

FORMAL OPINION

August 9, 1976

BOARD OF TRUSTEES
Public Employees' Retirement System
20 West Front Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 20 - 1976

Dear Members of the Board:

You have requested advice on several questions concerning the eligibility of former Governor Robert Meyner for receipt of a pension from the Public Employees' Retirement System. Specifically, you have asked whether Meyner properly received credit for his period of military service, whether he was entitled to purchase two years of municipal service where the annual salary was less than \$300 and lastly whether such a purchase during his term of office was constitutional. Meyner has been receiving a retirement allowance of \$485.35 per month since July 1968, upon attaining age 60, based on the approval of an application for deferred retirement by the Board of Trustees on January 23, 1962.*

A brief review of the factual background in this matter is necessary for a proper understanding of these issues. Robert Meyner enrolled in the Public Employees' Retirement System effective January 1, 1955, when he filed an enrollment application while serving as Governor of the State of New Jersey. At that time he was given prior service credit in the retirement system for the following periods:

Counsel for Warren County January 1, 1942 - January 15, 1943	1 year, ½ month
Senator in New Jersey Legislature January 1, 1948 - January 1, 1952	} 5 years, 10½ months
Attorney for Phillipsburg Board of Education February 1, 1949 - November 11, 1953	
Governor of State of New Jersey January 19, 1954 - December 31, 1954	11½ months
TOTAL - 7 years, 10½ months	

Subsequent to January 1, 1955, Meyner was to continue as Governor of the State until mid-January, 1962, and receive an additional 7 years, ½ month creditable service in the retirement system, giving him a proposed total of 14 years, 11 months service credit upon leaving office.

However, on March 3, 1961 the Governor, through his personal secretary, provided the Division of Pensions with a copy of a resolution, adopted by the Board of Freeholders of Warren County on April 28, 1943, which acknowledged his entrance into military service necessitating a temporary absence and appointing another attorney to act in his place. On the basis of this approved military leave of absence, Meyner was granted additional service credit for the period of that leave (January 15, 1943 to December 23, 1945 plus 90 days), a total of 3 years, 2½ months, pursuant to the Correction of Errors section N.J.S.A. 43:15A-54. In addition, on January 3, 1962, Meyner was permitted to purchase two years of membership credit for his employment as counsel for the Township of Pohatcong, at an annual salary of \$175, pursuant to the terms of N.J.S.A. 43:15A-128.

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Based on the total service in the retirement system of 20 years 1½ months, Governor Meyner filed an application for deferred retirement. The Board of Trustees of the Public Employees' Retirement System approved this application on January 23, 1962. Meyner became eligible for his first retirement allowance payment on attainment of age 60, in his case July of 1968. He has since been regularly receiving a monthly retirement allowance from the Public Employees' Retirement System.

Initially, it is clear that there has been no constitutional violation committed by the enactment of N.J.S.A. 43:15A-128 (L. 1959, c. 196, as amended by L. 1960, c. 188) and by Meyner's purchase of prior service credit pursuant to its terms. Since N.J.S.A. 43:15A-128 was enacted and amended during Meyner's second term as Governor, the question arises whether by the enactment of legislation to confer a right to purchase pension service credit by a State employee, Meyner's "salary" had been increased during his term of office in derogation of Art. V, § 1, para. 10 of our State Constitution. That paragraph provides:

"The Governor shall receive for his services a salary, which shall be neither increased nor diminished during the period for which he shall have been elected."

One apparent purpose of this provision is to insulate the Governor from direct pressures that otherwise could be brought to bear if legislation could be enacted affecting his salary during his term.

In this situation the Legislature did not by its enactment of N.J.S.A. 43:15A-128 increase Governor Meyner's "salary" *during his term* within the intendment of the constitutional prohibition. A pension is distinguishable from the term "salary" as used in the constitutional sense.** "Salary" is the regular, periodic payment made by employer to employee during the course of that relationship for services currently rendered. *Koribanics v. Board of Education of Clifton*, 48 N.J. 1, 6 (1966). It would not include "compensation" in other forms, such as a right to purchase pension service credit. *Cf. Salz v. State House Comm'n*, 18 N.J. 106 (1955). Since N.J.S.A. 43:15A-128 did not effectuate an increase in "salary" during Meyner's term of office there exists no constitutional impediment to his purchase of two years pension service credit on account of his employment by the Township of Pohatcong.

