April 21, 1983

WILLIAM J. JOSEPH, *Director*
Division of Pensions
20 West Front Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 5—1983

Dear Director Joseph:

A question has arisen concerning the validity of the mandatory retirement ages established for members of certain New Jersey uniformed services by State pension programs in light of *EEOC v. Wyoming,* 460 U.S. 226 (1983). In *Wyoming,* the Supreme Court concluded that Congress could properly extend application of the Age Discrimination in Employment Act (ADEA) to the States. It is our opinion that statutory provisions which require a member of a state administered retirement system to retire prior to his or her attaining age 70 are invalid and unenforceable.

The ADEA prohibits discrimination in employment on the basis of age against individuals between 40 and 70 years of age. 29 U.S.C. §§623(a) and 631(a). As originally enacted, the ADEA provided that, notwithstanding the other provisions of the Act, it shall not be unlawful for an employer to "observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension or insurance plan which is not a subterfuge to evade the purposes of [the Act], except that no employee benefit plan shall excuse the failure to hire any individual." P.L. 90-202, §4(f)(2). In 1978, however, this provision was amended to provide that "no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." P.L. 95-156, §2(a), codified at 29 U.S.C. §623(f)(2). This prohibition would directly affect the State Police Retirement System (SPRS), N.J.S.A. 53:5A-8(a)(2), the Police and Firemen's Retirement System (PFRS), N.J.S.A. 43:16A-5(1), the Consolidated Police and Firemen's Pension Fund (CPFPF), N.J.S.A. 43:16-1, and the law enforcement officers subchapter of the Public Employees Retirement System (PERS), N.J.S.A. 43:15A-99, all of which provide, in certain circumstances, for the mandatory retirement of their members prior to age 70.

Under the 1978 amendment to the ADEA, a general requirement in a pension plan that persons retire prior to age 70 constitutes a *prima facie* violation of the statute. *EEOC v. Chrysler Corp.,* 546 F. Supp. 54, 67-68 (E.D. Mich. 1982); *Campbell v. Connelie,* 542 F. Supp. 275, 278 (N.D.N.Y. 1982); *see* 29 C.F.R. §1625.9. The forced retirement on the basis of age of persons younger than age 70 imposed by the State uniformed services pension progams may therefore be justified only if the retirement ages established thereby are demonstrated to be bona fide occupational qualifications (BFOQ). 29 U.S.C. §623(f)(1) provides that it shall not be unlawful for an employer to take any actions otherwise prohibited by the Act "where age is bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentation is based on reasonable factors other than age. . . ."

The BFOQs subject to this exception are not further defined by the

statute. The applicable legislative history is silent as to the scope this provision should be afforded. *See* H.R. Rep. 805, 90th Cong., 1st Sess., reprinted in [1967] U.S. Code Cong. & Ad. News 2213, 2222. However, the Equal Employment Opportunity Commission which is charged with the enforcement of this Act, has stated in a regulation interpreting this provision that, for a mandatory retirement age to be valid, the alleged BFOQ must be "reasonably necessary to the essence of the business," and a reasonable factual basis must exist for the belief either that "all or substantially all" of the affected age group would be unable to safely and efficiently perform the duties of the job involved, or that it is impossible to ascertain the continued fitness of persons over the mandatory retirement age on an individualized basis. 29 C.F.R. §1625.6(b). This standard has been implicitly recognized by Congress as the appropriate test for determining whether a mandatory retirement age constitutes a valid BFOQ. *See* S. Rep. No. 95-493, 95th Cong., 2nd Sess. 1-2, [1978] U.S. Code Cong. & Ad. News at 513-14; H.R. Conf. Rep. No. 95-950, 95th Cong., 2nd Sess. 7, [1978] U.S. Code Cong. & Ad. News at 528-29. In addition, this standard has been endorsed by the courts virtually without exception. *See, e.g., Usery v. Tamiami Trail Tours, Inc.,* 531 F.2d 224, 236 (5th Cir. 1976); *EEOC v. City of St. Paul,* 671 F. 2d 1162, 1166 (8th Cir. 1982); *Smallwood v. United Airlines,* 661 F. 2d 303, 307 (4th Cir. 1981), *cert. denied* 456 U.S. 1007 (1982); *EEOC v. City of Allegheny,* 519 F. Supp. 1328, 1333 (W.D. Pa. 1981).

You are therefore advised that the provisions of the SPRS, N.J.S.A. 53:5A-8(a)(2), the PFRS, N.J.S.A. 43:16A-5(1), the law enforcement officers subchapter of the PERS, 43:15A-99, and the CPFPF, N.J.S.A. 43:16-1, which require the mandatory retirement on the basis of age of persons younger than age 70 are invalid and unenforceable. However, such mandatory retirement provisions could be validly established in an amended format if their application is limited to the specific uniformed positions in which continued fitness is reasonably necessary to job performance or protection of the public safety, and it can be established as a factual matter either that all of the persons above such retirement age would be unable to adequately perform their duties or that it would be impossible or impractical for the State to determine the fitness of persons older than the prescribed age on an individualized basis.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General