

# Withdrawal/Redaction Sheet

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Joseph N. Cleary to Ellen J. Vargyas re: Age Limitations for Law Enforcement Officers and Firefighters (6 pages)	2/2/1995	P5

### COLLECTION:

Clinton Presidential Records  
Domestic Policy Council  
Stephen Warnath (Civil Rights)  
OA/Box Number: 9589

### FOLDER TITLE:

[Age Discrimination in Employment Act]

ds47

### RESTRICTION CODES

#### Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

#### Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

EXECUTIVE OFFICE OF THE PRESIDENT

25-Jan-1995 10:44am

TO: Stephen C. Warnath  
TO: Jose Cerda, III

FROM: Anna M. Briatico  
Office of Mgmt and Budget, LRD

CC: Susan M. Carr  
CC: Janet R. Forsgren

SUBJECT: Age Discrimination in Employment Act Exemptions

Yesterday, the Employer-Employee Relations Subcommittee held a hearing on age discrimination exemptions, including HR 344. This bill would amend the Age Discrimination in Employment Act of 1967 to reinstate an exemption from the Act for the employment and retirement of State and local firefighters and law enforcement officials. There were no administration witnesses. According to EEOC, the Subcommittee Chair, Fawell (IL), favors the bill.

HR 344 is very similar to HR 2722 which was introduced during the last Congress. Last year, there was much debate on HR 2722. EEOC sent a letter to the HILL (which OMB cleared) opposing the bill in September 1993. Later, the White House withdrew the letter. There was discussion about including HR 2722 in the Crime Bill, but this did not occur. Director Panetta called Senator Metzenbaum regarding the bill. At that time, the Administration was prepared to support a temporary (three-year) extension of the exemption.

Recently, EEOC has contacted OMB stating that they are opposed to H.R. 344. The AARP is also opposed to the bill and are committed to blocking legislative action on it.

At this point, it looks like the Administration needs to decide its approach to this issue. We wanted to obtain your views on the approach the Administration may want to take (e.g., opposing, supporting another temporary extension, not taking a position, etc.). Since we are working under tight deadlines because of the attention H.R. 344 is getting, we would like to receive your comments by noon -- today. Please call me if you have any additional questions. I can be reached on extension 57887. Thanks.

EXECUTIVE OFFICE OF THE PRESIDENT

13-Feb-1995 06:06pm

TO: (See Below)  
FROM: Anna M. Briatico  
Office of Mgmt and Budget, LRD  
SUBJECT: Mark up of HR 849 - ADEA Exemption

Last week, Congressman Fawell (R-Illinois) introduced HR 849 to amend the Age Discrimination in Employment Act of 1967.

On Thursday, Feb. 16th, the Employer-Employee Relations panel of the House Economic and Educational Opportunities Committee will mark up HR 849.

This bill would reinstate the exemption to allow State and local governments to use age as a factor in hiring and retirement decisions for firefighters and law enforcement positions.

HR 849 would also require EEOC to conduct a study on performance tests for these public safety occupations and issue advisory guidelines on the use of physical mental fitness tests. The Chairman of the EEOC would also be required to solicit comments from certain professional organizations and advocacy groups. In addition, the EEOC Chairman would also be required to develop standards of wellness for these public safety officials.

This measure includes an authorization of \$5 million to carry this out.

Please let me know if you would like a copy of this bill.

Distribution:

TO: Christopher F. Edley, Jr  
TO: Francis S. Redburn  
TO: Susan M. Carr  
TO: Jose Cerda, III  
TO: Stephen C. Warnath  
TO: Lydia Muniz  
TO: Kenneth F. Ryder, Jr.  
TO: James C. Murr

CC: Janet R. Forsgren  
CC: Margaret R. Shaw

CC: Lori L. Victor

EXECUTIVE OFFICE OF THE PRESIDENT

14-Feb-1995 05:57pm

TO: (See Below)

FROM: Susan M. Carr  
Office of Mgmt and Budget, HTF

SUBJECT: RE: Mark up of HR 849 - ADEA Exemption

As a follow-up to my earlier e-mail on the EEOC ADEA exemption study --

In accordance with Section 5 of the 1986 Amendments to the ADEA, Secretary Lynn Martin of Labor and Chairman Evan Kemp of the EEOC submitted to Congress on October 20, 1992, the summary of research conducted by the Center for Applied Behavioral Sciences at Penn State concerning the use of fitness tests by law enforcement departments.

In short, the summary found that "accumulated deficits in abilities are only marginally associated with chronological age and can be documented with available tests that are better predictors than age".

This study cost \$1 million; H.R. 849 calls for another study at a cost of \$5 million. Do we really want to support another study?

Distribution:

TO: Anna M. Briatico

CC: Christopher F. Edley, Jr  
CC: Francis S. Redburn  
CC: Jose Cerdá, III  
CC: Stephen C. Warnath  
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CC: Janet R. Forsgren  
CC: Margaret R. Shaw  
CC: Lori L. Victor

EXECUTIVE OFFICE OF THE PRESIDENT

14-Feb-1995 07:35pm

TO: Lin C. Liu  
TO: Stephen C. Warnath

FROM: Ingrid M. Schroeder  
Office of Mgmt and Budget, LRD

SUBJECT: More comments



OFFICE OF  
THE CHAIRMAN

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON, D.C. 20507

September 22, 1993

The Honorable William D. Ford  
Chairman  
Committee on Education and Labor  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Ford:

This is in response to your July 30, 1993 request for the Equal Employment Opportunity Commission's views on H.R. 2722, the "Age Discrimination in Employment Amendments of 1993".

H.R. 2722 would amend the Age Discrimination in Employment Act in two general respects. First, all state and local governments would be permitted to use age as a basis for hiring and retiring law enforcement officers and firefighters. Second, the bill would prohibit state and local governments from retiring elected judges who attain the age of compulsory retirement prior to the expiration of a judge's term of office. If the amendments are signed into law, the pertinent parts of the ADEA would read as follows:

Sec. 4(j) It shall not be unlawful...to fail or refuse to hire or to discharge any [law enforcement officer or firefighter] because of such individual's age if such action is taken --

- (1) with respect to...an individual...[who]...has attained
- (A) the age of hiring and retirement in effect under applicable state or local law on March 3, 1983; or
  - (B) if such age was not in effect under applicable state or local law on March 3, 1983, 55 years of age...

Sec. 11(f) The term "employee" means an individual employed by any employer except that the term...shall not include any person elected to public office in any state or political subdivision...by the qualified voters thereof... The exemption set forth in the preceding sentence...shall not include with respect to retirement an elected judge before the expiration of the term of office in which such judge attains the age of compulsory retirement.

The Honorable William D. Ford  
Page two

The EEOC has reviewed H.R. 2722 and we provide the following substantive and technical comments:

GENERAL COMMENTS

First, we address the law enforcement and firefighter provisions in section 4(j). As you know, the 1986 ADEA Amendments created a temporary exemption permitting age-based hiring and retirement decisions in these public safety occupations through December 31, 1993. At the same time, Congress charged the EEOC and the Department of Labor with conducting a study to determine whether tests are available that could replace the use of age as a predictor of job performance. The central research questions were:

If one wanted to replace age with performance or capacity tests, would it be possible? Are there job-related tests that are practical, safe and cost effective? If so, can the tests be fairly administered without unduly compromising personal safety, public safety, or agency efficiency?<sup>1</sup>

In October 1992, this study<sup>2</sup> -- organized and structured by researchers from Penn State University -- was sent by the two agencies to Congress. The Study Group concluded that (1) age is a poor predictor of performance in public safety occupations, (2) practical tests are currently available that are better predictors, and (3) the temporary exemption should be permitted to expire as scheduled. H.R. 2722 rejects all of the above conclusions by, in essence, making permanent the exemption created in 1986. Moreover, Section 2(a)(B) is more expansive than the current exemption in that it permits the use of age even by state and local governments that had not implemented age limitations for public safety officers in prior years.

If signed into law, H.R. 2722 would undercut years of EEOC litigation (pre-1987) in which we routinely challenged the use of arbitrary age limitations by police and fire departments. Further, the proposed amendment to permit State and local

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<sup>1</sup> Edwards, R. *Mandatory Retirement: Police, Fire Fighters and Tenured Faculty*, Public Administration Review, Vol. 53, No. 4, 1993.

<sup>2</sup> *Alternatives to Chronological Age in Determining Standards of Suitability for Public Safety Jobs, Volume I: Technical Report*, Center for Applied Behavioral Sciences, Pennsylvania State University, (University Park, PA: Intercollegiate Research Programs, 1992), 459 pp.

governments to require the retirement of firefighters and law enforcement officers as early as age 55 is inconsistent with a substantial body of case law which has been developed previously under the ADEA that prohibited mandatory retirement of law enforcement officers and firefighters on the basis of an arbitrary age cut-off. See e.g. EEOC v. Kentucky State Police Dept., 860 F.2d 665 (6th Cir. 1988), cert. denied, 49 FEP Cases 1640 (1989); EEOC v. Pennsylvania State Police, 829 F.2d 392 (3rd Cir. 1987); EEOC v. Mississippi State Tax Commission, 873 F.2d 97 (5th Cir. 1989) (en banc).

Finally, we address the elected judges portion of H.R. 2722. Currently, the ADEA contains a blanket exemption for persons elected to public office by the qualified voters of a state or political subdivision of a state. H.R. 2722 would make an adjustment in this blanket exemption solely for elected judges. Under the bill, an elected judge would be entitled to complete his term of office even though attaining mandatory retirement age in advance of the full term. While it is unclear why this bill is being offered, its objective of removing one use of an arbitrary age limitation is in keeping with the spirit of the ADEA. On the other hand, the ADEA and Title VII have contained blanket exemptions for elected public officials since their dates of enactment. Thus, this bill affects a long-settled aspect of civil rights law.

#### TECHNICAL COMMENTS

Subsection (A) of H.R. 2722 would permit both maximum hiring ages and mandatory retirement ages. Subsection (B), to be applied when (A) is inapplicable, permits only mandatory retirement at age 55. This omission regarding maximum hiring ages may produce the curious circumstance of departments having to prove that age is a bona fide occupational qualification for hiring decisions even though they would have a specific statutory right to use age for retirement decisions.

With respect to elected judges, the bill appears to apply the ADEA only insofar as protecting an elected judge against age-based mandatory retirement prior to the completion of a full term of office. The limited nature of this objective would be made clearer were the bill to contain the word "solely" prior to "with respect to retirement."

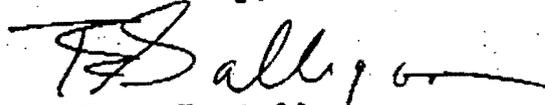
In summary, the EEOC believes that the proposed legislation -- which would continue the exemption for State and local firefighters and law enforcement officers -- is inconsistent with Congress' purpose in 1986. Further legislation on this issue was to be based on the results of the study the Commission was

The Honorable William D. Ford  
Page Four

charged by Congress to conduct. The findings contained in the Congressionally-mandated study on age and public safety jobs concluded that valid and job-related tests are viable alternatives to basing hiring and retirement decisions on age alone.

Thank you for providing the EEOC an opportunity to comment on this legislation. The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Gallegos', with a long horizontal flourish extending to the right.

Tony E. Gallegos  
Chairman

BILL TEXT Report for H.R.849  
As introduced in the House, February 7, 1995

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H.R.849 As introduced in the House, February 7, 1995  
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104th CONGRESS  
1st Session

H. R. 849

I

To amend the Age Discrimination in Employment Act of 1967 to reinstate an exemption for certain bona fide hiring and retirement plans applicable to State and local firefighters and law enforcement officers, and for other purposes.

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IN THE HOUSE OF REPRESENTATIVES  
February 7, 1995

Mr. Fawell (for himself, Mr. Owens, Mr. Goodling, Mr. Clay, Mr. Ballenger, Mr. Petri, Mrs. Roukema, Mr. Hoekstra, Mr. Sawyer, Mr. Martinez, Mr. Kildee, Mr. Talent, Mrs. Meyers of Kansas, Mr. Knollenberg, Mr. Payne of New Jersey, Mr. Weldon of Florida, Mr. Graham, Mr. Gene Green of Texas, Mr. McDermott, Mr. Engel, Ms. Slaughter, Mr. Andrews, and Ms. Eddie Bernice Johnson of Texas) introduced the following bill; which was referred to the Committee on Economic and Educational Opportunities

-----  
A BILL

To amend the Age Discrimination in Employment Act of 1967 to reinstate an exemption for certain bona fide hiring and retirement plans applicable to State and local firefighters and law enforcement officers, and for other purposes.

-----  
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Age Discrimination in Employment Amendments of 1995".

## SEC. 2. REINSTATEMENT OF EXEMPTION.

(a) Repeal of Repealer.--Section 3(b) of the Age Discrimination in Employment Amendments of 1986 (29 U.S.C. 623 note; Public Law 99-592) is repealed.

