October 25, 1976

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

FORMAL OPINION NO. 27–1976

Dear Director Joseph:

You have asked for an opinion as to the compensation creditable toward the pension to be paid to William A. Fasolo, Esq., a multiple veteran enrollee in the Public Employees' Retirement System (hereafter PERS) who has served separate local government employers as a part-time municipal magistrate and a part-time borough attorney.

Your request presents two major questions. The first is whether $60,000 in compensation paid under a contract with the Borough of Demarest for legal services rendered in connection with the construction of a sanitary sewage system is includable in pension benefit calculations. The fees were paid in installments during the last four years preceding retirement in the amount of $5,000 in 1971, $12,000 in 1972, $18,000 in 1973 and $25,000 in 1974. The second question is more general and has significant application to local government part-time professional positions such as municipal attorney and engineer. It is whether public services compensated for by a basic minimum retainer (salary) and additional compensation paid on a fee basis for each item of extra work performed and fluctuating in amount from year to year with the professional service needs of the municipality are covered by the Act.[1]

You are advised for the following reasons that the compensation of a part-time municipal attorney and other similar part-time professional positions is covered by the Act to the extent of a regular fixed salary (retainer) covering services directly attributable to the functioning of the public office (as hereinafter more particularly defined). Compensation does not include for purposes of the calculation of the pension benefits provided by the Act those payments for professional services normally billed on a fee basis for each item of work performed in addition to the accepted statutory responsibilities of the government office.

It has been judicially established that not all salary receipts or other forms of compensation for public services are creditable for pension purposes. *Bd. of Trustees of Teachers' Pension, etc. v. La Tronica,* 81 N.J. Super. 461 (App. Div. 1963), *Matthews v. Bd. of Ed. of Irvington,* 31 N.J. Super. 292 (App. Div. 1954). The compensation covered by the Act for the explicit purpose of funding benefits by employee and employer contributions and for calculation of retirement and death benefits is defined by N.J.S.A. 43:15A-6(r). This definition also implicitly confines membership coverage to an employment, office, or position remunerated by the compensation basis statutorily accepted for benefit funding and payments. 43:15A-6(r) provides as follows:

> " 'Compensation' means 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 perform-

ing temporary or extracurricular 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." (Emphasis supplied).

The statutory term "salary" as used in the above definition is not defined by the Act. Our Supreme Court however, has defined the statutory term "salary" in the general context of public employment in *Koribanics v. Board of Ed. of Clifton,* 48 N.J. 1, 6 (1966):

> "The term 'salary' used in a legislative enactment has been recognized judicially to apply to monies received by a person on a fixed and continuous basis, i.e., normally paid in regular periodic intervals in specific regular amounts. This is the commonly understood meaning of the term. *See White v. Koehler,* 70 N.J.L. 526 (Sup. Ct. 1904); *38 Words and Phrases* (perm. ed. 1940), pp. 37-55. Thus, in *Matthews v. Board of Ed. of Town of Irvington,* 29 N.J. Super. 232 (Law Div. 1953) affirmed 31 N.J. Super. 292 (App. Div. 1954), the term 'salary' in Pension Act N.J.S.A. 43: 4-1 *et seq.* was held not to include extra fees for coaching school teams. *See Flamm v. City of Passaic,* 14 N.J. Misc. 362, 138 A. 748 (C.P. 1936) (Workmen's Compensation Act)."

There is no indication in the Act that "salary" is used in other than this commonly understood manner. Accordingly, creditable compensation for purposes of the pension benefits provided by the Act is confined to the "base or contractual salary" which is in accordance with established salary policies of the member's employer and paid to its employees in regular periodic intervals in specific regular amounts. These installments are usually bi-weekly or monthly but not infrequently are paid quarterly or annually as for example the fixed $10,000 annual salary of legislative members.

Moreover, this limitation on creditable compensation is supported by the specific holding of the court in *Koribanics.* A suit was brought by an attorney for a board of education to obtain reinstatement and back pay as an occupant of a government office under the Veterans Tenure Act. It was urged that the plaintiff had received a salary in a government office, position, or employment within the meaning of that Act. The court denied the plaintiff's claim to veterans tenure and stated as follows:

> "Thus plaintiff, here, cannot be said to have 'received a salary' for an office, position or employment. The record clearly indicates that although the resolutions passed by the Board to provide for remuneration speak in terms of annual salary, plaintiff's services were of a type and quantity that are provided by an independent agent when work becomes available. He received nearly ⅓ of his total emolument on a fee basis, calculated, we assume, on the basis of the reasonable value of the work performed. *Because plaintiff's position as Board Counsel is partially based upon fees, he is not entitled to tenure under N.J.S.A. 38:16-1 as a person holding a 'position, office or employment *** receiving a salary'."* (Emphasis supplied)

The court concluded that since tenure did not apply to the portion of the professional services compensated for on a fee basis, the total compensation paid could not be characterized as a regular salary of an "employee" for purposes of the Veterans Tenure Act.

