December 22, 1997

Ms. Pilialoha 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: Former Per Diem Judges' Requests for Full Prior Service Credit Under the Provisions of Section 88-58, Hawaii Revised Statutes (1969)

This responds to requests from two retired judges for full prior service credit, for the entirety of their per diem judge terms that immediately preceded their appointments as full-time district court judges. The judges rely upon section 88-58, Hawaii Revised Statutes (HRS) (1969), "Prior service credit while per diem employee," the retirement law in effect when their respective per diem terms began.(1) The Employees' Retirement System (ERS) rejected the judges' requests and referred the matter to us.

We agree that section 88-58(2) neither requires nor permits the ERS to include the entirety of the judges' per diem terms in the computation of their retirement benefits. Neither judge is entitled to the prior service credit he claims.(3)

DISCUSSION

We understand that the ERS interprets section 88-58 as neither requiring nor permitting it to include prior service credit in an amount equal to the total number of months of each judge's per diem term, as credited service, to compute their retirement benefits. We understand further that the amounts of the retirement benefits the judges presently receive were computed in accordance with the method reviewed and approved by the Hawaii Supreme Court in Vail v. Employees Retirement System, 75 Haw. 42, 856 P.2d 1237 (1993).

The credited service the ERS used to establish those amounts consisted exclusively of each judge's membership service. Their membership service included service the judges provided both as per diem and full-time district judges, but the service the judges rendered as per diem judges was included as membership service only as permitted under Hawaii Administrative Rules (HAR) section 6-21-14(7)(4) and in amounts derived using the conversion method set out in section 6-21-8, HAR.(5) Months in which the judges' per diem service equaled ten or more days were included in their credited service as membership service on a pro rata, full-time equivalent basis. Months in which the amount of per diem service provided was less than ten days, were not counted toward their membership or credited service time. (top)

Generally, an ERS member judge's retirement benefits are computed by using the following formula:(6)

AFC as judge x 3.5% x Credited Service as judge (in years).

In pertinent part, the terms used in this formula are described or defined as follows:

> "Average final compensation" or "AFC" is "the average annual compensation pay or salary upon which a member has made contributions as required by sections 88-45 and 88-46, (A) during his three highest paid years of credited service; . . . .," HRS § 88-81; and
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> "Credited service" is "prior service plus membership service," HRS § 88-21, where
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> > "Membership service" is "all service rendered by a member for which the member had made the required contributions to the system," id.; and
> >
> > "Prior service" is "service rendered by a member to the State, territory or county or predecessor government prior to the establishment of the system or, as specifically provided in this part, prior to the admission of certain groups or classes of employees into the system membership."[(7)] Id.

The judges assert, that as the retirement law applicable at the time of their appointments as per diem judges, the 1969 version of section 88-58 requires the ERS to add the entirety of their respective per diem terms, as prior service credit, to the credited service the ERS used to compute their retirement benefits, irrespective of its amendment in 1982, or their subsequent appointments as full-time district judges well after that.[(8)] Both judges are aware of and rely upon the previously noted advice this office provided in the September 30, 1971, letter that was sent to the ERS that we rescind here. (top)

> The 1969 version of section 88-58[(9)] provided:
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> > Prior service credit while per diem employee. Employees in per diem positions, employees who formerly filled per diem positions, and former employees who filled per diem positions after December 31, 1927, shall be allowed full prior service credit in the system for their per diem service.

As defined by section 88-21, "prior service" is "service rendered by a member to the State, territory or county" (emphasis added), by employees who are part of a group or class of employees that were excluded from membership in the ERS at the time they provided the services for which they claim service credit. The version of section 88-58 upon which the judges rely was enacted in the same section of the same act in which the Legislature provided this definition for the term "prior service" which section 88-58 itself uses. See Section 1, Act 110, 1969 Haw. Sess. Laws 94.

Here, the judges are asking to receive "credited service" as "prior service credit" for blocks of time well after the group or class of employees of which they are a part had been categorically accorded membership in the ERS. During much of this time, the judges rendered no service for the State; the time simply represents portions of their various six-year terms of appointment as per diem judges. As has already been noted, months in which the judges actually rendered per diem service have already been counted as membership service and included in the credited service used to compute the retirement benefits the judges currently receive, to the extent they rendered services during ten or more days of a month. (top)

Under HRS section 88-42, judges as a group or class of employees have been categorically permitted to be members of the ERS since at least 1945. Similarly, per diem workers, as a group or class of territorial, state, or county employees were permitted to become members of the ERS in 1952. The judges were respectively first appointed to serve as per diem judges in 1981 and 1975, well after judges and per diem workers, as classes or groups of territorial, state, and county employees, were permitted to be ERS members.

