U. S. Department of Justice
Office of Justice Assistance, Research, and Statistics

Legal Interpretations Of The Public Safety Officers' Benefits Act

Legal Interpretations Of The Public Safety Officers' Benefits Act

---

Office of General Counsel

November 1981

Office of Justice Assistance, Research, and Statistics
U. S. Department of Justice
Washington, D. C. 20531

Table of Contents

Case Citations

Introduction

The Public Safety Officers' Benefit Act, Pub. L. 94-430, 42 U.S.C. 3796, *et seq.*, was signed into law on September 29, 1976. Since that time, the Law Enforcement Assistance Administration (LEAA) has examined over 1,500 claims for benefits from the survivors of law enforcement officers and firefighters who died in the line of duty. This volume is intended to inform the reader of LEAA's decisions on the principal legal issues that have arisen from those claims over the first five years of the Act's existence. The book is organized by topic and contains the legal opinions, agency determinations, and court decisions affecting each significant element of coverage and eligibility.

Those documents identified in this volume as "OGC Memoranda" are legal opinions written by the Office of General Counsel of the Office of Justice Assistance, Research, and Statistics (OJARS) and its predecessor, the LEAA Office of General Counsel. Documents identified as "Hearing Officers' Decisions" are decisions made by an LEAA hearing officer on a claimant's appeal from the initial denial of his or her claim. Documents identified as "Administrator's Decisions" are the final agency decisions rendered by the Administrator of LEAA.

These documents have been edited for format, syntax, and clarity, but otherwise appear in all respects as they did when first written. Questions or comments concerning any aspect of this volume should be addressed to the OJARS Office of General Counsel, 633 Indiana Avenue, N.W., Washington, D.C. 20531/ATTENTION: David I. Tevelin, Acting Deputy General Counsel.

John J. Wilson
Acting General Counsel
OJARS Office of General Counsel

Public Safety Officers' Benefits Act

To amend the Omnibus Crime Control and Safe Streets Act of 1968, as amended, to provide benefits to survivors of certain public safety officers who die in the performance of duty.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public Safety Officers' Benefits Act of 1976".

SEC. 2. Title I of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, is amended by adding at the end thereof the following new part:

"Part J.—Public Safety Officers' Death Benefits

"PAYMENTS"

"SEC. 701. (a) In any case in which the Administration determines, under regulations issued pursuant to this part, that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Administration shall pay a benefit of $50,000 as follows:

"(1) if there is no surviving child of such officer, to the surviving spouse of such officer;

"(2) if there is a surviving child or children and a surviving spouse, one-half to the surviving child or children of such officer in equal shares and one-half to the surviving spouse;

"(3) if there is no surviving spouse, to the child or children of such officer in equal shares; or

"(4) if none of the above, to the dependent parent or parents of such officer in equal shares.

"(b) Whenever the Administration determines, upon a showing of need and prior to taking final action , that the death of a public safety officer is one with respect to which a benefit will probably be paid, the Administration may make an interim benefit payment not exceeding $3,000 to the person entitled to receive a benefit under subsection (a) of this section.

"(c) The amount of an interim payment under subsection (b) of this section shall be deducted from the amount of any final benefit paid to such person.

"(d) Where there is no final benefit paid, the recipient of any interim payment under subsection (b) of this section shall be liable for repayment of such amount. The Administration may waive all or part of such repayment, considering for this purpose the hardship which would result from such repayment.

"(e) The benefit payable under this part shall be in addition to any other benefit that may be due from any other source, but shall be reduced by—

"(1) payments authorized by section 8191 of title 5, United States Code;

"(2) payments authorized by section 12(k) of the Act of September 1, 1916, as amended (D.C. Code, sec. 4—531(1)).

"(f) No benefit paid under this part shall be subject to execution or attachment.

"LIMITATIONS"

"SEC. 702. No benefit shall be paid under this part—

"(1) if the death was caused by the intentional misconduct of the public safety officer or by such officer's intention to bring about his death;

"(2) if voluntary intoxication of the public safety officer was the proximate cause of such officer's death; or

"(3) to any person who would otherwise be entitled to a benefit under this part if such person's actions were a substantial contributing factor to the death of the public safety officer.

"DEFINITIONS"

"SEC. 703. As used in this part—

"(1) 'child' means any natural, illegitimate, adopted, or posthumous child or stepchild of a deceased public safety officer who, at the time of the public safety officer's death, is—

"(A) eighteen years of age or under;

"(B) over eighteen years of age and a student as defined in section 8101 of title 5, United States Code; or

"(C) over eighteen years of age and incapable of self-support because of physical or mental disability;

"(2) 'dependent' means a person who was substantially reliant for support upon the income of the deceased public safety officer;

"(3) 'fireman' includes a person serving as an officially recognized or designated member of a legally organized volunteer fire department;

"(4) 'intoxication' means a disturbance of mental or physical faculties resulting from the introduction of alcohol, drugs, or other substances into the body;

"(5) 'law enforcement officer' means a person involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws. This includes, but is not limited to, police, corrections, probation, parole, and judicial officers;

"(6) 'public agency' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States, or any unit of local government, combination of such States, or units, or any department, agency, or instrumentality of any of the foregoing; and

"(7) 'public safety officer' means a person serving a public agency in an official capacity, with or without compensation, as a law enforcement officer or as a fireman.

"ADMINISTRATIVE PROVISIONS"

"SEC. 704. (a) The Administration is authorized to establish such rules, regulations, and procedures as may be necessary to carry out the purposes of this part. Such rules, regulations, and procedures will be determinative of conflict of laws issues arising under this part. Rules, regulations, and procedures issued under this part may

include regulations governing the recognition of agents or other persons representing claimants under this part before the Administration. The Administration may prescribe the maximum fees which may be charged for services performed in connection with any claim under this part before the Administration, and any agreement in violation of such rules and regulations shall be void.

"(b) In making determinations under section 701, the Administration may utilize such administrative and investigative assistance as may be available from State and local agencies. Responsibility for making final determinations shall rest with the Administration.".

MISCELLANEOUS PROVISIONS

SEC. 3. Section 520 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, is amended by adding at the end thereof the following new subsection:

"(c) There are authorized to be appropriated in each fiscal year such sums as may be necessary to carry out the purposes of part J."

SEC. 4. The authority to make payments under part J of the Omnibus Crime Control and Safe Streets Act of 1968 (as added by section 2 of this Act) shall be effective only to the extent provided for in advance by appropriation Acts.

SEC. 5. If the provisions of any part of this Act are found invalid, the provisions of the other parts and their application to other persons or circumstances shall not be affected thereby.

SEC. 6. The amendments made by this Act shall become effective and apply to deaths occurring from injuries sustained on or after the date of enactment of this Act.

Approved September 29, 1976.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94-1032 (Comm. on the Judiciary) and No. 94-1501 (Comm. of Conference).
SENATE REPORTS: No. 94-816 (Comm. on the Judiciary) and No. 94-825 accompanying S. 230 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 122 (1976):
Apr. 30, considered and passed House.
July 19, considered and passed Senate, amended.
Sept. 15, House agreed to conference report.
Sept. 16, Senate agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 12, No. 40:
Sept. 29, Presidential statement.

The LEAA Public Safety Officers' Benefits Regulations

PART 32—PUBLIC SAFETY OFFICERS' DEATH BENEFITS

Subpart A—Introduction

Subpart B—Officers Covered

Subpart C—Beneficiaries

Subpart D—Interim and Reduced Payments

Subpart E—Filing and Processing of Claims

Subpart F—Determination, Hearing, and Review

AUTHORITY: Secs. 501 and 704(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701, et seq., as amended (Pub. L. 90-351, as amended by Pub. L. 93-83, Pub. L. 93-415, Pub. L. 94-430, and Pub. L. 94-503).

SOURCE: 42 FR 23255, May 6, 1977, unless otherwise noted.

Subpart A—Introduction

§ 32.1 Purpose.

The purpose of this regulation is to implement the Public Safety Officers' Benefits Act of 1976 which authorizes the Law Enforcement Assistance Administration to pay a benefit of $50,000 to specified survivors of State and local public safety officers found to have died as the direct and proximate result of a personal injury sustained in the line of duty. The Act is Part J of Title I of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701, et seq., as amended by Pub. L. 93-83, Pub. L. 93-415, Pub. L. 94-430 and Pub. L. 94-503).

§ 32.2 Definitions.

(a) "The Act" means the Public Safety Officers' Benefits Act of 1976, 42 U.S.C. 3796, et seq., Pub. L. 94-430, 90 Stat. 1346 (September 29, 1976).

(b) "Administration" means the Law Enforcement Assistance Administration.

(c) "Line of duty" means any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves. For other officers, "line of duty" means any action the officer is so obligated or authorized to perform in the course of controlling or reducing crime, enforcing the criminal law, or suppressing fires.

(d) "Direct and proximate" or "proximate" means that the antecedent event is a substantial factor in the result.

(e) "Personal injury" means any traumatic injury, as well as diseases which are caused by or result from such an injury, but not occupational diseases.

(f) "Traumatic injury" means a wound or other condition of the body caused by external force, including injuries inflicted by bullets, explosives, sharp instruments, blunt objects or other physical blows, chemicals, electricity, climatic conditions, infectious diseases, radiation, and bacteria, but excluding stress and strain.

(g) "Occupational disease" means a disease which routinely constitutes a special hazard in, or is commonly regarded as a concomitant of the officer's occupation.

(h) "Public safety officer" means any person serving a public agency in an official capacity, with or without compensation, as a law enforcement officer or firefighter.

(i) "Law enforcement officer" means any person involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws, including but not limited to police, corrections, probation, parole, and judicial officers, and officials engaged in programs relating to narcotics addiction, such as those responsible for screening arrestees or prisoners for possible diversion into drug treatment programs, who are exposed, on a regular basis, to criminal offenders.

(j) "Firefighter" includes all fire service personnel authorized to engage in the suppression of fires, including any individual serving as an officially-recognized or designated member of a legally-organized volunteer fire department.

(k) "Child" means any natural, illegitimate, adopted, or posthumous child or stepchild of a deceased public safety officer who, at the time of the public safety officer's death, is:

(1) Eighteen years of age or under;

(2) Over eighteen years of age and a student; or

(3) Over eighteen years of age and incapable of self-support because of physical or mental disability.

(l) "Stepchild" means a child of the officer's spouse who was living with, dependent for support on, or otherwise in a parent-child relationship, as set forth in § 32.13(b) of the regulations, with the officer at the time of his death. The relationship of step-child is not terminated by the divorce, remarriage, or death of the stepchild's natural or adoptive parent.

(m) "Student" means in individual under 23 years of age who has not

completed four years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at an institution which is:

(1) A school or college or university operated or directly supported by the United States, or by a State or local government or political subdivision thereof;
(2) A school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body;
(3) A school or college or university not so accredited but whose credits are accepted, on transfer, by at least three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: or
(4) An additional type of educational or training insitution as defined by the Secretary of Labor.

Such an individual is deemed not to have ceased to be a student during an interim between school years if the interim is not more than four months and if he shows to the satisfaction of the Administration that he has a bona fide intention of continuing to pursue a full-time course of study or training during the semester or other enrollment period immediately after the interim or during periods of reasonable duration during which, in the judgment of the Administration, he is prevented by factors beyond his control from pursuing his education. A student whose 23rd birthday occurs during a semester or other enrollment period is deemed a student until the end of the semester or other enrollment period.

(n) "Spouse" means the husband or wife of the deceased officer at the time of the officer's death, and includes a spouse living apart from the officer at the time of the officer's death for any reason.

(o) "Dependent" means a person who was substantially reliant for support upon the income of the deceased safety officer.

(p) "Intoxication" means a disturbance of mental or physical faculties resulting from the introduction of alcohol, drugs, or other substances into the body.

(q) "Public agency" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States, or any unit of local government, combination of such States, or units, or any department, agency, or instrumentality of any of the foregoing.

(r) "Support" means food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for maintenance of the person supported.

Subpart B—Officers Covered

§ 32.3 Coverage.

In any case in which the Administration determines, pursuant to these regulations, that a public safety officer, as defined in § 32.2(h), has died as the direct and proximate result of a personal injury sustained in the line of duty, the Administration shall pay a benefit of $50,000 in the order specified in § 32.10, subject to the conditions set forth in § 32.6.

§ 32.4 Reasonable doubt of coverage.

The Administration shall resolve any reasonable doubt arising from the circumstances of the officer's death in favor of payment of the death benefit.

§ 32.5 Findings of State and local agencies.

The Administration will give substantial weight to the evidence and findings of fact presented by State and local administrative and investigative agencies. The Administration will request additional assistance or conduct its own investigation when it believes that the existing evidence does not provide the Administration a rational basis for a decision on a material element of eligibility.

§ 32.6 Conditions on payment.

(a) No benefit shall be paid: (1) if the death was caused by:
(i) The intentional misconduct of the public safety officer; or
(ii) The officer's intention to bring about his death;

(2) If voluntary intoxication of the public safety officer was the proximate cause of death; or

(3) To any person whose actions were a substantial contributing factor to the death of the officer.

(b) The Act applies only to deaths occurring from injuries sustained on or after September 29, 1976.

§ 32.7 Intentional misconduct of the officer.

The Administration will consider at least the following factors in determining whether death was caused by the intentional misconduct of the officer:

(a) Whether the conduct was in violation of rules and regulations of the employer, or ordinances and laws; and

(1) Whether the officer knew the conduct was prohibited and understood its import;

(2) Whether there was a reasonable excuse for the violation; or

(3) Whether the rule violated is habitually observed and enforced;

(b) Whether the officer had previously engaged in similar misconduct;

(c) Whether the officer's intentional misconduct was a substantial factor in the officer's death; and

(d) The existence of an intervening force which would have independently caused the officer's death and which would not otherwise prohibit payment of a death benefit pursuant to these regulations.

§ 32.8 Intention to bring about death.

The Administration will consider at least the following factors in determining whether the officer intended to bring about his own death:

(a) Whether the death was caused by insanity, through an uncontrollable impulse or without conscious volition to produce death;

(b) Whether the officer had a prior history of attempted suicide;

(c) Whether the officer's intent to bring about his death was a substantial factor in the officer's death; and

(d) The existence of an intervening force or action which would have independently caused the officer's death and which would not otherwise prohibit payment of a death benefit pursuant to these regulations.

§ 32.9 Voluntary intoxication.

The Administration will consider at least the following factors in determining whether voluntary intoxication was the proximate cause of the officer's death:

(a) The evidence of intoxication at the time the injury from which death resulted was sustained;

(b) Whether, and to what extent, the officer had a prior history of voluntary intoxication while in the line of duty;

(c) Whether and to what degree the officer had previously used the intoxicant in question;

(d) Whether the intoxicant was prescribed medically and was taken within the prescribed dosage;

(e) Whether the voluntary intoxication was a substantial factor in the officer's death; and

(f) The existence of an intervening force or action which would have independently caused the officer's death and which would not otherwise prohibit payment of a death benefit pursuant to these regulations.

Subpart C—Beneficiaries

§ 32.10 Order of priority.

(a) When the Administration has determined that a benefit may be paid according to the provisions of Subpart B and § 32.11 of Subpart C, a benefit of $50,000 shall be paid in the following order of precedence:

(1) If there is no surviving child of the deceased officer, to the spouse of such officer:

(2) If there is no spouse, to the child or children, in equal shares;

(3) If there are both a spouse and one or more children, one-half to the spouse and one-half to the child or children, in equal shares; and

(4) If there is no survivor in the above classes, to the dependent parent or parents, in equal shares.

(b) If no one qualifies as provided in paragraph (a), no benefit shall be paid.

§ 32.11 Contributing factor to death.

(a) No benefit shall be paid to any person who would otherwise be entitled to a benefit under this part if such person's intentional actions were a substantial contributing factor to the death of the public safety officer.

(b) When a potential beneficiary is denied benefits under subsection (a), the benefits shall be paid to the remaining eligible survivors, if any, of the officer as if the potential beneficiary denied benefits did not survive the officer.

§ 32.12 Determination of relationship of spouse.

(a) Marriage should be established by one (or more) of the following types of evidence in the following order of preference:

(1) Copy of the public record of marriage, certified or attested, or by an abstract of the public record, containing sufficient data to identify the parties, the date and place of the marriage, and the number of prior marriages by either party if shown on the official record, issued by the officer having custody of the record or other public official authorized to certify the record, or a certified copy of the religious record of marriage;

(2) Official report from a public agency as to a marriage which occurred while the officer was employed with such agency;

(3) The affidavit of the clergyman or magistrate who officiated;

(4) The original certificate of marriage accompanied by proof of its genuineness and the authority of the person to perform the marriage;

(5) The affidavits or sworn statement of two or more eyewitnesses to the ceremony;

(6) In jurisdictions where "common law" marriages are recognized, the affidavits or certified statements of the spouse setting forth all of the facts and circumstances concerning the alleged marriage, such as the agreement between the parties at the beginning of their cohabitation, the period of cohabitation, places and dates of residences, and whether children were born as a result of the relationship. This evidence should be supplemented by affidavits or certified statements from two or more persons who know as the result of personal observation the reputed relationship which existed between the parties to the alleged marriage including the period of cohabitation, places of residences, whether the parties held themselves out as husband and wife, and whether they were generally accepted as such in the communities in which they lived; or

(7) Any other evidence which would reasonably support a belief by the Administration that a valid marriage actually existed.

(b) LEAA will not recognize a claimant as a "common law" spouse under § 32.12(a)(6) unless the State of domicile recognizes him or her as the spouse of the officer.

(c) If applicable, certified copies of divorce decrees of previous marriages or death certificates of the former spouses of either party must be submitted.

§ 32.13 Determination of relationship of child.

(a) *In general.* A claimant is the child of a public safety officer if his birth certificate shows the officer as his parent.

(b) *Alternative.* If the birth certificate does not show the public safety officer as the claimant's parent, the sufficiency of the evidence will be determined in accordance with the facts of a particular case. Proof of the relationship may consist of—

(1) An acknowledgement in writing signed by the public safety officer; or

(2) Evidence that the officer has been identified as the child's parent by a judicial decree ordering him to contribute to the child's support or for other purposes; or

(3) Any other evidence which reasonably supports a finding of a parent-child relationship, such as—

(i) A certified copy of the public record of birth or a religious record showing that the officer was the informant and was named as the parent of the child; or

(ii) Affidavits or sworn statements of persons who know that the officer accepted the child as his; or

(iii) Information obtained from a public agency or public records, such as school or welfare agencies, which shows that with his knowledge the officer was named as the parent of the child.

(c) *Adopted child.* Except as may be provided in subsection (b) of this section, evidence of relationship must be shown by a certified copy of the decree of adoption and such other evidence as may be necessary. In jurisdictions where petition must be made to the court for release of adoption documents or information, or where the release of such documents or information is prohibited, a revised birth certificate will be sufficient to establish the fact of adoption.

(d) *Stepchild.* The relationship of a stepchild to the deceased officer shall be demonstrated by—

(1) Evidence of birth to the spouse of the officer as required by paragraphs (a) and (b) of this section; or

(2) If adopted by the spouse, evidence of adoption as required by paragraph (c) of this section; or

(3) Other evidence, such as that specified in § 32.13(b), which reasonably supports the existence of a parent-child relationship between the child and the spouse;

(4) Evidence that the stepchild was either—

(i) Living with;

(ii) Dependent for support, as set forth in § 32.15, on; or

(iii) In a parent-child relationship, as set forth in § 32.13(b), with the officer at the time of his death; and

(5) Evidence of the marriage of the officer and the spouse, as required by § 32.12.

§ 32.14 Determination of relationship of parent.

(a) *In general.* A claimant is the parent of a public safety officer if the officer's birth certificate shows the claimant as his parent.

(b) *Alternative.* If the birth certificate does not show the claimant as the officer's parent, proof of the relationship may be shown by—

(1) An acknowledgement in writing signed by the claimant before the officer's death; or

(2) Evidence that the claimant has been identified as the officer's parent by judicial decree ordering him to contribute to the officer's support or for other purposes; or

(3) Any other evidence which reasonably supports a finding of a parent-child relationship, such as:

(i) A certified copy of the public record of birth or a religious record showing that the claimant was the informant and was named as the parent of the officer; or

(ii) Affidavits or sworn statements of persons who know the claimant had accepted the officer as his child, or

(iii) Information obtained from a public agency or public records, such as school or welfare agencies, which shows that with his knowledge the claimant had been named as the parent of the child.

(c) *Adoptive Parent.* Except as provided in paragraph (b) of this section, evidence of relationship must be shown by a certified copy of the decree of adoption and such other evidence as may be necessary. In jurisdictions where petition must be made to the court for release of adoption documents or information, or where release of such documents or information is prohibited, a revised birth certificate showing the claimant as the officer's parent will suffice.

(d) *Step-parent.* The relationship of a step-parent to the deceased officer shall be demonstrated by—

(1) (i) Evidence of the officer's birth to the spouse of the step-parent as required by § 32.13 (a) and (b); or

(ii) If adopted by the spouse of the step-parent, proof of adoption as required by § 32.13(c); or

(iii) Other evidence, such as that specified in paragraph (b) of this section, which reasonably supports a parent-child relationship between the spouse and the officer; and

(2) Evidence of the marriage of the spouse and the step-parent, as required by § 32.12.

§ 32.15 Determination of dependency.

(a) To be eligible for a death benefit under the Act, a parent or a stepchild not living with the deceased officer at the time of the officer's death shall demonstrate that he or she was substantially reliant for support upon the income of the officer.

(b) The claimant parent or stepchild shall demonstrate that he or she was dependent upon the decedent at either the time of the officer's death or of the personal injury that was a substantial factor in the officer's death.

(c) The claimant parent or stepchild shall demonstrate dependency by submitting a signed statement of dependency within a year of the officer's death. This statement shall include the following information—

(1) A list of all sources of income or support for the twelve months preceding the officer's injury or death;

(2) The amount of income or value of support derived from each source listed; and

(3) The nature of support provided by each source.

(d) Generally, the Administration will consider a parent or stepchild "dependent" if he or she was reliant on the income of the deceased officer for over one-third of his or her support.

Subpart D—Interim and Reduced Payments

§ 32.16 Interim payment in general.

Whenever the Administration determines, upon a showing of need and prior to taking final action, that a death of a public safety officer is one with respect to which a benefit will probably be paid, the Administration may make an interim benefit payment not exceeding $3,000, to a person entitled to receive a benefit under Subpart C of this part.

§ 32.17 Repayment and waiver of repayment.

Where there is no final benefit paid, the recipient of any interim benefit paid under § 32.16 shall be liable for repayment of such amount. The Administration may waive all or part of such repayment and shall consider for this purpose the hardship which would result from repayment.

§ 32.18 Reduction of payment.

(a) The Benefit payable under this part shall be in addition to any other benefits that may be due from any other source, but shall be reduced by—

(1) Payments authorized by section 8191 of Title 5, United States Code, providing compensation for law enforcement officers not employed by the United States killed in connection with the commission of a crime against the United States;

(2) Payments authorized by Section 12(k) of the Act of September 1, 1916, as amended (§ 4-531(1) of the District of Columbia Code); and

(3) The amount of the interim benefit payment made to the claimant pursuant to § 32.16.

(b) No benefit paid under this part shall be subject to execution or attachment.

Subpart E—Filing and Processing of Claims

§ 32.19 Persons executing claims.

(a) The Administration shall determine who is the proper party to execute a claim in accordance with the following rules—

(1) The claim shall be executed by the claimant or his legally designated representative if the claimant is mentally competent and physically able to execute the claim.

(2) If the claimant is mentally incompetent or physically unable to execute the claim; and

(i) Has a legally appointed guardian, committee, or other representative, the claim may be executed by such guardian, committee, or other representative, or

(ii) Is in the care of an institution, the claim may be executed by the manager or principal officer of such institution.

(3) For good cause shown, such as the age or prolonged absence of the claimant, the Administration may accept a claim executed by a person other than one described in paragraphs (a) (1) and (2) of this section.

(b) Where the claim is executed by a person other than the claimant, such person shall, at the time of filing the claim or within a reasonable time thereafter, file evidence of his authority to execute the claim on behalf of such claimant in accordance with the following rules—

(1) If the person executing the claim is the legally-appointed guardian, committee, or other legally-designated representative of such claimant, the evidence shall be a certificate executed by the proper official of the court of appointment.

(2) If the person executing the claim is not such a legally-designated representative, the evidence shall be a statement describing his relationship to the claimant or the extent to which he has the care of such claimant or his position as an officer of the institution of which the claimant is an inmate or patient. The Administration may, at any time, require additional evidence to establish the authority of any such person to file or withdraw a claim.

§ 32.20 Claims.

(a) Claimants are encouraged to submit their claims on LEAA Form 3650/1, which can be obtained from: Public Safety Officers' Benefits Program, Law Enforcement Assistance Administration, Washington, D.C. 20531.

(b) Where an individual files Form 3650/1 or other written statement with the Administration which indicates an intention to claim benefits, the filing of such written statement shall be considered to be the filing of a claim for benefits.

(c) A claim by or on behalf of a survivor of a public safety officer shall be filed within one year after the date of death unless the time for filing is extended by the Administrator for good cause shown.

(d) Except as otherwise provided in this part, the withdrawal of a claim, the cancellation of a request for such withdrawal, or any notice provided for pursuant to the regulations in this part, shall be in writing and shall be signed by the claimant or the person legally designated to execute a claim under § 32.19.

§ 32.21 Evidence.

(a) A claimant for any benefit or fee under the Act and the regulations shall submit such evidence of eligibility or other material facts as is specified by these regulations. The Administration may at any time require additional evidence to be submitted with regard to entitlement, the right to receive payment, the amount to be paid, or any other material issue.

(b) Whenever a claimant for any benefit or fee under the Act and the Regulations has submitted no evidence or insufficient evidence of any material issue or fact, the Administration shall inform the claimant what evidence is necessary for a determination as to such issue or fact and shall request him to submit such evidence within a reasonable specified time. The claimant's failure to submit evidence on a material issue or fact, as requested by the Administration, shall be a basis for determining that the claimant fails to satisfy the conditions required to award a benefit or fee or any part thereof.

(c) In cases where a copy of a record, document, or other evidence, or an excerpt of information therefrom, is acceptable as evidence in lieu of the original, such copy or excerpt shall, except as may otherwise clearly be indicated thereon, be certified as a true and exact copy or excerpt by the official custodian of such record, or other public official authorized to certify the copy.

§ 32.22 Representation.

(a) A claimant may be represented in any proceeding before the Administration by an attorney or other person authorized to act on behalf of the claimant pursuant to § 32.19.

(b) No contract for a stipulated fee or for a fee on a contingent basis will be recognized. Any agreement between a representative and a claimant in violation of this subsection is void.

(c) Any individual who desires to charge or receive a fee for services rendered for an individual in any application or proceeding before the Administration must file a written petition therefore in accordance with paragraph (e) of this section. The amount of the fee he may charge or receive, if any, shall be determined by the Administration on the basis of the factors described in paragraphs (e) and (g) of this section.

(d) Written notice of a fee determination made under this section shall be mailed to the representative and the claimant at their last known addresses. Such notice shall inform the parties of the amount of the fee authorized, the basis of the determination, and the fact that the Administration assumes no responsibility for payment.

(e) To obtain approval of a fee for services performed before the Administration, a representative, upon completion of the proceedings in which he rendered services, must file with the Administration a written petition containing the following information—

(1) The dates his services began and ended;

(2) An itemization of services rendered with the amount of time spent in hours, or parts thereof;

(3) The amount of the fee he desires to charge for services performed;

(4) The amount of fee requested or charged for services rendered on behalf of the claimant in connection with other claims or causes of action arising from the officer's death before any State or Federal court or agency;

(5) The amount and itemization of expenses incurred for which reimbursement has been made or is expected;

(6) The special qualifications which enabled him to render valuable services to the claimant (this requirement does not apply where the representative is an attorney); and

(7) A statement showing that a copy of the petition was sent to the claimant and that the claimant was advised of his opportunity to submit his comments on the petition to LEAA within 20 days.

(f) No fee determination will be made by the Administration until 20 days after the date the petition was sent to the claimant. The Administration encourages the claimant to submit comments on the petition to the Administration during the 20-day period.

(g) In evaluating a request for approval of a fee, the purpose of the public safety officers' benefits program—to provide a measure of economic security for the beneficiaries thereof—will be considered, together with the following factors—

(1) The services performed (including type of service);

(2) The complexity of the case;

(3) The level of skill and competence required in rendition of the services;

(4) The amount of time spent on the case;

(5) The results achieved;

(6) The level of administrative review to which the claim was carried within the Administration and the level of such review at which the representative entered the proceedings;

(7) The amount of the fee requested for services rendered, excluding the amount of any expenses incurred, but including any amount previously authorized or requested;

(8) The customary fee for this kind of service; and

(9) Other awards in similar cases.

(h) In determining the fee, the Administration shall consider and add thereto the amount of reasonable and unreimbursed expenses incurred in establishing the claimant's case. No amount of reimbursement shall be permitted for expenses incurred in obtaining medical or documentary evidence in support of the claim which has previously been obtained by the Administration, and no reimbursement shall be allowed for expenses incurred by him in establishing or pursuing his application for approval of his fee.

Subpart F—Determination, Hearing, and Review

§ 32.23 Finding of eligibility or ineligibility.

Upon making a finding of eligibility, the Administration shall notify each claimant of its disposition of his or her claim. In those cases where the Administration has found the claimant to be ineligible for a death benefit, the Administration shall specify the reasons for the finding. The finding shall set forth the findings of fact, and conclusions of law supporting the decision. A copy of the decision, together with information as to the right to a hearing and review shall be mailed to the claimant at his or her last known address.

§ 32.24 Request for a hearing.

(a) A claimant may, within thirty (30) days after notification of ineligibility by the Administration, request the Administration to reconsider its finding of ineligibility. The Administration shall provide the claimant the opportunity for an oral hearing which shall be held within sixty (60) days after the request for reconsideration. The request for hearing shall be made to the Director, Public Safety Officers' Benefits Program, Law Enforcement Assistance Administration, Washington, D.C. 20531.

(b) If requested, the oral hearing shall be conducted before a hearing officer authorized by the Administration to conduct the hearing, in any location agreeable to the claimant and the hearing officer.

(c) In conducting the hearing, the hearing officer shall not be bound by common law or statutory rules of evidence, by technical or formal rules of procedure, or by Chapter 5 of the Administrative Procedures Act, but must conduct the hearing in such manner as to best ascertain the rights of the claimant. For this purpose the hearing officer shall receive such relevant evidence as may be introduced by the claimant and shall, in addition, receive such other evidence as the hearing officer may determine to be necessary or useful in evaluating the claim. Evidence may be presented orally or in the form of written statements and exhibits. The hearing shall be recorded, and the original of the complete transcript shall be made a part of the claims record.

(d) Pursuant to 42 U.S.C. 3787, the hearing officer may, whenever necessary: (1) Issue subpoenas; (2) Administer oaths; (3) Examine witnesses; and (4) Receive evidence at any place in the United States.

(e) If the hearing officer believes that there is relevant and material evidence available which has not been presented at the hearing, he may adjourn the hearing and, at any time prior to mailing the decision, reopen the hearing for the receipt of such evidence.

(f) A claimant may withdraw his or her request for a hearing at any time prior to the mailing of the decision by written notice to the hearing officer so stating, or by orally so stating at the hearing. A claimant shall be deemed to have abandoned his or her request for a hearing if he or she fails to appear at the time and place set for the hearing, and does not, within 10 days after the time set for the hearing, show good cause for such failure to appear.

(g) The hearing officer shall, within thirty (30) days after receipt of the last piece of evidence relevant to the proceeding, make a determination of eligibility. The determination shall set forth the findings of fact

and conclusions of law supporting the determination. The hearing officer's determination shall be the final agency decision, except when it is reviewed by the Administrator under paragraph (h) or (i).

(h) The Administrator may, on his own motion, review a determination made by a hearing officer. If he decides to review the determination, he shall:

(1) Inform the claimant of the hearing officer's determination and his decision to review that determination; and

(2) Give the claimant 30 days to comment on the record and offer new evidence or argument on the issues in controversy.

The Administrator, in accordance with the facts found on review, may affirm or reverse the hearing officer's determination. The Administrator's determination shall set forth the findings of fact and conclusions of law supporting the determination. The Administrator's determination shall be the final agency decision.

(i) A claimant determined ineligible by a hearing officer under paragraph (g) may, within thirty (30) days after notification of the hearing officer's determination:

(1) Request the Administrator to review the record and the hearing officer's determination; and

(2) Comment on the record, and offer new evidence or argument on the issues in controversy.

The Administrator shall make the final agency determination of eligibility within thirty (30) days after expiration of the comment period. The notice of final determination shall set forth the findings of fact and conclusions of law supporting the determination. The Administrator's determination shall be the final agency decision.

(j) No payment of any portion of a death benefit, except interim benefits payable under § 32.16, shall be made until all hearings and reviews which may affect that payment have been completed.

[45 FR 16180, Mar. 13, 1980]

APPENDIX TO PART 32—PSOB HEARING AND APPEAL PROCEDURES

1. *Notification to Claimant of Denial.* These appeal procedures apply to a claimant's request for reconsideration of a denial made by the Public Safety Officers' Benefits (PSOB) Office. The denial letter will advise the claimant of the findings of fact and conclusions of law supporting the PSOB Office's determination,and of the appeal procedures available under § 32.24 of the PSOB regulations. A copy of every document in the case file that (1) contributed to the determination: and (2) was not provided by the claimant shall also be attached to the denial letter, except where disclosure of the material would result in a clearly unwarranted invasion of a third party's privacy. The attached material might typically include medical opinions offered by the Armed Forces Institute of Pathology, legal memoranda from the Office of General Counsel of the Office of Justice Assistance, Research, and Statistics (OJARS), or memoranda to the file prepared by PSOB staff. A copy of the PSOB regulations shall also be enclosed.

2. *Receipt of Appeal.* A. When an appeal has been received, PSOB will assign the case, and transmit the complete case file to a hearing officer. Assignments will be made in turn, from a standing roster, except in those cases where a case is particularly suitable to a specific hearing officer's experience.

B. PSOB will inform the claimant of the name of the hearing officer, request submission of all evidence to the hearing officer, and send a copy of this appeals procedure. If an oral hearing is requested, PSOB will be responsible for scheduling the hearing and making the required travel arrangements.

C. PSOB will be responsible for providing all administrative support to the hearing officer. An attorney from the Office of General Counsel who has not participated in the consideration of the claim will provide legal advice to the hearing officer. The hearing officer is encouraged to solicit the advice of the assigned OGC attorney on all questions of law.

D. Prior to the hearing, the hearing officer shall request the claimant to provide a list of expected witnesses, and a brief summary of their anticipated testimony.

3. *Designation of Hearing Officers.* A. In LEAA Instruction I 1310.57A (December 26, 1979) the Administrator designated a roster of hearing officers to hear PSOB appeals.

---

[1] As used in this procedure, the word "claimant" means a claimant for benefits or, where appropriate, the claimant's designated representative.

B. The hearing officers are specifically delegated the Administrator's authority under 42 U.S.C. 3787 to:

(1) Issue subpoenas;

(2) Administer oaths;

(3) Examine witnesses; and

(4) Receive evidence at any place in the United States the officer may designate.

4. *Conduct of the Oral Hearing.* A. If requested, an oral hearing shall be conducted before the hearing officer in any location agreeable to the officer and the claimant.

B. The hearing officer shall call the hearing to order and advise the claimant of (1) the findings of fact and conclusions of law supporting the initial determination; (2) the nature of the hearing officer's authority; and (3) the manner in which the hearing will be conducted and a determination reached.

C. In conducting the hearing, the hearing officer shall not be bound by common law or statutory rules of evidence, by technical or formal rules or procedures, or by Chapter 5 of the Administrative Procedure Act, but must conduct the hearing in such a manner as to best ascertain the rights of the claimant.

D. The hearing officer shall receive such relevant evidence as may be introduced by the claimant and shall, in addition, receive such other evidence as the hearing officer may determine to be necessary or useful in evaluating the claim.

E. Evidence may be presented orally or in the form of written statements and exhibits. All witnesses shall be sworn by oath or affirmation.

F. If the hearing officer believes that there is relevant and material evidence available which has not been presented at the hearing, the hearing may be adjourned and, at any time prior to the mailing of notice of the decision, reopened for the receipt of such evidence. The officer should, in any event, seek to conclude the hearing within 30 days from the first day of the hearing.

G. All hearings shall be attended by the claimant and his or her representative, and such other persons as the hearing officer deems necessary and proper. The wishes of the claimant should always be solicited before any other persons are admitted to the hearing.

H. The hearing shall be recorded, and the original of the complete transcript shall be made a part of the claims record.

I. The hearing will be deemed closed on the day the hearing officer receives the last piece of evidence relevant to the proceeding.

J. If the claimant waives the oral hearing, the hearing officer shall receive all relevant written evidence the claimant wishes to submit. The hearing officer may ask the claimant to clairfy, or explain the evidence submitted, when appropriate. The hearing officer should seek to close the record no later than 60 days after the claimant's request for reconsideration.

5. *Determination.* A. A copy of the transcript shall be provided to the claimant, to PSOB, and OGC after the conclusion of the hearing.

B. The hearing officer shall make his, or her, determination no later than the 30th day after the last piece of evidence has been received. Copies of the determination shall be made available to PSOB and OGC for their review.

C. If either PSOB or OGC disagrees with the hearing officer's final determination, that office may request the Administrator to review the record. If the Administrator agrees to review the record, he will send the hearing officer's determination, all comments received from PSOB, OGC, or other souces (except where disclosure of the material would result in an unwarranted invasion of privacy), and notice of his intent to review the record, to the claimant. He will also advise the claimant of his or her opportunity to offer comments, new evidence, and argument to the Administrator within 30 days after the receipt of notification. The Administrator shall seek to advise all parties of the final agency decision within 30 days after the expiration of the comment period.

D. If PSOB and OGC agree with the hearing officer's determination, or the Administrator declines to review the record, the hearing officer's determination will be the final agency decision, and will be sent to the claimant by PSOB immediately.

E. If the hearing officer's determination is a denial, all material that (1) contributed to the determination and (2) was not provided by the claimant shall be attached to the denial letter, except where disclosure of the material would result in a clearly unwarranted invasion of a third party's privacy. The claimant will be given an opportunity to request the Administrator to review the record and the hearing officer's decision, and to offer comments, new evidence, or argument to the

Administrator within 30 days. The Administrator shall advise all parties of the final agency decision within 30 days after the expiration of the comment period.

F. PSOB will provide administrative support to the hearing officer and the Administrator throughout the appeal process.

[45 FR 16181, Mar. 13, 1980]

I. Public Safety Officers

Definitions

28 CFR 32.2 (h-j)

(h) "Public safety officer" means any person serving a public agency in an official capacity, with or without compensation, as a law enforcement officer or firefighter.

(i) "Law enforcement officer" means any person involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws, including but not limited to police, corrections, probation, parole, and judicial officers, and officials engaged in programs relating to narcotics addiction, such as those responsible for screening arrestees or prisoners for possible diversion into drug treatment programs, who are exposed, on a regular basis, to criminal offenders.

(j) "Firefighter" includes all fire service personnel authorized to engage in the suppression of fires, including any individual serving as an officially-recognized or designated member of a legally-organized volunteer fire department.

A. Auxiliary Police

March 23, 1981

OGC Letter

SUBJECT: **Coverage of County Auxiliary Police Officer**

This is in response to your letter of February 18, 1981 asking whether or not auxiliary police within the County of Suffolk, New York are covered by the Public Safety Officers' Benefits Act, 42 U.S.C. 3796 (PSOB).

Under the PSOB Act, benefits are payable when a "public safety officer" has died as a direct and proximate result of a personal injury sustained in the line of duty. 42 U.S.C. 3796. A "public safety officer" is defined by the Act as "any person serving a public agency in an official capacity, with or without compensation, as a law enforcement officer or firefighter." 42 U.S.C. 3796b(7).

In order for a member of your auxiliary police force to qualify as a "law enforcement officer," he or she must be "involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws." 42 U.S.C. 3796b(5).

* * *

If an auxiliary police officer was authorized to engage in such actual crime fighting activity, and was killed in the process "as a direct and proximate result of a personal injury," he would be covered by the PSOB Act. In addition, if engaging in this kind of activity was the auxiliary officer's primary function, he would also be covered if he was killed while performing any "line of duty" action. See the definition of "line of duty" at 28 C.F.R. 32.2(c).

January 16, 1978

OGC Memorandum

SUBJECT: **Coverage of Auxiliary Police Chief**

This office has reviewed the case file and the evidence submitted at the hearing requested by Mrs. M. On the basis of that review, we believe that the earlier decision that Officer M. was not a law enforcement officer should be reversed, and benefits paid to his eligible survivors.

The two issues presented by this case are:

(1) was George M., as captain of the Willowick Auxiliary Police, a law enforcement officer as defined in 28 C.F.R. 32.2(i)?; and

(2) if he was, was he acting in the line of duty, as defined in 28 C.F.R. 32.2(c), at the time of his death?

We believe that each question must be answered in the affirmative.

Under section 32.2(i), a "law enforcement officer" is any person involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws..." From the evidence presented in this case, it is clear that Mr. M. and other auxiliary police officers were responsible for controlling crowds of juveniles at parks, dances, football games, and drive-in restaurants; patrolling the city beaches in order to remove large gatherings of juveniles; and assisting the police department in a variety of crime control activities, including participating in a drug raid, protecting burned buildings after a fire, and making a grand larceny arrest. In some circumstances, auxiliary officers were even authorized to arrest suspects themselves.

The testimony and the Auxiliary Police Training Manual also show that the auxiliary police were trained in firearms, self-defense, riot control, and handling of civil disorders.

In its memorandum of November 30, 1977, Mr. C. of the PSOB Office argues that Mr. M. was not a law enforcement officer under Ohio law because he did not take the training required to be taken by any person to be appointed a "peace officer" in the State of Ohio. However, section 2901.01(k)(4) of the Ohio Revised Code defines "law enforcement officer" to include "a member of an auxiliary police force organized by county, township, or municipal law enforcement authorities, within the scope of such member's appointment or commission." As Mr. C. pointed out, the State of Ohio has established a Peace Officer Training Council (POTC) to establish minimum standards of training for peace officer personnel. In Opinion No. 67-015 (January 27, 1967), the Office of the Ohio Attorney General stated that "the determination of whether the members of a particular auxiliary (police) unit must fulfill the training requirements of the Ohio Peace Officers Training Council is a matter of fact to be determined by reference to the legislation creating that particular auxiliary unit." In a letter dated September 26, 1977, the Director of Law for the City of Willowick informed claimant's representative that the city never legislated a law establishing the Auxiliary Police. There is, therefore, no basis on which to determine whether Mr. M. was required to undergo training at the POTC or not. Accordingly, we do not believe that Mr. M. should be denied "law enforcement officer" status because he failed to take the training offered by POTC. To the contrary, we believe that, in light of O.R.C. §2901.01(k)(4), and the duties assigned to the Auxiliary Police, Mr. M. was a "law enforcement officer" within the meaning of section 32.2(i) of the LEAA PSOB Regulations.

Before it can be determined whether Mr. M. died in the line of duty, it must be ascertained whether crime and juvenile delinquency control or reduction was his primary function as an auxiliary police officer. If it is, Mr. M. would be covered by PSOB if his death occurred in connection with any act he was authorized or obligated to take as an auxiliary officer. As a result, his death while directing traffic would be covered. If, however, his primary function was something other than crime and juvenile delinquency control or reduction, his death would be covered by the Act only if it occurred in the course of controlling or reducing crime or juvenile delinquency. In these circumstances, Mr. M.'s death while directing traffic would not be covered, because it was not related to his crime or juvenile delinquency responsibilities.

We believe that the record in this case has demonstrated that crime and juvenile delinquency control and reduction are as important functions of the Willowick Auxiliary Police as any other function it is authorized to perform, and functions that its officers are expected to perform as frequently as any other. In light of the testimony and the manual bulletins cited above, we do not believe there is sufficient evidence in the record to deny that crime and juvenile delinquency

control and reduction are the primary functions of the Willowick Auxiliary Police.

B. Conservation Officers

April 21, 1980

OGC Memorandum

SUBJECT: **Law Enforcement Officer Status of Conservation Officer**

This is in response to your February 27, 1980 memorandum, asking whether the decedent in the above-captioned claim was acting as a law enforcement officer at the time of his death. In our opinion, he was.

The decedent was a State Conservation Officer who was killed in an auto accident while driving his employer's car to his office. He was to have picked up a case report on two arrests he had made two days earlier, for the purpose of taking it to the State's Attorney and assisting him in the preparation of criminal complaints against the suspects. We believe these actions suffice to bring him within the "line of duty" as defined in section 32.2(c) of the LEAA PSOB regulations, 28 C.F.R. 32.1, *et seq.* Section 32.2(c) states that:

> " 'Line of duty' means any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social ceremonial, or athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves. *For other officers, 'line of duty' means any action the officer is so obligated or authorized to perform in the course of controlling or reducing crime, enforcing the criminal law, or suppressing fires.*" (emphasis added)

The decedent's position description allocated 35 percent of his time to law enforcement. He was authorized, under South Dakota law, to act as a peace officer with respect to the enforcement of the state's fish and game laws. South Dakota Codified Laws, §41-15-10. He was also certified as a peace officer by the State Law Enforcement Standards and Training Commission.

Accordingly, we believe that he was a law enforcement officer acting in the "line of duty" at the time of his death.

C. Constables

August 17, 1978

OGC Memorandum

SUBJECT: **Authority of Texas Reserve Deputy Constables**

You have asked this office whether Reserve Deputy Constables (RDC's) have the authority under Texas law to act as law enforcement officers while off duty.

As you described the facts of this case, the RDC was acting on his own when he attempted to detain a hit and run driver on the property of another. The RDC was returning from his private security officer job in his private automobile when he encountered the hit and run accident. While attempting to detain the hit and run driver, he was hit and killed by another car.

Section 1(a) of Art. 6869.1, Vernon's Ann. Tex. Civ. St., states the RDC's "shall be subject to serve as police officers during the actual discharge of their official duties upon call of . . . the constable . . . ." They are to serve "at the discretion of the constable and may be called into service at any time the constable considers it necessary to have additional officers to preserve the peace and enforce the law." *Id.*, Section 1(c). Further, RDC's have the same authority as peace officers only "while on active duty at the call of the sheriff and while actively engaged in their assigned duties." *Id.*, Section 1(f).

If, therefore, there is no evidence that the decedent was acting at the call of the constable at the time of his death, he was not acting in the line of duty, as defined in Section 32.2(c) of the regulations.

October 27, 1977

OGC Memorandum

SUBJECT: **Coverage of Wisconsin Town Constable**

In this file, the Town Constable of Somers, Wisconsin, was killed in a traffic accident while en route to picking up a stray dog. The duties of a Constable are set forth in Wisconsin Statutes §60.54:

"The constable shall:

"(1) Serve within his county any writ, process, order or notice, and execute any order, warrant or execution lawfully directed to or required to be executed by him by any court or officer.

"(2) Attend upon sessions of the circuit court in his county when required by the sheriff.

"(3) Inform the district attorney of all trespasses on public lands of which he has knowledge or information.

"(5) Impound cattle, horses, sheep, swine and other animals at large on the highways in violation of any duly published order or bylaw adopted at an annual town meeting.

"(6) Cause to be prosecuted all violations of law of which he has knowledge or information.

"(6m) Keep his office in town, village or city for which he was elected or appointed. No constable who keeps his office outside the limits of such municipality shall receive fees for any services performed during the period such office is maintained.

"(7) Perform all other duties required by any law."*

The Constable is a "peace officer" under Wisconsin law. Section 939.22(22) of the Wisconsin Statutes defines a "peace officer" as "any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes." Under Section 59.24, sheriffs, coroners, and constables may call such persons as necessary to their aid for the purpose of keeping and preserving the peace, suppressing all affrays, routs, riots, unlawful assemblies and insurrections, and apprehending or securing any person for felony or breach of the peace. In addition, two opinions of the State Attorney General assert the general law enforcement authority of a Constable. See 46 OAG 280, 283 (1957) and 58 OAG 72, 74-75 (1969).

The statutory description of the Constable's duties and authority establishes that his primary function is crime control. As such, he is acting in the line of duty as a public safety officer when undertaking any act he is authorized to perform as a Constable. See Section 32.2(c)

*There is no paragraph (4).

of the LEAA PSOB Regulations, 28 C.F.R. 32.1, *et seq.* Impounding stray animals on the highway is a statutory duty of the Constable, W.S.A. §60.54(5), if the town he serves has passed a local order prohibiting animals to run at large on the highways. The Somers Town Board enacted such an ordinance on October 11, 1965. Accordingly, the Constable was acting in the line of duty and his survivors are entitled to PSOB benefits.

October 31, 1977

OGC Memorandum

SUBJECT: **Dickson County, Tennessee, Constable**

You have requested an opinion on whether a Dickson County, Tennessee Constable is a public safety officer. We believe that he is.

Section 8-1009 of the Tennessee Code states that every constable elected in counties of certain population ranges is a "conservator of the peace and vested with all the power and authority belonging to the office of the constable by common law." According to the 1960 census, Dickson County had a population of 18,839, placing it within a range of population (18,300 - 18,900) specified in the statute.

Such constables are specifically authorized to execute arrest warrants, Tennessee Code §40-711, and, in some circumstances, act as Sheriff, *Id.*, §8-808. A constable is also entitled to carry a weapon. *Id.*, §39-4902. For these reasons, we believe the decedent Constable is a "public safety officer" within the meaning of the LEAA PSOB Regulations, 28 C.F.R. 32.2(h), and, accordingly concur in your decision to award benefits.

D. Contractors

July 8, 1980

Administrator's Final Decision

SUBJECT: **Contract Pilot**

I have completed a careful review of the file in the above claim, including your submission of February 27, 1980, commenting on the memorandum of Deputy General Counsel Charles A. Lauer. It is my determination, based on this review, that the agency Hearing Officer's December 14, 1979, determination of eligibility is erroneous and must be reversed.

The primary issue on appeal was whether the decedent was a "public safety officer" as this term is defined in Section 703(7) of the Public Safety Officers' Benefits Act (42 U.S.C. 3796b). That section defines a public safety officer as follows:

> "(7) 'Public safety officer' means a person serving a public agency in an official capacity, with or without compensation, as a law enforcement officer or as a fireman.

The hearing officer determined that the decedent was "serving a public agency," the California Department of Forestry, as a fireman at the time of his death. He then determined that the service was "in an official capacity" based on principles of workmen's compensation law that distinguish an "employee" and an "independent contractor." Applying these principles, coupled with the "lent employee" and "dual employment" doctrines, the hearing officer concluded that there was an "implied contract of hire" arising out of Mr. H.'s flying under the direction of a Forest Service observer and out of the Forest Service's authority under its contract with Hemet Valley Flying Service to set standby hours and determine the adequacy of pilot performance.

While these workmen's compensation principles and doctrines may be applied in making PSOB determinations in an appropriate case, I have concluded that they are not applicable here because of the clear evidence that Mr. H. was in fact, and in the intent of the parties, the employee of the Hemet Valley Flying Service. Mr. H. was hired and paid by the Hemet Valley Flying Service which had, under its contract with the State, a clearly superior right of control as his employer. The Flying Service could remove Mr. H. from his assignment to the Forest Service contract at any time and could otherwise direct Mr. H.'s performance of his duties other than when he was flying on a Forest Service mission. The Forest Service exercised control only in limited ways over employees assigned to the contract of the Flying Service. Their authority was not specific to Mr. H. as an individual. The Hemet Valley Flying Service hired, assigned, and paid pilots and was free to remove any pilot from this assignment and substitute another pilot. Therefore, the superior right of control over Mr. H.'s employment was clearly in the Hemet Valley Flying Service as his employer. In addition, the contract between the State of California and the Hemet Valley Flying Service specifically provided that employees of the contractor were not agents and employees of the State of California:

> "The contractor, and the agents and employees of contractor, in the performance of this agreement, shall act in an independent capacity and not as officers or agents of the State of California."

I find that the contract provision reflects not only the actual relationship between the parties but also the clear intent and understanding of the parties to the contract that employees of the contractor would not be employees of the Department of Forestry or the State of California. Further, I conclude that the "dual employment" and "lent employee" doctrines cited by the hearing officer are not applicable because Mr. H. never entered into any express or implied contract of hire with the Department of Forestry of the State of California.

