Workplace Investigations
A Practical Guide for City Attorneys

Presented to: League of California Cities
Date: July 29, 2015
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Presentation Overview

• Why Investigate?
• City Attorney’s Role
  – Responding to Complaint
  – Defining Investigation
  – Overseeing Investigation
  – Concluding Investigation
Presentation Overview-Key Issues

- Whether an investigation is necessary
- Immediate interim measures
- Privileges and waiver
- Safeguarding employee rights
- Disclosure of results
WHY CONDUCT WORKPLACE INVESTIGATIONS?
Legal Duty to Investigate

• FEHA
  – “Take all reasonable steps to prevent discrimination and harassment from occurring.”
  – Gov. Code § 12940(k)
Legal Duty to Investigate

• Title VII
  - “Take all steps necessary to prevent harassment from occurring.”
  - 29 C.F.R. Section 1604.11(f).
Investigations Reduce Liability

• California
  – May reduce liability for harassment claims
    • Limit damages to date employee made complaint
      • McGinnis
  – Good faith basis for adverse employment action
    • Cotran and Silva
Investigations Reduce Liability

• Federal
  – No liability for harassment claims
    • No tangible action
    • Employer took action to prevent and correct harassment
    • Employee failed to avail itself of preventive corrective measures
  • Ellerth and Faragher
Consequences of Failure to Investigate

- Violation of City policy and state and federal law
- Policies perceived as ineffective and meaningless
- Discourages complaints
- Undermine City’s defense
  - Bolster weak claims
  - Evidence of pretext/retaliation
  - Reversal of discipline
  - Undermine summary judgment
  - Significant liability exposure
RESPONDING TO THE COMPLAINT
When to Investigate

Alleged conduct, if true, could lead to discipline

- Harassment, discrimination, retaliation
- Alcohol or drug use
- Violence or threats of violence
- Dishonesty
- Attendance
- Insubordination
- Falsification of records
- Criminal conduct
Interim Actions

• Assess safety issues
• Take immediate action to stop ongoing harassment or harm
• Anti-retaliation steps
• Preserve evidence
• Establish notification protocol
Interim Measures – Administrative Leave

Should Respondent Be Placed On Paid Administrative Leave?

- Civil service employees: due process rights
  - Unpaid leave
  - Involuntary retirement
  - Paid involuntary leave

- At-Will employees: liberty interest
Interim Measures – Administrative Leave

Can Complainant be Moved?

• No involuntary transfer = retaliation
• What is Complainant’s preference?
Interim Actions – High Ranking

- Respondent a direct report to City Manager
- Respondent an elected official
  - Confidentiality key
    - Who is final decision-maker?
    - Who will hear disciplinary appeal?
DEFINING THE INVESTIGATION
Who Should Investigate?

- Qualities of Investigator:
  - Impartial
  - Professional
  - Experienced
  - Available
  - Knowledgeable of relevant laws, policies
  - Excellent writing skills
  - Strong witness
Who Should Investigate?

• Internal vs. External
  – Internal Investigator
    • Supervisor
    • In-house HR
    • In-house attorney
  – External Investigator
    • Outside Counsel
    • Outside special counsel
    • Outside qualified HR professional
Use of External – High Ranking

- Liability exposure
- Remove potential conflicts of interest
- No role in future disciplinary action
- Potential perceived bias of internal investigator
Using Outside Investigators

California Private Investigator Act ("CPIA")

- State licensed private investigator, or
- State licensed attorney
- Unlicensed human resources consultants *cannot* legally conduct workplace investigations
  - Cal. Bus. & Prof. Code §§ 7520-7539
CPIA - Attorney Exemption

- Attorney does not have to be a licensed private investigator
- Must be acting as an attorney
- Fact-finding is a necessary part of rendering legal services under CIPA
  - Cal. Bus. & Prof. Code § 7522(e)
Investigations by Attorneys

Special Considerations

• Duty to notify City of “reasonably foreseeable legal problems” discovered during investigation

• Fiduciary duties
  – Competence, loyalty, avoid conflicts of interest, protect confidential information

