OPINION NO. 93-071

Syllabus:

1. For purposes of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634, as amended (1988 & Supp. III 1991), the Highway Patrol Retirement System qualifies as the employer of its members when administering the provisions of R.C. 5505.16(C).

2. The directive in R.C. 5505.16(C) that any member of the Highway Patrol Retirement System who attains the age of fifty-five years and has been in the service of the State Highway Patrol for a period of twenty years as a uniformed patrol officer shall file application for retirement with the State Highway Patrol Retirement Board contravenes 29 U.S.C. §623(a)(1) (1988).

3. R.C. 5505.16(C)'s imposition of mandatory retirement for any member of the Highway Patrol Retirement System who attains the age of fifty-five years and has been in the service of the State Highway Patrol for a period of twenty years as a uniformed patrol officer is permissible under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634, as amended (1988 & Supp. III 1991), if it is established in accordance with 29 U.S.C. §623(f)(1) (1988) that age is a bona fide occupational qualification reasonably necessary to the normal operation of the business of the State Highway Patrol.

4. The directive in R.C. 5505.16(A) that the pension of a member of the Highway Patrol Retirement System who has been in the service of the State Highway Patrol for twenty-five years as an employee shall be deferred until the member attains age forty-eight is permissible under the

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634, as amended (1988 & Supp. III 1991).

To: R. D. Huffman, Executive Director, Highway Patrol Retirement System, Columbus, Ohio
By: Lee Fisher, Attorney General, December 22, 1993

You have requested an opinion regarding the application of the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§621-634, as amended (1988 & Supp. III 1991), to certain retirement and benefit provisions of R.C. 5505.16. Specifically, you wish to know whether the requirement of R.C. 5505.16(C) that any member of the Highway Patrol Retirement System (HPRS) who attains the age of fifty-five years and has been in the service of the State Highway Patrol for a period of twenty years as a uniformed patrol officer is to file an application for retirement with the State Highway Patrol Retirement Board is valid for purposes of the ADEA. You also have asked whether the provision of R.C. 5505.16(A) that permits a member of HPRS who has been in the service of the State Highway Patrol for a period of twenty-five years to make application for a pension, but that defers any such pension until the member attains age forty-eight, is valid for purposes of the ADEA.

R.C. 5505.16(C)

R.C. 5505.16 sets forth specific age and service requirements that, when satisfied, make a member of HPRS eligible to file with the State Highway Patrol Retirement Board an application for retirement and the receipt of a pension. Division (C) of R.C. 5505.16 reads as follows:

> Any member who attains the age of fifty-five years and has been in the service of the patrol for a period of twenty years as a uniformed patrol officer according to the rules adopted by the board, shall file application for retirement with the board, and if he refuses or neglects to do so, the board may deem his application to have been filed on his fifty-fifth birthday. The member may, upon written application approved by the superintendent of the state highway patrol, be continued in service after attaining the age of fifty-five years, but only until the member has accumulated twenty years of service.

R.C. 5505.01 defines the following terms as used in R.C. Chapter 5505 (highway patrol retirement system):

> (F) "Plan" means the provisions of [R.C. Chapter 5505].
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> (G) "Retirement system" or "system" means the state highway patrol retirement system created and established in the plan.
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> ....
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> (I) "Retirement board" or "board" means the state highway patrol retirement board provided for in the plan.
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> (J) Except as provided in section 5505.18 of the Revised Code, "member" means any employee included in the membership of the retirement system, whether or not rendering contributing service.
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> ....
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> (Q) "Retirement" means termination as an employee of the state highway patrol, with application having been made to the system for a pension or a deferred pension.

R.C. 5505.02 further provides that membership in HPRS "includes all state highway patrol employees, as defined in [R.C. 5505.01],[1] and such membership is mandatory for such employees." (Footnote added.)

