

HR 101 - Responding to Complaints



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Why Complaint Responses Matter

- It's the law
- Detect discrimination or other unlawful or harmful conduct
- Expectations of parents/school community
- Basis for personnel action and/or student discipline
- Protect district and individual administrators from liability
- Sound complaint investigations and responses give administrators more control
- Public perception of the District, its programs/practices and its responsiveness to allegations and concerns

Failure to Respond

**FAILURE TO
PROPERLY
RESPOND MAY HAVE
NEGATIVE RESULTS**



Breach of legal duty to ensure health, safety & welfare



Charges of unlawful discrimination



Violations of District policies & regulations



Poor morale and poor productivity



Higher absenteeism and turnover



Damage to District reputation & difficulty attracting new staff

Common Mistakes in Complaint Processing

- 1 Applying the wrong complaint procedure
- 2 Failing to gather sufficient information
- 3 Failure to comply with complaint procedures
- 4 Failure to document compliance with complaint procedures
- 5 Letting the complainant (or other outside factors) dictate your complaint procedure
- 6 Lack of progressive intervention + follow through

Steps for Responding to a Complaint

- **Step I:**
 - Determine the Applicable Law/Policy/Procedure
- **Step II:**
 - Determine the Scope of Investigation
- **Step III:**
 - Commence Interviews/Gather Evidence
- **Step IV:**
 - Formulate Findings
- **Step V:**
 - Remedy/Steps Going Forward



STEP I - Determine the Applicable Law/Policy/Procedure

Complaints May:

- Allege violations of law
- Allege violations of policies, regulations, or procedures
- Allege violations of agreements
- Some are unclear, or overlap (e.g., “I’m being harassed.”)

Because Complaints Vary, You Must Identify the Applicable Complaint Procedures

Why Is The Correct Complaint Procedure Important?

- It will serve as a road map for how to investigate the complaint
 - Timelines
 - Notices
 - Necessity of outside investigator
- It can determine status of parties during investigation
 - Paid administrative leave?
 - Separate worksites?
 - Confidentiality?
- Internal notifications
 - Does applicable complaint policy require a record/log of complaint?
 - Notification to District administrator?

Complaint Procedures Identify the Process for Response and Resolution

- 1 Complaints Concerning the Schools
- 2 Complaints Concerning Employment Discrimination
- 3 Sexual Harassment Complaints
- 4 Personnel Complaints
- 5 Employee Grievance (or other CBA Complaint Procedures)

Sample Board Policies

BP 1312.1 – Complaint Concerning District Employees

BP 1312.2 – Complaint Concerning Instructional Materials

BP 1312.3 – Uniform Complaint Procedures

BP 1312.4 – Williams Complaints

BP 4030/4031 – Non Discrimination in Employment

BP 4119 – Sexual Harassment

BP 4119.12 – Title IX

BP 4144 – Personnel (Non-discrimination, non-harassment)

Pop Quiz – Identify The Correct Complaint Procedure

- Jack is a school custodian who files a complaint against his co-worker, Annie, an English teacher who routinely interferes with Jack’s work by engaging him in unwanted conversations about her cats.
- Two years later, Annie files a complaint against Jack after she overheard him speaking to a co-worker bragging about how he doesn’t clean Mr. Howard’s classroom because “I don’t trust guys who are missing half their fingers!” (**Mr. Howard has, in fact, had several fingers amputated*)
- A year after that, Mr. Howard files a complaint against his supervisor for not allowing him to take personal necessity leave when he requests it.



What Do You Know, And When Did You Know It?

Strategy – Assess who in your Department/District needs to know how many District complaint procedures there are and develop a plan to:

- (1) ensure the right people know the right procedures, and
- (2) maintain that knowledge.

It would be helpful to do the following:

- Checklists
- Department memos
- Determine other methods of assessment/dissemination



STEP II — Determine Scope of Investigation

- i. Consider nature of allegations
- ii. Consider number of allegations
- iii. Consider number of witnesses
- iv. Consider potential documentary evidence
- v. Consider remedy sought/possible resolutions



Hypothetical

An employee (Reginald) receives reasonable accommodation for a disability. Reginald alleges that his supervisor is treating him differently because he clearly favors his co-worker, Maude, because he allows her to take longer lunch breaks than him. The supervisor also lets Maude park in his reserved supervisor parking spot, but when Reginald tried to park there once, the supervisor yelled at him and called him “insolent.” Reginald files a formal complaint alleging discrimination...

