

CHAPTER TWO

FIVE FUNDAMENTAL ELEMENTS

Management has the burden in every case of discipline of proving each element of its case by a preponderance (e.g., a majority) of the evidence. There are five fundamental elements in every misconduct case. They are not necessarily laid out in a particular format, like the format you will see neatly labeled below. However, they must be present for discipline to be sustained on appeal. When you are thinking about your problem, consider each of these elements and be able to articulate what proof you would submit at hearing to prove each element.

I. ELEMENT 1— YOU MUST PROVE YOU HAVE A VALID RULE

By definition, misconduct is a violation of a rule. Rules can come from many places in a government workplace. The most obvious source of rules is the law: the federal, state, and municipal statutes that govern the particular institution. For example, it is a federal law that a federal employee cannot misuse a government vehicle for personal reasons. Also, it is a law in both the federal government and in most every state that government supervisors cannot discriminate among their employees based on race or sex. Rules that come from law are well-established, universal as far as their jurisdiction, and usually heavily litigated, thereby giving us a body of case law that helps us to understand what the law really means.

Rules can also come from individual government agencies or even local components of the agency. For example, the Internal Revenue Service (IRS) has an agency-wide rule that requires its employees to file personal tax returns in conformance with all the governing tax regulations. Employees at other government agencies are compelled by state and federal law to file their taxes properly, but the IRS has gone one step further to establish an administrative sanction for filing improperly. It is easy to see why the IRS has decided it is necessary to have an agency-specific rule in this area. We citizens are expected to comply with the tax code voluntarily. Some of us might decide not to do that if we knew that the very individuals responsible for monitoring our compliance with the code are code-breakers themselves. Agencies throughout government have agency-specific rules that apply just to their employees.

Local government facilities can also have rules: “No smoking within Building 123 or within 20 feet of any entrance or open window.” “Employees are not to park in front of the emergency entrance.” Local rules often are published in a policy manual or sometimes simply posted as signs on the wall.

Most important, though, and perhaps the most misunderstood authority for a rule, is the individual government supervisor. Individual supervisors set rules every time they give an order, instruction, or set a policy for their particular workplace:

The policy in this office is that all employees are to check out with me before leaving for the day.

Ed, I want you to close the door to your office before you engage in loud discussions on the phone.

Turn off your computers before leaving work each day.

Each of these is a statement a supervisor might make to establish a workplace rule, a rule that will result in discipline if the employee violates the rule. These rules are just as enforceable as are rules passed by the U.S. Congress, implemented from upon high at agency headquarters, or published in a local policy manual. When an individual voluntarily accepts a position with a government agency, the implicit agreement within that employment relationship is that the employee will do what he is told in exchange for a government paycheck (or electronic deposit) every couple of weeks or so. If the employee does not want to do what he is told, that's just fine; he can go work somewhere else. However, if he wants to remain a civil servant, he has to obey his supervisor's direction just as he would obey a state or federal law, or go find himself another job.

Whoa! What a ground-breaking concept! Are we saying that an employee cannot refuse an order because the assignment is not one that is in the employee's position description? That a supervisor can order an employee to do just about anything and the employee has to obey? That if he doesn't obey, he can be disciplined? Are we REALLY saying that a supervisor does not need specific superior authority (e.g., a law, regulation, or published policy) before he can establish a rule for the employees he supervises?

Yes, as crazy as that sounds, that is EXACTLY what we are saying. In the game of government employment, the supervisor gets to decide what has to be done and the employees who report to that supervisor have to do it. Refusal or failure to obey a supervisor's order is just as clearly bad conduct as failure to obey a law of Congress.

Suppose an employee who works for you dresses in a very revealing manner; six inch stiletto heels, super-short skirt, low-cut see-through blouse, midriff exposed from way below the belly button to the bottom of her short tight tube-top, and huge dangling ear rings that look and operate more like a wind chime than jewelry. Customers to the agency have made comments, coworkers have complained, and frankly you yourself have been distracted more than you care to think about. Do you need an act of Congress to be able to get the employee

to dress more conservatively? Do you need a published dress code that applies to all employees and in detail defines “business casual?”

No, you need only your inherent authority as a supervisor to say to the employee:

Pat, don't dress like that anymore. It's too revealing and distracting to the people in the office. Dress more conservatively, as do Terry and Alex. If you have any questions about the appropriateness of specific items of clothing, talk with me.

What, you say? Do we mean that government employees cannot wear whatever they want to work? Yes, that's right. Government employees have no basic right to dress any way that they want even if the agency they work for does not have a written dress code. The unwritten dress code throughout government is that an employee must dress in a manner that is appropriate for the work being assigned. And guess who gets to decide what is appropriate...yep, it is that employee's supervisor.

Of course, as a practical matter, it is a question of what the supervisor and the next level supervisor think is appropriate. That's because every employee has a right to grieve and grievances go up the chain of command. However, if a first-level supervisor can explain his business rationale for the order, in most organizations the upper levels of supervision should support that order.

What if there is a union? Unionized employees have the right to require management to notify the union and to bargain over changes to their “working conditions.” However, there are several complex exceptions to this right that can allow management to make changes that do not constitute “bargainable” working conditions. If you supervise unionized employees, it is a good idea to run your planned instructions past your labor relations advisor before implementing any changes that may affect working conditions.

When you do this, keep two things in mind. First, even though legally you may be entitled to make a work place change that does not need to be bargained, your labor relations advisor may recommend that you notify and bargain with the union anyway. That is because front line labor relations is half legal, half, relationship, and the other half is just plain luck (to paraphrase Yogi Berra). Sometimes it is best for the overall relationship to bargain workplace changes to avoid getting into a protracted legalistic fight with the union as to whether you need to bargain at all. The agency's labor relations specialist is in the best position to make this judgment.

Second, as much as we hate to say it, there are a few management advisors in government who have developed a posture over the years of just saying “no” whenever a supervisor proposes to make a change. Be aware of this tendency in