OPINION NO. 81-060

Syllabus:

1. Unless liability has been specifically imposed by statute, a soil and water conservation district supervisor acting within the scope of his authority will not, in the absence of bad faith or corrupt motive, be found personally liable for failure to properly perform a duty involving judgment and discretion. However, such supervisor may face potential personal liability for failure to properly perform a ministerial duty.

2. A soil and water conservation district supervisor is neither personally liable for the negligent acts of his subordinates nor personally liable for the negligent acts of persons renting district-owned equipment.

3. A soil and water conservation district is implicitly authorized, by virtue of the statutory liability imposed by R.C. 1515.08(G), to expend public funds to purchase liability insurance to protect itself against liability for the torts of its officers, employees, or agents acting within the scope of their employment. A district, pursuant to R.C. 9.83 and 1515.09, may use public funds to purchase liability insurance to protect its employees from liability which may accrue to them for acts within the scope of their employment; however, except to the extent authorized by R.C. 9.83, a district may not use public funds to purchase liability insurance to protect its supervisors from liability which may accrue to them for acts within the scope of their office.

4. A soil and water conservation district supervisor, or any other owner or occupier of land, who voluntarily allows a soil and water conservation district activity to be held upon his own land, may be liable to those attending if such supervisor or other owner or occupier breaches the duty owed to licensees upon his property. In this regard, pursuant to R.C. 1515.08(G), a district could be liable if the potential liability resulted from torts of its officers, employees, or agents acting within the scope of their office or employment.

To: Robert W. Teater, Director, Department of Natural Resources, Columbus, Ohio
By: William J. Brown, Attorney General, October 21, 1981

I have before me your request for my opinion regarding the civil liability of soil and water conservation districts and their supervisors in carrying out programs pursuant to R.C. Chapter 1515. Specifically you ask:

1. May the district purchase liability insurance from public funds to protect the district, individual district supervisors and employees while acting within the scope of their office or employment?

2. May district supervisors be held liable personally and individually:

   a. for claims arising from district functions and programs?

   b. for claims arising from transport and use of special equipment owned by a district and rented to private landowners for use in demonstration and field trials as a means of promoting district programs?

   c. for claims arising from a staff member's use of a district-owned vehicle?

   d. for failure of a district-designed conservation or pollution abatement practice or facility?

3. Would the liability of a district supervisor be increased if he permitted a public field day or activity to be held on his land?

4. Does an individual landowner subject himself to liability when voluntarily providing his land for a field day or district activity? Would the sponsoring district board be liable also?

For ease of discussion, I will address your second question, concerning the personal liability of district supervisors, first. Initially, it should be noted that soil and water conservation district supervisors, elected pursuant to R.C. 1515.05, are "public officers" as that term has been defined by Ohio courts. See State ex rel.

Landis v. Board of Commissioners, 95 Ohio St. 157, 115 N.E. 919 (1917); State ex rel. Attorney General v. Jennings, 57 Ohio St. 415, 49 N.E. 404 (1898); R.C. 1515.07-.08. Public officers may be personally sued; however, unless liability has been specifically imposed by statute, these officers have available to them the defense of "official immunity."[1] Under this doctrine, a public officer, acting within the scope of his authority, without bad faith or corrupt motive, will not be held personally liable for failure to properly perform a duty involving judgment and discretion. See Scot Lad Foods v. Sec'y of State, 66 Ohio St. 2d 1, 418 N.E.2d 1368 (1981); Thomas v. Wilton, 40 Ohio St. 516 (1884); Gregory v. Small, 39 Ohio St. 346 (1883). This doctrine does not, however, apply to those acts performed by an officer which are ministerial. See Scot Lad Foods v. Sec'y of State. A ministerial act has been defined "to be one which a person performs in a given set of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to[,] or the exercise of[,] his own judgment upon the propriety of the act being done." State ex rel. Trauger v. Nash, 66 Ohio St. 612, 618, 64 N.E. 558, 559 (1902) (quoting Flournoy v. Jeffersonville, 17 Ind. 169); accord, State v. Donahey, 110 Ohio St. 494, 144 N.E. 125 (1924).

A determination of whether an officer acted with discretion or whether he was simply performing a ministerial duty must ultimately be decided by a court of law, and will depend upon the facts as they may exist in a particular situation. With regard to parts a. and d. of question two, I am unable to determine from your questions whether the district supervisor's actions in implementing specific programs and practices are discretionary or ministerial. Such a determination could be made only upon review of the facts underlying the specific programs and practices implemented by the district supervisor. If the supervisor's acts were found to be discretionary, the district supervisor would be immune from personal liability; however, if they were found to be ministerial, the supervisor would face potential personal liability. See Scot Lad Foods v. Sec'y of State. See generally 1980 Op. Att'y Gen. No. 80-102 (veterans' service officer and his staff personally liable for damages resulting from their own negligent acts or misconduct).

