STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

January 16, 2015

CHRO No. 1140156 - Commission on Human Rights and Opportunities ex rel. Kirk McKinney, Complainant v. Town of Glastonbury, Glastonbury Fire Department, Respondent

Memorandum of Decision

Procedural Background

On November 11, 2010, Kirk McKinney ("the complainant" or "McKinney") filed an complaint of illegal discriminatory practice ("affidavit" or "complaint") with the Commission on Human Rights and Opportunities ("commission" or "CHRO") seeking an investigation into his claims that the Town of Glastonbury and the Glastonbury Fire Department ("the respondent") violated following provisions of the Connecticut General Statutes: sections 46a-60(a)(1), 46a-64(a)(1), 46a-74; and 46a-76.[1] The complaint also alleged that the respondent denied the complainant

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[1] Sec. 46a-60. (a) It shall be a discriminatory practice in violation of this section:(1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability or physical disability, including, but not limited to, blindness;....

Sec. 46a-64. (a) It shall be a discriminatory practice in violation of this section: (1) To deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability or physical disability, including, but not limited to, blindness or deafness of the applicant, subject only to the conditions and limitations established by law and applicable alike to all persons; (2) to discriminate, segregate or separate on account of race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, learning disability or physical disability, including, but not limited to, blindness or deafness....;

Sec. 46a-74. State agencies not to permit discriminatory practices in professional or occupational associations, public accommodations or housing. No state department, board or agency may permit any discriminatory practice in violation of section 46a-59, 46a-64 or 46a-64c.

Sec. 46a-76. (a) Race, color, religious creed, sex, gender identity or expression, marital status, age, national origin, ancestry, intellectual disability, mental disability, learning disability or physical disability,

due process of law and equal protection of the laws on the basis of his age in violation of Article One, §§ 1, 10 and 20 of the Connecticut Constitution and the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. The claims arose when the respondent refused to permit the complainant to retain his position as Deputy Chief because he turned 66 years old on October 27, 2010.

By letter dated April 26, 2012, the commission notified the parties that this complaint had been processed pursuant to Public Act 11-237 through the commission's Early Legal Intervention ("ELI") program and was being sent directly to the Office of Public Hearings ("OPH") for a de novo contested case proceeding. The letter also stated that complainant or his attorney would be responsible for putting on the case before the presiding human rights referee ("presiding referee"), and that, although the commission had deferred prosecution, pursuant to section 46a-84(d), commission counsel retained authority to participate in the hearing.

On April 26, 2012, the OPH received the complaint from the commission. On May 2, 2012, the required Notice of Contested Case Proceeding and Hearing Conference was issued and the case was assigned to the undersigned as the presiding referee. All statutory and procedural prerequisites having been satisfied, the complaint is properly before this tribunal for hearing and decision.

The public hearing was held on August 20 and 21 2013. Attorney Adam J. Teller, appeared on behalf of the complainant. Attorney David S. Monastersky, appeared on behalf of the respondent. Thereafter, the parties filed post-hearing briefs, including proposed findings of fact, on or about December 23, 2013. Subsequently, on January 24, 2014, post-hearing reply briefs were filed and the record was closed.

After careful review and consideration of the arguments set forth in the briefs of the respective parties, to resolve this dispute, the undersigned is required to a determine what the legislature

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including, but not limited to, blindness shall not be considered as limiting factors in state-administered programs involving the distribution of funds to qualify applicants for benefits authorized by law. (b) No state agency may provide grants, loans or other financial assistance to public agencies, private institutions or organizations which discriminate.

intended when it enacted sections 46a-60(b)(1)(C) and 46a-64(a)(2).[2] The issues raised by this dispute involve questions of statutory construction that have not been addressed by any Connecticut court.

For the following reasons, I conclude that section 46a-60(b)(1)(C) creates a statutory exclusion from the age discrimination protections found in section 46a-60(a) for all firefighters, irrespective of whether the firefighter receives compensation or benefits for his or her service. Furthermore, I conclude that the prohibitions against discrimination in the access to and enjoyment of public accommodations, pursuant to section 46a-64, do not extend to employment by any enterprise defined, pursuant to section 46a-63(1), to be a "place of public accommodation, resort or amusement." Employment discrimination by such enterprises, instead, is regulated, pursuant to Connecticut law, by sections 46a-58, 46a-60, and 46a-81c, as appropriate. Accordingly, the case is dismissed in its entirety.

Finding of Facts

The complainant is a resident of the Town of Glastonbury, Connecticut. He was born on October 27, 1944. Transcript p. 7 (hereinafter Tr. #).[3] McKinney joined the Glastonbury Fire Department ("GFD") in 1972 and became deputy chief in 2004. Tr. 8-9.

The GFD is a department of the Town of Glastonbury ("Town") and operates under the supervision of the Glastonbury Fire Commission. Answer ¶20 and Tr. 11-12. The Bylaws of the GFD provide that "any person" between the ages of 18 and 65 years of age is eligible for active membership subject to passing a Department physical examination. C6 at p. 13. R1 at p. 17.

