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Crime Shouldn't Pay: A Pension Forfeiture Statute for New York

New York State Commission on Government Integrity

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CRIME SHOULDN'T PAY:

*A Pension Forfeiture Statute
For New York*

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New York State Commission on Government Integrity

May 1988

Crime Shouldn't Pay:
A Pension Forfeiture Statute for New York

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May 31, 1988

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I.

Introduction

New York State currently has no policy mandating the forfeiture of pension benefits by a public official who has been convicted of a crime. No matter how serious the offense or how grossly an official has abused his or her public office, the current laws which govern the pension plans for state employees, as well as municipal employees outside New York City, make no provision for forfeiture. A state or local government employee who otherwise meets the age and length of service requirements for a pension contained in New York's Retirement and Social Security Law is entitled to collect pension benefits, at public expense, even if he or she has betrayed the public trust and been convicted of a crime related to the betrayal of that trust.

Pursuant to the Commission's charge that it examine "the adequacy of laws, regulations and procedures relating to ... assuring that public servants are duly accountable for the faithful discharge of the public trust reposed in them,"¹ the New York State Commission on Government Integrity has considered the need for a pension forfeiture statute in New York. We have explored in detail how other states have addressed this important but difficult question. We have concluded that the cause of government integrity would be promoted by the prompt passage of

¹ Executive Order No. 88.1 at 1 (April 21, 1987).

pension forfeiture legislation along the following lines:

1. Employees who join the retirement systems of New York State or any political subdivision thereof (including New York City) after the effective date of the new law should forfeit their publicly financed retirement benefits if convicted of a felony in state or federal court which constitutes a breach of their official duties or responsibilities.

2. In order to avoid undue hardship, the spouse, children, or other dependents of a convicted public employee should be entitled to assert a claim, based on financial need, to a portion of the employee's pension benefits, provided they had no culpability for the acts upon which the felony was based.

No pension forfeiture law can guarantee that public officials will remain faithful to their public trust. At a minimum, however, passage of such legislation would forcefully proclaim this State's determination to hold public officials to a high standard of ethical conduct and its refusal to underwrite the breach of that standard.

II.

Current Law and Practice

The case of convicted former Syracuse mayor Lee Alexander dramatically illustrates the problem created by the lack of a pension forfeiture statute in New York. Alexander pleaded guilty in January 1988 to federal charges that he turned the Mayor's office into a racketeering enterprise and extorted at least \$1.2 million from contractors doing business with the City

during his 16 years as Mayor. He was sentenced in March to ten years in prison. Nonetheless, he draws an annual state pension of \$18,715.54.

The same is true of a number of former highway superintendents who recently pleaded guilty to federal corruption charges of defrauding their local governments in connection with the purchase of materials and equipment. They are eligible for or are already receiving annual state pensions ranging from \$4,800 to \$14,700 a year.

The pensions of corrupt judges are likewise insulated. Former State Supreme Court Justice William C. Brennan was convicted in December 1985 of accepting or agreeing to accept close to \$50,000 in bribes over ten years to fix four criminal cases. A federal jury found him guilty of racketeering, conspiracy and interstate travel in aid of bribery. Released after serving 26 months in prison, he receives a \$41,236 annual state pension. The former Supreme Court Justice and Administrative Judge of Queens County, Francis X. Smith, who was convicted of perjury in 1987 in a probe of alleged extortion involving cable television franchises, receives a \$47,788 annual pension.

Convicted New York City employees are similarly rewarded. John Cassiliano, a former superintendent of the City

Sanitation Department's Bureau of Waste Management, pleaded guilty to three counts of a multi-count federal racketeering indictment which charged him with accepting over \$660,000 in bribes and payoffs. Over an eight-year period, Cassiliano permitted millions of gallons of hazardous and chemical waste to be dumped, much of it furtively at night, in New York City's municipal solid waste landfills, collecting payoffs in return. While New York City still struggles, at a cost of millions of dollars, to clean up the environmental damage Cassiliano left behind, taxpayers are footing a second bill: in the six years since Cassiliano retired on April 22, 1982, he has collected over \$122,166 in retirement benefits. His annual retirement allowance from the New York City Employees Retirement System ("NYCERS") is \$20,618.93.²

Cassiliano is not alone. Alex Liberman, the former Deputy Director of the New York City Department of General Services, pleaded guilty in June 1984 to a federal racketeering charge of extorting or attempting to extort over one million dollars from building owners seeking to lease space to the City and received a 12-year prison sentence. Nonetheless, he draws a \$9,950.65 annual City pension.

Over half a million dollars is paid annually to 29

² Cassiliano's right to a pension under current law was upheld by the Court of Appeals in Cassiliano v. Steisel, 64 N.Y.2d 674, 485 N.Y.S.2d 514 (1984).

former City employees (including 24 former New York City Housing Authority workers) convicted of various job-related crimes. One former Housing Authority supervisor, convicted in a federal bribery and extortion probe, is eligible for a \$46,964 annual pension; the fact that he was sentenced to over five years in prison and fined \$55,000 has been no impediment to his continued receipt of pension benefits. Twenty-three other Housing Authority employees have likewise found that their criminal conviction records are no bar to eligibility for public pensions ranging from \$11,358 to \$32,597 annually.

Only in certain of the plans which cover New York City employees is there, at best, an indirect forfeiture mechanism. With several important exceptions, members of the City's retirement systems must be "in city service" immediately prior to retirement in order to receive a pension and must be "in city service" immediately prior to resigning in order to acquire a vested right to a future retirement allowance.³ Certain City pension plans require a 30-day waiting period between the filing of an application to retire (or an application to vest) and the effective date of the retirement or vesting.⁴ This gives the City 30 days, when it suspects misconduct on the part of

³ See e.g., N.Y. Adm. Code sections 13-151(1) ("in city service" requirement for members of NYCERS); 13-246 ("in city service" requirement for police pension fund); 13-349 ("in city service" requirement for Fire Department pension fund).

⁴ See, e.g., N.Y. Adm. Code sections 13-151(1); 13-349; 13-360(b)(1)(iv).

an employee, to complete disciplinary proceedings and to terminate the employee, who thereby becomes ineligible for a pension since he or she is no longer in "city service" on the effective date of the application to retire or vest.

This indirect forfeiture provision, however, contains a gaping loophole, one which several City officials under investigation or indictment have invoked to preserve their pensions. Known as the "Plan B" loophole, certain non-uniformed members of NYCERS who have 15 years of service may elect a "deferred retirement allowance" payable at age 55 which vests automatically upon the employee's discontinuance of city service.⁵ Under present law, an eligible City employee need only switch to Plan B and resign in order to preserve his or her pension.

There are at least three other major New York City plans to which the "in city service" and waiting period forfeiture device does not apply. Certain non-uniformed NYCERS members over age 50 who have completed 25 years of service and who were honorably discharged after military service in time of war may retire even after dismissal without forfeiting their pension.⁶ Under the Teachers' Retirement System, a member with

⁵ N.Y. Adm. Code section 13-173.

⁶ N.Y. Adm. Code section 13-151(2) and (3); see Cassiliano v. Steisel, 64 N.Y.2d 674, 485 N.Y.S.2d 514 (1984) (employee dismissed as a superintendent with the New York City Sanitation Department for clandestinely facilitating the illegal dumping of
(continued...)

the requisite number of years of service may retire immediately after filing an application for service retirement⁷ and is entitled to a retirement allowance even if disciplinary proceedings are pending at the time. Finally, recently hired members of City-supported retirement systems become eligible for a deferred nonforfeitable retirement benefit after 10 years or more of credited service.⁸ There is no exception for termination by dismissal and no waiting period requirement.

