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Chapter 21: Extinguishing Mandatory Retirement Requirements for Firefighters . . . Finally

Stephanie R. Hartung

Code Sections Affected

Government Code § 31663.15 (amended), §§ 31663.2, 31680.9 (repealed).

SB 579 (Wiggins); 2008 STAT. Ch. 21 (*Effective June 2, 2008*).¹

I. INTRODUCTION

In 1997, thirty-four Los Angeles County firefighters and sheriff's deputies were forced to retire upon reaching the age of sixty.² One of those firefighters was Bob Pasqua, who, at age sixty-two, was probably more physically fit than most people in their prime, still lifting weights and running four miles a day.³ Nonetheless, the mandatory retirement provisions for all safety members,⁴ adopted by the Los Angeles County Board of Supervisors (Board) a decade earlier, forced him into premature retirement.⁵

With the number of forced firefighter and deputy retirees expected to nearly quadruple by the turn of the century,⁶ the Board unsuccessfully attempted to repeal the requirements.⁷ Although the Board removed the mandatory requirement for new safety members hired after March 31, 1997, hundreds of then-employed firefighters were left without any recourse.⁸ The Legislature eventually granted exemptions from the mandatory retirement provisions by

1. The Legislature included an urgency clause, making Chapter 21 effective immediately upon receiving the Governor's signature, and thereby allowing applications for firefighter reinstatement to begin immediately. 2008 Cal. Stat. ch. 21, § 4.

2. Duke Hefland, *State Senate Panel Hears Pros, Cons of Rule Forcing Retirement Age*, L.A. TIMES, Nov. 19, 1997, at B4.

3. *Id.*

4. CAL. GOV'T CODE § 31469.3 (West 2008) ("'Safety member' means . . . [a]ny person employed by a county . . . whose principal duties consist of active law enforcement or active fire suppression . . .").

5. See Duke Hefland, *Age-Old Dispute; Bias: County Orders Mandatory Retirement for Deputies and Firefighters Over 60*, L.A. TIMES, Feb. 24, 1997, at B1 ("'After 32 years of loyal service, they are firing me,' said Pasqua, a three-time winner of the 'Toughest Competitor Alive' contest at the World Police and Fire Olympics. 'Age should not be a factor on the job.'").

6. Hefland, *supra* note 2.

7. SENATE COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT, COMMITTEE ANALYSIS OF SB 134, at 2 (Apr. 17, 2007); SB 1354, 1997 Leg., 1997-1998 Sess. (Cal. 1997) (as amended on Jan. 5, 1998, but not enacted).

8. SENATE COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT, COMMITTEE ANALYSIS OF SB 134, at 2 (Apr. 17, 2007).

allowing reinstatement from retirement to all other safety member professions, including law enforcement officers, except firefighters.⁹

Chapter 21 exempts Los Angeles County firefighters from the mandatory retirement provisions and allows those firefighters who were forced to retire after April 1, 2007, to be reinstated.¹⁰ Thus, after eleven years of legislative effort, Chapter 21 finally puts an end to the mandatory retirement policy for all Los Angeles County safety members.¹¹

II. LEGAL BACKGROUND

A. *Prior California Law*

For decades, the mandatory retirement provisions found in Government Code sections 31662.4, 31662.6, 31662.8, and 31663 regulated the retirement of all safety members in California.¹² These sections required “every safety member except an elective officer, the sheriff and undersheriff” to retire upon reaching the age of sixty.¹³ Furthermore, the law mandated that the sheriff (if not an elected officer) and the undersheriff retire at age seventy.¹⁴ The time requirement for the mandatory retirement was “the first day of the calendar month next succeeding that in which he or she attains [the] age [of retirement].”¹⁵ The law required safety members who were elected officers to “retire[] at the end of the first term to which he or she is elected which expires on the date following his or her seventieth birthday.”¹⁶ Throughout the years, the Board has lobbied the Legislature to repeal the mandatory retirement provisions.¹⁷

In 1997, in response to the continued need for experienced firefighters and the increasing number of firefighters who are forced to retire each year, the Legislature introduced SB 1354, which would have added three sections to the

9. See SENATE COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT, COMMITTEE ANALYSIS OF SB 579, at 1 (May 12, 2008) (“The intent of SB 134 was to allow all safety members, i.e., police officers, sheriffs, and firefighters, to be reinstated from retirement. However, the two sections . . . applicable to firefighters needed to be repealed and SB 134 inadvertently failed to do this.”).

10. *Id.* at 2.

11. See *id.* at 1-2 (describing three pieces of legislation passed over the years in attempts to end the mandatory retirement provisions).

12. None of the sections were operative in a county “until such time as the board of supervisors . . . , by resolution adopted by a majority vote, ma[de the] section applicable in the county.” CAL. GOV’T CODE §§ 31662.4, 31662.6, 31662.8, 31663 (West 2008). Los Angeles County adopted the provision in 1986. Hefland, *supra* note 5.

13. CAL. GOV’T CODE § 31662.4.

14. *Id.*

15. *Id.* § 31663.

16. *Id.* § 31662.8.

17. See Hefland, *supra* note 2 (“County officials say they are required to enforce the mandatory retirement policy because of state law, and that they need the state’s permission to alter it. The county Board of Supervisors decided to seek legislation to do just that . . .”).

Government Code.¹⁸ The first section would have given all county boards of supervisors the authority to repeal the mandatory retirement provisions.¹⁹ The next section would have allowed all safety members throughout California who were forced to retire pursuant to the mandatory retirement provisions to be reinstated if determined physically capable.²⁰ The final section would have required any safety member who was reinstated to repay the county all retirement allowances received as well as the contributions that would have occurred during the time the member was retired.²¹

While SB 1354 was never enacted, the Legislature subsequently approved several separate regulations that apply specifically to Los Angeles County.²² In 2001, Chapter 33 added section 31663.1,²³ which exempted any “assistant sheriff or a chief in a sheriff’s office who is a safety member and whose primary duties are administrative” from the mandatory retirement constraints.²⁴ Likewise, in 2005, Chapter 134 added section 31663.2,²⁵ which provided the fire chief with an exemption from the above retirement provision.²⁶ However, this new law also required that the fire chief retire prior to April 1, 2009, and stated explicitly that any salary increase could not be disproportionate to similar positions.²⁷

In 2006, in another effort to circumvent the mandatory retirement provisions, Chapter 120 added section 31680.8, allowing a safety member to be reinstated to the same position if such retirement had been forced under the mandatory retirement provisions.²⁸ Before reinstatement, the new law required the safety member to submit an appropriate application to the Board,²⁹ which would then determine whether the

18. See *id.* (suggesting that mandatory retirement provisions are arbitrary and unfair); SB 1354, 1997 Leg., 1997-1998 Sess. (Cal. 1997) (as amended on Jan. 5, 1998, but not enacted) (adding three new sections to the Government Code).

19. SB 1354, 1997 Leg., 1997-1998 Sess. (Cal. 1997) (as amended on Jan. 5, 1998, but not enacted) (adding section 31663.1).

20. *Id.* (adding section 31680.8).

21. *Id.* (adding section 31680.9).

22. CAL. GOV’T CODE §§ 31663.1 (enacted by 2001 Stat. Ch. 33), 31663.2 (enacted by 2005 Stat. Ch. 134, repealed by 2008 Stat. Ch. 21), 31680.8 (enacted by 2006 Stat. Ch. 120), 31680.9 (enacted by 2006 Stat. Ch. 846, repealed by 2008 Stat. Ch. 21).

23. Unless otherwise stated, all statutory references are to the Government Code.

24. CAL. GOV’T CODE § 31663.1 (enacted by 2001 Stat. Ch. 33).

25. *Id.* § 31663.2 (enacted by 2005 Stat. Ch. 134, repealed by 2008 Stat. Ch. 21).

