really “fact-finding” missions. The organization might need to investigate the manner in which an employee incurred a work-related injury, or an allegation of sexual harassment, or an altercation between two employees. Regardless of the issue, the organization must learn the facts in order to resolve the matter in a fair manner. This article examines the elements of a fair investigation and proposes guidelines that could assist in its implementation.

WHAT IS AN INVESTIGATION?

An investigation is a systematic collection of facts for the purposes of describing what occurred and explaining why it occurred. The word *systematic* suggests more than a whimsical process. In other words, it should be thorough and fair. There is a right way to conduct a fair fact-finding investigation, just as there is a right way to take a blood pressure reading.

An investigator will collect the facts relating to the incident under investigation. But a *fact* is not synonymous with *truth*. To the investigator, a fact is nothing more than a piece of information. A witness might tell the investigator that he saw Fred hit the customer. That is a piece of information, whether it is true or false.

An investigator collects facts in order to describe and explain to the organization what occurred. Some facts will describe the event itself, such as a report in the company’s files stating that Fred, an employee, fell and broke his leg. There may also be physical evidence indicating that there was a fall, or a fight. Or there may be witnesses to the event.

It is also critical for the organization to learn the circumstances that caused the event to take place. What if water on the floor was the proximate cause of Fred's fall? Why was it there? Was there a leaky pipe? How long has it been leaking? Had anyone requested that it be repaired? If so, why wasn't it done? These are all questions that will help explain why Fred fell. In the most aggressive investigations, an organization will seek to identify the root cause of the incident.

Only after learning what occurred and why it occurred can the organization decide how to respond. If Fred fell because of a leaky pipe, it would not only fix the pipe, but it might find more effective ways to ensure that work orders related to safety are quickly resolved. If Fred fell because of a poorly lit stairwell, the organization would improve the physical environment by adding better lighting. If Fred fell because someone intentionally pushed him (a malicious act), the organization probably would take disciplinary action against the employee responsible for causing Fred's fall.

FORMS OF EVIDENCE

One of the first tasks involved in an investigation is identification of the relevant facts, or evidence. In this context, relevant does not mean important. It is only after the fact-gathering process is complete that the investigator will then decide what pieces of information are important. But at the beginning, relevant facts are simply pieces of information that have the potential to help describe and explain what occurred. For example, if there are five witnesses to an incident under investigation, the investigator should interview all five because any one of them could have important information in their possession.

There are four forms of evidence: testimonial evidence, documentary evidence, physical evidence and demonstrative evidence.

Testimonial evidence is what investigators collect when they interview witnesses. Witnesses tell the investigator about their observations and memories of the incident.

Documentary evidence is evidence that represents the various ways in which testimony can be preserved. Common examples are written statements and audio and video tapes. In our highly technological time, there is also "electronic" evidence, that is, evidence preserved in a computer or computer storage items.

Physical evidence refers to objects (i.e., things) related to the incident. Examples include a chair broken during a fight or an item of clothing torn during a fall at the workplace. Objects collected as evidence must be the real thing, not a copy. For example, it would never be acceptable to collect a bat "like" the bat that was used in the assault. Physical evidence also includes the spatial relationship

between and among things: i.e., if the incident under investigation was a fall in a dark stairwell, the distance between the light from the top step of the staircase.

Finally, demonstrative evidence is the way in which the investigator preserves the physical evidence. Common examples are a diagram of the office or warehouse, and a photograph of a bruise on an employee's arm.

THE NEED FOR FAIR INVESTIGATORY RULES

It is important for an investigator to understand how to collect each form of evidence in a fair and systematic way. However, where could one find a clear enunciation of how to do this? Unfortunately, for non-criminal investigators there is little published information about this subject.

For the most part, unionized employers rely on the *just cause* standard to determine when employee discipline is appropriate. This standard has existed in labor contracts for the better part of the last century. These contracts prohibit employers from imposing discipline or terminating employment without just cause. To ascertain whether just cause exists, the employer has an obligation to conduct a speedy, thorough and objective investigation of the allegations against the grievant. The vast majority of students of labor arbitration and grievance procedures use the book *How Arbitration Works* by Elkouri and Elkouri. However, there are fewer than a dozen entries in the 53-page index dealing with evidence-gathering techniques. For example, there are no entries that specifically deal with how to conduct an investigatory interview in a manner that is most likely to help a witness remember as much as possible about the incident.

