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Fair Investigation and Decision-Making: External Misconduct

When implementing a sanction, the sport manager has every incentive to get the decision right the first time; the stakes are high with regard to the manager's and the organization's reputation for fair judgment. The consequences for misjudging or failing to have explicit policies can be severe. For example NFL player Ray Rice assaulted his fiancé which was captured by an elevator videotape. The NFL Commissioner, Roger Goodell, originally suspended the player for two games and then subsequently suspended the player indefinitely for violating the NFL's personal conduct policy. The player and the NFL Players' Association appealed the indefinite suspension alleging that the second penalty constituted an enhanced punishment for the same violation and was contrary to labor laws. The player also contended that he fully admitted hitting the victim in his original hearing with the Commissioner and that the original decision was reasonable but the change to an excessively harsh penalty later was arbitrary and capricious. The player won an appeal with the judge agreeing that that second penalty was arbitrary and capricious. The Commissioner was severely criticized with regard to initially mishandling this domestic violence case.

Thus, the importance of having and consistently using a definitive process to investigate and judge the misconduct of employees or athletes is critical. The following process policies should be considered:

1 Obligation to Report. Upon learning of or observing any violation of governing association rules, employee policies or rules of conduct or any situation that could potentially be in violation of these guidelines, each employee, volunteer or athlete is responsible for reporting such situation to a designated senior staff member responsible for receiving such reports.

2 Restoration of Safe Environment. If the violation involves serious misconduct (for example, it has the potential for criminal charges) or has created an unsafe employment, practice, locker room or competition environment, a designated senior staff member shall act to immediately and temporarily suspend the employee or athlete from the workplace, practice, locker room or competition area.

3 Prohibition of Retaliation. Creating a culture of personal responsibility requires an assurance to employees and athletes that no retaliation will occur against those who report violations of rules or conduct policies. Upon receiving a report of any policy violation, the individual accused shall be informed of the prohibition of retaliation and the penalty of termination of employment for violation of this

policy. The reporter, victim and any witness to the violation should also be advised of protection against retaliation and the need to report any retaliatory behavior immediately.

4 Report to the Police. All alleged criminal conduct shall be immediately reported to the police, with such investigation and adjudication occurring independent of and simultaneous with the sport organization's investigatory and administrative decision-making process (as described in the following sections) which shall not be delayed to await the outcome of such police or court processes.

5 Investigation of Allegations. All allegations of policy violations shall be promptly and thoroughly investigated via in-person interviews by a trained and impartial investigator selected by the senior staff member assigned with the responsibility for receiving reports and overseeing the investigation process. The investigator's report shall be the written full and complete record upon which a determination is made and shall meet the following conditions:

- Parties shall be interviewed by the investigator as soon as possible in order to maximize the possibility of fresh recollections and accuracy.
- Both parties should be given the opportunity to provide written statements of the events in question to the investigator.
- The accused should be given a copy of the policy alleged to have been violated and fully informed of the details of the allegations.
- The investigator should take notes during each interview which should include any refusal to answer, efforts to evade answering, capture key quotes, impressions as to credibility and reactions/demeanor, generally and to specific questions.
- The investigator should allow the person interviewed to review his or her notes related to the statements of the interviewee (as opposed to any impressions of the investigator related to credibility, evasiveness, etc.)/
- An interview with and full statement shall be obtained from the reporter (either the victim of or witness to misconduct) alleged to be a policy violation and any other witnesses to the violation.
- The alleged transgressor does not have a right to confront any witness or accuser directly but should be allowed to submit written questions to be asked by the investigator without the transgressor being present.
- The reporter and the accused or any witness may have anyone of their choice present during the interview with the investigator. (Note: In school settings, the victim should be advised of the availability of victim services, including usually a trained support person that would accompany the victim during interviews)
- More than one interview with the reporter, the alleged transgressor or any witness may be required if new facts are revealed by interviewees.
- Every effort should be made to obtain a prompt (within no more than 30 days) and complete understanding of the alleged misconduct.
- The investigator shall submit a final written report that shall include: (1) an assessment of the weight, relevance and credibility of all information gathered, (2) an assessment of the credibility of all parties interviewed, (3) an explanation of non-responsive witnesses and/or unsuccessful attempts to acquire information, (4) an analysis of what information gathered supported or refuted the occurrence of a policy violation and (5) a summary of his or her findings as to whether the conduct occurred. At the option of the investigator, the report may include recommended sanctions.

