

INTERNAL INVESTIGATIONS

MUNICIPAL ATTORNEYS INSTITUTE

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Presented By:

von Briesen

von Briesen & Roper, s.c. | Attorneys at Law

Kyle J. Gulya
von Briesen & Roper, s.c.
10 E. Doty St., Suite 900
Madison, Wisconsin 53703
(608) 316-3177 (Mr. Gulya's direct line)
1-800-622-0607
kgulya@vonbriesen.com

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I. OVERVIEW

- A. The Goal is to uncover and gather information to a high degree of accuracy, to understand the objective facts, to establish and conduct a fair and credible process, to render a meaningful decision, to reduce or eliminate uncertainty and to prevent surprise**
- B. Effective investigations can result in reduced liability risk, reduced legal costs, greater organizational and public confidence, and a more professional workforce**
- C. Effective investigations protect the interests and rights of the employees and establish confidence in management and the decision maker**

II. DIFFERENT INVESTIGATIONS, DIFFERENT PROBLEMS

A. Types

- 1. Harassment investigations
- 2. Financial impropriety investigations
- 3. Investigations in conjunction with a criminal investigation
- 4. Internal investigations
- 5. To get to the bottom of things

B. Who should do the investigation and considerations to take into account?

- 1. Who?
 - a. Internal human resources
 - b. Law enforcement command staff
 - c. An outside law enforcement agency
 - d. An outside consultant
 - e. Outside counsel
- 2. Why?
 - a. Risk management
 - b. Privilege
 - c. Control

- d. Cost
 - e. Perception
 - f. Internal future operations
 - g. Due process
3. Other Partners
- a. Forensic accountants
 - b. Public relations consultants
 - c. Law enforcement consultants
 - d. Industry consultants
 - e. The Recruiter

III. THE LEGAL AND PRACTICAL ISSUES INVOLVING INVESTIGATING EMPLOYEE MISCONDUCT FROM BEGINNING TO END

A. Know the Job Security Standard and the Process for Removal

B. Seven Tests of Just Cause Remain a Meaningful Guide for the Investigation

- 1. Test 1: Notice of expected conduct.
- 2. Test 2: Reasonableness of the rules and expectations.
- 3. Test 3: Complete investigation.
- 4. Test 4: Fair investigation.
- 5. Test 5: Adequate proof.
- 6. Test 6: Equal treatment.
- 7. Test 7: Proper penalty in light of the seriousness of the offense and the employee's record of service.

C. Industrial due process

- 1. Notice to the accused of the specific accusations;
- 2. Opportunity for the accused to respond to the accusations before determination of discipline;

3. Fair investigation;
4. Timely employer action; and
5. No double jeopardy.
6. Arbitrator selection matters. As Arbitrators have different perspectives of what just cause means and how it is applied, Arbitrators also vary in their application of standards of industrial due process.

D. Document the allegation.

1. Try to get the complainant to sign a written statement; if not possible, document what you saw or were told, and all relevant details of the allegation.
2. Refer document to appropriate person in the organization for help with the investigation.

E. Fulfill legal (and moral?) reporting obligations to law enforcement or other government entities.

F. Fulfill contractual reporting obligations for insurance purposes (for example, thefts).

G. Legitimize and identify the reason for investigating.

H. Create an investigation plan.

1. Develop an investigation plan as a “living document” and document all relevant activities associated with conducting the investigation. These include:
 - a. Describe the allegations, the facts and the chronology
 - b. Identify the reason for the investigation
 - c. Identify evidence collected and the source of the evidence
 - d. Identify measures taken to preserve evidence
 - e. Meetings and discussions
 - f. Communications with and information received by or sent to law enforcement or other reporting agencies
 - g. Pertinent events that occurred during the investigation

- h. Interviewees (complainant, subject, eye witnesses, hearsay witnesses, experts) and the order
 - i. Investigation participants
 - j. Summary
 - 2. The investigation plan should be retained as notes by the drafter, but should be prepared in such a manner that the investigator is comfortable if disclosed the parties, in litigation or under the Open Records Law.
 - 3. A checklist can be developed and used for purposes of charting the plan.
- I. **Be prepared from the beginning to deal with the press, the politicians and the interested public.**
 - 1. Understanding what the press, the politicians and the interested public want from the employer.
 - 2. The first 24 hours of a crisis are the most critical—your actions and responses during these first 24 hours will direct the future reputation and effectiveness of your organization.
 - 3. Establish a “crisis” plan and establish a spokesperson. When a crisis arises, the team must implement the plan, organize and evaluate all current information, and establish possible courses of action consistent with the plan.
 - 4. Establish a communication system for public and media inquiries, and have a spokesperson handle requests for information.
 - 5. Keep careful records of all telephone calls, requests for information, and updated information.
 - 6. Even if the media has not contacted you, develop your organization’s message, assemble the facts, and continuously update this information. Distribute this information to key audiences.
 - 7. Be upfront and forthright. Do not hide from the media, unnecessarily withhold information, or refuse to talk with the media, except on matters that you are required to keep confidential. If you delay or withhold information, then you will need to be prepared to respond to rumors.
 - 8. Tell the truth to the public and correct errors immediately. If you do not know the answer to a question from the media or the public, then do not guess. Tell them you will get back to them when you know the answer and make certain you respond. Furthermore, if information is reported inaccurately, then communicate with the appropriate media outlets and

accurately convey the correct information. Follow-up with other interested outlets to confirm the correctness of the information.

9. If the scope of the investigation will in any manner peak the public and the media's interest, then consider preparing a press release as a preemptive strike. The press release should provide basic details and information but should be done so in a manner that does not contravene the integrity of the internal investigation.
 10. Preemptively address records requests. The release of records is barred if those records relate to the "current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation." Wisconsin Statute Section 19.36(10)(b).
 - a. An authority's investigation achieves its "disposition" when the authority acts to impose discipline on an employee as a result of the investigation, regardless of whether an employee elects to pursue grievance arbitration or another review mechanism that may be available under applicable statutes, ordinances, regulations or a collective bargaining agreement. *Local 2489 AFSCME, AFL-CIO v. Rock County*, 2004 WI App 210, 277 Wis. 2d 208, 689 N.W.2d 644.
 - b. Custodians may also rely on Wis. Stat. Section 19.35(1)(am)1 in certain circumstances as a basis for not turning over records related to pending investigations or litigation in response to requests for records containing personally identifiable information. It states: Any record containing personally identifiable information that is collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.
- J. **Consider the accused employee's status (leave with pay, leave without pay, transfer, limited duties, etc.) during the investigation.**
- K. **Gather and Preserve Evidence**
1. Identify sources of evidence and take measures to preserve those evidentiary sources and identify the chain of custody.
 2. Test 1 requires the accused to know what was expected of him and that this expectation was reasonable. What information will you obtain and preserve?

- a. Obtain copies of all applicable rules/policies, sign-off forms and job descriptions
- b. Check the personnel file and other training files for documents demonstrating the employee received rules, understood those rules, and also received training on relative matters
- c. Previous discipline and nondisciplinary documents
- d. Supervisor notes
- e. Formal and informal evaluations
- f. Review training records and materials
- g. Review Union publications and Memoranda
- h. Review Notes, Outlines, and other training documents prepared by a trainer or supervisor for staff meetings or trainings
- i. Determine past involvement of the subject in discipline situations involving others
- j. Review documents, telephone records, video and surveillance tapes, timesheets, attendance records, emails, voicemails and pictures relevant to the employee's work duty and the conduct to show understanding of expectations.
- k. Check with other supervisors and witnesses for statements or information indicating the employee knew what was expected of him.

L. Issue Written Notices of Administrative Leave and Communications of Expectations and Directives for Witnesses and the Investigation Subject.

- 1. What to say?
- 2. Lawful (and unlawful?) directives
 - a. Retaliation
 - b. Interference
 - c. Confidentiality and gag orders. *Wisconsin State Employees Union vs. State of Wisconsin*, Dec. No. 32392-B (WERC, 5/09).

M. Develop the Order for Questioning the Complainant and Witnesses

N. Fulfill Notice Obligations for Investigation Meetings

1. Satisfying Chapter 164 obligations and other investigation notice obligations
 2. Identify the need and subject for meeting to establish cooperation with the subject or witness without divulging detailed facts discovered during the investigation
- O. **Address Housekeeping Issues for Conducting Interviews and Consider Physical and Psychological Factors of the Investigation**
1. Type and location of interview rooms
 2. Positioning of the Interviewer and the interviewee
 3. Innocuous cues and perceived effects
 4. Confidentiality or a lack thereof and the impact on deception and fear of judgment
 5. Number and identity of interviewers and procedure of using multiple interviewers in the same interview
 6. Memorialization
 7. Active or Passive Listening
- P. **Conduct a complete investigation through all sources other than the accused.**
1. Contact all potential witnesses to all events; get written statements from each (consider *Garrity* implications for employee witnesses).
 2. Question the complainant and witnesses
 3. General considerations
 - a. Avoid leading the employee
 - b. Avoid connecting the dots
 - c. Be a slow learner
 4. Different techniques
 5. The Conversation or Free Narrative
 - a. General, open-ended questions
 - b. Few leading questions

