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Representing America's Finest

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October 18, 2016

Ms. Hope D. Janke
Bureau of Justice Assistance
Office of Justice Programs
810 7th Street N.W.
Washington, D.C. 20531

RE: Docket No.: OJP (BJA) 1722

Dear Ms. Janke:

On behalf of the National Association of Police Organizations (NAPO), I am submitting comments on the Notice of Proposed Rulemaking for the Public Safety Officers' Benefits (PSOB) Program, Docket No.: OJP (BJA) 1722, as published in the Federal Register, Vol. 81, No. 162, on August 22, 2016.

NAPO has been, and continues to be, an active stakeholder with the PSOB Program, working with you to protect the ability of survivors, disabled officers and their families to get the benefits they so rightly deserve. The PSOB Program was designed to offer peace of mind to men and women seeking careers in public safety and to make a strong statement about the value that American Society places on the contributions of those who serve their communities in potentially dangerous circumstances. However, NAPO strongly believes that changes must be made because the current state of the PSOB Program does little to instill confidence in officers that the federal government will do its part to take care of their loved ones should something happen.

NAPO is heartened by many of the changes to the PSOB program included in this proposed rulemaking as they address several concerns we have had with the program since the last major rulemaking in 2006 that implemented, among other changes, the Hometown Heroes Survivors Benefits Act of 2003. It is evident in this proposed rulemaking that the leadership of the PSOB Office and the Office of Justice Programs (OJP) has been listening to our concerns and recognizes their validity, of which we are greatly appreciative. Below are our comments and recommendations to strengthen the proposed changes to the program.

I. Subpart A: General Provisions

§ 32.2 Computation of Time; Filing

- § 32.2(e): Under current PSOB regulations, the Director of the BJA may extend the time for filing beyond the prescribed deadline if "good cause" is shown, but nowhere in the PSOB Act or its implementing regulations is what constitutes "good cause" defined. NAPO appreciates the detailed definition proposed in this

rulemaking, which encompasses several situations, such as circumstances out of the applicant's control or unavoidable delays, which may lead to a late filing of an application for benefits. However, we believe the proposed definition of "good cause" is not clear regarding cases where a claimant does not file an application due to the fact that the PSOB Office lacked the regulations or process to begin determining certain cases.

For example, the PSOB Office did not start the process of determining any 9/11 exposure-related death or disability claims until April of this year, even though the injury date for these claims is September 11, 2001. It is reasonable to assume that many would-be claimants assumed or were told by their agencies that the PSOB Office was not moving on these claims and therefore they did not submit applications within the three year time frame from September 11, 2001.

Therefore, NAPO recommends adding the following two provisions under § 32.2(e) to expand on the definition of "good cause" to ensure that all circumstances outside of a claimant's control are covered:

(e)(4) Knowledge that regulations affecting the determination of the individual's claim or application were not promulgated or finalized in time to permit timely filing;

(e)(5) The nature of the death or disability to which the claim or application relates was of a cause or type that was not covered at the date of death or disability; or

(e)(46) Other unavoidable circumstances demonstrating that the individual could not be reasonable expected to know about the time limits for filing an application or claim.

§ 32.3 Definitions

- *Child of a public safety officer:* Unfortunately, due to the statutory changes made by the Dale Long Public Safety Officers' Benefits Improvements Act to the definition of "child of a public safety officer", certain children of public safety officers injured in the line of duty will not be eligible for benefits under this program. This was not the intent of the public safety community or Congress when supporting the passage of this Act.

As defined under the Dale Long Act, "child of a public safety officer" would exclude children of public safety officers, whose death or disability is due to 9/11-related health conditions, who are born after the injury date. Children of those officers who were born prior to the injury date would be eligible for benefits while their younger siblings born after the injury date would not. While unintended, this situation is unacceptable.

The current definition of "child of a public safety officer" includes individuals who meet the definition of "child" under 42 U.S.C. 3796b(3). While "catastrophic injury" is defined in regulations, the term "fatal injury" is not. NAPO recommends adding a definition of the term "fatal injury" to the regulations. Through this definition, we can ensure a greater number of children of public safety officers will be eligible for benefits.

