

# Personnel Investigations in Athletics

*Processes, Parents and Pitfalls*

“Nothing is work unless you’d rather be doing something else.” George Halas

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**I. Role of the Investigator:** To gather information in response to serious allegations or suspicions of misconduct to aid a decision-maker in making a decision and determining the appropriate remedy. If that decision and remedy are challenged, the adequacy of the investigation can be the most important factor in upholding it.

A. When to retain an “outside” investigator:

- When the investigation will be time-consuming and complex
- When the investigation involves a high-ranking individual in the organization
- If there are politics or bias involved which could lead to a perception that the internal investigator is not fair or impartial
- When your sanity necessitates it

B. Remember that employees of a public entity (and students) have due process rights guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article II, Section 17 of the Montana Constitution. The essential elements of due process are **notice** and an **opportunity to respond**. “The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.” *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985). This notion guides the work of administration, attorneys, and investigators when addressing misconduct in a public entity: the accused must have notice and the opportunity to respond to any allegations that could lead to discipline.

C. What Makes an Investigation “Adequate” Under the Law

- Independent investigator (at least not in the same department)
- Prompt
- Memorializing witness testimony in notes
- Asking open-ended, non-leading questions
- Eliciting facts, not opinions, assumptions, or suppositions
- Holding interviews in a private place, preferably away from the workplace
- Encouraging witnesses to contact the investigator to add or correct
- Promptly notifying the accused of the charges and affording an opportunity to respond
- Allowing the critical witnesses an opportunity to clarify, correct or challenge information provided by other witnesses which contradicted their statement or which cast doubt on their credibility.
- Giving both the complainant and the accused an opportunity to comment on and rebut evidence contradictory to their allegations

## **II. What Types of Issues Require Investigation – Know Your Legal Framework:**

1. Mistreatment of Students
  - Bullying (including cyberbullying/social media issues)
  - Misconduct by coach or other staff, including but not limited to boundary invasion behaviors
2. Discrimination: Disparate treatment (for example, offering girls' softball better changing areas than boys' football)
3. Discriminatory Harassment (based upon status in a protected class: sex/gender, race, color, disability, religion, creed, marital status, political beliefs)
  - Supervisor-to-employee
  - Peer-to-peer (employee to employee; student to student)
  - Teacher-to-student
  - Third-party to employee (or student)
4. Retaliation
5. Financial misconduct/fraud
6. Computer misuse (such as pornography)
7. Other: humans have a remarkable ability to come up with new ways to make mistakes, intentional or inadvertent

## **III. Preparing Systematically for the Investigation:**

A. Make sure you have authority to conduct the investigation. Keep in contact with administration/ the Superintendent.

B. Identify and understand what you are looking for. Understand the *specific* allegations and the policies and laws that pertain. Do not be afraid to ask for clarification about what you are seeking and why. The best situation is where the victim/complainant has filed a written complaint.

C. Protect the victim. The School District should take immediate steps to protect the claimant-victim. Don't assume you or the District knows what form that protection should take. Some people want life to be "normal". Some need time away without the consequences of using sick days or penalties for missed homework. Are other interim measures necessary?

- Separate the parties
- Reassign supervisors
- Scheduling changes
- Transfer the accused employee or place on administrative leave with pay
- **These all require significant conversations with administrators/  
Superintendent**

*[Note: the complainant should not be transferred, suffer substantive job changes, or otherwise be treated adversely or what could be considered adverse (it is a somewhat subjective standard) or there will be a claim of retaliation.]*

D. Acknowledge and understand your personal feelings and biases. If you identify with a particular person even before you start interviewing, consider whether you can be impartial or what you must do in order to counter-balance your innate biases

E. DO NOT discuss the investigation at any time with anyone other than the people you are interviewing and the administrator with whom you are working. Remind everyone you talk to that they must not confer, share, or discuss with anyone. Privacy and confidentiality during the investigation (and sometimes beyond) are critical to its effectiveness. Be aware of the Family Education Right of Privacy Act (FERPA) and related state laws.

F. Create an investigation plan:

- Who will you interview
- In what order (generally it is best to interview the victim/complainant first)
- Where: consider privacy, comfort, time, convenience, etc.
- How will you reach people or will you ask for help from administration to schedule?
- What physical evidence do you need (records, photos, text messages, reports, calendars, diaries, measurements, weather reports, sign-in/out logs, etc.) How will you gather and keep track of the evidence?
- Think about your welcoming/opening statement: who are you and what are you doing? How will you engage and form trust?

Sample Questions for the Complainant:

Who committed the alleged harassment? What exactly occurred? What was said? To whom? Who was present? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you? How did you react and respond? Has your job/school/life been affected and how? Who has relevant information? Did you tell anyone about it? Did anyone see you immediately after the episode(s) of the harassment? Did the harasser harass anyone else? Do you know whether anyone else has complained about harassment by that person? What do you know about those complaints? Are there any notes, physical evidence, video, or other documentation regarding the incidents? What other relevant information exists? What do you hope will happen?

*{There will be follow up questions to the answers to each of these questions...}*

**IV. Conducting the Investigation (these tips are in no particular order)**

1. Interview the Complainant, and get a list of corroborating AND contrary witnesses. Same with the subject of the investigation. Both parties should be given full opportunity to offer any evidence or identify any witness who can support his or her side of the story. Adjust your investigation plan after these two most critical interviews to make sure you have the right witnesses on your list and the questions/topics fit the allegations and defenses.
2. Be sure to note if the subject (or witness) refuses to be interviewed and why.
3. Relying solely upon a denial by the alleged violator is not a sufficient investigation.
4. Parents of minors should be present.
5. Obtain all relevant information; if you are uncertain as to the relevance of the information, note it anyway as it may be important or relevant later or it may be helpful to someone else to refresh their recollection.
6. Your best friend is your yellow pad (or modern equivalent). Document, document, document. Make a written record of everything that anybody says. Constantly review your notes so that you cover all points with all witnesses. You can and should go back to a witness with follow up questions if you learn of things later in the investigation that open up a new (related) line of inquiry. It helps to allow 5-10 minutes between each interview so that you can fill in your notes and adjust your questions for the next witness.

7. Be Curious.
8. Be willing to make small talk to ease tension. Be empathetic. Use silence - sometimes you learn more when you leave blank space for a witness to relax and think (or get nervous and spill).
9. Maintain a professional demeanor, but respond to the behavioral cues of the subject. Have Kleenex handy. Balance your feelings of empathy with your need to remain objective.
10. Observe the witness's body language and be aware of your own. Your notes should reflect your observations, such as: "The witness seems nervous based on the fact that he stammered and averted his eyes when answering the critical questions and appeared to be blushing."
11. Don't be a TV lawyer. Avoid leading questions and dramatics. Avoid telling the story of the claimant-victim and then asking questions about the story—this technique signals to the witness or accused that you have already made up your mind.
12. Always ask the tough, uncomfortable questions, but NOT at the beginning of the interview.
13. Ask the follow up question: "Is there anything else you can remember that we haven't talked about?"
14. Never promise confidentiality.

V. **Reporting Your Findings**

- Just the facts, very objective
- Do not suggest result or solution
- Bear in mind, almost everything could one day be very public