DETERMINING CREDIBILITY IN ADMINISTRATIVE HEARINGS

NATIONAL ASSOCIATION OF HEARING OFFICIALS

2022 PROFESSIONAL DEVELOPMENT CONFERENCE

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COURSE DESCRIPTION

Determining Credibility in Administrative Hearings

Course Description

- Discussion of the credibility factors, in addition to demeanor, recognized in evidence law.
- Analysis of factors such as consistency or inconsistency of statements.
- Examination of psychological research related to truth telling and deception, and how that research may apply to credibility determinations by hearing officials.

CREDIBILITY FACTORS I

Calif. Evidence Code Section 780; Credibility factors…..

CREDIBILITY DETERMINATION FACTORS (from Calif. Evid. SS 780, 788)

1. Witness's Demeanor while testifying;(**D**)
2. Witness's manner of testifying;(**D**)
3. Character of testimony;(**D**)
4. Capacity to perceive, to recollect, or to communicate about matters testified;(**T**)
5. Opportunity to perceive matters testified;(**T**)
6. Character for honesty or veracity or opposites;(**T**)
7. Bias, interest, or other motive; (**T**)

CREDIBILITY FACTORS 2

CREDIBILITY DETERMINATION FACTORS (from Calif. Evid. SS 780, 788) continued

8. Prior consistent statement;(**T**)

9. Prior inconsistent statement;(**T**)

10. Existence or non-existence of facts testified; (**T**)

11. Attitude toward giving testimony or action; (**D**)

12. Admissions of untruthfulness;(**T**)

13. Prior conviction of a felony.(**T**)

CREDIBILITY FACTORS 3

CREDIBILITY FACTORS (BOTH DEMEANOR AND CONTENT) USED BY JURORS TO ASSESS CREDIBILITY OF TESTIMONY *

(*list taken from Lindsley Smith, Juror Assessment of Veracity, Deception, and Credibility, Table One, paper available on the internet at the following URL: http://www.uark.edu/depts/comminfo/CLR/smith1.html)

- **voice**
- vocal characteristics (accent, pitch, rate, volume, dialect)
- vocal fluencies (confidence in speaking and flow of words)
- vocal nonfluencies (stuttering, use of vocal pauses)
- **body and face**
- Appearance of communicator
- body movements
- facial expressions

CREDIBILITY FACTORS 4

CREDIBILITY FACTORS (BOTH DEMEANOR AND CONTENT) USED BY JURORS TO ASSESS CREDIBILITY OF TESTIMONY (continued)*

(*list taken from Lindsley Smith, Juror Assessment of Veracity, Deception, and Credibility, Table One, paper available on the internet at the following URL: http://www.uark.edu/depts/comminfo/CLR/smith1.html)

- **nonverbal behaviors of all courtroom participants**
- attractiveness of the parties
- social status
- race
- gender
- clothing
- occupation
- content

CREDIBILITY FACTORS 5

CREDIBILITY FACTORS (BOTH DEMEANOR AND CONTENT) USED BY JURORS TO ASSESS CREDIBILITY OF TESTIMONY (continued)*

(*list taken from Lindsley Smith, Juror Assessment of Veracity, Deception, and Credibility, Table One, paper available on the internet at the following URL: http://www.uark.edu/depts/comminfo/CLR/smith1.html)

- **use of language**
- whether the witness is labeled an expert or lay witness
- impact of evidence
- believability of statements
- confidence in direct eyewitness testimony
- areas of testimony conflict between witnesses
- evidence

CREDIBILITY FACTORS 6

CREDIBILITY FACTORS (BOTH DEMEANOR AND CONTENT) USED BY JURORS TO ASSESS CREDIBILITY OF TESTIMONY (continued)*

(*list taken from Lindsley Smith, Juror Assessment of Veracity, Deception, and Credibility, Table One, paper available on the internet at the following URL: http://www.uark.edu/depts/comminfo/CLR/smith1.html)

- demonstrative aids
- arguments
- juror attitudes about the crime
- overall testimony content
- whether the defendant has been charged with multiple offenses
- whether the defendant has a criminal record
- consistency of statements

PERCEIVED DECEPTION I

PERCEIVED DECEPTION INDICATORS (DEMEANOR CUES ASSOCIATED WITH DECEPTION) *

(*list taken from Lindsley Smith, Juror Assessment of Veracity, Deception, and Credibility, Table Three, paper available on the internet at the following URL: http://www.uark.edu/depts/comminfo/CLR/smith1.html)

- **vocal cues**
- speaking nonfluencies ("um's" and "ah's")
- slow to respond to questions
- slower vocal pace than normal
- unusually fast or slow talkers

