

NCHERM WEBINAR

“QUESTIONING, ANALYSIS & DELIBERATION”

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Preparing for the Hearing

2

- Review and understand the charges
- Review all the material carefully & thoroughly – get a general overview of the case
- Review it a second time and note all areas of consistency of information
 - ▣ You don't need additional verification or questioning on these issues
- Read it a third time to identify inconsistencies in the information
 - ▣ This is the area you will need to concentrate your questions

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Preparing for the Hearing (cont.)

3

- Identify additional questions for complainant, accused and witnesses
 - ▣ Was there corroborating evidence?
- Review the policy or section of the policy alleged to have been violated
 - ▣ Note any words that are unfamiliar and discuss
 - ▣ Parse all the policy elements
 - ▣ Identify the elements of each offense alleged
 - ▣ Break down the constituent elements of each relevant policy
- FOR EXAMPLE.....

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Sample Policy

4

NON-CONSENSUAL SEXUAL CONTACT:

- Any intentional sexual touching,
- However slight,
- With any object,
- By a man or a woman upon a man or a woman,
- That is without consent and/or by force.

Sexual Contact includes:

Intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; any intentional bodily contact in a sexual manner, though not involving contact with/of/by breasts, buttocks, groin, genitals, mouth or other orifice.

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GENERAL GUIDELINES: Understanding Evidence

5

- Formal rules of evidence do not apply. If the information is considered relevant to prove or disprove a fact at issue, it should be admitted.
 - Evidence is any kind of information presented with the intent to prove what took place
 - Certain types of evidence may be relevant to the credibility of the witness, but not to the charges
- Consider if drugs or alcohol played a role?
 - If so, do you know what you need to know about the role of alcohol on behavior? Decisions? Incapacitation?
 - Look for evidence of prior planning

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Understanding Evidence

6

- Discuss in advance the use of expert witness and how they may be used in the hearing
- Decide in advance on what evidence will be limited
- Recognize that evidence may vary in weight and reliability
- Withhold judgment about charges until all evidence has been considered

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Understanding Evidence

- You may assign weight to evidence based on:
 - ▣ Direct or testimonial evidence (personal observation or experience)
 - ▣ Circumstantial evidence (not eyewitness – but compelling)
 - ▣ Documentary evidence (supportive writings or documents)
 - ▣ Real evidence (physical object)
 - ▣ Hearsay evidence (statement made outside the hearing but presented as important information)
 - ▣ Character evidence (generally not relevant or acceptable)
 - ▣ Past record (should only be presented prior to sanctioning if it relates to significant pattern of behavior that would impact “more likely than not” determination)
 - ▣ Impact statements (should only be reviewed after a finding)

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Credibility

- “To assess credibility is to assess the extent to which you can rely on a witnesses’ testimony to be accurate and helpful in your understanding of the case”
 - ▣ Credibility is not synonymous with truthful
 - ▣ Memory errors do not necessarily destroy a witness’s credibility
 - ▣ Refrain from focusing on irrelevant inaccuracies and inconsistencies
- Pay attention to the following factors...

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Factors to Consider for Credibility

- Demeanor
 - ▣ Nonverbal language
 - ▣ Demeanor questions should be your cue to ask more questions
- Non-cooperation
 - ▣ Look for short, abrupt answers or refusal to answer
 - ▣ OK to ask, “you seem reluctant to answer these questions- can you tell me why?”
- Watch out for witnesses who love the limelight, have an axe to grind or try too hard to please

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Factors to Consider for Credibility

10

- Logic/Consistency
 - Ask “Does this make sense?”
- Corroborating evidence
- Circumstantial evidence
- Expertise
 - Establishing the expertise of a witness can be very important and helpful

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Making Credibility Determinations

11

- Look at consistency of story – substance and chronology of statements
- Consider inherent plausibility of all information given
- Look for the amount of detail (facts) provided, factual detail should be assessed against general allegations, accusations, excuses or denials that have no supporting detail
- Pay attention to non-verbal behavior, but don't read too much into it

