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trative agency in accordance with a program approved by the court on submission by such law school or by a legal aid office. R. 1:21-3(c). We have no knowledge in the present situation, however, of any authorization by the Supreme Court for the appearance by law students or graduates before the Appeal Tribunal or Board of Review.

You are therefore advised for all of the above stated reasons, that non-attorneys may not represent or render legal advice to claimants or employers at hearings or other formal proceedings conducted by the Appeal Tribunal or Board of Review of the Division of Unemployment and Disability Insurance.

Very truly yours,  
WILLIAM F. HYLAND  
*Attorney General*

By: MAX H. SCHLOFF  
*Deputy Attorney General*

October 16, 1974

HONORABLE THOMAS G. DUNN  
New Jersey State Senate  
State House  
Trenton, New Jersey 08625

FORMAL OPINION NO. 12-1974

Dear Senator Dunn:

You have asked for an opinion as to whether the Legislative Pension Act of 1972, Laws of 1972, c. 167, N.J.S.A. 43:15A-135 *et seq.*, is consistent with the provisions of Art. 4, § 4, par. 7 and 8 of the 1947 New Jersey Constitution. For the following reasons, you are advised that the Legislative Pension Act of 1972 is consistent with Art. 4, § 4, par. 7 of the 1947 New Jersey Constitution. You are also advised, however, that the Act is violative of the provisions of Art. 4, § 4, par. 8 of the State Constitution insofar as the Act specifies an effective date prior to January 1, 1974 but is otherwise in full force and effect as of and subsequent to that date.

A proper understanding of the issues posed by the inquiry requires a brief chronology of the provisions for pension benefits to members of the New Jersey State Legislature. From 1922 to 1954, the State Employees Retirement System, established under Laws of 1921, c. 109, administratively provided an option for a legislator to join that Retirement System. On December 30, 1954 the State Employees Retirement System was abolished as a result of the repeal of all Acts establishing that Retirement System. Laws of 1954, c. 84, § 4; N.J.S.A. 43:15A-4. The Public Employees Retirement System was then established as the State agency to provide pension benefits for state employees pursuant to the enactment of the Public Employees Retirement-Social Security Integration Act of 1954. Laws of 1954, c. 84, § 7; N.J.S.A. 43:15A-7. The Retirement System continued the administrative practice of

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SERS to allow for the optional election of membership by legislators except that membership for legislators who had served in the Armed Forces of the United States in time of war was made compulsory. Laws of 1955, c. 261, § 5; N.J.S.A. 43:15A-7 (c). Amendatory legislation in 1966 provided express statutory authorization for the optional enrollment of non-veteran legislators. Laws of 1966, c. 217, § 2; N.J.S.A. 43:15A-7(d). We have been advised that considerable numbers of State legislators have joined the PERS and have received the many benefits provided by that Retirement System.<sup>1</sup>

In 1972 it was deemed advisable by the Legislature to establish a new benefit and contribution schedule for its members within the existing framework of the Public Employees Retirement System by the enactment of the Legislative Pension Act of 1972. The lawmakers decided to extend mandatory enrollment to non-veteran legislators. N.J.S.A. 43:15A-135. The Act continued to confer on the members of the Legislature all of the existing benefits provided by the Public Employees Retirement System. N.J.S.A. 43:15A-135. These benefits include *inter alia* ordinary and accidental death benefits, N.J.S.A. 43:15A-49, as well as a noncontributory and additional contributory life insurance program, N.J.S.A. 43:15A-57. In addition, by virtue of the enactment of Laws of 1972, c. 167, an improved benefit and contribution program was enacted. It included an advantageous retirement allowance for those legislators who had attained the age of 60 years, and further included an eight year vesting period for a deferred retirement allowance. N.J.S.A. 43:15A-138, 139. The Act provided for a flat 5% contribution rate for all members of the Legislature irrespective of age on entry into the retirement system. An opportunity was also given for the purchase of prior service credit for all previous legislative service at a uniform rate of 5% of the salary received during such prior legislative tenure. N.J.S.A. 43:15A-136, 137.

The first issue raised is whether any legislative grant of pension benefits for legislators is in conformity with the provisions of Art. 4, §4, par. 7, insofar as it constitutes a deferral of the payment of legislative compensation until after the expiration of the legislative term.<sup>2</sup> The pertinent constitutional language provides as follows:

“Members of the Senate and General Assembly shall receive annually, during the term for which they shall have been elected and while they shall hold their office, such compensation as shall, from time to time, be fixed by law and no other allowance, or emolument, directly or indirectly, for any purpose whatever...”