5. Possible Sanctions. The organization has the authority to impose any of the following sanctions in response to findings of misconduct:
a. Informal verbal warning
b. Written warning
c. Final written warning
d. Mandatory training
e. Suspension with pay or in the case of an amateur athlete, suspension from participation in practices and/or competition
f. Suspension without pay or in the case of an amateur athlete, suspension from participation in practices and/or competition and revocation of scholarship
g. Termination of employment or ineligibility for participation or scholarship
When choosing corrective action appropriate for any misconduct violation, supervisors must consider the staff member's history of corrective actions, extent of violations in need of corrective action, and depth of harm resulting from the behavior in need of corrective action. When necessary for particularly egregious or harmful actions, supervisors may elect to immediately use more severe corrective actions rather than progressive corrective action. For instance, termination of employment or permanent revocation of participation privileges may be immediate for gross misconduct.

6. Decision-Making Authority with Supervisor. The supervisor making the final judgment should receive the findings from the investigator and have an option and an opportunity to query the investigator and any witnesses or party he or she chooses, whether or not they are part of the investigator's report.

7. Supervisor's Final Report. The supervisor will make a report with a final determination that is supported by the evidence.
a. The supervisor then meets with the accuser and the accused separately to deliver the finding and sanction, if any.
b. If the supervisor finds the accused to have violated the institutions policies or code of conduct, and the accused concurs, the sanction is implemented and the case ends.
c. If the accused objects, the accused may appeal the supervisor's decision.
d. If the supervisor finds the accused to not have violated the institution's code of conduct, and the accuser does not concur, the accuser may appeal the decision.

8. Appealing a Misconduct Determination. The supervisor appoints an unbiased appeal panel to preside at a hearing. The investigator's report and the supervisor's final report and judgment is provided to the panel prior to the hearing. Either the accused or the accuser may offer an alternative of disputed findings via a written appeal statement(s) by the accused and/or the accuser given to the appeal panel prior to the hearing. Only the written statements and new evidence may be considered by the appeal panel. At the hearing, the investigator briefly reviews his/her findings and the supervisor explains his/her decision including the proposed sanction. The accused and the accuser are given the opportunity to speak.

a. Standard of Review on Appeal. The panel may only overturn the decision if (1) new information is presented that reasonably could not have been discovered during the investigation and/or the supervisor's inquiry, or (2) the supervisor's decision is wholly unsupported by the evidence.

b. Appeal Panel Decision. The panel then meets and either confirms or overturns the judgment.

9. Final Determination. After the panel confirms or overturns the supervisor's decision, the case is final and there are no other avenues for reconsideration. All remedies have been exhausted. The accuser and the accused are informed of the decision. Either the victim or the accused has the right to republish the decision and shall not be required to sign any non-disclosure agreement.

Important Notes:

1. For policies specifically regarding school or college athletics staff or student-athlete misconduct, see Lopiano, D.A. and Zotos, C. (2013) Athletics Director's Desk Reference. Champaign, IL: Human Kinetics.
2. Like all SMR recommended policies and procedures, they should be considered as model templates and shouuld never be adopted without careful review by the organization's legal counsel for consistency with local, state, and federal laws, organization or institutional policies or conduct codes, collective bargaining agreements or other employment agreements. Obligations regarding employment and compensation of personnel vary significantly depending on many factors.
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Topics

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