

ATTORNEY GENERAL

April 21, 1975

WILLIAM JOSEPH, *Director*  
*Division of Pensions*  
20 West Front Street  
Trenton, New Jersey 08625

FORMAL OPINION NO. 9-1975

Dear Director Joseph:

You have requested an opinion concerning a public employer's liability for an employee's pension contributions during a leave of absence for military service. Your inquiry was precipitated by the issuance by Governor Byrne of Executive Order No. 7, which proclaimed "[t]hat August 1, 1974 shall be the terminal date of the Vietnam conflict. . . ." L.1971, c. 119 and L.1972, c. 166 authorized the Governor to proclaim the date of termination of the Vietnam conflict to define veteran status for the purpose of coverage by the Public Employees' Retirement System (hereinafter PERS), the Teachers' Pension and Annuity Fund (hereinafter TPAF) and other statutes. For the following reasons, you are advised that a public employer is not liable for employee contributions and an employee is not entitled to service credit in a retirement system for any period of military service entered into after August 1, 1974, since the nation is no longer in a period of war or national emergency.\*

N.J.S.A. 38:23-1 *et seq.* generally provides statutory guidelines concerning military leaves of absence for individuals in public employment. However, N.J.S.A. 38:23-5 and N.J.S.A. 38:23-6 are specifically concerned with the maintenance of pension rights. N.J.S.A. 38:23-5 provides that no member of a public pension fund who enters the active military service in time of war or in time of emergency will lose any rights, benefits or privileges accorded by the fund. Also, the period of military leave will be considered as creditable service in the retirement system. N.J.S.A. 38:23-5 specifically defines the period of emergency as follows:

"as used in this act the term 'in time of emergency' shall mean and include any time after June twenty-third, one thousand nine hundred and fifty and prior to the termination, suspension or revocation of the proclamation of the existence of a national emergency issued by the President of the United States on December sixteenth, one thousand nine hundred and fifty, or termination of the existence of such national emergency by appropriate action of the President or Congress of the United States."

N.J.S.A. 38:23-6 requires a public employer to remit to the retirement system, in addition to its own contributions, the employee's pension contributions which are due during the employee's leave of absence for military service.

Pension rights are protected by N.J.S.A. 38:23-5 only for military service during periods of war or in time of emergency. It is apparent that we are not in a period of war, as war has been construed as strictly the period of actual fighting and hostilities. *Bashwiner v. Police & Firemen's Retirement System of N.J.*, 68 N.J. Super. 1 (App. Div. 1961). Also, there is no longer a period of national emergency within the meaning of N.J.S.A. 38:23-5.

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The definition of "in time of emergency" was added to N.J.S.A. 38:23-5, as well as many other statutes, by amendment (L. 1951, c. 21, §2), shortly after President Truman declared a state of "national emergency" on December 16, 1950, by Presidential Proclamation No. 2914, 15 Fed. Reg. 9029 (1950). This definition has never been repealed or amended, and there has been no termination of the national emergency by appropriate action of the President or Congress. In fact, the continued existence of the national emergency has been recognized by subsequent Presidents in Executive Orders. *Veterans & Reservists for Peace in Vietnam v. Regional Commissioner of Customs*, 459 F.2d 676, 678 n. 1 (3rd Cir.), cert. den. 409 U.S. 933 (1972). On its face it would appear that the "time of emergency" continues to the present, requiring a continued implementation of N.J.S.A. 38:23-5 and N.J.S.A. 38:23-6. However, when considered *in pari materia* with related legislation this period of emergency has been impliedly terminated.

