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James R. "Smokey" Stanton
Chair, State Soil Conservation Committee
The Wayne A. Cawley, Jr. Building
50 Harry S. Truman Parkway
Annapolis, Maryland 21401

Dear Chairman Stanton:

You have asked a series of questions related to the supervisors and employees of the 24 soil conservation districts in the State. To paraphrase, you wish to know: (1) whether soil conservation district supervisors and employees have immunity under § 5-517 of the Courts & Judicial Proceedings Article (the "District Tort Claims Act" or "DTCA") for employment-related torts such as wrongful discharge; (2) whether there are circumstances when district supervisors and employees would not have immunity under the DTCA, such that—if the districts wanted to ensure that their personnel have protection from personal liability—they would have to purchase insurance; and (3) whether we can clarify the extent to which the Office of the Attorney General will provide legal guidance and representation to the districts and their supervisors and employees, particularly in tort cases.

In answer to your first two questions, the DTCA immunizes district supervisors and employees from suit and liability stemming from State-law claims, including employment-related claims, as long as the underlying action was tortious, was within the supervisor or employee's scope of employment, and was taken without malice or gross negligence. Although that means that the DTCA will immunize district personnel from most employment-related claims, there will be at least some claims, especially federal-law claims, for which district supervisors and employees do not have immunity.

In answer to your third question, the Attorney General has discretion to decide whether to provide legal representation to districts, their supervisors, and their employees.

Thus, although our Office has frequently provided assistance to the districts in the past and will continue to do so in the future, we cannot provide definitive guidance about precisely when the Attorney General will represent the districts and their personnel. That said, we can say that, assuming resources allow, our Office will have a particular interest in representing the districts and their personnel in tort suits filed under the District Tort Claims Act (and in providing advice to the districts about threatened tort suits), because any judgment against a district under the DTCA would ultimately be paid by the State Insurance Program.

I
Background

Maryland has 24 soil conservation districts. Md. Code Ann., Agric. § 8-301. All but two of the districts are contiguous with county boundaries, Agric. § 8-301, and each district is governed by a board of five supervisors. Agric. § 8-302(a). Four of the supervisors are appointed by the State Soil Conservation Committee, and one is appointed by the relevant county governing body. Agric. § 8-302(c). Each district "constitutes a political subdivision of the State . . . exercising public powers." Agric. § 8-306(a). Under this statutory scheme, district supervisors have authority to undertake various activities within their districts related to soil conservation and erosion prevention, including the formulation of land-use rules and regulations. Agric. §§ 8-306–8-309. In carrying out those powers and duties, district supervisors may "employ a secretary, technical experts, and other permanent and temporary officers and employees as they require" and also may delegate to "any employee powers and duties as they deem proper." Agric. § 8-303(b).

State, federal, and county personnel may also be assigned to work for a district. For example, of the 18 staff members assigned to the Frederick Soil Conservation District as of November 2018, seven were categorized as State employees of the Maryland Department of Agriculture; five were categorized as federal employees of the U.S. Department of Agriculture's Natural Resources Conservation Service; and none were categorized as county personnel. *See* Maryland Soil Conservation Districts Personnel Directory, Nov. 2018. That leaves just six staff members who were employees of the district itself.[1] To clarify, we will be limiting our analysis to district supervisors and those employees who are employed by the districts themselves because employees of the State,

[1] As we understand it, two of the six district employees are funded by a grant distributed by the Maryland Department of Agriculture and administered by the District.

federal, and county government are covered by their own separate laws regarding tort immunity and entitlement to legal representation.

The District Tort Claims Act immunizes a district supervisor or district employee from suit in State court "for a tortious act or omission: (1) [t]hat is within the scope of the public duties of the member or employee; (2) [t]hat is made without malice or gross negligence; and (3) [f]or which the soil conservation district has consented to suit." Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 5-517(a). The districts, in turn, have consented to be sued for those same tortious acts or omissions by their personnel and are precluded from raising the defense of governmental immunity in such a suit. CJP § 5-517(b); *see also Lee v. Cline*, 384 Md. 245, 262 (2004) (explaining that statutes like the DTCA "generally waive[] sovereign or governmental immunity and substitute[] the liability of the [government] for the liability of the . . . employee committing the tort."). Thus, "[t]he exclusive remedy for a tortious act or omission, for which a [district] member or employee . . . is immune[,] . . . is a suit brought against the appropriate soil conservation district." CJP § 5-517(b)(1). With respect to such suits, the State Insurance Program, which is part of the Treasurer's Office, "[g]overn[s] the limits of liability in any suit brought under" the DTCA and shall "[p]rovide funds for the payment of any settlement or judgment entered against the soil conservation district." CJP § 5-517(c).

