

# CITY OF MADISON

## Investigation Process

An investigation is a fact-finding mission that helps an organization use accurate information to support the decisions it makes. Related to employee misconduct, a fair and thorough investigation are necessary components to establish “just cause.” Just cause is a set of criteria that helps a neutral third party determine whether an organization took appropriate disciplinary steps related to misconduct. The keys to Just Cause include:

Notice	• Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?
Reasonable Rule	• Was the employer’s rule or order reasonably related to the orderly, efficient and safe operation of the employee’s work program?
Complete Investigation	• Did the employer, before administering discipline to an employee, make an effort to discover whether the employee violated or disobeyed a rule or order?
Fair	• Was the employer’s investigation conducted fairly and objectively?
Proof	• Did the employer obtain substantial evidence or proof that the employee was guilty as charged?
Equal Treatment	• Has the employer applied its rules, orders and penalties evenhandedly and without discrimination to all employees?
Appropriate Level of Discipline	• Was the degree of discipline administered by the employer related to the seriousness of the employee’s proven offense and the record of the employee in his/her service with the City?

### A. Guidelines for Performing an Investigation

1. Be very detailed. An investigation must be as detailed, specific, and exhaustive as possible. A good investigation will result in knowing who, what, where, when, why, and how to the fullest extent possible.
2. Identify and exhaust all sources of information. These sources may include participants, eyewitnesses, physical evidence, individuals with collateral knowledge, records, work rules,

policies, and other related documents. Other evidence might include video, phone recording, e-mail, and GPS vehicle tracking.

3. Be timely. As a matter of due process, an employee is entitled to a timely investigation. The investigation should be commenced promptly and without unreasonable delay.
4. Choose the right person to perform the investigation. Always choose the most appropriate investigator with full knowledge that whoever is chosen may later have to testify on the merits of the investigation. In order to pinpoint the best candidate(s) to perform the investigation consider the following:
  - The investigator should hold no bias or grudge against the accused.
  - There should not be a conflict of interest or close personal relationship (family member, friend outside of work) between the Investigator and participants in the investigation.
  - The investigator should understand the purpose and issues involved in the investigation as well as departmental policies and work rules.
  - The investigator should have the ability to develop a rapport, ask tough questions, press for admissions, and understand the interviewees as well as instill confidence in, and work with, the complainant and the accused.
  - The investigator should have the ability to take thorough and accurate notes that may be used as evidence.
  - The investigator should not have a history of discipline related to the incident they are investigating. The investigator should have the ability to testify clearly and be received as knowledgeable, impartial, thorough, and honest.

In the most critical investigations, it is important to assign a team of individuals to investigate in order to ensure the investigative process is beyond reproach. If the investigator(s) need to come from external agencies because of a conflict of interest, you should contact Human Resources to assist in investigator selection.

#### **B. Preliminary Steps to the Investigation**

Once the appropriate investigator has been identified they should meet with the appropriate management representative to discuss the parameters of the investigation, identify potential interviewees, determine whom to contact in order to set up the meetings, and determine an appropriate deadline for completing the investigation. The investigator should also consider the following:

1. The employee is presumed innocent throughout the investigatory process, until all evidence has been collected and weighed and a conclusion has been made based on the facts of the case. Hidden bias can harm the integrity of an investigation.

2. What are the allegations and any known, objective facts?
3. The type of information and evidence is needed to provide proof as to whether or not an employee engaged in misconduct.
4. What documents should be reviewed including: relevant work rules, departmental policies, ordinances, ethics rules, manager's notes, complaints filed, statements written or obtained from witnesses and APM's.
5. Potential interviewees and their relationship to the matter under investigation.
6. Records of prior investigations, complaints, or disciplinary action as well as any business records, such as time cards, calendars, photographs, logs, etc.
7. Who should be interviewed first.
8. The investigator should open an investigation file to include the following:



