Consolidated Docket Nos. 110012 & 110198

IN THE SUPREME COURT OF ILLINOIS

BRIAN J. LEMMENES,

Plaintiff-Appellee,

v.

ORLAND FIRE PROTECTION DISTRICT and BOARD OF TRUSTEES OF THE ORLAND FIRE PROTECTION DISTRICT,

Defendants-Appellants.

Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-09-1133, there heard on Appeal from the Circuit Court of Cook County, No. 06 CH 14847, Honorable Richard J. Billik, Judge Presiding

AMICUS CURIAE BRIEF AND ARGUMENT OF THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE IN SUPPORT OF DEFENDANTS-APPELLANTS IN DOCKET NO. 110198

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POINTS AND AUTHORITIES

ARGUMENT

THE APPELLATE COURT'S INCORRECT INTERPRETATION AND APPLICATION OF PSEBA TO TRAINING EXERCISES IN THE *LEMMENES* CASE WILL HAVE AN ADVERSE IMPACT ON THE ABILITY OF POLICE DEPARTMENTS TO PROVIDE EFFECTIVE TRAINING TO THEIR OFFICERS

The Illinois Association of Chiefs of Police ("ILACP") is a nationally recognized, professional organization representing over 800 law enforcement executives from local jurisdictions across the State of Illinois. Established in 1941, the ILACP's mission is to promote the professional and personal development of its members, in part, through innovative services and training. Accordingly, the ILACP has firsthand knowledge of the practical impact of this Court's decision in these consolidated cases and is in a unique position to impart its knowledge to this Court. The ILACP believes that its views will aid this Court in the resolution of the issues raised in these consolidated appeals and submits this brief in support of the Orland Fire Protection District and Board of Trustees.

At the onset, the ILACP does not intend to convey any message or suggestion that police officers injured in the line of duty should not be entitled to benefits under a proper application of the Public Safety Employees Benefits Act, 820 ILCS 320/1 *et seq.* ("PSEBA"). The ILACP recognizes and fully supports PSEBA. The statute provides an important benefit for catastrophically injured officers and their families or the families of officers killed in the line of duty. The ILACP does not wish to limit or deny that benefit to recipients who are legitimately covered by the statute's intent and scope.

However, as reflected by the four statutory circumstances that trigger benefits under section 10(b) of PSEBA, awarding life-time health insurance coverage is an extraordinary remedy provided to a limited number of officers injured or killed in the line of duty. In relation to the specific facts and issues raised in these consolidated cases, PSEBA is

reserved for catastrophic injuries which occur during the course of responding to emergencies. A controlled training exercise by its nature does not fit within that legislative category, particularly when the officer is instructed and knows that he or she is participating in a training exercise and not a real or actual emergency.

As discussed in this brief, the financial impact of providing legitimate PSEBA benefits is substantial; adding more to that burden for clearly unintended recipients will have a significant impact on operational budgets and may serve to adversely impact the ability of police agencies to provide the full range of training available to meet the public safety demands of modern day police work. For that reason, the ILACP submits that this Court should reverse the Lemmenes decision and affirm and adopt the rationale and analysis of the Appellate Court in Gaffney. It is the position of the ILACP that the relevant PSEBA provision should be limited to *actual* emergency situations and not simulated ones that are present in training exercises.

A. The Appellate Court in *Lemmenes* incorrectly applied PSEBA to an injury that occurred in a training exercise.

In Lemmenes v. Orland Fire Protection District, 399 Ill. App. 3d 644, 927 N.E.2d 783 (1st Dist. 2010), the Appellate Court held that a firefighter injured during a training exercise "done under emergency circumstances" was entitled to PSEBA health insurance benefits.[1] In so holding, the Court attempted to ascertain and give effect to the legislative intent by using the Webster's Third New International Dictionary definition of "emergency" adopted by the Second District Appellate Court in De Rose v. City of Highland Park, 386 Ill. App. 3d 658, 898 N.E.2d 1115, 1118-19 (2nd Dist. 2008). The

[1] That the firefighter was employed full time and suffered a catastrophic injury so as to otherwise qualify under PSEBA is not at issue in the present case. See 820 ILCS 320/10(a).

Court in DeRose held that a PSEBA emergency meant a situation that was urgent and called for emergency action. Id. Applying that definition to the present case, the Appellate Court in Lemmenes found that the firefighter was entitled to PSEBA benefits because he was required by his supervisor to respond as if it were an emergency and, therefore, reasonably believed it was an emergency. Lemmenes, 927 N.E.2d at 787-88.

The Appellate Court reached the opposite conclusion in Gaffney v. Board of Trustees of Orland Fire Protection District, 397 Ill. App. 3d 679, 921 N.E.2d 778 (1st Dist. 2010). In Gaffney, the Court held that a firefighter who was injured during a "live-fire" training exercise was not entitled to PSEBA benefits. 921 N.E.2d at 788-89. Like in Lemmenes, the Court in Gaffney used the definition of "emergency" adopted by the Second District in DeRose, but denied PSEBA benefits because the firefighter knew it was a training exercise and not an actual emergency. Id. at 788. The Court stated that "an instruction to treat a training exercise as though it were an emergency does not make it an emergency under the language of the statute." Id. Thus, the firefighter did not have a reasonable belief that he was responding to an emergency sufficient to trigger PSEBA benefits. Id.

It is the ILACP's position that the Gaffney decision reflects the true intent of the statute. To treat the term "emergency" as anything other than an actual emergency would impermissibly broaden the statute beyond its very limited scope. In drafting PSEBA, the Illinois Legislature chose to limit its triggering or qualifying events to four very narrow circumstances: injuries occurring during fresh pursuits, emergencies, unlawful acts by others, and investigations of criminal acts. See 820 ILCS 320/10(b). If the Legislature truly meant to include training exercises, it would have chosen broader language, such as the phrase "an act of duty" which triggers a line of duty disability under the police or fire

pension statutes. Gaffney, 921 N.E.2d at 788-89. As the Court in Gaffney concluded, "the difference in statutory language illustrates the legislative intent that [PSEBA] be applied narrower than the line of duty disability pension." Id. at 789.

Indeed, one can glean the clear purpose behind what PSEBA is intended to cover by just considering the language of the four triggering terms under section 10(b). For example, the term "pursuit" is qualified by the term "fresh;" the term "unlawful act" is qualified by "perpetrated by another;" and, the term "investigations" is qualified by the term "criminal act." Similarly, the Legislature chose to require an officer's "*response* to what is reasonably believed to be an *emergency*." The above terms and phrases connote real-life, actual events, not simulated ones. If the Legislature intended something different, such as injuries occurring during training, it could have chosen broader triggering language.

The ILACP also disagrees with the Appellate Court's statement in Lemmenes that "[t]he plain and ordinary language of the Act shows that the legislature did not intend to restrict emergency situations to one specific kind, nor did it intend to delineate training exercises as an exception to the ordinary meaning of the statute." Lemmenes, 927 N.E.2d at 789. The language used in the statute – "response to what is reasonably believed to be an emergency" – actually reflects an intent to limit the circumstances triggering a PSEBA claim, because it allows the benefit in the event that an officer responds under the belief that an actual emergency exists when one, in fact, did not exist, i.e., the burglary alarm call in DeRose. The intent is to take into consideration that officers responding to a call for service should not be denied benefits under PSEBA simply because the emergency situation unbeknownst to the officer was either not present in fact or had dissipated in the course of the officer's response.

The notion that PSEBA liability can arise from injuries occurring in training exercises could lead to unforeseen and extreme results. Take for example a newly appointed officer sent to the police academy for basic law enforcement training. The officer is employed as a full-time employee of the department when he or she enters the academy for training. During the course of that training officers often are required to participate in exercises that simulate emergencies and are directed to respond as if there were an emergency (i.e., pursuit driving). If the officer is hurt catastrophically, the local department will be saddled with paying life-time health insurance benefits for the officer and his family, even though the officer never spent a single day on the street as an officer of that municipality. Since most officers entering the academy are very young, typically in their mid-twenties, the financial burden on the municipality would be enormous. Certainly, this is not what the Legislature intended when it passed the PSEBA legislation. Accordingly, the ILACP submits that the Appellate Court incorrectly held in Lemmenes that injuries occurring in training exercises "done under emergency situations" qualify under PSEBA for life-time health insurance benefits. The ILACP believes that Gaffney presents the correct rationale and analysis, and that Lemmenes should be reversed and Gaffney affirmed.

B. Application of PSEBA to injuries occurring in training exercises absent an actual or real emergency will have an adverse impact on the ability of police agencies to provide effective training.

Since PSEBA took effect in 1997, municipal governments have seen significant costs associated with entitlements under the statute. A recent survey performed by the Intergovernmental Risk Management Agency ("IRMA") demonstrates that the estimated life-time payments for a single PSEBA claim can easily reach into the millions of dollars.

See Appendix A. Similarly, the Northwest Municipal Conference recently reported information about one municipality that has over $5.7 million in four PSEBA claims and another with nearly $5 million in liabilities for five cases. See http://www.nwmc-cog.org/Legislation/Legislation/2010_LegislativeProgram.aspx. In total, the value of PSEBA benefits awarded state-wide are estimated ultimately to cost municipalities hundreds of millions of dollars. See Appendix A.

