

April 3, 2001

Via Hand Delivery and Overnight Mail

Wendy Jamison
Board Secretary
Board of Trustees
Public Employees Retirement System
State of New Jersey
Department of the Treasury
Division of Pensions and Benefits
P.O. Box 295
Trenton, NJ 08625-0295

Location: 50 West State Street
Trenton, NJ 08625-0295

Re: G. Philip Lewis Request to Purchase Additional Service from
December 23, 1974 through April 6, 1993
PERS No. [REDACTED]

Dear Ms. Jamison:

In response to comments made at the conclusion of the Board of Trustees Public Employees Retirement System (PERS) meeting of March 21, 2001, please find herein one original and two copies of a letter brief in lieu of a more formal submission on behalf of G. Philip Lewis.

ISSUES PRESENTED

The following five issues presented are as follows:

Whether or not G. Philip Lewis' Job Training Partnership Act (JTPA) time should not be considered under the provisions of N.J.S.A. 43:15A-7 et seq. more specifically, the provisions of N.J.S.A. 43:15A-7(h); and how the board can distinguish why G. Philip Lewis' JTPA service is not considered temporary in relationship to all other JTPA employees in Salem County. The

third issue is: Documentation requested by the Board of Trustees, including payroll stubs and contracts showing CETA employment from July 1, 1981 through June 30, 1983; and the fourth issue is: Documentation requested by the Board of Trustees showing JTPA employment from July 1, 1983 through April 6, 1993; and the fifth issue is: Summary review of Senate Bill No. 1471 (2nd OCR) submitted by Governor Thomas H. Keene to the Senate April 21, 1986.

STATEMENT OF FACTS

Following Mr. Lewis' honorable discharge from the United States Navy, he domiciled in the County of Salem, State of New Jersey.

On December 23, 1974, Mr. Lewis was employed under the Comprehensive Employment and Training Act (CETA) as a teacher's aide. CETA was encouraged to be a long-term, grant-funded program in which Salem County was able to provide Public Service Employment (PSE), which allowed state and local governments in the community and Community Based Organizations (CBO) a tremendous amount of labor at no cost to the county. Salary: \$8,000 annually; then in March 1976: Mr. Lewis transferred from the Department of Health to the Community Development Department. Salary: \$8,957 annually; then in December 1976: A title change occurred. Salary: \$11,500 annually; then in July 1977: Mr. Lewis received another raise and title change. Salary: \$14,600 annually; then in July 1978: Pay raise given because of a new Salem County contract with the Union. Salary: \$15,535 annually; then in August 1979¹: A fourth raise in two years due to new county contract. Salary: \$16,436 annually; then in August 1980²: Mr. Lewis was promoted to Manpower Coordinator (Deputy Director) of CETA. Salary: \$18,700 annually; and then in January

¹ During the late 1970's Mr. Lewis' salary was split between two grants. A portion of his salary was used to purchase pension services in the PERS program and when one of the two grants ended, Mr. Lewis was no longer contributing to PERS and was refunded his prior contributions.

² In the early 1980s, Salem County changed the work schedule from 30 hours per week (9:00 a.m. to 4:00 p.m.) to 35 hours per week (8:30 a.m. to 4:30 p.m.) In addition to the 10% annual raise negotiated in the new contract, all county employees, except Department Heads, were given a 16.67% increment to account for the new hours. Mr. Lewis' staff was given a 26.67% raise and advised his was not as high (10%) because he was a Department Head.

1981: Mr. Lewis became the Department Head of the Salem County CETA Program.
Salary: \$22,000 annually.

Finally, on June 30, 2000 Mr. Lewis accepted layoff/retirement. Final salary: \$52,736 annually plus service award of 6% annually, paid during the month of employment anniversary.

It is important to note that Mr. Lewis was treated as a regular county employee. Mr. Lewis received medical benefits, all paid holidays, accrued sick and vacation time, travel expense reimbursement, prescription plan, eyeglass reimbursement, etc. These medical benefits have remained post-separation.

Additionally, on September 24, 1993, Mr. Lewis was asked to complete and he forwarded a Duties Questionnaire for the State of New Jersey, Department of Personnel, Division of County and Municipal Government Services. Exhibit "1". In this submission, he certified the statement and forwarded same to the Department of Personnel, State of New Jersey. It is important to note the questionnaire he submitted has never been questioned or objected to and included the following:

- a. Department: JPTA
- b. Title as of December 24, 1993: Human Resources Coordinator
- c. Employment Status: Full time
- d. Total Work Hours: 35 - 40 hours per week
- e. Job Description: Supervisor Responsibilities as of 9/24/93:
Oversaw the operation and work performance of eight employees assigned in his department
- f. The completed questionnaire also says that annually from April through September, Department hired four to five temporary [emphasis added] college students as staff to assist in the operation of summer use employment and training program.

