

**Congressional Fire Services Institute/International Association of Arson Investigators/
International Association of Fire Chiefs/International Association of Fire Fighters/
International Fire Service Training Association/
International Society of Fire Service Instructors/National Fallen Firefighters Foundation/
National Fire Protection Association/National Volunteer Fire Council/
North American Fire Training Directors**

September 22, 2005

Ms. Hope Janke
Counsel to the Director
Bureau of Justice Assistance
Office of Justice Programs
810 7th Street, NW
Washington, DC 20531

Dear Ms. Janke,

On behalf of America's public safety community, thank you for the work you and your office have done to assist our nation's first responders. It demonstrates a genuine desire to work with us to improve the program for the family members of our fallen heroes.

As you are aware, on Tuesday, July 26, 2005 the Department of Justice released the proposed rule for the Public Safety Officers' Benefits Act. The proposed rule incorporates changes made by recent legislation, including the Hometown Heroes Survivors Benefits Act of 2003 (PL108-182,) that will impact the entire PSOB program. In accordance with the requirements of the proposed rule, this letter contains the comments of our organizations regarding the proposed changes to the PSOB program.

Although the proposed rule has positive aspects, our organizations have several concerns, including how some of the definitions will be applied. Prior to the proposed rule, the term "firefighter, as defined by the PSOB program included "public employee member of a rescue squad and ambulance crew." Claiming that the definition created confusion when determining certain cases, DOJ created two separate and specific definition in the proposed rule – one for "firefighter" and one for "rescue squad crew member" (Federal Register; Vol. 70 No. 142; page 43081). Subpart A of the proposed rule contains the definitions, which read as follows:

A "firefighter" is defined as:

"an individual, other than a rescue squad or ambulance crew member, who –

- (1) Is trained in –
 - (i) Extinguishing or containing fire; or
 - (ii) Emergency response to the threatened actual release of hazardous materials, where life, property, or the environment is at significant risk; ..." (Federal Register; Vol. 70 No. 142; page 43084).

A "rescue squad or ambulance crew member" is defined as:

"an ambulance worker, paramedic, emergency medical technician, or other similar rescue worker,

who meets the definition provided in the Act, at 42 U.S.C. 3796b(4) (with exception of that portion thereof relating to members of fire departments)” (Federal Register; Vol. 70 No. 142; page 43086).

The proposed rule defines “line of duty activity or action” as:

- “Activity or an action preformed in the line of duty, in the case of a public safety officer who is-
- (1) A law enforcement officer, firefighter, or rescue squad or ambulance crew member-
 - (i.) Whose primary function (as applicable) is enforcement of the criminal law, suppression of fire, or rescue or ambulance activity, only if it is activity or action that he is obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, to perform ... by the public agency he serves, and such agency... recognizes it as such...; or
 - (ii.) Whose primary function is not enforcement of the criminal law, suppression of fire, or rescue or ambulance activity, only if –
 - (A.) It is activity or action that he is obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, to perform, by the public agency he serves, and such agency... recognizes it as such...; and
 - (B.) It is performed in the course of enforcing the criminal law, preventing or suppressing fire, performing rescue or ambulance activity, or training for on of the forgoing, and such agency... legally recognizes it as such...” (Federal Register; Vol. 70 No. 142; page 43085).

The proposed rule also defines “suppression of fire” as:

- (1) Extinguishing or containing fire;
- (2) Emergency response to the threatened or actual release of hazardous materials, where life, property, or the environment is at significant risk; or
- (3) Performing rescue or emergency response activity of the kind performed by firefighters who have the legal authority an –responsibility to engage in the activity described in paragraph (1) of this definition” (Federal Register; Vol. 70 No. 142; page 43086).

These definitions are restrictive. For example, the definition of a firefighter is limited to fire suppression and haz-mat response and fails to include the various other duties, including emergency medical services. Moreover, the proposed rule contains a limited definition of EMS providers that covers only those providers not affiliated with a fire department. As a result, the general provisions of the proposed rule will not cover the majority of public safety officers providing medical first response. We recommend the rule be revised to include all emergency activities provided by the fire service (fire suppression, hazmat, technical rescue, search & rescue, EMS, etc.). While it is possible the definition of “line of duty activity or action” may cover these responders, DOJ can clarify any confusion by using the definition of a firefighter found in the Fair Labor Standards Act. The definition is:

- “(y) "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who -

- (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and
- (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk” (29 U.S.C. 203 (y)).