Fatal injury means an injury where –

(1) Death is simultaneous (or practically simultaneous) to the line of duty injury;

- (2) **Death occurs after a qualifying engagement or participation in a training exercise pursuant to 42 U.S.C. 3796(k); or**
- (3) **Death is not simultaneous (or practically simultaneous) to the line of duty injury and results from a wound (such as exposure) or physical condition of the body that increases in severity over time.**

- *Gross Negligence:* While streamlined, the proposed change to the definition of “gross negligence” continues to place the onus on the claimant to prove that the officer’s death or disability was not due to gross negligence rather than assume the officer acted reasonably until proven otherwise.

NAPO recommends the following change to the proposed definition of “gross negligence”:

Gross negligence means a reckless departure from the ordinary care used by similarly situated public safety officers under circumstances where it is ~~highly likely that serious harm will follow~~ **foreseeable that death will be the certain result and where there is an affirmative showing that no call of legal or moral duty influenced the officer to undertake the actions at issue.**

- *Injury:* NAPO recommends that the definition of injury be expanded to include under paragraph (1)(i) a new subclause to clarify that cancer and those conditions found on the list of World Trade Center (WTC)-Related Health Conditions for purposes of the World Trade Center Health Program (WTCHP) and the Victims Compensation Fund (VCF) fall under the definition of “injury”.

PSOB Proposed Rule I (OJP Docket No. 1716) proposed to adopt the WTCHP’s list of WTC-Related Health Conditions as a means to streamline its own claim-specific evaluation of 9/11-related PSOB claims. It also proposed to add a new definition under § 32.3 for “List of WTC-related health conditions” as described either under the WTCHP statute at 42 U.S.C. 300mm-22(a)(3) or regulations at 42 C.F.R. part 88. OJP noted in the preamble to Proposed Rule I that it would “independently use the WTC Health Program’s ‘standards’ for certification...to establish an injury under the PSOB Act.” The proposed changes under this current rulemaking should reflect any changes to the regulations to address 9/11 claims and be consistent throughout the PSOB rules.

This new provision should specify that a covered injury includes “cancer, or a condition on the list of WTC-related health conditions.” This would help to ensure that there is no confusion between covered 9/11-related conditions and the conditions described under paragraph (1)(ii) of the proposed rulemaking that fall outside the definition of “injury” as a “chronic, cumulate, or progressive condition of the body.”

NAPO recommends the following addition to the proposed definition of “injury”:

(1)(i)(**E**) **Cancer, or a condition on the list of WTC-related health conditions**
[defined under PSOB Proposed Rule I (OJP Docket No. 1716)].

- *Injury Date:* There are public safety officers who responded to the 9/11 attacks registered with the WTCHP who may unfortunately develop late onset health conditions, such as cancer, which

have long latency periods, that are included on the List of WTC-related health conditions and could lead to the officer's death or permanent and total disability. The current injury date policy, which considers September 11, 2001 the injury date for 9/11-related health conditions, would preclude many public safety officers from being eligible to apply for PSOB benefits given it is now fifteen years after the injury date. Instead, the injury date for such officer should be the date of "disability determination"; when an officer is determined to be permanently and totally disabled from his or her 9/11-related illness or health condition.

NAPO recommends the following addition to the proposed definition of "injury date"

Injury date –

(3) With respect to public safety officers who suffer from injuries included on the List of WTC-related health conditions [defined under PSOB Proposed Rule I (OJP Docket No. 1716)], injury date means the date of the officer's determination of disability from a public agency authorized to make such determinations, or a certification of the officer's incapacity to perform gainful work.

- *Involvement:* We appreciate the proposed rule change to include law enforcement trainees under the definition of "involvement". To ensure that all law enforcement trainees tied to a public safety agency are covered under the definition, we recommend a minor language change under the newly proposed subclause (2):

Involvement –

(2) Legal authority to participate in an official training program ~~of~~ **authorized by** the officer's public agency that is mandatory for the individual's employment or certification as a public officer, corrections officer, probation officer, or their equivalent.

