

Arguing the Discipline Grievance

- Components of Controversy
 - Issues
 - Are inherent in the controversy
 - Are vital to the resolution of the controversy
 - Claims
 - Answer the issues
 - Support the resolution
 - That is, they lead to the desired conclusion
 - Resolution
 - A simple declarative statement

Arguing the Discipline Grievance

- Substantive rules –
- The *desired* resolution of the controversy must be supported by claims
 - Claims must be supported by evidence
 - Evidence, sometimes, must itself be supported by proofs
 - Combined, the claims and the evidence must lead to the resolution
 - One party has the *benefit of presumption* while the other has the *burden of proof*

The Fundamental Controversy In Disciplinary Actions

The fundamental controversy – the alleged misconduct – raises questions leading to claims (charges) that support a finding that the employee deserves disciplinary action (the Service's statement of *resolution*).

- The misconduct may be answered by the *resolution*.
"Jack Edwards deserves to be suspended for fourteen days due to . . ."
- Or, in the alternative, "There is no just cause for the discipline."
- Either *resolution* answers the controversy.

WHO STARTED THE ARGUMENT?
AND WHAT'S IT ABOUT?

In the Discipline Grievance –

- The Service starts the argument.
 - A supervisor asserts that an employee has engaged in misconduct sufficient to warrant disciplinary action.
 - This is the fundamental assertion of a *resolution*, "You will be suspended for fourteen days . . . You are charged with threatening . . . Your actions are in violation of . . . You were previously warned . . ."
 - Resolution supported by claims, (presumably) supported by evidence.

WHO STARTED THE ARGUMENT?
AND WHAT'S IT ABOUT?

- Having posed the *resolution* to its perceived controversy, the Service assumes certain obligations
- In order to *achieve the assent* of the other party – the Union – or *convince* the outside, third party – the Arbitrator – the Service must be able to
 - Support the *resolution* with claims,
 - Supported by evidence,
 - Supported by proofs . . .

WHO STARTED THE ARGUMENT?
AND WHAT'S IT ABOUT?

- The most important thing about how the argument proceeds, now, is the response.
 - Whether the alleged act occurred – "I didn't do it."
 - The act should not be defined as a violation – "There's no rule against it."
 - It was a violation, but should not be punished – "Extenuating circumstances."
 - The discipline itself is improper – "Fatal procedural or due process errors."
- Together, the original assertion and the response to it establish what is known as stasis.

**WHO STARTED THE ARGUMENT?
AND WHAT'S IT ABOUT?**

- *Stasis* is a focal point or a point of rest. It is a point of inertia that should establish a point the other party must overcome in order for the dispute to *move forward*. The progress of the argument is now dependent, not just on the initial assertion, but on the response.
 - Four types of *stasis*
 - *Conjecture* – whether an act occurred
 - *Definition* – what the act should be called
 - *Quality* – whether the act is justified
 - *Place* – whether the discussion is in the proper forum

**WHO STARTED THE ARGUMENT?
AND WHAT'S IT ABOUT?**

Characteristics of *stasis* –

- It is progressive
 - *definition* concedes *conjecture*
 - *quality* implicitly concedes *definition* and *conjecture*
- Presenting more than one *stasis* is better than shifting from one to another
- Select the *stasis* closest to what you can actually prove
- *Stasis in place* is preemptive to the original resolution

What has happened to the argument?

- If the employee responds to the allegations, "*I wasn't even in the building, and did not do it.*" this creates the *stasis* of *conjecture* – that is, it draws sharp focus on whether the act occurred

What has happened to the argument?

- Or the employee may respond, "*That wasn't a threat.*"
- *Stasis* of definition
 - Just what is a "threat"?
 - The dispute presents this *stasis* if, and only if, it raises the question
- Concedes that it happened

What has happened to the argument?

- If the employee responds, "*I had plenty of good reason for threatening Tom that I'd take him down . . .*" he has conceded he did it and that it was a threat – drawing the focus elsewhere

What has happened to the argument?

- "*I did it, but . . .*" in this example raises a question
 - Does this "threat" constitute misconduct?
 - Presenting a *stasis* of quality

What has happened to the argument?

- If the employee or the Union responds to the Service's claims that there was no rule against what the employee did and there were plenty of good reasons for what he did, not to mention, that the discipline is procedurally defective – clearly there are several *focal points* for the dispute.
- However, it is also clear this response concedes at least the question whether it occurred

What has happened to the argument?

- *Stasis* of place
- The Service attempts to defuse a grievance by claiming procedural defect
- The Union also makes preemptive challenge
 - Lack of review and concurrence
 - Lack of notice period
 - Other failures of due process

Responding before the discipline

- Counsel the employee prior to the pre-disciplinary interview
- Remember the characteristics of *stasis*
 - Progressive
 - Presenting more than one is better than changing claims
 - Present a *stasis* closest to what can be proven

Responding before the discipline

- Pre-discipline responses are critical
 - Establish the focal points of the argument
 - Claims that cannot be supported
 - Weaken any case
 - Damage credibility

Overcoming Inertia

"He said . . . ; she said . . ."