II
Analysis

You ask a series of questions about the scope of the DTCA in the context of employment-related claims such as wrongful discharge and about the extent to which the Attorney General's Office provides representation to the soil conservation districts. We will address each category of questions in turn.

A. Immunity Under the District Tort Claims Act

Your first question is whether, generally speaking, the DTCA provides immunity to district supervisors for employment-related torts, such as wrongful discharge. In asking that question, you note that supervisors and employees have immunity only with respect to acts within the scope of their "public duties," CJP § 5-517(a), and that employment matters

are not expressly mentioned in § 8-306 of the Agriculture Article, the statutory provision that outlines many of the supervisors' powers.

In our view, even though employment matters are not specifically mentioned in § 8-306, the power to hire, fire, and discipline district employees is clearly within the scope of a supervisor's "public duties." The Agriculture Article explicitly grants supervisors the authority to "employ a secretary, technical experts, and other permanent and temporary officers and employees as they require." Agric. § 8-303(b). By implication, therefore, the supervisors must have authority to fire or discipline those employees that they hire. *See, e.g.*, *Town of La Plata v. Faison-Rosewick LLC*, 434 Md. 496, 523 (2013) (explaining that "[g]enerally . . . a government official or agency has reasonable discretion to carry out 'fairly implied' powers incident to those duties or authority expressly granted"). District supervisors also have the power to determine the "qualifications, duties, and compensation" of those employees, and may "delegate to the chairman, to any supervisor, or any employee powers and duties as they deem proper." Agric. § 8-303(b). Employment-related activities thus appear to be within a district supervisor's authorized duties and may also be within a district employee's duties if that authority has been delegated to that employee.

Your second question about DTCA immunity is whether there are circumstances when supervisors or employees might not be protected by the DTCA and, thus, could be subject to liability, particularly for employment-related torts. Our understanding is that you ask this question to help determine whether the districts should purchase liability insurance on behalf of their personnel to cover circumstances for which Maryland law does not provide immunity. In answering this question, because there have not been any decisions interpreting the DTCA, we look primarily to the Maryland Tort Claims Act ("MTCA"), Md. Code. Ann., State Gov't ("SG"), §§ 12-101 *et seq.*, which provides tort immunity for State personnel and waives the State's sovereign immunity to the same extent. *See* CJP § 5-522(b); SG § 12-104. Given that the MTCA is analogous to the DTCA, decisions interpreting the MTCA are likely the most useful guide to interpreting the DTCA.[2] Using the MTCA as a guide, a district supervisor and employee would lack

[2] In fact, the legislative history of the DTCA reveals that, as originally envisioned, district supervisors and employees would have been provided immunity under the MTCA. *See* 1988 Leg., Reg. Sess., H.B. 1481 First Reader (proposing to amend the MTCA to include district members and employees within the definition of "State personnel" covered by the Act). However, at the time, the Attorney General pointed out that soil conservation districts are, technically, independent

immunity under the DTCA if: (1) the legal violation is not "tortious" in nature; (2) the claims do not arise under State law; (3) the challenged conduct is not within the scope of the supervisor or employee's public duties; or (4) the supervisor or employee acted with malice or gross negligence.

1. The DTCA Provides Immunity Only for Tortious Conduct.

Like the MTCA, the DTCA provides immunity only for lawsuits and liability arising from a "tortious act or omission." CJP § 5-517(a). Tortious conduct encompasses a broad range of actions, and includes intentional torts and constitutional torts. *See Lee*, 384 Md. at 256 (explaining that the MTCA "plainly appears to cover intentional torts and constitutional torts"). For example, Maryland recognizes the common-law tort of "wrongful discharge." *See, e.g., Wholey v. Sears Roebuck*, 370 Md. 38, 49 (2002) (explaining that the tort is "a 'public policy exception' to the common notion of at-will employment," thereby allowing "an employee who has been 'discharged in a manner that contravenes public policy' [to] 'maintain a cause of action for abusive or wrongful discharge against his former employer'" (*quoting Adler v. American Standard Corp.*, 291 Md. 31, 35-36 (1981))). Certain statutory and constitutional violations may also be considered torts. *See Espina v. Jackson*, 442 Md. 311, 324-25 (2015) (suggesting that the definition of "tort" in Black's Law Dictionary as encompassing all "civil wrong[s]," includes personal injuries arising out of common law torts and out of statutory and constitutional torts).

