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Honorable Gurbir S. Grewal
Attorney General
State of New Jersey
Office of Attorney General
Department of Law and Public Safety
P.O. Box 080
Trenton, New Jersey 08625-0081

Re: Federal Law Enforcement Officer Safety Act of 2004

Dear Honorable Sir:

Please be advised that we are outside counsel to the Federal Law Enforcement Officers Association, a not-for-profit corporation consisting of approximately 28,000 federal law enforcement members, both active and retired ("FLEOA"). We have recently been informed that the State of New Jersey, Office of the Attorney General, has issued (or re-issued) a Guidance, dated October 12, 2018, in response to frequently asked questions concerning retired law enforcement officer ("LEO") permits to carry firearms and the Federal Law Enforcement Officer Safety Act of 2004, 18 U.S.C. Section 926C ("LEOSA").

As we understand the Guidance, the LEOSA does not relieve the obligation of retired LEO's who are domiciled in New Jersey to comply with the provisions of N.J.S.A. 2C:39-61 in order to carry a firearm in New Jersey. The statute the New Jersey Attorney General indicates must be complied with requires annual applications be made to the New Jersey Superintendent of State Police for a permit to carry a firearm. The statute does not **require** issuance of the permit (i.e., it is discretionary).

The LEOSA preempts state firearms regulation, such as the statute cited in the Guidance. The LEOSA allows qualified individuals (certain current and retired qualified law enforcement officers) to possess firearms, notwithstanding assorted state restrictions, to protect themselves and to supplement local law enforcement efforts.

Under the LEOSA, a person who has retired as a potentially qualifying LEO, as long as he or she has the photographic identification attesting to his or her having been employed as a LEO, can get the remainder of his or her credentials (annual firearm certification) from a certified firearms instructor in his or her state of residence. 18 U.S.C. Section 926C(d)(2)(B).

The LEOSA does not vest in the state from which an officer retired or resides the exclusive control over licensure following retirement. Insofar as the New Jersey **statutory scheme** purports to

require its domiciled retirees to qualify under its state statute, the policy, for the reasons discussed below, is patently unlawful, as preempted by LEOSA.

Congress Enacted LEOSA To Help Retired Law Enforcement Officers, Among Others, To Protect Themselves And Their Families And Feel Secure In Their Retirement

Congress passed the LEOSA specifically to address the problematic known reality that active and retired law enforcement officers, in their off-duty, day-to-day lives, will and often do encounter individuals over whom they have exercised dominion in a law enforcement capacity during their careers, and that these individuals often maintain a potentially violent animus against the officer that once held the power of the law over them. See e.g., S. Rep. 108-29 (2003), 2003 WL 160954 at *4 (LEOSA "is designed to protect officers and their families from vindictive criminals"); id. ("[C]riminals often have long and exacting memories. A law enforcement officer is a target in uniform an out, active or retired; on duty or off."); H.R. Rep. 108-560 (2004), 2004 WL 5702383 at *3-4 ("Retired officers need to be able to protect themselves and their families and . . . are just as trustworthy as they were when they were employed full time"). LEOSA allows retired law enforcement officers to protect themselves and otherwise feel safe from the threat of potentially vindictive criminals by providing that they "may carry a

concealed firearm," irrespective of state law generally prohibiting such carry, so long as they qualify under the statute and are carrying statutory-specified identification. Section 926C(a).

The LEOSA sets forth an in-depth, seven-part definition of the term "qualified retired law enforcement officer" at Section 926C(c). Although the definition requires a number of particularized qualifications, such as service for 10 years or more, (c)(3), separation in good standing, (c)(1), and lack of disqualification for medical reasons, (c)(5), or other reason of federal law, (c)(7), it quite clearly intends to include broad categories of LEO's in the ambit of the core substantive component of the definition at (c)(2), which references officers "authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law." Section 926C(c)(2).

The definition at Section 926C(c)(2) also requires that the officer "had statutory powers of arrest" during his or her law enforcement tenure. *Id.* As long as an officer has an arrest authority provided by statute in connection with his or her position - as our retired members all did - the arrest authority requirement of Section 926C(c)(2) is satisfied.

The LEO's Who Are Domiciled In New Jersey Seek To Exercise Their LEOSA Rights But Are Intentionally

Blocked By The Requirement To Annually Apply To The Superintendent For A Discretionary Permit

The LEOSA does not implement any LEOSA-specific licensing scheme. Rather, it simply provides a superseding federal right to carry a concealed firearm that may be exercised by any qualifying individual who possesses the requisite identification. Under the LEOSA, the identification may take a number of different forms, but must ultimately reflect two components: one must be issued "by the agency" at which the individual served and must contain photo identification and indicate that the individual was a "Law enforcement officer"; the other is the annual certification of firearms qualification. Section 926C(d).

