TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. CV 78-56
of	:	March 13, 1979
GEORGE DEUKMEJIAN Attorney General	:	
Anthony S. Da Vigo Deputy Attorney General	:	

SUBJECT: AGE DISCRIMINATION—Government Code section 31558 is in conformance with state and federal laws on age discrimination. A county ordinance which limits appointment to any law enforcement position to applicants between ages 21 and 35 years is in conformance with state laws but not in conformance with federal laws unless it can specifically show that persons over the maximum age limitation would be unable to perform their duties safely and efficiently.

The Honorable John A. Drummond, County Counsel, County of Mendocino, has requested an opinion on the following questions:

1. Is Government Code section 31558 in conformance with state and federal laws on age discrimination?

2. Is a county ordinance which limits appointment to any law enforcement position to applicants between the ages of 21 and 35 years, with certain exceptions, in conformance with state and federal laws on age discrimination?

3. If the answers to the above questions are in the negative, may a county disregard the mandatory requirements of Government Code section 31558?

The conclusions are:

1. Government Code section 31558 is in conformance with state and federal laws on age discrimination.

2. A county ordinance which limits appointment to any law enforcement position to applicants between the ages of 21 and 35 years, with certain exceptions, is in conformance with state laws on age discrimination to the extent that the term "law enforcement position" falls within the designations set forth in Government Code section 31008. The ordinance is not in conformance with federal laws on age discrimination unless the county can show that the maximum age limitation is, in the case of each such position or class of positions respectively, a bona fide occupational qualification reasonably necessary to the normal operation of the particular agency, and that there is reasonable cause and a factual basis for belief that all or substantially all persons over the maximum age limitation would be unable to perform safely and efficiently the duties of such positions or that it would be impossible or impractical to make individualized determinations as to the competence of such persons to perform such duties.

3. The provisions of Government Code section 31558 may not be disregarded.

ANALYSIS

Government Code section 31558 (part of the County Employees Retirement Law of 1937, commencing with Gov. Code, § 31450) provides as follows:

> "All existing members of a pension system established pursuant to either Chapter 4 (commencing with Section 31900) or Chapter 5 (commencing with Section 32200) of this part and all employees eligible as safety members who at the time of entering service elected to become safety members, or who subsequently became members, shall become safety members and thereafter each person not over 35 years of age when employed in a position, the principal duties of which consist of active law enforcement or active fire suppression or juvenile hall group counseling and group supervision, as defined in Sections 31469.3, 31469.4, 31470.2 and 31470.4, shall become a safety member on the first day of the calendar month following his entrance into the service. The sheriff and undersheriff shall become safety members on the first day of the calendar month following their entrance into the service, regardless of age. The marshal and assistant marshal shall become safety members on the first day of the calendar month following their appointment, regardless of age."

The provisions of chapter 4 (commencing with § 31900) pertain to the County Peace Officers Retirement Law. The provisions of chapter 5 (commencing with § 32200) pertain to the County Fire Service Retirement Law.

The first inquiry is whether the statute, hereinabove set forth, is in conformance with state and federal laws on age discrimination. Specifically, the section draws a distinction between members who are not over the age of 35 and members who are over that age for purposes of eligibility to become safety members. We examine first the constitutional sufficiency of the classification based on age. Such a classification is not suspect. (*Massachusetts Board of Retirement v. Murgia* (1976) 427 U.S. 307, 313–314; *Arritt v. Grisell* (4th Cir. 1977) 567 F.2d 1267, 1272.) Nor is there a fundamental right to become a safety member. Thus, it has been held in connection with various categories of retirement and benefit plans that there is no requirement of uniform treatment but only that there be a reasonable basis for each classification. (*Bilyeu v. State Employees' Retirement System* (1962) 58 Cal. 2d 618, 623.) In the absence of a suspect classification or of a fundamental right, the constitutional right to equal protection requires that the subject classification bear some rational relationship to a legitimate governmental purpose. (*Schwalbe v. Jones* (1976) 16 Cal. 3d 514, 517–518; *Dandridge v. Williams* (1970) 397 U.S. 471, 485.) Safety members are provided certain benefits not provided to regular members. (Gov. Code, §§ 31664–31664.4.) Safety members suffer a greater risk of hypertension, coronary and other physical conditions related to and arising out of the work involved, and of industrial injury. It may be reasonably assumed that such risks correlate with age. The costs of benefits may be justified with regard to those under the age of 35, i.e., the probability of productive service for an acceptable period of years may justify such costs only for those who undertake such duties at an age less than 35. Consequently, the subject classification bears a rational relationship to a legitimate governmental purpose, to wit, the maintenance of the financial integrity of the system.