Regardless of whether Mr. H. was or was not an employee of the Department of Forestry, State of California, under the principles and criteria discussed above, I also find that he was not serving a public agency in an "official capacity," as required by law, at the time of his death. In order to be serving a public agency in an official capacity one must be an officer, employee, volunteer, or similar relationship of performing services as a part of a public agency. To have such a relationship with a public agency, an individual must be officially recognized or designated as functionally within or a part of the public agency.

Not only was Mr. H. acting in the capacity of an employee of the Hemet Valley Flying Service, he was clearly not recognized or designated by the State of California as performing services in the capacity of a State officer, employee, volunteer, or other position with the State agency. In fact, the State's contract with the Hemet Valley Flying Service specifically denied any such relationship. In sum, Mr. H. was serving a private employer in an official capacity as an employee. Thus, even if the hearing officer were correct in determining that Mr. H. was serving as an employee of the State for Workmen's Compensation purposes, his "official capacity" remained that of an employee of the independent contract.

The legislative history of the Public Safety Officer's Benefits Act gives express guidance on the intended scope of the term "public safety officer." Congressman Joshua Eilberg, the House sponsor of the PSOB bill, answered the question as follows:

> "Mr. Myers of Pennsylvania: Could the gentleman tell me, is there any way in which this bill would apply to privately employed safety or security officers?"
>
> "Mr. Eilberg: No, it would not."
>
> "Mr. Myers of Pennsylvania: What if they were called by a local arm of the government or the local police organization to assist in any way?"

"Mr. Eilberg: It is my opinion that they would not be included."

Cong. Rec. H.3725-26 (April 30, 1976, daily ed.)

There is no basis to conclude that Congress intended privately employed firefighters to be treated other than in a similar manner.

The following additional findings of fact are adopted:

1. On August 18, 1978, Joe H. died of injuries sustained when the aircraft he was piloting crashed.

2. The aircraft was owned by the California Division of Forestry and was providing air coordination of firefighting activities at the time of the crash.

3. Mr. H. was accompanied in the aircraft by a Division of Forestry employee at the time of the crash. The employee's function was to direct the air coordinator pilot where to fly and at what altitude.

4. Mr. H. was employed as a pilot by the Hemet Valley Flying Service Co. The California Division of Forestry contracted with the Hemet Valley Flying Service for the provision of pilots for aerial coordination of firefighting activities during wildland fires.

5. The contract between the Hemet Valley Flying Service and the California Department of Forestry provides, in part, that:

> "The contractor, and the agents and employees of contractor, in the performance of this agreement, shall act in an independent capacity and not as officers or employees or agents of State of California."

6. The Hemet Valley Flying Service exercised primary control over the activities performed by its employee, Joe H., under the contract.

The basic conclusion of law that I have reached is that the decedent was not a "public safety officer" as this term is defined in the Public Safety Officers' Benefits Act because he was not "serving a public agency in an official capacity . . . as a law enforcement officer or as a fireman."

As a result of my review, and for the reasons set forth above, the final agency determination is that the claimant is not entitled to benefits under the Public Safety Officer's Benefits Act of 1976 (Pub. L. 94-430, 90 Stat. 1346).*

E. Dogcatcher

November 17, 1977

Hearing Officer's Decision

SUBJECT: **Coverage of Kentucky Dogcatcher Attempting to Subdue Felon**

The pertinent facts of the matter on appeal are basically as follows: William D., 50 years of age, was the duly appointed and acting Dog Warden of Daviess County, Kentucky, on the 16th day of November, 1976. On that date, Warden D. had called the animal shelter by radio and informed the attendant, who was his daughter, that he was going to pick up a dog and then report to the shelter. He arrived at the shelter to find his daughter visibly distraught and Mr. Long, a man with whom he was not acquainted, standing nearby. At this time Warden D. was in a blue uniform with a badge, but had left his handgun, which he normally carried in a holster on his belt, on the seat of his truck. While Warden D. was trying to ascertain the reason for his daughter's obvious tension, a lady and two small children came into the animal shelter and went into the back room where the dogs were kept. At this point W., the Warden's daughter whispered, "Help me," to Warden D. Sensing the urgency of the situation, Warden D. asked his daughter to accompany him outside to get the dog in his truck. Once outside, she told Warden D., "He (the man in the shelter) has a gun and is going to shoot me."

Warden D. told the man, Long, to "stay there," and went to his truck, got his handgun, and attempted to make an apprehension. In the struggle, he was shot to death by Long, who was subsequently convicted of Attempted First Degree Rape and Murder. Mrs. D. thereafter filed claim for benefits under the Public Safety Officers Benefits Act of 1976. Her status as an eligible beneficiary is not contested.

*See Also Part III, A., "Coverage of Off-Duty Firefighters Assisting Contractor in Fire Horn Repair," for further discussion of the PSOB Act's coverage of contractors.

On May 25 1977, the Public Safety Officers Benefits Division of the Law Enforcement Assistance Administration denied Mrs. D.'s claim for benefits. The justification for the denial follows:

> "Warden D.'s death was not the direct and proximate result of a personal injury sustained in the line of duty as required by Section 701 of the Act and set forth in 28 CFR, 32.2(c). Section 32.2(c) of the Final Regulations limits coverage for public safety officers whose primary function is not 'crime control or reduction, enforcement of the criminal law, or suppression of fires.' For these officers to be covered, their death must occur as a result of an action which the officer is obligated or authorized to perform in the course of controlling or reducing crime, enforcing the criminal law, or suppressing fires.
>
> "Warden D.'s occupation places him in this limited coverage category. For his death to be covered under Section 32.2(c), it must have resulted from an action that he was obligated or authorized to perform. In Warden D.'s case, this would mean enforcing Kentucky criminal laws relating to cruelty to animals. Because Warden D.'s death did not result from such an act, it does not meet the line of duty requirement of the Act as set forth in 28 CFR 32.2(c) and his survivor's claim must therefore be determined ineligible."

The sole issue for determination is, was Warden D. obligated or authorized to attempt to take Mr. Long into custody, after being made aware that a felony had been committed by Long in the animal shelter, and knowing that Long was still armed and in the animal shelter, which was occupied by a woman and two small children? The question can be rephrased—under these circumstances, could Warden D. have refused to take action to apprehend Long without breaching his responsibilities and duties as Dog Warden of Daviess County?

The authorities of dog wardens in the State of Kentucky apparently can be conferred two distinct ways. Under Section 436.605 of the Kentucky Revised Statutes, dog wardens and officers and agents of humane societies have the powers of peace officers for the purpose of enforcing Kentucky statutes relating to cruelty and mistreatment of animals. This statute appears to confer limited peace officer powers upon dog wardens and others. It is not restrictive in that it does not purport to limit any authorities conveyed elsewhere.

According to the sworn testimony of Daviess County Sheriff Charles C. Norris, the sheriff is actually the dog warden under Kentucky statutes. This responsibility can be delegated to a dog warden, who is

appointed by the County Fiscal Court but reports directly to the sheriff. The sheriff administers the oath of office to the dog warden. In the case of Warden D., Sheriff Norris' testimony is clear and unequivocal that he intended to and did confer full law enforcement powers upon Mr. D. "I feel that with the oath he had taken, he could have written speeding tickets out there on the road..." (Transcript, p. 18)

Section 70.030 of the Kentucky Revised Statutes authorizes the sheriff to appoint his own deputies, who shall take the oath required to be taken by the sheriff. (*Humphrey* v. *Wade,* Ky. 391, 8 R.384, 1 S.W. 648) Although some sheriffs may restrict the authorities of their dog wardens to enforcing criminal laws relating to cruelty to animals, this obviously was not the case with Sheriff Norris and Warden D. The testimony of Sheriff Norris is clear on the subject.

"Mr. D. was a peace officer for the State of Kentucky, and could make an arrest anywhere that he wanted to." (Transcript, p. 18)

"In my opinion, Mr. D.'s duties were no different from anyone else's. If the law was broken, he was a sworn peace officer or police officer or whatever you want to say, to do his job." (Transcript, p. 20)

In response to a question from Mr. Yewell:

> "Q. ...was it Mr. D's duty at that point in time when he acted against this Long fellow to protect those persons there in that shelter that morning?
>
> A. It definitely was." (Transcript, p. 21)

Sheriff Norris' testimony in response to questions by the Hearing Officer was as follows:

> "Q. As a law enforcement officer, when a felony was being committed in his presence, what were his options?
>
> A. He had no other option but to make an arrest.
>
> Q. He could make an arrest or quit, is that right?
>
> A. Yes, sir. If he hadn't, I think he could have been indicted by the Grand Jury...
>
> Q. And this was because of the fact that he was a sworn police officer who was neglecting his duties? Is that correct?

A. That's true. He takes the same oath that I take and all the deputy sheriffs take.

Q. If a person like Mr. D. works in a special field but is a officer and he witnesses a felony being committed anywhere, what are his responsibilities?

A. His responsibilities would be for him to make an arrest." (Transcript, p. 22)

This testimony, under oath, states clearly that Warden D. had the authority and the responsibility to make arrests anywhere in the county if he witnessed or had knowledge of a felony being committed.

In the instant case, the issue of county-wide arrest powers is irrelevant. On November 16, 1976, prior to and at the time of his death, Warden D. was carrying out his responsibilities as Dog Warden of Daviess County. He had picked up and brought a dog to the animal shelter. His responsibilities included operation of the animal shelter. (Transcript, p. 21) After his arrival, he found that the shelter attendant, who worked under his supervision, was distraught after being threatened, and that the safety of all persons present, including Warden D., was threatened by a man with a gun. Could he, as Dog Warden, have failed to attempt to apprehend the gunman and not breached his oath of office and official responsibilities?

The testimony is clear on this point. The logic is clear. Warden D. was on duty, in uniform, in his regular place of employment. If he had not been a peace officer, he would not have been obligated or authorized to attempt to make an apprehension. Because he was a sworn peace officer, it was his duty to react to the felony which had been committed and to the continuing danger that was present. Warden D. responded as a true peace officer, losing his life while attempting to protect others.

It is hereby determined that William C. D.'s death was the direct and proximate result of a personal injury sustained in the line of duty as required by Section 701 of the Public Safety Officers' Benefits Act of 1976 and 28 CFR, 32.2(c). The ruling of May 25, 1977, of the Public Safety Officers Benefits Division is hereby rescinded and it is directed that benefits be paid to Mrs. Kathleen D. as survivor of William C. D., deceased.

F. Emergency Medical Technicians

March 12, 1981

OGC Letter

SUBJECT: **Emergency Medical Technicians' Eligibility for Death Benefits**

This is in response to your letter of February 11, 1981 requesting an opinion as to whether the Emergency Medical Technicians (EMT's) employed by your City Fire Department would be eligible for death benefits under the Public Safety Officers' Benefits Act, 42 U.S.C. 3796, if they were killed while on ambulance duty. An EMT on ambulance duty would be entitled to death benefits only if his primary job function was the suppression of fires.

Under the Act, PSOB benefits are payable where a public safety officer has died as a direct and proximate result of a personal injury sustained "in the line of duty." "Line of duty," as defined in 28 C.F.R. §32.2(c), can mean either of two things, depending on the officer's "primary function." If the officer's primary function is crime control or firefighting, then "line of duty" means:

> "any action which an officer . . . is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves." 28 C.F.R. §32.2(c).

If, on the other hand, the officer's primary function is not crime control or firefighting, then the definition of "line of duty" is restricted to:

> "any action the officer is so obligated or authorized to perform in the course of controlling or reducing crime, enforcing the criminal law, or suppressing fires." 28 C.F.R. §32.2(c).

Thus, an EMT whose primary job function was something other than firefighting would be covered by PSOB only if his death occurred in the course of the firefighting activities he was authorized to perform. If his primary function was firefighting, he would be covered if he died performing any action he was authorized to perform in the "line of duty."

G. Indian Tribal Safety Officers

June 2, 1977

OGC Memorandum

SUBJECT: **Applicability of the PSOB Act to Public Safety Officers Serving Indian Tribes**

This is in response to your letter of February 16, 1977, requesting a legal opinion on the applicability of the Public Safety Officers' Benefits Act of 1976 (PSOB), Pub. L. 94-430 (September 29, 1976) to public safety officers serving Indian tribes.

In the Preamble to the final PSOB regulations promulgated at 42 F.R. 23251 (May 6, 1977), LEAA stated:

> "Law enforcement officers of Indian tribes which have been determined by the Secretary of Interior to perform law enforcement functions are . . . covered by the Act. Such a tribe is considered a 'unit of general local government' under Section 601 of the Omnibus Crime Control and Safe Streets Act, as amended, and would, therefore, be a 'unit of local government' within the meaning of 'public agency' in Section 703(6) of the Act. The applicability of the Act to officers of Indian tribes not so designated by the Secretary of Interior will be determined on a case-by-case basis." 42 F.R. 23252-53.

On February 6, 1973, the Secretary of the Interior published a list of tribal entities recognized by the Federal government, accompanied by a chart indicating the nature of the criminal justice functions each tribe is authorized to perform. The list can be found in Appendix 7 of the LEAA Financial Grant Guideline Manual, M 7100.1A (April 30, 1973). Where the tribe actually performs the particular function, the appropriate block is marked by an "X". As the enclosed chart indicates, every listed New Mexico tribe actually employs tribal police. Accordingly, LEAA will presume the police officers of the listed tribes to be covered. This presumption is, of course, rebuttable and officers may not be covered where, in fact, the tribe, for one reason or another, has ceased to perform the police function.

The coverage of persons who may perform law enforcement functions for tribes not on the list will be determined on a case-by-case basis, as noted in the regulations. The two basic questions to be resolved in those cases will be whether the tribe (1) has law enforcement authority that has been recognized by the State, either formally or by a

documented history of acquiescence; and (2) has actually been performing the law enforcement function in question.

H. Mayor

December 7, 1979

OGC Memorandum

SUBJECT: **Eligibility of Survivors of George R. Moscone, Mayor of San Francisco**

This is in response to your request for my review of the record and the determination made by the Administration representative on the eligibility of the survivors of the late George R. Moscone for benefits under the Public Safety Officers' Benefits Act of 1976, Pub. L. 94-30, 42 U.S.C. §3796, *et. seq.* The review of the Act and regulations promulgated in implementation thereof, the legislative history, all documentation associated with the claim, and a review of past legal determinations by the LEAA Office of General Counsel indicated that payment of benefits to the survivors of Mayor Moscone are not legally authorized.

The Act provides that:

> "In any case in which the Administration determines under regulations issued pursuant to this part, that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Administration shall pay a benefit of $50,000 as follows . . ." (prioritized listing of eligible survivors omitted) 42 U.S.C. §3796.

Senator Strom Thurmond, one of the sponsors of the bill stated:

> "This legislation is designed to compensate families of public safety officers killed in the line of duty. It is not a group insurance program and should not be modified to provide for group insurance." Cong. Rec. S 11828 (daily ed., July 19, 1976).

Accordingly, the survivors of all public safety officers who die are not automatically covered. That officer must have been acting in the line of duty as defined in the regulations implementing the Act. 28 C.F.R. Part 32.2(c).

The initial finding of the Public Safety Officers' Benefits Office, confirmed by the Hearing Officer in denying benefits, was that Mayor Moscone did not die in the line of duty as defined in the implementing regulations. Senator John McClellan, one of the co-sponsors of this bill, stated:

> "Line of duty, as used in this bill, is intended to mean that the injury must have occurred when the officer was performing duties authorized, required, or normally associated with the responsibilities of such officer acting in his official capacity as a law enforcement officer or a fireman." Cong. Rec. S.11827 (daily ed., July 19, 1976.)

Consistent with this intent, "line of duty" is defined in 28 C.F.R. 32.2(c) to mean "any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is authorized by rule, regulation, condition of employment or service, or law to perform. . . For other officers, line of duty means any action the officer is so obligated or authorized to perform in the course of controlling or reducing crime, enforcing the criminal law, or suppressing fires."

This distinction in the line of duty recognizes that certain officers engage in law enforcement activities on a far more limited basis. Rather than extend coverage to the survivors of these officers for all non-law enforcement activities that they may engage in, the regulations limit coverage only to those situations in which the officers suffer an injury while actually engaged in law enforcement activity.

The Commentary to the Regulations indicates:

> "The Act was not intended to cover deaths arising from activities unrelated to law enforcement or firefighting. This would, however, be the certain result of covering all line of duty deaths suffered by officials whose crime control or firefighting responsibilities are significantly limited, in both scope and frequency. LEAA, will therefore, require that the deaths of such officials be substantially related to the law enforcement or firefighting authority they possess, before paying a benefit under the Act." 28 C.F.R. Part 32, published in Federal Register, May 6, 1977, p. 23260.

In the instant matter, the facts leading to the death of Mayor Moscone are uncontroverted. Mayor Moscone was assassinated in his office by Mr. Dan White when a dispute arose concerning the reappointment of Mr. White to a vacancy on the Board of Supervisors.

The Public Safety Officers' Benefits Office in its initial determination (Case No. 79-110) found that the primary function of the Mayor was not crime control or reduction or enforcement of the criminal laws. Primary function is determined on such criteria as the frequency of involvement in law enforcement activity and activities authorized under the job description. 28 C.F.R. Part 32. This determination was affirmed by the LEAA Hearing Officer when presented with all additional information and evidence by the claimant during the appeal. The Hearing Officer concluded:

> "His (Mayor Moscone's) primary duty, as stated in the charter for the City of San Francisco and described by Milinore and Teitlebaum, was administration and he gave law enforcement and police work only an equitable share of his time and attention compared with that given to other important departments of the City/County government."
>
> (Hearing Officer's Determination, September 18, 1979, p.9.)

There is substantial evidence in the record to support the finding and conclusion of the Hearing Officer on this point.

Accordingly, as law enforcement was not Mayor Moscone's primary function of office, it must be demonstrated for coverage, that Mayor Moscone was engaged in crime control or reduction or enforcement of the criminal law at the time of his death. In the initial determination, it was found that Mayor Moscone was not so engaged. This determination was affirmed by the Hearing Officer upon presentation of additional information. The Hearing Officer concluded:

> "At the time of his assassination, George Moscone was not enforcing any part of the criminal law. He was enforcing an opinion which had been issued by the City Attorney at the direction of the Board of Supervisors."

There is substantial evidence in the record to support this finding and conclusion of the Hearing Officer.

Mayor Moscone was not acting in the "line of duty" as defined by PSOB regulations. This determination is consistent with prior legal opinions from the LEAA Office of General Counsel. Although there have been no cases on point, that office has issued several advisory opinions explaining "line of duty." In a letter to the National Volunteer Fire Council from the Office of General Counsel, dated January 8, 1978, it was stated:

> "If the firefighter's primary function is to engage in fire suppression, he will be covered for any death sustained in the line of duty regardless of whether he died in connection with a fire call. If the firefighter's primary function is actually something other than fire suppression, his death will only be covered by PSOB if it occurs while he is in the course of performing his firefighting duties. . . An officer's 'primary function will be gauged by LEAA on the basis of both his frequency of involvement in firefighting activities and as assessment of the actions he was authorized to perform under his job description or the department's legal authorization.' " (see also letter to Oklahoma State Firefighters Association from LEAA OGC, March 8, 1978.)

Although the advisory opinions generally deal with firefighters the reasoning is applicable to the law enforcement situation.

Payment of benefits under the Public Safety Officer's Benefits Act of 1976 is not legally authorized in the instant matter. Payment of benefits is authorized only for those survivors of public safety officers who die in the line of duty as defined in the implementing regulations. The regulations extend coverage to officers who are primarily engaged in crime control or reduction or enforcement of the criminal law.

The primary function of Mayor Moscone was not crime control or law enforcement. Mayor Moscone did engage to a limited extent in such activities. The regulations recognize this type of situation and reflecting the intent of Congress specifically extend coverge only for the crime control and law enforcement activities actually engaged in by the officer. At the time of his death, Mayor Moscone was not performing any authorized action for the control or reduction of crime or the enforcement of the criminal law.

I. Meter Patrol Officer

June 19, 1981

OGC Memorandum

SUBJECT: **Coverage of Senior Meter Patrol Officer**

This is in response to your request concerning the above captioned claim. The case involves a "Senior Meter Patrol Officer" in Brownsville, Texas, who was shot and killed after an argument about a parking ticket he had just issued. It is the opinion of this office that

Mr. E. was not a law enforcement officer within the meaning of the Public Safety Officers' Benefits Act, 42 U.S.C. 3796, and that his survivors are, accordingly, not entitled to benefits under the Act.

Both the PSOB Act, 42 U.S.C. § 3796b(5), and its implementing regulations at 28 C.F.R. 32.2(i), define a law enforcement officer as a "person involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws." For an award to be granted, the Act requires a finding that the decedent had authority to act as a law enforcement officer.

It is our determination that the record fails to substantiate a finding that Mr. E. was involved in the enforcement of criminal laws as required by the Act. There is no indication on the parking tickets Mr. E. issued or in the description of violations Mr. E. was responsible for enforcing that the parking regulations were criminal laws which would subject the violator to criminal penalties. The parking ticket in the record does not support a determination that the issuance of such a ticket is an "ordering of a person to appear at a time and place certain" and therefore the "execution of criminal process" as argued by Mr. E.'s survivors. The procedure described on the ticket indicates that the violators may pay a fee or arrange for a court hearing within thirty days. The procedures as written on the ticket must be followed to avoid an "issuance of a *formal summons* (emphasis added) requiring a court appearance."

Further, according to section 27(a) of Article 6701d, V.T.C.S., "local authorities with respect to streets and highways under their jurisdiction" can regulate the "parking of vehicles." State statute does not define these local regulations as having the status of criminal laws. Section 22 does define failure to obey traffic laws as a misdemeanor but those laws apply only to the "operation of vehicles upon highways" (Section 21).

Mr. E.'s survivors argue that under Texas law Mr. E. was a "Peace Officer" with law enforcement authority. They rely on Article 2.12, Texas Code of Criminal Procedure, which provides that "any private person specially appointed to execute criminal process" is a "Peace Officer." Article 4413(29aa), V.T.C.S., generally requires that "Peace Officers" be certified by the State. Mr. Jack Pyle of the Texas Commission on Law Enforcement Standards and Education has written that no record exists showing that Mr. E. "is now or has ever been a certified peace officer in the State of Texas."

Neither the application of state statutes nor the facts of the case support a finding that Mr. E. was involved in the enforcement of criminal laws as required by the PSOB Act.

J. Private Security Officer

March 7, 1979

OGC Memorandum

SUBJECT: **Coverage of Private Security Officer**

In this claim, a private security officer assigned to maintain order at a State employment office was shot and killed while attempting to make a job applicant take a seat. In our opinion, the decedent is not covered by the Act because he is not a "public safety officer," as defined in 28 C.F.R. 32.2(h).

Section 32.2(h) defines a "public safety officer" as

> ". . . any person serving a public agency in an official capacity, with or without compensation, as a law enforcement officer or firefighter."

The decedent is excluded from coverage under this section for two reasons. First, he was not "serving a public agency" at the time of his death. His employer's contract with the State employment office specifically stated that guards such as the decedent "shall not in any way be subject to the control of [the State office] or its agents, servants or employees." The contract also states that the guards "shall be supervised at all times by [the private security service] so that they can perform competent professional work as security guards." These excerpts make it clear that the decedent was actually serving his private employer during his assignment to the employment office, and contractually beyond the control of the State.

The legislative history of the PSOB Act supports the position that the link between the decedent and the public agency in question is too weak to justify coverage under the Act. During House consideration of the PSOB Act, Congressman Eilberg, the bill's sponsor engaged in the following dialogue with Congressman Myers of Pennsylvania:

> "Mr. Myers of Pennsylvania: Could the gentleman tell me, is there any way in which this bill would apply to privately employed safety or security officers?
>
> "Mr. Eilberg: No, it would not.
>
> "Mr. Myers of Pennsylvania: What if they were called by a local arm of the government or the local police organization to assist in any way?

"Mr. Eilberg: It is my opinion that they would not be included." Cong. Rec. H 3725-26 (April 30, 1976, daily ed.)

If an actual call to service by a law enforcement agency was thought to be insufficient to bring private security officers within the scope of this Act, the nexus between the decedent and a public agency in the present case must be seen to lie even further beyond the scope of the Act.

The second reason for concluding that the decedent was not a "public safety officer" is that he was not a "law enforcement officer" within the meaning of Section 32.2(i) of the regulations. That section defines a "law enforcement officer" to be, in relevant part:

> ". . . any person involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws, including but not limited to police, corrections, probation, parole, and judicial officers. . ."

The job instructions given the decedent by the manager of the security service did not give him any authority to enforce the criminal law. He was instructed, instead to act as follows in the event of a disturbance:

> "In case of disorder or violation of casual labor rules, Security Guard will ask the violator to leave the building. If the violator refuses to leave the building, Security Guard will notify Casual Labor Management Personnel, who will in turn call city police. Under no circumstances will Security Guard attempt to manhandle any patrol or violator except to protect his own person or to protect the property of Employment Security Division then only necessary force may be used."

The authority to "manhandle" a violator in extreme circumstances is not tantamount to an arrest or any other proper exercise of law enforcement authority. Police authority could not, in any event, be granted to the decedent by his private employer.

Accordingly, we suggest that you use the following language to deny this claim:

> "Specifically, the decedent was not a 'public safety officer' within the meaning of the Act because he (1) was not 'serving a public agency' at the time of his death, and (2) did not have the authority to enforce the

criminal laws or otherwise act as a law enforcement officer as defined in 28 C.F.R. 32.2(i). See the attached legal memorandum."*

K. Psychiatric Aide

March 20, 1981

Hearing Officer's Decision

SUBJECT: **Coverage of Psychiatric Aide at Hospital for Criminally Insane**

The initial LEAA determination was based on the following findings of fact and conclusions of law:

> On September 27, 1978, Mr. N. was on duty in the Biggs Building of the Fulton State Hospital. While escorting patients from the dining area back to their ward, Mr. N. was attacked and struck upon the head by a patient who was hiding in the hallway. Mr. N. was fatally injured. His death was caused by cerebral concussions and lacerations.
>
> ...[T]he death of Robert N. is not covered under the provisions of Volume 28, Part 32 of the Code of Federal Regulations and Section 701 of the Omnibus Crime Control and Safe Streets Act of 1968 as amended (42 U.S.C. 3796). Mr. N. is not a public safety officer as required by the Act and as set out in 28 C.F.R. 32.2(h), (i) and (j).

The basis for his determination is expressed in detail in a memorandum prepared by the LEAA Office of General Counsel and dated December 3, 1979. The primary criterion for coverage applied by this memorandum is the authority of the decedent to act as a public safety officer. The memorandum concludes that Mr. N., as a Psychiatric Aide, did not have authority to act as a public safety officer. This conclusion is based on a review and comparison of relevant position descriptions, a review of Missouri case law and a review of testimony in precedent PSOB cases.

*See also § I.D., "Contractors."

Testimony taken on September 26, 1980 and subsequent submissions have served to expand the record and to guide interpretation of the pre-existing record, most notably the 14 transcribed tapes of the interviews held by the committee which investigated Mr. N.'s death. The criterion to be satisfied remains the same - the authority to act as a public safety officer. It is the function of this determination to assess the expanded record in light of that criterion.

Authority to Act

The authority to act is the common denominator of coverage. It is defined in the regulations and commentary as: ...[T]he authority to be "involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws." 42 Fed. Reg. 23252 (published May 6, 1977).

In addressing a directly related matter, the commentary makes a distinction between those public safety officers whose primary function is crime control or reduction, enforcement of the criminal laws, or suppression of fires, and other officers. The commentary concludes:

> "...PSOB coverage will be extended to those officers who engage in one or all of the above activities, where such activity is not their primary function, only when they suffer a personal injury in the course of crime control or reduction, enforcement of the criminal laws, or fire suppression." 42 Fed. Reg. 23259 (published May 6, 1977).

Indicators of Authority

Setting. Mr. N. was killed in a corridor in the Biggs Building which is located in the northeast corner of the grounds of the Fulton State Hospital. The Fulton State Hospital provides mental health services to the 34 counties that make up the northeast quadrant of the State of Missouri. The Biggs Building is the state's only male maximum security psychiatric facility and serves the whole state. It is both physically and programmatically separate from the other programs of Fulton State Hospital.

The maximum security nature of the Biggs facility is readily apparent. It is surrounded by a high fence, topped with barbed wire. Entry and exit are tightly controlled at the control center. A sophisticated and extensive electronic surveillance system is operated 24 hours a day. Movement within the facility is tightly regulated.

This level of security is necessitated by the makeup of an inmate population of about 200. Over 80 percent of the inmates are Circuit Court commitments for "care, custody and treatment." In order of their occurrence, according to a recently taken inmate census, they are: not guilty by reason of insanity, 87; incompetent for trial, 34; committed for pretrial evaluation, 28; criminal sexual psychopaths, 15; and transfers from the Missouri State Penitentiary, 3.

Within Biggs, inmates are assigned to specific wards based on program and security considerations. In addition to the maximum security nature of the entire facility, three closed or security wards offer an additional level of security for specific inmates. These are wards 7, 8 and 9 which offer, respectively, short-term care for acute behavior problems, new admissions evaluation, and new admissions for pre-trial examination. Mr. N. was in charge of ward 8 on the day he was killed.

The Biggs Building performs a unique, dual function of treatment and secure custody. It is charged, by the court, with the same responsibility for custody and care or safekeeping as the prison system. And it is charged with the additional responsibility of treatment. This dual responsibility is met in part by the manner in which the facility is staffed.

Staffing. The staff position which has direct responsibility for the dual role of security and treatment is entitled Security Aide (Psychiatric). Prior to March 1, 1979 and during the time of Mr. N.'s service, the position was entitled Psychiatric Aide (Security). Mr. N. served as a Psychiatric Aide II (Security).

The parenthetical designation "security" is significant. For although Psychiatric Aides did and do make up the bulk of the work force of the state mental hospitals, only those with the security designation were allowed to staff the forensic unit (i.e., Biggs and its small rehabilitation unit outside of the Biggs complex). Successful completion of specific training in security was a prerequisite for the security designation and for assignment to Biggs. The security responsibilities that flowed from this designation and from assignment to Biggs were reflected in a 10 percent "security differential' in pay for those so designated and assigned.

The initial claim was silent on all of these matters - designation, assignment, training, pay differential - and therefore failed to distinguish Mr. N. and other Biggs staff from other Psychiatric Aides throughout the state system. The initial agency determination was made based on an analysis of the position description under which all Psychiatric Aides function.

The new job class of Security Aide was created a few months after Mr. N.'s death as the position description for Biggs staff. It is set up at the

same salary level as the Corrections Officer series under the Missouri Merit System, reflecting a conclusion that the 10 percent security differential was not adequate compensation for the duties of aides at Biggs. The new description does not, as agency analysis has noted, provide much specific information on security responsibilities; it cites the existence of security responsibilities in reference to the rules, regulations and guidelines of the forensic unit.

Policies, Procedures, Rules, Regulations and Guidelines. The security responsibilities of the Psychiatric Aide (now Security Aide) assigned to Biggs are quite clearly addressed in the unit's written policies and procedures for security.

The individual responsible for security policy and procedures, and accountable for the overall security of the Biggs Building, is a Security Aide III (Psychiatric). At the time of Mr. N.'s death, the same individual, with the same responsibilities, held the job title of Psychiatric Aide III (Security). His functional title, within Biggs, is "Forensic Security Supervisor." His informal title is "Head of Security."

The Biggs control room, which controls entry and exit and which monitors the facility, is staffed by Security (formerly Psychiatric) Aides. Control room staff are guided by procedures which authorize them to: Check and question all who seek entrance; check the contents of all containers; stop law enforcement officers from carrying weapons into the building; sound the "All Call" when needed.

The emergency "All Call" procedure, established to move staff quickly to an area where trouble breaks out, is specifically a call for all *Aides* to report "double-quick." In operation this call directly excludes support personnel (e.g., dietary, housekeeping, laundry, secretaries). Treatment staff are not excluded but are expected to assist primarily with medical intervention as necessary. The primary burden for quelling disturbances, establishing order and maintaining Security is on the Security (formerly Psychiatric) Aides.

The chain of command regarding security, and the means necessary to its maintenance, is also denoted clearly in the procedures. Routine control room procedures require that all incidents involving security be reported immediately to the "nursing supervisor," a position staffed by a Security Aide III or a Security Aide II. Persons refused entry for security reasons are to be referred to the "Unit Director, Nursing Service Supervisor, or Security." The former is the director of the total forensic program, the latter two are Security Aides III or II.

Emergency procedures, addressing the use of irritant dust, mace and tear gas, clearly denote the chain of command. Authorization for the use of tear gas within the building may be given by the Shift or Security

Supervisor or by control room personnel, in their absence. These positions are staffed by Security Aides III and II, respectively.

The routine security responsibilities of the Security Aides II, who function as Ward Charges and supervisors in each of Biggs' ten wards, are addressed in some detail in testimony. These aides are expected to monitor the movement of the inmates to and from the ward. At the direction of the Security Supervisor, they conduct shakedowns in search of contraband. They are expected to handle disruptions in a competent and tactful manner. They have leather restraints available to them on the ward. Should they require other means, they can approach the control room and check out, in order, steel restraints, mace and tear gas. Policy makes it clear that tear gas is to be used in the building only when the situation is life threatening or as the last resort to prevent an actual escape attempt.

Summary Perspective. The expanded record draws a clear distinction between the position of Psychiatric Aide and the position of Psychiatric Aide (Security). The latter received additional training and additional pay, both directly related to security responsibility. The latter bore specific additional security responsibilities and was provided with the means to satisfy those security responsibilities.

The distinction, drawn by initial agency analysis, between the position held by Mr. N. and the positions of Security Officer and Corrections is eroded by the expanded record. The training received by each is virtually indistinguishable in basic content and duration. The routine security responsibilities of the Corrections Officer and the Psychiatric Aide (Security) were more similar than different. All three have powerful means of enforcement at their disposal.

The position of Psychiatric Aide (Security) did not possess the potential for use of firearms inherent in the positions of Corrections Officer or Security Officer. However, the position did possess the authority for the use of chemical agents; and there is general agreement among states regarding the gravity of this means. A 1978 Maryland case cited the Oklahoma guidelines for the use of force in corrections facilities as representative.* Those guidelines establish the levels of escalation as follows:

1. Physical restraint
2. Show of force
3. Use of physical force other than weapons fire (Riot Squads)

*See *McCargo* v. *Mister,* 462 F. Supp. 813, 819 (D. Md. 1978), citing *Battle* v. *Anderson,* 376 F. Supp. 402, 414 (E.D. Okl. 1974).

4. Use of high pressure water
5. Use of chemical agents
6. Fire by selected marksman
7. Use of full fire power

Finally, the record invites two other conclusions about the dual responsibility - treatment and security - of the Psychiatric Aide (Security). First, it was not shared by the professional treatment staff. There was an undercurrent of tension within the facility between the aides and the treatment staff regarding the latter's perceived lack of sensitivity to security requirements. Second, the Security Officers assigned to the Fulton State Hospital grounds could not practically provide security for the Biggs Building. There was a maximum of three on the grounds at any time. They were primarily assigned to other duties. Any disturbance serious enough to require outside assistance would require much greater numbers.

Findings of Fact

Introduction. The Biggs Building, which houses three forensic programs on the Fulton State Hospital grounds, is the state's only male maximum security psychiatric facility. Given its legal mandate, the nature of its inmates/patients, its physical design and its security procedures, it can be properly characterized as a prison with treatment responsibility.

Security Responsibility. The dual responsibility - treatment and security - is borne most directly by the staff at the Biggs Building functioning under the job title Security Aide (Psychiatric). Prior to the creation of the job title Security Aide on March 1, 1979, the dual responsibility was borne by staff working under the job title Psychiatric Aide (Security). The Aides share treatment responsibility with the professional treatment staff; security responsibility are not similarly shared. Treatment-staff are expected to follow security regulations; but the basic burden of security maintenance and enforcement is borne by the Aides.

The security responsibilities of Aides at the Biggs Building are reflected indirectly by the security training required prior to eligibility for assignment to Biggs and by the pay level, which was 10 percent higher than that of other Psychiatric Aides, prior to March 1, 1979, and which is now equal to that of Corrections Officers.

The security responsibilities of Aides at the Biggs Building are directly reflected in actual activities, routine and emergency, in which the Aides engage. These include, but are not limited to, making security rounds in the wards or other areas assigned; escorting inmates, singly

and in groups, to and from the wards and activity areas; conducting shakedowns in search of contraband; and quelling disturbances.

It is my finding, that, while engaged in one of the above listed activities, staff working under the job title Psychiatric Aide (Security) or the job title Security Aide (Psychiatric) are functioning as public safety officers. While engaging in these activities, they are virtually indistinguishable from Corrections Officers. While performing under the two listed job titles, they are afforded the procedural and enforcement means to carry out their security responsibilities.

The Occasion of the Personal Injury. Robert N., on September 27, 1978, while serving under the job title Psychiatric Aide II (Security) and functioning as Ward Charge on security ward #8, was escorting the inmates assigned to ward #8 from the dining room back to their ward. While leading the group through a corridor, he was attacked by an inmate who had been hiding and was beaten to death by the inmate, who was armed with a metal object.

It is my finding that, at the time of the incident, Mr. N. was authorized to be, and was in fact, engaged in a public safety officer activity.

Conclusions of Law

This case presents no "conflict of law" issues.

The administration has given substantial weight to the evidence and findings of fact presented by state and local administration and investigative agencies. In relying upon, and making a determination consistent with, official state documents and submissions, the Agency has met this requirement.

The Agency's denial of this claim was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The administration considered the record available at the time of denial and sought and followed the advice of legal counsel.

The Agency's denial of this claim was supported by substantial evidence. The denial was based on the whole record available and directly consistent with that record.

The initial Agency action, based on the initially available record, was responsible and sound. However, the expanded record presents a substantially different case. It is my conclusion that the death of Robert G. N. is covered under the provisions of Volume 28, Part 32 of the Code of Federal Regulations and Section 701 of the Omnibus Crime Control and Safe Streets Act of 1968 as amended (42 U.S.C. 3796). While it can be argued that Mr. N. did not function primarily

as a public safety officer, he was functioning as a public safety officer at the time of the fatal personal injury as required by the Act and as set out in 28 C.F.R. 32.2(h) (i) and (j).

Determination

The claimant, Mrs. Betty N., is eligible to receive and should be paid the death benefit.

L. Revenue Officer

August 29, 1979

OGC Memorandum

SUBJECT: **Public Safety Officer Status of Mississippi Revenue Officer**

In this file, the decedent was a Mississippi Revenue Officer who died in an automobile accident while pursuing a truck that failed to stop at a weight and inspection station.

Mississippi Revenue Officers are agents of the State Motor Vehicle Comptroller, who has the duty, and all "necessary power" to administer and enforce laws relating to motor vehicle license taxation and other laws placed under his jurisdiction. Mississippi Code Ann. §27-5-15. His employees on duty at inspection stations, have the authority to "enforce the provisions of all laws. . . [relating to taxes on motor vehicles, site and weight restrictions, type of cargo, fitness of drivers, and inspection laws]. . . and . . . have the authority to make arrests and hold and impound any vehicle which is being operated in violation of any of the laws administered by the comptroller. . ." *Id.*

The failure to stop at an inspection station is a misdemeanor under Mississippi law. Mississippi Code Ann. §27-5-77. Accordingly, the decedent was a public safety officer who died in the course of exercising his law enforcement authority. His death should, therefore, be covered under the Act.

M. School Crossing Guard

January 21, 1981

Administrator's Final Decision

SUBJECT: **School Crossing Guard's Status as Law Enforcement Officer**

I have completed a careful review of the file in the above claim... It is my determination, based on this review, that the Agency Hearing Officer's determination of eligibility is erroneous and must be reversed.

The primary issue on appeal was whether the decedent was a "law enforcement officer" as this term is defined in 42 U.S.C. §3796b(5) and 28 C.F.R. 32.2(i). Those sections define a law enforcement officer as "a person involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal law."

For an award to be granted to survivors, the Public Safety Officers' Benefits Act requires a finding that the decedent had authority to act as a law enforcement officer. The Hearing Officer in this case determined that Mrs. J. was a "public safety officer" who was "clearly 'clothed' with law enforcement authority and the power to enforce certain public laws." The record in the present case, however, fails to demonstrate that Mrs. J. was involved in crime control or enforcement of criminal laws as required by the Act.

Mrs. J.'s primary function was to control traffic near schools. The "other duties in the nature of criminal law enforcement beyond mere regulation of traffic" referred to in your rebuttal argument to the November 24, 1980 General Counsel's memorandum are "lookouts" for known and suspected law violators such as those involved in auto theft, child molestation, and drugs. A re-reading of the evidence, however, substantiates the General Counsel's conclusion that "Although their general law enforcement authority is alluded to by witnesses at the hearing, no credible recitation of events was provided to corroborate the intention that they did, in fact, possess and exercise that authority."

The lack of evidence supporting this claim that a school patrol guard has law enforcement authority distinguishes the present case from the M. case (PSOB Claim #79-90). An award under the PSOB Act was given to the survivors of Mr. M. who was a member of an Ohio auxiliary police force killed while directing traffic. In contrast to the present case, clear evidence was offered in the M. case corroborating Mr. M.'s participation in a wide variety of crime control activities. Also, in that case reference was made to an Ohio Statute which defined "law enforcement officer" to include a member of the auxiliary police force.

The PSOB Act requires the decedent to have authority to act as a law enforcement officer. It further requires in 28 C.F.R. §32.1 that the decedent die as a result of an injury sustained "in the line of duty" which is defined in §32.2(c) as an action of an officer "whose primary function is crime control or reduction." Mrs. J. at the time of her

death was controlling traffic near a school. Traffic violations are not criminal offenses. The only exception to administrative penalties are those which involve homicide by vehicle. This claim fails to meet the "primary function" test of the Act; the evidence fails to establish that Mrs. J.'s primary function was crime control.

On the basis of the record, I adopt the following as facts of this case:

1. The decedent died from head injuries sustained when she was struck by a motor vehicle on January 12, 1979 at a school crossing over a public highway (No. 138) in Clayton County, Georgia.

2. At the time of decedent's death, she was employed by the Clayton County Police Department to direct traffic in school-zoned areas and was assigned a school crossing post in front of the Swint Elementary School.

3. At the time of decedent's death she was properly performing her duties of directing traffic.

4. The functions being performed by the decedent at the time of her fatal accident were not those which involved crime control or enforcement of the criminal laws.

The basic conclusion of law that I have reached is that the decedent was not a public safety officer as the term is defined in the Public Safety Officers' Benefits Act because she did not have law enforcement authority. As a result of my review the final agency determination is that the claimant is not entitled to benefits under the Act.

You did request the opportunity to appear before me for oral argument. I regret that I cannot make a finding favorable to your client but in my judgment the evidence and arguments are included in the record and an appearance before me would not provide additional support for the claim of Mrs. J.'s survivors.

N. Volunteers

May 11, 1981

Administrator's Final Decision

SUBJECT: **Requirement that Volunteer Firefighter Be "Officially Designated" Member of VFD**

I have completed a careful review of the file in the above claim. It is my determination, based on this review, that the agency Hearing Officer's determination of eligibility is erroneous and must be reversed.

The Hearing Officer's conclusion that Mr. S. was a firefighter covered under the Act is set forth in the following statement from the determination:

> "Mr. S. had previously been a paid member of the East Baldwin Volunteer Fire Department. He had attended training sessions and had participated in fighting fires, even at times when he was not 'paid up.' These circumstances would differentiate him from merely being a good samaritan, whom the Act did not anticipate covering. His prior experience, combined with the request of the Fire Chief to assist—whether or not a 'designation' or 'official designation' under the Act—resulted in his response out of a belief of duty or obligation. The totality of the circumstances, considered in light of the gratuitous intent of the statute and regulations, leads to the conclusion that he was public safety officer covered by the Act at the time of his death."

The regulations implementing the Public Safety Officers' Benefits Act define, at 28 C.F.R. 32.2(j), a "firefighter" covered by the Act to include; "...all fire service personnel authorized to engage in the suppression of fires, including any individual serving as an officially recognized or designated member of a legally-organized volunteer fire department."

This definition is based on the statutory definitions of "public safety officer" (42 U.S.C. 3757 b(7)) and "fireman" (42 U.S.C. 3757 b(3)). It establishes that fire service personnel include not only paid firemen who have an employer-employee relationship with the public agency but also individuals serving the public as an *officially recognized* or *designated* member of a legally organized volunteer fire department.

My review of the record leads me to conclude that Mr. S. was not, under the law, an officially recognized or designated member of the East Baldwin Volunteer Fire Department or any other fire department at the time of his death. It can be concluded from the record that the Acting Chief of the Department authorized Mr. S. to "engage in the suppression" of a fire in the broadest sense of the term, by assisting in traffic control at the scene of a fire. However, that action was not sufficient to bring Mr. S. within the Act's coverage because he did not, as a result, qualify as "fire service personnel." Rather, he was acting as a citizen and as a "good samaritan." To qualify as (volunteer) "fire service personnel" he would have been "serving as an officially recognized or designated member of a legally organized volunteer fire department."

There is no evidence that the Chief of a volunteer fire department in Maine has authority to verbally appoint volunteers at the scene of a fire or, if that is the case, that such an appointment would amount to an official recognition or designation of Mr. S. as a member of the East Baldwin Volunteer Fire Department.

In fact, the records demonstrates that under Maine law Mr. S. was not a volunteer fireman. As found in 30 Me. Stats. §3771(4), a voluntary firefighter is defined as a person who is "an active member of a volunteer fire association..." As found in the record, Mr. S. was not a dues paying member of the East Baldwin Fire Department. He was not listed on the department's rolls as a member and he no longer attended its training sessions. Accordingly, he was not an "Active Member" of the fire department because he had failed to continue to meet the state's criteria for official recognition or designation as a member.

A second reason underlying my conclusion that Mr. S.'s death is not covered by the Act is the clear legislative history of the Act. The Congressional debate demonstrates a clear intent to exclude from coverage good samaritans who do not meet the statutory criteria for coverage.

Congressman Eilberg sponsor of the Act, and Congressman Myers of Pennsylvania discussed this issue during the House debate on the Firefighters Benefits Act of 1975, which was subsequently incorporated as part of the Public Safety Officers' Benefits Act:

> "Mr. Myers of Pennsylvania: Mr. Chairman, I rise again, as I did in the last bill, to ask the chairman of the commitee for some legislative history in regard to coverage of this bill.
>
> Could the chairman tell me if the people who are involved in preparation of fire equipment who are not members of a fire organization, but are hired by that organization, and were to be killed, would they be covered?
>
> "Mr. Eilberg: I would say no.
>
> "Mr. Myers of Pennsylvania: Would the gentleman also respond to the possibility of a good samaritan activity, a volunteer who is not on the roll of a volunteer organization?
>
> "Mr. Eilberg: He would not be covered.
>
> "Mr. Myers of Pennsylvania: What about an individual who is fighting his own fire on his own property?

"Mr. Eilberg: He would not be covered.

"Mr. Myers of Pennsylvania: What specifically would constitute membership in a firefighting organization?

"Mr. Eilberg: The bill defines fireman to include a volunteer of a legally organized volunteer fire department, and such firemen are covered when they are actually and directly engaged in fighting fires.

"Mr. Myers of Pennsylvania: Would a volunteer fireman have to be shown on a specific roll or membership list prior to the accident?

"Mr. Eilberg: Yes.

"Mr. Myers of Pennsylvania: This bill was not constructed to direct specifically in any way the situation where a firefighter met death as a result of a violent criminal activity, such as a sniper, was it?

* * *

"Mr. Eilberg: If the killing occurred while he was fighting a fire he would be covered...

"Mr. Myers of Pennsylvania: What about the man who is not a member of a firefighting organization? Is he not covered?

"Mr. Eilberg: No." Cong. Rec. H 3738-39 (April 30, 1976, daily ed.)

Mr. S. was neither "on the roll" of a volunteer organization, "on a specific roll or membership list," nor "a member of a firefighting organization" at the time of his death. Therefore, I must conclude that he was not intended by Congress to be covered by the Act. He was the "good samaritan" that Congressman Eilberg said would not be covered.

On the basis of the record, I adopt the following as my findings in this case:

1. The Decedent died from injuries sustained in a motorcycle accident occurring shortly after being asked by the Acting Chief of The East Baldwin Volunteer Fire Department to assist with traffic control near a fire.

2. At the time of Decedent's death, he did not qualify as fire service personnel because he was not serving as an officially recognized or designated member of the East Baldwin Volunteer Fire Department.

The dispositive conclusion of law that I have reached is that the decedent was not a firefighter as the term is defined by the Public Safety Officers' Benefits Act and regulations because he did not qualify as "fire service personnel authorized to engage in the suppression of fires." As a result of my review, the final agency determination is that the claimant is not entitled to benefits under the Act.

May 20, 1977

OGC Memorandum

SUBJECT: **"Legally-Organized" Fire Department**

This is in response to your inquiry of May 2, 1977, concerning the use of the term "legally-organized fire department" in Section 32.2(j) of the final LEAA Public Safety Officers' Benefits regulations, 28 C.F.R. 32.1 *et seq.,* published at 42 F.R. 23251 on May 6, 1977.

Your understanding that the term excludes "vigilante" fire departments that are not recognized by a unit of local government is correct. LEAA will accept any proof of legal organization that the volunteer department can offer. To date, for example, we have accepted the department's charter, the contract pursuant to which the local jurisdiction authorized it to provide fire service, and an affidavit from the executive officer of the local unit of government attesting to the department's status. All documentation is, of course, subject to the authenticity requirement set forth in Section 32.21(c) of the regulations.

November 14, 1977

OGC Memorandum

SUBJECT: **PSOB Coverage of Community Volunteers**

You have asked this office for an advisory legal opinion on whether volunteers serving as elderly escorts, or as part of neighborhood watch teams, under Community Anti-Crime Programs (CACP) are covered by the Public Safety Officers' Benefits (PSOB) Act of 1976. We believe that they would be covered only under certain, limited circumstances.

Volunteer firefighters are expressly covered by the Act if they serve as "officially recognized or designated member(s) of a legally organized volunteer fire department." 42 U.S.C. 3796b(3). The same criteria

should apply to determining whether other volunteers are within the scope of the Act. Only where CACP participants have (1) been officially designated as persons authorized to engage in crime and juvenile delinquency control or reduction by the group they serve, and (2) the group has been given legal sanction as a unit of law enforcement by the appropriate local unit of government, will they be deemed "public safety officers" within the meaning of the Act. The other requirements for eligibility set forth in the Act and the LEAA PSOB Regulations, 28 C.F.R. 32.1, *et seq.*, would, of course, also have to be met before any benefits were awarded. This latter process can be accomplished through a process similar to that required by Section 301(b)(6)[42 U.S.C. 3731(b)(6)(1976 ed.)] for community service officer grants.

September 18, 1979

OGC Memorandum

SUBJECT: **Law Enforcement Authority of Kansas "Volunteer Sheriff's Deputy"**

This is in reply to your inquiry regarding the authority of a Marion County volunteer sheriff deputy to respond to a crime complaint while he is off-duty.

Under Kansas law, it is the duty of the deputy sheriffs to "keep and preserve the peace in their respective counties, and to quiet and suppress all affrays, riots and unlawful assemblies. . ." (Kansas Stat. Ann., 19-813). No distinction is made in the statute between salaried and unsalaried deputies; the test for the official act of a non-pay deputy sheriff is whether the task falls into the category of duties imposed on *all* deputy sheriffs by the statute. See *Smith* v. *Fenner,* 102 Kan. 830 (1916).

Thus, provided that the decedent was operating at the time of his death in Marion County, it appears that he was charged by law to preserve the peace whether on duty or not.

As regards the decedent's authority within an incorporated area, Kansas Stat. Ann. §22-2401a(1) states that. . . "sheriffs and their deputies may exercise their powers as law enforcement officers anywhere within their county. . ."

No exception appears in the statute or case law for incorporated areas within the county.

Therefore, it appears that the decedent was operating within the scope of his authority.

The fact that the initial shots were not fired in decedent's presence is not controlling. Inasmuch as Deputy M. had authority to make arrests in preservation of the peace, he was empowered by Kansas Stat. Ann. §22-2401(c)(2)(ii) to arrest one who he had probable cause to believe would cause injury to others, or damage to property, regardless of whether the offense is committed in his view.

The above conclusions were corroborated by a telephone conversation with Sheriff J. on September 10, 1979. Sheriff J. stated that M. was empowered to respond to complaints of this type while off duty. He also stated that M. had at one time been active in the Goessel Police Force, that he had contacted the Goessel Police Force by police radio (which he possessed) on his way to the scene, and that Sheriff J. would have expected him to respond to a complaint immediately and to arm himself in such circumstances, even if not on duty status. M.'s former membership in the Goessel Police Force probably explains his possession of the police radio and holster.