In connection with the annual firearms certification, the Guidance issued in New Jersey is completely contrary to the LEOSA mandate. Congress recognized that states and local governments were frustrating exercise of the rights, by declining to issue certification of firearms qualification (that, coupled with photographic identification of former employment as a law enforcement officer, being the credentials required to benefit). The LEOSA was amended in 2010 to prevent denial of the credentialing by denying governmental (state) certification of firearms training. The statute was amended to allow the component to be satisfied by testing by "a certified firearms instructor that is qualified to conduct a firearms qualification test for active duty officers within that State." See Law Enforcement Officers Safety Act Improvements Act of 2010, Pub. L. No. 111-272 (amending 18 U.S.C. Section 926C(d)(2)(B)).

LEOSA's legislative history indicates that, in making the 2010 amendments, Congress had determined retired law enforcement officers were entitled to "benefits and privileges" conveyed by the statute. The legislative history further indicates the amendment was intended to address the fact that "many retired officers have experienced substantial difficulty in gaining the benefits the law was intended to confer." The amendments were designed to "ensure that law enforcement officers . . . who are now retired will have flexibility in achieving the law's benefits and privileges which Congress determined they deserve." [See 156 Cong. Rec. 8248C Statement of Sen. Leahy.] [Emphasis added.]

It is noteworthy that while other courts that have examined LEOSA have found that the requirement of agency-issued identification was an important legislative compromise intended to ameliorate the intrusion of the law on intrastate gun carry laws, see, e.g., *Moore v. Trent*, No. 09-cv-1712, 2010 WL 5232727 (N.D. Ill. Dec. 16, 2010) ("**the identification card** required in Section 926C(d) constitutes a reservoir of powers set aside for the States") [emphasis added], no court has found the same to be true of the firearms qualification certification component, which may be issued by a different authority (i.e., a "certified firearms instructor") and seems aimed more pragmatically at fulfilling the statutory requirement that LEOSA carriers keep current on their firearms qualification status.

The critical fact is that our retired members already have their agency issued photo identification. What remains for the LEO's is to obtain a firearms qualification certificate from an appropriate authority in New Jersey, the state of their residence, which the 2010 LEOSA amendment was calculated to achieve, without interference by the State. Once this firearm qualification certification is obtained, the LEO may carry and possess firearms in New Jersey, notwithstanding the New Jersey state licensing provision. The LEOSA preempts state firearms regulation.

There is no question that the LEO's are supremely capable of passing the necessary qualifications test: they carried weapons on the job and off-duty for decades. The firearms qualification certification is an important but fundamentally ministerial and perfunctory requirement of the statutory scheme designed to ensure that the LEOSA carriers meet certain technical requirement, and *not* designed to invest New Jersey or any agency with any additional discretion over LEOSA eligibility.

According to the Court in *Duberry v. District of Columbia*, 829 F.3d 1046 (D.C. Cir. 2016), because Congress had provided statutory criteria for defining the LEOSA right and for establishing eligibility for rights under the statute, the LEOSA was subject to judicial enforcement in the federal courts. See *Id.* at 1052-1053. Looking to Congress's "categorical preemption of state and local law standing in the way of the LEOSA right to carry," the Court concluded that states have a "mandatory duty" to "recognize the

right" the LEOSA establishes. *Id.* The Court observed that Congress did not afford states the discretion to "redefine either who are 'qualified law enforcement officers' or who is eligible for the LEOSA right." *Id.* at 1053-54.

The New Jersey Legislature, as well as the Guidance, by adding a conceal carry eligibility requirement (requiring the discretionary approval of the Superintendent of the State Police as a pre-condition to conceal carry) to the LEOSA, did exactly what the *Duberry* Court ruled was improper, that is, redefining who is a qualified law enforcement officer in New Jersey, in violation of the plain text of the LEOSA. As discussed above, the LEOSA does not implement any LEOSA-specific licensing scheme.

Rather, it simply provides a superseding federal right to carry a concealed firearm that may be exercised by any qualifying individual who possesses the requisite certification. The New Jersey Statute goes well beyond the requisite certification requirement under the LEOSA, by requiring State Police approval based on separate onerous criteria set forth in the local law. On behalf of the members of FLEOA who are New Jersey domiciliaries, we respectfully request that your office rescind its Guidance and relieve all New Jersey LEO's who are qualified retired LEO's under the LEOSA from the additional burden of having to apply to the Superintendent for a permit to conceal carry a firearm in New Jersey.

We prefer to resolve this matter amicably without Federal controversy. We await an expeditious reply. Thank you for your anticipated consideration.

Respectfully,

Lawrence Berger, Esq.

Tom Allen, Esq.