Part b. of question two concerns the potential liability of soil and water conservation district supervisors for claims arising from transport and use of special equipment owned by a district and rented to private landowners. I assume that the leases to which you refer are entered into by the supervisors pursuant to R.C. 1515.08(D), which authorizes them to "enter into agreements with any occupier of lands within the district in the carrying on of natural resource

---

[1]Immunity for state officials and employees is established by R.C. 9.86, which states in part:

> Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

This section applies, however, only to officers and employees of the state, and not to officers and employees of political subdivisions of the state. See R.C. 9.85 (applies definitions from R.C. 109.36 to R.C. 9.86); R.C. 109.36(A) ("[o]fficer or employee does not include any person elected, appointed, or employed by any political subdivision of the state"). Since a soil and water conservation district is a political subdivision, R.C. 1515.03; 1979 Op. Att'y Gen. No. 79-053, its district supervisors are not covered by the immunity provisions of R.C. 9.86. See R.C. 109.36(C).

conservation operations," or pursuant to their general authority under R.C. 1515.08(H) to "make and enter into all contracts and agreements. . .necessary or incidental to the performance of [their] duties and the execution of [their] powers" under R.C. Chapter 1515. I am aware of no provision which requires that district supervisors make the equipment of the district available for use by private landowners, either by lease or other method. To the contrary, the decision of whether to lease such equipment, and if so, upon what terms, is left to the judgment and discretion of the board of district supervisors, subject to the ordinary limitations of good faith and absence of corrupt motive in permitting such use, and in negotiating the terms of use. Since entering into such leases is a function within the discretion of the supervisors, I conclude, for the reasons discussed above, that, absent bad faith or corrupt motive, soil and water conservation district supervisors would not be personally liable for claims arising from transport and use of special district owned equipment rented to private landowners.

In answer to part c. of question two, it must be noted that, in the absence of any statute imposing such liability, public officers are not liable for acts or omissions of their subordinates. Conwell v. Voorhees, 13 Ohio 523 (1844); Baird v. Hosner, 48 Ohio App. 2d 51, 355 N.E.2d 525 (1975), aff'd, 46 Ohio St. 2d 273, 347 N.E.2d 533 (1976). Therefore, I conclude that soil and water conservation district supervisors would not be personally liable for claims arising from a staff member's use of a district-owned vehicle.

I turn now to your first question, which asks about the purchase of liability insurance to protect the district and its supervisors and employees. Since this question appears to be addressed to potential tort liability, I will limit my analysis to that subject. For purposes of this opinion, I use the term "liability insurance" to mean only such insurance as insures against liability arising from misfeasance, nonfeasance, or malfeasance in the performance of official duties. This office has previously opined that the authority of a public body created by statute to provide liability insurance "must be expressly granted by statute, except where there is some statutory liability to be insured against." 1979 Op. Att'y Gen. No. 79-084, at 2-268. Where there is a statutory imposition of liability, the purchase of insurance to protect against that liability is implicitly authorized, see 1979 Op. Att'y Gen. No. 79-025; 1974 Op. Att'y Gen. No. 74-098; 1950 Op. Att'y Gen. No. 2498, p. 730; 1931 Op. Att'y Gen. No. 2995, vol. I, p. 303.[2] Therefore, if there is a statutory imposition of liability on soil and water conservation districts, they will be implicitly authorized to purchase insurance to protect against that liability.

With respect to soil and water conservation districts,[3] statutory consent to be sued is granted by R.C. 1515.08, which provides in pertinent part:

---

[2]The statutory imposition of liability derived from R.C. Chapter 2743 (establishing the Court of Claims) constitutes the exception to this general rule. In that exception, instrumentalities of the state, subject to R.C. Chapter 2743 liability, are said to be self-insurers, and, thus, cannot purchase liability insurance in the absence of specific statutory authority to do so. See 1976 Op. Att'y Gen. No. 76-048; 1974 Op. Att'y Gen. No. 74-098. However, as noted in footnote one, soil and water conservation districts are political subdivisions, rather than instrumentalities of the state; consequently, under the definitions set forth in R.C. 2743.01, they are not part of the state and, hence, are not subject to R.C. Chapter 2743 liability as self-insurers.

[3]I am aware of no cases addressing the civil liability of soil and water conservation districts. However, Ohio Const. art. I, §16 provides that "[s]uits may be brought against the state. . .as may be provided by law." Historically, only the legislature, by means of statute, was authorized to make such provision. Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917). More recently, the Supreme Court has held that the judiciary may also provide for suit against the state. See Schenkolewski v. Metropark System, 67 Ohio St. 2d 31, ___ N.E.2d ___ (1981).