- Is this a discrimination complaint?

Practice Tip - Creating Multiple Investigation Tracks

Occasionally, a complaint will include multiple allegations that could be processed by more than one complaint procedure.

In such cases, although not required, it may be useful to separate out complaints by type, creating multiple investigation tracks.

Pros:

- Minimizes appeal procedures and other obligations for minor allegations of misconduct or things that can be handled informally
- Can make large, unwieldy complaints more manageable by breaking them down

Cons:

- Creates more work, potentially more employees involved in the investigation process, and coordination of different timelines
- Can create problems if there is not good communication and coordination of all investigations



Creating Multiple Investigation Tracks - Example

Investigation #1

- Floyd (PE Teacher) has accused Manny (from the IT Dept.) of sexual harassment.
- Floyd says Manny has been loitering around his classroom, giving him unwanted gifts, and sending inappropriately intimate emails

Investigation #2

- Floyd also asserts (based on what Manny has told him) that Manny has been taking unusually long lunch breaks, missing up to half a day of work at times

Investigation #3

- Floyd adds that he has previously complained about Manny's behavior to the site principal, Oscar, but was told to "stop worrying about Manny and do a better job in the classroom."
- Floyd adds that he believes Oscar and Manny are very good friends and socialize often outside of work.

Preparation

- Determine interview location
- Determine what documents might be relevant
- Determine the parties and witnesses to interview
- Outline questions/topics
- Select an appropriate investigator
- Determine status of parties during investigation
- Provide any necessary internal notifications

Practice Tip – Create a Checklist to Ensure Procedures Aren't Missed

- Confirm the correct complaint procedures
- Confirm the appropriate investigator
- Confirm timelines
- Confirm required notices
- Organize the evidence
- Confirm findings and conclusions
- Confirm corrective action, if any
- Confirm appeal rights offered, if any



Legal Requirements for Investigations

- The Supreme Court held that the employer does not have to prove that the alleged misconduct occurred, but rather the employer need only prove that it had a reasonable, good faith belief that the wrongful conduct took place.
 - *“A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.”*
- *Cotran v. Rollins Hudig Hall Int'l* (1998) 17 Cal.4th 93 (“Cotran”)

STEP III — Commence Interviews/Gather Evidence

- i. Witness(es) Interviews
- ii. Respondent's Interview
- iii. Physical Evidence
- iv. Documents
- v. Complainant's Interview



Good Investigation Strategies

Investigation Do's

- Investigator should be uninvolved with the complaint incident
- District should be able to show the investigator has relevant training
- Utilize the correct complaint procedure
- Ask open-ended questions to elicit facts rather than opinions

- Investigator should not be a party to complaint incident nor immediate supervisor
- Do not reach conclusions until after speaking with the relevant individuals
- Do not rely on written statements alone
- Do not be hesitant to follow up

Investigation Don'ts

Investigations - Know Your Evidence

Direct Evidence

- Evidence that someone directly observed or heard firsthand
- e.g., each participant in an argument can provide direct evidence of what occurred

Circumstantial Evidence

- Evidence that provides an inference of guilt or innocence
- e.g., after student files a sexual harassment complaint, professor gives student a low grade

Corroborating Evidence

- Any evidence which supports other evidence
- Roommate says complainant told her about harassment on the day it allegedly occurred

Complainant's Interview

- i. Ask who, what, where, when, why, how?
- ii. Ask for corroborating evidence/witnesses
- iii. Ask for a demonstration
- iv. Take notes/be a good listener
- v. Observe demeanor/emotions
- vi. Maintain the scope of the investigation
- vii. Follow up where necessary

Witness Interviews

- i. Determine which witnesses to interview first
 - E.g., eyewitnesses, character witnesses
- ii. Ask about relationship with Complainant and Respondent/ask about character
- iii. Take note of statements that corroborate/conflict with the allegations
- iv. Observe demeanor/emotions
- v. Thank them for participating and direct them to maintain confidentiality

Respondent's Interview

Respondents must be given an opportunity to respond to each allegation (confirm or deny)

- i. Ask who, what, when, where, why, how?
- ii. Ask for corroborating witnesses/evidence
- iii. Ask about relationship with Complainant
- iv. Provide copy of Complaint?
- v. Observe demeanor/emotions
- vi. If reluctant:
 - Explain your role/advise that failure to participate may weigh against him/her
 - Possible grounds for discipline?