II. Personal Injury

PSOB Regulations

Definitions—28 C.F.R. 32.2

> (d) "Direct and proximate" or "proximate" means that the antecedent event is a substantial factor in the result.
>
> (e) "Personal injury" means any traumatic injury, as well as diseases which are caused by or result from an injury, but not occupational diseases.
>
> (f) "Traumatic injury" means a wound or other condition of the body caused by external force, including injuries inflicted by bullets, explosives, sharp instruments, blunt objects or other physical blows, chemicals, electricity, climatic conditions, infectious diseases, radiation, and bacteria, but excluding stress and strain.
>
> (g) "Occupational disease" means a disease which routinely constitutes a special hazard in, or is commonly regarded as a concomitant of the officer's occupation.

28 C.F.R. 32.4—Reasonable doubt of coverage.

> The administration shall resolve any reasonable doubt arising from the circumstances of the officer's death in favor of payment of the death benefit.

Commentary to the Regulations

§ *32.2(e).* To be covered by the Act, an officer's death must be "the direct and proximate result of a personal injury sustained in the line of duty." The terms "direct and proximate result" and "personal injury" are not defined in the Act. The House Judiciary Committee Reports on H.R. 365 (firefighters) and H.R. 366 (public safety officers) noted the Committee's intent that the "direct and proximate result" requirement cover "those cases where the personal injury is a substantial factor in bringing about the officer's death." House

Reports No. 94-1031 and 94-1032 (94th Cong., 2d Sess.) at pp. 4 and 5, respectively. "Personal injury" was defined in both reports to include:

> "* * * all injuries to the body which are inflicted by an outside force, whether or not it is accompanied by physical impact, as well as diseases which are caused by or result from such injuries, but not diseases which arise merely out of the performance of duty. In other words, deaths from occupational diseases alone are not within the purview of this legislation." House Reports, supra, pp. 4 and 4-5, respectively.

House debate on the issue was confined to a reiteration by Congressman Joshua Eilberg, the bill's sponsor, of the exclusion of "occupational diseases and diseases which arise out of the performance of duties" from the scope of the legislation. Cong. Rec. H 3738 (April 30, 1976, daily ed.).

In the Senate, the bill passed by the Judiciary Committee covered officers who died in the line of duty from "injuries directly and proximately caused by a criminal act or an apparent criminal act * * *". Senator Frank Moss introduced an amendment on the Senate floor, substituting "as the direct and proximate result of a personal injury sustained in the line of duty" for the more limited "criminal act" condition. In expressing his support for the amendment, Senator John McClellan noted that the bill "is not health insurance; but it does provide for payment if an officer is killed in the line of duty, either by accident or by willful assault by a criminal." Cong. Rec. S 11837-38, (July 19, 1976, daily ed.). The amendment passed and ultimately became part of the final Act.

LEAA believes that the definition of "personal injury" in the House Judiciary Committee Reports manifests the Committee's intent to limit coverage to deaths caused by traumatic injuries. The Report language is consistent with the following definition of "trauma" in Stedman's Medical Dictionary (W. H. Anderson Company-Jefferson Law Book Company, Fourth Unabridged Lawyers' Edition): "traumatism; an injury caused by rough contact with a physical object; accidental or inflicted wound." The regulations, accordingly, have defined "traumatic injury" to mean "a wound or other condition of the body caused by external force, including injuries inflicted by bullets, explosives, sharp instruments, blunt objects or other physical blows, chemicals, electricity, climatic conditions, infectious diseases, radiation, and bacteria, but excluding stress and strain." Section 32.2(f). Deaths caused by traumatic injuries do not therefore include deaths directly attributable to exertion or stress encountered in the performance of duty, unless that stress resulted in or was caused by a traumatic injury that was a substantial factor in the officer's death.

The Committee expressly excluded occupational diseases from the scope of "personal injury." LEAA has defined "occupational diseases" to mean a "disease which routinely constitutes a special hazard in, or is commonly regarded as a concomitant of the officer's occupation." Section 32.2(g). See *Hanna* v. *Workmen's Compensation Appeals Board,* 108 Cal. Rept. 227, 32 Cal. App. 3d 917 (1973); *Harman* v. *Republic Aviation Corporation,* 298 N.Y. 285, 82 N.E. 785 (1948); and *Chausse* v. *Lowe,* 35 F. Supp. 1011 (E.D. N.Y. 1938).

The definition of "personal injury" in the legislative history of PSOB, and the exclusion of occupational diseases from the scope of the Act have led LEAA to conclude that deaths resulting from chronic, congenital, or progressive cardiac and pulmonary diseases are not covered by PSOB, unless a traumatic injury was a substantial factor in the death.

Where, for instance, LEAA determines the cause of death to be myocardial infarction resulting from a coronary thrombosis, no benefit will be paid unless the claimant can demonstrate a substantial causal connection between a traumatic injury and the thrombosis. Similarly, where an officer suffering from heart disease, such as arteriosclerosis, has sustained a traumatic injury and died of a "heart attack," a benefit will be paid only if the injury is determined to be a substantial factor in the officer's death. Prior to making this determination, LEAA will submit the claim file to a forensic pathologist for review. If appropriate, the opinions of other pathologists or cardiologists will be solicited. In those cases where LEAA cannot reasonably determine which factor—the heart condition or the personal injury— was the substantial causal contribution to death, it "shall resolve any reasonable doubt arising from the circumstances of the officer's death in favor of payment of the death benefit." Section 32.4. Because an autopsy report will greatly assist LEAA in expediting its review, and making the correct determination, claimants and public agencies are encouraged to request that autopsies be performed.

[42 F.R. 23260 (May 6, 1977)]

Hubert SMYKOWSKI, Jr., et al.
v.
The UNITED STATES.
No. 288-79C.
United States Court of Claims.
April 22, 1981.
(647 F.2d 1103)

James D. Kendis, Cleveland, Ohio, attorney of record, for plaintiffs; Shapiro, Kendis & Assoc. Co., L.P.A., Cleveland, Ohio, of counsel.

Loretta Reid, Washington, D.C., with whom was Asst. Atty. Gen. Alice Daniel, Washington, D.C., for defendant; Lynn J. Bush, Virginia I. Bradley and David I. Tevelin, Washington, D.C., of counsel.

Before COWAN, Senior Judge, and KUNZIG and SMITH, Judges.

ON CROSS MOTIONS FOR SUMMARY JUDGMENT

KUNZIG, Judge:

Plaintiffs ("claimants") seek review by this court of the administrative denial of survivors' death benefits under the Public Safety Officers' Benefits Act of 1976, Pub.L. No. 94-430, 90 Stat. 1346 (1976), 42 U.S.C. §§ 3796-3796c (Supp. III 1979) ("PSOBA"). The cause now comes before the court on the parties' cross motions for summary judgment. Claimants' decedent died from a heart attack suffered shortly after engaging in a physical struggle in the line of duty. The crucial issue is whether these circumstances constitute a compensable event under PSOBA. We hold that they do not and, therefore, are unable to award the contested death benefits.

I

PSOBA provides, *inter alia*, that "In any case in which the Administration [LEAA] determines, under regulations issued pursuant to this subchapter, that a public safety officer[1] has died as the direct and proximate result of a personal injury sustained in the line of duty, the

1. Under the Act, " 'public safety officer' means a person serving a public agency in an official capacity, with or without compensation, as a law enforcement officer or fireman." 42 U.S.C. § 3796b(7) (Supp. III 1979). "Public agency" refers to states and other units of local government. § 3796b(6). *Accord,* 28 C.F.R. §§ 32.2(h) and (q) (1980).

Administration shall pay a benefit of $50,000 ... one-half to the surviving ... children of such officer in equal shares and one-half to the surviving spouse. . . ." 42 U.S.C. § 3796(a)(2) (Supp. III 1979); *accord,* 28 C.F.R. § 32.3 (1980). The implementing regulations state that, " 'Personal injury' means any traumatic injury, as well as diseases which are caused by or result from such an injury, but not occupational diseases." 28 C.F.R. § 32.2(e) (1980). The regulations further provide: " 'Occupational disease' means a disease which routinely constitutes a special hazard in, or is commonly regarded as a concomitant of the officer's occupation." 28 C.F.R. § 32.2(g) (1980). " 'Traumatic injury' means a wound or other condition of the body caused by external force, including injuries inflicted by bullets, explosives, sharp instruments, blunt objects or other physical blows, chemicals, electricity, climatic conditions, infectious diseases, radiation, and bacteria, but excluding stress and strain." 28 C.F.R. § 32.2(f) (1980).

LEAA accompanied its promulgation of these regulations with a "Commentary" in the Federal Register to the effect that deaths resulting from heart disorders, *i.e.*, "chronic, congenital, or progressive cardiac and pulmonary diseases," would not be covered by PSOBA "unless a traumatic injury was a substantial factor in the death." (The "Commentary" does not appear in the Code of Federal Regulations.) Such disorders, in addition to being highly stress-related, are considered to fall within the exclusion in the implementing regulations for occupational diseases.[2] The statement indicates that, "Where, for instance, LEAA determines the cause of death to be myocardial infarction resulting from a coronary thrombosis, no benefit will be paid unless the claimant can demonstrate a substantial causal connection between a traumatic injury and the thrombosis." 42 Fed.Reg. 23260 (1977); *accord,* 42 Fed.Reg. 23254 (1977) ("Supplementary Information").[3]

---

2. The exclusion should apparently be read as modifying the entire first clause of 28 C.F.R. § 32.2(e) (1980), rather than just the immediately antecedent clause of the regulation. *See supra* at 2.

3. The "Commentary" continues: "Similarly, where an officer suffering from heart disease, such as arteriosclerosis, has sustained a traumatic injury and died of a 'heart attack,' a benefit will be paid only if the injury is determined to be a substantial factor in the officer's death."

The issue of proximate causation under PSOBA is addressed more fully in *Morrow* v. *United States,* Ct.Cl., 647 F.2d 1099 (1981).

II

The decedent, Hubert J. Smykowski, was a police officer in Garfield Heights, Ohio. On October 5, 1976, while on duty, he responded to a call for assistance from fellow officers who were in pursuit of two suspects. When Smykowski arrived at the scene, one of the suspects had been captured and the other was known to be hiding in a nearby house. Smykowski and two other policemen entered the house and found the suspect hiding in a closet off a narrow hallway. Smykowski and one of the officers then struggled with the suspect to pull him from his hiding place and lock him in handcuffs. The struggle lasted some two to three minutes and spilled from the hallway into an adjoining bedroom. Shortly after the struggle ended, Smykowski collapsed and was rushed to a hospital, where he was soon pronounced dead.

The report of autopsy disclosed no external or internal evidence of injury. The coroner's verdict was that "death in this case was the end result of Coronary Sclerotic Hypertensive Heart Disease with Acute and Healed Myocardial Infarcts, due to stress during and following the altercation incident to the arrest of the suspect...." This determination is reflected in other medical evidence which also appears in the record.

Claimants thereafter filed for PSOBA benefits. On June 13, 1977, LEAA issued an initial determination of ineligibility. Claimant then requested formal agency reconsideration and the opportunity for an oral hearing before a hearing officer, who ultimately decided that the initial determination of ineligibility should be reversed. The Administrator, upon his own motion, reviewed the award made by the hearing officer and concluded that the initial denial should be reinstated.[4]

The Administrator reasoned that "Officer Smykowski's death was not the direct and proximate result of a personal injury as defined in

4. Under the governing regulations, "claimants" initiate the claims process by filing a written statement or form. 28 C.F.R. § 32.20(a)-(b) (1980). In general, the claim must be filed within one year of the death of the public safety officer. § 32.20(c). Upon the basis of written submissions, § 32.21, LEAA makes an initial finding as to eligibility, § 32.23. The claimant may request formal agency reconsideration of a determination of ineligibility. § 32.24. Opportunity for an oral hearing shall be provided. *Id.* If the claimant is still determined ineligible by the hearing officer, the claimant may request that the Administrator review the record and determination. § 32.24(i). The Administrator may, upon his own motion, review a determination made by a hearing officer. § 32.24(h). The Administrator is empowered to make the final agency decision. § 32.24(h)-(i). *See generally* 42 U.S.C. § 3796c (Supp. III 1979).

implementing regulations 28 C.F.R. § 32.2(e) and (f) governing the Public Safety Officers' Benefit Act. . . ." The Administrator's decision continued:

> "Deaths resulting from chronic, congenital, progressive cardiac or pulmonary diseases are not covered by the Act unless a traumatic injury was a substantial factor in the death. A traumatic injury was not a substantial factor in the death of Officer Smykowski. The stress and strain incident to a struggle was not a traumatic injury as defined by 28 C.F.R. § 32.2(f)."

The Administrator's decision was dated January 19, 1979. Claimants filed in this court on August 20, 1979.[5]

5. The topic of judicial review of PSOBA denials is discussed in *Russell* v. *LEAA*, 637 F.2d 354 (5th Cir. 1981).

III

Claimants do not take issue with the agency's position excluding stress, strain, and heart disorders from the coverage of the Act, exclusions which in any event, are amply justified by the statutory language, legislative history,[6] and medical statistics.[7] *See* 42 Fed.Reg. 23260 (1977); *Udall* v. *Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1964); *Harold* v. *United States,* 225 Ct.Cl. —, —, 634 F.2d 547, 549 (1980). Their argument, instead, is that the Administrator overlooked a crucial factor in arriving at his decision. They essentially contend that the physical struggle in which Officer Smykowski engaged just prior to his death should itself be deemed to be a compensable "traumatic injury" under the regulations. We have no doubt that physical struggle involves something qualitatively different from mere stress and strain. We also agree that physical struggle is categorizable as a traumatic event.

---

6. The following statement which appears in the two House Reports is especially relevant:

> "[I]t is the Committee's intent that the term "personal injury" shall include all injuries to the body which are inflicted by an outside force, whether or not it is accompanied by physical impact, as well as diseases which are caused by or result from such injuries but not diseases which arise merely out of the performance of duty. *In other words, death from occupational diseases alone are not within the purview of this legislation."*

H.R.Rep.Nos. 94-1031 and 04-1032, 94th Cong., 2d Sess. 4 (1976) (emphasis supplied).

7. Senator Hruska, speaking during the Senate debate on PSOBA, made the following comments pertinent to the exclusion of heart ailments as an "occupational disease":

> "Mr. President, while it is important that the survivors of public safety officers who are tragically slain be provided for, it is even more important that steps be taken to avoid unnecessary deaths of police and firefighters. The Law Enforcement Assistance Administration, which will administer this program, firmly believes that many deaths could be avoided if preventive action were taken. By preventive action, I mean assuring that these public safety officers are in good physical and mental condition.
>
> There is good reason for such preventive action, Mr. President, because *recently the National Institute for Occupational Safety and Health identified police work as a most hazardous occupation in terms of the probability of developing stress-related problems... Present evidence ... indicates that more law enforcement officers are incapacitated because of heart-related illness than due to any other cause.*

122 Cong.Rec. 30712 (1976) (emphasis supplied). *Accord,* Public Safety Officers' Benefits Act: Hearing Before the Subcomm. on Crim. Laws and Procedures of the Comm. on the Judiciary, Senate, 94th Cong., 2d Sess. 38 (1976) (testimony of Richard W. Velde, LEAA Administrator).

Regardless, we cannot accept the ultimate step in claimants' chain of reasoning, *viz.*, that physical struggle represents a form of traumatic injury. To our minds, the words "struggle" and "injury" convey totally different notions. Our view is consistent with the definition in the regulations, providing that, "[t]raumatic injury means a wound or other condition of the body ...." *See supra* at 1104. Properly speaking, a struggle cannot be deemed to be either of these. At most, a physical struggle can serve as the occasion for the sustaining of injuries. If proven, these injuries could authorize an award of benefits under PSOBA. In the instant case, however, the Administrator found that no injury had been suffered. This finding is supported by substantial evidence and therefore will be not disturbed by this court. *See, e.g., Power* v. *United States,* 209 Ct.Cl. 126, 129-130, 531 F.2d 505, 507 (1976). Thus no basis for recovery under the regulations—or statute—has been demonstrated.[8]

The public policy questions whether, and under what circumstances, heart attack deaths in the line of duty should be made compensable under PSOBA involve technical and fiscal judgments best left to Congress and the agency.[9] We would welcome legislation in which Congress addresses with specificity the applicability of PSOBA to heart ailment situations.

IV

All other arguments raised by claimants, although not directly addressed in this opinion, have been considered and found to be without merit.

Accordingly, after consideration of the administrative record and the submissions of the parties, with oral argument of counsel, plaintiffs' motion for summary judgment is denied. Defendant's motion for summary judgment is granted. Plaintiffs' petition is dismissed.

---

8. This conclusion also disposes of claimants' argument that they would have prevailed before the Administrator had this official applied the statute, rather than the regulations (and "Commentary"), in making his decision. Since no "injury" has been shown, claimants do not have a maintainable claim under any of the applicable standards.

9. A survey of the legislative history shows that Congress has not yet focused upon the relative desirability of extending coverage to heart attack situations. *Public Safety Officers Benefits Act: Hearings Before the Subcomm. on Immigration, Citizenship, and Intl. Law of the Comm. on the Judiciary, House of Representatives,* 94th Cong., 1st Sess. (1975); *Public Safety Officers' Benefits Act: Hearing Before the Subcomm. on Crim. Laws and Procedures of the Comm. on the Judiciary, Senate,* 94th Cong., 2d Sess. (1976); H.Rep.Nos. 94-1031 and 94-1032, 94th Cong., 2d Sess. (1976); S.Rep.No. 94-825, 94th Cong., 2d Sess. (1976); 122 Cong.Rec. 12002, 22633, 30518, 30711 (1976).

Beverly MORROW et al.
v.
The UNITED STATES.
No. 382-79C.
United States Court of Claims.
April 22, 1981.
(647 F.2d 1099)

Robert L. Bartelt, Jr., Evansville, Ind., attorney of record, for plaintiffs; Sydney L. Berger, Berger, Berger & Bartelt, Evansville, Ind., of counsel.

Virginia I. Bradley, Washington, D.C., with whom was Asst. Atty. Gen. Alice Daniel, Washington, D.C., for defendants; David I. Tevelin, Washington, D.C., of counsel.

Before COWEN, Senior Judge, and KUNZIG and SMITH, Judges.

ON CROSS MOTION FOR
SUMMARY JUDGMENT

KUNZIG, Judge:

Plaintiffs ("claimants") seek review by this court of the administrative denial of survivors' death benefits under the Public Safety Officers' Benefits Act of 1976, Pub.L. No. 94-430, 90 Stat. 1346 (1976), 42 U.S.C. §§ 3796-3796c (Supp. III 1979) ("PSOBA"). The case now comes before the court on the parties' cross motions for summary judgment. Claimants' decedent, a fireman, was afflicted by smoke inhalation while fighting a house fire. He collapsed from a heart attack the same day and died from a second heart attack six weeks later. The fireman's heart had apparently already begun to deteriorate prior to the smoke inhalation incident. LEAA determined that the smoke inhalation, *i.e.*, "traumatic injury", did not proximately cause the fireman's death and that, consequently, a death benefit could not be paid. We concur.

I

PSOBA provides, *inter alia,* that "In any case in which the Administration [LEAA] determines, under regulations issued pursuant to this subchapter, that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the

Administration shall pay a benefit of $50,000 ... one half to the surviving ... children of such officer in equal shares and one-half to the surviving spouse. . . ." 42 U.S.C. § 3796(a)(2) (Supp. III 1979); *accord,* 28 C.F.R. § 32.3 (1980). The implementing regulations state that, " 'Personal injury' means any traumatic injury, as well as diseases which are caused by or result from such an injury, but not occupational diseases." 28 C.F.R. § 32.2(e) (1980).[1] The regulations further provide: " 'Occupational disease' means a disease which routinely constitutes a special hazard in, or is commonly regarded as a concomitant of the officer's occupation." 28 C.F.R. § 32.2(g) (1980)." 'Traumatic injury' means a wound or other condition of the body caused by external force, including injuries inflicted by bullets, explosives, sharp instruments, blunt objects or other physical blows, chemicals, electricity, *climatic conditions,* infectious diseases, radiation, and bacteria, but excluding stress and strain." 28 C.F.R. § 32.2(f) (1980) (emphasis supplied). A "Commentary" which appears directly following the regulations in the Federal Register (but which does not appear in the Code of Federal Regulations) states that "Climatic conditions include atmospheric conditions, *such as dense smoke* ...." 42 Fed.Reg. 23260 (1977) (emphasis supplied).

The regulations further indicate that " 'Direct and proximate' or 'proximate' means that the antecedent event is a substantial factor in the result." 28 C.F.R. 32.2(d) (1980). LEAA's General Counsel on September 12, 1977 issued a legal opinion to the PSOB Program, as follows:

> Generally, you should consider a traumatic injury a "substantial factor" in an officer's death when (1) the injury itself would be sufficient to kill the officer, regardless of the officer's physical condition at the time of death; or (2) the injury contributes to the officer's death to as great a degree as any other contributing factor, such as pre-existing chronic, congenital, or progressive disease."

1. The exclusion for occupational diseases should apparently be read as limiting the entire first clause of the regulation, rather than just the immediately antecedent clause thereof. *See Smykowski* v. *United States,* Ct.Cl., 647 F.2d 1103 at 1104 n.2 (1981).

The "Commentary" states: "In determining whether an injury was a substantial factor in the officers death, LEAA will make no presumptions with respect to the length of time between the injury and death. The claimant has the burden in all cases of showing that the injury was a substantial factor in the officer's death." 42 Fed.Reg. 23260 (1977).[2]

The "Commentary" also expresses the agency's viewpoint that deaths resulting from heart disorders, *i.e.*, "chronic, congenital, or progressive cardiac and pulmonary diseases," would not be covered by PSOBA "unless a traumatic injury was a substantial factor in the death."[3] *Id.* In *Smykowski* v. *United States,* Ct.Cl., 647 F.2d 1103, at 1105 (1981), decided this date, we stated that LEAA's exclusion of "stress, strain, and heart disorders from the coverage of the Act [was] amply justified by the statutory language, legislative history, and medical statistics."

Lastly, the implementing regulations contain the provision that, "The Administration shall resolve any reasonable doubt arising from the circumstances of the officer's death in favor of payment of the death benefit." 28 C.F.R. § 32.4 (1980). The "Commentary" states: "In those cases where LEAA cannot reasonably determine which factor—the heart condition or the personal injury—was the substantial causal contribution to death, it 'shall resolve any reasonable doubt' " in accordance with the foregoing rule. 42 Fed.Reg. 23260 (1977).

---

2. The House Judiciary Committee Reports on H.R. 365 (firefighters) and H.R. 366 (public safety officers) noted the Committee's intent that the "direct and proximate result" requirement cover "those cases where the personal injury is a substantial factor in bringing about the officer's death." H.R.Reps.Nos.94-1031 and 94-1032, 94th Cong., 2d Sess., 4 and 5, respectively (1976); *accord,* 42 Fed.Reg. 23260 (1977).

The "Commentary" indicates: "In applying terms such as 'direct and proximate result' or 'line of duty' or in determining proof of relationship, the applicable State law will be considered, but will not be determinative. LEAA seeks to assure that eligibility will be determined by a uniform set of rules, regardless of where in the country the officer died or his beneficiaries reside. LEAA believes that the establishment of uniform rules and precedents best manifests congressional intent." 42 Fed.Reg. 23260 (1977).

3. The "Commentary" further indicates: "Prior to making this determination, LEAA will submit the claim file to a forensic pathologist for review. If appropriate, the opinions of other pathologists or cardiologists will be solicited." 42 Fed.Reg. 23260 (1977).

II

The decedent, John C. Morrow, was a fireman with the Evansville, Indiana Fire Department. Morrow's crew was dispatched to fight a house fire on October 8, 1976. He became ill at the scene for a brief period, partially as the result of smoke inhalation, then continued to fight the fire. After returning to the fire station, Morrow again became ill and collapsed. He was taken to the hospital, where his illness was diagnosed as cardiac arrest. He was in the hospital 3½ weeks before being discharged. On November 16, 1976, he returned to the hospital after suffering severe chest pains at home. He was treated for 4 days before dying at the hospital on November 20, 1976. The diagnosis at autopsy was "marked" atherosclerotic heart disease. Evidence of an earlier healed myocardial infarction was noted. The death certificate listed the immediate cause of death as cardiac arrest due to myocardial infarction.

Claimants thereafter filed for PSOBA benefits. Prior to making its determination, LEAA sent the medical information in the file to Dr. Robert L. Thompson, Chairman of the Armed Forces Institute of Pathology, Department of Forensic Sciences, Walter Reed Hospital, for review. Dr. Thompson found no traumatic injury that might have contributed to Morrow's death. He found that the cause of death was "acute myocardial infarct secondary to arteriosclerotic heart disease." On February 15, 1978, LEAA issued an initial determination of ineligibility. The decision noted that "[a]n injury resulting from smoke inhalation is a traumatic injury under Section 32.2(f)." The decision continued: "On the basis of the evidence presented in this case, however, we have concluded that Firefighter Morrow's smoke inhalation on October 8, 1976, was not a substantial factor in his fatal myocardial infarction on November 20, 1976." Instead, "the overriding factor in his death was his severe underlying heart disease."

On March 3, 1978, claimants submitted a request for formal agency reconsideration of the initial denial. An oral hearing was held in Evansville on May 27, 1978. The hearing was then continued to permit further analysis of the data by the medical and chemical experts. On August 15, 1978, the hearing officer issued a decision upholding the denial. The analysis was based upon the definition of "substantial factor" previously announced by LEAA's General Counsel. The salient points of the analysis were as follows:

> (1) "Mr. Morrow was suffering from marked coronary arteriosclerosis before his cardiac arrest on 8 October 1976. The autopsy showed the presence of a previous, healed myocardial infarction."

(2) "The smoke inhalation which Mr. Morrow suffered at the scene of the fire along with the stress and strain of the event undoubtedly precipitated the acute infarct [of 8 October 1976]."

(3) It can be assumed from [the] evidence and from the information contained in the referenced publications, that Mr. Morrow did inhale sufficient carbon monoxide to block off consciousness of his activities following his exit from the fire room, but since he later recovered full consciousness, and no edema was reported by Dr. Sterne at the time of examination in the emergency room ... it can be assumed further that the effects of the carbon monoxide on his body were not sufficient to cause real respiratory problems."

(4) "The behavior of Mr. Morrow following the probable onset of his cardiac arrest—falling down stairs, loss of memory 'for the rest of the day,' living for an additional six weeks—suggests that the amount of smoke inhaled was not sufficient to cause real problems on a purely respiratory basis. His symptoms were primarily cardiac with chest pain and collapse."

(5) "[A]lthough Mr. Morrow probably inhaled enough carbon monoxide to have blocked out his memory of events following his departure from the bedroom in which the fire was located, and to have caused cardiac irregularities which contributed to the onset of cardiac arrest, the actual cause of death was the chronic, progressive, cardiovascular disease. Smoke inhalation effects were secondary and minor in comparison with the damage offered by the underlying, chronic disorder and did not, therefore, promote a 'traumatic injury' in this case."

The hearing officer's conclusion may be restated as follows. Since the smoke inhalation was not by itself sufficient to kill the fireman, nor did it contribute to the fireman's death to as great a degree as the pre-existing heart disease, it cannot be deemed to have been a "substantial factor" in the fireman's death. Thus, proximate causation has not been established. Benefits cannot be paid.

On September 6, 1978, claimants appealed the decision of the hearing officer to the LEAA Administrator. On January 3, 1979, the Administrator adopted the hearing officer's decision as the final agency action. Claimants filed their petition in this court of September 17, 1979.

III

[1] This court has held that it has limited authority in reviewing administrative decisions. Generally, such review is limited to determining (1) whether there has been substantial compliance with statutory and implementing regulations; (2) whether there had been any arbitrary or capricious action on the part of the Government officials involved; and (3) whether there was substantial evidence supporting the decision. *See, e.g., Urbina* v. *United States,* 209 Ct.Cl. 192, 197, 530 F.2d 1387, 1389-1390 (1976).

[2] Claimants first allege a want of substantial evidence to support the agency's determination that smoke inhalation was *not* a "substantial factor" in Morrow's death. The allegation is baseless. The agency received extensive lay and scientific evidence and solicited several expert evaluations. Claimants had complete discretion to enter relevant materials. The resulting record thoroughly supports the agency's position.[4]

[3] Claimants next allege that the Administrator has failed to comply with the regulatory requirement that "any reasonable doubt arising from the circumstances of the officer's death [be resolved] in favor of payment of the death benefit." 28 C.F.R. § 32.4 (1980). The allegation, relating to the agency's finding upon the issue of proximate causation, is again without foundation. There is no *reasonable* doubt to the effect that smoke inhalation might have been a substantial factor in Morrow's death six weeks hence. The obvious and overwhelming cause of death was heart disease—pre-existing, prolonged, and degenerative.[5]

IV

All other arguments raised by claimants, although not directly addressed in this opinion, have been considered and found to be without merit.

Accordingly, after consideration of the administrative record and the submissions of the parties, with oral argument of counsel, plaintiffs' motion for summary judgment is denied. Defendant's motion for summary judgment is granted. Plaintiffs' petition is dismissed.

---

4. We make no holding as to the propriety of LEAA General Counsel's particular construction of the term "substantial factor"—which strikes us as somewhat cramped—since we do not believe that claimants herein can prevail under any plausible construction of the term. *See generally Udall* v. *Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1964).

5. Claimants have also made various constitutional allegations. They are without substance.

September 2, 1977

OGC Memorandum

SUBJECT: **Summary of Coverage of Heart Attack Deaths**

The 94th Congress passed and President Ford signed into law the Public Safety Officers' Benefits Act of 1976 (Publ. L. 94-430), 42 U.S.C. 3796, *et seq.*, (PSOB). The Act directs the Law Enforcement Assistance Administration (LEAA) to pay a $50,000 benefit to the specified survivors of a public safety officer who dies as the "direct and proximate result of a personal injury sustained in the line of duty." One issue has continued to raise more problems in the administration of this Act than any other: the treatment of deaths due to heart attacks, accompanied by some degree of stressful activity or small physical contact. Several specific fact situations are abstracted from our files and set forth below. These cases provide more concrete examples of the problems. This paper presents our view on the legislative intent and proper handling of these cases.

On May 6, 1977, LEAA published its final PSOB regulations at 42 F.R. 23251. The following excerpt from the Preamble to the regulations summarizes the legislative history of the relevant portions of the Act, and LEAA's interpretation of Congress' intent:

> "To be covered by the Act, an officer's death must be 'the direct and proximate result of a personal injury sustained in the line of duty.' The terms 'direct and proximate result' and 'personal injury' are not defined in the Act. The House Judiciary Committee Reports on H.R. 365 (firefighters) and H.R. 366 (public safety officers) noted the Committee's intent that the 'direct and proximate result' requirement cover 'those cases where the personal injury is a substantial factor in bringing about the officer's death.' House Reports No. 94-1031 and 94-1032 (94th Cong., 2d Sess.) at pp. 4 and 5, respectively. 'Personal injury' was defined in both reports to include:
>
> ". . . all injuries to the body which are inflicted by an outside force, whether or not it is accompanied by physical impact, as well as diseases which are caused by or result from such injuries, but not diseases which arise merely out of the performance of duty. In other words, deaths from occupational diseases alone are not within the purview of this legislation. House Reports, *supra,* at pp. 4 and 4-5, respectively.

"House debate on the issue was confined to a reiteration by Congressman Joshua Eilberg, the bill's sponsor, of the exclusion of 'occupational diseses and diseases which arise out of the performance of duties' from the scope of the legislation. Cong. Rec. H 3738 (April 30, 1976, daily ed.).

"In the Senate, the bill passed by the Judiciary Committee covered officers who died in the line of duty from 'injuries directly and proximately caused by a criminal act or an apparent criminal act . . .' Senator Frank Moss introduced an amendment on the Senate floor, substituting 'as the direct and proximate result of a personal injury sustained in the line of duty' for the more limited 'criminal act' condition. In expressing his support for the amendment, Senator John McClellan, a sponsor of the bill, noted that the bill 'is not health insurance; but it does provide for payment if an officer is killed in the line of duty, either by accident or by willful assault by a criminal.' Cong. Rec. S 11837-38, (July 19, 1976, daily ed.). The amendment passed and ultimately became part of the final Act.

* * *

"LEAA believes that the definition of 'personal injury' in the House Judiciary Committee Reports manifests the Committee's intent to limit coverage to deaths caused by traumatic injuries. The Report language is consistent with the following definition of 'trauma' in Stedman's Medical Dictionary. (W.H. Anderson Company-Jefferson Law Book Company, Fourth Unabridged Lawyers' Edition): 'Traumatism; an injury caused by rough contact with a physical object, accidental or inflicted wound.' The regulations, accordingly, have defined 'traumatic injury' to mean 'a wound or other condition of the body caused by external force, including injuries inflicted by bullets, explosives, sharp instruments, blunt objects or other physical blows, chemicals, electricity, climatic conditions, infectious diseaes, radiation and bacteria, but excluding stress and strain.' Section 32.2(f). Deaths caused by traumatic injuries do not therefore include deaths directly attributable to exertion or stress encountered in the performance of duty, unless that stress resulted in or was caused by a traumatic injury that was a substantial factor in the officer's death."

"The Committee expressly excluded occupational diseases from the scope of 'personal injury.' LEAA has defined 'occupational diseases' to mean a 'disease which routinely constitutes a special hazard in, or is commonly regarded as a concomitant of the officer's occupation.' Section 32.2(g). See *Hanna v. Workmen's Compensation Appeals Board,* 108 Cal. Rptr. 227, 32 Cal. App. 3d 719 (1973); *Harmon v. Republic Aviation Corporation,* 298 N.Y. 285, 82 N.E. 785 (1948); and *Chausse v. Lowe,* 35 F.Supp. 1011 (E.D. N.Y. 1938).

"Virtually all State workmen's compensation laws cover, in some degree, deaths attributable to heart disease. Some, e.g. California, treat a law enforcement officer or firefighter's heart trouble as presumptively arising in the course of employment. California Labor Code, sections 3212 and 3212.5. The definition of personal injury in the legislative history of PSOB, and the exclusion of occupational diseases from the scope of the Act have led LEAA to conclude, however, that deaths resulting from chronic, congenital, or progressive cardiac and pulmonary diseases are not covered by PSOB, unless a traumatic injury was a substantial factor in the death.

"Where, for instance, LEAA determines the cause of death to be myocardial infarction resulting from a coronary thrombosis, no benefit will be paid unless the claimant can demonstrate a substantial causal connection between a traumatic injury and the thrombosis. Similarly, where an officer suffering from heart disease, such as arteriosclerosis, has sustained a traumatic injury and died of a 'heart attack,' a benefit will be paid only if the injury is determined to be a substantial factor in the officer's death. Prior to making this determination, LEAA will submit the claim file to a forensic pathologist for review. If appropriate, the opinions of other pathologists or cardiologists will be solicited. In those cases where LEAA cannot reasonably determine which factors—the heart condition or the personal injury—was the substantial causal contribution to death, it 'shall resolve any reasonable doubt arising from the circumstances of the officer's death in favor of payment of the death benefit.' Section 32.4. Because an autopsy report will greatly assist LEAA in expediting its review, and making the correct determination, claimants and public agencies are encouraged to request that autopsies be performed.

"Accordingly, 'personal injury' has been defined to mean 'any traumatic injury, as well as diseases which are caused by or result from such an injury, but not occupational diseases.' Section 32.2(e).

The Commentary on Section 32.2(e) of the regulations essentially restates the above discussion. There is one further consideration that we believe supports the position taken in the regulations. Since Congress clearly stated its intention that diseases arising from the performance of duty are beyond the purview of the Act, it is even clearer that deaths attributable to diseases arising from the officer's personal life should not be covered, either.

The application of these rules to specific cases has led to the following conclusions:

Eligibility Determinations

1. **Decedent:** Ronald C.B., Deputy Sheriff, New Orleans, Louisiana

Case Summary: On October 21, 1976, while on duty, Deputy B. became trapped on the fifth floor of the Orleans Parish Prison during a fire while attempting to move prisoners from that floor to a safer location. When Deputy B. was taken from the fifth floor by firemen he was unconscious. He was pronounced dead at the hospital. His death was caused by carbon monoxide inhalation, coronary arteriosclerosis and hypoplases of the right coronary artery.

Autopsy Conducted: 25% carbon monoxide level in blood.

2. **Decedent:** Robert G. C., Firefigher, East Weymouth, Massachusetts

Case Summary: On December 6, 1976, Firefighter C. was on duty fighting a motel fire. He was not wearing breathing apparatus as he fought the fire and was observed choking and coughing from the smoke and heat. Shortly after this observation, Firefighter C. collapsed and was taken to the hospital where he was dead on arrival. His death was caused by smoke inhalation and acute myocardial infarction with cardiac arrest.

No Autopsy: Medical data includes a statement by a doctor that "carbonaceous material was found in mouth and trachea." Death certificate also indicates "smoke inhalation."

3. **Decedent:** James J. G., Firefighter, Rumford, Maine

Case Summary: On January 16, 1977, Firefighter G. was on duty fighting a house fire. As Officer in Charge at the fire, G spent considerable time going in and out of the burning house. Early in the fire, Firefighter G. was overcome by smoke but despite this he put on an air-pak and went back into the burning house. He used up that air-pak and was in the process of putting on a new one when he lost consciousness and collapsed. Firefighter G. was taken to the hospital where he expired on February 17, 1977, never having regained consciousness. His death was caused by severe anoxic encephalopathy-respiratory failure due to a probable infarction and cardiac arrest. Although an autopsy was not performed on Firefighter G. both the medical and investigative evidence of the circumstances surrounding his death strongly indicate that his inhalation of large amounts of smoke and toxic fumes precipitated his heart attack thereby causing his death.

No Autopsy: Statements by Fire Department indicate G. was overcome by smoke. Physician's statement indicates much smoke at scene and G. was covered with ash and coughing up ash.

4. **Decedent:** Robert John M., Firefighter, Department of Fire Services, New Haven, Connecticut.

Case Summary: On January 27, 1977, Firefighter M. was on duty fighting a house fire. Firefighter M. and other firemen climbed a ladder to the roof of the house to ventilate it. Firefighter M. began to cough and complain about the smoke and heat but continued to ventilate the roof. After a while the other firefighters urged him to return to the ground. When Firefighter M. reached the ground he collapsed and shortly thereafter died. His death was due to severe arteriosclerosis of the coronary arteries with focal hemorrhages in the walls, pulmonary edema, and smoke inhalation.

Autopsy: 20.6% carbon monoxide level in blood.

Ineligibility Determinations

1. **Decedent:** Richard D. B., Police Officer, Ukiah Police Department, Ukiah, California

Case Summary: On January 1, 1977, while on duty, Officer B. observed a juvenile drinking an alcoholic beverage on the fair grounds parking lot. The juvenile seeing Officer B. ran from him. Officer B. ran after the juvenile and apprehended him when the juvenile without a struggle voluntarily decided to stop and give himself up. Officer B. requested the juvenile's identification and while examining it collapsed and shortly thereafter died. Officer B.'s death was caused by acute cardiac falure due to coronary artery insufficiency and aspiration of his gastric contents.

Autopsy: No injury. Advanced arteriosclerosis with occluded artery.

2. **Decedent:** John L. D., Firefighter, Portland, Oregon

Case Summary: On February 13, 1977, Firefighter D. was on duty fighting a fire when he suffered a heart attack and was hospitalized. Firefighter D. died at the hospital on February 15, 1977. His death was caused by cardiogenic shock due to or as a consequence of a myocardial infarction.

No Autopsy: No injury. History of heart problem. Physician's statement includes "in recent months he has been having increasing shoulder pains with exertion." Physician also states "myocardial infarction—precipitated by the heavy physical exertion involved in putting out a fire."

3. **Decedent:** Lyle D. H., Volunteer Firefighter, Dowagiac, Michigan

Case Summary: On December 29, 1976, Volunteer Firefighter H. was on duty fighting a fire. While operating the pumper truck, Firefighter H. suffered a heart attack and died. His death was caused by cardiac arrest due to an acute myocardial infarction.

No Autopsy: Had acute myocardial infarction in 1969. No injury.

4. **Decedent:** Dennis R. E., Police Officer, Athens, Texas

Case Summary: While on duty, January 6, 1977, Officer E. assisted other officers in putting a struggling prisoner into a cell. After the prisoner was in his cell, Officer E. went to the jail kitchen to clean some blood off of a scratch on his hand. While in the jail kitchen Officer E. collapsed. He was taken to the hospital but was pronounced dead on arrival. Officer E's death was caused by a probable acute myocardial infarction with cardiac arrest.

Autopsy: Bruise on chest found and described as "abrasion and contusion of anterior chest wall, recent, not directly contributory to death." Also evidence of previous occlusion and myocardial infarction.

5. **Decedent:** Joseph B. M., Corrections Officer, State Penitentiary, Sioux Falls, South Dakota

Case Summary: On January 19, 1977, while on duty, Corrections Officer M. struggled with an inmate who was attempting suicide in order to handcuff him. Immediately after restraining the inmate Officer M. collapsed and shortly thereafter died. Officer M.'s death was caused by an acute occlusion of the left anterior descending coronary artery due to or as a consequence of severe coronary heart disease.

Autopsy: Bruise on head but AFIP indicates that it did not have physical effect on the officer at time of death. Thrombosis occluded anterior branch of left coronary artery.

6. **Decedent:** Hubert J. S., Police Officer, Garfield Heights, Ohio

Case Summary: On October 5, 1976, while on duty, Officer S. and other officers responded to a call for assistance made by fellow officers who were searching for two suspects who were involved in an automobile accident. The two suspects were believed to be armed. When Officer S. arrived one suspect had been captured and the other was known to be hiding in a house. Officer S. and his partner entered the house and found the suspect hiding in a closet. The two officers had to struggle with the suspect to remove him from the closet. When the suspect was handcuffed Officer S. let him out of the house to a police car. Before reaching the police car Officer S. suffered a heart attack and collapsed. Officer S. was dead on arrival at the hospital. His death was caused by coronary sclerotic hypertensive heart disease with acute and healed myocardial infarctions.

Autopsy: Coroner's verdict indicated death and result of coronary sclerotic hypertensive heart disease with acute and healed myocardial infarction *due to stress* during and following the altercation incident to the arrest of the suspect and was homicidal in nature. AFIP indicates no traumatic injury.

7. **Decedent:** William B. C., Sheriff, Covington County, Mississippi

Case Summary: On December 20, 1976, Sheriff C. and a deputy had to struggle with a drunken prisoner in order to transfer her from the County to the City Jail. During the struggle, Sheriff C. experienced difficulty breathing. This difficulty persisted and the Sheriff was transported to a hospital where he died several hours later. Cause of death was found to be a pulmonary edema due to, or as a consequence of arteriosclerotic heart disease, with a previous myocardial infarction.

No Autospy: Had history of heart disease. A previous myocardial infarction three years before. AFIP indicates no injury based on medical data. Also pulmonary edema due to arteriosclerotic heart disease.

Each of these cases where an award was denied was reviewed by the Chief of the Forensic Pathology Section of the Armed Forces Institute of Pathology. His conclusion in each case, made after a review of the Act, the regulations, and the case file, has supported the conclusion of the medical authority who performed the autopsy or signed the death certificate.

* * * *

September 2, 1977

OGC Memorandum

SUBJECT: **Traumatic Injury as Substantial Factor in Deaths Due to Heart Attack**

You have asked this office to clarify the meaning of the term "substantial factor" as it applies to the relationship between a traumatic injury and the cause of a public safety officer's death. The term is used in the Commentary on Section 32.2(e) of the LEAA PSOB Regulations, 28 C.F.R. §32.1, *et seq.*, as follows:

> "The definition of 'personal injury' in the legislative history of PSOB, and the exclusion of occupational diseases from the scope of the Act have led LEAA to conclude that deaths resulting from chronic, congenital, or progressive cardiac and pulmonary diseases are not covered by PSOB, unless a traumatic injury was a substantial factor in the death.
>
> "Where, for instance, LEAA determines the cause of death to be myocardial infarction resulting from a coronary thrombosis, no benefit will be paid unless the claimant can demonstrate a substantial causal connection between a traumatic injury and the thrombosis. Similarly, where an officer suffering from heart disese, such as arteriosclerosis, has sustained a traumatic injury and died of a 'heart attack,' a benefit will be paid only if the injury is determined to be a substantial factor in the officer's death."

The regulation reflects the intent of Congress in determining when an officer's death should be considered "the direct and proximate result of a personal injury sustained in the line of duty." The House Judiciary Committee Reports on the firefighters' and public safety officers' benefits bills that were eventually joined as the Public Safety Officers' Benefits Act of 1976 stated that the "direct and proximate result" requirement was intended to cover "those cases where the personal injury is a substantial factor in bringing about the officer's death." House Reports No. 94-1031 and 94-1032 (94th Cong., 2nd Sess.), at pp. 4 and 5, respectively.

Generally, you should consider a traumatic injury a "substantial factor" in an officer's death when (1) the injury itself would be sufficient to kill the officer, regardless of the officer's physical condition at the time of death; or (2) the injury contributes to the officer's death to as

great a degree as any other contributing factor, such as a pre-existing chronic, congenital, or progressive disease.

In either situation, there must be sufficient medical, physical, or testimonial evidence to support the determination. Where the evidence is conflicting, the medical evidence should be given the greatest weight. Your conclusion should not be based on a remote medical possibility that is not supported by the facts developed at autopsy or by the officer's medical history. Even where the remote theory propounded by the claimant is consistent with the evidence in the file, it should not be accepted if the medical examiner, and the AFIP pathologists reviewing the file, believe the evidence reasonably supports a different conclusion.[1] Where there is a reasonable doubt as to causation, the death should be covered and the benefits paid. 28 C.F.R. §3?.4.

As the preceding discussion implies, two doctors looking at the same evidence can render two different opinions. However, a determination made on the basis of "substantial evidence," i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938), should survive an appeal, even if a different conclusion may be drawn by another reader. See Davis, Administrative Law Treatise, §§29.01, *et seq.* "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620 (1966).

Although your office's decision may, therefore, be a subjective one, it is likely to be upheld if made within the framework of the legal principles set forth in the regulations and this memorandum, and based on the testimonial, physical, and medical evidence assembled in the case file.

---

1. "Proof that employment was not a medical cause of a heart attack can be provided in several ways. There may be direct physical evidence, perhaps afforded by an autopsy, negating the existence of any new heart lesions or pathology. There may also be medical opinion evidence denying the causal connection. In such cases, under familiar rules, an appellate court will not disturb a denial of compensation. Or the medical testimony on which the claim rests may be too speculative or weak to meet the claimant's burden of proof. In fact, the medical situation may sometimes be impossible to analyze. In such a case, if unaided by evidence connecting the injury with the employment, the claim may fail." Larson, "The 'Heart Cases' in Workmen's Compensation: An Analysis and Suggested Solution," 65 Michigan Law Review 441, 475 (1967) (footnotes omitted).

B. Smoke Inhalation

[43 F.R. 41302, September 15, 1978]

Relative Contribution of Carbon Monoxide and Heart Diseases to the Death of Public Safety Officers

Meeting

On April 21, 1978, five leading medical experts on the toxic effects of carbon monoxide (CO) met in Washington with officials of the Law Enforcement Assistance Administration (LEAA) to offer advice on when CO inhalation should be considered a substantial factor in the deaths of firefighters and others whose survivors may be eligible for benefits under the Public Safety Officers' Benefits Act (PSOB). The experts were:

Wilbert S. Aronow, M.D., Chief, Cardiovascular Section of the Veterans Administration Hospital in Long Beach, Calif., Professor of Medicine, Professor of Pharmacology and Therapeutics, Professor of Community and Environmental Medicine, Vice-Chief, Cardiovascular Division, and Chief, Cardiovascular Research, University of California, Irvine;

Russell S. Fisher, M.D., Chief Medical Examiner of the State of Maryland;
Thomas L. Kurt, M.D., Associate Professor, Division of Cardiology, University of Colorado Medical Center;

Richard D. Stewart, M.D., Professor, Department of Environmental Medicine, Medical College of Wisconsin; and

Robert L. Thompson, M.D., Captain, U.S. Navy, Chairman, Department of Forensic Sciences, Armed Forced Institute of Pathology (AFIP).

Their advice was sought on a complex issue which arises regularly under the PSOB Act. Under the act, the eligible survivors of a public safety officer who dies as the direct and proximate result of a personal injury sustained in the line of duty are entitled to $50,000 in benefits. In accordance with the legislative history of the act, LEAA has determined that the "direct and proximate" requirement will be satisfied only when a traumatic injury is a "substantial factor" in the officer's death. To be a substantial factor, the injury must contribute to the death to as great a degree as any other contributing factor, such as a pre-existing chronic, congenital, or progressive disease. Deaths

resulting from such diseases, whether occupational or personal in origin, are not within the purview of the act. Neither are deaths attributable to "stress and strain." Inhalation of carbon monoxide is considered a traumatic injury.

Many of the firefighter deaths reviewed by LEAA have been attributable, in some degree, to chronic heart disease. In some of these cases, the toxicological examination of the victim at autopsy also revealed a higher than normal level of CO saturation in the blood. In order to properly decide the case, therefore, LEAA had to determine whether the CO level was so high as to warrant it being a substantial factor in the victim's death. A review of the medical literature and consultation with a variety of experts revealed that the relationship between CO exposure, heart disease, and death is complex and not yet fully understood even in the scientific community. In order to avail themselves of the best possible information, and more specifically, to develop a general guideline for coverage under the Act that was reasonable, fair, and supported by the most current expertise, LEAA staff responsible for administering the act asked the doctors listed above to share their knowledge with them.

Prior to the meeting, LEAA sent each doctor a letter explaining the act and its implementing regulations, and enclosed a number of relevant medical journal articles. A summary of the applicable law was presented again at the meeting.

The group, as a whole, cautioned LEAA that, for want of sufficient scientific knowledge, the subject was not yet capable of precise quanitification. Each doctor was asked to present the results of his own research for the consideration and comment of the others.

Dr. Aronow informed the group that his research had demonstrated that raising the venous carboxyhemoglobin (COHb) level from 1.03 percent to 2.68 percent aggravates angina pectoris. He also noted the similar conclusions reached by Dr. Anderson and associates, whose study demonstrated that increasing the venous COHb level from 1.3 percent to 2.9 percent aggravates angina pectoris. In addition, he cited a study by Cohen and associates which demonstrated an association between atmospheric CO pollution in Los Angeles and case fatality rates for patients with acute myocardial infarction admitted to 35 Los Angeles hospitals. Dr. Aronow explained that because CO has approximately 245 times a greater affinity for hemoglobin (Hb) than oxygen (0_2) does, CO inhibits the supply of oxygen to the heart muscle. Carbon monoxide also causes tighter binding of oxygen to hemoglobin, further decreasing the availability of oxygen to the heart muscle. Dr. Aronow's research has also demonstrated that raising the arterial carboxyhemoglobin level from 1.09 percent to 6.34 percent lowered the

ventricular fibrillation threshold in dogs with experimentally induced acute myocardial injury. These effects combine to make the victim more vulnerable to heart attacks and to sudden death.

Dr. Fisher presented an analysis of carbon monoxide-related deaths that had been seen by his office. A substantial number of cases supported the generally accepted theory advanced by Dr. Aronow, but the largest group of cases showed that persons with serious heart disease tolerated CO saturation levels of well over 50 percent before dying. Other participants pointed out that some of those deaths could have occurred in air containing a very high content of carbon monoxide. In those circumstances, just a few breaths could have produced the high CO saturation percentages noted and a fatal episode of ventricular fibrillation.

Dr. Stewart explained the results of a study he performed on Milwaukee firefighters, which found that, after a fire, nonsmoking firefighters had a mean CO saturation of approximately 5 percent, and smokers approximately 11 percent. Before a fire, each group had levels of approximately 3 percent and 7 percent, respectively. Only 0.5 percent of those firefighters who averaged between 11 and 19 percent saturation experienced any coronary trouble. The saturation levels of the firefighters who died ranged from 2-89 percent.