> The supervisors of a soil conservation district or a soil and water conservation district have the following powers in addition to their other powers:
>
> . . .
>
> (G) To sue and plead in its own name and be sued and impleaded in its own name with respect to its contracts or torts of its officers, employees, or agents acting within the scope of their employment, or to enforce its obligations and covenants made under Chapter 1515. of the Revised Code; . . . . (Emphasis added.)

This section specifically provides that a soil conservation district or a soil and water conservation district may "be sued and impleaded in its own name with respect to its contracts or torts of its officers, employees, or agents acting within the scope of their employment." (Emphasis added.) Thus, a soil and water conservation district is not immune from tort liability. See Brown v. Board of Education, 20 Ohio St. 2d 68, 253 N.E.2d 767 (1969). Therefore, since R.C. 1515.08(G) specifically allows suit against a district for the "torts of its officers, employees, or agents acting within the scope of their employment," the district may purchase insurance to protect itself from that potential tort liability.[4] See 1979 Op. Att'y Gen. No. 79-084; 1979 Op. Att'y Gen. No. 79-025; 1950 Op. Att'y Gen. No. 2498, p. 730; 1931 Op. Att'y Gen. No. 2995, vol. I, p. 303.

As noted above, a soil and water conservation district may purchase insurance to protect itself from liability which it may suffer as a result of torts of its officers, employees, or agents acting within the scope of their employment. I understand, however, that in your first question you are also asking whether the district may purchase liability insurance to protect its supervisors and employees from liability that may accrue to them personally and individually while they are acting within the scope of their office or employment.[5] Generally, I have opined that political subdivisions may not expend public funds to underwrite the individual responsibilities of their officers and employees, for such an expenditure would be an impermissible diversion of public funds for a private purpose. Op. No. 79-025; 1972 Op. Att'y Gen. No. 72-090; 1972 Op. Att'y Gen. No. 72-076. See also 1967 Op. Att'y Gen. No. 67-001. As previously mentioned, there must be express statutory authority for a public body created by statute to provide liability insurance, "except where there is some statutory liability to be insured against." Op. No. 79-084, at 2-268. There being no statutory imposition of liability on the district's supervisors or employees, the authority of the district to purchase liability insurance for its supervisors or employees must be expressly provided by statute. Such authority is given to a soil and water conservation district by R.C. 9.83, which provides in pertinent part:

> (A) The state and any political subdivision may procure a policy or policies of insurance insuring its officers and employees against liability on account of damage or injury to persons and property, including liability on account of death or accident by wrongful act, occasioned by the operation of such motor vehicles as are

---

[4] In addition, I note that the United States Code may contain other statutory bases of liability, which would provide implicit authorization for the district to purchase insurance to protect itself from liability under such statutes. See, e.g., 1979 Op. Att'y Gen. No. 79-025 (authority to purchase liability insurance to protect against potential tort liability under 42 U.S.C. §1983). I am not, however, at this time, attempting to consider any such possible liability under federal law.

[5] I limit myself to this question, and do not consider whether a district may insure its supervisors or employees from liability accruing from acts outside the scope of their office or employment.

> automobiles, trucks, motor vehicles with auxiliary equipment, self-propelling equipment or trailers, aircraft, or watercraft by employees or officers of the state or a political subdivision, while such vehicles are being used or operated in the course of the business of the state or the political subdivision.

By this provision, a soil and water conservation district, as a political subdivision, see R.C. 1515.03; Op. No. 79-053, is specifically authorized to procure insurance insuring its officers and employees against certain liabilities occasioned by the operation of various motor vehicles.

Further authority is given the district by R.C. 1515.09, which provides, in pertinent part, that:

> The supervisors of a soil and water conservation district may employ assistants and such other employees as they consider necessary and may provide for the payment of the reasonable compensation of such assistants and employees and expenses incurred by them in the discharge of their duties from the special fund established for the district pursuant to section 1515.10 of the Revised Code.
>
> . . . .
>
> The supervisors may designate the amounts and forms of other benefits, including insurance protection, to be provided to employees and may make payments of benefits from the district fund that is created with moneys accepted by the supervisors in accordance with division (E) of section 1515.08 of the Revised Code or from the special fund created pursuant to section 1515.10 of the Revised Code. The board of county commissioners may make payments of benefits that are provided under this section. (Emphasis added.)