In the employment context, a court would likely categorize as a tort both a common-law action for "wrongful discharge," *see Wholey*, 370 Md. at 52, and a claim for a violation of the Maryland Constitution, *see Lee*, 384 Md. at 256. But the answer is less clear as to a statutory cause of action for employment discrimination, such as a suit under the Maryland

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political subdivisions, and are therefore not units of the State. *See* Letter from Carolyn A. Quattrocki, Assistant Attorney General, to Hon. Lucille Maurer, State Treasurer (March 22, 1988). As a result, the State's waiver of its own sovereign immunity in the MTCA would not encompass the districts. *Id.* at 2. Thus, granting immunity to district employees and supervisors under the MTCA—without a concomitant waiver of the districts' governmental immunity—would have amounted to "leav[ing] injured parties without a remedy." *Id.* The DTCA, therefore, was instead enacted as a standalone provision that provides tort immunity to district members and employees and simultaneously precludes the districts from asserting governmental immunity to the same extent.

Fair Employment Practices Act ("MFEPA"). MFEPA prohibits both private and governmental employers from discriminating against an individual, including in hiring and firing, on the basis of "the individual's race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability." *See* SG §§ 20-606(a)(1)(i), 20-901(a).[3] Many local governments have similar prohibitions, and claims arising under some of those local anti-discrimination ordinances may be brought in State court. *See* SG § 20-1202.[4]

Although some courts have found that an employment-discrimination claim under MFEPA can serve as the basis for a tort claim under the MTCA, *see Royster v. Gahler*, 154 F. Supp. 3d 206, 218-20 (D. Md. 2015), (finding that the MTCA's notice provisions are applicable to an MFEPA claim against the State), *abrogated on other grounds by Pense v. Maryland Dep't of Pub. Safety & Corr. Servs.*, 926 F.3d 97 (4th Cir. 2019), other courts have reached the opposite conclusion. *See, e.g.*, *Roberts v. Office of the Sheriff for Charles County*, 2012 WL 12762, at *11 (D. Md. Jan. 3, 2012) (unreported) (holding the MTCA inapplicable to an MFEPA claim against Sheriff's office, because MTCA is a "wholly separate statute" from MFEPA, which contains its own notice provisions and waiver of the State's sovereign immunity, and because "employment discrimination is not a tort"); *see also Hansen v. City of Laurel*, 420 Md. 670, 682 (2011) (applying the provisions of the Local Government Tort Claims Act ("LGTCA") to a wrongful-termination claim brought under a county code provision, implying that such claims are torts, at least within the meaning of the LGTCA). Thus, there is at least some possibility a court would find that employment-discrimination claims under MFEPA or other similar statutory provisions are

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[3] MFEPA applies only to employers with 15 or more employees. SG § 20-601(d)(1). Our understanding is that most districts have fewer than 15 employees, such that MFEPA would not apply, but we will assume for purposes of our advice that at least some districts have 15 or more employees.

[4] Section 20-1202 of the State Government Article permits "a person that is subjected to a discriminatory act prohibited by the [Howard, Montgomery, or Prince George's] county code [to] bring and maintain a civil action against the person that committed the alleged discriminatory act for damages, injunctive relief, or other civil relief." The extent to which districts and district personnel would be covered by the county codes of these three counties—or of any other county—would require an individualized county-by-county analysis that is beyond the scope of this letter. But we note that these provisions exist and that it is at least possible that the DTCA would not apply to actions brought under those provisions.

not covered by the DTCA and that district supervisors and employees might not have immunity from such claims.

2. The DTCA Affords Immunity Only for Claims Arising Under State Law.

The DTCA grants district supervisors and employees immunity from suit and liability only for tortious acts or omissions arising under State law. CJP § 5-517(a). Although it is not possible to examine every cause of action that could be filed against a district supervisor or employee, employment-related lawsuits can include claims that do not arise under State law. The DTCA, for example, would not immunize a district supervisor or employee sued for claims arising under federal law, including an alleged violation of an individual's federal constitutional rights brought under 42 U.S.C. § 1983.[5] In such a case, a supervisor or employee may request that the Board of Public Works pay a settlement or judgment, but the Board has no obligation to do so. *See* SG § 12-404 (allowing the Board to voluntarily provide indemnification to State personnel); *see also* SG § 12-401 (defining "State personnel" for purposes of that provision to include district supervisors and employees). Similarly, the DTCA would not immunize a district supervisor or employee for violation of federal anti-discrimination laws. One such law would be Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, which prohibits employment discrimination by both private and governmental employers.[6] Thus, district personnel might face suits under federal law for which they would not have immunity

[5] Depending on the facts of the particular case, a supervisor or employee might have a different type of immunity that exists under federal law, called "qualified immunity," which would protect them from liability if their actions did not violate any "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). There is no guarantee, however, that a supervisor or employee would be entitled to federal qualified immunity in every case.

[6] As a practical matter, such a suit would be unlikely, because Title VII authorizes enforcement actions against employers, not individuals. *See* 42 U.S.C. § 2000e-5. Nonetheless, the U.S. Equal Employment Opportunity Commission is permitted to bring a civil action in federal court against "any person or group of persons . . . engaged in a pattern or practice" of employment discrimination prohibited by Title VII. 42 U.S.C. § 2000e-6. In that hypothetical scenario, the DTCA would not provide immunity to district supervisors and employees.

under the DTCA, just as State officers and employees would not have immunity under the MTCA from such federal-law claims.[7]

3. The DTCA Provides Immunity Only for Conduct Within the Scope of Public Duties.

The DTCA also requires the conduct to be "within the scope of the public duties of the member or employee." Agric. § 5-517(a)(1). The "scope" of one's "public duties" for purposes of the MTCA—the most useful guide in this context—is generally understood to be the same as the "scope of employment" under the common-law doctrine of respondeat superior. *Larsen v. Chinwuba*, 377 Md. 92, 105 (2003). "The general test set forth in numerous Maryland cases for determining if an employee's tortious acts were within the scope of [the employee's] employment is whether they were in furtherance of the employer's business and were 'authorized' by the employer." *Id.* (quoting *Sawyer v. Humphries*, 322 Md. 247, 255 (1991)). Conversely, "when 'an employee's actions are personal, or where they represent a departure from . . . furthering the employer's business, or where the employee is acting to protect his own interests, even if during normal duty hours and at an authorized locality, the employee's actions are outside the scope of his employment.'" *Brown v. Mayor & City Council*, 167 Md. App. 306, 323-24 (2006) (quoting *Sawyer*, 322 Md. at 256-57). Similarly, when an employee's conduct is "highly unusual, and quite outrageous, courts tend to hold that this in itself is sufficient to indicate that the motive was a purely personal one and the conduct outside the scope of employment." *Id.* at 324 (finding that, for purposes of LGTCA immunity, a police officer was not acting within the scope of his duties when he fatally shot his wife's lover).

As an example in the employment context, some courts have held that sexual assault and sexual harassment are outside the scope of employment. *See, e.g., Tall v. Board of Sch. Comm'rs of Baltimore City*, 120 Md. App. 236, 258-59 (1998) (collecting cases and

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[7] You have asked about the immunity of district *personnel*, not the immunity of the districts themselves. We thus do not analyze whether the districts themselves would be entitled to the same immunity that State agencies have from certain federal claims under the Eleventh Amendment of the United States Constitution. Although the districts are not generally considered to be State entities for purposes of Maryland law, *see* Part II.B., below, the federal courts apply their own test to determine whether an entity is an arm of the State for purposes of Eleventh Amendment immunity. *See, e.g., Ram Ditta v. Maryland Natl. Capital Park & Planning Comm'n*, 822 F.2d 456, 457 (4th Cir. 1987).

explaining that many courts in the country "have refused to hold employers liable under the doctrine of respondeat superior for sexual assaults upon children perpetrated by school employees"); *Perry v. FTData, Inc.*, 198 F. Supp. 2d 699, 709 (D. Md. 2002) (applying Maryland law, and refusing to hold an employer vicariously liable for assault and false imprisonment where those torts stemmed from a male supervisor's sexual harassment of a female employee); *Green v. The Wills Grp., Inc.*, 161 F. Supp. 2d 618, 626 (D. Md. 2001) ("[U]nder Maryland law, an employer is not vicariously liable for the torts of assault and battery based on sexual assaults by another employee as they are outside the scope of employment.").[8] Although the extent to which a particular action is within the scope of an individual's employment will depend on the particular circumstances of each case, we think that a district supervisor's typical employment decisions in the normal course of the district's operations would probably qualify for DTCA immunity. But a district supervisor or employee would not be covered by the DTCA if their actions were outside the scope of their work on behalf of the district.

