Fact Finding for Disciplinary Action
The truth is rarely pure and never simple.

OSCAR WILDE
Agenda

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

- Full fledged investigation
- Short conversation with the employee
Fact Finding Continuum

First discovery of issues or minor issues

Continued issues or major issues
Fact Finding and Disciplinary Action

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

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
Fact Finding

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

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?

- Suspected Misconduct
- Attendance Issues
- Performance Issues
Misconduct – Key Considerations

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

- 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

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

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

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

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

- 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

- 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

- 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

- 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

- 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

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

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

Implicated person requests representation:

- If an implicated person requests representation and is covered under a collective bargaining agreement (CBA), stop the meeting and contact your HR Consultant or Labor/Employee Relations.

- If the employee is represented by an attorney please contact your HR Consultant before preceding with the interview - they will contact University Counsel and will assist you.
Reviewing Documentation
Potential Items For Review

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

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?

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

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

- 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

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

- 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:

- UAP 3215: Performance Management
  - [https://policy.unm.edu/university-policies/3000/3215.html](https://policy.unm.edu/university-policies/3000/3215.html)

- HR Consultant
  - Client Services: 277-2013
Questions
Thank You!