The ILACP is particularly concerned that the application of PSEBA to training related injuries will only increase this estimated cost thereby having a significant adverse effect on the ability of police agencies to provide effective training. Training is not only an important aspect of police work designed to protect officers and the public, but also helps to manage the risk of third party liability, i.e., civil rights claims under 42 U.S.C. § 1983. In these days of statutory tax caps combined with dwindling municipal budgets, choices will inevitably be made on where to spend competing public dollars. Grafting on an increased fiscal risk and burden to the training process through application of PSEBA to training injuries comes at exactly the wrong time. The ILACP is concerned that the increased risk may result in reduced training options which, in turn, will impair officer safety and public safety, and potentially increase police liability.

This is not to suggest in any way that police agencies will stop training. The ILACP recognizes that police agencies understand their duty to train officers. However, training takes on a variety of forms. Traditional training, beyond basic law enforcement training required from an accredited police academy, might include annual firearms qualifications and classroom instruction. In recent years, however, technology and experience have enhanced police training. For example, advanced scenario training, such as Simunition® training, is gaining great popularity. See http://www.simunition.com. Taser®

technology is also very prevalent and requires significant training, including live demonstrations on trainees. See http://www.taser.com/training. In addition, many police agencies perform "rapid deployment" training, so as to simulate a police response to a riot or a "Columbine" scenario. Firearms qualifications have also changed from the traditional stationary shooting range to the officer moving and firing. Many agencies routinely practice felony traffic stops that involve extracting suspects from vehicles. Ongoing K-9 training often includes apprehension and bite work on volunteer officers wearing specialized protective suits. Pursuit training, physical defensive tactics, and traditional duty belt training (use of handcuffing, tactical batons, flashlights, pepper spray, etc.) are also employed as part of a police agency's training regimen.

The ILACP's concern is that police agencies may feel compelled to forego the more risky, physical, and real life scenario training in order to reduce or manage the financial risks inherent in potential PSEBA costs and liabilities. Police executives may feel the need to control exposure in their training budgets by eliminating the more risky, physically demanding options. See Scott Buhrmaster, *Cutting back on training? Re-think that idea*, PoliceOne.com, Feb. 20, 2009, *available at* http://www.policeone.com /training/articles/1788416-Cutting-back-on-training-Re-think-that-idea/; George Houde and Brian Cox, *Police feel sting of recession: Departments pare programs, purchases to keep cops on streets*, PoliceOne.com, April 22, 2009, *available at* http://www.policeone. com/patrol-issues/articles/1813441-Police-feel-sting-of-recession-Departments-pare-programs-purchases-to-keep-cops-on-streets/; Kevin Bohn, *Police face cuts as economy falters*, CNN.com, Oct. 23, 2008, *available at* http://www.cnn.com/2008/CRIME/10/23/ police.economy/; John David, *Illinois State Police brace for drastic cuts in budget crisis*, WQAD.com, March 24, 2010, *available at* http://www.wqad.com/news/wqad-macomb-

state-police-032410,0,7088188.story; Paul Wood, *Four More UI units under budget review*, The News-Gazette, March 31, 2010, *available at* http://www.news-gazette.com/news/university-illinois/2010-03-31/four-more-ui-units-under-budget-review.html (the austere economic times have even threatened the existence of the State's oldest training academy). The ILACP does not believe that this is the correct choice for officer safety, public safety and liability reasons but contends that the choice may be inevitable if PSEBA is expanded beyond its original intent.[2]

CONCLUSION

For the foregoing reasons, the Illinois Association of Chiefs of Police respectfully urges this Court to reverse the decision of the Appellate Court in Lemmenes and affirm the decision in Gaffney.

Respectfully submitted,

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[2] Exempting training injuries from the scope of PSEBA will not leave officers injured or killed in training without any remedies. A variety of statutory relief is available for the full range of injuries that may occur on the job. See Illinois Worker's Compensation Act, 820 ILCS 305/2 (compensating employees for accidental injuries arising out of and in the course of employment); Public Employee Disability Act, 5 ILCS 345/0.01 (providing payment of salary and benefits for maximum one-year period for injuries in the line of duty that causes officer to be unable to perform his duties); Police Pension Code, 40 ILCS 5/3-114 (line of duty disability pension); Line of Duty Compensation Act, 820 ILCS 315/1 (providing death benefits for death incurred in the line of duty); Public Safety Officers' Benefits Act, 42 U.S.C. § 3796 (death benefits for personal injury sustained in line of duty).

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APPENDIX A

Certificate of Compliance

I, Michael D. Bersani, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341 (h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 341(a) is **nine (9)** pages.

Respectfully submitted,

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