The main guidance in the unionized setting concerning the adequacy of an investigation comes from arbitration decisions themselves. Arbitrators often find in specific cases that an investigation was not adequate. The employer might have failed to interview witnesses with relevant information, or asked a witness a leading question at a critical juncture in an interview, or failed to preserve testimony or physical evidence or both, or collected physical evidence in a manner that tainted it.

However important feedback from arbitration decisions can be, it is feedback of the last resort. It is similar to waiting for a plane to crash before discovering the wing was cracked. Since employers are held accountable for their employment decisions – for example, the decision to challenge an application for unemployment insurance benefits because the employee was fired for cause – they should have a sound basis for making those decisions. That requires a fair investigation, including fair investigative procedures.

There is little published material touching on the subject of investigations in the non-unionized setting. One recently published text in the human resources field

contains but two paragraphs analyzing the *Weingarten Rule* (which requires an employee who has a reasonable fear of discipline to be permitted union representation during a disciplinary interview), and two paragraphs emphasizing the importance of conducting an investigation before bringing a disciplinary charge against an employee. This doesn't even scratch the surface of what is needed. In light of this dearth of information, it is important to develop procedures for those conducting investigations. Interestingly, I worked as a grocery stock boy at the J.W. Weingarten grocery store in southwest Houston where the *Weingarten Rule* began.

INVESTIGATORY VALUES

We associate three critical values with the investigation process: speed, thoroughness and objectivity. Whatever rules might be developed to guide the investigative process should be related to these values.

Why *speed*? Relevant facts are *evidence* in an investigation. The longer evidence remains uncollected, the more likely it will be contaminated or lost. For example, a splash of water on the floor eventually will evaporate. A witness will forget certain facts, or may even fabricate a story. Therefore, an investigation should be commenced immediately after an incident occurs and continue without delay. There will be times when the vicissitudes of business and life will interfere with this endeavor. However, an investigator should not unreasonably delay the investigation. Evidence will change even in situations where delay is justified. The clock just keeps ticking and each tick represents decay. Thus, an investigator who does not respond in a timely fashion will collect less evidence.

Thoroughness is the second value associated with investigations because it is necessary to collect *all* of the relevant facts. Assume that there were five witnesses to an incident. What if the investigator only spoke to three of them and all told virtually the same story? How important is it for the investigator to interview the remaining two witnesses? The answer is *very important*. We know too much about the frail nature of eyewitness testimony to exclude even the possibility that even a majority of eyewitnesses could be wrong. Suppose they all were standing in the same place and did not have the opportunity to observe the incident from the perspective of the remaining two witnesses. Or perhaps the three witnesses had reason to make up consistent stories. The best fact finders will interview all five witnesses.

Objectivity is the ability of a good investigator to conduct a fact-finding mission with a substantial degree of detachment. Frankly, investigators should not care about the conclusions they might reach. An investigator who is biased or less than completely objective is likely to collect less than all the facts. For example, an investigator who sympathizes with an employee being investigated for sexual harassment might fail to ask tough questions, thus creating a less than complete

record. In essence, the biased investigator is prone to departing from the correct methodology because of emotional feelings about the case.

RULES FOR WORKPLACE INVESTIGATIONS

Here are nine important expectations that I suggest should govern an investigator's activities in investigating a serious incident. These expectations are based on a commitment to the values of speed, thoroughness and objectivity.

1. A person assigned to a case as an investigator should have no interest in the outcome of the case.

It is impossible to know for certain whether a person's interest in a matter is substantial enough to color his or her objectivity. Therefore, the person assigning a matter to an investigator should answer the following question about the potential investigator: "Can I make a reasonable inference from the alleged facts in the initial report that this particular investigator will prefer a particular outcome?" If the answer is "yes," that person should not be assigned as the investigator in that case.

