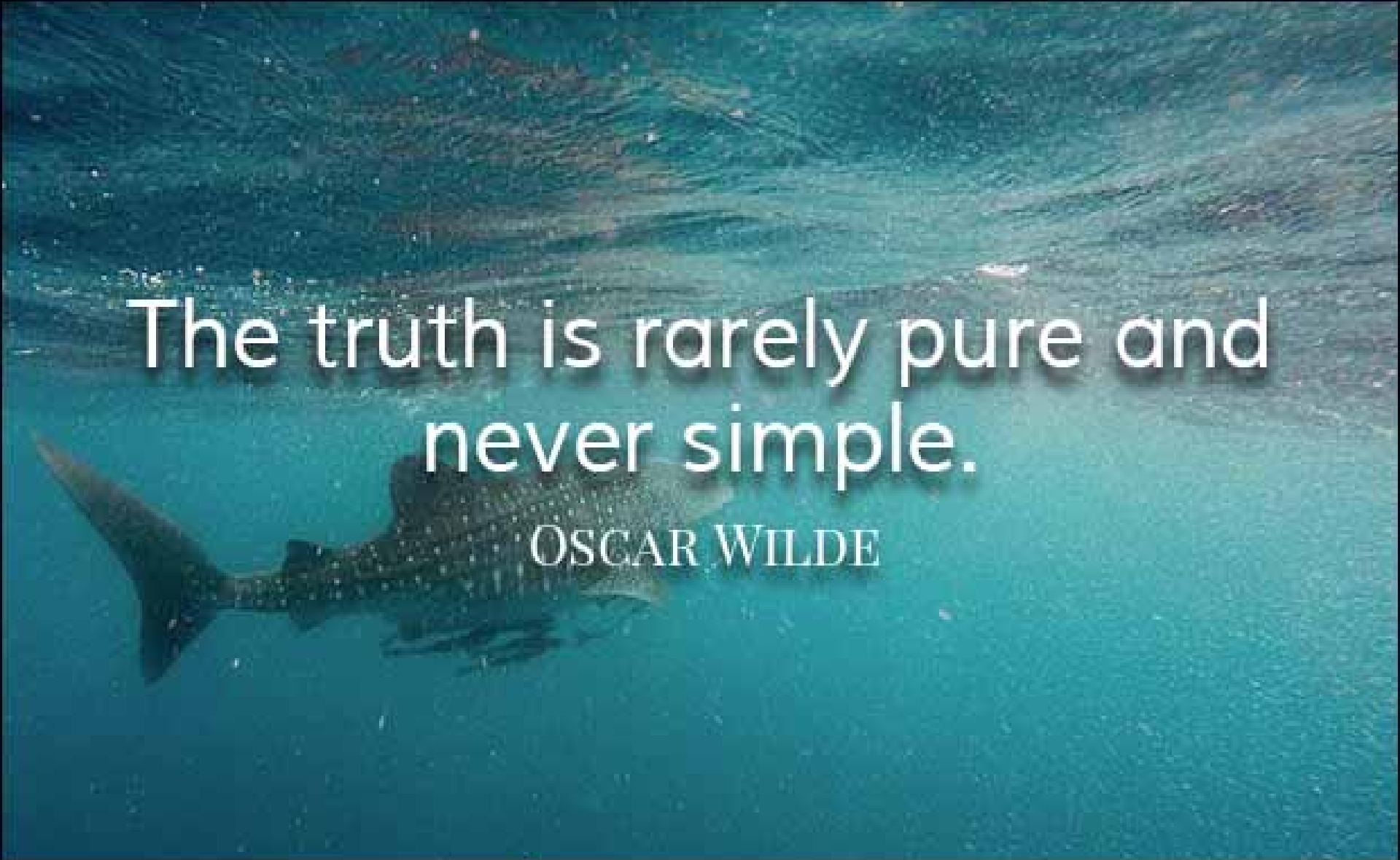


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# Fact Finding for Disciplinary Action

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The truth is rarely pure and  
never simple.

