Conducting Effective Internal Investigations
Module One: Planning the Investigation

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Overview of Course

• Purpose: providing guidance for best practices in conducting internal investigations. *Any* type of internal investigation.
Overview of Course

• Series of modules on the following topics:
  • Module One: Planning the Investigation
  • Module Two: Conducting the Investigation, Interviewing, and Information Gathering
  • Module Three: Reaching a Conclusion and Credibility Determinations
  • Module Four: Writing the Report and Post-Investigation Considerations

Module Overview

Types of Investigations
Value of Good Investigative Practices
Pre-investigation Considerations
Choosing an Investigator
Confidentiality v. Transparency
Receiving and Evaluating the Complaint
Notice
Interim Measures
Developing an Investigative Strategy or Plan
Public Relations Considerations
Types of Investigations

- Employee Discrimination
- Academic Integrity
- Research Misconduct
- Athletics Compliance
- Tenured Faculty Discipline
- Financial or Time Fraud
- Student Conduct

Types of Investigations

- What is the subject matter?
- Who is the respondent, if any?
- What is the process?
  - Institutional policies and procedures
  - Regulatory or statutory process
  - Legal requirements
Types of Investigations

What is the purpose of the investigation?
- Neutral?
- Privileged?

Types of Investigations

What is the role of the investigator?
- Fact-gathering?
- Proposed findings?
- Making a decision?
- Recommended action?
Why Good Investigations Are Important

• It’s about fair process for all institutions
• Procedural due process for public institutions
  o Property interest: notice and opportunity to be heard
  o Liberty interest: name-clearing hearing
  o Policy determines how much process is due

Substantive due process: decision-making is not arbitrary or capricious
Judicial deference for internal administrative investigations
Good management
Pre-Investigation Considerations

• Interim safety/preservation measures
  o Interim leave/suspension
  o Document retention
  o Sequestration of evidence

Pre-Investigation Considerations

• Concurrent investigations
  o Police involvement
  o Government investigator
  o Required notifications
Choosing An Investigator

- What type of case is it?
- Consider actual or apparent conflicts of interest
- Internal or external investigator?

Choosing An Investigator

Are there “political” issues to consider?
- Who are the parties?
- What are the issues?
- Review investigator’s background and training
- Investigator’s credibility and the process is at stake
Confidentiality vs. Transparency

• Tension between maintaining privacy and assuring fair process
• Limits on absolute confidentiality

Confidentiality vs. Transparency

• Applicable policy and law
• FERPA
• Research misconduct
• Employee discipline
Confidentiality vs. Transparency

• Privilege/work product protections
  o Scope may be limited
  o Waiver possible
• Public records
  o State-specific

Investigative Steps

1. Receive/Evaluate Complaint
2. Initiate Investigation/Notification Letters
3. Develop Investigation Strategy
4. Conduct Interviews
5. Gather other Information
6. Write Investigation Report
Receive/Evaluate/Document Complaint

- Written complaint vs. in person?
- Determine what laws, policies, procedures/practices apply
- Evaluate to determine if should be accepted

Evaluate/Document Complaint

- Harmani Case Study Issues:
  - Layoff
  - Harassment
Notice: Notify Respondent/Parties of Complaint

• Method of notification
  • Verbally?
  • In writing?
    • Letter or email?

Notice: Notify Respondent/Parties of Complaint

• Information to include:
  • What to expect during the process.
  • Any available resources, e.g., counseling, health/mental health services, representation
  • Prohibition against retaliation
  • Timing – what rights are triggered once notification provided?
  • Any required disclosures?
Interim Measures

- Purpose?
- Who has authority to impose?
- Types of circumstances that might warrant an interim employment/academic suspension?
- For employment, with/without pay?
- Process for implementing interim suspension? Due process considerations?

Investigative Plan

Benefits of written plan:
  - Keep facts straight
  - Keep investigation on course
  - Fill in to become investigative report
  - Particularly helpful with complicated cases
**Develop Investigative Plan**

- Frame allegations – identify definitions and standards of proof.
- What evidence do you need and how will you get it?
- Scope of investigation.

1. Determine scope of investigation.
2. Develop key questions based on scope of investigation.
3. Identify possible witnesses and other sources of information.
4. Determine order of interviews.
Public Relations Considerations

- Likelihood of publicity – Harmani has hinted about talking with the press
- Designated spokesperson?
- Limitations on information that can be disclosed

Investigation Plan – Key Questions

KEY QUESTIONS to Inform Your Strategy Using the Harmani Case Study

1. Was the conduct based on race, national origin, or other protected basis?
2. Was the conduct unwelcome? Did R know/should’ve known?
Investigation Plan – Key Questions

3. Subjective: Was the conduct sufficiently serious to create a hostile, intimidating, or abusive environment for Complainant?

4. Objective: Was it reasonable for Complainant to believe that the conduct created a hostile, intimidating, or abusive environment?

Investigative Plan - Standards

What is the burden of proof?
- Preponderance?
- Clear and convincing?

Who bears the burden of proof?
- On institution?
- On parties?
Investigative Plan – Harmani – Layoff – Discrimination

Guiding document: East Coast University Policy on Discrimination and Harassment

• Basis for the alleged policy violation?
• Elements of the definition?
• *Prima facie* case – member of protected group, adverse action, others treated better?
• Legitimate, nondiscriminatory reason?
• Pretext?

Investigative Plan – Harmani – Layoff – Retaliation

Guiding documents: East Coast University Policy on Discrimination and Harassment, FMLA Policy, any relevant policies re whistleblowing

Elements:

• Protected activity
• Adverse action
• Causal connection
• Legitimate nonretaliatory reason
• Pretext
Investigative Plan – Harmani – Harassment

Guiding document: East Coast University Policy on Discrimination and Harassment

• Unwelcome conduct
• Based on (religion/sex?)
• Severe, persistent, and/or pervasive
  • Subjective/objective

Questions
Note

• This training does not cover investigations conducted under the 2020 Title IX Regulations. Other NACUA courses cover those types of investigations.

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