The Investigative Process, Procedural Niceties and the 7 Tests of Just Cause

IPMA – HR Central Region

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I’d love your input

- I’ll sprinkle in some recommendations from war stories
- Please feel free to ask questions and share insights
- I’ll poll the audience a few times to get collective group knowledge and use some quick quizzes to highlight some points (cell phone text polls)

The workplace investigator is the drummer in the Labor Relations Rock Band

Sets the framework

- The foundation of the grievance process
- But is generally not that flashy, and they tend not to standout
- They get the job done so the *other* pieces can shine
  - HR
  - LR professionals
  - Department Heads
  - Attorneys
- And the drummer can standout in good ways (killer solos) and bad ones (a missed beat that ruins the song, disrupts the process)

What are you trying to prove in your investigation?

- For labor relations professionals, if you are seeking to support discipline, the investigation must establish facts that show “Just Cause”
- For any disciplinary action, reprimands, suspensions, suspensions, demotions
- Various ways to show it
- One of most prevalent is the “7 tests” of just cause, so I’ll discuss how a proper investigation is central to that
- Might be trying to make sure policies are followed and avoid litigation

The Investigator's Role

- Objective fact-gatherer when speaking to witnesses
- Neutral, fair-minded, professional seeking the facts
- What you shouldn't be:
  - Member of the inquisition (the "bad cop")
  - Therapist
  - Employee advocate, or
  - Employer advocate for that matter

Now, more than ever, investigators have a target on their back

Scrutinized for any number of things

They are basically treated like expert witnesses, and attacked for:

- Failure to follow procedure- and we will talk about areas that investigators must and should do
- Issues with bias
  - Either due to clients (and payments)
  - Due to actions during investigation
  - Wording of results

More attacks . . .

- Evidentiary issues
  - Stones left unturned; witnesses not spoken to or interviews incomplete
  - Failure to look at all of the pertinent evidence (or evidence Respondent thinks is pertinent)
- Credential concerns; some states require outside investigator to be a licensed private detective or an attorney (Minnesota is one)
- Inferential leaps
- Burden of Proof issues
- So, so many more
- Must withstand these attacks for your discipline to hold

Help maintain integrity of the process

- Good investigators are not swayed by emotion
- Sometimes investigations are in a sensitive area
  - Still need to gather evidence
  - Give time, breaks, additional process, show empathy but do not let it affect your process
- Maintain objectivity throughout the investigation process
- Avoid drawing conclusions until the evidence is gathered; always write the conclusion last

Just when do you go to an outside investigator? Informal survey results:

- Most common answer—limited resources at the time
- When a high-level member of the organization is being investigated (to avoid lower level members becoming involved)
- When HR/LR is implicated in any way
- When internal processes are questioned or there are allegations of internal bias

Cont. reasons for outside investigator

- When legal research and application might be required
- When it appears that testimony might be required at an arbitration hearing, or criminal or civil case
- Send a message of seriousness
- The repeat Respondent – to avoid allegations of internal targeting
- When there is a higher level forensic review required, or the case is complex otherwise

Cont. reasons for an outside investigator

- Cost considerations – hope to pay less on the backend on review challenges
- When there is a public relations component, and want to lock it down
- When there is a potential for criminal implications
- When an organization does not have someone experienced or trained on investigations at the time
- When you need it faster because of potential statute of limitations issues (to be discussed later)
- More…?

Procedural hurdles

- Public employers face additional procedural hurdles in every investigation; in some respects more complicated than private employer investigations
- Ensure the witnesses receive the requisite procedural protections, including:
  - Tennessen warnings
  - *Garrity* warnings
  - *Weingarten* rights
  - Potential additional protections – Police Bill of Rights-type statutes

Interview warnings

- Some jurisdictions have interview advisories that are required
- May be good practice to provide similar warnings even without statute
  - Let the interviewee know private data is being collected
  - Why it is being collected and what it is being used for
  - Whether interviewees may refuse or are legally required to provide the data, and the consequences if they don't
  - Who might see it (I see this variously described)
  - That the character of the data might change
- All goes to providing perceived procedural fairness in investigative process

Garrity Warnings

- If you are investigating a matter that could also be a crime, you have a *Garrity* problem
  - Cannot use compelled statement later in a criminal case
  - Can use voluntary statements
- I find many folks get confused about *Garrity* when you don't need to; if you never see a potential criminal issue, you don't need to be concerned
    - Then you can compel a statement without worrying about *Garrity*
    - If you compel and employee refuses, you can then discipline

Cont.

