

The Investigation



The Investigation – The Interview

- ▶ Explain the purpose of the interview and refer to any notice that may have been provided prior to the interview.
- ▶ State that the interview is fact-finding in nature and no conclusionary decision will be made at the meeting.
- ▶ Invite questions.
- ▶ Explain retaliation policy.
- ▶ If other individuals / representatives present, explain purpose.
- ▶ Share that notes will be taken.

Interviewing the Complainant

Written statement:

- ▶ Have the complainant submit a written statement detailing the incident(s) giving rise to the complaint (if willing).
- ▶ Statement should be factual rather than conclusive.
- ▶ Statement should be signed and dated.
- ▶ Witnesses to the signature should be noted.

Interviewing the Witness

These General Guidelines should be the parameters during your questioning, including but not limited to:

Open-Ended Questions: Ask open-ended questions because it gives individuals a full opportunity to explain what they saw or what happened; and the opportunity to provide a complete response addresses due process concerns.

▶ Examples:

- ▶ What did you see?
- ▶ What did he say?
- ▶ What did she do?
- ▶ What happened next?
- ▶ Where did this happen?
- ▶ Who else was there?

Interviewing the Witness

These General Guidelines should be the parameters during your questioning, including but not limited to:

Start with broad questions and become more focused.

- ▶ The investigator should only disclose to witnesses what is necessary to question them and what information is required to be disclosed by law.
- ▶ Allow the respondent to answer each allegation in detail.
- ▶ Avoid leading questions (which suggest the answer to the question) and accusatory questions.
- ▶ Avoid compound questions.
- ▶ Note the witness's source of knowledge – personal observation or hearsay (gossip, rumors or conjecture).
- ▶ End by asking the witness if the witness has anything else they would like to share.

Interviewing the Witness

These General Guidelines should be the parameters during your questioning, including but not limited to:

Ask repetitive questions.

- ▶ Repeating a question may verify the initial answer, reveal inconsistencies, or provide the witness with the opportunity to give you more information if he/she was avoiding the first question.

Periodically summarize and review what is said.

- ▶ It helps assure that you have been hearing the witness accurately, as well as assures the witness that you have been listening. Can also be used as a tool to close a particular topic or keep a discussion on track.

Interviewing the Witness

These General Guidelines should be the parameters during your questioning, including but not limited to:

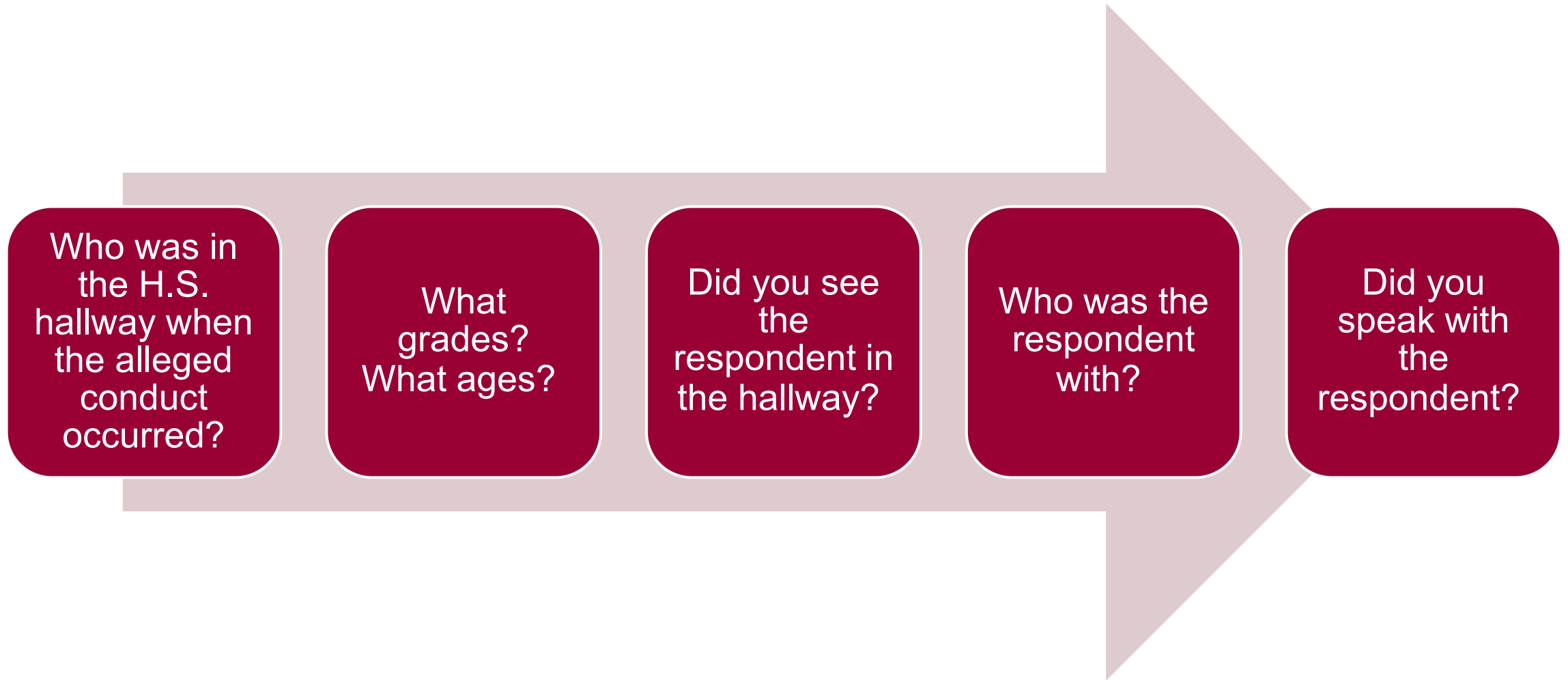
Assess credibility.

