

Fact Finding/ Investigating

The information in this section provides guidance for the agency planning group. It is not technical information for professional investigators; nor is it a summary of fact-finding or investigating procedures. Rather, it is intended to provide the agency planning group with a general overview of fact-finding/investigating considerations. It is also important to note that this section discusses investigations that are administrative inquiries as distinct from criminal investigations.

Introduction

I can't work here anymore. I'm afraid he may actually kill one of us.

The supervisor hears the details of the incident that is causing the employee to feel threatened. Now the supervisor has to do something. The incident can't be ignored. It must be reported. Once reported, the members of the incident response team (along with the supervisor) have to look into it.

What you need to know

As in all other serious administrative matters that come to the agency's attention, you probably want to learn more about what is going on in this situation. You want to know:

- ◆ **What** happened?
- ◆ **Who** was involved?
- ◆ **Where** it happened?
- ◆ **When** it happened?
- ◆ **Why** it happened?
- ◆ **How** it happened?

What to do next

Sometimes taking a few minutes for a cursory overview will give you enough information to know what to do next. Of course, if there is imminent danger, law enforcement must be notified immediately.

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However, if there is no imminent danger, deciding what to do next will depend on agency procedures and the strategy/relationship you have worked out ahead of time with your agency's Office of the General Counsel, Office of Inspector General, and the law enforcement organization that has jurisdiction over your worksite. (For information on law enforcement, see Part III, Section 5.) In most Federal agencies, these offices are notified immediately when certain types of reports are made, and they advise team members (or agency officials) on how to proceed with the investigation of the case.

Types of Investigations

Often, one of the first decisions to be made is whether to conduct an administrative or a criminal investigation. The answer will depend on whether the facts as presented indicate possible criminal behavior. Since arriving at a decision generally involves discussion with law enforcement personnel, the Office of the General Counsel, the Office of Inspector General, and employee relations specialists, it is imperative to coordinate efforts fully with these offices ahead of time. Also, as discussed below, an important point of these discussions is to ensure that actions taken by an agency during an administrative investigation do not impede potential criminal prosecutions.

Administrative Investigations

Use a qualified investigator

If a decision is made to conduct an administrative investigation, it is important to use a qualified and experienced professional workplace violence investigator. The agency planning group should locate one or more such investigators before the need for an investigator arises. Your agency probably already has qualified administrative investigators, for example, in the Office of Inspector General. Some other good places to look in your own agency are Employee Relations and Security. In some agencies, these offices have their own investigators. In others, they contract with private investigators, or utilize the services of investigators from other Federal agencies. In any case, they should be able to help you locate trained, qualified administrative investigators ahead of time.

Administrative Investigations (continued)

Ensure that criminal prosecutions are not compromised

It is important to use an investigator who conducts the investigation in a fair and objective manner. The investigation should be conducive to developing truthful responses to issues that may surface. It must be conducted with full appreciation for the legal considerations that protect individual privacy. It is imperative that an atmosphere of candor and propriety be maintained.

Criminal prosecutions must not be compromised by actions taken during administrative investigations. It is necessary to ensure that the administrative investigator, management, and all members of an incident response team understand that actions taken during an administrative investigation may compromise potential criminal prosecutions. If the agency obtains statements from the subject of the investigation in the wrong way, the statements can impede or even destroy the ability to criminally prosecute the case. On the other hand, if handled correctly, statements made in administrative investigations could prove vital in subsequent criminal proceedings.

Therefore, in a case where a decision is made to conduct an administrative investigation, and there is potential criminal liability, it is good practice to give the **subject** of the investigation what are usually called “non-custodial warnings and assurances.” That is, the person is given the **option** of participating in the interview after being warned that any statements he or she makes **may** be used against him or her in criminal proceedings. The option not to participate in the interview is exercised by the person’s invocation of his or her Fifth Amendment right against self-incrimination. Note: Since the person is not legally in custody, he or she is not entitled to an attorney.

If a decision is made to **compel** the subject of an investigation to participate in an interview (instead of being given an option to participate), the investigator should give *Kalkines*¹ warnings. This means that the person is told that (1) he or she is subject to discharge for not answering and (2) statements he or she makes (and the information gained as a result of these statements) **cannot** be used against him or her in criminal proceedings.

