

FORMAL OPINION

A careful examination of the procedures of the Division, in light of *Stanley*, reveals that such procedures are in full conformity with all constitutional requirements. The specific administrative procedures which are designed to provide for actual or constructive notice to a putative father are consistent with constitutional demands for due process of law. See generally *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1949). In fact, the Division has extended the *Stanley* mandate beyond the mere requirement of giving a putative father notice of any court proceeding involving the custody or guardianship of his children to a situation where the Division receives a surrender from an unwed mother. These procedures are designed to give a putative father notice that his child has been surrendered and to allow him the opportunity to be heard or to offer a proposal regarding the disposition of his child.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: SHIRLEY A. TOLENTINO
Deputy Attorney General

* In order to fully satisfy all constitutional requirements it would appear that some responsibility should be placed on the Division to make reasonable inquiry as to the identity and whereabouts of the putative father.

** The father in the *Stanley* case was not the typical putative father seen in so many cases involving the custody of children. He was easily ascertainable, had lived with his children intermittently over a period of 18 years and had assumed his responsibilities. In other words, he was not a mere putative father, but had elevated himself to the status of an admitted father. Nevertheless, the *Stanley* case stands for the proposition that all putative fathers are constitutionally entitled to reasonable notice and a hearing on their fitness before children may be removed from their custody.

*** However, the Court indicated in *Stanley* that the father's right to be heard may be waived either by his signing a surrender or his failing to respond to the notice.

WILLIAM JOSEPH, *Director*
Division of Pensions
20 West Front St.
Trenton, New Jersey

April 21, 1975

FORMAL OPINION NO. 8-1975

Dear Mr. Joseph:

You have requested an opinion as to whether retroactive salary increases in collective negotiations agreements effective after retirement or death of an individual employee are creditable for calculation of retirement allowances, dependency pen-

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sions, and insurance death benefits provided by the State administered retirement systems and pension funds. You are advised that such increases are creditable for pension purposes where they are regular salary increases for all employees in the same position and are payable regardless of the retirement or death status of the individual employee. You are also advised that an individual salary increase included in a collective negotiations agreement for a single individual or single group of individuals should be reviewed by the retirement system on a case by case basis to determine whether or not the salary adjustment was granted primarily in anticipation of retirement or additional remuneration for extra work beyond the regular work day or year.

The majority of statutory pension benefits are required to be calculated on the member's "final compensation," *See for example* N.J.S.A. 43:15A-48 (service retirement allowance). This term is defined as

"...the average annual compensation for which contributions are made for the 3 years of creditable service in New Jersey immediately preceding his retirement or death, or it shall mean the average annual compensation for New Jersey service for which contributions are made during any 3 fiscal years of his or her membership providing the largest possible benefit to the member or his beneficiary." N.J.S.A. 43:15A-6(h) (Public Employees' Retirement System, hereafter PERS); N.J.S.A. 18A:66-2(f) (Teachers' Pension and Annuity Fund, hereafter TPAF).

The same basic definition with some variation in language and/or time period coverage is found in the acts governing the Prison Officers' Pension Fund (POPF, N.J.S.A. 43:7-8); The Consolidated Police and Firemen's Pension Fund (CP & FRS, N.J.S.A. 43:16-17(9)); the Police and Firemen's Retirement System (P&FRS, N.J.S.A. 43:16A-1(15)); the State Police Retirement System (SPRS, N.J.S.A. 53:5A-3(i)); and the Alternate Benefit Program (ABP, N.J.S.A. 18A:66-169(c)). The statutory term "compensation" as used in the definition of final compensation and as used for the basis of calculating employee pension contributions (*see for example* N.J.S.A. 43:15A-25 governing PERS contributions) is statutorily defined in PERS as:

"... the base or contractual salary, for services as an employee, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for performing temporary or extra-curricular duties beyond the regular work day or the regular work year. In cases where salary includes maintenance, the retirement system shall fix the value of that part of the salary not paid in money which shall be considered under this act." N.J.S.A. 43:15A-6(r).

The almost identical definition is also found in N.J.S.A. 18A:66-2(d) (TPAF); N.J.S.A. 18:66-169(b) (ABP); N.J.S.A. 43:16A-1(26) (P&FRS) and N.J.S.A. 53:5A-3(u) (SPRS). There is no definition of the statutory term "compensation" or "salary" in POPF or CP&FRS.

The above statutory definitions must be read together to determine the salary

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basis for calculation of pension benefits. When so read, it is clear the Legislature intended pension benefits and employee contributions which partially finance these benefits be calculated in all cases on regular salaries as set by salary schedules and policies and as applicable to all persons holding the same position. Only salary increases, adjustments or payments for individual employees in excess of this regular salary are excluded, as for example for extra services, longevity, or in anticipation of retirement.

The statutory definitions do not *per se* exclude retroactive salary increases. Moreover, it would be unreasonable to assume a legislative purpose to preclude the use of retroactive regular salary adjustments merely on the fortuitous basis that retirement or death of the individual employee occurred during the pendency of contract negotiations and before the effective date of the agreement. Statutory enactments are to be construed reasonably to preclude unjust, absurd or incongruous results. *Roman v. Sharper*, 53 N.J. 338, 341 (1969); *Restaurant Enterprises, Inc. v. Sussex Mutual Ins. Co.*, 52 N.J. 73 (1968). These increases pursuant to the definitions controlling calculation of pension benefits are the average compensation for which contributions are required to be made, are regular salary increases, and are effective for the required period immediately preceding retirement or death. Accordingly, regular salary increases arising from collective negotiations agreements which are rendered retroactive by the approval of the contract after commencement of the fiscal year covered by the contract must be included in the base salary subject to employee pension contributions and upon which pension benefits are calculated.

The decision in *Casale v. Pension Com, etc. of Newark*, 78 N.J. Super. 38 (Law Div. 1963), which excluded a retroactive salary increase in the calculation of retirement benefits in a local pension fund is inapplicable to the State-administered retirement systems and broader in scope than the language of the act in *Casale*. Moreover, regular salary increases in accordance with uniform salary policies negate the possibility of individual favoritism in retroactive increases of retirement benefits which was the primary concern of the *Casale* court.

For these reasons, you are advised that retroactive salary increases arising from collective negotiations agreements which are applicable and payable to all employees in the same position are creditable for pension purposes including the calculation of retirement and death benefits on account of members who have retired or have died prior to the approval of the increase. You are cautioned, however, that not all salary items contained in a collective negotiations agreement are creditable compensation for pension purposes. Salary payments not payable to all persons in the same positions such as retroactive and prospective individual adjustments in anticipation of retirement and extra compensation are excludable. Accordingly, the appropriate pension board or commission must in each individual case determine whether the retroactive increase involved is creditable by examining the contract and surrounding factual circumstances in the context of the legal guidelines set forth above.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By PRUDENCE H. BISBEE
Deputy Attorney General