The loopholes in New York City's pension laws were recently dramatized by the indictment of 21 City health inspectors on charges of extorting bribes from restaurants. Six of the 21 City health inspectors charged with extortion promptly applied for retirement benefits. All six may be eligible to collect their full pensions under the provision of the City pension law which insulates the pensions of employees honorably discharged after military service in time of war. In addition, three other indicted inspectors may be able to preserve their pension rights by switching to plan B, a step which would

⁶(...continued)

liquid waste was nonetheless entitled to a City pension under special provision for military veterans); Rapp v. New York City Employees' Retirement System, 42 N.Y.2d 1, 396 N.Y.S. 2d 605 (1977) (transit police chief dismissed for misconduct was nonetheless entitled to pension benefits under special provision for veterans).

⁷ N.Y. Adm. Code section 13-545.

⁸ Retirement and Social Security Law, sections 516(a), 612(a).

insulate their pensions even if the City successfully brought timely disciplinary charges against them.

In short, the public pension law in New York is a crazy quilt of contradictory provisions. The law speaks not with one voice, but with many. Employees of New York City are treated differently from state employees. Certain New York City employees are treated differently from others. These disparities cry out for a new, even-handed procedure.

III.

The Need For Reform

New York's retirement systems at all levels of government should be explicitly based on the principle that the faithful and honest performance of a public employee's official duties is as much a precondition to eligibility for a pension as fulfilling the existing statutory age and length of service requirements. In the public sector, pensions are not merely a form of deferred compensation. They are a "reward for faithfulness to duty and honesty of performance."⁹ A public servant who, by engaging in serious criminal misconduct, abuses the power of office and violates the fiduciary duty owed to the public relinquishes any claim to a pension financed by the taxpaying citizens of this State.

⁹ Pell v. Board of Education, 34 N.Y. 2d 222, 238, 356 N.Y.S.2d 833 (1974).

The Commission is not alone in this view. Pennsylvania,¹⁰ Florida¹¹, Georgia¹², Illinois¹³ and Massachusetts¹⁴ have all enacted pension forfeiture statutes which recognize that loyal, honest public service is an essential prerequisite to pension eligibility. (These statutes are attached to this report as Appendix A). In these five states, criminal misconduct related to a public employee's official duties operates to sever the employee's claim to a taxpayer-financed pension.

At the same time, the Commission is mindful that pension forfeiture is a drastic remedy, one that may have harsh consequences for the convicted official's innocent dependents. Particularly where the employee's spouse is elderly and has no independent economic resources, the loss of pension benefits may inflict an unduly severe burden.¹⁵ For this reason, a pension forfeiture statute should leave room for a portion of the

¹⁰ 43 P.S. section 1311, et seq. (1987)

¹¹ 7A F.S.A. section 112.3173 (1987).

¹² 35 Georgia Code section 47-1-22 (1987).

¹³ Ill. Annot. Stat. ch. 108(1/2), section 14-149 (1987).

¹⁴ Mass. Gen. Laws ch. 32, section 15(4) (1988).

¹⁵ See Eyers v. Public Employees' Retirement System, 91 N.J. 51, 449 A.2d 1261 (1982) (widow of convicted public employee entitled to survivors' benefits calculated to exclude credit earned subsequent to year during which misconduct was committed).

convicted employee's pension to be paid to the employee's financially dependent spouse, children or other beneficiaries.

Recently, the New York State Comptroller introduced pension forfeiture legislation identified as Senate Bill 8069 (hereinafter "S-8069", a copy of which is attached as Appendix B) which, if enacted, would go far toward addressing the Commission's concerns. In substance, that proposed legislation provides that public employees who join the State's retirement systems after the effective date of the new statute will forfeit their publicly financed retirement benefits if convicted of a felony that constitutes a breach of their official duties or responsibilities. At the same time, the bill empowers a judge to direct the payment of benefits to a convicted official's financially needy spouse or dependents, provided they had no culpability for the acts upon which the felony conviction was based.

With the modifications discussed below, the Commission favors the prompt passage of pension forfeiture legislation along the lines of S-8069. It is time New York put an end to the unjustified and unjustifiable practice of pensioning corrupt officials at public expense.

IV.

The Commission's Recommendations

1. Persons Subject To Forfeiture

Any pension forfeiture measure should apply equally to members of all public pension systems. Employees of New York City should be treated in the same manner as state and other municipal employees. S-8069, however, applies only to members of the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System. It does not cover members of the five New York City pension systems. This is a serious omission.

In contrast, legislation recommended for passage by the New York City Council last year suffers from an equal but opposite flaw. Assembly Bill 6293, "home-ruled" by the City Council on June 30, 1987, is couched as an amendment to Public Officers Law section 30(1)(e) and is designed, in part, to address the situation where the official's misconduct is discovered after he or she has resigned or retired. The City's bill deems a convicted public employee to have been constructively removed from office on the date of the first act or omission constituting an element of the crime. The City's theory is that the convicted employee will thereby automatically lose his or her eligibility for a pension since, in order to receive retirement benefits, a member of a City retirement system

must be "in City service" on the date of his retirement or resignation.¹⁶

The City's bill has limited applicability. It would exempt all state officials and all local officials not employed by New York City:¹⁷ by its terms, it applies only "with respect to a local office in a city with a population of one million or more." Second, it is not clear that it would apply to all public employees in New York City since it applies only to those covered by the Public Officers Law, a category of employees not readily defined.¹⁸

Any pension forfeiture statute should apply uniformly to all public employees in this State. For this reason, S-8069's forfeiture scheme should be extended to include members of all public pension systems, including New York City's.¹⁹

¹⁶ City Council Stated Meeting, Report of the Committee on State Legislation, M-354, June 30, 1987 at 1427-29.

¹⁷ Other measures submitted on behalf of New York City -- Assembly Bills 6040, 6041, 6042 and 6292 -- which would impose a 60-day waiting period in all five of the City's pension systems and close the veterans' loophole, are similarly restricted in their applicability to New York City's pension systems.

¹⁸ For example, it has been held that while the person who heads an office is a "public officer", persons to whom he or she delegates the work, such as a deputy, are not. Application of Sweeney, 1 Misc.2d 125, 147 N.Y.S.2d 612 (1955).

¹⁹ See, e.g., Senate Bill 8376 ("S-8376"), which is modeled on S-8069. As presently drafted, S-8376 contains a number of ambiguities which require clarification. For instance, language in section 6 of S-8376 providing for the return of a member's
(continued...)

2. Event Triggering Forfeiture

The purpose of a pension forfeiture statute is to withhold public tax dollars from the employee who has broken faith with the public and breached in a significant way the fiduciary duty owed to the citizens of this State. Consequently, pension forfeiture should be limited to those public employees whose crimes are both serious and job-related.

In light of the important role played by federal law enforcement efforts in the area of public corruption, forfeiture legislation should apply to federal, as well as state, felony convictions. This approach is adopted in S-8069, which provides that forfeiture of pension benefits is triggered by a conviction of "any felony which is based on acts or omissions which constituted a breach of the official duties or responsibilities of [a] member's or retiree's public employment." The proposed legislation applies not only to felony convictions in New York

19 (...continued)

contributions refers only to contributions to the New York City Employees' Retirement System. It should be made clear that this provision of S-8376 (as well as all others) applies to members of all New York City pension systems: NYCERS, the New York City Police Pension Fund, the Fire Department Pension Fund, the New York City Teachers' Retirement System and the Board of Education Retirement System. Similarly, it is not clear whether S-8376 extends to New York City employees S-8069's procedure for forfeiture in the wake of a federal conviction. This ambiguity should be removed to make it clear that the pensions of New York City employees convicted on federal charges are subject to forfeiture under the procedures set forth in sections 3 and 4 of S-8069 and S-8376.

State court but to federal and out-of-state felony convictions as well.