OSCAR WILDE

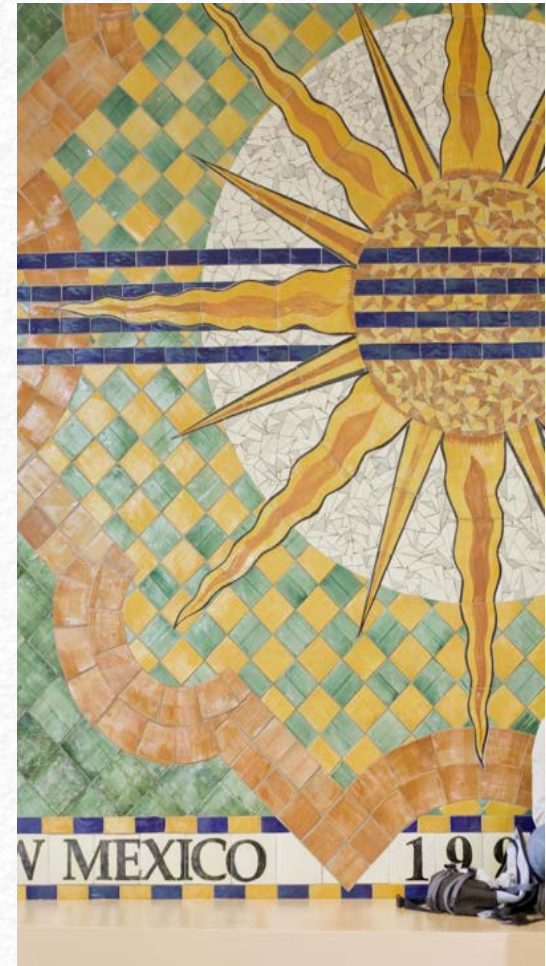




# Agenda

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- Importance of Fact Finding
- Fact Finding and Disciplinary Action
- What Requires Fact Finding
- Interviewing
- Reviewing Documentation
- Making Decisions
- Conclusions

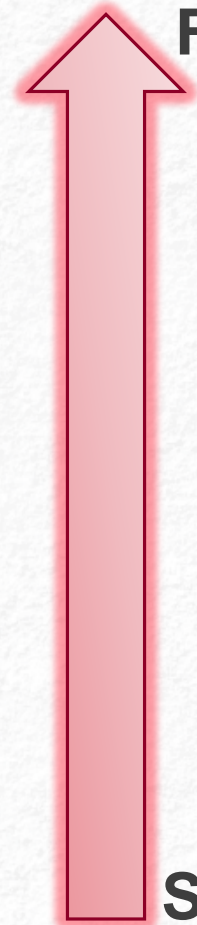




# Fact Finding

# Fact finding Levels

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**Full fledged investigation**

**Short conversation with the employee**



# Fact Finding Continuum

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First discovery of  
issues or minor  
issues



Continued issues or  
major issues

# Fact Finding and Disciplinary Action

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- What do you consider disciplinary action?
- Currently, what steps do you complete before taking disciplinary action?



# Fact Finding

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Fact Finding is an integral part of maintaining a comprehensive safe and healthy work environment. It is important to determine:

- If the behavior/action that was misconduct.
- Any laws/policies/collective bargaining agreements/work rules that may have been violated.

**It also is important to:**

- Remain neutral while gathering facts;
- Use the Elements of Just Cause when disciplinary action will be involved; and
- Ask: **What, Why, When, Where, How**



# Fact Finding

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## GENERAL CONSIDERATIONS

- Does the department have a clear practice, policy or procedure for the item in question?
- Has the department communicated **clearly** and **often** the expectations for adherence to practice, policy and procedures?
- Has the department been transparent regarding consequences around practice, policy and procedures?

# Fact Finding

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You should contact your HR Consultant first. Then gather and review facts. Escalate findings to your HR Consultant and determine one of the below outcomes:

- Take Disciplinary Action
- No Disciplinary Action Necessary

In addition, training or other options such as referral to CARS or Ombuds may be appropriate.



