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.

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.

Provisions concerning dual office holding by members of the Legislature have been included in each of the three New Jersey Constitutions. In Article XX of the 1776 Constitution, the people expressed their concern that "the legislative department. . . be preserved from all suspicion of corruption" and therefore prohibited any "persons possessed of any post of profit under the government, other than justices of the peace" from being entitled to a seat in the assembly. A similar provision was included in the Constitution of 1844 where Article IV, §V, par. 3 provided that "No . . . persons possessed of any office of profit under the government of this state, shall be entitled to a seat either in the senate or in the general assembly. . . ."

The prohibition of the 1844 Constitution was construed by the Court of Errors and Appeals in *Wilentz v. Stanger,* 129 N.J.L. 606 (E. & A. 1943). The respondent, George Stanger, during his term of office in the Senate, was appointed as counsel to the State Board of Milk Control. Among other things, it was alleged that Senator Stanger vacated his office in the Senate upon accepting his appointment as counsel. The court held that the constitutional provision related only to "offices" and found that counsel to the Director of Milk Control was not an "office" within the meaning of the prohibition.

The constitutional framers in 1947 considered the impact of the *Wilentz* decision on constitutional provisions dealing with dual office-holding. *See Reilly v. Ozzard,* 33 N.J. 529, 541 (1960). A monograph prepared for the Convention commented that one of the primary issues concerning the Constitutional prohibitions on dual-office holding was the legal definition of the term "office." *Monograph,* II *Constitutional Convention of 1947* at 1478. That monograph presented various arguments for strengthening the provisions on dual office holding. Those arguments included the doctrine of separation of powers, protection of legislation against improper motives and prevention of executive dominance or usurpation of the legislative branch of government. The rationale was also to afford protection against the executive promising an appointment in State government to a legislator or the legislator requesting an appointment in return for the legislator's cooperation in furthering the objectives of the administration. III *Constitutional Convention of 1947* at 703.

Accordingly, the framers extended the existing constitutional prohibition of dual office-holding by legislators to include a "position of profit" as well as an "office" heretofore set forth in the 1776 and 1844 Constitutions:

> "3. If any member of the Legislature shall become a member of Congress or shall accept any Federal of State office or *position, of profit,* his seat shall thereupon become vacant.
>
> "4. No member of Congress, no person holding any Federal or State office or *position of profit,* and no judge of any court shall be entitled to a seat in the Legislature." *N.J. Const.* (1947), Art. IV, §V, pars. 3 and 4. (Emphasis supplied)

Paragraph 4 which governs the present question prohibits a person holding any "State office or position of profit" from being entitled to a seat in the Legislature. The question that arises is whether a professor at a State college holds either a "State office or position of profit."

In order to determine the meaning of these terms in our Constitution, resort may be made to well established judicial interpretation. An "office" has been defined by the courts of this State to be:

> "a place in a governmental system created or recognized by the law of the state which, either directly or by delegated authority, assigns to the incumbent thereof the continuous performance of certain permanent public duties. . . ." *Fredericks v. Board of Health,* 82 N.J.L. 200 (Sup. Ct. 1912).

The question of whether teachers in government hold an office was brought before the court in *Thorp v. Board of Trustees of Schools for Industrial Educ.,* 6 N.J. 498 (1951), *vacated as moot,* 342 U.S. 803 (1951), which concerned a special lecturer at the Newark College of Engineering. There the New Jersey Supreme Court held that teaching was a profession and that in New Jersey, the practitioners of the profession in the public system were not to be deemed public officers. The court said that a teacher at the college exercised no governmental powers and that the mere attainment of tenure did not convert the teacher's employment into a public office. Since, as the court said in *Thorp, supra,* teachers do not exercise what is in essence governmental authority, it is concluded that a professor at a State college or university does not hold a State "office" within the meaning of Article IV, §V, par. 4 of our Constitution.

In the present situation, it must also be determined whether a professor at a State college holds a State "position." Initially, it should be noted that the State colleges are located in the Department of Higher Education and are under the supervision of the State Board of Higher Education and the Chancellor. The academic staffs of the colleges, including professors, associate professors, assistant professors, instructors etc. are set forth in the statutes establishing and relating to the administration of the State colleges. *E.g.,* N.J.S.A. 18A:64-1 *et seq.* 18A:64-6, 20. They carry out a permanent program of higher education for the citizens of the State as provided by law. N.J.S.A. 18A:64-1 *et seq.*

The definition of a "position" is found in *Fredericks v. Board of Health, supra,* where the court said:

> "A position is analogous to an office, in that the duties that pertain to it are permanent and certain, but it differs from an office, in that its duties may be nongovernmental and not assigned to it by any public law of the state. . . ." 82 N.J.L. at 201.

After explaining the nature of a position, the court also went on to differentiate a "position" from mere employment as follows:

> "An employment differs from both an office and a position, in that its duties, which are non-governmental, are neither certain nor permanent. . . ." 82 N.J.L. at 202.

In *Kovalycsik v. Garfield,* 58 N.J. Super. 229 (App. Div. 1959) the court found a senior clerk in a municipal tax receiver's office to be holding a position. The court there said:

> "These responsibilities, and hence his position, were neither casual, greatly varied nor subject to change. They were performed regularly and consti-

tuted a customary and usual work routine requiring skill, discretion and public confidence." 58 N.J. Super. at 236-37.[1]

The remarks of the Appellate Division appear to be particularly applicable to this situation. Although a professor at a State college does not hold an "office", his duties are of sufficient certainty and permanency to make him the holder of a State "position" within the meaning of Article IV, §V, par. 4 of the 1947 Constitution.

For the foregoing reasons, you are advised that a professor at a State college may become a candidate for a seat in the Legislature but, if elected, must resign as a professor at the State college before taking his seat.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: MARK I. SIMAN
Deputy Attorney General

1. Other cases which have decided that a particular activity constituted a position include *Freeholders of Hudson Co. v. Brenner*, 25 N.J. Super. 557 (App. Div. 1953), *aff'd* 14 N.J. 348 (1954) (assistant county counsel); *Cavenaugh v. Essex*, 58 N.J.L. 531 (Sup. Ct. 1896) (guard in county jail); *Daily v. Essex*, 58 N.J.L. 319 (Sup. Ct. 1895) (janitor of a court house); *Lewis v. Jersey City*, 51 N.J.L. 240 (Sup. Ct. 1889) (bridge tender).

April 28, 1975

COLONEL EUGENE OLAFF
Superintendent
Division of State Police
Division Headquarters
West Trenton, New Jersey 08625

FORMAL OPINION NO. 11—1975

Dear Colonel Olaff:

In his former capacity as Superintendent, Colonel E. B. Kelly had inquired as to the effect of the decision in *State v. Shack*, 58 *N.J.* 297 (1971), on the prospective enforcement of New Jersey's general trespass statute embodied in *N.J.S.A.* 2A:170-31. Since *Shack* represents the only New Jersey Supreme Court decision construing *N.J.S.A.*2A:170-31, it will undoubtedly serve as a guide for future judicial resolution of controversies emerging from the conflict of interests between farmers and their seasonal migrant help. Accordingly, Colonel Kelly's inquiry warrants discussion of the decision's basis and scope.

It should be noted at the outset that the civil law of trespass is a field separate and distinct from criminal trespass. This dichotomy had its origin in English law