We turn next to the provisions of state law. Labor Code section 1420.1 provides as follows:

> "(a) It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action. This section shall not be construed to make unlawful the rejection or termination of employment where the individual applicant or employee failed to meet bona fide requirements for the job or position sought or held, or to require any changes in any bona fide retirement or pension programs or existing collective-bargaining agreements during the life of the contract, or for two years after the effective date of this section, whichever occurs first, nor shall this section preclude such physical

and medical examinations of applicants and employees as an employer may make or have made to determine fitness for the job or position sought or held.

"Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, and trade schools shall not, in and of themselves, constitute a violation of this section.

"(b) This section shall not limit the right of an employer, employment agency, or labor union to select or refer the better qualified person from among all applicants for a job. The burden of proving a violation of this section shall be upon the person or persons claiming that the violation occurred.

"(c) The age limitations of the apprenticeship programs in which the state participates shall not be deemed to violate this section."

The term "employer" includes the state and its political or civil subdivisions. (Lab. Code, § 1413, subd. (d).)

For the reasons which follow, it is clear that Labor Code section 1420.1 does not supersede the provisions of Government Code section 31558. First, in the event of an ostensible conflict between two state statutes, the more specific enactment will control over the more general one. (*Mitchell v. County Sanitation Dist*. (1958) 164 Cal. App. 2d 133, 141; Civ. Code, § 3534; 59 Ops. Cal. Atty. Gen. 73, 79 (1976).) While discrimination based on age is prohibited generally under the provisions of Labor Code section 1420.1, Government Code section 31558 deals with specific employers (counties) and specific positions (law enforcement). Thus, the more specific statute, Government Code section 31558, would control over the general statute, Labor Code section 1420.1, in the event that they were deemed to be in conflict. Second, Labor Code section 1420.1 expressly excepts cases "where the law compels or provides for such action." Consequently, to the extent that Government Code section 31558 is deemed to be in conflict with Labor Code section 1420.1, the provisions of the former are expressly excepted from the terms of the latter. Third, Government Code section 31558, while establishing the requirement that new members in the retirement system must not he over the age of 35 years to be eligible to become safety members, does not prohibit the employment of persons over that age. (56 Ops. Cal. Atty. Gen. 23, 24 (1973).) Hence, Government Code section 31558 is not in conflict with the prohibitions of Labor Code section 1420.1. It is concluded that Government Code section 31558 is in conformance with state laws on age discrimination.

