

DOCUMENTING MISCONDUCT

The goal of any inquiry into allegations of misconduct is to obtain information. Generally, misconduct inquiries involve gathering facts and evaluating evidence to determine whether it is more likely than not misconduct occurred.

Types of Evidence

Evidence is the most critical piece to any workplace inquiry. The three main categories of evidence include:

1. Testimonial Evidence

Testimonial evidence consists of witness testimony. Witnesses should document, sign, and date their written testimony. During a workplace inquiry the following individuals are typically interviewed: employees involved in the incident, employees who were in a position to observe the incident, and employees with relevant information and documents. Management should obtain testimony from all witnesses that were in a position to observe the incident even if their statement claims they did not see or hear the incident of alleged misconduct.

Example: In a misconduct case involving unprofessional language, if a witness in close proximity did not hear any use of improper language, the testimonial evidence suggests that the employee may not have engaged in the alleged misconduct. **Note:** Recording interviews does not comply with Coast Guard policy and practice. Avoid recording interviews.

2. Documentary Evidence

Documentary evidence includes documents such as timesheets, training records, incident reports, emails, and other documentation. **Example:** In a misconduct case involving computer misuse, if the employee's timesheet shows the employee was on annual leave on the day in question, the documentary evidence suggests that the employee may not have engaged in the suspected misconduct on the day in question.

3. Physical Evidence

Physical evidence is tangible evidence. Physical evidence often includes photographs, video recordings, audio recordings, and other tangible things. **Example:** This could include a photograph that shows damage to government property or a video recording of a physical altercation between employees.

Weighing the Evidence

After gathering the evidence, management weighs the evidence and determines whether the alleged misconduct occurred. To "weigh" evidence means to assess its credibility and probative value. The probative value of evidence is essentially its value in determining the truth of what happened. The more credible and probative the evidence, the more weight given to that evidence. Some evidence may be ascribed more or less weight than other evidence or no weight at all. Evidence that is direct or incontrovertible is given more weight than evidence that is indirect or vague. **Example:** The testimony of a witness who directly observes an inebriated employee stumbling or using slurred speech is given greater weight than testimony offered by a witness who did not witness the behavior firsthand.

Burden of Proof

The final step in evaluating evidence involves making a determination as to whether the evidence proves employee misconduct occurred. When evaluating the evidence the supervisor considers whether the agency has met its burden of proof. In employee misconduct cases, the evidence must support that misconduct occurred by a "preponderance of the evidence". To meet this burden there must be sufficient evidence to conclude that it is more likely than not that, when considering the record as whole, the employee misconduct occurred. This burden of proof is much easier to meet than the "beyond a reasonable doubt" standard used in criminal cases.