¹ Derived from *Kalkines v United States*, 473 F.2d 1391 (1973).

Administrative Investigations (continued)

Even if an investigator does not actually give *Kalkines* warnings, if the investigator compels the subject to give a statement, the information in the statement (**and the information gained as a result of the statement**) **cannot** be used in criminal proceedings.

Since this may make criminal prosecution impossible, an investigator should never give *Kalkines* warnings or compel statements from the subject of an investigation without the permission of the appropriate U.S. Attorney's or prosecutor's office. Such permission is usually obtained by the agency's Office of the General Counsel or Office of Inspector General. Since this is an extremely complicated consideration, be sure to work closely with your Office of the General Counsel, Office of Inspector General, and law enforcement organization. In potentially violent situations, it is often difficult to determine whether the misconduct is a criminal offense. When there is any doubt, check it out.

Additional considerations for the agency planning group, such as having well-defined agency policies on handling investigations, are discussed on page 89.

Preparation and Procedures in Administrative Investigations

A thorough and professional investigative product is the result of thorough, professional preparation and procedures. Personally obtaining information from individuals will constitute a significant part of any investigation. An awareness of the skills and techniques necessary for effective interviewing is required.

In preparing for and conducting investigations, experienced professional administrative investigators have found the following approaches to be effective.

Reviewing available information

The investigator, after thoroughly reviewing the information that gave rise to the investigation, is probably ready to begin the investigation process. Discrepancies or deficiencies in the information should be noted so they can be addressed during the interviews.

Preparation and Procedures in Administrative Investigations (continued)

Selecting an interview site

Since the investigator is conducting an official investigation, he or she should conduct as many interviews as possible in an official environment, i.e., in government work space (instead of restaurants, cars, or private homes). Privacy is the most important consideration in selection of an interview site. The investigator should guarantee that the room will be available for the entire interview, so that there is no disruption of the interview once it begins. The interview room should be comfortably furnished with as few distractions as possible.

Scheduling the interview

Depending on the circumstances of the situation, the investigator may or may not want to contact the individual in advance. In either event, the investigator should advise the individual of the general nature and purpose of the interview. If the individual declines the interview, the investigator should attempt to dissuade the individual and, if unsuccessful, ascertain and record the reasons for the declination. If the individual fails to appear more than once for the interview, the investigator should follow whatever policy has been decided upon by the agency ahead of time.

Allowing the presence of additional persons

There may be instances when the investigator or the individual being interviewed wishes to have an additional person present. In cases involving bargaining unit employees, see the discussion in the next section. Investigators sometimes prefer to have an agency representative present when interviewing the subject of the investigation. In any event, the investigator should follow whatever policy has been decided upon by the agency ahead of time.

Adhering to the law regarding bargaining unit employees

The provisions of law set forth in 5 USC 7114 (a)(2)(B), commonly known as “Weingarten” rights, cover any examination of a bargaining unit employee by a representative of the agency in connection with an investigation. If a bargaining unit employee reasonably believes that an investigation may result in disciplinary action, and requests union representation, the agency has three options:

Preparation and Procedures in Administrative Investigations (continued)

- (1) Immediately terminate the interview,
- (2) Continue the interview with the employee's representative present, or
- (3) Give the employee the option of proceeding with the interview without a representative or terminating the interview.

Since interpretation of this law is very complex, consult with your labor relations specialists or Office of General Counsel when faced with such situations. Note: The law is currently unsettled as to whether Inspector General investigations are subject to 5 USC 7114 (a)(2)(B).

Taking notes

Since watching an investigator take notes can be intimidating to some people, it is important to establish rapport before beginning to take notes. The investigator should concentrate on observing the individual during the interview. Note-taking should not unduly interfere with observation. Note-taking materials should be positioned inconspicuously and not become a focus of attention. The investigator should learn and exercise the skill of taking adequate notes while still observing the individual and without distracting the person being interviewed. In some cases, it may even be useful to have a second investigator or other official present to take notes.

Should note-taking have a materially adverse effect on the interview process, the investigator may explain the purpose of note-taking. The notes are intended for the investigator's use in preparing a report and are not a verbatim transcript of the interview. The investigator can modify or cease note-taking so long as the information can be recorded in adequate detail after the interview.