26. *Id.* § 31663.2(a)(1) (enacted by 2005 Stat. Ch. 134, repealed by 2008 Stat. Ch. 21) (stating that the exception applies to fire chiefs employed on May 1, 2005). In 1989, the Los Angeles County Board of Supervisors appointed P. Michael Freeman, age 43, to the position of Fire Chief. With his mandatory retirement at age 60 quickly approaching in 2005, the Legislature swiftly enacted Chapter 134 to exempt Freeman from the requirement and allow him to continue his duties until, at the latest, April 1, 2009. *Los Angeles County Fire Chief Can Stay on Job Past 60*, L.A. TIMES, July 28, 2005, at B4; *Retirement Rule Waived for County Fire Official*, L.A. TIMES, Aug. 10, 2005, at B4.

27. CAL. GOV’T CODE § 31663.2(a)(2) (enacted by 2005 Stat. Ch. 134, repealed by 2008 Stat. Ch. 21).

28. *Id.* § 31680.8 (enacted by 2006 Stat. Ch. 120); SENATE COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT, COMMITTEE ANALYSIS OF SB 579, at 3 (May 12, 2008) (stating that the provision proved unfeasible due to employee contribution rates).

29. CAL. GOV’T CODE § 31680.8(a)(1) (enacted by 2006 Stat. Ch. 120).

candidate was capable of fulfilling his or her job duties based on “medical advice.”³⁰ Once reinstated, the safety member’s retirement would be completely terminated so that all benefits associated with longevity in employment would remain as if the retirement had never occurred.³¹ However, section 31680.9³² greatly limited the application of section 31680.8 by excluding the fire chief³³ as well as other safety members as described under sections 31470.4³⁴ and 31470.6.³⁵

In 2007, when the Los Angeles County Sheriff’s Department desperately needed 1,000 new deputies, the Legislature enacted Chapter 290 (2007 law),³⁶ purporting to exempt all service members from the requirements and again allowing those who had already retired to be reinstated.³⁷ The legislation attempted to “remove the mandatory retirement age for *all* safety members of the Los Angeles County Sheriff’s Department”³⁸ by allowing safety members to continue in their employment with certification from a county-approved physician that the applicant was fully “capable of performing his or her assigned duties pursuant to standards set forth by the member’s employer.”³⁹ The 2007 law provided that the mandatory retirement provisions did not apply to safety members, as described under sections 31469.3 and 31470.4.⁴⁰ The 2007 law was supposed to “create equitable and consistent policies for *all* safety members” while allowing for the retention of personnel with “specific experience or expertise.”⁴¹

30. *Id.* § 31680.8(a)(2) (enacted by 2006 Stat. Ch. 120).

31. *Id.* § 31680.8(b)-(d) (enacted by 2006 Stat. Ch. 120).

32. *Id.* § 31680.9 (enacted by 2006 Stat. Ch. 846, repealed by 2008 Stat. Ch. 21).

33. *Id.* § 31680.9(a)(1) (enacted by 2006 Stat. Ch. 846, repealed by 2008 Stat. Ch. 21).

34. *Id.* § 31680.9(a)(2) (enacted by 2006 Stat. Ch. 846, repealed by 2008 Stat. Ch. 21).

All county foresters, county firewardens, deputies or assistant county foresters, deputies or assistant county firewardens, *firefighters*, fire apparatus engineers, fire prevention inspectors, forest firemen, fire patrolmen, aircraft pilots, and foremen assigned to fire suppression crews, all other personnel assigned to active fire suppression in any county forester’s or county firewarden’s department and all officers, engineers, and firemen of any county fire protection district, and all other personnel assigned to active fire suppression in any county fire protection district . . .

Id. § 31470.4 (West 2008) (emphasis added).

35. *Id.* § 31680.9(a)(2) (enacted by 2006 Stat. Ch. 846, repealed by 2008 Stat. Ch. 21).

A permanent employee . . . whose principal duties consist of active protection, rescue, and rendition of aid or assistance to persons injured or imperiled in water areas at beaches and lakes, streams, dams, reservoirs, or other bodies of open water (not including swimming pools) or in small craft or airplanes at sea near the shoreline and the recovery from water areas of submerged objects and bodies of persons drowned or believed to have drowned in those areas . . .

Id. § 31470.6.

36. *Id.* § 31663.15 (enacted by 2007 Stat. Ch. 290).

37. SENATE COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT, COMMITTEE ANALYSIS OF SB 134, at 4 (Apr. 17, 2007).

38. ASSEMBLY COMMITTEE ON PUBLIC EMPLOYEES, RETIREMENT AND SOCIAL SECURITY, COMMITTEE ANALYSIS OF SB 134, at 2 (June 20, 2007) (emphasis added).

39. CAL. GOV’T CODE § 31663.15(a) (enacted by 2007 Stat. Ch. 290).

40. *Id.*; see also CAL. GOV’T CODE § 31469.3 (West 2008) (defining “safety member”); *Id.* § 31470.4 (same).

41. ASSEMBLY COMMITTEE ON PUBLIC EMPLOYEES, RETIREMENT AND SOCIAL SECURITY, COMMITTEE ANALYSIS OF SB 134, at 2 (June 20, 2007) (emphasis added).

B. Inconsistencies Remained

Recently, “the pension system advised L.A. County that a drafting error prevented firefighters from reinstating.”⁴² The 2007 law inadvertently failed to repeal sections 31663.2 and 31680.9, and thus “firefighters [were] . . . not allowed to work beyond their mandatory retirement age.”⁴³ By failing to repeal section 31663.2, the 2007 law left in place the requirement that the fire chief retire by April 1, 2009.⁴⁴ Furthermore, under section 31680.9, firefighters continued to be ineligible for reinstatement.⁴⁵ Thus, the 2007 law was unable to effectively accomplish the goal of “clarify[ing] that all L.A. County safety members [be] allowed to work beyond the mandatory retirement age (60) and continue in active employment provided that he or she pass[] a physical and that the county certif[y] that he or she is capable of performing their assigned duties.”⁴⁶ Chapter 21 exists to correct these inconsistencies.⁴⁷

III. CHAPTER 21

Chapter 21 adds two essential provisions to Government Code section 31663.15.⁴⁸ First, Chapter 21 explicitly repeals sections 31663.2 and 31680.9, thereby allowing the fire chief to remain longer than the previous April 1, 2009 deadline and allowing firefighters to be reinstated if physically able.⁴⁹ Second, a new section states that the Board may decide that safety members⁵⁰ who retired⁵¹ prior to April 1, 2007 are “not eligible to reinstate from retirement pursuant to [s]ection 31680.8,”⁵² potentially limiting reinstatement to recent retirees.

IV. ANALYSIS

In 1996, Congress enacted legislation “that allow[ed] local governments to enforce mandatory retirement rules for firefighters and police officers, whose job

42. Pat Wiggins, Cal. Senator, SB 579 (Wiggins): LA County Firefighters Reinstatement (on file with the *McGeorge Law Review*) (Senator Wiggins’ prepared remarks for the Senate Floor on May 15, 2008).

43. SENATE COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT, COMMITTEE ANALYSIS OF SB 579, at 2 (May 12, 2008).

44. CAL. GOV’T CODE § 31663.2(a)(2) (repealed by Chapter 21).

45. *Id.* § 31680.9 (repealed by Chapter 21).

46. ASSEMBLY COMMITTEE ON PUBLIC EMPLOYEES, RETIREMENT AND SOCIAL SECURITY, COMMITTEE ANALYSIS OF SB 579, at 1 (Apr. 9, 2008).

