ALFRED ABBOTS,
Petitioner,

v.

BOARD OF TRUSTEES,
PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
Respondent.

Initial Decision: April 9, 1984 Final Agency Decision: June 20, 1984

Approved for Publication by the Director of the Division of Pensions,
Douglas Forrester: March 6, 1985

SYNOPSIS

Petitioner appealed from a decision of the Board of Trustees denying his request to purchase credit for a portion of the total time he spent in the military, pursuant to N.J.S.A 43:15A-60.1.

The administrative law judge assigned to the case found petitioner was a veteran of service with the National Guard and the United States Army, from August 14, 1950 through October 30, 1953, and that based upon this service he had applied for a military service purchase request. In allowing a partial purchase of credit, the Board excluded petitioner's service from August 14, 1950 through June 4, 1951, declaring it was not active duty as required by N.J.S.A 43:15A-60.1 but merely a training period.

The judge found that although during the period in dispute, petitioner was a National Guard member attending military training school, this period was eligible for the purchase of credit. While recognizing that in some instances there is a valid distinction between "active duty" and "active duty for training," in this instance no such distinction was present since petitioner had been ordered to attend the training in direct preparation for his service in the Korean conflict. The judge adopted a test of eligibility which determined if the training service was short and voluntary as opposed to involuntary and part of an overall active engagement.

Accordingly, the judge concluded that petitioner was entitled to purchase credit for the entire period of his military service.

Upon review, the Board of Trustees of the Public Employees' Retirement System adopted this decision as its own.
Alfred Abbotts, Esq., pro se
Charlotte Kitler, Deputy Attorney General, for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

Initial Decision

LAVERY, ALJ:
Alfred Abbotts, Esq. (petitioner) appeals from a decision by the Board of Trustees, Public Employees’ Retirement System (Board) to deny his request to purchase credit for a portion of the total time he spent in military service. He seeks relief pursuant to N.J.S.A. 43:15A-60.1.

PROCEDURAL HISTORY
This matter was initiated after a partial refusal by the Board of petitioner’s request to purchase, at its meeting of August 16, 1983. Petitioner made timely appeal by letter of September 13, and the Board at its meeting of September 21, 1983, granted a hearing. It filed the matter as a contested case with the Office of Administrative Law on September 30, 1984.

ISSUES
The general issue in this case is exclusively a legal question. What must be resolved is: whether N.J.S.A. 43:15A-60.1, as administratively interpreted by the Board, bars petitioner from purchasing credit retroactively for a certain portion of his military service.

Before answering this overall question, two threshold inquiries must be made:

Issue No. 1. May the Division rely on other statutes, regulations, and prior Attorney General’s advice to administratively interpret the act by analogy?

Issue No. 2. If so, did the Division of Pensions and the Board correctly interpret the act, using these aids, when they ruled that petitioner’s military service from August 14, 1950 to June 4, 1951, was not “active military service,” and thus should not be credited for purchase?

BURDEN OF PROOF
The burden of proof falls on petitioner, who must carry it by a preponderance of the credible evidence.
UNDISPUTED FACTS

Petitioner is a veteran of service with the National Guard and the United States Army. As a result of that service, on June 21, 1982, he executed a military service purchase request form. Under the printed terms on this Division form the costs would be borne entirely by himself. His biweekly salary was then $2,024.35. Petitioner sought credit for the length of his sojourn in the military: August 14, 1950 through October 30, 1953.

In response, the Division partially denied his request. It stated that his eligibility for military service purchase credit was limited to two years. The Division wrote that only service during war or national emergency, not exceeding five years, would be considered as eligible service. Petitioner had a choice of submitting either a lump sum payment of $16,874.76 or, in the alternative, making 130 payments at the rate of $151.50 per period, for a total cost of $19,695. In effect, the Board excluded petitioner’s service from August 14, 1950 through June 4, 1951, while crediting 2 remaining years. The entire length of the ten months in dispute (i.e., August 15, 1950 through June 4, 1951) falls within the statutory term defining the “Korean Conflict”: June 23, 1950, and prior to July 27, 1953. N.J.S.A. 43:15A-6p(11).

Petitioner protested this rejection. He forwarded to the Division a documentary history of his military service. The duty assignment during this time frame in dispute was described therein as “active duty for training.” The Division nonetheless maintained its refusal. It felt that the portion of time served as a National Guard member attending military training school in Ft. Sill, Oklahoma under the rubric of “active duty for training” could not be credited to petitioner.