2. The investigator should first interview the person who reported the incident.

Often the information an investigator receives is filtered through a number of sources. This increases the likelihood that the information has been distorted. Also, although the initial report may have been sufficiently detailed to justify starting an investigation, it might not have been sufficiently detailed to create the question being investigated. Thus, it is important for the first interview to be with the person who reported the incident.

Occasionally it may be necessary to deviate from this procedure. For example, the one who has reported an incident may for some reason not be available for an interview early in the investigation. That fact should not delay the investigator in moving forward with the investigation, using this person's written incident report or someone else's notes based on a conversation with this person.

3. If the scene of the incident has been secured, the investigator should visit the scene before interviewing other witnesses and reviewing documentary evidence.

Physical evidence is the most volatile of the four types of evidence. Therefore, an investigator should collect physical evidence before beginning any systematic collection of other types of evidence.

4. At the scene, the investigator should prepare the demonstrative evidence and collect physical evidence that would be useful to the individuals who will evaluate the evidence and make decisions about the validity of the investigatory findings.

Investigators usually cannot collect all of the physical evidence. For this reason, they commonly prepare demonstrative evidence by taking photographs or making diagrams of the scene to record relevant information. The evidence that will be most useful will depend on the nature of the allegations. In a case in which a student complained that a teacher used profane language, the investigator would likely diagram where the student, teacher and witnesses were at the time of the alleged incident. The diagram would help the investigator ascertain whether someone standing in the hallway is likely to have heard what the teacher said. If the incident involved an alleged physical altercation, the investigator would diagram the incident and photograph the scene to illustrate its condition.

No physical evidence should be collected until after the investigator has photographed and diagramed the scene. Once the physical evidence is collected, the investigator should maintain it consistent with the concept of the *chain of custody*.

5. The investigator should interview and take written statements from people who were at or near the scene of the incident. Since reports from alleged witnesses can easily become tainted – e.g., through memory loss or due to influence by other witnesses – an investigator should begin to gather *incident interviews* immediately after visiting the scene. The investigator should also take written, signed and notarized statements from each witness to the incident.

The objective of the incident interview is not simply to discover what the witness remembers. The more ambitious purpose is to help the witness remember as much as possible without distorting the person’s memory. Therefore, one of the most important rules governing witness interviews is to avoid using leading questions. Instead the investigator should ask open-ended questions, such as those beginning with the words, “who,” “what,” “where,” “why,” “when” and “how.”

6. The investigator should review pertinent documentary evidence about the employee under investigation only after he or she has collected the other types of evidence.

Some types of documentary evidence in an employee’s personnel folder, such as periodic evaluations and medical information, have the potential to affect the investigator’s objectivity. Therefore, with the exception of assignment sheets, attendance records and work schedules – which the investigator can use to identify potential witnesses to the incident – an investigator should not review documentary evidence until after collecting physical evidence and interviewing incident witnesses.

7. The investigator should conduct interviews with background witnesses. These are individuals who were not at the scene of the incident but who nonetheless might have relevant information – i.e., information that could help describe or explain what occurred. Background witnesses could include the employee’s supervisor, coworkers, medical professionals who could help the investigator understand the age or source of a particular injury, and others who have had contact with the employee. As in the case of witnesses to the incident, the investigator should obtain a signed, written statement from each background witness.

8. Near the conclusion of the investigation, the investigator should conduct follow-up interviews – i.e., a second or third interview – with certain witnesses. These interviews should be undertaken in three situations. First, where the investigator forgot to ask a question during the first interview. Second, if the investigator has discovered additional information that requires asking additional questions. Third, if the investigator has questions that could help reconcile conflicting evidence already gathered. The investigator should obtain a signed, written and notarized statement from each follow-up witness.

9. The investigator should write a final report detailing the investigatory activities and conclusions.

An investigator’s final report is *not* a legal brief. It is not intended to assert or defend a particular position. Rather it is intended to communicate to the organization the important elements of the case. Those elements include a description of the methods the investigator used to find and collect evidence, as well as a summary of the evidence collected.

Although not strictly an investigatory activity, most investigators will also include a section in the final report which represents their finding about what occurred and why.