With respect to "credited service" and "membership service", the Supreme Court in Vail has

already said:

> [O]nly the days for which Vail was actually "paid by the State" can qualify as "service" under chapter 88. Likewise, Vail's "membership service" can only comprise those days for which he was actually compensated. Consequently, Vail's "credited service," upon which his retirement allowance must be based, can only include those days for which he was actually paid. To give Vail the full-time credit he claims for the entire period of his per diem appointment would violate the express method of calculating retirement allowances provided in HRS § 88-74 and would result in a substantial windfall to Vail in direct contravention of the mandates of chapter 88.

75 Haw. at 61-62, 856 P.2d at 1238. (top)

With respect to the exclusion of service from a per diem judge's "credited service" and "membership service" whenever the service was rendered by the judge as a part-time employee because less than ten days of service was rendered in a month, the Supreme Court in Vail also has already said:

> The ERS notes that the Hawai`i State legislature in 1951 decided to grant membership status to per diem workers specifically to "provide[] a retirement allowance computed in the same manner for all government employees and remove[] the exclusion of a group not at present permitted to become members because of the method of payment (daily or hourly basis)." [citation omitted.] The ERS therefore concludes that the legislature intended merely to permit per diem workers to enter the system on the same basis as all other government employees. The ERS argues that per diem workers should consequently be subject to the same qualifications and restrictions as all other government employees, specifically including those pertaining to part-time employees under HRS § 88-43.
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> . . . .
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> . . . [T]he plain language of HRS § 88-42 dictates that all employees -- full-time, part-time, and per diem -- "shall be members of the system." However, HRS § 88-43 just as plainly gives the ERS the power to "deny membership to any class of part-time employees" and therefore must logically be considered a specific qualification of HRS § 88-42's blanket admission of all employees.
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> . . . .
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> . . . [T]he ERS has persuasively argued that per diem employees are included in the class of part-time employees to whom the agency may deny membership in the system under HRS § 88-43 and its implementing administrative rule § 6-21-14. Therefore, because at least portions of Vail's time as a per diem judge fell within categories specified in Rule § 6-21-14, we hold that the agency correctly determined that Vail did not qualify for full-time credited service under the retirement law.

75 Haw. at 63-66, 856 P.2d at 1239-40 (emphases in original)(footnote omitted).

The legislative history of section 88-58 reflects this reliance upon the definition of "prior service credit" and its concept of providing retirement credits for per diem service that otherwise could not be included in a member's "credited service" because the service was rendered prior to per diem workers being accorded ERS membership as a class or group of employees. Act 110, 1969 Haw. Sess. Laws 94, completely rewrote the retirement law, "to provide for clarity, fill in gaps in the law, remove obsolete and conflicting provisions and reorganize the sections." Conf. Comm. Rep. No. 17, Haw. H.J. 829 (1969). Included among its various revisions was the version

of section 88-58 upon which the judges rely, and the definition of "prior service credit" upon which that section and this opinion hinge. The new section was adopted to ensure that the Legislature's earlier effort to convert per diem county and territorial positions and workers to employee and ERS membership status in 1951 (by Act 110, 1951 Haw. Sess. Laws 98) and in 1955 (by Act 274, 1955 Haw. Sess. Laws 307), included a means of conferring credited service status on the per diem services that the converted per diem workers had provided prior to becoming employees and ERS members. The Senate Committee on Public Employment in Senate Standing Committee Report No. 127 on the bill that became Act 110 expressly noted:

> The following sections have been deleted as obsolete and unnecessary provisions:
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> . . .
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> 6-36. Service while per diem employee.
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> 6-36.5. Per diem employee attaining monthly status. These sections are obsolete, having been enacted to provide special treatment for per diem employees during specific periods of time. Per diem positions were abolished by law January 1, 1960, and Section 6-36.8 provides that all per diem service rendered at any time in the past shall be treated as "prior service" (free).

Haw. S.J. 914, 916 (1969). (top)

At that time, the Revised Laws of Hawaii 1955 section 6-36.8, which had been last amended in 1964 provided:

> Prior service credit while per diem employee. Notwithstanding any other provisions of the law to the contrary, employees in per diem positions, employees who formerly filled per diem positions, and former employees who filled per diem positions on or after January 1, 1928, shall be allowed full prior service credit in the [ERS] from the date they entered government employment as per diem employees until the date they attain or attained monthly status.

This legislative objective is confirmed by not only the previously noted Acts 110 (1951), 274 (1955), and 62 (1964), but by Act 200, 1957 Haw. Sess. Laws 229, Act 173, 1959 Haw. Sess. Laws 110, and Act 22, 1960 Haw. Sess. Laws 55, as well. (top)

It is also confirmed by the legislative history which accompanies the 1982 amendment to section 88-58, which the judges claim cannot be applied to them. The House Committee on Finance, in House Standing Committee Report No. 778-82 on the bill by which the present version of section 88-58 was enacted, noted:

> Subsection (11) amends HRS 88-58 by clarifying the provision dealing with per diem workers. In the early 1950's the retirement law was amended to provide membership to per diem county road workers who were at that time excluded because of the part-time nature of their work. Unfortunately, the law did not make clear that only county road workers were to be covered, so presently anyone who has been paid on a per diem basis may claim prior service. The amendment corrects this situation by restricting such prior service credit to only those per diem employees who had been county road maintenance workers after December 27, 1927.

Haw. H.J. 1254-55 (1982). (top)

Although subsequently enacted legislation ordinarily does not determine the underlying intent of an earlier version of a statute, the Supreme Court has recognized that it is "'[o]ur primary duty in interpreting and applying statutes is to ascertain and give effect to the legislature's intention to

the fullest degree,'" and subsequent legislative history can be used to determine the original legislative intent of a statute when the subsequent legislation is enacted to clarify the purpose for which a statute was first enacted. State v. Bolosan, 78 Haw. 86, 90, 890 P.2d 673, 677 (1995).

Moreover, the Legislature only made fiscal provisions to fund "prior service credits" for per diem services rendered by county per diem workers only, and only in amounts equal to per diem work performed prior to each worker's eligibility for regular employee status and ERS membership. See, Acts 274 (1955), 200 (1957), 173 (1959), 22 (1960) and 62 (1964).

In view of all of this, we believe no part of the judges' per diem term qualifies as "prior service credit" if the judges did not actually render per diem services. Further, since the per diem service the judges rendered was rendered after judges and per diem workers as a group or class of employees became entitled to ERS membership, the per diem service would not constitute "prior service credit." To the extent the per diem service the judges rendered in a month equaled or exceeded ten days, we understand that the per diem service has already been included as "membership" and "credited" service, and reflected in their retirement benefits. (top)

Very truly yours,
Charleen M. Aina
Deputy Attorney General

APPROVED:
Margery S. Bronster
Attorney General

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1. In 1982, section 88-58 was amended to limit its application to providing prior service credit for county per diem road workers who had provided per diem service as county road workers prior to inclusion of county per diem road workers in the ERS's membership. The section has not been subsequently amended. The judges do not dispute that in its present form the section does not apply to them. (top)

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2. Unless the context expressly indicates otherwise, hereinafter, every reference to section 88-58 is intended to be a reference to the 1969 version of the section. (top)

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3. We fully appreciate that in a September 30, 1971 letter from this office to the ERS we addressed a request nearly identical to the judges' question. We also recognize that our conclusion here is diametrically opposed to the conclusion we reached in 1971. However, as explained in greater detail at pages 5-7 of this opinion, the Supreme Court's decision in Vail v. Employees Retirement System, 75 Haw. 42, 856 P.2d 1237 (1993), requires a rescission of the advice provided in our 1971 letter. (top)

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4. As the Supreme Court explained in Vail, this section represents the ERS's exercise of the discretionary power it has under section 88-43, HRS, to exclude part-time per diem employees from ERS membership even though per diem employees as a class are afforded membership in the ERS pursuant to section 88-42, HRS. 75 Haw. 63-66, 856 P.2d at 1239-40.(top)

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5. This section specifies that when a member has service comprised of both part-time and

full-time employment, the service will be converted entirely to full-time equivalents before retirement benefits are computed. (top)

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6. Judges also receive an annuity in an amount equal to the actuarial equivalent of their accumulated contributions, i.e., semi-monthly deductions of 7.8 percent of gross compensation paid over to the ERS by the Judiciary pursuant to section 88-45, HRS. HRS § 88-74(3). The judges' requests do not differentiate between the portion of their retirement benefits derived by section 88-74(3)(A)'s formula and the portion generated as an annuity from their accumulated contributions of gross compensation. (top)

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7. This definition of "prior service" was enacted in the same section of the act, i.e., Act 110, 1969 Haw. Sess. Laws 94, that added the version of section 88-58 upon which the judges base their claim for additional credited service.(top)

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8. One judge variously asserted that he is entitled to (1) an additional 17 months of service credit, i.e., for the period beginning when he was first appointed a per diem judge until July 1, 1982, when section 88-58 was amended to read as it presently reads, (2) the entire six years of this first per diem appointment, and (3) the combined duration of his three terms as a per diem judge until his appointment as a full-time district judge. The other judge asserts that he is entitled to an additional 118 months of service credit for the entire period he served as a per diem judge.

Although the judges do not appear to have asked this, their question may include an alternative claim of lesser scope, for prior service credit for only the per diem service the judges actually provided, but including the per diem service they provided while relegated to part-time employee status which was not included in their membership service under section 6-21-14(7), HAR, because they worked less than ten days during a month. (top)

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9. Section 6-47, Revised Laws of Hawaii 1955, as amended by section 1 of Act 110, 1969 Haw. Sess. Laws 94, 105, and renumbered and incorporated into the Hawaii Revised Statutes by the Revisor of Statutes pursuant to section 3 of Act 110, 1969 Haw. Sess. Laws 94, 129. (top)