Except for the chief of the GFD, all firefighters, officers, and assistant/deputy chiefs do not receive a salary; however, all receive some financial benefits for their service. For his service,

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[2] The post-hearing briefs that were filed by the complainant did not offer any arguments regarding the claims that the respondent violated either sections 46a-74 or 46a-76, or the alleged state and federal constitutional provisions. Pursuant to the Regulations of State Agencies section 46a-54-93a (closing arguments and briefs), those claims are deemed waived and will not be addressed in this decision.

[3] The complainant's exhibits, post-hearing brief, and reply brief will be designated C#, C-brief #, and C-reply brief #" respectively. The respondent's exhibits, post-hearing brief, and reply brief will be R#, R-brief #, and R-reply brief #" respectively.

McKinney, like all other members, was entitled to and was paid "unit pay" for his attendance at emergency calls and training events; he also received and continues to receive property tax abatements from the Town. Tr. 18-19, 69-70. (The unit pay is significantly less than the state's statutory minimum wage. Tr. 119.) Additionally, as deputy chief, he received an annual stipend. Tr. 17-18. Members of the GFD do not participate in the any municipal retirement or pension system. Tr. 112.

The complainant had both administrative and operational responsibilities as deputy chief. His operational responsibilities required that he respond to a minimum number of emergency calls each year. Tr. 17, 18, 60, 98, and 112. As a deputy chief, McKinney was required to meet the same standards of an interior firefighter, and at times, performed fire suppression duties. Tr. 39, 78-79, 85-86, 123, 124, 153-154 and 164. Connecticut has established OSHA standards to determine medical and physical qualifications for firefighters from the level of probationary firefighters through the fire chief. Tr. 86-87, 145. The GFD follows the OSHA standards. Tr. 146. The OSHA standards do not contain any age limitation. Tr. 157-158.

The Bylaws contain a mandatory retirement provision that prohibits "all Officers and Fire Persons upon reaching age sixty-five (65)" from continuing in those positions; however such members could elect to serve on the GFD in a fire support or fire police capacity. C1, C2, C5 and C6 at 13; Tr. 40, 72, 76, 156.

By letter dated June 9, 2010, the respondent notified the complainant that the Bylaws would be amended to state that, "Upon reaching age 65 a member is required to notify the Chief's office in writing, at least two weeks prior to his/her 66th birthday [of] their intent to do one of the following: Retire from the Department; Become a support member; Become a member of the fire police. This appointment is at the discretion of the Chief's office and the Board of Fire Commissioners. Failure to notify the Chief's office in writing of their intentions will result in the member's effective retirement on their 66th birthday." C1.

By letter dated October 25, 2010, the respondent notified the complainant that effective October 27, 2010, his 66th birthday, his duties and responsibilities as deputy chief would terminate. C2. In accordance with its normal procedures, the respondent offered the

complainant the opportunity to continue to serve with the GFD, after October 27, 2010, in the capacity of fire support or fire police, but McKinney never notified the respondent that he wished to serve in either capacity. Tr. 44, 73-74; C2.

In February 2011, the respondent notified the complainant that he was no longer an active member of the GFD because he failed to indicate whether he elected to become a member of either the fire support or fire police. C-5. Tr. 74-75.

Fire police and support members do not receive the stipend paid to the deputy chief and other officers. Tr. 43-45.

Analysis

Standard of Review

In the absence of any determination of the meaning of a statute by a Connecticut court, a human rights referee is obligated to "ascertain and give effect to the apparent intent of the legislature.... In other words, [each referee must] seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply.... In seeking to determine that meaning, General Statutes [section] 1–2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.... When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter...." (Internal quotation marks omitted.) Friezo v. Friezo, 281 Conn. 166, 181–82, 914 A.2d 533 (2007)." Lyon v. Jones, 291 Conn. 384, 395-96, 968 A.2d 416, 423-24 (2009). See also Matthews v. Dept. Public Safety, 2013 WL 3306435, 56 Conn. L. Rptr. 262 (Superior Court, May 31, 2013).

The task at hand, therefore, is to consider sections 46a-60(b)(1)(C) and 46a-64(a)(2), respectively, to determine whether each of the respective sections is "plain and unambiguous." "A statute is ambiguous if, when read in context, it is subject to more than one reasonable interpretation." Fairchild Heights, Inc. v. Dickel, 305 Conn. 488, 497 (2012) (citation omitted. Internal quotation marks omitted). "As was stated by the Court in State v. Campbell, 180 Conn. 557... (1980), 'the unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result.'" Esposito v. City of New London, CHRO. No. 9340530, Memorandum of Decision, October 21, 1999.

"We assume that the legislature attempts to create a consistent body of law.... Assuredly, we are guided by the principle that the legislature is always presumed to have created a harmonious and consistent body of law.... Indeed, this tenet of statutory construction requiring us to read statutes together is particularly applicable when the statutes relate to the same subject matter.... Finally, [w]e presume that the legislature had a purpose for each sentence, clause or phrase in a legislative enactment, and that it did not intend to enact meaningless provisions." CHRO v. Truelove & Maclean, Inc., 238 Conn. 337, 347, 680 A.2d 1261, 1267 (1996) (Citations omitted; internal quotation marks omitted).