You have further inquired concerning the propriety of the purchase of prior service credit, pursuant to N.J.S.A. 43:15A-128, where the annual salary for that service did not meet the \$300 minimum then required by N.J.S.A. 43:15A-39. N.J.S.A. 43:15A-128 provided as follows:

"Notwithstanding any other provision of law, a member of the Public Employees' Retirement System of New Jersey, who is in the State service and who, prior to entering the State service, was the holder of office, position or employment in the service of a county or of a municipality, or both, shall be entitled to purchase prior service credit for the years of such county and municipal service or either thereof; but the said county or municipality shall not be liable for any payment to the system by reason of the said member's purchase of benefits under this act and any and all contributions required hereunder shall be made by the member. Proof of such prior county and municipal service shall be furnished by the affidavit of the member, supported by other evidence if required by the board of trustees of the said re-

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tirement system, and the said board may prescribe rules and regulations to effectuate the purposes of this act. Any such member desiring to acquire such credits for prior service shall be required to contribute either in a lump sum or by installment payments an amount calculated in accordance with the rules and regulations of the board of trustees to cover the required contribution for his acquisition of such prior service credits.”

The legislative purpose underlying the enactment of this section was to authorize State employees to purchase credit for service previously rendered to a county or municipality. Normally, the purchase of prior service credit in the retirement system was allowable to members only where the annual salary was at least \$500 for non-veterans and \$300 for veterans. N.J.S.A. 43:15A-39. However, N.J.S.A. 43:15A-128 granted a new and independent right to State employees to purchase prior service with a county or municipality “[n]otwithstanding any other provision of law.” It is reasonable to assume that the Legislature intended thereby to avoid any statutory impediment to the purchase of prior service credit, including *inter alia* the existing \$300 minimum salary requirement found in N.J.S.A. 43:15A-39.

This conclusion is further reinforced by L. 1962, c. 236, which further amended N.J.S.A. 43:15A-128 by granting the right to purchase prior service credit for prior county or municipal service to *any* member of the retirement system, not merely State employee members. However, in that case the Legislature expressly allowed a purchase of only “prior service credit for his years of other *eligible employment*.” It clearly delimited the purchase to period of service otherwise meeting the minimum requirements of creditable service.

Parenthetically, this issue was also considered by the then Attorney General Furman on November 29, 1961. He concluded that since N.J.S.A. 43:15A-128 provided that a State employee member would be entitled to purchase service credit for the years of county or municipal service “[n]otwithstanding any other provision of law,” the minimum annual salary requirements of N.J.S.A. 43:15A-39 were “superse- ded.” He also noted that unlike other pension provisions the entire liability for the cost of the purchase is the responsibility of the employee. Furthermore, N.J.S.A. 43:15A-128 did not set any minimum requirements or qualify in any way what prior service in a county or municipality may be purchased.

Based on our own review of the circumstances and the statutory framework at that time, it is our opinion that although the issue is not entirely free from doubt, the Board of Trustees arguably acted within the then governing legislation*** by allowing the purchase by Meyner of prior service credit on account of his employment by Pohatcong Township.

The Board has lastly questioned the propriety of granting prior service credit for Meyner’s period of military service during World War II while on a leave of absence from his position as counsel for Warren County, to which Meyner had been appointed on January 2, 1942. That credit was originally based on a military leave of absence from January 15, 1943 to December 23, 1945 plus 90 days, a total of 3 years, 2½ months. However, it has been learned that the Warren County employer certification is incorrect in that Meyner was not actively serving as counsel through January 15, 1943, but in fact had commenced his military leave in August 1942. Thus Meyner’s period of military service extends from August, 1942 to December 23, 1945 plus 90 days, or a total of 3 years, 8 months. You are advised that there exists no statutory basis for the grant of prior service credit in Meyner’s case for that period of his military leave of absence.

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A public employee member of a retirement system is entitled to continued service credit when he interrupts his public employment to enter the military service during a period of war or national emergency. The employee's retirement rights, benefits and privileges are preserved during the period of his military leave of absence. N.J.S.A. 38:23-5. However, Warren County was not a participating unit in the Public Employees' Retirement System at the time of Meyner's leave of absence.

