

Guide to Gathering Relevant, Credible Evidence

A “preponderance of the evidence” is required to take a disciplinary or adverse action against an employee for misconduct. A preponderance of the evidence is defined as “a degree of relevant evidence that a reasonable person considering the record, as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.”

In other words, it is not enough that an event occurred. We must prove by a preponderance of the evidence that our account of events occurred. However, if you gather relevant, credible evidence of the misconduct and promptly contact the WHS Labor and Management Employee Relations (LMER) division after an incident occurs, you should be able to support a warranted disciplinary action.

The following checklist will help you to gather and evaluate credible evidence. See page 2 and 3 for more detailed information about evidence. Please provide a copy of all relevant evidence to the LMER office when initiating a disciplinary or adverse action.

Employee's Name: _____

Proposing Official's Name: _____

Brief Description of Misconduct: _____

1. What proof do you have that the incident occurred?

- Was there a witness? Yes___ No___
 - Did the witness provide a signed, dated memo for the record? Yes___ No___

- Can anyone else corroborate (or back up) the story? Yes___ No___
 - Did the witness provide a signed, dated memo for the record? Yes___ No___

- Is there other documentation to support (see page 2 &3)? Yes___ No___
 - Please list below:

2. What proof do you have that the employee was on notice that this conduct was unacceptable?

- Is there a policy or procedure? Yes___ No___
- Did the employee receive a copy of the policy or procedure? Yes___ No___
- Was the employee counseled on the matter in the past? Yes___ No___
- Did the employee receive training on this matter? Yes___ No___
- Other? Please list: Yes___ No___

TYPES OF EVIDENCE

Documentary Evidence

Documentary evidence consists of paper evidence that supports the facts of the case. For example,

- printed email correspondence or memorandums for the record,
- printed leave records or training records,
- copies of regulations or policies, or
- copies of work products with corrections.

Testimony Evidence

Testimony evidence consists of the unwritten words of witnesses that support the facts of the case.

Testimony must be recorded in writing, signed, and dated by the person providing the testimony as soon as possible after the incident.

Recommended Format for Witness Statements: The following format is recommended because a declaration under 28 U.S.C. § 1746 is acceptable in court without notarization.

Pursuant to 28 U.S.C. § 1746, I, [Name of Person Providing Testimony], declare as follows:

[body of declaration]

I declare under penalty of perjury that the foregoing is true and correct. Executed on ___[date]_____.

_____[Signature]_____

_____[Witness]_____

It can also be important to record specific words and non-verbal clues. For example, if a witness says an employee was "red-faced, with veins bulging in his neck" when he said, "remember, I know where you live" to a supervisor, you should reflect those exact words. They paint a much more telling picture than to say the "witness says the employee appeared angry" in your notes.

It is important to consider the credibility of testimony evidence using the following factors:

- **Is the story detailed and consistent?** People who tell the truth usually recount their stories in great detail and their stories do not change.
- **Is the story plausible (or likely to be possible)?** A story may be detailed and consistent, but still may be highly unlikely.
- **What is the character of the witness?** The character and reputation of the employee can be very important to the credibility of the employee's story.
- **Is there corroboration (or something to back up the person's story)?** It may be helpful if you can find something to corroborate even a small part of one person's story.
- **Is there no corroboration where there should be?** The *absence* of corroboration can also be highly significant. For example, if someone shouts in a crowded office, several people should have heard the shouts. If no one did, the claim that an employee shouted in the office may be open to skepticism.

- **Does the body language or reactions of the witness support or discredit the story?** For example, when someone feels threatened he/she will often appear physically upset or tell someone what else happened right after the incident occurs. However, if a person claims he was terrified by a threat of bodily harm made against him and is later seen joking and laughing with the person that allegedly threatened him, the “victims” story may be open to skepticism.
- **Are there any reasons for bias?** Does the witness have a reason to fabricate or twist the story? Friendships, romantic entanglements, and off-duty business relationships are just a few of the many reasons for bias.

Physical Evidence

Physical evidence consists of objects that support the facts of the case. For example, a government laptop with a label that certifies that it is government property, a knife, or a bloody shirt.

A chain of custody—or record reflecting the handling of evidence from the moment it is obtained until it is presented as evidence—must be established and documented, to show that the object being presented as evidence is the same object involved in the misconduct.

It is also a good idea to convert physical evidence into a more useful format. This will allow the physical evidence to be included in the evidentiary case file. To do this you can

- **Take a picture.** If you want to establish that an employee did substantial damage to a government vehicle, take detailed pictures of the damage. Use an instant or digital camera if possible, to make sure you have a usable picture right away and to avoid lost film and developing problems. Back up those digital files!
- **Have it analyzed.** If you want to establish that the substance contained in those little packets in an employee's desk is cocaine, have it analyzed by a certified lab and convert it into an authoritative lab report.
- **Get it measured, described, or weighed.** An employee may contend he tossed a harmless handful of snow at a supervisor's head, but you can have the ice ball weighed, measured and described before it melts. And do not forget to photograph both the ice ball and that lump on the supervisor's head.

Demonstrative Evidence

Demonstrative evidence consists of a “demonstration” of a process, procedure, or technique that supports the facts of the case.

For example, a commissary officer determined through a demonstration that a cashier had deliberately under-rung purchases—and subsequently proved it to an MSPB judge. In simulating the actions of a cashier using the exact items purchased and the check-out equipment provided, he was able to show that the employee's claim that the items had simply slipped past her was implausible, since the physical layout of the check-out station prevented that from occurring.

Demonstrative evidence also includes evidence that does not involve an actual demonstration, such as: scale drawings, models or mock-ups of locations or equipment, site visits to observe particular processes or techniques.