

offset is applicable, it can be applied only against the "pension" part of the member's retirement allowance.

The question, therefore, can be phrased as follows: should the Social Security offset be applied against the "pension" benefits payable under N.J.S.A. 18:13-112.51? We are of the opinion that it should not. The word "pension" in the latter statute is not used in a technical sense. It is expressly made to mean "the actuarial equivalent of the contributions, without interest, which he [the member] paid to the Teachers' Retirement Fund * * *." Cf. the definition of "pension" found in N.J.S.A. 18:13-112.4(h):

"'Pension' means payments for life derived from appropriations made by the State to the Teachers' Pension and Annuity Fund."

In sum, the word "pension" in N.J.S.A. 18:13-112.51 is equivalent to "the annuity portion of the retirement allowance" found in N.J.S.A. 18:13-112.70. Thus, the Social Security offset should not apply to it. The offset should be applied only to the pension portion of the retirement allowance otherwise payable to the member.

For the reasons expressed above, we also hold that R.S. 43:3-1 et seq. does not require that the benefits payable under N.J.S.A. 18:13-112.51 be suspended on account of earnings in public employment. R.S. 43:3-1 provides that a person who receives a governmental pension is ineligible to hold any public position or employment other than elective and receive both the "pension" and the salary or compensation allotted to his office or employment; if he wishes to retain the salary of the position, he must waive his "pension." The statute, however, expressly provides that:

"The term 'pension,' when applied to a retirement allowance, shall include only that portion of the retirement allowance which is derived from appropriations made by the employer or by the State."

Since the benefits payable under N.J.S.A. 18:13-112.51 clearly do not come within this definition, R.S. 43:3-1 is not applicable.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: ROBERT S. MILLER
Deputy Attorney General

SEPTEMBER 20, 1961

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

MEMORANDUM OPINION—P-26

DEAR MRS. WHITE:

You have asked our opinion with respect to the amount of the disability retirement allowance, if any, payable to an individual who retired on a disability retirement allowance under N.J.S.A. 43:15A-44 but subsequently returned to public employment.

N.J.S.A. 43:15A-44 provides that a disability retirant shall be re-examined periodically and if he is, upon such re-examination, found to be engaged in or capable of engaging in a gainful occupation "then the amount of his pension shall be reduced to an amount which, when added to the amount then earnable by him, shall not exceed the amount of his final compensation." On the other hand, R.S. 43:3-1 requires that a pensioner who returns to public employment must waive either (1) his pension or (2) the salary or compensation allotted to his office or employment. In pertinent part the latter statute reads:

"Any person who is receiving or who shall be entitled to receive any pension or subsidy from this or any other State * * * shall be ineligible to hold any public position or employment other than elective in the State * * * unless he shall have previously notified and authorized the proper authorities of said State * * * from which he is receiving or entitled to receive the pension that, for the duration of the term of office of his public position or employment he elects to receive (1) his pension or (2) the salary or compensation allotted to his office or employment."

In sum, the question becomes: which of these statutory provisions takes precedence when a disability retirant subsequently becomes engaged in public employment in this State? Is the retirant to be required to waive the entire pension pursuant to R.S. 43:3-1 et seq. or is he rather subjected to the reduced disability retirement allowance in accordance with the provisions of N.J.S.A. 43:15A-44?

It is important to note that the statutes governing the major pension fund systems make provisions of a similar nature to that found in N.J.S.A. 43:15A-44. In the Consolidated Police and Firemen's Pension Fund Commission, R.S. 43:16-2, a disability retirant who "is able to perform either his former usual duties, if such be available, or such other available duties in the department which his employer shall assign to him * * * shall report for such duty within ten days * * * and thereupon his pension payments shall cease." Under N.J.S.A. 43:16A-8 (Police and Firemen's Retirement System), when a policeman or fireman is "engaged in or is able to engage in a gainful occupation paying more than the difference between his retirement allowance and his average final compensation * * * then the amount of his pension shall be reduced to an amount which, together with his annuity and the amount earnable by him, shall equal the amount of his average final compensation." Additionally, under N.J.S.A. 18:13-112.42 (Teachers' Pension and Annuity Fund), the "amount of pension shall be reduced to the amount which, when added to the amount then earned by him, shall not exceed the amount of his final compensation."

We note first that policemen and firemen who retire on disability pensions for service-connected disabilities and then return to public employment are not subject to R.S. 43:3-1. R.S. 43:3-5 specifically exempts such persons. In applicable part it reads:

"* * * nor shall the provisions of this chapter apply to * * * any person who has or who may hereafter receive permanent disability in the performance of his duty while serving as a member of the Armed Forces of the United States, the New Jersey State Police, or the police department, or the fire department of any county or municipality of this State."

With respect to members belonging to the Teachers' Pension and Annuity Fund and the Public Employees' Retirement System, however, a contrary result must be

reached. R.S. 43:3-1.1, R.S. 43:3-5, R.S. 43:3-5.1 and R.S. 43:3-5.2 expressly exclude from the operation of R.S. 43:3-1 various employees, offices and positions. By so doing the Legislature has indicated its intention to make R.S. 43:3-1 applicable to all other people. *Expressio unius est exclusio alterius.*

R.S. 43:3-2 further manifests this intention: "The pensions from or the public positions or employment with the state referred to in section 43:3-1 of this title shall affect *all* officers, employees or persons under the government of this state, even though they may not be paid directly from the state treasury, but are paid from proceeds derived from appropriations, license fees or other sources." (Emphasis supplied.)

Additionally, it must be observed that R.S. 43:3-1 has been amended as recently as 1959 (*See: Laws of 1959, c. 101*), whereas N.J.S.A. 43:15A-44 has not been amended at all since its original enactment and N.J.S.A. 18:13-112.42 was last amended in 1956 (*See: Laws of 1956, c. 145, § 10*). It is a fundamental rule of statutory construction that the later expression of legislative will prevails over the former to the extent of any inconsistency. *Two Guys from Harrison, Inc. v. Furman*, 32 N.J. 199, 223, 225 (1960).

In sum, the particular employee in question, and all members of the Teachers' Pension and Annuity Fund and Public Employees' Retirement System who retire on a disability retirement allowance are subject to the provisions of R.S. 43:3-1 upon securing public reemployment except as permitted by R.S. 43:3-1.1, R.S. 43:3-5, R.S. 43:3-5.1 and R.S. 43:3-5.2. Upon a return to private employment, R.S. 43:15A-44 is specifically applicable and must be enforced.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: ROBERT S. MILLER
Deputy Attorney General

SEPTEMBER 29, 1961

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

MEMORANDUM OPINION—P-27

DEAR MRS. WHITE:

We have been asked to determine whether the Pension Increase Act, L. 1958, c. 143, N.J.S.A. 43:3B-1 et seq., applies to employees of terminated pension funds (such as the Board of Education Employees' Pension Fund of Hudson County, and the Municipal Employees' Pension Fund of the Village of South Orange) who retired between 1915 and 1951, inclusive, and are now receiving their pension allowances from the Public Employees' Retirement System (*see* N.J.S.A. 43:15A-111).

In applicable part (N.J.S.A. 43:3B-1) Chapter 143 reads as follows: