

3817

2011-2012 Regular Sessions

I N S E N A T E

March 5, 2011

Introduced by Sen. BALL -- 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 CLASS A OR CLASS B FELONY OFFENSE;

18 (B) ANY OTHER FELONY OFFENSE, OR ANY ATTEMPT, CONSPIRACY OR SOLICITA-
19 TION TO COMMIT ANY OTHER SUCH OFFENSE WHERE SUCH ACT HAS A DIRECT AND
20 ACTUAL RELATIONSHIP BETWEEN THE CRIMINAL CONDUCT AND THE PERFORMANCE OF
21 ONE'S STATUTORY OR REGULATORY PUBLIC DUTIES;

22 (C) ANY OTHER FELONY OR MISDEMEANOR COMMITTED BY LARCENY, PERJURY,
23 FALSE OR FRAUDULENT STATEMENT OR OMISSION, EXTORTION, BRIBERY, THEFT OR
24 FAILURE TO ACT WHEN A DUTY TO ACT EXISTS, OR INTENTIONAL CONCEALMENT OF

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

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1 SUCH ACTS BY THE PERSON OR ANY OTHER PERSON OR ENTITY WHEN SUCH IS KNOWN
2 TO THE PUBLIC OFFICIAL, BY WHICH A PUBLIC OFFICER OBTAIN MONEY, GOODS OR
3 SERVICES UNDER FALSE PRETENSES AS A RESULT OF FILINGS BY SAID PUBLIC
4 OFFICER;

5 (D) ANY CONVICTION OF A CRIME INVOLVING FALSE, FRAUDULENT OR FORGED
6 DOCUMENTS INTENDED TO BE MADE PART OF A PUBLIC PROCEEDING OR RECORD IN
7 ORDER TO WILLFULLY ALTER OR MISREPRESENT THE PUBLIC RECORD;

8 (E) ANY CRIMINAL OFFENSE COMMITTED IN WHOLE IN PART UPON USE OF A
9 PUBLIC OFFICE, OR A REPRESENTATION IN WORD OR DEED THAT THE ACTOR WAS A
10 PUBLIC OFFICER, ACTING UNDER LEGAL AUTHORITY OR COLOR OF LAW, WHETHER
11 WITHIN OR WITHOUT THE SCOPE OF THE ACTOR'S PUBLIC EMPLOYMENT;

12 (F) ANY OFFENSE RELATIVE TO THE CONCEALMENT, OR OBSTRUCTING INVESTI-
13 GATION OF SUCH ACTS LISTED HEREIN; OR

14 (G) ANY SUBSTANTIALLY SIMILAR FELONY OFFENSE UNDER THE LAWS OF ANOTHER
15 STATE OR FEDERAL JURISDICTION AS LISTED IN PARAGRAPHS (A) THROUGH (F) OF
16 THIS SUBDIVISION.

17 3. "CHIEF ADMINISTRATOR OF THE RETIREMENT SYSTEM" SHALL MEAN THE COMP-
18 TROLLER OF THE STATE OF NEW YORK WITH RESPECT TO THE NEW YORK STATE AND
19 LOCAL EMPLOYEES' RETIREMENT SYSTEM AND THE NEW YORK STATE AND LOCAL
20 POLICE AND FIRE RETIREMENT SYSTEM AND THE BOARDS OF TRUSTEES WITH
21 RESPECT TO THE OTHER PUBLIC RETIREMENT SYSTEMS AND PENSION FUNDS OF THE
22 STATE AND THE CITY OF NEW YORK.

23 4. "MEMBER" SHALL MEAN A MEMBER OF THE NEW YORK STATE AND LOCAL
24 EMPLOYEES' RETIREMENT SYSTEM, THE NEW YORK STATE AND LOCAL POLICE AND
25 FIRE RETIREMENT SYSTEM, THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM,
26 THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE NEW YORK CITY TEACH-
27 ERS' RETIREMENT SYSTEM, THE NEW YORK CITY POLICE PENSION FUND, THE NEW
28 YORK CITY FIRE DEPARTMENT PENSION FUND AND THE NEW YORK CITY BOARD OF
29 EDUCATION RETIREMENT SYSTEM WHO JOINED SUCH SYSTEM ON OR AFTER THE
30 EFFECTIVE DATE OF THIS ARTICLE.