Since it is a "conviction" that triggers forfeiture, it would be helpful to define that term in the forfeiture statute. Following the lead of the Florida law,²⁰ a statutory definition of "conviction" should be included covering not only a judge's or jury's verdict of guilty, but also a plea of guilty or nolo contendere or an Alford plea.²¹

3. Extent of Forfeiture

The proper measure of the forfeiture to be imposed on a convicted employee is the publicly financed portion of the employee's retirement benefit. A convicted employee should not be deprived of the contributions which he or she has made over the years to the retirement system.

Under S-8069, an employee who is convicted of a felony which constitutes a breach of his or her duties or responsibilities of public employment "shall forfeit all rights or benefits to which he or she may have been otherwise entitled" at the time of conviction (emphasis supplied). S-8069 provides,

²⁰ See 7A F.S.A. section 112.3173(2)(a)

²¹ See North Carolina v. Alford, 400 U.S. 25 (1970) (authorizing acceptance of a guilty plea which is accompanied by a contemporaneous denial of acts constituting the crime).

however, that the employee's right to the return of his or her own contributions to the retirement system remains unaltered. In addition, the court may order that certain retirement benefits be paid to the employee's spouse, dependents and/or designated beneficiaries.

Pension forfeiture legislation should explicitly spell out that the convicted employee is entitled to the return of his or her contributions with interest at the statutory rate²² subject, however, to a provision, similar to one found in the Pennsylvania statute,²³ which would allow for the satisfaction out of the employee's contributions of any outstanding order requiring the employee to make restitution to New York State or any political subdivision thereof for any monetary loss suffered as a result of the criminal offense.

4. Forfeiture Procedure

Because the forfeiture of an employee's pension benefits is a serious step, it is important that the convicted employee be afforded all the guarantees of due process which inhere in a formal legal proceeding before a forfeiture is imposed. For this reason, the power to order a forfeiture should

²² See Retirement and Social Security Law sections 517(b), 613(c).

²³ See 43 P.S. sections 1313(d), 1314.

be vested in the judiciary.

The legislative scheme set forth in S-8069 vests in New York State court judges the power to order a forfeiture of retirement benefits. The legislation creates two alternate forfeiture procedures depending upon whether the public employee has been convicted in a New York State court or in a federal or out-of-state court.

In the case of a felony conviction in New York State court, the legislation assigns to the state court sentencing judge the responsibility for determining whether a forfeiture shall occur. The finding which the sentencing judge is required to make is a narrow one: whether "the defendant has committed a felony based on acts or omissions which constituted a breach of defendant's official duties or responsibilities of public employment." The burden of proving job-relatedness by a preponderance of the evidence rests on the district attorney.

If the sentencing judge finds that the defendant has committed a felony involving a breach of his or her official duties, the judge must issue an order directing the appropriate retirement system to terminate the defendant's rights or benefits. The termination of pension benefits follows automatically upon a finding that acts or omissions upon which the conviction was based were job-related. The judge may,

however, make a supplemental finding and award certain benefits to the employee's spouse, dependents and/or designated beneficiaries.

In the case of a felony conviction in federal court or a jurisdiction outside New York, S-8069 empowers the Attorney General (with the advice and consent of the State Comptroller) to initiate a proceeding in New York Supreme Court to determine whether a forfeiture shall be imposed. As above, the burden rests on the State to prove by a preponderance of the evidence that the acts or omissions on which the felony was based involved a breach of the employee's official duties or responsibilities. If the court so finds, it must issue an order directing the appropriate retirement system to terminate the employee's rights or benefits. As in the case of the New York state court offense, the judge is empowered to award certain benefits to the employee's spouse, dependents and/or designated beneficiaries.

With the reservations set forth in subsection 5 below, the Commission endorses this procedure.²⁴ The assignment of the

²⁴ The Commission has some concern about the language in S-8069 which appears to require the "advice and consent of the state comptroller" before the Attorney General may initiate a forfeiture proceeding based on a federal felony conviction. While the Commission recognizes the need for the Comptroller to share forfeiture-related information with the Attorney General, the Commission would not favor giving the Comptroller veto power over the Attorney General's initiation of forfeiture proceedings.

forfeiture responsibility to the sentencing judge in state felony cases serves the interests of judicial economy and vests the forfeiture responsibility in the judge most familiar with facts of the underlying criminal offense.

The analogous procedure for federal convictions will perhaps be most effective if procedures can be set in place to insure that the Attorney General is promptly notified by federal authorities of the federal conviction.

S-8069 does not make clear what effect, if any, the pendency of an appeal of the underlying criminal conviction will have on the imposition of a forfeiture. New York should follow the example of Pennsylvania and Florida²⁵ and suspend the payment of benefits pending an appeal, provided, of course, that the necessary finding of job-relatedness has been made by the forfeiture judge. As in Pennsylvania, New York should include a provision which explicitly spells out that, in the event that the criminal conviction is reversed on appeal, the employee or retiree is entitled to all benefits, including those accruing during the period of forfeiture.²⁶

²⁵ See 43 P.S. section 1313(b); 7A F.S.A. section 112.3173(5)(c).

²⁶ See 43 P.S. section 1313(b).

5. Special Protective Provision for Spouse, Dependents and Designated Beneficiaries

Pension forfeiture is a drastic remedy, one which may have harsh consequences for the convicted employee's innocent dependents. Where, for example, the employee's spouse is elderly and lacks independent economic resources or where the convicted employee is the sole support for dependent children or parents, the loss of pension benefits may inflict an unduly severe burden. For this reason, a judge should be given discretion to evaluate the financial circumstances of dependents and to order that some portion of the convicted employee's state-financed pension be paid directly to them.

In a novel but vague provision, S-8069 authorizes the forfeiture judge to award certain benefits to the employee's spouse, dependents and/or designated beneficiaries. The bill provides that in the event the court determines that the employee's retirement rights have been forfeited, it may make the following supplemental finding:

The court, in its discretion, after taking into consideration the financial needs and resources of the spouse, dependents and/or designated beneficiaries of the convicted member or retiree, may order that any benefits that would otherwise be payable to or on behalf of the member or retiree but for the determination that retirement system rights have been forfeited, be paid to or on behalf of the spouse and/or dependents and/or designated beneficiaries, provided that the court determines that the spouse, dependents

or designated beneficiaries had no culpability with regard to the crime or crimes for which the member or retiree was convicted.

There are several troubling aspects to this mitigative provision. First, the forfeiture judge is given no guidance as to the amount which may be awarded to the spouse or dependents. The Commission recommends that the spouse, dependents or designated beneficiaries should not be awarded more than they would have received had the employee elected to receive a joint allowance.²⁷ Further, in computing the pension amount payable to the spouse, dependents, or beneficiaries, any salary earned and years of service accrued by the convicted employee on or after the date of the first act or omission constituting an element of the felony should be excluded from the benefit calculation. In this way, the benefits paid to the spouse or dependents will be based only on service that has been untainted by the public employee's criminal conduct.

²⁷ As presently drafted, S-8069 allows the judge to order that the spouse, dependents, or other beneficiaries be paid "any benefits that would otherwise be payable to or on behalf of the member or retiree but for the determination that retirement system rights have been forfeited." This could conceivably provide the spouse or other beneficiary of a convicted official with a greater benefit than he or she would have been entitled to had the pensioner had no criminal record and retired in the ordinary course, electing a joint allowance. The benefit payable to the spouse of the convicted official should not exceed that which a spouse is entitled to as a surviving beneficiary under a joint allowance option. In any event, any benefits ordered paid to the spouse, dependents or designated beneficiaries should be made payable to them alone.

In addition, the judge should be directed by statute to take into consideration, in assessing the amount to be awarded to the spouse, dependents or other designated beneficiaries, two other factors: whether they reaped any financial benefit from the employee's crime, and whether the employee has elected to withdraw his or her contributions from the pension system. If so, the extent of the financial benefit and the amount of the withdrawn contributions should be taken into account by the judge before an award is made.

