

Neutral Fact-Finding As A Tool To Resolve Employment Disputes

Unresolved workplace conflict can divide a work group, drag down productivity, and destroy a professional environment. Direct negotiation between the employee and employer may

works best when it is embedded in the corporate culture through the HR policy manual and is structured in an environment where it can be requested by the HR department, the manager or the employee. It may be optional or mandatory depending on corporate policy, but it works best when the parties can consent to the process rather than have it imposed upon them.

Norman Schultz defines the process as a "fact-finding endeavor in which those conducting the investigation are neutral with respect to the conflict at hand. Neutral fact-finding can be employed at many levels, from small (but heated) environmental or community conflicts to large-scale political or international conflicts." According to Schultz, "[t]he obvious advantage of employing neutral parties in an attempt to settle a factual dispute is that neutrals are much more likely to be objective, and in being objective they are more likely to discover the real facts."

Where has it been used?

Neutral fact-finding is a common tool in the resolution of international disputes over just about everything from commercial contracts to treaty violations. For example, the international investigation by the United Nations into Saddam Hussein's weapons arsenal was a recent example of neutral fact-finding.

The process is not just for international problems. Neutral fact-finding has been used in a great many public policy disputes, including those involving acid rain and other scientific environmental issues. Governmental agencies use neu-

tral fact-finding to determine whether social service providers are complying with licensing agreements. The process has also been used to determine the cause of police shootings.

And the process has been employed effectively in civil disputes as well. In fact, many special masters have been appointed by courts to determine the root causes of discovery delay, reliability of evidence, and other similar sorts of problems.

How does it work?

The first step is to identify the problem to be investigated. The second step is to find a neutral. The third step is to create a protocol which typically includes an agreement that all material collected by the neutral shall be kept confidential until the final report is released. Typically, the report is held confidential for a stated period of time while the parties attempt to negotiate a resolution consonant with the facts found.

How does it work in the workplace?

The Intake Form: A simple form initiates this process. It is made available to all department heads, employees, and to Human Resources. In a company with a collective bargaining agreement that allows union employees to use this process, the forms are available to union stewards and committee members. The form identifies the date, the party submitting the complaint, names of interested parties and a brief description of the issue. The form is submitted to the corporate designee or directly to an outside neutral service



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be impossible if there are interpersonal issues, and in workplace conflict, there usually are. Mediation may be impractical or unripe. Arbitration may be unwelcome, as employees and employers may not feel comfortable giving up control over the resolution of the dispute. The use of an ombudsman may be regarded by the employee as a waste of time if the ombudsman is perceived to be a corporate skill. However, the rarely considered device known as neutral fact-finding may offer a way to bring feuding parties back to a working relationship and restore productivity to the workplace.

What is Neutral Fact-Finding?

Neutral fact-finding is a process-oriented dispute resolution vehicle. It takes the resolution out of the company's hands and into the hands of a neutral third party. It

provider. After it is submitted, a neutral fact-finder is selected.

The First Step: Once the neutral fact-finder is selected, either through a neutral provider list or a strike list, an initial caucus is scheduled. This is typically done as a joint caucus. The neutral fact-finder establishes the parameters, explains that the process is confidential, clearly defines the objective as the development of a win-win resolution, and requests each party to explain the situation in a non-adversarial (non-competitive) manner. After each side provides their overview, the neutral may ask some questions in joint session.

And Then... the neutral fact-finder will have individual meetings with the disputing parties to flesh out the issues and underlying facts, and to decide who will be witnesses. The neutral fact-finder is not seeking to test realities or create a solution at this stage. He is simply deciding the investigation strategy.

These first sessions are adjourned with the understanding that the neutral fact-finder will prepare an investigation plan and interview the necessary parties. The parties to the dispute are requested not to discuss the dispute or the inquiry with any of the potential witnesses or their co-workers.

The Interviews: The interviews are scheduled through the HR department. This may be done in conjunction with the manager, unless the manager is the source of the complaint. It is important that parties to the disagreement be asked not to discuss the issues or the pending interview. Thereafter, the neutral fact-finder engages in confidential discussions with the witnesses and, if necessary, with other managers or individuals within the department. The interview is generally conducted in a conversational style, making extensive use of open-ended questions.

The introduction to the interview is important. The neutral fact-finder must gain the confidence of the witnesses through an assurance of confidentiality and

an understanding that individual names will not be linked to any particular statements or conclusions. Therefore, the interview is not recorded.

After The Interviews – The Report/Conclusions: Depending upon the circumstances, the neutral fact-finder will either draft a report or provide an oral debriefing. In either case, an overview of the issue, scope of investigation and conclusions are provided. The conclusions will typically include a recommendation for specific action that may be taken to address the issue. Sometimes the recommendation may be that no action be taken. Whatever the recommendation, it should be stated in neutral terms.

The single most significant advantage of neutral fact-finding is that by inserting a review level that is not connected to management, a greater sense of neutrality is assured. Employees are more comfortable and more candid when they are assured that specific comments will not be attributed to them and that their personal opinions will not be communicated to co-workers or management. It is often believed that employees are fearful of being critical of management. Often, employees do not wish to be critical of the co-worker if the criticism might get back to the co-worker. Neutral fact-finding reduces these concerns.

Moreover, many jurisdictions require that the firing of an employee meet certain due process standards, including a “reasoned decision.” The California Supreme Court stated in a fairly recent case that what is required is a “reasoned conclusion... supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.” Neutral fact-finding meets this requirement.

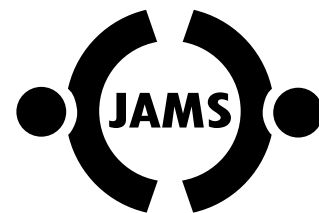
After The Report: When a report is completed, questions about the use of the report remain. Should the neutral report be binding? Whether or not binding, should

the neutral report be admissible in a collateral proceeding such as a complaint before the EEOC or other administrative body, or in civil litigation?

As a voluntary administrative remedy, neutral fact-finding should fall within the mediation privilege, and neither the results nor the investigation be subject to disclosure or discovery beyond the scope of the parties involved in the investigation. In those situations where the findings are not binding, the neutral fact-finder or a third party should be permitted to utilize the findings in an effort to obtain a voluntary agreement.

A process that provides an outside review of employee grievances, that includes even handed fact finding and provides stated conclusions, is an effective and constructive method of resolving workplace disputes. The earlier it is undertaken; the sooner people get back to work.

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