Employee's Right to Representation During Investigations

• *NLRB v. J. Weingarten, Inc. (1975)*

An employee may be represented by the union at an **investigatory interview** with his or her employer when the employee **reasonably believes** that the interview may lead to a **disciplinary action**.

Rule applies whether interview is live or conducted remotely, on campus or off campus.



Employee Right to Representation, cont.

Does employee have the right to union representative of his/her choice?

Does the employee have the right to a union representative during an annual evaluation meeting or other routine meeting?

Must an employer postpone an investigatory meeting to allow employee to secure a union representative?

Physical Evidence & Documentation

- i. Go to the school site, classroom, etc.
- ii. Gather physical pieces of evidence
- iii. Review photographs, social media
- iv. Review emails, memorandums, text messages, personnel file, etc.



**Investigations aren't
always just office
interviews!**

STEP IV – Formulate Findings

- Organize the Evidence
- Make Credibility Determinations
- Make Factual Findings
 - Know your evidence and weigh
 - Understand the applicable burden
- Prepare Report
- Optional: Prepare Letter of Findings

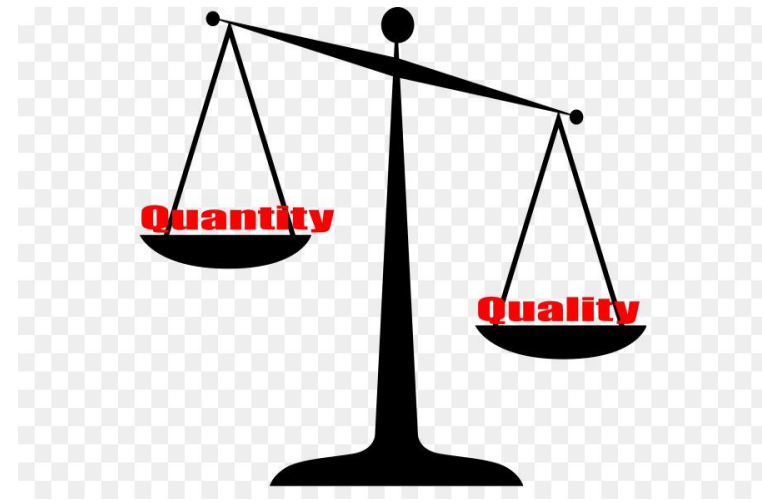


Organizing the Evidence

- Review all of the evidence gathered
 - Review all of the relevant documents, tangible evidence and your interview notes
 - Review all of the applicable policies, regulations or other procedures again
 - Go back and ask clarifying questions if there are gaps, confusion, or you need more information to make a credibility determination
- Make sure subsequent findings are based on existing evidence

Organizing the Evidence

- Weigh the Evidence for Each Allegation
 - You are governed by a “preponderance of evidence” standard. That means you are looking to see if a simple majority (50% plus a feather) of the evidence weighs more on one side. A hunch or speculation is not evidence.
 - You must determine what weight to give the evidence you have – some evidence may be more reliable; some may be less reliable.
 - Hearsay evidence is evidence – but consider what weight to assign.



Credibility Determinations

Relevancy to Investigations

- Investigators must make determinations, even when there is a dispute in the evidence
 - Conflicting witness stories (“he said, she said”)
- Credibility also helps determine elements of the cause for investigation
 - Welcome versus unwelcome in sexual harassment claims
 - Negative impact in work environment

Credibility Determinations, cont.

Are you qualified to determine credibility?

- People make credibility assessments every day
- Jury members assess the credibility of witnesses
- Administrators regularly assess the credibility of students and employees



Prior to Making Factual Findings

- Do not reach conclusions until after reviewing all relevant evidence and speaking with all relevant individuals
- Do not rely on written statements alone
- Do not be hesitant to follow up

Make Factual Findings

- Make a Factual Finding for Each Allegation
 - A factual finding is a conclusion about what happened, based upon the preponderance of the evidence.
 - Look at each allegation separately before you make conclusions about the whole complaint.
 - For example, in a hostile environment sexual harassment complaint, you should make a finding about each factual allegation before you determine if there was a pervasive pattern of sexual harassment that violated the sexual harassment policy.

Prepare a Report

- Prepare a Confidential Investigation Report. A possible model:
 - The beginning of the report should set forth the date the complaint was received, the names of all people interviewed, the documents reviewed and the procedures you followed
 - Write-up each allegation separately
 - Explain pertinent evidence gathered which was relevant to that allegation
 - If there are conflicts in witness testimony regarding material facts, you will need make a credibility determination (i.e., decide whom to believe) and explain the reasons for your credibility determinations

Prepare a Report

- Prepare a Confidential Investigation Report. A possible model (continued):
 - After describing the evidence, make a factual finding.
 - If appropriate or necessary, draw a conclusion (e.g., Respondent did/did not violate District policy)
 - Continue this pattern of analysis until you have discussed all the allegations.
 - Prepare a final analysis and conclusion at the end of the report. Depending on the direction given to the investigator, the conclusion may or may not include recommendations with regard to the District's response.

Letter of Findings

- Summary of the Investigation
 - Investigation Procedure
 - Allegations and Findings of Fact
 - Separate each allegation and what the findings were immediately below each allegation
 - Address what evidence was used determine findings
 - Conclusions of Law and Policy
 - Corrective Actions, if applicable
 - Appeal Rights
 - Conclusion

Practice Tip – Be Able to Show Your Work

- Complaint
 - Including any allegations made separate from the complaint form (email, letters, etc.)
- Notices
 - Includes before, during, and after investigation
- Evidence
- Investigation Notes
- Closing documents/corrective or disciplinary action



STEP V – Remedy/Steps Going Forward

- **Remedy**

- Determine an Effective Remedy

- If the Complainant was found to have merit, the employer or administrator must determine how to implement an effective remedy
- An effective remedy includes action reasonably calculated to end the misconduct by imposing sufficient penalties on offender

- **Correction**

- **Discipline**

- Know your evidence and weigh

- Understand the applicable burden (statutory reqs., contract reqs., etc.)

- **Communication**

- Communication immediately following investigation/findings

- Follow-up communications and steps

- **Appeal Rights**

- Depending on the type and nature of the complaint, an appeal process may continue during or even after corrective/disciplinary action has been implemented

Additional Considerations

- Real World Practical Issues
 - Dealing with parents, including whether to tell parents in advance when children will be interviewed
 - Dealing with students
 - Dealing with rumors
 - Dealing with the press
 - Dealing with the accused employee
 - What if we are 99% sure the allegations are complete untrue/fabricated?
 - Unrealistic expectations by parents/complainants

Additional Considerations

- Real World Practical Issues
 - The report and District response could be public records
 - Union involvement and demands
 - Need to be fair and impartial **and** to appear to be fair and impartial
 - Thoughtfulness of all communications:
 - Emails last forever
 - Discussions of investigation with persons other than complainant/accused

How Does A Complaint End?

Notice

- Requirements will usually be found in policy/procedure
- Be mindful of privacy/confidentiality requirements
- Even where no procedure, due process requires some degree of notice of findings/conclusions

Appeal

- Requirements will usually be found in policy/procedure
- Be mindful of statutory appeal requirements
- Will depend on the investigation findings/conclusions

Corrective Action

- Make sure there is documentation
- Always prudent to confer with peer administrator/supervisor

Hypothetical

A former employee is appropriately released without cause (classified probationary.) On her way out, she makes several serious allegations against her co-workers. District conducts a thorough, appropriate investigation and concludes the allegations are not substantiated. After receiving a summary of the investigation findings, employee insists the District got it wrong, and repeatedly calls for further investigation.

- What should the district do?

Agencies that Handle Discrimination, Harassment & Retaliation



- California Civil Rights Department (CRD)



- U.S. Equal Employment Opportunity Commission (EEOC)

CRD Complaint Procedure

- Department will investigate complaint, unless class action
- Complaint provided to employer within thirty (30) days, if represented by counsel then sixty (60) days
- During investigation process, resolution of dispute to include mediation
- Merit to complaint: file civil complaint or suit
- No-merit to complaint: issue right-to-sue notice (one-year statute) **or** request right-to-sue letter
- Trial

EEOC Complaint Procedure

- 1 Complaint, notice and copy received within 10 days
- 2 Investigation, in person or by phone
- 3 Findings, if violation occurred then referred to EEOC legal staff for lawsuit or notice-of-right-to-sue
- 3 Findings, if no violation occurred then provides notice-of-right-to-sue
- 4 Trial

CRD | EEOC Complaint Response Tips

- ✓ Prepare a response in letter format
- ✓ Remember the response may be discoverable
- ✓ Include performance/conduct issues related to complainant
- ✓ Include what has been done to mitigate conduct/issues

Question & Answer

Thank You

For questions or comments, please contact:

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