without preference of charges, an opportunity for a hearing and a determination of cause.

My answer is that you as Superintendent may deny reappointment summarily under such circumstances. The fourth anniversary trooper has not attained tenure under R.S. 53:1-8.1. He is one year short of the requisite five years' continuous service to qualify.

The State Police Act (L. 1921, c. 102) provides protection to members of the State Police against removal except for cause during two year enlistment terms. That section, now R.S. 53:1-8, is as follows:

> "All the officers and troopers enumerated in section 53:1-5 of this title shall be appointed or reappointed by the superintendent for a period of two years, and shall be removable by him after charges have been preferred and a hearing granted. Any one so removed from the state police for cause after a hearing shall be ineligible for reappointment."

Pursuant to R.S. 53:1-8, a member of the State Police is entitled to a preference of charges, an opportunity for a hearing and a determination of cause prior to his removal during the two year period after his first appointment, during the two year period after his reappointment, if he is reappointed on his second anniversary, and during the one year period after a second reappointment on his fourth anniversary, until he qualifies for statutory tenure under R.S. 53:1-8.1.

R.S. 53:1-8 fixes no requirement that the Superintendent reappoint members of the force at the termination of two year enlistment periods except upon a determination of cause for their removal and ancillary procedural safeguards. *McQuillin, Municipal Corporations*, Sec. 12.269, p. 424 sets forth the general rule applicable to public employment:

> "So, if the term of office is fixed and has expired, mandamus to compel reappointment will be denied, for, in such case, the officer is not removed."

I recommend as head of the Department of Law and Public Safety an administrative policy favoring reappointments to second and fourth anniversary troopers in the absence of substantial grounds to question their fitness to serve as members of the State Police.

Very truly yours,

DAVID D. FURMAN
Attorney General

AUGUST 16, 1961

HONORABLE KATHARINE E. WHITE
Acting State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1961—No. 24

DEAR MRS. WHITE:

We have been asked to render an opinion on the relationship between N.J.S.A. 43:15A-50 and N.J.S.A. 43:15A-59 (Public Employees' Retirement System) as well

as between the analogous provisions of N.J.S.A. 18:13-112.49 and N.J.S.A. 18:13-112.70 (Teachers' Pension and Annuity Fund). Hereinafter statutory references will be made solely to the applicable provisions in the Public Employees' Retirement-Social Security Integration Act, Laws of 1954, c. 84, N.J.S.A. 43:15A-1 to N.J.S.A. 43:15A-86, although what is said is equally applicable to the Teachers' Pension and Annuity Fund-Social Security Integration Act, Laws of 1955, c. 37, N.J.S.A. 18:13-112.3 to N.J.S.A. 18:13-112.75.

The first question posed concerns the effect of the Social Security offset provision in N.J.S.A. 43:15A-59 upon that part of N.J.S.A. 43:15A-50 which establishes the privilege in retiring members to select certain options in order to provide, upon the death of the retirant, payments to designated beneficiaries.

The latter section in applicable part reads:

> "*Subject to the provisions of section 59 of this act* [N.J.S.A. 43:15A-59], at the time of his retirement any member may elect to receive his benefits in a retirement allowance payable throughout life, or he may on retirement elect to receive the *actuarial equivalent* * * * of his annuity, his pension, or his retirement allowance, in a lesser annuity, or a lesser pension, or a lesser retirement allowance * * * with the provision that:
>
> "Option 1. If he dies before he has received in payments the present value of his annuity, his pension or his retirement allowance as it was at the time of his retirement, the balance shall be paid to his legal representatives or to such person as he shall nominate * * *." (Emphasis supplied.)

Three other options are also provided in this section. What is said hereinafter with regard to the necessity of maintaining an actuarial equivalent is equally applicable to all the options.

Section 59 [N.J.S.A. 43:15A-59], referred to above, reads in pertinent part as follows:

> "* * * upon retirement of a member after the attainment of age 65, the board of trustees shall reduce such member's retirement alowance by the amount of the Old Age Insurance Benefit under Title II of the Social Security Act payable to him. * * * however, such reduction shall be subject to the following limitations:
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> * * *
>
> "(b) The retirement allowance shall not be reduced below the amount of the annuity portion of the retirement allowance being paid at the time of his retirement."

The question can be paraphrased as follows: In the case where a retirant is covered by Social Security and is subject to the offset provisions of section 59, upon what basis shall the actuary figure the insurance benefits payable under the options referred to in section 50? In other words, shall the insurance reserves be established upon the basis of the full retirement allowance as it would exist if no offset were applicable, or shall the basis be the full retirement allowance reduced by the amount of Social Security payments payable to the retirant, but in no event less than the annuity. We are of the opinion that the latter interpretation is the proper one.

The option provisions of the statute (section 50) are expressly tied in with the offset provisions found in section 59:

"Subject to the provisions of section 59 of this act * * *."

Cf. the predecessor to N.J.S.A. 43:15A–50, R.S. 43:14–38. Inasmuch as the retirement allowance must be reduced by the amount of the Social Security benefits payable, when a member selects an option based upon his retirement allowance, it must be the retirement allowance *as reduced* under section 59. With this as the basis the "actuarial equivalent" can be determined for purposes of computing the insurance reserves which will have to be established under the various options.

We understand that under the present interpretation of the statutes by the respective boards of trustees, more than an "actuarial equivalent" is being provided. This has resulted from the failure to apply the reduced retirement allowance as indicated above. The "premium" necessary to pay for the optional benefits, i.e., the monthly reduction from a full retirement allowance, has not been fully paid by the members, and the system has been required to make up the balance. As we interpret the statute, this is not proper.

The boards' policies, purportedly, have been based upon that part of section 59 which declares that the retirement allowance "shall not be reduced below the amount of the annuity portion of the retirement allowance." Clearly the purpose of this provision is to make certain that, as a result of Social Security integration, the retirant's benefits payable by the State shall not be reduced to a figure below the annuity portion of his retirement allowance. This provision, however, does not authorize the establishment of insurance reverves in the manner heretofore followed. An administrative body has no power to waive or alter a statutory requirement by interpretation. *DeNike* v. *Board of Trustees etc. Retirement System,* 62 N.J. Super. 280, 300 (App. Div. 1960), *affirmed,* 34 N.J. 430 (1961); *Frigiola* v. *State Board of Education,* 25 N.J. Super. 75 (App. Div. 1953).

It should be observed that under the interpretation as we now set it forth, a member who selects Option 1 is precluded from obtaining the same amount of insurance that he would have been entitled to if Social Security integration had not occurred. (Of course it also results in the member's having to pay a smaller "premium.")

The result of this opinion is, as indicated, to require that a new basis be used for establishing the initial insurance reserve. This fact bears on another question posed: how should the initial insurance established under Option 1 be reduced each month in which a retirant receives a benefit? At present the Teachers' Pension and Annuity Fund reduces the initial insurance reserve by the amount of the annuity and pension established, whereas the Public Employees' Retirement System reduces the initial insurance reserve by the amount of the annuity plus the amount of the member's Social Security benefit in cases where there is a complete offset.

Since the statutes are worded the same in all material respects, there is no reason to have different methods for purposes of reducing the reserve. Under the interpretation rendered in this opinion it is necessary to reduce the initial insurance reserve by the amount of the member's annuity plus the amount, if any, required to be paid by the system as part of the "pension." This must be the procedure followed in both systems.

Finally, we have been asked to consider the present relevance of an opinion of the Attorney General dated February 6, 1930 dealing with the meaning of the term "present value" found in the provision establishing Option 1 benefits. Under the 1930 opinion the "present value" of a retirant's annuity, pension or retirement allow-

ance is considered to be the value reduced by virtue of his selection of an option. This interpretation is applied only with respect to the Teachers' Pension and Annuity Fund. We are informed that this interpretation is *sui generis*. It is not followed by the Public Employees' Retirement System nor by systems having similar provisions. We are further informed that the interpretation was rendered at a time when the statute, R.S. 43:14–38, did not have its present 30-day limitation militating against deathbed selections. Clearly, moreover, the 1930 interpretation results in the establishment of lower initial insurance reserves and in the ultimate beneficiary's receiving a lesser sum than he would receive under the interpretation followed by the Public Employees' Retirement System.

The statutory language concerning Option 1 benefits is substantially identical in both the Teachers' Pension and Annuity Fund and the Public Employees' Retirement System. There is no sound reason why different interpretations should exist in this connection. We are therefore of the opinion that the 1930 interpretation is no longer relevant to the present statute and should no longer be followed. The method presently employed by the Public Employees' Retirement System for determining "present value" should be followed by the Teachers' Pension and Annuity Fund also.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: ROBERT S. MILLER
Deputy Attorney General

SEPTEMBER 1, 1961

JOSEPH SOLIMINE, *Secretary*
Essex County Board of Taxation
Hall of Records
Newark, New Jersey

FORMAL OPINION 1961—No. 25

DEAR MR. SOLIMINE:

The Essex County Board of Taxation has asked our opinion as to the taxability of land owned by a municipality and leased by the municipality to a non-exempt person, corporation or other entity. In the example given, land of considerable value has been leased on a long-term basis to a business corporation. A building, constructed on the land, is used for business purposes under the control and management of the lessee.

Jamouneau v. *Division of Tax Appeals*, 2 N.J. 325 (1949) dealt with land owned by the City of Newark and leased to the C-O-Two Fire Equipment Company. On this site was erected a building by and at the cost of the tenant, C-O-Two Fire Equipment Company. The building was actively used by the tenant for its own commercial purposes. The Newark Tax Assessor's list showed an assessment of the personal property on the premises against the tenant and showed an assessment value of the land at $42,900 and of the building at $250,000. Although the land and building were assessed, they were carried in the name of the City of Newark as owner and