• Ethical duties
  – No communication with represented employees
Attorney-Client Privilege

• **Dominant Purpose Test:**
  - Dominant purpose of workplace investigation must be to obtain legal advice or legal services
  - *Costco Wholesale Corp.*
Investigations by Attorneys

Anticipate Waiver of Privilege

- Investigation report key evidence to defend employment claims
  - Must waive privilege to rely on investigation in defense
    - *Wellpoint*
- Report as basis for disciplinary action
  - Must produce all documentation relied upon by decision-maker
    - *Skelly*
Investigations by Attorneys

Anticipate Waiver of Privilege

• Structure investigation to secure protection of legal analysis

• Bi-furcation of fact-finding and legal advice to decision-maker
  - Kaiser Foundation Hospital
Retaining The Investigator

- Define Scope
  - Limit to set allegations
    - Identify in scope of work
  - No work beyond scope without authorization
    - Only City Attorney power to expand scope or order a separate investigation
  - Communications not privileged
Retaining The Investigator

- Investigator’s Role
  - Factual Findings
    - Specify that City Attorney will rely on report to render legal advice
  - Define Findings
    - Sustained, Not Sustained, Unfounded
  - Require Credibility Determinations
  - Affirm Independence
Retaining The Investigator

- Communication Protocol
  - Right to Representation
    - Safety: right to representative of choice
    - Non-safety: right to union representative
  - Recording of Interview
    - Safety: right to record
    - Non-safety: no right
  - Recalcitrant witness
    - Lybarger warning
Retaining The Investigator

• Communication Protocol
  - Employer representative
  - Limit communications
    • Maintain communications re legal advice separate
  - Proper advisements
    • Safety officers
      - Nature of investigation before interview
  • Anti-retaliation policy
Considerations for High Ranking

• Strong public interest in disclosure of report
• Potential for leaks in confidentiality of investigation
• Strong investigator to protect integrity of process
CONFIDENTIALITY AND PRIVACY
City’s Interest in Confidentiality

- Support investigative process
- Protect privacy rights of parties and witnesses
- Protect parties and witnesses from retaliation
- Protect evidence
- Preserve privileges
Employee’s Interest –Concerted Activity

• Meyers-Milies-Brown Act (”MMBA”)
  - Right to freely participate in activities of employee organizations, including open discussion regarding working conditions
Employee’s Interest – Free Speech

• First Amendment right to speak freely on matters of public concern
Limitation on Confidentiality

• Balancing Test: Does City’s Legitimate Business Justification Outweigh Associational Rights

  - Will dissemination of information about investigation/complaint among employees interfere with City’s ability to conduct effective investigation?
No Blanket Confidentiality

- Federal Law: National Labor Relations Board ("NLRB")
  - Blanket policy that prohibits employees from discussing complaint under investigation violates employee’s associational rights
  - Employee entitled to ask co-workers for help to preserve evidence for a harassment claim
    - Banner Health
No Blanket Confidentiality

- California Law: Public Employment Relations Board ("PERB")
  - No-contact instruction issued pursuant to standard policy interfered with employee’s associational rights
  - No specific showing of risk that employee would taint evidence
    - Perez v. LACC
Limitation on Confidentiality

• Blanket confidentiality instruction does not justify restrictions on employees’ associational rights
  – City must make specific showing of need to justify issuance of confidentiality instruction while investigation is pending
Protecting Confidentiality

- Modify any policy that requires blanket confidentiality instruction
- Adopt case-by-case approach
- Specify investigation under attorney-client privilege
- Except union and attorney from any instruction
OVERSEEING THE INVESTIGATION
Overseeing the Investigation

**Limited Role**

- Scope issues
- Due process issues
- Retaliation issues
- Investigation on track?
  √ Prompt, fair, thorough
CONCLUDING THE INVESTIGATION
Concluding The Investigation

• Review of Report
  – Is investigation properly documented?
    • Scope
    • Investigation process
    • Applicable policies/procedures
    • Evidentiary standard
    • Identification of evidence
    • Summary of evidence
    • Evaluation of evidence
    • Statement of findings
Concluding The Investigation

