An Open Letter to the Federal Wildland Fire Fighting Community

The following is an article my law partner and I wrote in 2005 about our experience in representing several of the people involved in the Thirtymile and Cramer fires and why it is so important to have liability protection in place. Shortly after we wrote this article, I founded a company to provide professional liability coverage with benefits and claims administration specifically tailored to the needs of federal employees and that of the federal wildland fire fighting community.

Just a few years after founding this company, Federal Employee Defense Services (FEDS) is the preferred professional liability provider for Federal Wildland Fire Service Association (FWFSA), Senior Executives Association (SEA), Federal Law Enforcement Officers Association (FLEOA) and many other federal employee associations.

Now, more than ever, the need for liability protection is necessary for all federal employees—especially those engaged in wildland fire fighting. Based upon what I learned about the dangers associated with wildland firefighting, and the scope of the criminal and administrative investigative inquires into firefighting fatalities due to entrapments or burnovers, I have come to an unmistakable conclusion that professional liability protection is a must have for all line officers, fire management officers, incident commanders and any employee involved in firefighting or fire management. The following is a brief overview of the foundation upon which this conclusion is based, including the potential criminal, administrative and civil liabilities all federal employees sometimes face in their careers.

Very Truly Yours,

Anthony F. Vergnetti

President

<u>Investigative Landscape</u>

In the aftermath of the Thirtymile Fire tragedy, Congress enacted Public Law 107-203 (July 24, 2002), requiring that for each fatality of an employee of the Forest Service due to wildfire entrapment or burnover, the Inspector General (IG) of the Department of Agriculture must conduct an independent investigation of the fatality and report its results to Congress. Given the jurisdiction conferred to the IG from the Inspector General Act of 1978, this new authority resulted in an USDA OIG criminal investigation looking for criminal culpability on the part of federal employees involved with both the Cramer Fire and Thirtymile Fire.

The Cramer IG investigation began almost immediately after the incident. The Cramer IG investigation, which was directed by the United States Attorney's Office for the District of Idaho focused primarily on the federal crime of involuntary manslaughter. The applicable provision of the federal criminal code as it applied to the Cramer Fire investigation defines involuntary manslaughter as "the commission in an unlawful manner, *or without due caution and the circumspection, of a lawful act which might produce death*." 18 U.S.C. § 1112. As with every federal criminal investigation, other federal crimes such as false statements made during the investigations, obstruction of justice, and witness tampering are always carefully considered, (such as False Statements (18 U.S.C. § 1001), Protection of U.S. Officers and employees (18 U.S.C. § 1114), Obstruction of a Proceeding Before a Department or Criminal Investigation (18 U.S.C. §§ 1505 and 1510(a), Witness Tampering (18 U.S.C. §§ 1512(b), 1513(b) (Retaliation)).

The Thirtymile OIG criminal investigation began several years after the incident and did not result in a prosecutorial decision by the Department of Justice (DOJ) until some five years after the incident and long after the administrative investigations actions discussed below had concluded. The reason for this delay will be explained in more detail below. In January 2007, the IC for the Thirtymile fire was indicted by the Eastern District of Washington on four counts of involuntary manslaughter and seven counts of section 1001 false statements. Currently, there is trial date set for April 2008 for this prosecution.

Although not considered in either the Thirtymile or Cramer Fires, it is also possible that a State and local entity may attempt to file criminal charges in a fire fatality situation involving federal employees. These types of State or local prosecutions are usually barred by the Supremacy Clause of the U.S. Constitution. However, that does not mean that a State or local entity will not attempt to prosecute. Take for instance the Ruby Ridge case, where the State of Idaho attempted to prosecute FBI sharpshooter Lon Horiuchi for manslaughter in the tragic shooting of Vicki Weaver. Horiuchi killed Weaver during the 1992 standoff between federal agents and the Weaver family at Ruby Ridge. Horiuchi initially was successful in his argument that he is immune from state prosecution because he was a federal officer acting within the scope of his duties; however, the Ninth Circuit Court of Appeals ultimately said that the issue of whether there could be a local prosecution consistent with the Supremacy Clause turned on whether the use of force was deemed reasonable and that was a decision for the local trial court. In essence, the Ninth Circuit stated that the local prosecution could take place. In the end, however, the *Horiuchi* prosecution never took place because by the time the case was remanded there was a new local prosecutor in place and he decided it was time for the community to put the whole behind them (i.e., the locals elected not to prosecute in the end). The Ruby Ridge case is the exception rather than the rule, but we mention it to show what the vulnerabilities and possibilities are in a high charged political environment.

