OPINION NO. 94-010

Syllabus:

1. For purposes of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634, as amended (1988 & Supp. IV 1992), the State Highway Patrol is an employer as defined in 29 U.S.C. §630(b) (1988).

2. When applied to individuals age forty or older, the directive in R.C. 5503.01 that at the time of their appointment troopers of the State Highway Patrol shall not have reached thirty-five years of age contravenes 29 U.S.C. §623(a)(1) (1988), but would be permissible under 29 U.S.C. §623(f)(1) (1988) if it is established that such age limitation is a bona fide occupational qualification reasonably necessary to the normal operation of the business of the State Highway Patrol.

To: Warren H. Davies, Superintendent, State Highway Patrol, Columbus, Ohio
By: Lee Fisher, Attorney General, March 18, 1994

Your predecessor 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. IV 1992), to the maximum hiring age provision of R.C. 5503.01. The question presented is whether the directive in R.C. 5503.01 that troopers of the State Highway Patrol, at the time of their appointment, shall not have reached thirty-five years of age, is valid for purposes of the ADEA.

R.C. 5503.01

R.C. 5503.01 creates the State Highway Patrol as a division within the Department of Public Safety and vests the administration of the Patrol in its Superintendent. R.C. 5503.01 confers upon the Superintendent the authority to appoint troopers and radio operators, and specifies certain age limitations in that regard. R.C. 5503.01 reads, in pertinent part, as follows:

> The superintendent, with the approval of the director, may appoint any number of state highway patrol troopers and radio operators as are necessary to carry out sections 5503.01 to 5503.06 of the Revised Code, but the number of troopers shall not be less than eight hundred eighty. The number of radio operators shall not exceed eighty in number. At the time of appointment, troopers shall not be less than twenty-one years of age, nor have reached thirty-five years of age, and shall have been legal residents of Ohio for at least one year, except that the residence requirement may be waived by the superintendent. No person can be disqualified as over age prior to the time he reaches thirty-five years of age.

Pursuant to R.C. 5503.01, therefore, a trooper of the State Highway Patrol, at the time of appointment, must be at least twenty-one years of age, and must not have reached thirty-five years of age. Such individual must also have been a legal resident of Ohio for at least one year, unless that residence requirement is waived by the Superintendent. *Id.*

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

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. IV 1992) states that the prohibitions of the ADEA "shall be limited to individuals who are at least 40 years of age."[1]

Practices Permitted by the ADEA

29 U.S.C. §623(f) (1988 & Supp. IV 1992) 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,

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[1] Former 29 U.S.C. §623(j) (Supp. IV 1992) provided 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
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> (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, was repealed December 31, 1993. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, §3(b), 100 Stat. 3342.

as permissible under section 1625.10, title 29, Code of Federal 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 State Highway Patrol Is An Employer 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."

The question, therefore, is whether the State Highway Patrol 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 State Highway Patrol is an "agency" or "instrumentality" of the State of Ohio. Created pursuant to R.C. 5503.01, the State Highway Patrol functions as a division of the Department of Public Safety, under the administration of a Superintendent appointed by the Director of Public Safety. R.C. 5503.01 further provides that the Superintendent and the troopers of the State Highway Patrol "shall be vested with the authority of peace officers for the purpose of enforcing the laws of the state that it is the duty of the patrol to enforce and may arrest, without warrant, any person who, in the presence of the superintendent or any trooper, is engaged in the violation of any such laws."

R.C. 5503.02 delineates more specifically the various duties and powers conferred upon the State Highway Patrol. R.C. 5503.02(A) provides that the State Highway Patrol shall enforce the laws of the state relating to the titling, registration and licensing of motor vehicles, the operation and use of vehicles on highways, and the size, weight, and speed of commercial vehicles, and regulate the movement of traffic on the roads and highways of the state; determine, whenever possible, the identity of, and thereafter arrest, persons responsible for damaging or destroying any improved surfaced roadway, structure, sign, marker, guardrail, or other appurtenance constructed or maintained by the Department of Transportation; investigate and report all motor vehicle accidents on all roads and highways outside of municipal corporations; and may enforce the criminal laws on all state properties and state institutions, owned or leased by the state. Division (B) of R.C. 5503.02 provides that in the event of riot, civil disorder, or insurrection, or the reasonable threat thereof, and upon the request of a county sheriff or a municipal corporation mayor, the Governor may order the State Highway Patrol to enforce the criminal laws within the area threatened in that respect. R.C. 5503.02(E) sets forth the responsibility of the State Highway Patrol to provide security for the Governor, R.C. 5503.02(E)(1)(a); other Ohio state government officials, officials of the state governments of other states, and officials of the United States and other foreign countries, R.C.

