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Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Marvin Krislov

Subseries:

OA/ID Number: 18948

FolderID:

Folder Title:

Firefighters Benefit - ADA [Americans with Disabilities Act]

Stack:

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Row:

113

Section:

3

Shelf:

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a copy of
this letter

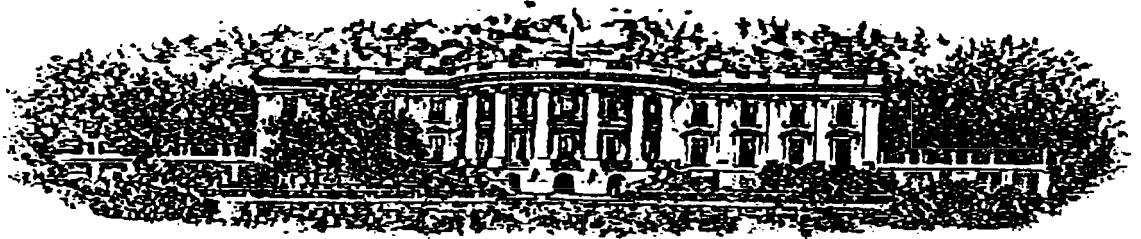
Pls. fax to
Franklin 663-
Woteaga 44900

Office of Chief
of Staff
6/12/21

per your request
mm

Then attach to
Folder &
return
mm

The White House



COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE: 12/14/95
TO: Franklin Urteaga
FACSIMILE NUMBER: 62464
TELEPHONE NUMBER:
FROM: K. Gavin, Counsel's Office
TELEPHONE NUMBER: 6-7141
PAGES (WITH COVER): 5
COMMENTS: Please see the attached with confirmation that
was forwarded to your office on 12/12
Thanks

PLEASE DELIVER AS SOON AS POSSIBLE

The document(s) accompanying this facsimile transmittal sheet is intended only for the use of the individual or entity to whom it is addressed. This message contains information which may be privileged, confidential or exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any disclosure, dissemination, copying or distribution, or the taking of any action in reliance on the contents of this communication is strictly prohibited. If you have received this information in error, please immediately notify the sender at their telephone number stated above.

TRANSMISSION REPORT

THIS DOCUMENT (REDUCED SAMPLE ABOVE)
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5

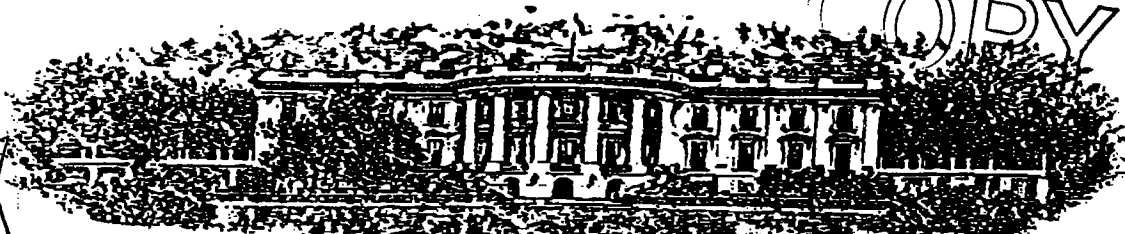
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NO	REMOTE STATION I. D.	START TIME	DURATION	#PAGES	COMMENT
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TOTAL 0:03'55" 5

XEROX TELECOPIER 7020

The White House



COPY

COPY

COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE: 12/12/95
 TO: Jennifer O'Connor, Office of Chief of Staff
 FACSIMILE NUMBER: 61121
 TELEPHONE NUMBER:
 FROM: Marvin Krislov
 TELEPHONE NUMBER: 456-7903
 PAGES (WITH COVER): 4
 COMMENTS: per your request
 Marvin Krislov

PLEASE DELIVER AS SOON AS POSSIBLE

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TRANSMISSION REPORT

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** COUNT **
 # 4

*** SEND ***

NO	REMOTE STATION I. D.	START TIME	DURATION	#PAGES	COMMENT
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TOTAL 0:02'51" 4