### C. Investigative Interviews

1. Definition: An investigative interview is an interview conducted by an investigator with an employee for the purpose of obtaining whatever facts, knowledge or information an employee may have concerning an incident or situation. An investigative interview is a fact-finding effort to determine whether it is more likely than not, and with what degree of certainty, the event occurred and/or the policy was violated. This investigative finding establishes the basis for convening a pre-determination hearing. It is necessary to provide the employee under investigation with notice of the investigative interview, information on the nature of the issue, EAP referral, and information on the option of union or association representation.
2. Union or association representation for employees against whom no discipline could possibly result: Employees who may have witnessed an incident or who may have knowledge related to an incident under investigation may be questioned, as a witness, without Union or association representation. However, investigators must do two things first: (1) be sure of the witnesses' role in the incident to determine they would not face discipline. This may not always be possible at the early stages of an investigation and (2) tell the employee at the start of the interview that they are not facing any discipline for what they tell the investigators.<sup>3</sup> Union representation for employees under investigation or against whom discipline can reasonably be anticipated: An employee directly involved in an incident or matter under investigation, and against whom discipline could reasonably be anticipated, may be questioned by their supervisor or investigators

in order to gather further facts and/or information. For employees with direct participation in the incident, union representation must be provided if the employee requests representation.

4. The Employee has an obligation to answer questions during an investigatory interview. Employees may be required to answer proper work related questions during the interview. Failure to answer such questions may be considered insubordination. If the employee refuses to comply with a direct order to cooperate, a separate disciplinary process may be initiated for the insubordination. An employee who is under investigation for an incident that could also be a criminal offense (theft of large value items, assault, etc.) presents a special legal consideration. Supervisors or investigators facing such a situation should consult with the Office of Labor Relations and the City Attorney before proceeding with interviews.
5. Employees should be told at the start of the interview they are not to discuss the investigation with others aside from their Union or Association representative. If the issue involves a dispute between two employees, or harassment or discrimination allegations, employees should also be noticed that retaliatory behavior will not be tolerated.

#### **D. Documentation**

The notes derived from an investigation are an extremely important component of the investigation. Below are a few techniques that may help the investigator or their designated non-represented note taker in recording information obtained during witness interviews.

- It is extremely important to be as accurate as possible. Typically, it is appropriate to take detailed notes as close to verbatim as possible. However, quotations marks should only be used if you can record the response with 100% accuracy as it was spoken.
- Start a new page for each interview
- At the top of the page include the names of those present at the interview, the date, time and place of the interview.
- Record what is asked by the interviewer as well as the answers provided by the interviewee.
- Do not include interpretations, assumptions, beliefs, or conclusions about the facts stated. Rather than interpreting what the employee says, ask them to be more specific about what they really mean.
- Record facial expressions, hand gestures, rising or falling voice, evasiveness, contradictions, anxiety, or defensiveness.
- At the conclusion of the interview, the note taker should review the notes with the interviewee and confirm their accuracy. When the interviewee expresses agreement it should be noted.

#### **E. The Role of the Union/Association Representative During Investigations**

1. The Union/Association representative may:
  - Engage in a brief discussion with the employee prior to the hearing.
  - Observe and take notes during the hearing.
  - Repeat points the employee has previously attempted to express.
  - Explain the significance of a point made by the employee.
  - Speak about practices at the work site.
  - Occasionally confer with the employee in a confidential manner.
2. The Union representative may not:
  - Bargain about disciplinary penalties during the hearing.
  - Respond to questioning for the employee. Note: If the union representative continues to answer for the employee or instructs the employee not to respond, take the following steps:
    1. Inform the union representative that you have the right to question your employees about work related matters, and you have the right to expect the employee to answer as completely and truthfully as reasonably possible. Also, inform the Union representative that they have no right to interfere with the process.
    2. Inform the employee that it is their duty to cooperate and answer your questions and that they may be disciplined for failure to cooperate. If the union representative continues to be disruptive or if the employee continues to refuse to answer your questions inform them that you will be forced to make a disciplinary decision based on existing facts and sources of information.

The documentation you develop through the course of the investigation will help serve as a foundation for completing your investigative report. A template for an investigative report is attached.