The present legislation also contains certain procedural drawbacks. For state court criminal convictions, notice of the forfeiture hearing must be sent by the court clerk to "the defendant, his counsel, the district attorney and the state comptroller." No notice is required to be sent to the spouse, dependents or other designated beneficiaries.²⁸ It is therefore uncertain that the judge will be provided with a complete record regarding their "financial needs and resources." The clerk should be required to obtain from the State Comptroller the name and address of the spouse, dependents or other beneficiaries designated by the employee and to give them notice of the forfeiture hearing.

²⁸ Similarly, where the employee has been convicted in federal court, notice of the state court forfeiture hearing must be sent to the defendant and his counsel. There is no requirement that the spouse or other beneficiary be notified.

Finally, it is unclear from the legislation as currently drafted how great a financial need must be demonstrated by the spouse, dependents or other designated beneficiaries in order to justify the supplemental award of benefits. At a minimum, the statute should explicitly provide that benefits are to be awarded only upon a showing of financial hardship.

6. Compatibility with Article V, Section 7 of the New York State Constitution

A frequently cited obstacle to the passage of pension reform legislation in New York is Article V, section 7 of the New York State Constitution, which provides:

After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

New York's highest court, however, has made clear that Article V, section 7 does not set the State's present pension system in stone for all time. Statutory changes lessening pension benefits can be made, provided they apply prospectively to employees entering public service after the effective date of the new legislation.²⁹

²⁹ See Public Employees Federation v. Cuomo, 62 N.Y.2d 450, 478 N.Y.S. 2d 588, 591 (1984):

The purpose of [Section 7 of Article V] was
(continued...)

This is precisely the approach taken by S-8069, which is drafted to apply to employees who join or rejoin the state retirement systems on or after the effective date of the legislation.³⁰ The Commission does not believe that there are valid objections to such prospective legislation under Article V, section 7 of the State Constitution.

V.

Conclusion

The prompt enactment of a pension forfeiture statute as described above would not only punish officials who betray the public trust for corrupt private purposes, but would also serve to deter official wrongdoing. It would put an end to the unseemly practice of subsidizing with public tax dollars those

²⁹ (...continued)

to fix the rights of the employee at the time he became a member of the system ... [A] member's rights [are] frozen as of the date of employment and any changes lessening benefits must be made prospectively.

³⁰ It is not the Commission's intention to suggest that this is the only constitutional approach to pension forfeiture legislation. There is an argument to be made that the common law already deems the duty to render faithful, honest service to be an essential part of the "contractual relationship" protected by Article V, section 7, and that any forfeiture statute which divests current employees and retirees of their pension based on dishonest conduct is thus not an impairment of that contract. For a more detailed review of the law in this area, see Appendix C.

who have abused the power of their office for private gain.

The Commission is mindful that under any legislation which applies prospectively, convicted public officials who are now retired or who entered public service prior to the enactment of a forfeiture statute may retain their pension rights.³¹ But an end will be in sight to the pensioning of corrupt public

³¹ To address this issue, the Nassau County District Attorney's office has proposed legislation that would amend Article V, Section 7 to read as follows:

After July first, nineteen hundred forty, membership in any pension or retirement system of the state or a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired, except that all such benefits shall be forfeited by any member of such a pension or retirement system who shall be convicted, whether during or after public employment, of a felony related to misconduct as a public employee.

Insofar as such a constitutional provision would proscribe dependents' benefits, it goes too far. Moreover, it may still not suffice to mandate forfeiture of the pension rights of incumbent employees or vested retirees. Over a bitter dissent, the Supreme Court of Pennsylvania has held that the retroactive application of a pension forfeiture statute to employees whose pension rights have vested operates as an unconstitutional impairment of the obligation of contracts. See Bellomini v. State Employees' Retirement Board, 498 Pa. 204, 445 A.2d 737 (1982).

officials at taxpayer expense and New York will have laid an important cornerstone for the future of government integrity.

Dated: New York, New York
May 31, 1988

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APPENDIX A

FLORIDA

Florida's pension forfeiture statute, 7A F.S.A. section 112.3173, provides:

112.3173. Felonies involving breach of public trust and other specified offenses by public officers and employees; forfeiture of retirement benefits

(1) Intent- It is the intent of the Legislature to implement the provisions of s.8(d), Art. II of the State Constitution.

(2) Definitions- As used in this section, unless the context otherwise requires, the term:

(a) "Conviction" and "convicted" mean an adjudication of guilt by a court of competent jurisdiction; a plea of guilty or of nolo contendere; a jury verdict of guilty when adjudication of guilt is withheld and the accused is placed on probation; or a conviction by the Senate of an impeachable offense.

(b) "Court" means any state or federal court of competent jurisdiction which is exercising its jurisdiction to consider a proceeding involving the alleged commission of a specified offense.

(c) "Public officer or employee" means an officer or employee of any public body, political subdivision, or public instrumentality within the state.

(d) "Public retirement system" means any retirement system or plan to which the provisions of part VII of this chapter apply.

(e) "Specified offense" means:

1. The committing, aiding, or abetting of an embezzlement of public funds;

2. The committing, aiding, or abetting of any theft by a public officer or employee from his employer;

3. Bribery in connection with the employment of a public officer or employee;

4. Any felony specified in chapter 838;

5. The committing of an impeachable offense; or

6. The committing of any felony by a public officer or employee who, willfully and with the intent to defraud the public or the public agency for which he acts or in which he is employed to the right to receive the faithful performance of his duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his public office or employment position.

(3) Forfeiture- Any public officer or employee who is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of his admitted commission, aid, or abetment of a specified offense, shall forfeit all rights and benefits under any public retirement system of which he is a member, except for the return of his accumulated contributions as of his date of termination.

(4) Notice-

(a) The clerk of a court in which a proceeding involving a specified offense is being conducted against a public officer or employee shall furnish notice of the proceeding to the Commission on Ethics. Such notice is sufficient if it is in the form of a copy of the indictment, information, or other document containing the charges. In addition, if a verdict of guilty is returned by a jury or by the court trying the case without a jury, or a plea of guilty or of nolo contendere is entered in the court by the public officer or employee, the clerk shall furnish a copy thereof to the Commission on Ethics.

(b) The Secretary of the Senate shall furnish to the Commission on Ethics notice of any proceeding of impeachment being conducted by the Senate. In addition, if such trial results in conviction, the Secretary of the Senate shall furnish notice of the conviction to the commission.

(c) The employer of any member whose office or employment is terminated by reason of his admitted commission, aid, or abetment of a specified offense shall forward notice thereof to the commission.

(d) The Commission on Ethics shall forward any notice and any other document received by it pursuant to this subsection to the governing body of the public retirement system of which the public officer or employee is a member or from which the public officer or employee may be entitled to receive a benefit. When called on by the Commission on Ethics, the Division of Retirement of the Department of Administration shall assist the commission in identifying the appropriate public retirement system.

(5) Forfeiture determination-

(a) Whenever the official or board responsible for paying benefits under a public retirement system receives notice pursuant to subsection (4), or otherwise has reason to believe that the rights and privileges of any person under such system are required to be forfeited under this section, such official or board shall give notice and hold a hearing in accordance with chapter 120 for the purpose of determining whether such rights and privileges are required to be forfeited. If the official or board determines that such rights and privileges are required to be forfeited, the official or board shall order such rights and privileges forfeited.

(b) Any order of forfeiture of retirement system rights and privileges is appealable to the district court of appeal.

(c) The payment of retirement benefits ordered forfeited, except payments drawn from nonemployer contributions to the retiree's account, shall be stayed pending an appeal as to a felony conviction. If such conviction is reversed, no retirement benefits shall be forfeited. If such conviction is affirmed, retirement benefits shall be forfeited as ordered in this section.

(d) If any person's rights and privileges under a public retirement system are forfeited pursuant to this section and that person has received benefits from the system in excess of his accumulated contributions, such person shall pay back to the system the amount of the benefits received in excess of his accumulated contributions. If he fails to pay back such amount, the official or board responsible for paying benefits pursuant to the retirement system or pension plan may bring an action in circuit court to recover such amount, plus court costs.

