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

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I N A S S E M B L Y

January 12, 2011

Introduced by M. of A. REILLY, SCHIMMINGER, GALEF, THIELE -- Multi-Sponsored by -- M. of A. SCHROEDER, SWEENEY -- read once and referred to the Committee on Governmental Employees

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:

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 MISCONDUCT 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 MISCONDUCT 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. "COVERED CRIME" SHALL MEAN ANY OF THE FOLLOWING:

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

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

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

(D) AN ATTEMPT, CONSPIRACY, OR SOLICITATION OF ANOTHER TO COMMIT ANY 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 RESPONSIBIL-

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-

FITS, 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. THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL MAY SEEK AN ORDER FROM THE COURT THAT SOME OR ALL OF THE FORFEITED PENSION BE PAID FOR THE BENEFIT OF ANY DEPENDENT CHILDREN AS JUSTICE MAY REQUIRE, AFTER TAKING INTO CONSIDERATION THE FINANCIAL NEEDS AND RESOURCES AVAILABLE FOR SUPPORT OF SUCH CHILDREN. FURTHER, IN THE EVENT OF ANY FORFEITURE, SUCH MEMBER OR RETIRED MEMBER SHALL BE ENTITLED TO A PRO RATA RETURN OF HIS OR HER CONTRIBUTION PAID INTO THE RELEVANT RETIREMENT SYSTEMS, IN ANY AMOUNT PROPORTIONATE TO THE AMOUNT OF ANY FORFEITURE, WITHOUT INTEREST.

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 SIX THOUSAND THREE HUNDRED ELEVEN OR SECTION SIX THOUSAND 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 A HEARING.

7. THE BURDEN OF PROOF SHALL BE UPON THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL, AS THE CASE MAY BE, TO PROVE BY A PREPONDERANCE OF THE 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 MAY ORDER THAT SOME OR ALL OF THE FORFEITED PENSION BE PAID FOR THE BENEFIT OF ANY DEPENDENT CHILDREN AS JUSTICE MAY REQUIRE, AFTER TAKING INTO CONSIDERATION THE FINANCIAL NEEDS AND RESOURCES AVAILABLE FOR SUPPORT OF SUCH CHILDREN. THE COURT SHALL ISSUE A WRITTEN DECISION STATING THE BASIS FOR AN ORDER ISSUED PURSUANT TO THIS SUBDIVISION.

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

SHALL ISSUE AN ORDER TO THE APPROPRIATE RETIREMENT SYSTEM FOR 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 AND FOR THE RECOUPMENT OF ALL OR A PORTION OF THE RETIREMENT BENEFITS PAID TO THE DEFENDANT. 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 CHIEF ADMINISTRATOR OF THE DEFENDANT'S RETIREMENT SYSTEM.

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.

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.

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.