July 11, 1984

COLONEL CLINTON L. PAGANO
Superintendent
Division of State Police
Department of Law and Public Safety
River Road
P.O. Box 7068
West Trenton, New Jersey 08625

FORMAL OPINION NO. 1—1984

Dear Superintendent Pagano:

You have asked for our opinion as to whether the requirement of certain statutes, that persons appointed to the uniformed law enforcement and firefighting services shall be between 21 and 35 years of age, is valid under the Age Discrimination in Employment Act (ADEA).[1] That Act provides that it shall be unlawful "to fail or refuse to hire . . . any individual [between the ages of 40 and 70] . . . because of such individual's age." 29 U.S.C. §§623(a)(1) and 631(a).

The constitutionality of applying the ADEA to the States was upheld by the United States Supreme Court in *EEOC v. Wyoming,* 103 S. Ct. 1054 (1983). As a result of this decision, it was concluded in *Formal Opinion* No. 5-1983 that the applicable provisions of the State uniformed services pension statutes which require the mandatory retirement of their members prior to age 70 were invalid and unenforceable under the ADEA. For the following reasons, you are advised that maximum hiring ages established by the noted statutes for the uniformed law enforcement and firefighting services are similarly invalid and unenforceable.[2]

It is settled that a restriction which uniformly bars the employment of persons age 40 and older is a *prima facie* violation of the ADEA. *EEOC v. County of Allegheny,* 705 F. 2d 679, 680 (3rd Cir. 1983). Such a hiring age ceiling is permissible under the Act only if demonstrated to be a bona fide occupational qualification (BFOQ) within the meaning of 29 U.S.C. §623(f)(1), which provides that it shall not be unlawful for an employer to take any action otherwise prohibited "where age is a bona fide occupa-

1. Identical maximum hiring restrictions are imposed by State statute with respect to State Police, *see* N.J.S.A. 53:1-9, State motor vehicle inspectors, *see* N.J.S.A. 39:2-6.1, as well as with respect to paid municipal firefighters and municipal police officers. N.J.S.A. 40A:14-12,127.

2. In EEOC, the potential impact of the ADEA on a state's mandatory retirement policy was held to be an insignificant intrusion into the area of integral state operations under the Tenth Amendment to the United States Constitution. The court noted that a state would still be in a position to assess the fitness of its employees because the Act only requires the state to achieve its goals in a more individualized manner through a demonstration that age is a bona fide occupational qualification for the particular job involved. The invalidation of uniform maximum entry level ages by the ADEA is no greater an intrusion into the area of integral state operations since in this case the state may also demonstrate that a maximum entry level age is a bona fide occupational qualification for certain jobs in the uniformed law enforcement and firefighting services.

tional qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." Although the BFOQs subject to this exception are not further defined by the statute, the Equal Employment Opportunity Commission (EEOC), which is charged with the enforcement of this statute, has promulgated a regulation which states that a BFOQ will be valid only where:

> (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. [29 C.F.R. §1625.6(b).]

The regulation further provides that, "[i]f the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact." *Ibid.*

Two reported decisions have upheld maximum hiring ages for law enforcement personnel under these BFOQ standards. In *EEOC v. Missouri State Highway Patrol,* 555 F. Supp. 97 (W.D. Mo. 1982), the court held that a maximum hiring age of 32 for State troopers validly furthered public safety by maximizing the career length of the average trooper, since "[t]he safest patrolman is one who has acquired several years of experience," and "[a]n experienced patrolman is best able" to serve as an administrator, the job most senior troopers performed, after approximately 11 years experience as a trooper with line duties. 555 F. Supp. at 106. Similarly, in *Poteet v. City of Palestine,* 620 S.W. 2d 181 (Tex. Civ. App. 1981), the court upheld the refusal of a municipal police department to consider applications from persons older than age 40 on the ground that the court had "a factual basis for believing" that it would be impossible or impracticable to assess the physical fitness of persons older than age 36 on an individualized basis and that, accordingly, "[the] public safety would be jeopardized to some degree by eliminating the employer's hiring policy. . . ." 620 S.W. 2d at 184-185.

However, the validity of such maximum hiring ages in the law enforcement field has been decisively rejected by several other courts. In *EEOC v. County of Los Angeles,* 706 F. 2d 1039 (9th Cir. 1983) *cert. den.* 104 S. Ct. 984-985 (1984), the Court of Appeals recognized that police work is physically arduous and requires strength, ability and good reflexes, but affirmed the conclusion of the district court that a maximum hiring age of 35 for county sheriffs and fire department helicopter pilots was invalid since the ability to perform these tasks, as well as the prospective risk from such ailments as heart disease, could be detected by the use of simple, inexpensive and extremely reliable physical performance tests. 706 F. 2d at 1043-1044. The same conclusion was reached in *EEOC v. County of Allegheny, supra,* and *Rodriguez v. Taylor,* 428 F. Supp. 1118 (E.D. Pa. 1976), *damage award vacated* 569 F. 2d 1231 (3rd Cir. 1977), *cert. den.*

436 U.S. 913 (1978), where the courts invalidated maximum hiring ages of 40 for police officers and municipal security officers on the ground that there was no evidence that substantially all persons over this age would be unable to safely and efficiently perform the duties of these jobs or that it would be impossible to test applicants individually.

It is our opinion that the results reached by these latter cases are more consistent with the applicable provisions of the ADEA. First, there appears to be a valid distinction, as recognized by the court in *EEOC v. County of Los Angeles,* between the physical demands of inter-city bus driving, where age restrictions have been upheld, and police work. The validity of a hiring age restriction for the uniformed services must be considered in light of the fact that the physical demands of such positions, and hence the degenerative consequences of age, are less subtle than those involved in bus driving and are thus easier to objectively ascertain. *See Aaron v. Davis,* 414 F. Supp. 453, 462 (E.D. Ark. 1976). Moreover, the overwhelming weight of authority, involving law enforcement and the related profession of fire fighting, holds that the ability of particular individuals to perform these jobs may adequately be determined on the basis of existing medical testing procedures, and has rejected the contention accepted by the court in *Poteet v. City of Palestine* that an employer need only show that it had a reasonable basis for believing that such procedures would be inadequate. *See EEOC v. County of Los Angeles, supra; EEOC v. County of Allegheny, supra; Rodriguez v. Taylor, supra; Orzel v. City of Wauwatosa Fire Dept.,* 697 F. 2d 743, 755 (7th Cir.) *cert. den.* 104 S. Ct. 484 (1983) *EEOC v. City of St. Paul,* 671 F. 2d 1162, 1166 (8th Cir. 1982); *Johnson v. Mayor and City Council of Baltimore,* 515 F. Supp. 1287, 1298-99 (D. Md. 1981), *cert. den.* 455 U.S. 944 (1982); *Aaron v. Davis, supra,* 414 F. Supp. at 463.

In addition, the conclusion reached by the court in *EEOC v. Missouri State Highway Patrol,* 555 F. Supp. at 106, that a hiring age restriction may constitute a BFOQ because it provides the most collectively experienced police force appears, in essence, to be a restatement of the argument that an age restriction may be valid on the ground that it ensures the maximum return on the economic investment made by the State in training new recruits. *See Smallwood v. United Airlines,* 661 F. 2d 303, 307 (4th Cir. 1981) *cert. den.* 456 U.S. 1007 (1982). However, it is settled that such economic considerations may not be used to establish an age restriction as a BFOQ. *Ibid.; EEOC v. County of Los Angeles, supra,* 706 F. 2d at 1042; 29 C.F.R. §860.103(h); *cf. City of Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 716-717 (1978) (cost-jusitification defense not available in Title VII action). Finally, there is no suggestion that the maximum hiring age restriction in the uniformed services is based upon any specific medical or other factual findings regarding the ability of persons above the prescribed age to perform his or her duties. However, it is established that such age restrictions must "be based on something more than mere speculation or the subjective belief" that persons older than a prescribed age are incapable of handling the physical demands of a job, and that in the absence of specific factual proof thereof an age limit will not be sustained. *Orzel v. City of Wauwatosa Fire Dept., supra,* 697 F. 2d at 755; *accord, EEOC v. County of Allegheny, supra,* 705 F. 2d at

681; *EEOC v. County of Santa Barbara,* 666 F. 2d 373, 376 (9th Cir. 1982).

You are therefore advised that the requirement of statutes that appointees to the uniformed law enforcement and firefighting services shall be no older than 35 are invalid and unenforceable under the ADEA.[3] A maximum hiring age may be validly adopted in an amended format only when it can be shown that all or substantially all of the persons above a prescribed maximum hiring age are unable to perform the duties of the position or that it is impossible to assess the fitness of individual applicants over the prescribed age on an individual basis.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

3. The ADEA by its terms protects only persons between the ages of 40 to 70 against discrimination in employment. The New Jersey statutory scheme establishes a maximum hiring age for the uniformed services at 35. It would be unreasonable though to assume that the legislature intended a maximum hiring age to apply for persons between 35 and 40 when persons up to 30 years over the age of 40 are not subject to a comparable limitation. A statute should be interpreted sensibly and not to reach an anomalous or irrational result. *Suter v. San Angelo Foundry & Mach. Co.,* 81 N.J. 150 (1979); *Federal Paper Bd. Co., Inc. v. Borough of Bogota,* 129 N.J. Super. 308 (App. Div. 1974). Moreover, a statute may be deemed to be severable only where the offensive portion can be excised without impairing the principal object of the statute as a whole. *110-112 Van Wagenen Avenue Co. v. Julian,* 101 N.J. Super. 230, 235 (App. Div. 1968). In the instant situation, the application of maximum hiring ages to a limited group of persons between the ages of 35 to 40 would not only be unreasonable but also inconsistent with the apparent purpose of the statute to prohibit the appointment of *all* persons of whatever age over 35.

November 15, 1984

HONORABLE MICHAEL M. HORN
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION NO. 2—1984

Dear Treasurer Horn:

It has been brought to our attention that Public Question Number 2 ("The Human Services Facilities Construction Bond Act"), which was presented on the ballot and approved by the people at the General Election held on November 6, 1984, contained language concerning the refinancing of bonds authorized by the Act which does not appear in section 22 of Senate Bill No. 2095, The Human Services Facilities Construction Bond Act of 1984. The question is raised whether the Issuing Officials may lawfully issue bonds pursuant to the provision of the Bond Act. For the following reasons, it is our opinion that the inclusion of additional wording on the ballot concerning the refinancing of bonds authorized by the Act