XEROX TELECOPIER 7020



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

OCT 26 1995

Mr. Harold A. Schaitberger
Executive Assistant to the General President
International Association of Firefighters
1750 New York Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Schaitberger:

The White House Counsel has referred your letter of September 26, 1995, to the Equal Employment Opportunity Commission (EEOC or the Commission) for a response. The letter states that your members' pension boards require persons entering a pension plan to undergo a physical examination to identify pre-existing conditions. According to your letter, the purpose of such an examination is not to exclude persons from employment or plan participation, but rather to give the pension board a point of measurement in case the person applies for service-connected disability retirement. You ask whether such a procedure is consistent with the Americans with Disabilities Act (ADA).

As you know, the EEOC enforces Title I of the ADA, which prohibits discrimination in employment on the basis of disability. The procedures outlined in your letter raise two significant ADA issues: first, whether the physical examination can even be administered and, second, whether the results of the examination can be used in the manner you describe. We address each issue in turn.

Whether the Physical Examination Can Be Administered

The ADA has specific requirements pertaining to medical examinations which vary depending on when the examination is given. Covered entities are prohibited from conducting medical examinations before an applicant is extended a conditional offer of employment. 42 U.S.C. § 12112 (d) (2) & (3); 29 C.F.R. §§ 1630.13, 1630.14. After an individual has been given a conditional offer of employment, but before s/he starts work, an employer may conduct medical examinations if this is done for all entering employees in the job category. 42 U.S.C. § 12112(d) (3); 29 C.F.R. § 1630.14 (b).

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whether an employee poses a "direct threat" (i.e., a significant risk of substantial harm to him/herself or others) in the position.

The ADA also permits medical examinations of employees conducted as part of the administration of a bona fide benefit plan. Section 501(c) of the ADA does not prohibit or restrict:

a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law.

42 U.S.C. § 12201(c) (2).

It is not clear from your letter whether the Pension Boards' physical examinations are given before or after the person has started work. If the examinations are given after a conditional offer of employment, but before a person starts working, then the Pension Boards would not be violating the ADA since the statute permits any type of medical examination at that point.

If, however, the Pension Boards' physical examinations occur after an individual begins work, then the purpose of the examination is critical in determining whether it is permitted under the ADA. If, as your letter states, the Pension Boards give the examinations for the purpose of identifying pre-existing conditions in order to establish a point of measurement for service-connected disability retirement, then the examinations would be lawful under § 501(c) of the ADA since they are conducted as part of the administration of a bona fide benefit plan.

How May the Pension Boards Use the Results of the Physical Examinations?

The next issue is whether the Boards may use the information obtained from those examinations to exclude service-connected disability-retirement for pre-existing conditions. The ADA permits the adoption of pension eligibility requirements that do not discriminate on the basis of disability, as long as such requirements are applied in the same manner to all employees. In its Interim Enforcement Guidance on the application of the ADA to employer-provided health insurance, the Commission took the position that pre-existing condition clauses are not distinctions based on disability because they apply to a multitude of dissimilar conditions and constrain individuals both with and without disabilities. While the Commission has not yet issued policy specifically addressing this issue as it relates to disability retirement plans, a similar argument can be made with respect to

pre-existing condition clauses in the disability retirement context.

It should be noted, however, that while the ADA permits the Boards to obtain and use information about pre-existing conditions to deny certain claims for disability retirement, the ADA would prohibit the Boards from using the same information to discriminate on the basis of disability. If, for example, an individual's pre-existing condition constitutes a disability under the ADA, the Boards or the employer could not use that information to revoke a job offer if the individual could perform the essential functions of the position, with or without reasonable accommodation.