The original intent of N.J.S.A. 38:23-5 and N.J.S.A. 38:23-6 was to protect the pension rights of public employees performing military service during a period of war or national crisis. Nearly identical language defining the period of emergency as set forth in N.J.S.A. 38:23-5 was also found in PERS, N.J.S.A. 43:15A-6(1) (11) (L. 1954, c.84), to establish veterans' status and consequent rights, benefits and privileges. It was amended by L. 1966, c. 217 to limit the period of service cognizable for veteran status. To be considered a veteran under the Act required military service during the Korean conflict, between June 23, 1950 and July 27, 1953, or during the Vietnam conflict, between December 31, 1960 and the date of termination as proclaimed by the Governor. The TPAF was similarly amended by L. 1966, c.218 to also circumscribe the periods of service according to the dates of the Korean and Vietnam conflicts for purposes of veteran status.

The purpose of the 1966 amendments to PERS and TPAF was, according to the Statement on the Bills, to "redefine[s] the Korean Emergency by establishing the same period followed by the Civil Service statute." Language nearly identical to that found in N.J.S.A. 38:23-5 was originally found in the veterans' preference provision of the Civil Service Act, N.J.S.A. 11:27-1(11). The law was later amended to delimit veteran status according to actual service during the Korean and Vietnam conflicts within the above prescribed dates. (L. 1963, c.120; L. 1967, c.312; L. 1971, c.119).

When the probable legislative purpose of N.J.S.A. 38:23-5 is to be determined, it cannot be done in a vacuum. Consideration must be given to subsequent legislative action in related areas to avoid inconsistent or unreasonable results. The court in *Clifton v. Passaic County Bd. of Taxation*, 28 N.J. 411, 421 (1958), commented:

"Statutes *in pari materia*, that is, those which relate to the same matter or subject, although some may be special and some general, are to be construed together as a unitary and harmonious whole, in order that each may be fully effective. *New Jersey Turnpike Authority v. Washington Township*, 16 N.J. 38 (1954); *Maritime Petroleum Corporation v. City of Jersey City*, 1 N.J. 287 (1949)."

The provisions of existing civil service and pension law evidence a legislative intent to circumscribe veterans' benefits to recognized periods of specific military crisis. Although there has been no express reference to the termination of a national emergency in N.J.S.A. 38:23-5, there has been a general legislative recognition of

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that fact. The failure of the Legislature to similarly amend this obscure section of the New Jersey Statutes may be attributed to an oversight in draftsmanship rather than to a purposeful omission. It is, therefore, concluded that the termination date of the "emergency" in N.J.S.A. 38:23-5 is July 27, 1953 for the purposes of the Korean war and August 1, 1974 for the Vietnam conflict.

Thus, a public employer is not liable for an employee's pension contributions for a period of military service entered into after August 1, 1974, and the employee is not entitled to credit in the retirement system for such a period of military service.\*\* Where military service is entered into prior to August 1, 1974, the employer is liable for pension contributions, and the employee is entitled to credit in the retirement system for the entire period of initial military service thereafter.

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

By STACY L. MOORE, JR.  
*Deputy Attorney General*

\* Military leaves of absence for service entered into before August 1, 1974 should be governed by prior legal and administrative requirements concerning such leaves, *i.e.* the public employer is liable for employee contributions and the employee is entitled to service credit for the period of initial military service. *State Highway Dept. v. Civil Service Comm.* 35 N.J. 320 (1961); Formal Opinion No. 15 (1958); Formal Opinion No. 17 (1959).

\*\* A public employer should not voluntarily remit the employee's pension contributions, because to do so is no longer required by N.J.S.A. 38:23-5 and N.J.S.A. 38:23-6. Any such payments would constitute an unauthorized expenditure of public monies by the employer, which should not be accepted by the Division of Pensions. Also, the employee would not receive service credit in the retirement system.

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April 24, 1975

WILLIAM M. LANNING, ESQ.  
*Chief Counsel*  
*Law Revision and Legislative*  
*Services Commission*  
State House, Rm. 227  
Trenton, New Jersey 08625

FORMAL OPINION NO. 10-1975

Dear Mr. Lanning:

You have requested advice as to whether a professor at a State college may become a candidate for and accept membership in the New Jersey Legislature. For the following reasons, you are advised that a professor at a State college may become a candidate for the Legislature but, if elected, must resign as a professor at the State college before taking a seat in the Legislature.