Section 46a-60(b)(1)(C) Claim

The Respondent's Argument

The Respondent argues that section 46a-60(b)(1)(C) is a statutory bona fide occupational qualification that authorizes an employer to require a firefighter to retire upon reaching an age chosen by the employer, without having to consider whether the employee remains qualified for the position. R-brief 8. Citing the decision of the Human Rights Referee in CHRO ex rel. Armando Esposito v. City of New London, CHRO No. 9340530 (Oct. 21, 1999), the respondent argues that section 46a-60(b)(1)(C), "in conjunction with [section] 7-430, establishes a mandatory retirement age of 65 as a statutory BFOQ."[4] R-brief 9. The respondent also cites the

[4] Section 7-430 states. In relevant part,

decision in CHRO ex rel. Laurence Jankowski v. City of Meriden, CHRO No. 9730288 (April 6, 2000), where "the Human Rights Referee agreed with the Esposito decision, and held that [sections] 46a-60(b)(1)(C) and 7-430 provide for a per se mandatory retirement age of 65 for firefighter." R-brief 10.

While the reasoning of Esposito and Jankowski is sound, the instant case is factually distinct; it does not involve a complainant entitled to retirement benefits provided to a firefighter who is a regular full-time employee of a municipality that has elected to participate in the Municipal Employees Retirement Fund. See section 7-425, et seq. The reasoning of the respective referees in Esposito and Jankowski, therefore, is not dispositive of the instant matter.

The Complainant's Argument

The complainant asserts that because the respondent stipulated that it terminated the complainant solely because of his age, unless the law "expressly authorized them to discriminate on the basis of age," the undersigned must find that the respondent has violated section 46a-60(a). C-brief 21. The complainant states that this tribunal is required to examine the legislative history of section 46a-60(b)(1)(C) because no court has interpreted that provision to authorize the mandatory retirement of any member of a volunteer fire department. C-brief 22.

Any member, other than an elective officer, shall be retired at any time after such member has become eligible for retirement upon the recommendation of the legislative body of the municipality by which he is employed. Any member, except an elective officer, who has attained the age of sixty-five years if employed as a policeman or fireman shall be retired on the day following the attainment of such age, except that any such member, at his request and with the annual approval of the legislative body, may be retained in the employ of the participating municipality, but such person shall receive no pension payments during the period he is so retained, provided, for any member, except an elective officer, who at or before the end of three years after the effective date of participation has attained the age of sixty-five years, if employed as a policeman or fireman, the compulsory retirement date shall be the end of such three years after such effective date, unless application for retirement is made before such compulsory dated by the legislative body of the municipality.

The complainant provides an analysis of the House debate on two of the amendments (LCO 2794 and LCO 3735) offered to House Bill 5809 (An Act Concerning Mandatory Retirement) during the 1978 legislative session, C-brief 22-24, and concludes that the legislature intended only to preserve the right of a municipality to collectively bargain for and set an involuntary retirement age below 70 for professional police and firefighters entitled to retirement benefits pursuant to section 7-430 or some other municipal retirement plan. C-brief 26. The complainant also argues that the use of the term "occupation" in section 46a-60(b)(1)(C) was intended to limit the term firefighter to only those individuals who earn a living as a career fire-fighter, not those who volunteer as a "means of community service," and who receive minimal compensation for such efforts. C-brief 26-27. Lastly, the complainant argues that the position of firefighter and deputy chief are factually distinct, and each must be considered separately for purposes of BFOQ analysis. C-brief 28-32 (citing U.S. EEOC v. St. Paul, 500 F. Supp. 1135 (D. Minn. 3d Div. 1980), aff'd 671 F.2d 1162 (8th Cir. 1982)).[5]

Interpretation of section 46a-60(b)(1)(C)

Section 46(a)-60(b)(1)(C) is ambiguous on its face. As noted by the complainant, that subdivision is the successor to a provision added, in 1978, to then section 31-126 of the Fair Employment Practiced Act ("FEPA") with the enactment of PA 78-350, An Act Concerning Mandatory Retirement. This tribunal, therefore, in accordance with section 1-2z, must consider the provision in relation to the remainder of section 31-126, as amended by PA 78-350, and its relationship to other relevant statutes.

Public Act 78-350

Section 1 of PA 78-350, stated in relevant part –

> It shall be an unfair employment practice (a) For an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, because of the ... age ... of any individual, ... to discharge from employment such

[5] St. Paul is an Age Discrimination and Employment Act ("ADEA") case that predated the 1986 and 1996 amendments to the ADEA, 29 U.S.C. section 623(j). Those amendments relieved firefighting and law enforcement agencies from having to establish that age is a BFOQ in order to discriminate on the basis of age. See Feldman v. Nassau County, 434 F.3d 177, 182, footnote 5 (2d Cir. 2006).

individual .... The provisions of this section as to age shall not apply to ... (1) the termination of employment of any person who has attained the age of seventy and is entitled to benefits under any pension or retirement plan or system provided for state or municipal employees or for teachers in the public schools of the state, (2) the termination of employment of any person entitled to receive retirement benefits of not less than twenty-seven thousand dollars per year exclusive of social security benefits, (3) the termination of employment of persons in occupations, including police work and firefighting in which age is a bona fide occupational qualification or (4) operation of any bona fide apprenticeship system or plan. (Emphasis added.)[6]

Bona Fide Occupational Qualification

Subsection (a) of section 31-126, contains a bona fide occupational qualification or need ("BFOQ") exception from the protections created therein. This exception was included in the state's first employment discrimination law enacted in 1947 and was in effect in 1959 when protections against age discrimination were originally added to FEPA. The BFOQ exception remains in section 46a-60 today.

