

4068

2009-2010 Regular Sessions

I N   S E N A T E

April 8, 2009

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Introduced by Sens. FLANAGAN, LANZA, LITTLE, MORAHAN, WINNER -- 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 certain crimes 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 adding  
2 a new article 3-B to read as follows:

3                                 ARTICLE 3-B

4                                 PENSION FORFEITURE FOR PUBLIC MISCONDUCT ACT

5 SECTION 156. SHORT TITLE.

6                 157. DEFINITIONS.

7                 158. PENSION FORFEITURE.

8                 159. MISCELLANEOUS.

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

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

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

16     2. "COVERED CRIME" SHALL MEAN ANY OF THE FOLLOWING:

17         (A) ANY FELONY OFFENSE SET FORTH IN THE PENAL LAW;

18         (B) ANY CRIME DEFINED IN TITLE L OF THE PENAL LAW;

19         (C) AN ATTEMPT, CONSPIRACY, OR SOLICITATION OF ANOTHER TO COMMIT ANY  
20 FELONY OFFENSE SET FORTH IN THE PENAL LAW;

21         (D) AN ATTEMPT, CONSPIRACY, OR SOLICITATION OF ANOTHER TO COMMIT ANY  
22 CRIME DEFINED IN TITLE L OF THE PENAL LAW;

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

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(E) ANY OTHER CRIME DEFINED BY THE LAWS OF THIS STATE, A NECESSARY ELEMENT OF WHICH, AS DETERMINED BY STATUTORY OR COMMON LAW DEFINITION OF SUCH CRIME, INCLUDES INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE, FALSE SWEARING, MISREPRESENTATION, FRAUD, DECEIT, BRIBERY, EXTORTION, MISAPPROPRIATION, THEFT, PROHIBITED ACTION OR FAILURE TO ACT BY A PUBLIC OFFICER OR EMPLOYEE;

(F) ANY CRIME DEFINED BY THE LAWS OF THIS STATE FOR WHICH THE VACATING OR FORFEITURE OF THE PUBLIC OFFICE OR EMPLOYMENT HELD BY SUCH INDIVIDUAL IS REQUIRED BY LAW;

(G) ANY CRIMINAL OFFENSE COMMITTED IN ANY OTHER STATE, DISTRICT OR TERRITORY OF THE UNITED STATES, WHICH IF COMMITTED WITHIN THIS STATE, WOULD CONSTITUTE AN OFFENSE DESIGNATED IN PARAGRAPH (A), (B), (C), (D), (E), OR (F) OF THIS SUBDIVISION.

3. "CHIEF ADMINISTRATOR OF THE RETIREMENT SYSTEM" SHALL MEAN THE COMPTROLLER OF THE STATE OF NEW YORK WITH RESPECT TO THE NEW YORK STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM AND THE NEW YORK STATE AND LOCAL POLICE AND FIRE RETIREMENT SYSTEM AND THE BOARDS OF TRUSTEES WITH RESPECT TO THE OTHER PUBLIC RETIREMENT SYSTEMS AND PENSION FUNDS OF THE STATE AND THE CITY OF NEW YORK.

4. "MEMBER" SHALL MEAN A MEMBER OF THE NEW YORK STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM, THE NEW YORK STATE AND LOCAL POLICE AND FIRE RETIREMENT SYSTEM, THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM, THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE NEW YORK CITY TEACHERS' RETIREMENT SYSTEM, THE NEW YORK CITY POLICE PENSION FUND, THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND AND THE NEW YORK CITY BOARD OF EDUCATION 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, THE NEW YORK STATE AND LOCAL POLICE AND FIRE RETIREMENT SYSTEM, THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM, THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE NEW YORK CITY TEACHERS' RETIREMENT SYSTEM, THE NEW YORK CITY POLICE PENSION FUND, THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND AND THE NEW YORK CITY BOARD OF EDUCATION RETIREMENT SYSTEM.

7. "DEPENDENT CHILDREN" SHALL INCLUDE:

(A) ANY CHILD OF AN OFFICER OR EMPLOYEE, WHERE SUCH CHILD IS UNDER AGE NINETEEN;

(B) ANY UNMARRIED DEPENDENT CHILD OF AN OFFICER OR EMPLOYEE, REGARDLESS OF SUCH CHILD'S AGE, WHERE SUCH CHILD IS INCAPABLE OF SELF-SUSTAINING EMPLOYMENT BY REASON OF MENTAL OR PHYSICAL DISABILITY AND BECAME SO INCAPABLE PRIOR TO ATTAINING THE AGE OF NINETEEN; AND

(C) ANY UNMARRIED CHILD OF AN OFFICER OR EMPLOYEE, WHERE SUCH CHILD IS AT AN ACCREDITED INSTITUTION OF HIGHER LEARNING AND IS UNDER AGE TWENTY-THREE.

