



Montana Legislative Services Division
Legal Services Office

MEMORANDUM

TO: State Administration and Veterans' Affairs Interim Committee

FROM: David S. Niss, Staff Attorney

RE: Litigation Report

DATE: October 5, 2009

I
Introduction

Recently, the Montana Supreme Court released its decision in Jaksha v. Butte-Silver Bow County, 2009 MT 263, 352 M 46 (2009), concerning the constitutionality of section 7-33-4107, MCA, regulating the age at which an individual may be appointed as a municipal firefighter. Because the opinion may require amending or repealing that section of law and because the decision may have actuarial ramifications for the firefighters' unified retirement system, the opinion is brought to the attention of the State Administration and Veterans' Affairs (SAVA) Committee.

II
Discussion

A. The Jaksha opinion

Every year beginning in 2000 and through 2004, Mr. Jaksha applied to be a firefighter for Silver Bow County. After the June 2004 testing and interviews were conducted, Mr. Jaksah was ranked second best qualified along with another applicant and his name, along with that of the first best qualified applicant and the tying runner-up, was approved by the County Council in 2005 pending openings. When a second position opened in June of 2005, the tying runner-up was appointed due to Mr Jaksha's age (35 at the time the position opened), and based upon the provisions of section 7-33-4107, MCA, that provides:

7-33-4107. **Qualifications of firefighters.** The state of Montana determines that age is a valid, bona fide occupational qualification for the position of firefighter because of the rigorous physical demands of the firefighting profession and the expectation of many years of emergency service. The qualifications of firefighters shall be that they:

(1) shall not be more than 34 years of age at the time

of original appointment;

(2) shall have passed a physical examination by a practicing physician duly authorized to practice in this state; and

(3) at the option of said city or town, shall be qualified voters of the city or town [emphasis supplied].

Mr. Jaksha sued the County in District Court, alleging that subsection (1) of the quoted section constituted age discrimination in violation of the equal protection clause of the Montana Constitution.¹ The Montana Supreme Court reversed the District Court's decision and held that the state must show that in order for the statute to be held constitutional, the maximum age limitation had to be rationally related to a public purpose. The County argued that the age limitation is to protect the safety of firefighters by making sure that they're young enough when they begin employment to have a career unhampered by the physical deterioration affecting older firefighters. Mr. Jaksha had presented at trial evidence that (1) the mandatory retirement age for firefighters had been repealed in 1985; (2) there was no legislative history of studies or data justifying the hiring age limit on the basis of safety; and (3) Mr. Jaksha had demonstrated at trial that some firefighters perform well past 50 years old. Based on Mr. Jaksha's arguments, the Supreme Court concluded that the age limitation in section 7-33-4107, MCA, was not rationally related to a legitimate governmental purpose and stated:

Provided an individual satisfies the Consortium's written and physical tests, and successfully completes the interview process, the 34 year-old age limitation bears no rational relation to the purported objective of § 7-33-4107, MCA. Accordingly, we hold § 7-33-4107, MCA, is unconstitutional.

B. The implications of the Jaksha opinion

By the language of the Court's opinion quoted above, the Court seems to be saying that the maximum age requirement is allowable in some instances, but that if an applicant passes the three tests referred to by the Court, then there can be no maximum age limitation. Thus, the Court has not held the age limitation to be unconstitutional for all purposes -- it is an additional basis for disqualification if a candidate fails any of the other requirements for the position. Additionally, the Court noted that there was no empirical data in the legislative history enacting the statute on which to conclude that the age requirement was reasonable.

¹Article II, section 4, of the Montana Constitution provides "No person shall be denied the equal protection of the laws."

While the opinion might have been decided differently,² the Jaksha opinion is now precedent for persons in Mr. Jaksha's position and indicates that maximum age limitations for public safety employees are constitutionally suspect, at least for those individuals who meet remaining qualifications, such as a physical ability test, for the position. There may also be other maximum age requirements for other public safety jobs that would also be affected by the opinion in Jaksha.³ A similar maximum age restriction for police officers contained in section 7-32-4112, MCA, was amended out of the statute in 1995 by section 1, Chapter 150, Laws of 1995. How great an actuarial impact the Jaksha decision will have on the firefighters' unified retirement system is unknown at this time.

C. Options for the Committee

For all of the foregoing reasons reason, if the Committee is interested in responding to the Jaksha opinion with legislation, the options available to the Committee appear to be the following:

1. Repeal the entire statute.
2. Reenact the statute with a sufficient factual or research basis to withstand another constitutional challenge based upon the same grounds used in Jaksha.
3. Amend the statute to create a two-tiered requirement enacting an age requirement for initial application but eliminating the requirement once the applicant has passed the other three requirements (written test, physical test, interview test) contained in the statute.
4. Amend the statute only to eliminate the age requirement.
5. Determine whether there are other maximum age restrictions in statute for other public safety employees and amend those statutes to treat those other restrictions similarly.
6. Determine whether the opinion in Jaksha will have an actuarial impact on the firefighters' retirement system and make any statutory changes indicated by that impact.

²In Ross v. Great Falls, 1998 MT 276, 291 M 377, 967 P.2d 1103 (1998), the Montana Supreme Court held that a maximum age limitation for municipal police officers that existed prior to 1995 was not repugnant to the age limitation provisions of the Montana Human Rights Act and declined to rule on the issue of whether the limitation denied the equal protection of the laws.

³The author has briefly looked at the requirements for two other public safety jobs or quasi-public safety jobs, the Montana Highway Patrol and the game warden positions with the Department of Fish, Wildlife, and Parks, and found no similar requirements. A maximum retirement age (60) for game wardens was amended out of section 19-8-601, MCA, by Chapters 86 and 249, Laws of 1985.

III Conclusion

The Montana Supreme Court's opinion in Jaksha held section 7-33-4107, MCA, to be unconstitutional for those firefighter applicants who meet other minimum qualifications for the position. A range of options presented to the SAVA Committee will make the statute more reflective of the Court's opinion so that firefighter applicants and prospective employers will be better able to understand and apply the law and so that any adverse impacts of the Jaksha decision on the firefighters' unified retirement system may be considered by the Legislature.

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