S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N S E N A T E

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Introduced by Sens. KRUEGER, DUANE, C. JOHNSON, SCHNEIDERMAN -- 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, 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:

Section 1. The retirement and social security law is amended by adding a new article 3-B to read as follows:

ARTICLE 3-B

PENSION FORFEITURE FOR PUBLIC CORRUPTION ACT

SECTION 156. SHORT TITLE.
157. DEFINITIONS.
158. PENSION FORFEITURE.
159. MISCELLANEOUS.

S 156. SHORT TITLE. THIS ARTICLE SHALL BE KNOWN AND MAY BE CITED AS THE "PENSION FORFEITURE FOR PUBLIC CORRUPTION ACT".

S 157. DEFINITIONS. THE FOLLOWING WORDS AND PHRASES, AS USED IN THIS ARTICLE, SHALL HAVE THE FOLLOWING MEANINGS, UNLESS A DIFFERENT MEANING IS PLAINLY REQUIRED BY THE CONTEXT:

1. "DEFENDANT" SHALL MEAN A PERSON AGAINST WHOM A FORFEITURE ACTION IS COMMENCED.

2. "DESIGNATED FELONY OFFENSE" SHALL MEAN: (A) ANY FELONY OFFENSE SET FORTH IN THE PENAL LAW; (B) A CONSPIRACY TO COMMIT ANY FELONY OFFENSE SET FORTH IN THE PENAL LAW; OR (C) ANY CRIMINAL OFFENSE COMMITTED IN ANY OTHER STATE, DISTRICT, OR TERRITORY OF THE UNITED STATES AND CLASSIFIED AS A FELONY THEREIN, WHICH IF COMMITTED WITHIN THIS STATE, WOULD CONSTITUTE AN OFFENSE DESIGNATED IN PARAGRAPH (A) OR (B) OF THIS SUBDIVISION.

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

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3. "COMPTROLLER" SHALL MEAN THE COMPTROLLER OF THE STATE OF NEW YORK IN HIS OR HER CAPACITY AS ADMINISTRATIVE HEAD OF THE NEW YORK STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM AND THE NEW YORK STATE AND LOCAL POLICE AND FIRE RETIREMENT SYSTEM.

4. "MEMBER" SHALL MEAN A MEMBER OF THE NEW YORK STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM OR THE NEW YORK STATE AND LOCAL POLICE AND FIRE RETIREMENT SYSTEM WHO JOINED SUCH SYSTEM ON OR AFTER THE EFFECTIVE DATE OF THIS ARTICLE.

5. "RETIRED MEMBER" SHALL MEAN A PERSON WHO IS RETIRED FROM AND WHO IS RECEIVING A RETIREMENT ALLOWANCE FROM A RETIREMENT SYSTEM AND WHO HAD JOINED SUCH SYSTEM ON OR AFTER THE EFFECTIVE DATE OF THIS ARTICLE.

6. "RETIREMENT SYSTEM" SHALL MEAN THE NEW YORK STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM OR THE NEW YORK STATE AND LOCAL POLICE AND FIRE RETIREMENT SYSTEM.

S 158. PENSION FORFEITURE. NOTWITHSTANDING ANY OTHER PROVISION OF GENERAL, SPECIAL OR LOCAL LAW, RULE OR REGULATION TO THE CONTRARY:

1. IN THE CASE OF A MEMBER OR RETIRED MEMBER WHO IS CONVICTED OF ANY DESIGNATED FELONY OFFENSE SET FORTH IN PARAGRAPH (A) OR (B) OF SUBDIVISION TWO OF SECTION ONE HUNDRED FIFTY-SEVEN OF THIS ARTICLE, THE COMMISSION OF WHICH IS RELATED TO THE PERFORMANCE OR FAILURE TO PERFORM SUCH MEMBER OR RETIRED MEMBER'S OFFICIAL DUTIES AND RESPONSIBILITIES, AN ACTION MAY BE COMMENCED IN SUPREME COURT BY THE DISTRICT ATTORNEY HAVING JURISDICTION OVER THE OFFENSE FOR THE FORFEITURE OF ALL OR A PORTION OF THOSE RIGHTS AND BENEFITS TO WHICH SUCH PERSON IS OR WILL BE ENTITLED AS A MEMBER OR RETIRED MEMBER PROVIDED THAT ANY CONTRIBUTIONS MADE BY THE OFFICIAL TO HIS OR HER RETIREMENT SYSTEM SHALL NOT BE SUBJECT TO FORFEITURE, BUT SHALL BE RETURNED TO SUCH OFFICIAL. SUCH ACTION SHALL BE COMMENCED WITHIN SIX MONTHS OF SUCH CONVICTION. FOR PURPOSES OF THIS ARTICLE, A DESIGNATED FELONY OFFENSE IS RELATED TO THE PERFORMANCE OR FAILURE TO PERFORM SUCH MEMBER OR RETIRED MEMBER'S OFFICIAL DUTIES AND RESPONSIBILITIES IF IT: (A) CONSTITUTED A MATERIAL VIOLATION OF SUCH MEMBER OR RETIRED MEMBER'S DUTIES AND RESPONSIBILITIES AS A PUBLIC SERVANT; OR (B) EVEN THOUGH COMMITTED OUTSIDE THE SCOPE OF SUCH MEMBER'S OFFICIAL DUTIES OR RESPONSIBILITIES, INVOLVED ACTIONS OR CONDUCT BY WHICH SUCH MEMBER OR RETIRED MEMBER INDICATED OR CONVEYED THAT HE OR SHE WAS ACTING WITH THE AUTHORITY OF, OR UNDER COLOR OF THE AUTHORITY OF, ANY GOVERNMENTAL ENTITY.