Referring to the provisions of federal law, the Age Discrimination in Employment Act of 1967, title 29, United States Code, section 621 *et seq*., was amended by the Fair Labor Standards Amendments of 1974 (P.L. 93–259) to include states and their political subdivisions (29 U.S.C. § 630(b)). We consider first the validity of the extension of the act to state and local governments. In *National League of Cities v. Usery* (1976) 426 U.S. 833, the Supreme Court held that Congress exceeded its authority under the commerce clause by attempting, through the Fair Labor Standards Amendments of 1974, to extend coverage of the minimum wage and maximum hour provisions of the Fair Labor Standards Act to the states and their political subdivisions. The Fair Labor Standards Amendments of 1974 also extended the Equal Pay Act and the Age Discrimination in Employment Act of 1967 to the states and their political subdivisions. It has been argued that the National League decision also bars the extension of such acts. Unlike the Fair Labor Standard's Act's wage and hour provisions, however, the application of the Equal Pay Act and of the Age Discrimination in Employment Act of 1967 to the states and their political subdivisions may be viewed as an exercise of congressional authority under section 5 of the Fourteenth Amendment to enforce that amendment's equal protection provisions. This is the clear weight of authority with respect to the Equal Pay Act (*cf. Usery v. Charleston County School District* (4th Cir. 1977) 558 F.2d 1169; *Usery v. Allegheny County Institution District* (3d Cir. 1976) 544 F.2d 148, cert. den. (1977) 430 U.S. 946) and with respect to the Age Discrimination in Employment Act of 1967 (*Arritt v. Grisell*, *supra*, 567 F.2d 1267, 1269–1271; *Aaron v. Davis* (E.D. Ark. 1976) 424 F. Supp. 1238; *Usery v. Board of Education of Salt Lake City* (D. Utah 1976) 421 F. Supp. 718; *Rernnzick v. Barnes County* (D.C.N.D. 1977) 435 F. Supp. 914). On remand of the National League case, the district court expressly limited relief to the wage and hour provisions, and refused to extend such relief to the other provisions of the Fair labor Standards Amendments of 1974. (*National League of Cities v. Marshall* (D.C.D.C. 1977) 429 F. Supp. 703.) Although a few cases have held that the extension of the Equal Pay Act to the states and their political subdivisions exceeds the federal power (*User v. Owensboro-Daviess County Hospital* (W.D. Ky. 1976) 423 F. Supp. 843; *Howard v. Ward County* (D.N.D. 1976) 418 F. Supp. 494), we are aware of no case which has so held in connection with the Age Discrimination in Employment Act. We predicate our conclusions herein upon the premise that the extension of that act to states and their political subdivisions is a proper exercise of the power to enforce the Fourteenth Amendment. Shortly after its decision in National League, the Supreme Court sustained the application of title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, to the states as employers on the basis of section 5 of the Fourteenth Amendment, noting that the amendment is a limitation on state power and its enforcement is not an invasion of state sovereignty. (*Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 454; and see *United States v. City of Milwaukee* (E.D. Wis. 1975) 395 F. Supp. 725, 728.)

We turn to the substantive provisions of title 29, United States Code section 623(a):

> "It shall be unlawful for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> "(3) to reduce the wage rate of any employee in order to comply with this chapter."[1]

Section 623 (f) provides:

> "It shall not be unlawful for an employer, employment agency, or labor organization—
>
> "(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> "(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631 of this title because of the age of such individual; or
>
> "(3) to discharge or otherwise discipline an individual for good cause.

By drawing a distinction between members who are not over the age of 35 and members who are over that age for purposes of eligibility to become safety members, Government Code section 31558 does discriminate against individuals with respect to their

[1] The prohibitions are limited to individuals between the ages of 40 and 70 years (§ 631.)

"compensation, terms, conditions, or privileges of employment" because of the age of such individuals, within the meaning of title 29, United States Code section 623(a) (1). Since individuals who are precluded from safety membership include those designated in title 29, United States Code section 631 (see fn. 1, *supra*), we turn to the provisions of section 623 (f) to determine whether the classification is excepted under the terms specified therein. Specifically, section 623 (f) (2) excepts from the provisions of section 623 (a) (1) compliance with the terms of a bona fide employee benefit plan such as a retirement or pension plan.

In order to satisfy the terms of the exception, it must first be determined that the plan is not a subterfuge to evade the purposes of the Age Discrimination in Employment Act of 1967. In this regard, it is noted that Government Code section 31558 was enacted in its substantial form by Statutes 1951, chapter 1098, section 14, and was subsequently amended by Statutes 1953, chapter 789, section 8, and chapter 955, section 2; Statutes 1957, chapter 568, section 4; Statutes 1970, chapter 396, section 2 (adding juvenile hall group counselors and group supervisors); and Statutes 1974, chapter 131, section 1 (exempting the marshal and assistant marshal from the age limitation). As previously noted, the Age Discrimination in Employment Act of 1967 was amended to cover the states and their political subdivisions by the Fair Labor Standards Amendments of 1974. In view of the legislative history of Government Code section 31558, and particularly of the fact that it was enacted in its substantial form 23 years prior to the extension of the federal act to the states and their political subdivisions, it cannot be concluded that the statute[2] is a subterfuge to evade the purposes of the federal act. *(Cf. United Airlines, Inc. v. McMann* (1977) 434 U.S. 192, 197, 203.) The statute, therefore, does fall within the purview of title 29, United States Code section 623 (f) (2). Nevertheless, the exception provided thereunder is limited. First, no such employee benefit plan shall excuse the failure to hire any individual. As previously noted, however, Government Code section 31558 does not prohibit the employment of persons over the age of 35 years. Second, the plan must not require or permit the involuntary retirement of any individual designated in title 29, United States Code section 631. The latter section includes persons between the ages of 40 and 70 years. (See fn. 1, *supra*.) The County Employees Retirement Law of 1937, of which Government Code section 31558 is a part, as well as the County Peace Officers Retirement Law and the County Fire Service Retirement Law therein referred to, require the involuntary retirement of safety members at the age of 60 years. (Gov. Code, §§ 31662.6, 32050, 32350.) Thus, the exception provided in title 29, United States Code section 623 (f)