A review of the historical origins of this constitutional provision is important to a determination as to whether the benefits conferred by the Act are a constitutionally permissible form of legislative compensation within the contemplation of the framers of the 1947 New Jersey Constitution. In drafting this provision, a change was effected from fixed legislative compensation as prescribed in the 1844 Constitution and in its 1875 amendment to a flexible mode of compensation, subject only to the limitation that an increase or decrease in such compensation shall not become effective until the electorate has had an opportunity to express its choice for members of the General Assembly in the next succeeding general election.<sup>3</sup> Art. 4, §4, par. 8, 1947 New Jersey Constitution.

The proceedings of the 1947 constitutional convention reveal in this connection an almost exclusive concern with the question of fixed constitutional compensation

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versus flexible compensation to be established by legislative enactment. The only reference to the prohibition of allowance discovered is the remark, in Committee, that "members of a legislative council could not be paid for what might amount to considerable extra work." 3 *Proceedings of the Constitutional Convention of 1947*, p. 689. While the constitutional history of Art. 4, §4, par. 7, thus does not provide any definitive insight into the character of the permissible "compensation" contemplated by that provision, it may be assumed that the constitutional framers considered to be embraced within the term "compensation" all of those pecuniary benefits of public service commonly comprehended under that terminology. The detailed specification of such "compensation" was purposely left to the broad discretion of the Legislature.

A public pension is a mode or form of deferred compensation where an employee receives pension service credit in a retirement system as compensation during his government service and where the payment of benefits are postponed until after employment with government has been terminated. A long line of judicial precedent has, accordingly, held that the legitimate compensation of a public employee for services rendered includes the deferred payment of a pension benefit. *Salz v. State House Commission*, 18 N.J. 106 (1955); *Hayes v. Hoboken*, 93 N.J.L. 432, 433 (E. & A. 1919); *Emanuel v. Sproat*, 136 N.J.L. 154 (Sup. Ct. 1947), affirmed 137 N.J.L. 610 (E. & A. 1948); *Passaic National Bank & Trust Co. v. Eelman*, 116 N.J.L. 279, 283 (Sup. Ct. 1936). This proposition was well illustrated in *Hayes v. Hoboken, supra*, at 433, where the Court of Errors and Appeals was confronted with the issue of whether a governmental pension fund act was violative of the state constitutional prohibition against the donation of public funds to or in aid of any individual association or corporation. The Court upheld the constitutionality of the Act and concluded the monies paid for pensions are validly a part of the compensation to be paid for the services rendered by members of the government. See also *Giannettino v. McGoldrick*, 295 N.Y. 208, 66 N.E. 2d 57 (Ct. App. 1946); *Kneeland v. Administrator, Unemployment Compensation Act*, 138 Conn. 63, 88 A. 2d 376 (Sup. Ct. Err. 1952). Therefore, Art. 4, §4, par. 4, par. 7, should be construed in light of the fact that a pension has been considered to be a form of deferred "compensation" for government service.

The question of whether legislative pensions are constitutionally permissible should also be determined in view of certain broad policies and objectives underlying the terms of all pension enactments. It is well established in our case law that a pension is a means or inducement to conscientious, efficient and honorable government service. *Hozer v. State, etc.*, 95 N.J. Super. 196, 199 (App. Div. 1967). The Supreme Court most recently in *Geller v. Dept. of Treasury*, 53 N.J. 591, 597 (1969) opined as follows:

"Pensions for public employees serve a public purpose. A primary objective in establishing them is *to induce able persons to enter and remain in public employment*, and to render faithful and efficient service while so employed. 3 *McQuillin, Municipal Corporations* (3d Ed. Rev. 1963) § 12.141. They are in the nature of compensation for services previously rendered and act as an *inducement to continued and faithful service*. Being remedial in character, statutes creating pensions should be liberally construed and administered *in favor* of the persons intended to be benefited thereby." (cites omitted) (Emphasis added.)

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The inclusion of legislators in a pension fund or retirement system is designed to promote all of these salutary objectives. It is contemplated that pensions will be an inducement to attract qualified citizens to devote themselves to a period of elected government service. In light of these essential policies underlying the enactment of pension legislation, a constitutional purpose to foreclose the award of retirement benefits for members of the State Legislature should appear in unavoidable terms and with unmistakable clarity. The presumption is that a statute is constitutional and it will not be declared inoperative or unenforceable unless it is plainly in contravention of a constitutional prohibition. *Daly v. Daly*, 21 N.J. 599, 604 (1956), *Lynch v. Borough of Edgewater*, 8 N.J. 279 (1951). In this case, there does not appear to be any identifiable constitutional purpose to negate the award of pensions as a form of additional compensation for members of the Legislature.