With the issue thus joined, the Board of Trustees at its meetings of April 20, 1983 and August 16, 1983 reviewed the written record. It continued to conclude that “active duty for training” was not “active duty.” By extension, the Board reasoned further that “active duty for training” could not be thought of as “active military service,” within the meaning of N.J.S.A. 43:15A-60.1. Thus, the disputed time period could not be credited.

Petitioner appealed for plenary hearing, and these proceedings ensued.

ADVERSARY ARGUMENTS

In petitioner’s view, the Board cannot narrow the definition of “veteran” set forth at N.J.S.A. 43:15A-6p(11), nor can it further interpret the meaning of “active military service” envisioned in the act. The language in either section delegates no authority to so regul-
late. Consequently, these two statutes must serve as the sole guides for the Board. Petitioner emphasizes further that there are only two exceptions which would void his status as a "veteran" of service in the Korean Conflict between June 23, 1950 and July 27, 1953. The first arises from education or training under the Army Specialized Training Program or Navy College Training Program. The second is assignment during those years as a cadet or midshipman. It is undisputed that petitioner comes within neither exception. Therefore, since the ten months credit under dispute here falls within the above statutory time frame, the Board has no discretion to deny it.

As to the "active military service" described in the act, petitioner testified that, on June 23, 1950, there was a state of emergency declared by the President following the invasion of South Korea by the North. At the time, he had been accepted at Harvard Law School. Nevertheless, he was directed by his commander, through orders issued under authority of the Governor, to proceed to Fort Sill in Oklahoma. He there received advance training as an artillery officer. He thereafter even served as an Instructor. Ultimately, he was assigned to the war theatre, without any break in service. Petitioner strenuously argues that he had no choice in these assignments, as a matter of fact. At the time, this was not unusual. A nationwide draft was in effect. He differed from those drafted only because of his status as a National Guardsman. Had he been in a federal unit, there would have been no clear distinction. At Fort Sill, varying administrative designations in wartime were not uncommon. Once in Oklahoma, repeated new orders continued his assignment.

Perceiving that he was to be retained indefinitely, he applied for a regular U.S. Army competitive tour in June 1951. Eventually, his status of record changed as a result of this application. He was shipped then to Korea in a regular army capacity. Petitioner participated in major battles of the war. Relating past interpretation in other government agencies, petitioner also recalled that, when serving as a federal employee, as an Assistant United States Attorney for the district of New Jersey, his full service was credited. He observes also that the Board cannot even argue there is burdensome cost to the State. He alone must pay the nearly $17,000 lump sum contributions necessary to receive the credit sought.

Finally, petitioner disagrees that any of the Attorney General's opinions cited can be applied. They treat the Reserve Forces Training Act of 1955. The latter has no bearing on his circumstances. It was enacted two years after the close of the Korean Conflict. Reference to a Civil Service subpart is equally uninformative. That regulation was
issued in 1973, well in advance of the act's effective date. N.J.S.A. 43:15A-60.1. If the pension statutes are to be liberally construed, as the judicial precedents make clear, the Board has failed in its duty.

The Board responds that it is not singling out petitioner through any unique interpretation of the act. Rather, this is an example of uniform construction which it applies to all requests for purchase. "Active military service" is not defined in the act. Neither is there any legislative history to provide insight. As a result, the Board has been left to its own devices. It has therefore resorted to permissible analogy. It is relying on Att'y Gen. Form. Op. 1958—No. 2, and an informal opinion by Deputy Attorney General Steven S. Raden, dated May 3, 1962 (unpublished). It has referred as well to subpart 17-3.102b of the Civil Service Personnel Manual (State Service)\(^1\). The Board has been further influenced by N.J.S.A. 38:23-4 et seq., which distinguishes "active duty for training" from "active duty."

The Board concedes that it can provide no evidence of exposure potential for the fund, nor does it dispute petitioner's assertion that the only monies contributed to the fund are his own.

**FINDINGS OF FACT**

I find as fact those previously discussed uncontested facts.

As to CONTESTED matters, pursuant to N.J.A.C. 1:1-16.3(c)7, I FIND that petitioner was ordered to Fort Sill, Oklahoma, without option to refuse. He served thereafter involuntarily.

**ANALYSIS AND CONCLUSION**

*Issue No. 1:* May the Division rely on other statutes, regulations, and prior Attorney General's advice to administratively interpret the act by analogy?

