The fact that the Legislature saw fit to define the term "in service" in N. J. S. A. 43:15A—39 for the purpose of computing service creditable for retirement indicates that the Legislature considered this definition to be within the proper sphere of legislation enactment. The Board of Trustees cannot take upon itself legislative prerogatives merely because the legislation is silent in the area of definition of the term "in service" as used in N. J. S. A. 43:15A—41 (c) and N. J. S. A. 43:15A—57, which referred to death benefits of members of the Public Employees' Retirement System who die "in service".

The correction of this omission is a matter for supplemental legislation.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General

By: CHARLES S. JOELSON,
Deputy Attorney General

MARCH 23, 1955.

MR. GEORGE BORDEN, *Secretary,*
Public Employees' Retirement System,
48 West State Street,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 8.

DEAR MR. BORDEN:

This is in answer to your communication of March 15, 1955, in which you ask whether a county, municipality, or department of the State may upon request effect the retirement by the Board of Trustees of the Public Employees' Retirement System of a member of the system who is sixty years of age or over, but under the age of seventy.

N. J. S. A. 43:15A—47 provides as follows:

"Retirement from service shall be as follows:

a. A member who shall have reached 60 years of age may retire from service by filing with the board of trustees a written statement duly attested, stating at which time subsequent to the execution and filing thereof he desires to be retired. The board of trustees shall retire him at the time specified or at such other time within 30 days after the date so specified as the board finds advisable.

b. A member who shall have reached 70 years of age shall be retired by the board for service forthwith, or at such time within 90 days thereafter, as it deems advisable, except that an employee reaching 70 years of age may be continued in service from time to time upon written notice to the board of trustees by the head of the department where the employee is employed."

It should be noted that retirement by the Board in the case of a member who is sixty years of age or over, but not yet seventy years of age, shall be at the application of the member himself.

The only exception to this requirement made by our Public Employees' Retirement Act is with regard to disability retirement. N. J. S. A. 43:15A—42 provides as follows with respect to such cases:

NOVEMBER 10, 1955.

HON. CARL HOLDERMAN,

Commissioner of Labor and Industry,
1035 Parkway Avenue,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 39.

DEAR COMMISSIONER HOLDERMAN:

You have requested our opinion with reference to certain questions involving the Supplemental Unemployment Benefit Plans embodied in contracts recently negotiated by the United Automobile Workers of America, C.I.O., one with the Ford Motor Company and the other with General Motors Corporation.

In each case, we have procured copies of the Plan and the agreement to which it is attached. Since there appear to be no significant differences insofar as your inquiries are concerned, they will hereafter be referred to as "the Plan" and the automobile companies will be referred to simply as "the Company".

In summary, the Plan contemplates the establishment by the Company of a trust fund or funds (hereinafter referred to as "the Trust Fund" or "the Fund"). Contributions to the Fund are made solely by the Company, at the rate of 5 cents per hour for each hour an employee has received pay from the Company. This is the sole obligation of the Company. There is a limitation as to the total amount of money to be built up in the Fund. This limitation is called "Maximum Funding" and will be computed once a month in accordance with a formula set out in the Plan. The Fund is to be used solely for the payment of benefits to eligible applicants and the expenses of administration of the Fund. In no event does the Fund revert to the Company. The express purpose of the Plan is to supplement State system unemployment benefits to the levels provided for in the Plan, and not to replace or duplicate them. Beginning June 1, 1956, eligible laid off workers will be paid benefits by the trustee out of the Trust Fund in exchange for certain "credit units" they have accumulated while employed by the Company. The rate of exchange for such "credit units" will depend on the seniority of the applicant and the relative value of the assets of the Fund as compared with the current "Maximum Funding" figure. Within the limitation of a $25.00 maximum, the benefits, when added to State Unemployment Compensation, could give an eligible applicant an amount equal to 65% of his weekly after-tax straight-time wage, for a limited number of weeks, and an amount equal to 60% for a maximum of 22 additional weeks.

An applicant is eligible for a supplemental benefit only if he is on layoff from the Company with respect to the week for which application is made and if, among other things, (a) such layoff occurred as the result of a reduction in force or temporary layoff, including a layoff because of the discontinuance of a plant or an operation, (b) with respect to such week, the applicant has registered at and has reported to an employment office maintained by the applicable State system and has not failed or refused to accept employment deemed suitable under such State system, and (c) with respect to such week, the applicant has received a State system unemployment benefit not currently under protest by the Company or was ineligible to receive the State unemployment benefit for certain limited reasons not pertinent here.

The Plan provides that no benefit paid thereunder shall be considered a part of any employee's wages for any purpose and that no person who receives any benefit shall for that reason be deemed an employee of the company during such period.

In your letter of request you state that:

"Particularly the matters it is desired to be ruled on are:

a. Whether or not these [supplemental unemployment] benefits may be received simultaneously without interfering with the workers rights to receive [state unemployment benefits].

b. Whether or not the company and/or worker are required to pay unemployment insurance contributions on the supplemental benefits paid under the . . . plan."

In dealing with the questions you have propounded it is necessary to keep in mind the declaration of public policy made by the legislature concerning the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment. The declaration is contained in Section 2 of the Unemployment Compensation Law, R. S. 43:21—2:

"As a guide to the interpretation and application of this chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed after qualifying periods of employment."

It would seem that the Plan as outlined above constitutes a voluntary effort to further the purposes expressed in this statement of policy. The terms of the Plan are clearly consistent with the terms of the declared public policy.

The Unemployment Compensation Law of our state provides that an unemployed individual, under certain conditions and limitations, is eligible to receive benefits from the state fund with respect to any week of unemployment. R. S. 43:21—4.