- *Line of duty activity or action:* NAPO welcomes the proposed changes to the definition of "line of duty activity or action" to cover emergency actions necessary to save or protect human life and acts performed as part of an official training program by a trainee.

To be consistent with our suggested change to the definition of "involvement", we recommend the following edit to the new proposed language in subclause (1)(ii)(B):

(1)(ii)(B) It is performed (as applicable) in the course of public safety activity (including emergency response activity the agency is authorized to perform), or taking part (as a trainer or trainee) in an official training program of his public agency (including participation in an official training program ~~of~~ **authorized by** a public safety officer's public agency that is mandatory for the individual's employment or certification as a firefighter, police officer, corrections officer, probation officer, or equivalent)...

In regards to emergency actions, there is language included under subclause (1)(iii) that we believe would inadvertently exclude certain circumstances in which the officer is responding to a situation that became an emergency simply due to his or her lawful actions as an officer.

NAPO recommends the following edit to subclause (1)(iii) of the definition of "line of duty activity or action":

(1)(iii) Only if it constitutes a public safety activity, is performed in the course or responding to an emergency situation ~~that the officer did not create through his own actions~~, requires prompt decisions and action to save another human life, and is not contrary to the law of the jurisdiction in which performed;

- *Line of duty injury*: NAPO supports the addition of language to the definition of “line of duty injury” that includes injuries resulting from an attack due to an officer’s status as a public safety officer or in retaliation for line of duty actions taken by the officer. Unfortunately, we are experiencing an increase in officers being targeted for violent crimes simply due to the fact that they are law enforcement officers. It is important for the PSOB Program and OJP to recognize that the deaths and disabilities that result from such violent attacks are in the line of duty and that their families get the benefits they so rightly deserve.
- *Medical probability*: NAPO agrees with the proposed change from “medical certainty” to “medical probability” as the former was a significantly high standard to meet in proving an officer’s death or disability was in the line of duty. This change would move the PSOB Program a step closer to being the presumptive benefit it was created to be. It also would make it easier for the PSOB determining official to determine claims, thus reducing the amount of time it takes a claim to be processed, which has been a significant issue for the program.
- *Official capacity*: NAPO supports the inclusion of the exception under subclause (3) that would deem the extraordinary acts of a public safety officer to save a human life as serving in an “official capacity”. As mentioned under Part IV. Section-by-Section Analysis of the proposed rulemaking, this addition rightfully recognizes that “local public safety officers often serve the public outside of the officer’s immediate jurisdiction”.
- *Voluntary intoxication at the time of death or catastrophic injury*: NAPO appreciates that the proposed changes to this definition will no longer consider substances on Schedules IV and V in determining whether an officer is intoxicated at the time of death or catastrophic injury. We also agree with the changes made to subclause (2) that allows for exceptions when the introduction of the drugs or other substances was not an intentional act by the officer. However, we feel that the definition of voluntary intoxication is still too rigid and does not take into account all circumstances in which law enforcement officers sometimes find themselves while on duty.

A prime example of this is the case of undercover narcotics agent Kurt Harper, who was killed in the line of duty while driving home alone after leaving a bar where he had been on an undercover assignment drinking with a target of a criminal investigation. NAPO strongly agrees with Bureau of Justice Assistance Director Denise O’Donnell in her approval of the claim and her reasons for approving the claim, as laid out in the U.S. Department of Justice Office of Inspector General Report, “A Review of Certain Public Safety Officers’ Benefits Act Claim Determinations by the Director of the Bureau of Justice Assistance, Office of Justice Programs”, published in May 2016. While Officer Harper was found to be intoxicated at the time of his death, it was in the course of an undercover operation. His decision to drink was to protect his cover, the investigation, and the safety of his roommate, another officer who was not part of the undercover operation.

NAPO therefore recommends the following changes to the definition of “intoxication at the time of death or catastrophic injury” in order to ensure that officers who are forced to become intoxicated in the course of their duties to protect themselves, the public or an ongoing investigation are unquestionably eligible for PSOB benefits under these regulations.

Voluntary intoxication at the time of death or catastrophic injury...