- *Conversely*, you can often seek only voluntary statements, which can be used in criminal
  - Big question is whether you can wait until after criminal is done to act as an employer
- Must consult with law enforcement, county attorney, and labor relations counsel if you see a potential *Garrity* issue

Limits on *Garrity's* scope

- Some confusion here too…
- *Garrity* only applies to *statements* by a witness that might be incriminating
- It does NOT apply to other types of evidence; like documents and an employee's own recordings
- If you know an employee has that information and refuses to provide it, you can discipline, without regard to *Garrity*
  - Might be some attorneys who take a different view, but case law supports this limit

All of these considerations can be an "awkward" way to commence, but

- Building rapport is important in interview; can use this prefatory process to do so
- Become familiar with reasons behind these practices and explain them
  - Give employees time
  - Answer questions about process
  - Confirm they understand and are ready to begin

More prefatory admonitions . . .

- Need full and complete recollection; truthfulness REQUIRED or discipline will follow
  - Some discretion here, when employee "thinks better of it"
- Anti-Retaliation admonitions
- Ask that they do not speak while investigation happening (some controversy here, discuss later)

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Weingarten rights

- Ability to have union member present for interview and there is a potential for that employee to be disciplined
- I generally encourage MN public sector employers to look at this broadly
  - If employee had a duty to report misconduct by others, and did not, you might want to discipline them (so allow a representative)
  - See that issue in law enforcement, fiduciary roles

Some employers allow union rep for all witnesses

- Pros and Cons for this
- Once you start letting this happen, it will be expected ongoing
- Opens up scheduling issues and possibility for the over-active union rep (we will talk about those problems too)
- But also provides a safe-guard on the integrity of investigation process
  - Employee can't say they never said something; union rep was there (unless they both lie)
  - I often see union rep being (gulp) *helpful!* Especially when witness had been evasive
- Largely depends on your relations with the union representatives

Dealing with the overactive employee representative

- Explain their role in the investigative process
  - Not to coach or disrupt; only to protect from abuse
  - Ask the respect process
  - Explain that when coach/interrupt, affects perceived credibility of witness
- Be assertive, not aggressive
  - You control the process; it's your investigation
- I often allow the rep a chance to ask questions and seek clarity at the end of the interview process only; telling them this often stops the interruption (and I almost always get to their concern anyway)

Issues with union rep availability

- A couple of recent examples of this where Respondent wants particular union rep (attorney for instance) and that person is unavailable, and they want to the delay investigation
- There is a "reasonableness" standard here—if it is a day or two perhaps let it go (case law says requiring within 24 hours may be too strict)
- But reason matters
  - Some unions understaffed –severely
- One area where you might go against the general advice of too much process—after all, the employee is likely getting paid on leave

Always check the CBA

- CBA may have some specific requirements on who is allowed to be present for what type of interview
- May also require certain notice, location, and other benefits

Police Officers' Bill of Rights Statutes

- Procedural IA investigative requirements, unique to law enforcement—must be followed

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Investigator is creating the record

- Recorded or written record of interviews become “the record”
- Extremely important
- I recently changed to electronic notes on iPad; record when necessary on the same device
  - Immediately save to the Cloud
  - Easy to transfer if and when needed
  - Easy edit/searchable (and easy to read)!

Some thoughts on credibility determinations

- Certainly nuanced; some reliable indicators include:
- Statements are inconsistent with a reliable record/contemporaneous actions
- Corroboration, or lack thereof, from other witnesses
- Inherent implausibility; I like to say that common sense is a great cross-examiner
- Whether witness could have actually perceived what was done; viewpoint, within hearing range, etc.

Credibility cont.