(b) Exemption.--Section 4(j) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623), as in effect immediately before December 31, 1993--

(1) is hereby reenacted as such, and

(2) as so reenacted, is amended by striking "attained the age" and all that follows through "1983, and", and inserting the following:

"attained--

"(A) the age of hiring or retirement in effect under applicable State or local law on March 3, 1983; or

"(B) if the age of retirement was not in effect under applicable State or local law on March 3, 1983, 55 years of age; and".

## SEC. 3. STUDY AND GUIDELINES FOR PERFORMANCE TESTS.

(a) Study.--Not later than 3 years after the date of enactment of this Act, the Chairman of the Equal Employment Opportunity Commission (in this section referred to as "the Chairman") shall conduct, directly or by contract, a study that will include--

(1) a list and description of all tests available for the assessment of abilities important for completion of public safety tasks performed by law enforcement officers and firefighters,

(2) a list of such public safety tasks for which adequate tests do not exist,

(3) a description of the technical characteristics that performance tests must meet to be compatible with applicable Federal civil rights Acts and policies,

(4) a description of the alternative methods available for determining minimally acceptable performance standards on the tests described in paragraph (1),

(5) a description of the administrative standards that should be met in the administration, scoring, and score interpretation of the tests described in paragraph (1), and

(6) an examination of the extent to which the tests described in paragraph (1) are cost effective, safe, and comply with Federal civil rights Acts and regulations.

(b) Advisory Guidelines.--Not later than 4 years after the date of enactment of this Act, the Chairman shall develop and issue, based on the

results of the study required by subsection (a), advisory guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of law enforcement officers and firefighters to perform the requirements of their jobs.

(c) Consultation Requirement; Opportunity for Public Comment.--(1) The Chairman shall, during the conduct of the study required by subsection (a), consult with--

(A) the United States Fire Administration,

(B) the Federal Emergency Management Agency,

(C) organizations that represent law enforcement officers, firefighters, and their employers, and

(D) organizations that represent older individuals.

(2) Before issuing the advisory guidelines required in subsection (b), the Chairman shall allow for public comment on the proposed guidelines.

(d) Development of Standards for Wellness Programs.--Not later than 2 years after the date of the enactment of this Act, the Chairman shall propose advisory standards for wellness programs for law enforcement officers and firefighters.

(e) Authorization of Appropriations.--There is authorized to be appropriated to carry out this section \$5,000,000.

#### SEC. 4. EFFECTIVE DATES.

(a) General Effective Date.--Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act.

(b) Special Effective Date.--Section 2(b)(1) shall take effect on December 31, 1993.

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Please type desired COMMAND (or MENU):

BILL TEXT Report for H.R.2722  
As passed by the House (Engrossed)

-----  
H.R.2722 As passed by the House (Engrossed)  
-----

103d CONGRESS  
1st Session

H. R. 2722

-----  
AN ACT

To amend the Age Discrimination in Employment Act of 1967 with respect to State and local firefighters and law enforcement officers; and to amend the Age Discrimination in Employment Amendments of 1986 to prevent the repeal of the exemption for certain bona fide hiring and retirement plans applicable to State and local firefighters and law enforcement officers.

-----  
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Age Discrimination in Employment Amendments of 1993".

SEC. 2. AMENDMENTS.

Section 4(j)(1) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(j)(1)) is amended by striking "attained the age" and all that follows through "1983, and", and inserting the following:

"attained--

"(A) the age of hiring or retirement in effect under applicable State or local law on March 3, 1983; or

"(B) if the age of retirement was not in effect under applicable State or local law on March 3, 1983, 55 years of age; and".

SEC. 3. REPEALER.

Section 3(b) of the Age Discrimination in Employment Amendments of 1986 (29 U.S.C. 623 note) is repealed.

SEC. 4. STUDY AND GUIDELINES FOR PERFORMANCE TESTS.

(a) Study.--Not later than 3 years after the date of enactment of this Act, the Chairman of the Equal Employment Opportunity Commission (in this section referred to as "the Chairman") shall conduct, directly or by contract, a study that will include--

(1) a list and description of all tests available for the assessment of abilities important for completion of public safety tasks performed by law enforcement officers and firefighters,

(2) a list of such public safety tasks for which adequate tests do not exist,

(3) a description of the technical characteristics that performance tests must meet to be compatible with applicable Federal civil rights Acts and policies,

(4) a description of the alternative methods available for determining minimally acceptable performance standards on the tests described in paragraph (1),

(5) a description of the administrative standards that should be met in the administration, scoring, and score interpretation of the tests described in paragraph (1), and

(6) an examination of the extent to which the tests described in paragraph (1) are cost effective, safe, and comply with Federal civil rights Acts and regulations.

(b) Advisory Guidelines.--Not later than 4 years after the date of enactment of this Act, the Chairman shall develop and issue, based on the results of the study required by subsection (a), advisory guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of law enforcement officers and firefighters to perform the requirements of their jobs.

(c) Consultation Requirement; Opportunity for Public Comment.--(1) The Chairman shall, during the conduct of the study required by subsection (a), consult with--

(A) the United States Fire Administration,

(B) the Federal Emergency Management Agency,

(C) organizations that represent law enforcement officers, firefighters, and their employers, and

(D) organizations that represent older individuals.

(2) Before issuing the advisory guidelines required in subsection (b), the Chairman shall allow for public comment on the proposed guidelines.

(d) Development of Standards for Wellness Programs.--Not later than 2 years after the date of the enactment of this Act, the Chairman shall propose advisory standards for wellness programs for law enforcement officers and firefighters.

(e) Authorization of Appropriations.--There is authorized to be appropriated to carry out this section \$5,000,000.

Passed the House of Representatives November 8, 1993.

Attest:

Clerk.

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\*\*\* Remember you are in the 103rd Congress

Please type desired COMMAND (or MENU):

104TH CONGRESS  
1ST SESSION

# H. R. 344

To amend the Age Discrimination in Employment Act of 1967 to reinstate an exemption with respect to the employment of individuals as State and local firefighters and law enforcement officers.

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## IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1995

Mr. PICKETT introduced the following bill; which was referred to the Committee on Economic and Educational Opportunities

---

## A BILL

To amend the Age Discrimination in Employment Act of 1967 to reinstate an exemption with respect to the employment of individuals as State and local firefighters and law enforcement officers.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. AMENDMENT.**

4 Section 4 of the Age Discrimination in Employment  
5 Act of 1967 (29 U.S.C. 623) is amended by inserting after  
6 subsection (i) the following:

1       “(j) It shall not be unlawful for an employer that is  
2 a State, a political subdivision of a State, an agency or  
3 instrumentality of a State or of a political subdivision of  
4 a State, or an interstate agency to fail or refuse to hire,  
5 or to discharge, any individual because of such individual’s  
6 age if such action is taken—

7               “(1) with respect to the employment of such in-  
8 dividual as a firefighter or law enforcement officer  
9 and such individual has attained the age of hiring or  
10 retirement in effect under applicable State or local  
11 law on March 3, 1983; and

12               “(2) pursuant to a bona fide hiring or retire-  
13 ment plan that is not a subterfuge to evade the pur-  
14 poses of this Act.”.

15 **SEC. 2. EFFECTIVE DATE.**

16       This Act shall take effect on the first day of the first  
17 month that begins after the date of the enactment of this  
18 Act.

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO: AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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**This marker identifies the original location of the withdrawn item listed above.  
For a complete list of items withdrawn from this folder, see the  
Withdrawal/Redaction Sheet at the front of the folder.**

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**COLLECTION:**

Clinton Presidential Records  
Domestic Policy Council  
Stephen Warnath (Civil Rights)  
OA/Box Number: 9589

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**FOLDER TITLE:**

[Age Discrimination in Employment Act]

ds47

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**RESTRICTION CODES**

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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

~~CONFIDENTIAL~~

DETERMINED TO BE AN ADMINISTRATIVE  
MARKING Per E.O. 12958 as amended, Sec. 3.2 (c)  
Initials: OMJ Date: 8/22/05

## EXECUTIVE SUMMARY

The Age Discrimination in Employment Act (ADEA), as amended in 1986, prohibits mandatory retirement based on chronological age for all but select occupations. These occupations included tenured college faculty and public safety officers. With respect to these occupations, the exemption is to expire in 1993. Thus, Congress mandated that the EEOC provide some foundation for either continuing the exemption or eliminating it prior to the expiration date. The National Academy of Sciences has recently issued a report suggesting the elimination of the ADEA exemption for tenured college faculty based on a comprehensive review of research and policy (Hammond & Morgan, 1991). The Center for Applied Behavioral Sciences at Penn State University was given the responsibility of conducting a similar study related to the value of age-based retirement for public safety officers.

Congress defined public safety positions as encompassing fire fighters, police officers and corrections officers. These occupations were identified for exemption from the ADEA amendment regarding age-related retirement because of the sensitive nature of these positions vis a vis public well being. It was assumed that any compromise in the ability of members of these occupations to carry out their job duties would place members of the public (including fellow workers) in jeopardy of possible serious injury or death. The exemption, then, implicitly accepts the notion that age is a Bona Fide Occupational Qualification and that all of those incumbents above a certain age do not possess the necessary attributes for safe and efficient occupational performance. Thus, a logic exists for maintaining age-based mandatory retirement - it promotes public welfare. Nevertheless, the

Equal Employment Opportunity Commission (EEOC) is charged with the protection of the rights of older Americans. Thus, there is reason for EEOC to question the age-based logic since any retirement for those workers below that age creates a circumstance of prima facie disparate impact. It was our responsibility to determine if there were tests available that could be shown to be job-related, cost effective, and safe for the test taker. If this were the case, then a comparative recommendation might be made contrasting chronological age with tests as a predictor.

There are two sets of circumstances that might be thought to compromise the performance of public safety tasks. The first is a sudden incapacitation precipitated by a catastrophic medical event such as a myocardial infarction (heart attack). The second set of circumstances might be described as accumulated deficit. In this latter situation, an individual might gradually deteriorate with respect to a particular ability until that person is no longer capable of performing a public safety task in a reasonably efficient manner. As an example, an incumbent's memory might degenerate to the point that he or she forgets the correct sequence of a critical procedure and creates a hazard to the public and fellow workers by using the wrong procedure. The central question, then, is the extent to which testing (in lieu of age) can predict the onset of either a sudden incapacitation in an individual who was previously without symptoms or can identify the point at which an individual will fall below some critical minimal level on an ability required for safe and efficient performance of public safety tasks.

In addressing these issues, the project team considered many sources of information. These included research published in scientific journals, technical reports, current practices

in public safety agencies, extant data sets related to fitness, illness, and injury, opinions of knowledgeable professional groups, and the shared expertise of task team members. Our conclusions and recommendations are based on these information sources. Although we were aware of the various public policy implications of our recommendations, we were careful not to allow those to influence these recommendations.

Based on our review of material available to us, we came to several conclusions. They are as follows:

**The risk of experiencing a catastrophic medical event that would compromise public safety is so small as to eliminate this factor in the debate regarding age-based retirement.**

The responsibilities of public safety officers only occasionally involve the direct threat to the well being of citizens and fellow officers. Further, the base rate for the occurrence of catastrophic medical events leading to sudden incapacitation in the workplace is generally low and not well predicted by age. The joint probability of the occurrence of sudden incapacitation in an asymptomatic public safety officer while performing a task directly related to protecting the public is vanishingly small. Further, there are tests available for predicting the probability of such an event that are more effective than age and with lesser adverse impact on older employees.

**Accumulated deficits in abilities are only marginally associated with chronological age and can be documented with available tests that are better predictors than age.** There are substantial ability differences among individuals of any age grouping. This variability increases with chronological age. Thus, it is fair to say that any statements about age groups based on averages will not be accurate about individuals. Further, even within individuals,

changes in abilities are often irregular rather than gradual and predictable. Thus, individuals can be characterized as moving through a series of plateaus, often evidencing increases in ability as well as decreases. Finally, many of the changes associated with aging are actually the result of illness, injury, and life style variables rather than aging, per se. Our use of age in this report reflects some unique explanation of psychological or physiological functioning that is not captured by medical or ability testing. Thus, the possibility exists of retarding, arresting, or reversing declines as a result of various interventions. It is unlikely that all or almost all people of any age group under 70 could be shown to be unable to meet the requirements of most public safety tasks, and we believe that municipal policies pertaining to health and fitness significantly influence the likelihood of all or nearly all such incumbents failing. Further, although there might be some individuals who are incapable of meeting performance standards, these individuals can be identified through the use of tests, thus decreasing the probability that a worker will be the victim of age-discrimination.

In sum, then, we feel that neither the sudden incapacitation nor the accumulated deficit models are well served by an age-based mandatory retirement rule. It would appear that the public well being is better served by a testing regimen than by a chronological age decision rule when it comes to retirement decisions. Consequently, we recommend that the exemption of public safety officers from the provisions of the 1986 ADEA amendments be eliminated and that these occupations be treated like all others covered by the ADEA.

## NOTES OF DECISIONS

Cost-of-living adjustments 8  
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## 4. Refunds

Person, who had obtained a refund of his contribution to civil service retirement account, was not entitled to have the refunded amount redeposited to the account, in view of fact that he was no longer employed by government in any capacity when he sought to make the redeposit, and, thus, he was not entitled to use the period of service for which he received a refund in determining his entitlement to a civil service retirement annuity. *Abubot for Abubot's Estate v. U.S.*, 1982, 1 Cl.Ct. 296.

Applicant was not entitled to disability retirement based upon his service prior to his receipt of lump-sum payment of his retirement reduction, where lump-sum payment was not redeposited by applicant when he was subsequently reemployed in a position subject to the Civil Service Retirement System. *Broad v. Office of Personnel Management*, M.S.P.B.1992, 53 M.S.P.R. 575.

Applicant for deferred civil service retirement annuity did not prove, by preponderant evidence, that he did not receive a refund of his retirement contributions, where routine records of Office of Personnel Management (OPM) established application for refund and issuance of voucher for refund check; moreover, there was no evidence that check was not issued by the Department of the Treasury and applicant introduced no probative evidence showing nonreceipt of retirement contributions. *Rint v. Office of Personnel Management*, M.S.P.B.1991, 48 M.S.P.R. 69.

Former employee who received refund of retirement deductions was not entitled to an annuity on theory that, when he was reemployed in a permanent position, agency was obligated to require him to make a redeposit into retirement fund, and deprived him of an annuity because it did not inform him of the need to do so; employee who served under an indefinite appointment excluded from coverage under the Civil Service

Retirement System (CSRS), was ineligible to redeposit his refund for reemployment, and thus agency was not obligated to either require or inform employee to redeposit his refund for credit. *Sanchez v. Office of Personnel Management*, MSPB 1991, 47 M.S.P.R. 343.

## 6. Contributions as assets

In view of plain language of unemployment compensation statute, AS 23.20.362, stating that only that part of pension or similar periodic payment that is attributable to contributions of the insured worker is excluded in determining disqualifying income, Department of Labor correctly concluded that out of each \$1,490 monthly pension payment the 50 percent contributed by employer constituted disqualifying income. *Wentland v. Employment Sec. Div., Dept. of Labor, Alaska* 1983, 671 P.2d 1285.

## 7. Community property rights

To the extent that community contributed to the husband's federal civil service disability benefits, they were community property; the husband's right to receive the benefits did not vest before his marriage to wife. *Hughes v. Hughes*, 1981, 634 P.2d 1271, 96 N.M. 719.

## 8. Cost-of-living adjustments

Fact that federal retirees paid their own money into the Civil Service Retirement and Disability Fund did not mandate conclusion that a contract implied in fact arose which would bind government to continue to provide cost-of-living adjustment increases subsequent to retirement. *Zucker v. U.S.*, C.A.Fed.1985, 758 F.2d 637, certiorari denied 106 S.Ct. 129, 474 U.S. 842, 88 L.Ed.2d 105.

## 9. Duty of agency

Office of Personnel Management (OPM) erred when it failed to address retiree's contention that she had not been afforded opportunity to make a deposit for post-1966 military service, or specific request to be allowed to make such a deposit. *Wilber v. Office of Personnel Management*, MSPB 1991, 47 M.S.P.R. 444.

## ✓ § 8335. Mandatory separation

(a) An air traffic controller shall be separated from the service on the last day of the month in which he becomes 56 years of age. The Secretary, under such regulations as he may prescribe, may exempt a controller having exceptional skills and experience as a controller from the automatic separation provisions of this subsection until that controller becomes 61 years of age. The Secretary shall notify the controller in writing of the date of separation at least 60 days before that date. Action to separate the controller is not effective, without the consent of the controller, until the last day of the month in which the 60-day notice expires.

(b) A firefighter who is otherwise eligible for immediate retirement under section 8336(c) shall be separated from the service on the last day of the month in which such firefighter becomes 55 years of age or completes 20 years of service if then over that age. A law enforcement officer who is otherwise eligible for immediate retirement under section 8336(c) shall be separated from the service on the last day of the month in which that officer becomes 57 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee

[attached]

ACTS OF DECISIONS

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Fact that federal retirees paid their own money into the Civil Service Retirement and Disability Fund did not mandate conclusion that a contract implied in fact arose which would bind government to continue to provide cost-of-living adjustment increases subsequent to retirement. *Zucker v. U.S.*, C.A.Fed.1985, 758 F.2d 637, certiorari denied 106 S.Ct. 123, 474 U.S. 842, 83 L.Ed.2d 105.

9. Duty of agency

Office of Personnel Management (OPM) erred when it failed to address retiree's contention that she had not been afforded opportunity to make a deposit for post-1956 military service, or specific request to be allowed to make such a deposit. *Wilber v. Office of Personnel Management*, MSPB 1991, 47 M.S.P.R. 444.

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be separated from the service on the last day of the 60 days of age. The Secretary, under such regulations as the controller having exceptional skills and experience as a controller provisions of this subsection until that date. The Secretary shall notify the controller in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the member, until the last day of the month in which the 60-day notice expires.

be eligible for immediate retirement under section 8336(c) on the last day of the month in which such member becomes 60 years of age or completes 20 years of service if then over that age. The employing office shall notify the employee

in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

(c) An employee of the Alaska Railroad in Alaska and an employee who is a citizen of the United States employed on the Isthmus of Panama by the Panama Canal Commission, who becomes 62 years of age and completes 15 years of service in Alaska or on the Isthmus of Panama shall be automatically separated from the service. The separation is effective on the last day of the month in which the employee becomes age 62 or completes 15 years of service in Alaska or on the Isthmus of Panama if then over that age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

(d) A member of the Capitol Police who is otherwise eligible for immediate retirement under section 8336(m) shall be separated from the service on the last day of the month in which such member becomes 55 years of age or completes 20 years of service if then over that age. The Capitol Police Board, when in its judgment the public interest so requires, may exempt such a member from automatic separation under this subsection until that member becomes 60 years of age. The Board shall notify the member in writing of the date of separation at least 60 days in advance thereof. Action to separate the member is not effective, without the consent of the member, until the last day of the month in which the 60-day notice expires.

(e) The President, by Executive order, may exempt an employee (other than a member of the Capitol Police) from automatic separation under this section when he determines the public interest so requires.

(As amended Pub.L. 96-70, Title III, § 3302(e)(3), Sept. 27, 1979, 93 Stat. 498; Pub.L. 96-347, § 1(b), Sept. 12, 1980, 94 Stat. 1150; Pub.L. 101-428, § 2(b)(1)(A), (2), Oct. 15, 1990, 104 Stat. 928; Pub.L. 101-509, Title IV, § 409(a), Nov. 5, 1990, 104 Stat. 1468; Pub.L. 102-378, § 2(60), Oct. 2, 1992, 106 Stat. 1354.)

HISTORICAL AND STATUTORY NOTES

Codification

Amendment by section 409(a)(1) of Pub.L. 101-509, which directed the striking out of "law enforcement officer of a" from subsec. (b) of this section, was executed by striking out "law enforcement officer or a" as the probable intent of Congress.

Pub.L. 96-70, § 3302(e)(3), purported to amend subsec. (e) of this section. Previously, Pub.L. 96-256, § 5(c), revised and restated the provisions of subsec. (e) in subsec. (c), and struck out subsec. (e). Accordingly, the amendment by Pub.L. 96-70 was executed to subsec. (c).

1992 Amendments

Subsec. (b). Pub.L. 102-378, § 2(60), substituted "section 8336(c)" for "section 8336(c) of this title" and "such firefighter" for "he".

1990 Amendment

Subsec. (b). Pub.L. 101-509, § 409(a)(1), struck out "law enforcement officer or a" preceding "firefighter who is". See Codification note under this section.

Pub.L. 101-509, § 409(a)(2), added provisions setting forth when a law enforcement officer otherwise eligible for retirement under section 8336(c) shall be separated from service.

Subsec. (d). Pub.L. 101-428, § 2(b)(1)(A), added subsec. (d). Former subsec. (d) was redesignated (e).

Subsec. (e). Pub.L. 101-428, § 2(b)(1)(A), (2), redesignated former subsec. (d) as (e), and, as so

redesignated, inserted "(other than a member of the Capitol Police)" following "employee".

1980 Amendment

Subsec. (a). Pub.L. 96-347 substituted "Secretary" for "Secretary of Transportation" in two places.

1979 Amendment

Subsec. (c). Pub.L. 96-70 substituted "Panama Canal Commission" for "Panama Canal Company or the Canal Zone Government". See Codification note above.

Effective Date of 1992 Amendments

Amendment by section 2(60) of Pub.L. 102-378 effective Nov. 5, 1990, see section 9(b)(6) of Pub.L. 102-378, set out as a note under section 6303 of this title.

Effective Date of 1990 Amendment

Section 409(c) of Pub.L. 101-509 provided that: "For the purposes of this section [amending subsec. (b) of this section and section 8425(b) of this title], the effective date shall be the date of enactment of this Act [Nov. 5, 1990]."

Section 2(b)(1)(B) of Pub.L. 101-428 provided that: "The amendment made by subparagraph (A) [enacting subsec. (d) and redesignating former subsec. (d) as (e)] shall take effect two years after the date of enactment of this Act [Oct. 15, 1990]."

**Effective Date of 1980 Amendment**

Amendment by Pub.L. 96-347 effective on the later of Oct. 1, 1980 or the ninetieth day after Sept. 12, 1980, see section 3 of Pub.L. 96-347, set out as a note under section 2109 of this title.

**Mandatory Separation Provisions Not to Be Applied Retroactively**

Pub.L. 99-556, Title V, § 504, Oct. 27, 1986, 100 Stat. 3141, provided that:

"(a) In general.—Section 8335(a) of title 5, United States Code [subsec. (a) of this section], shall not apply to any air traffic controller appointed before January 1, 1987.

"(b) Definition.—For purposes of this section, the term 'air traffic controller' means any individual who—

"(1) is an air traffic controller within the meaning of section 2109(1) of title 5, United

States Code [section 2109(1) of this title], as in effect on January 1, 1987; but

"(2) is not an air traffic controller within the meaning of section 2109(1) of title 5, United States Code, as in effect on December 31, 1986."

**Nonapplicability of Subsection (a) to Department of Defense Air Traffic Controllers Appointed Before September 12, 1980**

Section 2 of Pub.L. 96-347 provided that: "Section 8335(a) of title 5, United States Code [subsec. (a) of this section], shall not apply to an individual appointed as an air traffic controller in the Department of Defense before the date of the enactment of this Act [Sept. 12, 1980]."

**Legislative History**

For legislative history and purpose of Pub.L. 96-347, see 1980 U.S. Code Cong. and Adm. News, p. 2714.

**WEST'S FEDERAL PRACTICE MANUAL**

Employee protection, executive order, see § 15401.

Judicial decisions, see § 15422.

Mandatory age retirement, see § 15419 et seq.

**NOTES OF DECISIONS**

Construction with other laws 1a  
Firefighters 8  
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Review 9

**7. Waiver**

Regular civil service retirement benefits and civil service disability retirement benefits are subject to division and partition in divorce proceeding. *Bonar v. Bonar*, Tex.Civ.App.1981, 614 S.W.2d 472.

**8. Firefighters**

Federal civil service statute [5 U.S.C.A. § 8335(b)] providing for retirement of most fire fighters at age 55 did not establish that age 55 was a bona fide occupational qualification for nonfederal fire fighters. *Johnson v. Mayor and City Council of Baltimore, Md.* 1985, 105 S.Ct. 2717, 472 U.S. 353, 86 L.Ed.2d 226, on remand 637 F.Supp. 903.

Presence of statutorily mandated retirement age of 55 for federal firefighters did not establish validity of city's defense in action under Age Discrimination in Employment, section 621 et seq. of Title 29, that age 55 constituted valid bona fide occupational qualification for local firefighters, where federal retirement scheme, unlike city's scheme, expressly allowed for individualized determinations of fitness in exceptional cases. *Orzel v. City of Wauwatosa Fire Dept.*, C.A.Wis.1983, 697 F.2d 743, certiorari denied 104 S.Ct. 484, 464 U.S. 992, 78 L.Ed.2d 680.

Merit Systems Protection Board was without jurisdiction to consider agency decision not to exempt law enforcement officer from mandatory retirement provisions of statute providing that a law enforcement officer or fire fighter who is eligible for immediate retirement shall be separated from service on last day of month in which he becomes 55 years of age; moreover, erroneous statement of appeal rights by Office of Personnel Management in its reconsideration decision did not serve to confer jurisdiction upon Board. *Conway v. Office of Personnel Management, MSPB* 1984, 19 M.S.P.R. 25.

**1. Constitutionality**

Generally, federal government or state government may constitutionally set an age for the mandatory retirement of its employees. *Martin v. Tamaki*, C.A.Cal.1979, 607 F.2d 807.

Subsec. (b) of this section, requiring mandatory retirement of law enforcement officers at age of 55, does not violate equal protection clause of U.S.C.A. Const. Amend. 14. *Bowman v. U.S. Dept. of Justice, Federal Prison System*, D.C.Va.1981, 510 F.Supp. 1183, affirmed 679 F.2d 876, certiorari denied 103 S.Ct. 494, 459 U.S. 1072, 74 L.Ed.2d 635.

**1a. Construction with other laws**

Fact that 55 was mandatory retirement age for federal law enforcement officers was not conclusive on question whether such retirement age was reasonable for state or local officers having similar duties. *Heiar v. Crawford County, Wis.*, C.A.Wis.1984, 746 F.2d 1190, certiorari denied 105 S.Ct. 3500, 472 U.S. 1027, 87 L.Ed.2d 631.

Mandatory retirement schemes approved by Congress for federal employees are not subject to strict requirements of Age Discrimination in Employment Act, section 621 et seq. of Title 29; rather, such schemes need only be rationally related to permissible government objective and only those age limitations that are so unreasonable as to constitute arbitrary and capricious exercise of legislative power will fail this test. *Orzel v. City of Wauwatosa Fire Dept.*, C.A.Wis. 1983, 697 F.2d 743, certiorari denied 104 S.Ct. 484, 464 U.S. 992, 78 L.Ed.2d 680.

States Code [section 2109(1) of this title], as in effect on January 1, 1987; but

"(2) is not an air traffic controller within the meaning of section 2109(1) of title 5, United States Code, as in effect on December 31, 1986."

**Nonapplicability of Subsection (a) to Department of Defense Air Traffic Controllers Appointed Before September 12, 1980**

Section 2 of Pub.L. 96-347 provided that: "Section 8335(a) of title 5, United States Code [subsec. (a) of this section], shall not apply to an individual appointed as an air traffic controller in the Department of Defense before the date of the enactment of this Act [Sept. 12, 1980]."

**Legislative History**

For legislative history and purpose of Pub.L. 96-347, see 1980 U.S. Code Cong. and Adm. News, p. 2714.

**9. Review**

Board may not review failure to grant exemption to mandatory retirement provision for law enforcement officers which allows head of an agency to exempt such an employee from automatic separation until that employee becomes sixty years of age. *Ryan v. Defense Investigation Service*, MSPB 1985, 25 M.S.P.R. 551.

**10. Law enforcement officers**

Fact that employee of the Defense Investigation Service was accorded, as a matter of administrative convenience, retirement benefits normally granted to law enforcement officers did not compel conclusion that he would be deemed a law enforcement officer for purposes of mandatory retirement statute, 5 U.S.C.A. § 8335(b). *Ryan v. Merit Systems Protection Bd.*, C.A.Fed. 1985, 779 F.2d 669.

Employee, who was transferred from position of investigator with the Naval Investigation Service to a position of investigator with the Defense Investigation Service, continued to perform same personnel security investigations that he had previously performed, and thus had every good reason to believe that same law enforcement retirement coverage would apply to him after transfer; therefore, notwithstanding initial determination by Director of the Bureau of Retirement, Insurance, and Occupational Health of the former Civil Service Commission that employee was not entitled to law enforcement coverage for retirement purposes, a determination which was subsequently reversed, employee was occupying a law enforcement position entitled to a retirement annuity, and thus agency could mandatorily retire him pursuant to statute providing for such retirement at 55 years of age. *Ryan v. Defense Investigation Service*, MSPB 1985, 25 M.S.P.R. 551.

**§ 8336. Immediate retirement**

[See main volume for text of (a) to (c)]

**(d) An employee who—**

(1) is separated from the service involuntarily, except by removal for cause on charges of misconduct or delinquency; or

(2) while serving in a geographic area designated by the Office of Personnel Management, is separated from the service voluntarily during a period in which the Office determines that—

(A) the agency in which the employee is serving is undergoing a major reorganization, a major reduction in force, or a major transfer of function; and

(B) a significant percent of the employees serving in such agency will be separated or subject to an immediate reduction in the rate of basic pay (without regard to subchapter VI of chapter 53 of this title or comparable provisions);

after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity. For purposes of paragraph (1) of this subsection, separation for failure to accept a directed reassignment to a position outside the commuting area of the employee concerned or to accompany a position outside of such area pursuant to a transfer of function shall not be considered to be a removal for cause on charges of misconduct or delinquency. Notwithstanding the first sentence of this subsection, an employee described in paragraph (1) of this subsection is not entitled to an annuity under this subsection if the employee has declined a reasonable offer of another position in the employee's agency for which the employee is qualified, which is not lower than 2 grades (or pay levels) below the employee's grade (or pay level), and which is within the employee's commuting area.

[See main volume for text of (e) to (g)]

(h)(1) A member of the Senior Executive Service who is removed from the Senior Executive Service for failure to be recertified as a senior executive under section 3393a or for less than fully successful executive performance (as determined under subchapter II of chapter 43 of this title) after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity.

(2) A member of the Defense Intelligence Senior Executive Service or the Senior Cryptologic Executive Service who is removed from such service for failure to be recertified as a senior executive or for less than fully successful executive performance after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity.

(3) A member of the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service who is removed from such service for failure to be recertified as a senior executive or for less than fully successful executive perfor-

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**FEDERAL PRACTICE MANUAL**

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and a showing of his efficiency and competency based upon the information specified in the statute, and where the Civil Service Commission approved and certified the continuance of an employee in the service, it was required to grant an extension for two years. 36 Op. Atty. Gen. 130.

Former section 715 of this title [now covered by this section] did not prescribe degree of efficiency which an employee of retirement age had to pass as condition of his continuation in the civil service, and such efficiency was not necessarily determined by rating established according to method provided by said section, nor was said section controlling in determining application, and head of department was warranted in giving greater weight to opinion of employee's immediate superior as best evidence of his efficiency. 1928, 35 Op. Atty. Gen. 159.

#### Unemployment insurance

United States postal employee whose employment had been terminated at age 50 by reason of mandatory retirement provision of Federal Civil Service Commission [now Office of Personnel Management] regulation was disqualified as having "voluntarily" left work under unemployment insurance statute providing that an individual should be disqualified for benefits for period of unemployment subsequent to his having retired or having left regular employment voluntarily without good cause attributable to the employment. Richardson v. Maine Employment Sec. Commission, Me. 1967, 229 Me. 326.

#### Standing to sue

Injury in fact was suffered by plaintiff in functioning of former provisions of statute which forced him to become rehired "annuitant" with Veterans' Administration at age 70 and, hence, plaintiff had standing to attack constitutionality of such provisions. Issarescu v. Cleland, D.C.R.I. 1979, 465 F. Supp. 657.

#### Waiver

Right to test constitutionality of former provisions of this section which forced plaintiff to become a rehired "annuitant" with Veterans' Administration was not waived by plaintiff's failure to attack constitutionality of such provisions at the time he was mandatorily retired where reasons for delaying an attack upon such provisions were justifiable and where length of delay was relatively slight. Issarescu v. Cleland, D.C.R.I. 1979, 465 F. Supp. 657.

### § 8336. Immediate retirement

(a) An employee who is separated from the service after becoming 55 years of age and completing 30 years of service is entitled to an annuity.

(b) An employee who is separated from the service after becoming 60 years of age and completing 20 years of service is entitled to an annuity.

✓ (c)(1) An employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer or firefighter, or any combination of such service totaling at least 20 years, is entitled to an annuity.

(2) An employee is entitled to an annuity if the employee—

(A) was a law enforcement officer or firefighter employed by the Panama Canal Company or the Canal Zone Government at any time during the period beginning March 31, 1979, and ending September 30, 1979; and

(B) is separated from the service before January 1, 2000, after becoming 48 years of age and completing 18 years of service as a law enforcement officer or firefighter, or any combination of such service totaling at least 18 years.

(d) An employee who is separated from the service—

(1) involuntarily, except by removal for cause on charges of misconduct or delinquency; or

(2) voluntarily, during a period when the agency in which the employee is serving is undergoing a major reorganization, a major reduction in force, or a major transfer of function, as determined by the Office of Personnel Management, and the employee is serving in a geographic area designated by the Office; after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity.

(e) An employee who is voluntarily or involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity.

(f) An employee who is separated from the service after becoming 62 years of age and completing 5 years of service is entitled to an annuity.

(g) A Member who is separated from the service after becoming 62 years of age and completing 5 years of civilian service or after becoming 60 years of age and completing 10 years of Member service is entitled to an annuity. A Member who is separated from the

section] meant promotion or appointment to the classified civil service of some other department than that to which the applicant might belong. 1890, 19 Op. Atty. Gen. 624.

#### 5. Residence

An applicant for reinstatement to a position in the classified service, could not, within the meaning of the term "legal residence" as used in the regulation of the Civil Service Commission, establish in Pennsylvania a legal residence separate and apart from that of her husband who was domiciled in Virginia, and at the same time continued to live with him. 1934, 37 Op. Atty. Gen. 448.

If a domicile he once established it is presumed to continue until there has been a change of residence, with the intention of establishing a new residence. 1909, 27 Op. Atty. Gen. 546.

The words "for at least one year previous," as used in former section 644 of this title [now this section] meant for at least one year next preceding. *Id.*

Although the President and the Civil Service Commissioners, could make all reasonable regulations as to the nature of the testimony required to establish the facts as to residence, they could not narrow the definition of the statutory phrase "actual bona fide residence" found in former section 643 [now this section], by requiring on the part of an applicant for examination six months' continuous physical presence in the county as well as residence. 1893, 20 Op. Atty. Gen. 649.

What constituted "an actual and bona fide resident" of a county and state was a mixed question of law and fact to be determined in each instance upon its own

peculiar facts and, although a general rule applicable to all cases could not be formulated, it was suggested that such a person would be liable to all the burdens of residence and citizenship at home, that is, he would be liable to a poll tax, his personal property could be assessed for taxation, he could be enrolled in the census, in case of war he would be liable to military duty, and, in case of death, the administration of his estate would be there. 1891, 20 Op. Atty. Gen. 62.

#### 6. Temporary absences

Minor's absence from Ohio with father, who was federal employee, during year preceding civil service examination did not defeat his right to enter examination as resident of Ohio. *Deming v. U. S.* ex rel. Ward, 1930, 37 F.2d 818, 59 App.D.C. 188.

Absence of wives and minor children of persons not in the employ of the federal service from the state of their residence would not defeat their right to enter an examination as a resident of that state. 1934, 37 Op. Atty. Gen. 448.

The temporary absence from the United States of an applicant for examination into the civil service of the United States for two years, on account of illness in her family, did not affect such person's bona fide residence and domicile in Missouri, since, as matter of fact, she went abroad with the intention of remaining temporarily and of returning to Missouri and did not abandon such intention during her absence, but at all times meant to return, and finally did return, to her home in that state. 1909, 27 Op. Atty. Gen. 566.

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### ✓ § 3307. Competitive service; maximum-age entrance requirements; exceptions

(a) Except as provided in subsections (b), (c), and (d) of this section, appropriated funds may not be used to pay an employee who establishes a maximum-age requirement for entrance into the competitive service.

(b) The Secretary of Transportation may, with the concurrence of such agent as the President may designate, determine and fix the maximum limit of age within which an original appointment to a position as an air traffic controller may be made.

(c) The Secretary of the Interior may determine and fix the minimum and maximum limits of age within which original appointments to the United States Park Police may be made.

ar facts and, although a general applicable to all cases could not be stated, it was suggested that such a man would be liable to all the burdens of residence and citizenship at home, that he would be liable to a poll tax, his real property could be assessed for taxation, he could be enrolled in the militia in case of war he would be liable to military duty, and, in case of death, the administration of his estate would be governed by the laws of the State in 1891, 20 Op. Atty. Gen. 82.

#### Temporary absences

A man's absence from Ohio with father was federal employee, during year following civil service examination did not defeat his right to enter examination as a resident of Ohio. *Deming v. U. S. ex. Ward*, 1930, 37 F.2d 818, 39 App.D.C.

A man's absence of wives and minor children of a man not in the employ of the federal government from the state of their residence did not defeat their right to enter examination as a resident of that state. 37 Op. Atty. Gen. 448.

A man's temporary absence from the United States of an applicant for examination in the civil service of the United States for two years, on account of illness in family, did not affect such person's domicile residence and domicile in Missouri, since, as matter of fact, she went away with the intention of remaining temporarily and of returning to Missouri and did not abandon such intention during her absence, but at all times meant to return, and finally did return, to her residence in that state. 1909, 27 Op. Atty. Gen.

#### Maximum-age entrance requirements

Sections (b), (c), and (d) of this title are used to pay an employee who is not qualified for entrance into the com-

mission may, with the concurrence of the President, designate, determine and fix the minimum and maximum limits of age within which an original appointment to a position may be made.

The President may determine and fix the minimum and maximum limits of age within which an original appointment to a position may be made.

(d) The head of any agency may, with the concurrence of such agent as the President may designate, determine and fix the minimum and maximum limits of age within which an original appointment may be made to a position as a law enforcement officer or firefighter, as defined by section 8331(20) and (21), respectively, of this title.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 419; Pub.L. 92-297, § 2(a), May 16, 1972, 86 Stat. 141; Pub.L. 93-350, § 1, July 12, 1974, 88 Stat. 355.

#### Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
5	U.S.C. 6330 less proviso)	June 27, 1958, ch. 452, § 302 (less proviso), 70 Stat. 355.

#### Explanatory Notes

The prohibition is restated in positive form. The word "officers" is omitted as included in "employees" in view of the definition of "employee" in section 2105.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1974 Amendment. Subsec. (a). Pub.L. 93-350, § 1(1), inserted reference to subsec. (d).

Subsec. (d). Pub.L. 93-350, § 1(2), added subsec. (d).

1972 Amendment. Pub.L. 92-297 designated existing provisions as subsec. (a) and added subssecs. (b) and (c).

Effective Date of 1974 Amendment. Section 7 of Pub.L. 93-350 provided that: "The amendments made by the first section [amending this section], and sections 2(b) [adding pars. (20) and (21) to section 8331 of this title], 5 [amending section 8330(c) of this title], and 6 [amending section 8330(d) of this title], of this Act shall become effective on the date of enactment of this Act [July 12, 1974]. The amendments made by sections 2(a) [amending section 8331(3) of this title]

and 3 [amending section 8334 of this title] of this Act shall become effective at the beginning of the first applicable pay period which begins after December 31, 1974. The amendment made by section 4 of this Act [enacting 8335(g) of this title] shall become effective on January 1, 1978."

Effective Date of 1972 Amendment. Amendment by Pub.L. 92-297 effective on the 90th day after May 16, 1972, see section 10 of Pub.L. 92-297, set out as a note under section 3381 of this title.

United States Park Police; Age Limits for Original Appointments. Pub.L. 91-73, Sept. 28, 1969, 83 Stat. 116, which provided for age limits for appointments to the United States Park Police, was repealed by Pub.L. 92-297, § 11, May 16, 1972, 86 Stat. 145, effective at the end of the eighty-ninth day after May 16, 1972. The Secretary of the Interior may now fix age limits for appointment under subsec. (c) of this section.

Legislative History. For legislative history and purpose of Pub.L. 92-297, see 1972 U.S. Code Cong. and Adm. News, p. 2287. See, also, Pub.L. 93-350, 1974 U.S. Code Cong. and Adm. News, p. 3698.

#### EXECUTIVE ORDER NO. 11817

Nov. 5, 1974, 39 F.R. 39427

#### CIVIL SERVICE COMMISSION DESIGNATED AGENT TO CONCUR WITH AGENCY DETERMINATIONS FIXING AGE LIMITS FOR MAKING ORIGINAL APPOINTMENTS RESPECTING LAW ENFORCEMENT OFFICER AND FIREFIGHTER POSITIONS

By virtue of the authority vested in me by section 3307(d) of title 5 of the United States Code [subsec. (d) of this section], as added by the first section of the Act of July 12, 1974 (Public Law

93-350; 88 Stat. 355), I hereby designate the United States Civil Service Commission as the agency to concur with determinations made by agencies to fix the

minimum and maximum limits of age [section 8331(20) and (21) of this title].  
 within which an original appointment The designation made by this order shall  
 may be made to a position as a law en- be effective as of October 15, 1974.  
 forcement officer or firefighter, as de-  
 fined by section 8331(20) and (21), respec-  
 tively, of title 5 of the United States Code

GERALD R. FORD

**Library References**

Officers ⇐18.

C.J.S. Officers § 11 et seq.

**Code of Federal Regulations**

Age requirements, see 5 CFR 338.601.

**§ 3308. Competitive service; examinations; educational requirements prohibited; exceptions**

The Civil Service Commission or other examining agency may not prescribe a minimum educational requirement for an examination for the competitive service except when the Commission decides that the duties of a scientific, technical, or professional position cannot be performed by an individual who does not have a prescribed minimum education. The Commission shall make the reasons for its decision under this section a part of its public records.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 419.

**Historical and Revision Notes**

<b>Derivation:</b>	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 854 (less 1st 2 sentences)	June 27, 1944, ch. 287, § 5 (less 1st 2 sentences), 58 Stat. 388.

**Explanatory Notes**

The prohibition is restated in positive form. The words "The Civil Service Commission or other examining agency" are added because these are the only agencies to which the prohibition could apply.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

**Library References**

Officers ⇐26(1).

C.J.S. Officers § 34.

**§ 3309. Preference eligibles; examinations; additional points for**

A preference eligible who receives a passing grade in an examination for entrance into the competitive service is entitled to additional points above his earned rating, as follows—

- (1) a preference eligible under section 2108(3)(C)-(G) of this title—10 points; and
- (2) a preference eligible under section 2108(3)(A) of this title—5 points.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 419; Pub.L. 90-83, § 1(8), Sept. 11, 1967, 81 Stat. 197.

U.S., D.C. Puerto Rico 1984, 584 F.Supp. 252,  
affirmed 775 F.2d 399.

§ 3305. Competitive service; examinations; when held

(a) The Office of Personnel Management shall hold examinations for the competitive service at least twice a year in each State and territory or possession of the United States where there are individuals to be examined.

(b) The Office shall hold an examination for a position to which an appointment has been made within the preceding 3 years, on the application of an individual who qualifies as a preference eligible under section 2108(3)(C)-(G) of this title. The examination shall be held during the quarter following the application.

(As amended Pub.L. 96-54, § 2(a)(14), (15), Aug. 14, 1979, 93 Stat. 382.)

HISTORICAL AND STATUTORY NOTES

1979 Amendment

Subsec. (a). Pub.L. 96-54, § 2(a)(14) substituted "Office of Personnel Management" for "Civil Service Commission".

Subsec. (b). Pub.L. 96-54, § 2(a)(15), substituted "Office" for "Commission".

Effective Date of 1979 Amendment

Amendment by Pub.L. 96-54 effective July 12, 1979, see section 2(b) of Pub.L. 96-54, set out as a note under section 305 of this title.

Legislative History

For legislative history and purpose of Pub.L. 96-54, see 1979 U.S. Code Cong. and Adm. News, p. 931.

§ 3306. Repealed. Pub.L. 95-228, § 1, Feb. 10, 1978, 92 Stat. 25]

HISTORICAL AND STATUTORY NOTES

Section, Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 419, related to apportionment of appointments in

the departmental service in the District of Columbia among the States, territories, etc.

✓ § 3307. Competitive service; maximum-age entrance requirements; exceptions

[See main volume for text of (a)]

[1994  
Supplementary  
sample for  
1978-1993]

(b) The Secretary may, with the concurrence of such agent as the President may designate, determine and fix the maximum limit of age within which an original appointment to a position as an air traffic controller may be made.

[See main volume for text of (c)]

(d) The head of any agency may determine and fix the minimum and maximum limits of age within which an original appointment may be made to a position as a law enforcement officer or firefighter, as defined by section 8331(20) and (21), respectively, of this title.

(e) The head of an agency may determine and fix the maximum age limit for an original appointment to a position as a firefighter or law enforcement officer, as defined by section 8401(14) or (17), respectively, of this title.

(As amended Pub.L. 96-347, § 1(b), Sept. 12, 1980, 94 Stat. 1150; Pub.L. 100-238, Title I, § 103(a)(1), Jan. 8, 1988, 101 Stat. 1744.)

HISTORICAL AND STATUTORY NOTES

1988 Amendment

Subsec. (d). Pub.L. 100-238, § 103(a)(1)(A), struck out " , with the concurrence of such agent as the President may designate," after "The head of any agency may".

Subsec. (e). Pub.L. 100-238, § 103(a)(1)(B), added subsec. (e).

Effective Date of 1987 Amendment

Section 103(f) of Pub.L. 100-238, provided that: "This section, and the amendments made by this section [amending this section and section 8401 of this title and enacting provisions set out as a note under section 8334 of this title], shall be effective as of January 1, 1987."

1980 Amendment

Subsec. (b). Pub.L. 96-347 substituted "Secretary" for "Secretary of Transportation".

Effective Date of 1980 Amendment

Amendment by Pub.L. 96-347 effective on the later of Oct. 1, 1980 or the ninetieth day after

pp. 252.

Sept. 12, 1980, see section 3 of Pub.L. 96-347, set out as a note under section 2109 of this title.

News, p. 2714. See, also, Pub.L. 100-238, 1987 U.S. Code Cong. and Adm. News, p. 3217.

examinations; when held

Management shall hold examinations for the competitive each State and territory or possession of the United to be examined.

Appointment for a position to which an appointment has years, on the application of an individual who qualifies on 2108(3)(C)-(G) of this title. The examination shall ng the application.

(15), Aug. 14, 1979, 93 Stat. 332.)

AL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 96-54, see 1979 U.S. Code Cong. and Adm. News, p. 931.

July 12, et out as

228, § 1, Feb. 10, 1978, 92 Stat. 25]

AL AND STATUTORY NOTES

80 Stat. the departmental service in the District of Columbia among the States, territories, etc.

maximum-age entrance requirements; exceptions

in volume for text of (a)]

the concurrence of such agent as the President may maximum limit of age within which an original r traffic controller may be made.

in volume for text of (c)]

determine and fix the minimum and maximum limits appointment may be made to a position as a law as defined by section 8331(20) and (21), respectively,

determine and fix the maximum age limit for an as a firefighter or law enforcement officer, as defined ively, of this title.

Sept. 12, 1980, 94 Stat. 1150; Pub.L. 100-238, Title I,

AL AND STATUTORY NOTES

Effective Date of 1987 Amendment

Section 103(f) of Pub.L. 100-238, provided that: "This section, and the amendments made by this section [amending this section and section 8401 of this title and enacting provisions set out as a note under section 8334 of this title], shall be effective as of January 1, 1987."

Effective Date of 1980 Amendment

Amendment by Pub.L. 96-347 effective on the later of Oct. 1, 1980 or the ninetieth day after

Legislative History

For legislative history and purpose of Pub.L. 96-347, see 1980 U.S. Code Cong. and Adm.

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 11817

Nov. 5, 1974, 39 F.R. 39427, as amended by Ex.Ord. No. 12107, Dec. 28, 1978, 44 F.R. 1055

OFFICE OF PERSONNEL MANAGEMENT DESIGNATED AGENT TO CONCUR WITH AGENCY DETERMINATIONS FIXING AGE LIMITS FOR MAKING ORIGINAL APPOINTMENTS RESPECTING LAW ENFORCEMENT OFFICER AND FIREFIGHTER POSITIONS

Redesignation. Section 2-101 of Ex.Ord. No. 12107, Dec. 28, 1978, 44 F.R. 1055, substituted the words "Office of Personnel Management" for the words "Civil Service Commission" or "United States Civil Service Commission"; substituted the word "Office" for the word "Commission" wherever the word "Commission" is used as a reference to United States Civil Service Com-

mission; and substituted the words "Director, Office of Personnel Management" for the words "Chairman, Civil Service Commission", "Chairman, United States Civil Service Commission", "Commissioners" or "Commissioner" wherever said word or words appeared in this Executive Order.

LIBRARY REFERENCES

C.J.S. Officers and Public Employees § 20 et seq.

NOTES OF DECISIONS

Age discrimination 3  
Bona fide occupational qualification 1  
Original appointment 2

1. Bona fide occupational qualification

Subsec. (d) of this section, authorizing head of any agency with concurrence of designated agent to determine and fix minimum and maximum limits of age within which original appointment may be made to position as law enforcement officer or fire fighter neither authorized nor approved specific age restrictions concurrently in force nor did it establish age limit of 35 years as bona fide occupational qualification under section 623(f) of Title 29. Equal Employment Opportunity Commission v. Los Angeles County, D.C.Cal.1981, 526 F.Supp. 1135, affirmed 706 F.2d 1039, certiorari denied 104 S.Ct. 984, 464 U.S. 1073, 79 L.Ed.2d 220.

2. Original appointment

Federal employee's application for new law enforcement officer position was application for

"original appointment" within meaning of statute authorizing federal agencies to set maximum hiring ages for such positions, even though applicant had previously been employed as law enforcement officer in Customs Service while under maximum age set by that agency for those positions. Francke v. U.S. Dept. of Treasury, S.D.N.Y.1989, 721 F.Supp. 47.

3. Age discrimination

Postal service's refusal to appoint anyone over age of 35 to position of postal inspector does not violate ADEA. Benford v. Frank, C.A.6 (Ohio) 1991, 943 F.2d 609.

Congress created an exception to the Age Discrimination in Employment Act (ADEA) when it enacted statute allowing federal agencies to establish maximum age limits for appointment as a law enforcement officer. Patterson v. U.S. Postal Service, C.A.11 (Fla.) 1990, 901 F.2d 927.

