

AS:JL:djd

cc: Files
Gauf
Laitos
April 3, 1975

Glen E. Pommerening
Assistant Attorney General
for Administration

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

out 4/4/75

Establishing a Maximum Entry Age Limit for Law Enforcement Officer Positions in the Department of Justice

This is in response to your request of March 17, 1975, that this Office consider the effect of two statutes on a proposed Justice Department determination setting a maximum entry-age limit for law enforcement positions.

Public Law 93-350, 88 Stat. 355, approved July 12, 1974, amended 5 U.S.C. 3307 by adding a new subsection (d). Subsection (d) provides in pertinent part as follows:

"The head of any agency may, with the concurrence of such agent as the President may designate, determine and fix the minimum and maximum limits of age within which an original appointment may be made to a position as a law enforcement officer. . . ."

On November 5, 1974, the President signed Executive Order 11817 designating the Civil Service Commission as the President's agent for purposes of concurrence under §3307(d). In early 1975, Justice Department components agreed to fix 35 as the maximum age for entry into law enforcement positions in the Department.

Section 15 of Public Law 93-259, 88 Stat. 74 (hereafter referred to as P.L. 93-259), effective May 1, 1974, provides in part:

"(a) All personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from non-appropriated funds) . . . shall be made free from any discrimination based on age.

"(b) . . . Reasonable exemptions to the provisions of this section may be established by the [Civil Service] Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position"

(These provisions are codified at 29 U.S.C.A. 633a(a) and 633a(b)).

It appears that you have been informed by the Civil Service Commission that while it will "concur" with a Justice Department maximum age determination under 5 U.S.C. 3307(d), it will not make a formal determination under P.L. 93-259 that "age is a bona fide occupational qualification" for law enforcement officers. Accordingly, you seek our views on whether it is legally permissible for the Attorney General to fix 35 as the maximum entry age for the Department's law enforcement officers, with the concurrence of the Civil Service Commission as provided by §3307(d), in the absence of a Commission determination under P.L. 93-259.

In our view, a determination under P.L. 93-259 is not required. We believe that should the §3307(d) maximum entry age determination be challenged by a suit under P.L. 93-259, the Department would prevail. Our reasons for this conclusion are two-fold. First, it appears that the two statutes can be reconciled so that compliance with §3307(d) operates as an implied exception to the requirements of P.L. 93-259. Second, even if the two statutes cannot be harmonized, the provisions of the more specific and later-in-time statute (§3307(d)) should govern over the more general and earlier-in-time statute (P.L. 93-259).

1. A long-standing maxim of statutory construction is that statutes are enacted in accord with the legislative policy embodied in prior statutes, and that therefore statutes dealing with the same subject should be construed together. Allen v. Grand Cent. Aircraft Co., 347 U.S. 535 (1954); Sanford v. Comm'r of Int. Rev., 308 U.S. 39 (1939). A review of the history of the two statutes reveals that they can reasonably be construed to be in harmony with each other.

Section 3307(d) is an exception to 5 U.S.C. 3307(a), which provides that:

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

Thus §3307(a), which was originally enacted in 1957 (and which then contained no exceptions), articulates the same policy against age discrimination as that contained in P.L. 93-259. 1/ The latter merely sets up a different mechanism for preventing age discrimination than that used in §3307(a). 2/ Since P.L. 93-259 reiterates a policy first enacted into law in 1957, any statutory exception to the age discrimination prohibitions found in §3307(a) (i.e., §3307(d)) is an implicit exception to the general prohibitions contained

1/ As the House Report on §3307(a) stated:

"[R]estrictions on employment by the Government based solely on age shall not be effective" H. Rept. 1847, 84th Cong., 2d Sess. at 20.

2/ Section 3307(a) prohibits use of appropriated funds to pay employees who establish maximum-age requirements. P.L. 93-259 flatly prohibits age discrimination in federal agencies and authorizes the Civil Service Commission to enforce this prohibition. Also, by including within the scope of its coverage employees and applicants who are paid from "nonappropriated" funds, P.L. 93-259 protects employees and applicants not covered by §3307(a).

in P.L. 93-259. 3/

It should also be noted that since Congress passed P.L. 93-259 after the enactment of §3307, which then contained exceptions for Park Police and Air Traffic Controllers, it is permissible to presume that it was aware of the latter's provisions. But P.L. 93-259 does not contain the formula "Notwithstanding any other law," which would indicate that it was to govern generally. The absence of such language suggests that P.L. 93-259 does not impliedly repeal the exceptions to §3307(a), and similarly that §3307(d) should be construed as a special exception to more general statutes dealing with the subject. 4/

Additional support for harmonization is to be found in the legislative history of §3307(d). Before it was enacted several Congressmen, as well as the Civil Service Commission, criticized it for being too "piecemeal" (because it gave each agency authority to establish maximum age limits), and recommended instead that the Civil Service Commission establish "uniform" age limits for law enforcement positions. H. Rept. 93-463, 93d Cong., 1st Sess., at 9, 20; S. Rept. 93-948,

3/ In 1969 Congress amended §3307(a) and made an exception for United States Park Police. The House Report justified this exception with the following reasoning:

"Present law [citing 5 U.S.C. 3307(a)] effectively prohibits the establishment of maximum age limits for any officer or employees entering their positions through the competitive civil service [But] because of the demanding nature of police work [there is] general agreement that maximum age limits are essential in recruiting new officers." H. Rept. 91-477, 91st Cong., 1st Sess. at 1-2.

In 1972 Congress made a similar exception for air traffic controllers. Both the Federal Aviation Administration and the Interior Department established maximum-entrance age limits under these exceptions, and we have been informed by these agencies that they do not believe P.L. 93-259 now requires them to secure an exemption.

4/ There is nothing in the legislative history of P.L. 93-259 which evidences a Congressional intent to supersede or repeal the then existing provisions of §3307.

93d Cong., 2d Sess. at 7. Since the House and Senate refused to change §3307(d)'s "piecemeal" approach, one can assume that Congress did not wish to require agencies to resort to a more uniform P.L. 93-259 procedure requiring Civil Service determination exempting firefighter and law enforcement positions, but instead was satisfied with the provision affording each agency the power to make maximum-age entrance determinations under the more flexible §3307(d) procedure. 5/

2. Even if one assumes that the two statutes cannot be reconciled, another rule of statutory construction holds that where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the more specific will prevail. Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961); Missouri v. Ross, 299 U.S. 72, 76 (1937). Since §3307(d) sets forth a procedure for fixing age limits for two specific classes of employees (law enforcement officials and firefighters) while P.L. 93-259 generally prohibits age discrimination for all classes of federal employees, §3307(d) would govern.

Another principle of statutory interpretation holds that if there is apparent conflict between two statutes relating to the same subject matter, the more recent of the two statutes will govern. See Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 451 F. 2d 1211, 1214 (4th Cir. 1971). As §3307(d) is the more recent of the two statutes, its provisions would control.

5/ Both the House and Senate Reports on §3307(d) state that firefighter and law enforcement positions are "occupations [which] should be composed, insofar as possible, of young men and women." H. Rept. 93-463, 93d Cong., 1st Sess. at 2; S. Rept. 93-948, 93d Cong., 2d Sess. at 2.