4. The DTCA Provides Immunity Only for Conduct Taken Without Malice or Gross Negligence.

In addition to the requirements above, the DTCA applies only to conduct taken "without malice or gross negligence." CJP § 5-517(a)(2). Malicious conduct is "conduct characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill-will or fraud." *Barbre v. Pope*, 402 Md. 157, 182 (2007). To establish malice, a plaintiff must show that the governmental defendant "intentionally performed an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff." *Bord v. Baltimore County*, 220 Md. App. 529, 556 (2014) (internal quotation marks and citation omitted). Gross negligence comprises "something more than simple negligence, and likely more akin to reckless conduct," evincing a "reckless disregard of the consequences" and utter "indifferen[ce] to the rights of others . . . as if such rights did not exist." *Cooper v. Rodriguez*, 443 Md. 680, 708 (2015) (internal quotation marks and citation omitted).

In sum, the DTCA will immunize a district supervisor or employee from suit and liability for employment-related claims, as long as the underlying conduct was tortious, the

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[8] Although an employer might not be liable for an employee's acts of sexual harassment or assault under the theory of vicarious liability, employers may still face liability under other theories, such as negligent hiring, supervision, or retention.

claims arose under State law, the alleged conduct was within the supervisor or employee's scope of employment, and the alleged conduct was performed without malice or gross negligence. If those criteria are not met, the DTCA would not provide district supervisors and employees with immunity, though—in many such cases—the supervisors and employees could ask for indemnification from the Board of Public Works. Thus, if the districts wanted to *guarantee* coverage for their personnel where the DTCA does not apply, they would have to purchase liability insurance on behalf of their supervisors and employees.[9]

B. Attorney General Representation of District Supervisors and Employees

Your remaining questions concern the Attorney General's legal representation of the districts, district supervisors, and district employees. Again, the guidance here applies only to district supervisors and employees *per se*, not to the State, federal, or county employees who may be assigned to work with the districts.[10] As we explain more fully below, the Attorney General has discretion to decide whether to represent the districts, as well as district supervisors and employees, in any particular case, and our Office will necessarily have make that determination on a case-by-case basis. We can say, however, that (assuming resources allow) our Office has an inherent interest in representing the districts and their personnel in cases under the DTCA.

Section 8-303 of the Agriculture Article states that "[t]he Office of the Attorney General *may* provide services to the supervisors as needed." Agric. § 8-303(e) (emphasis added).[11] Ordinarily, the word "may" in a statute denotes discretion. *See, e.g., Board of*

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[9] It is beyond the scope of this letter for us to advise about whether, as a practical matter, the districts can in fact obtain insurance to cover all of these circumstances or whether, as a policy matter, it makes sense for the districts to do so.

[10] Those State, federal, and county personnel presumably fall within the schemes that correspond to their respective governmental employers. For example, State employees who are assigned to districts would likely fall under SG § 12-304, which requires the Attorney General to represent "a State officer or State employee" in civil actions against them, as long as certain conditions are met.

[11] The provision of "services to the supervisors as needed" would, in our view, necessarily encompass providing representation to the district itself, as well as representing individual district supervisors and employees if they are sued for conduct related to their work for the district.

Physician Quality Assurance v. Mullan, 381 Md. 157, 166 (2004) ("The word 'may' is generally considered to be permissive, as opposed to mandatory, language."). The plain meaning of the word "may" thus indicates that the Attorney General has discretion to decide whether to provide services to the districts and district supervisors.

The legislative history confirms that understanding. The General Assembly first considered a bill about legal representation for the soil conservation districts in 1981, when the Maryland Association of Soil Conservation Districts requested that § 8-303 of the Agriculture Article be amended to permit district supervisors to ask the Attorney General for legal services. *See* Letter from Ray F. Chapman, Chair of the Anne Arundel Soil Conservation District, to Del. Elizabeth S. Smith and Del. Robert R. Neall (Jan. 30, 1981). In response to that request, the Legislature considered House Bill 1168, which ultimately did not pass.[12] House Bill 1168 would have *required* the Attorney General to provide legal services to district supervisors by amending 8-303 to provide that "[t]he Office of the Attorney General *shall* provide services to the supervisors as needed." H.B. 1168, 1981 Leg., Reg. Sess. (First Reader) (emphasis added). The fiscal note for the bill explained that the Attorney General had in the past provided legal assistance to districts on a voluntary basis, and that the bill, in *requiring* such assistance, might necessitate hiring an additional Assistant Attorney General, with related expenses. *See* Fiscal Note, H.B. 1168, 1981 Leg., Reg. Sess. (Feb. 24, 1981). After the Senate adopted an amendment to H.B. 1168 that substituted the word "may" for "shall," the House did not concur, and the bill did not pass.

The next year, the Legislature took up the matter again. That bill, as introduced, contained the same wording as the previous year's bill, *i.e.*, it provided that the Attorney General "*shall* provide services to the supervisors as needed." S.B. 600, 1982 Leg., Reg. Sess. (First Reader) (emphasis added). During the hearings on the bill, however, our Office cautioned that soil conservation districts are "political subdivisions of the State," and thus are "not State agencies or instrumentalities in the usual sense of those words." *See* Bill File for S.B. 600, 1982 Leg., Reg. Sess., Letter from Dennis M. Sweeney, Chief General Counsel, to Hon. Harry J. McGuirk, Chairman, Senate Economic Affairs (Feb. 16, 1982)

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[12] Meanwhile, a separate bill, which did pass, added district supervisors and employees in the definition of "State employee"—later changed to "State personnel"—for purposes of being able to request discretionary State indemnification from the Board of Public Works. *See* 1981 Md. Laws, ch. 430 (now codified at SG § 12-401); *see also* SG § 12-404 (providing that "the Board of Public Works may . . . pay wholly or partly a settlement or judgment against the State or any State personnel").

("Sweeney Letter"). Our Office also explained that, "[h]istorically, [we] ha[ve] generally not provided legal representation to entities that, although created by State statute, operate on a local or regional basis." *Id.*; *see also* Bill File for S.B. 600, Summary of Testimony by Craig Nielson, Assistant Attorney General (noting that the bill would "change[] the historic role of [the] Attorney General," and that the "Attorney General does not give assistance to political subdivisions in the State").[13]

Subsequently, the Senate amended the bill to strike the word "shall" and substitute the word "may." *See* Amendments to S.B. 600, Econ. Aff. Comm. (March 1, 1982). The Department of Agriculture stated that it would support the bill as amended and, in doing so, suggested that the Attorney General would not be required to represent the districts:

> Soil Conservation Districts provide free technical assistance for the conservation of soil and water resources at the request of cooperators; however, they also provide assistance and or approvals through some programs that are more of a required nature such as the State Sediment Control Program, Small Pond Law . . . . These activities make the districts vulnerable to liability suits. . . . The Districts Law provides that the State Soil Conservation Committee may call upon the Attorney General for assistance it may need but it does not make clear the status of the soil conservation districts. This legislation would make it clear that assistance *could be* provided by the Attorney General.

Maryland Department of Agriculture, Legislative Comment on S.B. 600 (Feb. 24, 1982) (emphasis added). The revised fiscal note similarly reflected an understanding that representation would not be required: "[t]his *discretionary* bill should not increase State expenditures beyond those present ones for services now voluntarily provided by the Attorney General." Revised Fiscal Note, S.B. 600, 1982 Leg., Reg. Sess. (Mar. 3, 1982) (emphasis added). The amended bill passed unanimously. *See* 1982 Md. Laws, ch. 139.

Based on that legislative history and the text of the statute, the General Assembly did not intend to *require* the Attorney General to represent the soil conservation districts

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[13] Although the Attorney General's Office stopped short of taking an official position on Senate Bill 600, we noted that we could only provide the required "advice and counselling functions or litigation efforts" for the districts if the State or the districts directly funded an additional Assistant Attorney General position. Sweeney Letter.

or their supervisors or employees. In fact, the Legislature's decision to reject the version of the bill that would have required the Attorney General to provide legal services to the districts is a clear indication that it intended to grant the Attorney General discretion to decide whether to represent a soil conservation district in any given matter. *See, e.g.*, *Harris v. State*, 331 Md. 137, 152 (1993); *Krauss v. State*, 322 Md. 376, 386-87 (1991). Thus, under § 8-303(e) of the Agriculture Article, district supervisors and employees are free to request legal representation from the Attorney General, but that representation is neither automatic nor mandatory.

Nonetheless, given that you have asked in particular about tort cases, we consider whether there is any separate obligation elsewhere in Maryland law that might require the Attorney General to provide representation in such cases. One statute that requires the Attorney General to provide representation to officers and employees in certain situations is § 12-304 of the State Government Article. Under that provision, the Attorney General must represent "a State officer or State employee" in a civil action, as long as the officer or employee requests representation, was acting within the scope of employment, and acted without malice or gross negligence. SG § 12-304(a), (b). If district supervisors or employees are "State officer[s] or State employee[s]" for purposes of SG § 12-304, then the Attorney General generally would be required to provide representation for them in tort cases.