- ▶ Note eye contact, facial expressions, and body language when individuals are answering questions.
- ▶ Make note when you have an uncooperative witness.

Use silence.

- ▶ People are often uncomfortable with silence, and it may prompt a nervous witness to provide you with relevant information.

Funnel Example



Interviewing Witnesses – Questions to Ask

- ▶ What did the applicable party (e.g., complainant, respondent, witness) witness?
- ▶ Does video exist?
- ▶ Is there a record in another format, e.g., email, text message, etc.?
- ▶ What, where, when, how?
- ▶ Is there a personal relationship between the complainant, the respondent and/or the witness(-es)?

Interviewing Witnesses – Questions to Ask

When it comes to interviewing minors, review your local policy and procedures:

- ▶ Parental permission?
- ▶ Parental participation?
- ▶ Conduct interview during a non-course period.
- ▶ Do questions change if Police Liaison officer is involved?

Investigation – The Respondent

- ▶ Respondent has a right to bring an advisor / representative to meeting.
- ▶ Investigator should also have an individual / representative present.
- ▶ Review notes, recordings, and any evidence.
- ▶ Confidentiality
- ▶ Reiterate that the interview is fact-finding in nature and no conclusions will be made at the meeting.

Compelling Testimony from Employees

- ▶ An employee can be compelled to testify about his/her employment performance and can be disciplined or discharged for failing to respond. *Oddsens v. Board of Fire and Police Commissioners*, 108 Wis. 2d 143 (1982).
- ▶ However, courts and arbitrators have held that there must be additional evidence and cannot solely discipline based upon a refusal to testify. Also see, *Hoover v. Knight*, 678 F.2d 578 (5th Cir. 1982); *Shell Lake School District*, Dec. No. 20024-A, B (WERC, 1983).

Compelling Testimony from Employees

Garrity Rights - Traditional Analysis for matters other than Title IX.

- ▶ The Fifth Amendment protects against criminal self-incrimination, not employment self-incrimination.
- ▶ A school district can compel an employee to answer questions about their conduct provided they grant the employee immunity from criminal prosecution.
- ▶ Thus, the Fifth Amendment is not violated when a school district asks an employee, without threat of criminal prosecution, for information regarding an incident upon which discharge from the district may be predicated.

Compelling Testimony from Employees

Garrity Rights - Traditional Analysis for matters other than Title IX.

- ▶ If no Garrity warning is given, the Seventh Circuit believes due process is not met. Franklin v. Evanston, No. 03-2127 (Sept. 27, 2004).
- ▶ In Garrity vs. New Jersey, 385 U.S. 493 (1967) the U.S. Supreme Court held the following:
 - ▶ Statements obtained after Garrity warning has been provided:
Statements obtained in the course of an investigatory interview under threat of termination from public employment could not be used as evidence against the employee in a subsequent criminal proceeding(s).
 - ▶ However, while the statements the employee makes may not be used against him/her in a subsequent criminal proceeding, they can still form the basis for discipline on the underlying work-related charge.

Compelling Testimony from Employees

Garrity Rights - Traditional Analysis for matters other than Title IX.

- ▶ Refusal to answer after Garrity warning has been provided:
 - ▶ If, however, the employee refuses to answer questions after he/she has been assured that his/her statements cannot be used against him/her in a subsequent criminal proceeding, the refusal to answer questions thereafter may lead to the imposition of discipline for insubordination.

Retaliation & Garrity

- ▶ No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.
- ▶ [34 CFR 106.71\(a\) \(Aug. 15, 2020\)](#)

Retaliation

- ▶ Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.
- ▶ Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).
- ▶ 34 CFR 106.71(a) (Aug. 15, 2020)

Retaliation & Garrity

Garrity Rights - Analysis for matters under Title IX.

- ▶ Refusal to answer after Garrity warning has been provided under Title IX:
 - ▶ If the employee refuses to answer questions after he/she has been assured that his/her statements cannot be used against him/her in a subsequent criminal proceeding, the refusal to answer questions thereafter **may not** lead to the imposition of discipline for insubordination **under the Title IX retaliation provision.**