- It is never enough to know and to assert. Knowledge is not fact.
Truth is not fact.
- The Service states,
"The employee deserves discipline for threatening his supervisor, in violation of known and published rules."
- The employee and the Union respond,
"The Grievant made no threat."

Overcoming Inertia

- A point of *stasis* is created where two competing assertions conflict in such a way that the underlying dispute cannot move forward without overcoming this stalemate.
 - In other words, the argument is stalled.
 - If the parties simply engage in childish exchanges like,
 - "I didn't touch you."
 - "Yes, you did."
 - "No, I didn't."
 - "Yes, you did."
- nothing is accomplished.
But that is what some grievances look like.

Overcoming Inertia

Burden of going forward

- One party or the other must proffer something to overcome this hurdle or the dispute cannot be resolved.
- Uniquely – in disciplinary actions – the Service has the burden of proof and must be able to support its case.
- However, because the grievance-arbitration procedure is a cooperative effort the Union has its own burdens to carry, and the Union must do what is necessary to move beyond a stalemate in the process.

Mutual obligation to move the argument forward

- Both parties in an argument – in the grievance procedure – are obligated to support assertions they make.
- Any claim made *must be* supported by evidence,
which may also have to be supported as to its validity or relevance

Claims and Evidence

- The misconduct (the controversy) is addressed by the Service's statement of the discipline (the resolution)
- Inherent in the controversy are certain issues (or questions) vital to the resolution
- Each issue raised by the misconduct points to a specific claim
- All of the claims, taken together, support the resolution

Claims and Evidence

- Every claim may be placed in one of four categories
 - Claim of fact
 - Claim of definition
 - Claim of value
 - Claim of policy

Claims and Evidence

In the context of the grievance procedure, we focus on the first three types of claims.

- *Claims of fact* relate to matters that should be verifiable by objective, independent means.
- *Claims of definition* involve placing facts in specific context, because contractual terms have specific implications.
- *Claims of value* are our means of providing judgment or evaluation as to whether something constitutes a breach of the contract.

Claims and Evidence

- The distinction between these different types of claims is important, because each claim answers certain *issues* ;
 - and each type of claim has its own proof requirements.
- The *issues* point to the evidence necessary to support the claims that flow from them.

Claims and Evidence

- Evidence in support of a claim should meet several tests
 - Easy to understand
 - Consistent with other things known to the parties
 - Efficient to present
 - Likely to be accepted by the "critical listener" – the arbitrator

Claims and Evidence

- Evidence supports the claims that lead to the resolution
 - Evidence answers the questions
 - "How do you know?"
 - "What do you have to go on?"
 - Evidence should be agreed upon by the parties
 - If the evidence is disputed, it becomes a claim and must, itself, be supported by evidence

Presumption and Burden of Proof

Presumption in the context of discipline uniquely lies with the employee, not with the Service

- In all other disputes in the employment arena, presumption lies with the Employer

Presumption and Burden of Proof

Presumption benefits just one of the parties and is held by just one

- Absent controversy, who prevails?
- The party with presumption controls the ground
- The other party initiates the dispute
- Presumption never shifts
- Cannot be confused with being "right"

Presumption and Burden of Proof

Burden of Proof

- Opposite of Presumption
- The burden of proof adheres to the initiator of the dispute – the *moving party*
- That is, the party who starts the argument has the burden of proof
- The ultimate burden of proof does not shift

Presumption and Burden of Proof

Burden of Proof – mixed terms

- The ultimate burden of proof is also known as the burden of persuasion
 - It never shifts in the course of the argument
 - It establishes the responsibility of the moving party to support the resolution
 - That is, in a discipline grievance, it requires the Service to prove the asserted discipline is warranted

Presumption and Burden of Proof

Burden of going forward

- Requires proof of a contested claim
- Applies to each party as it advances its case
- It is also known as a burden of *rejoinder*
- It is each party's obligation to advance the argument
 - This is the obligation to address the other party's claims or risk failing to refute

Presumption and Burden of Proof

Rejoinder

- The party holding *presumption* has the first burden of rejoinder
- The moving party likewise must make appropriate response
 - Each such response is what creates the *stasis* that occurs on each claim and will dictate how the other party proceeds

Presumption and Burden of Proof

Rejoinder – Failure to make

- If the claim that is ignored is sufficient to lead to the desired resolution, the case may be lost simply on a failure of rejoinder
 - Service asserts violation of a "last chance agreement"
 - Union fails to address the implications of the "last chance agreement"
 - We lose – Irrespective of all other claims