Other, non-criminal investigations, of burnover and entrapment fatalities include an Accident Investigation by the Forest Service and a safety investigation by the Occupational Safety and Health Administration (OSHA). Both of these investigations are administrative in nature and commence almost immediately after the accident. A third administrative investigation usually commences several months after an incident to investigate whether disciplinary action is warranted against employees. The Forest Service typically hires a contract investigator to conduct the misconduct investigation.

At the conclusion of the investigation, the FS may elect to take disciplinary action responsible employees. In this process, the employee has due process rights which include the right to notice of the charges of misconduct and the opportunity to respond in writing and orally. Removal, demotions, suspensions of 15 days or more are appealable to the Merit Systems Protection Board. Suspensions of 14 days or less, letter of reprimands may be challenged through the agency's internal grievance procedures or through the collective bargaining arbitration procedures.

Problems Associated with this Legislative Landscape

The first major problem arising from this post-Thirtymile Fire investigative landscape is the reality that dedicated federal employees involved in the very dangerous profession of fighting wildland fires will now be considered for criminal prosecution simply for trying to do their jobs. Both the dangers and unpredictability of wildland fire fighting dictate that fatalities are going to occur no matter what safety tactics or countermeasures are employed, so long as the national political direction is to fight the fire. In our opinion, this precedent of criminally prosecuting well-intentioned federal employees involved in a dangerous profession is a bad one to set.

The second problem associated with this investigative landscape is that the IG for the USDA does not have expertise in running a manslaughter investigation, nor does it have any experience in investigating wildland firefighting accidents. Interestingly enough, this lack of experience in investigating firefighting fatalities has resulted in the IG relying heavily on the Forest Service's Accident Investigation – a result Congress specifically did not want in enacting the new law—Congress wanted an independent investigation. With regard to the IG's lack of experience in investigating supposed manslaughter crimes, this is because the IG's statutory mandate is to investigate matters associated with fraud, waste and abuse of government funds or authority. Rarely will the USDA IG, or any IG for that matter, be called upon to conduct a criminal investigation involving manslaughter or other fatalities. It has been our experience that the federal entity that usually investigates fatalities involving federal officials/employees is the Federal Bureau of Investigations (FBI). The FBI and local law enforcement typically investigate all accidental shootings by federal employees (Border Patrol, INS agent, etc.) that result in injury

or fatality, and it has been our experience that these federal officials are cleared by the FBI of any criminal wrongdoing within 24 to 48 hours of the shooting. Back in 2005, based upon our experience in the very first IG investigation conducted under this new authority into the Cramer Fire, Debra Roth and I stated our belief that criminal prosecutions will be aggressively considered in every burnover and entrapment fatality, which we stated was unlike the outcome of other accident-related fatalities occurring throughout the federal government. Unfortunately, this belief has become a reality with the prosecution of the IC for the Thirtymile fire tragedy well over five years after the incident.

A major point of concern is that the USDA IG conducts its criminal investigation simultaneously with the above-mentioned administrative investigations, which raised a serious conflict with the employee's constitutional rights in the criminal investigation. Under well-established federal law, employees who participate in an IG and administrative investigation "voluntarily," do so with serious implications to their constitutional right to remain silent in any criminal investigation.[1] If you participate in any of the administrative investigation(s) voluntarily, the IG and the prosecutor will have access to your statements and could use it against you in the criminal investigation, and your statement could be considered a testimonial waiver of your right to remain silent. Criminal defense lawyers involved in federal criminal prosecutions consistently advise their clients not to participate in any criminal or administrative investigation unless they are "compelled" to do so, regardless of their innocence.