On the other hand, the Supreme Court specifically compared the fee basis method of remuneration of a government attorney in that case with the compensation for legal work performed by a regular salaried attorney to a board of education, in *Fox v. Board of Education*, 129 N.J.L. 349 (Sup. Ct.), *aff'd o.b.* 130 N.J.L. 531 (E. & A. 1943).[2] In *Fox*, the plaintiff was appointed in July of 1940 as a legal assistant to the Board of Education of the City of Newark at a fixed salary of $7,000 per annum. In July of 1942 a successor Board of Education removed Fox from his position of legal assistant and replaced him with another person. It was argued that the removal was illegal, since Fox had acquired tenure in his position under the Veterans Tenure Act. The court concluded that plaintiff would be regarded as an "employee" compensated for by a regular salary under the Board of Education enabling legislation R.S. 18:6-27, 11:22-26B and would consequently be entitled to protection within the meaning of the Veterans Tenure Act.

The *Koribanics* and *Fox* holdings are clearly applicable to the coverage provided by the Act, since public employees tenure and pension statutes are to be construed *in pari materia, Schultz v. State Board of Education*, 132 N.J.L. 345, 351-352 (E. & A. 1944). Moreover, the two statutes have complimentary purposes. The tenure statute provides security to salary and position during active employment years while the pension act provides economic security during retirement years by continuing a portion of the salary earned during active employment. Both have similar language. The Veterans Tenure Act covers a person holding a "position, office or employment. . .receiving a salary." The Act covers a person who is a public employee, an elected or appointed official who receives a "base or contractual salary for services as an employee in accordance with established salary policies of the members employer. N.J.S.A. 43:15A-6(r). The intended identity of coverage is further underscored by the specific PERS membership exclusion providing in pertinent part:

> "No person in *employment, office or position for which the annual salary or remuneration is fixed* at less than $500.00, shall be eligible to become a member of the retirement system." (Emphasis supplied.) N.J.S.A. 43:15A-7(d).

and by N.J.S.A. 43:15A-39 providing in pertinent part:

> "In computing the service or in computing final compensation no time during which a member was in *employment, office, or position, for which the annual salary or remuneration was fixed* at less than $500.00 shall be credited. . . ." (Emphasis supplied.)

Accordingly, the decision of our Supreme Court in *Koribanics*, the decision of the former Supreme Court and the Court of Errors and Appeals in *Fox*, and the comparable terms of the statutory language governing eligible credit in the Act require that part-time professional services performed for a local governing body compensated for by fluctuating fees for each item of available work are not eligible for

pension credit. Those services are generally performed by an independent contractor on a case-by-case basis rather than as part of the basic responsibilities of a regularly salaried employee of a governmental entity. On the other hand those established professional services performed in a statutory office or position and compensated for by a fixed annual retainer (salary) paid at regular, periodic intervals in specific, regular amounts should be regarded as the services of an "employee" for pension credit purposes. It must be emphasized that what is involved is either the amount of compensation paid without regard to the actual performance of services simply to "retain" the professional or to cover those general services normally associated with the holding of the office itself.[3] Excluded would be items of work usually regarded as "extras" and rendered essentially on an independent contractor type basis.[4]

These principles are controlling in the disposition of this case. There are three separate employments to be considered. Fasolo initially enrolled in PERS on September 1, 1964 as a Tenafly Borough Magistrate. His total service credit through a purchase and current membership covers the period March 1, 1956 to his anticipated retirement date of August 1, 1975. The salaries for this position were fixed annual salaries increasing by normal annual increments from $1,166.60 in 1956 to $5,400 in 1974. There is no suggestion of extra compensation or fees above these fixed amounts. Magistrates or municipal judges are limited by law to fixed annual salaries and are prohibited from accepting fees or other additional remuneration for services rendered. The services to be rendered are controlled by statute. Accordingly, the entire period of service and the compensation for this position are creditable for pension purposes.