R.C. 5505.16(C) thus requires any member of HPRS who attains the age of fifty-five years and has been in the service of the State Highway Patrol for a period of twenty years as a uniformed patrol officer to file an application for retirement with the State Highway Patrol Retirement Board. A member may, upon written application approved by the Superintendent of the State Highway Patrol, be continued in service after attaining the age of fifty-five years, but only until the member has accumulated twenty years of service. *Id.*

R.C. 5505.16(A)

Division (A) of R.C. 5505.16 authorizes application for a pension by a member of HPRS who has been in the service of the State Highway Patrol for twenty-five years as an employee. R.C. 5505.16(A) further provides that if a member who makes such an application is under age forty-eight, such pension "shall be deferred until he attains age forty-eight."

Practices Prohibited by the Age Discrimination in Employment Act (ADEA) of 1967

The Age Discrimination in Employment Act of 1967, as amended, declares that its purpose is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. §621(b) (1988). Consonant with those purposes, 29 U.S.C. §623(a) (1988) declares that 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. (Emphasis added.)

See also 29 U.S.C. §623(b) (prohibited practices for employment agencies); §623(c) (prohibited practices for labor organizations); §623(d) (declaring unlawful any discrimination by an

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[1] The term "[e]mployee," as used in R.C. Chapter 5505 (highway patrol retirement system), is defined in R.C. 5505.01(A) in the following manner:

> "Employee" means any qualified employee in the uniform division of the state highway patrol, any qualified employee in the radio division hired prior to November 2, 1989, and any state highway patrol cadet attending training school pursuant to section 5503.05 of the Revised Code whose attendance at the school begins on or after the effective date of this amendment. "Employee" includes the superintendent of the state highway patrol. In all cases of doubt, the state highway patrol retirement board shall determine whether any person is an employee as defined in this division, and the decision of the board is final.

employer against persons opposing practices made unlawful by §623); §623(e) (declaring unlawful the printing or publication of employment advertisements that indicate any age preference); §623(i) (prohibited practices in the case of employee pension benefit plans). 29 U.S.C. §631(a) (Supp. III 1991) states that the prohibitions of the ADEA "shall be limited to individuals who are at least 40 years of age."[2]

Practices Permitted by the ADEA

29 U.S.C. §623(f) (1988 & Supp. III 1991) permits an employer to take certain actions otherwise proscribed by §§623(a)-(c) and 623(e). Section 623(f) states, in pertinent part, that it shall not be unlawful for an employer

> (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, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;
> (2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section --
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> (A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or
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> (B) to observe the terms of a bona fide employee benefit plan --
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> (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal

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[2] 29 U.S.C. §623(j) (Supp. III 1991) currently provides as follows with respect to certain age discrimination directed at firefighters or law enforcement officers by government employers:

> It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken --
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> (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and
> (2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.

This exemption, however, is repealed December 31, 1993. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, §3(b), 100 Stat. 3342.

Regulations (as in effect on June 22, 1989); or
(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter....; or
(3) to discharge or otherwise discipline an individual for good cause.

The Highway Patrol Retirement System (HPRS) Qualifies As the Employer of Its Members for Purposes of the ADEA

29 U.S.C. §630 (1988) sets forth definitions of various terms for purposes of the ADEA. Section 630(b) provides that the term "employer" means, *inter alia*, "a State ... and any agency or instrumentality of a State," and §630(f) provides that the term "employee" means, *inter alia*, "an individual employed by any employer."

It is likely that the Highway Patrol Retirement System qualifies as an "agency" or "instrumentality" of the State of Ohio for purposes of §630(b)'s definition of "employer." The ADEA does not separately define the terms "agency" and "instrumentality" as used in §630(b). With respect to the governmental context, however, the dictionary defines "agency" as "an administrative division of government with specific functions." *Webster's New World Dictionary* 25 (2d college ed. 1978). *Cf., e.g.*, R.C. 1.60 (as used in R.C. Title 1 (state government), except as otherwise provided in that title, "state agency" means "every organized body, office, or agency established by the laws of the state for the exercise of any function of state government"). "Instrumentality" is defined similarly as "[a] subsidiary branch, as of a government, by means of which functions or policies are carried out." *The American Heritage Dictionary* 667 (2d college ed. 1985).

An examination of the statutory scheme pursuant to which it is organized and operates indicates that the Highway Patrol Retirement System is an "agency" or "instrumentality" of the State of Ohio. By its enactment of R.C. 5505.02 the General Assembly has established HPRS for employees of the State Highway Patrol. HPRS exists for the purpose of providing pension benefits to members of HPRS or their survivors. *See* R.C. 5505.17; R.C. 5505.171-.175; R.C. 5505.18. Pursuant to R.C. 5505.04(A), the General Assembly has vested in the State Highway Patrol Retirement Board the general administration and management of HPRS. Included as members of the Board are the Auditor of State and the Superintendent of the State Highway Patrol. *Id.* It is the responsibility of the members of the State Highway Patrol Retirement Board to act as trustees of the various funds that serve as the source of those benefit payments, to preserve the assets of those funds, and to invest those assets in a diligent and prudent fashion. R.C. 5505.06. *See also* R.C. 5505.03(A)-(G) (enumerating the six different funds thereby created and describing the category of benefits payable from each). R.C. 5505.11 provides that the Treasurer of State shall be the treasurer of HPRS and the custodian of its funds, and further imposes specific responsibilities upon the Treasurer of State with respect to the disbursement and deposit of those funds. R.C. 5505.23 provides that the Attorney General shall serve as the legal adviser to the State Highway Patrol Retirement Board.

It is thus apparent that HPRS is a creation of the General Assembly that exercises its statutory powers and responsibilities on a statewide basis for the benefit of current and former employees of the State Highway Patrol. The provisions of R.C. Chapter 5505 noted above further demonstrate that HPRS exercises those powers and responsibilities as an agency or instrumentality of state government. *Cf., e.g., In re Ford*, 3 Ohio App. 3d 416, 419, 446 N.E.2d 214, 217 (Franklin County 1982) (the State Teachers Retirement System, *see* R.C. Chapter 3307, is a state agency that exercises statewide jurisdiction and authority); *Fair v. School Employees Retirement System*, 44 Ohio App. 2d 115, 119, 335 N.E.2d 868, 872 (Franklin County 1975) (the School Employees Retirement Board, *see* R.C. 3309.04, is an instrumentality of the state that exercises its powers and duties throughout the state). It follows,

therefore, that HPRS is an "agency" or "instrumentality" of the State of Ohio for purposes of 29 U.S.C. §630(b), and thus is an "employer" as defined in that section.

The remaining inquiry is whether HPRS qualifies as the employer of its members for purposes of 29 U.S.C. §630(f) and the other provisions of the ADEA. Section 630(f) provides, in pertinent part, that an "employee" is an individual employed by any employer. Members of HPRS are employed by the State Highway Patrol, not HPRS. *See* R.C. 5505.01(A), (J). *See also* R.C. 5503.01. In *Betts v. Hamilton County Bd. of Mental Retardation*, 631 F. Supp. 1198 (S.D. Ohio 1986), *aff'd*, 848 F.2d 692 (6th Cir. 1988), *rev'd on other grounds*, 492 U.S. 158 (1989), however, the district court endorsed a broad reading of the ADEA's use of the term "employer" in concluding that Ohio's Public Employees Retirement System (PERS) was the employer of an individual who, although a contributing member of PERS, was, in fact, employed by a county board of mental retardation and developmental disabilities (MR/DD board). On this point the district court stated as follows:

> PERS argues that it cannot be defined as an employer because it is independent of [the county MR/DD board] and is only involved to the extent that it receives county contributions to the public employees retirement system pursuant to Ohio Rev. Code § 145.48.
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> ....
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> The Sixth Circuit has held that "Title VII ... should not be construed narrowly." *Tipler v. du Pont de Nemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971). For purposes of Title VII, the term "employer" "has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment." *Spirt v. Teachers Insurance and Annuity Assoc.*, 475 F.Supp. 1298, 1308 (S.D.N.Y. 1979). *See also EEOC v. Wooster Brush Co.*, 523 F.Supp. 1256 (N.D. Ohio 1981). In this case, defendant PERS does not deny that it is vested with the general administration and management of the Public Employees Retirement System and that it denied plaintiff's application for disability retirement in accordance with the provisions of Ohio Rev. Code § 145.35. Therefore, we conclude that PERS is an employer for purposes of the ADEA because it controls some aspects of plaintiff's compensation, terms, conditions, and privileges of employment.

631 F. Supp. at 1206 (footnote omitted). The district court, accordingly, found that PERS was subject to the proscriptions of 29 U.S.C. §623(a)(1) with respect to the claim of the county MR/DD board employee that the action of PERS in denying her application for disability retirement under R.C. 145.35 constituted age discrimination.[3]

Accordingly, if asked to consider the question, a court likely would similarly find that HPRS is the employer of its members for purposes of the ADEA because it controls some aspects of their compensation, terms, conditions, and privileges of employment. For the purpose of this opinion it will be assumed that HPRS occupies that status. This means that the

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[3] The finding of the district court regarding the status of the Public Employees Retirement System (PERS) as the employer of one of its contributing members for purposes of the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§621-634, as amended (1988 & Supp. III 1991), was not reversed or modified on appeal. *See Betts v. Hamilton County Bd. of Mental Retardation*, 848 F.2d 692 (6th Cir. 1988), *rev'd on other grounds*, 492 U.S. 158 (1989).

proscriptions set forth in 29 U.S.C. §623(a) apply to HPRS with respect to its administration of the provisions of R.C. 5505.16(C).[4]

The Mandatory Retirement Provision of R.C. 5505.16(C) Contravenes 29 U.S.C. §623(a)(1) (1988)

As noted previously, R.C. 5505.16(C) requires any member of HPRS who attains the age of fifty-five years and has been in the service of the State Highway Patrol for a period of twenty years as a uniformed patrol officer to file an application for retirement with the State Highway Patrol Retirement Board. The practical effect of R.C. 5505.16(C) is to mandate retirement, and thus termination as an employee of the State Highway Patrol, *see* R.C. 5505.01(Q), for any member of HPRS who attains the age of fifty-five years. This retirement provision thus contravenes 29 U.S.C. §623(a)(1) (1988) because it imposes retirement and employment termination upon members of HPRS exclusively on the basis of age. *See, e.g., EEOC v. New Jersey*, 631 F. Supp. 1506, 1507 (D.N.J. 1986) (noting that plaintiff established a prima facie ADEA violation insofar as it was undisputed that a New Jersey law imposing retirement at age fifty-five for officers of the state police restricted the continued employment of those officers solely with reference to their age), *aff'd*, 815 F.2d 694 (3d Cir. 1987); *EEOC v. Missouri State Highway Patrol*, 555 F. Supp. 97, 104 (W.D. Mo. 1982) (finding that the policy of the state highway patrol requiring the retirement of all uniformed patrol members at age sixty constituted a per se violation of the ADEA), *aff'd in part and rev'd in part on other grounds*, 748 F.2d 447 (8th Cir. 1984). Consequently, following expiration of the exemption for employers of firefighters or law enforcement officers that appears in 29 U.S.C. §623(j) (Supp. III 1991), *see* note two, *supra*, application of R.C. 5505.16(C) to members of HPRS who attain the age of fifty-five years may subject HPRS to liability under the ADEA, unless it can be demonstrated that the age-based restriction of that section is otherwise permitted by the provisions of 29 U.S.C. §623(f) (1988 & Supp. III 1991).

Age As a Bona Fide Occupational Qualification

A. Controlling Case Law

29 U.S.C. §623(f)(1)-(3) (1988 & Supp. III 1991) set forth the various circumstances in which an employer may use age-based classifications that are otherwise proscribed by §§623(a)-(c) and 623(e). Relevant to the present inquiry is the language of paragraph (1) of §623(f) that states that it shall not be unlawful for an employer to use an age classification "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" of the employer.[5] *See generally, e.g., EEOC v. Mississippi*, 837 F.2d 1398, 1399 (5th Cir. 1988) (§623(f)(1) is "an 'escape clause' which allows employers some limited flexibility in using age as a factor in business decisions").

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[4] In *EEOC v. Wyoming*, 460 U.S. 226 (1983), the Supreme Court held that the extension of the ADEA to cover state and local governments, *see* 29 U.S.C. §630(b) (Supp. V 1975), was a valid exercise of Congress' powers under the Commerce Clause, U.S. Const. art. I, §8, cl. 3.

[5] The other bases in 29 U.S.C. §623(f)(1) and (3) (1988) for the use of age classifications by an employer are not germane to the age limitation that appears in R.C. 5505.16(C). The exception for bona fide employee benefit plans in §623(f)(2)(B) (Supp. III 1991) cannot apply to R.C. 5505.16(C) because §623(f)(2) specifically provides that "no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual."

In *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985), the Supreme Court explained what must be demonstrated by an employer that seeks to avail itself of the bona fide occupational qualification exception of §623(f)(1). Endorsing the test developed by the court of appeals in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), the Supreme Court described a two-step analysis that must be undertaken in that regard. An employer that asserts a relationship between an individual's age and the qualifications for performing a particular job must first establish that those qualifications are reasonably necessary to the essence of its business. *Western Air Lines, Inc. v. Criswell*, 472 U.S. at 413. The employer must then be able to demonstrate that it is compelled to rely upon age as a proxy for the foregoing job qualifications, and this the employer may do in one of two ways. *Id.* at 414. The employer must be able to show a factual basis for believing that all or substantially all persons beyond a certain age are unable to perform safely and efficiently the duties of the job in question. *Id.* Alternatively, the employer must demonstrate that it is impossible or highly impractical to deal with older employees on an individualized basis with respect to their ability to perform those job duties, *id.*, and "[o]ne method by which the employer can carry this burden is to establish that some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the [employee's] membership in the class." *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d at 235 (footnote omitted).

B. Mandatory Retirement for Law Enforcement Employees

Federal courts have applied the foregoing analysis in evaluating the claims of government employers under §623(f)(1) that age is a bona fide occupational qualification for law enforcement employees, and thus may serve as a basis for their mandatory retirement. *See, e.g., EEOC v. Kentucky State Police Dept.*, 860 F.2d 665 (6th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989); *EEOC v. Mississippi*, 837 F.2d 1398 (5th Cir. 1988); *EEOC v. Pennsylvania*, 829 F.2d 392 (3d Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); *EEOC v. City of East Providence*, 798 F.2d 524 (1st Cir. 1986); *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985); *EEOC v. New Jersey*, 631 F. Supp. 1506 (D.N.J. 1986), *aff'd*, 815 F.2d 694 (3d Cir. 1987); *EEOC v. New Jersey*, 620 F. Supp. 977 (D.N.J. 1985); *EEOC v. City of Bowling Green, Ky.*, 607 F. Supp. 524 (W.D.Ky. 1985). Law enforcement employers often assert a relationship between an employee's age and the physical and emotional demands placed upon that employee in performing various law enforcement activities. Regarding the first branch of the analysis in *Western Air Lines, Inc. v. Criswell*, those employers generally have been able to establish that physical ability is reasonably necessary to the safe and efficient performance of many law enforcement duties, *see, e.g., EEOC v. City of East Providence*, 798 F.2d at 530 ("[b]ecause we cannot say that [its] findings are 'clearly erroneous,' we sustain the district court's findings that the physical strength and stamina and the ability to withstand stress are job qualifications reasonably necessary to the performance of the East Providence police force"); *EEOC v. Missouri State Highway Patrol*, 748 F.2d at 451 ("[i]n light of these obligations and demands upon Patrol members, the Patrol has clearly established that physical ability and ability to withstand stress are job qualifications which are reasonably necessary to the performance of its functions"), and that physical ability ordinarily correlates with the maintenance of particular levels of personal health and fitness, *see, e.g., EEOC v. New Jersey*, 631 F. Supp. at 1508 ("[t]here continues to be no serious dispute that the continued health and fitness of New Jersey State Police officers is essential to the safe and efficient performance of their law enforcement duties").

Often at issue, however, is whether the employer has developed, implemented, and uniformly enforced appropriate physiological and psychological standards with respect to the health and fitness of all its employees. The courts have rejected employer claims of age as a

bona fide occupational qualification under §623(f)(1) where it has been shown that an employer has failed to develop, implement, and enforce such standards. *See EEOC v. Mississippi*, 837 F.2d at 1402 (finding that the district court correctly reasoned that Mississippi failed the first step of the *Criswell* analysis because it had not developed and implemented minimum health and fitness standards for state game wardens, who were required to retire at age sixty); *EEOC v. Pennsylvania*, 829 F.2d at 395 (until Pennsylvania State Police developed, implemented, and enforced mandatory minimum fitness standards for all officers, it could not justify its mandatory retirement law by relying on good health and physical conditioning as bona fide occupational qualifications reasonably necessary to its business).

In *EEOC v. Kentucky State Police Dept.*, the court of appeals reversed a finding by the district court that a mandatory retirement age of fifty-five years for officers of the Kentucky State Police was valid under the ADEA because age was a bona fide occupational qualification reasonably necessary to the business of the Kentucky State Police. The court of appeals accepted the district court's determination that cardiovascular fitness and aerobic capacity were traits reasonably necessary to the performance of a Kentucky State Police officer's job. The evidentiary record, however, disclosed that the Kentucky State Police failed to institute or enforce a regular program of physiological testing designed to monitor and maintain the cardiovascular and aerobic fitness of its officers, and permitted officers under age fifty-five who had suffered debilitating coronary attacks or underwent coronary surgery to remain in active service as patrol officers. The court of appeals thus stated as follows:

> This record shows that Kentucky State Police has no program for regular testing of all of its officers for physical fitness. At one time, Commissioner Elkins testified Kentucky State Police tried giving physical fitness tests to all members of the force but abandoned the practice. Elkins explained "it was putting people in the hospital rather than keeping them on the road working."
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> The record also discloses that Kentucky State Police permits officers to remain on the job in spite of known heart attacks or by-pass surgery. Equally important, in the facts with which we are confronted, is the fact that Kentucky State Police has no program for testing or maintaining the physical or the cardiovascular health of its officers. In fact, the record discloses that one veteran of the force died on patrol in his cruiser as a result of his fourth heart attack.

860 F.2d at 667 (footnote omitted). This holding by the Sixth Circuit would control any challenge to Ohio law brought in the federal courts here.

Pursuant to the second branch of the *Criswell* analysis, a law enforcement employer must then demonstrate that it is compelled to rely upon age as a proxy for the specific health and fitness qualifications it asserts are reasonably necessary to the performance of law enforcement activities, either by establishing a factual basis for believing that all or substantially all employees beyond a certain age are unable to meet those qualifications, or by showing that it is impossible or highly impractical to evaluate on an individual basis the ability of those employees to satisfy those qualifications. In *EEOC v. New Jersey*, for example, the New Jersey State Police relied upon the testimony of medical experts and the results of physiological studies to demonstrate that nearly 97.5% of active duty officers, at the time they attained age fifty-five, would not possess the level of aerobic capacity and fitness needed to perform essential police functions and activities. 631 F. Supp. at 1510-11. *See also EEOC v. New Jersey*, 620 F. Supp. at 987-90. Evidence was also presented from which the district court was able to conclude that a substantial number of officers age fifty-five and older "would possess significant, but asymptomatic, coronary artery disease which would interfere with the safe and efficient performance of essential New Jersey State Police duties, as well as preclude the testing of the aerobic capacity of those officers on an individualized basis," and that it would be "impossible

to screen for the presence of silent heart disease on an individualized basis absent cardiac catheterization, an invasive technique which is medically impracticable and unacceptable for diagnosing such an asymptomatic population." 631 F. Supp. at 1511. *See also* 620 F. Supp. at 990-95. Consequently, the district court accepted the use of age by the New Jersey State Police as "an appropriate 'proxy' for the job qualification of continued health and fitness." 631 F. Supp. at 1515. *See also EEOC v. Missouri State Highway Patrol,* 748 F.2d at 455 (evidence established a basis for believing that substantially all State Highway Patrol members over age sixty lacked sufficient aerobic capacity to perform their duties safely and efficiently and established inefficacy of testing, as an alternative to age, as a means of distinguishing among members over sixty).

Accordingly, R.C. 5505.16(C)'s imposition of mandatory retirement for members of HPRS who attain the age of fifty-five years will not subject HPRS to liability under the ADEA if it is established that age is a bona fide occupational qualification reasonably necessary to the normal operation of the business of the State Highway Patrol.[6] 29 U.S.C. §623(f)(1) (1988). In that regard, one must be able to demonstrate that certain qualifications, physical, mental, emotional, or otherwise, are necessary to the safe and efficient performance of the State Highway Patrol's various law enforcement activities, and thus are required of every individual employed by the Patrol. If it is asserted, and then established, for example, that certain levels of cardiovascular fitness and aerobic capacity are qualifications essential to the performance of a trooper's regular law enforcement duties, then it must also be shown that the State Highway Patrol has developed, implemented, and uniformly enforced appropriate physiological standards with respect to all its employees, in order to ensure that those levels of health and fitness are maintained by each Patrol employee. *EEOC v. Kentucky State Police Dept.*

Having made that demonstration, one must then be able to show that the State Highway Patrol is compelled to rely upon age as a proxy for those qualifications, either by demonstrating a factual basis for believing that all or substantially all members of HPRS beyond the age of fifty-five years do not possess those qualifications, or by demonstrating that it is impossible or highly impractical to evaluate on an individual basis the ability of those members of HPRS beyond the age of fifty-five years to satisfy those qualifications. If it is asserted, and then established, for example, that a certain level of aerobic capacity is a qualification essential to the performance of a trooper's regular duties, then one must show a factual basis for believing that all or substantially all troopers beyond the age of fifty-five years will not possess that level of aerobic capacity. *EEOC v. New Jersey.* Similarly, if it is claimed that cardiovascular fitness of a specific degree and quality is required in the performance of those duties, then one must again either show a factual basis for believing that all or substantially all troopers beyond the age of fifty-five years will not possess that degree and quality of cardiovascular fitness, or demonstrate that it is impossible or impractical to evaluate on an individual basis the precise cardiovascular fitness of each trooper beyond the age of fifty-five years. *Id.*

If all the foregoing can be demonstrated by HPRS, in accordance with the standards of proof set forth in the decisions of those federal courts that have considered these questions, then one may conclude that age is a bona fide occupational qualification reasonably necessary to the

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[6] As explained previously, for purposes of the ADEA, the Highway Patrol Retirement System (HPRS) qualifies as the employer of its members in administering R.C. 5505.16(C). In relying upon the bona fide occupational qualification exception of 29 U.S.C. §623(f)(1) (1988) to support the validity of R.C. 5505.16(C)'s mandatory retirement provision, however, logic and reason indicate that the inquiry must focus upon the normal operation of the business of the State Highway Patrol, not HPRS.

normal operation of the State Highway Patrol, and, in turn, that R.C. 5505.16(C)'s imposition of mandatory retirement for members of HPRS who attain the age of fifty-five years is permissible under the ADEA.

Minimum Age Requirement for the Receipt of Retirement Benefits

You have also asked whether R.C. 5506.16(A) is valid under the ADEA. R.C. 5505.16(A) permits a member of HPRS who has been in the service of the State Highway Patrol for a period of twenty-five years as an employee to apply for a pension which, if the member is under age forty-eight, shall be deferred until the member attains age forty-eight.

Deferral of a pension on the basis of a member's attainment of a minimum age does not violate the ADEA. Subsection (*l*) of 29 U.S.C. §623 (Supp. III 1991) reads, in pertinent part, as follows:

> Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section --
>
> (1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because --
>
> (A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits[.]

29 U.S.C. §1002(2)(A) (1988) provides that an "employee pension benefit plan," for purposes of the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§1001-1461, as amended (1988 & Supp. III 1991), means

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

See also 29 U.S.C. §1002(3) (1988) (the term "employee benefit plan" or "plan" means, *inter alia*, an employee pension benefit plan). Pursuant to 29 U.S.C. §623(*l*), therefore, an employee pension benefit plan, as thus defined in §1002(2)(A), may provide for the attainment of a minimum age by an employee as a condition of eligibility for normal or early retirement benefits without violating the ADEA.

A governmental pension plan such as HPRS is not subject to the provisions of ERISA. 29 U.S.C. §1003(b)(1) (1988) (the ERISA provisions shall not apply to any employee benefit plan if such plan is a governmental plan as defined in §1002(32)). *See also* 29 U.S.C. §1002(32) (1988) (the term "governmental plan" means, *inter alia*, a plan established or maintained by the government of any State). Nonetheless, one may reasonably conclude that the minimum age policy that motivated Congress' enactment of 29 U.S.C. §623(*l*)(1) also applies to the provisions of a governmental pension plan. Indeed, evidence appears within the legislative history of 29 U.S.C. §623(*l*) to support this conclusion. The language that comprises §623(*l*) was enacted by Congress in §103 of the Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) as an amendment to §4 of the ADEA. The report of the

Senate Labor and Human Resources Committee that recommended passage of that Act commented, in pertinent part, upon the exception created in §623(*l*) for defined pension benefit plans:

> The Committee intentionally limited section 4(*l*)(1) exceptions to defined benefit pension plans. Unlike defined contribution pension plans, defined benefit plans customarily take age into account in determining a participant's benefit level. The Committee refers to defined benefit pension plans within the meaning of section 3(35) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. section 1002(35). In limiting the exceptions to these types of pension plans, the Committee wishes to ensure that the benefit practices in issue are subject to the comprehensive range of reporting, disclosure, funding, and fiduciary standards set forth in ERISA, applicable state law, or the Internal Revenue Code. *The Committee specifically intends that section 4(l)(1) apply to state and local government pension plans even though such plans are not regulated under ERISA.*

Senate Comm. on Labor and Human Resources, Older Workers Benefit Protection Act, S. Rep. No. 101-263, 101st Cong., 2d Sess. 20 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1525-26 (emphasis added). This means, therefore, that R.C. 5505.16(A)'s directive that the pension of a member of HPRS who has twenty-five years of service as an employee of the State Highway Patrol shall be deferred until that member attains age forty-eight does not violate the ADEA.

Conclusion

Based upon the foregoing, it is my opinion, and you are advised that:

1. For purposes of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634, as amended (1988 & Supp. III 1991), the Highway Patrol Retirement System qualifies as the employer of its members when administering the provisions of R.C. 5505.16(C).

2. The directive in R.C. 5505.16(C) that any member of the Highway Patrol Retirement System who attains the age of fifty-five years and has been in the service of the State Highway Patrol for a period of twenty years as a uniformed patrol officer shall file application for retirement with the State Highway Patrol Retirement Board contravenes 29 U.S.C. §623(a)(1) (1988).

3. R.C. 5505.16(C)'s imposition of mandatory retirement for any member of the Highway Patrol Retirement System who attains the age of fifty-five years and has been in the service of the State Highway Patrol for a period of twenty years as a uniformed patrol officer is permissible under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634, as amended (1988 & Supp. III 1991), if it is established in accordance with 29 U.S.C. §623(f)(1) (1988) that age is a bona fide occupational qualification reasonably necessary to the normal operation of the business of the State Highway Patrol.

4. The directive in R.C. 5505.16(A) that the pension of a member of the Highway Patrol Retirement System who has been in the service of the State Highway Patrol for twenty-five years as an employee shall be deferred until the member attains age forty-eight is permissible under the

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634, as amended (1988 & Supp. III 1991).