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Questioning Demeanor of Panel Member

12

- Work to establish a baseline of relaxed conversation
- Maintain good eye contact
- Listen carefully to the answers to your question
 - Do not write while they are talking
 - Do not be thinking about your next question while they are talking
- Nod affirmatively to keep witness talking
- Do not fidget, roll your eyes or shake your head “no”
- Do not look shocked, smug, stunned or accusing

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Preparing Questions

13

- Have the Code section at the top of your note page
- Write down the following:
 - What do I need to know?
 - Why do I need to know it?
 - What is the best way to ask the question?
 - Am I the best person to ask the question?
- When dealing with conflicting testimony, ask questions that would confirm or deny sexual misconduct occurred.
- Is conflicting testimony a result of credibility concerns?

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Questioning Guidelines

14

- Take the complaint from start to finish through a process of broad to narrow questions and issues that need to be addressed
- Engage in a matching process
 - Ask questions about the allegations and the evidence and the policy elements
 - Focus on areas of conflicting evidence or gaps of information
- Don't try for the "Perry Mason" moment – you won't get it
- Ask questions in a straightforward, non-accusatory manner

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Analyzing the Information

15

- Examine only actions that have a direct relation to the situation under review
- Explore motivation, attitude and behavior of accused and witnesses
- Apply relevant standards:
 - Force
 - Consent
 - Incapacity
- Panel members must understand concept of coercion and role of race and culture in analysis

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Analyzing the Information

16

- Assessing each answer: for each piece of information you have as a result of your analysis and matching you need to assess its evidentiary value. Measure with the following questions:
 - ** Is the question answered with fact(s)?
 - ** Is the question answered with opinion(s)?
 - ** Is the question answered with circumstantial evidence?
- Analyze the broadest, most serious violations first and make a determination of each and every violation

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Analyzing the Information

17

- You should assess evidence carefully:
 - What are the facts?
 - What are the opinions?
 - What are the circumstantial evidence?
 - How does the evidence add up?
- If, when analyzing information you realize you have unexplained gaps, don't go forward!

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GENERAL GUIDELINES: Deliberation Process

18

- Decisions must be based only upon the facts, opinions, evidence and circumstances presented at the hearing
- Decisions must be based on the specific policy alleged to have been violated
- Explore motivation, attitude and behavior of accused and witnesses
- Issue Spotting
 - Look at each element to be measured in the policy, separate it out and determine if you have evidence that supports a violation of that component

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Deliberation Process

19

- Deliberate only on evidence that is relevant to the issue and the policy being charged in the hearing
- When determining if information is relevant, ask
 - Is the fact or information that is being offered likely to prove or disprove an issue in the hearing?
- Construct the most reasonable scenario as to what happened
 - Use greater weight of the evidence as the evidentiary standard
 - Do you know how to measure the greater weight of the evidence?

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Deliberation Process

20

- Decisions must be fair and impartial, not made with bias or conflict of interest
- Cannot consider past behavior unless it represents a pattern
- Consider what establishes a pattern:
 - How similar are the incidents being compared?
 - Do the multiple incidents involve the same type of behavior?
 - Does the incident in question involve the same parties?

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Deliberation

21

- Your personal feelings about the complaining party, witnesses or the accused should not influence your decision
 - Panel members must be aware of personal bias
 - Remain focused on the facts, evidence, policy alleged to have been violated
 - The role of a panel member is not to determine right or wrong
 - Panel members must determine by a preponderance of the evidence if the specific policy elements were violated.

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Deliberation

22

- ❑ Complainant and accused should be allowed to deliver an impact statement only after the accused is found in violation
- ❑ Understand that the question of whether someone violated the policy should be distinct from factors that aggravate or mitigate the severity of the violation
- ❑ Be careful about not heightening the standard for a finding because the sanctions may be more severe

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