- Motive to lie, or lack of motive to not tell the truth by other witnesses (what's at stake for the speaker?)
- History of conduct and habit – getting shaky ground here
- Types of answers- again, inherently uncomfortable, so be careful in putting too much stock in it; BUT continued and repeated evasiveness can be indicator of deception
- Demeanor at interview; trained in identifying deceptive behavior – clusters of unusual, stress relieving conduct

Types of investigator determinations

- Facts only
- Facts plus determination of policy
- Need not make legal determinations (unless retained to)
  - Keep determinations to a preponderance of the evidence standard
  - A judge (then an appeals court, then a Supreme Court) might disagree with legal determinations
- Typically an employer can act to stop behavior even if it does not reach the level of illegal or legally culpable conduct (i.e. harassment)

Limits of confidentiality

- Should never be promised
- Those with a need to know in the organization will get information
- If the basis of discipline, might either:
  - Become public by operation of law (Minnesota example)
  - Need to be turned over to Respondent employee that grieves discipline
  - If litigation involved, might need to be turned over in discovery
- Explain retaliatory acts prohibited
  - But, unless a Respondent, don't force statements

The inextricably intertwined nature of investigations in your labor relations process

The investigation is laying down the back beat for the other pieces to work

7 Tests of Just Cause tied to Investigations

- A framework for analysis; Not used by all arbitrators
- Very useful, though, in looking at various facets that an arbitrator is likely to evaluate
- We all would like to think that arbitrator don't just decide these things based on their gut
- Thrust of it all: fair and impartial process and judgment

Genesis

- 1966 arbitration decision- over 50 years ago!
- *Enterprise Wire Co. and Enterprise Independent Union*, 46 LA 1966
- A summary compilation of common standards at the time by Arbitrator Carroll Daugherty
- Posed in the frame of questions that the arbitrator is asking his or herself - “Guidelines”
- Based on facts, “cannot be applied with precision”
- Must also follow and contractually required prerequisites
- Arbitrator included notes to help explain framework – use the notes if you have an arbitrator that likes the tests

Will touch on all, but focus on investigation

Warning

1. Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
    - Oral or written communication of rules
    - "[C]ertain offenses . . . are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable"
    - Cites insubordination, theft, being drunk on the job
    - I'd argue there are quite a few more now … proven sexual harassment for instance
    - Good counter to "there is no policy on that . . ."

Reasonable Rule

2. Was the employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the employer might properly expect of the employee?

- Arbitrator noted that there may be justified disobedience if employee is in an unsafe situation
- Notes that employer may impose reasonable rules without negotiation – of course this depends on whether the area involved is an inherent managerial right or closer to a term or condition of employment

Conduct investigated– The investigator enters…

3. Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

- You might wonder why so many investigations are needed– here is why
- Investigate *before* discipline imposed
- "In a very real sense the company is obligated to conduct itself like a court trial"
- Might need to act, then investigate– hence the ubiquitous "administrative leave"
- Company should also look at employee's side– possible justification for actions; Incorporates *Loudermill* notice and opportunity to respond
  - An area of attack

Fair investigation – again, the investigation implicated. . .

4. Was the company's investigation conducted fairly and objectively?

- Someone uninvolved, impartial investigating
- "It is essential for some higher, detached management official to assume and conscientiously perform the judicial role"
- Hence the use of the outside investigator at times
- Examine and cross-examine witnesses

Full investigation with substantial evidence

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

- Goes to completeness
- Not "beyond reasonable doubt" but "truly substantial and not flimsy"
- Be an active investigator, not passive: investigator "should actively search out witnesses and evidence, not just passively take what participants or 'volunteer' witnesses tell him."
- When evidence leads to contradictions, the arbitrator's "task is then to determine whether the management . . . originally had reasonable grounds for believing the evidence presented to him by his own people." Deferential to employer.

So you can see that the core of the 7 steps deal with a proper investigation

2. Employee informed of charges and given opportunity to respond; Investigation should happen before discipline imposed
3. Investigation has to happen
4. Has to be by impartial person
5. Has to be complete

Even treatment of other employees

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

- A “no” “warrants negation or modification of the discipline imposed.”
- Internal investigation- what have we done before?
- If company provides prior warning that it will now enforce rules differently, then it might stand
  - Test cases must be announced beforehand

Degree of discipline reasonable

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service to the company?