(6) Forfeiture nonexclusive-

(a) The forfeiture of retirement rights and privileges pursuant to this section is supplemental to any other forfeiture requirements provided by law.

(b) This section does not preclude or otherwise limit the Commission on Ethics in conducting under authority of other law an independent investigation of a complaint which it may receive against a public officer or employee involving a specified offense.

GEORGIA

Georgia Code section 47-1-22 provides:

47-1-22 Forfeiture of rights and benefits under membership in public retirement system by public employees after July 1, 1985, for committing public employment related crimes; reimbursement of contributions.

(a) This Code section shall apply to public employees first or again becoming public employees after July 1, 1985.

(b) If a public employee commits a public employment related crime in the capacity of a public employee and is convicted for the commission of such crime, such employee shall forfeit all rights and benefits under and membership in any public retirement system in which the employee is a member, effective on the date of final conviction. Any such public employee shall not at any time after such final conviction be eligible for membership in any public retirement system. Any employee contributions made by any such public employee to any public retirement system during membership in the public retirement system shall be reimbursed, without interest, to the public employee within 60 days after the date of final conviction for the commission of a public employment related crime.

Georgia Code section 47-1-20(5) defines "public employee"

as:

elected and appointed officials and employees of the state or any branch, department, board, bureau, commission, authority or other agency of the state and elected and appointed officials and employees of any political subdivision or authority or other agency of a political subdivision.

Georgia Code section 47-1-20(6) defines "public employment related crime" as follows:

(a) Theft as provided in any one or more of Code Sections 16-8-2 through 16-8-9 when the theft is by a officer or employee of a government in breach

of duties as such officer or employee and conviction for such crime is punishable under paragraph (2) of Code Section 16-8-12;

(b) Any felony provided for in Article 1 of Chapter 10 of Title 16, relating to abuse of governmental office;

(c) Making false statements or concealing facts in matters within the jurisdiction of the state or a political subdivision as provided in Code 16-10-20;

(d) Conspiracy to defraud the state or a political subdivision as provided in Code Section 16-10-21;

(e) Stealing, altering, or concealing public records as provided in Code Section 45-11-1; and

(f) Selling offices or dividing fees as provided in Code Section 45-11-2.

ILLINOIS

A pension forfeiture provision appears in the governing statute of each of several different Illinois retirement systems. A typical provision is found in Ill. Annot. Stat. ch. 108(1/2), paragraph 7-219 (1987), which governs the Illinois Municipal Retirement Fund:

None of the benefits provided for in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his or her service as an employee.

This section shall not operate to impair any contract or vested right acquired under any law or laws continued in this Article, nor to preclude the right to a refund.

All future entrants entering service subsequent to July 9, 1955 shall be deemed to have consented to the provisions of this Section as a condition of coverage.

Similar language may be found in Ill. Annot. Stat. ch. 108(1/2), paragraphs 2-156 (General Assembly and Statewide officials); 3-147 (police officers); 4-138 (firefighters); 5-227 (police officers); 6-221 (firefighters); 8-251 (municipal employees); 9-235 (county employees and officers); 11-230 (laborers); 12-191 (park employees); 13-221 (sanitary district employees); 14-149 (state employees); 15-187 (state university employees); 16-199 (teachers); 18-163 (state judges).

Illinois' highest court has broadly construed Illinois'

forfeiture provision to include both state and federal felony convictions. The Illinois Supreme Court held in Kerner v. State Employees' Retirement System, 72 Ill.2d 507, 382 N.E.2d 243, 246 (1978), cert. denied, 441 U.S. 923 (1979):

In our judgment the legislature's choice of the word "any" evinces an intent to include all felonies, State or Federal, so long as the offense was a "felony relating to or arising out of or in connection with" service as a State employee This literal interpretation accords with the obvious purpose of the statute, to discourage official malfeasance by denying the public servant convicted of unfaithfulness to his trust the retirement benefits to which he otherwise would have been entitled. This construction accords, too, with the related purpose of implementing the public's right to conscientious service from those in governmental positions. In view of this legislative goal, it seems to us plainly immaterial whether the felony involved is defined by the laws of this State, a sister State or the Federal government as long as it arose from, was connected with, or related to the State service.

MASSACHUSETTS

The most recently enacted forfeiture provision in Massachusetts is codified as Mass. Gen. Laws c.32, section 15(4) (1988), which provides:

Forfeiture of pension upon misconduct. In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of section one to twenty-eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated total deductions; provided, however, that the rate of regular interest for the purpose of calculating accumulated total deductions shall be zero.

PENNSYLVANIA

Pennsylvania's Public Employee Pension Forfeiture Act
is codified at 43 P.S. section 1311, et seq.:

§ 1311. Short title

This act shall be known and may be cited as the "Public Employee Pension Forfeiture Act."

§ 1312 Definitions

The following words and phrases when used in this act shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Crimes related to public office or public employment." Any of the following criminal offenses as set forth in title 18 (crimes and offenses) of the Pennsylvania Consolidated Statutes or other enumerated statute when committed by a public official or public employee through his public office or position or when his public employment places him in a position to commit the crime:

- (1) § 3922 (relating to theft by deception);
- (2) § 3923 (relating to theft by extortion);
- (3) § 3926 (relating to theft of services);
- (4) § 3927 (relating to theft by failure to make required disposition of funds received). The provisions of paragraphs (1) through (4) shall only apply when the criminal culpability reaches the level of a misdemeanor of the first degree or higher;
- (5) § 4101 (relating to forgery);
- (6) § 4104 (relating to tampering with records or identification);
- (7) § 4113 (relating to misapplication of entrusted property and property of government or financial institutions) when the criminal culpability reaches the level of misdemeanor of the second degree;
- (8) § 4701 (relating to bribery in official and political matters);
- (9) § 4702 (relating to threats and other improper

influence in official and political matters);

(10) § 4902 (relating to perjury);

(11) §4903(a) (relating to false swearing);

(12) § 4904 (relating to unsworn falsification to authorities);

(13) § 4906 (relating to false reports to law enforcement authorities);

(14) § 4907 (relating to tampering with witnesses and informants);

(15) §4908 (relating to retaliation against witness or informant);

(16) § 4909 (relating to witness or informant taking bribe);

(17) §4910 (relating to tampering with or fabricating physical evidence);

(18) § 4911 (relating to tampering with public records or information);

(19) § 5101 (relating to obstructing administration of law or other governmental function);

(20) § 5301 (relating to official oppression);

(21) § 5302 (relating to speculating or wagering on official action or information);

(22) Article III, act of March 4, 1971 (P.L 6, No.2), known as the "Tax Reform Code of 1971." [72 P.S. § 7301 et seq.]

In addition to the foregoing specific crimes, the term also includes all criminal offenses as set forth in federal law substantially the same as the crimes enumerated herein.

"Political subdivision." Any county, city, borough, incorporated town, township, school district, vocational school district, intermediate unit, municipal authority, home rule, optional plan or optional charter municipality, and any agencies, boards, commissions, committees, departments, instrumentalities, or entities thereof designated to act in behalf of a political subdivision either by statute or appropriation.

"Public official" or "public employee." Any person who is

elected or appointed to any public office or employment including justices, judges of the peace and members of the General Assembly or who is acting or who has acted in behalf of the Commonwealth or a political subdivision or any agency thereof including but not limited to any person who has so acted and is otherwise entitled to or is receiving retirement benefits whether that person is acting on a permanent or temporary basis and whether or not compensated on a full or part-time basis. This term shall not include independent contractors nor their employees or agents under contract to the Commonwealth or political subdivision nor shall it apply to any person performing tasks over which the Commonwealth or political subdivision has no legal right of control. However, this term shall include all persons who are members of any retirement system funded in whole or in part by the Commonwealth or any political subdivision. For the purposes of this act such persons are deemed to be engaged in public employment.

