

Employment Practices *Update*

Bringing important information to emergency service organizations

VOLUME 12 • NUMBER 3

Options other than termination? Reduce exposure to personnel litigation

Terminations in the workplace setting are bad news for everyone involved. Discharged workers might face the fears of what this means for their careers and future while emergency services organizations (ESOs) will consider:

- Attracting, recruiting and selecting replacement workers.
- Educating and training new personnel in order to get them up-to-speed and fully productive.
- Reallocating job responsibilities.
- Retraining personnel.
- Managing change.
- Attempting to maintain positive morale in the work environment.
- Being aware that the organization's exposure to personnel or employment-related litigation dramatically increases after a worker is terminated.

There are options available to an ESO to avoid terminating an employee or volunteer. The end result may be improvement in productivity and attitude from the poor performing worker who becomes more loyal and dedicated after the ESO provides additional guidance and opportunities for success.

Terminated worker's perspective

Being terminated from a job, whether as an employee or volunteer, may be a difficult, humbling and often times humiliating experience. In general, individuals don't want to fail. Yet, many discharged workers don't always have a full appreciation that termination was coming. In fact, displaced workers might say things like, *"I knew I was having problems at work, but didn't know termination was the next step. I thought I had more time."*

What if that ESO member had more time, direction from the ESO and a last opportunity to turn performance around? An ESO that communicates expectations and

consequences for substandard performance may salvage and strengthen the working relationship.

Theoretical approach to poor performers

Decision makers within an organization may contact their labor and employment attorney and state the following, "We have an employee within our organization that we would like to terminate. We are seeking your counsel on how we can release this worker and protect our legal liability interests."

Rehabilitate rather than terminate – One way that organizations might be able to protect its legal liability interests, as well as strengthen productivity and morale, is to consider the approach of "rehabilitate rather than terminate." Instead of acting with emotion and viewing termination as the only recourse, consider the multitude of other options that could turn around the workers' performance.

Instead of acting with emotion and viewing termination as the only recourse, consider the multitude of other options that could turn around the workers' performance.

"Second chance" ESO member could turn out to be your best – Employees and volunteers may make mistakes in skill, judgments and execution of job duties. Giving a member of your workforce a "second chance" might result in gratitude and redemption. If given a second chance, a positively motivated ESO member could emerge and help foster a productive and healthy work environment and serve as a model worker. Other ESO members may take notice that the organization is equitable and caring in treatment of its personnel.

By Michael J. McCall, J.D.

Photocopying or transferring this document is a violation of federal copyright law and is prohibited without the express written consent of VFIS.

VFIS does not offer legal advice. Readers should seek the advice of an employment attorney regarding any legal questions.

We welcome comments, suggestions and questions from our readers.

E-mail: epupdate.opinion@vfis.com



Published by the
Glatfelter Insurance Group
York, Pennsylvania

Continued on page 2

Turn around poor performance

If an ESO works under the premise that there are situations where an employee or volunteer can modify and improve performance, a variety of options may be utilized to accomplish this objective. In fact, mediators, state and federal agency investigators (i.e. EEOC), judges and jurors might ask the question, "Short of termination, what other steps did the organization take to turn around the worker's performance?"

Corrective action – Correcting substandard job performance commonly comes in the following forms:

1. **Coaching or counseling** – Non-punitive communications directing the employee or volunteer that performance needs improvement or modification.
2. **Verbal or written warning** – Punitive documentation informing the worker of consequences of further deficiencies in performance. Usually appropriate for minor offenses.
3. **Reprimand** – Documentation of punitive action for more serious misconduct or poor performance, with further offenses resulting in more severe discipline such as suspension or termination.
4. **Suspension** – Temporary suspension of job duties as a sign of disciplinary action for serious offenses, misconduct or poor performance. Further violations may typically result in termination.

"Hard skills" – Safety and operational job duties may be referred to as hard skills. When an ESO member's hard skills are deficient, classroom and demonstrative education and training may lead to improved performance. A mentoring program could also hold the ESO accountable for guidance and its members for execution of tasks and skills. It is most likely easier and cheaper to retrain or refine an existing ESO member's skills than orient a new member with no experience with your organization's policies and protocols.

"Soft skills" – Deficiencies in employees' and volunteers' soft skills, such as interpersonal skills, communication and behaviors, may lead to terminations but are generally not well measured by ESOs. An individual may be proficient in the hard skills required for a position, but his or her soft skills could be lacking.

Improving soft skills may be a matter of will or motivation. After being put on notice of soft skills deficiencies, does the individual thereafter display a positive attitude, become a better team-player and work to solve problems rather than create them?

Alternatives to termination

Rather than termination, consider the following options available to ESO leaders that may turn around an underperforming employee or volunteer:

1. **PIP (Performance Improvement Plan)** – An ESO-directed plan for setting performance goals, seeking ESO member input and scheduling dates to revisit the PIP's effectiveness.
2. **"Last chance" agreement** – Documentation of ESO's clearly communicated expectations and standards, which if not met will result in termination.

3. **Training** – A variety of training subjects can address issues like safety and operational deficiencies, communication skills, team-building, interpersonal relationships, conflict management and customer service.
4. **EAP (Employee Assistance Program)** – Benefit provided that allows an ESO member to address personal problems (i.e. financial, substance abuse, divorce) that negatively impact job performance.
5. **Substance abuse treatment** – Supporting an ESO member participating in substance abuse rehabilitation or treatment.

Set-up-to-fail?

Underperforming personnel may believe that a performance improvement plan established by the ESO is setting the member up for failure. This perception is perpetuated when the ESO sets unrealistic or unattainable standards or performance goals.

The set-up-to-fail perception may be based on the organization communicating in an impersonal or formal manner without providing much direction. ESO leaders are encouraged to communicate to the volunteer or employee that they believe in the individual's ability to turn around performance.

When termination might be the only option

Situations do arise when termination might be the only prudent option for an ESO, especially considering the need to perform operational functions in a safe and efficient manner. Progressive or corrective discipline may not be appropriate depending upon the nature and severity of the incident. Examples of actions or inactions that may necessitate immediate termination include, but are not limited to:

- Willful or reckless disregard for operational or safety policies, procedures or guidelines.
- Negligence in not following safety or operational policies, procedures or guidelines, resulting in serious harm or a close call.
- Severe harassment, discrimination or retaliation that unreasonably interferes with the work environment or an individual's ability to perform the job.
- Hazing or horseplay that violates ESO policy, is offensive to a coworker or could be considered offensive.
- Using, possessing or being under the influence of illegal drugs or alcohol while on the job.
- Violence, threats of violence, theft or dishonesty.
- Gross insubordination or unprofessional behavior.
- Failing to take action when knowing of or suspecting unlawful conduct or behaviors that violate ESO policies.
- Any other conduct that negatively impacts the work environment, integrity or reputation of the ESO.

Conclusion

An ESO is encouraged to contact labor and employment counsel well before the decision is made to terminate an employee or volunteer. Consult with legal counsel to help determine what steps the organization can take to give the worker an opportunity to turn performance around and avoid termination.