

**OP. NO. 04-083**

**MILITARY AND EMERGENCY LAWS: EMERGENCY SERVICES AND DISASTER LAW.**

**CIVIL REMEDIES AND PROCEDURES: ACTIONS – MISCELLANEOUS PROVISIONS.**

**Formal declaration of emergency under Virginia Emergency Services Disaster Law of 2000 affords Medical Reserve Corps volunteers immunity for acts of negligence; no immunity for acts of willful misconduct. Common law Good Samaritan doctrine may provide limited immunity to Corps volunteers acting within confines of law. Federal Volunteer Protection Act of 1997 provides broad immunity, both before and during declared emergency, for volunteers' negligent acts provided they act within scope of their responsibilities; no immunity for claims of noneconomic damages, acts involving gross negligence or reckless misconduct, or awards of punitive damage. Whether Corps volunteers are agents of Commonwealth for purposes of sovereign immunity and workers' compensation protection is factual determination.**

The Honorable Mitchell Van Yahres  
Member, House of Delegates  
January 13, 2005

### **Issues Presented**

You inquire concerning liability issues related to the activities of volunteers responding to emergency or disaster situations. Specifically, you inquire about the Medical Reserve Corps, which is a community-based organization with volunteers trained to respond to such situations. You ask whether state law protects volunteers from liability in the performance of their duties as part of an organized response to disaster situations. Additionally, you ask under what circumstances state law would protect such volunteers. Next, you ask whether volunteers working with state agencies in an exercise or response scenario are considered agents of the Commonwealth, and whether that designation would entitle the volunteers to sovereign immunity protection and worker's compensation benefits. Finally, you ask whether the volunteer members of the Medical Reserve Corps are protected when they

respond pursuant to a local Incident Command System<sup>1</sup> prior to a gubernatorial declaration of emergency.

### **Response**

It is my opinion that volunteer members of the Medical Reserve Corps are afforded immunity for their services upon a formal declaration<sup>2</sup> of emergency pursuant to the Commonwealth of Virginia Emergency Services and Disaster Law of 2000. The liability protections afforded by this act protect volunteers from liability for acts of negligence, but not for acts of willful misconduct. In the absence of a formal declaration, this broad immunity does not apply. The volunteer members of the Medical Reserve Corps may have limited immunity prior to the declaration of an emergency or disaster if they are acting within the narrow circumstances of the Good Samaritan law. The federal Volunteer Protection Act of 1997, however, provides broad immunity to volunteer members of the Medical Reserve Corps for their negligent acts when acting within the scope of their responsibilities both before and during a formal declaration of emergency. Such immunity does not extend to claims for noneconomic damages or for acts involving gross negligence or reckless misconduct, nor for awards of punitive damages.

I am unable to offer an opinion whether the members of the volunteer Medical Reserve Corps would be agents of the Commonwealth for purposes of sovereign immunity and worker's compensation protection. Ultimately, such a determination is fact dependant and must be made on a case-by-case basis. Finally, it is my opinion that the protection from the Virginia Emergency Services and Disaster Law of 2000 is applicable only upon a formal declaration of emergency.

### **Background**

You relate that the volunteer Medical Reserve Corps for the Commonwealth has been created to provide local assistance in emergency situations. The national Medical Reserve Corps is community-based and functions as a component of the Citizen Corps and the USA Freedom Corps, a national network of volunteers.<sup>3</sup> The Citizen Corps is organized under the direction of the federal Department of Homeland Security and is designed to provide assistance to their communities during emergencies.<sup>4</sup> The USA Freedom Corps is a "Coordinating Council housed at the White House and chaired by President George W. Bush ... working to strengthen ... service and help find opportunities for every American to [volunteer]."<sup>5</sup> The Governor has established the

Virginia Corps as a "clearinghouse" to coordinate volunteer organizations.<sup>6</sup> The Virginia Citizen Corps, which is linked to the Virginia Corps, manages the Medical Reserve Corps at the local level.<sup>7</sup>

Virginia's Medical Reserve Corps provides communities with medical volunteers who can assist local health professionals during a large-scale local emergency. This corps consists of practicing and retired health care professionals who volunteer to be on a medical reserve list. Volunteers assist medical response professionals during emergencies such as influenza epidemics, hazardous materials spills or acts of terrorism.<sup>[8]</sup>

Both the Virginia Corps and Virginia Citizens Corps are linked to the national Citizen Corps.<sup>9</sup>

### **Applicable Law and Discussion**

There are currently several provisions of state and federal law designed to provide immunity to volunteers from liability arising out of their service. The Commonwealth of Virginia Emergency Services and Disaster Law of 2000<sup>10</sup> ("2000 Act"), § 8.01-225<sup>11</sup> ("Good Samaritan law"), and the federal Volunteer Protection Act of 1997<sup>12</sup> ("Volunteer Protection Act") provide varying levels of protection to volunteers. Sovereign immunity may provide additional protection, but may only be determined on a case-by-case basis.

The 2000 Act confers several forms of immunity upon volunteers during a disaster. The liability protection afforded thereunder goes into effect upon a formal declaration of emergency. Such protection would not apply to services performed by volunteers prior to the declaration. Section 44-146.23(a) of the 2000 Act provides:

Neither the Commonwealth, nor any political subdivision thereof, nor federal agencies, nor other public or private agencies, nor, except in the cases of willful misconduct, public or private employees, nor representatives of any of them, engaged in any emergency services activities, while complying with or attempting to comply with [Chapter 3.2] or any rule, regulation, or executive order promulgated pursuant to the provisions of [Chapter 3.2], shall be liable for the death of, or any injury to, persons or damage to

property as a result of such activities. The provisions of this section shall not affect the right of any person to receive benefits to which he would otherwise be entitled under [Chapter 3.2], or under the Workers' Compensation Act (§ 65.2-100 et seq.), or under any pension law, nor the right of any such person to receive any benefits or compensation under any act of Congress.

This provision grants immunity to public or private agencies and their employees when engaged in emergency services and complying with the 2000 Act. The 2000 Act does not define "public or private agencies," but the volunteer Medical Reserve Corps should be considered a "public or private agency" if it has been organized as a component of Citizen Corps, a federally created national volunteer program. "Emergency services" include "medical and health services" and "rescue" services.<sup>13</sup> Therefore, the volunteer Medical Reserve Corps must perform "medical and health services" or "rescue" services for the immunity provided by § 44-146.23(a) to apply. While § 44-146.23(a) provides immunity from liability "for the death of, or any injury to, persons or damage to property," the immunity will not apply in cases of "willful misconduct."

The 2000 Act also provides immunity to licensed or certified individuals responding to disasters. Specifically, § 44-146.23(c) provides:

If any person holds a license, certificate, or other permit issued by any state, or political subdivision thereof, evidencing the meeting of qualifications for professional, mechanical, or other skills, the person may gratuitously render aid involving that skill in this Commonwealth during a disaster, and such person shall not be liable for negligently causing the death of, or injury to, any person or for the loss of, or damage to, the property of any person resulting from such gratuitous service.

The General Assembly has defined four types of disasters for which the immunity in § 44-146.23(c) would apply. First, § 44-146.16 provides that a "major disaster" is

any natural catastrophe, including any: hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption,

landslide, mudslide, snowstorm or drought, or regardless of cause, any fire, flood, or explosion, in any part of the United States, which, in the determination of the President of the United States is, or thereafter determined to be, of sufficient severity and magnitude to warrant major disaster assistance under the Strafford Act (P.L. 43-288 as amended) to supplement the efforts and available resources of states, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby and is so declared by him[.]

Second, § 44-146.16 defines a "man-made disaster" as

any condition following an attack by any enemy or foreign nation upon the United States resulting in substantial damage of property or injury to persons in the United States and may be by use of bombs, missiles, shell fire, nuclear, radiological, chemical or biological means or other weapons or by overt paramilitary actions; terrorism, foreign and domestic; also any industrial, nuclear or transportation accident, explosion, conflagration, power failure, resources shortage or other condition such as sabotage, oil spills and other injurious environmental contaminations that threaten or cause damage to property, human suffering, hardship or loss of life[.]

Next, § 44-146.16 provides that a "natural disaster" "means any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, drought, fire or other natural catastrophe resulting in damage, hardship, suffering or possible loss of life." Finally, § 44-146.16 defines a "local emergency," in part, as

the condition declared by the local governing body when in its judgment the threat or actual occurrence of an emergency or disaster is or threatens to be of sufficient severity and magnitude to warrant local government action to prevent or alleviate the damage, loss, hardship or suffering threatened or caused thereby; provided, however, that a local emergency arising wholly or substantially out of a resource shortage may be declared only by the Governor[.]

A "natural disaster" differs from a "major disaster" in that it does not require a Presidential declaration; rather, it requires a gubernatorial determination that a natural catastrophe resulted "in damage, hardship, suffering or possible loss of life."<sup>14</sup> The immunity provided in § 44-146.23(c) also only applies to negligent action by the volunteer.

The Good Samaritan law confers immunity upon volunteers in certain narrow situations. Unlike the 2000 Act, the Good Samaritan law applies regardless of whether the emergency is declared. Section 8.01-225(A)(1) provides that any person who:

In good faith, renders emergency care or assistance, without compensation, to any ill or injured person at the scene of an accident, fire, or any life-threatening emergency, or en route therefrom to any hospital, medical clinic or doctor's office, shall not be liable for any civil damages for acts or omissions resulting from the rendering of such care or assistance.

The immunity provided by the Good Samaritan law only applies to the specific assistance listed therein. The Good Samaritan law also imparts immunity to individuals, who provide emergency obstetrical services in the absence of gross negligence,<sup>15</sup> emergency cardiopulmonary resuscitation or cardiac defibrillation at the scene or en route to a hospital, medical clinic, doctor's hospital, or other medical facility,<sup>16</sup> or operate an automated external defibrillator.<sup>17</sup> Further, the Good Samaritan law confers immunity in the "absence of gross negligence or willful misconduct" for the administration of smallpox vaccines by a health care provider to health care workers, or for injuries suffered by anyone who comes into contact with a vaccinated health care worker.<sup>18</sup> Finally, § 8.01-225.01 provides immunity in the "absence of gross negligence or willful misconduct" to any health care provider responding to a "man-made disaster" as defined in § 44-146.16 of the 2000 Act, who abandons a patient to respond to the disaster.<sup>19</sup> The immunity provided by § 8.01-225.01 is effective when "a state or local emergency has been or is subsequently declared."<sup>20</sup>

The Volunteer Protection Act was passed by Congress in 1997<sup>21</sup> and provides liability protection for volunteers regardless of whether an emergency exists.<sup>22</sup> The Volunteer Protection Act contains a preemptive clause applying the federal provisions over less protective state laws.<sup>23</sup> This liability protection only applies to volunteers who work without compensation for government or nonprofit organizations.<sup>24</sup> The protection afforded by the Volunteer

Protection Act applies as long as the volunteer is acting within the scope of his responsibilities.<sup>25</sup> The protection provided by the Act is limited to economic damages; the volunteer is still potentially liable for noneconomic losses.<sup>26</sup> The Act's liability protection is further limited as injured individuals may seek punitive damages against volunteers who act with "gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer."<sup>27</sup>

If the volunteer Medical Reserve Corps in question is a nonprofit organization organized and conducted for public benefit and primarily operated for health purposes, it will fall under the Volunteer Protection Act. 42 U.S.C.S. § 14505(4) defines a "nonprofit organization" as

(A) any organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 [26 USCS § 501(c)(3)] and exempt from tax under section 501(a) of such Code [26 USCS § 501(a)] and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C.S. 534 note); or

(B) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C.S. 534 note).

If training exercises, mock disasters, transportation to and from exercises and actual disaster situations are within the scope of the volunteer's duties, then the liability protection afforded by this section would apply.

You also inquire whether volunteers working with state agencies in an emergency are considered agents of the Commonwealth and, therefore, entitled to the benefits of sovereign immunity protection and worker's compensation. A 2003 opinion of the Attorney General concludes that whether nongovernmental personnel are entitled to sovereign immunity for acts or omissions is impacted by whether there has been a formal declaration of an emergency.<sup>28</sup> The 2003 opinion concluded that in the absence of a formally declared emergency and without specific legislation, the general

test of whether sovereign immunity applies depends upon the capacity in which the private entity was acting and whether such acts are under the direction and control of the Commonwealth, based on the nature of and the state's interest in the function to be performed.<sup>29</sup> A determination of sovereign immunity depends upon the facts and circumstances of each case. You provide no facts upon which to make such a determination.

Regarding worker's compensation, volunteers generally are not entitled to such coverage because they are not employees of the Commonwealth.<sup>30</sup> Should the Department of Emergency Management, however, request that members of the volunteer Medical Reserve Corps respond to an incident, then, in that situation, the volunteers would be considered employees of the Department for purposes of worker's compensation.<sup>31</sup>

Finally, you inquire whether volunteers would be protected from liability when they respond prior to a gubernatorial declaration of emergency under a local incident command system. As previously noted, when a volunteer complies with the requirements of the Good Samaritan law and the Volunteer Protection Act, the liability protection associated with those laws would apply prior to a gubernatorial declaration. The liability protection associated with the 2000 Act is effective only upon a formal declaration<sup>32</sup> of emergency.

## **Conclusion**

Accordingly, it is my opinion that volunteer members of the Medical Reserve Corps are afforded immunity for their services upon a formal declaration<sup>33</sup> of emergency pursuant to the Commonwealth of Virginia Emergency Services and Disaster Law of 2000. The liability protections afforded by this act protect volunteers from liability for acts of negligence, but not for acts of willful misconduct. In the absence of a formal declaration, this broad immunity does not apply. The volunteer members of the Medical Reserve Corps may have limited immunity prior to the declaration of an emergency or disaster if they are acting within the narrow circumstances of the Good Samaritan law. The federal Volunteer Protection Act of 1997, however, provides broad immunity to volunteer members of the Medical Reserve Corps for their negligent acts when acting within the scope of their responsibilities both before and during a formal declaration of emergency. Such immunity does not extend to claims for noneconomic damages or for acts involving gross negligence or reckless misconduct, nor for awards of punitive damages.

I am unable to offer an opinion whether the members of the volunteer Medical Reserve Corps would be agents of the Commonwealth for purposes of sovereign immunity and worker's compensation protection. Ultimately, such a determination is fact dependant and must be made on a case-by-case basis. Finally, it is my opinion that the protection from the Virginia Emergency Services and Disaster Law of 2000 is applicable only upon a formal declaration of emergency.

<sup>1</sup>For purposes of this opinion, I assume that the term "local Incident Command System" means "Incident Command System" as that term is used in the Commonwealth of Virginia Emergency Operations Plan. See Virginia Department of Emergency Management website, "Commonwealth of Virginia Emergency Operations Plan," Basic Plan, Volume 1, p.12, at [http://www.vdem.state.va.us/library/eopvol1/eopvol1\\_a.pdf](http://www.vdem.state.va.us/library/eopvol1/eopvol1_a.pdf) (defining "Incident Command System" as "[a]n open-ended organizational structure designed to effectively direct and control an in-the-field emergency response").

<sup>2</sup>For purposes of this opinion, a "formal declaration" means a Presidential, gubernatorial, or local governing body's declaration of emergency as described in §§ 44-146.16, 44-146.17, 44-146.21.

<sup>3</sup>See national Medical Reserve Corps website, "Supporting and Guiding Our Nation's Medical and Public Health Volunteers," at <http://www.medicalreservecorps.gov/index.cfm> (last visited Dec. 15, 2004).

<sup>4</sup>See Citizen Corps website "Programs & Partners," at <http://www.citizencorps.gov/programs/> (last visited Dec. 15, 2004).

<sup>5</sup>See USA Freedom Corps website, "Overview," at [http://www.usafreedomcorps.gov/content/about\\_usafc/overview/index.asp](http://www.usafreedomcorps.gov/content/about_usafc/overview/index.asp) (last visited Dec. 15, 2004).

<sup>6</sup>See Virginia Corps website, "About VirginiaCORPS," at <http://www.virginiacorps.org/About/index.htm> (noting that Virginia Corps "serves as a central clearinghouse for volunteer opportunities across Virginia") (last visited Dec. 15, 2004).

<sup>7</sup>See Virginia Corps website, "Homeland Security," at <http://www.virginiacorps.org/CitizenCorps/index.htm>.

<sup>8</sup>See Virginia Corps website, "Medical Reserve Corps in Virginia," at <http://www.virginiacorps.org/CitizenCorps/MedCorps/MedReserveCorps.htm> (last visited Dec. 15, 2004).

<sup>9</sup>See *supra* notes 6, 7.

<sup>10</sup>Va. Code Ann. §§ 44-146.13 to 44-146.28:1 (LexisNexis Repl. Vol. 2002 & Supp. 2004).

<sup>11</sup>Section 8.01-225 provides immunity for persons offering good faith emergency care or assistance in certain situations. See *Creasy v. United States*, 345 F. Supp. 853, 855-56 (W.D. Va. 1986) (noting that enactment of § 8.01-225 supports conclusion that Virginia has accepted common law Good Samaritan doctrine).

<sup>12</sup>42 U.S.C.S. §§ 14501 to 14505 (Law Co-op. 2004).

<sup>13</sup>"*Emergency services*' means the preparation for and the carrying out of functions, other than functions for which military forces are primarily responsible, to prevent, minimize and repair injury and damage resulting from natural or man-made disasters, together with all other activities necessary or incidental to the preparation for and carrying out of the foregoing functions. These functions include, without limitation, fire-fighting services, police services, medical and health services, rescue, engineering, warning services, communications, radiological, chemical and other special weapons defense, evacuation of persons from stricken areas, emergency welfare services, emergency transportation, emergency resource management, existing or properly assigned functions of plant protection, temporary restoration of public utility services, and other functions related to civilian protection. These functions also include the administration of approved state and federal disaster recovery and assistance programs[.]" Section 44-146.16 (LexisNexis Supp. 2004).