Presumption and Burden of Proof

Rejoinder

- This burden shifts back and forth as the grievance advances
- It is intended to keep the argument going forward to resolution
- Simple repetition of a previously stated position is a failure to advance the case
- Each *rejoinder* is a claim that requires evidence in support

Presumption and Burden of Proof

Quantum of proof

- Preponderance of evidence – generally accepted as appropriate measure in employment disputes
 - Sufficient weight of evidence to tip the scale in favor of a conclusion "*more likely than not*"
- Clear and convincing evidence
 - More than sufficient – a higher quantum of proof
- Beyond a reasonable doubt
 - Highest quantum of proof
 - Generally reserved for criminal justice disputes
 - Almost never applied to arbitration – even in discharge cases

Presumption and Burden of Proof

Quantum of proof

- Never presume the Service must satisfy a quantum of proof higher than the lowest – preponderance of the evidence
- Showing failure to meet a higher standard may neglect what the Service has proven

Arguing the Discipline Case

- Each grievance demands a theory of the case
- The essentials of the theory are those elements determined as necessary for the steward to *"do what we need to do"*
- In other words, *"What do we need to do to prove the case?"*

Arguing the Discipline Case

The most fundamental rule for the steward should be

- Never neglect the burden of rejoinder
 - Not your own
 - Not your counterpart's
- Secondly, and in direct correlation with the burden of rejoinder
 - Always seek to shift the burden of going forward

Arguing the Discipline Case

- Remember the discipline is the Service's argument of its case
- In answer to the discipline the steward must make choices
 - Which arguments to attack
 - Which part of an argument to attack
 - What type of attack to develop

Attack and Defense *Refutation*

Which arguments

- Not every argument presented by the Service requires attack
 - Addressing every one may be tedious and may elevate pointless claims to an unwanted level of significance
 - The steward must exercise a critical eye toward narrowing the dispute to the essential issues – especially those that support the steward's theory of the case
- However, any significant issue raised by the Service must be refuted

Attack and Defense *Refutation*

Which *part* of an argument

- The *claim* made, itself, may be denied or contradicted
- The *evidence* relied upon by the Service to support its claim may be attacked as not being relevant, valid or supportive of the claim
- An *inference* from a claim may be shown to be faulty
- Underlying *assumptions* relied upon may be attacked as being false or irrelevant
- Keep in mind each counter-argument will create its own proof requirements
 - i.e., Do not make empty assertions. Follow up with evidence.

Constructing the Case

- The grievance may present affirmative defenses
- These are arguments
 - Claims supported by evidence
- They also require choices to be made
 - Which claims to make
 - What evidence best supports the claims
 - How to arrange

Constructing the Case

Which claims to make

- Strength of the claim – enough to withstand challenge
- The acceptability of the evidence in support of the claim
 - Is the evidence indisputable or otherwise fully supported?
- The relevance of the claim to the resolution
 - Is the claim vital and necessary to acceptance of the resolution?

Constructing the Case

How many claims to make

- The number of claims depends on their individual strengths
 - A greater number of claims may offset inconclusiveness of each standing on its own
- There are risks in relying on a multitude of claims
 - The sheer number of various claims raises doubts about their validity
 - One poor claim can discredit the whole case and the credibility of the steward
- Any claim that cannot be supported by evidence should probably not be made

Constructing the Case

Arranging the elements of the case

- Chronology
 - If the sequence of events is critical to the case, structure the case chronologically

Constructing the Case

Arranging the elements of the case

- Anticipating the other party's counter-claims
 - If a counter-claim is reasonably certain to be made and if it could be persuasive, anticipating its presentation can serve to undermine its impact or preempt it altogether

Constructing the Case

Arranging the elements of the case

- Strongest argument
 - Make this the cornerstone of the case by placing it at the beginning, or
 - Make it the conclusive, final blow by putting it at the end
 - Never use the strongest argument in the middle

Principles for Effective Resolution

Obligations of the parties

- Article 15 of the National Agreement is unequivocal in its commitment – by both parties – to cooperate in a process of effective resolution of grievances.
- The Union must fulfill its side of the obligation
- It must also aggressively point to failures on the Service's part to live up to these obligations

Principles for Effective Resolution

Rules of Engagement

1. A party who advances a standpoint is obligated to defend it if asked by the other party
2. An attack must relate to the standpoint advanced by the other party
3. Neither party may advance a false premise nor deny a premise that would be an accepted starting point

Principles for Effective Resolution

Rules of Engagement

4. A failed defense of a claim must result in the party who advanced it retracting it; and a conclusive defense of a claim must result in the other party retracting its attack
5. Neither party may deliberately use insufficiently clear or confusingly ambiguous assertions; and each must interpret the other party's assertions as carefully and as accurately as possible

Failure to abide by these reasonable rules must be considered a violation of the basic tenets of Article 15 and a denial of due process.