2. WHERE THE ATTORNEY GENERAL FINDS THAT A MEMBER OR A RETIRED MEMBER HAS BEEN CONVICTED OF A DESIGNATED FELONY OFFENSE AS DEFINED IN PARAGRAPH (C) OF SUBDIVISION TWO OF SECTION ONE HUNDRED FIFTY-SEVEN OF THIS ARTICLE, THE COMMISSION OF WHICH IS RELATED TO THE PERFORMANCE OR FAILURE TO PERFORM SUCH MEMBER OR RETIRED MEMBER'S OFFICIAL DUTIES AND RESPONSIBILITIES, AN ACTION MAY BE COMMENCED IN SUPREME COURT BY THE ATTORNEY GENERAL FOR THE FORFEITURE OF ALL OR A PORTION OF THOSE RIGHTS AND BENEFITS TO WHICH SUCH PERSON IS OR WILL BE ENTITLED AS A MEMBER OR RETIRED MEMBER. SUCH ACTION SHALL BE COMMENCED WITHIN ONE YEAR OF SUCH CONVICTION.

3. PRIOR TO COMMENCEMENT OF SUCH ACTION DESCRIBED IN SUBDIVISION ONE OR TWO OF THIS SECTION, THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL, AS THE CASE MAY BE, SHALL PROVIDE NOTICE TO THE COMPTROLLER STATING THAT HE OR SHE HAS REASON TO BELIEVE THAT THE PERSON CONVICTED COMMITTED THE FELONY RELATED TO HIS OR HER OFFICIAL DUTIES AND RESPONSIBILITIES. WITHIN TWENTY DAYS OF RECEIPT OF SUCH NOTICE, THE COMPTROLLER SHALL SUBMIT A NOTICE OF APPLICABILITY TO THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL AS THE CASE MAY BE. THE NOTICE OF APPLICABILITY SHALL CONTAIN A STATEMENT SPECIFYING WHETHER THE PERSON CONVICTED IS OR HAS

BEEN A MEMBER OR RETIRED MEMBER OF THE NEW YORK STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM OR THE NEW YORK STATE AND LOCAL POLICE AND FIRE RETIREMENT SYSTEM AND SHALL DESCRIBE THE RIGHTS AND BENEFITS TO WHICH SUCH PERSON IS OR WILL BE ENTITLED FROM SUCH PUBLIC RETIREMENT SYSTEM.

4. NO FORFEITURE ACTION MAY BE COMMENCED BY THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL UNTIL RECEIPT OF THE NOTICE OF APPLICABILITY AS SET FORTH IN SUBDIVISION THREE OF THIS SECTION. IN DETERMINING WHETHER TO SEEK FORFEITURE OF A PORTION, RATHER THAN ALL, OF SUCH RETIREMENT BENEFITS, THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL MAY CONSIDER MITIGATING FACTORS INCLUDING, BUT NOT LIMITED TO: THE NATURE AND SERIOUSNESS OF THE OFFENSE COMMITTED IN RELATION TO THE AMOUNT OF THE FORFEITURE PENALTY; WHETHER THE DEFENDANT'S CONDUCT IN COMMITTING THE OFFENSE WAS WILLFUL OR MALICIOUS; WHETHER THE DEFENDANT MADE ANY SUBSTANTIAL GOOD FAITH EFFORTS TO PREVENT OR MITIGATE THE HARM CAUSED BY THE OFFENSE; WHETHER THE DEFENDANT'S PARTICIPATION IN THE CRIME WAS UNDER DURESS, COERCION OR INDUCED BY OTHERS; THE IMPACT OF THE CRIME ON THE STATE OR LOCAL GOVERNMENT AND THE NUMBER OF YEARS OF THE DEFENDANT'S PUBLIC SERVICE PERFORMED WITHOUT CRIMINAL CONDUCT; THE PECUNIARY BENEFIT TO THE DEFENDANT FROM THE CRIME; AND WHETHER AND TO WHAT EXTENT THE DEFENDANT'S FAMILY IS DEPENDENT UPON THE DEFENDANT'S PRESENT AND FUTURE RETIREMENT BENEFITS.