There is little doubt that the Board may interpret the act by reference to reasonably analogous laws and regulations which apply to similar persons, things or relationships. 2A Sutherland, Sec. 53.03. There are limits, of course, to the probative force of such analogies. Such an approach may serve only as a general criterion for showing the general course of legislative policy through reference to several sources of equal dignity. 2A Sutherland, Sec. 53.05. Interpretation also should be tempered with the knowledge that the statute, or other source seen as analogous, may have been drafted with an intention to project a different meaning than the act under scrutiny. *Ibid.*

---

\(^1\)Now codified at N.J.A.C. 4:2-17.3.
After reviewing the statutory and regulatory authorities relied upon by the Board, it does not seem an unreasonable construction to equate "active duty for training," normally as imposing only a temporary removal from civilian life, solely for purposes of training. Nor is there great strain required to view "active duty" as full time, nontraining duty carried out in the regular course of "active military service." Under normal circumstances then, administrative convenience might permit the Board, in a threshold screening, to first categorize "active duty for training" as something apart from both "active duty" and "active military service," as set forth in the act.

Issue No. 2: If so, did the Division and the Board correctly interpret the act, using these aids, when they ruled that petitioner's military service from August 14, 1950 to June 4, 1951 was not "active military service" and thus should not be credited for purchase?

As noted above, the Board's administrative latitude in interpretation of the act is not without boundaries. In this particular case, the Board has exceeded the limits of its reasonable discretion. Nowhere in the act itself, or in any legislative history of record, is there a definition of "active military service." Consequently, even when falling back on construction by analogy, the Board must still afford a scrupulous regard to the act's overall legislative intent:

... it is the proper function, indeed the obligation, of the judiciary to give effect to the obvious purpose of the legislature, and to that end "words used may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms.


Lacking a legislative history, judicial precedents sometimes shed light on "the spirit of the legislative direction" underlying statutory language. Petitioner correctly asserts that pension statutes are to be liberally construed and administered in favor of the persons intended to benefit thereby. *Salz v. State House Commission*, 32 N.J. Super. 230, 235 (App. Div. 1954) aff'd 18 N.J. 106 (1955); *Geller v. Department of the Treasury of New Jersey*, 53 N.J. 591, 597 (1969). In addition, the granting of veterans' benefits is not normally thought of as a task to be undertaken with a narrow perspective:

... every consideration of fairness and justice makes it imperative that the statute (citation omitted) should be construed as liberally
as possible so that military service should entail no greater set-
back in the private pursuit or career of the returning soldier than
is unavoidable.

_Kaye v. General Cable Corp._, F2d 653, 654 (3rd Cir. 1944). _See also,

More to the point, the New Jersey courts have examined the crucial
technical phraseology relied on by the Board: "active duty for train-
ing." The gist of those cases is that, where the training service is _short
term and voluntary_ as opposed to _involuntary_ and part of an overall
_de facto_ active engagement, statutory benefits (e.g. veteran's
preference; compensation) will not be granted. _McHale v. Civil Service
active duty has been served, the benefits are granted.

The foregoing analysis suggests that petitioner is entitled to
purchase credit for the ten months at issue. Petitioner credibly testified
that he was ordered by his commander to attend the training at Fort
Sill as part of the overall participation by thousands of military-age
men in the Korean War. He had no option to refuse. Petitioner
testified with total believability that this forced him to forego imminent
legal education. The record of his stay at Fort Sill on "active
duty for training" is continuous with his "active duty" begun in June
1951. It was plainly preparation for assignment to the front line war
in Korea. He was a participant in the conflict meriting veteran's
preference for all those called up. It is not possible to divorce peti-
tioner's ten months of preparation from his active engagement in voluntarily wartime duty. A rose by any other name remains a rose.

Petitioner was eventually shipped to the field of battle at great
personal sacrifice. The fact that "active duty for training" may reason-
ably be held in the abstract to signal less than regular army "active
duty" should not be dispositive here. The facts of this case are not
abstract. Petitioner, from August 14, 1950 onward, served in "active
military service" in every sense but the technical, as superimposed by
the Board's analogous interpretation. In a routine case, the Board
might reasonably assert that an "active duty for training" assignment
should not warrant purchase credit. Usually, such a tour is voluntary,
short-term and only for training. However, the specific facts of this
case are not routine. Mechanical application of the Board's policy here
would conflict with the act's intent. It should therefore be set aside,
as a matter of law.
ORDER

I ORDER, therefore, that petitioner be permitted to purchase credit for his active military service beginning on August 14, 1950 through the end of the period disputed here, June 4, 1951.

FINAL DECISION BY THE BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM:

The Board of Trustees of the Public Employees' Retirement System at its meeting on June 20, 1984 reconsidered their previous action of May 16, 1984 wherein it rejected the findings of the administrative law judge.

The Board with its inherent authority to reopen an administrative matter reviewed the decision and by majority vote approved your request to purchase military service credit from August 15, 1950 to June 4, 1951.

Your account is being transferred to the Purchase Section for calculation and you will be notified of the cost and terms of the purchase.