There is no sound basis to assume that the constitution framers contemplated that a pension benefit paid to members of the Legislature would be a form of impermissible remuneration for legislative service. The concern of the drafters was to prohibit allowances and emoluments to legislators over their prescribed compensation and not the provision of a new mode or form of compensation to be fixed from time to time. In view of the firmly established characterization of a pension as a payment of a deferred benefit on account of previously earned compensation for the rendition of government service, it may be reasonably concluded that a pension is a constitutionally permissible form of compensation within the intendment of Art. 4, §4, par. 7 of our State Constitution.

The second question posed by your inquiry is whether the effective date of the Act, November 3, 1972, is violative of Art. 4, §4, par. 8, of the 1947 New Jersey Constitution which provides as follows:

“The compensation of members of the Senate and General Assembly shall be fixed at the first session of the Legislature held after this Constitution takes effect, and may be increased or decreased by law from time to time thereafter, *but no increase or decrease shall be effective until the legislative year following the next general election for members of the General Assembly.*” (Emphasis added.)

It is clear from the foregoing language that any increase in the compensation of members of the Legislature shall not become effective until the legislative year following the next general election for members of the General Assembly. In this case, chapter 167 of the Laws of 1972 became effective on November 3, 1972 or fourteen months prior to the legislative year following the next general election held for the members of the Assembly on November 6, 1973. We are, therefore, constrained to conclude that the administrative implementation of the improved benefit structure provided by this Act as of November 3, 1972 is interdicted by Art. 4, §4, par. 8 of our State Constitution, since the administrative effectuation of the Act by the PERS as of that date would permit an increase in compensation prior to the expiration of the constitutional waiting period for an increase in the compensation of members of the Legislature.

As a consequence, it is now incumbent on the Public Employees Retirement System in the Division of Pensions to effectuate such adjustments as may be necessary to administer the provisions of this Act in a purely prospective manner as of its constitutionally acceptable effective date or January 1, 1974. Increased or additional

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benefits shall not become effective until that date and a member of the Legislature may not purchase credit for prior legislative service rendered before January 1, 1974 by paying the 5% rate prescribed by Section 3 of the Act. N.J.S.A. 43:15A-137. Rather, credit for previous legislative service may only be purchased at the actuarial rate generally applicable to the purchase of prior service credit in the Public Employees Retirement System. As a result, legislative service rendered prior to January 1, 1974 shall not be creditable towards a "3% of final compensation" retirement allowance provided by section 4 of this Act, but only creditable towards the normal service retirement allowance provided for all members of the PERS.<sup>4</sup> It is our opinion that these administrative practices in the implementation of the Act are consistent with the spirit and purpose underlying Art. 4, §4, par. 8, since there is no retroactive effect to an increase in legislative compensation prior to the constitutionally effective date of the Act.

For these reasons, it is our opinion that the provisions of the Legislative Pension Act of 1972 are constitutional under Art. 4, §4, par. 7 of the 1947 New Jersey Constitution, but are unconstitutional under Art. 4, §4, par. 8, insofar as the Act specifies an effective date prior to January 1, 1974 which is the constitutionally effective date of the Act.

Very truly yours,  
ROBERT J. DEL TUFO  
*Acting Attorney General*

1. The records of the Division of Pensions reveal that as of September 22, 1971, 28 of the 40 senators and 39 of the 80 assemblymen were members of the Public Employees Retirement System.
2. Even though the issue directly posed concerns the validity of the Legislative Pension Act of 1972 under the applicable provisions of our State Constitution, the conclusions reached herein have equal application to all pensions granted to members of the State Legislature.
3. The original language of 1844 specified:

"Members of the senate and general assembly shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the State; which compensation shall not exceed the sum of three dollars per day for the period of forty days from the commencement of the session, and shall not exceed the sum of one dollar and fifty cents per day for the remainder of the session. When convened in extra session by the Governor they shall receive such sum as shall be fixed for the first forty days of the ordinary session. They shall also receive the sum of one dollar for every ten miles they shall travel in going to and returning from their place of meeting, on the most usual route."

Art. IV, §4, par. 7 of the 1844 document, as amended, directed:

"Members of the senate and general assembly shall receive annually the sum of five hundred dollars during the time for which they shall have been elected, and while they shall hold their office, and no other allowance or emolument, directly or indirectly, for any purpose whatever."

4. A member of the PERS who has attained age 60 shall receive "a pension in the amount which, when added to the member's annuity, will provide a total retirement allowance of 1/70 of his final compensation for each year of service credited as Class A service, and 1/60 of his final compensation for each year of service credited as Class B service)" N.J.S.A. 43:15A-48. In sharp contrast, a member of the PERS who attained the age of 60 years upon retirement on the basis of legislative service shall receive a more advantageous retirement allowance of 3% of final compensation as a legislator for each year of creditable service as a member of the Legislature. N.J.S.A. 43:15A-138.