RICHARD BALES

Burdens of Proof in Arbitration

Rick Bales
ONU Law School
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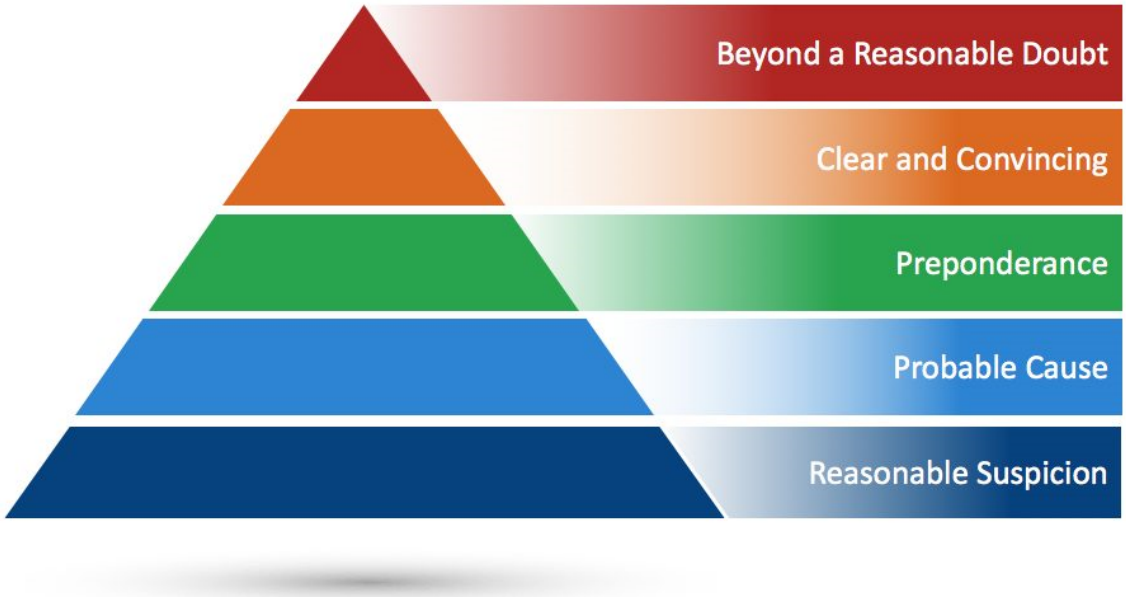

It's a pyramid because "reasonable suspicion" is common; "beyond a reasonable doubt" is rare.

1. Key principles:
    a. As a general rule, and when you are in the same tribunal (e.g., criminal court), if you have met your burden of proof at a high level (e.g., clear & convincing), you automatically have met your burden at all lower levels.
    b. However, a finding by one tribunal that a given burden of proof has been met may not be binding on another tribunal.
        i. This is especially true in labor arbitration, where the parties have specifically bargained for an arbitrator – not a court, not an administrative agency, not an ethics board – to find facts and apply the contract.

2. Hypo #1 [This is a non-labor hypothetical.] Bob, a First National Bank employee, is convicted in a criminal court of embezzling money from the bank. The burden of proof in a criminal case is "beyond a reasonable doubt."
    a. After the conviction and after all appeals are exhausted, the Bank brings a civil case against Bob in the same court for the same embezzlement that resulted in Bob's conviction. What result?
    b. Same as (a), but Bob's criminal case is still on appeal. What result?
    c. Reverse the order of the proceedings: first the Bank brings a civil case against Bob and wins. Then the State brings criminal charges against Bob for the same thing. What result?

3. Hypo #2: Employer fires Employee for stealing scrap metal.
    a. Employer wants to introduce as evidence at the arbitration hearing the Employee's:
        i. arrest for stealing the scrap metal.
        ii. indictment for stealing the scrap metal.
        iii. conviction for stealing the scrap metal.
            1. In Canada, the conviction is dispositive.
    b. Union wants to introduce as evidence in the arbitration hearing:
        i. The prosecutor's decision not to press charges for stealing the scrap metal.
        ii. The employee's acquittal after trial of stealing the scrap metal.
    c. Employee has been indicted but not yet gone to trial. Union moves to delay the arbitration hearing until after the trial date. What result?
    d. Employee has gone to trial and been convicted, but case is on appeal. Union moves to delay the arbitration hearing until after the appeal is resolved.

4. Hypo #3: Employer disciplines employee. Employee believes discipline was discriminatory. Employee both grieves and files an EEOC charge. Union wants to introduce the EEOC charge. Or, employer wants to introduce the EEOC's right-to-sue letter. On what bases should the parties object?

5. What do you really need to know about burdens of proof for arbitration?
    a. "Preponderance of the evidence" means >50% probability.
    b. Employer has the burden of proving discipline/discharge by a preponderance of the evidence, and therefore presents its case first.
    c. Union has the burden of proving contract violations by a preponderance of the evidence, and therefore presents its case first.

d. Union can argue (maybe successfully) that Employer has higher burden (clear & convincing) for career-killers.
e. Arbitrators dislike arguments about burdens of proof.
    i. No Arbitrator gets re-hired if, after a hard-fought case, s/he rules that it's a 50-50 tie and the winner goes to the party who didn't have the burden of proof.
    ii. Sometimes arbitrators say "The [party] didn't meet its burden of proof" as a nice way of saying the arbitrator doesn't buy that party's version of the facts.
    iii. If the parties can't agree on who has the burden, just say you agree to disagree, and move on.
f. The burden of proof is most relevant when the party with the burden has failed to introduce **any** competent evidence to support its argument. E.g., in a discipline case, Employer relies entirely on hearsay testimony.

6. Hypo #4: Discharge grievance goes to arbitration. At the beginning of the hearing, Employer calls Grievant as its first witness. Should Union object?
    a. Grievance for contract violation goes to arbitration. At the beginning of the hearing, Union calls an H.R. officer as its first witness. Should Employer object?