PERCEIVED DECEPTION 2

PERCEIVED DECEPTION INDICATORS (DEMEANOR CUES ASSOCIATED WITH DECEPTION (continued) *

(*list taken from Lindsley Smith, Juror Assessment of Veracity, Deception, and Credibility, Table Three, paper available on the internet at the following URL: http://www.uark.edu/depts/comminfo/CLR/smith1.html)

- high vocal pitch
- loud volume
- intense and unusual vocal behaviors
- planned responses
- frequent swallowing
- stuttering

PERCEIVED DECEPTION 3

PERCEIVED DECEPTION INDICATORS (DEMEANOR CUES ASSOCIATED WITH DECEPTION (continued) *

(*list taken from Lindsley Smith, Juror Assessment of Veracity, Deception, and Credibility, Table Three, paper available on the internet at the following URL: http://www.uark.edu/depts/comminfo/CLR/smith1.html)

- **body and face (visual cues)**
- less eye contact
- tenseness
- nervousness
- unnatural gesturing
- body stiffness
- squinting
- avoidance of gaze

PERCEIVED DECEPTION 3

PERCEIVED DECEPTION INDICATORS (DEMEANOR CUES ASSOCIATED WITH DECEPTION (continued) *

(*list taken from Lindsley Smith, Juror Assessment of Veracity, Deception, and Credibility, Table Three, paper available on the internet at the following URL: http://www.uark.edu/depts/comminfo/CLR/smith1.html)

- decrease in smiling
- increase in postural shifts
- forced and unnatural smiles
- tight faces
- scratching of the head
- rigid posture
- relaxed facial expressions

PERCEIVED DECEPTION 4

PERCEIVED DECEPTION INDICATORS (DEMEANOR CUES ASSOCIATED WITH DECEPTION (continued) *

(*list taken from Lindsley Smith, Juror Assessment of Veracity, Deception, and Credibility, Table Three, paper available on the internet at the following URL: http://www.uark.edu/depts/comminfo/CLR/smith1.html)

- erratic hand movement
- more foot and leg movement
- fidgetings
- yawns
- shifty eyes
- air of candor or evasiveness
- planned responses

PERCEIVED TRUTHFULNESS 1

PERCEIVED TRUTHFULNESS INDICATORS (DEMEANOR CUES ASSOCIATED WITH TRUTHFUL COMMUNICATION *

(*list taken from Lindsley Smith, Juror Assessment of Veracity, Deception, and Credibility, Table Four, paper available on the internet at the following URL: http://www.uark.edu/depts/comminfo/CLR/smith1.html)

- **vocal**
- faster vocal pace
- lower vocal pitch
- **body and face**
- close distance
- direct body and facial expressions
- forward lean

PERCEIVED TRUTHFULNESS 2

PERCEIVED TRUTHFULNESS INDICATORS (DEMEANOR CUES ASSOCIATED WITH TRUTHFUL COMMUNICATION (continued)*

(*list taken from Lindsley Smith, Juror Assessment of Veracity, Deception, and Credibility, Table Four, paper available on the internet at the following URL: http://www.uark.edu/depts/comminfo/CLR/smith1.html)

- increased eye contact
- pleasant facial features
- smiling
- nodding
- frequent gestures
- pleasant facial expressions

CORRELATION OF FACTORS I

CORRELATION BETWEEN ACTUAL AND PERCEIVED DECEPTION INDICATORS (DEMEANOR CUES ASSOCIATED WITH DECEPTIVE COMMUNICATION *

(*list taken from Lindsley Smith, Juror Assessment of Veracity, Deception, and Credibility, Table Six, paper available on the internet at the following URL: http://www.uark.edu/depts/comminfo/CLR/smith1.html)

- **vocal**
- speech nonfluencies ("um's" and "er's")
- slow speech rate
- "hemming and hawing" (vocal hesitations, stuttering, frequent pauses)
- increased vocal hesitations/pauses within responses
- shorter response length
- higher vocal pitches
- response latency

CORRELATION OF FACTORS 2

CORRELATION BETWEEN ACTUAL AND PERCEIVED DECEPTION INDICATORS (DEMEANOR CUES ASSOCIATED WITH DECEPTIVE COMMUNICATION (continued) *

(*list taken from Lindsley Smith, Juror Assessment of Veracity, Deception, and Credibility, Table Six, paper available on the internet at the following URL: http://www.uark.edu/depts/comminfo/CLR/smith1.html)

- **body or face**
- increased and nervous hand gestures
- content
- less evaluatively extreme descriptions
- more neutral descriptions
- fewer self-references
- speech errors (more errors in the fashioning of coherent sentences)
- more references of others
- more undifferentiated descriptive terms