When PA 78-350 was enacted, the BFOQ exception was well established, and appropriately restrictive, having been addressed by the Connecticut Supreme Court only a few years earlier, in 1975. Although the FEPA does not define the term BFOQ, the Connecticut Supreme Court noted that the test circumscribed by the definition of BFOQ was "stringent and narrow," and stated that "[a] BFOQ exist[ed] only if no member of the class excluded is physically capable of performing the tasks required by the job." Evening Sentinel v. Nat'l Org. for Women, 168 Conn. 26, 36-38 (1975)(citations omitted).[7]

[6] More specifically, the provision that was to become section 46a-60(b)(1)(C) was first added to House Bill 5809, with the adoption of House Amendment A, LCO No. 3735, on April 20, 1978.

[7] Coincidentally, after the passage of PA 78-350, and prior to its January 1, 1979 effective date, the Connecticut Supreme Court, on September 5, 1978, released its decision in Connecticut Inst. for the Blind v. Connecticut Comm'n on Human Rights & Opportunities, 176 Conn. 88 (1978). The Court revisited and endorsed its prior annunciation of the stringent requirements of the BFOQ exceptions contained in section 31-126, noting that "[it] is ... eminently clear that the [employer's] blanket exclusion of anyone without normal visual acuity, without any effort to define the specifications of the position ... or to test the capacities of the [applicant] for that position, cannot stand. Blanket exclusions ... fly in the face of the command to individuate that is central to fair employment practices." Id at 95.

The logical conclusion is that when PA 78-350 was enacted, the legislature intended the exclusion now found in section 46a-60(b)(1)(C) not to replicate the requirements of the existing BFOQ exception; otherwise, the provision would be superfluous.

Firefighters

The complainant argues that the exclusion does not apply to "volunteer" firefighters; however, the term firefighter is not defined in PA 78-350 or elsewhere in the FEPA. There is no language in either the FEPA or PA 78-350 to indicate that the legislature intended to limit the term firefighter to only fulltime professional firefighters.

Entitlement to Retirement Benefits

The text of section 31-126, prior to and after the enactment of PA 78-350, reveals that entitlement to a pension or retirement benefit was not a factor with regard to the exclusion of firefighters and policemen from the age discrimination protections. Unlike other subdivisions found in the provisions of PA 78-350 that create exclusions from the age protections, the exclusion for police work and firefighting have no requirement that those individuals be entitled to a retirement benefit.

Prior to the enactment of PA 78-350 (and the adoption amendment of LCO No. 3735), section 31-126 stated, in relevant part,

> It shall be an unfair employment practice (a) For an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, because of the ... age ... of any individual, ... to discharge from employment such individual .... The provisions of this section as to age shall not apply to (1) termination of employment where the employee is thereupon <u>entitled to benefits</u> under the terms and conditions of any <u>bona fide retirement or pension plan or collective bargaining agreement</u> between the employer and a bona fide labor organization, provided any new employee shall be subject to all the provisions of any existing bona fide retirement or pension plan or collective bargaining agreement entered into between the employer and its employees, (2) operation of the terms or conditions of any <u>bona fide retirement or pension plan</u>, (3) operation of the terms or conditions of any bona fide group or employee insurance plan or (4) operation of any bona fide apprenticeship system of plan. (Emphasis added.)

Except for the proviso contained in subdivision (1), the provisions of section 31-126 enumerated (1), (2), and (3) were added in 1959 by the act that made age discrimination an unfair employment practice and created the exclusions of the specified conduct from the newly instituted prohibitions against age discrimination. See PA 59-145. From 1959 to 1978, the exclusions from the age protections contained in the FEPA specifically referenced the termination of an employee entitled to benefits under the term and conditions of a bona fide retirement or pension plan or a collective bargaining agreement.

PA 78-350 deleted the provisions enumerated (1), (2) and (3), and replaced those exclusions with two provisions that specifically reference the termination of an employee entitled to retirement or pension benefits and a third provision, now section 46a-60(b)(1)(C), that does not state that a person whose occupation is either police work or firefighting must be entitled to a retirement or pension benefit for the exclusion to apply.