The second employment was borough attorney for New Milford from January 1, 1951 to January 1, 1963. A borough attorney is appointed pursuant to the authority of N.J.S.A. 40:87-15. Unless sooner removed, a borough attorney holds office for a period of one year and until his successor has been duly qualified. In this situation, the salary ordinance in New Milford fixed the remuneration of a borough attorney at "the annual compensation" of $500 "payable in quarterly installments, which compensation shall cover all legal services excepting" specifically enumerated services. It was certified by the Borough that the $500 salary was designed to cover only attendance at meetings. Additional compensation was also paid as fees for each separate item of legal services performed encompassing appearances before administrative boards, preparing ordinances, contracts and deeds, and litigation. These fees fluctuated widely with no uniform pattern from a low of $970 paid in 1955 to a high of $6,715 in 1960. The total compensation paid for these 12 years consisted of $24,644 in fees and $6,000 in salary-retainer. It is therefore clear that the position of borough attorney in New Milford was not a regularly salaried position in its entirety and only those services contemplated by the fixed annual salary (retainer) for attendance at meetings of the governing body would be creditable for pension purposes.

The third employment was Demarest borough attorney from January 1, 1953 to approximately December 1974. Fasolo was enrolled on September 1, 1970 on the basis of this employment and became a multiple enrollee in PERS. In November 1971 he administratively received credit retroactively to January 1, 1953, through a purchase and as free veteran service credit. Compensation recorded for this employment reveals that an amount fixed annually as a retainer was paid for attendance at regularly scheduled meetings and additional compensation as fees was paid during each year for various items of additional legal services. The additional compensation

for regular services performed was categorized as "contractual services" or "extra fees" or "fees paid by voucher" and compensation assigned to planning board, zoning board, police department and "salary paid as sewer attorney" and "as borough attorney". These additional payments were fees fluctuating widely both in total amount and within each separate category of extra compensation paid. Accordingly, the total scheme of compensation for the legal services of the borough attorney in Demarest indicates clearly that the fixed annual retainer was but a small portion of the total compensation received and, therefore, only that amount should be includable in the calculation of salaries eligible for pension service credit.

The Demarest compensation also encompasses a special $60,000 contract payment. On August 20, 1969 the member executed a contract to render legal services in connection with the construction of a sanitary sewage system for the borough. The compensation set in this contract was:

> "*** a fee equal to two and one-quarter (2¼%) per centum of the total cost of construction of the Borough Sanitary Sewer System***, but in no event shall said fee exceed Sixty Thousand ($60,000.00) Dollars. . . ."

Payment of the fee was subject to appropriation of the monies by the borough. The contract also provided that the method and means of payment are to be selected through mutually satisfactory arrangements of the contracting parties and authorized payment "in the form of an annual salary basis, quarter-annual basis or upon a partial periodic basis. . . ." Pursuant to this latter provision, the total maximum contract amount of $60,000 was paid in varying amounts from 1971 to 1974 as "salary".

It is clear from the terms of the contract and the distribution of the compensation in unequal amounts over a four year period that the compensation paid is not "salary" in the context of the definition of "compensation" in the Act. Moreover the legal services by their very nature were special temporary work and confined to legal work arising from the construction of the sewage system. Accordingly, even though the member had otherwise been a regular salaried borough attorney to the extent of his retainer (salary) this additional $60,000 of compensation clearly is excludable for pension purposes as an "extra" paid to an independent contractor.

There may be equitable assertions raised in this case since administratively credit has been recorded by the Retirement System for those services compensated for on a fee basis. However, equitable estoppel is generally not applicable to a government agency and has never been applied to pension boards except in those instances where pensions have been paid for a considerable period of time. *Ruvoldt v. Nolan* 63 N.J. 171 (1973); *Skulsky v. Nolan* 68 N.J. 179 (1975). See, also, *Tubridy v. Consolidated etc., Pensions Com.* 84 N.J. Super 257 (App. Div. 1964) where equitable estoppel against the pension board was denied on a claim of reliance and anticipation of a higher pension on acceptance of contributions for services not covered by the fund. Thus, although a pension may not normally be reopened to examine the basis of the service upon which the retirement allowance had been granted, in the case of this *active* member no service compensated for on a fee basis has yet been calculated into a final retirement allowance. A question as to the member's creditable compensation was raised as early as 1971 by the member and his entire creditable service has been under active investigation since that date. Moreover, the Retirement System has expressly reserved the issue of his creditable compensation for a subsequent de-

termination and the member has full knowledge that his pension award was not final and conclusive.