Dr. Stewart also noted one problem that could result from setting too high a level of saturation as the "substantial factor" standard. The inhalation of high concentrations of CO can result in arterial blood with a toxic CO saturation reaching the brain, causing cerebral hypoxia. By the time that blood with the high CO saturation has circulated to the rest of the body, however, the percentage of CO in the venous blood would be reduced sharply. For example, inhalation of 10 percent CO for a few breaths could send blood to the brain that was 50 percent to 70 percent saturated. After several minutes of recirculation and no further exposure to CO, the venous blood might show a 5 percent saturation. If the hypoxia (which cannot be identified at autopsy) resulted in ventricular fibrillaton and death, the relatively low CO level found at autopsy and the victim's preexisting heart disease could lead LEAA to improperly deny benefits in a case where CO inhalation was truly a substantial factor in the victim's death.

Dr. Kurt summarized two of his studies, one of which demonstrated a positive correlation between CO levels in the atmosphere and the number of cardio-respiratory complaints received in the emergency room of Colorado General Hospital. On the basis of his own experience and the preceding discussion, Dr. Kurt suggested 20 percent saturation as the level at which CO became a substantial factor in a death also contributed to by heart disease. He noted the level was con-

sistent with Dr. Fisher's findings, and above the CO level found in even the heaviest smoker. He had originally suggested a sliding scale of benefits for carbon monoxide-related deaths starting a zero dollars in benefits for job-related deaths at 2 percent CO saturation and working up to $50,000 in benefits at 20 percent CO saturation and greater. Because the Act only permits the award of $50,000 or nothing, this concept could not be applied.

Discussion followed on whether different standards should be set for smokers and nonsmokers. The group agreed that the standard set should take into account the increased CO levels in the blood of regular smokers. This increased level had been amply demonstrated by several studies, including Dr. Stewart's study of the Milwaukee firefighters. On the basis of that study, Dr. Stewart felt that 20 percent would be a substantial factor beyond a reasonable doubt, but that at 13 percent, there was still a likelihood that CO inhalation would be a major contributing factor to death. Dr. Kurt suggested a level of 15 percent saturation for both smokers and nonsmokers, with a benefit of the doubt given to nonsmokers with as low as 10 percent saturation. The group concurred in this recommendation, believing that most doctors familiar with the issue would find these figures generous to the victim's survivors.

On a later date, Dr. Fisher urged that LEAA consider a 20 percent level for smokers, and 13 percent for nonsmokers, respectively. However, given the imprecision of present scientific knowledge and the possibility, as recognized in his own findings, that CO saturation levels of less that 20 percent could be a substantial factor in a particular decedent's death, he concurred in the agreed standard.

The group was also asked to develop a method of estimating the CO saturation level in the blood at the onset of a fatal cardiac or pulmonary event, if resuscitative attempts resulted in reducing the level below the "substantial factor" level by the time of death. Dr. Stewart stated that the percentage of CO in a sedentary individual breathing air at sea level is reduced by 50 percent in 5 hours. The same person receiving 100 percent oxygen would eliminate 50 percent of the CO in his system in 90 minutes. Dr. Stewart offered to provide LEAA with computer-generated tables specifying the percentage of CO reduction over a 12-hour period at 5-minute intervals. The charts would be prepared for resuscitation by 21 percent oxygen (ambient air), 40 percent oxygen (nasal prongs), 85 percent oxygen (mask), and 100 percent oxygen (bag). Because the rate of elimination also varies slightly depending on the atmospheric pressure, Dr. Stewart also agreed to provide LEAA the appropriate charts for above sea level, under sea level, and sea level.

Reviewed and Approved: Dr. Wilbert S. Aronow, Dr. Russell S. Fisher, Dr. Thomas L. Kurt, Dr. Richard D. Stewart, Dr. Robert L. Thompson.

On the basis of the group's recommendation, LEAA will find CO inhalation a substantial factor in a public safety officer's death when the decedent had a CO saturation level of 15 percent or greater at the time of the fatal event, or, if the decedent was a nonsmoker, a saturation level of 10 percent or greater. LEAA believes that the selection of these standards reflects the most advanced thought on this issue and comports with the requirement in the PSOB regulations that any reasonable doubt arising from the circumstances of the officer's death be resolved in favor of paying the benefit. See 28 CFR 32.4.

Benefits will be denied in cases meeting the above guideline only if the doctor performing the autopsy and the doctor reviewing the file on behalf of LEAA expressly agree that (1) CO inhalation was not a substantial factor in the death, or (2) the CO saturation level was not attributable to a personal injury, as defined in the LEAA regulations.

The tables provided by Dr. Stewart will be used to calculate the CO saturation level at the onset of the fatal event.

If any further information on this subject is needed, please contact Mr. William F. Powers, Director, Public Safety Officers' Benefits Program, LEAA, Washington, D.C. 20531.

JAMES M. H. GREGG,
Assistant Administrator,
Office of Planning and Management.
[FR Doc. 78-26046 Filed 9-14-78; 8:45 am]

(See also §II.A., *Morrow v. U.S.*)

C. **Stress**

October 31, 1977

OGC Memorandum

SUBJECT: **Volunteer Fireman Walking to Firehouse in Subzero Temperature**

In this case, a volunteer firefighter responding to a fire call attempted to walk from his home to the firehouse through deep snow in subzero temperatures. Shortly after leaving the house, he collapsed and died. The death certificate listed the primary cause of death as "Recurrent Myocardial Infarct."

We concur in your decision to deny benefits. Although "climatic conditions" may inflict a traumatic injury, as stated in Section 32.2(f) of the regulations, neither the medical evidence nor the statement of eyewitnesses in the file demonstrate that either the snow or the cold weather in any way inflicted an injury resulting in the decedent's fatal heart attack. In Legal Opinion No. 77-6 (September 2, 1977), we stated that a traumatic injury should be considered a substantial factor in the death only when "(1) the injury itself would be sufficient to kill the officer, regardless of the officer's physical condition at the time of death; or (2) the injury contributes to the officer's death to as great a degree as any other contributing factor, such as a pre-existing chronic, congenital, or progressive disease . . . Where there is a reasonable doubt as to causation, the death should be covered and the benefit paid."

We do not believe that there can be a reasonable doubt about whether the weather conditions contributed to the officer's death to as great a degree as his evident heart disease. As noted above, the doctor completing the death certificate found the primary cause of death to be "recurrent myocardial infarct." Dr. Thompson of AFIP concurred, finding the most likely cause of death to be arteriosclerotic heart disease. Unless evidence is provided showing that the cold weather was a substantial factor in the firefighter's death, it must be presumed that the stress of wading in the snow and responding to a fire call promoted the heart attack that killed him.

March 1, 1978

OGC Memorandum

SUBJECT: **PSOB Appeals of Mrs. Betty N. and Mrs. Elaine R.**

This office has reviewed the transcripts of the hearings conducted on January 25 and 26, 1978, on the denial of PSOB benefits to the survivors of Milton W. N. and Carl O. R., respectively. For the reasons offered below, we recommend that you affirm the initial determination of the PSOB Office that neither Mr. N's nor Mr. R's death was the direct and proximate result of a personal injury, as defined in 28 C.F.R. 32.2(d), (e), and (f).

As you know, the LEAA PSOB Regulations provide that: ". . . deaths resulting from chronic, congenital, or progressive cardiac and pulmonary diseases are not covered by PSOB, unless a traumatic injury was a substantial factor in the death." Commentary on 28 C.F.R. 32.2(e).

Deaths resulting from occupational diseases and "stress and strain" are also expessly excluded from coverage. See 28 C.F.R. 32.2(d) and (e).

With respect to the N. case, we do not believe that the evidence demonstrates any link between a traumatic injury and death. On the basis of Dr. Thompson's analysis, we concur in the opinion offered by Dr. Max L. Fox at the hearing held before the State of New York Workmen's Compensation Board, that ". . . the excitement, as well as the undue physical exertion in which he was involved, was certainly a producing causative factor (in Mr. N's death)." Workmen's Compensation Transcript, at p. 7. We also agree with the observation of Dr. Willard Cohen in his November 25, 1977 letter to a representative of Aetna Life and Casualty that "given the underlying arteriosclerotic heart disease ... the physical exertion of 11/9/76 at the scene of the fire was a competent producing factor in Mr. Milton N's death."

Regrettably, however, deaths produced by the interplay of chronic coronary disease and physical exertion are not covered by the PSOB Act. In House Reports No. 94-1031 and 94-1032 (94th Cong., 2d Sess.), at pp. 4 and 5, respectively, the House Judiciary Committee stated that the term "personal injury" was not intended to include "diseases which arise merely out of the performance of duty." This policy was reiterated by Congressman Joshua Eilberg, the Act's sponsor, during House debate of the bill. See the Commentary on Section 32.2(e) of the Regulations and Cong. Rec. H 3738 (April 30, 1976, daily ed.). If occupational diseases are outside the scope of the Act, then it is even more true that diseases arising from the decedent's personal life are beyond the scope of coverage. Therefore, we believe that Mr. N's death is not covered by this Act.

Further, exertion arising from the performance of strenuous duties while acting as a public safety officer is not a "traumatic injury," as defined in 28 C.F.R. 32.2(f). In fact, as noted above, the definition of that term expressly excludes "stess and strain." As a result, we are compelled to conclude that neither factor in Mr. N's death--the stress of carrying the portable water tanker or his heart disease--falls within the ambit of the Act. We continue to believe, therefore, that a denial of benefits is still appropriate.

In the matter of Officer R., we believe that the same rationale applies. This case is complicated by the fact that the stress on Officer R. was promoted by the severe weather conditions prevailing during Buffalo's "Blizzard of '77." As claimant's counsel informed you, Section 32.2(f) of the Regulations lists "climatic conditions" among the type of forces that could inflict "traumatic injuries." The Commentary of that section explains that "climatic conditions include at-

mospheric conditions, such as dense smoke, as well as precipitation and intensely high or low termperatures."

In this case, however, the climatic conditions only occasioned the stress that combined with the officer's heart condtion to cause his death. The conditions did not cause a traumatic injury as defined in Section 32.2(f), because they were not an "external force" that caused "a wound or other condition of the body." The significant "condition of the body" in this case was Officer R's *pre-existing* heart disease, which was not caused by the blizzard of January 28th and 29th. The climatic conditions in this case are the causative parallel of the portable water tanker in the N. case; both were no doubt substantial factors in the respective decedent's death but neither was, or caused, a traumatic injury within the meaning of the Regulations.

We do not believe that Dr. Militello's testimony at the hearing refutes his ealier opinion that Officer R's death was caused by a coronary thrombosis due to coronary artery disease. Although he concedes that his diagnosis was speculation, and that there was no evidence of arteriosclerosis, his opinon was based on his considered judgment as the personal physician of Officer R. and the knowledge of his condition acquired over five years of treatment for hypertension. Although Dr. Militello did not have the benefit of the definitive evidence that could have been revealed by an autopsy, he did conclude at the time of death, on the basis of 37 years of practice and the intimate knowledge of his patient, that death was attributable to a coronary thrombosis as a consequence of coronary artery disease. His conclusion was supported by the opinion of Dr. Thompson, an experienced forensic pathologist, after a review of the claim file. We do not believe that the alternative theories of death solicited by claimant's counsel are as well supported by the available evidence or as probabtive as the medical opinions advanced by Drs. Militello and Thompson.

We recommend, therefore, that you affirm the PSOB Office's initial decision to deny benefits in this case.

Our medical conclusions are based on the opinions expressed in Dr. Robert L. Thompson's letters of February 17, 1978.

D. **Traumatic Injury**

November 15, 1978

Hearing Officer's Decision

SUBJECT: **Contribution of Blow to Chest to Officer's Death**

This determination is made with respect to the claim for benefits under the Public Safety Officers' Benefits Act (PSOB) arising out of the death of Robert W. C., Police Officer, New York City, New York, 107 Precinct.

* * *

The initial LEAA review of this claim resulted in the determination on January 4, 1978 that claimants were ineligible for benefits. The Determination stated that:

> Based on the Report of the Public Safety Officers' Death submitted by the New York City Police Department, the Claim for Death Benefits submitted by Marie A. C. and an alalysis of the facts of the case, it is determined that the death of Robert W. C. is not covered under the provisions of Volume 28, Part 32 of the Code of Federal Regulations and Section 701 of the Omnibus Crime Control and Safe Streets Act of 1968 as amended (42 U.S.C. 3796). Officer C's death was not the direct and proximate result of a personal injury as defined by 28 C.F.R. 32.2(d), (e), and (f). Specifically, a public safety officer's death which results from a chronic, congenital, or progressive cardiac and pulmonary disease is not covered by the Act, unless a traumatic injury was a substantial factor in the death. See the Commentary on Section 32.2(e) at page 23260 of the regulations. On the basis of the evidence presented in this case, we have concluded that Officer C did not suffer a traumatic injury as defined in Section 32.2(f) of the Regulations. His widow and children are therefore not entitled to the benefit authorized to be paid by the Act.

* * *

In light of the medical complexity of the testimony presented in both the record and the oral hearing, the hearing was continued to permit further analysis of the factual data by a medical expert not previously acquainted with the case. The medical expert, who was asked to review the hearing record and other relevant documents, was Dr. Douglas S. Dixon, Chief, Division of Forensic Pathology, Air Force Institute of Pathology, Washington, D.C. A copy of the letter from Dr. Dixon setting out his findings has been included in the hearing materials.

On the basis of our review of the existing record, the testimony and exhibits entered at the hearing and the findings of medical experts, it is hereby determined that claimants are eligible to receive benefits under

the Act and that, accordingly, the initial determination should be reversed. This conclusion rests upon our analysis of the evidence presented, the PSOB Act, the relevant sections of the LEAA Regulations implementing the PSOB Act, and related Office of General Counsel opinions interpreting these Regulations.

* * *

As respects the facts in this case, Officer C. died on March 11, 1977, having spent the preceding 43 days in a total coma which followed his collapse in his station house on January 26, 1977.

As indicated in the attached transcript and related exhibits, it is claimant's position that Officer C.'s collapse was the result of a blow to the chest which was received during an attempt to control a robbery suspect approximately 30-60 minutes prior to his collapse.

More specifically, it is claimants' position:

> (1) that except as noted in (2) below, the findings of the autopsy describe physical conditions which developed as a result of Officer C.'s comatose condition (and of the medical procedures used in connection therewith) and that since these conditions did not necessarily exist prior to the officer's collapse, the findings of the autopsy report should not be considered in determining the "cause" of death for puposes of PSOB eligibility, (except to the extent that such conditions may be deemed to be "diseases which are caused by or result from a (traumatic) injury" within the meaning of Sec. 32.2(f);
>
> (2) that (subject to possible revision upon microscopic review of slides and tissues by claimants doctor) the foregoing position applies to the cardio-vascular findings in the autopsy report (except for the "atheromatous plaques" which were considered a normal condition of aging) and that in light of Officer C.'s general prior level of physical activity and the absence of any contrary autopsy findings, the Record does not indicate the existence of a prior existing cardiac condition.[1]

1. In keeping with claimants' request, wet tissue slides were forwarded to Dr. Felderman after the oral hearing for microscopic review. On the basis of review of these slides Dr. Felderman indicated, in a letter of October 24, 1978, that "I believe that the myocardial hypertrophy, as evidenced at the time of his death, did *not* exist.. (at) .. the time of the traumatic incident." To avoid further delay of time, the slides were not forwarded to Dr. Dixon for further review since Dr. Dixon in his letter of August 30, 1978, setting forth his view in support of claimants position, stated that although "I have not seen the microscope slides . . I do not feel that they are critical. . and probably will not add any additional information. ."

(3) that the collapse and subsequent coma was the result of an anterior chest wall trauma caused by a blow inflicted by a robbery suspect attempting to escape Officer C.'s control.

(4) that the medical basis for the collapse was anoxia resulting from cardiac fibrillations and arrhythmias caused by the trauma (as documented in Diseases of the Heart; Charles K. Friedburg, M.D., Third Edition, (p.1697));

(5) that the blow, as described in testimony of Police Officer M. an eye witness to the struggle, was sufficient to have initiated this course of events despite the fact that extensive clothing worn by Officer C. prevented any markings from being seen on his body at time of admission to the hospital.

(6) that accordingly, in light of the absence of any indications of prior cardiac difficulties, a causal relation exists between the blow suffered in the course of Officer C.'s duty and his subsequent death 43 days thereafter.

On the basis of the foregoing general summary of the legal framework to be applied and the facts indicated in the transcript and other exhibits (including hospital records) it is our view that a finding for the claimants must be made if it is determined that either:

(1) the severity of the chest blow, as distinct from the ongoing struggle, was medically sufficient to have resulted in events leading to Officer C.'s collapse and coma or, could be considered as substantial a cause of such events as any other factors, (as evidenced in the transcript, autopsy, etc.); or

(2) the combined analysis of the facts (including the possible impact of the chest blow, the relationship of the blow to the struggle, the apparent physical fitness of Officer C. and the uncertainty regarding the applicability of autopsy findings) are sufficientiy ambiguous as to bring the case within the framework of Sec. 32.4 cited above.

The above-noted issues were presented to Dr. Dixon by letter of August 4, 1978. As indicated in his reply of August 30, 1978, it is the view of Dr. Dixon that:

"The autopsy findings are such that they document *minimal chronic progressive cardiovascular disease,* a

healing infarct of the *myocardium and multiple sequelae of a long hospitalization following a period of anoxia*;. . The only evidence for chronic progressive cardiovascular disease is the presence of a 'few atheromatous plaques' in the coronary arteries and minimal hypertrophy of the myocardium (475g); the latter finding may have occurred during the hospitalization after the infarct. These minimal findings coupled with a clinical history of a non-smoking, vigorous man without hypertension, obesity, or history of chest pain point to another etiology for his cardiovascular collapse beside arteriosclerotic cardiovascular disease.

"Historically, the decedent received a localized blow to the chest of sufficient intensity to push him backward several feet; in the hour following this traumatic episode, he became progressively more uncomfortable and eventually collapsed. EKG examination apparently revealed ventricular tachycardia and fibrillation. There have been reported cases where a blow to the chest has resulted in a fatal arrhythmia in an individual whose heart was normal at autopsy; ... We have clear evidence, therefore, that blows to the chest may affect the electrical rhythm of the heart. **The most reasonable medical explanation for this man's collapse is an arrhythmia initiated by a discrete traumatic event - a blow to the chest.** The resultant ineffective pumping of the heart led to anoxia of the heart muscle with an acute myocardial infarction and anoxia of the brain with coma and death; . .these are the sequelae of the post-resuscitation hospitalization as documented by the autopsy. **The proximate cause of death in this case is therefore a cardiac arrhythmia secondary to a traumatic blow to the chest,** supporting the claimant's position as summarized on pages 3 and 4 of your letter of 4 August, 1978," (and described on p. 3 and 4 of this opinion)(emphasis supplied).

On the basis of the foregoing, and of our review of the transcript and related materials, it is our view that: the findings indicated in the autopsy report reflect conditions which resulted from (rather than caused) the lengthy hospital stay; that the medical and other exhibits do not establish the presence of a prior existing cardiac condition; that a blow of substantial intensity was incurred by Officer C. during the course of the attempted arrest on January 26; that medical studies support the possibility that such a blow can result in cardiac arrhythmia (and subsequent cardiac failure) in an otherwise normal individual; that Officer C.'s death one month after receiving the blow

could medically be considered to be a delayed result of the cardiac event triggered by the blow received on January 26, and that the extent and severity of the struggle involved in controlling the suspect was not sufficient to be considered a substantial cause of cardiac malfunction in an individual possessing Officer C.'s medical history.[2] Accordingly, it is our view that the facts support the conclusion that the blow suffered by Officer C. was a substantial cause of his death or, that at the very least, the specific cause of the officer's death was sufficiently ambiguous so as to bring the case within the provision of Sec. 32.4 and that, therefore, the initial determination of January 4, 1978, should be reversed and payment made to claimants in accordance with appropriate procedures under PSOB.

It should be noted that this conclusion is not inconsistent with the fact that homicide charges were not raised against the party inflicting the blow received by Officer C. This is the case since, as noted in the October 4, 1978 letter from Queens Assistant District Attorney John M. Ryan, to David Tevelin, LEAA Office of General Counsel, the decision to withhold prosecution on homicide charges was based on the fact that, the applicable standard of proof for such prosecution required a finding "beyond a reasonable doubt" and that, in the view of the medical examiner of the City of New York, "sufficient doubt existed as to preclude such a finding." Since, as noted previously, however, the PSOB Act does not require a finding "beyond a reasonable doubt" the determination by the Queens District Attorney does not conflict with the determination made in this opinion.

April 6, 1980

Hearing Officer's Decision

SUBJECT: **Contribution of Decedent's Fall to Death**

This determination is made with respect to the claim for benefits under the Public Safety Officer's Benefits Act (PSOB) arising out of the death of Emanuel G., Firefighter, Kearny, N.J.

This claim was filed on behalf of Mary G., widow of the decedent, and Donna M. G., an eligible "child" beneficiary, within the meaning of 28 C.F.R. 32.2(k)(2). Two other surviving sons do not qualify as

2. It is recognized that varying exhibits in the record (including the autopsy report and hospital admission records) indicate that Officer C.'s collapse followed a "struggle" -with no specific mention being made of the particular blows received during the course of the struggle - (as were described during the oral hearing). We do not consider this fact to be at variance with our determination regarding the impact of the particular blows, however, since no reason existed to itemize individual blows under the circumstances in which the information regarding the struggle was presented.

beneficiaries under the Regulations by virtue of age and independent employment.

The initial LEAA review of this claim resulted in the determination on March 16, 1979 that claimants were ineligible for benefits. The Determination stated that:

> "Based on the Report of Public Safety Officer's Death submitted by the Kearny Fire Department, the Claim for Death Benefits submitted by Mary G. and an analysis of the facts of the case, it is determined that the death of Emanuel G. is not covered under the provisions of Volume 28, Part 32 of the Code of Federal Regulations and Section 701 of the Omnibus Crime Control and Safe Streets Act of 1968 as amended (42 U.S.C. 3796)...(since)...Firefighter G's death was not the direct and proximate result of a personal injury as defined by 28 C.F.R. 32.2(d), (e), and (f)."

A request for reconsideration of the initial determination was submitted to LEAA by John E. Garippa, Esq., on behalf of Mrs. G. and the eligible child beneficiary on April 2, 1979. An oral hearing on the case was conducted in Kearny, N.J. on July 16, 1979. Claimants were represented at the hearing by Mr. Garippa. Testimony for claimants was presented by Firefighter Joseph T. Whittles, Deputy Fire Chief William R. Harrison, Fire Chief Joseph W. Philips, Robert J. Oldknow and Ronald E.G., M.D.

Additional evidentiary materials, including fire department photographs and reports, and further medical records were also submitted for inclusion in the record.

In light of the medical complexity of the testimony presented in both the record and the oral hearing, the hearing was continued to permit further analysis of the factual data by a medical expert not previously acquainted with the case. The medical expert, who was asked to review the hearing record and other relevant documents, was Dr. Kenneth H. Mueller, Chief, Division of Forensic Pathology, Air Force Institute of Pathology, Washington, D.C. A copy of the letter from Dr. Mueller setting out his findings has been included in the hearing materials.

On the basis of our review of the existing record, the testimony and exhibits entered at the hearing and the findings of medical experts, it is hereby determined that claimants are eligible to receive benefits under the Act and that, accordingly, the initial determination should be reversed. This conclusion rests upon our analysis of the evidence presented, the PSOB Act, the relevant sections of the Regulations im-

plementing the PSOB Act (28 C.F.R. Part 32), and related Office of General Counsel opinions interpreting these Regulations.

Specifically, Sec. 32.2 of the Regulations provides that benefits can be paid, assuming that other factors are appropriate, where a public safety officer "has died as the direct and proximate result of a personal injury sustained in the line of duty." Sec. 32.2(e) of the Regulations defines "personal injury" as "any traumatic injury, as well as diseases which are caused by or result from such an injury, but not occupational diseases"; Sec. 32.2(f) defines "traumatic injury" as a "wound or other condition of the body caused by external force, including injuries inflicted by bullets, explosives, sharp instruments,...(etc.)...but excluding stress and strain."

Additionally, the Supplementary Information, accompanying the Regulations states that "The definition of personal injury in the legislative history of PSOB, and the exclusion of occupational diseases from the scope of the Act have led LEAA to conclude...that deaths resulting from chronic, congenital, or progressive cardiac and pulmonary diseases are not covered by PSOB, unless a traumatic injury was a substantial factor in the death...(and that).. where an officer suffering from heart disease, such as arteriosclerosis, has sustained a traumatic injury and dies of a 'heart attack', a benefit will be paid only if the injury is determined to be a substantial factor in the officer's death."

An Advisory Opinion of LEAA Office of General Counsel further provides that generally, a traumatic injury would be considered a "substantial factor" in an officer's death "when (1) the injury itself would be sufficient to kill the officer, regardless of the officer's physical condition at the time of death; or (2) the injury contributes to the officer's death to as great a degree as any other contributing factor, such as a pre-existing chronic, congenital or progressive disease."

In recognition of the complexity of relevant medical factors, however, Sec. 32.4 of the Regulations specifically provides that "The Administration shall resolve any reasonable doubt arising from the circumstances of the officer's death in favor of payment of the death benefit." Additionally, the above-noted LEAA OGC Advisory Opinion, in discussing the weight of varying evidence, states that although "there must be sufficient medical, physical, or testimonial evidence to support the determination...*where there is a reasonable doubt as to causation, the death should be covered and the benefit paid.* 28 C.F.R. 32.4 (emphasis supplied).

As respects the facts in this case, Firefighter G. died on December 24, 1977, following a heart attack suffered on December 23 during or immediately following duty on a fire call.

As indicated in the Hearing Record and related exhibits, it is claimants' position:

(1) that Firefighter G's cardiac failure resulted from a trauma to the chest wall incurred when he fell into a hole while carrying a hose on the fire call;

(2) that medically, the cardiac failure resulted from fibrillations and cardiac arrhythmias which occurred as a result of the cardiac trauma; and

(3) that Firefighter G's physical condition, despite three visits to a cardiologist during the 12 months prior to the death, did not constitute a sufficient factor as to preclude eligible payment under PSOB.

In support of this position, claimant has offered testimony to indicate that:

(1) Firefighter G. in fact fell into a hole while on duty.

(2) The size of the hole as estimated by an inspection several days after the incident was approximately 5 x 9 x 4 ft. deep...and that railroad ties across the hole concealed the hole and narrowed its opening to about 2 x 3 ft. in size.

(3) Firefighter G. might reasonably have been expected to hit his chest on the side of the hole or railroad ties while breaking his fall.

(4) The absence of immediate symptoms and/or concern over the impact of the fall did not preclude the later onset of medical symptoms such as those described above.

In addition to the foregoing, it is claimants' view that Firefighter G's prior medical history, (including three visits to a cardiologist during the year preceding Firefighter G's death) does not indicate that the officer's death resulted from a prior existing condition so as to preclude payment under PSOB. In this connection, the record includes:

(1) statements offered during the hearing by Dr. Ronald E. G., a resident in orthopedics and the son of the decedent. (These statements indicate that Firefighter G's initial referral to a cardiologist to a large degree reflected the concerns of his son rather than the severity of the pains involved.)

(2) a letter from Dr. Michael Edward Kelly, a cardiologist discussing Firefighter G's condition posthumously on the basis of medical records. (The letter indicates that "the new electrocardiographic appearance of a myocardial injury pattern associated with malignant ar-

rhythmias, immediately following a potentially severe deceleration trauma, could feasibly represent myocardial contusion.")

(3) A written statement by Dr. Leonard Weinstein, a cardiologist who examined Firefighter G. and accompanying records relating to Firefighter G's three visits to Dr. Weinstein.

On the basis of the foregoing general summary of the legal framework to be applied and the facts indicated in the transcript and other exhibits, Dr. Mueller was asked to determine whether, in his view:

(1) The severity of the chest trauma likely to have been suffered by Firefighter G. in the fall appeared medically sufficient to have resulted in cardiac events leading to Firefighter G's death or, alternatively, could be considered as substantial a cause of such events as any other facts (including Firefighter G's physical condition prior thereto); or

(2) The combined analysis of the facts (including the possible impact of the fall and Firefighter G's prior medical history) are sufficiently ambiguous as to preclude any possible determination within the PSOB legal framework as respects the cause of the collapse, and resulting death and, accordingly, bring this case within the framework of Sec. 32.4 of the Regulations cited above.

In response thereto, Dr. Mueller's letter of March 17, 1980, confirmed the theory of cardiac trauma and specifically stated that: "Cardiac contusions (bruising of the heart) are becoming increasingly recognized as a relatively common occurrence in serious nonpenetrating chest trauma...(and that)...the signs and symptoms (and ECG and lab findings) of cardiac contusions may mimic exactly those of an ordinary non-traumatic heart attack."

With specific relevance to the issues raised, Dr. Mueller indicated that: "...although the probability is great that death followed a naturally occurring heart attack which coincidently came shortly after Firefighter G's fall....There is no denying the possibility suggested by Dr. Kelley and Dr. G...(that the fatal heart attack was initiated by the cardiac contusion)."

Dr. Mueller further states that: "Without a post-mortem examination or more extensive ante-mortem investigation, we have no reasonable way of excluding this possibility...(and that)... Whatever the true mechanism of the death was, there was a very close connection in time with a traumatic event of probably *more than usual stress and strain variety*." (emphasis supplied).

In closing Dr. Mueller discusses the impact of cardiac trauma on individuals having a prior existing cardiac condition and states that:

"even if Firefighter G. had advanced ischemic heart disease, as I suspect he did, the trauma that he may have sustained to his heart could be considered a substantial factor leading to his death, i.e., that the trauma was as great a contributing factor as any other."

On the basis of the foregoing, it is our conclusion that sufficient uncertainty exists as respects the cause of Firefigher G's death as to bring the case within the purview of Sec. 32.4 of the Regulations and to therefore require reversal of the initial findings.

It should be noted that our conclusion rests upon our view that Sec. 32.4 requires that benefits be paid to the claimant in any case in which reasonable alternative causes for the death can be established--regardless of whether the possibility of such alternative causes can be established beyond a reasonable doubt or whether the uncertainty regarding such alternative causes reflects the absence of adequate data describing either the decedent's "trauma" and/or his pre- or post-mortem medical condition.

September 18, 1979

OGC Memorandum

SUBJECT: **Contribution of Ammonia Inhalation to Death**

This is to advise you of our concurrence in Hearing Officer John Gregrich's decision to award benefits in the above-captioned case on the basis of "reasonable doubt." This case presented the unusual fact situation of a firefighter with advanced heart disease dying shortly after being exposed to ammonia fumes. In our opinion, sufficient evidence now exists in the case file to support, to at least a reasonable doubt, a conclusion that the decedent's inhalation of that toxic gas was a substantial factor in his death.

We also must specify that our concurrence is not based on Dr. Mueller's argument that an injury that acts as the "last straw" satisfies the "substantial factor" requirement. Acceptance of that argument would undermine the rationale behind the requirement that a traumatic injury be a "substantial factor" in a public safety officer's death if benefits are to be paid. In PSOB Legal Opinion No. 77-6, we stated that a traumatic injury should be considered a "substantial factor" if "(1) the injury itself would be sufficient to kill the officer, regardless of the officer's physical condition at the time of death; or (2) the injury contributes to the officer's death *to as great a degree as any other contributing factor,* such as a pre-existing chronic, congenital, or progressive disease." (emphasis added)

Although we recognize that the second test requires, at bottom, a subjective decision on the part of the deciding official, we believe that a decision to pay benefits that is based on equating a "last straw" traumatic injury with severe, pre-existing heart disease would render the "substantial factor" requirement meaningless. Benefits would have to be paid even in those cases where there was only a temporal connection between a minor injury and death, despite the presence of serious chronic heart disease that was the overriding cause of death.

In carbon monoxide cases, we have defined 10% CO saturation (for nonsmokers) and 15% saturation (for smokers) as the points where CO inhalation becomes a substantial factor in a public safety officer's death. Implicit in this is a judgment that a smaller dose of CO poisoning is not a substantial factor in the death. Dr. Mueller's argument would demand a payment even in the smaller dose cases if the inhalation occurred soon before the death and was, accordingly, deemed a "last straw."

III. Line of Duty

Definition - 28 C.F.R. 32.2(c)

(c) "Line of duty" means any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves. For other officers, "line of duty" means any action the officer is so obligated or authorized to perform in the course of controlling or reducing crime, enforcing the criminal law, or suppressing fires.

A. **Contractor's Work**

May 26, 1981

OGC Memorandum

SUBJECT: **Coverage of Off-Duty Firefighter Assisting Contractor in Fire Horn Repair**

In our opinion, the decedent's death is not covered by the Act.

The decedent was employed as a full-time firefighter by the Fairfield, Maine Fire Department. On December 22, 1978, while off duty, Mr. H. assisted Mr. Spofford Hutchinson, a contractor with the Town, in repairing the fire horn atop the firehouse. Mr. H. fell to his death from a tower on the firehouse roof.

The precise question to be resolved in this claim is whether, at the time of his death, Mr. H. was acting in the "line of duty" as required by the Act. As defined in 28 C.F.R. 32.2(c), "line of duty" means, in relevant part: "any action which an officer . . . is obligated or authorized by rule, regulation, condition of employment or service, or law to perform. . ."

This definition has been analyzed in a recent Court of Claims decision, *Budd v. Gregg,* No. 82-80C (November 14, 1980). The court found that "eligibility for benefits turns on whether the specific activity causing death was an inherent part of employment as an officer. Thus the death must be 'authorized, required, or normally associated with'

an officer's law enforcement duties as the interpretative regulation requires." *Budd,* slip op., at 3, fn 6. The court elaborated that "The proper test is . . . whether the activity itself is required of an officer." *Id.,* 5.

In the instant case, Mr. Hutchinson (d/b/a Somerset Communications) was asked by the Town to maintain the town fire alarm. According to the transcript of the workmen's compensation proceeding in this matter, Mr. Hutchinson's specific task on December 22, 1978 was to mount new horns on the firehouse roof. In order to do so, steel brackets had to first be mounted on the tower. The horns were then to be mounted on the brackets, and pneumatically connected to a valve on the tower.

Mr. Hutchinson had been responsible for maintaining the alarm system since late 1974 or early 1975. By arrangement with the Fire Department, he agreed to use off-duty fire department drivers, when available, to help him do the work. The tools Mr. Hutchinson used were his own, although the Town provided the horns, valve, and framework. Mr. Hutchinson also used his own pick-up truck, and on the day in question, obtained an aerial boom truck from another town to elevate himself and his assistant. Mr. Hutchinson would bill the Town of Fairfield for his work, and mark up the cost of the materials he had to buy for the job.

Mr. H. was apparently, at least sometimes, paid directly by Mr. Hutchinson for his work. The Town Treasurer has stated in an affidavit requested by your office that Mr. H. never directly submitted a voucher to the Town for the work he did for Mr. Hutchinson. The Town paid Mr. H. $3.37 for his services as a fireman, but he received $3.50-$3.75 for his work for Mr. Hutchinson.

Mr. Hutchinson was solely responsible for deciding how many assistants he would need on a particular job, and for choosing who would assist him. Mr. Hutchinson was also in charge of the project, and responsible for the supervision of his assistant.

Our analysis of these facts leads us to conclude that the activities Mr. H. was performing at the time of his death were not activities he was authorized or obligated to take as a firefighter, or an inherent part of his duties.

Mr. H. is described in the file as both a "rescue man" with the Department, and a "full time rescue and fire driver." Although no job description is provided, it is apparent from the claim forms and the workmen's compensation proceeding that his duties for the department did not include mechanical, electrical, and pneumatic maintenance of the alarm system. The lack of the necessary internal

expertise in such matters appears to be the principal reason the Department had to "contract out" for the work.

The tasks Mr. H. was helping to perform at the time he died are wholly discrete from those normally associated with firefighting. The fact that the work was being performed at the firehouse is insufficient to bring him under the scope of the Act. None of his duties with Mr. Hutchinson appear to have been "obligated or authorized" by law, or any rule, regulation, or condition of employment of the department.

In this connection, we distinguish between those activities Mr. H. was authorized by rule tc perform and those he was authorized by permission to perform. The department's permitting him to work with the contractor is not the sort of "authorization" contemplated by the "line of duty" regulation, 28 C.F.R. 32.2(c). As an analogy, we would not cover police officers moonlighting as private security guards solely because their departments had permitted them to do so. To be covered by the Act, they would also have to die while performing some action they were empowered or required to take as police officers. It is this latter element of coverage that is lacking in this case.

The lack of the department's authority over the decedent while he worked for the contractor is manifested in several significant ways. The contractor, not the department, was responsible for his work assignments and setting the time he was called on to perform them. The contractor also set the rate of pay, and provided many of the tools needed to perform the job. The method of payment was also a matter to be decided by the contractor and the decedent, without any direction from the department.

Although we cannot be certain whether these circumstances would make Mr. H. a "lent employee" under the general principles of workmen's compensation law, and therefore beyond the scope of his employment with the department, we do not believe that an analysis of this distinction would be particularly enlightening. As the Court of Claims observed in *Budd,* the "Congressional choice of the 'line of duty' standard" rather than the traditional workers' compensation "scope of employment" standard makes workers' compensation cases "of only limited relevance." *Budd, supra,* at 2, fn 5.

Accordingly, we are compelled to conclude that Mr. H. was not acting in the "line of duty" as a firefighter at the time of his death, and that PSOB benefits must be denied.*

* See also Part I, D., "Contract Pilot."

B. Dual Purpose Trip

February 1, 1978

OGC Memorandum

SUBJECT: **Participation in National Police Pistol Championships** (PSOB Claim No. 78-11)

In this file, a Dallas, Texas policeman was in Jackson, Mississippi, representing his department at the National Police Pistol Championships. After experiencing difficulty with his pistols during the first two days of the match the officer asked friends on another team about the availability of a weapon that he might use in a shotgun event on the third day of the championships. On the evening of the second day, the officer ate dinner with his teammates and returned with them to their place of lodging. At approximately 10:00 p.m., the officer asked his colleagues if anyone wanted to go out with him and get something to eat. When they declined, the officer left alone in a police van. Sometime later, he arrived at the hotel where his friends on the other team were staying. Statements given by officers present do not say that the shotgun was discussed during the officer's visit. He left to return to his place of lodging, without a shotgun, at about 1:00 a.m. At approximately 1:20 a.m., he was killed when an automobile struck him as he alighted from the van on the shoulder of a highway after running out of gas.

As you know, the Public Safety Officers' Benefits Act of 1976 (PSOB) covers those officers who die as the "direct and proximate result of a personal injury sustained in the line of duty." Section 32.2(c) of the LEAA PSOB Regulations, 28 C.F.R. 32.1, *et seq.*, defines "line of duty" to mean:

> "any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves."

The following questions must be resolved in this case before a determination that the decedent was acting in the line of duty can be made: (1) Was the officer, by virtue of his authorization to compete in the championships at Jackson, in an "on duty" status during his *entire* stay there? And, if not, (2) Did the officer's visit to his friends have such a substantial business purpose as to bring his visit within the line of duty? Based on the evidence presented in the claim file, we must conclude that both questions should be answered in the negative.

With respect to the first question, Professor Larson, in his authoritative work, *Workmen's Compensation Law,* states the general rule: "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown." *Id.*, §25.00

When an employee has suffered an injury in the course of a personal mission, State workmen's compensation claims have been denied. In *Hardware Mutual Casualty Company v. McDonald,* 502 S.W. 602 (Tex. Civ. App. 1973), for instance, a traveling salesman returned to his motel at approximately 10 p.m., after having dinner in a cafe five miles away. After making some phone calls, he returned to the cafe for approximately forty-five minutes. He then drove to a nearby river, where he was discovered drowned the next morning. The court concluded that the decedent was on a purely personal mission when he returned to the cafe, and reversed the trial court's award of compensation. Compensation was also denied a salesman who died in an auto accident on his way home from dinner with officers of his employer. *Bormeister v. Industrial Commission,* 284 N.E. 2d 625 (Ill. 1972). See also *Miller v. Sleight & Hellmuth Co.,* 436 S.W. 2d 625 (Mo. 1968). In this case, the answer to the first question posed above also answers the second, because the facts strongly support a conclusion that the decedent was returning from a purely personal mission at the time of his death.

In *Mark's Dependents v. Gray,* 251 N.W. 90, 167 N.E. 181 (1920), Judge Cardozo formulated the principle of law that has been applied by the great majority of jurisdictions* to "dual-purpose" activity problems such as the one presented in the second question. He wrote:

> "The test in brief is that: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own . . . .

* Texas is one of these jurisdictions. Section 1b of Article 8309, Vernon's Ann. Tex. Civ. Stat., reads in relevant part: "Travel by an employee in the furtherance of the affairs or business of his employer shall not be the basis for a claim that an injury occurring during the course of such travel is sustained in the course of employment, if said travel is also in furtherance of personal or private affairs of the employee, unless the trip to the place of occurrence of said injury would have been made had there been no personal or private affairs of the employee to be furthered by said trip, and unless said trip would not have been made had there been no affairs or business of the employer to be furthered by said trip."

> "If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk." *Mark's,* at 93.

In this case, therefore, the officer's trip would have been in the line of duty if he would have gone to see the shotgun even if he had not decided to go out to eat or to see his friends.

The evidence supporting the business purpose of the trip, however, is weak. While at the pistol range the afternoon before his death, the officer had evidently discussed his need for a shotgun with the officers he visited that night. Two of those officers gave statements in this matter to that effect, but neither officer stated that the shotgun was discussed when they met that night. The evidence supporting a conclusion that the decedent's trip was made for personal reasons is much stronger. His annouced intention was to get something to eat. The officers he visited were evidently friends made during prior competitions; one of the two who gave statements said the decedent was a personal friend and the other stated that they "talked shop and old times." These statements are supported by the fact that the group spent between two and four hours together, depending on whose chronology is accurate. Finally, according to the inventory made by the Jackson Police Department, there was no shotgun in the van when the officer was killed.

We do not believe this evidence presents a reasonable basis on which to conclude that the decedent would have pursued the purported business aspect of this trip had the personal purpose been removed. We believe to the contrary, that the evidence strongly shows that the decedent had made a "distinct departure on a personal errand" at the time of his death. Accordingly, it is the opinion of this office that the decedent was not acting in the line of duty at the time of his death and that benefits should not, therefore, be paid to his survivors.

November 17, 1978

Hearing Officer's Decision

SUBJECT: **Appeal of Denial in File 78-11 (Police Pistol Championship)**

The initial review of this case resulted in a determination that the claimant was ineligible for benefits. The determination stated that:

Based on the Report of the Public Safety Officer's Death submitted by the Dallas Police Department, the claim for death benefits submitted by Patricia C. and an analysis of the facts of the case, it is determined that the death of Max C. is not covered under the provisions of Volume 28, Part 32 of the Code of Federal Regulations and Section 701 of the Omnibus Crime Control and Safe Streets Act of 1968 as amended. Specifically, Officer C's death was not the result of a line of duty action as required by 28 C.F.R. 32.2(c) in that, at the time of his death, Officer C. was not going to, coming from, or participating in the event to which he was assigned. His widow is therefore not entitled to the benefit authorized to be paid by the Act.

A request for an oral hearing was submitted by Thomas F. Clayton, Attorney at Law, on behalf of the claimant on March 10, 1978. An oral hearing was conducted on August 23, 1978 in Dallas, Texas.

Additional information was provided at the hearing through testimony from Mrs. C. and assurance was provided that further information would be forthcoming in the form of affidavits, from Detective John S. and Sgt. Jim F., Cobb County, Georgia Police Department. An affidavit was received from F. on October 2, 1978, and an affidavit was received from S. on November 15, 1978.

The denial of benefits was based upon a determination that Officer C.'s death did not occur in the line of duty, specifically that his visit to the quarters of S. and F. was for personal reasons. A review of the information acquired as a result of the hearing, particularly the affidavits from Officers S. and F., present a reasonable basis to conclude that the primary reason for Officer C's trip was duty related, i.e., to examine and familiarize himself with a weapon to be used in the competition the following day.

Accordingly, it is my determination that Officer C.'s death occurred in the line of duty and the claimant be deemed eligible to receive benefits under the Act.

November 2, 1979

OGC Memorandum

SUBJECT: **Death During "Dual Purpose" Airplane Flight**

In this claim, Mr. Oscar R., a New Jersey county prosecutor, was killed in an airplane crash shortly after leaving a National District Attorneys' Association (NDAA) Conference in Biloxi, Mississippi. The

crash occurred during the decedent's flight from Gulfport, Mississippi to New Orleans, Louisiana. He had intended to fly from New Orleans to visit his parents in West Palm Beach, Florida, before returning home to New Jersey. The question presented is whether Mr. R. died while in the "line of duty." In our opinion, he did.

Mr. R. had presented a program at the conference that ended sometime after noon on Thursday, March 1, 1979. The final program on the conference schedule was to end in the middle of the afternoon. Mr. R. was driven to Gulfport, Mississippi airport in time to catch a 2:30 p.m. Universal Airways flight to New Orleans. Mr. R. died when the Universal flight crashed almost immediately upon takeoff, at 3:04 p.m.

The applicable rule of law in this case was first stated in *Mark's Dependents v. Gray,* 251 N.Y. 90, 167 N.E. 181 (1920). Judge Cardozo stated the test of coverage under the New York State Workmen's Compensation law as follows:

> "If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own...
>
> "If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk." *Marks,* at 93.

Here, the decedent's work had created the necessity for his travel from New Jersey to Biloxi and back. Mr. R. would have had to travel from Gulfport to New Orleans even if he were returning directly to New Jersey, and not going to West Palm Beach. Although it is not necessary to coverage that his death occurred on the very same flight he would have taken had he been going directly to New Jersey, Larson, *Workmen's Compensation Law,* §18.13, that was, in fact, the case. Our calls to Eastern and Delta Airlines have shown that Mr. R's Universal flight would have permitted him to make the first flights to Newark leaving New Orleans after 11:30 a.m. on March 1.

Accordingly, we recommend that benefits be paid to Mr. R's eligible survivors.

January 12, 1981

OGC Memorandum

SUBJECT: **Death Resulting from Decedent's Participation in Gunplay (PSOB Claim No. 80-60)**

The precise nature of the circumstances surrounding Officer H's death are at the core of our disagreement with the Hearing Officer's decision. The facts not in dispute are that, early in the morning of December 31, 1979, three officers of the Williamson, West Virginia Police Department, Patrolman Bobby H., Patrolman Ronald C. Lovins, (and according to the West Virginia Department of Public Safety Report and the statement of Patrolman Lovins) Patrolman James H. Pack were "quick drawing" their weapons at each other at the police station.

Our interpretation of events differs at this point from the Hearing Officer's. Mr. Swain found that Patrolman H. ceased his gunplay at the time Patrolman Lovins began to leave the station. Officer Lovins then reached his drawn gun back into the duty room through a pay window and said "Ha-ha, I've got the drop on you," or words to that effect. Patrolman H. suddenly turned toward Patrolman Lovins, at which time Lovins' gun went off, fatally shooting H.

The critical difference between our interpretation of events of Mr. Swain's is that we do not believe that Patrolman H. ceased his gunplay prior to the shooting. We are in agreement with the remainder of Mr. Swain's view of the facts.

To support his contention that Patrolman H. had ceased participating in the gunplay prior to his death, Mr. Swain relies on Lovins' statement that H. had re-holstered his gun before Lovins began to leave the station. Mr. Swain also discounts Patrolman Pack's statement that H. had his gun out and was sneaking up to the window at the time of the shooting by finding it inconsistent with the later statements Pack made about the shooting.

We believe that the weight of the most reliable evidence supports a conclusion that Patrolman H. was still participating in the gunplay at the time he was shot. In the sworn statement Patrolman Pack gave to the West Virginia Department of Public Safety less than three hours after the shooting, he describes the circumstances leading up to the fatal shot:

> "After watching them [Lovins and H.] quick draw on each other for a few minutes, I told Ron to let's go back on patrol. As we were leaving the station, Ron Lovins

was in front of me and as Patrolman Lovins entered the hallway, Patrolman Lovins pulled his pistol, stepped up to the pay window, jumped in front of the pay window and said, "Ah! Ha!", pointing his pistol at Patrolman H. Patrolman H. also had his pistol pulled and was sneaking to the window to surprise Patrolman Lovins. The next thing I knew was that I saw Patrolman Lovins put his gun on the ledge of the pay window and Patrolman Lovins pistol went off."

The two statements Mr. Swain relies on to discount the veracity of this contemporaneous account are both hearsay. The first is a statement Pack purportedly made to the decedent's widow that morning. Mrs. H. recalled the conversation as follows:

> "...it was before my husband was pronounced dead. I know that Pack was supposed to be with him, working with him, just Bobby and Pack, and I asked him what had happened and he said he didn't know. That's all he had to say."

In our view, the self-serving testimony of Mrs. H., relating an out-of-court, unsworn statement by Officer P. is not credible, particularly when his disclaimer of knowledge is contrasted to the detailed, sworn statement about the incident that he gave the State police the same morning.

The second statement relied on by the Hearing Officer is a notarized statement made on October 10, 1980 by Cpl. C. R. Bush of the Williamson Police Department. Cpl. Bush stated:

> "On Thursday 9th day of October, 1980 at 11:15 PM, Myself, and Trooper Manning, had stopped at the Corner Carry Out for Trooper Manning to purchase a pack of cigarettes.
>
> "Sergeant Bob H. and Patrolman Pack approached us and Patrolman Pack wanted to give us a statement about Bobby H.'s death. He stated that Patrolman Lovins gun was holstered, and the horseplay had stopped and that he saw Patrolman Lovins re-draw his weapon as he went out the door and that he did not see Bobby H. draw his gun, but he heard the shot."

Aside from being hearsay, this statement was purportedly made more than nine months after the incident being described. The fact that the statement was purported to have been made in the presence of the decedent's father (Sgt. Bob H.) also suggests that it might have been

made out of fear, sympathy, or some other emotional pressure. In short, this statement lacks the objective reliability of Patrolman Pack's earlier statement.

Patrolman Lovins gave two statements to the State police about the incident. In both statements, he notes that Patrolman H. had reholstered his gun after a previous episode of gunplay, but before he (Lovins) began to leave the station. Neither of these statements is inconsistent with Patrolman Pack's account. By all accounts, there was ample time between Lovins' departure from the room, and the fatal shot for H. to pull his gun.

One other (apparent) fact supports a conclusion that H.'s gun was unholstered at the time he was shot. Sgt. H. testified at the hearing that his son's gun had been found on the floor:

> "BY EXAMINER SWAIN: Q. Now if I could interrupt you there, where was your son's gun at that time? Do you know?
>
> "A. The gun? At that time the gun was found, it was hid in one of the desk drawers over in a file cabinet. In other words, away from that.
>
> "Q. How did you find that?
>
> "A. The desk clerk found it at 3:30 or 4:00 in the morning. See, this happened — Officer Pack said he hid it. He said his gun was on the floor. He don't know whether it fell out or not, but he was carrying his swivel holster. If he had been fast drawing, when he fell, his gun would have come out of that holster...."

We, accordingly, believe that the most reasonable interpretation of the evidence in this file supports a conclusion that Patrolman H. was still engaged in gunplay at the time of his death.

The second question that must be resolved, therefore, is whether Patrolman H's participation in this gunplay was in the "line of duty" as that term is defined in the LEAA PSOB Regulations. Section 32.2(c) of the Regulations defines "line of duty" (in relevant part) as:

> "any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or

athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves."

The United States Court of Claims recently upheld this definition in *Budd v. U.S.*, No. 82-80C (November 14, 1980), a PSOB case arising out of circumstances substantially similar to those here. In *Budd,* two policer officers were "quickdrawing" each other at the stationhouse when one fatally shot the other. The agency's conclusion that the decedent's actions were not in the "line of duty" was affirmed by the court.

The court first found that our definition of "line of duty" was consistent with the intent of the Act. The court specifically held that eligibility "turns on whether the specific activity causing death was an inherent part of employment as an officer. Thus, the death must be 'authorized, required, or normally associated with' an officer's law enforcement duties as the interpretative regulation requires." *Budd,* Slip op., p.3, fn 6.

The court also noted that "the proper test is not whether an activity improves a skill which is required of a police officer but, rather, whether the activity itself is required of the officer." *Id.* p. 5.

In determining that quickdrawing was not required by the conditions of the decedent's employment, the court found five factors relevant:

> "First, there was no evidence introduced by plaintiff that the New London Police Department, or any other police department, felt that 'quick draw' contests between officers were such an essential part of employment that such contests were either required or authorized...
>
> "Second, alternative activities were apparently available in which rapid revolver removal might be practiced...
>
> "Third, there was apparently an unwritten rule in the New London Police Department that firearms were not to be pointed at others. This common-sense rule accords with gun safety rules in other departments....
>
> "Fourth, the evidence in the record suggests that none of the other officers in the New London Police Department regarded 'quick draw' contests as required by their employment...
>
> "Fifth, Officer Skillicorn [who fired the fatal shot] indicated he participated in these contests at least in part to make the night pass more quickly." *Id.*, pp. 5-6.

