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

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2011-2012 Regular Sessions

I N A S S E M B L Y

(PREFILED)

January 5, 2011

Introduced by M. of A. PAULIN, GALEF, HOYT, SCHIMMINGER, JAFFEE -- Multi-Sponsored by -- M. of A. BING, BOYLAND, CLARK, COLTON, MAISEL, PHEFFER, ROSENTHAL, SWEENEY, THIELE -- 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 ELECTED OFFICIALS

SECTION 156. DEFINITIONS.
157. PENSION FORFEITURE.
158. MISCELLANEOUS.

S 156. 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 AN ELECTED OFFICIAL AGAINST WHOM A FORFEITURE ACTION IS COMMENCED.

2. "COVERED CRIME" SHALL MEAN ANY FELONY OFFENSE, OTHER THAN MAIL FRAUD, COMMITTED BY A DEFENDANT DURING HIS OR HER TENURE AS AN ELECTED OFFICIAL AND WHERE THERE WAS KNOWLEDGE AND INTENT ON THE PART OF THE DEFENDANT TO COMMIT SUCH CRIME.

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

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

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RESPECT TO THE OTHER PUBLIC RETIREMENT SYSTEMS AND PENSION FUNDS OF THE STATE AND THE CITY OF NEW YORK.

4. "MEMBER" SHALL MEAN ANY ELECTED OFFICIAL WHO BELONGS TO ANY STATE OR CITY RETIREMENT SYSTEM.

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 ANY RETIREMENT SYSTEM OF THE STATE OF NEW YORK OR OF THE CITY OF NEW YORK.

7. "DEPENDENT CHILDREN" SHALL INCLUDE:

(A) ANY CHILD OF AN ELECTED OFFICIAL, WHERE SUCH CHILD IS UNDER AGE NINETEEN;

(B) ANY UNMARRIED DEPENDENT CHILD OF AN ELECTED OFFICIAL, 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 ELECTED OFFICIAL, WHERE SUCH CHILD IS AT AN ACCREDITED INSTITUTION OF HIGHER LEARNING AND IS UNDER AGE TWENTY-THREE.

S 157. 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 SUBDIVISION TWO OF SECTION ONE HUNDRED FIFTY-SIX 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 AS AN ELECTED OFFICIAL, AN ACTION SHALL 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 THOSE RIGHTS AND BENEFITS TO WHICH SUCH PERSON IS OR WILL BE ENTITLED AS A MEMBER OR RETIRED MEMBER. SUCH FORFEITURE SHALL ONLY APPLY TO THAT PORTION OF THE DEFENDANT'S RIGHTS AND BENEFITS DERIVED FROM HIS OR HER EMPLOYMENT AS AN ELECTED OFFICIAL. 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. PRIOR TO COMMENCEMENT OF SUCH ACTION DESCRIBED IN SUBDIVISION ONE 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 PORTION OF SUCH RIGHTS AND BENEFITS TO WHICH SUCH PERSON IS OR WILL BE ENTITLED TO FROM SUCH PUBLIC RETIREMENT SYSTEM THAT RESULTED FROM SUCH PERSON'S EMPLOYMENT AS AN ELECTED OFFICIAL.

3. 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 TWO OF THIS SECTION. 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.

4. 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.

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

6. 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. THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL MUST, AT THE TIME OF THE HEARING, PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT KNOWINGLY AND INTENTIONALLY COMMITTED THE COVERED CRIME.

7. 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 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.

8. 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 AS AN ELECTED OFFICIAL, AND A FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT - ELECTED OFFICIAL KNOWINGLY AND INTENTIONALLY COMMITTED THE COVERED FELONY CRIME, THE COURT SHALL ISSUE AN ORDER TO THE APPROPRIATE RETIREMENT SYSTEM FOR THE FORFEITURE OF THE DEFENDANT'S RIGHTS AND BENEFITS AS A MEMBER OR RETIRED MEMBER OF SUCH SYSTEM AND FOR THE RECOUPMENT OF ALL THE RETIREMENT BENEFITS PAID TO THE DEFENDANT. 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.

9. UPON A FINAL DETERMINATION THAT REVERSES OR VACATES THE CONVICTION OR CONVICTIONS OF A COVERED CRIME, 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.

10. 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 158. 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 on the ninetieth day after it shall have become a law and shall only apply to acts committed by elected officials on or after such date.