6. Question and Answer formats
 - a. Direct examination
 - (i) Systemic and orderly in nature
 - (ii) General and Specific questions
 - (iii) Who, what, when, where, why and how, and all designed to elicit facts and to fill in gaps.
 - (iv) Leading questions used from time to time
 - (v) Avoid accusatory type questions and tone
 - b. Cross examination
 - (i) Not necessarily systemic or orderly
 - (ii) Specific questions
 - (iii) Some leading questions but not loaded questions
 - (iv) Probing and exploratory questioning and testing the accuracy or validity of information
 - (v) Probing and testing judgment and perception
 - (vi) Challenging untruthful statements or evasive or misleading responses
 - (vii) Repetitive questions to determine whether answers change and to monitor shifting if questions are asked at different intervals
 - (viii) Expansion of specific details
 - (ix) Challenge the interviewee. Provide known information that conflicts with information provided by the interviewee
 - c. Techniques to avoid (poorly timed leading questions, negative-phrased questions, compound questions and either/or scenarios, confusing and overly complex questions).
7. Develop an outline of topics to cover and questions and write out specific, necessary questions but remain flexible and conduct interviews fluidly
 - a. “Good Questions” for witnesses and the complainant.

- (i) If you did this, then would you expect to be disciplined for it? Why?
 - (ii) What penalty would you expect? Why?
 - (iii) Are you aware of anyone else who has violated this rule but not been disciplined for it? Who?
 - (iv) Why didn't you report that person for that rule violation?
 - (v) Does the accused, the complainant, or any witness have a reputation for untruthfulness?
 - (vi) Have you spoken to any other person about this case before today? Who? What was said by either of you?
 - (vii) What other witnesses should we talk to? What do you think they will tell us? Why do you think that?
8. Listen to the Answer. Is it an answer? Understanding the importance and usefulness of nonresponsive answers and utilizing efforts to obtain responsive answers.
9. Be mindful of patterns that develop with the employee's verbal answers that may indicate deception.
- a. Direct and spontaneous answers given quickly to direct questions may be indicative of truthfulness, while delays in answers or asking for a repeat of the question may indicate a concocted or deceptive response
 - b. Qualifying answers
 - c. Evasiveness and talking off subject
 - d. Reliance and use of honor, oath or religion as support
 - e. Quickness to be angered
 - f. Lack of bluntness in language (lack of harsh or realistic language)
10. Read Body Language
- a. Facial expressions and coloring. A lack of expression may indicate deception. Expressions of anger may indicate innocence, but defiance or fear (and blanching of skin tone) may indicate guilt.
 - b. Eye gaze.

- c. Body posture
 - d. Shifting body parts or torso movement, retreating movements
 - e. Hand gestures and hand motions over the body (grooming type gestures)
11. Verification of Notes.
 - a. Contemporaneous notes should be updated immediately
 - b. Use the interviewee's words and statements
 - c. During interviews, restate statements of the interviewee to confirm understanding
 - d. Confer with the witness
 - e. Initialing specific quotes within quotes
 12. Demand the production of information within the possession or purview of the interviewee and others
 13. Give the interviewee the last substantive word and the opportunity to make final statements
 14. By the end of the questioning, the interviewer should believe they have introduced the subject matter, established rapport, questioned and obtained factual information, summarized the interview and determined accuracy of its content, established timelines and substance for obtaining physical evidence from the interviewee, and closed the interview

Q. Since no *Garrity* warnings have been issued, this may be your possible last chance to report potential criminal violations and confer with law enforcement in two-way form. You can still receive information from law enforcement.

R. Prepare for the Meeting with the accused.

1. Prepare questioning outlines and develop strategy for conducting the meeting
2. Review investigation records and prepare records to address with the accused
3. "Order" the employee in writing to attend the interrogation.
4. What do we tell the employee/representative prior to the interview?

- a. There is no obligation to share what you know while investigating. *WLEA Local 2 v. University of Wisconsin System*, Dec. No. 32239-B (WERC 2009)
 - b. When the investigation is completed, due process requires (nearly) full disclosure. The decision to file Charges does not trigger due process; the filing of Charges does.
 - c. Department rules, procedures, or contracts often require some disclosure.
 - d. Does disclosure aid in settlement of the dispute?
5. Union or other representation; some options:
- a. Notice of rights in advance?
 - b. Wait for employee to request?
 - c. Wis. Stat. 164.02 rights

S. ***Garrity* warning.**

- 1. If and when the *Garrity* Warning is given
- 2. In the absence of a warning, the employee may do the following:
 - a. Answer questions truthfully
 - b. Refuse to answer questions
- 3. If the employee refuses to answer a question:
 - a. Issue or repeat *Garrity* warning.
 - b. Repeat question asked.
 - c. If second refusal, then ask why.
 - d. If the employee claims “Fifth Amendment,” then remind employee the *Garrity* warning eliminates that excuse.
 - e. If “advice of counsel or Union rep,” remind employee it is their decision not to answer, and if advice is wrong, then the remedy is lawsuit against their advisor.
 - f. Remind the employee of the penalties for refusing to answer.
 - g. Repeat the question asked

- h. Continue with interview and remaining questions
4. When does *Garrity* apply and when should it be given? Timing of giving the *Garrity* warning matters, because poor timing can fully compromise a criminal investigation and prosecution!
 5. What questions can the employer compel the employee to answer during the interview? *Oddsens v. Board of Fire & Police Commissioners*, 108 Wis.2d 143, 321 N.W.2d 161 (1982).
 6. Can the employee refuse to come to the meeting? Probably not.
 7. What if the employer shares *Garrity* protected information with law enforcement? Don't.
 8. Can the employer draw negative inferences from the Employee's refusal to answer compelled questions?
 - a. With Probative Evidence: The employer may draw adverse inferences from the individual's refusal to answer questions when probative evidence is offered against the individual.
 - b. Without Probative Evidence: an employer's "direct inference of guilt from silence is forbidden."
 9. Without a *Garrity* warning, can the employee lie?
 - a. *Garrity* does not provide immunity for false statements when the statements, if true, would have been entitled to immunity. *U.S. v. Devitt*, 499 F.2d at 142 (7th Cir. 1994); *Herek v. Police & Fire Comm'n*, 226 Wis. 2d 504 (Ct. App. 1999) (rejecting "a bright-line rule [that] suggests that any statement made, regardless of its truthfulness, ought to be suppressed if the maker of the statement is not given *Garrity* protection").
 - b. Giving a false statement can be a separate crime (perjury) for which *Garrity* does not preclude prosecution.
 10. What if the employee does not receive a *Garrity* Warning? *Franklin v. City of Evanston*, 384 F.3d 838 (7th Cir. 2004).
 - a. The City questioned an employee about his marijuana possession arrest without warning him of his *Garrity* rights. The employer relied on its policy that *Garrity* warnings would not be given unless the employer explicitly required an individual to answer questions under the pain of losing his employment. The individual refused to respond to questions regarding his criminal conduct and the employer terminated his employment.

- b. The Court found the employer's policy did not provide the employee an opportunity to tell his story without penalty before termination without fear of impairing his criminal defense and therefore could constitute a due process violation.

T. Questioning of the Accused

- 1. Goal: by the end of the questioning, the investigator should have clear direction as to whether all seven tests of just cause can be met
 - (i) Address the accused with questions pertaining to knowledge and understanding of rules and expectations of conduct
 - (ii) Address the accused regarding the reasonableness of the rules and expectations of conduct.
 - (iii) Address the accused regarding the thoroughness of the investigation
 - (iv) Address the accused regarding the fairness of the investigation
 - (v) Address the accused regarding conduct of others in compliance or noncompliance with these rules and expectations of conduct
 - (vi) Address the accused regarding the accused's record of service and the appropriate penalty
- b. By the end of the questioning, the investigator must have identified, addressed, and questioned all of the accused's challenges to evidence, statements, and claims of unfair or discriminatory treatment
- c. Decide whether to start questioning with pursuing the facts of the incident, knowledge of rules and expectations of conduct or some other starting point
- d. Relating Questions to the Seven Tests. Good Direct Examination Questions, Cross-Examination questions and leading questions to consider.
 - (i) Are you familiar with the City's Rules and Regulations? How are you familiar? Are you familiar because _____?

