



## State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY

OFFICE OF THE ATTORNEY GENERAL

CN 080

TRENTON, NJ 08625-0080

(609) 292-4925

CHRISTINE TODD WHITMAN  
*Governor*

PETER VERNIERO  
*Attorney General*

February 25, 1997

Margaret M. McMahon, Director  
Division of Pensions & Benefits  
50 West State Street  
CN 295  
Trenton, New Jersey 08625

Janet Share Zatz  
Chief of Staff  
Department of Personnel  
CN 312  
3 Station Plaza  
Trenton, New Jersey 08625

Re: FORMAL OPINION NO. 1 - 1997

Dear Chief of Staff Zatz and Director McMahon:

Recent Congressional action amending the Age Discrimination In Employment Act has raised a question regarding the current status of State laws which impose mandatory maximum hiring and retirement ages for law enforcement and firefighting personnel. These include N.J.S.A. 40A:14-12 which precludes the hiring as a firefighter of anyone who is over 35 years of age, and N.J.S.A. 40A:14-127, which is a parallel provision relating to law enforcement officers. Also implicated is N.J.S.A. 53:1-9, which establishes a maximum hiring age for State Police members at age 35, as well as N.J.S.A. 43:16A-5 which sets the mandatory

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Both laws permit the age cut-off for eligibility to be determined as of the "announced closing date of a civil service examination" given for the position. Accordingly, an individual who is under 35 years of age at the announced closing date for a civil service test, is considered to have met the age requirement for the life of any eligible list thereafter promulgated for the position.

retirement age for the Police and Fire pension system at age 65. For the reasons set forth below, you are advised that those State laws which impose maximum hiring and mandatory retirement ages for police officers and firefighter positions must again be enforced.

This issue arises by virtue of the automatic repeal on December 31, 1993, and subsequent reenactment, on September 30, 1996, of amendments to the "Age Discrimination in Employment Act" (hereinafter ADEA), 29 U.S.C. §623 et seq. Those amendments carved out an exception to the age discrimination prohibition contained in the ADEA for firefighters and law enforcement personnel. A short review of the history of those amendments is warranted and will facilitate a proper interpretation and understanding of their effect upon and interaction with State law.

The ADEA prohibits discrimination in the hiring or discharge of employees based upon age. 29 U.S.C. §621 et seq. The prohibition against age discrimination contained in the law applies to individuals "who are at least 40 years of age but less than 70 years of age." 29 U.S.C. §631(a).

In Formal Opinion No. 1 (1984) this Office concluded that the ADEA prohibition against individuals over 40 years of age had to be read in conjunction with State laws prohibiting the hiring of anyone older than 35 for law enforcement and firefighter positions. Therefore, that opinion concluded that those laws which prohibited the hiring of individuals over the age of 35 were similarly invalid and unenforceable under the ADEA. Similarly, in Formal Opinion No. 5 (1983), the Attorney General advised that the provisions of the State pension statutes which required mandatory retirement prior to age 70 for uniformed police officers and firefighters were invalid and unenforceable as well, absent demonstrable evidence that such mandatory retirement ages were valid BFOQs.

Congress enacted the original amendments to the ADEA at issue here in 1986, which were codified at 29 U.S.C. §623(j). They permitted states to enforce any maximum hiring age and mandatory retirement age provisions for law enforcement personnel and firefighters contained in State law which was in effect as of March 3, 1983. Accordingly, on February 11, 1987 this Office issued Attorney General Opinion No. 87-0012, which advised both the Department of Personnel and the Division of

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The U.S. District Court for the District of New Jersey has held that the age 55 mandatory retirement requirement contained in the statutes governing the State Police Retirement System is a BFOQ and therefore enforceable. E.E.O.C. v. State of New Jersey, 631 F.Supp. 1506 (D.N.J. 1986). Accordingly, the State Police have continued to enforce mandatory retirement at age 55.

Pensions that any State laws providing for maximum hiring ages and mandatory retirement ages, were to be enforced.

On December 31, 1993, these amendments to the ADEA which permitted the enforcement of such State laws were automatically repealed by virtue of express language contained in the original amendments themselves. 29 U.S.C. 623(j). At that time Congress took no definitive action to reenact those amendments. Accordingly both the Department of Personnel and the Division of Pensions were advised that enforcement of any State statutes containing maximum hiring ages or mandatory retirement ages was to be immediately suspended. See Attorney General Opinion 94-0072 (May 17, 1994).

Thereafter, on September 30, 1996, Congress again enacted amendments to the ADEA specifically repealing the "automatic repealer" provision of the prior amendments and restoring the "public safety exemption" to the ADEA. This "repeal of the automatic repealer" of the amendments was made retroactive to December 31, 1993. The practical effect of the "repeal of the repealer" is that the State statutory provisions providing for mandatory retirement ages and maximum age hiring cut-offs are now again enforceable. Accordingly, all necessary steps should be taken as quickly as reasonably possible to implement these age-based employment statutory provisions.

As set forth above, the amendments have been made retroactive to December 31, 1993. Thus, all hiring and discharge decisions made by appointing authorities during the period between December 31, 1993 and September 30, 1996 are arguably affected by this change in the law. With regard to the statutorily-imposed age limitations upon hiring however, such limitations need not be read to require the discharge of any individual who was hired after December 31, 1993 and was over the age of 35 at the time of hire, as set forth in both N.J.S.A. 40A:14-12 and N.J.S.A. 40A:14-127.

It is the balance of these individuals' interest in their employment against the competing public interest, coupled with the need to read all statutes fairly and reasonably, which compels this conclusion. The courts decline to apply statutes retroactively where to do so would result in depriving individuals of a vested right or would otherwise be manifestly unfair. Prospective application of statutes is favored, although a clear indication by the Legislature that a statute is meant to be applied retroactively will generally be given effect. Phillips v. Curiale, 128 N.J. 608 (1992); State Department of Environmental Protection v. Ventron Corp., 94 N.J. 473 (1983). Thus, courts will apply statutes retroactively, given a legislative directive to do so, unless such application would result in manifest injustice to the adversely affected parties. Twiss v. State Dept. of Treasury, 124 N.J. 461 (1991). Manifest injustice

may be shown if an affected party can demonstrate that he relied upon the prior law to his prejudice and the "consequences of such reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively." Gibbons v. Gibbons, 86 N.J. 515 (1981).

Here, persons over the age of 35 were lawfully hired between the period December 31, 1993 through September 30, 1996. It would be manifestly unfair to discharge such individuals who relied upon the prior law in accepting employment. In this regard it should be noted that tenure in continued public employment, guaranteed by statute, is a vested right subject to the protection of the United States Constitution. Board of Regents v. Roth, 408 U.S. 564, 576-577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Battaglia v. Union Cty. Welfare Bd., 88 N.J. 48 (1982), cert. den. 456 U.S. 965 (1982). The New Jersey Civil Service Act, N.J.S.A. 11A:1-1 et seq., protects the right to employment held by civil servants with career service status by insulating them from termination except for good cause disciplinary reasons or a layoff. N.J.S.A. 11A:2-6, N.J.A.C. 4A:2-2.3. Employees appointed to career service titles gain such tenure upon completion of a working test period. N.J.S.A. 11A:4-13(a). Accordingly, those individuals over the age of 35 who were lawfully hired need not be discharged.

By contrast, those individuals who were over 35 years of age at the announced closing date for any civil service examination and whose names now appear on any outstanding eligible lists for law enforcement or firefighter positions should not be appointed to any available positions, consistent with the maximum hiring age restrictions contained at N.J.S.A. 40A:14-12 and N.J.S.A. 40A:14-127. The individuals whose names merely appear on a list do not have a vested right to appointment. In re Crowley, 193 N.J. Super. 197 (App. Div. 1984), Schroeder v. Kiss, 74 N.J. Super. 229 (App. Div. 1962). Accordingly, the direction contained in the plain language of the State statutes rendering these individuals ineligible for appointment and prohibiting such appointments should be followed. In Re Jamesburg High School Closing, 83 N.J. 540, 547 (1980). Likewise, those individuals over 35 waiting for employment in non-civil service municipalities would not be entitled to appointment and would be precluded from employment due to age.

Additionally, the provisions of N.J.S.A. 43:16A-5 imposing mandatory retirement based upon age for law enforcement and firefighting personnel should similarly be enforced. Thus, any individual who has reached the mandatory retirement age contained in those statutes, should now be retired. Significantly, these amendments, unlike the prior amendments, contain a requirement that within a period of not less than four years from September 30, 1996, the Director of the National Institute for Occupational Safety and Health must issue regulations identifying valid, nondiscriminatory job performance tests which are to be used by employers who seek

to retire firefighters and law enforcement personnel based upon age. At this juncture, however, it is the advice of this Office that, in the absence of such regulations, the statutory provisions which provide for mandatory retirement should be enforced until such time as the test process envisioned in the amendments is implemented.

We are fully aware of the problems associated with immediately implementing the mandatory retirement provisions of this Act. Given the fact that the Act lapsed several years ago, the impact of this mandatory retirement could force individuals who have not yet contemplated retirement into an immediate life change. As such, it would be practical to provide an appropriate time period (at least two or three months) to complete the necessary administrative steps to enforce the mandatory retirement provisions. However, it is important to establish a uniform date for enforcement of the mandatory retirement and maximum hiring age provisions. This date should consider the practical problems associated with the retirement application process, taking into consideration the needs and concerns of the retirees, the municipalities and the Division of Pensions and Benefits.

A potential concern of those covered by the Police and Fire Retirement System is "grandfathering" those individuals who have become members of the system through their employment during the period when there was not a mandatory hiring age. The issue is whether to allow them to serve a minimum of 25 years, regardless of age, in order to be eligible for a retirement benefit. This is not consistent with the law. The terms and conditions of public service in office or employment rest in legislative policy rather than contractual obligation, and hence may be changed. See Spina v. Consolidated Police, etc. Pension Fund. Com., 41 N.J. 391 (1964). The law clearly states that a mandatory retirement age must be enforced. As there is no constitutional right to benefit entitlement in the various retirement systems, this "grandfathering" would not be permissible by law. N.J.S.A. 43:16A-5.

As you have previously been advised, there is no requirement to reenact the State statutes regarding mandatory retirement or hiring. The New Jersey Supreme Court has held that "[w]here a state statute is . . . invalid because it is in conflict with federal legislation, the state statute is in effect merely unenforceable or suspended by the existence of the federal legislation." General Electric Co. v. Packard Bamberger & Co., 14 N.J. 209, 218 (1933). However, once the federal statute with which the State statute conflicted is repealed, or when Congress affirmatively acts to remove the conflict, the State statute will be deemed reinstated or revived without the need for "an express reenactment by the state legislature." Id. at 219. The State statutes which exist as to mandatory hiring and retirement for law enforcement personnel may be enforced as a matter of federal law. As a result, they must be enforced as a matter of State law.

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In summary, you are advised that as a result of amendments to the ADEA contained in 29 U.S.C. §623(j), your agencies must once again enforce those statutory provisions which permit the imposition of statutory mandatory retirement and maximum hiring age thresholds for law enforcement personnel and firefighters.

Sincerely yours,



PETER VERNIERO  
Attorney General of New Jersey