

MOTT COMMUNITY COLLEGE

SUPERVISORY INVESTIGATIONS

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MCC SUPERVISOR INVESTIGATION PROCEDURES

Part of management duties as a Mott Community College supervisor will involve investigating allegations against employees. The types of investigations encountered can vary, from claims of sexual or racial harassment, to issues relating to misconduct, even potentially criminal activity such as drug use or theft. The steps of each investigation should be considered on its own merits, and the investigation should be tailored based upon the nature and severity of the allegation.

Many ramifications and reasons exist for conducting factual investigations. In some instances, an employer may be able to forego or minimize liability by taking prompt remedial action in response to an alleged victim's complaint. In other circumstances, an employer may avoid the even more dangerous situation of an employee engaging in unacceptable conduct after the employer is put on actual or constructive notice that the behavior is occurring. At a minimum, the employee will be able to point to an objective basis for disciplinary action that may become necessary.

You should always notify HR of any situation that you are investigating. Some situations may be sufficiently complex or sensitive to warrant having HR or outside counsel conduct the investigation from the outset; that determination will be made during your initial contact discussion with HR.

This document will analyze the following three concepts: (1) Due Process. The employee's basic legal and contractual due process rights. At a basic level this includes notice to the employee of the charges and an opportunity for the employee to respond; (2) Union Representation. The employee has a general right to representation in any meeting that the employee could reasonably believe may result in disciplinary action. (3) A Step-by-Step investigative process, interview techniques and a just cause flow chart.

DUE PROCESS RIGHTS

Due process is afforded to public employees with just cause protections before adverse employment decisions are made.

The two basic tenants of due process are: (1) Notice to the employee of the charge(s) and (2) an opportunity for the employee to respond to the charge(s). Generally, the level of due process required in a situation potentially involving discharge is determined by balancing the employee's interests in retaining employment and the risk of erroneous termination against the employer's interest in quick removal of unsatisfactory employees without unnecessary administrative burdens. A thorough investigation will assist an employer in its defense of a due process claim by allowing the alleged wrongdoer a chance to explain and by helping to insulate the employee from arbitrary, erroneous decisions. *Cleveland Board of Education v. Loudermill*, 470 US 532 (1985).

In addition to minimum legal due process requirements, the College's collective bargaining agreements also contain due process requirements which must be adhered to when conducting

investigations. These requirements include procedural due process (whether pre or post disciplinary action) and substantive due process (whether the penalty fits the offense). All the college's union contracts contain "just cause" protections (See the attached just cause flow chart for a further break down of the due process requirements.) Compliance with procedural and substantive due process will more than likely result in a finding that the disciplinary action was for "just cause."

(1) Secretarial-Clerical - "No employee shall be reprimanded, suspended with or without pay, discharged or otherwise disciplined without just cause...." Article XVI, Disciplinary Procedures, Section A., p. 54. Compare Article IV H.1 p. 17 – at-will probationary employees
(2) Professional/Technical - "No employee shall be disciplined without just cause." Article 9, Disciplinary Procedures, Section 6, p. 37. Compare Article 6, Security of Employment, Section 1, Probationary Period, Section A., at-will probationary dismissal p. 22, and Section 4, Representation, p. 23. **(3) Maintenance-Operational** - "It is recognized by the College and the Union that the College may discipline employees by issuing oral and written warnings, reprimands, suspensions and by discharging employees. However, no employee shall be disciplined without just cause, ...". Article 15 Discipline of Employees, Section (15), p. 33. Compare Article 9, Seniority, Section 9(b) p. 9 at-will probationary employees. **(4) Public Safety Officers** - "It is recognized by the College and the Union that the College may discipline employees by issuing oral and written warnings, reprimands, suspensions and by discharging employees. However, no employee shall be disciplined without just cause, ..." Article 14, Discipline of Employees, Section A, p. 18. **(5) Faculty** - "No faculty member shall be reprimanded, suspended with or without pay, demoted, discharged or otherwise disciplined without just cause. Just cause shall include but not be limited to incompetence and/or violation of the terms of this Agreement." Article XVII, Discipline of Faculty Members, Section A, p. 74. **(6) Supervisory and Managerial** - "No employee shall be disciplined without just cause" Article 16, Disciplinary Procedures, Section 6, p. 32.