This problem manifested itself in the Cramer investigation in a very troubling way. It essentially forced employees to choose between their constitutional right to remain silent in the IG investigation and their desire to answer questions from administrative investigators in order to clear their names in the administrative investigation(s). The problem was truly made worse when the Forest Service decided to propose disciplinary actions against employees while the IG investigation was ongoing and while the United States Attorney's office was actively considering criminal prosecution of those involved in the Cramer fire. Thus, the Forest Service placed employees between the proverbial rock and a hard place, because employees facing disciplinary

[1] It is recommended by attorneys who specialize in defending federal employees that no employee should participate in any investigation, particularly one involving the IG unless he or she is "required" or "compelled" to answer questions. "Compelled" means that you are instructed that you must answer questions in the investigation and that if you fail to answer questions, you would be vulnerable to disciplinary action up to and including removal from federal service for failure to do so. This type of warning will accord you "use immunity" during the criminal investigation, meaning anything you say during the investigation cannot be used against you in any criminal proceeding.

action were unable to avail themselves of their statutory and constitutional right to defend themselves in the disciplinary action without jeopardizing their constitutional right to silence in the separate but concurrent criminal investigation.[2]

We also note that the way the Forest Service handled the timing of its misconduct investigation and disciplinary actions is contrary to the way every other federal agency handles similar matters. Every other agency waits until the criminal investigation comes to a discernable conclusion before it commences its administrative/misconduct process. The reason every agency waits is because it does not want to interfere with the criminal investigation. But more importantly, the deference to the criminal investigation is also so employees can be free to defend themselves and have meaningful due process in the disciplinary matter – the way the Civil Service Reform Act intended – because the end of a criminal investigation eliminates the concern that statements made to defend a disciplinary action will also be used to indict or convict the employee who made the statements.

Now with the prosecution of Thirtymile coming some five years after the incident, nobody is suggesting to the Forest Service that it must wait that length of time to take administrative action—we agree such delay in the administrative process would be counterproductive and accomplish very little, if anything. However, what must be understood is that the timing of the prosecution in Thirtymile is an aberration and is unlikely to be repeated in the future. This is because the statute that authorized and mandated an investigation by the IG was enacted into law a year after the tragedy. Further, we believe that it was not until the IG started to investigate the Cramer incident that the IG truly appreciated its role under the new law, and that the criminal inquiry into Thirtymile did not commence until after the Cramer incident. The implausibility that any future potential criminal action involving a fire fatality would come remotely close to the delay that occurred in Thirtymile, is supported by the investigative activity surrounding the most recent fire fatality—the Esperanza Fire. In the aftermath of the Esperanza tragedy, the IG inquiry started almost immediately after the incident, similar to the timing in the Cramer incident. Therefore, it is anticipated that all future IG inquires into fire fatalities would

[2] Ultimately, we believe this problem resulted in the Cramer Fire Incident Commander being forced to accept the prosecutor's pretrial diversion agreement which secured his removal from the Forest Service, rather than defend himself in either the administrative and criminal proceedings. In other words, if he was unable to respond in the disciplinary proceeding and knew he would be removed without presenting a meaningful defense, why not accept the deal being offered by the prosecutor which really only resulted in his removal from federal service and resolved the criminal matter.

commence immediately after the fire and will not result in the delay that occurred with the Thirtymile incident.

Since Cramer, it appears the FS has taken steps to understand and respect employee's rights in the various administrative investigations. The FS has apparently appreciated that statements obtained in the administrative accident investigation could ultimately be used by the IG in any potential criminal inquiry because during the Esperanza Fire investigation, cooperation was voluntary on the part of each employee. In other words, if an employee wished to exercise their constitutional right to remain silent (something that is highly recommended by attorneys who defend federal employees), the FS respected that right. It remains to be seen how the FS will handle any further administrative inquiry into Esperanza. As of the date of the writing of this article, the IG investigation into Esperanza is ongoing and there has been no further administrative action from the FS. We are very encouraged that the FS has learned many valuable lessons through its experience in handling the Thirtymile and Cramer tragedies.

Notwithstanding the appropriateness of the legislative landscape, and the apparent steps the FS has taken to respect employee's rights, the current landscape that exists dictates that every employee involved in any way with wildland fire fighting should consider protecting themselves with liability benefits.

Why Is Liability Protection Necessary?

