



# National Federation of Federal Employees



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## Forest Service Council

We work for America every day

*Ron Thatcher, President*

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Abigail Kimbell  
Chief, USDA Forest Service

Chief Kimbell,

Time and again, we have heard from Chief after Chief that the agency's top priority is to ensure the safety of Forest Service employees. In contrast to this statement, many employees have come to believe that the purpose of post-accident investigations is less to develop lessons learned and improve safety than it is to assign blame. This belief is not easily refuted, given the current policy vacuum and recent events. With all due respect, if safety is truly the agency's top priority, then it is long past time to back this statement up with policy.

Information about accidents can be needed for a variety of purposes. Safety investigations are performed to identify causative factors and develop recommendations for the prevention of similar accidents. In the wake of a serious accident, information must also be gathered for claims and liability purposes. In the rare cases of accidents involving negligent or potentially criminal conduct, information must be gathered to justify administrative action or criminal prosecution. The type of information, the means by which it is obtained, employee rights in different interview settings, and the degree of certainty required are all different depending on the use to which the information is to be put.

Current Forest Service policy does not adequately address how to obtain post-accident information for multiple purposes. In fact, in a number of recent cases the only investigation performed was a safety investigation. This resulted in information from the safety investigation being used for these multiple purposes. Employees who thought their candid disclosures were solely for accident-prevention purposes learned they could also be used against them, for example, in a court of law.

Participation in safety investigations is voluntary. The agency has an interest in encouraging the free and frank disclosure of information and opinions in the context of a safety investigation. NFFE shares this interest. However, employees are understandably reluctant to participate freely if their statements may be used against them or their co-workers in legal proceedings. If the only investigation is a safety investigation and employees decline to participate, then the agency interests of safety, claims, and criminal fact finding are all poorly served. The choice is not whether safety interviews may be used for other purposes. The real choice is whether effective safety interviews will happen at all.

Although the purpose of safety investigations and the record developed by them is to develop lessons learned and improve safety, there are currently no policies in place to encourage employee participation by preventing disclosure of the information they share. Separation of legal and liability investigations from safety investigations would make it administratively and legislatively possible to protect safety witness statements. In addition, it would ensure that all legal and liability responsibilities are met. It is imperative to develop an accident investigation protocol that will allow Law Enforcement and Investigations (LEI) to determine whether there is probable cause that unlawful activity has occurred and collect information for claims and liability purposes while also allowing the Office of Safety and Occupational Health (OSOH) to conduct a timely independent safety investigation for accident prevention purposes.

Performing separate investigations is a necessary first step, but this step alone is insufficient to address employee concerns. Policy is also needed to ensure, within the limits of agency authority, that safety witness statements will be used solely for the use intended. Policy could be put in place to prevent their release internally. Indeed, the National Parks Service has a policy stating that safety witness statements will not be used to support disciplinary actions. It is also within the agency's authority to prevent release of such statements to LEI or personnel assessing claims. A collateral investigation, undertaken with appropriate Constitutional protections against self-incrimination in place, would develop the record necessary for these purposes.

It is essential to put these administrative approaches in place in order to provide the fullest extent of protection possible to employees within the agency's authority. It is equally important to acknowledge that this protection is limited, and the agency lacks the authority to completely protect safety witness statements from disclosure to third parties. With the administrative reforms contemplated above in place, it is possible that legislative action to bestow this authority may be taken in the near future. The agency and NFFE are actively working with key members of Congress on such legislation; however, the word from the Hill is that we should act first within our administrative processes before a legislative solution can be provided. We must do what we can first.

Even after we put appropriate policies in place, it will take years to regain the trust that the agency has lost with employees on the ground. We must start by telling the whole truth about the limits of agency authority to protect safety witness statements. We would even go so far as to recommend that OSOH stand down and refrain from conducting investigations of serious accidents pending implementation of reforms. While we recognize this may hinder safety improvements in the short run, we believe it would be an important first step to restoring employees' trust – trust that is vital for an effective safety program in the long term. In any event, NFFE will be advising employees we represent to refrain from participating in serious accident investigations until appropriate policies are put in place.

In a recent e-meeting in which preliminary discussions on this issue were held, it was suggested that a working group be convened to develop and recommend policy solutions. It was suggested that this group be comprised of a representative from OSOH, LEI, Fire and Aviation Management (FAM), line management, claims processing, and NFFE. We urge you to charter such a group and give them the charge to develop appropriate policies and procedures to meet the top priority of employee safety while ensuring other agency priorities are met as well. We stand ready to assist in this important endeavor.

Regards,

*/s/ Ron Thatcher*

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