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, PLEADS GUILTY TO, PLEADS NOLO CONTENDERE TO, OR PLEADS GUILTY TO PURSUANT TO SUBDIVISION TWO OF SECTION 220.10 OF THE CRIMINAL PROCEDURE LAW ANY COVERED CRIME SET FORTH IN PARAGRAPH (A), (B), (C), (D), (E), OR (F) OF SUBDIVISION TWO OF SECTION ONE HUNDRED FIFTY-SEVEN OF THIS ARTICLE, THE COMMISSION OF WHICH IS RELATED TO THE PERFORMANCE OF OR FAILURE TO PERFORM SUCH MEMBER OR RETIRED MEMBER'S OFFICIAL DUTIES AND RESPONSIBILITIES

ITIES, AN ACTION MAY BE COMMENCED IN SUPREME COURT BY THE DISTRICT ATTORNEY HAVING JURISDICTION OVER THE OFFENSE, OR BY THE ATTORNEY GENERAL IF THE ATTORNEY GENERAL BROUGHT THE UNDERLYING CRIMINAL CHARGE, 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 SIX MONTHS OF SUCH CONVICTION. FOR PURPOSES OF THIS ARTICLE, A COVERED CRIME IS RELATED TO THE PERFORMANCE OF OR FAILURE TO PERFORM SUCH MEMBER OR RETIRED MEMBER'S OFFICIAL DUTIES AND RESPONSIBILITIES IF IT:

(A) CONSTITUTED A MATERIAL VIOLATION OF SUCH MEMBER'S OR RETIRED MEMBER'S DUTIES AND RESPONSIBILITIES AS A PUBLIC SERVANT; OR

(B) WAS COMMITTED IN THE COURSE OF AN INDIVIDUAL'S PUBLIC EMPLOYMENT; OR

(C) INVOLVED THE USE OF PUBLIC PERSONNEL OR RESOURCES; OR

(D) INVOLVED AN INDIVIDUAL'S MISREPRESENTATION OF HIS OR HER ACTUAL OFFICIAL POWERS, DUTIES AND RESPONSIBILITIES; OR

(E) 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, OR THE DISTRICT ATTORNEY OF THE COUNTY IN WHICH THE MEMBER OR RETIRED MEMBER RESIDES IN THIS STATE, FINDS THAT A MEMBER OR A RETIRED MEMBER HAS BEEN CONVICTED OF A COVERED CRIME AS DEFINED IN PARAGRAPH (G) 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'S OR RETIRED MEMBER'S OFFICIAL DUTIES AND RESPONSIBILITIES, AN ACTION MAY BE COMMENCED IN SUPREME COURT BY THE ATTORNEY GENERAL, OR BY THE DISTRICT ATTORNEY OF THE COUNTY IN WHICH THE MEMBER OR RETIRED MEMBER RESIDES IN THIS STATE, 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 CHIEF ADMINISTRATOR OF THE DEFENDANT'S RETIREMENT SYSTEM STATING THAT HE OR SHE HAS REASON TO BELIEVE THAT THE PERSON CONVICTED COMMITTED THE COVERED CRIME RELATED TO HIS OR HER OFFICIAL DUTIES AND RESPONSIBILITIES. WITHIN TWENTY DAYS OF RECEIPT OF SUCH NOTICE, THE CHIEF ADMINISTRATOR OF THE DEFENDANT'S RETIREMENT SYSTEM 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, THE NEW YORK STATE AND LOCAL POLICE AND FIRE RETIREMENT SYSTEM, THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM, THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE NEW YORK CITY TEACHERS' RETIREMENT SYSTEM, THE NEW YORK CITY POLICE PENSION FUND, THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND AND THE NEW YORK CITY BOARD OF EDUCATION RETIREMENT SYSTEM AND SHALL DESCRIBE THE RIGHTS AND BENEFITS TO WHICH SUCH PERSON IS OR WILL BE ENTITLED TO 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 BENE-

