

## Lesson 19. AGENCY & PERSONAL LIABILITY

### INTRODUCTION

It should be obvious that the sanitarian, environmental protection specialist or industrial hygienist employed by federal, state or local government agencies must be treated differently by the employer than private employees. Corresponding to their special treatment, is the enhanced responsibilities of public employees who hold positions of public trust. So that environmental health practitioners may perform their job thoroughly and diligently, they must be aware of the protection the law affords and the sanctions which may result from misconduct.

### LESSON OBJECTIVES

The readings and discussion for this lesson are intended to enable you to:

1. Understand the major types of civil sanctions available for use in environmental health; and,
2. Be able to describe the procedures for applying civil sanctions in a particular situation.

### KEY POINTS

#### A. Responsibilities

Professor Grad's text discusses the nature of the public health officer's legal responsibilities and liabilities. The environmental health specialist derives certain powers and protections from the state, or federal, legislature which are necessary to the performance of his/her duties. At the same time, this grant of power entails certain additional responsibilities beyond those of an ordinary citizen. The scope of both of these aspects of the public official's position has, and continues to be, subject to definition and interpretation by the courts.

#### B. Liabilities

It might not be too much of an oversimplification to suggest that, with regard to the question of liability, most sanitarians are concerned with those actions and activities for which he or she may be held personally responsible; while for the most part the administration is just as concerned with those actions of their employees for which the agency may be held liable. By this time, it should come as no surprise that there is not a hard and fast boundary between the two. Both field and administrative personnel need to be aware of the types of conduct and activities which might subject them to legal action.

There are three basic areas in which the environmental health practitioner may run afoul of the law.

1. **Misconduct:** Misconduct in office includes any unlawful behavior by a public officer in relation to the duties of his/her office which is willful in character. The term embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act.<sup>1</sup>

Two types of misconduct, of which a sanitarian might be accused and which could result in criminal prosecution are malfeasance and bribery. The legal profession distinguishes between malfeasance (the commission of an act which is positively unlawfully); misfeasance (performance of a lawful act in an unlawful manner); and non-feasance (failure to perform an act which ought to be done). The importance of knowing the distinction between the feasances is only that some attorneys and judges still use the terms.

Acceptance of gifts by an environmental health specialist must be considered at three levels: criminal, departmental policy and moral. If the latter two levels are well-defined, reasonable and understandable, then the criminal aspect is only of minor importance. That is, if through personal or professional code of ethics, or through their department's policy and procedures, practitioners are able to make the determination of what is acceptable and prudent conduct in a situation, then there should be no occasion in which a criminal charge should be filed.

Bribery, though, is a crime for which environmental health practitioners have been accused and needs to be examined in light of the following questions.

- a. What constitutes a bribe?
- b. How is the taking of a bribe proven in a court of law?
- c. What should the sanitarian do if a bribe is offered?

Intent and actions are essential to the determination of whether something is a bribe. The law says that there must be "a corrupt intent to influence", but, this is relatively vague and hard to judge. On the other hand consider who will judge your actions -- a group of upstanding, taxpaying citizens from the community. Thus, the appearance of the act is, perhaps, even more important than the intent. The sanitarian must avoid giving any impression of impropriety and there must not be any hint of a conflict of interest.

2. **Tort Liability:** Torts are wrongs or injuries committed against a person or property, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages. Every tort must have three elements:

- a. Existence of a legal duty from defendant to plaintiff;
- b. Breach of this duty; and
- c. Damage as a proximate result.<sup>2</sup>

Torts are basically of two types -- intentional torts and negligence. Intentional torts consist of battery, assault, false imprisonment, defamation, trespass and conversion of personal property<sup>3</sup>. The intentional tort requires, beside an action or injury, an intent to harm someone or something. Negligence involves the performance of an act which would obviously cause an injury.

3. **Deprivation of Constitutional Rights:** A new liability problem for sanitarians has grown out of the Civil Rights Act. In *Wilson v. Health and Welfare Corporation of Marion County*, the court found that a government official is liable if he deprives a person of "any rights, privileges

or immunities secured by the Constitution" while acting "under the color of any statute or ordinance"<sup>4</sup>. That is, an official deprive a person of a Constitutional right, by improperly exercising a statutory authority, or doing something on the pretense that it is a legally authorized action.

Since this is a still emerging area of law, you can expect that there will be more challenges brought, and that the decisions in some of them, will affect the way in which you conduct your various program activities.