LEGAL ARGUMENT

ISSUE ONE: WHETHER OR NOT G. PHILIP LEWIS'

JOB TRAINING PARTNERSHIP ACT (JTPA) TIME SHOULD NOT BE

CONSIDERED UNDER THE PROVISIONS OF N.J.S.A. 43:15A-7 ET.SEQ.

MORE SPECIFICALLY, THE PROVISIONS OF N.J.S.A. 43:15A-7(h)

G. Philip Lewis should be considered a member of the retirement system pursuant to N.J.S.A. 43:15A-7(b) wherein:

Any person becoming an employee of the state or other employer after January 2, 1955 and every veteran [emphasis added], other than a retired member who returns to service pursuant to Subsection b. of Section 27 of P.L.1966, c.217 (C.43:15A-57.2) other than those whose appointments are seasonal, becoming an employee of the state or other employer after such date, including a temporary employee with at least one years' continuous service.

Mr. G. Philip Lewis was a member of our armed services and, pursuant to N.J.S.A. 43:15A-7(b), it specifically states that membership to the retirement system is for every veteran which is described in N.J.S.A. 43:15A-7(b). See Exhibit "2". In further support of Mr. Lewis' veteran status pursuant to N.J.S.A. 43:15A-7(d) it says:

Membership in the retirement system shall be optional for elected officials other than veterans [emphasis added], and for school crossing guards, who have become eligible for benefits under other pension systems are so employed on a part-time basis. . . [and] [N]o person in employment, office or position, for which the annual salary or remuneration is fixed at less than \$1,500.00 shall be eligible to become a member of the retirement system.

As described above, membership in the retirement system is optional for elected officials other than veterans. It is interpreted to be that membership into the retirement system is not optional for veterans. Membership in the retirement system should be automatic for veterans. Any person becoming an employee of the state or other employee after January 2, 1955 and every veteran becomes a member of the retirement system. G. Philip Lewis is a veteran and the statute is interpreted that being a veteran is not

an option to becoming a member of the retirement system, but being a veteran is a requirement for membership to the retirement system. Pursuant to N.J.S.A. 43:15A-7(d), people with veteran status employed by the State become a member of PERS. See Exhibit "2".

The Board of Trustees of PERS has made an inquiry as to how G. Philip Lewis' JTPA time should not be considered under the provisions of N.J.S.A. 43:15A-7(h) which says:

A temporary employee who is employed under the Federal Job Training Partnership Act, PUB.L.97-300(29U.S.C. Section 1501) shall not be eligible for membership in the system. Membership for temporary employees employed under the Federal Job Training Partnership Act, PUB.L.97-300(29U.S.C. Section 1501) who are in the system on September 19, 1986 shall be terminated, and affected employees shall receive a refund of their accumulated deductions as of the date of commencement of employment in the Federal Job Training Partnership Act Program. Such refund of contributions shall serve as a waiver of all benefits payable to the employee, to his dependent or dependents or any of his beneficiaries under the retirement system.

As to caselaw, in Re: Hudson City Probation Department, 178 N.J. Super 362(1981) at page 363, the freeholders of Hudson County appealed a final decision of the Civil Service Commission issued on March 18, 1980 which held that hired investigators in the County's Probation Department are "permanent" pursuant to Title IV part D of the 1975 Amendments to the Social Security Act, 42 U.S.C.A. Section 651 et seq. are "permanent" civil service employees and accordingly are subject to the provisions of N.J.S.A. Title XI Civil Service. In Kyer v City of East Orange, 315 N.J. Super, 524(1998), the issue raised in that matter is whether a merit system for a provisional employee in the municipal classified service who is denied the opportunity to become a permanent employee by reason of the municipalities negligence and her own unawareness of the merit system requirements may, after seven years of exemplary service, be summarily discharged. The court held that under circumstances in that case, the employee's job rates are a matter for determination by the department of personnel, which has the authority to

grant a retroactive competitive examination or waiver thereof to declare her status as permanent and protected employee and thus fashion an appropriate remedy.

The Kyer case compared to this (Lewis) case is a matter for determination by the Department of Personnel who should have the authority to grant a retroactive competitive examination or waiver thereof of Mr. Lewis' objective to being considered a permanent employee.