UNION ISSUES

In addition to adherence to employee due process rights during an investigation, the employee also has a right to union representation.

The case of *NLRB v. Weingarten*, 420 US 251 (1975), discussed such rights of representation in the investigation context. The Weingarten court held that if the employee requests that union representation be present and the employee reasonably believes that the investigation could result in discipline, the request must be granted *Id.* at 256-260. The burden for such a request, under the law, vest, with the employee and not the employer.

In November, 2001, the DC Circuit Court of Appeals extended *Weingarten* to non-union situations in *Epilepsy Foundation of NE Ohio v NLRB*, 268 F3d 1095. The *Epilepsy Foundation* court held that, if requested, a non-union employee must be granted the presence of a co-worker during an interview, if a union employee would be granted representation in the same situation. *Id.* at 1100. The sixth circuit case of *ITT Lighting Fixtures v. NLRB*, 719 2d 851 (1983) reasoned that such a request is proper even if the purpose is only to document the meeting:

The Supreme Court implied in *Weingarten* that one advantage of allowing the employee to be represented at an investigatory confrontation was to assure that the employee would enjoy 'recourse to the safeguards of the Act.' *Weingarten, supra*, at 930,...'One rationale advanced by the Board, a rationale upheld by the [Supreme] Court, for affording the employee the right to have a witness present at such an interview is that a **third party** can confirm what actually transpires between the employee and employer during the confrontation.' We agree that even if Williams' sole interest in having a representative present was to substantiate his story at a later grievance proceeding, the request was a proper one under *Weingarten*. Williams had every reason to want to document what occurred at the meeting with management. By requesting a representative, Williams was simply trying to protect himself from retaliation for his pro-union activity. The company violated Williams' rights by denying this request and then continuing to press him concerning his unauthorized absence.

Id. at 856 (Emphasis added).

The following collective bargaining agreement clauses also provide for union representation:

Maintenance-Operational – “In all cases involving disciplinary action or discharge, representation shall be made available prior to such action, except in cases involving probationary employees.” Article 15, Discipline of Employees, Section (a), p. 33.

Pro-Tech - "Warnings and reprimands may be discussed privately between the employee and the administrator. Either party may request the presence of a Pro-Tech representative." Article 9, Disciplinary Procedures, Section 2, Progressive Discipline, Subsection (c), p. 36. See also: "Before any meeting is called from which disciplinary action may result, the employee shall be notified and shall be entitled to have present a representative of the Pro-Tech. If a Pro-Tech representative is requested to be present, no longer than three (3) days may lapse before such a meeting is held." Article 9(3) Disciplinary Procedures, Section 3, Representation, p. 36.

Public Safety Officers – “In all cases involving disciplinary action or discharge, representation shall be made available prior to such action, except in cases involving probationary employees.” Article 14, Discipline of Employees, Section B, p. 18. See also Article 6, Function of Union Officers, Sections B and C, p. 5 regarding grievances.

Faculty – “Any meeting with a faculty member initiated by the College for the purpose of investigating possible cause for disciplinary action shall be conducted by the faculty member’s immediate supervisor or designee and the purpose of the meeting shall be clearly stated at the onset. In the event person’s [sic] other than the faculty member and the immediate supervisor or designee are to be present at such meeting, the faculty member shall be given twenty-four (24) hours written notice, which shall specifically inform the faculty member of his/her right to be

accompanied by a representative of the MCCEA.” Article XVII, Discipline of Faculty Members, Section (B)(1), p. 74.

Secretarial-Clerical – "In all cases involving disciplinary action or discharge, representation shall be made available prior to such action, except in cases involving probationary employees." Article XVI (D), Disciplinary Procedures, p.54.

Supervisory and Managerial – Article 16, Disciplinary Procedures. Section 3. Representation, p. 31. “Before any meeting is called from which formal written disciplinary action may result, the employee shall be notified in writing, and shall be entitled to have present a representative of the Union. If a Union representative is requested to be present, no longer than three (3) working days may lapse before such meeting is held." Note, also, in addition to above, differences in representation of probationary, Article 8, Security of Employment, Section 4. Representation of Probationary Employees, p. 15, and non-probationary employees, Article 15, Grievance Procedure, Section 3, Representation, p. 27.