5503.02(E)(1)(b); the capitol square, R.C. 5503.02(E)(1)(c); and other state property, R.C. 5503.02(E)(1)(d). Finally, R.C. 5503.02(F) provides that the Governor may order the State Highway Patrol to undertake major criminal investigations that involve state property interests.

It is thus apparent that the State Highway Patrol is a creation of the General Assembly that exercises its statutory powers and responsibilities on a statewide basis on behalf of both the State of Ohio and its residents. The provisions of R.C. Chapter 5503 enumerated above also indicate that the State Highway Patrol exercises those powers and responsibilities as an agency or instrumentality of state government. Indeed, the State Highway Patrol functions as a division of the Department of Public Safety, itself an agency of state government. *See* R.C. 121.02(K) (creating the Department of Public Safety as an administrative department of state government); R.C. 5502.01 (setting forth the general responsibilities of the Department of Public Safety). It follows, therefore, that the State Highway Patrol 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. This means that the proscriptions of 29 U.S.C. §623(a) apply to the State Highway Patrol in its relationship with both its employees and individuals who seek employment with the Patrol.[2]

The Maximum Hiring Age Provision of R.C. 5503.01 Contravenes 29 U.S.C. §623(a)(1) (1988)

As noted previously, R.C. 5503.01 provides, in pertinent part, that at the time of their appointment, troopers of the State Highway Patrol shall not have reached thirty-five years of age, and no person can be disqualified for such appointment as over age prior to the time he reaches thirty-five years of age. The practical effect of the foregoing provision is to preclude appointing as a trooper of the State Highway Patrol any individual who has attained thirty-five years of age. This provision thus contravenes 29 U.S.C. §623(a)(1) (1988) because it bases an individual's qualification for such an appointment upon that person's age. *See, e.g., EEOC v. Missouri State Highway Patrol*, 555 F. Supp. 97, 104 (W.D. Mo. 1982) (finding that the policy of the state highway patrol refusing to hire as troopers or radio operators persons over age thirty-two 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, application of the maximum hiring age provision of R.C. 5503.01 to individuals seeking appointment as troopers of the State Highway Patrol who have attained forty years of age may subject the Patrol 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. IV 1992). *See* 29 U.S.C. §631(a) (Supp. IV 1992); *Hahn v. City of Buffalo*, 770 F.2d 12, 14 (2d Cir. 1985) (pursuant to 29 U.S.C. §631(a), "only those plaintiffs age 40 or older have standing to pursue [an] ADEA claim" (footnote omitted)); *Sobieralski v. City of South Bend*, 479 N.E.2d 98, 101 (Ind. App. 1985) (the ADEA "is limited in its scope to individuals who are at least forty years old").

Age As a Bona Fide Occupational Qualification

A. Controlling Case Law

29 U.S.C. §623(f)(1)-(3) (1988 & Supp. IV 1992) set forth the various circumstances in which an employer may use age-based classifications that are otherwise proscribed by §§623(a)-

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[2] 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.

(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.[3] *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").

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. Maximum Hiring Age for Law Enforcement Employees

Federal courts have applied the foregoing analysis in evaluating 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 refusing employment to individuals who have attained a certain age. *See EEOC v. Mississippi*, 837 F.2d 1398 (5th Cir. 1988); *Hahn v. City of Buffalo* 770 F.2d 12 (2d Cir. 1985); *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984), *cert. denied*, 474 U.S. 828 (1985); *EEOC v. County of Allegheny*, 705 F.2d 679 (3d Cir. 1983); *EEOC v. U. of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983); *EEOC v. Linton*, 623 F. Supp. 724 (S.D. Ind. 1985); *EEOC v. County of Los Angeles*, 526 F. Supp. 1135 (C.D. Cal. 1981), *aff'd*, 706 F.2d 1039 (9th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Rodriguez v. Taylor*, 428 F. Supp. 1118 (E.D. Pa. 1976), *vacated in part on other grounds and remanded for further proceedings*, 569 F.2d 1231 (3d Cir. 1977); *Arritt v. Grisell*, 421 F. Supp. 800 (N.D. W. Va. 1976), *aff'd in part and rev'd in part on other grounds*, 567 F.2d 1267 (4th Cir. 1977).