§ 3308. Competitive service; examinations; educational requirements prohibited; exceptions

The Office of Personnel Management or other examining agency may not prescribe a minimum educational requirement for an examination for the competitive service except when the Office decides that the duties of a scientific, technical, or professional position cannot be performed by an individual who does not have a prescribed minimum education. The Office shall make the reasons for its decision under this section a part of its public records.

(As amended Pub.L. 95-454, Title IX, § 906(a)(2), (3), Oct. 13, 1978, 92 Stat. 1224.)

HISTORICAL AND STATUTORY NOTES

1978 Amendment

Pub.L. 95-454 substituted "Office of Personnel Management" for "Civil Service Commis-

sion", and "Office" for "Commission" wherever appearing therein.



**U.S. Equal Employment Opportunity Commission  
U.S. Department of Labor**



OCT 20 1992

Honorable Thomas S. Foley,  
The Speaker,  
House of Representatives  
U.S. Capitol  
Washington, D.C.

Honorable Robert C. Byrd,  
President Pro Tempore  
U.S. Senate  
U.S. Capitol  
Washington, D.C.

Dear Sirs:

In accordance with Section 5 of the 1986 Amendments to the Age Discrimination in Employment Act (ADEA), we are submitting this summary of research concerning the use of fitness tests by police, corrections and fire departments. As mandated by Congress, the study was to determine whether tests are valid measurements of the ability and competency of police officers and fire fighters to perform the requirements of their jobs, discern which particular types of tests most effectively measure such ability and competency and develop recommendations for test standards.

The research was conducted by the Center for Applied Behavioral Sciences at Pennsylvania State University. The Center has extensive relevant experience and assembled an impressive research team for this project. The study finds that accumulated deficits in abilities are only marginally associated with chronological age and can be documented with available tests that are better predictors than age. It also concludes that the risk of experiencing a catastrophic medical event that would compromise public safety is so small as to eliminate this factor in the debate regarding age-based retirement. Finally, the report recommends that the exemption of public safety officers from the provisions of the 1986 ADEA amendments be eliminated. The transmittal of this study, does not in any way, indicate the administration's support or rejection of its policy conclusions. We hope that the report will enhance future considerations of mandatory retirement ages in police, corrections and fire departments.

Sincerely yours,

*Lynn Martin*

Lynn Martin  
Secretary  
Department of Labor

*E. J. Kemp, Jr.*

Evan J. Kemp, Jr.  
Chairman  
Equal Employment  
Opportunity Commission

**ALTERNATIVES TO CHRONOLOGICAL AGE  
IN DETERMINING STANDARDS OF  
SUITABILITY FOR PUBLIC SAFETY JOBS**

**Executive Summary**

**Principal Investigator**

**Frank J. Landy, Ph.D., The Pennsylvania State University**

**Associate Investigators**

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Edwin A. Fleishman, Ph.D., George Mason University  
Deborah L. Gebhardt, Ph.D., Human Performance Systems, Inc.  
James L. Hodgson, Ph.D., The Pennsylvania State University  
W. Larry Kenney, Ph.D., The Pennsylvania State University  
John R. Nesselroade, Ph.D., University of Virginia  
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Peter B. Raven, Ph.D., Texas College of Osteopathic Medicine  
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Robert J. Vance, Ph.D., The Pennsylvania State University  
Steven H. Zarit, Ph.D., The Pennsylvania State University**

## EXECUTIVE SUMMARY

The Age Discrimination in Employment Act (ADEA), as amended in 1986, removed the upper age-cap of 70 thus eliminating mandatory retirement based on chronological age for all but select occupations. These occupations include employees serving under contracts of unlimited tenure at institutions of higher education and public safety officers. With respect to these areas, Congress fashioned temporary exemptions that are scheduled to expire in 1993. Congress further directed that pertinent studies be completed prior to the expiration date of the exemptions. The National Academy of Sciences has recently issued a report suggesting the elimination of the ADEA exemption for tenured college faculty based on a comprehensive review of research and policy (Hammond & Morgan, 1991). The Center for Applied Behavioral Sciences at Penn State University was given the responsibility of conducting a similar study related to the value of age-based retirement for public safety officers.

The temporary exemption for certain public safety officers permits State and local governments, in certain circumstances, to utilize age limitations for hiring and discharging law enforcement officers and fire fighters. Nevertheless, the ADEA was designed principally to promote the employment of older persons based on individual ability rather than age and to prohibit arbitrary age discrimination in employment. Thus, there is ample reason to assess carefully whether there is a bona fide need for using age as a controlling factor in making employment decisions. It was our responsibility to determine if there were tests available that

could be shown to be job-related, cost effective, and safe for the test taker. If this were the case, then a comparative recommendation might be made contrasting chronological age with tests as a predictor.

There are two sets of circumstances that might be thought to compromise the performance of public safety tasks. The first is a sudden incapacitation precipitated by a catastrophic medical event such as a myocardial infarction (heart attack). The second set of circumstances might be described as accumulated deficit. In this latter situation, an individual might gradually deteriorate with respect to a particular ability until that person is no longer capable of performing a public safety task in a reasonably efficient manner. As an example, an incumbent's memory might degenerate to the point that he or she forgets the correct sequence of a critical procedure and creates a hazard to the public and fellow workers by using the wrong procedure. The central question, then, is the extent to which testing (in lieu of age) can predict the onset of either a sudden incapacitation in an individual who was previously without symptoms or can identify the point at which an individual will fall below some critical minimal level on an ability required for safe and efficient performance of public safety tasks.

In addressing these issues, the project team considered many sources of information. These included research published in scientific journals, technical reports, current practices in public safety agencies, extant data sets related to fitness, illness, and

injury, opinions of knowledgeable professional groups, and the shared expertise of task team members. Our conclusions and recommendations are based on these information sources. Although we were aware of the various public policy implications of our recommendations, we were careful not to allow those to influence these recommendations.

Based on our review of material available to us, we came to several conclusions. They are as follows:

The risk of experiencing a catastrophic medical event that would compromise public safety is so small as to eliminate this factor in the debate regarding age-based retirement. The responsibilities of public safety officers only occasionally involve the direct threat to the well being of citizens and fellow officers. Further, the base rate for the occurrence of catastrophic medical events leading to sudden incapacitation in the work place is generally low and not well predicted by age. The joint probability of the occurrence of sudden incapacitation in an asymptomatic public safety officer while performing a task directly related to protecting the public is vanishingly small. Further, there are tests available for predicting the probability of such an event that are more effective than age and with lesser adverse impact on older employees.

Accumulated deficits in abilities are only marginally associated with chronological age and can be documented with available tests that are better predictors than age. There are substantial ability differences among individuals of any age

grouping. This variability increases with chronological age. Thus, it is fair to say that any statements about age groups based on averages will not be accurate about individuals. Further, even within individuals, changes in abilities are often irregular rather than gradual and predictable. Thus, individuals can be characterized as moving through a series of plateaus, often evidencing increases in ability as well as decreases. Finally, many of the changes associated with aging are actually the result of illness, injury, and life style variables rather than aging, per se. Thus, the possibility exists of retarding, arresting, or reversing declines as a result of various interventions. It is unlikely that all or almost all people of any age group under 70 could be shown to be unable to meet the requirements of most public safety tasks, and we believe that municipal policies pertaining to health and fitness significantly influence the likelihood of all or nearly all such incumbents failing. Further, although there might be some individuals who are incapable of meeting performance standards, these individuals can be identified through the use of tests, thus decreasing the probability that a worker will be the victim of age-discrimination.

Medical and ability tests for individual retirement decisions can be shown to be reliable, valid, and job related using existing testing technology. The proper implementation of medical and ability testing to identify individuals who may not be able to meet the performance standards of public safety jobs requires that agencies pay careful attention to professionally recognized testing

standards (e.g., Principles for the Validation and Use of Personnel Selection Procedures, published by the Society for Industrial and Organizational Psychology). Of particular concern are the reliability, validity, job relatedness, and fairness of any such test.

Reliability refers to the extent to which individuals' scores on a test are stable or repeatable. Several procedures are available for estimating the reliability of a test with the most common ones yielding a reliability coefficient. A minimum reliability coefficient of .70 provides confidence that a test has sufficient reliability for use in making personnel decisions.

Validity and job relatedness are both concepts addressing the degree to which decisions or inferences about job behaviors or performance, based on test scores, are accurate, meaningful, and supported by evidence. In the present case, the evidence could be obtained from empirical data concerning the existence of a statistically significant correlation between test scores and measures of job performance. In addition, for some tests, especially medical and physiological tests, the evidence could be developed from a consideration of the relevance of the content of the test protocol for the performance of the job in question. Here, the links between the medical condition or the physiological function assessed by the test and the ability to perform important public safety tasks would be established by consensual expert judgment.

Fairness is a social concept, not a psychometric or technical

one. It refers to a minimization of the adverse impact of a personnel decision system while providing for sufficient validity of the resulting decisions. That is, tests which demonstrate mean score differences among individuals of different gender, racial, or ethnic groups must have demonstrable job relatedness and should be used only if other tests with fewer such mean differences and equivalent job relatedness do not exist.

In sum, then, we feel that neither the sudden incapacitation nor the accumulated deficit models are well served by an age-based mandatory retirement rule. It would appear that the public well being is better served by a testing regimen than by a chronological age decision rule when it comes to retirement decisions. Consequently, we recommend that the exemption of public safety officers promulgated in the 1986 ADEA amendments not be renewed after its scheduled expiration date..

#### SUMMARY AND RECOMMENDATIONS/CONCLUSIONS

##### Heuristic Model of Age as a BFOQ for Retirement Decisions

In the following sections, we will consider the model presented in Figure 1 (Flow Diagram for Age as a BFOQ) as a way of summarizing the considerations and discussions of the project team. We do this in the hope that it will assist the reader in understanding the logic and data that we depended on in coming to our conclusions and recommendations. The discussion will follow the model directly and each section will correspond to one of the

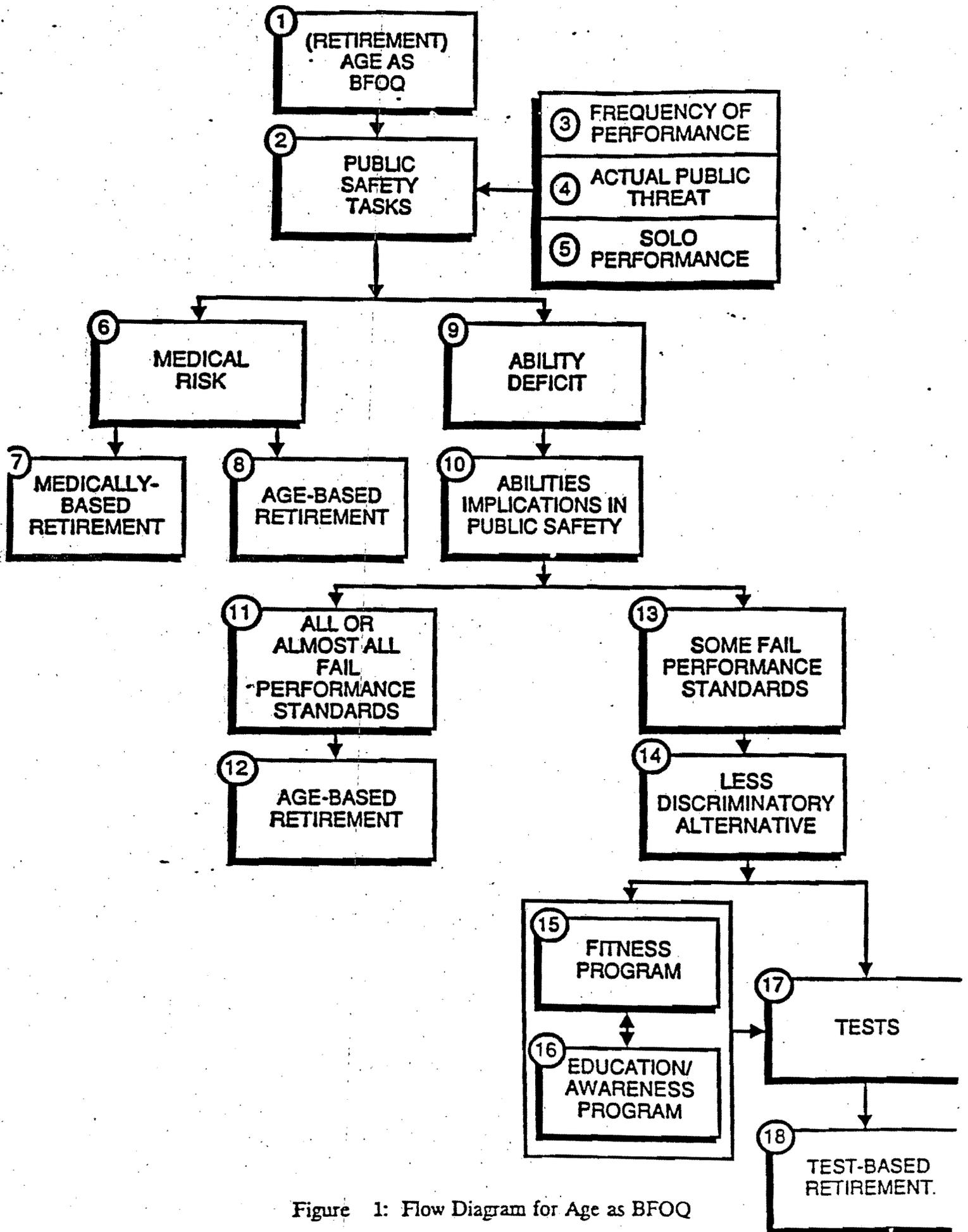


Figure 1: Flow Diagram for Age as BFOQ

numbered boxes.

The Age Discrimination in Employment Act ("ADEA") of 1967, as amended, makes it unlawful for an employer to discriminate against persons age 40 and older on the basis of age unless one of the Act's exemptions is applicable. One such exemption permits the use of age if it is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business (the BFOQ defense)

On October 31, 1986 President Reagan signed into law a bill amending the ADEA to permit state and local police, fire, and correction departments to enforce, until January 1, 1994, the maximum hiring/mandatory retirement provision in effect on March 3, 1983. In effect, this amendment permits law enforcement and fire fighting departments to use age limitations, for a seven-year period, without having to prove the applicability of the BFOQ exemption.

1. (Retirement) Age as a BFOQ: In order to establish a BFOQ defense, EEOC regulations require the following,

An employer asserting a BFOQ defense has the burden of proving that (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 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. If 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 (29 CFR 1625.6(b)(1)).

2. Public Safety Tasks: It is often assumed that all of a public safety officer's activities relate directly to the safety of the public. Our task analyses demonstrate that this is not the case. In fact, the public safety is implicated in only a subset of the tasks that comprise each of the positions under consideration. Further, the number of tasks varies by position level in the organization. Thus, for example, a corrections lieutenant performs 38 tasks that would involve the public safety while the job of a fire chief includes 75 such tasks.

3. Frequency of Performance: As we suggested in the section dealing with medical risk, the actual frequencies with which public safety tasks are performed are often low, thus limiting the risk to the public even more. For example, approximately two-thirds of the tasks with public safety consequences performed by police officers are performed less than once a week. Similar patterns hold for corrections officers and fire fighters.

4. Actual Public Threat: Another related issue is the extent to which the public safety is actually rather than potentially threatened. For example, one of the tasks of a fire fighter that might jeopardize public safety if not performed effectively is ventilation. If heat and gases are not eliminated quickly from a structure that is on fire, flashover (spontaneous combustion of the affected area) might occur. This would jeopardize other fire fighters in the immediate vicinity as well as residents of the structure. It is not true, however, that flashover is a likelihood

in every ventilation situation or that there are individuals (other than the fire fighter) in the vicinity who would be killed or injured if flashover did occur. Similar examples can be constructed for police and corrections officers. It is important to recognize then that every threat to public safety is not expected to occur with 100 percent certainty just as we do not expect 100 percent of public safety tasks to actually involve public safety.

5. Solo Performance: Finally, there is the issue of individual versus group performance. Since communications systems among public safety workers at the site of an event is often excellent (through radio communication), it is unlikely that other workers would be unaware of a problem in job performance were it to occur. Further, it is often the case that there are many fellow workers in the immediate vicinity to help with a task that is being performed ineffectively by a single performer. As an example, it is common for a police officer to be joined by several other officers and a supervisor at any scene involving the public safety. Dispatchers regularly provide substantial back-up (or "defense in depth"). The same is true in most fire and corrections situations. Thus, it is unlikely in most instances, that the public will have to depend on the abilities of only one person performing a task.

6. Medical Risk: There are two distinct circumstances that could be explored with respect to understanding why chronological age may function as a predictor of (in)effectiveness. The first

set of circumstances relates to medical risk and the second to ability declines that result from aging. In this section we will consider the issue of medical risk and in the next section we will examine ability decline. It might be hypothesized that all or almost all of the individuals above a certain age are likely to fall victim to a set of medical conditions that would render them unable to complete their job duties. These medical conditions may be further classified as appearing in either symptomatic or asymptomatic individuals.

7. Medically-Based Retirement: Symptomatic individuals are not an issue since the medical conditions we are concerned with are also the symptoms. Thus, there is no need to use age as a criterion in these cases since we have direct evidence of the incapacitation itself in the form of the symptoms. In Figure 8-1, we have considered this as element #7, medically-based retirement. In fact, the term "retirement" might be inappropriate here since it is really a classic disability issue rather than a retirement issue. The point is that an individual might be forced to leave the work place as a result of medical condition that might compromise the public safety.

8. Age-Based Retirement: More problematic is the asymptomatic individual. In this latter case, the challenge is to predict who is likely to experience a major medical catastrophic event that would result in sudden incapacitation and, consequently, jeopardize the public safety. One possible predictor of this sudden incapacitation might be age and if all or almost all of the

people who reached a particular age were shown to be at substantial risk for the occurrence of a catastrophic medical event (such as an Myocardial Infarction), then age might very well function as a BFOQ and retirement decisions might well be driven by chronological age. However, as concluded in Chapter 6 of the report, the evidence does not support age as a BFOQ due to the low probability that a sudden incapacitation will compromise the public safety at any age. Thus, it seems reasonable to conclude that medical risk is minimal when abandoning chronological age as a BFOQ and we can concentrate on the issue of ability deficit.

9. Ability Deficit: There is little reason to feel confident that all abilities decline at similar rates for all individuals as a result of aging per se. In fact, many of the declines noted can be attributed to injury, illness, and lifestyle variables rather than aging. Further, there is reason to believe that ability declines that do appear are much less dramatic than had been suggested by earlier research. This is the result of more appropriate measurement designs that employ longitudinal rather than cross-sectional methods of data collection. It is also true that there is wide variability among and within individuals with respect to ability profiles. This is just as true of cognitive as it is of physical abilities. Thus, averages are not good indicators of individual ability levels and the average ability of a 50, 60, or 70-year-old is not a useful basis for estimating individual capabilities and limitations. Thus, generally speaking, we have no confidence in concluding that ability declines are so uniform, common, or dramatic as to warrant the selection of age as a decision criterion. Nevertheless, for the sake of argument, let us assume that these declines are uniform, common and dramatic. There are still some ancillary questions that must be considered.

10. Implicated Abilities: Even though some abilities might

decline with age, for purposes of our project, we are really only concerned with those that have relevance for the performance of public safety tasks (as implied earlier in the discussion of element #2). It should also be noted (as illustrated in our analyses) that many abilities are implicated in the performance of only one or a small number of public safety tasks. Thus, we are concerned only with the subset of abilities that support the subset of public safety tasks. As an example, a fire fighter might need social skills to get along with fellow fire fighters at the fire house but since social skills are not implicated in the performance of public safety tasks, then we are unconcerned with any possible decline of these skills that might be associated with chronological age. On the other hand, stamina seems to be heavily implicated in the performance of fire fighter tasks directly associated with protecting the public, thus we would be concerned with any decline in stamina that might be associated with chronological age.

11. All or Almost All Fail Performance Standards: If all or almost all incumbents above a given age were unable to perform public safety tasks, then age as a BFOQ might very well be warranted. But it is our belief that even if all or almost all incumbents above a certain age could be shown to be incapable of performing a particular task, it is still unlikely that the public safety would be seriously compromised since these tasks occur so infrequently, often do not affect the public safety in any concrete way and could be performed by coworkers. The other side of the coin, however, is the extent to which those same individuals might have some difficulty in reliably performing a public safety task because of the decline of one ability might actually be able to compensate for this decline with an abundance of another ability.

In the case of public safety officers, a premium is placed on experience in similar situations such that "wisdom" may very well compensate for other abilities in particular situations.

12. Age-Based Retirement: Assuming that the frequency of performance were high enough, the actual public threat exceeded some minimum, and that solo performance was anticipated, if all or almost all of the incumbents of a particular age were to fail to meet performance standards, then it would be feasible to use age as a BFOQ.

13. Some Fail Performance Standards: The arguments related to some failing performance standards are similar to those presented above for the all or almost all condition. The tasks are still infrequent, seldom involve the public directly, and can be performed by others if necessary. Also, as described above, it may very well be that other abilities or knowledge can compensate for abilities compromised by age (e.g., wisdom).

The general point to be made about the issues raised above in elements #9 and #10 is that the failure to perform a critical task associated with public safety is an extremely unlikely event for multiple reasons.

14. Less Discriminatory Alternative: In circumstances where some incumbents above a certain age cannot perform a task at a level compatible with public safety, the BFOQ rules suggest the search for an equally effective predictor with less adverse impact. It is our belief that chronological age is not a good predictor of abilities or performance. We would suggest that tests (Element #17) are better predictors of such attributes. Thus, tests do represent a less discriminatory alternative and if an incumbent failed to pass a requisite test, retirement might be

indicated (Element #18). In addition, there are clear interventions (training, health and fitness interventions) that can increase the capacity of individuals to perform these critical public safety tasks (as well as increase the probability that the individual would pass the critical requisite test) when called upon to do so. Thus, a fitness program (Element #15) and/or an educational or awareness program (Element #16) might also represent an alternative mechanism with equal or greater job relatedness and lesser adverse impact to the extent to which these interventions prepare an individual to pass a job-related test associated predictive of the performance of public safety tasks. It is conceivable that successful completion of the fitness program might, in and of itself, constitute the "test" on which retirement decisions are based, such that an individual might present a form of "certification" of readiness to perform public safety tasks through completion of that program. If the individual were either to fail the relevant test(s) or fail to complete the mandated fitness program, then the result would be forced retirement, as indicated by element #18.

#### Summary

By considering the elements described above (as documented in substantial detail in the body of the main report), the reader can see more clearly how we arrived at our ultimate recommendation. We believe that age is a poor predictor of individual capacity and limitation. Further, we believe that the public safety is seldom at substantial risk from ineffective performance of the single public safety officer. Thus, we cannot recommend the retention of chronological age as a criterion for mandatory retirement

decisions.

#### Executive Summary of Medical Section (Sudden Incapacitation)

The rationale for age-based mandatory retirement of public safety officers is to diminish the risk to the public and coworkers of sudden, unexpected medical incapacitation. Since the chief cause of such medical incapacitation is heart attack, mandatory retirement has naturally focused on the identification of individuals at high risk of cardiac incapacitation. In general, these are individuals whose coronary arteries have become severely narrowed, even in the absence of warning symptoms. Coronary artery disease can be diagnosed only by coronary arteriography, a diagnostic procedure that visualizes the coronary arteries directly. Logically, since no other diagnostic procedures or clinical attribute accurately predicts the presence or extent of coronary artery disease, performance of this procedure could provide a rational basis for mandatory retirement. However, since coronary arteriography is not free of risk or cost, it is an impractical basis for mandatory retirement policy. Hence, age has been advanced as a bona fide occupational qualification (BFOQ).

However, this argument for age as a BFOQ provides a grossly inadequate medical basis for mandatory retirement of public safety officers for the following reasons, which are more fully developed below:

1. Among individuals not known to have coronary artery disease, the risk of sudden incapacitation due to heart disease is extremely low; even among individuals aged 60, the age at which mandatory retirement of public safety officers is common, it is less than 2 cases per thousand i.e., 0.002 per year.

2. Few heart attacks occurring in public safety officers pose a risk to the public or coworkers. To do so, a heart attack must result in sudden incapacitation of the public safety officer during a critical job-related activity in the absence of any mitigating action by one or more co-workers. Among a work force of 500 public safety officers this train of events is conservatively estimated to occur once every 25 years.

3. Assessment strategies based on clinical attributes and the results of specialized medical tests, especially exercise tests, result in a lower risk in those continuing to work and a smaller proportion of needlessly retired individuals than reliance on age alone.

The risk of sudden incapacitation among healthy individuals is very low. This conclusion is supported by a variety of scientific studies that have evaluated the actual rate of sudden cardiac events among individuals undergoing a baseline evaluation that included age, coronary risk factors such as hypertension and smoking, and the results of specialized medical tests including exercise tests and coronary arteriography. It is important to note that the risk of heart attack has diminished by 25-30% during the past 25 years, due to a reduction in the rate of heart attacks and the mortality resulting from them. Changes in lifestyle and advanced treatment of heart attack both appear to contribute.

Although the annual risk of sudden incapacitation increases nearly six-fold between the age of 40 and 60, even at age 60 it is still less than 0.2%. The rate of cardiac events is greater among individuals who develop ischemic chest pain i.e. angina pectoris, which results from insufficient coronary blood flow due to narrowed coronary arteries. However, the appearance of angina pectoris

affords the opportunity for clinical evaluation and consideration of treatments that reduce the risk of sudden incapacitation.

Although the physical circumstances of public safety work, especially fire fighting, substantially increase cardiac work, most follow-up studies of public safety officers reveal a risk of sudden incapacitation no higher than that of non-public safety officers of the same age.

From a theoretical and public policy perspective, precise identification of individuals at increased risk of sudden incapacitation is ideal. In practice, this is not possible. For example, even among a group of individuals whose coronary artery disease has been demonstrated with coronary arteriography, identification of the specific individual who will develop sudden incapacitation is very imprecise. Hence, identifying "high risk" individuals is tantamount to identifying groups of "high risk" individuals. One such group is composed of individuals whose coronary artery disease is manifested by cardiac symptoms (angina pectoris) or clinical or electrocardiographic evidence of heart attack. Among this group, the incidence of sudden incapacitation is roughly 6 times higher than among individuals with no previous evidence of coronary artery disease.

Coronary risk factors are also helpful in identifying groups of individuals at higher risk of sudden incapacitation. Compared to individuals with no coronary risk factors, those with multiple risk factors including male gender, advanced age, hypertension, smoking, diabetes mellitus, high blood cholesterol, and resting electrocardiographic abnormalities experience as much as thirty-fold increase in the risk of sudden incapacitation. In general, the same increase associated with coronary risk factors

noted among the general population applies to public safety officers.

Sudden incapacitation occurring in public safety officers seldom poses a risk to the public or to coworkers. More than 80% of heart attacks occur during sleep, at rest or during minimal physical activity. There is no compelling evidence that the rate of heart attacks on the job is higher than the rate off the job, even among public safety officers whose tasks involve heavy physical effort, psychological stressors or exposure to heat, toxic fumes, etc. Moreover, the majority of individuals experiencing sudden incapacitation, including public safety officers, have prior evidence of coronary artery disease that enables evaluation and treatment; their medical status is evaluated upon hire and at intervals thereafter. A risk to the public and to coworkers exists only during critical occupational tasks. Like others, public safety officers spend less than one quarter of their time at work; well under one quarter of the time spent by public safety officers on the job is devoted to physical or psychologically stressful activity. Moreover, risk is further diminished when one considers that, in addition to the foregoing factors only 50% of heart attacks are suddenly incapacitating i.e. occurring with fewer than 30 minutes warning. Finally, even when heart attacks are sudden and incapacitating, they usually do not materially affect the outcome of public safety tasks, due to the mitigating actions of coworkers. Consequently, in the worse case, in which an individual without evidence of coronary artery disease experiences sudden, significant incapacitation during the performance of an activity in which no mitigating action by coworkers is possible, is extremely rare.

Assessment strategies based on clinical attributes and specialized test results are more effective than age alone in predicting sudden incapacitation. Decisions regarding the mandatory retirement of public safety officers must balance the risk to the public of retaining groups of "high risk" individuals against needlessly retiring "low risk" groups of individuals. Much of the impetus to the use of age as a BFOQ arises from the impracticability of performing coronary arteriography to define coronary artery disease. However, the incidence of sudden incapacitation, not the prevalence of coronary artery disease, is the more relevant criterion in policies regarding mandatory retirement. This is because of the following:

a. The prevalence of coronary artery disease among asymptomatic individuals well below the mandatory retirement age of 60 years is lower than that of older individuals. However, since these younger individuals are substantially more numerous in the work force than older individuals, they constitute the greatest pool of individuals with coronary artery disease.

b. Similarly, the incidence of sudden incapacitation among asymptomatic individuals well below the mandatory retirement age of 60 years is lower than that of older individuals. However, since these younger individuals are substantially more numerous in the work force than older individuals, they constitute the greatest pool of individuals at risk for sudden incapacitation. Retirement of asymptomatic individuals at age 60 would only minimally decrease the risks to the public.

c. Evaluation strategies based on clinical attributes and the results of specialized medical tests result in a lower risk among those continuing to work and a lower rate of needless

retirement than age alone. Follow-up studies have compared the prognostic value of various clinical attributes including age with specialized tests including exercise tests performed with or without radionuclide imaging techniques. Reliance on age alone results in disqualification of as much as half of the work force (when age criteria are based on minimizing the risk), including many individuals below the age of 60. Clinical characteristics and exercise test criteria disqualify fewer than 10% of the work force with an acceptably low risk of subsequent cardiac events among those continuing to work.

Asymptomatic individuals exhibiting an abnormal exercise test response experience a rate of subsequent cardiac events roughly ten times that of individuals with negative tests. Among individuals with strongly abnormal exercise test responses, this differential in risk is even greater.

Physical fitness programs and risk factor screening have demonstrably reduced medical care costs and direct disability costs. Such programs represent yet another means to reduce the risk to the public and obviate needless retirement of public safety officers.

#### Conclusion

A comprehensive evaluation of the evidence indicates that as criterion to minimize sudden incapacitation age should be discarded as a BFOQ for public safety officers: alternative methods are better in protecting the public and in obviating needless retirement of qualified individuals.

## Executive Summary Physical Abilities and Aging

### Introduction

A perception exists that older public safety employees have a diminished ability to effectively perform the more physically strenuous aspects of their jobs. This has traditionally been one justification cited in defense of using a mandatory retirement age. The critical physical tasks confronting public safety employees may require performance for unpredictable work durations, in extreme environmental conditions and under time constraints. A failure to effectively perform in such conditions may lead to loss of life, serious injury, or extensive property damage. Given the potential negative outcomes of an inability to physically perform, the abolishment of a mandatory retirement policy in public safety occupations is justified only if a more desirable and equally effective alternative exists for judging performance capability. This Executive Summary presents the principal findings from extensive reviews of the scientific literature and data analyses on the efficacy of physical abilities assessment of older public safety employees. More detailed treatments of the concepts presented in this summary appear in subsequent sections of the final report. The principal findings are discussed within four broad topics, (1) physical abilities and aging, (2) abilities testing and physical performance, (3) physical abilities profiles of public safety employees, and (4) challenges faced by municipalities in implementing physical abilities testing as an employment criterion.

## Physical Abilities

Effective performance of a physical task is dependent upon the integration of numerous physical abilities. Physical abilities consist of such attributes as stamina, strength, flexibility, and motor control, and they have been operationally defined and organized into taxonomies. The taxonomy developed by Fleishman and coworkers is used in this study and it consists of eighteen physical abilities. Other sections of this report describe that taxonomy in detail. The degree to which an individual manifests a specific physical ability is highly dependent upon the functioning of underlying physiological systems (e.g., cardiovascular, pulmonary, musculoskeletal, neuromuscular, nervous, endocrine, etc.).

Depending upon the physical ability, cross sectional and longitudinal studies of the general population indicate declines ranging from 10-40% from age 20 to 70 years. However, there is evidence that some older individuals manifest variability in their physical abilities and this last led to a distinction between what is termed "chronological age" and "functional age". The relative roles of heredity and lifestyle in the variability have not been fully elucidated, but it is clear that older individuals (>55 years) are able to maintain physical work capacities comparable to much younger counterparts. One of the more common research strategies to study the relationship between lifestyle and work capacity has been to conduct cross sectional and longitudinal studies on stamina and strength, two physical abilities that are highly involved in the public safety occupations under study. Adherence to a lifestyle emphasizing weight control, smoking

abstinence or cessation, dynamic exercise, and strength training has repeatedly been demonstrated to moderate the decline in stamina and strength up to at least 70 years of age. Less is known about the influence of lifestyle on physical abilities involving motor control and flexibility but there is evidence that behavioral factors (i.e., practice, experience) may play a role in overcoming some age associated declines in these abilities. Moreover, research on adaptation to aging has indicated physiological compensation for age dependent declines in function. This ability has been observed with the maintenance of cardiac output and heat tolerance in older individuals.

It should be recognized that in studies where older individuals manifest high levels of physiological functioning, there is generally a sustained and ongoing commitment to exercise and weight control for many years. The individual's commitment is a critical element in whether or not physical abilities enhancement programs are sufficient to maintain physical work capacity with advancing age. Nevertheless, the combined findings from research on the physiology of aging indicate that individuals well into their sixties can maintain physical work capacities at levels comparable to younger counterparts, and they highlight the important point that physiological declines often attributed to the aging process are not necessarily due to age per se but are more indicative of modifiable lifestyle patterns.

#### Physical Abilities Testing and Physical Performance Capability

Testing for physical abilities generally takes two forms consisting of work sample (simulation) or direct assessment of individual abilities (e.g., stamina, strength, motor control,

flexibility, etc.). The identification of appropriate tests is done through a Knowledge, Skills, and Abilities (KSA) analysis that identifies the important physical attributes for effective performance. Using this approach, tests can then be identified that encompass the principal physiological demands. This strategy has been used to assess the oxygen consumption and strength requirements of fire fighting and law enforcement, and to develop tests that predict an individual's probability to sustain physical performance in hostile environmental conditions. The job-relatedness of physical abilities testing is generally determined by examining how well it predicts some aspect of job performance. The most frequently used criterion in public safety occupations has been the time to complete a series of critical tasks. The correlations between performance time and relevant physical abilities are generally in the range of 0.50-0.80. Other criteria used to establish the job-relatedness of a test have included the likelihood of voluntarily terminating performance of critical tasks and the probability of sustaining injury.

Two studies have reported data showing that physical abilities testing is at least as effective as chronological age (range 20-45 yrs) for predicting performance effectiveness on a battery of public safety tasks. Although this issue has not been specifically examined in older cohorts of public safety officers, there are data on older subjects from the general population indicating that physical abilities testing is a significant predictor of performance capability. For example, older individuals with high levels of aerobic fitness have higher maximal power outputs, are able to sustain a submaximal power output for longer periods, and have better heat tolerance when compared to lower fit counterparts.

of the same age. In such studies, chronological age is a poor predictor of physical performance when compared to physical abilities assessment.

#### Physical Abilities Profiles of Public Safety Employees

A better understanding of the variability in age-related changes in physical performance capability of public safety employees depends upon our ability to characterize the physical abilities and health status of this occupational group. This information is necessary to evaluate the likelihood of older employees manifesting the appropriate levels of physical abilities for effective performance, and it addresses the issue of whether "all or nearly all" older employees would fail individualized assessment.

A review of the extant literature on the physical fitness of fire fighters and police officers indicates that these groups typically exhibit physical abilities declines with advancing age that are similar to those characteristic of the sedentary segment of the general population. Such changes involve reductions in cardiovascular fitness, pulmonary functioning, and strength with increases in body fatness. There are also reports of a higher incidence of moderate hypertension, positive electrocardiograms, and mild pulmonary impairment in older public safety employees when compared to younger counterparts. In one published study consisting of a cross-sectional analysis of a large municipality, the investigators found out that over 90% of fire fighters aged 60-65 years would fail a performance based standard. The combined findings from numerous studies in this area suggest that although certain job tasks in public safety occupations may require

strenuous physical effort, these tasks are not performed with sufficient regularity to forestall the age associated declines in physiological functioning typically observed in a sedentary population. Moreover, they accent the importance of medical screening in physical abilities testing of older employees.

These observations led the research group to examine the issue of whether "all or nearly all" older employees would fail performance based testing. Although a definitive test of this issue was not possible, insight was gleaned from existing published studies and analyses of original data provided by municipalities on the physiological status of their employees. This approach showed that marked differences exist in the physical fitness of older employees when those departments having mandatory fitness programs are compared to those not requiring a regime of chronic exercise. Published values for aerobic fitness were used as hypothetical cut off scores and it was evident that municipalities having no fitness programming had a considerably larger percentage of older employees failing the fitness expectation than municipalities with ongoing exercise programs. When these findings are considered in light of the research on the physiology of aging demonstrating substantial variability in the physiological status of older adults and showing that lifestyle is a significant factor in physical abilities status, the perspective that "all or nearly all" older employees would fail performance based testing becomes less tenable.

#### Challenges Faced by Municipalities in Implementing Physical Abilities Testing

There will be many challenges faced by municipalities attempting to implement testing as an employment criterion for

incumbents. These include but are not limited to the need to validate standards on the relevant tests, to determine how broad based the testing should be, and to consider how individualized testing may affect existing policies on promotion, pension benefits, and medical disability. These potentially controversial and litigious issues will undoubtedly require resourcefulness as administrative personnel balance worker rights with the need to maintain public safety. Unfortunately, little information exists in the extant literature on these issues, and the methodology by which one establishes minimum competency levels for employment retention has only recently become a topic of study.

#### Conclusions

While recognizing that using individualized assessment as an employment criterion may affect established hiring and retention policies, we do not believe that age is a BFOQ for public safety occupations for the following reasons pertaining to physical abilities testing:

1. Age associated declines in many of the principal physical abilities involved in successfully completing routine and critical public safety tasks are highly modifiable depending upon one's lifestyle.

2. There is evidence for substantial variability in the physiological status of older adults.

3. The physiological requirements of critical public safety tasks can be documented and physical abilities tests are available to assess the probability of successfully meeting such physical challenges.

4. Comprehensive physical abilities testing is likely to be

at least as effective as chronological age in assessing physical performance capability in public safety settings.

5. Depending upon the structure, health promotion and physical fitness programs can sufficiently modify age associated declines in many of the relevant physical abilities such that a significant percentage of older employees would be likely to pass physical abilities testing.