5. UPON MOTION BY THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL, AS THE CASE MAY BE, MADE UPON COMMENCEMENT OF OR AT ANY TIME DURING THE PENDENCY OF A FORFEITURE ACTION, PURSUANT TO THE PROCEDURE SET FORTH IN SUBDIVISION ONE OF SECTION SIXTY-THREE HUNDRED ELEVEN OR SECTION SIXTY-THREE HUNDRED THIRTEEN OF THE CIVIL PRACTICE LAW AND RULES, THE COURT MAY ISSUE A TEMPORARY RESTRAINING ORDER OR A PRELIMINARY INJUNCTION PROHIBITING THE DEFENDANT FROM RECEIVING ANY RIGHTS OR BENEFITS FROM THE APPROPRIATE RETIREMENT SYSTEM. A PRELIMINARY INJUNCTION MAY BE GRANTED WHERE THE COURT FINDS THAT THERE IS A SUBSTANTIAL PROBABILITY THAT THE DISTRICT ATTORNEY OR ATTORNEY GENERAL WILL PREVAIL ON THE ISSUE OF FORFEITURE. NO SHOWING OF IRREPARABLE HARM SHALL BE REQUIRED. THE COURT MAY NOT CONSIDER ON SUCH MOTION ANY ISSUES PRESENTED TO THE COURT WHICH HEARD THE CRIMINAL ACTION IN WHICH THE DEFENDANT WAS CONVICTED OR WHICH ARISE OUT OF SUCH CRIMINAL ACTION AND MAY BE PRESENTED ON APPEAL.

6. ALL DEFENDANTS IN A FORFEITURE ACTION BROUGHT PURSUANT TO THIS ARTICLE SHALL HAVE THE RIGHT TO TRIAL BY JURY ON ANY ISSUE OF FACT.

7. THE BURDEN OF PROOF SHALL BE UPON THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL, AS THE CASE MAY BE, TO PROVE BY CLEAR AND CONVINCING EVIDENCE THE FACTS NECESSARY TO ESTABLISH A CLAIM OF PENSION FORFEITURE.

8. AT ANY TIME DURING THE PENDENCY OF A FORFEITURE ACTION, THE COURT MAY DISMISS THE ACTION IF IT FINDS THAT SUCH RELIEF IS WARRANTED BY THE EXISTENCE OF SOME COMPELLING FACTOR, CONSIDERATION OR CIRCUMSTANCE INCLUDING, BUT NOT LIMITED TO, ONE OR MORE OF THE MITIGATING FACTORS SET FORTH IN SUBDIVISION FOUR OF THIS SECTION, OR OTHER INFORMATION OR EVIDENCE WHICH DEMONSTRATES THAT SUCH FORFEITURE WOULD NOT SERVE THE ENDS OF JUSTICE. THE COURT SHALL ISSUE A WRITTEN DECISION STATING THE BASIS FOR AN ORDER ISSUED PURSUANT TO THIS SUBDIVISION.

9. (A) UPON A FINDING BY THE COURT THAT THE DEFENDANT HAS COMMITTED A FELONY IN CONNECTION WITH HIS OR HER OFFICIAL DUTIES AND RESPONSIBILITIES IN THIS STATE, THE COURT SHALL ISSUE AN ORDER TO THE APPROPRIATE RETIREMENT SYSTEM FOR: (I) THE FORFEITURE OR RECOUPMENT OF ALL OR A PORTION OF THE DEFENDANT'S RIGHTS AND BENEFITS AS A MEMBER OR RETIRED MEMBER OF SUCH SYSTEM; (II) THE RECOUPMENT OF ALL OR A PORTION OF THE RETIREMENT BENEFITS PAID TO THE DEFENDANT; AND (III) THE REFUND TO THE DEFENDANT OF ANY CONTRIBUTIONS MADE BY THE DEFENDANT TO THE RETIREMENT

SYSTEM FOR ANY PERIOD FOR WHICH THE DEFENDANT'S RIGHTS AND BENEFITS AS A MEMBER OR RETIRED MEMBER OF SUCH RETIREMENT SYSTEM HAVE BEEN ORDERED FORFEIT.