However, district supervisors and employees do not appear to be State officers or employees within the meaning of that requirement. Although there is no statutory definition of the term "State officer or State employee" under SG § 12-304, the Office of the Attorney General has consistently advised that soil conservation districts, because the General Assembly has specifically labeled them as "political subdivision[s]" of the State, Agric. § 8-306(a), are "independent units of *local* government," not units of State government. *Opinion of the Attorney General* No. 78-111 (Aug. 23, 1978) (unpublished) (emphasis added); *see also Opinion of the Attorney General* No. 87-058, 1987 WL 342788 (Dec. 21, 1987) (unpublished); Letter of Carolyn Quattrocki, Assistant Attorney General, to Hon. Lucille Maurer, State Treasurer (Mar. 22, 1988) (concluding that soil conservation districts are not "units of the State"); *cf. Maryland-Nat'l Capital Park & Planning Comm'n v. Montgomery County*, 267 Md. 82, 91 (1972) (stating that political subdivisions are generally understood to "embrace a certain territory and its inhabitants," are "organized for the public advantage," and "exercise . . . the power of *local government*, to be wielded . . . within their territory for the peculiar benefit of the people there residing" (emphasis added; internal quotation marks and citations omitted)).

To be sure, an entity can be "an agency, unit, or instrumentality of [the State] for one purpose, but not for another." 71 *Opinions of the Attorney General* 206, 211 (1986). District supervisors and employees thus might qualify as State officers or employees for some purposes or under some statutes, depending on the particular statutory scheme at issue. After all, "there is no single test for determining whether an entity is a unit or instrumentality of the State" for any particular purpose. *Napata v. University of Maryland Med. Sys. Corp.*, 417 Md. 724, 733 (2011). But, in this instance, the historical development of the statutory scheme governing legal representation for the soil conservation districts makes clear that they were never understood to be State entities under SG § 12-304.

What is now SG § 12-304, as originally enacted, gave the Attorney General sole discretion about whether to defend any "officer or employee of the State" in a civil or criminal proceeding. 1973 Md. Laws, ch. 758, codified in Md. Ann. Code Art. 32A, § 12A (1971 Repl. Vol.) ("The Attorney General, when requested in writing by any officer or employee of the State, may appear and defend any action, civil or criminal. . . . The Attorney General has sole discretion to assume the defense of any officer or employee."). Then, in 1978, the statute was amended to *require* the Attorney General, subject to certain conditions, to appear and defend State officers or employees in civil actions. *See* 1978 Md. Laws, ch. 793, codified at Md. Code Ann., Art. 32A § 12A (1976 Repl. Vol. & 1977 Supp.) ("The Attorney General, when requested in writing by any Officer or employee of the State, *shall* appear and defend any civil action . . . ." (emphasis added)). At the time, no one understood that change to require the Attorney General to represent soil conservation district supervisors or employees. To the contrary, the Attorney General's Office was continuing to offer legal assistance to the districts solely on a voluntary basis. *See, e.g.*, Fiscal Note, H.B. 1168, 1981 Leg., Reg. Sess.

Three years later, the districts asked the General Assembly to require the Attorney General to represent them. *See* Letter from Ray F. Chapman., *supra*. They asked for that change in large part to guarantee that the Attorney General would represent district supervisors in civil suits—a change that would not have been necessary if the predecessor of SG § 12-304 had already guaranteed them that representation. *See, e.g.*, Hearing on H.B. 1168, 1981 Leg., Reg. Sess. (March 10, 1981) (written testimony of William G. Greenage, Chair, Caroline Soil Conservation District) (stating that providing district supervisors with Attorney General representation is important "if we are to continue to have reliable and qualified people to fill these . . . positions"); *id.* (written testimony of G.F. Holloway, Chair, Worcester Soil Conservation District) (describing the increasingly

litigious environment in which district supervisors operate and explaining that legal representation and protections are necessary in order to retain qualified supervisors). But, as explained above, the enacted bill was amended to remove any requirement that the Attorney General provide representation and, instead, to give the Attorney General discretion about whether to represent the districts. *See* Agric. § 8-303(e); *see also* 1982 Md. Laws, ch. 139.[14]

Thus, the General Assembly not only acquiesced in the Attorney General's view that what is now SG § 12-304 did not require the Office to represent district personnel; it affirmatively decided, by enacting § 8-303(e) of the Agriculture Article, that the Attorney General has discretion to represent district supervisors and employees. That enactment is more specific than SG § 12-304 as applied to soil conservation districts and, as such, would control to the extent that there is any conflict between the two provisions. *See Ingram v. State*, 461 Md. 650, 665-66 (2018) (explaining that, where two statutes might conflict, the more specific statute should generally be read as an exception to the more general one). In our view, therefore, SG § 12-304 does not require our Office to represent district supervisors or employees.[15] Instead, § 8-303(e) of the Agriculture Article governs the

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[14] Around that same time, in 1981, the General Assembly amended what is now SG § 12-401 to provide that district supervisors and employees would be "State employee[s]" for purposes of the statutory provision allowing State employees to request indemnification from the Board of Public Works for settlements and judgments against them. *See* 1981 Md. Laws, ch. 430. (The statute now uses the term "State personnel.") Although the Legislature's decision to categorize district personnel as State employees under that statute could—in the abstract—suggest that they are State employees under SG § 12-304 too, the General Assembly specifically rejected an attempt during that same session to *require* the Attorney General to represent district supervisors and employees. *See* H.B. 1168, 1981 Leg., Reg. Sess. In any event, the fact that what is now § 12-401 had to be amended to add district supervisors and employees could just as easily suggest that they were not otherwise understood to be State officers or employees at the time. *See* Legislative Comment by the Dep't of Agriculture on H.B. 1167, 1981 Leg., Reg. Sess. (March 20, 1981) (explaining that the amendment would allow persons "other than State employees" to be "included in the term 'State employee' for the purpose of" what is now SG § 12-401 to make them "eligible to apply for funds").

[15] In determining whether individuals are "State officers or State employees" for purposes of SG § 12-304, we have sometimes applied the "traditional criteria in determining whether or not an employer/employee relationship exists between two parties," which are: (1) the power to select and hire the employee, (2) the payment of wages, (3) the power to discharge, (4) the power to control the employee's conduct, and (5) whether the work is part of the regular business of the

provision of State legal services to district supervisors and employees, including in civil suits.

Given the Attorney General's discretion under § 8-303(e), we cannot offer comprehensive guidance about when our Office will represent the districts, their supervisors, or their employees. To provide you with some sense, our ability to provide representation will depend on factors such as whether there are sufficient resources within our Office, whether there is a potential conflict of interest between the districts and one of our other clients, and whether there are important State interests at stake. At the very least, however, we can say that the Office will have a particular interest in providing representation to the districts and their personnel in tort cases under the DTCA and in providing advice about threatened tort litigation. That is because any judgment or settlement against a district under the DTCA will be paid using State funds from the State Insurance Program. *See* CJP § 5-517(c). And if our Office is already representing the districts, it would typically make sense from an efficiency standpoint for us to represent any district supervisors and employees named in the same complaint, so long as there is no conflict of interest and those employees were acting within the scope of their public duties without malice or gross negligence. Still, although we have an interest in providing representation to the districts under such circumstances, we cannot *guarantee* representation, given our resource constraints and our obligations to our State clients. The Office, however, is willing to work together with the districts and State Soil Conservation Committee to discuss the possibility of additional funding that would allow us to be more definitive about when we will, and will not, represent the districts.

III
Conclusion

The DTCA would immunize a district supervisor and employee from suit and from liability under State law, including as to employment-related claims, as long as the

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employer. *E.g.*, *Opinion of the Attorney General* No. 86-038 at 5 (July 3, 1986) (unpublished) (quoting *Whitehead v. Safway Steel Products, Inc.*, 304 Md. 67, 77-78 (1985)). Under that five-part test, the ability to control is the most important—and potentially decisive—factor. *Id.* Here, however, there is no need to consider this five-factor test, given the General Assembly's express statement that soil conservation districts are "political subdivisions" and the clear statutory history indicating that district supervisors and employees have never been understood to be State officers or employees for purposes of SG § 12-304.

underlying act or omission could be considered tortious, was within the supervisor or employee's scope of employment, and was taken without malice or gross negligence. As to legal representation from the Office of the Attorney General, the Attorney General has discretion about whether to provide legal guidance and representation to districts, their supervisors, and their employees. Although this is not an official opinion of the Attorney General, we hope that it is responsive to your inquiry.

Sincerely,

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