- (ii) Are you obligated to familiarize yourself with all rules, pertaining to your position in the City? Do you believe that familiarizing your self with the rules is important? Why?
- (iii) What does Rule ____ require you to do?
- (iv) Do you believe the rules identified to you are reasonable for the effective operation of the City? Why? Have you ever questioned the reasonableness of these rules? Has the Union ever questioned the reasonableness of these rules? To who? When? What was discussed?
- (v) Please describe your record of service to the City? Have you been disciplined? Please describe that discipline. Has your supervisor ever addressed performance-related concerns with you? Please describe those performance-related concerns.
- (vi) What happened on June 15, 2017?
- (vii) What did you do to comply with the City's rules based on your conduct on June 15, 2017? Was your conduct in compliance with this rule? Why not?
- (viii) Do you believe the City can reasonably expect that its employees will comply with this Rule? Do you believe that your failure to comply with this rule can subject you to disciplinary consequences? Why do you believe that?
- (ix) Are you aware of anyone else who has violated this rule? What information do you know about that situation? Is there any difference between your situation and that situation? What is the difference? Why do you believe this is different?
- (x) Do you believe it would be fair to discipline you for violating this rule? Do you accept responsibility for your conduct? Why not?

e. Good open-ended fact-inquiry questions include:

- (i) What happened?
- (ii) When did this occur?
- (iii) Who else was present?
- (iv) What did you do?

(v) Who else have you spoken to about this incident? What did you discuss? When? What did you say? What did that other person say?

(vi) Who else should I speak to about this matter?

U. Review entire investigation.

1. Reinterview witnesses and the complainant
2. Consider all other possible sources of information (including exculpatory evidence).
3. Reinterview the accused
4. Consider witness credibility and strength of evidence
5. Consider possible outcomes
6. Investigative Reports
 - a. Are they necessary?
 - b. Contents
 - (i) Recitation of the allegations
 - (ii) Rules and expectations of conduct, including job descriptions, department policies, and professional standards
 - (iii) Findings of fact
 - (iv) Conclusions
 - (v) Recommendations, if requested
 - c. Meetings to discuss investigative reports
 - d. Is additional investigation warranted?

V. Discipline Negotiations Strategies

W. Preparing for the Hearing

X. Decision making time

1. Wis. Stat. § 17.16 removal hearings, Wis. Stat. § 62.13 hearings, Wis. Stat. § 66.0509 IHO processes, and civil service processes.

2. Property Interest Hearings

- a. Who will advise the decision maker?
- b. Who will advise the charging party?
- c. What roles did these attorneys play so far and why does it matter?
- d. What if the governmental body serving as decision maker for removal wants to consider matters not part of the notice for hearing for termination?

In *State ex rel. Alba v. City of Waukesha Police & Fire Commission*, 365 Wis. 2d 195 (Ct. App. 2015), the decision maker could not consider evidence unrelated to a specific charge and then issue a finding on that “new” charge based in part on evidence that members of that governmental body were witnesses to the evidence for that new charge,

The Court of Appeals stated: “One of the findings of fact from the disciplinary hearing stated that the PFC considered as evidence the responses Alba gave to [PFC Chairperson’s] questioning. We agree with Alba that this constituted a due process violation. PFC members essentially were witnesses at the interview, then used their recollections when they sat as adjudicators at his disciplinary hearing. The PFC undisputedly made a finding based on personal knowledge and perception rather than on evidence presented at the hearing and available to the public. A judge ‘cannot be a witness and the finder of fact, too.’”

3. Liberty Interest Hearings

- a. When do they apply?
 - (i) Termination of employment alone is not a deprivation of liberty in spite of possible adverse effects on future employment opportunities.
 - (ii) A stigmatizing charge giving rise to “a ‘badge of infamy,’ public scorn, or the like.” Examples: charges of theft, dishonesty, immorality, drug use or alcoholism, disloyalty, mental disorder, criminal acts, prone to suicide prone, lack of intellectual ability, abusers, sexual harassment, and racism.

- (iii) The stigma of one's employability must take place at the time of employment deprivation—statements made months before or after termination of employment do not infringe liberty interests.
- b. Notice and opportunity to be heard.
 - (i) Liberty interest procedures need not be formal and need not consist of a traditional hearing.
 - (ii) May be held in conjunction with a property interest hearing if the employee is so entitled
 - (iii) A chance to review the charges and supporting evidence and to respond in writing has been held to satisfy due process.