Again, section 1 of PA 78-350, stated in relevant part –

> It shall be an unfair employment practice (a) For an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, because of the ... age ... of any individual, ... to discharge from employment such individual .... The provisions of this section as to age shall not apply to ... (1) the termination of employment of any person who has attained the age of seventy and is <u>entitled to benefits under any pension or retirement plan or system</u> provided for state or municipal employees or for teachers in the public schools of the state, (2) the termination of employment of any person <u>entitled to receive retirement benefits</u> of not less than twenty-seven thousand dollars per year exclusive of social security benefits, (3) <u>the termination of employment of persons in occupations, including police work and firefighting in which age is a bona fide occupational qualification</u> or (4) operation of any bona fide apprenticeship system of plan. (Emphasis added.)

The legislature did not specify in PA 78-350 that a firefighter be entitled to retirement or pension benefits for the exclusion from the age discrimination protections to apply. However, the legislature unambiguously stated in provisions (1) and (2) that other employees, including, but not limited to, state and municipal employees, be entitled to benefits under a pension plan

to exclude them from the section 31-126 age protections.[8] This language may signal the legislature's intent that the exclusion apply to all firefighters, whether or not entitled to retirement benefits.

Occupation

The complainant argues that the use of the term "occupation" in section 46a-60(b)(1)(C) was intended to limit the term firefighter to only those individuals that earn a living as a career fire-fighter, not those who volunteer as a "means of community service," and who receive minimal compensation for such efforts. C-brief 26-27. However, that term is undefined in either PA 78-350 or elsewhere in the FEPA.

It is the opinion of this tribunal that it is reasonable to conclude that any relationship deemed sufficient enough to permit this tribunal to adjudicate a claim based on an alleged violation of section 46a-60(a), is also sufficient to be deemed an occupation for the purposes of the section 46a-60(b)(1)(C).

Related Statutes

As noted previously, the respondent looks to section 7-430 (codified in chapter 113, part II, Retirement, Municipal Employees, of Title 7, Municipalities) to support the proposition that section 46a-60(b)(1)(C) excludes volunteer firefighters from the age discrimination protections in section 46a-60(a). The complainant argues that section 7-430 does not apply to volunteer firefighters, so it cannot support the conclusion that section 46a-60(b)(1)(C) includes those firefighters.

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[8] PA 78-350 also contained, inter alia, the follow new sections that also specifically referenced retirement or pension –

> (2) No employee, as a result of this act, shall receive a retirement benefit in excess of the maximum retirement benefit payable to such employee under the terms of any bona fide retirement or pension plan applicable to such employee in effect on the effective date of this act.; ... and (5) Any employee who continues employment beyond the date on which such employee becomes eligible for maximum possible retirement benefit available to such employee shall give notice of intent to retire, in writing, to such employees' employer not less than thirty days prior to the date of such retirement.

There is no dispute that, for purposes of chapter 113, volunteer firefighters are not municipal employees. Assuming arguendo that section 7-430 is related to section 46a-60, the fact that such firefighters are not municipal employees, does not resolve the question of whether or not firefighters, other than fulltime municipal firefighters, are included in the section 46a-60(b) exclusion.

In addition to section 7-430, there are a number of other statutes in Title 7 of the Conn. Gen. Statutes that deal with firefighters. Specifically, part III (Fire Departments) and part IV (Municipal Police and Fire Protection – Volunteer Firefighters and Volunteer Ambulance Service Members).

Once again, assuming arguendo, that these statutes are related to section 46a-60, a thorough review of these sections provides information that may be helpful in determining of the meaning of the term firefighter contained in section 46a-60(b)(1)(C). For example, pursuant to section 7-308, municipalities are obligated to protect volunteer firefighters from financial loss or expense arising from alleged negligent acts while performing their duties.[9] Furthermore, the state provides workers compensation benefits to volunteer firefighters.[10]

These laws are evidence that the legislature determined that both professional fulltime and "volunteer" firefighters should be treated similarly with respect to certain statutory

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[9] Section 7-308 (part III of chapter 104, Fire Departments) states, in pertinent part, that, "each municipality of this state, notwithstanding any inconsistent provision of the law, general, special or local, or any limitation contained in any charter, shall protect and save harmless any volunteer firefighter, volunteer ambulance member or volunteer fire police officer of such municipality from financial loss or expense, including fees and costs, if any arising out of (1) any claim, demand, suit or judgment by reason of alleged negligence on the part of such volunteer firefighter, volunteer ambulance member or volunteer fire police officer while performing fire, volunteer ambulance or fire police duties ...." Section 7-303 defines "work" or "duty" to include "the time spent and duties performed while at fires, answering alarms, returning from fires, attending fire drills or classes, conducting tests or trials of any of the apparatus or equipment normally used by a fire department, instructing or being instructed in fire duties, and any other duty which is ordered to be performed by a superior or commanding officer in the fire department."

[10] See sections 7-314a to 7-322a.

protections. This may also indicate that the legislature also intended the term "firefighter" in section 46a-60 to include all firefighters.

To the extent that ambiguity remains, this tribunal, is permitted to examine extratextual sources to assist in determining what the legislature intended when it adopted what is now codified at section 46a-60(b)(1)(C).

Legislative History

The complainant's argument that legislature did not intend for the provision now codified at section 46a-60(b)(1)(C) to exclude "volunteer" firefighters from the FEPA prohibitions against age discrimination is premised on its review of the April 19-20, 1978 House debate, between Representatives Motto and Stevens, regarding House Amendment Schedule "A", LCO No. 2794, Substitute House Bill No. 5809, File No. 340, An Act Concerning Mandatory Retirement. If adopted, LCO No. 2794 would have amended the portion of section 31-126 that excluded certain conduct from the age protections created therein.[11]

First, the amendment would have deleting the following provisions enumerated 1, 2, and 3:

> The provisions of this section as to age shall not apply to ... (1) termination of employment where the employee is thereupon entitled to benefits under the terms and conditions of any bona fide retirement of pension plan or collective bargaining agreement between the employer and a bona fide labor organization, provided any new employee shall be subject to all the provisions of any existing bona fide retirement or pension plan or collective bargaining agreement entered into between the employer and its employees, (2) operation of the terms or conditions of any bona fide retirement or pension plan, (3) operation of the terms or conditions of any bona fide group or employee insurance plan....[12]

This amendment then would have added the following exclusions, numbered 1, 2, and 3, to section 31-126:

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[11] The day after this debate, on April 20, 1978, LCO 2794 was withdrawn from consideration.

[12] Except for the proviso contained in subdivision (1), the provisions of section 31-126, enumerated (1), (2), and (3), that this amendment proposed to delete, were added in 1959, by the public act that made age discrimination illegal and simultaneously created the original exclusions of the specified acts from the newly instituted prohibitions against age discrimination. See PA 59-145.

> The provisions of this section as to age shall not apply to (1) ... *THE TERMINATION OF EMPLOYMENT OF ANY PERSON WHO HAS ATTAINED THE AGE OF SEVENTY AND IS ENTITLED TO BENEFITS UNDER ANY PENSION OR RETIREMENT PLAN OR SYSTEM PROVIDED FOR STATE OR MUNICIPAL EMPLOYEES OR FOR TEACHERS IN THE PUBLIC SCHOOLS OF THE STATE, (2) THE TERMINATION OF EMPLOYMENT OF ANY PERSON ENTITLED TO RECEIVE RETIREMENT BENEFITS OF NOT LESS THAN TWENTY-SEVEN THOUSAND DOLLARS PER YEAR EXCLUSIVE OF SOCIAL SECURITY BENEFITS, (3) THE TERMINATION OF ANY TENURED FACULTY MEMBER AT AN INSTITUTION OF HIGHER LEARNING OR* (4) operation of any bona fide apprenticeship system or plan."

Questioning Motto on the impact of language contained in LCO No. 2794, Stevens asked, "[i]f this amendment were adopted into law, could a city and the bargaining agent agree for mandatory retirement at age sixty-five?" Transcript of Conn. House of Representatives, April 1978 at 2381 (hereinafter "House #"). Stevens also asked, "[w]ould you identify where in the amendment a collective bargaining agreement that expires after the effective date of this Act permits a municipality to enter into a collective bargaining agreement requiring a mandatory retirement age sixty five? Or anything lower than seventy?" Id. 2382. Stevens then asked, "[d]oes not this amendment establish an age seventy below which any covered employer may not require retirement based upon age alone – below seventy?" Id 2385. Motto replied, "I think my answer would be yes." Id. 2385.

Stevens then asked, "[a] municipality in Connecticut after the effective date of this Act, if they are negotiating with a police or fire union, would this [amendment] prohibit the city and the union from entering into a pension agreement whereby members of the police force or fire department would have to retire at an age below seventy?" Id. 2385. Stevens expressed his concern about the significant change in the ability of municipalities and unions representing the uniformed services to bargain collectively for a retirement age below seventy. Id. 2388. Stevens then asked that the amendment be modified to address the concerns he raised regarding municipal pensions for police and fire fighters to allow for retirement below the age of seventy. Id. 2391. Motto replied, "I believe that this is covered in this bill and it's in the occupational qualification which would be the police and the fire." Id. 2385.

Reviewing the actual language of LCO 2794, Motto appears to refer to the section of the amendment, lines 22-29, that states "[i]t shall be an unfair employment practice (a) for an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, because of the ... age ... of any individual, ... to discharge from employment such individual...." Section 1 of LCO 2794, that was being debated, proposed an amendment to section 31-126, and contained the reference to "occupational qualification."

Stevens replied, "My question was, based on age alone, without regard to the section to which you refer." House 2386. Motto responded, "If it's just age, then you're right, but I think when you talk about the uniform services then it becomes a combined occupational qualification that goes with age." Id. 2386.

A few moments later, Motto replied, "Mr. Stevens, as far as the uniformed people are concerned, I think the answer to that is that age itself could be the factor. You mentioned it to me before, that age alone could be the occupational qualification. That if a person gets to old, a municipality – it could be upheld that a man can't work beyond a certain age as a policeman or a fireman, which might take care of that area." Id. 2392. Soon after this statement was made, the debate on the amendment was curtailed by a request to pass the item.