# Fact Finding and Disciplinary Action

# Fact Finding and Disciplinary Action

## Possible Outcomes:

- Change in processes
- Uncover larger systematic problems
- Provide training/resources
- Progressive Discipline/Immediate Discharge



# What Requires Fact Finding?



# What requires Fact Finding?

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- Suspected Misconduct
- Attendance Issues
- Performance Issues



# Misconduct – Key Considerations

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## Definition of Misconduct:

Misconduct means conduct or actions are substantive violations of laws, regulations, University policies, ethical or professional standards, act(s) of retaliation.

This may include but is not limited to:

- fraud
- theft or embezzlement
- inappropriate supervisory directive
- bullying
- time abuse
- inappropriate disclosure of confidential information

For more information on types of misconduct and the responsible departments on campus contact your HR Consultant.

# Attendance-Key Considerations

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- Reasons for attendance issues
- Length of employment and hours worked
  - Is the poor attendance a recent problem?
  - Is paid leave administered consistently for all employees?
- Family Medical Leave (FML) and American with Disabilities Act (ADA)
  - Has the employee exhausted FML/ADA?
  - Did the manager discuss FML/ADA with the employee or give him/her paperwork?
  - Did employee request FLML/ADA?

**Work closely with your HR Consultant.**



# Performance-Key Considerations

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## Inability to do the job:

- Inefficiency
- Incompetency
- **Lack of Skill** (Regardless of training)

Is the employee misclassified and can succeed in a different position?

# Identifying Performance Deficiencies

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Before deciding whether to take disciplinary action:

- Review the employee's evaluations.
- Has there been a change in supervisors?
- Review trainings and certifications received.
- Review Job Description, is the employee working within that scope?
- Review published standards. Are other similarly situated employees doing the same duties/processes. How are they doing? If they aren't performing, are you taking similar action with them?
- Review the processes from start to finish and question subject matter experts to see if they make sense.



# Key Considerations

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## Do we bear any responsibility?

- Consider items in our control
  - ✓ Training and feedback
  - ✓ Processes and systems
  - ✓ Resources
  
- Consider items out of our control
  - Employee capabilities
  - Employee taking ownership
  - Personal/Medical issues

Use the Pre-disciplinary checklist.

# Key Considerations

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## Identify root cause behaviors or direct causes:

- Look at the evidence
- Consider the facts - third parties won't be considering opinions

## Do NOT:

- Make assumptions before all facts are known
- Ignore facts
- Draw immediate conclusions before reviewing anything
- Make a pre-determination of guilt



Got Knowledge?

Got Culpability?

Got Control?



# Knowledge

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- Does the employee have a clear understanding of the misconduct, attendance or performance that is expected and the consequences of failing to meet the expectations and is this documented?
- Are the employee's actions willful or contrary to instructions?



# Culpability

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- Does the action or inaction of the employee have a harmful or potentially damaging impact on the Employer, co-workers and/or clients?
  - Contrary to the interest of the Employer
  - Contrary to operational requirements of the organization
  - Is there a serious safety issue caused by their absence, performance or misconduct?

# Control

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- Does the employee have sufficient control to prevent the final incident?
- Theft, dishonesty, assault, threatening behavior or other inappropriate behavior would be issues under the employee's control.



# Starting the Fact Finding Process



# Elements of Just Cause

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- Did the employer give the employee clear expectations and a forewarning of possible or probable disciplinary action of the employee's conduct?
- Was the employer's rule or order reasonably related to the orderly, efficient, and safe operation of the establishment?
- Did the employer investigate whether the employee violated the rule of order?
- Was the investigation fair and objective?
- Did the investigation reveal substantial evidence or proof of violation of the rule or order?
- Has the employer applied the rule or order and the penalties even handedly to all employees?
- Is the degree of discipline reasonably related to the violation?