(1) With respect to alcohol,

(i) In any claim arising from a public safety officer’s death in which the death was simultaneous (or practically simultaneous) with the injury, it means intoxication as defined in the Act, at 42 U.S.C. 3796b(5), unless convincing evidence demonstrates that ~~the officer did not introduce the alcohol into his body intentionally~~

(A) The officer did not introduce the alcohol into his body intentionally;

(B) It was in the furtherance of an investigation, enforcement action, or undercover operation; or

(C) The public safety officer was not acting in an intoxicated manner immediately prior to his fatal or catastrophic injury.

(2) With respect to drugs or other substances, it means intoxication as defined in the Act, at 42 U.S.C. 3796b(5), as evidenced by

(i) The officer acting in an intoxicated manner as of the injury date, unless convincing evidence demonstrates that the introduction of drugs or other substances was not an intentional act of the officer’s; or
(ii) The presence (as of the injury date) in the body of the public safety officer of drugs or substances included on Schedules I-III of the drug control and enforcement laws (see 21 U.S.C. 812(a)), unless convincing evidence demonstrates that –

(A) The introduction of such drug or other substance was not an intentional act of the officer’s, or **was in the furtherance of an investigation, enforcement action, or undercover operation;**

(B) The drug or other substance would not produce intoxication in the amount present in the public safety officer’s body; **or**

(C) The public safety officer was not acting in an intoxicated manner immediately prior to his fatal or catastrophic injury.

§ 32.5 Evidence

- § 32.5(k): Since it was removed in the changes to the PSOB regulations made in 2006, NAPO has called for the return of the reasonable doubt standard to the PSOB Program. The PSOB Program was created to be a presumptive benefit to honor those who have given their lives or have been catastrophically injured in the line of duty and to help support their loved ones. NAPO is grateful that the leadership of the PSOB Program and OJP are finally acting on our concerns and are bringing back the reasonable doubt standard to the Program in the proposed rulemaking. That being said, we suggest a minor change to strengthen the proposed language.

Therefore, NAPO suggests the following change to § 32.5(k):

(k) In instances where the determining official finds that there is a balance of positive and negative evidence for an issue material to the particular benefit sought, **or any reasonable doubt arising from the circumstances of the officer's death or permanent and total disability**, the PSOB determining official will resolve the point in favor of the payment of benefits. Such a finding of equivalence must be based on reason, logic, **and** common sense, and the determining official's experience, and, under no circumstances, may a lack of evidence in support of a particular fact be understood to establish or create such equivalence.

- § 32.5(m): The PSOB Office should do everything in its power to obtain the necessary evidence in order to determine a claim before it is considered abandoned. NAPO does not believe that weekly emails to a claimant are enough effort to consider a claim abandoned if the claimant does not file the requested information within a year. Even considering the additional 180 days the claimant has to respond with the necessary evidence, it may not be enough time if a third party has the needed evidence and is unresponsive. While PSOB Office leadership claims that in such circumstances, the Office will work with the claimant to try to get enough evidence to determine the case, it is important that such protections against a claim being abandoned are put into regulations.

NAPO suggests the following changes to § 32.5(m) to address our concerns with this proposed abandonment policy:

(m) **The PSOB Office, with all due diligence, will expeditiously attempt to obtain the information and documentation necessary to determine a benefit claim, including the use of the investigative tools available to the Bureau of Justice Assistance such as subpoenas. After such efforts, in the absence of reasonable excuse or justification, when evidence necessary to a determination on a claim that has been requested in writing in connection with a complete claim for benefits is not filed with the PSOB Office within one year of the date of such request, or a claimant has otherwise failed to pursue in a timely fashion a determination on his or her claim, the claim will be considered as abandoned, as though never filed. This does not include claims for benefits that are incomplete due to inaction by a third party where the inability to provide the requested information is completely out of the claimants' control.** Not less than 33 days prior to the PSOB determining official finding the claim to be abandoned, the PSOB Office shall serve the claimant with notice of intent to deem the claim abandoned. In the event of abandonment, the time periods prescribed for filing an initial application for benefits or other filing deadline are neither tolled nor applicable. A claimant may reopen an abandoned claim within 180 days from the date of abandonment provided claimant files with the PSOB Office a complete claim, including any information previously requested but not provided. After a claim for benefits has been abandoned and a complete claim has not been filed with the PSOB Office in the time prescribed for reopening such claim, no further action on the claim will be taken by the agency **unless the claimant can show good cause for not filing a completed claim.**

§ 32.10 PSOB Counsel

NAPO appreciates the added proposed definition of PSOB Counsel as it would limit PSOB counsel's role to legal advice only and would not delay determinations by re-reviewing the conclusions of the

PSOB determining official. Over the years, too many cases have been delayed for unacceptable periods of time due to counsel second guessing and re-reviewing claim determinations. That was an improper use of counsel and it went against the original intent of the PSOB Program to be a presumptive benefit. We welcome this proposed policy change.

II. Subpart B – Death Benefit Claims

§ 32.12 Time for filing claim

Under the proposed rulemaking, claimants must file applications with the PSOB Office no more than three years after the public safety officer's death. Thousands of public safety officers heroically responded to the terrorist attacks on the World Trade Center, the Pentagon and Shanksville on September 11, 2001, and helped in the rescue and recovery efforts in the days, weeks and months after. As of August 1, 2016, the PSOB Program had 140 9/11 exposure-related death and disability claims yet to be determined. This is just a small fraction of the number of cases that would be eligible for PSOB death and disability claims.

As the PSOB Office did not start the process of determining any 9/11 exposure-related death or disability claims until April 2016, it is reasonable to assume that many would-be claimants assumed or were told by their agencies that the PSOB Office was not moving on these claims and therefore they did not submit applications within the three year time period.

We recommend that the PSOB Office allow such applicants who have not submitted an application for PSOB benefits to file a claim within three years of the effective date of these rules. This would be consistent with the VCF regulations (28 CFR 104.62(a)(1)), which allowed for a time limit on filing claims for those “who knew (or reasonably should have known)... that the individual suffered from physical harm at a 9/11 crash site as a result of the terrorist-related aircraft crashes of September 11, 2001, or as a result of debris removal”.

NAPO recommends the following addition to § 32.12:

- (a) Unless, for good cause shown, as defined in § 32.2(e) of this part, the Director extends the time for filing, no application shall be considered if it is filed with the PSOB Office more than three years after the ~~public safety officer's death~~ **later of –**
 - (1) The public safety officer's death; or**
 - (2) The date upon which any final regulations, or changes in Bureau policy, that would affect the processing of the applicant's claim take effect.**

III. Subpart C – Disability Benefit Claims

§ 32.22 Time for filing claim

Under the proposed rulemaking, claimants must file applications with the PSOB Office within three years of the injury date. The PSOB Office has indicated that it considers September 11, 2001 the injury date for all public safety officers who have died or been injured due to their response to the 9/11 terrorist attacks. September 11, 2016 was the fifteenth anniversary of those attacks.

As mentioned in our comments on the proposed changes to the definition of “injury date”, there are public safety officers who responded to the 9/11 attacks registered with the WTCHP who may unfortunately develop late onset health conditions that could lead to the officer's permanent and total disability.

Corresponding to our recommended change under the definition of “injury date”, we recommend that the PSOB Office allow for individuals to file for disability benefits within three years from the date of “disability determination”:

- (a) Unless, for good cause shown, as defined in § 32.2(e) of this part, the Director extends the time for filing, no application shall be considered if it is filed with the PSOB Office more than three years after the ~~injury date~~ **later of –**
- (1) The injury date;**
 - (2) A determination of disability from a public agency authorized to make such determinations, or a certification of the officer’s incapacity to perform gainful work; or**
 - (3) The date upon which any final regulations, or changes in Bureau policy, that would affect the processing of the applicant’s claim take effect.**

We appreciate your consideration of our comments and concerns and we look forward to continue working with the PSOB Office and OJP to ensure that the PSOB Program continues to be a vital benefit to the public safety community. If NAPO can provide any additional information on our comments, please feel free to contact me at (703) 549-0775.

Sincerely,



William J. Johnson, Esq., CAE
Executive Director