N.J.S.A. 38:23-4 also preserves the pension rights, benefits and privileges of any public employee who entered active military service during a period of war or national emergency with no specific requirement that the public employee be a current member of a retirement system at the time the military leave of absence is taken. The intent of N.J.S.A. 38:23-4 is to protect the employment status of permanent public employees who serve in the military during a period of war or emergency. *State Highway Department v. Civil Service Comm'n*, 35 N.J. 320 (1961). However, N.J.S.A. 38:23-4 permits protection of pension rights for the period of a military leave of absence from a position in public employment "other than for a fixed term or period." Meyner was appointed as Warren County counsel for a term of three years —from January 2, 1942 to January 1, 1945. N.J.S.A. 38:23-4 clearly does not afford protection of pension rights, benefits and privileges to public employees holding a position for a fixed term or period. In conclusion, it is our opinion that there was no specific statutory authority to allow prior service credit to Meyner for his military leave of absence. Accordingly, 3 years and 8 months service was improperly credited by the Board of Trustees in 1962 towards the minimum 20 years of creditable service then required for deferred retirement.

It should be recognized that the Board of Trustees may, in the exercise of its discretion, reopen, modify or correct a prior administrative determination in any instance when it may be found to have been erroneous or without a basis in law. However, our Supreme Court has identified certain factors to be considered by a pension board in weighing a vacation of a pension award. In *Ruvoldt v. Nolan*, 63 N.J. 171, 183-84 (1973), the court held that a pension board is required to act within a reasonable time or with reasonable diligence. Furthermore,

"... what is a reasonable time must perforce depend on the interplay with the time element of a number of other attendant factors, such as the particular occasion for administrative reexamination of the matter, the fraud or illegality in the original action and any contribution thereto or participation therein by the beneficiary of the original action, as well as the extent of any reliance or justified change of position by parties affected by the action."

Thus, the Board of Trustees if it should reopen this matter, must determine whether 3 years, 8 months prior service credit for military leave should be approved or vacated in light of the principles laid down in *Ruvoldt*. The Board approved Meyner's application for a deferred retirement allowance in January 1962, some 14 years ago. Due to the passage of a substantial period of time, the current Board would be obligated in reopening the matter to consider (a) the reason for this administrative reexamination, (b) fraud or illegality, if any, in the request for service credit, (c) any contribution to or participation by Meyner, if any, in the erroneous award of service credit for his period of military leave, as well as (d) the extent that he reasonably relied on the prior determination and may have unalterably changed his position as a

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result. It would also be incumbent on the Board to inquire into its administrative practice and procedure then in effect concerning the award of prior service credit for military leaves of absence. We have been advised by the Director of the Division of Pensions that an administrative practice existed whereby free prior service credit was uniformly granted to *any* public employee veteran for the period of an approved military leave of absence irrespective of membership in a retirement system, the nature of the employment position or whether the employee returned to his former position following termination of military service. Moreover, it would be essential to determine whether Meyner's request for service credit was made in the bona fide belief that he was statutorily entitled to that credit and whether he substantially relied upon the grant of that credit in terms of his foreclosure of alternate means to obtain the required 20 years service credit to qualify for a deferred pension. *Skulsky v. Nolan*, 68 N.J. 179 (1975). Based upon a thorough review of all these considerations, the Board could then render its final decision concerning the eligibility of Meyner for continued receipt of his pension and support the same with findings of fact and conclusions of law.

In conclusion, there exists no constitutional impediment to Meyner's purchase of service pursuant to N.J.S.A. 43:15A-128 as there occurred no increase in "salary" prohibited by Art. V, § 1, par. 10 of the New Jersey Constitution. Further, the purchase of two years service credit for employment with the Township of Pohatcong was authorized by and in accordance with N.J.S.A. 43:15A-128, irrespective of the minimum salary requirements contained in N.J.S.A. 43:15A-39. Lastly, although it has been the administrative practice of the Board of Trustees to grant military service credit in these cases, there exists no statutory authority permitting the award of prior service credit for a military leave of absence from an appointive position with an employer not participating in the retirement system. Accordingly, if the Meyner award is to be reopened, for reasons of fairness and consistency, pension awards to all other similarly situated veteran members or retirees should be examined.

Very truly yours,

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Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

* Such an application is made in advance of retirement where the individual is separated from service, before reaching retirement age, in order to "vest" accumulated service credits. N.J.S.A. 43:15A-38. At the time Meyner applied for deferred retirement, vesting required 20 years of service. In 1966 this requirement was reduced to 15 years. L. 1966, c. 217, § 6.

** In contrast to the specific prohibition of Art. V, § 1, par. 10, a broader prohibition may be found in Art. IV, § 4, par. 7:

"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 . . ."

See: Attorney General's *Formal Opinion No. 12 - 1974; Chamber of Commerce, et al. v. Leone*, 141 N.J. Super 114 (Ch. Div. 1976).

*** L. 1959, c. 196, as amended (N.J.S.A. 43:15A-128) was repealed by L. 1966, c. 217, § 30, effective August 1, 1966.