We understand from your letter that the Boards do not use the results to withdraw offers of employment or to bar persons from participating in the disability retirement plan altogether.** Rather, the results are used only to establish pre-existing conditions so that the Boards can deny claims for disability retirement benefits based on such conditions. Since the results of the physical examinations are not used to single out persons with disabilities, the Pension Boards do not appear to be violating the ADA.

This letter is an informal discussion of the questions you raised and does not constitute an official opinion of the Equal Employment Opportunity Commission. I hope that you find this information helpful.

Sincerely,


Ellen J. Vargyas
Legal Counsel

** Thus, this procedure differs from the system challenged by the Department of Justice in U.S. v. State of Illinois, 3 AD 1157 (N.D. Ill 1994), where a pension plan excluded police officers and firefighters with certain disabilities from qualifying for any pension benefits.

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INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

ALFRED K. WHITEHEAD
President

VINCENT J. BOLLON
Secretary-Treasurer

September 26, 1995

Janice Enright, Special Assistant
to the Deputy Chief of Staff
The White House
Washington, D.C.

Dear Janice:

I would like to again extend our sincere appreciation for your response to our July 31 letter concerning the Consumer Product Safety Commission and its flammability standards for sleepware. Once again, as you did during the Seattle arsonist situation, your quick and effective response continues to reaffirm our commitment to the Administration and the work it does to protect the American people.

After that glowing compliment, I hope that you do not mind if we take one more liberty and call upon you again to intervene on a matter of considerable importance to not only our members in Houston but fire fighters throughout the country. This situation involves the interpretation of the Americans with Disabilities Act vis a vis the liability of our members' pension boards, which have established physical exams for persons entering the plan, to determine pre-existing conditions (not for determining employment or participation in a pension plan). It is my understanding that Claire Gonzales of the EEOC is deliberating on an inquiry of this nature, which was brought to the attention of the EEOC by Congressman Gene Green (D-Texas).

Under Texas law, the Pension Board is permitted to give physical examinations to determine whether persons entering the plan have pre-existing physical conditions. The purpose of the exam is not to exclude any person from membership, but rather to give the Board a point of measurement in the case of persons who apply for a service-connected disability retirement. Under the Texas law governing the plan, a person cannot claim an on the job injury if the injury existed at the time employment began. By giving a comprehensive medical exam at the time of entry into the pension plan, members are protected by having a clearly established record of their health and the Fund is protected against improvidently granted disability benefits.

The City of Houston has objected to the Pension Board's program of medical examinations out of fear that it (the City) will be sued under the Americans with



Disabilities Act. The Pension Board, an independent legal entity, has offered to indemnify and defend any City official who is involved in any lawsuits concerning the Board's physical examinations. The Pension Board has also made it clear to the City that any person who is hired by the City as a firefighter will be admitted to the retirement plan, regardless of any condition revealed by the physical examination. The Pension Board has also established the necessary confidentiality procedures required by state and federal law for the maintenance of medical records.

Our Houston local and the Houston Pension Fund are attempting to get some clarification from the Equal Employment Opportunity Commission and/or the Justice Department to reassure the City as to the correctness of the Board's position.

I have reviewed the materials gathered by the Houston Retirement Fund and personally spoken with the Board's legal advisor whom I have worked with on other pension projects. I am satisfied that the Board's procedure is fully in compliance with state and federal law and clarification from the Equal Employment Opportunity Commission and the Justice Department would go a long way towards easing the City's concerns.

On behalf of the Houston fire firefighters as well as our members across the country, I would be grateful for any assistance which you could give us in achieving that goal.

After reviewing this letter, your intervention, as appropriate, would be appreciated. You can reach me by telephone at the IAFF if you need to discuss this in more detail.

I look forward to hearing from you soon.

Sincerely,

Harold A. Schaitberger
Executive Assistant to the General President

redact.

Note to James Casello

From: Jen O'Z

Attached is a note from
the Intl Assoc of FF
asking for our assistance
in getting clarification
from EEOC + DOJ on a
matter relating to its
Personnel Boards. Could
you please let me know
what, if anything, we can
do to assist the firefighters.
If possible, we would like
to ~~get them the information~~
~~they want about how to~~
~~interpret the ADA whether~~
~~from the right~~
get them an opinion as to
whether their scheme, as
defined in the memo, meets
ADA guidelines.

ADA
compliance
with
me

Te: Martin
copy file: Assigned &
Pending

THE WHITE HOUSE
WASHINGTON

5 October 1995

MEMORANDUM FOR JAMES CASTELLO

FROM: JENNIFER O'CONNOR

SUBJECT: INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

Attached is a note from the International Association of Fire Fighters asking for our assistance in getting clarifications from the Equal Employment Opportunity Commission and the Department of Justice in a matter relating to its Pensions Boards' and their compliance with the American with Disabilities Act. Could you please let me know what, if anything, we can do to assist the fire fighters. If possible, we would like to get them an opinion from the right authority as to whether their scheme; as defined in the memorandum, meets ADA guidelines.



INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

ALFRED K. WHITEHEAD
President

VINCENT J. BOLLON
Secretary-Treasurer

September 26, 1995

Janice Enright, Special Assistant
to the Deputy Chief of Staff
The White House
Washington, D.C.

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I look forward to hearing from you soon.

Sincerely,

Harold A. Schaitberger
Executive Assistant to the General President

THE WHITE HOUSE
WASHINGTON

26 October 1995

MEMORANDUM FOR MARVIN KRISLOV

FROM: JENNIFER O'CONNOR

RE: ATTACHED LETTER

Looks good. Please have her send it out. Thanks.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

OFFICE OF LEGAL COUNSEL

FAX TRANSMITTAL COVER SHEET

DATE: October 25, 1995

PLEASE DELIVER TO:

NAME: Marvin Krislov

AGENCY/OFFICE/DEPT: White House Counsel

FAX #: 456-1647

TELEPHONE #: 456-7903

THIS MESSAGE IS BEING SENT BY:

NAME Ellen J. Vargyas

TELEPHONE #: (202) 663-4637

THIS MESSAGE HAS 3 PLUS THIS COVER SHEET.

This Fax # is (202) 663-4639

REMARKS:

I am faxing this letter to you per our
conversation. I will wait to hear from
you before sending it out.

IF YOU HAVE ANY PROBLEMS RECEIVING THIS TELECOPY MESSAGE, PLEASE
CALL THE FOLLOWING # IMMEDIATELY, (202) 663-4637. THANK YOU.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

DRAFT

Mr. Harold A. Schaitberger
Executive Assistant to the General President
International Association of Firefighters
1750 New York Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Schaitberger:

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As you know, the EEOC enforces Title I of the ADA, which prohibits discrimination in employment on the basis of disability. The procedures outlined in your letter raise two significant ADA issues: first, whether the physical examination can even be administered and, second, whether the results of the examination can be used in the manner you describe. We address each issue in turn.

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whether an employee poses a "direct threat" (i.e., a significant risk of substantial harm to him/herself or others) in the position.

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a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law.

42 U.S.C. § 12201(c)(2).

It is not clear from your letter whether the Pension Boards' physical examinations are given before or after the person has started work. If the examinations are given after a conditional offer of employment, but before a person starts working, then the Pension Boards would not be violating the ADA since the statute permits any type of medical examination at that point.

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We understand from your letter that the Boards do not use the results to withdraw offers of employment or to bar persons from participating in the disability retirement plan altogether.** Rather, the results are used only to establish pre-existing conditions so that the Boards can deny claims for disability retirement benefits based on such conditions. Since the results of the physical examinations are not used to single out persons with disabilities, the Pension Boards do not appear to be violating the ADA.

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Sincerely,

Ellen J. Vargyas
Legal Counsel

** Thus, this procedure differs from the system challenged by the Department of Justice in U.S. v. State of Illinois, 3 AD 1157 (N.D. Ill 1994), where a pension plan excluded police officers and firefighters with certain disabilities from qualifying for any pension benefits.

Red dot copy

1 to Don / 3 / 10
Jennifer O'Connor
for your
0093MM file

PRIORITY

Red dot

to Jennifer
O'Connor

Pres.
MM

Don / 3 / 10



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

OFFICE OF LEGAL COUNSEL

FAX TRANSMITTAL COVER SHEET

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Washington, D.C. 20507

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Legal Counsel

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To: Marvin

copy file: Assigned &
Pending

THE WHITE HOUSE
WASHINGTON

5 October 1995

MEMORANDUM FOR JAMES CASTELLO

FROM: JENNIFER O'CONNOR

SUBJECT: INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

Attached is a note from the International Association of Fire Fighters asking for our assistance in getting clarifications from the Equal Employment Opportunity Commission and the Department of Justice in a matter relating to its Pensions Boards' and their compliance with the American with Disabilities Act. Could you please let me know what, if anything, we can do to assist the fire fighters. If possible, we would like to get them an opinion from the right authority as to whether their scheme; as defined in the memorandum, meets ADA guidelines.

P/s. Send
a copy of these
2 pp., redacted as
indicated, to Ellen
Vargyas, 220C
Rm # 663-4639
Thurs.
MK

Write
for discussion only --
Please review and
comment.

Jorg
10/18

Note to James Casello

From: Jen O'Z

Attached is a note from
the Intl Assoc of FF
asking for our assistance
in getting clarification
from EEOC + DOJ on a
matter relating to its
Pension Boards. Could

ADA
compliance
with
me

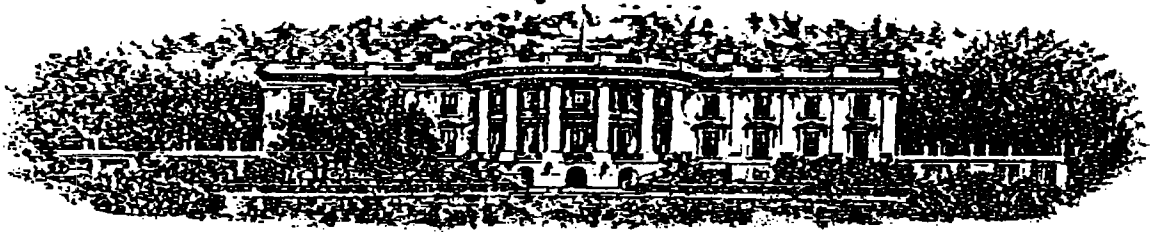
you please let me know
what, if anything, we can
do to assist the firefighters.

If possible, we would like
to ~~either get them the information~~
~~they want about how to~~
~~interpret the ADA~~ ^{from the right}
^{authority}

get them an opinion as to
whether their scheme, as
defined in the memo, meets
ADA guidelines. —

663-
4639

The White House



COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE: October 12, 1995
TO: Ellen Vargyas
FACSIMILE NUMBER: 663-4639
TELEPHONE NUMBER: _____
FROM: Marvin Krislov
TELEPHONE NUMBER: 456-7903
PAGES (WITH COVER): 3
COMMENTS: For discussion only.... Please
review and comment. Thanks

PLEASE DELIVER AS SOON AS POSSIBLE

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TRANSMISSION REPORT

THIS DOCUMENT (REDUCED SAMPLE ABOVE)
WAS SENT

**** COUNT ****
3

*** SEND ***

NO	REMOTE STATION I. D.	START TIME	DURATION	#PAGES	COMMENT
1	EEOC - OLC	10-12-95 4:55PM	2'00"	3	

TOTAL 0:02'00"

3

XEROX TELECOPIER 7020



INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

ALFRED K. WHITEHEAD
President

VINCENT J. BOLLON
Secretary-Treasurer

September 26, 1995

After that glowing compliment, I hope that you do not mind if we take one more liberty and call upon you again to intervene on a matter of considerable importance to not only our members in Houston but fire fighters throughout the country. This situation involves the interpretation of the Americans with Disabilities Act vis a vis the liability of our members' pension boards, which have established physical exams for persons entering the plan, to determine pre-existing conditions (not for determining employment or participation in a pension plan). It is my understanding that Claire Gonzales of the EEOC is deliberating on an inquiry of this nature, which was brought to the attention of the EEOC by Congressman Gene Green (D-Texas).

Under Texas law, the Pension Board is permitted to give physical examinations to determine whether persons entering the plan have pre-existing physical conditions. The purpose of the exam is not to exclude any person from membership, but rather to give the Board a point of measurement in the case of persons who apply for a service-connected disability retirement. Under the Texas law governing the plan, a person cannot claim an on the job injury if the injury existed at the time employment began. By giving a comprehensive medical exam at the time of entry into the pension plan, members are protected by having a clearly established record of their health and the Fund is protected against improvidently granted disability benefits.

The City of Houston has objected to the Pension Board's program of medical examinations out of fear that it (the City) will be sued under the Americans with



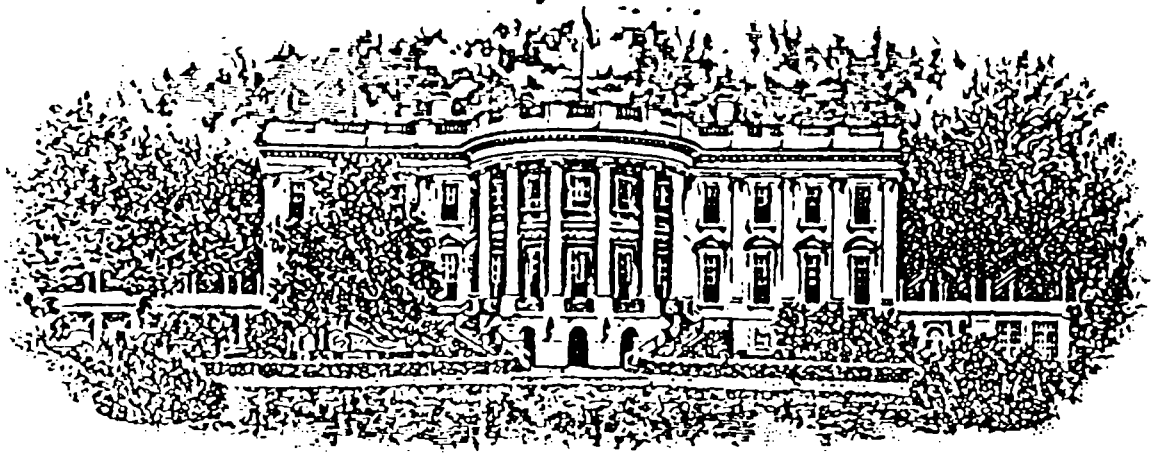
Disabilities Act. The Pension Board, an independent legal entity, has offered to indemnify and defend any City official who is involved in any lawsuits concerning the Board's physical examinations. The Pension Board has also made it clear to the City that any person who is hired by the City as a firefighter will be admitted to the retirement plan, regardless of any condition revealed by the physical examination. The Pension Board has also established the necessary confidentiality procedures required by state and federal law for the maintenance of medical records.

Our Houston local and the Houston Pension Fund are attempting to get some clarification from the Equal Employment Opportunity Commission and/or the Justice Department to reassure the City as to the correctness of the Board's position.

I have reviewed the materials gathered by the Houston Retirement Fund and personally spoken with the Board's legal advisor whom I have worked with on other pension projects. I am satisfied that the Board's procedure is fully in compliance with state and federal law and clarification from the Equal Employment Opportunity Commission and the Justice Department would go a long way towards easing the City's concerns.

On behalf of the Houston fire firefighters as well as our members across the country, I would be grateful for any assistance which you could give us in achieving that goal.

The White House



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