In conclusion, you are advised that for purposes of pension credit, services performed as a part-time municipal attorney or similar professional services for local governmental subdivisions compensated for by a fixed annual retainer are to the extent described above generally regarded to be eligible services for coverage by the Act where the retainer or salary can be demonstrated to be paid under regular salary policies of the governmental entity and as incident to services performed in a governmental office or employment. Those legal or other professional services performed for a fluctuating fee for each item of professional service rendered to the local unit should not be considered to be eligible for pension credit as remuneration for services performed in government office or employment.[5] In this case, then, and based upon all available factual information provided to us, the creditable service and compensation of Fasolo for eligible retirement credit should be limited to his service and compensation as magistrate to the Borough of Tenafly and for his professional services compensated by the fixed annual retainer-salary in the Boroughs of New Milford and Demarest. He does not qualify for any of the other professional services compensated for on a fee basis, including the special $60,000 fee for services rendered in connection with the construction of a sanitary sewage system for the Borough of Demarest.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey
By: THEODORE A. WINARD
Assistant Attorney General

1. Public Employees' Retirement-Social Security Integration Act of 1954 as amended, N.J.S.A. 43:15A-1 *et seq.*

2. The plaintiff in *Fox* received no "extras" in compensation but rather performed under a straight periodic $7,000 per annum salary. See *Koribanics,* 48 N.J. at 8. However, it must be emphasized that the intent and import of the pension law cannot be evaded simply by restructuring total professional compensation from a retainer plus fees to a flat compensation basis. See footnote 3, *infra* and accompanying text.

3. In the case of a municipal attorney, this is usually a comparatively nominal amount of compensation for work normally regarded as within the duties of the office such as: attendance at meetings of the governing body, the preparation of simple resolutions and other work related to such meetings and some day-to-day routine advice. The preparation of detailed opinion letters, the drafting of complex and involved ordinances and contracts, and the conduct of litigation would generally be excluded. However, due to the variety of governmental sub-divisions and their differing legal requirements, some factual situations may well dictate a contrary conclusion such as, for example, the circumstances of counsel for a city of substantial size who performs services for such purposes. Accordingly, whether a compensation arrangement or certain specific items of work are eventually eligible or ineligible for pension credit may involve a factual question as to the presence of a bona fide employer-employee arrangement between the parties in a given situation to be determined by the Board of Trustees of the Retirement System.

4. As indicated in Footnote 2 *supra,* this result would follow regardless of whether the compensation plan was one of nominal retainer plus fees for other work or a substantial retainer (salary) to cover all services. Rephrased, the conclusion is that the structuring of payment cannot be a device to defeat the purpose and intent of the pension statutes. The touchstone is the nature of the services rendered—*i.e.* are they nominal, directly related to the office itself and thus arguably rendered as an "employee" or are they more substantial, usually rendered on a

fee basis, and thus arguably performed by an "independent contractor" for his client? Only the actual or reasonably equivalent amount to compensate for the former is includable. The policy underlying our pension laws does not oblige the public to bear the financial burden of pension credit afforded to fees which a lawyer essentially charges to his client—at least over and above the normal retainer for professional services arising out of the occupancy of the statutory and usually mandatory office of municipal attorney.

5. As indicated above (see footnote 3, *supra* and accompanying text), it may be necessary in specific instances for the Board of Trustees to evaluate the factual circumstances applicable to the rendition of professional services to determine whether or not a bona fide employer-employee relationship existed within the meaning of the principles set forth above.

October 26, 1976

FRED G. BURKE
Commissioner of Education
Department of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 28—1976

Dear Commissioner Burke:

The Department of Education has asked whether a local board of education must obtain the approval of the legal voters of its district at a public referendum for the construction of school facilities paid for in its entirety by federal grant moneys. You have indicated that this question was generated by the recent enactment of the Local Public Works Capital Development and Investment Act of 1976.* This law authorizes the Secretary of Commerce, acting through the Economic Development Administration, to make direct or supplemental grants to any State or local government for local public works projects which will stimulate employment. Pursuant to this law and the regulatory scheme implementing it, local school districts within the State of New Jersey may apply for direct grants for the construction of educational facilities.

The basic question involved herein is whether Type II or regional school districts applying for federal moneys for school construction must obtain voter approval for such projects. Local boards of education are political subdivisions created by the Legislature and empowered by it to provide, maintain and supervise local school districts. N.J.S.A. 18A:33-1 requires each local school district to provide "suitable educational facilities including proper school buildings and furniture and equipment" for children resident within the district.

Pursuant to this statutory requirement, local districts must prepare acceptable building proposals and financing plans which include, where necessary, the borrowing of funds and the issuance of bonds to finance such projects. The authority for such borrowing is found in N.J.S.A. 18A:20-4.2 which provides: