

LEGISLATIVE HISTORY CHECKLIST

NJSA: 43:16A-3

(Police officers and firemen--
certain-- retain positions)

LAWS OF: 1987

CHAPTER: 263

Bill No: A4217

Sponsor(s): Gargiulo

Date Introduced: May 28, 1987

Committee: Assembly: -----

Senate: State Government, Federal and Interstate Relations and
Veterans' Affairs

Amended during passage: No

Date of Passage: Assembly: June 4, 1987

Senate: August 6, 1987

Date of Approval: September 8, 1987

Following statements are attached if available:

Sponsor statement: Yes

Committee statement: Assembly No

Senate Yes

Fiscal Note: No

Veto Message: No

Message on Signing: No

Following were printed:

Reports: No

Hearings: No

Attorney General advice as mentioned in committee statement-- attached.

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ASSEMBLY, No. 4217

STATE OF NEW JERSEY

INTRODUCED MAY 28, 1987

By Assemblyman GARGIULO

**AN ACT concerning certain appointments as a municipal firefighter
or a municipal police officer.**

1 BE IT ENACTED *by the Senate and General Assembly of the State*
2 *of New Jersey:*

1 1. Notwithstanding any other law, rule, regulation, or directive
2 to the contrary, any person appointed to a position as a municipal
3 firefighter or a municipal police officer on or after March 1, 1987
4 and prior to June 1, 1987 who has been removed from that position
5 or whose removal has been directed or who is deemed to be ineligible
6 for that position because the person was over 35 years of age on
7 the announced closing date for the open competitive examination
8 for that position shall be restored to that position or retained in
9 that position, as the case may be, and shall be enrolled as a member
10 of the Police and Firemen's Retirement System established pur-
11 suant to P. L. 1944, c. 255 (C. 43:16A-1 et seq.).

1 2. This act shall take effect immediately

STATEMENT

This bill provides that any person appointed to a position as a municipal firefighter or a municipal police officer on or after March 1, 1987 and prior to June 1, 1987 who has been removed from that position or whose removal has been directed or who is deemed to be ineligible because the person was over 35 years of age on the announced closing date for the open competitive examination for that position shall be restored to that position or retained in that position, as the case may be, and shall be enrolled as a member of the Police and Firemen's Retirement System established pursuant to P. L. 1944, c. 255 (C. 43:16A-1 et seq.).

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PUBLIC EMPLOYEES AND PERSONNEL

Restores or retains certain persons in positions of municipal fire-fighter and municipal police officer.

SENATE STATE GOVERNMENT AND FEDERAL AND
INTERSTATE RELATIONS AND VETERANS AFFAIRS
COMMITTEE

STATEMENT TO

ASSEMBLY, No. 4217

STATE OF NEW JERSEY

DATED: JUNE 22, 1987

The Senate State Government Committee reports favorably Assembly Bill No. 4217.

Amendments in 1986 of the federal Age Discrimination in Employment Act authorize states to continue until December 31, 1993 the imposition of a mandatory retirement age and a maximum hiring age for firefighters and law enforcement officers. As a result of these amendments, the Attorney General has advised that this State's maximum hiring age of 35 for those positions is again in effect and must be enforced. The date of March 1, 1987 was set as the date for reimposition of the hiring age limitation.

There have been some instances where appointments were made after March 1 because of unawareness of the directive imposing that date for reimposition of the age 35 limitation. This bill addresses those appointments. It provides that any person appointed to a position as a municipal firefighter or a municipal police officer on or after March 1, 1987 and prior to June 1, 1987 who has been removed from that position or whose removal has been directed or who is deemed to be ineligible because the person was over 35 years of age on the announced closing date for the open competitive examination for that position shall be restored to or retained in that position, as the case may be, and shall be enrolled as a member of the Police and Firemen's Retirement System established pursuant to P. L. 1944, c. 255 (C. 43:16A-1 et seq.).



State of New Jersey

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February 11, 1987

Douglas R. Forrester
Director
Division of Pensions
20 West Front Street
Trenton, New Jersey 08625

Re: 87-0012: Amendments to the Age
Discrimination in Employment Act

Dear Director Forrester:

A question has arisen regarding the status of mandatory maximum retirement ages and maximum hiring ages for members of certain New Jersey uniformed services participating in State-administered pension programs. The issue is prompted by recent amendments (hereinafter "1986 Amendments"), P.L. 99-592, to the "Age Discrimination in Employment Act" (hereinafter "ADEA"), 29 U.S.C. §623 et seq. These amendments generally provide that it is not unlawful, i.e. a violation of the ADEA, for a state to enforce any maximum retirement age or maximum hiring age for law enforcement officers or firefighters in effect on March 3, 1983. The Amendment generally became effective January 1, 1987; it expires by its own terms on December 31, 1993.

For the reasons set forth below, it is our opinion that the mandatory retirement provisions established by State law requiring law enforcement officers and firefighters to retire prior to age 70 must again be enforced. It is also our view that the 1986 Amendments require the enforcement of the relevant pension provisions concerning maximum hiring ages for law enforcement and firefighter personnel.

Some brief background is helpful in discussing this issue. On March 2, 1983, the United States Supreme Court concluded in EEOC v. Wyoming, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), that Congress could properly extend application of the ADEA consistent with the Tenth Amendment of the United States Constitution to the states. This holding resulted in the issuance of two Formal Attorney General Opinions. In Formal Opinion No. 5 (1983).

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it was concluded 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 in the absence of facts at that time demonstrating that such mandatory retirement ages were a valid bona fide occupational qualification ("BFOQ"). In Formal Opinion No. 1 (1984), we concluded that the maximum hiring ages established in those State pension provisions were similarly invalid and unenforceable under the ADEA. However, as a consequence of the 1986 Amendments, the ADEA now permits until December 31, 1993 the enforcement by states or their political subdivisions of previously unenforceable mandatory retirement and maximum hiring ages for covered law enforcement officers and firefighters.

The 1986 Amendments amending Section 4 of the ADEA provide:

(i) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken-

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act. [P.L. 99-592, §3 (to be codified at 29 U.S.C. §623(i)) (emphasis supplied).

These Amendments generally took effect on January 1, 1987.* Section 3 of the 1986 Amendments expressly provides that the above

* Section 7 of the 1986 Amendments generally provides that its provisions are to take effect on January 1, 1987. An exception to this general operative date applies to employees subject to a collective-bargaining agreement which meets certain conditions set forth in the act. In that event, the 1986 Amendments do not become effective until the collective bargaining agreement expires or January 1, 1990, whichever occurs first.

(Footnote Continued On Following Page)

suspension provisions are automatically repealed as of December 31, 1993. The purpose underlying the enactment of these provisions, as suggested by the legislative history and as is evident from their plain meaning, is to maintain the status quo as of March 3, 1983 regarding the retirement and hiring age restrictions in effect at that time. See H.R. 4154, 99th Cong., 2d Sess., 132 Cong. Rec. 5628-5642 (1986).

By the operation of its terms then, the 1986 Amendments hold in abeyance the provisions of the ADEA which would otherwise require states to eliminate mandatory retirement and maximum hiring ages, absent a demonstrated factual basis supporting the adoption of such age restrictions as a BFOQ. Accordingly, under the 1986 Amendments it is not unlawful for a state to enforce any mandatory retirement and maximum hiring ages for law enforcement officers and firefighters in effect on March 3, 1983.

In New Jersey on that date, the following uniformed officer State pension programs generally provided for the mandatory retirement of their members before age 70, and also set a general maximum hiring age of 35: State Police Retirement System (SPRS), N.J.S.A. 53:5A-8(a)(2) (mandatory retirement at age 55), N.J.S.A. 53:1-9 (35 year-old maximum hiring age); the Police and Firemen's Retirement System (PFRS), N.J.S.A. 43:16A-5(1) (mandatory retirement at age 65), N.J.S.A. 43:16A-3 (35 year-old maximum hiring age); the Consolidated Police and Firemen's Pension Fund (CPFPPF), N.J.S.A. 43:16-1 (mandatory retirement at age 65 or 70 depending on when 25 years of honorable service is attained), N.J.S.A. 43:16-1.1 (mandatory retirement of chief of police at age 70); the law enforcement officers subchapter of the Public Employees' Retirement System (PERS), N.J.S.A. 43:15A-99 (mandatory retirement at age 65, with exception of veterans who may remain employed until age 70 if they have not attained 20 years of service); see also N.J.S.A. 39:2-6.1 (35 year-old maximum hiring age for State motor vehicle

(Footnote Continued From Previous Page)

That exception, however, is inapplicable here. It is well-settled in this State that public employees and their representatives are constrained from negotiating any provision which would "affect the sacrosanct subject of employee pensions." Fair Lawn Ed. Assn. v. Fair Lawn Bd. of Education, 79 N.J. 574, 582-583 (1979) (quoting State v. State Supervisory Employees Assn., 78 N.J. 54, 83 (1978)); see also Jacobs v. New Jersey Highway Authority, 54 N.J. 393 (1969). Accordingly, it is our opinion that the application of the 1986 Amendments to the affected employees being considered here should have taken effect January 1, 1987. We recognize, however, that it may take the Division of Pensions several months to implement the provisions of the 1986 Amendments in a manner consistent with the advice set forth in this letter.

inspectors); N.J.S.A. 40A:14-12, 127 (35 year-old maximum hiring age for municipal firefighters and police officers).

With the exception of the SPRS and motor vehicle provisions, the above statutes were never amended following the issuance of Formal Opinion No. 5 (1983) or Formal Opinion No. 1 (1984).* The absence of any statutory change in the mandatory retirement and maximum hiring ages in the State pension provisions makes it clear that the Legislature has never departed from its determination that age is a significant and relevant factor which must be considered in the hiring and retention of the covered public safety officers. This conclusion is buttressed by the recent enactment of L. 1985, c. 73 amending the "New Jersey Law Against Discrimination", N.J.S.A. 10:5-1 et seq. Those amendments prohibit a public or private employer from compelling a person to retire at a particular age. However, the Legislature specifically exempted members of police and fire departments from the law's provisions. L. 1985, c. 73, §1.

The question presented here is whether the State pension retirement and hiring restrictions in effect on March 3, 1983, in order to have effect, must be reenacted after the relaxation of the ADEA requirement upon the states by virtue of the 1986 Amendments to the ADEA. In our view, reenactment of the State statutes is unnecessary.

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 (1953).

* The Legislature did not amend N.J.S.A. 53:1-9 (imposing a 35 year-old maximum hiring age); it did however, repeal N.J.S.A. 53:5A-8 (imposing mandatory retirement at age 55) by L. 1983, c. 448, §1. N.J.S.A. 39:2-6.1 (35 year-old maximum hiring age for motor vehicle inspectors) was similarly repealed by L. 1983, c. 403, §45.

The Legislature thereafter reestablished the State Police 55 year-old mandatory retirement law by the enactment of L. 1985, c. 175, §1. In subsequent litigation brought against the State in Federal District Court challenging the age 55 mandatory retirement limitation, the court held that the age restriction was a BFOQ. In essence, it is the requirement of factually demonstrating a BFOQ as a prerequisite to the imposition of mandatory retirement or maximum hiring ages that is suspended until December 31, 1993 for those states that had such restrictions in place on March 3, 1983 by virtue of the 1986 Amendments. See E.E.O.C v. State of New Jersey, 631 F. Supp. 1506 (D.C.N.J. 1986), appeal pending, Docket No. 86-5421 (3rd Cir. 1986).

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 Court further noted that this principle would not apply if the State statute independently violated either the State or federal constitutions. Ibid. That is not the case here. As long as the age requirements embodied in the State pension provisions are functionally related to a bona fide hiring or retirement plan which is "not a subterfuge to evade the purpose of th[e] [ADEA]," P.L. 99-592, §3, the 1986 Amendments provide that a state may enforce any age restrictions as to retirement or hiring that existed on March 3, 1983.* Since the age restrictions (with the exception of the hiring age for motor vehicle inspectors) in the State pension laws have not been effectively altered by the Legislature and remain as law, their provisions are effective. They may now be enforced as a matter of federal law. They must be enforced as a matter of State law. Thus, the Division of Pensions should take immediate steps to implement the statutory provisions at issue.

We are fully cognizant, however, of the problems associated with immediately implementing the mandatory retirement provisions. Many local governments may be unaware of the impact of the 1986 Amendments upon the operation of their municipal police and fire departments. In addition, the Division of Pensions will need time to deal with the administrative consequences of the unanticipated retirements prompted by the 1986 Amendments as will the public safety officers affected by the change in federal law. As a practical matter we are aware that it could take the Division of Pensions up to two or three months to complete the necessary administrative steps to enforce the mandatory retirement provisions. Under these circumstances, you are therefore advised that it would be appropriate for the Division to establish a uniform date for enforcement of the mandatory retirement and maximum hiring age provisions that takes into account the practical problems associated with the retirement application process. This effective date should grant a reasonable period of time for the Division of

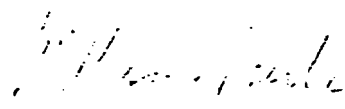
* All of the State-administered retirement programs considered here are bona fide pension plans since they are genuine and actually pay substantial benefits. United Air Lines, Inc. v. McMann, 434 U.S. 192, 203, 98 S.Ct. 444, 450, 54 L.Ed.2d 402 (1977). See also E.E.O.C. v. Westinghouse Electric Corp., 725 F.2d 211, 225 (3rd Cir. 1983), cert. denied, 469 U.S. 820, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984). Moreover, because the above retirement plans pre-existed the enactment of the ADEA in 1967, they cannot by definition be considered a "subterfuge" to evade the purposes of the Act. United Air Lines, Inc. v. McMann, supra; Sikora v. American Can Co., 622 F.2d 1116, 1124 (3rd Cir. 1980); Crosland v. Charlotte Eye, Ear and Throat Hospital 686 F. 2d 208, 212, n. 3 (4th Cir. 1982).

Pensions and municipalities to administer the retirements occasioned by the change in the law. On the other hand, it is apparent that the enforcement of the maximum hiring age provisions will not present as many administrative problems. The Division of Pensions should consider this administrative reality in establishing a uniform effective date for the enforcement of the maximum hiring age provisions.

In summary, you are advised that as a result of the 1986 Amendments to the ADEA, the mandatory retirement age and maximum hiring age provisions found in the various State uniformed services pension statutes must be again enforced. You are also advised that the Division of Pensions should immediately begin the necessary administrative efforts to implement the enforcement of the statutorily mandated retirement and hiring age provisions in a manner that accommodates the practical administrative problems associated with that task and with the advice in this letter.

Very truly yours,

W. CARY EDWARDS
Attorney General


William Harla
Assistant Attorney General