We are also concerned with the definition of “Competent medical evidence to the contrary” found in Subpart B, § 32.13:

“The presumption raised by the Act, at 42 U.S.C. 3796(k) , is overcome by competent medical evidence to the contrary –

- (1) In the event of death as a result of heart attack, when such evidence as may be available indicates to a degree of medical certainty that, as of the event date,
 - (i) The officer’s score under the most recent Framingham algorithm for predicting coronary heart disease within the next ten years, was not less than ten;
 - (ii) Not less than seventy percent of the risk factors for cardiovascular disease identified by the American Heart Association were present in the officer;
or
 - (iii) The officer had not less than seventy-five percent stenosis by atherosclerotic plaques or a thrombosis in one or more of the following:
 - (A) Left main coronary artery;
 - (B) Left anterior descending coronary artery;
 - (C) Left circumflex coronary artery; and
 - (D) Right coronary artery; and
- (2) In the event of death as a result of a stroke, when such evidence as may be available indicates to a degree of medical certainty that, as of the event date, not less than seventy percent of the risk factors for stroke identified by the American Stroke Association were present in the officer;” (Federal Register, Vol. 70 No. 142; page 43089).

The American Heart Association (AHA) risk factors for cardiovascular disease referenced in (1)(ii) are: high blood pressure, tobacco smoke, high blood cholesterol, physical inactivity, obesity, diabetes mellitus, increasing age, male gender, race, heredity/family history, individual response to stress, aging and menopause, excessive alcohol use, and some illegal drugs (Heart and Stroke Facts; American Heart Association; Pages 36 – 43). Of these risk factors, AHA describes the following as being uncontrollable:

- Increasing Age;
- Gender;
- Race;
- Heredity/Family History (Heart and Stroke Facts; American Heart Association; Pages 41 – 42).

The American Stroke Association risk factors for cardiovascular disease referenced in (2) are: high blood pressure, tobacco smoke, diabetes mellitus, carotid or other artery disease, atrial fibrillation, other heart disease, transient ischemic attacks (TIAs), certain blood disorders, sickle cell anemia, high blood cholesterol, physical inactivity or

obesity, excessive alcohol, some illegal drugs, increasing age, gender, heredity (family history) and race, prior stroke or heart attack, individual response to stress, aging and menopause, and use of birth control pills (Heart and Stroke Facts; American Heart Association; Pages 47 – 49). Of these risk factors, the following are describes as being uncontrollable:

- Increasing Age;
- Gender;
- Heredity (Family History) and Race;
- Prior Stroke or Heart Attack (Heart and Stroke Facts; American Heart Association; Page 49).

Many of these risk factors are vague and poorly defined. The use of uncontrollable risk factors established by the American Heart Association/American Stroke Association could appear discriminatory towards certain elements of the fire service. Similarly, the Framingham algorithm employees factor such as gender and age. And according to the National Heart Blood and Lung Institute, the Framingham Heart Study population is almost entirely Caucasian and may not reflect all ethnicities properly (<http://www.nhlbi.nih.gov/about/framingham/riskabs.htm>). DOJ needs to address these concerns as well to ensure that no segment is unintentionally discriminated against based on these factors.

The presence of a thrombosis, as referenced in section (1)(iii) of Subpart B, § 32.13 of the proposed rule, confirms the occurrence of a heart attack. By defining the presence of a thrombosis as “competent medical evidence to the contrary,” DOJ would almost guarantee that a public safety officer who died in the line of duty as the result of a heart attack would be disqualified. Moreover, we are concerned that the requirements under section (1)(iii) of Subpart B, § 32.13, could potentially cause a downward trend in autopsies performed on fallen public safety officers. This would undermine the research efforts of NIOSH and other agencies attempting to reduce firefighter deaths and injuries.

Our organizations are also concerned with the Department of Justice’s interpretation of “nonroutine strenuous physical activity.” The Hometown Heroes Survivors Benefits Act of 2003 stated that a public safety officer who dies from a heart attack or stroke shall be presumed to have died in the line of duty if “involved in nonroutine stressful or strenuous physical law enforcement, fire suppression, rescue, hazardous material response, emergency medical services, prison security, disaster relief, or other emergency response activity...” (P.L. 108-182 Sec. 2(k)(1)(A)). Following passage of the legislation by the House of Representatives, the Chairman of the House Judiciary Committee, Congressman James Sensenbrenner, clarified the term “nonroutine strenuous physical activity:”

“For the purposes of this Act, the phrase ‘nonroutine stressful or strenuous physical’ activity will exclude actions of a clerical, administrative or non-manual nature. Included in the category of ‘actions of a clerical, administrative or non-manual nature’ are such tasks including, but not limited to, the following: sitting at a desk; typing on a computer; talking on the telephone; reading or writing paperwork or other literature; watching a police or corrections facility’s monitors of cells or grounds; teaching a class; cleaning or organizing an emergency response vehicle; signing in or out a prisoner; driving a vehicle on routine patrol; and directing traffic at or participating in a local parade...”

“For the purposes of this Act, the phrase ‘nonroutine stressful or strenuous physical’ actions will include, but are not limited to, the following: involvement in a physical struggle with a suspected or convicted criminal; performing a search and rescue mission; performing or assisting with emergency medical treatment; performing or assisting with fire suppression; involvement in a situation that requires either a high speed response or pursuit on foot or in a

vehicle; participation in hazardous material response; responding to a riot that broke out at a public event; and physically engaging in the arrest or apprehension of a suspected criminal.

“The situation listed above the types of heart attack and stroke cases that are considered to be in the line of duty. The families of officers who died in such cases are eligible to receive Public Safety Officers Benefits” (Congressional Record; November 21, 2003; Page H12300).

In the proposed rule, DOJ defines “nonroutine strenuous physical activity” as;

“Except as excluded by the Act..., nonroutine strenuous physical activity means line of duty activities that –

- (1) Is not performed as a matter of routine; and
- (2) Entails an unusually-high level of physical exertion” (Federal Register, Vol. 70 No. 142; page 43089).

We recommended that DOJ add in its definition of “nonroutine strenuous physical activity”, “mental or emotional” in addition to physical exertion as cause shown in (2).

The proposed rule also defines “nonroutine stressful physical activity” as:

Except as excluded by the Act...,nonroutine stressful physical activity means line of duty activity that –

- (1) Is not performed as a matter of routine;
- (2) Entails non-negligible physical exertion; and
- (3) Occurs –
 - (i) With respect to a situation in which an individual is engaged, under circumstances that objectively and reasonably –
 - (A) Pose (or appear to pose) significant dangers, threats, or hazards (or reasonably-foreseeable risks thereof) not faced by similarly-situated members of the public in ordinary course; and
 - (B) Provoke, cause, or occasion an unusually-high level of alarm, fear, or anxiety;...” (Federal Register, Vol. 70 No. 142; page 43089).

Our concern is with what DOJ considers “routine.” It is clear from Congressman Sensenbrenner’s statement that the intent of Congress is to cover emergency activities that public safety officers face in the course of the day, and are activities of a highly stressful or strenuous nature that the general public is not likely to face. Because DOJ’s definition of “routine” is vague, we are concerned that the above language could be interpreted to mean only those incidents of a rare and extreme nature (terrorist attacks, WMD) would be considered nonroutine. DOJ must clarify the terms “routine” and “non-routine.”

It should be noted that NIOSH investigative reports on firefighter fatalities often address the extreme stress experienced by firefighters when responding to an incident. The increase in heart rate at that point exceeds the heart rate when they begin physical exertion at the scene.

"Data were obtained from 35 fire fighters responding to 189 alarms. Fifteen to 30 sec after an alarm heart rate showed a mean increase of 47 beats/min (range 12-117 beats/min). Approximately one minute after the alarm, while on the truck, heart rate still showed a mean increase of 30 beats/min (range 1 to 80 beats/min) above that recorded before alarm. S-T segment changes were observed in the ECG shortly after the alarm sounded. Upon approaching a fire, heart rates as high as 150 beats/min were observed before the men got off the fire truck. During actual fire fighting extremely high heart rates were observed for prolonged periods of time. One fire fighter had a mean heart rate of 188 beats/min for 15 minutes during the initial stages of a structure fire. The heart rate responses observed immediately after the alarm as well as on the truck approaching a fire indicate that the men experience a state of high anxiety. The extremely high heart rates observed for prolonged periods during fire fighting may also indicate a state of high anxiety coupled with the heavy work performed in a hot environment. Repeated exposure to states of high anxiety as well as inhaling pollutants related to the high incidence of ischemic-stress tests previously observed in fire fighters" (Barnard, RJ and Duncan, HW); Heart rate and ECG Responses of Fire Fighters; Journal of Occupational Medicine; 1975 Apr;17(4):247).

These firefighters are under a great deal of stress; however DOJ's definition makes it unclear as to whether or not this is considered a routine situation.

We thank you for taking the time to review our concerns. Should you wish to discuss them further, please do not hesitate to contact us. Once again, thank you for your continued service to our nation's first responders.

Sincerely,

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