§ 1313. Disqualification and forfeiture of benefits

(a) Notwithstanding any other provision of law, no public official or public employee nor any beneficiary designated by such public official or public employee shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment.

(b) The benefits shall be forfeited upon entry of a plea of guilty or no defense or upon initial conviction and no payment or partial payment shall be made during the pendency of an appeal. If a verdict of not guilty is rendered or the indictment or criminal information finally dismissed, then the public official or public employee shall be reinstated as a member of the pension fund or system and shall be entitled to all benefits including those accruing during the period of forfeiture if any. Such conviction or plea shall be deemed to be a breach of a public officer's or public employee's contract with his employer.

(c) Each time a public officer or public employee is elected, appointed, promoted, or otherwise changes a job classification, there is a termination and renewal of the contract for purposes of this act.

(d) The appropriate retirement board may retain a member's contributions and interest thereon for the purpose of paying any fine imposed upon the member of the fund, or for the repayment of any funds misappropriated by such member from the Commonwealth or any political subdivision.

(e) Notwithstanding any other provision of this act, the State Employees' Retirement Board shall not disburse any funds to any person who has forfeited their right to benefits until the Auditor General and the Attorney General have determined and certified that there has been no loss to the Commonwealth as a result of the conduct that resulted in forfeiture of benefits. If there is a loss to the Commonwealth, the board shall pay the amount of the loss to the State Treasurer from the member's contributions and the interest thereon.

§ 1314. Restitution for monetary loss

(a) Whenever any public official or employee who is a member of any pension system funded by public moneys is convicted or pleads guilty or pleads no defense in any court of record to any crime related to a public office or public employment, the court shall order the defendant to make complete and full restitution to the Commonwealth or political subdivision of any monetary loss incurred as a result of the criminal offense.

(b) If the court fails to order such restitution the Commonwealth, through the Attorney General, or a political subdivision shall petition the court pronouncing sentence for an order establishing the amount of restitution due it. If the court does not have authority to order restitution, the Commonwealth or the political subdivision shall bring an original action for restitution.

(c) Notwithstanding any law or provision of law exempting the pension account or benefits of any public official or public employee from garnishment or attachment, whenever the court shall order restitution or establish the amount of restitution due after petition, all sums then credited to the defendant's account or payable to the defendant including the contributions shall be available to satisfy such restitution order.

(d) The retirement board, administrator of the pension fund or employer of the defendant, upon being served with a copy of the court's order, shall pay over all such pension benefits, contributions or other benefits to the extent necessary to satisfy the order of restitution.

APPENDIX B

STATE OF NEW YORK

8069

IN SENATE

April 6, 1988

Introduced by Sens. TRUNZO, COOK, DUNNE, FLOSS, LACK, E. LEVY, McHUGH, MEGA, ROLISON, SRELOS, SPANO, TULLY, VOLKER -- read twice and ordered printed, and when printed to be committed to the Committee on Civil Service and Pensions.

AN ACT to amend the retirement and social security law and the criminal procedure law, in relation to forfeiture of pension rights or retirement benefits upon conviction of a felony related to public employment

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

- 1 Section 1. The retirement and social security law is amended by add-
2 ing a new section one hundred eleven-b to read as follows:
3 § 111-b. Forfeiture of rights or benefits by reason of official
4 misconduct. a. Notwithstanding any other provision of law, rule or regu-
5 lation to the contrary, any member or retiree of the New York state and
6 local employees' retirement system who joined or rejoined said retire-
7 ment system on or after the effective date of this section and, who is
8 subsequently convicted of any felony which is based on acts or omissions
9 which constituted a breach of the official duties or responsibilities of
10 such member's or retiree's public employment, shall forfeit all rights
11 or benefits to which he or she may have been otherwise entitled pursuant
12 to this chapter at the time of conviction.
13 b. Such forfeiture of rights or benefits shall not occur, however, un-
14 less there has been a judicial determination, pursuant to section 400.35
15 of the criminal procedure law, or section one hundred eleven-c of this
16 article, that the acts or omissions upon which the felony conviction is
17 based constituted a breach of the member's or retiree's official duties
18 or responsibilities of public employment and the court issues an order
19 directing the New York state and local employees' retirement system to
20 terminate the member's or retiree's rights or benefits pursuant to this
21 chapter.
22 c. In the event that the court determines that all retirement system
23 rights and benefits of the member or retiree have been forfeited, the

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [] is old law to be omitted.

LBD14222-02-8

1 court may make a supplemental finding pursuant to this subdivision. The
2 court, in its discretion, after taking into consideration the financial
3 needs and resources of the spouse, dependents and/or designated benefi-
4 ciaries of the convicted member or retiree, and after having determined
5 that the spouse, dependents or designated beneficiaries had no culpabil-
6 ity with regard to the crime or crimes for which the member or retiree
7 was convicted, may order that any benefits that would otherwise be paya-
8 ble to or on behalf of the member or retiree but for the determination
9 that retirement system rights have been forfeited, be paid to or on
10 behalf of the spouse and/or dependents and/or designated beneficiaries.
11 Such order shall contain an effective date and a copy shall be served
12 upon the state comptroller.

13 d. Nothing contained in this section shall limit, impair or alter any
14 member's right to the return of his or her own contributions to the New
15 York state and local employees' retirement system.

16 § 2. Such law is amended by adding a new section four hundred eleven-a
17 to read as follows:

18 § 411-a. Forfeiture of rights or benefits by reason of official
19 misconduct. a. Notwithstanding any other provision of law, rule or regu-
20 lation to the contrary, any member or retiree of the New York state and
21 local police and fire retirement system who joined or rejoined said
22 retirement system on or after the effective date of this section and,
23 who is subsequently convicted of any felony which is based on acts or
24 omissions which constituted a breach of the member's or retiree's offi-
25 cial duties or responsibilities of such member's or retiree's public em-
26 ployment, shall forfeit all rights or benefits to which he or she may
27 have been otherwise entitled pursuant to this chapter at the time of
28 conviction.

29 b. Such forfeiture of rights or benefits shall not occur, however, un-
30 less there has been a judicial determination pursuant to section 400.35
31 of the criminal procedure law or section four hundred eleven-b of this
32 article, that the acts or omissions upon which the felony conviction is
33 based constituted a breach of the member's or retiree's official duties
34 or responsibilities and the court issues an order directing the New York
35 state and local police and fire retirement system to terminate the
36 member's or retiree's rights or benefits.

37 c. In the event that the court determines that all retirement system
38 rights and benefits of the member or retiree have been forfeited, the
39 court may make a supplemental finding pursuant to this subdivision. The
40 court, in its discretion, after taking into consideration the financial
41 needs and resources of the spouse, dependents and/or designated benefi-
42 ciaries of the convicted member or retiree, and after having determined
43 that the spouse, dependents or designated beneficiaries had no culpabil-
44 ity with regard to the crime or crimes for which the member or retiree
45 was convicted, may order that any benefits that would otherwise be paya-
46 ble to or on behalf of the member or retiree but for the determination
47 that retirement system rights have been forfeited, be paid to the spouse
48 and/or dependents and/or designated beneficiaries. Such order shall con-
49 tain an effective date and a copy shall be served upon the stat-
50 comptroller.

51 d. Nothing contained in this section shall limit, impair or alter an
52 member's right to the return of his or her own contributions to the Ne
53 York state and local police and fire retirement system.

54 § 3. Such law is amended by adding a new section one hundred eleven-
55 to read as follows:

1 § 111-c. Procedure for determining whether retirement system rights
2 and benefits shall be forfeited upon a felony conviction in a jurisdic-
3 tion other than New York state. a. Initiation of proceeding. In any case
4 where a conviction is entered for a felony in a federal court or any
5 jurisdiction other than New York state, and where such felony may be
6 based on acts or omissions which constituted a breach of the defendant's
7 official duties or responsibilities of public employment, the attorney
8 general, upon the advice and consent of the state comptroller, shall in-
9 itiate a proceeding in the New York supreme court to determine whether
10 the defendant's rights or benefits pursuant to this chapter shall be
11 forfeited pursuant to this section. In any such proceeding the defendant
12 shall have the right to a hearing.