[2] It may be argued that a distinction exists between the enactment of the statute and the establishment of a retirement system thereunder by a county. (Gov. Code, § 31500.) It is theoretically possible that a particular retirement system was established with the intent to evade the purposes of the federal act. The resolution of such issue in any case would depend upon a determination of fact.

(2) does not extend to the mandatory retirement aspect of these retirement systems.[3]

The second inquiry is whether the following county ordinance is in conformance with state and federal laws on age discrimination:

> "No person shall be appointed to any law enforcement position unless at the time of the appointment he has passed his 21st birthday and has not passed his 35th birthday. Provided, however, that if any applicant at the time of employment is over 35 but has not yet passed his 45th birthday, he may be considered for employment if he has had five (5) years of previous law enforcement experience and has performed within ninety (90) days of appointment active police work as a safety member, as defined by Sections 31469.3 and 31470.2 of the Government Code, of a retirement system established under the County Employees Retirement Law of 1937 or as a member of the Public Employees Retirement System and he retains said membership in the System."

Turning first to the provisions of state law, Labor Code section 1420.1, *supra*, which applies to counties (Lab. Code, § 1413, subd. (d)), prohibits generally discrimination in employment based on age. The statute expressly excepts, however, those cases "where the law compels or provides for such action." The following statutes are pertinent. Government Code section 31005 provides:

> "The board of supervisors of any county, chartered or otherwise, shall not by ordinance establish any minimum or maximum age limits for any county employment, whether as officer, deputy, or assistant, and age shall not be a minimum qualification for any county employment."

However, the subject ordinance is authorized under Government Code section 31008:

> "This part does not prevent the board of supervisors from fixing minimum or maximum age limits for the employment of deputy sheriffs and county peace officers or county firemen, nor, while acting directly as the governing body or ex officio governing body of any fire district or fire protection district, from fixing minimum or maximum age limits for the employment of firemen for any such district."

---

[3] Inasmuch as the present inquiry is limited to the validity of the classification drawn in Government Code section 31558, we do not reach the question whether the mandatory retirement of safety members may be justified as a bona fide occupational qualification within the meaning of title 29, United States Code section 623 (f) (1).

The foregoing provision is constitutionally sufficient. A statute must be construed, if possible, in a manner which is consistent with constitutional constraints. (21 Ops. Cal. Atty. Gen. 1, 5 (1953).) Consequently, Government Code section 31008 does not authorize the establishment of any classification which is constitutionally infirm. As previously noted, classifications based on age are not suspect. (*Massachusetts Board of Retirement v. Murgia*, *supra*, 427 U.S. 307, 313–314; *Arritt v. Grisell*, *supra*, 567 F.2d 1267, 1272; *Weiss v. Walsh* (S.D. N.Y. 1971) 324 F. Supp. 75, 77, affd. (2d Cir. 1971) 461 F.2d 846, cert. den. (1973) 409 U.S. 1129; *Armstrong v. Howell* (D. Neb. 1974) 371 F. Supp. 48, 51.) Nor is there a fundamental right to employment with any governmental agency. (*Cf. Arritt v. Grisell*, *supra*, *NAACP v. Allen* (5th Cir. 1974) 493 F.2d 614, 618; *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission* (2d Cir. 1973) 482 F.2d 1333, 1337; *Massachusetts Board of Retirement v. Murgia*, *supra*; *Townsend v. County of Los Angeles* (1975) 49 Cal. App. 3d 263, 267; *Hetherington v. State Personnel Board* (1978) 82 Cal. App. 3d 582, 589.) Since the classifications authorized under Government Code section 31008 are neither suspect nor involve a fundamental right, it is sufficient for purposes of equal protection that such classifications bear some rational relationship to a legitimate governmental purpose. (*Schwalbe v. Jones*, *supra*, 16 Cal. 3d 514, 517–518; *Dandridge v. Williams*, *supra*, 397 U.S. 471, 485.) Maximum age limitations for the employment of law enforcement officers, such as provided in the subject ordinance, have been sustained under constitutional challenge. (*Arritt v. Grisell*, *supra*.)

