

CHAPTER FIVE

ESTABLISHING THE FACTS

“The horror of that moment,” the King went on, “I shall never, never forget!”

“You will, though,” the Queen said, “if you don’t make a memorandum of it.”

— Lewis Carrol
Alice in Wonderland

This chapter will continue with the discussion of basic components of a disciplinary action and those elements that management must demonstrate if the employee challenges the action. First, we studied when you may take a disciplinary action (nexus or reasonable connection to the efficiency of the service). Then we looked at the choice between formal or informal discipline. And in the last chapter, we examined how to assess penalties once you establish a need for some formal discipline (consider all relevant factors). Now we’ll turn to issues of proof and how we prove to an outside party that the employee committed the offense in question.

Actually, even before you worry about nexus and penalty factors, you must find out for yourself, and then satisfy others that what you are alleging happened actually took place. For example, the last chapter mentioned a Postal employee striking a Postmaster and said that removal in such cases is automatic. However, management must first make sure and later be able to prove before a third party that the incident occurred. If the employee is removed and appeals from his removal, even before the Post Office starts arguing “efficiency of the service” and penalty, it first must prove that the employee did, indeed, strike the postmaster. If the employee had admitted it, no problem. But what if he denied it? What if he said that he never hit him? What if he said that he was never there? How much evidence do you need? How many witnesses have to see the incident? Is physical evidence necessary?

We’ll begin this chapter with an in-depth discussion about how to prove

factual issues in disciplinary cases. Then we shall conclude with a list of the steps in a pre-action investigation in a time-sensitive case.

The following discussion will unfortunately become a bit technical. However, the supervisor must have a good layman's grasp of some basic concepts on how to prove facts. You must know them before you can conduct a proper pre-action investigation so you can then decide whether you have enough proof to justify a disciplinary action. Far too many supervisors fail to act when they should because they fear they will not be able to prove the offense. Conversely, just as many err by taking action when they should have recognized that the facts would not support a charge. Although attorneys will usually present the agency's case before an appellate body, the attorneys cannot manufacture a case. They can only work with what you give them and if the information in its original form has not been preserved, they cannot fabricate it.

Types and Weight of Evidence

Therefore, you must first prove certain facts (that the employee hit the Postmaster, that an employee took a typewriter, that an employee was not at work) even before you begin examining the rectitude or propriety of the act. How do you prove that something did or did not occur? How do we prove these facts? Facts are proved in administrative discipline cases the same way that they are proven in other forms of litigation—through evidence.

Evidence in disciplinary cases falls into three broad categories: (1) Physical evidence is objects and things—O.J.'s bloody glove, a bag of cocaine, (2) Documentary evidence is pieces of paper, and (3) Testimonial evidence is what comes out of somebody's mouth.

However, not all evidence is equally important and in most cases evidence is contradictory. One piece of evidence will point to one possibility and another item may suggest the contrary. The eye-witness testimony of people will often be wildly variant over the same point—even though nobody is lying. People see things differently. Documents do not always agree with peoples' recollections. What types of evidence, therefore, carry greater or lesser weight? Depending upon the form evidence takes, it will have varying degrees of clout. Let's look at the three types of evidence and how third parties give it weight.

Physical Evidence

As we mentioned, physical evidence is objects. You don't see much of this in disciplinary cases, but it's important when it does surface. For example, a wildland firefighter bent over and a small bag of cocaine fell out of his pocket. The supervisor confiscated it before the employee could retrieve it, and it became an important piece of evidence. A supervisor at another activity found a bottle of bourbon in an employee's assigned vehicle.

The weight third parties give to physical evidence depends upon the charge and how the employee tries to rebut it. We cannot give you any easy rules about what it will or will not prove. What is important about physical evidence, though, is how you collect and protect it.

We'll get into this in more detail below when we look at pre-action investigations, but Constitutional protections against unreasonable search also apply, albeit to a lesser degree, on the federal job site and you do have to make sure that the evidence was in plain view or otherwise in a place where the employee had no expectation of privacy.

Documentary Evidence

Documentary evidence is anything on paper—a log book, an e-mail, a note, a report. Several principles are important about documents:

Routine Business Records

Routine records are documents that follow some periodic schedule and have been processed or authenticated. These records, which include production records, cash register tapes, and financial reports, are usually accepted at face value. The contents are assumed to be true, e.g. if the cash register tape shows a total of \$102.98, a court accepts that the clerk indeed rang up that amount (whether there is that much money in the till or whether all items were rung up is, of course, another matter). However, few documents fall into this category and it does not include letters, memoranda, notes, and correspondence.

Sworn and Unsworn Documents

It makes a huge difference whether documents not in the form of routine business records are in sworn or unsworn form. A sworn statement is not generally as good as the live sworn testimony we'll discuss below, but it is the next best thing. Since it is sworn, it is given under jeopardy of perjury,