13 b. Notice of applicability. Upon initiation of the proceeding by the
14 attorney general, the state comptroller shall determine the extent of
15 defendant's rights and benefit eligibility pursuant to this chapter
16 which may be subject to forfeiture pursuant to section one hundred
17 eleven-b of this article or section four hundred eleven-a of this
18 chapter. The comptroller shall then file a notice of applicability with
19 the court, the defendant, his counsel and the attorney general. Such
20 notice of applicability shall contain a statement specifying whether the
21 defendant is or has been a member or retiree of the New York state and
22 local employees' retirement system or New York state and local police
23 and fire retirement system and describe what rights and/or benefits pur-
24 suant to this chapter may be subject to forfeiture.

25 c. Burden and standard of proof; evidence. At any hearing held pur-
26 suant to this section the burden of proof rests upon the attorney
27 general. A finding as to whether the felony is based on acts or omis-
28 sions which constituted a breach of the defendant's official duties or
29 responsibilities of such member's or retiree's public employment must be
30 based upon a preponderance of the evidence. The defendant shall be af-
31 forded the opportunity at the commencement of the hearing to make a
32 statement with respect to whether the felony conviction is based on acts
33 or omissions which constituted a breach of defendant's official duties
34 or responsibilities of public employment.

35 d. Finding. After the completion of the hearing the court shall make a
36 finding as to whether the defendant has committed a felony based on acts
37 or omissions which constitute a breach of official duties or responsi-
38 bilities of his public employment. If the court finds that the defendant
39 has committed such a felony it shall issue an order directing the New
40 York state and local employees' retirement system or the New York state
41 and local police and fire retirement system to terminate the defendant's
42 rights or benefits pursuant to this chapter as provided for in section
43 one hundred eleven-b of this article or section four hundred eleven-a of
44 this chapter. Such order shall be served upon the state comptroller.

45 e. Supplemental finding. In the event that the court determines that
46 all retirement system rights and benefits of the member or retiree have
47 been forfeited, the court may make a supplemental finding pursuant to
48 this subdivision. The court, in its discretion, after taking into con-
49 sideration the financial needs and resources of the spouse, dependents
50 and/or designated beneficiaries of the convicted member or retiree, may
51 order that any benefits that would otherwise be payable to or on behalf
52 of the member or retiree but for the determination that retirement sys-
53 tem rights have been forfeited, be paid to or on behalf of the spouse
54 and/or dependents and/or designated beneficiaries, provided that the
55 court determines that the spouse, dependents or designated beneficiaries
56 had no culpability with regard to the crime or crimes for which the mem-

1 ber or retiree was convicted. Such order shall contain an effective date
2 and a copy shall be served upon the state comptroller.

3 f. All orders and findings made by the court pursuant to this section
4 shall be served upon the state comptroller.

5 § 4. Such law is amended by adding a new section four hundred eleven-
6 b to read as follows:

7 § 411-b. Procedure for determining whether retirement system rights
8 and benefits shall be forfeited upon felony conviction in jurisdiction
9 other than New York state. a. Initiation of proceeding. In any case
10 where a conviction is entered for a felony in a federal court or any
11 jurisdiction other than New York state, and where such felony may be
12 based on acts or omissions which constituted a breach of the defendant's
13 official duties or responsibilities of public employment, the attorney
14 general, upon the advice and consent of the state comptroller, shall in-
15 itiate a proceeding in the New York supreme court to determine whether
16 the defendant's rights or benefits pursuant to this chapter shall be
17 forfeited pursuant to this section. In any such proceeding the defendant
18 shall have the right to a hearing.

19 b. Notice of applicability. Upon initiation of the proceeding by the
20 attorney general, the state comptroller shall determine the extent of
21 defendant's rights and benefit eligibility pursuant to this chapter
22 which may be subject to forfeiture pursuant to section one hundred
23 eleven-b of this chapter or section four hundred eleven-a of this
24 article. The comptroller shall then file a notice of applicability with
25 the court, the defendant, his counsel and the attorney general. Such
26 notice of applicability shall contain a statement specifying whether the
27 defendant is or has been a member or retiree of the New York state and
28 local employees' retirement system or New York state and local police
29 and fire retirement system and describe what rights and/or benefits pur-
30 suant to this chapter may be subject to forfeiture.

31 c. Burden and standard of proof; evidence. At any hearing held pur-
32 suant to this section the burden of proof rests upon the attorney
33 general. A finding as to whether the felony is based on acts or omis-
34 sions which constituted a breach of the defendant's official duties or
35 responsibilities, public employment must be based upon a preponderance
36 of the evidence. The defendant shall be afforded the opportunity at the
37 commencement of the hearing to make a statement with respect to whether
38 the felony conviction is based on acts or omissions which constituted a
39 breach of defendant's official duties or responsibilities of public
40 employment.

41 d. Finding. After the completion of the hearing the court shall make a
42 finding as to whether the defendant has committed a felony based on acts
43 or omissions which constitute a breach of official duties or responsi-
44 bilities of his public employment. If the court finds that the defendant
45 has committed such a felony it shall issue an order directing the New
46 York state and local employees' retirement system or the New York state
47 and local police and fire retirement system to terminate the defendant's
48 rights or benefits pursuant to this chapter as provided for in section
49 one hundred eleven-b of this chapter or section four hundred eleven-a of
50 this article. Such order shall be served upon the state comptroller.

51 e. Supplemental finding. In the event that the court determines that
52 all retirement system rights and benefits of the member or retiree have
53 been forfeited, the court may make a supplemental finding pursuant to
54 this subdivision. The court, in its discretion, after taking into con-
55 sideration the financial needs and resources of the spouse, dependents
56 and/or designated beneficiaries of the convicted member or retiree, may

1 order that any benefits that would otherwise be payable to or on behalf
2 of the member or retiree but for the determination that retirement sys-
3 tem rights have been forfeited, be paid to or on behalf of the spouse
4 and/or dependents and/or designated beneficiaries, provided that the
5 court determines that the spouse, dependents or designated beneficiaries
6 had no culpability with regard to the crime or crimes for which the mem-
7 ber or retiree was convicted. Such order shall contain an effective date
8 and a copy shall be served upon the state comptroller.

9 f. All orders and findings made by the court pursuant to this section
10 shall be served upon the state comptroller.

11 § 5. The criminal procedure law is amended by adding a new section
12 400.35 to read as follows:

13 § 400.35 Procedure for determining whether defendant has forfeited
14 retirement system rights and benefits by committing a felony
15 which may be based on acts or omissions which constituted a
16 breach of defendant's official duties or responsibilities of
17 public employment.

18 1. Order directing a hearing. In any case where a conviction is en-
19 tered for a felony which may be based on acts or omissions which consti-
20 tuted a breach of defendant's official duties or responsibilities of pu-
21 blic employment, the court shall order a hearing to determine whether
22 the defendant's rights or benefits pursuant to the retirement and social
23 security law shall be forfeited pursuant to section one hundred eleven-b
24 or four hundred eleven-a of such law. The order must be filed with the
25 clerk of the court and must specify a date for the hearing not less than
26 ten and not more than forty-five days after the filing of the order.

27 2. Notice of hearing. Upon receipt of the order, the clerk of the
28 court shall send a notice of the hearing to the defendant, his counsel,
29 the district attorney and the state comptroller. Such notice shall spe-
30 cify the time and place of the hearing and the fact that the purpose
31 thereof is to determine whether the defendant's rights or benefits pur-
32 suant to the retirement and social security law shall be forfeited as
33 provided for in section one hundred eleven-b or four hundred eleven-a
34 of such law.

