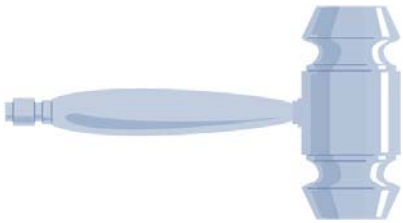
Legal Corner



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Investigating Allegations of Employee and Student Misconduct

Principals and assistant principals are often called upon to conduct investigations of alleged wrongdoing by employees and students. Unfortunately, all too often, principals and assistant principals have never been trained as to the practical and legal rules governing such investigations. The adverse consequences of an improperly or inadequately conducted investigation can lead to legal liability for the school district or investigator involved. It also could lead to an invalidation of the action taken that was based on the flawed investigation. Consequently, it is critical that investigations be conducted properly and adequately.

Although it is not uncommon for principals and assistant principals to conduct investigations, the most important preliminary question to ask is, when should an administrator not conduct the investigation and instead leave it to an attorney. The rule of thumb that I frequently offer to clients is that counsel should be used for an investigation when the failure to conduct an investigation properly can: **(i)** lead to legal liability for the school district or the administrator; or **(ii)** result in overturning a suspension without pay or dismissal. For example, investigation of alleged sexual harassment, racial intimidation or hazing must be done properly or legal liability may be the result. Likewise, if an investigation of an employee is not performed properly, a suspension or a discharge may be overturned by an arbitrator or the courts. Consequently, rule one is to retain legal counsel to conduct an investigation when necessary to minimize or eliminate the risk of legal liability or to ensure that disciplinary action is upheld.

Where the principal or assistant principal is to conduct an investigation, the relevant legal rules must be thoroughly understood. Because of the risks involved, if an administrator does not have a good working knowledge of the rules governing investigations or the imposition of discipline, that the administrator should not be involved in the investigation. As Attorney Karl W. Kristoff commented in his article, *How to Train Administrators to Properly Investigate Allegations of Employee and Student Misconduct,* NSBA School Law in Review, 2005, "if you don't know the rules, you can't play the game." The proper conduct of an investigation requires much more than the ability to ask questions. Among the many rules that must be understood are rules pertaining to: **(i)** self-incrimination; **(ii)** due process; **(iii)** rules of evidence; **(iv)** Miranda warnings; **(v)** search and seizure; **(vi)** privacy; **(vii)** collective bargaining rights; **(viii)** just cause; **(ix)** the substantive rules of law that may be applicable to a particular investigation, such as an investigation of alleged sexual harassment; and **(x)** confidentiality.[1] If the investigator is not completely familiar with the rules pertaining to sexual harassment, it is doubtful that the investigation will be conducted properly or adequately.

Another important aspect of conducting an investigation is the ability to draw proper conclusions. Consider this hypothetical. Suppose that you are investigating a massive cheating scandal where numerous seniors in a class are accused of stealing a mid-term examination and distributing copies to other students. Two girls tell you that they were talking to two boys and that the boys admitted to them that they stole the test. You question the two boys and they absolutely deny being involved in cheating or doing anything wrong. It is the classic case of "he said, she said." There is no evidence of wrongdoing by the boys, other than the "hearsay" statements by the two girls. Can you take action based on the girls' "hearsay" statements? Can you draw any conclusions based on the information from the girls? Do you have to allow the girls to be confronted by the boys in an informal hearing before you can discipline the boys? Can you tell colleges where the boys applied that they were named as being involved in cheating?

Before I provide the answers to these questions, allow me to put forth some of the essentials of an investigation. First, document, document, document. You may be telling the truth, but unless you can demonstrate it with contemporaneous documentation, credibility becomes an issue. Second, during an investigation, have two pairs of ears in the room. It is well to have a third-party witness to the proceedings and avoids "he-said"/"she-said" problems arising thereafter. Assistant principals often fulfill this function. Third, be sure to have in attendance a witness of the same gender as the interviewee. If a male principal is interviewing a female student, then have a female assistant principal sit in on the

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conference. The inclusion of the female assistant principal may help to reassure the student and avoids problems arising from the interview.

1. **The Complaint**

The starting point in any investigation is the complaint. What are you investigating? What are the alleged facts? The nature of the complaint will often dictate the nature of the investigation. For example, if the complaint is of sexual harassment, the investigation will involve proving what the alleged perpetrator did. On the other hand, if the complaint is that money was stolen, the investigation will involve determining the identity of the individual who engaged in the theft.

- ✓ **Documenting the Complaint.** In some situations, the nature and scope of the complaint may be critically important. How have you documented the complaint so that you can prove what it was if called into question? For example, it is not unheard of for complaints of sexual harassment to change over time. I was involved in a sexual harassment case once where the student victim initially complained to the principal and assistant principal of the high school. When she repeated the story to the superintendent, the story changed. She then filed a complaint with the Pennsylvania Human Relations Commission ("PHRC"). Once again, the complaint changed. She filed a report with the PHRC as part of its investigation and the complaint grew again. Finally, a complaint was filed in federal court and the complaint grew again. Naturally, the initial investigation by the administrators did not take into account the allegations that were subsequently made, and the student argued that the investigation was deficient because it was not complete.

  I suggest that it is critically important for any investigation to document precisely the nature and scope of the complaint. The documentation must be acknowledged by the complaining party whenever possible. At a minimum, if at all possible, the complaining party should sign a document that contains a description of the complaint. Preferably, the complaining party should execute an affidavit describing the nature of the complaint, identifying possible witnesses and detailing the remedy that the complaining party may be seeking. You do not need a notary public to provide a seal on such an affidavit. Instead, the document should be titled an "Affidavit" and can conclude with the following statement: "I hereby certify that the foregoing facts are true and correct to the best of my knowledge and belief and are made subject to 18 Pa.C.S.A. §4904 (relating to unsworn falsifications to authorities)." This statement must be followed with the signature of the affiant and the date of the signature.

- ✓ **Anonymous Complaints.** Principals and assistant principals sometimes receive anonymous complaints. Can they be acted upon? Should they be acted upon? Depending upon the nature of the complaint, they must be acted upon or the administrator and school district can be subject to legal liability. For example, if a teacher has been accused of sexually harassing or abusing a student by an anonymous source, a determination must be made as to whether it can be investigated. In the very least, however, the teacher must be confronted, told of the allegations and be given clear directives that such conduct is not acceptable.
- ✓ **Confidential Complaints.** It is not unusual for principals and assistant principals to obtain complaints from an individual who wants to remain anonymous and asks that his or her identity be kept confidential. Such confidentiality cannot be promised. Depending upon the action taken in light of the nature of the complaint, there may have to be a hearing where the complaining party may have to testify.
- ✓ **The "Do Nothing" Complaint.** There have been times when a student or an employee complains that another has done something inappropriate, such as telling offensive jokes, but the complaining party asks that you not do anything. You may not accommodate a request to do nothing. You must investigate the matter and, if it is found that the alleged perpetrator engaged in inappropriate conduct, you must take action reasonably calculated to stop the inappropriate conduct.

2. **Interviewing Witnesses**

Numerous issues are associated with interviewing witnesses. With respect to student witnesses, depending upon the age of the child and the nature of the subject matter being investigated, it may be appropriate to notify the student's parents before the investigative interview. With respect to employee witnesses, if the employee is in a collective bargaining unit, a determination should be made whether to allow a union representative to sit in on the interview. There is no right to union representation of an employee witness. The only time that an employee has the right to a union representative is when the employee is being questioned, and there is a reasonable basis to believe that the questioning may lead to discipline of that employee. If the employee is simply a witness to wrongdoing by another employee, the employee has no right to union representation. Indeed, it may be an impediment to the investigation to allow union representatives in on interviews of witnesses. Another important point is to know and understand that the employee does not have the right to refuse to answer questions, unless the employee invokes the Fifth Amendment right against self-incrimination,

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which arises in the criminal context. An employee's refusal to answers is insubordination and can form the basis of discipline.

As with the complaining party, it is generally good practice to have witnesses authenticate the information that they provide. When possible, they should be asked to sign a statement or an affidavit.

Like complaining victims, there are witnesses who may ask for confidentiality. Remember, you cannot and should not promise confidentiality.

Depending upon the nature and complexity of the investigation, principals should consider using a court stenographer to prepare a verbatim transcript. An alternative approach is to tape record the interview, but that approach has the disadvantage of thus creating two records—the tape and the typed transcript. If the typed transcript is inaccurate in any respect, the tape may cause difficulty.

- ✓ **The Fearful Witness.** It is not uncommon for witnesses to be fearful of the process. They may be concerned that they will not be believed or that someone will retaliate against them, especially if the alleged perpetrator holds a position of power. It is recommended that you consider having a written statement prepared in advance of the interview succinctly stating the reason for the interview, the fact that retaliation or retribution will not be tolerated and inviting the witness to contact you if he or she has any concerns of retaliation.

3. Interviewing the Alleged Perpetrator

Ordinarily, the last person to interview is the alleged perpetrator. There are a number of rules that govern the questioning of the alleged perpetrator.

- ✓ **Notice of Allegations and Explanation of Evidence.** Under due process principles, the alleged perpetrator is ordinarily entitled to notice of the allegations against him or her and an opportunity to give his or her side of the story. The alleged perpetrator should be given sufficient information about the evidence against him or her to enable him or her to mitigate or deny the allegations.
- ✓ **Duty to Answer Questions.** Employees are required to answer questions by supervisors, and the failure to answer a question can itself be the basis for discipline. There is only one exception to that rule. An employee may refuse to answer questions under the Fifth Amendment and no adverse inference can be taken from the employee's refusal to answer questions on the basis of the Fifth Amendment right against self-incrimination.
- ✓ **Right to Union Representation.** An alleged perpetrator, who is a member of a collective bargaining unit, has the right to union representation in an investigative interview where the employee reasonably fears being disciplined, provided the employee requests union representation. Under the law, the employer is not required to offer union representation and the right to such representation is triggered only upon request by the employee. However, it is generally good practice to offer to the alleged perpetrator the right to union representation.
- ✓ **Special Rules Applicable to Students.** If there is a possibility that a student is to be suspended, the investigative interview and the due process "informal hearing" may be combined. Where the investigative interview and the "informal hearing" are combined, the rules set forth in the regulations of the State Board of Education must be fulfilled. Those rules essentially require that: **(i)** there be written notice of the allegations to both the parents (or guardians) and the student; **(ii)** there be reasonable notice of the informal hearing; **(iii)** the student be given the right to question any witnesses present at the hearing; and **(iv)** the student be given the right to speak and to produce witnesses on his own behalf. 22 Pa.Code §12.8(c).

4. Drawing Conclusions from the Evidence Provided

No investigation is successful unless the proper conclusions have been formed as a result of the information obtained. When forming conclusions, it is important to realize that "guilt" of the perpetrator is not required to be proven beyond a reasonable doubt. That is a standard that is used in criminal cases and has no place in public schools. On the contrary, the correct standard is whether the "preponderance" of the evidence leads to a conclusion of guilt.

A "preponderance" of the evidence is defined in the law as such proof as leads the investigator to find that the existence of the contested fact is more probable than not. *Las Vegas Supper Club, Inc. vs.*

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Pennsylvania Liquor Control Board, 211 Pa. Super. 385, 237 A.2d 252 (1967); *South Hills Health Systems vs. Department of Welfare*, 98 Pa.Cmwlth. 183, 510 A.2d 934 (1986). In the hypothetical stated previously, if it was more probable than not that the two boys who admitted to the girls that they actually cheated, then the investigator may come to that conclusion.

There are two types of evidence that an investigator can properly use in reaching his or her conclusion. One type of evidence is *direct evidence*. Direct evidence is when a witness discusses something he or she knows by virtue of his own senses—something he has seen, felt, touched or heard. Direct evidence may also be in the form of an exhibit or other physical evidence. *Michalic vs. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960).

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. There is a simple example that is often used in court. Assume that when you come into the administration building at the start of the hearing the sun was shining and it was nice day. Assume that the hearing room blinds were drawn and you could not look outside. As you were sitting in the room, someone walked in with an umbrella which was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the hearing room and you cannot see whether it is raining, so you have no direct evidence of that fact. But on the combination of facts that you have been asked to assume, it would be reasonable and logical for you to conclude that it had been raining. That is all there is to circumstantial evidence. You can infer on the basis of reason, experience and common sense from one established fact the existence or the non-existence of some other fact.

> Circumstantial evidence is of no less value than direct evidence; for, it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence, but simply requires that conclusions be based on a preponderance of all evidence presented. Indeed, the United States Supreme Court has stated that in civil cases, "[d]irect evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may be also more certain, satisfying and persuasive then direct evidence." *Michalic vs. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960).

Under the hypothetical stated previously, if you conclude that the two girls had no motive to lie about the admissions of wrongdoing that they described to you from the boys, it is perfectly permissible to conclude that the boys cheated, as they admitted, and that they can be suspended. Moreover, the boys have no right to confront the girls at an informal hearing that is required if the suspension is going to be 10 days or less. If there is going to be an expulsion, however, an expulsion requires a school board hearing and an expulsion must be based upon sworn testimony that is subject to cross examination. Moreover, if it is your conclusion that the boys were involved in cheating, you can advise the colleges of the conclusions reached, provided due process has been provided to the student.

Footnotes

[1] Unfortunately, there is not enough space in this article to address each of these issues. This article will focus instead on the more basic and practical elements of an investigation and the conclusions to be drawn from an investigation.