### C. Protections

Just as public officials have additional responsibilities placed upon them by the nature of their public office, so they also have certain protections.

1. **Constitutional Protections:** There are the constitutional protections and guarantees available to all citizens. These include equal protection and due process.

2. **Sovereign Immunity:** The doctrine of sovereign immunity derives from English Common Law and holds that the government is immune from suit. (Since the "King could do no wrong", there could be no basis for a legal action against him, and hence against any one acting in his stead.) In recent years this doctrine has become extremely limited and most states have explicitly refuted or restricted its application to administrative agencies.

3. **Respondeat superior:** The doctrine of respondeat superior holds that the master is liable for the actions of his servants, hence the department or agency is liable for the actions of its employees. In many circumstances, this doctrine provides considerable protection for the practitioner. However, for the protection to hold, the sanitarian must be performing an action in good faith which he/she believes to be authorized. In other words, your agency cannot be held responsible for action taken by you which are clearly outside of your authority.

4. **Agency Discretion:** We have already discussed the fact that some of the activities performed by an agency are ministerial and some are discretionary. So long as there is no abuse of discretion, those activities which are discretionary are secure against suit. The problem, of course, lies in determining whether a particular action is a discretionary or ministerial action.

5. **Good Faith:** In the final analysis, environmental health practitioners' best defense is their good faith. "Good faith is an intangible and abstract quality with no technical or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or seek unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not be conclusively be determined by his protestations alone."<sup>[1]</sup> Despite the fuzziness of this concept, the absence of demonstrable bad faith, together with the sanitarian's assertion that he/she was acting in a manner which he/she believed to be lawful, may result in a presumption of good faith and therefore provide the sanitarian with personal protection even if the agency is found liable.

6. **Liability Insurance:** Finally, one additional form of protection which the sanitarians can provide for themselves is professional liability insurance. This is the same protection which many medical professional have found necessary to secure in recent years. In most cases,

sanitarians, environmental protection specialists, industrial hygienists, and other practitioners not involved in personal or patient care have not found it necessary to purchase this kind of protection. Nevertheless some environmental health practitioners, usually through their professional associations, have been looking into the desirability and costs of obtaining liability insurance in recent years.

### STUDY QUESTIONS:

1. When might a sanitarian act "under the color of statute"?
  - a. Would a routine inspection or investigation of a complaint qualify?
  - b. Under what circumstances?
  - c. What protection does a sanitarian have against this liability?
  
2. With regard to misconduct and the higher standard of conduct to which a government official is held, what is this standard of conduct and how is it determined?
  - a. What should be the conduct of a reasonably prudent sanitarian when a bulging can of green beans is discovered in a restaurant?
  - b. What about the identification of rat droppings in patient rooms in a nursing home?
  - c. What if a sanitarian sees an oily, odorous liquid being dumped into a sanitary landfill?
  
3. An environmental health practitioner can be held liable for breach of his/her normal duty to act as a reasonably prudent person and for malpractice. Three cases involving employee and/or agency liability were assigned for this lesson. Discuss the types and nature of the protections which are available to practitioners in each case, being sure to describe the primary issues of the case, the decision of the judge and his/her grounds for making the decision.
  - a. The situation in *Wilson v. Health and Hospital Corp.* [Reading #38].
  - b. The employee in *Michael Yashko* [Reading #39].
  - c. The inspector in *Nathanson* [Reading #40].
  
4. In this lesson we have discussed the three aspects of bribery. How do these apply to the following situations? What factors or additional information would be important to determining the "facts" and the "law" in each case?

- a. A sanitarian who accepts a free cup of coffee from the manager of a restaurant as they go over the list of violations at the conclusion of an inspection.
  - b. An industrial hygienist who accepts a name plate from one of the workers in an industrial engraving plant.
  - c. An environmental protection specialist who is invited to be the guest speaker (with a \$500 honorarium) at a regional meeting of the solid waste contractors in his area.
5. What constitutes a conflict of interest?
- a. Can a sanitarian inspect a restaurant owned or franchised by a national chain in which he/she owns stock?
  - b. Could an inspector sell Amway products to the employees of a business that he/she inspects? What if the sales occurred off of the premises? After regular working hours?
  - c. Could an inspector "moonlight" installing septic tanks in the county in which he/she works? What about in an adjacent county?