The next day, on April 20, 1978, LCO No. 2794 was withdrawn from consideration. LCO No. 3735 was offered in its place and designated House Amendment Schedule A. LCO No. 3735 also deleted the existing provisions enumerated 1, 2 and 3, and replaced those with the following exclusions from the age provisions designated 1, 2, 3, and 4:

> (1) THE TERMINATION OF EMPLOYMENT OF ANY PERSON WHO HAS ATTAINED THE AGE OF SEVENTY AND IS *ENTITLED TO BENEFITS UNDER ANY PENSION OR RETIREMENT PLAN OR SYSTEM* PROVIDED FOR STATE OR MUNICIPAL EMPLOYEES OR FOR TEACHERS IN THE PUBLIC SCHOOLS OF THE STATE, (2) THE TERMINATION OF EMPLOYMENT OF ANY PERSON ENTITLED TO RECEIVE RETIREMENT BENEFITS OF NOT LESS THAN TWENTY-SEVEN THOUSAND DOLLARS PER YEAR EXCLUSIVE OF SOCIAL SECURITY BENEFITS, (3) THE TERMINATION OF ANY TENURED FACULTY MEMBER AT AN INSTITUTION OF HIGHER LEARNING, (4) THE TERMINATION OF EMPLOYMENT OF PERSONS IN OCCUPATIONS, INCLUDING POLICE WORK AND

FIREFIGHTING, IN WHICH AGE IS A BONA FIDE OCCUPATIONAL QUALIFICATION OR (5) operation of any bona fide apprenticeship system or plan.

Representative Motto stated, "the purpose of withdrawing the other amendment was to replace it with a new amendment that simply added the language that we were talking about yesterday when we finished our discussion on the uniform services, and what we have done in the new amendment is to add language that would exempt from the provisions of this Act the termination of persons in occupations including police work and firefighting in which age is a bona fide occupational qualification." House at 2642 and 2643. Motto then was asked by Representative Kipp, if the amendment would allow municipalities, after January 1, 1980, to negotiate for involuntary retirement an at age less than seventy. Motto replied, "[t]here are different categories of people ... involved in a municipality ... If it's the uniform, we've already taken care of them – uniform people." Id. 2654.

A review of this debate establishes that by adopting the amendment the legislature intended to exclude "uniform services," i.e., police and firefighters, from the protections against involuntary retirement based on age. It is clear that Motto intended to address Stevens' core concern -- to preserve the ability of a municipality to negotiate with the representatives of police and firefighters for an involuntary retirement age below seventy. There, however, is no language in PA 78-350 to indicate that a condition of such exclusion is that a firefighter be entitled to any pension or retirement benefit.

As noted above, the legislature included repeated references to an entitlement to retirement or pension benefits within some of the other exclusions from the age protections found in section 31-126 (prior to and after its amendment with the adoption of LCO 3735, and its final passage as PA 78-350). Such a reference is not found in the provision "occupations, including police

work and firefighting, in which age is a bona fide occupational qualification...," and neither is a reference to section 7-430.[13]

This creates an inference that such an entitlement is not a precondition to including a firefighter in the exclusion from the age protections. Motto's statement -- "age alone could be the occupational qualification. That if a person gets to old ... it could be upheld that a man can't work beyond a certain age as a policeman or a fireman...," -- may also be read to support this conclusion.

Based on the above analysis, the undersigned concludes that section 46a-60(b)(1)(C) creates an exclusion from the age discrimination protections found in section 46a-60(a) for all firefighters.

Section 46a-64 Claims

The complainant argues that by terminating his employment, the respondent violated subdivisions (1) and (2) of section 46a-64(a). These subdivisions state, in pertinent part, "(a) It shall be a discriminatory practice in violation of this section: (1) To deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of ... age ..., subject only to the conditions and limitations established by law and applicable alike to all persons; [or](2) to discriminate, segregate or separate on account of ... age ....

Section 46a-64(a)(1)Claim

The Connecticut Supreme Court, in Quinnipiac Council, Boy Scouts of Am., Inc. v. CHRO, stated that it was the intention of the legislature "to restrict the scope of discriminatory accommodation practices as defined by § 53-35(a) to instances of access to goods and

[13] It should be noted that, during the floor debate, section 7-430 was not mentioned. The provision of section 7-430 that authorized the involuntary retirement of municipal policeman and firefighters was first enacted in 1945, was in effect in 1978, and remains in the law today. See PA 45-396.

services." 204 Conn. 287, 301 (1987).[14] The Court remarked that "our public accommodation statute, § 53–35(a), gives no indication that it was intended to encompass the proffer of services within its definition of discriminatory accommodation practices. The absence of a statutory exception for a 'bona fide occupational qualification or need' in the text of § 53–35(a) is more consistent with a legislative intent to leave such practices to be regulated by statutes that address employment discrimination rather than by statutes directed to discrimination in public accommodations." Id. at 302.