1 FITS, THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL MAY CONSIDER MITI-  
2 GATING FACTORS INCLUDING, BUT NOT LIMITED TO: THE NATURE AND SERIOUSNESS  
3 OF THE OFFENSE COMMITTED IN RELATION TO THE AMOUNT OF THE FORFEITURE  
4 PENALTY; WHETHER THE DEFENDANT'S CONDUCT IN COMMITTING THE OFFENSE WAS  
5 WILLFUL OR MALICIOUS; WHETHER THE DEFENDANT MADE ANY SUBSTANTIAL GOOD  
6 FAITH EFFORTS TO PREVENT OR MITIGATE THE HARM CAUSED BY THE OFFENSE;  
7 WHETHER THE DEFENDANT'S PARTICIPATION IN THE CRIME WAS UNDER DURESS,  
8 COERCION OR INDUCED BY OTHERS; THE IMPACT OF THE CRIME ON THE STATE OR  
9 LOCAL GOVERNMENT AND THE NUMBER OF YEARS OF THE DEFENDANT'S PUBLIC  
10 SERVICE PERFORMED WITHOUT CRIMINAL CONDUCT; THE PECUNIARY BENEFIT TO THE  
11 DEFENDANT FROM THE CRIME; AND WHETHER AND TO WHAT EXTENT THE DEFENDANT'S  
12 FAMILY IS DEPENDENT UPON THE DEFENDANT'S PRESENT AND FUTURE RETIREMENT  
13 BENEFITS. THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL MAY SEEK AN  
14 ORDER FROM THE COURT THAT SOME OR ALL OF THE FORFEITED PENSION BE PAID  
15 FOR THE BENEFIT OF ANY DEPENDENT CHILDREN AS JUSTICE MAY REQUIRE, AFTER  
16 TAKING INTO CONSIDERATION THE FINANCIAL NEEDS AND RESOURCES AVAILABLE  
17 FOR SUPPORT OF SUCH CHILDREN. FURTHER, IN THE EVENT OF ANY FORFEITURE,  
18 SUCH MEMBER OR RETIRED MEMBER SHALL BE ENTITLED TO A PRO RATA RETURN OF  
19 HIS OR HER CONTRIBUTION PAID INTO THE RELEVANT RETIREMENT SYSTEMS, IN  
20 ANY AMOUNT PROPORTIONATE TO THE AMOUNT OF ANY FORFEITURE, WITHOUT INTER-  
21 EST.

22 5. UPON MOTION BY THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL, AS  
23 THE CASE MAY BE, MADE UPON COMMENCEMENT OF OR AT ANY TIME DURING THE  
24 PENDENCY OF A FORFEITURE ACTION, PURSUANT TO THE PROCEDURE SET FORTH IN  
25 SUBDIVISION ONE OF SECTION SIX THOUSAND THREE HUNDRED ELEVEN OR SECTION  
26 SIX THOUSAND THREE HUNDRED THIRTEEN OF THE CIVIL PRACTICE LAW AND RULES,  
27 THE COURT MAY ISSUE A TEMPORARY RESTRAINING ORDER OR A PRELIMINARY  
28 INJUNCTION PROHIBITING THE DEFENDANT FROM RECEIVING ANY RIGHTS OR BENE-  
29 FITS FROM THE APPROPRIATE RETIREMENT SYSTEM. A PRELIMINARY INJUNCTION  
30 MAY BE GRANTED WHERE THE COURT FINDS THAT THERE IS A SUBSTANTIAL PROBA-  
31 BILITY THAT THE DISTRICT ATTORNEY OR ATTORNEY GENERAL WILL PREVAIL ON  
32 THE ISSUE OF FORFEITURE. NO SHOWING OF IRREPARABLE HARM SHALL BE  
33 REQUIRED. THE COURT MAY NOT CONSIDER ON SUCH MOTION ANY ISSUES PRESENTED  
34 TO THE COURT WHICH HEARD THE CRIMINAL ACTION IN WHICH THE DEFENDANT WAS  
35 CONVICTED OR WHICH ARISE OUT OF SUCH CRIMINAL ACTION AND MAY BE  
36 PRESENTED ON APPEAL.

37 6. ALL DEFENDANTS IN A FORFEITURE ACTION BROUGHT PURSUANT TO THIS  
38 ARTICLE SHALL HAVE THE RIGHT TO A HEARING.