The FEDS liability benefits will pays the cost of defense in a criminal investigation/prosecution (up to $100,000), administrative investigation/disciplinary action, or judicial sanction proceeding (up to $200,000). It will also pay a personal judgment up to $1,000,000 in a civil suit and attorney fees to defend in a civil suit.

A. Criminal and Administrative Defense

The primary reason Forest Service employees need PLI is because of its defense provision. This provision entitles a federal employee when acting in the scope of employment to have his/her legal fees paid up to the limits described herein if he/she 1) becomes the subject of an IG, Internal Affairs, criminal or Congressional investigation, or an investigation for alleged whistleblower reprisal by OSC; 2) is named as the responsible management official in an EEO complaint; or 3) has a disciplinary action proposed against him/her from some alleged wrongdoing. Considering the investigative landscape discussed above, in the tragic event that an entrapment or burnover fatality occurs on a fire that you have anything do with, you will need an attorney to navigate through the process.

It is our experience that the actions or inactions of those employees directly involved in

such fires are scrutinized with a magnifying glass and with the benefit of 20/20 hindsight, notwithstanding that fire management decisions are often made in a compressed time frame and only with the information then available. Applying that level of scrutiny to the inexactness of the 10 Standing Firefighting Orders and the discretionary nature of mitigating the 18 Watchout Situations in a political environment that demands accountability, it is hard for us to imagine that anyone directly involved in a burnover or entrapment fatality will not face some allegation of negligence or wrongdoing. In light of this reality, you will need an attorney to protect your interests. Regrettably, it can cost at least $30,000 to $100,000 to prevent a criminal indictment, protect your rights throughout the administrative process, including defending against any disciplinary action at the agency level or take your disciplinary case through the MSPB.

B. Civil Suits/Personal Liability

Federal employees at all levels can be sued by private persons for alleged violations of their constitutional and common law rights. These issues arise most often for law enforcement officials, but could arise for non-federal law enforcement managers and employees who have frequent dealings with the public. As this applies to Forest Service employees, any fatalities or injuries to private citizens could make a federal employee vulnerable to civil actions.[3] In addition, many Forest Service employees, like federal managers and executives throughout the federal government make decisions which could subject them to suit by a citizen (i.e., land use, water use and natural resources decisions). In most civil suits, the Department of Justice will defend the named individual defendant and judgments are rarely issued ordering individual employees to pay damages. On occasion, however, DOJ will refuse representation and the individual employee must then obtain representation to defend him or herself in court. With lawyer hourly rates running between $250 and $350 per hour for experienced lawyers, an individual forced to retain private counsel finds him or herself quickly paying a lot of money in legal fees, even if the allegation is ultimately disproved.

While federal employees are absolutely immune from suit for common law torts (i.e., FTCA claims) if they are performing their official duties, otherwise known as acting "within the scope of employment," and have qualified immunity in suits alleging constitutional torts, this does not mean a federal employee cannot be sued. In cases involving personal liability (i.e., constitutional torts), if DOJ determines that the federal employee is acting within the scope of his/her employment and that it is "in the interest of the United States" to represent that person, a discretionary decision, then DOJ will defend the employee. In suits based on common law torts (i.e., FTCA claims), DOJ will take over and seek to have the United States substituted as the

[3] Damages associated with injuries and fatalities to federal employees is governed by and limited to the Federal Employees Compensation Act (FECA).

defendant in suits based on common law torts or file a motion to dismiss in suits based on constitutional tort claims. The likely result under both of these circumstances is that the suit will be dismissed. For personal capacity lawsuits (i.e. constitutional torts), there have been occasions when DOJ has taken the position that certain conduct is either not within the scope of employment or conduct not in interest of the U.S. to defend. In these cases, an employee is forced to retain private counsel at his/her own expense, and of course may become liable to pay a judgment if he or she unsuccessfully raises an immunity defense.

Professional liability benefits can protect you against these civil actions. As long as any civil claim brought against you as a federal employee arises from actions taken in the scope of your employment, the FEDS liability benefits pays up to $1,000,000 in damages, regardless of whether your agency authorizes payment of the judgment from agency appropriated funds. FEDS will also pay for private legal defense if DOJ will not defend you. If you suddenly find yourself facing a civil suit or criminal charges without DOJ representation, defending yourself can run $25,000 to well over $100,000 in legal fees.