CREDIBILITY FACTORS 1

FACTORS IN CREDIBILITY DETERMINATIONS (ALJ RATING OF THE RELATIVE VALUE OF TYPES OF DEMEANOR EVIDENCE AND RELATIVE VALUE OF DEMEANOR EVIDENCE COMPARED TO OTHER CREDIBILITY DETERMINATION FACTORS)*

(*list taken from Gregory L. Ogden, *The Role of Demeanor Evidence in Determining the Credibility of Witnesses in Fact Finding: The Views of ALJ's,* 20 Nat'l A Admin. L. Judges 1 (2000) (Chart C1, page 12))

Ranking of types of demeanor evidence based on comparative importance in making credibility determinations

1. Manner of testifying (e.g., evasive or direct);
2. Witnesses's attitude while testifying (positive or negative);
3. Body language;
4. Facial Expressions;
5. Voice tone.

CREDIBILITY FACTORS 2

Ranking of credibility determination factors based on comparative importance

(Ogden Charts C2, C3, and C4)

1. Prior inconsistent statements
2. 2. Implausibility of testimony
3. Plausibility of testimony
4. Existence of facts testified to
5. Opportunity to perceive matters testified to
6. Admission of untruthfulness
7. Nonexistence of facts testified to

CREDIBILITY FACTORS 3

Ranking of credibility determination factors based on comparative importance (continued)

(Ogden Charts C2, C3, and C4)

8. Capacity to perceive, recall, or communicate matters testified to
9. Bias, interest, or motive
10. Prior consistent statements
11. Character of testimony
12. Character for honesty or veracity, or lack of either;
13. Attitude of witness (positive or negative) toward proceeding or testifying
14. Demeanor evidence

ALJ DECISIONS I

DFEH v. Valadez, 2002 DFEH Dec. No. 02-01, 2002 WL 471371 (Cal. DFEH. 1/10/02); Sexual harassment in the workplace decision. DFEH adopted hearing officer's proposed decision. Quoted text taken from Page 5 of decision:

".....Though the Department **presented only complainant's testimony in support of the allegations, her testimony was credible. Complainant's testimony was internally consistent and the character of her testimony, as well as her demeanor, did not exaggerate the nature or circumstances of the incidents**.....Although the Department called respondent as an adverse witness (Evid. Code, §776) he chose not to testify on his own behalf to rebut complainant's account of his conduct, and presented only brief testimony by three witnesses in his case in chief--Victor Bustamonte, Maria Verdugo, and Carlos Duran.....Duran testified that he was a foreman and supervisor for respondent, and that he did not see respondent touch complainant or bother her. On cross-examination, Duran testified that he normally worked with his own crew and that complainant worked with foreman Trinidad Cazares' crew. **In sum, none of respondent's witnesses had the opportunity to regularly observe respondent's interaction with complainant. Because the acts of harassment described by complainant could have easily occurred outside their presence, respondent's witnesses' testimony does not significantly conflict with or diminish the credibility of complainant's testimony."**

ALJ DECISIONS 2

DFEH v. Reavis, 2002 DFEH Dec. No. 02-01, 2002 WL 471661 (Cal. DFEH, 1/10/02); Sexual harassment in housing decision. DFEH adopted hearing officer's proposed decision. Quoted text taken from pages 4-7 of decision:

"…. Complainant alleged that respondent subjected her to several instances of unwelcome sexual comments, advances and physical touching from approximately February 1999 to September 1999. **However, a review of the record, particularly complainant's own testimony, reveals multiple and inconsistent versions of the various incidents of respondent's alleged conduct….Particularly revealing is that complainant's versions of respondent's alleged conduct generally became more egregious each time she described the incidents…..**On cross-examination, respondent impeached complainant with her prior inconsistent statements in her deposition testimony….The Department argues that complainant's testimony was inconsistent because the incidents occurred over two years ago and could easily be forgotten, that she was nauseous, nervous and uncomfortable at the hearing and "got incidents mixed-up," and that complainant was too embarrassed to disclose alleged "lewd acts" by respondent in statements to the Department and the housing authority.

ALJ DECISIONS 3

Reavis cont:

The Department's arguments are not persuasive and do not overcome the credibility concerns raised by complainant's inconsistent testimony.....Contrary to the Department's argument, **complainant's testimony at hearing did not omit alleged incidents of harassment. Instead, she embellished and made more egregious the specific details of the alleged incidents of harassment. Moreover, complainant omitted several significant details about the allegations of harassment.....The Department's assertion that complainant was too embarrassed to discuss certain details about respondent's conduct ... is also not convincing. Complainant did not appear embarrassed or reluctant at hearing to describe .....by respondent** and openly testified to such allegations.

