

Employment Practices *Update*

Bringing important information to emergency service organizations

VOLUME 15 • NUMBER 1



Personnel Policies Uniformly Administered? *Exceptions shouldn't be the rule*

Work-related lawsuits like discrimination, harassment, retaliation and wrongful discharge may hinge on whether an emergency service organization (ESO) followed its written personnel policies. Common questions in litigation include:

Michael J. McCall, J.D.

- *Are personnel policies being consistently administered throughout the organization? If not, why?*
- *Could there be an unlawful reason, such as discrimination or retaliation, for the disparity in administering personnel policies?*
- *Can the ESO show the legitimate reasons for varying enforcement of policies for different personnel through documentation?*

When a workplace policy or rule that should apply to everyone seems to be applied only selectively, workers may end up feeling aggrieved.

High risk — discrimination and retaliation claims

Many discrimination and retaliation cases focus on whether an ESO enforced its policies inconsistently for different employees or volunteers. A deviation from standard procedure may raise the perception of unlawful discrimination or retaliation. When an ESO disciplines or terminates a member, the question could become, "How has the ESO disciplined others for similar actions or policy violations?" A worker may perceive that harsher discipline or termination was influenced by, or because of, legally protected class status such as race, color, gender, national origin, religion, disability, age (40 or over), military status, genetic information, sexual orientation, political affiliation or marital, parental or family status.

Why not just follow the policies?

Need for discretion — Adhering to policies exactly as written sounds like a simple concept, but human behavior is complex and ESOs need to maintain a reasonable degree of flexibility or discretion to address workplace interactions. While striving to remain consistent, an ESO is allowed to reach personnel decisions on a case-by-case basis. Every employee and volunteer is different and brings a unique personality, attitude and performance history to the workplace.

Many policies — Personnel manuals contain dozens of policies, which often include different reporting and response procedures to follow. It may be a challenge to have separate policies that are consistent within the context of the entire personnel manual.

Non-contractual nature of policies — Personnel manuals typically include clear declarations that policies are not intended to create any contractual obligations between an ESO and its members. Generally, it is not recommended to use obligatory policy language. Establish policies to regulate workplace behavior and practices, but still allow for discretion or exceptions to the rule. When exercising an exception to a rule or policy, consult with, and even obtain written approval from,

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

Personnel Policies Uniformly Administered?

Continued from page 1

senior management, human resources and/or legal counsel.

Assess current personnel policies and practices

Assess accuracy of a personnel policy manual in its entirety. A policy that isn't followed diminishes workers' confidence that other policies will be uniformly and equitably enforced. For instance, an ESO member could argue, "Why should I trust that the harassment and discrimination reporting and investigation process will be administered consistently by the ESO when there are six other published personnel policies that are not being enforced?" Without confidence that personnel matters will be uniformly and equitably addressed, workers may choose to circumvent internal methods of resolution and instead turn outside the organization to legal counsel or a state or federal agency.

Review personnel manuals with the following question in mind, "Are there any published policies that are not being followed?" Organizations can put themselves in precarious positions when a written policy has been in hibernation for an extended period of time, not being enforced, and all of a sudden is used as a tool to discipline or terminate a worker.

Assess, track and monitor what employees and volunteers are being disciplined for.

Why are employees and volunteers being disciplined?

Throughout an organization it is important to understand what specific policy violations result in coaching, counseling, discipline and terminations. It is a sound risk management practice to assess, track and monitor why employees and volunteers are being disciplined. This helps uncover inconsistencies, such as supervisors or officers who are more lenient or stringent with respects to policy violations and corresponding corrective action.

Training for those with supervisory authority is recommended to gain consistency in managing personnel relations. Train management to understand that failure to enforce rules against one worker, but choosing to enforce it against another, can lead to allegations of unequal treatment or discrimination. Questions to consider for training include:

- What policies do you enforce that most commonly lead to coaching, counseling and discipline?
- What policy violations have lead to termination of a subordinate in the last 12 months?
- Have you disciplined workers differently for violations of the same policy? Do you have documentation that supports or justifies the different disciplinary determinations?
- Do you have any concerns about issuing discipline that may be inconsistent with other supervisors?
- Are there policies that you find unclear and therefore unlikely to enforce?

Common pitfalls – personnel policies with varying enforcement

Grievance procedures – One of the most difficult personnel policies to follow, grievance procedures typically call for the response of multiple persons within an organization and contain many time-sensitive deadlines. Particularly because grievances are serious in nature and may not be called upon frequently, assess written procedures to verify they can be accurately administered.

Performance evaluations – Many policies state that performance evaluations will be completed annually, but may not be performed on time or at all.

For ESOs that are completing evaluations in a timely manner, assess which supervisors or officers are providing valuable documentation and commentary to support the evaluation category ratings. It is difficult to demonstrate why a particular worker was passed over for a promotion, disciplined or terminated without insightful performance evaluations.

Email, Internet, social media and other electronic communications – Many policies restrict workers' usage of electronic communications while on-the-job or that otherwise negatively impact the workplace or ESO. For instance, a policy may permit incidental personal use of electronic communications on-the-job, which is often not enforced. Overall, examine whether some workers are disciplined for policy violations but others' infractions are ignored.

Harassment and discrimination – It is not uncommon to hear jokes and comments in the work environment that relate to sexual matters, gender, race, religion, national origin, sexual orientation and other legally protected groups. Think about the organization's credibility with its workforce if one individual is disciplined for inappropriate comments while everyone knows that other persons in more powerful positions are the worst offenders. Similarly, an organization that takes no steps to manage dating, romantic or sexual relationships between co-workers may have a difficult time establishing a work culture that prohibits sexual jokes, comments and innuendoes within the broader workplace.

Leave, attendance and tardiness – Because of extenuating circumstances, organizations may be compelled to apply leave, attendance and tardiness rules differently for certain workers. While an ESO may be acting in good faith by trying to help one person, others may speculate about whether there are questionable reasons behind why leave was applied differently in their situation.

Conclusion

Writing personnel policies and procedures is easier than enforcing them uniformly.

Establish systems to assess personnel policies and procedures to uncover selective or inconsistent application. Track how discipline is administered across the organization; train those with supervisory duties; and educate workers to utilize internal response processes should they know of, or perceive inconsistent application of personnel practices.