- If smaller level offense, smaller level of discipline, unless repeated
- Only use repeated offenses if actually found guilty of this one—don't assume guilt of instant offense based on past
- Comparison of past work records of different employees is appropriate if they are found guilty of same offense; may lead to different levels of discipline

Some Employer-friendly tidbits from notes

- Per *Enterprise Wire* Arbitrator:
  - "[L]eniency is the *prerogative of the employer* rather than the arbitrator; and the latter is not supposed to substitute his judgment. . . This is the rule, even though an arbitrator, if had been the original [decision-maker] might have imposed a lesser penalty."
    - Query: How often is this principle actually followed once a matter had reached an arbitration hearing?
  - So employee judgment should hold "unless there is compelling evidence that the company abused its discretion"
    - But I digress

Some takeaways on Investigation and Just Cause

- Has to look at each side's evidence
- Investigation must look at possible justifications for employee's actions
- Has to question witnesses "rigorously and thoroughly"- even management
- Must seek out additional evidence, not just accept what you are told
- Has to gather substantial evidence
- Has to determine if on par with discipline in other similar cases

Some current issues impacting workplace investigations

- Some improvisational bars of current investigative tidbits
- A/k/a recent investigative developments that this presenter finds interesting
- The “Wait, what?” section.

Investigator obtains Complaint

- Obtain the allegation of misconduct, whether written or oral, and documentation of the complaint.
- It is important to obtain the entire complaint; talk to complainant if written
- Equally important to ensure that the complaint has not been screened by other employees.
- What about false complaints?

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EEOC Enforcement Guidance on Retaliation and Related Issues, August 25, 2016

- The Commission has long taken the position that the participation clause broadly protects EEO participation *regardless* of whether an individual has a reasonable, good faith belief that the underlying allegations are, or could become, unlawful conduct.

EEOC cont.

- The application of the participation clause cannot depend on the substance of testimony because, "[i]f a witness in [an EEO] proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard, she would surely be less than forthcoming."
- These protections ensure that individuals are not intimidated into forgoing the complaint process, and that those investigating and adjudicating EEO allegations can obtain witnesses' unchilled testimony.

EEOC cont.

- This does not mean that bad faith actions taken in the course of participation are without consequence.
- False or bad faith statements by either the employee or the employer should be taken into appropriate account by the factfinder, investigator, or adjudicator of the EEO allegation when weighing credibility, ruling on procedural matters, deciding on the scope of the factfinding process, and deciding if the claim has merit.
- It is the Commission's position, however, that an employer can be liable for retaliation if it takes it upon itself to impose consequences for actions taken in the course of participation.

Wait, what?

- So we have to let false claims come in?
- Waste our own time on those
- Sometimes hire an outside investigator and incur that expense
- Let an employee smear and disparage other upstanding members of our public organization
- And waste all of the witnesses' time, leading to waste of productivity and public tax dollars
- And not discipline those scoundrels? . . .
  - So as not to potentially "chill" complaints!
  - That can't be right Wiley. Help!

There is an 8th Circuit decision to contrary

- *Gilooly v. Mo. Dep't of Health and Senior Servs.*, 421 F.3d 734, 740 (8th Cir. 2005). Cited in footnote of EEOC guidance. Here…

> [It] cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees without suffering repercussions simply because the investigation was about sexual harassment.

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Potentially scary NLRB talk on Section 7 Rights in the investigative area

- NLRB interpretation of employees Section 7 rights under the NLRA, on the premise that some of this might bleed over to public agencies in various states
    - It does NOT currently apply, but judges and labor arbitrators like to look elsewhere for rationale, so it is worth paying attention to
- The general rule is that if an employer is going to create a restriction on employee speech, it must show a legitimate business reason outweighs employees' Section 7 rights

Banner Health System d/b/a Banner Estrella Medical Center,358 NLRB 93 (2012)

Held that an employer's blanket statement to employees participating in an investigation, asking [not directing] employees not to discuss the substance of the investigation with coworkers while the investigation continued violated the NLRA.

Board explicitly rejected the rationale that the employer wanted to "preserve the integrity of the investigation." (Some very good investigators say that all the time, ahem.)

Board felt that blanket statements, without showing of need, has a tendency to "coerce employees" and was an unlawful restraint.

Instead, per the Board, an employer "must"

- Employer must make an *individualized* showing for the case and witnesses that:
  - Witnesses need protection
  - Evidence is in danger of being destroyed
  - Testimony was in danger of being fabricated
  - There is a need to prevent a cover-up

Wait, what? So what so we do (if anything)?

We can get creative here Qualified Labor Relations Professionals.

[Remember, not really the law here (*yet) but perhaps protect yourself with an individualized showing as a precaution]

The employer needs to be able to articulate this danger. Like, for instance, because they saw folks talking about the investigation, observed changed behavior, felt that there might be retaliation, etc.

When it works,
The Labor Relations Rock Band ROCKS!
Thank you.

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