STEP-BY-STEP PROCESS FOR AN INVESTIGATION

The following steps provide a systematic framework for conducting an investigation.

- 1) Begin the process as soon as the employer becomes aware of the situation.
- 2) Consider suspending the employee with pay (with prior Human Resources approval) for serious allegations or if employee’s continued presence could result in adverse consequences or further misconduct.
- 3) Compile a list of potential interviewees or witnesses. Include at least the employees directly involved, direct witnesses and anyone else with personal involvement.
- 4) Obtain signed witness statements.
- 5) If you are the investigator, you should be neutral and ask open ended questions.
- 6) Document all investigation steps.
- 7) Adhere to all collective bargaining agreement or individual contract investigative and due process mandates.
- 8) Schedule meetings with the selected interviewees.
- 9) Follow the interview techniques provided in the following section.
- 10) Create an interview summary for each interview.
- 11) Carefully weigh the evidence.
- 12) Produce a factually supported final report when appropriate.
- 13) Communicate the conclusions of the investigation to the involved parties.
- 14) Create a summary chronology log.
- 15) Keep Human Resources apprised of the progress of the investigation.
- 16) Make your recommendations and proposed discipline to Human Resources, and review the procedural steps prior to rendering the final discipline and meeting with the employee.

INTERVIEW TECHNIQUES

Though each investigator has their own style, the following techniques are often employed by effective interviewers.

- 1) Listen to the undertones being expressed by the interviewee as well as the objective data being conveyed. These undertones often reveal the interviewee's subjective beliefs.
- 2) Listen for what is not revealed by the interviewee as well. For example, not denying accusations may provide insight.
- 3) Listen carefully. The interviewer can often learn new information by allowing the interviewee to speak freely at first. The interviewee may even suggest solutions not yet considered.
- 4) When questioning the interviewee, open ended questions followed up with direct precise questions often yields the best results.
- 5) The tone of the question is almost always as important as the question itself. Tailor your interview style to be professional, friendly, or business-like depending on the interview's purpose.
- 6) Leading questions are often helpful to stimulate the conversation or to clarify an answer, but they should not be used to put words in an interviewee's mouth.
- 7) Questions should be prepared in advance if the information needed is known in advance.
- 8) The interviewer should limit their comments only to those situations where reassurance or encouragement is required to help the employee discuss further relevant matters.
- 9) Questions should almost always be tailored to accomplish one of two objectives, (a) to obtain specifically needed information or (b) to direct the interview back to a productive path.
- 10) The interviewer's first goal should be to understand an answer's full significance.
- 11) The setting of the interview should be conducive to a private, comfortable and relaxed atmosphere in which the interview can proceed without interruption.
- 12) The length of the interview should be dependent upon its purpose. Generally, the interviewee should be informed of the time required ahead of time. A second interview can be scheduled if needed.
- 13) The interviewer should have a separate note taker present at the interview.
- 14) Where appropriate, a statement including all factual testimony should be signed and dated by the interviewee as soon as possible after the interview if possible.
- 15) The interview's primary focus should only be on the record if it is needed for future documentation. The interviewer is generally better served by putting the interviewee at ease, encouraging purposeful conversation, guiding the conversation and interpreting clues.
- 16) The information gleaned from the interview should be held in confidence and not used for improper purposes.
- 17) The interview should generally answer who, what, when and where as well as determining the witnesses relationship to the incident. Why and how answers shall be elicited if possible as well.

CONCLUSION

The preceding guide will be helpful in conducting any investigation and adherence to same should result in supervisor actions/decisions being more likely upheld. The best interviews should result in the supervisor being able to fully explain the rationale, based upon the facts, for a disciplinary decision on multiple occasions as necessary (i.e., to Human Resources, to the employee, union representatives, arbitrator, judges, etc.). Finally, a thorough interview not only renders a justifiable decision, it also minimizes surprises at a later date which, if known, could have altered the initial decision.