<sup>14</sup>Section 44-146.16.

<sup>15</sup>Va. Code Ann. § 8.01-225(A)(2) (LexisNexis Supp. 2004).

<sup>16</sup>Section 8.01-225(A)(6).

<sup>17</sup>Section 8.01-225(A)(7).

<sup>18</sup>Section 8.01-225(E)(1)-(2) (expiring on July 1, 2005).

<sup>19</sup>Section 8.01-225.01 provides that:

"A. In the absence of gross negligence or willful misconduct, any health care provider who responds to a man-made disaster by delivering health care to persons injured in such man-made disaster shall be immune from civil liability for any injury or wrongful death arising from abandonment by such health care provider of any person to whom such health care provider owes a duty to provide health care when (i) a state or local emergency has been or is subsequently declared; and (ii) the provider was unable to provide the requisite health care to the person to whom he owed such duty of care as a result of the provider's voluntary or mandatory response to the relevant man-made disaster.

"B. In the absence of gross negligence or willful misconduct, any hospital or other entity credentialing health care providers to deliver health care in response to a man-made disaster shall be immune from civil liability for any cause of action arising out of such credentialing or granting of practice privileges if (i) a state or local emergency has been or is subsequently declared; and (ii) the hospital has followed procedures for such credentialing and granting of practice privileges that are consistent with the Joint Commission on Accreditation of Healthcare Organizations' standards for granting emergency practice privileges.

"C. For the purposes of this section:

"*Health care provider*" means those professions defined as such in § 8.01-581.1; and

"*Man-made disaster*" means the circumstances described in § 44-146.16.

"D. The immunity provided by this section shall be in addition to, and shall not be in lieu of, any immunities provided in other state or federal law, including, but not limited to, §§ 8.01-225 and 44-146.23."

<sup>20</sup>Section 8.01-225.01 (LexisNexis Supp. 2004).

<sup>21</sup>See Volunteer Protection Act of 1997, Pub. L. No. 105-19, 111 Stat. 218 (1997).

<sup>22</sup>42 U.S.C.S. § 14501(a), (b).

<sup>23</sup>42 U.S.C.S. § 14502(a).

<sup>24</sup> See 42 U.S.C.S. §§ 14503 (providing liability protection for volunteers of nonprofit organizations or governmental entities who meet certain criteria); 14505(6) (defining "volunteer").

<sup>25</sup> See 42 U.S.C.S. § 14503(a)(1), (e).

<sup>26</sup> 42 U.S.C.S. § 14504(b) provides that:

"(1) In general. Each defendant who is a volunteer, shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.

"(2) Percentage of responsibility. For purposes of determining the amount of noneconomic loss allocated to a defendant who is a volunteer under this section, the trier of fact shall determine the percentage of responsibility of that defendant for the claimant's harm."

42 U.S.C.S. § 14505(3) defines "noneconomic losses" as "losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature."

<sup>27</sup> 42 U.S.C.S. § 14503(a)(3). In addition, 42 U.S.C.S. § 14503(e)(1) provides the general rule that "[p]unitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed."

<sup>28</sup> See 2003 Op. Va. Att'y Gen. 133, 135.

<sup>29</sup> *Id.* at 135; see also *Atkinson v. Sachno*, 261 Va. 278, 541 S.E.2d 902 (2001) (holding that licensed physician providing consultant services for state agency was independent contractor excluded

from sovereign immunity with regard to medical malpractice claim); *but see* Wesley v. Mercy Ambulance Corp., 37 Va. Cir. 354, 1995 Va. Cir. LEXIS 1112 (1995) (holding that ambulance service "employed" by city of Richmond was sufficiently under control of city to be covered by sovereign immunity).

<sup>30</sup>See, e.g., Va. Code Ann. § 65.2-101 (LexisNexis Supp. 2004) (providing that employee does not include "a member of a volunteer fire-fighting, lifesaving or rescue squad when engaged in activities related principally to participation as a member of such squad whether or not the volunteer continues to receive compensation from his employer for time away from the job").

<sup>31</sup>Section 65.2-101 provides that the term "employee" includes "[v]olunteer firefighters, volunteer lifesaving or rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, volunteer emergency medical technicians, members of volunteer search and rescue organizations and any other persons who respond to an incident upon request of the Department of Emergency Management, who shall be deemed employees of the Department of Emergency Management for the purposes of this title."

<sup>32</sup>See *supra* note 2.

<sup>33</sup>*Id.*

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