D7 Auxiliary Staff Legal Officer Opinion 11-1

Date: 4 December 2011

**Topics:** Personal Liability Exposure of Auxiliary Elected and Appointed Leaders Arising From Their Supervision and Administration of Auxiliary Training of Naval Sea Cadets and Sea Scouts.

**Issue/Facts:** Auxiliary leaders charged with responsibility of administering and supervising the shore side and underway training of Naval Sea Cadets and Sea Scouts by Auxiliary members have expressed concerns about their personal liability exposure for the costs of defense and/or indemnity should they be named as a party in a law suit arising from inappropriate contact between a minor and an adult during the course of such training by the Auxiliary.

**References**: (a) Title 14, U. S. Code, § 821

 (b) Title 14, U. S. Code, § 822

 (c) Title 14, U.S. Code, § 823a.

 (d) Auxiliary Manual COMDTINST M16790.1G

 (e) USCGAUX/BOA MOA Dated

 (f) USCGAUX/NSCC MO Dated 11/12/09

 (g) CG-54211Advisory on Auxiliary Interaction With Youth Groups, 4 MAR 2011

 (h) Commodore James Vass NACON Youth Policy Letter Dated 24 MAR 2011

 (i) RBS Department, Guide to Providing Shoreside and Underway Training Opportunities to Sea Cadets & Sea Scouts

 (j) Checklist for Auxiliarists Participating in Shore Side and Underway Training of Sea Scouts and Sea Cadets.

 (k) Florida Statutes Section 768.1355

 (l) Boy Scouts of America, Insurance Coverage Update March 2011

 (m) Naval Sea Cadet Corps Regulations, Chapter 12

**Premise**

For purposes of this analysis, it is presumed that, in administering and supervising the provision of training to Sea Cadets and Sea Scouts by Auxiliarists, their involved elected and appointed leaders are attempting, in good faith, to comply with the guidelines, checklists, procedures, precautions and conditions precedent established by National for the provision of such training and not recklessly ignoring them. It is further presumed that the elected and appointed leaders are not personally involved in any inappropriate conduct with a minor and have not failed to terminate and report any inappropriate conduct with a minor by an adult which they knew about or should have known about.

**Executive Summary**

As discussed in more detail below, elected and appointed Auxiliary leaders have little need to be concerned about personal liability arising from their administration and supervision of the training of Sea Cadets and Sea Scouts by Auxiliarists pursuant to the MOU and MOA signed by the Auxiliary with their parent organizations and conducted in accordance with the guidelines, checklists, procedures and guidelines promulgated by the National Staff. There is little reason to believe that they will not be protected by the provisions of the Federal Tort Claims Act and defended by the Department of Justice. Additional protection against personal liability is provided by the comprehensive releases each participant is required to sign as a condition precedent to participation in such training. Most states, including Florida, also have statutes which afford personal immunity against lawsuits to the officers of not for profit organizations. Finally, significant liability insurance protection is afforded to Auxiliary leaders who sign up for it by the Boys Scouts of America and may also be available through the Naval Sea Cadet Corps. It is recommended that action by the Auxiliary Chief Counsel be requested to broaden the group liability coverage available to Auxiliary members in connection with the training of Naval Sea Cadets.

**Analysis**:

 The status of the Auxiliary as an instrumentality of the United States has been enacted into law by reference (a), wherein Congress provided that each organizational element or unit of the Auxiliary organization shall, except when acting outside the scope of reference (b), at all times be considered an instrumentality of the United States for purposes of the Federal Tort Claims Act, Suits in Admiralty Act, Public Vessels Act and other matters related to noncontractual civil liability.

 Reference (b) provides that the purpose of the Coast Guard Auxiliary is to assist the Coast Guard, as authorized by the Commandant, in performing any Coast Guard function, power, duty, role, mission or operation authorized by law. Accordingly, each organizational element and unit of the Auxiliary is an instrumentality of the United States whenever engaged within the scope of the duties, missions and activities authorized by the Commandant for the purposes of the statutes set forth above and other matters related to noncontractual civil liability.

 Members of the Coast Guard Auxiliary, while assigned to duty, are, pursuant to reference (c), deemed to be Federal employees for the purposes, *inter alia*, of the Federal Tort Claims Act, the Military Claims Act, the Admiralty Extension Act, the Suits in Admiralty Act, the Public Vessels Act and all other matters related to non-contractual civil liability. A member of the Auxiliary, while assigned to duty, shall also be deemed to be a person acting under an officer of the United States or an agency thereof for purposes of Title 28, U. S. Code, § 1442(a)(1).

 Therefore, members of the U. S. Coast Guard Auxiliary, when assigned to duty, and acting within the course and scope of such assignment to duty, are considered to be Federal employees, acting under an agency of the United States, for purposes of the Federal Tort Claims Act, the Military Claims Act, the Admiralty Extension Act, the Suits in Admiralty Act, the Public Vessels Act and all other matters related to non-contractual civil liability.

 Thus, to the extent that elected and appointed leaders are “assigned to duty” and acting within the scope of duties, missions and activities authorized by the Commandant, they are considered to be Federal employees for matters related to noncontractual civil liability and are provided with the protections against personal liability afforded by the Federal Tort Claims Act and the other statutes set forth above. Barring any arbitrary and capricious refusal by the Department of Justice to recognize the Federal employee status of elected and appointed leaders carrying out their assigned duties, an unlikely event, elected and appointed leaders can reasonably expect to be defended by the Department of Justice should they be named in a lawsuit arising from the execution of the Auxiliary duties.

 Chapter 5, Section J.3, reference (d), provides that Auxiliary elected leaders and appointed staff officers are authorized to perform such activities as are required for the proper supervision and administration of their offices. These duties include, but are not limited to the duties and responsibilities of elected leaders and staff officers described in Chapter 4 of reference (d). For example, the duties and responsibilities of district leaders and staff officers include supervisory support of divisions and promoting National Policy. To the extent that elected leaders and staff officers are performing such duties and carrying out their responsibilities, they are considered to be “assigned to duty” within the meaning of reference (c).

 The provision of training to Sea Scouts by Auxiliary members is addressed in a Memorandum of Agreement between the Coast Guard Auxiliary and the Boy Scouts of America, reference (e). The provision of training by Auxiliary members to Naval Sea Cadets is addressed in a Memorandum of Understanding between the Coast Guard Auxiliary and the Naval Sea Cadet Corps, reference (f), signed by the National Commodore and Chief Director. The provision of training by Auxiliary members to Naval Sea Cadets and Sea Scouts has been approved by the Chief Director’s Office, reference (g), and encouraged by the National Commodore, reference (h). Guidelines, procedures, precautions and requirements for the conduct of the training of Naval Sea Cadets and Sea Cadets have been developed and promulgated by the Auxiliary National Staff, Department of Recreational Boating Safety Outreach, reference (i). The National Staff has also developed and promulgated a checklist for Auxiliary members participating in shore side and underway training of Sea Scouts and Sea Cadets, reference (j).

 Taking together, the referenced documents make it clear that the provision of shore side and underway training is an authorized activity which may be conducted by members of the Auxiliary. These same documents also make it clear that elected and appointed Auxiliary leaders at every organizational level have certain responsibilities with regard to the administration and supervision of these programs. Accordingly, elected and appointed leaders carrying out their supervisory and administrative responsibilities concerning the Auxiliary program of providing shore side and underway training to Sea Scouts and Naval Sea Cadets would be considered “assigned to duty” and entitled to the protections of reference (c) in the vent they are named as a party to litigation arising from their performance of these duties.

**Other Protections Against Legal Liability Available to Elected and Appointed Leaders**

 Generally speaking, there are three levels of legal protections that can be afforded to an individual for protection against exposure of their personal assets from legal liability for defenses costs and indemnity exposure. That is, protection against having to pay to defend against a lawsuit even if not liable and having to pay a judgment if found liable. These three forms of protection are: (1) liability releases, (2) statutory limitations of liability and (3) liability insurance.

**Liability Releases**

A properly drafted liability release can afford a great deal of protection against legal liability arising from ordinary negligence. A properly drafted release includes language that adequately informs the party asked to execute the release of the nature and extent of the liability being released and often requires that such notice and release language be in a distinctive font. As a matter of public policy, many courts are reluctant to enforce a liability release that releases someone from the consequences of their gross negligence, intentional conduct or criminal conduct.

With these factors in mind, the guidelines for Auxiliary units conducting shore side and underway training of Sea Scouts and Sea Cadets require, as a condition precedent to their participation, that the participating Scouts and Cadets, or their parents in the case of minors, execute a liability release. A separate release form has been prepared for Sea Scouts and Naval Sea Cadets. These releases, attached to this memorandum, have been drafted with a view to maximizing the legal protection against legal liability afforded to elected and appointed Auxiliary leaders as well as the exposure of other participating members. It is essential, therefore, that the requirement for the execution of these releases be diligently enforced.

If properly executed, these releases should adequately protect elected and appointed leaders against claims for personal injury, property damage and other injuries to Sea Scouts and Sea Cadets that are premised on the supervision and administration of the training programs by such leaders. Auxiliary members engaged in grossly negligent, intentional or criminal conduct, especially anything involving inappropriate conduct with a minor, can expect little or no protection from such releases.

**Statutory Limitations of Personal Liability**

 As discussed above, elected and appointed leaders can reasonably expect to be defended by the Department of Justice in any litigation arising from their execution of their supervisory and administrative duties as a “Federal employee” in connection with youth training programs. Liability arising under the Federal Tort Claims Act does not give rise to personal liability on the part of the Federal employee but rather liability on the part of the United States. As a “Federal employee” under the Federal Tort Claims Act, in the event that an elected or appointed leader is personally named as a defendant, one of the first actions to be taken by the Department of Justice, or other counsel appointed to defend, would be to move the Court to dismiss the leader as a named party to the litigation and substitute the United States as the named Defendant. Further, if the litigation had been filed in state court, the case would be removed to the United States District Court and tried without a jury.

 The procedural provisions governing claims arising under the Federal Tort Claims Act provide that in cases arising from the alleged negligence of a Federal employee, the only proper defendant is the United States. It is improper to name the Federal employee as a party defendant in the litigation. Further, state courts lack the subject matter jurisdiction to hear such a lawsuit which may only be properly brought in the U. S. District Court where it is tried without a jury. Thus, the Federal Tort Claims Act, as well as the other Federal statutes governing non-contractual civil liability of Federal employees provides protection against personal liability on the part of Federal employees for claims arising from the performance of their duties as a Federal employee.

 In addition, most states, including Florida, have state statutes which protect the volunteer officers and other volunteers of nonprofit organizations from personal liability arising from their performance of duties on behalf of the organization. In Florida, the Volunteer Protection Act, reference (j), provides that the volunteers, defined as persons performing services without compensation except for reimbursement of out of pocket expense, for a nonprofit organization, including any federal entity, shall incur no civil liability arising from performing volunteer services if they were acting as an ordinary reasonably prudent person would act. This statute would also apply to elected and appointed Auxiliary leaders. Its primary impact to do eliminate vicarious liability on the part of volunteer leaders for the acts of others.

**Availability of Liability Insurance to Protect Elected and Appointed Leaders**

 In addition to the protections afforded by liability releases and statutory limitations on personal liability, the availability of liability insurance to provide a defense against any litigation brought as well as to pay any judgments also affords significant protection to the personal assets of elected and appointed leaders in the event they become involved in litigation arising from their execution of their supervisory and administrative duties arising from the provision of training to Sea Scouts and Naval Sea Cadets.

 The protection afforded by typical liability policy wording usually includes protection arising from both ordinary and gross negligence but typically excludes protection against claims for punitive damages or those claims arising from intentional and criminal acts such as sexual molestation.

 If the insured is sued for claims that are covered as well as claims that are not covered by the policy, the insurance company is required to defend against all the claims brought but is only required to pay judgments entered against the insured for covered claims.

**Homeowners’ Policies**

Most Homeowner’s policies provide broad coverage, including defense costs, for a wide variety of claims of negligence against the insured homeowner. Of course, each member should review the wording of their specific policy as well as the conditions and exclusion However, the typically homeowners’ policy provides low coverage limits such as $300,000. The insured may, however, and probably should, buy excess coverage for a relatively low amount. For example, one could expect to pay approximately $450 with some insurers for an additional $2,000,000 in liability coverage.

Members should check the scope of their homeowners’ coverage for such claims as well as the cost and availability of excess coverage with their insurance agent.

**Group Liability Insurance Coverage**

 Elected and appointed Auxiliary leaders charged with the responsibility to supervise and administer the provision of shore side and underway training to Sea Scots and Sea Cadets by Auxiliarists may also obtain liability insurance coverage from group policies provided by those organizations.

 Reference (l), is found at:

<http://www.scouting.org/sitecore/content/Home/HealthandSafety/Alerts/Insurance.aspx>

Reference (l) provides that registered scouting volunteers are provided with $5 Million dollars of primary group general liability coverage with respect to claims arising from official scouting activity. Thus, all Auxiliary members providing shore side and underway training to Sea Scouts pursuant to the BSA/USCGAUX MOA are not only required to undergo specific training as required by the Boy Scouts of America but to register as merit badge counselors. By doing so, they are then covered by $5 Million in primary group general liability coverage. Elected and appointed Auxiliary leaders supervising and administering such training should also register and obtain the benefit of such coverage. Unregistered scouting volunteers receive the same group general liability coverage as an excess coverage over any coverage the volunteer might have that provides primary coverage.

 As provided by Section 122.1 of reference (m), the Naval Sea Cadet Corps provides very broad group comprehensive general liability coverage of $1,000,000 per incident, $2,000,000 aggregate with a $5 Million excess umbrella coverage to NSCC officers, members and volunteers, the Navy League, sponsoring Navy League Councils and Navy League members for any liability arising out of activities performed on behalf of the Naval Sea Cadet Corps. The National Guidelines address Auxiliary members who are also members of the Naval Sea Cadet Corps from acting in both capacities. However, Auxiliary members who are members of the Navy League may act as members of the Auxiliary in training Naval Sea Cadets but would still be covered by the group general liability coverage as members of the Navy League.

 The best solution to the issue is for the Auxiliary General Counsel to negotiate with the National Chairman of the Naval Sea Cadet Corps to have members of the Coast Guard Auxiliary providing training to Naval Sea Cadets pursuant to the NSCC/USCGAUX MOU named as an additional insured to the NSCC Group Comprehensive General Liability Policy. In the interim, however, Auxiliary members can obtain such coverage by joining the Navy League for a $50 annual membership.

**Recommendations**

Based on the foregoing discussions and analysis, the following action is recommended:

1. Approval of the provision of shore side and underway training to Sea Scouts and Sea Cadets by flotillas that have demonstrated compliance with the published D7 DCO requirements.
2. Ensure that all Auxiliarists training Sea Scouts or supervising or administering the provision of such training complete the required BSA training and register as merit badge counselors.
3. Recommend that all Auxiliarists training Naval Sea Cadets or supervising or administering the provision of such training become members of the Navy League.
4. That a recommendation go forward to the Auxiliary General Counsel to negotiate an agreement with the National Chairman of the Naval Sea Cadet Corps to have members of the Coast Guard Auxiliary providing training to Naval Sea Cadets pursuant to the NSCC/USCGAUX MOU named as an additional insured to the NSCC Group Comprehensive General Liability Policy.