Also, a letter dated February 23, 2001, forwarded to Richard A. Dann, president of Local 1085 Communication Workers of America, AFL-CIO located in Woodbury Heights, states that employees, in particular, Joan Cole and former employer of Mr. Lewis was the Former Assistant Deputy Director (Assistant Human Resource Coordinator) and is to be considered to be Salem County merit system employees entitled to all rights forwarded under Title XI A of the New Jersey Status. See Exhibits "1" and "3".

Furthermore, N.J.S.A. 43:13-22.52a, says that temporary employees become a member of the retirement system and the condition of membership requires that:

Any temporary employee included by this act in the definition of "employee" set forth in section 1 of P.L. 1964, c.275(c.43:13-22.50), shall, unless he is a member of another retirement system or otherwise ineligible, become a member of the retirement system established pursuant to P.L. 1964, c.275 as a condition of his employment; provided that he shall submit to and pass the physical and mental examinations required by the commission and shall provide such evidence of good health. . .

G. Philip Lewis began employment in 1974 through June 2000 and submitted and passed any physical and mental examinations required and shown by his continuous promotions throughout his tenure. Reading the word continuous raises the inquiry as to what is the employment definition of "continuous promotions" or "continuous employment" or "continuous service". As held in Mei Kennedy, Anthony Longo, Martin Devoursney, Joseph Seerbo, Edward Wiese, C. Chiwalk, William E. Reynolds, Sr., and Walter Geisler v.

Westinghouse Electric Corp., a Corporation of Pennsylvania, 27 N.J. Super. 68, 101A.2d 592; 1953N.S. Super., Lexis 407, 333L.R.R.M 2741; 24 Lab. Cas (COH) P68, 071. The court said:

[T]hat the expression "continuous service" found in the contract [employment contract] is equivalent to uninterrupted employment", that the employment of the plaintiffs and their fellow employees was never discontinued because the plaintiffs remained in the employ of the defendant during the entire period of time involved in [that] controversy; that the contract had not been terminated and that the employees were continuously carried on the company's payroll; and that plaintiffs and their fellow employees did not interrupt their "continuous employment" and consequently did not forfeit their right to holiday pay merely by indulging in [the] work stoppages.

So, arguably, even if Mr. Lewis was classified as temporary, he would still be considered a member of the retirement system provided he met the "continuous" criteria described in N.J.S.A. 43:13-22, 52a.

Unfortunately, there is a lack of more specific case authority in New Jersey on the issues of "temporary" and "continuous" employment, but as to New Jersey Statutes Annotated, specifically, N.J.S.A. 43:15A-7(h) when interpreting the words *temporary employee* [emphasis added]. . . employed under the Federal JTPA, the following interpretation must be considered by the Board of Trustees for PERS. See Exhibit "2".

Interpretation of this New Jersey statute requires that all relevant terms be defined. It is necessary to look at the terms both generally and those rules published in the **New Jersey Register**, a bi-weekly publication prepared by the office of Administrative Law, and, after adoption, that rule becoming part of the **New Jersey Administrative Code**.

Generally, BLACK'S LAW DICTIONARY, page 1464 (6th ed. 1991), defines temporary as, "That which is to last for a limited time only, as distinguished from that which is perpetual, or indefinite, in its duration. Opposite of permanent." In Mr. Lewis' instance, his employment was not temporary or limited in time for it was continuous or without interruption as

a Salem County employee beginning in 1974 through June 2000. See also Mei Kennedy, *Supra* at pages 6-7, for the definition of continuous in the employment context.

In the context of the New Jersey Administrative Code, the Board of Trustees of the PERS must consider the following.

Under *N.J.A.C.* 4A:4-1.7 entitled temporary appointments, subsection (a), the commissioner may approve temporary appointments to positions in which the job assignment is for an aggregate period of not more than 6 months in a 12 month period; and pursuant to *N.J.A.C.* 4:4-1.7(d), consecutive temporary appointments in excessive of the period set forth in *N.J.A.C.* 4A:4-1.7(a) are prohibited. See Exhibit "4". Mr. Lewis' record or employment history does not reflect the commissioner having approved him as a temporary employee nor does Mr. Lewis' employment record show any consecutive temporary appointments in excess of the period set forth but the exhibits attached hereto do show Mr. Lewis had consecutive permanent employment by the County of Salem for positions which were funded by the JTPA and those grant monies were then distributed to each of those departments in which he was employed and described in Exhibits "5" through "13" which show memorandums from the Clerk of the Board with annual increases from 1983 through 1993.