# Gathering the Facts

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- Be timely
- Determine if there is a possible policy violation
- Review back-up documentation
  - Department personnel file
  - Training records
- Interview and obtain written statements if necessary
- Visit the area
- Contact your HR Consultant as necessary



# Interviewing



# Interviewing

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Determine if formal interviewing is necessary or some other lower level review. If it is, consider the following:

- Where to hold interviews?
- Who to interview?
- In what order should witnesses be interviewed?
- Prepare questions prior to interview
- Confidentiality
- Retaliation
- Rapport

# Interviewing

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## Post Interview Notes:

- Document time, date, place and who was present during the interview
- Document relevant information
- Document any notices/instructions given during the interview
- Type notes as soon as possible after the interview
- Interview notes should be factual and not contain your opinions



# Interviewing

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## Implicated person requests representation:

- If the employee is covered under the **Communication Workers of America (CWA)** collective bargaining agreement (CBA), please inform the individual that if they feel it is necessary to have a union representative present during the interview, that they may ask to stop the interview in order to obtain a union representative within three (3) business days.
- If the employee is covered under another CBA, you do not have to inform them of this right but if they ask to stop the interview in order to obtain a Union representative you will have to allow them three (3) business days.
- If the employee is represented by an attorney please contact your HR Consultant before proceeding with the interview - they will contact University Counsel and will assist you.



# Reviewing Documentation



# Potential Items For Review

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- Date of hire
- Performance Evaluations
- Prior discipline
- Signed policy acknowledgements
- Video footage, emails, texts, pictures (if applicable)
- Training/certifications received

# Fact Finding Folder

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This folder should contain:

- Interview notes
- All evidence & documents related to allegations
- Any reports or other information used
- Audio & video recordings (if applicable)



# Decision Time!

# Disciplinary Action or Not?

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- Review Facts & Evidence
- Was the allegation substantiated, unsubstantiated or inconclusive?
- Is Disciplinary Action necessary?



# Disciplinary Action

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## **Taking Disciplinary Action:**

- Review your completed Pre-Disciplinary Checklist
- Review UAP 3215: Performance Management and any other applicable policies
- Contact your HR Consultant
- Decide on the appropriate level of discipline

**Being comprehensive & accurate during the Fact Finding process provides you with a concrete basis for taking action**

# No Disciplinary Action

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- Fact Finding determines no action to be taken because the employee did not violate policy or procedure
- Fact Finding reveals flaw in a process or system that caused the employee's performance to appear substandard
- Fact Finding uncovers a larger issue that must be escalated to HR for investigation



# Goal of Fact Finding

# Fact Finding Goals

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## Did the Fact Finding process achieve the goal?

- Assess the issue/incident
- Recommend disciplinary actions or solutions to prevent similar occurrences
- Reinforce importance of a safe and healthy work environment

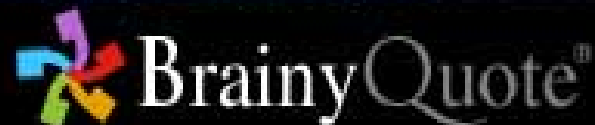


# Fact Finding

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- Fact Finding can have a long lasting impact - ensure due care is taken and fact finders are equipped with the skills and resources to achieve the best possible outcome
- Workplace fact finding requires a serious commitment to resolve problems in a fair and appropriate way
- There are costly litigation factors, if not done properly
- The department's image will be impacted negatively if done incorrectly or with a bias
- When the fact finding is completed, ensure follow-up actions are completed whether or not discipline is included.

Truth is like the sun. You can  
shut it out for a time, but it ain't  
goin' away.  
*Elvis Presley*





# Resources:

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- UAP 3215: Performance Management
  - <https://policy.unm.edu/university-policies/3000/3215.html>
- HR Consultant
  - Client Services: 277-2013
  - [https://www8.unm.edu/apex\\_ods/f?p=145:1](https://www8.unm.edu/apex_ods/f?p=145:1)

# Questions





# Thank You!

