

December 24, 1997

Ms. Piliialoha E. Lee Loy  
Chairperson, Board of Trustees  
Employees' Retirement System of  
the State of Hawaii  
City Financial Tower, Suite 1400  
201 Merchant Street  
Honolulu, Hawaii 96813

Dear Ms. Lee Loy:

Re: Eligibility of a Former Employee to Purchase Military Service Credit

This responds to a request from the Administrator of the Employees' Retirement System ("ERS") for our opinion whether a vested noncontributory plan participant who has left government service and has applied for retirement is still a "member" of the ERS eligible to apply for and be credited with military service credit. We believe that the former employee who is a vested noncontributory plan participant is a member of the ERS who is eligible to apply for and be credited with military service credit.

#### I. FACT CIRCUMSTANCES

The factual circumstances as we understand them are that the former employee had completed nineteen years and eleven months of credited service as a class C (noncontributory) member at the time he terminated his service on March 2, 1990. On March 9, 1994, the former employee applied for retirement to become effective on April 9, 1994. On the same day the former employee submitted his application for retirement, he submitted his application to be credited with military service credit pursuant to section 88-132.5, Hawaii Revised Statutes. Section 88-281, Hawaii Revised Statutes, provides the eligibility criteria for noncontributory members. Section 88-281(a) provides that a member with ten years of credited service who has attained age sixty-two is eligible to retire. In addition, subsection (c) provides that a member with twenty years of credited service and who has attained age fifty-five is eligible to retire. When the former employee applied for retirement, he was fifty-five years old. If the former employee is unable to obtain credit for his military service, he will be unable to retire because he will not meet the twenty-year-length-of-service requirement of section 88-281(c) and he does not meet the age requirement of section 88-281(d). ([top](#))

The former employee began state service on October 16, 1969. In 1983, he elected to become a noncontributory member of the ERS. He seeks a determination of his eligibility for service credit for his military service for the period of November 7, 1961, to October 26, 1962. The Administrator indicated that because the former employee left government service on March 2, 1990, and applied for retirement more than four years later, on March 9, 1994, he is not eligible for military service credit because he is no longer a "member" of the system. ([1](#))

#### II. QUESTION PRESENTED

The question raised by the former employee's application to be credited with military service credit is whether he was still a member of the ERS on March 9, 1994, more than four years after he left state employment.

#### III. DISCUSSION

The former employee applied to retire on March 9, 1994, thus section 88-132.5, Hawaii

Revised Statutes, as it existed on March 9, 1994, is applicable. [\(2\)](#) Section 88-132.5 provided in pertinent part as follows:

§88-132.5 Credit for military service. (a) Any member of the system who rendered honorable active military service in the armed forces of the United States and who has eight years of credited service in the system, may be credited with membership service credit for active military service of up to four years or the actual number of years of active military service, whichever is less, as follows:

- (1) Any member with eight years of credited service in the system may be credited with up to two years of membership service credit;
- (2) Any member with twenty years of credited service in the system may be credited with up to three years of membership service credit; and
- (3) Any member with twenty-five years of credited service in the system may be credited with up to four years of membership service credit.

. . . .

Thus, the criteria for service credit under section 88-132.5 can be enumerated as: (1) rendition of honorable active military service; (2) in the armed forces of the United States; (3) by a member; (4) who has at least eight years of credited service; (5) at the time of application pursuant to section 88-132.5. There is no time frame specified in section 88-132.5 within which an individual must apply for military service credit after attaining the stated years of credited service. "Active" military service should generally include such service deemed to be active military service within federal standards. [\(top\)](#)

Section 88-273, Hawaii Revised Statutes, provides in pertinent part as follows:

(a) Any class C member who terminates service prior to accumulating ten years of credited service . . . shall cease to be a member . . . . [Emphasis added.]

Subsection (a) states that a class C member who leaves state service with less than ten years of credited service "shall cease to be a member" of the system, with the inference that a class C member who terminates service with more than ten years of credited service continues to be a member even though not actively employed. This interpretation is reinforced by section 88-281, Hawaii Revised Statutes.

Section 88-281 provides in pertinent part as follows:

§88-281 Eligibility for retirement allowance.

. . . .

(d) A member who has ten years of credited service and terminates service prior to attaining age sixty-two shall have a vested right and shall be eligible to apply for a normal retirement allowance payable beginning with the month when the member has attained age sixty-five.

(e) A member may retire upon the written application to the board specifying the desired date of retirement . . . . [Emphasis added.]

Subsection (d) indicates that a member who has ten years of credited service remains a member of the ERS eligible to apply for retirement, even if the member terminates employment before applying for retirement. Consequently, we believe that, pursuant to sections 88-273 and 88-281, the former employee is a member of the ERS until the effective date of his retirement. [\(top\)](#)

If there is an ambiguity regarding the former employee's entitlement to apply for and receive military service credit, case law provides that pension statutes are to be liberally

construed to provide benefits to members of a pension plan. *Hitchcock v. Washington State Dep't of Retirement Sys.*, 692 P.2d 834, 838 (Wash. Ct. App. 1984). Under such interpretation, any ambiguity should be resolved in the former employee's favor.

#### IV. CONCLUSION

We believe that the former employee, as a vested noncontributory plan participant, is a member of the ERS who is eligible to apply for and be credited with military service credit pursuant to section 88-132.5. Sections 88-273 and 88-281 indicate that the former employee is a member of the ERS even though he is no longer employed by the State. Moreover, section 88-132.5 does not set a time by which a member must apply for military service credit.

Please be advised that the foregoing analysis applies only to noncontributory members. A different result may occur in the analysis of the provisions of chapter 88 that apply to contributory members, or to different fact situations.

Very truly yours,  
Katherine C. Desmarais  
Deputy Attorney General

APPROVED:  
Margery S. Bronster  
Attorney General ([top](#))

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1. Under sections 88-131 to 88-141, Hawaii Revised Statutes, certain periods of military service are recognized as service which may be credited toward retirement. These sections, included in a subpart entitled "Special Benefits for Members in Military Service," and, pursuant to section 88-131, popularly known as "the Servicemen's Act," provide that a "service member" is retained as a member of the ERS and is entitled to the status and benefits conferred by the Act. Pursuant to section 88-131, a "service member" is defined as a member of the ERS who is entitled to the benefits provided by the Act. If the former employee is a member of the retirement system, he is entitled to receive military service credit pursuant to sections 88-132.5 and 88-272(4), Hawaii Revised Statutes.

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2. Act 241, Session Laws of Hawaii 1996, increased from eight to ten the minimum number of years of credited service required before a member becomes eligible for credit for honorable active military service. Act 136, Session Laws of Hawaii 1997, amended section 88-132.5 for the purpose of excepting members of the ERS as of June 17, 1996 from the increased minimum number of years. Currently, section 88-132.5, provides in pertinent part as follows:

§88-132.5 Credit for military service.

. . . .

(b) Any employee who became a member of the system in accordance with section 88-42 before June 17, 1996, and has rendered honorable active military service in the armed forces of the United States, may be credited with membership service credit for active military service of up to four years or the actual number of years of active military service, whichever is less, as follows:

(1) Any member with eight years of credited service in the system may be credited with up to two years of membership service credit;

. . . .

The Senate Committee on Human Resources stated in Senate Standing Committee Report No. 933, dated March 19, 1997, that, because Act 241, Session Laws of Hawaii 1996, did not

"grandfather" in "current members," the bill that became Act 136 was intended to rectify that oversight. ([top](#))