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[3] The other bases in 29 U.S.C. §623(f)(1), (2)(B), and (3) (1988 & Supp. IV 1992) for the use of age classifications by an employer are not germane to the maximum hiring age provision of R.C. 5503.01. To date, reported decisions of the federal courts have not addressed any employer claim under §623(f)(2)(A) that a maximum hiring age requirement relates to the observance of the terms of a bona fide seniority system.

In *EEOC v. U. of Texas Health Science Center*, for example, the University of Texas defended its policy of refusing to hire as commissioned campus police officers[4] any individuals beyond age forty-five. The district court determined that the age restriction was a bona fide occupational qualification under §623(f)(1) of the ADEA, and this determination was affirmed on appeal. 710 F.2d at 1092. In reaching its decision, the court of appeals examined under each branch of the *Tamiami* analysis the evidence presented to the district court regarding the University's bona fide occupational qualification claim. With respect to the first branch of that analysis, the University offered evidence that demonstrated that physical strength, agility, and stamina are qualifications that must be possessed by every commissioned police officer if that officer is to carry out his responsibilities competently and in a manner that ensures the safety of the campus population:

> There was consistent testimony at trial that physical strength, agility and stamina are important to the training and performance of campus policemen. George Hess, Jr., chief of police at the University of Houston, indicated on cross-examination that physical training is a very important aspect of training a police officer....Frank Cornwall, director of police with the University of Texas System, indicated that the training and daily routine of his officers is strenuous, and Maurice Harr, chief of police at the University of Texas Medical Branch at Galveston, endorsed the hiring ceiling because the campus police job requires stamina and the ability to remain afoot for eight hours, cover an assigned beat, and perform individually....Numerous witnesses testified that the job of campus policeman is similar to that of a city policeman, and that campus police officers conduct joint operations with city officers. Several officers testified that the campus job is if anything more difficult and stressful, because of crowd control problems, the need to exercise restraint with students in a college setting, and the special problems confronted by university medical schools in treating mental patients and inmates.

710 F.2d at 1095. The University also elicited testimony that "younger officers are needed to understand and relate to potential offenders and to prevent minor occurrences from erupting into major ones." *Id.* Thus, one police chief at the University indicated that commissioned officers "must take sixty hours of college credit to acquaint themselves with student pressures and problems," and the University's director of police testified that younger officers "are better able to handle frequent confrontational episodes on campus because of their ability to relate to youthful offenders." *Id. But cf. EEOC v. Mississippi State Tax Com'n*, 848 F.2d 526, 531 (5th Cir. 1988) (the earlier decision in *EEOC v. U. of Texas Health Science Center* "rests at least in part on a BFOQ entirely distinct from that at issue in the later cases involving law enforcement or public safety").

Regarding the second branch of the *Tamiami* analysis, the University offered testimony from medical experts to support its assertion that it would be impossible or impractical to screen applicants beyond age forty-five on an individual basis. Although noting that the EEOC offered testimony on this point that diverged from that offered by the University's expert witness, the court of appeals determined that the findings of the district court in favor of the University on this issue were not clearly erroneous. *EEOC v. U. of Texas Health Science Center*, 710 F.2d at 1097.

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[4] Commissioned campus police officers at the University of Texas "are armed and authorized to conduct criminal investigations and make arrests." *EEOC v. U. of Texas Health Science Center*, 710 F.2d 1091, 1093 (5th Cir. 1983).

In *EEOC v. Missouri State Highway Patrol*, the court of appeals affirmed a finding by the district court that a maximum hiring age of thirty-two for state highway troopers was a bona fide occupational qualification under 29 U.S.C. §623(f)(1). The court of appeals explained as follows in support of its affirmance:

> The maximum entry age insures that the Patrol can take advantage of the physical skills and abilities of younger persons and also provide those persons with enough experience while they are relatively young to compensate for the inevitable reduction in their physical skills and abilities that comes with aging. The Patrol's experts testified on the effects of aging, on the statistical correlation between age and coronary artery disease, and on the inadequacy of testing as a means of distinguishing among individuals. A lifting of the maximum hiring age would result in more older members in the lower ranks, which, as indicated above, spend a large proportion of their time on the road and make the greatest number of arrests. The safety of both Patrol members and the public would be in greater jeopardy with less experienced, less physically capable, older members in the lower and middle ranks. In addition, the Patrol explained that it has a policy of systematic promotion through the ranks which fosters good morale by allowing younger members to work toward promotion and to rise through the ranks in a steady progression. As the District Court noted, it takes approximately eleven years for a trooper to gain sufficient experience to serve the Patrol in an administrative capacity. All of these considerations support the conclusion that the maximum hiring age for Patrol members is a BFOQ.