35 3. Burden and standard of proof; evidence. At any hearing held pur-
36 suant to this section the burden of proof rests upon the district
37 attorney. A finding as to whether the felony is based on acts or omis-
38 sions which constituted a breach of the defendant's official duties or
39 responsibilities of public employment must be based upon a preponderance
40 of the evidence. The defendant shall be afforded the opportunity at the
41 commencement of the hearing to make a statement with respect to whether
42 the felony conviction is based on acts or omissions which constituted a
43 breach of defendant's official duties or responsibilities of public
44 employment.

45 4. Finding. After the completion of the hearing the court shall make a
46 finding as to whether the defendant has committed a felony based on acts
47 or omissions which constituted a breach of defendant's official duties
48 or responsibilities of public employment. If the court finds that the
49 defendant has committed such a felony it shall issue an order directing
50 the New York state and local employees' retirement system or the New
51 York state and local police and fire retirement system to terminate the
52 defendant's rights or benefits pursuant to the retirement and social
53 security law as provided for in section one hundred eleven-b or four
54 hundred eleven-a of such law. Such order shall be served upon the state
55 comptroller.

1 5. Supplemental finding. In the event that the court determines that
2 all retirement system rights and benefits of the member or retiree have
3 been forfeited, the court may make a supplemental finding pursuant to
4 this subdivision. The court, in its discretion, after taking into con-
5 sideration the financial needs and resources of the spouse, dependents
6 and/or designated beneficiaries of the convicted member or retiree, may
7 order that any benefits that would otherwise be payable to or on behalf
8 of the member or retiree but for the determination that retirement sys-
9 tem rights have been forfeited, be paid to or on behalf of the spouse
10 and/or dependents and/or designated beneficiaries, provided that the
11 court determines that the spouse, dependents or designated beneficiaries
12 had no culpability with regard to the crime or crimes for which the mem-
13 ber or retiree was convicted. Such order shall contain an effective date
14 and a copy shall be served upon the state comptroller.

15 6. All orders and findings made by the court pursuant to this section
16 shall be served upon the state comptroller.

17 § 6. This act shall take effect immediately.

FISCAL NOTE.—PURSUANT TO LEGISLATIVE LAW SECTION 50:

This bill would pertain to certain future members or retirees of the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System. It would provide that if such a member or retiree is convicted of a felony which relates to his (her) duties or responsibilities of employment, the member or retiree shall forfeit all rights and benefits to which he (she) may have been entitled at the time of conviction.

If this bill were enacted there could be a resulting decrease in the fiscal obligations of the System. The amount of the decrease would be the present value of all such forfeited benefit payments.

This estimate, intended for use only during the 1988 Legislative Session, is Fiscal Note No. 88-21, dated January 5, 1988, prepared by the Actuary for the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.

APPENDIX C

State Constitutional Obstacles To The Enactment of
Pension Forfeiture Legislation in New York

The principal obstacle to the enactment of pension forfeiture legislation which would apply to incumbent employees and those who have already retired from public service is Article V, Section 7 of the New York State Constitution,¹ which provides:

After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

The Court of Appeals, in a line of cases addressing attempts by the legislature to adjust the method of computing benefits to preserve the solvency of the state retirement system, has taken a strict view of Article V, Section 7's prohibition on diminishing or impairing pension benefits. Thus, in Public Employees Federation v. Cuomo, 62 N.Y.2d 450, 478 N.Y.S.2d 588 (1984), the Court of Appeals sustained a constitutional challenge to a provision of the Retirement and Social Security Law effective September 1, 1983, which would have limited the rights of state employees hired on or after July 1, 1976 to withdraw

¹ As set forth below, Article V, Section 7 would not prevent the enactment of forfeiture legislation which applies prospectively to employees entering public service after the effective date of the legislation. See Public Employees Federation v. Cuomo, 62 N.Y.2d 450, 478 N.Y.S.2d 588, 591 (1984) (under Section 7 of Article V, "a member's rights were frozen as of the date of employment [;]...any changes lessening benefits must be made prospectively.")

contributions they had made to the retirement system. The Court held that employees had a right to a refund of all their contributions (and not just those made prior to the effective date of the statute) without regard to the new provision, which would have postponed a refund until the employee died or reached age 62. The Court reasoned that:

The purpose of [Section 7 of Article V] was to fix the rights of the employee at the time he became a member of the system...[A] member's rights [are] frozen as of the date of employment and any changes lessening benefits must be made prospectively.

Public Employee Federation, supra, 478 N.Y.S.2d at 591. See also Kleinfeldt v. New York City Employees' Retirement System, 36 N.Y. 2d 95, 365 N.Y.S.2d 500 (1975) (nullifying attempts to redefine the factors considered in computing employee's final average salary, as applied to employees who become members of a public retirement system before the effective date of the new statute); Birnbaum v. New York State Teachers Retirement System, 5 N.Y.2d 1, 176 N.Y.S. 2d 984 (1958) (application of updated mortality tables to employees who entered the retirement system before the effective date of the new tables was an impermissible diminution and impairment of benefits).

Running as a counterpoint to this line of cases is the theme, sounded in several cases in which employee misconduct has

been an issue, that "pensions are not only compensation for services rendered but they serve also as a reward for faithfulness of duty and honesty of performance". Pell v. Board of Education, 34 N.Y.2d 222, 238, 356 N.Y.S.2d 833 (1974) (upholding dismissal of senior construction inspector who pleaded guilty to misdemeanor of receiving unlawful gratuities; Court of Appeals rejected employee's contention that dismissal, with its resultant loss of pension and retirement rights, was too drastic a penalty in light of his misconduct); Mahoney v. McGuire, 107 A.D.2d 363, 366, 487 N.Y.S. 2d 13 (1st Dep't), aff'd 66 N.Y.2d 622, 495 N.Y.S.2d 29 (1985) ("it is the public policy of this State not to pension employees who have betrayed the faith reposed in them by virtue of their position"). But see Rapp v. New York City Employees' Retirement System, 42 N.Y.2d 1, 396 N.Y.S.2d 605 (1977) (transit police chief dismissed for misconduct was nonetheless entitled to pension benefits, even though he was discharged before the effective date of his application for service retirement. Court did not reach constitutional issue but relied on its reading of Administrative Code provision relating to veterans).

In this regard, a key case is Gorman v. City of New York, 280 A.D. 39, 110 N.Y.S.2d 711 (1st Dep't), aff'd 304 N.Y. 865, 109 N.E. 2d 881 (1952), which held that Article V, Section 7 did not preclude the enactment of legislation requiring that a police officer give 30 days notice before his or her election to

retire on a pension became effective, and which further provided that the officer shall not have been terminated before the expiration of that 30-day waiting period. Under the law previously in effect, a police officer's retirement was effective immediately upon his or her election to retire.

The Court did not limit the applicability of the new law to police officers joining the force after the effective date of the statute. (Indeed, the opinion is silent on the issue of retroactivity.) Even though the new 30-day waiting procedure might serve to divest an employee of a pension, the Court held:

[T]he Constitution contemplates a public employment which validly continues until the right to be pensioned matures and it does not imply a restriction upon public authority to remove a member from a public position for valid cause, even though the right to a pension terminates with the removal.

280 A.D. at 44, 110 N.Y.S.2d at 716.

Gorman, Pell and Mahoney suggest that the duty to render faithful and honest service may already be an essential part of the "contractual relationship" protected by Article V, Section 7 and that any forfeiture statute which divests current employees and retirees of their pension based on their unfaithful or dishonest conduct is thus not an impairment of that contract. In any event, the fact that under Article V, Section 7 an employee's pension is couched in terms of a "contractual

relationship" argues strongly for the inclusion, in any forfeiture statute, of language expressly conditioning a pension on the faithful and honest performance of official duty.