The subject ordinance is authorized by and in conformance with state laws on age discrimination provided that the term "law enforcement position" falls within the designations set forth in Government Code section 31008. In this regard, it should be noted that the latter section constitutes an exception to the general prohibition contained in Government Code section 31005. Exceptions to statutes should be narrowly construed. (61 Ops. Cal. Atty. Gen. 335, 338 (1978); 60 Ops. Cal. Atty. Gen. 32, 34 (1977).) The exception is specifically limited to deputy sheriffs, county peace officers, and county and district firemen. (The term "county peace officers" is not otherwise defined except for the various definitions in the specific contexts of the County Employees Retirement Law of 1937 (Gov. Code, § 31469.1), the County Peace Officers Retirement law (Gov. Code, § 31904), the County Peace Officer and Fire Service Retirement Plan Law (Gov. Code, § 33003), and the Public Employees' Retirement Law (Gov. Code, § 20021.5 *et seq*.).) To the extent that the general term "law enforcement," as it may be defined by the county for purposes of the subject ordinance, exceeds the scope of the specifically limited exception, the ordinance fails to conform with the general prohibition of Government Code section 31005.

Referring to the provisions of federal law, the Age Discrimination in Employment Act of 1967 provides, inter alia, that it shall be unlawful for an employer to fail or refuse to hire any individual because of such individual's age. (29 U.S.C. § 623(a) (1), *supra*.)

Unlike Government Code section 31558, which we first considered, the county ordinance does preclude the appointment of any person over the age of 35 years or, under the circumstances therein prescribed, over the age of 45 years. Thus, the ordinance is clearly unlawful unless it falls within any of the exceptions provided in title 29, United States Code section 623(f), *supra*.

Title 29, United States Code section 623 (f) (1) provides that it shall not be unlawful for an employer to take any action otherwise prohibited under section 623(a) where age is "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." While the existence of a bona fide occupational qualification is a question of fact, the burden of proof with respect thereto is on the employer. (29 CFR 860.102 (b).) In a case challenging the validity of a 35–year age limitation for employment as a city police officer, the court set forth the following standard:

> ". . . the burden is on the employer to show (1) that the [bona fide occupational qualification which it invokes is reasonably necessary to the essence of its business (here the operation of an efficient police department for the protection of the public), and (2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class (in out case, persons over 35 years of age) would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over that age limit on an individualized basis. . ."

(*Arritt v. Grisell*, *supra*, 567 F.2d 1267, 1271; *cf. Houghton v. McDonnell Douglas Corp.* (8th Cir. 1977) 553 F.2d 561; *Usery v. Tamiami Trail Tours* (5th Cir. 1976) 531 F.2d 224; *Hodgson v. Greybound Lines* (7th Cir. 1974) 499 F.2d 859; *Rodriquez v. Taylor* (ED. Pa. 1976) 428 F. Supp. 1118; remanded on other grounds (3d Cir. 1977) 569 F.2d 1231; *Aaron v. Davis* (E.D. Ark. 1976) 414 F. Supp. 453.)

The applicable standard must be applied to each of the positions or classes of positions which fall within the general category of "law enforcement." Consequently, it is concluded that the ordinance is not in conformance with federal laws on age discrimination unless the county can show that the maximum age limitation is, in the case of each such position or class of positions respectively, a bona tide occupational qualification reasonably necessary to the normal operation of the particular agency to which the position is allocated, and that there is reasonable cause and a factual basis for belief that all or substantially all persons over the maximum age limitation would be unable to perform safely and efficiently the duties of such positions or that it would be impossible or impractical to make individualized determinations as to the competence of such persons to perform such duties.

The third inquiry, whether a county may disregard the mandatory requirements of Government Code section 31558, assumes a negative answer to the first inquiry. We have concluded, however, that Government Code section 31558 is in conformance with state and federal laws on age discrimination. Its provisions may not be disregarded.

*****