

NEMRT 36th Annual Meeting & Professional Workshop

March 20, 2018

Managing Law Enforcement Today

Update on PSEBA, Police Discipline, and Civil Rights Liability

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INTRODUCTION



PSEBA

- PEDA – Public Employee Disability Act
5 ILCS 341/1 et. seq.
 - Police and fire injured in line of duty entitled to receive full salary for one year after injury.
- PSEBA – Public Safety Employee Benefits Acts
820 ILCS 320/1 et. seq.
 - Police and fire entitled to health insurance benefits under certain circumstances.

PSEBA

- Two Steps in order to obtain Health Coverage Benefit.
 - 1) Section 10(a) – full-time law enforcement officer or firefighter who suffers “a catastrophic injury or is killed in the line of duty . . .”
 - 2) Section 10(b) – injury or death must have occurred as a result of one of the following:
 - a) Officer's response to fresh pursuit;
 - b) Officer or firefighter's response to what is reasonably believed to be an emergency;
 - c) An unlawful act perpetrated by another; or
 - d) During the investigation of a criminal act.

Recent Illinois Supreme Court Cases

- *Village of Vernon Hills v. Heelan*, 2015 IL 118170
 - Affirms Krohe – Catastrophic Injury Requirement of PSEBA satisfied by Line of Duty Disability Pension.
- *Bremer v. City of Rockford*, 2016 IL 119889
 - Occupational Disease Disability Pension does *not* automatically satisfy Catastrophic Injury requirement of PSEBA.
- *Vaughn v. City of Carbondale*, 2016 IL 119181
 - Court interprets emergency issue in Section 10(b) of PSEBA (reaching for microphone to respond to dispatch is not an emergency).

Municipal Intervention into Pension Hearing

- *Village of Vernon Hills v. Vernon Hills Police Pension Fund*, 2017 IL App (2d) 160308-U
 - Municipal Intervention in Pension Proceedings not a right. Intervention only with discretion of Pension Fund.

Municipal Ordinances for PSEBA Hearings

- *Pedersen v. Village of Hoffman Estates*, 2014 IL App (1st) 123402
 - Home Rule Municipalities may pass ordinance requiring administrative hearing for PSEBA benefits.
- *Englum v. City of Charleston*, 2017 IL App (4th) 160747
 - Non-Home Rule Municipalities may pass ordinance requiring administrative hearing for PSEBA benefits.

WHAT IS AN EMERGENCY?

- An Officer's response to what is reasonably believed to be an emergency
 - *Vaughn v. City of Carbondale*, 2016 IL 119181
 - Reaching for microphone to respond to dispatching – not an emergency
 - *Springborn v. Village of Sugar Grove*, 2013 IL App (2d) 120861
 - Picking up debris in active traffic lane with squad blocking road is an emergency
 - Moving a downed signal pole, post-accident, is an emergency (even if squad blocking hazard)
 - *Wilczak v. Village of Lombard*, 2016 IL App (2d) 160205
 - Paramedic response to invalid requiring assistance off the floor was in no imminent danger and no unforeseen circumstances arose during the response

Police Discipline

- Board of Fire and Police Commission v. Grievance Arbitration
 - Almost every police union contract now has a grievance arbitration for discipline of more than 5 days and termination
 - Past 30 years have seen major change. Probably here to stay
- Stark Difference in discipline standards between two systems
 - Compare *Des Plaines v. MAP* from 2015 against *Valio v. Bd. of Police Commissioners of Itasca* from 2000.
- Appeals from grievance arbitration decisions are difficult to win

Civil Rights Liability – Why Law Enforcement is a Frequently Sued Group

- Civil Rights Act of 1871
 - Codified at 42 U.S.C. § 1983
 - “Every person who, under color of any [law] . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law”
 - Post Civil War Reconstruction statute passed to implement 13th, 14th, and 15th Amendments.

Civil Rights Liability – Why Law Enforcement is a Frequently Sued Group

- *Monroe v. Pape*, 365 U.S. 167 (1961)
 - The conduct of the local police constitute State action “under color of law” even when not authorized by statute or law
 - However, a local government is not a person under § 1983
- *Monell v. Dep’t Soc. Services*, 436 U.S. 658 (1978)
 - A local government is a person under § 1983
 - Local government liability pursuant to custom, practice, or policy.

Civil Rights Liability – Why Law Enforcement is a Frequently Sued Group

County or City = deep pocket = indemnification

Civil Rights Liability – Why Law Enforcement is a Frequently Sued Group

- 42 U.S.C. § 1988
 - Civil Rights Attorney's Fees Award Act of 1976
 - Private Attorney General Theory
 - *Riverside v. Rivera*, 477 U.S. 561 (1986)
 - Plaintiff award attorney's fees if successful – the plaintiff's lawyer will get “paid.”
 - Prevailing Plaintiffs, not prevailing Defendants, recoup fees
 - Cost of litigation = settlement

Civil Rights Liability – Why Law Enforcement is a Frequently Sued Group

- Societal Attitudes and Perceptions
 - The Rodney King saga and jury perceptions (1991)
 - Continuing public mistrust of law enforcements in the 1990's
 - September 11, 2001 – did the pendulum swing back?
 - Illinois Areas of Concern
 - Wrongful convictions – death row emptied
 - Torture suits
 - High profile police misconduct

Civil Rights Liability – Why Law Enforcement is a Frequently Sued Group

- Scope of punitive damages problem
 - Damages available in civil rights cases
 - Compensatory damages – make plaintiff whole
 - Punitive damages – punish and deter future misconduct

Civil Rights Liability – Why Law Enforcement is a Frequently Sued Group

- Punitive damages sought in most every civil rights case – usually within jury's discretion
 - Intentional misconduct is not necessary for punitive damages award.
Smith v. Wade, 461 U.S. 30 (1983)
- Large punitive damages award occurring with greater frequency
- Illinois municipalities cannot pay punitive damages on behalf of officer
 - 745 ILCS 10/2-302

Civil Rights Liability – Why Law Enforcement is a Frequently Sued Group

- How to protect yourself – Action Plan
 - Consult an estate planning lawyer *before* being sued
 - Residence (in Illinois) can be held in tenancy by the entirety
 - Consider asset plan with an experienced attorney if you have substantial assets apart from your residence

10 Tips on Risk Management of Excessive Force Claims

1. Training

- Increases effectiveness and reduces injuries/liability risks
- *City of Canton v. Harris*, 489 U.S. 378 (1989) – city and police chief may be liable for deliberate indifference to known training deficiencies

10 Tips on Risk Management of Excessive Force Claims

2. Report Writing

- “If it’s not in the report, it didn’t happen.”
 - An incomplete or inaccurate report will be used to impeach your testimony and can cause you to lose a civil rights trial
 - Don’t give your opponent ammunition for cross examination
- Timely, legible, and accurate
- Articulate the facts that support the action taken (facts supporting use of force or probable cause)
- Supervisory approval – don’t be afraid to “kick it back.”

10 Tips on Risk Management of Excessive Force Claims

3. Medical Treatment for Arrestee's Injuries

- Pay attention to injuries and always offer medical treatment
- Document refusal of treatment
- Don't turn a "no case" into a possible claim for failure to summon medical care
- A failure to pay attention to injuries may fuel a punitive damage claim

10 Tips on Risk Management of Excessive Force Claims

4. Document Arrestee's Injuries

- Document injuries accurately
- Even if the arrestee does not appear to need medical treatment, did not receive treatment, or refused treatment
- Why?
 - An arrestee in a civil rights suit probably will exaggerate injuries
 - Jury needs to know how someone was injured
 - Note: Unexplained injuries are a big problem for a jury!

10 Tips on Risk Management of Excessive Force Claims

5. Document Alcohol and Drug Use

- Include facts in report where alcohol and/or drugs used or suspected of being used
- Even if the offense is not alcohol or drug related
- Unlike a criminal case, the arrestee's alcohol or drug use is admissible in a civil rights case:
 - Part of totality of circumstances
 - Shows erratic behavior
 - Affects credibility

10 Tips on Risk Management of Excessive Force Claims

6. Document Officer's Injuries

- Even if injuries are minor and officer did not obtain medical attention
- The fact that an officer was injured will impact a jury regarding the amount of force that was necessary to make an arrest
- Potential counterclaim

10 Tips on Risk Management of Excessive Force Claims

7. Booking Photos

- A civil rights plaintiff will often exaggerate injuries and how the injuries occurred
- The booking photo does not lie



10 Tips on Risk Management of Excessive Force Claims

8. Preserve video and audio

- Ask that squad video, station surveillance/security camera video, and communications audio be saved and preserved. Preservation is very important!
- At the very least, it helps to fill in the gaps in the story
- Court will disregard plaintiff's version if it contradicts what the video shows
 - *Scott v. Harris*, 550 U.S. 372 (2007)

10 Tips on Risk Management of Excessive Force Claims

9. Criminal trial testimony

- Don't miss court!
- Let ASA know if a civil rights case has been filed or threatened
- Prepare for the criminal trial testimony
- Officer's testimony in the underlying criminal trial can and will be used against the officer in the civil rights case
- Follow your cases!

10 Tips on Risk Management of Excessive Force Claims

10. Citizen's complaints and internal disciplinary investigations

- An investigation of a citizen's complaint is discoverable in a civil rights case
- Don't go it alone – seek advice/representation from attorney
- Prepare your to/from carefully
- Prepare for your interview/interrogation – don't be casual
- Always be truthful!

U.S. Supreme Court – Latest Cases

- *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) – Fourth Amendment claim extends to pretrial detention without probable cause. Statute of Limitations does not start at time of arrest but also includes time in unlawful pretrial detention
- *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017) – Ninth Circuit’s “provocation rule” overturned. Fourth Amendment violation will not impact independent determination of force used in making an arrest

U.S. Supreme Court – Latest Cases

- *District of Columbia v. Wesby*, 583 U.S. _____ (2018)
 - Police entitled to qualified immunity, and probable cause existed to arrest party-goers for illegal entry into vacant residence
- *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017)
 - N.C. statute prohibiting sex offender from accessing social media site where minors might be present was overbroad and a violation of the First Amendment

U.S. Supreme Court – Cert. Granted

- *Collins v. Virginia*, 292 Va. 486, 790 S.E. 2d 611 (Va. 2017), cert. granted, 138 S. Ct. _____ (Sept. 29, 2017). Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a house and search a vehicle parked a few feet from the house.
- *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), cert. granted, 137 S. Ct. 2211 (2017). Whether the warrantless seizure and search of historical cellphone records revealing the location and movements of a cellphone user over the course of 127 days is permitted by the Fourth Amendment.

U.S. Supreme Court – Cert. Granted

- *Byrd v. United States*, 679 Fed.Appx. 146 (3d Cir. 2017), *cert. granted*, 138 S. Ct. _____ (Sept. 28, 2017). Whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement.