

In arbitration case, frequently the question comes down to one employee claiming to have witnessed or experienced an incident and the charged employee denying the allegations; a situation of my word against your word. While it may appear that the two statements cancel each other out, the arbitrator has the authority and responsibility to determine if one statement should be deemed credible while the other not credible. Additionally, this matter of credibility must be evaluated in the context of fairness and appropriate due process for the employee who has been charged (in most cases, the grievant).

My discussion on this point begins by noting that a chief function of the arbitrator is to determine the pertinence (probative value) of the evidence and the weight that is to be given to it. Evidence can have high probative value but not be given much weight because it is not considered credible. On the other hand, evidence can be given substantial weight because it is credible but not have much probative value – not very relevant.

What usually decides a case is evidence with high probative value that can be given substantial weight. An eye-witness account of an incident that brought about discipline is clearly probative. The question is whether the person's statement can be given substantial weight. Likewise, the direct denials of the charged employee have high probative value leaving the arbitrator with the question of the weight that can be assigned to the denials.

Without question, the arbitrator is confronted with a difficult situation when one person testifies to a set of facts while another directly contradicts or refutes those facts. When faced with this situation, the arbitrator can apply a set of criteria to determine how to assign weight to the conflictive statements. While there is no universally accepted set of criteria for determining the credibility of a witness, the following eight points can be helpful and should provide some insight into the process of determining credibility.

1. Does the person providing the statement or testimony have an obvious bias, perhaps a family member or a close friend? Or, from a

negative perspective, is there a history of a rancorous relationship between the two individuals that are making contrary statements?

2. Is there a specific motive that undermines the credibility of the statement? What does the individual gain by his or her statement? A manager typically, for example, gains nothing by losing a good employee. Why then would that manager want to unnecessarily put the employee's employment at risk? On the other hand, this may be an employee with a disciplinary history or who has previously embarrassed the manager and the manager is just looking for a good excuse to get rid of him or her. As to the employee, his or her statement may obviously be motivated by the desire to keep the job – it is self serving.
3. Statements that are clear, specific and to the point will usually be viewed as credible; statements that are over generalized, ambiguous and vague seen as not credible. This is one of the reasons it is important to make a written statement with a reasonable amount of detail as soon as possible after an incident. Include pertinent factual information such as place, time, who else was present, and general conditions.
4. Does the witness have a good memory of the event or is memory playing tricks on him/her? This is another reason why a written statement can be helpful. Typically, in a hearing, testimony is given from memory and the witness is not allowed to use notes or prior recordings of the event as an assist. However, before giving testimony the witness can review contemporaneous notes to “refresh his or her memory.” A point of caution, having too good of a memory may be viewed as a sign of untruthfulness unless there is a specific reason why one's memory is that good (I wrote it in my diary, it happened at my birthday party, etc.).
5. Oftentimes there is circumstantial evidence that will support the veracity of one statement as opposed to the other. Circumstantial evidence does not directly relate to the truthfulness of a statement. Rather it indirectly supports the statement by making more likely what has been said. Or, it makes the statement hard to believe because the content of the statement is not compatible with the other known facts about the incident or the situation.

6. Common sense often plays a part in determining credibility. One way of thinking about common sense is to consider the probability of such an event happening in the way that it is described by the witness. What is the likelihood, for example, that the brakes on the car involved in the accident malfunctioned but had no history of a problem before the event and were working perfectly after the accident?
7. Witnesses are often their own worst enemy by having a belligerent or defensive demeanor. Giving simple, straightforward, direct answers to questions increases the believability factor. Arguing with the person asking the question makes the witness appear defensive or evasive. Freely acknowledge what is not known as it makes the rest of the testimony appear more credible.
8. There is a general principle that one does not directly accuse the person providing information of lying when he or she makes a statement, particularly if it is a sworn statement. Rather the approach is to attempt to impeach the statement either by evidence that it is incorrect or by evidence that the individual has previously made contrary statements.

When these eight criteria are applied, there are those situations where it is quite obvious that one statement should not be given much weight and the other given substantial weight; one credible the other not. Obviously, however, there will also be those situations where it will be extremely difficult to find one person's account more credible than the other. In those situations, an arbitrator will not be able to reach a decision based only on the testimony. Rather, the decision must be made based on the other evidence or based on which party has the burden of proof. There is also the fact that different arbitrators will apply the criteria and end up with a different result.

Clearly, what is hoped is that there is an honest accounting of what has happened and the final decision made based on a correct assessment of the facts.