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

42 8. AT ANY TIME DURING THE PENDENCY OF A FORFEITURE ACTION, THE COURT  
43 MAY DISMISS THE ACTION IF IT FINDS THAT SUCH RELIEF IS WARRANTED BY THE  
44 EXISTENCE OF SOME COMPELLING FACTOR, CONSIDERATION OR CIRCUMSTANCE  
45 INCLUDING, BUT NOT LIMITED TO, ONE OR MORE OF THE MITIGATING FACTORS SET  
46 FORTH IN SUBDIVISION FOUR OF THIS SECTION, OR OTHER INFORMATION OR  
47 EVIDENCE WHICH DEMONSTRATES THAT SUCH FORFEITURE WOULD NOT SERVE THE  
48 ENDS OF JUSTICE. THE COURT MAY ORDER THAT SOME OR ALL OF THE FORFEITED  
49 PENSION BE PAID FOR THE BENEFIT OF ANY DEPENDENT CHILDREN AS JUSTICE MAY  
50 REQUIRE, AFTER TAKING INTO CONSIDERATION THE FINANCIAL NEEDS AND  
51 RESOURCES AVAILABLE FOR SUPPORT OF SUCH CHILDREN. THE COURT SHALL ISSUE  
52 A WRITTEN DECISION STATING THE BASIS FOR AN ORDER ISSUED PURSUANT TO  
53 THIS SUBDIVISION.

54 9. UPON A FINDING BY THE COURT THAT THE DEFENDANT HAS COMMITTED A  
55 COVERED CRIME THAT IS RELATED TO THE PERFORMANCE OF OR FAILURE TO  
56 PERFORM SUCH DEFENDANT'S OFFICIAL DUTIES AND RESPONSIBILITIES, THE COURT

1 SHALL ISSUE AN ORDER TO THE APPROPRIATE RETIREMENT SYSTEM FOR THE  
2 FORFEITURE OR RECOUPMENT OF ALL OR A PORTION OF THE DEFENDANT'S RIGHTS  
3 AND BENEFITS AS A MEMBER OR RETIRED MEMBER OF SUCH SYSTEM AND FOR THE  
4 RECOUPMENT OF ALL OR A PORTION OF THE RETIREMENT BENEFITS PAID TO THE  
5 DEFENDANT. IN DETERMINING THE EXTENT OF THE FORFEITURE OR RECOUPMENT  
6 THAT IS WARRANTED, THE COURT MAY CONSIDER ONE OR MORE OF THE MITIGATING  
7 FACTORS SET FORTH IN SUBDIVISION FOUR OF THIS SECTION. ALL ORDERS AND  
8 FINDINGS MADE BY THE COURT PURSUANT TO THIS SECTION SHALL BE SERVED UPON  
9 THE CHIEF ADMINISTRATOR OF THE DEFENDANT'S RETIREMENT SYSTEM.

10 10. UPON A FINAL DETERMINATION THAT REVERSES OR VACATES THE CONVICTION  
11 OR CONVICTIONS OF A DESIGNATED OFFENSE OR OFFENSES, THE MEMBER OR  
12 RETIRED MEMBER WHO HAS FORFEITED RETIREMENT RIGHTS AND BENEFITS PURSUANT  
13 TO THIS SECTION SHALL HAVE SUCH RIGHTS AND BENEFITS RETROACTIVELY  
14 RESTORED UPON APPLICATION TO THE COURT WITH JURISDICTION OVER THE  
15 FORFEITURE ACTION, REGARDLESS OF ANY TEMPORARY RESTRAINING ORDER OR  
16 PRELIMINARY INJUNCTION WHICH MAY BE OUTSTANDING OR ORDER WHICH MAY HAVE  
17 BEEN ISSUED. SUCH COURT, UPON FINDING THAT SUCH A FINAL DETERMINATION  
18 HAS OCCURRED, SHALL ISSUE AN ORDER RETROACTIVELY RESTORING SUCH RIGHTS  
19 AND BENEFITS, TOGETHER WITH SUCH OTHER RELIEF DEEMED APPROPRIATE.

20 11. EXCEPT AS OTHERWISE PROVIDED BY THIS ARTICLE, THE CIVIL PRACTICE  
21 LAW AND RULES SHALL GOVERN THE PROCEDURE IN ACTIONS COMMENCED UNDER THIS  
22 ARTICLE, EXCEPT WHERE THE ACTION IS REGULATED BY ANY INCONSISTENT  
23 PROVISIONS HEREIN.

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

28 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 any public retirement system in New York State.

If this bill is enacted, insofar as it affects 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 a future member or retiree was convicted of any one of certain criminal 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 April 2, 2009 and intended for use only during the 2009 Legislative Session, is Fiscal Note No. 2009-210, 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.