

Pitfalls in Conducting Fact-finding Investigations

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Assume that you have been asked by your manager to conduct a fact-finding investigation into a complaint that he has received from an employee, whom you do not know. You are being directed to complete an investigation by reviewing any existing documentation and interview key witnesses, including the complaining and accused persons. Afterward, you are expected to prepare a Final Investigative report that includes: evidence reviewed, witnesses interviewed, findings of fact, conclusions, and perhaps your recommendations. Based largely on your report, the manager will make a decision for disciplinary action or exoneration of the accused employee.

How could such a straightforward assignment as conducting a fact-finding investigation go awry? Unfortunately, it too often happens in various unexpected ways. Personnel fact finding investigations are at times bungled and poorly carried out, leaving the impression in the media that those conducting these investigations are either incompetent or attempting to cover up misdeeds, even though such was not the intent of the investigator. This can occur because of five unanticipated pitfalls awaiting those who naively prepare to conduct a fact finding investigation.

There is much written about the positive techniques for conducting investigative interviews with employees in a work setting (Yeschke 1997). It is probably obvious that one should plan an investigation carefully, utilize solid interviewing skills, and aim to complete the Fact Finder Investigative Report in a timely fashion. What may be less apparent are the pitfalls that can destroy the reliability of your fact-finding investigation as well as your own credibility.

Yet, these potential pitfalls in a fact finding investigation can be easily avoided by:

1) Divulging real and apparent conflicts of interest

A Fact Finder must be a *third-party neutral* to any investigation. This means she is a *third party*, not a participant in the dispute giving rise to the investigation. She also must be perceived by everyone concerned as a *neutral*, someone who has no vested interest in the outcome of the investigation. Despite this requirement, a Fact Finder investigator can tarnish her image if *perceived conflicts of interests* are not stated in writing, prior to undertaking the investigation.

“Perception is everything” and it does not matter whether you believe the conflict is “real” or honestly think you can conduct the investigation without prejudice. What matters is the belief of others, especially in the media. If there is even a whisper of a conflict of interest, disqualify yourself and ask the Manager to select someone else. For example, perceptions of a conflict of interest can occur if: 1) you were formerly related by marriage, 2) if you or a family member had a romantic relationship with any of the participants, 3) you presently have personal, marriage or political ties, 4) or if you stand to *potentially* gain financially from the investigation results.

2) Always interviewing the accused person

As a long time Fact Finder and Arbitrator, I have been shocked to see how many investigations were completed without ever interviewing the accused employee to gain his perspective. The right of the accused to have “a say in his own defense” has been a cornerstone of Anglo-American law since the Magna Carta, but still is too often ignored. The excuses for doing so are inexcusable: “We already knew he was guilty because other witnesses were so credible,” “An eyewitness identified him, so there was no need to interview him,” “He provided an affidavit and that was sufficient.” Failure to interview the accused person will be argued as declining to

provide substantive due process rights during the investigative fact finding process; as such, it will almost assuredly be a key part of the defense for the accused.

3) **Realizing eyewitnesses seldom lie, yet are too often mistaken.**

There was a time prior to DNA testing when the word of an eyewitness observer was held to be inviolable. That era vanished as a shocking number of innocent people were sent to prison based on the words of eyewitnesses, only years later to be released by DNA testing (Collins 2009).

More recent studies by cognitive psychologists demonstrate that as humans we “look but don’t see,” make mistakes in memory, and have undependable intuitions (Hallinan 2009; Chabris and Simons 2010). This is why several eyewitnesses viewing the same event often time have widely conflicting memories of what they observed. As a consequence, the Fact Finding investigator should not assume that someone is being dishonest if two or more eyewitnesses disagree regarding what they remember. Nor should an investigator conclude that eyewitnesses are always right or that their testimony should be given conclusive weight when preparing findings of fact in the final fact finding report.

4) **Practicing transparency with each interviewee**

Too frequently, fact finding investigators are confused regarding the purpose of interviewing witnesses. It is not to trap the witness with leading questions. It is not to gain corroborating information to support what the investigator already believes to be the truth. The purpose of the interview is to clearly understand the witness’ point of view. In order to do so, *the notes taken by the interviewer must be **verified** by the witness **before** the interview is concluded.* This means the interviewer should employ one of the following techniques for verification: a) ask the witness to read his interview notes, b) read the notes to the witness, c) or summarize the notes for the witness. In each case, the witness should have the opportunity to ask questions. Most

importantly, the witness must be asked to either initial or sign that the notes are an accurate statement of his comments. Otherwise, the witness may later recant his statements or simply forget parts of his statement.

5) Destroying notes only after investigation is long over.

Do not be in a hurry to destroy your notes once you have interviewed a witness or even after the investigation has been concluded. The Manager who bases his or her decision to apply disciplinary action to an employee relies on your Fact Finding report. If that action is subsequently contested, you may be required to testify in a future arbitration or court hearing. If so, your notes are your only reliable guide to what the employee said or why you made particular decisions during the course of the investigation. Conversely, if the Manager decides to take no action against the employee and the media cries “cover up,” the interview notes will be your best defense. Remember, organizational leaders have many times attempted to make the investigator the “scapegoat” for their own inaction or incompetence. In such eventuality, your notes constitute solid documentation on your behalf. They also will help you to CYA (“cover your actions”).

References

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