47. SENATE COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT, COMMITTEE ANALYSIS OF SB 579, at 2 (May 12, 2008).

48. 2008 Cal. Stat. ch. 21 § 1.

49. *Id.* §§ 2-3.

50. See CAL. GOV’T CODE § 31469.4 (West 2008) (defining “safety member”).

51. CAL. GOV’T CODE § 31663.15(d) (amended by Chapter 21) (explaining that the section refers to those “who retired pursuant to Section 31662.4 or 31662.6”).

52. *Id.*

performance depends on being in top physical shape.”⁵³ Proponents of the mandatory retirement rule believed the policy was necessary “to have a young work force to protect the public” as well as “to open doors of advancement to younger employees.”⁵⁴ However, both Sheriff Sherman Block and County Fire Chief Michael Freeman “oppose[d] a blanket policy that fails to consider the merits of individual cases.”⁵⁵ With veteran firefighters willing to “take physical tests every other year to ensure their capabilities,” the Legislature decided to provide exemptions from the mandatory retirement provisions.⁵⁶

As a “clean-up” bill for last year’s Chapter 290,⁵⁷ Chapter 21 finally allows firefighters in good health to continue their service in Los Angeles County past the age of sixty.⁵⁸ As noted earlier, Chapter 290 attempted to permit all Los Angeles County safety members to work past the previous mandatory retirement age, but ultimately failed to repeal code provisions specifically applicable to firefighters.⁵⁹ Chapter 21 remedies this problem by explicitly repealing sections 31663.2 and 31680.9.⁶⁰

Without Chapter 21, Fire Chief Freeman would have had to retire by the April 1, 2009, deadline.⁶¹ According to Chapter 21’s supporters, including Governor Schwarzenegger, the increasing frequency of fires in recent years⁶² made Freeman’s expertise indispensable.⁶³ Thus, supporters urged the Legislature

53. Hefland, *supra* note 5 (“After the federal bill was signed into law in September, the county quietly resurrected its mandatory retirement policy, which had been shelved three years ago when an identical federal law expired.”).

54. Hefland, *supra* note 2.

Proponents of the mandatory retirement rule believe that older emergency workers are injury prone and could be unfit for jobs that require them to sprint up skyscraper stairwells or chase fleeing suspects.

But some firefighters and deputies who are affected call the county retirement policy discriminatory. They believe that they are being pushed out because they earn top salaries and pay less into the retirement system than younger workers.

Hefland, *supra* note 5.

55. Hefland, *supra* note 2.

56. *See id.* (“‘Bring on the test,’ former Fire Capt. Robert Contreras, 62, told the [Senate] committee. ‘I could pass it just the way it’s made.’”).

57. Wiggins, *supra* note 42.

58. SENATE COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT, COMMITTEE ANALYSIS OF SB 579, at 2 (May 12, 2008) (stating that firefighters may reinstate and work beyond the retirement age so long as they pass a physical examination and remain capable of performing their duties).

59. *Id.*

60. 2008 Cal. Stat. ch. 21, §§ 2-3.

61. CAL. GOV’T CODE § 31663.2 (repealed by Chapter 21).

62. *See* Press Release, Office of the Governor, Cal. State, Governor Schwarzenegger Discusses Importance of Emergency Response Initiative to California in Weekly Radio Address (July 5, 2008) (on file with the *McGeorge Law Review*) (“Two weeks ago, thousands of lightning strikes sparked fires up and down the state and we were suddenly battling more than 1400 fires at once. . . . We are prepared to fight 20, 25, or 30 fires at once, yes, but not 1,400.”).

63. *Id.* (signing Message issued by Governor Schwarzenegger for 2005 Cal. Stat. ch. 134).

Like a fine wine, fire chiefs improve with age and experience. Just because an individual hits a mark on a calendar does not mean that he or she is incapable of doing his or her duties. I encourage our

to repeal section 31663.2, allowing Freeman to remain as Fire Chief. In doing so, the Legislature affirmed the Governor's approval of Fire Chief Freeman.⁶⁴

Chapter 21 also repeals section 31680.9, which excluded Los Angeles County firefighters from reinstatement under section 31680.8.⁶⁵ However, firefighters who retired prior to April 1, 2007, may still be ineligible for reinstatement if the Board so provides.⁶⁶ Thus, the Legislature has managed to allow some firefighters to be reinstated—those between the ages of sixty and sixty-one—while potentially retaining the age restriction for those beyond the age of sixty-one.⁶⁷ Supporters argue that the date was “based on reasonable expectations of retirees who have maintained the appropriate level of training including local accreditation, conditioning, and expertise.”⁶⁸

The Legislature also added an urgency clause to Chapter 21, thus allowing reinstatement applications to begin immediately upon the bill receiving Governor Schwarzenegger's signature.⁶⁹ According to the California Professional Firefighters, the urgency clause was created in response to the plight of several helicopter pilots, who were forced into early retirement and sat idly by while fires raged throughout the area.⁷⁰

V. CONCLUSION

After Chapter 290 was enacted in 2007, all safety members, other than firefighters, were exempt from the mandatory retirement provisions.⁷¹ With the

public servants to continue to serve our state as long as they are willing and capable. . . . Furthermore, the Legislature should revisit this issue and eliminate the clause that requires the chief to resign in 2009.

Id.

64. See CAL. GOV'T CODE § 31663.2 (Signing Message issued by Governor Schwarzenegger for 2005 Cal. Stat. ch. 134).

Chief Freeman is a well-respected leader in Los Angeles County. Losing his expertise and experience by placing a limit on his service is a detriment to the Los Angeles County Fire Department and the four million residents it serves. If he is willing and capable, he should be allowed to serve until he is ready to retire.

Id.

65. 2008 Cal. Stat. ch. 21 §3.

66. CAL. GOV'T CODE § 31663.15(d) (amended by Chapter 21) (“[A] member . . . who retired . . . prior to April 1, 2007, is not eligible to reinstate from retirement pursuant to Section 31680.8.”).

67. See *id.* (setting April 1, 2007, as the cut-off date for reinstatement).

68. SENATE COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT, COMMITTEE ANALYSIS OF SB 579, at 2 (May 12, 2008).

69. 2008 Cal. Stat. ch. 21, § 4.

70. SB 579 (Wiggins) - County Employees Retirement Law of 1937, <http://www.cpf.org/go/cpf/issues-and-legislation/status-report-2007-cpf-legislation/sb-579-wiggins-county-employees-retirement-law-of-1937/?keywords=wiggins> (last visited Feb. 3, 2009) (on file with the *McGeorge Law Review*). Over 2,000 fires sparked across California due to a lightning storm on June 20, 2008, and only 77 helicopters were available as resources. Wildland Fire Information: Statewide Fire Overview-Lightning Series, www.fire.ca.gov/downloads/incidents/Statewide_Fire_Overview_072608_AM.pdf (last visited Feb. 3, 2009) (on file with the *McGeorge Law Review*).

71. SENATE COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT, COMMITTEE ANALYSIS OF SB 579, at 2 (May 12, 2008).

passage of Chapter 21, firefighters who maintain their physical health, like Bob Pasqua, can continue their service past the age of sixty.⁷² In addition, Los Angeles County Fire Chief Freeman will no longer be forced to retire on April 1, 2009, but can remain as long as he is capable of performing his duties.⁷³ While the Board has the power to limit the eligibility of some retirees by restricting those eligible for reinstatement to those who retired prior to April 1, 2007, Chapter 21 may finally eliminate the mandatory retirement rule for all safety members, including firefighters, if such power is narrowly exercised.

72. *Id.*

73. CAL. GOV'T CODE § 31663 (amended by Chapter 21).