As such, take under consideration *N.J.A.C.* 17:2-2.4(d) wherein it says:

An employee of a civil service employer who is not in a classified or unclassified position or an employee of a non-civil service employer who is not in a regular budgeted position may be considered a temporary employee by the employer for the one-year period following the employee's date of hire, but if the employment continues into a second year, the employee will be required to enroll immediately, as follows:

1. For employees whose employers report on a monthly basis, compulsory enrollment date will be the first of the month following the end of the one-year (12-month) period.
2. For employees whose employers report on a bi-weekly basis, the compulsory enrollment date will be the first day of the pay period following the end of the one-year (12-month) period.

As described above and shown in Exhibits "5" through "13", Mr. Lewis' employment continued into a second year. In fact, Mr. Lewis' employment continued for 25 years and, therefore, he should be required to enroll in the membership immediately. Mr. Lewis, much like the case of Kyer v. City of East Orange, 315 N.J. Super 524 (1998) should not be denied the opportunity to become a permanent employee by reason of Salem County's negligence in not informing him if they considered him temporary and, moreover, much like Kyer, Mr. Lewis should not be prejudiced because of his own unawareness of the merit system requirements. (Seen below and also shown as Exhibit "14".)

Also, consider N.J.A.C. 17:2-2.3(a)(4) where it says:

Any employee who is provisionally appointed to a civil service position is considered as an employee with temporary employment status and is ineligible to establish membership until he or she receives a regular civil service appointment, **or has one year of continuous service** [emphasis added]. This does not apply to anyone who is already enrolled as a member.

Mr. Lewis had one year of continuous service so, therefore, does not fit the category of temporary employment and ineligibility as described above. Again, his continuous service exceeded one year and, therefore, he should be considered eligible for membership.

SECOND ISSUE: HOW THE BOARD CAN DISTINGUISH WHY G. PHILIP LEWIS' JTPA SERVICE IS NOT CONSIDERED TEMPORARY IN RELATIONSHIP TO ALL OTHER EMPLOYEES IN SALEM COUNTY.

The Board of Trustees of PERS asked counsel for Mr. Lewis to indicate how the Board can distinguish why Mr. Lewis' JTPA service is not considered temporary in relationship to all other JTPA employees in Salem County. Counsel for Mr. Lewis does not represent the other JTPA employees in Salem County and counsel is not privy to the details of each of their respective employment histories and individual review as to whether or not they should be considered temporary, permanent or continuous status. However, what

information counsel has available regarding other employees who provided JTPA services is provided below.

Counsel for Mr. Lewis has in his possession and is providing the following information as to the permanency of fellow JTPA employees working in Salem County. This is being provided to assist the Board of Trustees in distinguishing why Mr. Lewis should not be considered temporary in relationship to some Salem County employees.

As previously shown in Exhibit "1" under the Duties Questionnaire completed by Mr. Lewis dated September 24, 1993, he named eight employees assigned to his department. One employee in particular named in Exhibit "1" is Joan M. Cole who was corresponded to by PERS. More specifically, I refer the Board of Trustees of PERS to a copy of a letter dated December 21, 1998 forwarded to Ms. Cole (see Exhibit "15"). The letter says: "[T]he PERS Board approved your [Joan M. Cole's] request for enrollment in PERS based on provisions N.J.A.C. 17:2-2.4, in which employees are eligible for enrollment in PERS either the date of permanent employment or one year after continuous service, whichever comes first." See Exhibit "16".

The standard set for Ms. Cole who is an employee in Mr. Lewis' department establishes the date for enrollment as either the date for permanent employment or one year after continuous service, whichever comes first. In comparing Ms. Cole's letter and the statements in Ms. Cole's letter to Mr. Lewis' circumstances, then Mr. Lewis should be eligible for enrollment after one year of continuous service. This standard was defined by an agent of PERS and as the exhibits attached hereto will show Mr. Lewis' continuous employment from 1974 through June 2000, which would qualify Mr. Lewis as a member.

Now, if the Cole letter of December 21, 1998 is considered the standard, then each of the employees of Salem County should be individually evaluated to determine whether or not those employees in Salem County are

eligible for enrollment, based on their permanent employment status or one year after continuous service, whichever comes first. See Exhibit "15".

ISSUE THREE: DOCUMENTATION REQUESTED BY THE BOARD OF TRUSTEES,
INCLUDING PAYROLL STUBS AND CONTRACTS SHOWING CETA EMPLOYMENT
FROM JULY 1, 1981, THROUGH JUNE 30, 1983

<u>Exhibit No.</u>	<u>Description</u>	<u>Dates</u>
17	Original CETA Employee Roster	1980
18	Original CETA Employee Roster	1981
19	Original CETA Employee Roster	1982 (12/29/81)
20	Memo to CETA staff from G. Philip Lewis, Director, re: Working Hours	2/25/82
21	Memo to CETA staff from G. Philip Lewis, Director, re: Working Hours	4/13/82 9/10/82
22	Memo to all staff from G. Philip Lewis, Director, re: Confidentiality	10/12/82
23	Original CETA Employee Roster	1982 (rev. 10/82)
24	Official Salem County Directory showing G. Philip Lewis as Coordinator of the CETA Program. Directory would have been published 7 to 9 months after July 1, 1981 - the first date in question as to employment with CETA.	1982
25	Original CETA Employee Roster	1983
26	Memo to all staff from G. Philip Lewis, Director, re: Telephones	1/11/83
27	Memo to JTPA staff from G. Philip Lewis, Director, re: working hours	4/17/84
28	Official Salem County Directory showing G. Philip Lewis as Coordinator of the CETA Program.	1984
29	Official Salem County Directory showing G. Philip Lewis as Coordinator of the CETA Program.	1985
30	Official Salem County Directory showing G. Philip Lewis as Coordinator of the CETA Program.	1986
31	Memo to JTPA staff from G. Philip Lewis, Director, re: lateness & absences	10/4/88

ISSUE FOUR: DOCUMENTATION REQUESTED BY THE BOARD OF TRUSTEES

SHOWING JTPA EMPLOYMENT FROM JULY 1, 1983 THROUGH APRIL 6, 1993

Please find herein the following documents including payroll stubs, contracts, notices or personnel actions from the Department of Personnel, minutes or resolutions from Salem County Board of Chosen Freeholders and a copy of the JTPA job description including the scope of work.

Exhibit No. 32: Copy of Resolution 93 approved and adopted by the Salem County Board of Chosen Freeholders; and

Exhibit No. 33: Copy of a form completed by Mr. Lewis and submitted to the administrator showing a title, employee, effective dates, permanent or provisional appointments with date of hire, and first date of permanent service; and duties and a copy of G. Philip Lewis' job description as defined on September 24, 1993; and

Exhibit No. 34: Copies of Form W-2 listed in reverse chronological order from 1993 back to 1983, inclusive.

Exhibit No. 35: Assorted payroll stubs.

Exhibit Nos. 5-13: Notification of pay raises for the following year signed by each individual originator for the years 1983 - 1993.

ISSUE FIVE: SUMMARY REVIEW OF SENATE BILL NO. 1471 (2ND OCR)

SUBMITTED BY GOVERNOR THOMAS H. KEENE TO THE SENATE APRIL 21, 1986

The Board of Trustees of PERS should approve G. Philip Lewis' request to purchase additional service from December 23, 1974 through April 6, 1993.

The basis for the Board of Trustees from PERS approving Mr. Lewis' request is that, pursuant to N.J.S.A. 43:15A.7(b), the statute entitled above clearly states that any person becoming an employee of the State or other employer after January 2, 1955 **and every veteran** [emphasis added] . . . or other employer after such date including a **temporary employee** [emphasis added] with at **least one year's continuous service** [emphasis added] is

eligible to become a member and enroll in the PERS. See Exhibit "36" copy of Senate Bill No. 1471 (2nd OCR) amendment forwarded to the Senate by Governor Thomas H. Keene on April 21, 1986.

I have shown the Board of Trustees of PERS that every veteran, which includes Mr. Lewis, is eligible. Additionally, any temporary employee with at least one year's continuous service is eligible.

Assuming *arguendo*, even if the Board of Trustees of PERS were to consider Mr. Lewis a "temporary employee" he still has and has shown the Board of Trustees that he has at least one year of continuous service beginning in 1974 and ending June 2000. See also Mel Kennedy, *Supra* at page 7, for the definition of "continuous service."

As to *N.J.S.A. 43:15A-7(h)*, Governor Keene's veto is absent any specificity as to the term temporary in that particular section of said statute, however, in reviewing the statute and applying all relevant terms defined in the statute, the reader cannot ignore *N.J.S.A. 43:15A-7(b)* of the same veto says that a temporary employee with at least one year of continuous service is eligible to become a member. This status applies to Mr. Lewis and, therefore, makes him eligible to receive the full benefits of PERS. See Exhibit "2".

The Board of Trustees of PERS will notice Governor Keene submitted *N.J.S.A. 43:15A-7(h)* as an addition to this amended Senate bill with the intent of broadening its scope, however, doing such has created confusion and subsection (h) which cannot be viewed as a single paragraph. Do not view this statute in a vacuum, the whole statute must be considered in its totality. As such, interpretation of this New Jersey statute requires that all relevant terms of this statute be defined. Therefore, when viewing this statute in its totality, the reader must take into consideration all subsections of the statute and how those subsections affect Mr. Lewis, not just the single subsection (h).