748 F.2d at 456.

In several other instances, however, plaintiffs have successfully refuted the assertions of particular law enforcement employers that a maximum hiring age serves as a bona fide occupational qualification for their employees. Thus, at issue in *EEOC v. County of Los Angeles* was a county policy of rejecting applications of persons age thirty-five and older who were seeking positions as deputy sheriffs or fire helicopter pilots. The county sought to justify this policy by arguing that persons over the maximum hiring age would be unable to adequately perform the assignments and tasks required of persons in those positions, and that abandonment of its policy would compel the county to hire more persons suffering from undetected heart disease. The district court, however, found that the evidence presented by the county failed to support either of those claims. Regarding the county's first claimed justification, for example, the district court stated as follows:

> [T]he record establishes that there is no strict relationship between age and physical ability. Thus, the overwhelming weight of the evidence demonstrates that many persons over the age of forty are capable of physically outperforming many persons under the age of forty years. Indeed, many persons over the age of forty possess the physical strength, agility and other characteristics needed for these jobs, while many persons under the age of forty lack these characteristics. The evidence also shows that persons lacking such characteristics may easily be distinguished from those possessing them by the use of simple, inexpensive and extremely reliable physical performance tests. This being the case, the general correlation between age and physical ability cannot serve as a justification for defendant's age restriction policy.

526 F. Supp. at 1139.

The district court then ruled that the county's second claimed justification of asymptomatic heart disease in older applicants did not pass the *Tamiami* standard:

> Applying the first prong of the *Tamiami* test to these facts, it is apparent from the record that all or substantially all persons above the age of forty years are not unable to meet defendant's health standards due to heart disease.
>
> Turning to the second prong of the test, and considering that only an extremely small percentage of all persons currently barred by defendant's age restrictions are likely to have heart disease and go undetected by the available medical tests, the court concludes that in this regard it is not impractical for defendant to differentiate the qualified from the unqualified applicants. Thus on the second prong of the *Tamiami* test, defendant's age limit policy again fails to pass muster.
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> Nor is this conclusion altered by the fact that a very small number of persons may conceivably go undetected. In the court's view, *Tamiami* requires only a practical reliable differentiation of the unqualified from the qualified applicant, 531 F.2d at 236, not a perfect differentiation.

526 F. Supp. at 1140. *See also Hahn v. City of Buffalo*, 770 F.2d at 16 (affirming the district court's ruling that the city failed to establish in accordance with the *Tamiami* standards that a maximum hiring age of twenty-nine for city police officers was a bona fide occupational qualification); *EEOC v. County of Allegheny*, 705 F.2d at 681 (same, maximum hiring age of thirty-five for police officers); *EEOC v. City of Linton*, 623 F. Supp. at 726-27 (district court determined that city failed to establish in accordance with the *Tamiami* standards that a maximum hiring age of thirty-five for city police officers was a bona fide occupational qualification).

Accordingly, the directive in R.C. 5503.01 that at the time of their appointment troopers of the State Highway Patrol shall not have reached thirty-five years of age will not subject the Patrol to liability under the ADEA if it is established that such age limitation is a bona fide occupational qualification reasonably necessary to the normal operation of the business of the State Highway Patrol. In that regard, one must be able to demonstrate that certain qualifications 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. 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 individuals age thirty-five and older who seek appointment as troopers do not possess those qualifications, or by demonstrating that it is impossible or highly impractical to evaluate on a case-by-case basis the ability of such individuals to satisfy those qualifications.

If all the foregoing can be demonstrated by the State Highway Patrol, in accordance with the standards of proof set forth in the decisions of the courts that have considered these questions, then one may conclude that age is a bona fide occupational qualification reasonably necessary to the normal operation of the business of the State Highway Patrol, and, in turn, that R.C. 5503.01's imposition of a maximum hiring age for individuals who apply for appointment as Patrol troopers is permissible under the ADEA.

Conclusion

It is therefore, 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. IV 1992), the State Highway Patrol is an employer as defined in 29 U.S.C. §630(b) (1988).

2. When applied to individuals age forty or older, the directive in R.C. 5503.01 that at the time of their appointment troopers of the State Highway Patrol shall not have reached thirty-five years of age contravenes 29 U.S.C. §623(a)(1) (1988), but would be permissible under 29 U.S.C. §623(f)(1) (1988) if it is established that such age limitation is a bona fide occupational qualification reasonably necessary to the normal operation of the business of the State Highway Patrol.