By this provision, the supervisors of a soil and water conservation district are authorized to employ and compensate assistants and other employees, and to "designate the amounts and forms of other benefits, including insurance protection," to be provided to district employees out of district funds. Although R.C. 1515.09 does not specifically mention liability insurance, it does expressly authorize the designation of "forms" of insurance protection. Liability insurance being a "form" of insurance, it may be argued that the legislature intended, and expressly authorized, the supervisors of a soil and water conservation district to purchase, with district funds, such insurance for its employees. In addition, by granting the power to employ and compensate, R.C. 1515.09 also grants district supervisors the power to fix any fringe benefit, including liability insurance, for district employees. See Ebert v. Stark County Bd. of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980) (per curiam); 1981 Op. Att'y Gen. No. 81-052. Relying on the rationale of Ebert, I opined in Op. No. 81-052 that any creature of statute that has the power to employ also has "the power to fix any fringe benefit—absent constricting statutory authority." I am aware of no statute constricting the fixing of liability insurance as a fringe benefit for district employees; consequently, it is my opinion that R.C. 1515.09 authorizes such a benefit.

Therefore, in answer to question one, it is my opinion, and you are advised, that a soil and water conservation district, pursuant to R.C. 1515.08(G), may purchase liability insurance to protect the district against potential tort liability imposed on it by R.C. 1515.08(G). Furthermore, pursuant to R.C. 9.83 and 1515.09, district supervisors may designate that liability insurance be provided to district employees, out of district funds, to protect such employees from personal liability which may accrue to them for acts within the scope of their employment. However, except as provided in R.C. 9.83, the district may not purchase liability insurance to protect its supervisors from liability which may accrue to them for acts within the scope of their office.

Question three of your letter concerns the liability of a district supervisor when district activities such as demonstrations of pollution abatement practices are held upon the supervisor's private property. The duties of district supervisors are prescribed by statute in R.C. 1515.08. Allowing district functions to be held on their property is not described as a duty or official function of the supervisors. Therefore, the supervisor is placed upon the same level as any private party and the general rules as to the tort liability of owners and occupiers of land will apply to the supervisors. I will discuss these general rules below, in connection with your fourth question.

Your fourth question concerns the liability of a landowner who allows a district activity upon his private property. A landowner, including a district supervisor allowing activities upon his private property, may be liable in accordance with the general rules of tort liability of owners and occupiers of land.

A person who owns or possesses land has certain affirmative duties of care to a person who comes onto his land. A breach of these duties results in the landowner's liability. The persons attending district activities upon privately owned land are licensees, in that they enter the land with the owner's permission, yet for their own benefit. Hannan v. Ehrlich, 102 Ohio St. 176, 131 N.E. 504 (1921).

An owner or occupier of land owes a licensee the duty not to injure the licensee by willful or wanton misconduct. Salemi v. Duffy Construction Corp., 3 Ohio St. 2d 169, 209 N.E.2d 566 (1965); Clary v. McDonald, 120 Ohio App. 8, 200 N.E.2d 805 (Ct. App. Pickaway County 1963). The possessor of land must, also, warn the licensee of latent dangers of which the possessor is actually aware. Salemi v. Duffy Construction Corp., supra. Should the landowner breach the above duty owed to individuals attending district functions upon the landowner's property, he will be liable in tort.

Your fourth question also asks whether the district board may be held liable for injury to individuals attending district functions upon private property. I direct your attention to my discussion of your second question. Under R.C. 1515.08(G), a district may be "sued and impleaded in its own name with respect to its contracts or torts of its officers, employees, or agents acting within the scope of their employment." (Emphasis added.) Thus, a district could be liable in this regard if the potential liability resulted from torts of its officers, employees or agents acting within the scope of their employment.

In specific answer to your question, it is my opinion, and you are so advised, that:

1. Unless liability has been specifically imposed by statute, a soil and water conservation district supervisor acting within the scope of his authority will not, in the absence of bad faith or corrupt motive, be found personally liable for failure to properly perform a duty involving judgment and discretion. However, such supervisor may face potential personal liability for failure to properly perform a ministerial duty.

2. A soil and water conservation district supervisor is neither personally liable for the negligent acts of his subordinates nor personally liable for the negligent acts of persons renting district-owned equipment.

3. A soil and water conservation district is implicitly authorized, by virtue of the statutory liability imposed by R.C. 1515.08(G), to expend public funds to purchase liability insurance to protect itself against liability for the torts of its officers, employees, or agents acting within the scope of their employment. A district, pursuant to R.C. 9.83 and 1515.09, may use public funds to purchase liability insurance to protect its employees from

liability which may accrue to them for acts within the scope of their employment; however, except to the extent authorized by R.C. 9.83, a district may not use public funds to purchase liability insurance to protect its supervisors from liability which may accrue to them for acts within the scope of their office.

4. A soil and water conservation district supervisor, or any other owner or occupier of land, who voluntarily allows a soil and water conservation district activity to be held upon his own land, may be liable to those attending if such supervisor or other owner or occupier breaches the duty owed to licensees upon his property. In this regard, pursuant to R.C. 1515.08(G), a district could be liable if the potential liability resulted from torts of its officers, employees, or agents acting within the scope of their office or employment.