An individual is deemed "unemployed" for any week (1) during which he is not engaged in full time work and (2) with respect to which his remuneration is less than his weekly benefit rate under the state system. R. S. 43:21—19 (m) (1).

Since an eligible applicant under the Plan described above must be on layoff with respect to the week for which application is made, it is obvious that an applicant is not engaged in full time work for that week. Thus, the first clause of the definition of "unemployed" is satisfied.

As to the second clause of the definition, if the payments to an applicant under the Plan are considered not to be remuneration with respect to the week of layoff, then that clause too is satisfied. It is appropriate, therefore, to determine whether supplemental unemployment benefits are remuneration within the terms of the Law.

Remuneration is defined in R. S. 43:21—19 (p) to mean:

"all compensation for personal services, including commissions and bonuses and the cash value of all compensation in any medium other than cash."

It is to be noted that the benefits under the Plan are not paid by the employers to employees, nor does the Company have a legal obligation to make benefit payments. Payments are made from the Trust Fund to the beneficiaries by independent trustees. Fund benefits are non-alienable. The employees have no vested interest in the assets of the Fund. Some or all of the employees may never receive benefits from it. The Plan affords them the possibility of receiving benefits in the future, in varying amounts and for varying periods. It can hardly be said that such benefits are "compensation for personal services." (See *Radice v. N. J. Department of Labor and Industry,* 4 N. J. Super, 364 (App. Div. 1949) and *Bartholf v. Bd. of Review, Div. of* Employment Sec., 36 N. J. Super. 349 (App. Div. 1955).

In *Radice v. N. J. Department of Labor and Industry,* supra, the court, in dealing with strike benefits, stated, p. 369:

> "We do not believe the strike benefits were in any real sense a payment of the services . . . They came from a fund to which appellants [members of striking union] had contributed and might be analogized to savings funds or to private insurance for which they had paid premiums."

In that case the striking employees of a newspaper plant performed work for another newspaper founded by the union in furtherance of its strike activities. Since the strike benefits were not payment for the services, the members were deemed unemployed so as to be eligible for unemployment compensation benefits for the period of the dispute following restoration of normal operations at the struck plant.

In *Bartholf v. Bd. of Review, Div. of Employment Sec.,* supra, the court held that sickness disability benefits paid under the company's state-approved plan were not remuneration earned in employment or wages or compensation for personal services. The court distinguished vacation, holiday and back pay cases where payments and wages earned in employment could logically be equated. In that case the success of a claim for unemployment compensation benefits depended on the claimant's being able to count certain weeks, during which he received sickness disability benefits, toward the number of "base" weeks required by the Unemployment Compensation Law. A base week is one in which the individual has earned from an employer remuneration equal to not less than $15.00. In holding that the benefits were not remuneration the court stated, at p. 359:

> ". . . the act places the status of wages only on those monies which represent remuneration for services rendered and which are paid *for* employment rather than *because* of employment."

Our conclusion is that supplemental unemployment benefits are not remuneration within the provisions of our Unemployment Compensation Law.

In light of the foregoing, an applicant entitled to benefits under the Plan for any week would still be deemed an unemployed individual for such week under our statute and, if otherwise eligible and not disqualified, would be entitled to receive benefits for such week out of the State unemployment compensation fund. It likewise follows that the state benefits would not be reduced by the amount of the benefits under the Plan.

To phrase our opinion in the terminology of the Plan (Article X, Section 5 (a) of the Ford Plan; Article IX Section 5 (a) of the General Motors Plan) a person has a right to receive both unemployment benefits under the New Jersey Unemployment Compensation Law and a weekly supplemental benefit under the Plan for the same week of layoff at approximately the same time and without the reduction of the State unemployment benefit because of the payment of the weekly supplemental benefit under the Plan.

Our answer to your first question, therefore, is "Yes."

With reference to your second question, our conclusion that the supplemental unemployment benefits are not remuneration is controlling.

Contributions to the state unemployment compensation fund by both the employer and employee are based on a percentage of wages paid. R. S. 43:21—7.

Wages are defined in R. S. 43:21—19 (o) which provides, in part:

"'Wages' means remuneration payable by employers for employment . . ."

Having concluded that the supplemental unemployment benefits are not remuneration, it follows by definition that such payments are not wages and, consequently, are not to be considered in the determination of contributions required of employers and employees under the Unemployment Compensation Law.

In light of this, our answer to your second inquiry is in the negative.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: THOMAS L. FRANKLIN,
Deputy Attorney General.

TLF:lc

NOVEMBER 16, 1955.

HON. ABRAM M. VERMEULEN,
Director, Division of Budget and Accounting,
State House,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 40.

DEAR DIRECTOR VERMEULEN:

You have requested advice as to whether the Treasury Department or the Legislative Budget and Finance Director (N. J. S. A. 52:11—32 et seq) has responsibility for the fiscal control of the following state agencies:

South Jersey Port Commission
Commission on Interstate Cooperation
Interstate Sanitation Commission
Commission on State Tax Policy
State Beach Erosion Commission
Commission on Narcotic Control
New Jersey Metropolitan Rapid Transit Commission
Commission on Election Laws Study
Commission on Inter-Governmental Relations
Juvenile Delinquency Study Commission
Legislative Commission on Water Supply
Advisory Commission on Lesser Offenders
Commission to Study Sea Storm Damage

N. J. S. A. 52:27B-12, P. L. 1944, C. 112, Article 3, Section 3, provides that the Commissioner of Taxation and Finance "* * * shall carry into effect and execute the formulation of the annual budget * * *." By the terms of N. J. S. A. 52:18A-6, P. L. 1948, C. 92, Section 6, the powers, functions and duties of the Commissioner of Taxation and Finance exercised through the Bureau of the Budget were transferred to the State Treasurer to be performed through the Division of Budget and Accounting. This places the responsibility of preparing the budget in your hands.