Applying those factors to this case, no evidence has been presented which would show that the type of gunplay engaged in by the decedent was a required or authorized condition of employment. There is no evidence on the second factor, about available alternate activities, although Patrolman Lovins told the State police that the department offered no firearms training.

With respect to the third factor, the department apparently had no written rule about playing with firearms. At the hearing, however, the decedent's father stated that no one played with their guns in front of him "because I raised too much sand about it...I would chew them out...I'd relieve them of duty." This statement by a senior sergeant suggests that the "common-sense" rule cited by the court in *Budd* existed in the decedent's department as well.

On the fourth factor, none of the eight officers interviewed by the Department of Public Safety stated, even impliedly, that they believed that participation in gunplay was a condition of their employment. They all recalled, however, seeing others participate in gunplay, or participating in it themselves. Their statements, and Sgt. H.'s testimony at the hearing, indicate that the older officers, including the Chief, never participated in gunplay, but that a number of the younger officers did.

With respect to the final factor, Patrolman Lovins did not state his reasons for participating in the gunplay, although the nature of the episode speaks for itself.

Accordingly, although each of the five factors relied upon in *Budd* is not present in the instant case, there is substantial reason to believe that the frivolous type of gunplay that occurred here was not required as a condition of employment, and was not, therefore, an action Patrolman H. took in the "line of duty."

March 9, 1981

Administrator's Decision

SUBJECT: **Death Resulting from Participation in Gunplay (PSOB Claim No. 80-60)**

As Mr. Broome informed you in his letter of January 22, 1981, the determination of the Hearing Officer in the above-captioned case, in which you represented Mrs. Bobby D.H., is subject to final review by the LEAA Administrator. After careful review of the entire file, including your letter of Feburary 4, 1981, it is my decision as Acting Administrator that Mrs. H. is not entitled to benefits under the PSOB

Act because her husband was not acting in the "line of duty" at the time of his death. Accordingly, the decision of the hearing officer to grant benefits is reversed.

The decision is based on the following findings of fact and conclusions of law:

1. The weight of the most reliable evidence supports a conclusion that Patrolman H. was still participating in gunplay at the time he was shot. A sworn statement given by Patrolman Pack less than three hours after the shooting clearly supports this conclusion. The self-serving testimony of Mrs. H., relating to an out-of-court, unsworn general disclaimer of knowledge by Pack is not credible impeachment of his subsequent detailed statement, nor is the noncontemporaneous hearsay account given by Cpl. Bush (in his notarized statement of October 10, 1980). In addition, neither of Patrolman Lovins' statements is inconsistent with Patrolman Pack's account, since there was ample time between Lovins' departure from the room and the fatal shot for H. to pull his gun.

2. There is substantial reason to believe that the frivolous type of gunplay that occurred here was not required as a condition of employment or condoned by the West Virginia Police Department. Therefore, it was not an action Patrolman H. took in the "line of duty."As the United States Court of Claims specifically held in *Budd v. United States,* No. 82-80C (November 14, 1980), PSOB eligibility "turns on whether the specific activity causing death was an inherent part of employment as an officer. Thus the death [activity] must be 'authorized, required, or normally associated with' an officer's law enforcement duties as the interpretative regulations require." *Budd,* Slip, Op. at 3 n.6. No evidence has been presented in this case to show that the type of gunplay engaged in by the decedent was required or authorized as a condition of employment, and the testimony of the decedent's father suggests that in fact the senior officers of the department strongly disapproved of the practice.

Under these circumstances, PSOB benefits cannot lawfully be paid to Mrs. H. This decision to deny benefits is the LEAA's final agency determination. I regret we cannot give you a more favorable decision.

July 20, 1981

Administrator's Final Decision

SUBJECT: **Completion of Participation in Horseplay**

I have reviewed the file in the above-captioned case, including claimant's June 19, 1981 submission, and it is my determination that the decision of the hearing officer must be affirmed.

I agree with the conclusion of the hearing officer that the events just prior to the fatal shooting of Officer H.H. did not constitute a quick-draw situation. The Office of General Counsel, however, pointed out in recommending my review that the evidence supported a finding that Officers Two Bulls and H.H. were engaged, at the time of the shoting of Officer H.H., in "horseplay" that would constitute a significant deviation from the course of employment. As such, Officer H.H.'s death would not have occurred while he was acting in the line of duty.

I agree with the Office of General Counsel's legal opinion that an officer who is killed while engaging in the unauthorized "horseplay" which results in his death would not be covered under the PSOB Act because such action would not be within the scope of the officer's line of duty. However, the evidence supports a finding that, while Officer H.H. was briefly engaged in unauthorized horseplay, he had subsequently discontinued or ceased his involvement in the horseplay, resuming the performance of authorized or obligatory line of duty activities. I do not believe it would be a sound policy to hold, under the PSOB program, that an officer's acting outside the scope of his line of duty by engaging in unauthorized horseplay should be considered to extend beyond the time that he has ceased to participate in the horseplay and resumed authorized line of duty activity. Therefore, it is my determination that Officer H.H. was engaged in line of duty activity which he was authorized to perform at the time of his death.

The evidence is this case is unclear and, at times, conflicting on the circumstances surrounding Officer H.H.'s death. In such cases, the PSOB regulations provide that: "The administrator shall resolve any reasonable doubt arising from the circumstances of the officer's death in favor of payment of the death benefit." 28 C.F.R. §32.4.

The hearing officer determined that the two officers involved in this incident were acting in the line of duty because they were taking part in a briefing session and conducting a daily check of their weapons when the shooting of Officer H.H. occurred. He concluded that these activities were either obligated or authorized by rule, regulation, condition of employment or service or law to be performed. I disagree. I do not believe that the record supports a finding that these officers

were authorized to enter into horseplay activities that involved pointing their weapons at one another or otherwise placing human life in danger. Therefore, this finding is expressly overruled. However, with the reasonable doubt provision of 28 C.F.R. §32.4 in mind, I am of the opinion that the record supports a conclusion that Officer H.H. had discontinued his role in the horseplay and resumed his line of duty activity at the time he was shot.

I hereby adopt, except as modified above, the findings of fact and conclusions of law contained in the hearing officer's determination of February 20, 1981. The final agency determination is that the claimant is entitled to benefits under the Public Safety Officer's Benefits Act.

C. Going And Coming

Donna Sue RUSSELL, a widow;
Gary Robert Russell and Kirsten Hope Russell, minors,
by their Guardian, Donna Sue Russell, Petitioners,

v.

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION,
United States Department of Justice, Respondent.

No. 78-2437

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 4, 1980.

Decided Oct. 31, 1980.

637 F.2d 1255 (1980)

Michael Korn, Korn & Marblestone, Sherman Oaks, Cal., for petitioners.

Howard Gest, Asst. U.S. Attn., Los Angeles, Cal., for respondent.

Petition for Review of a Final Action of the Law Enforcement Assistance Administration, United States Department of Justice.

Before TRASK and FLETCHER, Circuit Judges, and SOLOMON,* District Judge.

* * *

Mrs. Russell contends that Sergeant Russell's death in a commuting accident was in the line of duty. She makes two supporting points.

First, she argues that the standard for determining whether a death occurred in the line of duty is the same as the standard for determining whether an injury is job-related under workers' compensation law. Second, she argues that under workers' compensation law Sergeant Russell's death was within an exception to the ordinary rule against compensating for injuries sustained while commuting.[12] LEAA contests only the first point. It argues that the standard for determining whether a death occurred in the line of duty is more rigorous than the workers' compensation job-relatedness standard. It does not dispute that Sergeant Russell's death is covered under that standard.

In order to ascertain the standard established by the Benefits Act it is necessary to understand the purposes Congress sought to promote by it. Congress was concerned that states and municipalities did not provide adequate death benefits to police officers and their families and that the low level of benefits impeded recruitment efforts and impaired morale.[13] By increasing the level of benefits it sought to remedy these defects and thereby assist in the national fight against crime.

---

* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

12. At oral argument Mrs. Russell also contended that it was not clear whether Sergeant Russell was driving home or driving to an investigative stop when the accident occurred. However, our examination of the factfindings underlying an LEAA denial is limited to determining whether they are supported by substantial evidence. 42 U.S.C. § 3759(b) (1976); *Massachusetts Dep't of Correction v. Law Enforcement Assistance Administration,* 605 F.2d 21 (1st Cir. 1979). There is substantial evidence to support LEAA's finding that Russell was driving home when the accident occurred.

13. See H.R. Rep. No. 94-1032, 94th Cong., 2d Sess. 3 (1976); 122 *Cong. Rec.* 12002 (1976) (remarks of Rep. Eilberg); *id* at 12003 (remarks of Rep. Matsunaga); *id.* at 12004 (remarks of Rep. Drinan); *id,* at 12008 (remarks of Rep. Minish); *id.* at 12008-9 (remarks of Rep. Russo); *id.* at 12011 (remarks of Rep. Conte); *id.* at 22644 (remarks of Senator Moss); *id.* at 30521 (remarks of Rep. Eilberg and Rep. Sarbanes). The purpose of the Benefits Act was explained more generally in the Sente Report:

> The motivation for this legislation is obvious: The physical risks to public safety officers are great; the financial and fringe benefits are not usually generous; and the officers are generally young with growing families and heavy financial commitments. The economic and emotional burden placed on the survivors of a deceased public safety officer is often very heavy.
>
> The dedicated public safety officer is concerned about the security of his family, and to provide the assurance of a Federal death benefit to his survivors is a very minor recognition of the value our government places on the work of this dedicated group of public servants.

S. Rep. No. 94-816, 94th Cong., 2d Sess. 1, 3-4 (1976), reprinted in [1976] *U.S. Code Cong. & Ad. News,* pp. 2504-05.

The most direct and effective method of compensating for inadequate state and local death benefits would have been adoption of a comprehensive federal police officers' death benefits program compensating the families of every deceased police officer. Congress did not go that far. Constrained by budgetary considerations and by fears that federal assumption of full responsibility for compensating the families of deceased officers would weaken the federal system and allow states and municipalities to evade their responsibility,[14] it adopted a limited program. Our task is to discern its limits.

There are four groups of police officers that Congress could cover by passing a death benefits statute. Listed from narrowest to broadest, they are:

(1) All officers who die as the result of a criminal act or hazardous activity;

(2) All officers who die from an injury sustained in the course of employment as the result of an accident or a criminal act (expanding the first group to include victims of job-related accidents);

(3) All officers who die from any job-related cause (expanding the second group to include victims of diseases and stress-induced infirmities which are job-related);

(4) All officers who die, from any cause (i.e., a *de facto* life insurance program).

The fourth group was clearly not covered by the Benefits Act,[15] and the question of whether the third group was covered is not raised in this case. The only issue here is whether, by covering deaths occurring "in the line of duty," Congress limited coverage to the first group, or extended it to the second group as well.

It is clear that Congress was concerned primarily with the first group: officers who fall victim to the special risks attending police duty. Murders of police officers dramatize the vital service police officers render and the great dangers they face. The congressional debates and legislative history are replete with stories of young officers who were

14. Several opponents focused on the extent to which the Benefits Act would weaken the federal system. 122 *Cong. Rec.* 12010-12 (1976) (remarks of Rep. Wiggins; response of Rep. Pattison); *id.* at 12015 (general debate); H.R. Rep. No. 94-1032, 94th Cong., 2d Sess. 17-21 (1976) (dissent from Committee Report).

15. Senator Kennedy amended the Senate version of the bill by adding a comprehensive life insurance program. The amendment passed the Senate but was deleted in conference. 122 *Cong. Rec.* 30712 (1976).

killed by violence while protecting the public[16] and with statistics indicating the number of police officers killed by violence annually.[17] The original House version of the Benefits Act, H.R. 366, 94th Cong., 2d Sess. (1976), U.S.Code Cong. & Admin.News, 1976 p. 2504, was directed at only these cases. It limited coverage to officers whose deaths resulted from criminal acts or from the performance of hazardous duties,[18] and the legislative history is explicit that coverage was

16. See 122 *Cong. Rec.* 12004, 12005, 12008, 12017 (1976).

17. H.R. Rep. No. 94-1032, 94th Cong., 2d Sess. 3 (1976); S. Rep. No. 94-816, 94th Cong., 2d Sess. 5 (1976), reprinted in [1976] *U.S.Code Cong. & Ad. News* pp. 2504, 2506; 122 *Cong. Rec.*, 22634, 22644 (1976).

18. The original version of the Benefits Act, H.R. 366, provided:

> Sec. 701.(a) In any case in which [LEAA] determines, under regulations issued under part F of this title, that an eligible safety officer has died as the direct and proximate result of a personal injury sustained in the performance of duty, leaving a spouse or one or more eligible dependents, [LEAA] shall pay a gratuity of $50,000 ....
>
> . . . . .
>
> (g) As used in this section, the term "eligible public officer" means any individual serving, with or without compensation, a public agency in an official capacity as a law enforcement officer who is determined by [LEAA] to have been, at the time of his injury, engaged in-
>
> (1) the apprehension or attempted apprehension of any person-
>
> (A) for the commission of a crime, or
>
> (B) who at the time was sought as a material witness in a criminal proceeding; or
>
> (2) protecting or guarding a person held for the commission of a crime or held as a material witness in connection with a crime; or
>
> (3) the lawful prevention of, or lawful attempt to prevent, the commission of a crime ....

H.R. 366, 94th Cong., 2d Sess. (1976).

not extended to officers whose deaths resulted from routine accidents, even job-related ones.[19]

However, when the Benefits Act was debated in the Senate several senators objected that its coverage was too uncertain and narrow.[20] To cure this perceived defect, Senator Moss introduced an amendment broadening coverage to include any police officer who dies "as the direct and proximate result of a personal injury sustained in the line of duty." 122 *Cong. Rec.* 22643 (1976). The Senate manager of the bill,

---

19. The House Report stated:

> The committee expects that LEAA regulations should make it clear that a simple accident which occurs in the performance of routine, non-hazardous duties is not within the scope of coverage or the rationale of this bill. In other words, the bill is not designed to cover an accidental death of a policeman who is engaged in his normal patrol activities.

H.R. Rep. No. 94-1032, 94th Cong., 2d Sess. 5 (1976). During the House debate Congresswoman Holtzman, an opponent of the bill, said: "What happens if a policeman on his way home ... is involved in an automobile accident and is killed? There is not a single penny in this bill that would assist his family." 122 *Cong. Rec.* 12017-18 (1976). In response one of the bill's advocates, Congressman Sieberling, admitted that such an accident would not be covered. *Id.* at 12018.

20. Senator Moss explained the deficiencies his amendment was meant to correct:

> [B]y requiring that the benefit be limited to death resulting from an injury directly or proximately caused by a criminal act, the committee has failed to provide for the stated purpose and need of this legislation. This specific language leaves a loophole in the bill whereby those who should be benefited and are deserving may be excluded. There can arise a situation which may give cause to question whether a death was actually the result of a criminal act. An excellent example is the police officer who is directing traffic.

122 *Cong. Rec.* 22644 (1976). Senator Allen supported the amendment and explained its purpose as follows:

> I thought the chief shortcoming of the bill as it came out of the committee was the provision that, in order to qualify the family of the officer for this death benefit, he would be required to have been killed as a result of a criminal act. That would always put on the family the burden of proof that a criminal act had caused the death. I think it is sufficient that the death occur while the public safety officer, including law enforcement officers and firemen, is engaged in the performance of his duty. I think this amendment will greatly improve the bill and make it equitable, make it fair, make it easier to provide benefits for those entitled to the benefits.

Id. at 22645.

Senator McClellan, supported the Moss Amendment, explaining its effect as follows:

> The effect of this amendment is to make the survivors of a law enforcement officer or fireman, as defined by the bill, eligible for receipt of benefits if the latter is killed in the line of duty. In other words, it is not health insurance, but is does provide for payment if an officer is killed in the line of duty, either by accidental or by willful assault by a criminal.

Id. at 22644-45. The amendment passed overwhelmingly. *Id.* at 22645. The conference committee accepted the Senate version, and the House expressly endorsed the change when approving the Conference Report. *Id.* at 30518. The House Conference Report explained:

> The House bill authorized payment if the public safety officer's death was the result of a personal injury sustained in the line of certain hazardous duties which are specified in the bill. Such duties included: apprehending or guarding criminals; preventing crime; and other activities determined by [LEAA] to be potentially dangerous....
>
> The Senate amendment authorized payment of the death benefit to the survivors of law enforcement officers ... for all line of duty deaths.
>
> The Conference substitute conforms to the Senate amendment.

H.R.Conf.Rep.No.94-1501, 94th Cong., 2d Sess. 5-6, reprinted in [1976] *U.S. Code Cong. & Ad. News* pp. 2504, 2510-11.

It is beyond doubt that by deleting the references to criminal or inherently dangerous activity Congress meant to extend Benefits Act coverage to all victims of fatal injuries sustained in the line of duty.[21] But we still must determine precisely what Congress intended by the phrase "line of duty."

---

21. In its brief LEAA quotes a statement in the Senate Report explaining that H.R. 366 was intended to compensate line of duty deaths caused by "a criminal act or an apparent criminal act." S.Rep.No.94-816, 94th Cong., 2d Sess. 6 (1976), reprinted in [1976] *U.S. Code Cong. & Ad. News* pp. 2504, 2507. However, the Senate Report related to the original version of the bill, before the Moss Amendment deleted the quoted language.

We know Congress intended to cover all job-related accidental deaths[22] and to incorporate an existing legal standard.[23] Unfortunately, there is more than one source from which the standard might derive: LEAA regulations, the workers' compensation law of the relevant state, or general workers' compensation law.

LEAA argues that Congress delegated to it the responsibility of defining "line of duty" and hence job-relatedness. We reject this argument. The legislative history indicates that Congress used "line of duty" as a term of art, with substantive meaning. By its use, Congress fashioned a delicate political compromise striking a balance between the purposes of enhancing recruitment and morale and the need to limit federal expenditures. It would frustrate the intent of Congress and threaten to upset its compromise for LEAA to take unto itself the defining of the term. The terms of the Benefits Act do not expressly delegate to LEAA the authority to define job-relatedness. Each of the provisions authorizing LEAA to promulgate regulations are general provisions enabling the agency to erect the procedural framework it

22. Senator McClellan stated:

> Line of duty, as used in this bill, is intended to mean that the injury resulting in the officer's death must have occurred when the officer was performing duties authorized, required, or normally associated with the responsibilities of such officer acting in his official capacity as a law enforcement officer ....

122 *Cong.Rec.* 22634 (1976). The Conference Report concurred: "[I]t is appropriate to extend coverage to all acts performed by the public safety officer in the discharge of those duties which are required of him in his capacity as a law enforcement officer ...."

H.R.Conf.Rep.No.94-1501, 94th Cong., 2d Sess. 6, reprinted in [1976] *U.S. Code Cong. & Ad. News* pp. 2504, 2511. In addition, during the floor debate on the Moss Amendment several senators cited examples of deaths which would not be covered under the stricter House version but would be covered by the Moss Amendment. These examples included purely accidental job related deaths.

23. The Senate Report stated that "[t]he term 'line of duty' as used in this bill has the customary usage. S.Rep.No.94-816, 94th Cong., 2d Sess. 6 (1976), reprinted in [1976] *U.S. Code Cong. & Ad. News* pp. 2504, 2507. The House Conference Report stated that "[t]he Managers believe that 'line of duty' is a well-established concept." H.R.Conf.Rep.No.94-1501, 94th Cong., 2d Sess. 6 (1976), reprinted in [1976] *U.S. Code Cong. & Ad. News* pp. 2510, 2511. When introducing the Conference Report to the House, one of the House Managers, Representative Eilberg, stated that "[t]he Managers on both sides ... believed that the concept of line of duty is well defined and that this type of coverage will greatly facilitate the administration of this Act." 122 *Cong.Rec.* 30518 (1976). During a debate on the Conference Report, Representative Brown asked whether a police officer was covered anytime he was "within the scope of his employment," even though he acted negligently, and another of the House Managers, Representative Sarbanes, responded that "I think the phrase 'line of duty' is a work [sic] of art. It is not defined precisely as the gentleman is defining it. However, [Representative Brown's interpretation] is correct." *Id.* at 30520.

needs to carry out its mission. There is no indication that the regulations may reach substantive matters.[24]

[4] We also reject LEAA's assertion that we should defer to its interpretation of the job-relatedness standard upon the theory that courts must defer to the interpretation of a statute rendered by the agency charged with administering it. See *Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). Such deference is not appropriate when the particular interpretation is outside the agency's expertise. *Amchem Products, Inc. v. GAF Corp.,* 594 F.2d 470, 476 (5th Cir. 1979), modified 602 F.2d 724 (5th Cir. 1979). Determining whether a death is job-related is surely not a matter about which LEAA has acquired an extensive store of experience.

Russell makes her argument in the alternative. She contends first that Congress has directed LEAA to defer to state workers' compensation law, *i.e.,* that Benefits Act payments should be made if the death would be covered under the workers' compensation law of the state where the death occurred. We reject this contention. The Act enunciates a single standard and provides uniform payments by a single administrative entity. There is no indication in the text of the statute or its legislative history that Congress intended to fragment the administration of the Benefits Act by deferring to the laws of fifty states.[25]

---

24. LEAA has in fact promulgated regulations defining "line of duty." 28 C.F.R. § 32.2(c) (1980) provides in pertinent part:

> "Line of duty" means any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves.

This definition seems entirely consistent with the workers' compensation job-relatedness standard we apply *infra.* In this case, however, LEAA ignored an established doctrine encompassed by the job-relatedness standard. It is irrelevant whether this error results from some sublety lurking in the language of LEAA's regulation, or from a misinterpretation of the regulation. Either way, the agency has applied an erroneous legal standard.

25. Russell also argues that Congress intended the employer's definition of line of duty to govern, but she points to nothing in the statutes or legislative history to support that proposition.

We agree with Mrs. Russell's alternate argument that the workers' compensation standard is the more apt guide for measuring job-relatedness under the Benefits Act. There are two reasons for this conclusion. First, it appears that Congress was actually alluding to workers' compensation law when it adopted the "line of duty" standard and stated that it was a term of art. There are three common usages of the phrase "line of duty" in the case law: to describe a police officer's murder; to describe the agency doctrine of *respondeat superior*; and to describe the workers' compensation job-relatedness test. Given the legislative history, the latter is the intended usage.[26]

Second, the purposes of workers' compensation laws and the Benefits Act have common elements. We discern no reasoned basis for distinguishing between whether an injury is job-related and therefore compensable under workers' compensation law and whether a death is job-related and therefore compensable under the Benefits Act.

We conclude that by using the "line of duty" language Congress meant to adopt a job-relatedness test akin to that developed under workers' compensation law. Although workers' compensation is a statutory rather than common law doctrine and jurisdictions with different statutes have occasionally developed different rules, there is considerable doctrinal uniformity. Therefore, LEAA and the courts should look to general workers' compensation law as a guide to the development of a federal law and interpret the Benefits Act job-relatedness test consistently with workers' compensation doctrines, unless there is a significant policy reason to diverge.

[5] Adopting this approach, we conclude that Sergeant Russell's accident is compensable. Under general workers' compensation law, the basic rule, oft described as the "going and coming rule," denies compensation for injuries sustained en route to and from work.[27] But

---

26. The first use of the phrase "line of duty" is to describe a police officer's murder while performing police duties. For example, several jurisdictions impose a mandatory death penalty for killing a police officer who is "in the line of duty." See *Roberts v. Louisiana,* 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977). As stated previously, murders of police officers were of paramount concern to the supporters of the Benefits Act. However, by adopting the Moss Amendment and thereby deleting all references to criminal acts or inherently dangerous activity, Congress expressly expanded coverage beyond these cases. The second common use of the phrase is under the tort doctrine of *respondeat superior,* according to which an employer is liable for torts an employee commits "in the line of duty." We think it unlikely that Congress would import the *respondeat superior* standard into the Benefits Act, because the purposes of the two doctrines are dissimilar. *Respondeat superior* is concerned with attributing fault to an employer because he controlled, or should have controlled, the employee's activities. See Seavey, *Handbook of the Law of Agency* §§ 83-84, at 141-42 (1964). The Benefits Act, on the other hand, is simply concerned with compensating job-related deaths.

27. See *Butt v. City Wide Rock Excavating Co.,* 204 Neb. 126, 281 N.W.2d 406, 407 (1979).

there are several exceptions to this rule, which derive from an understanding that the employer sometimes controls the employee's commute. The Michigan Court of Appeals explains the state of the law as follows: "Having become riddled with exceptions, the general rule of noncompensability while going to and from work has evolved into a new rule which compensates injury where there is a sufficient nexus between the employment and the injury to conclude that it was a circumstance of employment." *Hicks v. General Motors Corp., Chevrolet Assembly Plant,* 66 Mich.App. 38, 238 N.W.2d 194, 196 (1975). The requisite nexus has been found where the employer provides transportation to the employee, *F.W.A. Drilling Co. v. Ulery,* 512 P.2d 192, 194 (Okl.1973), and where the nature of the employment subjects the employee to special commuting risks, *Hicks v. General Motors Corp.,* 238 N.W.2d at 197 (excessive traffic congestion); *Briggs v. American Biltrite,* 174 N.J. 185, 376 A.2d 1231, 1234 (1977) (late night overtime, fatiguing the employee).

Russell relies on a line of cases finding compensable injury where the employer had restricted the employee's choice of means of transportation, because the Los Angeles County Sheriff controlled Sergeant Russell's choice of means of transportation by requiring him to use his own car on the job. She is correct. Many jurisdictions have established an exception to the "going and coming rule" when the employee is required to use his own car at work. See, e.g., *Rhodes v. Workers' Compensation Appeals Bd.,* 84 Cal.App.3d 471, 148 Cal.Rptr. 713 (1978); *Davis v. Bjorenson,* 229 Iowa 7, 293 N.W. 829 (1940); *Pittsburg Testing Laboratories v. Kiel,* 130 Ind.App. 598, 167 N.E.2d 604 (1960); *Begley v. International Terminal Operating Co.,* 114 N.J.Super. 537, 277 A.2d 422 (1971); *Lutgen v. A. Conte Electrical, Inc.,* 50 App.Div.2d 624, 374 N.Y.S.2d 434 (1975); *Bebout v. State Accident Ins. Fund,* 22 Or.App. 1, 537 P.2d 563 (1975), aff'd, 273 Or. 487, 541 P.2d 1293 (1975); *Bailey v. State Indus. Comm'n,* 16 Utah 2d 208, 398 P.2d 545 (1965). See generally I A. Larson, *Workmen's Compensation Law* § 17.50 (1972). We find no jurisdiction which rejects the exception.[28]

---

28. In *Rhodes v. Workers' Compensation Appeals Bd.,* 84 Cal.App.3d 471, 148 Cal.Rptr. 713 (1978), the court explained the reason for the exception as follows: "An exception to the going and coming rule is where the employer requires that the employee bring a car to and from work for use in his employment duties. In such a case the obligations of the job reach out beyond the employer's premises, make the vehicle a mandatory part of the employment, and compel the employee to submit to the hazards associated with private motor travel, which otherwise the employee would have the option of avoiding." 148 Cal.Rptr. at 715 (citations omitted). Professor Larson supports this view, noting that workers' compensation coverage is extended in such situations not only because the employee's choice to means of transportation is constrained but also because the employee is serving the employer by conveying a major piece of business equipment to the business premises. I A. Larson, *Workmen's Compensation Law* § 17.50 (1972).

Sergeant Russell was expressly required to have a driver's license and a car of his own to perform his job. He was required to bring the car to work and usually spent much of his work day on the road. He used his car for job-related activities on the day of the accident. When driving home he was rendering a service to his employer by transporting a piece of law enforcement equipment. In addition, his employment conditions increased the hazards of his commute, because as weekend duty detective he had to put in long hours and drive home at a particularly dangerous time—late on a Saturday night. We conclude that Russell was engaging in a job-related activity at the time of his death and therefore that his death occurred in the line of duty.[29]

In summary, LEAA applied an erroneous legal standard. We reserve and remand with instruction that LEAA pay a $50,000 death benefit to Mrs. Russell for herself and in her representative capacity for her children in accordance with the payment provisions of the Benefits Act.

---

29. This result is consistent with the determinations made by the State of California and Los Angeles County. Russell's survivors were awarded county death benefits which are paid when a death occurs "in the performance of duty," Cal.Gov't Code §§ 31787.5, 31787.6 (West Supp.1980), and state workers' compensation for a death "in the course of employment," Cal.Lab.Code § 3600 (West Supp.1960).

April 14, 1981

OGC Memorandum

SUBJECT: **Russell v. LEAA** (9th Cir., October 31, 1980)

On March 13, 1981, the Ninth Circuit Court of Appeals denied the Government's petition for rehearing in the above-captioned case. As a result, the court's October 31, 1980 ruling that Mrs. Donna Sue Russell and her children be paid PSOB benefits must be viewed as final. We will not appeal this decision further.

At issue in *Russell* was LEAA's decision to deny benefits to Mrs. Russell because her husband had not been acting in the "line of duty" at the time of his death. Specifically, he was killed in an automobile accident while en route home in his personal car. The court found Officer Russell's death compensable under the Act on the basis of an exception to the "going and coming" rule frequently applied in workers' compensation cases. The court explained its rationale as follows:

> Russell relies on a line of cases finding compensable injury where the employer had restricted the employee's choice of means of transportation, because the Los Angeles County Sheriff controlled Sergeant Russell's choice of means of transportation by requiring him to use his own car on the job. She is correct. Many jurisdictions have established an exception to the 'going and coming rule' when the employee is required to use his own car at work. . . . We find no jurisdiction which rejects the exception.
>
> Sergeant Russell was expressly required to have a driver's license and a car of his own to perform his job. He was required to bring the car to work and usually spent much of his work day on the road. He used his car for job-related activities on the day of the accident. When driving home he was rendering a service to his employer by transporting a piece of law enforcement equipment. In addition, his employment conditions increased the hazards of his commute, because as weekend duty detective he had to put in long hours and drive home at a particularly dangerous time—late on a Saturday night. We conclude that Russell was engaging in a job-related activity at the time of his death and therefore that his death occurred in the line of duty." *Russell,* 637 F.2d 1255, 1266.

This decision will require a change in our treatment of "going and coming" cases. Your office has, in the past, relied on this office's PSOB Legal Opinion No 77-3 (June 27, 1977) which provided, in relevant part, that coverage should be limited to: "...those circumstances where (1) the public safety officer is actually en route to or from a specific emergency or responding to a particular request for assistance; or (2) the officer is, as required or authorized by law or condition of employment, driving his employer's car to or from work."

This restrictive coverage must be broadened in light of *Russell.* In the future, benefits should also be paid when a decedent required by law or condition of employment to drive his own car at work is killed in his personal car while en route to or from the job.

With respect to *Russell*'s effect on the attached claim (William E. W, decedent) there is no information presently in the file that indicates whether or not the decedent was required by his employer to drive his personal car while on the job. We recommend, accordingly, that you ask his employer for this information before deciding the claim. You should also review any earlier claims denied on the basis of our "going and coming" opinion, and determine whether those claims should be re-opened in light of *Russell.*

D. Gross Negligence

Dolores P. HAROLD, Widow of David D. Harold, Deceased

v.

the UNITED STATES.

No. 424-79.

United States Court of Claims.

Sept. 10, 1980.

634 F.2d 547 (1980)

John M. Gallagher, Jr., Media, Pa., for plaintiff; Alexander A. DiSanti, Media, Pa., attorney of record for plaintiff; Richard, Brian, DiSanti & Hamilton, Media, Pa., of counsel.

Benjamin F. Wilson, with whom was Asst. Atty. Gen. Alice Daniel and David I. Tevelin, Washington, D.C., of counsel.

Before COWEN, Senior Judge, and DAVIS and NICHOLS, Judges.

On Cross-Motions For Summary Judgment

COWEN, Senior Judge:

Plaintiff, the widow of David D. Harold, former Chief of the Aldan, Pennsylvania Police Department, sued here to recover a payment of $50,000, which she claims is due her by virtue of the Public Safety Officers' Benefit Act of 1976, Pub.L. 94-430, 90 Stat. 1346, codified as 42 U.S.C. § 3796, *et seq.* (1976).[1] Both parties have moved for summary judgment and there are no material facts in dispute. For the reasons stated herein, we hold that plaintiff is entitled to the claimed payment and accordingly grant her motion for summary judgment.

I.

The Public Safety Officers' Benefits Act of 1976 is neither a complex nor a lengthy statute. 42 U.S.C. § 3796 (1976) directs the Law Enforcement Assistance Administration (LEAA) to pay a $50,000 death benefit to the survivors of "a public safety officer [who] has died as the direct and proximate result of a personal injury sustained in the line of duty * * *." Section 3796a of title 42, entitled "Limitations on benefits," sets forth three specific situations in which no death benefit shall be paid.[2] 42 U.S.C. § 3796b defines certain terms used in the Act and the final section, 42 U.S.C. § 3796c grants LEAA the power, *inter alia,* to establish rules and regulations for the administration of the death benefit program established by the Act. Pursuant to this authority, LEAA has promulgated a regulation, codified as 28 C.F.R. § 32.2(c) (1979), which defines "line of duty" for purposes of section 3796. This regulation provides in pertinent part that:

> "Line of duty" means any action which an officer whose primary function is crime control or reduction,

---

1. 42 U.S.C. § 3796 provides in pertinent part as follows:

"§ 3796. Payment of death benefits

"(a) Amount; recipients

"In any case in which the Administration determines, under regulations issued pursuant to this subchapter, that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Administration shall pay a benefit of $50,000 as follows:

"(1) if there is no surviving child of such officer, to the surviving spouse of such officer; * * *"

2. For the text of section 3796a, see *infra.*

> enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves. * * * [28 C.F.R. § 32.2(c) (1979)].

LEAA accompanied its promulgation of this regulation with the following commentary in the Federal Register: An officer is not acting within the line of duty when he is grossly negligent. See the dialogue between Congressmen Brown and Eilberg at Cong.Rec. H 10135-36 (Sept. 15, 1976, daily ed.). [42 Fed.Reg. 23259 (1977)].[3]

As will be seen, plaintiff's right to recover the contested benefits turns on whether the LEAA commentary is a valid interpretation of the statutory phrase "line of duty."

II.

Plaintiff's husband, Chief Harold, died on February 4, 1977, as a result of an accidental, self-inflicted gunshot wound incurred on that date. Chief Harold was cleaning his police revolver in his home when it discharged. The weapon was fully loaded and the grips had been removed when the accident occurred. Shortly after her husband's death, plaintiff submitted to LEAA a claim for a section 3796 death benefit. In October 1978, the Director of the Public Safety Officers' Benefit Program ruled that plaintiff was not entitled to a death benefit because, in the director's opinion, Chief Harold's death did not occur in the line of duty as required by section 3796. The following two reasons were cited in support of the director's conclusion that Chief Harold's death did not occur in the line of duty:

(1) Chief Harold's death was not the result of a line of duty action, which he was obligated or authorized to perform while off duty.

(2) Chief Harold's death resulted from his gross negligence in the handling of his police revolver.

On October 30, 1978, plaintiff requested LEAA to reconsider the program director's decision. LEAA assented to this request and a hearing was held on plaintiff's claim on January 10, 1979. The hearing officer

3. While the quoted commentary does not appear in the Code of Federal Regulations, defendant argues that the commentary has the same force and effect as a regulation which does appear in C.F.R. Plaintiff does not take issue with this argument and for purposes of this case, we will assume that the commentary has equal validity with a regulation which appears in C.F.R.

issued a decision on May 14, 1979, in which he affirmed the program director's determination that Chief Harold's death did not occur in the line of duty. The hearing officer based his affirmance solely on his finding that Chief Harold was grossly negligent in his handling of his weapon. He reasoned that by virtue of the commentary to section 32.2(c) of the regulations, the death was not sustained in the line of duty. He specifically rejected the other basis of the program director's initial determination, *i.e.,* that Chief Harold's death did not result from an action which he was required to perform while off duty. Rather, the hearing officer found that because of the small size of the Aldan police force "it was an unwritten rule of the police department that the policemen were to clean their weapons at home." Therefore, he concluded that in this sense, Chief Harold's death did occur in the line of duty.

Plaintiff appealed the decison of the hearing officer to the LEAA administrator, who, on August 10, 1979, affirmed the hearing officer's decision. Specifically, the administrator found that "but for the gross negligence in the handling of his weapon that resulted in his death, [Chief Harold's] action in cleaning his weapon at home while off duty would have been in the 'line of duty' * * *." Plaintiff then brought this suit.

III.

Plaintiff concedes for purposes of this action that Chief Harold was grossly negligent in his handling of his police revolver. As a consequence, the sole issue here is the validity of the administrator's determination that Chief Harold's gross negligence placed his activities outside of the line of duty. Since the only cited basis for this determination was the commentary to section 32.2(c) of the regulations, we must decide whether this commentary comports with the meaning attached by Congress to the term "line of duty" when it enacted the Public Safety Officers' Benefits Act of 1976.

The starting point for any inquiry into the meaning of a statute is of course the language used by Congress in the statute. *St. Paul Fire & Marine Ins. Co. v. Barry,* 438 U.S. 531, 98 S.Ct. 2923, 2930, 57 L.Ed.2d 932 (1978); *Ampex Corporation v. United States,* 223 Ct.Cl. —, 620 F.2d 853, 857-858 (1980). Defendant does not dispute the fact that the Public Safety Officers' Benefits Act contains no provision which explicitly debars the payment of a death benefit to the survivors of a law enforcement officer when his death is caused by his own gross negligence. Indeed, to the extent that the language of the statute supports any speculation regarding the Congressional intent on this question, it suggests just the opposite.

In section 3796a Congress specifically delineated three sets of circumstances in which the payment of death benefits would be barred. Section 3796a provides:

No benefits shall be paid under this [Act]

(1) if the death was caused by the intentional misconduct of the public safety officer or by such officer's intention to bring about his death;

(2) if voluntary intoxication of the public safety officer was the proximate cause of such officer's death; or

(3) to any person who would otherwise be entitled to a benefit under this subchapter if such person's actions were a substantial contributing factor to the death of the public safety officer.

Congress failed to make even an implicit reference to an officer's gross negligence in this list of disentitling circumstances when "it could easily have done so explicitly." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). This omission suggests to us that Congress did not intend an officer's gross negligence to preclude the payment of death benefits. See *Zuber v. Allen*, 396 U.S. 168, 185-87, 90 S.Ct. 314, 323-25, 24 L.Ed.2d 345 (1969).

Nevertheless, defendant argues that the failure of Congress to include an officer's gross negligence in the section 3796a list of disentitling circumstances is irrelevant, because Congress intended the term "line of duty" to be interpreted as excluding acts performed in a grossly negligent manner. The sole support cited by defendant for the view that Congress adopted the rule set out in LEAA's commentary is a colloquy among Representatives Brown of Michigan, Eilberg and Sarbanes, during the floor consideration of the conference report on H.R. 366, 94th Cong., 1st Sess. (1975), the bill which became the Public Safety Officers' Benefits Act of 1976. This colloquy addressed the question whether an officer whose death resulted from his own gross negligence would be covered by the Act. The colloquy is reproduced in pertinent part below.[4]

---

4. "Mr. BROWN of Michigan. * * * I take this time only to pose a question. * * * Am I correct that the benefit payable under this legislation would be payable even though the death occurred as a result of the gross negligence of the individual involved?

"Mr. EILBERG. * * * that is absolutely incorrect. If the individual involved is grossly negligent and that is the cause of his death, there would be no benefits that would flow to his next of kin.

"Mr. BROWN. * * * section 702 says as follows: 'No benefit shall be paid under this part-(1) if the death was caused by the intentional misconduct of the public safety of-

While some of the quoted remarks can be viewed as corroborative of LEAA's interpretation of "line of duty," we think that the colloquy considered as a whole is ambiguous. At most, it casts a very hazy light upon the Congressional understanding of the term "line of duty." The ambiguity and resulting haziness are caused (1) by Mr. Eilberg's remark that there would be "no coverage" (*i.e.*, no death benefit) if a law enforcement officer's death resulted from either the officer's gross negligence or from his *negligence*; and (2) by Congressman Brown's statement that the responses given him in the colloquy did not dispose of his question as to whether "line of duty" excluded "negligence." 122 *Cong.Rec.* 30520 (1976) (emphasis added).

---

ficer or by such officer's intention to bring about his death; (2) if voluntary intoxication of the public safety officer was the proximate cause of such officer's death; or (3) to any person who would otherwise be entitled to a benefit under this part if such person's actions were a substantial contributing factor to the death of the public safety officer.' Are those not the only disentitling factors?

* * * * * *

"Mr. SARBANES. * * * before any payment can be considered, the person has to come within the limitation of having acted within the line of duty. A person grossly negligent in exercising his responsibility would fall outside of the umbrella of the act since his action was not within the line of duty, and therefore his next of kin would not be paid.

"Mr. BROWN. * * * is the gentleman telling me that if the person is within the geographic area of his employment, if he is working or acting during the hours of his employment, and he does things, even though negligently, within the scope of his employment, that he is not acting in the line of duty?

"Mr. SARBANES. I think the phrase 'line of duty' is a work of art. It is not defined precisely as the gentleman is defining it. However, that is correct. That is what I am saying to the gentleman from Michigan (Mr. Brown).

"Mr. BROWN. * * * To establish the legislative history, is the gentleman saying, then, that negligent conduct in the line of duty precludes benefits? Is that right?

"Mr. EILBERG. * * * the term 'line of duty' I think is fully defined in the report, and I will read it at this point, for the purposes of legislative history. 'The term "line of duty," as used in the [Senate] bill-means that the officer's death must have occurred when the officer is performing duties authorized or required by law, acting in his official capabity as a law enforcement officer or fireman.'

"Mr. BROWN. * * * it says nothing about whether or not his death resulted because of his own negligence.

"Mr. EILBERG. * * * there would be no coverage in that case.

"Mr. WIGGINS. I think the legislative history is now clear.

"Mr. BROWN. * * * That may be so, but I think the language of the report should be in the law and whether in the report or in the law, I respectfully suggest it does not dispose of my questions in view of the response I have received." [122 Cong.Rec. 30520-21 (1976)].

In its brief, defendant takes the position that "undoubtedly" Congressman Eilberg was "of the belief that only gross negligence, and not mere negligence on the part of a public safety officer would preclude the officer's survivors from recovering benefits under the Act." Brief for defendant at 8. Why there is no doubt about his proposition is not explained. Because of the ambiguity of the colloquy and the fact that it is the only element of the legislative history which indicates that Congress intended to preclude death benefits for the beneficiaries of grossly negligent officers, we decline to give it the significance urged by defendant. See *Zuber v. Allen, supra,* 396 U.S. at 185-87, 90 S.Ct. at 323-25; *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760,* 377 U.S. 58, 69-70, 84 S.Ct. 1063, 1069-70, 12 L.Ed.2d 129 (1964); *United States v. McKesson & Robbins, Inc.,* 351 U.S. 305, 313-15, 76 S.Ct. 937, 942-43, 100 L.Ed. 1209 (1956); *Pennsylvania R.R. Co. v. International Coal Mining Co.,* 230 U.S. 184, 197-99, 33 S.Ct. 893, 896-97, 57 L.Ed. 1446 (1913). As Justice Frankfurter has so aptly phrased it: " A loose statement even by a chairman of a committee, made impromptu in the heat of debate, less informing in cold type than when heard on the floor, will hardly be accorded the weight of an encyclical. * * *" [Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Col.L.Rev. 527, 543 (1947).]

What we find determinative, however, is that the colloquy is in conflict with other elements of the legislative history—elements which are both more revealing of the Congressional understanding of the term "line of duty" and also more probative of that understanding.

Although the bill which became the Public Safety Officers' Benefits Act was introduced in the House of Representatives, the term "line of duty" first appeared in the bill as a result of a Senate amendment. The version of H.R. 366 which passed the House of Representatives authorized a benefit for an officer who "died as the direct and proximate result of a personal injury sustained *in the performance of duty.*" H.R. Rep. No. 94-1032, 94th Cong., 2d Sess. 12 (1976) (emphasis added). After passage by the House, the bill was referred to the Senate Judiciary Committee. That Committee was already considering S. 2572, 94th Cong., 1st Sess. (1975), a bill similar to H.R. 366, sponsored by Senator McClellan. The Committee amended H.R. 366, by substituting the text of S. 2572 for the entirety of the House version. S.Rep. No. 94-816, 94th Cong., 2d Sess. 3 (1976), *U.S.Code Cong. & Admin. News 1976,* p. 2504. As part of this amendment, the term "line of duty" supplanted the term "performance of duty." The Senate report on H.R. 366, as amended, set out the following explanation of the new phrasing:

> The term "line of duty" as used in this bill has the customary usage that the injury resulting in the officer's

> death must have occurred when the officer is performing duties authorized, required, or normally associated with the responsibilities of such officer acting in his official capacity as a law enforcement officer or fireman. [S.Rep.No.94-816, *supra*, at 6, *U.S.Code Cong. & Admin.News 1976*, p. 2507.]

Senator McClellan, the sponsor of the amendment, repeated this explanation from the committee report almost word-for-word during the Senate floor debate on H.R. 366.[5] After Senate passage of the amended bill, the conference committee adopted the Senate's substitution of the term "line of duty" for "performance of duty." The House conference report stated: "The Managers believe that 'line of duty' is a well established concept and that it is appropriate to extend coverage to all acts performed by the public safety officer in the discharge of those duties which are required of him in his capacity as a law enforcement officer or as a fireman." [H.R.Rep.No.94-1501, 94th Cong., 2d Sess. 6 (1976)].

Two points are of particular importance with regard to these aspects of the legislative history. First, neither Senator McClellan in his floor remarks, nor the report of the Senate Judiciary Committee, mention gross negligence in discussing the meaning of "line of duty." While this silence is not, by itself, determinative of the issue, it does suggest that neither the sponsor of the amendment, nor the committee which reported the bill, believed an officer's gross negligence to be relevant to a determination of whether the officer was acting in the line of duty. See *Zuber v. Allen, supra,* 396 U.S. at 195, 90 S.Ct. at 323. It would have been a simple matter to include "gross negligence" in section 3796a as one of the circumstances in which payment of death benefits would be barred, or at least to allude to "gross negligence" in one of the committee reports in connection with the discussion of the term "line of duty."

Second, the Judiciary Committee report and the Conference Committee report show that Congress intended the term "line of duty" to be given its "customary" and "well established" usage. S.Rep.No.94-816, *supra,* at 6; H.R.Rep.No. 94-1501, *supra,* at 6. While neither report explicitly states what that usage is, both reports concentrate on the nature of the activities being performed by the law enforcement officer at the time of his death. *Id.* Neither report alludes to the manner in which the acts leading to the officer's death were be-

5. "Line of duty, as used in this bil is intended to mean that the injury resulting in the officer's death must have occurred when the officer was performing duties authorized, required, or normally associated with the responsibilities of such officer acting in his official capacity as a law enforcement officer or a fireman." [122 *Cong.Rec.* 22634 (1976).]

ing performed. *Id.* This emphasis on the nature of the acts rather than the manner of their performance is consistent with the interpretation of the term "line of duty" as it has been used in a variety of pension acts for military personnel. See e.g. 7 Op.Att'y.Gen. 149, 162 (1855); 32 Op.Att'y.Gen. 12, 21-22 (1919); 32 Op.Att'y.Gen. 193 (1920).

The House report on H.R. 366 contains an additional reason for concluding that Congress understood the customary usage of the term "line of duty" as addressing only the nature and not the manner of performance. In discussing the tax status of the death benefits to be paid under the Act the report states: "The Internal Revenue Service has advised the Committee that the benefit provided under the legislation could be regarded as benefits received under a statute which is in the nature of [a] Workmen's Compensation Act and as such would be excludable under Section 104(a)(1) of the [Internal Revenue] Code. Therefore, such benefits shall not be subject to Federal income taxes." [H.R.Rep. No.94-1032, *supra,* at 5-6.]

It is a well accepted principle of the law of workmen's compensation that the manner in which a worker performs a task is not directly relevant to whether that task is within the scope of the worker's employment. 1A A. Larson, Workmen's Compensation Law §§ 31.21-.22 (1979). To the extent that this excerpt from the House report indicates that Congress considered the Public Safety Officers' Benefits Act to be "in the nature of [a] Workmen's Compensation Act," it too supports a conclusion that Congress did not intend an officer's gross negligence to preclude the payment of a death benefit.

In sum, we conclude that the legislative history of the Act shows that Congress did not intend that the term "line of duty" should exclude instances in which the death of a safety officer is caused by his gross negligence in the performance of his duties. To the contrary, we think Congress recognized the distinction between the nature of the acts being performed at the time of an officer's death and the manner in which they were being performed, and that except for deaths due to intentional misconduct[6] and intoxication, Congress intended only the nature of the acts to be relevant to a determination of whether the death occurred in the line of duty. Therefore, we do not see how the LEAA commentary to section 32.2(c) of the regulation can be construed as anything but a contradiction of the Congressional understanding of the term "line of duty." As such, the commentary is entitled to very little weight in determining whether Chief Harold died in the line of duty. See *Manhattan General Equipment Co. v Commis-*

6. It is undisputed that Chief Harold's death was accidental. Defendant does not contend that it resulted from his intentional misconduct. Furthermore, the terms "intentional misconduct" and "intentional wrong" are not equivalent to "gross negligence." *Bryan v. Jeffers,* 103 N.J. Super. 522, 248 A.2d 129 (1968).

sioner, 297 U.S. 129, 134-35, 56 S.Ct. 397, 399-400, 80 L.Ed. 528 (1936); *Lynch v. Tilden Produce Co.,* 265 U.S. 315, 320-22, 44 S.Ct. 488, 489, 490, 68 L.Ed. 1034 (1924). Since we find that Chief Harold's death occurred in the line of duty within the intended and generally accepted senses of that term, it follows that plaintiff is entitled to the claimed death benefit. Accordingly, plaintiff's motion for summary judgment is granted; defendant's motion is denied, and judgment is entered in favor of plaintiff in the sum of Fifty Thousand Dollars ($50,000).

Davis, Judge, concurring:

I join generally in the court's opinion but add these words because the problem of legislative history in the case has given me a great deal of difficulty. On the one hand we have the comments of Representatives Eilberg and Sarbanes (important figures in the legislation) in the House debate, plus the fact that LEAA turned those views into a regulation. On the other hand, we have all the materials, including the statute's text marshalled in the court's opinion. How to choose?

I assume, first of all, that in all probability Congressmen Eilberg and Sarbanes were quite deliberate when they said that gross negligence would bar coverage. It does not seem to me a slip of the tongue or an inadvertent phrasing (except perhaps for the mixing up of gross negligence and negligence). Nevertheless I agree with the court that these comments are outweighed. First, this floor conversation took place in the House debate, just before acceptance of the conference committee report, and was not reflected in any of the committee reports. Second, there is no indication that the Senate knew or accepted this belated version of the bill's meaning (see my concurring opinion in *Alyeska Pipeline Service Co. v. United States* 224 Ct.Cl. ——, 624 F.2d 1005 (1980)). Third, the Senate materials do not suggest in any way that gross negligence was excluded from "line of duty" if the officer was otherwise acting within his line of duty. Fourth, the text of the statute and the other authoritative House materials (aside from the Eilberg-Sarbanes comments) do not suggest the exclusion of gross negligence from "line of duty," but rather the opposite (especially the comparision to military "line of duty" and worker's compensation). Fifth, there was no agreement in the House that the Eilberg-Sarbanes colloquy settled that meaning of the law; Congressman Wiggins seemed to think it did while Congressman Brown appeared dissatisfied. In the end, I conclude with the court that this last-minute, single House attempt to construe the bill cannot prevail against the other indicia of congressional intent, including the precise words of the statute and the committee reports. Contrast my dissent in *Hart v. United States,* 218 Ct.Cl. 212, 585 F.2d 1025 (1978).

Nichols, Judge, concurring:

I concur in the court's opinion which well supports the conclusion we reach, as far as it goes, but I would go further. I also concur in Judge Davis' separate remarks. The colloquy quoted in the court's fn. 4 is an obvious instance of "planted" legislative history. By this I mean its purpose rather obviously was not to explain the bill to other Congressmen in order to enlist their support or opposition, but to talk over their heads to the LEAA and to us. As legislative deliberations have become more complex, the practice has grown up to try to fix up by legislative history any defect perceived at a time when it may be too late to fix it by the obvious means of amending the bill, without causing delay. This may be all right when the purpose of the planted history is to resolve an ambiguity, as, *e.g.,* the proper antecedent of a pronoun. It is all wrong when the intent is to supply an omitted case or contradict plain language. The present amendment by legislative history is either one or the other, most likely the former. It adds a fourth exception to the otherwise complete coverage (really a fifth). To (1)a intentional misconduct, (1)b suicide, (2) voluntary intoxication, (3) substantial contribution to causing the officer's death by the beneficiary, a (4) is in effect added, gross negligence of the deceased. It is therefore an attempt to insert statutory language neither House has voted on, nor has the language gone before the President for his signature or veto. Whatever constitutional objections exist to the one-House veto exist in spades to this practice. The one-House veto at least is always above board. What we know of planted legislative history, whether in floor debate or in committee reports, leaves us in doubt whether any particular instance is above board or not, and without passing on this instance, frequently it may not be.

Here, the reference to "legislative history" by Mr. Wiggins is a dead give away, and the sour note sounded by Mr. Brown at the end destroys the otherwise beautiful harmony. Our decision still should not be construed as admitting that a planted history constructed with more artistic verisimilitude would have achieved its purpose, though I am afraid that must often occur in fact. The decisive issue should be whether the asserted interpretation is one appropriate to accomplish other than by amending the bill. Whatever else a planted history may *de facto* achieve, it should not be allowed to hoodwink simple characters out in the boondocks who still suppose they can ascertain what Congress intends by procuring and reading the statutes.

E. Gunplay

Drema K. BUDD, Spouse of Timothy Budd, Deceased
v.
The UNITED STATES
No. 82-80C
United States Court of Claims.
Nov. 14, 1980

(1) Death resulting from "quick draw" contests is not death in line of duty, as required by Public Safety Officers' Benefit Act, codified at 42 U.S.C. § 3796(a) (1976);

(2) 28 C.F.R. § 32.2(c) (1979), defining "line of duty," is consistent with the PSOB Act.

Jerry B. Murray, attorney of record, for plaintiff. *Jerry B. Murray Co., L.P.A.,* of counsel.

Zinora M. Mitchell, with whom was *Assistant Attorney General Alice Daniel,* for defendant. *David Tevelin,* of counsel.

Before FRIEDMAN, *Chief Judge,* KASHIWA and KUNZIG, *Judges.*

Order

This case is before us on defendant's motion for summary judgment. For the reasons discussed below, we grant the motion for summary judgment without oral argument.

Drema Budd is the widow of Timothy Budd, a police officer with the New London, Ohio, Police Department at the time of his death. Officer Budd died on January 7, 1977, as a result of gunshot wounds he sustained in a "quick draw" competition with a fellow officer at the New London stationhouse.[1] His widow applied to the Law Enforce-

---

1 Apparently, Officer Budd had engaged in other "quick draw" contests with the same officer who participated in the fatal match.

In the typical "quick draw" contest, the two participants would sit or stand close together, facing each other. At a prearranged point, both officers would withdraw their loaded service revolvers from their holsters and then point the guns at the other, all as quickly as possible.

Thus, it was the gun of the other participant which killed Officer Budd. At the fatal moment, Officer Budd's gun was aimed at the other officer; while the other officer's gun was aimed at Budd.

ment Assistance Administration (LEAA) to receive the $50,000 benefit payable to eligible survivors of a police officer killed in the line of duty.[2] The LEAA concluded that Budd's death was not in the line of duty and denied the award. This suit followed.

At issue is whether Budd's death was in the line of duty as the statute requires. The regulations promulgated under the authority of the Act[3] were duly published in the Federal Register and define "line of duty" as follows:

> (c) "Line of duty" means any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves. * * *[4]

Plaintiff's first contention is this regulation construes the statutory phrase too narrowly. It is her contention the phrase "line of duty" has a meaning more closely resembling "an activity occurring during employment" rather than "an activity required by employment," as the regulation defines the term.[5] We find no support for her definition in the legislative history. Indeed, relevant portions suggest the opposite conclusion, namely that the regulation defining the phrase, 28 C.F.R. § 32.2(c), is consistent with the intent of the legislation.[6]

---

2. Mrs. Budd seeks recovery under the Public Safety Officer's Benefits Act of 1976 (referred to in the text as "the Act"), codified at 42 U.S.C. § 3796 *et seq.* (1976). Section 3796(a) provides: "(a) In any case in which the Administration determines, under regulations issued pursuant to this subchapter that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Administration shall pay a benefit of $50,000 * * *."

3. Codified at 42 U.S.C. § 3796c.

4. Listed at 28 C.F.R. § 32.2(c) (1979).

5. We note that this standard, and similar ones, has been used to allow Workmen's Compensation Benefits for other "quick draw" contests. *See, e.g., State Compensation Insurance Fund v. Coleman,* 155 Colo. 82, 392 P. 2d 598 (1964). However, the Congressional choice of the "line of duty" standard makes these cases of only limited relevance.

6. We have discussed the legislative history of the phrase "line of duty" in a recent opinion, *Harold* v. *United States,* Ct. Cl. No. 424-79 (slip opinion of September 10, 1980). In *Harold,* Senior Judge Cowen noted the phrase "performance of duty" was in an early version of the Act. The Senate deleted that phrase and, instead, substituted "line of duty". The Senate Report on this language explained:

> The term "line of duty" as used in this bill has the customary usage that the injury resulting in the officer's death must have occurred

The second major contention[7] of plaintiff is more difficult. Under 28 C.F.R. § 32.2(c), "line of duty" encompasses any action which an officer is "obligated * * * by * * * condition of employment * * * to perform." Mrs. Budd argues that the large number of police officers killed and assaulted each year is a "condition of employment" within the meaning of the regulation. Police officers, she continues, are therefore obligated to engage in exercises which increase their ability to protect themselves. Because a "quick draw" contest increases an officer's skill in the rapid removal of his service revolver from its holster and in readying it for firing, a "quick draw" contest is required of police officer by the conditions of employment. The plaintiff concludes Officer Budd's death was therefore in the line of duty.

> when the officer is performing duties authorized, required, or normally associated with the responsibilities of such officer acting in his official capacity as a law enforcement officer or fireman. [S. Rep. No. 94-816, 94th Cong., 2d Sess. 6 (1975).]

At conference, the Committee adopted the Senate version. The House Conference report stated:

> The Managers believe that "line of duty" is a well established concept and that it is appropriate to extend coverage to all acts performed by the public safety officer in the discharge of those duties which are required of him in his capacity as a law enforcement officer or as a fireman. [H.R. Rep. No. 94-1501, 94th Cong., 2d Sess. 6 (1976).]

It is clear to us the phrase Congress ultimately chose requires more than that death occur while an officer is at work. Rather, eligibility for benefits turns on whether the specific activity causing death was an inherent part of employment as an officer. Thus, the death must be "authorized, required, or normally associated with" an officer's law enforcement duties as the interpretative regulation requires.

Further, even if we had doubt that this regulation reflected the statutory intent, it is well settled that the agency interpretation is entitled to deference where the regulations are promulgated under a statutory directive. *E.g., Port Authority of St. Paul* v. *United States,* 193 Ct. Cl. 108, 115, 432 F. 2d 455, 458-459 (1970). It is also beyond doubt that regulations within the statutory delegation of authority may be the basis for denying a legislative benefit. *Morton* v. *Ruiz,* 415 U.S. 199, 235 (1974).

7. Mrs. Budd also argues that because Officer Budd should have realized "quick draw" contests with loaded guns were in violation of an "unwritten rule" within the New London Police Department, the regulations applicable to "intentional misconduct," 28 C.F.R. § 32.7 (1979), are the only grounds on which LEAA may deny her the benefit she seeks. Whatever else may be said concerning the relationship of 28 C.F.R. § 32.2(c) and 28 C.F.R. § 32.7, it is clear the statute and its history (*supra* n. 6) require a determination that the activity causing Officer Budd's death must have occurred in the line of duty. Thus, the LEAA decision denying Mrs. Budd recovery turned on the application of 28 C.F.R. § 32.2(c), just as our decision today turns on the same section of the regulations. We leave to another day the question of whether 28 C.F.R. § 32.7 is consistent with the intent of the statute.

This argument, of course, seeks to overturn the LEAA determination that this "quick draw" contest was not in the line of duty.[8]

The essence of Mrs. Budd's argument is that because a particular skill is useful to an officer, any activity which might improve that skill is required by conditions of employment. We decline to adopt such a broad test to determine what activities are within the line of duty. The legislative history makes it clear the statutory term covers "duties authorized, required, or normally associated with the responsibilities" of the officer.[9] The proper test is not whether an activity improves a skill which is required of a police officer but, rather, whether the activity itself is required of the officer. In concluding that a "quick draw" contest is not required by the conditions of employment, we find five factors relevant.

---

8. The LEAA adopted the hearing officer's findings of fact and conclusions of law. The hearing officer concluded:

> [t]he totality of the evidence presented in this case is such that it is the view of this hearing officer that the practice of quick draw was not an activity that Officer Budd was either obligated or authorized by rule, regulation, condition of employment or service to perform. Therefore, his death was not as the direct and proximate result of a personal injury sustained in the line of duty.

Thus, this case is significantly different from our recent decision in *Harold v. United States, supra* note 6. In *Harold,* the LEAA concluded that although Chief Harold was acting *within* the line of duty when cleaning his gun (an activity he was obligated to perform as a condition of employment), the grossly negligent manner in which Harold performed his duty (failing to unload the gun) denied his widow benefits under the Act. In a well-reasoned opinion which explored the legislative materials in detail, Senior Judge Cowen found no support for the LEAA's refusal to pay benefits. Recovery was allowed.

Here, the *Harold* issue is not present. The LEAA concluded that the fatal quick draw contest was not in the line of duty. The *Harold* issue would be present if the LEAA had concluded that "quick draw" contests were within the line of duty but that the manner in which this test was performed (with loaded guns) was negligent. Recovery turns on whether the LEAA determination that this activity is not in the line of duty was correct.

9. *Supra* note 6.

First, there was no evidence introduced by plaintiff that the New London Police Department, or any other police department, felt that "quick draw" contests between officers were such an essential part of employment that such contests were either required or authorized. Police departments, by their very nature, are acutely aware of the dangerous conditions in which police officers must operate. If these contests are essential to the discharge of a policeman's duties, as plaintiff argues, it seems logical that at least some departments might require or, at the very least, authorize such contests.

Second, alternative activities were apparently available in which rapid revolver removal might be practiced. Testimony in the record indicated some opportunities to practice rapid revolver removal against a silhouette target on a firing range were available in most departments, including the New London one. Thus, an opportunity apparently existed for Officers Budd and Skillicorn[10] to acquire the ability to quickly get ready to use their weapons other than the manner they chose, the "quick draw." Where alternative opportunities to acquire the particular skill being sought exist, we should be cautious to conclude that a particular activity is required.

Third, there was apparently an unwritten rule in the New London Police Department that firearms were not to be pointed at others. This common-sense rule accords with gun safety rules in other departments. This policy was violated as an inherent part of any "quick draw" contest. If the manner in which an activity is to be performed contravenes established rules of the employing authority, it is unlikely that activity is required by the employment.

Fourth, the evidence in the record suggests that none of the other officers in the New London Police Department regarded "quick draw" contests as required by their employment. Evidently, none of the other officers of the department engaged customarily in these contests, although there was little question the "quick draw" was a customary activity between Officers Budd and Skillicorn. Plaintiff also did not suggest that officers in other departments routinely engage in "quick draw" contests, as one might expect if conditions of police employment required such activity.

Fifth, Officer Skillicorn indicated he participated in these contests at least in part to make the night pass more quickly. While this is not dispositive of Officer Budd's motives, it does suggest other considerations, such as amusement, might have been a factor behind these contests, rather than because such contests were an essential part of police duty.

---

10. The surviving participant in the fatal contest.

In light of these factors, we find the LEAA decision denying the death benefit to be correct. In reaching our conclusion, we are not unmindful the LEAA is directed, by a portion of the same regulations which here deny a death benefit, to resolve any reasonable doubts as to the circumstances of an officer's death in favor of the death benefit. 28 C.F.R. § 32.4 (1979).[11] Nevertheless, we conclude the LEAA did not err.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment is granted. Plaintiff's petition is dismissed. BY THE COURT, Daniel M. Friedman, Chief Judge.

F. Jurisdiction

October 9, 1979

Hearing Officer's Decision

SUBJECT: **Firefighter Acting Outside Geographical Boundaries of Jurisdiction (PSOB Claim No. 77-141)**

On October 17, 1978 a hearing was conducted in the law offices of Ruth Finn to reconsider the LEAA determination to deny the payment of death benefits to the survivors of Chauncey E. R., firefighter of the City of Phoenix, Arizona. The original determination was that Fireman R.'s death did not occur in the line of duty as is required by the Act and as set out in C.F.R. 32.2(c). Based on the testimony of individuals who testified at the October hearing, and additional evidence submitted to me by Ruth Finn, counselor for Arizona R., the claimant, I made a determination that Chauncey R. did in fact die as a result of injuries sustained in performance of his duties as a Phoenix City firefighter and therefore his beneficiaries should be paid the death benefit of $50,000.

My determination was submitted to the LEAA Office of General Counsel to review it for the Administrator. After review of the file, the General Counsel recommended that the Administrator not uphold my findings unless further evidence was obtained to support my conclusion that Fireman R. did die in the line of duty.

Specifically, the General Counsel stated that the heroic actions of Chauncey R., the decedent, took place outside the area of his department's legal authority. Lake Pleasant, where the accident occurred, is located approximately 15 miles beyond the Phoenix City limits. It is bordered by unincorporated areas in Yavapai and Maricopa Counties.

---

11. We leave consideration of the scope of 28 C.F.R. § 32.4 to another day.

Chauncey R. suffered his fatal injury on the Yavapai County side of the lake, which is the side farthest from Phoenix.

The General Counsel ascertained that the area in question would be serviced during a fire by Rural Metro and that the president of Rural Metro knew of no instance where Phoenix City Fire Department had responded to a fire at Lake Pleasant.

The General Counsel therefore concluded that no evidence had been presented which would show that the Phoenix City Fire Department had authority to respond to a fire or emergency situation in the Lake Pleasant area, and therefore the original finding that the death of Chauncey R. is not covered under the provisions of the Public Safety Officers' Benefit Act should stand.

Since the issue of jurisdiction had not previously been raised, I recommended that the hearing be reopened to give the claimant an opportunity to present evidence in this regard.

A rehearing was held in the offices of Ruth Finn on July 12, 1979 and testimony was taken regarding the issue of jurisdiction. Evidence was also submitted for the record to substantiate the claimant's position.

The General Counsel question concerning the authority of Chauncey R. to act outside the geographic boundaries of the City of Phoenix is a valid one.

Six members of the Phoenix Fire Department testified at the hearing and several documents were submitted for the record. Several facts are evident from testimony presented at both the first and second hearing:

1. Phoenix City firefighters are instructed and believe that they are on duty 24 hours a day 7 days a week.

2. Sixty percent of the calls for service to the Fire Department are for medical emergency services.

3. All Phoenix City Firefighters are required to be qualified medical emergency technicians. They receive an initial period of training and yearly updates.

4. The State of Arizona tests and certifies annually each firefighter with regard to his EMT skills.

5. The firefighters are told by their instructors, and supervisors after they graduate that they are to render aid wherever and whenever needed, especially emergency medical aid.

6. The firefighters are told in training that there is a State law which protects them and requires them to act wherever they witness the need for emergency care (Arizona Good Samaritan Act).

7. Any firefighter who did not make every effort to help in an emergency, and particularly where the life of a fellow firefighter is concerned would at the very least be disciplined and almost surely would have to quit due to peer pressure.

8. The firefighters are trained to act instinctively. If they do not they are released during training.

During the second hearing, it was additionally established that:

1. The Mayor and Council of the City of Phoenix passed a resolution on October 22, 1974 which gives Phoenix City firefighters authority to act in surrounding communities: "...It is the express and official policy of the City of Phoenix that existing mutual aid agreements with surrounding communities shall also be extended to cover assistance to all public and quasi-public agencies who have a need for assistance under emergency conditions or situations and, that this intent is to be extended to cover all services which the city does perform which are not already covered by mutual aid agreements." Mr. Gordon Routley, who worked directly for the Chief and who was responsible for the mutual aid agreements, testified that: "Mayor Borrow at that time heard about some of the incidents that we had gone on and wanted to express support and encourage us to do that so had a couple of discussions with then Assistant Chief Brunacini, Chief Roberts — and I was involved in a couple of discussions which we talked about what we can do. At that time the mutual aid resolution was drafted and made quite clear to us at that time that the whole idea was to encourage this sort of thing and eliminate any questions about whether or not we could go and if anyone needed help and we had to help to give them to go ahead and do it. This covered areas such as the unincorporated areas all around the city—Lake Pleasant is an unincorporated area."

2. Testimony of Fire Department officials clearly shows that they believe the resolution from the Mayor and Council gives them complete authority to provide emergency services when necessary. As an example, Mr. James Routley, fire protection engineer testified, "Ever since that resolution came down, it has always been the understanding that if anyone asks for help we just go."

3. The firefighters are issued an EMT kit which they are responsible for. It is standard practice for them to take the kit with them in their private car when they are away from the firehouse. They are expected to stop and render aid if they observe an emergency. The firefighters have been told that there is a law requiring them to render aid where

and when needed and to continue that aid until a higher qualified person takes over. Geographic boundaries have not been drawn as to where they can render aid. They are instructed to render aid where and when it is needed.

4. Rural Metro would normally be responsible for rendering fire or other emergency service to the Lake Pleasant area where Chauncey R. died. The City of Scottsdale, who contracts with Rural Metro fire department has a mutual aid agreement with the City of Phoenix. The Phoenix City fire department has responded to emergencies in the Lake Pleasant area.

5. A computer printout of service calls made outside the limits of Phoenix City shows that it is a common occurrence for Phoenix firefighters to respond to emergencies outside the city limits.

Based on the testimony given at two hearings which developed the above facts, I am convinced that Chauncey R., due to the training he received as a firefighter, acted in the only way possible to him at the time to save the life of a fellow firefighter. I further believe that the 1974 Resolution of the Mayor and Council together with the mutual aid pacts with areas adjoining Phoenix City and specifically covering the area where Chauncey R. died, as well as the multitude of cases shown where Phoenix City firefighters responded to calls for emergency service during and after official duty hours clearly demonstrates that Phoenix City firefighters do have authority and in fact a responsibility to render aid in emergency situations outside the Phoenix City limits. Specifically, I find that Chauncey R. did have authority to act to try to save the life of a fellow fighter in the Lake Pleasant area. Accordingly, I believe LEAA should pay the claimant, Arizona R., the $50,000 benefit.

March 23, 1981

OGC Memorandum

SUBJECT: **Death of Corrections Officer Outside Prison**

This is in response to your request for an opinion as to whether the survivors of the decedent in the above-captioned case are entitled to benefits under the Public Safety Officers' Benefits Act, 42 U.S.C. 3796. In our opinion, PSOB benefits are not payable in this case because, at the time of his death, the decedent was not engaged in "line of duty" activity which he was obligated or authorized to perform.

Under the PSOB Act, benefits are payable when a public safety officer dies as a direct and proximate result of a personal injury sustained "in

the line of duty." 42 U.S.C. 3796. "Line of duty" is defined, *inter alia,* as "action which an officer...is obligated or authorized by rule, regulation, condition of employment or service, by law to perform." 28 C.F.R. 32.2(c).

The record in this case indicates that Mr. C.'s duties as a corrections officer required him to search for contraband in all areas in and around the correctional institution where he worked. The record also indicates that obtaining a State law enforcement commission was a prerequisite for this job.

Two witnesses, Jack Bowdan and Joe Martin, have supplied affidavits contending that Mr. C.'s commission gave him statewide law enforcement authority. The provisions of the commission itself, however, specifically state that Mr. C.'s authority was "restricted to duties within the S.C. Department of Corrections." In addition, State law stipulates that Corrections Department employees shall have the status of peace officers not in all circumstances, but only when performing their officially assigned duties in matters relating to the custody, control, transportation or recapture of inmates. (See Code of Laws of South Carolina §24-1-280 (1976).)

In engaging in a gun battle outside the institution with an assailant during off-duty hours, Mr. C. was not acting within the scope of the law enforcement authority he possessed under South Carolina law. PSOB benefits should, accordingly, be denied.

October 19, 1979

OGC Memorandum

SUBJECT: **Deputy Sheriff Acting Outside Geographical Boundries of his Jurisdiction (PSOB Claim No. 79-41)**

In this claim, Mr. Eldon B., a Mitchell County, Georgia Special Deputy was killed while investigating a suspected burglary in neighboring Colquitt County. The two questions requiring resolution in this case are:

1. Was the decedent, in fact, a law enforcement officer? and

2. If so, was he authorized to act as such in another county?

For the reasons offered below, we believe that both questions should be answered in the affirmative, and that benefits should be paid to his eligible survivors.

1. Was the decedent a law enforcement officer?

The evidence in the claim file supporting the decedent's status as a law enforcement officer consists of the following:

A. An April 10, 1979 letter from the Sheriff of Mitchell County stating that B. had been employed as a Special Deputy since December 1976;

B. A copy of the sworn testimony given by the Sheriff in the homicide trial arising out of B's death, stating that the decedent was a Special Deputy Sheriff and that he was certified by the State of Georgia as a police officer; and

C. Information found at several places in the certified copy of the Georgia Bureau of Investigation's (GBI) investigative file that the decedent's deputy badge was found beside him on the day he died.

Other supporting information, such as an undated xerox copy of an identification card showing Mr. B. to be a Deputy Sheriff, is also present in the file, but is not probative of his public safety officer status because B. had also been a full-time Deputy Sheriff prior to November 1976. (His Special Deputy status began in December 1976). In our opinion, the Sheriff's sworn testimony and the fact that the decedent was carrying his badge at the time of his death are sufficient to demonstrate that he was a law enforcement officer at the time of his death.

2. Was he authorized to act as a law enforcement officer in a county other than his own?

A letter from the Mitchell County Sheriff, sent to PSOB sometime in late 1978, states that he had called B. to his office approximately three weeks before his death to ask him to help the department stop a rash of house burglaries in several south Georgia counties, including Colquitt County.

On the day of his death, the decedent had been combining soybeans at a farm, and was evidently en route to a nearby town to get a part for the combine when he came across a house burglary in progress. According to the statement of a woman accompanying the burglars, B. "was trying to get out of his car and he got something out of his shirt pocket (sic). It looked something like a billfold and he showed it to Gene. Gene said something like I don't care who you are or what you are." A struggle over B's rifle ensued, and "Gene" ultimately shot him to death. As noted earlier, B's Deputy badge was found next to him by an officer of the Colquitt County Sheriff Department.

The circumstances described above demonstrate that B. was killed in the course of taking a law enforcement function he had been expressly authorized to take by his department. The fact that the fatal incident

occurred in a county other than his own should not prohibit the payment of benefits. The Sheriff of Colquitt County, in a letter to the Mitchell County Sheriff's Office dated April 10, 1979, acknowledged that "it is a common practice in south Georgia, if any officer, wherever he is, sees or comes up on any serious crime to report the crime[s] and intervene. It is the duty as an officer...to do this."

Mr. Keith Murphy, counsel to Colquitt County, has advised us of his opinion that the decedent had the legal authority to act as he did in Colquitt County. His October 11, 1979 letter to this office reads in relevant part:

> ...Ga. Code Ann. §27-298 reads as follows: 'an arresting officer may arrest any person charged with crime, under a warrant issued by judicial officer, *in any county, without regard to the residence of the said arresting officer;...*'
>
> Although I have not been able to find a case directly on point, this statute authorizes any law enforcement officer to make an arrest even outside the county of the residence of the arresting officer. It does state that the officer should have an arrest warrant; however, Ga. Code Ann. §27-207 states than an officer may make an arrest, either with or without a warrant, if the offense is committed in the presence of the officer. I feel that reading these statutes together, the Courts would find that an officer has the power to arrest outside of the county of the officer's residence if the offense was being committed in his presence. I have not found a case directly on point supporting this position; however, it is my considered opinion that any Deputy Sheriff who happens upon a crime in progress, even outside that Deputy Sheriff's original jurisdiction, would have the power to make the arrest pursuant to the intent of Ga. Code Ann. §27-209, and §27-207.

We share his analysis of these statutes. In addition, we note that Georgia has, by statute, limited the arrest of only municipal law enforcement officers, not county officers, to their own jurisdiction. Ga. Code Ann. §92A-509 reads:

> Arrests by highway patrolman or any arresting officer.-State Highway patrolmen and any officer of this State, or of any county or municipality thereof having authority to arrest for a criminal offense of the grade of misdemeanor shall have authority to prefer charges and bring offenders to trial under this Chapter: Provided,

that officers of an incorporated municipality shall have no power to make arrests beyond the corporate limits of such municipality, unless such jurisdiction is given by local or other laws.

Under the familiar rules of statutory construction, the express inclusion of a restriction on one class of people is an implicit exclusion of the restriction on others ("expressio unius est exclusio alterius"). See Sands, *Sutherland Statutory Construction* (4th ed.), §47.23. As a result, any restriction on county officers to their own county is absent by implication. Even the express limitation on municipal officers has been eroded by two recent Georgia appellate decisions, *Wooten v. State,* 135 Ga. App. 97, 217 S.E. 2d 350 (1975) (extrajurisdictional arrest of person interfering with officer's arrest of motorist pursued beyond city limits sustained), and *Wright v. State,* 134 Ga. App. 406, 214 S.E. 2d 688 (1975) (extrajurisdictional arrest under authority of statute authorizing counties to request police services from neighboring city sustained).

In light of this recent trend in Georgia law, the implicit statutory permission given county law enforcement officials to make arrest in counties other than their own, and the informal practice of the counties in question, we believe that the payment of benefits to Deputy Sheriff B's eligible survivors is warranted.

[See also OGC Memorandum "Volunteer Firefighter's Death in Supper Club Fire" (Part III, I.)]

G. Manner of Performance

See *Harold v. U.S.* (Part IV, D.) and *Budd v. Gregg* (Part III, E.)

May 18, 1981

OGC Memorandum

SUBJECT: **Performance of Duties in Unauthorized Manner (PSOB Claim No. 79-156)**

On May 1, 1981, Hearing Officer William R. Herndon reversed your office's denial of the above captioned claim. For the reasons presented below, we concur in Mr. Herndon's decision.

Mr. C. was a pilot with the North Carolina Division of Forest Resources. On March 27, 1979, Mr. C. was concluding his fire spotting activities when he put his aircraft into a steep climb. The plane subsequently dove to the ground, killing Mr. C. The National

Transportation Safety Board (NTSB) concluded that the probable cause of the accident was Mr. C's "failure to follow approved procedures, directives, etc.," his exercise of "poor judgment," and "unwarranted low flying." Your office concluded that Mr. C. had not been acting in the line of duty because he was grossly negligent, and because he had performed his duties in an unauthorized manner.

Mr. Herndon's decision to award benefits is based largely on his perception that the two eyewitnesses on whose statements the NTSB based its report were "apparently not sufficiently knowledgeable about aviation to properly describe or understand the maneuvers they witnessed." Herndon decision, p.4. Mr. Herndon found that "the aerial maneuvers required in the fire control activities in which the decedent was involved could, and normally would, require low flying and other potentially dangerous aircraft movements." *Id.*, p.6. He concluded that "while [Mr. C's] activities were careless, there is insufficient evidence of carelessness or negligence sufficient to render them ineligible for PSOB coverage." *Id.*

In our opinion, the Court of Claims' decision in *Harold v. U.S.*, 634 F.2d 547 (1980) requires payment of this claim. The court there held that a decedent's "gross negligence" was not a bar to his survivors' receipt of benefits under the Act. Looking beyond that issue to the second basis for denial raised in this claim, it is our view that *Harold* also precludes LEAA from denying a claim because a decedent performed his authorized duties in an unauthorized manner.

Examining the legislative history of the term "line of duty," the court found that:

> ...the Judiciary Committee report and the Conference Committee report show that Congress intended the term "line of duty" to be given its "customary" and "well established" usage. S. Rep. No. 94-1501, *supra,* at 6. While neither report explicitly states what that usage is, both reports concentrate on the nature of activities being performed by the law enforcement officer at the time of his death. *Id.* Neither report alludes to the manner in which the acts leading to the officer's death were being performed. *Id.* This emphasis on the nature of the acts rather than the manner of their performance is consistent with the interpretation of the term "line of duty" as it has been used in a variety of pension acts for military personnel. See e.g. 7 Op. Att'y. Gen. 149, 162 (1855); 32 Op. Att'y. Gen. 12, 21-22 (1919); 32 Op. Att'y. Gen. 193 (1920).

The House report on H.R. 366 contains an additional reason for concluding that Congress understood the customary usage of the term "line of duty" as addressing only the nature and not the manner of performance. In discussing the tax status of the death benefits to be paid under the Act the report states:

"The Internal Revenue Service has advised the Committee that the benefit provided under the legislation 'could be regarded as benefits received under a statute which is in the nature of [a] Workmen's Compensation Act and as such would be excludable under Section 104(a)(1) of the [Internal Revenue] Code.' Therefore, such benefits shall not be subject to Federal income taxes." H.R. Rep. No. 94-1032, *supra,* at 5-6.

It is a well accepted principle of the law of workmen's compensation that the manner in which a worker performs a task is not directly relevant to whether that task is within the scope of the worker's employment. 1A A. Larson, Workmen's Compensation Law §§31.21-.22 (1979). To the extent that this excerpt from the House report indicates that Congress considered the Public Safety Officers' Benefits Act to be "in the nature of [a] Workmen's Compensation Act," it too supports a conclusion that Congress did not intend an officer's gross negligence to preclude the payment of a death benefit.

In sum, we conclude that the legislative history of the Act shows that Congress did not intend that the term "line of duty" should exclude instances in which the death of a safety officer is caused by his gross negligence in the performance of his duties. To the contrary, we think Congress recognizes the distinction between the nature of the acts being performed at the time of an officer's death and the manner in which they were being performed, and that except for deaths due to intentional misconduct and intoxication, Congress intended only the nature of the acts to be relevant to a determination of whether the death occurred in the line of duty." *Harold, supra,* at 552 (footnote omitted).

In the instant case, it is undisputed that the decedent's fire spotting activities were actions he was authorized to take in the "line of duty." It was only the apparently reckless manner in which he performed those activities that led to the initial denial of the claim. In light of *Harold,* the "manner of performance" is an irrelevant element to PSOB claim decisions. This opinion, and the *Harold* decision, should, however, be

distinguished from those cases where the decedent was performing an activity that was itself not an activity that he was authorized or obligated to perform.

In *Budd v. Gregg,* No. 82-80C (Ct. Cl. 1980), for example, the court upheld our position that "quickdrawing" was not an activity the decedent police officer was authorized to perform, and affirmed our decision to deny benefits.

The court observed that: "It is clear to us the phrase Congress ultimately chose requires more than that death occur while an officer is at work. Rather, eligibility for benefits turns on whether the specific activity causing death was an inherent part of employment as an officer. Thus, the death must be 'authorized, required, or normally associated with' an officer's law enforcement duties as the interpretative regulation requires." *Budd,* slip op., at 3, fn 6.

H. Moonlighting

April 15, 1977

OGC Memorandum

SUBJECT: **Death of Police Officer While Working as Private Security Officer**

A Columbus, Georgia police officer was killed while attempting to prevent a robbery of a bar. At the time of the incident, the officer was making his rounds as a private security officer at a shopping mall. He was holding the job with the permission of the police chief. The department manual made officers subject to call 24 hours a day. In *United States Fire Insurance Co. v. City of Atlanta,* 217 S.E. 2d 647 (1975), an Atlanta police officer killed in similar circumstances was held to be acting in the line of duty. His survivors were, accordingly, held entitled to workmen's compensation benefits from the city.

There is legislative history on the general issue of the Act's applicability to private security officers. During House debate on H.R. 366, Congressman Eilberg was questioned by Congressman Myers of Pennsylvania as follows:

> MR. MYERS of Pennsylvania ... Could the gentleman tell me, is there any way in which this bill would apply to privately engaged safety or security officers?
>
> MR. EILBERG. No, it would not.

MR. MYERS of Pennsylvania. What if they were called by a local arm of the government or the local police organization to assist in any way?

MR. EILBERG. It is my opinion that they would not be included. *Cong. Rec.* H 3725-26 (April 30, 1976, daily ed.)

The particular situation presented by this case was never addressed in the legislative history. Because (1) the dialogue shown does not preclude coverage in the circumstances of this case; (2) the deceased was a public safety officer required to be available for duty at all times; and (3) Georgia law would consider him as acting in the line of duty as a police officer, it is the opinion of this office that the benefit should be paid. Otherwise, officers moonlighting in non-security jobs who confront crimes in progress and die attempting to enforce the law should be denied benefits as well, a result inconsistent with equity and the intent of Congress. An officer should not be denied coverage because he has chosen to find part time work in the security business, a job for which he is uniquely qualified.

March 13, 1979

OGC Memorandum

SUBJECT: **Death of Police Officer While Working as Bank Teller**

This is in response to your request for further advice concerning the applicability of the Public Safety Officers' Benefit Act (PSOB) to a New York City police officer who, while moonlighting as a bank teller, died attempting to prevent a bank robbery.

As you requested, we reviewed California law to determine how that State's Workmen's Compensation Act would have treated an officer who died in the same circumstances as the decedent. In 1972, the following provision was added to the California Labor Code:

§3600.3 Off-duty peace officer, performance of normal duty within jurisdiction of employing agency:

(a) For the purposes of Section 3600, an off-duty peace officer who is performing, within the jurisdiction of his employing agency, a service he would, in the course of his employment, have been required to perform if he were on duty, is performing a service growing out of and incidental to his employment and is acting within the course of his employment if, as a condition of his employment, he is required to be on call within such jurisdiction during his off-duty hours.

* * *

> (d) This section shall not apply to any off-duty peace officer while he is engaged, either as an employee or as an independent contractor, in any capacity other than as a peace officer.

Accordingly, under §3600.3(d), the death in this claim would not have been covered under the California Workmen's Compensation Act. However, the officer's family was determined to be entitled to a "line of duty" death benefit under the New York City Police Pension Fund.

Congress anticipated that LEAA would occasionally have to choose between conflicting State laws in making PSOB determinations. Section 704(a) of the Act, 42 U.S.C.3796(a), gives LEAA the authority to: "...establish such rules, regulations, and procedures as may be necessary to carry out the provisions of this part. Such rules, regulations, and procedures will be determinative of conflict of law issues arising under this part."

To implement this section, LEAA made the following statement in the Commentary to Section 32.3 of the Regulations:

> In applying terms such as 'direct and proximate result' or 'line of duty,' or in determining proof of relationship, the applicable State law will be considered, but will not be determinative. LEAA seeks to assure that eligibility will be determined by a uniform set of rules, regardless of where in the country the officer died or his beneficiaries reside. LEAA believes that the establishment of uniform rules and precedents best manifests congressional intent.

In resolving the conflict presented by the case in question, we believe that the prior legal opinions given by this office, the prior determinations made by the agency in similar PSOB claims, and the coverage of the officer under his own city's "line of duty" benefits program all militate in favor of the payment of this claim.

July 19, 1977

OGC Memorandum

SUBJECT: **Death of Constable While Working as Bartender**

According to the statements of witnesses, the decedent was playing pool when his assailant entered the bar and claimed that someone

would not sell him a beer there. The decedent evidently began to answer the assailant when the latter pulled a gun and shot him in the face, killing him.

It is the opinion of this office that the decedent was not acting in the line of duty as a law enforcement officer at the time of his death. Section 32.2(c) of the LEAA PSOB Regulations, 28 C.F.R. 32.1, *et seq.*, defines "line of duty" as:

> Any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves. For other officers, "line of duty" means any action the officer is so obligated or authorized to perform in the course of controlling or reducing crime enforcing the criminal law, or suppressing fires.

It is unclear from a review of the file, and Texas law*, whether the primary function of a constable is law enforcement, but, even if it was, we believe that the decedent was not engaged in any law enforcement activity he was obligated or authorized to perform as a constable, at the time of his death. The decedent had neither identified himself as a peace officer, nor acted pursuant to his law enforcement duties at the time he was shot. The common law duty a constable may have to act as a peace officer 24 hours a day does not justify an award, without some evidence that the officer was in fact acting pursuant to that duty, and not merely as an ordinary citizen.

This case is unlike previous cases in which awards have been made to off-duty public safety officers who have been killed in violent encounters. In those cases, the decedent had held himself out as a law enforcement officer, either by identifying himself as such, or acting to subdue a suspected criminal or protect a member of the public. None of these circumstances is present in the instant situation.

*Article 5, Section 18 of the Texas Constitution; Texas Civil Statutes, Articles 6878-6886; and the Texas Code of Criminal Procedures, Articles 2-12 and 2-13.

I. Off Duty Deaths

June 28, 1978

OGC Memorandum

SUBJECT: **Death of Volunteer Firefighter in Supper Club Fire (PSOB Claim No.77-344)**

In this file, a volunteer firefighter from Ohio was attending a supper club in Kentucky when a fire broke out. The firefighter helped his wife escape, but was burned to death after returning to help his father and aunt leave the building.

Your office has asked this office if, in our opinion, the decedent was acting in the "line of duty" at the time of his death. We do not believe that he was.

The crucial consideration in this matter is whether, at the time of his death, the decedent was performing an action that was "...obligated or authorized by rule, regulation, condition of employment or service, or law to perform..." 28 C.F.R. 32.2(c).

Decedent was a member of the Mack Volunteer Fire Department serving Green Township in Hamilton County, Ohio. The supper club was located in Campbell County, Kentucky, a jurisdiction immediately adjacent to Hamilton County within the Metropolitan Cincinnati area. The Mack Fire Department's general rules expressly contemplate aid to "neighboring departments." See Section 1, paragraphs 13-18; Section 2, paragraphs 12-16; and Section 4, paragraph 23.

Section 4, paragraph 36, of the Department's general rules also provides that:

> When a fireman may arise upon a fire or emergency in a territory other than Green Township and, whereas, the Mack Fire Department hasn't been called at that time to respond, the fireman may assist in the fire emergency or rescue as if it was a fire of the Mack Fire Department. The procedure to be taken before fighting such a fire, is to identify himself by name, rank, and name of his department, and ask how he may assist the local fire department. If he is advised that no assistance is needed, he shall respect their wishes. If no local fire department is on the scene at the time of his arrival, he should assist by putting his training to use to handle the fire or emergency until the local fire department arrives and then at that time follow the above procedure to the ranking officer of local authority.

There is no indication in the file that the decedent attempted to "handle the fire or emergency" in accordance with his training as a firefighter. Instead, following the most noble human impulses, he attempted to save his family from the fire. His actions were understandably motivated by purely personal considerations and were focused on only the members of his family.

Further, the Mack Fire Department's general rules overstated the Department's authority. Section 505.442 of the Ohio Revised Code provides: "In order to provide fire protection, or to provide additional fire protection in terms of emergency, any township may extend the services of its fire department, or the use of its fire apparatus, to any other subdivision or other governmental entity of an adjoining state, upon authorization by the board of township trustees."

[Accordingly, we do not believe that Firefighter Z's death should be covered under the Act.]

November 28, 1978

SUBJECT: **Appeal of Denial in Claim No. 77-344 (Volunteer Firefighter in Supper Club Fire)**

This determination is made with respect to the claim of Janet Z. for benefits under the Public Safety Officers' Benefits Act (PSOB Act). Mrs. Z's claim arose out of the death of her husband George Z., Volunteer Fire Fighter, Mack Volunteer Fire Department, Cincinnati, Ohio.

The initial LEAA review of this claim resulted in the determination on July 10, 1978, that the claimant was not eligible for benefits. The determination stated that:

> The death of George Z., III is not covered under the provisions of Volume 28, Part 32 of the Code of Federal Regulations and Section 701 of the Omnibus Crime Control and Safe Streets Act of 1968 as amended (42 U.S.C. 3796). Specifically, Volunteer Fire Fighter Z's death did not occur in the line of duty as defined by 28 C.F.R. 32.2(c). See the Office of General Counsel Legal Opinion attached to this determination and see 28 C.F.R. 32.2(c) on page 23255 of the attached regulations. His widow and children are therefore not entitled to the benefits authorized by the Act.

On the basis of my review of the existing record, the testimony entered at the hearing, and the fire chief's subsequent statement, it is hereby

determined that the initial determination should be reversed and that the claimant is eligible to receive benefits under the Act.

Specifically, Section 32.2 of the Regulations defines "Line of Duty" as meaning:

> ...any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves. For other officers, "line of duty" means any action the officer is so obligated or authorized to perform in the course of controlling or reducing crime, enforcing the criminal law, or suppressing fires.

It is my opinion that this case comes within the definition of "line of duty" and that the decedent's death was a direct result of the actions he took as a volunteer firefighter for the Mack Volunteer Fire Company.

The initial PSOB determination states decedent made no attempt to "handle the fire or emergency" in accordance with his training as a firefighter.

However, testimony given by Mrs. Z. before a congressional subcommittee and at the appeal hearing revealed that Mr. Z. clearly used his training as a firefighter by:

1. Clearly recognizing the seriousness of the fire and alerting the public.

2. Leading his wife and others to safety.

3. Trying to keep the public calm.

4. Clearing an exit.

5. Giving life saving instructions.

In its legal memorandum, the Office of General Counsel questions the motivation of Firefighter Z. by stating "his actions were understandably motivated by purely personal considerations and were focused on only members of his family."

In the Z. matter, the facts indicate that the decedent used his training to assist people other than his family and that it would be unreasonable to require a firefighter to ignore his own wife's safety.

Further, the purpose of re-entering the building is unclear. The wife surmised in her congressional testimony that the decedent went back for his relatives. She later stated at the hearing that she was unconscious at the time he went back and that he never mentioned that he was going back.

Fire Chief Weitzel in his sworn statement, stated that "In his opinion as Chief of the Fire Department and a long acquaintance of Captain Z., that he was attempting to rescue other patrons at the time of his death." Since there is no definite evidence as to the purpose of reentry, the rescue of relatives is purely speculative.

The legal opinion also questions the authority of the Mack Company to respond to the fire. The Mack Fire Department's general rules permit aid to neighboring departments. The rules also require any of its members to assist persons involved in any emergency including fires regardless of whether that member is officially on duty or acting as a private citizen. The opinion states, "the Mack Fire Department's general rule overstated the Department's authority in that Section 505.442 of the Ohio Revised Code provides:

> 'In order to provide fire protection, or to provide additional protection in terms of emergency, any township may extend the services of its fire department or the use of its fire apparatus, to any other subdivision of this State, or to a subdivision or other governmental entity of an adjoining state, upon authorization by the board of township trustees.' "

Despite the above, the Mack Fire Company did in fact respond to the emergency with rescue equipment.

Up to that time, those general rules were never questioned and were in force at the time of Mr. Z's death. Mr. Z. would therefore have felt he could act with authority under emergency situations; members of the public could reasonably believe he had authority; the regulations were an invitation for the claimant to rescue; and the Mack Fire Company itself thought it had authority.

Conclusion. The Mack Fire Company responded to the fire with rescue units. They obviously felt they were acting within their authority. This also raises the possibility that the decedent could have been called to the site to assist in rescue operations. It appears clear from the Chief's statement that firefighters familiar with the regulations of their department would be obligated to respond in the manner Firefighter Z. did, not being aware of the possible legality of the regulation. Therefore, I find that the alleged technical legal deficiency in Section 505.442 of the Ohio Code is immaterial.

It is clear that Firefighter Z. used his training during the fire while rescuing his wife and assisting others. It is unclear, however, as to why he reentered the building. There is absolutely no conclusive evidence to show that he was going back solely to save a relative as his wife initially guessed. To the contrary, there is sworn testimony from the Fire Chief that, in his opinion, the firefighter would have gone back to save the general public.

Since there is not conclusive evidence as to the purpose of reentry, there is left a reasonable doubt whether he re-entered in the line of duty.

Section 32.4 of the regulation states: "The Administration shall resolve any reasonable doubt arising from the circumstance of the officer's death in favor of the payment of the death benefit."

From the totality of the circumstances, I find that Firefighter Z. reentered in the line of duty to continue rescue efforts. He had already succeeded in rescuing his wife and probably believed, given his training, he could be of assistance to others. Firefighter Z. believed he was authorized to act and in fact a portion of his unit did respond to the fire and provided assistance.

Accordingly, I find that Firefighter Z. was acting in the line of duty as defined by 28 C.F.R. 32(2), and, therefore, the original determination should be reversed and the claimant should receive benefits under the Act.

March 13, 1979

Administrator's Decision

SUBJECT: **Death of Police Officer at Convenience Store (PSOB Claim No. 77-176)**

[Facts: On April 19, 1977, Officer James T. of the Dania, Florida Police Department, was off duty and waiting in an automobile for his brother-in-law, Kenneth J.H. to close the store in which he was employed and be driven home from work. The store was located three to four miles outside the jurisdiction of the Police Department by which Officer T. was employed. It was apparently routine for Officer T. to drive H. home each evening as H. did not have a vehicle or valid driver's license. While he was waiting in the automobile in front of the store, two men entered the store carrying handguns and demanded money. Learning that all of the money had been put in a drop safe, the robbers exited the store. As the robbers exited the store, Officer T. exited from the vehicle in which he had been sitting and walked into the store. As he passed the robbers, words were exchanged and one robber

fired the weapon which he was carrying, killing Officer T. Since the perpertrators have not been apprehended, the investigation remains open and is being conducted by the Broward County, Florida Sheriff's Department.]

This is in response to your request for a review of the record and determination made by the Administration representative in the case of the late James T. T. I have carefully reviewed the file and application, and it is my determination that the decision of the hearing officer should be affirmed.

I agree with the finding of the PSOB Office, confirmed by the hearing officer, that Officer T's death did not occur in the "line of duty" as is required by the Act and as set out in 28 C.F.R. 32.2(c). The evidence supports the hearing officer's finding that Officer T. was not involved in any action or activity in the performance of his duties as a police officer at the time of his death.

As a matter of law, a claimant cannot receive a benefit unless the officer's death is the direct and proximate result of a personal injury suffered in the "line of duty" (28 C.F.R. 32.2). "Line of duty" is defined as follows: "...any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves...."

While Officer T. may have been "on duty" in the sense that he is obligated and authorized to enforce the law 24 hours a day, this does not mean that a public safety officer is acting in the "line of duty" 24 hours a day.

In PSOB Opinion 77-5, "Coverage of Off-Duty Public Safety Officers," July 19, 1977, the Office of General Counsel stated the rule as follows: "The common law duty a constable may have to act as a police officer 24 hours a day does not justify an award, without some evidence that the officer was in fact acting pursuant to that duty, and not merely as an ordinary citizen."

Such evidence would include the decedent holding himself out as a police officer or some other act undertaken pursuant to his law enforcement duties such as acting to subdue a suspected criminal or to protect a member of the public.

The evidence on the record does not support a finding of fact that Officer T. took any action during the robbery incident that would

reasonably establish that he was acting in the "line of duty" at the time of his death.

I hereby adopt as my findings of fact and conclusions of law those contained in the hearing officer's determination of October 2, 1978. The final agency determination is that the claimant is not entitled to benefits under the Public Safety Officers' Benefits Act of 1976 (Pub. L. 94-430, 90 Stat. 1346).

March 17, 1978

Hearing Officer's Determination

SUBJECT: **Death of State Trooper at Home**

The initial LEAA review of this claim resulted in the determination on May 19, 1977 that claimants were ineligible for benefits. The Determination stated that:

> Based on the Report of Public Safety Officer's death submitted by the South Carolina Highway Patrol...and an analysis of the facts of the case, it is determined that Gerald W.D., Sr.,'s death did not occur in the line of duty and is therefore not covered under the provisions of Volume 28, Part 32 of the Code of Federal Regulations or Section 701 of the Omnibus Crime Control and Safe Streets Act of 1968 as amended (42 U.S.C. 3796)...

A request for reconsideration of the initial determination was submitted to LEAA by R. Markley Dennis, Jr., attorney for claimants, on June 3, 1977. The right to an oral hearing was waived and in lieu thereof additional evidence was submitted in the form of affidavits and certified copies of other relevant records. At the request of the hearing officer, a transcript of the hearing conducted by the South Carolina Industrial Commission and the investigation report, dated March 10, 1977, compiled by the South Carolina State Highway Department were made part of the record.

In order to be eligible for the benefits under the PSOB Act, death must have occurred in the line of duty as defined in 28 C.F.R. 32.2(c). The relevant portion of this section states:

> Line of duty means any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which

he is assigned, or for which he is compensated, by the public agency he serves.

To be determined is whether the decedent was acting in the line of duty at the time of his death. The officer died of gunshot wounds, sustained while he was in his home, waiting for a fellow officer to bring a squad car. When found, Patrolman D. was in his patrol uniform in an upright position, sitting on his couch at home. His service revolver was on the floor approximately three to five feet from the body. His own state-provided squad car was out of commission. The affidavit from the chief dispatcher for the Highway Patrol in that District stated that Officer D. had informed him over the radio at approximately 3:05 that he was "10-8 (in service), but that his car was 10-7 (out of commission) and that he wanted to use Patrolman Paul's car for his shift..."

The coroner's affidavit stated that Patrolman D. had received what appeared to be a gunshot wound to the chest and died at approximately 3:30 p.m. He further stated that in his professional opinion, the cause of the injury was accidental discharge of the pistol. No inquest was held. No autopsy was performed. The death certificate states "Pistol accidental discharge." The coroner ascertained from examining the gun at the scene that one round had been fired from the .38 special revolver and that the gunshot wound was the size which would have been made by a .38 caliber bullet.

In an affidavit, Corporal M. M. Ford, one of Patrolman D.'s superior officers, stated that there was no evidence that a struggle had taken place in the home nor any evidence of forceful entry.

At the Industrial Commission hearing the purpose of which was to determine whether death resulted from a compensable accident arising out of the course of employment, evidence was produced that Patrolman D. had on occasion been seen "spot" cleaning his pistol with a pencil eraser to remove the rust. No cleaning paraphernalia including a pencil with an eraser was found in the room. This militates against the possibility that the weapon may have accidentally discharged while being cleaned.

Lt. Dan De Freese, Firearms Examiner of the South Carolina Law Enforcement Division, Firearms Laboratory, examined the firearm to determine if it was mechanically defective. The examination indicated that "The single action trigger pull of K-1 [weapon] is 3-3/4 pounds; double action trigger pull is 12 pounds. Both trigger pulls are within normal limits for a weapon of this type. K-1 was drop tested onto concrete from various distances up to 24 inches. Even when the cocked hammer did fall, the primed cartridge was not discharged. No mechanical defects were noted in K-1..."

At the South Carolina Industrial Commission hearing, Lt. De Freese testified that the weapon had a safety mechanism built into the pistol that would prevent it from touching the cap. In this Smith and Wesson model, there was included a rising and falling hammer lock which effectively prevented the hammer from moving far enough forward to prevent the firing pin from touching the primer unless the trigger is pulled fully to the rear.

Additional evidence produced at the Industrial Commission hearing and in the investigative report would appear to indicate that the officer was involved in an extremely stressful personal crisis at the time of his death. The record as here detailed does not support a finding that Patrolman D. died in the line of duty.

As was stated above, a law enforcement officer is acting in the line of duty when he is engaged in an action he is "obligated or authorized by rule, regulation, condition of employment or service, or law to perform..." 28 C.F.R. 32.2(c). The test is, did the injury arise out of and in the course of employment.

An excellent explanation of the phrase "arising out of and in the course of employment" is provided in *Eargles v. S.C. Electric & Gas Co.*, 205 S.C. 423 (1944), citing *In Re Employer's Liability Assurance Corp.*, 215 Mass. 497:

> There is apparently a causal connection between the conditions under which the work is required to be performed and the resulting injury. If the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. *Eargles, supra,* p. 429.

In the instant case, the deceased may or may not have been "on duty" with regards to his normal duty hours. (Officer Paul testified at the Industrial Commission hearing that he was assigned the Interstate 26 from 7:00 a.m. to 4:00 p.m. shift but that because he did not take a lunch hour, he was to be relieved at 3:00.) This issue is not relevant, however; since decedent was in his own home at the time of death, he was in no way exposed to dangers inherent in being a police officer. It is difficult to conceive of his death occurring "as a result of the exposure occasioned by the nature of the employment." *Eargles, supra.* Rather, it appears that the officer died due to a "hazard to which [he] would

have been equally exposed to apart from the employment." *Eargles, supra.*

At the time of his death, Officer D. was neither in a position to respond to calls received over his police radio, because he believed his car to be inoperable, nor in a position to observe or be observed by anyone needing the assistance of a law enforcement officer.

One could posit situations where a policeman is found dead, shot by his own gun, at home, and determine that he died in the line of duty. For instance, if there was evidence of forced entry, and a struggle, one could conclude that a burglary had been attempted, and the officer, acting as a homeowner, but also as a law enforcement officer, had attempted to thwart the burglary. Or, if an officer were found dead in his home, later the murderer was caught, and the death was found to have been part of a plan to execute police officers, certainly the officer died in the line of duty. His merely being a police officer was the proximate cause of his death.

However, "assaults for private reasons do not arise out of employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor." Larson on Workmen's Compensation, Sec. 11, cited in *Carter v. Penny Tire & Recapping Co.,* 261 S.C. 341 at 342 (1973).

In the instant case, there is no evidence that an assault resulting in death was directed against the officer as a law enforcement officer. Coupled with the strong circumstantial evidence, most of which has not been detailed in this opinion, but which can be found in the transcript of the Industrial Commission and the Investigative Report dated March 10, 1977, it cannot be said that the decedent died in the line of duty.

Accordingly, it is hereby determined that the original determination should be upheld and that the claimant's request for reversal thereof should be denied.

September 22, 1980

Administrator's Decision

SUBJECT: **Death of Off-Duty Police Officer Leaving Crime Scene**

I have carefully reviewed the file, the application, and your final brief, and it is my determination that the decision of the hearing officer should be reversed and the following findings of facts and conclusions of law should be substituted.

Findings of Fact

1. Ralph S. was a police officer with the Suffolk County Police Department.

2. On August 14, 1977, shortly afer 1:00 a.m., Mr. S. was off-duty. He responded to an alarm at the Parkside Service Station on Route 25A.

3. The response to this alarm placed Mr. S. on an on-duty status. The rules and regulations of the police department obligate officers to respond and to call in at the first opportunity to report his/her activity. Officers are also required to report or call in after police action has been completed as the police department considers officers on-duty until notified otherwise.

4. Ralph S. notified the precinct to report the apparent burglary of the gas station and his activation to on-duty status.

5. The owner of the gas station was also notified.

6. A second, uniformed police officer arrived at the scene. He spoke with S. and left after about ten minutes, because S. indicated that he would remain at the scene.

7. The gas station owner left the area to get a piece of wood to board up the broken window. This resulted in approximately a 20 minute interval, during which time S. remained, guarding the premises.

8. After the window was boarded, but before the owner had left, S. departed, crossing Route 25A. He was immediately struck by an automobile about 2:00 a.m. At 2:29 a.m. he was declared dead.

9. Prior to his death, S. had not yet called the precinct to report his change of status back to off-duty. Testimony by a Deputy Inspector indicated that this notification could be made at the call box down the street, at Mr. S's home a short distance away, by driving to the precinct, if it were a reasonable distance, or, if there was one, at a nearby bar with a telephone.

10. The police department considered Ralph S. on-duty until the time of his death.

Conclusions of Law

As a matter of law, claimant is entitled to receive a benefit if the officer's death is the direct and proximate result of a personal injury suffered in the "line of duty" (28 C.F.R. 32.2). "Line of duty" is defined

as follows: ". . . any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves."

Under the rules and procedures of his department, as an off-duty police officer, Ralph S. was not only obligated to take appropriate action when he sighted the apparently burglarized gas station, but he was entitled to, and in fact received, compensation from his department for such actions.

In concluding that the decedent was not acting in the "line of duty" when he was killed, great weight was placed both on the departmental requirement to call and place oneself on off-duty status once police responsibilities have been fulfilled and on the decedent's failure to comply with such requirement. No mention was made of the policy that if the distance was reasonable, given the circumstances and weather conditions, the decedent could have responsibly discharged this requirement by returning to the precinct station or telephoning from someplace other than the scene of his investigation. The decedent's residence, where such a call could have been made, was located approximately 500 feet from the scene of the investigation. Moreover, the hearing examiner rejected as unacceptable guidelines for ascertaining action in the "line of duty" the rules and regulations concerning on-duty/off-duty status and overtime compensation adopted under the collective bargaining agreement in effect at that time between the Suffolk County Patrolmen's Benevolent Association and the County of Suffolk. The hearing officer concluded that compensation was not an appropriate guideline to determine action in the "line of duty," because contractual requirements provided that (1) an off-duty officer, when he came on duty, gets paid, at a minimum, four hours at time and a half, regardless of how long he works, and (2) the department's method of computing overtime payment in half hour intervals resulted in the decedent being compensated for thirty minutes after his death. It is incongruent to disregard compensation as a guideline in this instance when, by this Administration's regulations, the fact of compensation is looked to when a "line of duty" question arises concerning ceremonial, social, or athletic functions. Rather, such regulation would appear to support the use of compensation as an appropriate criterion for determining "line of duty" in this case.

While the decedent may have fulfilled his responsibilities as to the gas station owner in remaining at the station until it was secured, he was still obligated to report his change of duty status at the time of his death. Until he so reported, his department considered him officially on-duty. Although his status could not have been ascertained from his

attire at the time of his death, it was no different from that of the uniformed "on-duty" police officer who had earlier responded to the decedent's request for assistance. His department did not consider the decedent remiss in his duties to communicate his change in status. Neither should this Administration presume that the decedent, upon leaving the gas station without telephoning the precinct, was acting improperly and was, therefore, no longer acting within the "line of duty." According to testimony, the decedent was not obligated to call in at the gas station, but could have done so from his home. Such behavior would not be improper; therefore, a presumption that he was acting improperly is totally unjustified.

The hearing examiner concluded that the decedent had failed to appropriately comply with this change of status requirement; therefore, compensation as a guideline was no longer appropos. A "better reasoned approach" necessitated that "when the officer reverted to the position he was in prior to taking any police action," the mantle of "on-duty" status was lost and any injury immediately thereafter would necessarily be incurred outside the line of duty. Return to his initial geographic location was not required; what was required was that the officer no longer had any police duties to perform and had continued on his way. This standard for determining "line of duty" results in a combined question of law, pursuant to a police officer's responsibilities by rule, regulation, condition of employment, or statute, and of fact, whether the officer had the intent to continue on his way. As to the former, there is ample evidence that the decedent had police duties as yet unperformed when he left the gas station; as for the latter, there is no evidence that the decedent had dismissed his responsibilities and continued on his way.

In that a reasonable doubt exists that when the decedent was hit crossing Route 25A he was attempting to fulfill his remaining obligation, the doubt should be resolved in the decedent's favor and the benefit should be awarded.

Whether the decedent would have crossed and recrossed Route 25A but for his response to apparent criminal activity at the gas station, this Administration will not conjecture, but the fact remains that the decedent's position at the time of his death was directly attributable to his performance of his responsibilities as an off-duty but ever-obligated police officer. It was in pursuit of these responsibilities that the decedent met his death. The circumstances surrounding his death warrant a determination that Ralph S. was fatally injured in the line of duty.

I hereby adopt the aforesaid as my findings of fact and conclusions of law, in lieu of Hearing Examiner Sorrentino's recommendation of May 20, 1980. The final agency determination is that the claimant is

entitled to benefits under the Public Safety Officers' Benefits Act of 1976 (Pub. L.94-430, 90 Stat. 1346).

J. Social or Ceremonial Functions

March 13, 1979

OGC Memorandum

SUBJECT: **Volunteer Fire Chief's Death While Hanging a Banner**

This is in response to your request for a legal opinion on the applicability of the Public Safety Officers' Benefits Act (PSOB) to a fire chief who was killed while hanging a banner for a volunteer firemen's convention his department was planning to host.

Section 32.2(c) of the LEAA PSOB Regulations, 28 C.F.R. 32.1, *et seq.*, defines "line of duty" to mean:

> . . . any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, *including those social, ceremonial, or athletic functions to which he is assigned,* or for which he is compensated, by the public agency he serves." (Emphasis added.)

When, therefore, a public safety officer is assigned by his department to be at a "social, ceremonial, or athletic" event, benefits must be paid under the regulations. These situations are distinguished from those events that an officer voluntarily attends, such as a Fireman's Ball, or Police Athletic League event. The Act would not cover officers who died while attending such functions.

In the instant case, the victim was the Chief of the Department hosting the convention. His presence at the convention site can be seen as arising from either his "assignment" of himself to the banner-raising, or his implicit obligation, as Chief, to supervise the convention preparations. Coverage is not precluded by the fact that the Chief was not actually fighting a fire at the time he died. As long as his "primary function" as a volunteer was firefighting, he would be covered if he died at any time while acting in the line of duty. See the Commentary on Section 32.2(c).

Volunteer firefighters are accorded the same coverage, and are subject to the same restrictions under the Act as any other public safety officer. A volunteer would not be covered if he died while driving to or from the station in his own car, nor would he be covered if he was burned in a fire while sleeping at home. If, however, he died while fighting a fire

in his own house (and he lived within the jurisdiction of his department), he would be covered. He would also be covered, like a police officer or paid firefighter, if he died in an automobile accident en route to a particular emergency or call for service.

As introduced in the Senate, the Act would have covered only those public safety officers whose injuries were caused by "a criminal act or an apparent criminal act" (primarily police officers). Senator Moss of Utah proposed an amendment deleting that restriction and making the Act applicable to any officer who died as the result of a personal injury sustained "in the line of duty." The Senators who spoke in favor of the amendment, prior to its passage by voice vote, cited several examples of deaths which would be brought under the Act by the new language. Senator McClellan, for instance, cited the case of an officer run over by a car while walking to lunch, and the situation where an officer filling out forms at his desk was shot and killed. *Cong. Rec.* S 11838 (July 19, 1976, daily ed.). Senator Thurmond noted that a fireman falling off the back of a firetruck rushing to a fire would be covered by the proposed amendment, though not by the original language. *Id.*

We believe that the case in question falls within the scope of the broad coverage mandated by the term "line of duty." Because payment would also be consistent with the unequivocal language of the regulations, *supra,* we recommend that you approve the claim.

September 21, 1978

OGC Memorandum

SUBJECT: **Death of Police Officer Serving as Funeral Escort**

In the case at hand, the police officer was killed while off duty. He was being paid by a funeral director as a funeral escort when he left the procession to reprimand a driver for a traffic violation, and while returning to the procession, he was hit by a car. He was riding his own motorcycle and he was in his police uniform. In our opinion, benefits should be awarded in this case because the officer was killed in the course of performing a law enforcement function he was authorized to perform.

Previous PSOB cases have awarded death benefits where [off-duty] police officers have acted pursuant to their law enforcement duties at the time of the accident, if the officer "held himself out as a law enforcement officer either by identifying himself as such or acting to subdue a suspected criminal or protect the public." (See OGC memorandum, July 19, 1977, p. 2.)

In an April 15, 1977 OGC memorandum, we recommended that benefits be paid where a police officer was killed attempting to prevent a robbery at a bar while making rounds as a private security officer at a shopping mall. The rationale behind this decision was that if the benefit were not awarded, "officers moonlighting in nonsecurity jobs who confront crimes in progress and die attempting to enforce the law" would be denied benefits which is considered "inconsistent with equity and the intent of Congress." The opinion concludes that "an officer should not be denied coverage because he has chosen to find part-time work in the security business, a job for which he is uniquely qualified."

A similar rationale applies to this case. At the time he reprimanded the driver in question, he was also acting in his line of duty as a police officer. The officer's reprimand in the circumstances of this case was an action authorized by his department's rules. Rule 3 of Section V of the City of Beaumont Police Rules and Regulations states that "when 'off-duty,' members shall take proper police action on any matter coming to their attention at any time." The decedent handled the traffic violation precisely as he was required to do according to the rules. While he did not arrest the violator (an action he is not authorized to take unless the violation is "especially flagrant or involves an accident," or the violator is intoxicated) he did enforce the traffic regulations by pulling the driver aside and reprimanding him.

The traffic regulations the decedent was authorized to enforce include the following: "FUNERALS AND OTHER PROCESSIONS, PARADES—DRIVING THROUGH: No driver of a vehicle shall drive between the vehicles while they are in action and when such vehicles are conspicuously designated . . . ." Beaumont Code, § 37-75; and "No person shall willfully fail or refuse to comply with any lawful order or direction of any police officer invested by law with authority to direct, control, or regulate traffic." Article II—Texas Motor Vehicle Laws § 23, Obedience to Police Officers.

The Beaumont Police regulations also state in Section 1, Rule 3, that: "Members of the Police Department shall at all times endeavor to preserve the public peace, prevent crime, detect and arrest violators of the law, protect life and property and enforce State and Federal laws and the ordinances of the City of Beaumont."

For all these reasons, it is our opinion that the decedent was acting in the line of duty at the time of his death, and that benefits should, accordingly, be paid to his eligible beneficiaries.

November 7, 1978

OGC Memorandum

SUBJECT: **Police Officer's Death While Escorting Funeral Procession**

In the above-referenced claim file, a Birmingham, Alabama, police officer was killed in a traffic accident while escorting a funeral procession. The officer was evidently in uniform, riding a police motorcycle, and equipped with a police walkie-talkie at the time of his death. The accident occurred at 2 p.m.

To be covered by the PSOB Act, an officer must have died as the direct and proximate result of a personal injury sustained in the line of duty. The LEAA PSOB Regulations define "line of duty" to mean (in relevant part):

> . . . any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which he is assigned, or for which he is compensated, by the public agency he serves. 28 C.F.R. 32.2(c).

In his "Statement of Policy," Birmingham Police Chief James C. Parsons states, implicitly, that Birmingham police officers are authorized to engage in outside employment, and notes expressly that, while doing so, they are "subject to the supervision of superiors on duty in that particular area of the city." In addition, the Department provides uniforms and equipment, including personal portable radios, to such officers. The Chief also notes that it is "customary for all funeral processions to be escorted by uniformed police officers. Only sworn police officers may stop and direct traffic within the State of Alabama."

In our opinion, the officer's death should be covered by the Act under the same rationale expressed in our June 27, 1977 memorandum on the "Going and Coming" rule. We concluded in that opinion that the Act should cover officers who die in the course of driving a departmental car to or from work, if the use of the vehicle was authorized or required by the department. Coverage of an officer in that situation was found appropriate for three reasons:

> (1) the officer in such circumstances is acting within the "line of duty," as defined in 28 C.F.R. 32.2(c); (2) by his mere presence in the car, the officer is acting as a deter-

rent to criminal activity, and is therefore engaged in "crime control or reduction" as a 'law enforcement officer' pursuant to 28 C.F.R. 32.2(i); and (3) the officer is obligated to respond to requests for assistance received both over the police radio and from citizens who see him in his car and properly assume he is available for law enforcement purposes.

These reasons apply with equal force to the circumstances of this case. Our conclusion in this case is further buttressed by the fact that only police officers may escort funerals, as a result of their unique authority to regulate traffic. We believe, in sum, that a payment of benefits is justified in this case.

IV. Eligible Survivors

Definitions

Sec. 1203. As used in this part—

(1) "child" means any natural, illegitimate, adopted, or posthumous child or stepchild of a deceased public safety officer who, at the time of the public safety officer's death, is—

(i) eighteen years of age or under;

(ii) over eighteen years of age and a student as defined in section 8101 of titie 5, United States Code; or

(iii) over eighteen years of age and incapable of self-support because of physical or mental disability;

(2) "dependent" means a person who was substantially reliant for support upon the income of the deceased public safety officer;

§ 28 C.F.R. 32.2 (k-o)

(k) "Child" means any natural, illegitimate, adopted, or posthumous child or stepchild of a deceased public safety officer who, at the same time of the public safety officer's death, is:

(1) Eighteen years of age or under;

(2) Over eighteen years of age and a student; or

(3) Over eighteen years of age and incapable of self-support because of physical or mental disability.

(1) "Stepchild" means a child of the officer's spouse who was living with, dependent for support on, or otherwise in a parent-child relationship, as set forth in § 32.13(b) of the regulations, with the officer at the time of his death. The relationship of stepchild is not terminated by the divorce, remarriage, or death of the stepchild's natural or adoptive parent.

(m) "Student" means an individual under 23 years of age who has not completed four years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at an institution which is:

(1) A school or college or university operated or directly supported by the United States, or by a State or local government or political subdivision thereof;

(2) A school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body;

(3) A school or college or university not so accredited but whose credits are accepted, on transfer, by at least three institutions which are so accredited for credit on the same basis as if transferred from an institution so accredited; or

(4) An additional type of educational or training institution as defined by the Secretary of Labor.

Such an individual is deemed not to have ceased to be a student during an interim between school years if the interim is not more than four months and if he shows to the satisfaction of the Administration that he has a bona fide intention of continuing to pursue a full-time course of study or training during the semester or other enrollment period immediately after the interim or during periods of reasonable duration during which, in the judgment of the Administration, he is prevented by factors beyond his control from pursuing his education. A student whose 23rd birthday occurs during a semester or other enrollment period is deemed a student until the end of the semester or other enrollment period.

(n) "Spouse" means the husband or wife of the deceased officer at the time of the officer's death, and includes a spouse living apart from the officer at the time of the officer's death for any reason.

(o) "Dependent" means a person who was substantially reliant for support upon the income of the deceased public safety officer.

A. **Children**

December 3, 1980

OGC Memorandum

SUBJECT: **Proof of Illegitimate Child Status in New York**

This is in response to your October 8, 1980 memorandum, requesting a legal opinion on the eligibility of a child in the above-captioned file

to receive PSOB benefits. In our opinion, he is an eligible survivor under the Act.

It has been held that birth certificates are not competent as proof of facts therein recited on an issue between private persons as to the parentage of a child. *Bilkovic v. Loeb,* 141 NYS 279, 156 AD 719 (1913). In New York, proof of parentage of a child born out of wedlock must be clear and convincing. *Gray v. Rose,* 302 NYS 2d 185, 32 AD 994 (1969).

In *Commissioner of Social Services v. "S",* 312 NYS 2d 466, 34 AD 2d 1052 (1970), the court found the following to constitute clear and convincing evidence: "The admission, during trial, by putative father, of intercourse with an unwed mother, his previous admission of paternity in Family Court, as well as the uncontradicted evidence of absence of sexual relations by the mother with others during the period of conception."

A father may also acknowledge a child born out of wedlock, as his own, in writing, where there is no doubt that the father was claiming the child as his own. *Scheurf v. Fowler,* 156 NYS 2d 859, 2 AD 2d 541 (1956).

Other New York cases have shown parentage by proof that the father supported the child, which encompasses more than monetary payments. Support would normally include, but is not limited to contributions for food, shelter, clothing, medicine, and medical care. *People ex rel Mendes v. Pennyfeather,* 174 NYS 2d 766, 11 Misc. 2d 546 (1958). Evidence that the father claimed the child as a dependent on his income tax return would also be sufficient proof. *Brown v. White,* 286 NYS 2d 64, 29 AD 2d 1054 (1968).

It appears from the signed statements contained in our file, that Edward R., Jr., supported Edward R., III, and Jeanne M., while she was carrying C., until his death September 3, 1979. The extent of this support may be used, under New York law, as competent proof of parentage. The birth and baptismal certificates which name Edward R., Jr. the father may be considered partial proof when used in conjunction with the other available proof.

The evidence in the file does, however, meet the standards for determining a "parent-child" relationship, as set out in 28 C.F.R. 32.13. See, specifically Sections 32.13(a) and 32.13(b)(3)(ii).

As noted in the commentary to the PSOB Regulations,

> In applying terms such as direct and proximate result or line of duty, or in determining proof of relationship, the

applicable State law will be considered, but will not be determinative. LEAA seeks to assure that eligibility will be determined by a uniform set of rules, regardless of where in the country the officer died or his beneficiaries reside. LEAA believes that the establishment of uniform rules and precedents best manifests congressional intent.

Accordingly, we believe sufficient proof exists in the file to support a determination under the Public Safety Officers' Benefits Act that Edward R., III, was the child of deceased firefighter Edward R., Jr.

March 18, 1977

OGC Memorandum

SUBJECT: **Eligibility of Decedent's Adopted Child Subsequently Adopted By Step-Father**

This is in response to your request for a legal opinion on the eligibility for benefits of a child whose adoptive father divorced his adoptive mother and who was subsequently adopted by the second husband of the adoptive mother.

The precise facts, as you presented them, are as follows:

Wife (W) and Husband (H), a policeman, adopted child (CH). W and H were later divorced, CH remaining in the custody of W. W later married a second Husband (H_2). H_2 sought and was granted the adoption of CH. H_1 was notified of the pending adoption action and did not respond; a "waiver" of some sort was apparently granted by the judge and CH was officially adopted by H_2. H_1 was later killed in the line of duty as a police officer.

The issue presented is whether CH, by virtue of his having been adopted by H_1, is entitled to a child's share of PSOB benefits, his later adoption by H_2 notwithstanding.

The process of adoption in New Mexico, where these events took place, is governed by the Adoption Act of 1971 (N.M. Stat. 22-2-20, *et. seq.*)

Section 22-2-25 of the Act. specifies that consent to an adoption must be given by, *inter alia*:

A. (2) "The *father* of the minor, if the minor was conceived or born while the father was married to the mother, *if the minor is his child by*

adoption, or if the minor has been established to be his child by his acknowledgement or court proceedings." (Emphasis added.)

Exceptions to that rule are contained in Section 22-2-26 of the Act. Without further facts, however, it is impossible to say exactly what grounds existed for the "waiver" (presumably of consent by the father, H_1) granted by the judge. Perhaps the fact that, after providing H_1 with notice of adoption proceedings (see §22-2-30) and a request for his consent, no response was received gave impetus to a finding tantamount to "constructive abandonment." Whatever the basis for the judge's actions, however, they must be presumed to be binding, and, hence, the decree of adoption valid.

The effects of a valid adoption under New Mexico law are clear:

> (1) to divest the *natural parents* and the child of all legal rights, privileges, duties and obligations, *including rights of inheritance,* with respect to each other; and
>
> (2) to create the relationship of parent and child between the petitioner and the individual to be adopted, *as if the individual adopted were a legitimate blood descendant of the petitioner* for all purposes, including inheritance and applicability of statutes, documents and instruments, whether executed before or after the adoption is adjudged, which do not expressly exclude an adopted individual from their operation or effect. (§22-2-33A of the Act.) (Emphasis added.)

While subsection (1) speaks in terms of "natural parents," there is not reason to expect that the treatment of "adoptive parents" would be any different, especially in light of the fact that the prior adoption of CH by W and H_1 would have, under subsection (2), given them a relationship of parent and child ... as if the individual adopted were a ... blood descendant ...," i.e., a "natural" child.

In sum, then, it is clear that under New Mexico law, CH, by virtue of his adoption by H_2, is not longer the adopted child of H_1. Giving substantial weight to the law of the State, we believe that the child is not, therefore, entitled to a share of the death payment arising from H_1's death.

July 28, 1980

OGC Memorandum

SUBJECT: **Eligibility of Decedent's Natural Child Adopted by Stepfather**

This is in response to your request for a legal opinion on whether a child whose natural parents are divorced and who was subsequently adopted by the second husband of the natural mother is eligible for PSOB benefits following the death of his natural father.

The child is not entitled to benefits as a "surviving child" of the decedent. Excepting the right to inherit from its natural parents under Texas law, adoption severs all legal relationships, rights, and duties between the adopted child and its natural parents. Since rights to PSOB benefits are not obtained through inheritance but are conferred by Federal statute, the exception will not re-establish the parent-child relationship requisite for PSOB eligibility.

Texas Family Code Ann. §1507 (previously Tex. Rev. Civ. Stat. Ann., Art. 46a §9) states: "When a minor child is adopted ... all legal relationship and all rights and duties between such child and its natural parents shall cease and determine ... but said child shall inherit from and through its natural parent or parents."

In *Patton v. Shamburger,* 431 S.W.2d 506 (1968), the Texas Supreme Court held that an adopted child was not entitled to workmen's compensation benefits as such benefits are statutorily created, not derived through inheritance. More recently, *Benegas v. Holmquist,* 535 S.W.2d 410 (Tex. Civ. App. 1976) and *Griffith v. Christian,* 564 S.W.2d 170 (Tex. Civ. App. 1978) have reached similar conclusions while *Holmquist v. Occidental Life Ins. Co. of Cal.,* 536 S.W.2d 434 (Tex. Civ. App. 1976) has extended *Patton* to life insurance contracts. A decision to deny PSOB benefits to the child in question would, accordingly, be consistent with Texas law.

November 29, 1979

OGC Memorandum

SUBJECT: **Claim of Adult Child**

Your office has asked whether benefits should be paid to the mentally and physically disabled adult son of the decedent in the above-referenced claim. In our opinion, they should.

The claimant is a 34 year-old son of the decedent who was diagnosed five years ago as a schizophrenic, paranoid type. He has been institutionalized in the North Carolina State Mental Hospital on three separate occasions, discharged most recently in November, 1974. He also has an atrophied right arm and hand. One doctor familiar with his case stated in a June 5, 1979 letter that as long as claimant remained on his prescribed medication, "he can cope in a limited way. He must have the security of his home and parent ... there is not hope that he will ever be able to support himself or for that matter, care for himself as an independent person."

A second doctor, a psychiatrist affiliated with a local mental health clinic, also states that the claimant is "not able to support himself through gainful employment," but, after an October 29, 1979 interview with the claimant, concludes that he is "competent to handle his finances at the present time."

The medical evidence in the file describes a person with severe mental disorders who, with the use of drugs prescribed for him, is competent enough to at least maintain himself in his present circumstances. His condition has apparently improved sufficiently since his stays at the state mental hospital that he can be entrusted to his own care while living at home, and taking his prescribed medication. Although this file presents a close case to lay observers, we must conclude that the psychiatrist observing him is the best evaluator of his medical condition. As a result, we believe that a payment of benefits to the claimant, directly, is justified on the basis of the thorough medical information presented in the file.

October 20, 1977

OGC Memorandum

SUBJECT: **Eligibility of Claimed Illegitimate Children Under Washington Law**

[In this claim, a child was asserted to be the illegitimate child of a State of Washington public safety officer. The specific question presented for resolution is what evidence is competent, under Washington law, to establish paternity of an illegitimate child?]

Concerning this question, Washington, like many other states, does not require formal paternity suits to establish paternity and right to support. Such suits, which in Washington are called filiation suits, are encouraged in order to ensure the child's right to support from birth. If such a suit is not commenced within the statutory period—two years from birth—a suit to determine paternity and compel support is not

barred, nor do any presumptions against paternity arise. *State* v. *Russell,* 68 Wash. 2d 748, 415 P.2d 503 (1966).

The Washington legislature acted in 1975 to produce a comprehensive set of criteria for aid in establishing paternity, whether for use in filiation or support suits. The Uniform Parentage Act, Laws of 1975, 2d Exec. Sess., Ch. 42, p. 169 (Feb. 21, 1976), presents both presumptions available to establish paternity, and lacking an available presumption, examples of competent evidence.

The Act, codified at RCW §§ 26.42.1, *et seq.*, sets out the following presumptions of paternity:

> A man is presumed to be the natural father of a child if . . .
>
> (4) While the child is under the age of majority, he receives the child into his home and openly holds out the child as his child; or
>
> (5) He acknowledges his paternity of the child in a writing filed with the registrar of vital statistics . . . .
>
> A presumption under this section may be rebutted . . . only by clear, cogent and convincing evidence . . . . RCW 26.42.5 (sections concerning married parents or parents who have attempted to legally marry are omitted).

The statute goes on to indicate examples of evidence admissible to build a case for paternity:

> (1) Evidence of sexual intercourse between the mother and alleged father at any possible time of conception;
>
> (2) An expert's opinion concerning the statistical probability of the alleged father's paternity based on the duration of pregnancy;
>
> (3) Blood test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity;
>
> (4) Medical or anthropological evidence relating to the alleged father's paternity of the child based on tests performed by experts . . . and
>
> (5) All other evidence relevant to the issue of paternity of the child. RCW 26.42.12

As may be adduced from the above, especially noting RCW 26.42.12(5) above, the legislature intended that any reasonable indication of paternity should be introduced. This is no doubt due to the strong legislative intent that all children have a right of support from their natural parents (unless, of course, adopted). *Kaur* v. *Singh Chawla,* 11 Wash. App. 362, 522 P.2d 1198 (1975). Note in particular the presumption of paternity arising from treating a minor child as a member of the household and holding out the child as one's own. RCW 26.42.54, *supra.*

Therefore, it seems clear that any evidence which, to a reasonable person would tend to indicate paternity should be solicited by your office. Accordingly, we believe that you should send a letter modeled after the letters previously sent in illegitimacy cases, and decide whether the evidence submitted reasonably supports a conclusion that the claimant is, in fact, the child of the deceased officer.

B. **Parents**

July 10, 1981

OGC Memorandum

SUBJECT: **Determination of Dependency Under the PSOB Act**

Section 1201(a)(4) of the Public Safety Officers' Benefits Act[1] provides that if there is no surviving children or a surviving spouse, payment shall be made to the dependent parent or parents of the deceased officer. Section 1203(2) of the Act defines as "dependent" a person who was "substantially reliant for support upon the income of the deceased public safety officer." The Act does not define "substantially reliant."

The regulations[2] implementing the Act address this issue. Section 32.15, "Determination or dependency," states in paragraph (d) that a parent will be considered "dependent" if "he or she was reliant on the income of the deceased officer for over one-third of his or her support." The requirement of one-third support is lenient when compared to other Federal Acts and regulations which define dependency to require a showing of support of at least 50%.[3] Two Acts, in fact, re-

1. 42 U.S.C. §3796

2. 28 C.F.R. §32.15

3. *See, e.g.,* The Black Lung Benefits Act, 30 U.S.C. § 902(a)(2); and Internal Revenue Code Regulations, 26 C.F.R., 1.152-1(a)(1).

quire that the beneficiary be "wholly dependent" for support upon the person covered by those Acts.[4]

For purposes of determining whether or not a person has received the appropriate share of support from the deceased officer, LEAA's approach is substantially the same as that taken by the IRS.[5] The applicable IRS regulation states that "there shall be taken into account the amount of support which the individual received from the taxpayer as compared to the entire amount of support which the individual received from all sources, including support which the individual himself supplied." *Id.*

LEAA also considers the amount contributed by the "dependent" in determining whether the one-third support threshold has been reached. So, for example, if a parent of a public safety officer received $10,000 from the deceased officer, and $20,000 of income from other sources, that person's total income would be $30,000. In this circumstance, the deceased officer's contributions would be one-third of his parent's support ($10,000/ $30,000 = 1/3). The parent would, therefore, be dependent upon the officer for support under the PSOB Regulations.

C. Spouses

1. "Common Law" Status

February 27, 1980

OGC Memorandum

SUBJECT: **Common-Law Marriages In Georgia**

This is in response to your request concerning the legal status of common-law marriages in Georgia and the type of documentation necessary to prove such a marriage.

Common-law marriage has long been recognized in Georgia, and the existence of this form of marriage has recently been reaffirmed by the state's highest appellate court in the case of *Brown* v. *Brown,* 215 S.E. 2d 671, 234 Ga. 300 (1975).

To establish such a marriage, neither a public nor a private marriage ceremony is necessary, *Alberson* v. *Alberson.* 229 S.E. 2d 409, 237 Ga. 622 (1976). All that is required is mutual agreement by competent

4. The Federal Employees' Compensation Act, 5 U.S.C. §§ 8101, 8110(4) and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, 902(14).

5. Internal Revenue Code Regulations, 26 C.F.R. 1.152-1(a)(2)(i).

parties to be husband and wife and immediate, subsequent cohabitation. *Id.* There must, however, be both a mutual intent to be married in the present as well as a contemporaneous cohabitation. A cohabitation coupled with a present intent to be wed in the future or never to be wed will not be recognized as a common-law marriage. *Hubbard* v. *State,* 244 S.E. 2d 639, 145 Ga. App. 714 (1978).

Evidence of cohabitation can be testimonial, i.e. statements by neighbors, relatives, or friends attesting to the fact that the couple lived together and that neither maintained a separate residence. Cohabitation can also be proved with documentary evidence, such as mail addressed to both parties at a single address, identical phone listings, etc.

Proof of the agreement to marry can be provided by witnesses who can testify that the couple held themselves out to the world as husband and wife. For instance, testimony from neighbors and other members of the community regarding a couple's reputed marital status can be persuasive. Documentary proof of a marital agreement can be found by examining credit cards, bank accounts, automobile registrations, real estate mortgages, etc. for signatures showing that the parties represented themselves as husband and wife. Additionally, marital representations by either party as recorded on employment, medical, and tax forms can be probabitive as can proof that the putative spouse has been named as the primary beneficiary of a life insurance policy or under a will. Another indication is mail received as Mr. and Mrs. Most persuasive, perhaps, could be an exchange of wedding rings.

Essentially, any evidence of the existence of a marriage relationship will be valuable in establishing the validity of a common-law marriage.

June 26, 1978

OGC Memorandum

SUBJECT: **Common-Law Marriages in Iowa**

This is in response to your request concerning the legal status of "common-law" marriages in Iowa.

Common-law marriage has been recognized in Iowa for more than a century, but "a claim of common-law marriage is regarded with suspicion" by the State courts and is closely scrutinized. *In Re Fisher's Estate,* 176 N.W. 2d 801 (1970). There is no presumption that two people are married; the burden of proving marriage rests on the party that asserts it, "particularly where a common-law marriage is asserted." *Id.*

To establish a common-law marriage, "no particular form or ceremony is necessary. . . all that is required is that the minds of the

parties meet in mutual consent; this is accomplished if they live together and in so doing intend to sustain a relationship of husband and wife, but neither intention to change such relationship into a legitimate relationship of husband and wife is essential to establish a common-law marriage." *In Re Estate of Boyington,* 137 N.W. 949 (1912). An intent to marry in the future is insufficient to establish a common-law marriage. *Pegg v. Pegg,* 138 Iowa 572, 115 N.W. 1027 (1908).

According to the Iowa Supreme Court, in order to establish the existence of a common-law marrige, it is necessary to show an "intent and agreement *in praesenti* as to marriage on the part of both parties together with continuous cohabitation and public declaration that they are husband and wife." The court goes on to state that "the burden of proof is on the one asserting the claim; all elements of the relationship as to marriage must be shown by clear, consistent and convincing evidence." *Fisher, supra.* Thus to prove a common-law marriage, it is necessary to show a present intent and agreement to treat each other as husband and wife, continuous cohabitation, and a public declaration of marriage. *In Re Estate of Dallman, 228 N. W. 2d 187, 189 (1975).*

Common-law marriage can be proved by circumstantial evidence. *Coleman* v. *Graves,* 255 Iowa 396, 122 N.W. 2d 853 (1963). The purpose and intention of the two people are the key considerations in determining whether a common-law marriage actually exists. Factors to consider in determining whether a common-law marriage exists include whether the individuals indicated they were single or married on their employment or medical applications and forms, whether the two individuals have exchanged wedding rings, the way they introduce each other to friends, (e.g. as "my husband" or "my wife") and the way they speak of each other's relations (e.g. "my mother-in-law"). As noted in *Gamelgaard v. Gamelgaard,* 77 N.W. 2d 479 (1956), "Introduction of one party by the other as wife or husband is in and of itself an acknowledgement of a marital relation, and while it may not be in and of itself proof of present agreement and intent, it may support other evidence and is important." It is also important to note that continuous cohabitation and an express agreement is insufficient to establish a common-law marriage absent a public declaration of the marital relationship. *Dallman, supra,* at 189.

The following summary synopsizes the facts courts considered in five relatively recent Iowa cases involving common law marriages:

In Re Fisher's Estate, supra. This was a proceeding where the decedent's divorced former wife had filed an application to remove the administrator of decedent's estate who claimed to be the decedent's common-law wife. On appeal, the Iowa Supreme Court held that

there was sufficient evidence to establish a common-law marriage. The couple had bought and exchanged wedding rings which they wore publicly, they used the same name on medical records, they gave their child the last name of the decedent, the decedent introduced the woman he lived with as his wife, his employment application said he was married, and they referred to each other's parents as their in-laws.

In Re Estate of Fallman, supra. A woman in this case sought a declaratory judgment upholding the claimed common-law marriage which would entitle her to dower interest in the deceased's estate. The Supreme Court of Iowa held that, although the two people expressly agreed to be married and continuously cohabited for many years prior to decedent's death, there was no "holding out" or public declaration of the marital relationship so there existed no common-law marriage. The court pointed out that the woman registered at hospital as a single person, the tax returns indicated they were single (they claimed no deductions or dependents), the woman never used the decedent's name, and the real estate mortgage indicated she was single. Thus, despite their agreement of marriage, the fact that they failed to hold themselves out as married made their common-law marriage invalid.

Coleman v. Graves, supra. The plaintiff in this case claimed to be the deceased widow by virtue of a common law marriage, and accordingly sought a one-third dower interest in certain personal and real property. The court found there was no common-law marriage because the evidence showed that the deceased listed himself as single on his deeds and tax returns, in his will he referred to her as a housekeeper, they never exchanged rings, she rarely assumed his name, and even referred to herself as the deceased's housekeeper.

Gamelgaard v. Gamelgaard, supra. This was an action for divorce and alimony where the court found a common-law marriage to exist. Cohabitation was clearly proven and contrary to the husband's contentions, intent and agreement in praesenti were also found to exist. Evidence showed that the couple checked into hotels as husband and wife, they attended social functions as a married couple, they shared a checking account, they had a husband and wife fishing license, they received cards and invitations addressed to "Mr. and Mrs." and they were referred to as husband and wife in the neighborhood. The defendant's actions indicating he was single on some tax forms and loans were considered insufficient evidence to negate the finding of a common-law marriage because these matters were solely in the defendant's control and there was no showing that the plaintiff knew about them. Thus, the court held that the majority of the evidence indicated the existence of a common-law marriage.

In Re Long's Estate, 102 N.W. 2d 76 (1960). This was a probate proceeding where the decedent's brother contended he was her sole heir

and respondent contended he was the surviving husband both by ceremony and common-law marriage. The Iowa Supreme Court held the respondent husband failed to establish a marriage existed. Here there was considerable evidence that a marriage existed: the deceased's driver's license was in the respondent's last name, there were cards addressed to "Mr. and Mrs.", the health and hospital insurance policies were filed in the respondent's last name and the deceased's voter's registration was in the respondent's last name. The deceased often used her maiden name, however, and indicated she was single. For example, she purchased savings bonds using her maiden name, she had a separate bank account and she used her maiden name for her safety deposit box and on a court petition. The court held a common-law marriage did not exist because the couple appeared to refer to themselves as husband and wife only when it served their purpose, but with business transactions, actions in court, or other situations where it served their purpose to be single, they ignored their common-law marriage relationship.

August 17, 1978

OGC Memorandum

SUBJECT: **Common Law Marriages In South Carolina**

South Carolina recognizes common law marriages. *A Code of Laws of South Carolina,* §20-3 (1952), *Tedder* v. *Tedder,* 94 S.E. 19 (1917). The Act of 1865, 13 *Stats. at Large,* p. 291, provides that cohabitation, "with reputation and recognition of the parties," shall be evidence of marriage.

The question of whether relations between two people constitute a marriage must be determined by particular facts and circumstances. *Jackson* v. *U.S.,* 14 F. Supp. 132, *aff'd, U.S.* v. *Jackson,* 89 F.2d 572, *aff'd,* 302 U.S. 628 (1936). "Under the law of South Carolina, continuance of illicit relations between man and woman cannot of themselves ripen into marriage, but declaratons and manner of parties, following period of concubinage may be liberally construed to create a state of marriage in support. . . of rights arising under laws of dower and of inheritance." *Id.*

The intent of the parties is important in proving the existence of a common law marriage. Intent is "usually evidenced by public and unequivocal delcaration," *Tedder, supra,* but other facts and circumstances may evidence a "mutual agreement to live together as husband and wife and not in concubinage." *Rodgers* v. *Herron,* 85 S.E. 2d 104 (1954).

Cohabitation alone does not automatically ripen into marriage with lapse of time. *Tedder, supra.* Essential to a common law marriage is a

"mutual agreement between parties to assume toward each other the relation of husband and wife and cohabitation without such an agreement does not constitute marriage." *Johnson* v. *Johnson,* 112 S.E. 2d 647 (1960).

An agreement to marry can "be valid even if no express words are used;" all that is necessary is that the parties intend to marry and this intention can be shown by word or conduct, *Rodgers* v. *Herron,* 85 S.E. 2d 104 (1954), based on the testimony of the parties themselves, *Tarleton* v. *Thompson,* 118 S.E. 421 (1922) or by the testimony of third parties. *Fryer* v. *Fryer,* Rich. Eq. Cas. 85 (S.C. 1832).

"The fact that a man and woman have openly cohabitated as husband and wife for a considerable length of time, holding each other out and recognizing and treating each other as such by declarations, admissions, or conduct, and are accordingly generally reputed to be such among their relatives and acquaintances and those who come in contact with them" may suggest marriage even if there is no direct evidence documenting the marriage agreement. *James* v. *Mickey,* 26 S.C. 273, 2 S.E. 130 (1886). The parties must recognize and treat each other as husband and wife so as to create the reputation that they are married. *Fryer, supra.*

"A presumption of marriage arising from marital cohabitation and repute may be rebutted by proof that the cohabitation was in its inception illicit and non-material." *Cave* v. *Cave,* 101 S.C. 40, 85 S.E. 244 (1914), as where "it is proved that at its commencement either party had a prior spouse living and undivorced or was otherwise incapacitated to contract in marriage." *Ex parte Blizzard,* 193 S.E. 633 (1937).

Where a common law marriage exists and was illicit in its inception due to failure to agree to marry, it continues to be a common law relationship and not a marriage, *Cave, supra,* even though the parties continue to cohabit. *Howell* v. *Littlefield,* 211 S.C. 462, 46 S.E. 2d 47 (1947). An illicit relationship between a cohabitating couple does not become a legal marriage until there is a mutual recognition of the marriage relationship. *Campbell* v. *Chrishan,* 110 S.E. 2d 1 (1959).

With regard to the instant claim, the following questions should be asked of the claimant:

1. Did you ever mutually agree to marry and if so, when?

2. What proof do you have of this agreement?

   a. Do your parents and his parents consider you married?

b. Do your friends consider you married?

c. Do you have a joint bank account?

d. Were you and the decedent identified on your bills, bank statements, tax returns, or other documents as husband and wife?

e. Did you ever represent yourselves as husband and wife? Did the decedent?

3. Did you ever exchange wedding rings or do anything that would indicate to the public that you were married and not merely living together for six years?

4. Were either of you previously married and never divorced?

If the claimant does not indicate or prove that there was any mutual agreement to marry, the mere fact that she was living with the decedent for six years is insufficient to prove a common law marriage. There must be some actual indication of a mutual agreement to marry or an intention to hold their relationship out as a marriage if the relationship is to be considered a valid common law marriage which would warrant the award of a PSOB death benefit to the claimant.

February 9, 1979

OGC Memorandum

SUBJECT: **Common-Law Marriage in Texas**

This is in response to your inquiry concerning whether the State of Texas recognizes common law marriages. This memorandum specifically addresses the PSOB claim made by a woman purporting to be the common law wife of a deceased constable from the State of Texas.

Common law marriages are recognized in the State of Texas pursuant to *DeShazo* v. *Christian,* 191 S.W. 2d 495 (1946); *Middlebrook* v. *Wideman,* 203 S.W. 2d 686 (1947); and *Smith* v. *Smith,* 257 S.W. 2d 335 (1953). See also *Vernon's Texas Code Annotated —Family,* Section 1.91(a)(2)(b).

According to *Till* v. *Till,* 539 S.W. 2d 381, (Tex. Civ. App. 1976), three essential elements of common law marriage are: a present agreement to be husband and wife; cohabitation as husband and wife; and public representation of each other as husband and wife.

Both the decedent and the claimant terminated their previous marriages with divorce decrees at least fifty days before they entered into their purported common law marriage. These facts seem to be in line with the rule set forth in *Tatum* v. *Tatum,* 478 S.W. 2d 629, (Tex. Civ. App. 1972), where a man and woman who began living together under a present agreement to be husband and wife, and continued to live together as husband and wife for a period of about five years during which they held each other out to the public as being husband and wife, were found to have a valid common law marriage.

Although a court of competent jurisdiction has noted that the claimant in the case at hand is the decedent's wife, we believe some further documentation of their relationship is required because the issue of the claimant's status as the decedent's wife may not have been actually adjudicated by the court. We believe, therefore, that you should ask for independent corroboration of the marriage, in the form of affidavits, from at least two people who can attest to the fact that the parties had cohabited and held themselves out to the public as husband and wife, as well as copies of checks, credit cards, automobile registration and other documents that would show that they had publicly considered themselves as husband and wife.

October 20, 1977

OGC Memorandum

SUBJECT: **Eligibility of "Common Law" Wives Based on Washington State Law**

This memorandum addresses PSOB claims made by two women, each purporting to be the common law wife of a deceased Washington State public safety officer, and a child asserted to be the illegitimate child of the deceased officer. Two questions are specifically presented:

(1) Under Washington State law, is common law marriage recognized, and if so, under what circumstances?

The first question is readily answered: It is not possible to contract a common law marriage while residing within Washington. *Percy* v. *Finch,* 320 F.Supp. 787 (E.D. Wash. 1970). However, a "common law" marriage entered while residing in a State which recognizes such marriages will be honored in Washington. *Smith ex rel. Smith* v. *Superior Court,* 23 Wash. 2d 357, 161 P. 2d 188 (1937). Therefore, to determine whether a marriage between deceased and either of his two alleged spouses exists one necessarily would inquire as to what jurisdiction they resided in when they entered the relationship. That jurisdiction's law on common law marriage—intent, notoriousness, and durational requirements—would prevail.

2. Putative Spouses

August 21, 1978

OGC Memorandum

SUBJECT: **Eligibility of "Putative Spouses" Under California Law**

California does not recognize common law marriages, Sections 4100 and 4213, California Civil Code, but it does recognize putative marriages. In *Miller* v. *Johnson,* 214 Cal. App. 2d 123, 29 Cal. Rptr. 251 (1963), the court held that "the essential basis of a putative marriage is a belief in the existence of a valid marriage (citation omitted). But there must also be an attempt to meet the requisites of a valid marriage .... The usual putative marriage arises where it is solemnized in due form and celebrated in good faith but because of some legal infirmity is either void or voidable." *Miller,* at 126. See also *Union Bank & Trust Co.* v. *Gordon,* 116 Cal. App. 2d, 681, 689 (1953).

In *Powell* v. *Rodgers,* 496 F.2d 1248 (9th Cir. 1974), a claimant for benefits under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C.A. §901, et seq. (LHWCA), who had lived with the decedent without having participated in a marriage ceremony, was found not to be the lawful or putative wife of the decedent under California law, and not, therefore, entitled to benefits under the LHWCA. If the claimant could have demonstrated that she believed in good faith that she was a party to a valid marriage, she would have been a putative wife under California law, and entitled to LHWCA benefits. The same is true for putative spouses under the PSOB Act.

In *Powell, supra,* claimant and decedent had lived together for 14 years, had three children, and the decedent supported the entire household. However, the claimant knew this relationship did not constitute a valid marrige because she knew that the decedent, during most of this period, was lawfully married to another. Although the claimant lived with the decedent for four years after his previous marriage had been dissolved by divorce, there had been no ceremonial marriage.

The parties' good faith belief must continue throughout the life of the marriage. If there is a discovery of any infirmity in the marriage, the parties must attempt to perfect the marital status for the marriage relationship to be valid. Upon discovery of any infirmity in the marriage, the relationship loses the status of a putative marriage. *Tatum* v. *Tatum,* 241 F.2d 401 (9th Cir. 1957).

In the W. case, there does not appear to have been an attempt to meet the requisites of a valid marriage which as *Miller,* supra, stated, is essential to the establishment of a putative spouse's claim. If the claimant can demonstrate that the marriage was not solemnized because

of her own honest ignorance about the statutory requirements of a license and a ceremony, your office should recognize her as the decedent's spouse. Otherwise, her claim should be denied.

We suggest that you ask Ms. W. to submit an affidavit in response to the following questions:

1. Were you ever married previously, in either a civil or religious ceremony? If so, when? Was this marriage concluded by a divorce? If so, when?

2. Was Mr. W. ever married previously, in either a civil or religious ceremony, to anyone other than Diane W.? If so, when? Was this marriage concluded by a divorce? If so, when?

3. Did you attempt to obtain a marriage license or to have a ceremony performed to solemnize your December 24, 1970, marriage to Delbert W., III? Please explain why or why not.

4. Did other people, such as Mr. W., or your friends and relatives, ever suggest to you that you should solemnize your relationship to Mr. W. by a civil or religious ceremony? If so, please explain the circumstances and why you did not act upon the suggestion(s)?

5. Did other people, such as Mr. W., friends, relatives, attorneys, or religious counselors, ever advise you, either before or after December 24, 1970, that California law required the issuance of a marriage license and solemnization by ceremony for a marriage to be legal? Did you ever learn this from any other source? If so, please explain.

6. Please describe the level of formal education you have attained and your employment experience.*

Your office should verify her answers to questions 1, 2 and 6 in particular. Affidavits from others related to, or friendly with the claimant and the decedent may ultimately be required as well.

*In *Temescal Rock Co.* v. *Industrial Accident Commission,* 180 Cal. R. 637 (1919), the ignorance of the purported spouse was found a sufficient reason to justify her claim as a putative spouse.

September 10, 1979

OGC Memorandum

SUBJECT: **Eligibility of Putative Spouse**

This is in response to your memorandum of August 23, 1979, requesting our opinion on the eligibility of Linda Lee W. to receive PSOB benefits in the above-captioned case.

In an affidavit dated May 9, 1978, Ms. W. stated that she and the decedent, Delbert L. W., exchanged private vows of marriage in California on December 24, 1970, and lived together as man and wife until his death on September 14, 1977. She also declared that she had held herself out to the general public as Delbert W.'s wife by taking his name, and being identified as Linda W. on a driver's license, bank accounts, work permits and other official documents.

In response to your office's August 30, 1978 letter, she supplied further information in a January 11, 1979 affidavit. She attached to her statement, among other things, copies of insurance checks payable to her as Linda W., a number of business and local tax records in which she was identified as Linda W., and a passport in the name of Linda Lee W. However, Federal tax returns were not filed for several years under either her name or her husband's. She also declared in her affidavit that:

> At no time did either my husband or I attempt to obtain a marriage license or did we attempt to have a civil ceremony because it was our belief at the time of our marriage that the exchanging of private vows of marriage was more significant than a religious or civil ceremony. I was under the belief that if two parties lived together for a period of one year and held themselves out as husband and wife, that a common law marriage would exist which was just as binding as any other type of marriage. Consequently, from Christmas Eve of 1970 and following, I sincerely believed that I was married to Delbert L. W., III and that no further action was necessary to solemnize our marriage relationship.

The Commentary to Section 32.3 of the LEAA PSOB Regulations, 28 C.F.R. 32.1, et seq., states that: "In applying terms such as "direct and proximate result" or "line of duty," or in determining proof of relationship, the applicable State law will be considered, but will not be determinative." 42 F.R. 23258.

This comment is subject to the provision at 28 C.F.R. 32.12(b) that: "LEAA will not recognize a claimant as a "common law" spouse

under these regulations unless the State of domicile recognizes him or her as the spouse of the officer."

California does not recognize "common law" marriages. California Civil Code, Sections 4100 and 4213. As noted in our August 21, 1978 memorandum to your office on this case, however, it does recognize "putative" marriages. The leading California case on the issue, *Miller* v. *Johnson,* 214 Cal. App. 2d 123, 29 Cal. Rptr. 251 (1963), stated the requirements of a putative marriage as follows:

> The essential basis of a putative marriage is a belief in the existence of a valid marriage (citation omitted). *But there must also be an attempt to meet the requisites of a valid marriage...* The usual putative marriage arises where it is solemnized in due form and celebrated in good faith but because of some legal infirmity is either void or voidable. *Miller,* at 126 (emphasis added).

The parties' good faith effort to solemnize their relationship in a legally authorized manner has been present in every California case where a "putative" spouse has been recognized. The circumstances in *Brennfleck v. WCAB,* 265 Cal. App. 2d 738, 71 Cal. Rptr. 525 (1968) and 3 Cal. App. 3d 666, 84 Cal. Rptr. 50 (1970) are typical.

The parties in *Brennfleck* were married by a legal ceremony in Mexico. Because the interlocutory period following the husband's prior divorce had not lapsed, there was a legal barrier to their marriage.

The wife was held to be a putative spouse, however, because of her good faith belief that she was legally married. Her good faith was demonstrated by her participation in the ceremony, her consultation with two lawyers about the legality of her intended marriage, her acceptance of one of the lawyers' advice to be wed in Mexico, and the "considerable expense" she incurred traveling to that country to be married. See also *Holland America Ins. Comp. v. Rogers,* 313 F. Supp. 314 (N.D. Cal. 1970); *Neureither v. WCAB,* 15 Cal. App. 3d 429, 93 Cal. Rptr. 162 (1971); *Adduddell v. Board of Administration,* 8 Cal. App. 3d 23, 87 Cal. Rptr. 268 (1970); and *Brown v. Brown,* 274 Cal. App. 2d 178, 79 Cal. Rptr. 257 (1969). In each of these cases, the putative spouse had celebrated her marriage in a legally valid manner.

The putative spouse doctrine is designed to protect those who attempt to meet the requirements of the marriage law, but, because of a legal infirmity unknown to them, fail to be legally wed. Commentators have observed that:

> Both the status to putative spouse and its incidents evolved by analogy to legal marriages. This analogy is

> appropriate, for—unlike persons who deliberately decide not to marry—no one chooses to become a putative spouse. Rather, the persons whose rights are governed by this doctrine have chosen to be married. Once it is shown that the marriage upon which one or both has relief is invalid, the law has sought to equate the parties as closely as possible to legally married persons. That putative spouses believe themselves married explains the absence of cases defining the rights of putative spouse during the continuance of the relationship: when the good faith belief evaporated, the status disappeared; continuance of the relationship at that point was deemed 'meretricious' and rights were adjudged accordingly. Kay and Amyx, *"Marvin v. Marvin:* Preserving the Options, 65 Cal. L. Rev. 937, 941-42 (1977) (citations omitted).

Section 32.12 of the PSOB Regulations lists a variety of ways in which proof of marriage can be demonstrated. Because of her failure to wed in a legally valid manner, and because California does not recognize "common law" marriages, Linda W. has failed to demonstrate that she was the spouse of Delbert L. W. in any manner specified under the regulations. Her claim for benefits should therefore be denied.

October 16, 1980

OGC Memorandum

SUBJECT: **Eligibility of Multiple Wives**

The decedent in this claim was the Chief of Police of Wilmot, Arkansas, who died in an automobile accident in Morehouse, Louisiana, while on a recruiting mission for his department.

The issue in this claim is: Who are his eligible survivors?

The answer to this question requires some factual background. The decedent was first married to Ms. Bobbie Jean P. in Oklahoma on March 19, 1951. Two children, Glen and Gregory W., were born during this marriage, on May 7, 1953, and August 2, 1955, respectively. This mariage ended in divorce on May 22, 1961.

On January 18, 1959, however, the decedent married Tressie Lee H. in Louisiana. The marriage is evidenced by a certified marriage certificate. Two children, Van Charles and Derek, were born to Tressie and Henry on July 5, 1959 and May 28, 1961, respectively. According to an affidavit executed by Tressie Lee D., she and the decedent intermittently lived together in Louisiana and Texas until 1964, when she

left to live in California. Her statement that they were never divorced is corroborated by a review of California State divorce records.

The decedent subsequently married Doris Marie D. on December 24, 1967 and divorced her on September 17,1970. No children were born of this marriage.

On December 11, 1970, the decedent married Lonnie Bell B. in Louisiana. They had a daughter, Tracie Michelle, on May 7, 1974. The decedent purported to divorce Lonnie on January 26, 1976. This decree, however, was subsequently found to be procured by fraud.

On October 18, 1976, the decedent married Shielia Joyce P. in Louisiana, after the birth of their daughter, Mystiqua Trinette, on August 13, 1976. She and the decedent lived together in Arkansas until his death on May 23, 1978.

Examining the children's eligibility first, the decedent left five children. Mystiqua and Tracie Michelle were under eighteen years old at the time of his death, and their birthdates are established by certified birth certificates. They are, accordingly, eligible survivors.

Glen, Gregory Wayne, and Van Charles D. were all over eighteen years old at the time of their father's death. With the exception of a statement that Gregory was a part-time university student prior to his father's death, there is no evidence in the file showing whether or not the children were full-time students, or physically or mentally incapable of support at the time of their father's death. Final determinations of the children's eligibility must, therefore, await receipt of affidavits or other information responding to those issues.

With respect to the decedent's wives, there are three (Tressie, Lonnie, and Shelia) whose spousal relationships with the decedent were not terminated by a legal divorce decree. Although Sheila was ostensibly his wife at the time of his death, the Third Judicial District Court of Lincoln Parish, Louisiana set aside the decedent's fraudulent divorce from Lonnie and held her to be his legal wife at the time of his death. Case No. 28,778 (March 27, 1979). The Arkansas Workers' Compensation Commission subsequently relied on this decision to award workers' compensation benefits to Lonnie as the decedent's legal wife. Claim No. C810091 (June 28, 1979).

In our opinion, all three wives have equally strong claims to be the decedent's legal wife. We accordingly recommend that each be awarded a one-third share of the spouse's $25,000.00 benefit under the Act.

Tressie D.'s claim rests upon her bona fide marriage to Henry, and their continuing relationship from 1964 to 1978. By her affidavit, she

states "I have remained in touch with Henry through phone conversations with him at Ruston, Louisiana, and Monroe, Louisiana. During this period of time, Henry asked me many times to return to him ... Henry has repeatedly told me that he would never give me a divorce, and I have never been notified of any legal action for divorce or separation." As noted earlier, their continuing relationship as man and wife is corroborated by the lack of any California record showing they were divorced.

Although she was married to Henry prior to his divorce from Bobbie Jean D., she appears to still qualify as a "putative" spouse under Louisiana law. A "putative spouse" under Louisiana law is a person who, in good faith, believes that he or she entered a valid marriage and that no legal impediment existed to nullify the marriage at the time it was entered. *Gothright v. Smith,* 368 So. 2d 679 (La. Sup. 1978). A putative spouse is entitled to the same share of his or her decedent spouse's property as the prior existing wife. *Succession of Fields,* 62 So. 2d 495 (La. 1953).

The circumstances of their marriage strongly indicate that she had no knowledge of his prior marriage. She should, however, be asked to state that in the form of an affidavit. If she can demonstrate her belief that she entered a valid marriage, she will have, in our opinion, offered sufficient evidence of her spousal relationship with Henry to entitle her to a share of the spouse's death benefits under the Act.

Lonnie D. is also entitled to a share of the same benefits. Her claim is supported by the judgment of the Louisiana District Court that her husband's attempt to divorce her was null and void, and by the Arkansas Workers' Compensation Commission decision in her favor.

Henry D.'s prior, continuing marriage to Tressie D. does not deprive her of her right to share PSOB benefits, because like Tressie, she is a putative spouse under Louisiana law. As noted above, Tressie D. was living in California in 1970, still married to Henry, the year Lonnie married Henry in Louisiana. Lonnie cannot, therefore, reasonably be imputed with knowledge of this legal impediment to her marriage.

Acceptance of Shelia's claim requires resolution of a conflict of laws problem. As noted above, she married Henry in Louisiana in 1970, but was living with him in Arkansas when he died in 1978. Louisiana law would recognize her as a putative spouse. Arkansas, however, does not recognize putative spouses. *Bruno v. Bruno,* 256 S.W. 2d 341 (1953). This rule was, in effect, applied by the Arkansas Workers' Compensation Commission to award all death benefits arising from the decedent's death to Lonnie D. The choice of which State's law to

apply depends essentially upon which state's interests would best be furthered by the appication of its law to the situation at hand.*

The Louisiana interests that would be furthered by application of the putative spouse doctrine, generally, are (1) its interest in maintaining public confidence in its authority to create a legitimate marriage, and (2) its interest in keeping a "putative" spouse from becoming a ward of the state because he or she was unable to share in the decedent spouse's estate. Applying this analysis to the case at hand, the second reason is not relevant, because Sheila was a resident of another state, Arkansas, at the time of Henry's death. The first interest, however, continues to support application of Louisiana law because persons married in Louisiana continue to rely on its authority to create a binding marriage, throughout the marriage, regardless of where they might later reside.

The Arkansas interests that would be furthered by applying its law not recognizing putative spouses are (1) its interest in deterring bigamy by residents of the state and (2) its interest in protecting the rights of previous "legal" spouses either married, or residing in Arkansas. Examining the relevance of these interests to the instant situation, it is apparent that the second interest is inapposite here; no previous legal spouse of Henry D. was either married or residing in Arkansas. The first reason, however, is relevant to the case at hand, because Henry D. was conducting a bigamous relationship while living in Arkansas.

Resolution of the question, therefore, requires a balancing of Louisiana's relevant interest against Arkansas'. In our opinion, the Louisiana interest is stronger because it survives Henry D.'s death. Even though he has died, Sheila P. is still entitled to rely on the validity of the marriage she entered into in Louisiana. Arkansas's interest in deterring bigamy, however, dies when Henry dies; his bigamous relationship expires with him.

Accordingly, we believe that Sheila Joyce D., Lonnie D., and Tressie Lee D. (upon the showing of proof described above), all have supportable claims to the spousal benefit available under the PSOB Act. Each would, therefore, be entitled to one-third of that $25,000 benefit.

---

*Restatement (Second) Conflict of Laws, §6(2) (1971), lists the relevant factors as:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

V. Miscellaneous

A. Intentional Misconduct

June 12, 1981

OGC Memorandum

SUBJECT: **Contribution of Decedent's Intentional Misconduct to His Own Death**

The issues presented for resolution in this case are whether the decedent engaged in intentional misconduct, and, if so, whether his death was caused by that misconduct. It is our opinion that, although the decedent may have engaged in intentional misconduct, it did not cause his death. We accordingly recommend a payment of benefits in this claim.

The deceased public safety officer in this claim was a Deputy Sheriff of the Lake County, Oregon Sheriff's Department. On December 1, 1979, the local school superintendent asked the officer to be available because school officials anticipated trouble from a non-student at the school dance to be held that night.

The decedent cancelled his plans for the evening in order to prevent trouble at the high school. In between the officer's first and second visits to the school, the "troublemaker" appeared and harassed the school officials who refused to allow him into the dance. When the officer was summoned to the dance by one of the school's teachers, a verbal altercation occurred between the deputy sheriff and the youth. Tests conducted later indicated that the officer's blood alcohol level was .17%.

Witnesses observed the 6'6", 324 lb. officer push the youth around and pull him roughly by his hair. Some witnesses stated that the officer at one point appeared to have the youth by the throat. The deputy forced the young man into the young man's pick-up truck. Upon forcing the youth into the truck, the officer took a rifle found on the seat, and asked the youth if there were any more weapons in the vehicle, to which the youth replied, "No." The officer and the youth then proceeded toward the local jail. Witnesses stated that they assumed that the deputy was taking the youth to the jail because that was the direction in which the two men left the school.

A short time later, the deputy brought the truck to an abrupt halt before reaching the jail. On the basis of the evidence provided, there are two possible explanations for this abrupt stop. The first is that the youth drew a pistol and shot the deputy in the upper right shoulder. This action may have caused the officer to stop the truck and, at the same time, discharge the rifle once through the roof. Upon finding that the rifle had jammed, the officer then jumped from the truck and for unknown reasons, began smashing the windows with the butt of the gun. The youth then fully discharged the first pistol and then another, a total of 18 bullets, striking the officer 14 times.

The second possible sequence of events (the youth's version) is that the officer stopped the truck in an effort to further brutalize the youth. Under this theory, the officer may have fired the rifle through the roof first, and finding it now inoperative, stopped the vehicle. It is uncertain under these circumstances why the unarmed officer would have gone to the passenger side of the truck, but it is certain that when the officer reached the youth, the youth shot the officer five times, incapacitating the officer's right shoulder. The unarmed officer then left the youth, who followed him around the truck, and shot the officer nine more times in the back.

The youth ran to a nearby mobile home and reported to the occupants that he had just killed the deputy. He claimed, "I hope he's dead,... because then he can't talk [in court]" and "You know a man doesn't go down easy by getting hit with a .22. It takes a lot of rounds to put a man of his [the deputy's] size down."

On at least two prior occasions, the youth made it known to others in the small town, that he planned to "put [the deputy] in the ground," and kill the officer before the officer could run him out of town. These threats were made as a result of the youth's prior run-ins with the law, which in this town was the decedent alone.

The youth claims that the officer severely beat him while they were driving from the school. Several bruises were observed on the youth by police officers that investigated the case. The youth admits, however, that he had also been involved in a motorcycle accident the week before the shooting, which caused at least some of his injuries.

The youth was subsequently indicted for murder by a county grand jury. After one and a half weeks of trial, but before he presented any evidence, the accused pleaded guilty to a lesser charge of manslaughter.

The PSOB Act precludes coverage of an officer's death "if the death was caused by the intentional misconduct of the public safety

officer...". 42 U.S.C. 3796a. The LEAA PSOB Regulations address the issue as follows:

> §32.7 Intentional misconduct of the officer.
>
> The Administration will consider at least the following factors in determining whether death was caused by the intentional misconduct of the officer:
>
> (a) Whether the conduct was in violation of rules and regulations of the employer, or ordinances and laws; and
>
> (1) Whether the officer knew the conduct was prohibited and understood its import;
>
> (2) Whether there was a reasonable excuse for the violation; or
>
> (3) Whether the rule violated is habitually observed and enforced:
>
> (b) Whether the officer had previously engaged in similar misconduct;
>
> (c) Whether the officer's intentional misconduct was a substantial factor in the officer's death; and
>
> (d) The existence of an intervening force which would have independently caused the officer's death and which would not otherwise prohibit payment of a death benefit pursuant to these regulations."

Under either version of the facts posed above, benefits should be paid. Although the officer may have used excessive force upon first encountering the youth, that force did not set in motion an inexorable series of events leading to his own death. Once his rifle jammed, he no longer possessed a certain means of fatally injuring the youth, particularly in view of the youth's possession of a loaded pistol. The youth's repeated shots into the decedent after the officer ceased to pose a threat to his life constituted a superseding, intervening force breaking the flow of causation from the officer's possible misconduct.

The trial judge determined on the basis of the autopsy and reenactment using a mannequin, that the deputy was first wounded five times, incapacitating his right shoulder. After the first set of bullets were fired, witnesses saw a "figure" (the officer) pass through the headlights of the truck from the passenger side to the driver side.

At this point the youth was in no immediate danger of personal harm. By following the deputy around to the driver's side of the truck, and shooting him nine more times in the back and head, the youth was no longer engaged in an act that flowed from the officer's earlier misconduct. The youth's intervening pursuit and slaying of the officer was the independent cause of the officer's death.

Although the precise sequence of events leading up to the youth's slaying of the officer cannot be recounted with certainty, the evidence in the claim file does raise at least a reasonable doubt about whether coverage should be denied on the basis of the decedent's misconduct. The PSOB Regulations provide that: "The Administrator shall resolve any reasonable doubt arising from the circumstances of the officer's death in favor of payment of death benefits." 28 C.F.R. 32.4.

Our view of the contribution of the decedent's possible alcohol intoxication to his death is substantially the same. We recommend, therefore, that benefits be paid in this claim.

B. **Suicide**

February 27, 1980

OGC Memorandum

SUBJECT: **Suicide of Chief of Police**

In this file, the Chief of the Providence, Rhode Island Police Department was found dead in his office at approximately 5:00 a.m. He was holding a revolver in his right hand, and left a note reading "Leo: everything is too much. John: take care of my family."

Section 1202(1) of the PSOB Act, 42 U.S.C. 3796a(1), states that: "No benefit shall be paid under this part if the death was caused by the intentional misconduct of the public safety officer or by such officer's intention to bring about his own death."

The PSOB regulations state that "the Administration will consider at least the following factors in determining whether the officer intended to bring about his own death:

> (a) Whether the death was caused by insanity, through an uncontrollable impulse or without conscious volition to produce death;
>
> (b) Whether the officer had a prior history of attempted suicide;

(c) Whether the officer's intent to bring about his death was a substantial factor in the officer's death; and

(d) The existence of an intervening force or action which would have independently caused the officer's death and which would not otherwise prohibit payment of a death benefit pursuant to these regulations. 28 C.F.R: 32.8.

The only section that could nominally bring the decedent's death within the scope of the Act is (a). The evidence in the claim file, however, clearly shows that the victim intended to kill himself. The two most convincing pieces of evidence supporting this conclusion are (1) the suicide note, and (2) the autopsy report showing that the gun was pressed to the side of the decedent's head when the fatal bullet was fired. The letter from the victim's administrative assistant, describing the steadily mounting pressures on the chief and the resignation in the chief's voice during their final phone conversation only hours before his death, is also probative of the chief's intent.

The fact that the pressures that led to the suicide emanated strictly from his job does not warrant a payment of benefits either. See the discussion in *In the matter of Florence M. Tinsworth,* 10 ECAB 369 (1959), a Department of Labor decision under the Federal Employees' Compensation Act. The Board found that, once it had established that the employee had intentionally killed himself, it was unnecessary to determine whether there was a causal relationship between his job, his medical disabilities, and his death. The intentional taking of his own life took him out of the scope of the Act in any event.

Accordingly, we recommend a denial of benefits in this case, on the basis of suicide.

C. **Post-Payment Claim**

April 28, 1980

OGC Memorandum

SUBJECT: **Payment to Late-Filing Child in Excess of $50,000 Statutory Limitation**

Turning to the claim of the child, Robert V., we are faced with the problem of double payment of benefits. LEAA paid $25,000 to Karen G. for the benefit of Tracy V., daughter of the decedent, and $25,000 to Sandra V. for the benefit of Danny V., son of the decedent, in March of 1978. We have no evidence that either of those beneficiaries

was not properly entitled to a share of the $50,000 to which survivors of the decedent were entitled under the Act.

Therefore, we must determine whether LEAA should pay the claim of an additional survivor, if the survivor is entitled, when all monies authorized by law for payment to the survivors of the decedent have been exhausted. In 19 Comp. Gen. 104 (1939), the Social Security Board paid benefits to the mother of the decedent, under the erroneous belief that the decedent was not survived by a widow. The widow subsequently filed her own claim. In ruling that the Social Security Board should pay the claim of the widow the Comptroller General quoted the following passage from an earlier opinion involving the double payment of war risk insurance benefits by the Veterans' Bureau:

> The establishing ruling and practice is that an officer may correct his own mistakes of law or of fact, but may not correct errors of law of his predecessor. If through his own mistake of law or of fact, the director may, and it is his duty to do so, make payment to the rightful claimant upon a proper claim therefore, irrespective of recovery by the government of the amount erroneously paid. The rightful claimant should not be denied a payment to which he is clearly entitled because of the director's error. 2 Comp. Gen. 102 (1922).

The Comptroller General added that the double payment should be made only if the second claimant were clearly entitled, e.g., if the second claimant were not guilty of negligence or laches in filing her claim. 19 Comp. Gen., at 106.

While both of the opinions cited above involved specific benefits programs, the Comptroller General refers to the quoted passage from 2 Comp. Gen. 102 as a "general theory with respect to duplicate payments." 19 Comp. Gen., at 105. Thus, it would seem appropriate to apply the rule of the two opinions to the instant case.

The child claimant, Robert V. has made out a *prima facie* case of eligibility. Mr. P. has submitted the following evidence to the effect that he is a surviving son of the decedent.

1) His certified birth certificate, issued by Los Angeles County, California, on which the name of the decedent appears in the space labelled, "Father of Child,";

2) A letter of October 10 (presumably 1966) to "Dear Jackie and Darling Chris" from the decedent in which the decedent refers to things that Chris (the claimant) will need and in which the decedent expresses affection for the claimant; and

3) A letter of June 20 1966, to Jacqueline from the decedent in which the decedent expresses his desire to see "my child."

4) The affidavits of Jacqueline V. (Mother of the claimant), Robert O. (maternal grandfather of the claimant), and Celia M. (maternal great-grandmother of the claimant), attesting to the claimant's status as son of the deceased; and

5) A letter of October 22, 1966, to "Jackie and Chris" from Pat V. (the decedent's stepmother) in which the writer suggests that Jacqueline take steps to obtain support from the decedent.

It does not appear that the claimant has been guilty of negligence in prosecuting his claim. The evidence in the file indicates that Jacqueline and the decedent did not see each other after they separated in late 1966. The decedent was not a public safety officer at that time. The decedent did not die until November 19, 1976. Thus, it is likely that the claimant and his mother were not aware of the potential entitlement until a considerable length of time after the decedent passed away. Section 32.20(c) of the LEAA PSOB Regulations, 28 C.F.R. 32.1, *et seq.*, provides that: "A claim by or on behalf of a survivor of a public safety officer shall be filed within one year after the date of death unless the time for filing is extended by the Administrator for good cause shown."

The Commentary on section 32.20(c) states that: "An example of good cause which would clearly warrant an extension of the filing period is a statement from the claimant indicating that he or she was unaware of the existence of the Act or of his or her eligibility for its benefits."

We believe that Jacqueline V.'s October 22, 1979 affidavit, reciting the facts of her relationship with Danny V., satisfies this requirement. The claimant's delinquency in filing his claim should not, therefore, be a bar to the payment of the claim.

Thus, the claimant should receive the share of the $50,000 to which he is entitled, despite the overpayments to the other claimants. Since there are three entitled claimants, LEAA should pay one-third of $50,000 or $16,666.67, to the present claimant, Robert V. In light of the obvious equities against seeking a recovery of the excess sum paid to the decedent's other two children, we do not recommend that any recovery action be initiated against the other children.

D. **Payment of Interest**

June 22, 1981

OGC Letter

SUBJECT: **Payment of Interest on PSOB Benefits**

This is in response to your letter of June 9, 1981, in which you requested the Law Enforcement Assistance Administration to pay interest on the Public Safety Officers' Benefits award recently made to Mrs. Edward J. R.

A long line of cases has established the rule that the payment of interest on claims against the Government is not authorized, absent an express contractual or statutory provision so requiring. The Supreme Court has stated that:

> It has been established as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are where the government stipulates to pay interest, and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages. ...The principle above stated is recognized by this court. *U.S.C. ex rel. Angarica de la Rua* v. *Bayard,* 127 U.S. 251, 8 S.Ct. 1156, 1161 (1888).

This rule has been affirmed repeatedly. See *U.S.* v. *Louisiana,* 446 U.S. 253, 100 S.Ct. 1618 (1980); *Peoria Tribe of Indians of Oklahoma* v. *U.S.,* 390 U.S. 468, 88 S.Ct. 1137 (1968); *Smyth* v. *U.S.,* 302 U.S. 329, 58 S.Ct. 248 (1937); and *U.S.* v. *North American Transportation and Trading Co.,* 253 U.S. 330, 40 S.Ct. 518 (1920).

We must accordingly deny your request for interest.

Ruth Elzey LANKFORD, Petitioner,
v.
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, William F. Powers, Griffin B. Bell, Winifred A. Dunton, and Henry S. Dogin, Respondents.

No. 79-1158

(620 F.2d 35)

United States Court of Appeals, Fourth Circuit

On Petition for Appeal from Order dated January 3, 1979. Argued January 8, 1980. Decided April 14, 1980. Before HAYNSWORTH, Chief Judge, WINTER, Circuit Judge, and FIELD, Senior Circuit Judge.

Terry Paul Meyers (Amos I. Meyers on brief) for Petitioner; Burton D. Fretz, Dept. of Justice, Civil Division, Appellate Staff (David Tevelin, Office of General Counsel, Law Enforcement Assistance Administration; Stuart E. Schiffer, Acting Assistant Attorney General; William Kanter, Dept. of Justice, Civil Division, Appellate Staff on brief) for Respondents.

HAYNSWORTH, Chief Judge:

Claimant petitions for review of the administrative denial of benefits under the Public Safety Officers' Benefit Act (Act), 42 U.S.C. 3796 *et seq.* We conclude that this court is without jurisdiction, and, accordingly, dismiss the petition.

The Act was passed in 1976 as an amendment to the Omnibus Crime Control and Safe Streets Act of 1968. It provides for payment of a $50,000 benefit to designated survivors of a peace officer who dies as the proximate result of a personal injury sustained in the line of duty. Claimant is the widow of a deputy sheriff who died while attempting to break up an altercation at a carnival. She seeks review of the final administrative denial of her claim, contending that the denial is not supported by substantial evidence and that procedures followed by the Law Enforcement Assistance Administration (LEAA) worked a denial of due process.

The Act makes no express provision for judicial review by this Court. Claimant relies upon 42 U.S.C. § 3759(a), which is part of the Omnibus Crime Control and Safe Streets Act. It provides that an unsuc-

cessful "applicant or grantee" may petition the Court of Appeals for review. Claimant emphasizes the fact that § 3759(a) provides for such review of applications "submitted under this chapter." Because the Act is within the same chapter as § 3759(a), claimant asserts that this court has jurisdiction over her petition.

The legislative history is silent as to whether § 3759(a) was intended to provide for review of administrative denials under the Act. Resort to the statutory language itself, however, makes it amply clear to us that Congress did not intend that.

Section 3759(a) provides that an "applicant or grantee" dissatisfied with the administrative decision regarding "its application or plan submitted under this chapter" may seek review. The terminology is the same as that used in the Omnibus Crime Control and Safe Streets Act, which speaks in terms of "applicants" or "grantees" who submit "applications" or "plans" for programs seeking to improve the administration of criminal justice and law enforcement.

In contrast, the Benefits Act directs the payment of a monetary "benefit" to "claimants." We presume that this clear use of different terminology within a body of legislation is evidence of an intentional differentiation. See *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th. Cir. 1972). Accordingly, we conclude that the provision for judicial review contained in § 3759(a) is inapplicable to the Benefits Act. Thus, while § 3759(a) is chapterwide in scope, it provides only for review of denials of "applications" or "plans" submitted by "applicants" or "grantees."[1] The Act involves none of these.

Further, it is clear that the provision that a section is to have chapterwide application does not automatically render it applicable to the Act. Section 3751, part of the same subchapter as § 3759, gives the LEAA general rulemaking power. It also purports to apply chapterwide. Nonetheless, § 3796(c), part of the Act, grants the agency such rulemaking power "as may be necessary to carry out the purposes of this subchapter." Thus, while the Act amends the Omnibus Crime Control and Safe Streets Act, Congress apparently considered it a separate provision, to which administrative provisions of the earlier legislation did not necessarily apply. The fact that Congress neglected to provide specifically for review in this court, coupled with the difference in terminology employed, leads us to the conclusion that this court is without jurisdiction.

---

1. Section 3759(a) places venue in the Court of Appeals for the circuit in which the applicant or grantee "is located." While this language is fitting for the institutional entities which normally apply under the Omnibus Crime Control and Safe Streets Act, it is inappropriate as a reference to the individuals who will seek benefits under the Act. The fact that Congress did not change the language of the venue provision when it adopted the Act reinforces our opinion that § 3759(a) does not apply to the Act.

Our decision is bolstered further by a very recent amendment to the Omnibus Crime Control and Safe Streets Act. Passed shortly before oral argument to this court in this case, the amendment deletes the reference to chapterwide scope earlier contained in § 3759(a), and specifies that applicants under certain sections are entitled to judicial review. Act of December 27, 1979, Pub. L. No. 96-157 (to be codified in 42 U.S.C. § 3785). Because these sections do not include the Act, it is clear that claimant would have no right to review in this court under the amended legislation. We are of the opinion that the amendment made clear beyond cavil what we had determined to be the meaning of the statutes as they stood when this petition was filed.

We hold that the provision for judicial review contained in § 3759(a) does not apply to decisions under the Public Safety Officers' Benefits Act. Accordingly, this court is without jurisdiction to entertain this petition.

PETITION DISMISSED.

Elaine Easley RUSSELL, Petitioner,

v.

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION OF THE UNITED STATES of America, Respondent.

No. 79—1593.
[637 F.2d 354]

United States Court of Appeals,
Fifth Circuit.
Unit A

Feb. 17, 1981.

Chester John Caskey, Baton Rouge, La., for petitioner.

Barbara L. Herwig, Howard S. Scher, Dept. of Justice, Civ. Div., Appellate Staff, Washington, D.C., for respondent.

Petition for Review of an Order of the Law Enforcement Assistance Administration.

Before AINSWORTH, Circuit Judge, KUNZIG, Judge*, and RANDALL, Circuit Judge.

KUNZIG, Judge:

Claimant petitions this court for direct review of the administrative denial of survivor's death benefits under the Public Safety Officers' Benefits Act of 1976, Pub. L.No. 94-430, 90 Stat. 1346 (1976), 42 U.S.C. §§ 3796-3796c (1976) ("PSOBA"). The Government has made a motion to dismiss for want of subject matter jurisdiction. The motion is well-founded. Our ultimate disposition is to transfer this cause to the United States Court of Claims.

PSOBA was passed as an amendment to the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L.No. 90-351, 82 Stat. 197 (1968) (amended version at 42 U.S.C. §§ 3701 *et seq.* (1976)("Crime Control Act"). PSOBA provides *inter alia,* that, "In any case in which the Administration [i.e., LEAA] determines ... that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty the Administration shall pay a benefit of $50,000 ... to the surviving spouse of such officer...." 42 U.S.C. §§ 3796(a)(1976). Claimant is the widow of a police chief who suffered a heart attack and died shortly after physically subduing and arresting a disorderly person. LEAA denied the widow's claim on the ground that, although Chief Russell's death had been precipitated by a traumatic event, the traumatic event did not qualify as a compensable traumatic "injury" within the meaning of PSOBA.[1]

[1,2] Federal courts of appeals are not courts of general jurisdiction; they possess only the jurisdiction conferred upon them by acts of Congress. See, e.g., AF of L v. NLRB, 308 U.S. 401, 404, 60 S.Ct. 300, 301, 84 L.Ed. 347 (1940); *Dillard v. HUD,* 548 F.2d 1142, 1143 (4th Cir. 1977); *9 Moore's Federal Practice,* para. 110.01 (2d ed. 1980). PSOBA, however, contains no express judicial review provision and its

*Judge of the United States Court of Claims, sitting by designation.

1. Under the governing regulations, "claimants" initiate the claims process by filing with LEAA a written statement or form. 28 C.F.R. § 32.20(a)-(b)(1979). In general, the claim must be filed within one year of the death of the public safety officer. § 32.20(c). Upon the basis of written submissions, § 32.21, LEAA makes an initial finding as to eligibility. § 32.23. The claimant may request formal agency reconsideration of a determination of ineligibility. § 32.24(a). Opportunity for an oral hearing shall be provided. *Id.* If the claimant is still determined ineligible, the claimant may request that the Administrator review the record and determination. § 32.24(i). The Administrator is empowered to make the final agency determination. *Id.* See generally 42 U.S.C. § 3796c (1976).

In the instant case, claimant exhausted all available procedures prior to seeking judicial review in this court.

legislative history does not discuss the matter. As a consequence, claimant advances 42 U.S.C. § 3759(a) (1976), the general appellate review provision enacted with the original Crime Control Act in 1968, Pub.L.No. 90-351, § 511(a), 82 Stat. 206 (1968). The statute, unchanged since passage, provides in relevant part:

> If any applicant or grantee is dissatisfied with the Administration's final action with respect to the approval of its application or plan submitted under this chapter ... such applicant or grantee may ... file with the United States court of appeals for the circuit in which such applicant or grantee is located a petition for review of that action.

The crucial issue raised by this provision is whether Chief Russell's widow qualifies as an "applicant" or "grantee". We think not. Thus, there is simply no basis for us to proceed with judicial review in this case.

While the terms "applicant" and "grantee" are nowhere expressly defined in the Crime Control Act—or its amendments—there are sufficient other constructional aids upon which we may rely.

Under the Crime Control Act as originally passed, only "States and units of general local government" were eligible for LEAA funding. See Pub.L.No. 90-351, §§ 201, 301, 82 Stat. 198, 199 (1968), 42 U.S.C. §§ 3721, 3731 (1976).[2] These, then, must have constituted the sole referents for "applicant" and "grantee" as first used. Our basic point is that the subsequent passage of PSOBA cannot be construed as having effected any change in this regard.

Note that despite the advent of PSOBA, § 3759(a) retained language to the effect that "any applicant or grantee ... dissatisfied with ... final action with respect to ... its application or plan" may petition for review in the court of appeals. (Emphasis supplied). Note also that

---

2. The purpose of the Crime Control Act was set forth in its opening section as follows:

> It is therefore the declared policy of the Congress to assist State and local governments in strengthening and improving law enforcement at every level by national assistance. It is the purpose of this title to (1) encourage States and units of general local government to prepare and adopt comprehensive plans based upon their evaluation of State and local problems of law enforcement; (2) authorize grants to States and units of local government in order to improve and strengthen law enforcement; and (3) encourage research and development directed toward the improvement of law enforcement and the development of new methods for the prevention and reduction of crime and the detection and apprehension of criminals. Pub.L.No. 90-351, 82 Stat. 197 (1968)(amended version at 42 U.S.C. § 3701 (1976)).

since its inception, § 3759(a) has placed venue in "the circuit in which such applicant or grantee is *located*". (Emphasis supplied.) The emphasized language plainly assumes that entities or jurisdictions, not individuals, are covered. This forcefully overrides any contrary impression which may emanate from the passage of PSOBA. Indeed, had Congress genuinely intended to make § 3759(a) applicable to PSOBA, it most certainly would have modified the troublesome language in the appellate review provision to reflect that fact.

[3] A final, rather telling, consideration is the fact that Congress expressly chose to characterize potential beneficiaries of PSOBA as "claimants," rather than "applicants" or "grantees". 42 U.S.C. § 3796c (1976). "There is ... a well settled rule of statutory construction that where different language is used in the same connection in different parts of a statute it is presumed that the Legislature intended a different meaning and effect." *Morgan v. Jewell Constr. Co.,* 230 Mo.App. 425, 91 S.W.2d 638, 640 (1936).

We note that the Fourth Circuit previously considered the same issue under discussion here and resolved it in the same manner. Section 3759(a) was held inapplicable to PSOBA denials. *Lankford v. LEAA,* 620 F.2d 35 (4th Cir. 1980).[3]

We recognize that the Supreme Court has enunciated a strong presumption against precluding judicial review, see *Morris v. Gressette,* 432 U.S. 491, 501, 97 S.Ct. 2411, 2418, 53 L.Ed.2d 506 (1977); *Dunlop v. Bachowski,* 421 U.S. 560, 567, 95 S.Ct. 1851, 1857, 44 L.Ed.2d 377 (1975); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 139-141, 87 S.Ct. 1507, 1510-1511, 18 L.Ed.2d 681 (1967), but find no call for invoking that presumption here. Under 28 U.S.C. § 1491 (Supp. III 1980), "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded upon ... any Act of Congress...." Pursuant to this general authorization, the Court of Claims has already exercised jurisdiction upon a number of occasions to review PSOBA denials. See, e. g., *Budd v. United States,* No. 82-80C (Ct.Cl. Nov. 14, 1980); *Harold v. United States, 634 F.2d 547 (Ct.Cl. 1980).* The Court of Claims, of course, is

3. On December 27, 1979, Congress enacted the Justice System Improvement Act, an extensive reorganization and revision of the statutes governing LEAA and other related federal arms. Pub.L.No. 96-157, 93 Stat. 1167, 42 U.S.C. §§ 3701 *et seq.* (Supp. III 1980)("Justice Act"). The Justice Act expressly provides that it "shall not affect any suit, action, or other proceeding commenced by or against the Government before December 27, 1979". 42 U.S.C. § 3797(e) (Supp. III 1980). Since the current proceeding was commenced prior to that date, the Justice Act has no direct bearing upon the problem before us. It is important to note, however, that the contextual evidence in the new law is even stronger in support of the proposition that PSOBA beneficiaries do not fall within the ambit of the appellate review provision. See 42 U.S.C. §§ 3701, 3712, 3741-3744, 3751, 3761, 3771, 3773, 3782-3785, 3791, 3796-3796c (Supp. III. 1980).

free of the $10,000 jurisdictional limit which applies in federal district court. See 28 U.S.C. § 1346(a)(2) (Supp. III 1980)[4]

Section 1406(c) of Title 28 of the United States Code (1976) provides as follows: "If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims where the case shall proceed as it it had been filed on the date it was filed in the district court."

In *Dr. John T. MacDonald Foundation, Inc. v. Califano,* 571 F.2d 328, 332 (5th Cir.), cert. denied, 439 U.S. 893, 99 S.Ct. 250, 58 L.Ed.2d 238 (1978), this court held that "[a]lthough [§ 1406(c)] purports to limit the transfer power to the district court", the court of appeals may also effect the transfer directly. This procedure "not only furthers the policies behind § 1406, but also comports with the precepts of judicial economy." *Id.*

In summary, we hold that his court lacks authority for the exercise of judicial review in this case. By contrast, the Court of Claims had "exclusive jurisdiction", see supra, to adjudicate the type of claim involved here. In the terms of § 1406(c), it would "be in the interest of justice" to transfer in this instance.

Accordingly, after consideration of the submissions of the parties, with oral argument of counsel, the Government's motion to dismiss is granted, but only as to dismissal from this court. We hereby transfer this cause to the United States Court of Claims in Washington, D.C.

4. The Government lawyer conceded during oral argument that the Justice Department views the Court of Claims as the appropriate forum for trying these actions.

**Donna Sue RUSSELL, a widow;
Gary Robert Russell and Kirsten Hope Russell, minors,
by their Guardian, Donna Sue Russell, Petitioners,**

v.

**LAW ENFORCEMENT ASSISTANCE ADMINISTRATION,
United States Department of Justice, Respondent.**

No. 78-2437.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 4, 1980.
Decided Oct. 31, 1980

637 F.2d 1255 (1980)

* * *

II

JURISDICTION

[1] The threshold question is whether we have jurisdiction to review LEAA denials of applications for Benefits Act payments.

[2] The jurisdiction of the United States courts of appeals is limited to that conferred by statute. *Young Properties Corp. v. United Equity Corp.*, 534 F.2d 847, 849-50 (9th Cir.), *cert. denied*, 429 U.S. 830, 97 S.Ct. 90, 50 L.Ed.2d 94 (1976). We turn to the LEAA statute, chapter 46 of title 42 of the United States Code, to determine whether Congress has directed us to review Benefits Act denials. This examination is a frustrating exercise, because Congress has delivered a set of opaque and conflicting signals. Nevertheless, we must try to ascertain and apply the legislative intent.

A. The Statute

In order to understand the judicial review provisions of the LEAA Act it is necessary to understand the structure of the Act, which comprises chapter 46 of title 42 of the United States Code, 42 U.S.C. §§ 3701-3796c (1976). Chapter 46 has nine subchapters. Subchapter I, section 3711, charters LEAA. Subchapters II-IV, sections 3721-3750d, authorize grants for various state and local law enforcement programs. Subchapter V, sections 3751-3774, establishes the procedural regime; its key provisions are section 3751, authorizing promulgation

of rules and regulations, section 3758, authorizing administrative review, and section 3759, authorizing judicial review. Subchapters VI-VII, sections 3781-3795, contain minor technical provisions. Subchapter IX, sections 3796-3796c, is the Benefits Act.

Russell contends that jurisdiction is straightforwardly conferred by the judicial review provision, section 3759, which provides in pertinent part: "(a) If any applicant or grantee ... is dissatisfied with [LEAA's] final action under section 3757 or section 3758 of this title, such applicant or grantee may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such applicant or grantee is located a petition for review of that action."

In order to decide whether judicial review is available under this section, we must apply the "throwback" clause and determine whether denial of an application for Benefits Act payments constitutes "final action under section 3757 or section 3758."[1] The answer hinges on our interpretation of section 3758.[2]

Section 3758 has three subsections. Subsection (a) precludes review except as "hereafter provided." Subsections (b) and (c) establish the procedure for administrative review of denials of financial and technical assistance grants.

The government insists that section 3758 applies only to actions covered by subsections (b) and (c): applications by state and local law enforcement agencies for financial and technical assistance grants. It then characterizes an application for Benefits Act payments not as an "application for a grant" for rather as a "claim for a benefit," which, it contends, is outside the scope of subsections (b) and (c). We disagree.

We conclude that subsection 3758(a), read in conjunction with section 3759, authorizes review independent of subsections 3758(b) and (c). Subsection (a) provides: "In carrying out the functions vested by this chapter in [LEAA], the determinations, findings, and conclusions of [LEAA] shall be final and conclusive upon all applicants, *except as hereafter provided.*" (emphasis added). Admittedly, this language is

---

1. The clause in 42 U.S.C. § 3759(a) (1976), authorizing review of an "application or plan submitted under this chapter" is not an alternative source of review. The language is surplusage. It was adopted several years before passage of the Benefits Act when *all* applications or plans submitted to LEAA were covered by 42 U.S.C. § 3758 (1976). Therefore this clause had no effect on reviewability. This conclusion is confirmed by the fact that the recent revision of the LEAA Act, discussed *infra,* omits the clause. Justice System Improvement Act of 1979, Pub.L.No.96-157, § 805, 93 Stat. 1167 (1979).

2. 42 U.S.C. § 3757 (1976) relates to revocation of formerly approved grant applications. It is not relevant here.

susceptible of two interpretations. The government asserts that it precludes judicial review of any LEAA action except to the extent that the action is subject to the administrative review provisions of subsections (b) and (c), thus restricting review to applications for grants. Alternatively, it merely establishes the manner and extent of review of all LEAA final actions, including those under the Benefits Act, limiting review to the manner and extent provided by section 3759.[3] We adopt the latter interpretation.[4]

Our conclusion is supported by the recent revision of the LEAA statute contained in the Justice System Improvement Act of 1979, Pub.L.No.96-157, 93 Stat. 1167 (1979) (Revised Act).[5] The Revised

---

3. 42 U.S.C. § 3759 (1976) limits the manner of review to direct review by the courts of appeals in subsection (a) and limits the extent of review in subsections (b) and (c), which provide:

> (b) The determinations and the findings of fact by [LEAA], if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to [LEAA] to take further evidence. [LEAA] may thereupon make new or modified findings of fact and may modify its previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact or determinations shall likewise be conclusive if supported by substantial evidence.
>
> (c) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of [LEAA] or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court .....

4. In doing so, we reach three subsidiary conclusions which harmonize the relationships among subsections 3758(a), (b), (c), and section 3759. First, we interpret the language of subsection 3758(a) as making the subsection applicable not only to the sections concerning financial and technical assistance grants, but to all of chapter 46 of title 42, including the Benefits Act. Therefore, judicial review of any LEAA function including Benefits Act denials, is precluded except as "hereafter provided." Second, subsection 3758(a) does not limit review to cases which are covered by subsections 3758(b) and (c), i.e., financial and technical assistance grants, but merely limits the manner and extent of review to that provided by section 3759. Third, by providing judicial review of "final action ... under section 3758," section 3759 extends review to any final action which is covered by subsection 3758(a), even when not covered by subsection 3758(b) and (c).

5. These revisions are valuable guides. Although the instant case must be decided under the terms of the old LEAA Act rather than the Revised Act, we may look to subsequent amendments to assist us in resolving ambiguity. *Amchem Products, Inc. v. GAF Corp.*, 594 F.2d 470, 477-79 (5th Cir. 1979) modified, 602 F.2d 724 (5th Cir. 1979); *May Dep't Stores Co., Inc. v. Smith*, 572 F.2d 1275, 1277 (8th Cir.) cert. denied, 439 U.S. 837, 99 S.Ct. 122, 58 L.Ed.2d 134 (1978). See 2A A. Sutherland, *Statutes and Statutory Construction* § 49.11, at 266 (4th ed. C. Sands 1973). The legislative history of the Revised Act does not reveal a congressional intent to alter substantively the relationship between the Benefits Act and the judicial review provisions of the LEAA statute. The reorganization of the sections in one statute and the revised language simply clarifies the original legislative intent.

Act makes no substantive changes in the judicial review provisions of the LEAA statute or in the Benefits Act, and neither the Revised Act nor its legislative history mentions judicial review of Benefits Act cases. There is, however, a significant reorganization of the relevant provisions. Former subsections 3758(b) and (c), establishing the procedure for administrative review of grant application denials, are now subsections 3783(a) and (b). Former subsection 3758(a), limiting the manner and extent of review, is now an independent section, 3784. Former subsection 3759, providing judicial review, is now section 3785. It authorizes judicial review if "any ... recipient is dissatisfied with a final action with respect to section 3783, *3784* or 3789(c)(2)(G) ..." (emphasis added).[6]

LEAA contends that, to the extent that the statute is ambiguous regarding judicial review of denials of applications for Benefits Act payments, the legislative history reveals that judicial review was not intended. We find the legislative history at best inconclusive. As noted above, the statutory provisions relating to LEAA are all contained in chapter 46 of title 42 of the United States Code, 42 U.S.C. §§ 3701-3796c (1976). Most of chapter 46 was enacted as title I of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L.No.90-351, 82 Stat. 197 (1968) (Omnibus Act). The Omnibus Act created LEAA and authorized it to provide financial and technical assistance grants to state and local law enforcement agencies. It was rewritten, without substantive change in any of the provisions relevant here, by the Crime Control Act of 1973, Pub.L.No.93-83, 87 Stat. 197 (1973). In 1976, the Benefits Act was added to chapter 46, as subchapter IX. There is little discussion of judicial review in the legislative history of either the Omnibus Act or the Crime Control Act, and judicial review is not mentioned in either the text or the legislative history of the Benefits Act.

LEAA insists that because the Omnibus Act and the Benefits Act are substantively different and use different language, Congress would have made explicit an intention to extend the judicial review provisions of the Omnibus Act to Benefits Act cases. It is, however, just as

---

6. These changes clarify each of the three points made in note 4, *supra*. First, subsection 3758(a) (new section 3784) is broad, precluding review of any LEAA function except as "hereafter provided." Second, by limiting review to the extent and manner "hereafter provided," subsection 3758(a) is referring to the provisions governing judicial review in section 3759 (new section 3785) and not to the provisions regarding administrative review of grant application denials in subsections 3758(b) and (c), new subsections 3783(a) and (b). This is clearer because new section 3784 follows, rather than precedes, new subsections 3783(a) and (b). Third, the "throwback" provision of section 3759 (new section 3785) is not limited to actions which fall within subsections 3758(b) and (c) (new subsections 3783(a) and (b)), but also applies to actions which fall only within subsection 3758(a) (new section 3784). This is clearer because new section 3785 explicitly provides judicial review of any final action under either section 3783 or section 3784.

logical to argue that because the Benefits Act was added to chapter 46 and the existing programs in that chapter were all subject to judicial review, Congress would have made explicit an intention to withhold review of Benefits Act cases. Such barren legislative history, susceptible as it is to easy syllogistic manipulation, does not aid our inquiry.

Since section 3758(a) precludes judicial review of all LEAA final actions except in the manner and to the extent provided by 42 U.S.C. § 3759, were we to find that a denial of an application for Benefits Act payments was nonreviewable under section 3759, it could not be reviewed at all. Courts have always disfavored such a result, and the Supreme Court has stated that " 'judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' " *Morris v. Gressette,* 432 U.S. 491, 501, 97 S.Ct. 2411, 2418-2419, 53 L.Ed.2d 506 (1977) (quoting *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967)). See also *Barlow v. Collins,* 397 U.S. 159, 166-67, 90 S.Ct. 832, 837-838, 25 L.Ed.2d 192 (1970); *Legal Aid Soc'y of Alameda County v. Brennan,* 608 F.2d 1319, 1330-31 (9th Cir. 1979), cert. denied, — U.S. —, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980); *Hahn v. Gottlieb,* 430 F.2d 1243, 1249-51 (1st Cir. 1970). In the face of the ambiguity of the LEAA statute and its legislative history, we find no clear expression of an intention to withhold review.

Nor do we find present in this case any of the factors on which courts have relied to infer an intention to withhold review. Two considerations are relevant here: (1) the appropriateness and necessity of judicial review and (2) the impact judicial review will have on the agency's ability to carry out its mission. See *Hahn v. Gottlieb,* 430 F.2d 1243, 1249 (1st Cir. 1970). Regarding the first, Benefits Act cases are well suited to review because there is a clear legal standard to apply: when a death occurred "in the line of duty." Analysis of the legal issues which arise as LEAA applies this standard is within the special competence of courts, and review is necessary to insure that LEAA correctly interprets and applies the statute.[7] The appropriateness of review is indicated also by the fact that three similar federal programs provide direct review in the court of appeals: The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c) (1976); the Railroad Unemployment Compensation Act, 45 U.S.C. § 355(f)

7. In fact, denial of an application for Benefits Act payments is probably better suited to judicial review than is denial of an application for a grant under subsections 3758(b) and (c), which is clearly reviewable, because grant denials frequently involve the evaluation of nebulous competitive factors among competing state and local law enforcement agencies rather than the application of legal doctrines.

(1976); and the Railroad Retirement Act, 45 U.S.C. § 231g (1976).[8] The second consideration also brings us down on the side of review. Judicial review of Benefits Act cases will not interfere with agency policymaking. It will simply augment the internal adjudicative process which the agency has devised to handle Benefits Act applications.

For the foregoing reasons we conclude Congress has mandated appellate court review of LEAA denials of applications for Benefits Act payments. We are not unmindful that the United States Court of Appeals for the Fourth Circuit has reached the opposite conclusion. *Lankford v. Law Enforcement Assistance Administration,* 620 F.2d 35 (4th Cir. 1980). We have carefully considered the reasoning underlying that decision, but we are persuaded otherwise.[9]

---

8. On the other hand, another program, the Federal Employees Compensation Act, 5 U.S.C. §§ 8101-8193 (1976), precludes judicial review of administrative determinations. Its preclusion, however, is very explicit. 5 U.S.C. § 8128(b) (1976) provides in pertinent part:

> The action of the Secretary or his designee in allowing or denying a payment under this subchapter is -
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

9. The *Lankford* court have two main reasons for its refusal to review Benefits Act cases. First it stated that the use of differing terminology shows that Congress intended the two statutes—the Omnibus Act and the Benefits Act—to be treated separately, giving great weight to the fact that the Omnibus Act refers to "applications" for "grants," the Benefits Act to "claims" for "benefits." We think this point weaker than does the *Lankford* court. The presumption that Congress used its words precisely as part of a coherent structure, and hence that the use of different terms in different sections show an intention to give them separate meanings, is strongest when the terms re used in a single act, passed at one time. Here we have two acts passed eight years apart. The use of different terms is as likely to have been careless as planned, particularly since the legislative history reveals no intention to attach discrete meanings. We also note that the words "application," "claim," "grant," and "benefit" are not terms of art, and "application" is used frequently in conjunction with "benefit" in title 42 of the United States Code. See e.g. 42 U.S.C. § 402(j) (1976); 42 U.S.C. § 1395nn(a)(1) (1976).

Second, the *Lankford* court relied on the separate regulatory authorizations contained in the Omnibus Act and the Benefits Act. Compare 42 U.S.C. §§ 3751, 3796 (1976). We suspect that this overlap was due to overcautious drafting and note that LEAA itself considers both regulatory provisions applicable to the Benefits Act. It cites both as authority for its Benefits Act regulations. See 28 C.F.R. Part 32 (1980).

Finally, we note that the *Lankford* court did not consider the arguments we find most telling—the meaning of section 3758(a) and the presumption against precluding judicial review.

Jannie Hannah THOMAS, Plaintiff

v.

UNITED STATES OF AMERICA, Defendant
No. 80-6511-Civ-ALH

United States District Court,
Southern District of Florida

ORDER OF DISMISSAL

THIS CAUSE comes before the Court on the Federal Defendant's Motion to Dismiss, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for lack of jurisdiction over the subject matter of this action.

The Court having reviewed the record in this cause and being otherwise duly advised in the premises, it is hereby

ORDER AND ADJUDGED that Defendant's Motion to Dismiss is GRANTED. Under the Tucker Act, Title 28 United States Code §1346(a)(2) which provides the exclusive jurisdictional basis by which the United States can be sued on a claim based on a federal statute, claims in excess of $10,000.00 fall within the exclusive jurisdiction of the United States Court of Claims. *Atkins v. United States,* 556 F.2d 1028 (Ct. Cl. 1977); *Akin Mobile Homes, Inc. v. Secretary of Housing and Urban Dev.,* 475 F.2d 1261 (5th Cir. 1973). This action is hereby dismissed, without prejudice to Plaintiff's right to sue the United States under the Tucker Act in the United States Court of Claims.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of March, 1981. Alcee L. HASTINGS, United States District Judge.

☆U.S. GOVERNMENT PRINTING OFFICE: 1982-359-571/8168