ALJ DECISIONS 4

Reavis continued:

Finally, the Department asserts that complainant was nauseous, nervous, and "mixed-up" at hearing. **However, complainant's demeanor and the nature of her testimony at hearing evidenced that she was uncertain and confused about the occurrence of essential details that are central to her allegations of harassment. Complainant did not merely confuse specific dates when alleged incidents occurred, but rather she appeared to be uncertain as to when or whether particularly egregious conduct by respondent occurred**. When subjected to cross examination about these incidents or other aspects of her prior statements, complainant contradicted her own testimony or became vague and uncertain about her prior versions of the incidents. Complainant's inconsistent testimony on matters central to her claims of harassment seriously undermines her credibility. Complainant's allegation of unwelcome conduct by respondent is also diminished by the conflicting testimony of the Department's corroborating witnesses.

ALJ DECISIONS 5

Reavis continued:

The Department called three of complainant's minor children as witnesses to corroborate complainant's allegations.....Thus, complainant's children's testimony does not corroborate complainant's allegations of unwelcome sexual conduct by respondent. **To the contrary, complainant's children contradict complainant's testimony and cast further doubt on complainant's credibility..... Respondent's version of the alleged incidents of harassment is more credible. Respondent's testimony at hearing was consistent and forthright. His demeanor, manner, and attitude on the witness stand was that of a truthful person.**

ALJ DECISIONS 6

Reavis continued:

Respondent credibly testified .....**Based on complainant's multiple and inconsistent versions of the sexual conduct by respondent, the lack of corroboration provided by complainant's children's testimony, and respondent's credible testimony, the Hearing Officer finds that complainant's testimony was not credible and did not show that the respondent subjected her to unwelcome sexual conduct.** Thus, there is insufficient evidence to show that respondent .... subjected complainant .... to unwelcome sexual conduct.[FN 3]

ALJ DECISIONS 7

Reavis continued:

FN3. At hearing, **complainant admitted that she had been convicted of a felony for welfare fraud in 1997 or 1998, and that she was still on probation for that conviction**. A witness's credibility may be impeached in both civil and criminal cases by showing that the witness has been convicted of a felony. (Evidence Code section 788; Robbins v. Wong (1994) 27 Cal.App.4th 261, 274.) Although conviction of a felony in and of itself is not sufficient to determine the veracity of complainant's testimony, when considered in light of complainant's multiple and inconsistent versions of the alleged incidents of harassment, complainant's recent felony conviction for fraud further undermines her credibility. (Robbins v. Wong, supra, 27 Cal.App.4th at p. 274.)

ALJ DECISIONS 8

DFEH v. Cook, 1999 DFEH Dec. No. 99-13, 1999 WL 1276695 (Cal. DFEH, 11/09/99); Age discrimination in employment decision. DFEH adopted hearing officer's proposed decision. Quoted text taken from pages 7-9 of decision:

".....**The evidence did not support the extent, frequency, or severity of complainant's assertions and instead casts doubt on her credibility. No witness from either the Department or respondents corroborates complainant's assertions ....** This is critical to the credibility determination in this case since complainant asserted that "most everyone" in the office overheard these remarks and that Cook made these comments on a daily basis (the "mom" comments) or up to twice a week (the "over the hill" and "slowing down" comments) in the months leading to her termination.....For the following reasons, this Hearing Officer finds respondent Cook to be the more credible witness and thus credits his testimony over complainant's. **First, other statements which complainant asserts Cook made on numerous occasions to her ("mom," "over the hill," "slowing down") and which complainant testified were overheard by "most everyone" were not corroborated by any of the present or former employees who testified.....**

ALJ DECISIONS 9

Cook continued:

Complainant's demeanor on the stand was defensive and evasive on some significant points. At times, she denied engaging in conduct that the weight of the evidence demonstrated occurred. ....Further, complainant denied ever ignoring a patient, despite consistent testimony from other witnesses that she did so. **In contrast, respondent Cook was a credible witness. Cook's demeanor was forthright. He admitted to a number of statements that potentially went against his interest in this matter....”**

CREDIBILITY QUESTIONS I

Determining Credibility in Your Hearings

1. What is credibility?

2. What makes a witness believable?

3. Could a witness that seems believable give false testimony? How can you tell?

4. Witness competence v. witness credibility: Might a witness lack the capacity to perceive or recall an event and still offer believable, convincing testimony? How do you know when a witness is truthful but mistaken?

CREDIBILITY QUESTIONS 2

Determining Credibility in Your Hearings

5. What role does bias or interest play in determining credibility? Give examples from your hearings.

6. In your hearings, do you find that the testimony of a witness is sometimes contradicted by other evidence in the record? How do you determine which evidence should be given more evidentiary weight?

7. Are the credibility factors *other than demeanor* more or less reliable and/or persuasive than demeanor evidence?

8. Has any case over which you've presided ever turned on the demeanor of a single witness?