Maintaining control of the interview

Questions developed ahead of time can be memorized, but they should never be read verbatim from a list or recited in a perfunctory manner. The investigator should know in advance the topics of concern to be covered. The investigator should maintain a singleness of purpose during the interview. The investigator should resist any efforts to shorten the interview or drift from topics of concern.

Preparation and Procedures in Administrative Investigations (continued)

Developing rapport

The investigator should have a comfortable style that projects professionalism and competence. The investigator's style should generate rapport with the person being interviewed. An open approach that conveys a willingness to communicate generally fosters rapport. Rapport is evident when the individual appears comfortable with the investigator and is willing to confide personally sensitive information. Continuing rapport can oftentimes be maintained if the investigator does not become judgmental when disagreeable conduct or information is disclosed. The investigator who can project empathy when appropriate to do so often gains special insight but, at the same time, no investigator should get personally involved with the case.

Handling hostility

If the investigator feels threatened by the individual being interviewed, the investigator should stop the interview and report the situation to the appropriate authorities.

Investigators may encounter argumentative individuals. When this type of hostility is encountered, the investigator can seek to defuse it by explaining the purpose of the interview and that the interview is a required part of the investigation. Reminding the interviewee that the investigator has full authority to conduct the interview and that the interviewee is required to cooperate may lessen the reluctance. **[See, however, the discussion on page 81 regarding warnings that must be given when requiring the subject of an investigation to cooperate.]**

Recognizing and acknowledging the person's hostility and the reason for it will sometimes let both parties reach the mutual understanding that the interview will proceed (whether or not the topics under discussion are related to the hostility).

If, after repeated attempts in various ways, an individual refuses to answer a specific question, the investigator should attempt to learn the reason. The investigator should record the refusal to

Preparation and Procedures in Administrative Investigations (continued)

answer any question and the reason. If the individual wants to terminate the interview, the investigator should attempt to learn the reason and to dissuade the individual by addressing the concerns. If the individual persists, the investigator should conclude the interview.

Interview Techniques

This section contains questioning, listening and observing techniques and suggestions.

Questioning techniques

Questioning usually proceeds from general areas to specific issues. For example, comments on the dates and location of the incident are usually obtained before comments on the circumstances surrounding the event.

The investigator should usually frame questions that require a narrative answer. Soliciting “Yes” or “No” responses restricts the individual from providing information. Such responses are helpful when summarizing or verifying information, but they should be avoided when seeking to elicit new information.

The investigator should use questioning techniques that result in the most productive responses from the person being investigated. This requires the investigator to exercise judgment based on observation of attitude, demeanor, and actions during the interview. These may change at times during the interview. The investigator should be continuously alert to such changes and should modify questioning techniques accordingly.

Non-confrontational approach. The non-confrontational approach is best. Here are some examples of the non-confrontational approach.

- ◆ If a person refuses to answer follow-up questions about an issue, the investigator notes the refusal to answer and moves on to the next area of questioning. However, the investigator then comes back to the issue later.
- ◆ If the person raises his or her voice in the interview, the investigator maintains a calm, level voice, or lowers his or her voice.

Interview Techniques (continued)

Direct and non-direct questions. A direct question calls for a factual or precise answer. Direct questions are ordinarily used when covering background data.

Here are some examples of direct questions.

- ◆ *Who told you that he made a threat?*
- ◆ *When did you notice that he had a gun?*
- ◆ *What were the circumstances surrounding the argument?*

Non-direct questions are usually more appropriate in discussing opinions and feelings because they allow more latitude in responding.

Here are some examples of non-direct questions.

- ◆ *What led you to say that?*
- ◆ *What made that unusual?*
- ◆ *Has this happened before to anyone?*
- ◆ *What was your reaction when he yelled at you?*

Assumptive questions. Assumptive questions assume involvement in the activity under discussion. The investigator can use assumptive questions when involvement has already been admitted, either at some other time or earlier in the interview. Assumptive questions allow the investigator to assist the individual in describing the degree of involvement, particularly when it is difficult to respond narratively. The investigator puts the individual at ease when using assumptive questions by demonstrating that the investigator is not shocked by the conduct being discussed.

Here are some examples of assumptive questions.

- ◆ *Have you made similar statements to others?*
- ◆ *Is it fairly routine for you to carry a knife to work?*

Summarizing questions. Summarizing questions are used to verify what has been said in summary form. The investigator uses summarizing questions to give the individual an opportunity to hear what the investigator understood. In concluding each segment of the interview, the investigator should pause after asking a summarizing question to allow the individual to respond and verify, correct, disagree with, or amplify a previous response.

Interview Techniques (continued)

Here are some examples of summarizing questions.

- ◆ *In other words, it was not what he said, but the tone of his voice, that scared you?*
- ◆ *You're telling me that you were only joking when you said you'd blow up the place?*
- ◆ *Have I got this straight? You did not think he would actually carry out his threat?*

Listening techniques

Investigators should not be intent on listening for the end of an answer only so that they can get to the next question. The meaning and sense of the answers will be ignored and lost. Careful attention to each response is what provides the basis for the next appropriate question, not a checklist of questions.

The person being interviewed may be signaling a problem with the area under discussion by not immediately responding to a question. The investigator should be patient and let the person respond. The urge to complete a statement for the person with an assumption of what the person was going to say should be suppressed.

Listen to the whole response for its substance, inferences, suggestions, or implications that there is more to be said, or some qualification to the answer. Answers that are really non-answers, such as *that's about right*, or *you know how it is*, are not helpful because they are not definitive. Do not accept this type of response. Press for more specificity. Some people may attempt to avoid responding by blaming a faulty memory. Follow-up questions that can stimulate responses are, *Do you mean you're just not sure?* and, *But you remember **SOMETHING** about it, don't you?*

Investigators should both listen and think intensely throughout the interview, measuring what is being said with what is known from a review of what is already known. Compare new information to other statements made in the interview, and any other information in the investigator's possession.

Observing techniques

Questioning and listening are not the only communicative aspects of the interview. Actions may strengthen the credibility of the spoken word or contradict it. Body movement, gestures, and other observable manifestations provide clues to truth and

Interview Techniques (continued)

deception. The investigator should be alert to behavior changes throughout the interview and assess the significance of those changes. While no single behavior indicates truth or deception, clusters of behavior patterns may be valuable clues to the truth of what is being said. These patterns should prompt the investigator to pursue a certain or broader line of questioning.

Other Considerations for the Agency Planning Group

Here are other fact finding/investigating issues that the agency planning group should address:

1. Agency policy should be formulated ahead of time regarding such matters as no-shows, whether to allow tape recording of the interviews, and whether to allow the presence of additional persons during the interviews. Policy should be based on sound legal analysis.
2. Keep in mind that the routine, administrative details can't be ignored. Prior to beginning the actual investigation, the investigator should be given all administrative details, e.g., who gets the report and whom to contact regarding other administrative matters such as the investigator's pay, parking, and overtime.
3. Consider giving the investigator the list of factors the Merit Systems Protection Board will consider in making credibility determinations if the investigation leads to a case before the Board². They are:
 - (1) The witness' opportunity and capacity to observe the event or act in question;
 - (2) The witness' character;
 - (3) Any prior inconsistent statement by the witness;
 - (4) A witness' bias, or lack of bias;

² See *Hillen v. Army*, 35 MSPR 453 (1987).

**Other Considerations
for the Agency
Planning Group
(continued)**

- (5) The contradiction of the witness' version of events by other evidence or its consistency with other evidence;
 - (6) The inherent improbability of the witness' version of events; and
 - (7) The witness' demeanor.
4. Every step of the investigation should be objective, impartial, and unbiased.
 5. The investigative report will contain:
 - ◆ Statements of witnesses
 - ◆ Documentary evidence

The investigative report generally does not include an *analysis* of the report.
 6. Both the investigator and the person who prepares the analysis of the report should be objective, impartial, and unbiased.
 7. Consider developing a letter signed by the agency head or high-level designated official authorizing the investigation and requiring employees to cooperate. (See, however, the information on page 81 regarding warnings to the subjects of administrative investigations when it is necessary to require cooperation.)
 8. Ensure that all appropriate agency personnel are aware of the requirements discussed on page 81 regarding warnings when compelling statements from the subject of an administrative investigation.

Case Study 13 provides practical examples of some of the issues discussed in this section.