The Quinnipiac Court's reasoning compels the dismissal of the complainant's section 46a-60(a)(1) claim in this matter. In denying the complainant the opportunity to serve, the

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[14] General Statutes (Rev. to 1979) section 53–35(a), is the predecessor to sections 46a-64(a)(1) and (2), and 46a-63(1). Section 53-35(a) read, (a) "All persons within the jurisdiction of this state shall be entitled to full and equal accommodations in every place of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons; and any denial of such accommodation by reason of race, creed, color, national origin, ancestry, sex, marital status, age, mental retardation or physical disability, including, but not limited to, blindness or deafness of the applicant therefor shall be a violation of the provisions of this section. Any discrimination, segregation or separation, on account of race, creed, color, national origin, ancestry, sex, marital status, age, mental retardation or physical disability, including, but not limited to, blindness or deafness shall be a violation of this section. A place of public accommodation, resort or amusement within the meaning of this section means any establishment, which caters or offers its services or facilities or goods to the general public including, but not limited to, public housing projects and all other forms of publicly assisted housing, and further including any housing accommodation, commercial property or building lot, on which it is intended that a housing accommodation or commercial building will be constructed, offered for sale or rent, and mobile home parks as defined in section 21–64, provided the provisions of this section shall not apply (1) to the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other, if the owner or members of his family reside in one of such housing accommodations, or (2) to the rental of a room or rooms in a housing accommodation, if such rental is by the occupant of the housing accommodation, or by the owner of the housing accommodation and he or members of his family reside in such housing accommodation. The provisions of this section, with respect to the prohibition of sex discrimination, shall not apply to the rental of sleeping accommodations provided by associations and organizations which rent all such sleeping accommodations on a temporary or permanent basis for the exclusive use of persons of the same sex. The provisions of this section, with respect to the prohibition of discrimination on the basis of marital status, shall not be construed to prohibit the denial of housing accommodations to a man and a woman who are unrelated by blood or who are not married to each other. The provisions of this section, with respect to the prohibition of discrimination on the basis of age, shall not apply to minors, to federal or state aided or municipal housing for elderly persons or to privately owned housing developed and maintained exclusively for persons within specified age groups." (Emphasis added.)

respondent did not deprive him of an "accommodation" as defined in Connecticut's public accommodation statute. Id. 302-303.

Section 46a-64(a)(2) Claim

Section 46a-64(a)(2) states, in pertinent part, "(a) It shall be a discriminatory practice in violation of this section ...(2) to discriminate, segregate or separate on account of ... age .... As written, and in the context of the specific protections against discrimination contained in chapter 814c of the Connecticut General Statutes, this provision, on its face is ambiguous and superfluous.

While the undersigned concurs with the conclusion of the human rights referee in CHRO v. Chesire Bd. of Education, CHRO No. 9830294, 1999 WL 34765993 (1999), that section 46a-64(a)(2) governs only cases involving the interference, based on protected status, with ones entitlement to full and equal accommodation in every place of public accommodation, resort or amusement, this case presents an opportunity to clarify further any confusion that arises from the wording of this provision.

As noted by the complainant, section 46a-64 is the successor to section 53-35. Section 53-35 was modified by section 12 of PA 80-422, An Act Implementing a Technical Revision of the Statutes Concerning Human Rights and Opportunities. Prior to passage of PA 80-422, what is now 46a-64(a)(2) was the second sentence in section 53-35(a). That sentence made it a violation to deprive another person of the "[entitlement] to full and equal accommodations in every place of public accommodation, resort or amusement" by discriminating against segregating, or separating such person on the basis of any of the enumerated protected statuses.[15]

As stated numerous times during both the House and Senate debates, the legislature intended PA 80-422 to be purely technical, that is, to make no substantive changes to the law.[16] The

[15] See footnote 14, supra.

[16] Representative Richard Tulisano stated, "Mr. Speaker, yes, to point out clearly to the members of this body that the bill before us, as amended, so far is technical in nature only, is one that I can stand up before this body and say

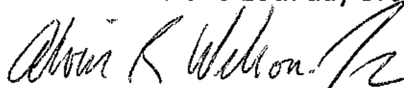
Connecticut Supreme Court reached this conclusion, stating that, "Indeed, the legislative history indicates that P.A. 80–422 was precisely what its title stated it to be, namely, simply a technical revision of the statutes concerning human rights and opportunities ... with no intended substantive effect." CHRO v. Bd. of Educ. of Town of Cheshire, 270 Conn. 665, 693, (2004) (quoting Pollio v. Planning Commission, 232 Conn. 44, 55 (1995) ("[t]echnical amendments are not generally intended to effect substantive changes in the law").

The section 46a-64(a)(2) claim, therefore, is dismissed.

Final Decision and Order

In light of the foregoing, I find in favor of the Respondent. It is hereby ordered, in accordance with the provisions of subdivision (4) of subsection (d) of section 46a-54-88a of the Regulations of Connecticut State Agencies, that the complaint be, and hereby is, dismissed in its entirety.

It is so ordered this 16th day of January 2015.



Alvin R. Wilson, Jr.
Presiding Human Rights Referee

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are only dealing with technical revisions and there are no substantive changes. ... It is merely a recodification of law that has already been passed." House transcript, April 23, 1988, pp. 4243-4246. On May 1, 1980, Senator DePiano noted, "I move now for adoption of the bill as amended, Mr. President and just explain very briefly that this is a bill which has the technical revisions of the statutes concerning human rights and opportunities." Senate Transcript, p. 3482.