Review of Report

• Are findings consistent with scope?
  – Findings of fact
  – Well-reasoned
  – Credibility determination

• Proper evidentiary standard?
Concluding The Investigation

Review of Report

- Handling Deficiencies
  - Discoverability
  - Draft report
  - Contract management
  - Resolve evidentiary issues
  - Seek clarification
Concluding The Investigation

Considerations

- Nature of allegations
- Respondent’s status
- Potential conflict
- Potential liability
  - Enforcement action/civil action/discipline
PROTECTING REPORT FROM DISCLOSURE
Protecting Report From Disclosure

- Privileges that may provide protection
  - Attorney-Client
  - Attorney Work-Product
  - Deliberative Process
  - Closed Session Reporting
  - Employee’s Right to Privacy
Protecting Report From Disclosure

Disclosure to Complainant

- Do not:
  - Volunteer disclosure of report
- Do report:
  - Outcome
  - Appropriate action being taken
  - Anti-retaliation process
  - Thank employee
- May have to disclose if subsequent claim
Protecting Report From Disclosure

Disclosure to Respondent

- **Disciplinary action:**
  - Disclosure required in *Skelly* process
    - What decision-maker relied on
    - Redact to protect privacy rights of third parties

- **No disciplinary action:**
  - No obligation to disclose for non-safety*
  - Report results
  - Anti-retaliation reminder
Disclosure to Public Safety Officers

• “Adverse Comment” Rule:
  - Notice and opportunity to respond to “adverse comments” in personnel file
    • Gov. Code §§3305 and 3255
  - Any document that may affect employment
  - No need for direct punitive action
  - Document maintained in any file
    • Not necessarily entitled to entire file
  - Applies regardless of outcome of investigation
Protecting Report From Disclosure

Disclosure to Union

- In response to demand for disclosure, City may:
  - Assert objections based on privileges
  - Demand showing that information is necessary and relevant to representation
Disclosure to the Union

• “Necessary and Relevant” Standard:
  – Under the MMBA, Union entitled to information that is “necessary and relevant” to representation of members
  • Gov. Code §3505
  – Refusal to provide report or portions of it may constitute an unfair labor practice.

City of Redding
Protecting Report From Disclosure

Disclosure to Union

• Necessary and Relevant?
  ≠ General concern with investigation process or outcome insufficient
  ≠ Investigation of employee outside bargaining unit insufficient
  √ Concern of potential ongoing harassment and unsafe working conditions of members sufficient
Disclosure to the Public

• “Substantial Nature” and “Reasonably Well-Founded” Standard:

• Under California Public Records Act (“CPRA”), personnel records are generally exempt from disclosure.
  – Gov. Code §6254(c)

• Apply balancing test for disclosure of investigation reports that reflect allegations of a “substantial nature” and are “reasonably well-founded.”
• Substantial Nature & Well Founded?
• ≠ Unfounded charges against attorney
  – Irreparable harm to reputation
Protecting Report From Disclosure

Disclosure to Public

- Substantial Nature & Well Founded?
  - High ranking official: investigation of sexual harassment of pupils by superintendent following voluntary resignation
  - Position of trust: investigation of alleged sexual harassment of pupils by teacher who received reprimand
  - Redact to protect privacy
Protecting Report From Disclosure

High Ranking Managers and Officials

• Greater likelihood of disclosure
  – High rank
  – Position of trust

• Name clearing
  – Nature of finding
    • Sustained
    • Not sustained
    • Unfounded
Post Investigation Measures

- Implement remedial measures
  - Training
  - Create/revise policies and procedures

- Disciplinary process

- Protect against Retaliation

- Prepare City’s defense
High Ranking Respondents: Recap

- City’s duty to protect employees extends to conduct of elected officials
- Notification Protocol
  - Chain of Command
  - Need to know
High Ranking Respondents: Recap

- Conflicts of Interest
  - Final decision-maker
  - Who reviews appeal of decision

- External investigator

- Prepare for disclosure of report/portion thereof
QUESTIONS?