(B) IN DETERMINING THE EXTENT OF THE FORFEITURE OR RECOUPMENT THAT IS WARRANTED, THE COURT MAY CONSIDER ONE OR MORE OF THE MITIGATING FACTORS SET FORTH IN SUBDIVISION FOUR OF THIS SECTION. ALL ORDERS AND FINDINGS MADE BY THE COURT PURSUANT TO THIS SECTION SHALL BE SERVED UPON THE COMPTROLLER.

10. UPON A FINAL DETERMINATION THAT REVERSES OR VACATES THE CONVICTION OR CONVICTIONS OF A DESIGNATED OFFENSE OR OFFENSES, THE MEMBER OR RETIRED MEMBER WHO HAS FORFEITED RETIREMENT RIGHTS AND BENEFITS PURSUANT TO THIS SECTION SHALL HAVE SUCH RIGHTS AND BENEFITS RETROACTIVELY RESTORED UPON APPLICATION TO THE COURT WITH JURISDICTION OVER THE FORFEITURE ACTION, REGARDLESS OF ANY TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION WHICH MAY BE OUTSTANDING OR ORDER WHICH MAY HAVE BEEN ISSUED. SUCH COURT, UPON FINDING THAT SUCH A FINAL DETERMINATION HAS OCCURRED, SHALL ISSUE AN ORDER RETROACTIVELY RESTORING SUCH RIGHTS AND BENEFITS, TOGETHER WITH SUCH OTHER RELIEF DEEMED APPROPRIATE. AS A CONDITION TO FULL RESTORATION OF RIGHTS AND BENEFITS AS PROVIDED IN THIS SUBDIVISION, THE MEMBER OR RETIRED MEMBER SHALL REIMBURSE THE RETIREMENT SYSTEM FOR ANY CONTRIBUTIONS THAT WERE REFUNDED TO THE MEMBER OR RETIRED MEMBER PURSUANT TO THE PROVISIONS OF PARAGRAPH (A) OF SUBDIVISION NINE OF THIS SECTION.

11. EXCEPT AS OTHERWISE PROVIDED BY THIS ARTICLE, THE CIVIL PRACTICE LAW AND RULES SHALL GOVERN THE PROCEDURE IN ACTIONS COMMENCED UNDER THIS ARTICLE, EXCEPT WHERE THE ACTION IS REGULATED BY ANY INCONSISTENT PROVISIONS HEREIN. IN SUCH ACTIONS, THE COURT MAY NOT CONSIDER ANY ISSUES PRESENTED TO THE COURT WHICH HEARD THE CRIMINAL ACTION IN WHICH THE DEFENDANT WAS CONVICTED OR WHICH ARISE OUT OF SUCH CRIMINAL ACTION AND MAY BE PRESENTED ON APPEAL.

S 159. MISCELLANEOUS. THE REMEDIES PROVIDED FOR IN THIS ARTICLE ARE NOT INTENDED TO SUBSTITUTE FOR, LIMIT OR SUPERSEDE THE LAWFUL AUTHORITY OF ANY PUBLIC OFFICER, AGENCY OR OTHER PERSON TO ENFORCE ANY OTHER RIGHT OR REMEDY PROVIDED FOR BY LAW.

S 2. This act shall take effect immediately.

FISCAL NOTE.--Pursuant to Legislative Law, Section 50:

This bill would amend the Retirement and Social Security Law with regard to the forfeiture of the retirement system rights and benefits of certain future members or retirees of the New York State and Local Employees' Retirement System or the New York State and Local Police and Fire Retirement system.

If this bill is enacted, it would provide that if a future member or retiree was convicted of any one of certain felony offenses relating to his (or her) performance or failure to perform official duties and responsibilities, such member or retiree would forfeit all or a portion of his (or her) rights and benefits as a member or retiree of such System and all or a portion of retirement benefits already received. There could be a resulting decrease in the fiscal obligations of the Systems. The amount of the decrease would be the present value of all such forfeited benefit payments.

This estimate, dated January 20, 2009 and intended for use only during the 2009 Legislative Session, is Fiscal Note No. 2009-100, 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.