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

34 6. "RETIREMENT SYSTEM" SHALL MEAN THE NEW YORK STATE AND LOCAL EMPLOY-
35 EES' RETIREMENT SYSTEM, THE NEW YORK STATE AND LOCAL POLICE AND FIRE
36 RETIREMENT SYSTEM, THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM, THE
37 NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE NEW YORK CITY TEACHERS'
38 RETIREMENT SYSTEM, THE NEW YORK CITY POLICE PENSION FUND, THE NEW YORK
39 CITY FIRE DEPARTMENT PENSION FUND AND THE NEW YORK CITY BOARD OF EDUCA-
40 TION RETIREMENT SYSTEM.

41 7. "DEPENDENT CHILDREN" SHALL INCLUDE:

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

44 (B) ANY UNMARRIED DEPENDENT CHILD OF AN OFFICER OR EMPLOYEE, REGARD-
45 LESS OF SUCH CHILD'S AGE, WHERE SUCH CHILD IS INCAPABLE OF SELF-SUSTAIN-
46 ING EMPLOYMENT BY REASON OF MENTAL OR PHYSICAL DISABILITY AND BECAME SO
47 INCAPABLE PRIOR TO ATTAINING THE AGE OF NINETEEN; AND

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

51 8. (A) "NEXUS" SHALL MEAN THAT THE ACT OR OMISSION IS A CRIME WHERE
52 PUBLIC MONIES WERE IMPROPERLY USED, EXPENDED, OR LOST AND:

53 (I) IS RELATED DIRECTLY TO THE PERFORMANCE OF OR THE FAILURE TO
54 PERFORM DUTIES AS A PUBLIC OFFICER REQUIRED BY LAW; OR

(II) HAS AN ACTUAL AND DIRECT RELATIONSHIP BETWEEN THE CRIMINAL ACT AND PERFORMANCE OF PUBLIC DUTIES OR ACTUALLY AND DIRECTLY ARISES OUT OF OR IN CONNECTION WITH PUBLIC SERVICE.

(B) NOTWITHSTANDING PARAGRAPH (A) OF THIS SUBDIVISION, PERSONAL, PRIVATE OFFENSES THAT ARE CRIMINAL IN NATURE WHICH ARE NOT IN CONNECTION WITH THE ADMINISTRATION OF THE PUBLIC EMPLOYEE'S OFFICE OR POSITION SHALL NOT BE CAUSE FOR USE OF THIS ARTICLE.

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, AND SUCH CRIME HAS A NEXUS, AS DEFINED IN SUBDIVISION EIGHT OF SECTION ONE HUNDRED FIFTY-SEVEN OF THIS ARTICLE, TO THE PUBLIC OFFICER, AN ACTION TO FORFEIT THE PENSION OF THE PUBLIC OFFICER MAY BE COMMENCED IN SUPREME COURT.

2. WITHIN SIX MONTHS OF A CONVICTION FOR ANY COVERED CRIME, THE PROSECUTING AUTHORITY, WHICH PROSECUTED THE UNDERLYING CRIMINAL CHARGES, OR THE ATTORNEY GENERAL OF THE STATE MAY INITIATE A SPECIAL PROCEEDING IN THE SUPREME COURT OF THE COUNTY IN WHICH THE OFFENSE WAS PROSECUTED PURSUANT TO THIS SECTION TO SEEK AN ORDER OF THE SUPREME COURT OF CIVIL FORFEITURE OF ALL OR A PORTION OF THE RIGHTS AND BENEFITS TO WHICH SUCH PERSON IS ENTITLED OR WILL BE ENTITLED TO AS A MEMBER OR RETIRED MEMBER.

3. NO PROCEEDING SHALL BE BEGUN WITHOUT NOTICE BEING PROVIDED TO THE MEMBER OF THE RETIREMENT SYSTEM AT ARRAIGNMENT FOR THE CRIMINAL ACTION IF PROSECUTED IN THIS STATE OR BY NOTICE WITHIN SEVEN DAYS PRIOR TO DISPOSITION BY PLEA OR SENTENCE, IF THE COVERED CRIME IS PROSECUTED IN ANOTHER JURISDICTION.

4. NO PROCEEDING SHALL BE BEGUN BY ANY PROSECUTING AUTHORITY WITHOUT NOTICE BEING PROVIDED TO THE RETIREMENT SYSTEM THAT THE PERSON HAS BEEN CONVICTED OF A COVERED CRIME.

5. NO PROCEEDING SHALL BE BEGUN BY ANY PROSECUTING AUTHORITY UNTIL THE PROSECUTING AUTHORITY HAS SERVED UPON HIM AND WITHIN TWENTY-FOUR HOURS SERVED UPON THE PERSON CONVICTED OF A COVERED CRIME A FULL STATEMENT OF THE PENSION RIGHTS AND MONIES TO WHICH THE PERSON MAY BE ENTITLED FROM THEIR SERVICE AS A PUBLIC OFFICER AND SAID SERVICE INFORMATION BE BROKEN INTO CATEGORIES OF PENSION RIGHTS BASED UPON EACH PUBLIC OFFICE HELD.

6. SUBJECT TO AN ORDER OF THE COURT FOR PURPOSES OF RESTITUTION, ORDERED AS PART OF THE UNDERLYING CRIMINAL CASE AND ONLY FOR THE COVERED CRIME, THE PERSON SHALL BE DELIVERED AT THE TIME OF THE NOTICE FROM THE RETIREMENT SYSTEM, AN AMOUNT OF PRO RATA OF CONTRIBUTIONS PAID INTO THE RETIREMENT SYSTEMS, UNLESS A COURT SHALL ORDER OTHERWISE.

7. THE PERSON SUBJECT TO FORFEITURE OF THE RIGHTS AND MONIES OF A PUBLIC PENSION SHALL BE SERVED WITH A SUMMONS AND COMPLAINT SPECIFYING THE COVERED CRIME, THE JURISDICTION, THE AMOUNT OF PENSION IN ISSUE, THE BASIS FOR SUCH A CLAIM AS TO THAT PORTION OR ENTITY OF THE PENSION. THE PERSON RECEIVING SUCH COMPLAINT MAY FILE AN ANSWER OR MOVE TO DISMISS WITHIN THE TIME PERIOD FOR SUCH ANSWERS IN A SPECIAL PROCEEDING. THE COURT UPON RECEIPT OF THE MOTION SHALL PROMPTLY HOLD A HEARING. THE COURT SHALL APPOINT A GUARDIAN AD LITEM FOR ANY DEPENDENT CHILDREN.

8. THE COURT SHALL PERMIT ANY DEPENDENT CHILD, SPOUSE, DIVORCED SPOUSE, OR PERSON IN SUCH RELATIONSHIP OR CONSANGUINITY OR DOMICILE WHO SEEKS TO MAKE A CLAIM ON SUCH PENSION AS A RESULT OF ENTITLEMENT TO SUCH FUNDS HAD THE COVERED CRIME NOT BEEN COMMITTED. IF SUCH CLAIMANT PROF-

1 ITED OR BENEFITED KNOWINGLY FROM SUCH COVERED CRIME AND THE COURT SO
2 FINDS THEN THE COURT MAY EXTINGUISH ANY CLAIM UPON MOTION OF ANY PARTY.

3 9. THE BURDEN OF PROOF IN ALL MATTERS SHALL BE UPON THE PROSECUTING
4 AUTHORITY WHO INITIATES THE ACTION.

5 10. THE PERSON SUBJECT TO THE FORFEITURE PROCEEDING RETAINS THE SAME
6 RIGHTS AS IN A CRIMINAL TRIAL. SHOULD THE PERSON ELECTED TO TESTIFY IN
7 HIS OWN BEHALF, NOTHING SAID IN THE PROCEEDING MAY BE USED AGAINST HIM
8 UPON APPEAL OR RETRIAL OF SUCH A COVERED CRIME, IF A COURT OF COMPETENT
9 JURISDICTION VACATED OR REVERSES THE CONVICTION FOR A COVERED CRIME.

10 11. FORFEITURE OF THE WHOLE OR ANY PART MAY BE ORDERED SOLELY UPON
11 CLEAR AND CONVINCING EVIDENCE.

12 12. THE COURT SHALL MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

13 13. (A) THE COURT SHALL CONSIDER THE FOLLOWING FACTORS IN REACHING A
14 DETERMINATION:

15 (I) THE NATURE OF THE OFFENSE IN TERMS OF DURATION AND ACTS.

16 (II) THE SERIOUSNESS OF THE OFFENSE, MEASURED BY THE AMOUNT OF PUBLIC
17 MONIES ACTUALLY MISAPPROPRIATED OR DIRECTLY LOST AS A RESULT OF THE
18 COVERED CRIME.

19 (III) THE RELATIONSHIP OF THE OFFENSE TO THE PUBLIC OFFICE.

20 (IV) THE PUBLIC OFFICE WHICH THE PERSON HELD AT THE TIME OF THE
21 OFFENSE.

22 (V) MEMBERS OF THE PUBLIC DIRECTLY AFFECTED BY THE COVERED CRIME.

23 (VI) THE LEVEL OF WILLFULNESS OR MALICE OR OTHER CULPABILITY IN THE
24 COMMISSION OF THE COVERED CRIME.

25 (VII) ANY GOOD FAITH EFFORT TO MITIGATE OR PREVENT THE HARM CAUSED BY
26 THE OFFENSE.

27 (VIII) WHETHER THE PERSON PLEADED GUILTY OR NOT.

28 (IX) WHETHER THE PERSON OBSTRUCTED, IMPEDED OR CONCEALED MATTERS
29 DURING OR IN THE COURSE OF INVESTIGATION, TRIAL OR INSTANT PROCEEDING.

30 (X) WHETHER THE PERSON ACTED OUT OF DURESS, COERCION OR INDUCEMENT,
31 NOT SUFFICIENT TO BE A DEFENSE UNDER THE PENAL LAW.

32 (XI) THE LENGTH OF PUBLIC SERVICE AND THE OFFICES HELD.

33 (XII) THE NUMBER OF YEARS OF PUBLIC SERVICE BY THE PERSON WITHOUT ANY
34 CRIMINAL CONDUCT.

35 (XIII) THE DIRECT PECUNIARY BENEFIT TO THE PERSON, IF ANY.

36 (XIV) THE EXTENT TO WHICH THE PENSION OF THE PERSON HAS VESTED.

37 (XV) ANY AMOUNTS PREVIOUSLY PAID OUT OF THE PENSION.

38 (XVI) ANY OTHER PUBLIC SERVICE, IN ANY OTHER FORM NOT COVERED BY A
39 PENSION SYSTEM.

40 (XVII) THE AVAILABILITY AND ADEQUACY OF OTHER PENAL SANCTIONS.

41 (XVIII) ANY AND ALL PERSONAL CIRCUMSTANCES OF THE PERSON WHICH BEAR ON
42 THE JUSTNESS OR NEED FOR FORFEITURE.

43 (XIX) ANY AND ALL OTHER MATTERS THAT JUSTICE REQUIRES.

44 (B) NO ONE OF THESE FACTORS SHALL BE CONCLUSIVE AND NONE SHALL BE
45 OMITTED.

46 (C) THE COURT SHALL ALSO CONSIDER ANY MITIGATING FACTOR SET FORTH BY
47 ANY PARTY OPPOSING FORFEITURE, WITHOUT LIMITATION.

48 (D) THE COURT SHALL CONSIDER AND MAKE A SPECIFIC FACTUAL FINDING AS TO
49 THE EXTENT TO WHICH THE PERSON'S FAMILY INCLUDING EACH CHILD OR CHILDREN
50 IS DEPENDENT UPON SAID PERSON AND THE EXTENT TO WHICH THE FAMILY IS
51 DEPENDENT UPON OR EXPECTED TO BE DEPENDENT UPON SUCH PENSION, INCLUDING
52 ANY EVIDENCE OF PLANNING BY SUCH FAMILY.

53 14. AT ANY TIME DURING THE PENDENCY OF A FORFEITURE ACTION, THE COURT
54 MAY DISMISS THE ACTION IF IT FINDS THAT SUCH RELIEF IS WARRANTED BY THE
55 EXISTENCE OF SOME COMPELLING FACTOR, CONSIDERATION OR CIRCUMSTANCE
56 INCLUDING, BUT NOT LIMITED TO, ONE OR MORE OF THE MITIGATING FACTORS SET

1 FORTH IN THIS SECTION, OR OTHER INFORMATION OR EVIDENCE WHICH DEMON-
2 STRATES THAT SUCH FORFEITURE WOULD NOT SERVE THE ENDS OF JUSTICE. THE
3 COURT MAY ORDER THAT SOME OR ALL OF THE FORFEITED PENSION BE PAID FOR
4 THE BENEFIT OF ANY DEPENDENT CHILDREN AS JUSTICE MAY REQUIRE, AFTER
5 TAKING INTO CONSIDERATION THE FINANCIAL NEEDS AND RESOURCES AVAILABLE
6 FOR SUPPORT OF SUCH CHILDREN. THE COURT SHALL ISSUE A WRITTEN DECISION
7 STATING THE BASIS FOR AN ORDER ISSUED PURSUANT TO THIS SUBDIVISION.

8 15. UPON A FINDING BY THE SUPREME COURT AFTER A FULL HEARING THAT A
9 PORTION, A PRO RATA OR AN ENTIRE PENSION SHALL BE FORFEITED TO THE
10 STATE, THE COURT SHALL ISSUE AN ORDER TO THE APPROPRIATE RETIREMENT
11 SYSTEM FOR FORFEITURE OF SUCH PORTION OR ENTIRETY OF THE PENSION, LESS
12 ANY ADJUSTMENTS OR MODIFICATIONS IN THE TERMS THEREOF TO PROTECT THIRD
13 PARTY INTERESTS FOUND BY THE COURT AND SHALL CAUSE SUCH ORDER TO BE
14 SERVED UPON THE PERSON SUBJECT TO THE ORDER, THIRD PARTIES ADVERSELY OR
15 OTHERWISE EFFECTED BY THE ORDER, THE PROSECUTION AND THE CHIEF ADMINIS-
16 TRATOR OF THE APPROPRIATE RETIREMENT SYSTEM.

17 16. ALL PARTIES SHALL HAVE THE SAME APPELLATE RIGHTS AS IN ANY CIVIL
18 ACTION. IN THE EVENT OF AN APPEAL, ANY PARTY WHO SHALL SEEK A STAY PEND-
19 ING APPEAL SHALL HAVE IT GRANTED FOR GOOD CAUSE SHOWN.

20 17. UPON A FINAL DETERMINATION THAT REVERSES OR VACATES A CONVICTION
21 OF A COVERED OFFENSE AND WHERE THERE HAS BEEN A DECISION FORFEITING ALL
22 OR A PORTION OF THE PENSION BASED UPON SUCH CONVICTION, THE PROSECUTION
23 SHALL NOTIFY THE APPROPRIATE RETIREMENT SYSTEM OF THE REVERSAL OR VACA-
24 TUR, NOTIFY THE COURT THAT ISSUED OR IS HEARING AN APPEAL FROM SUCH
25 ORDER OF FORFEITURE FORTHWITH AND SEEK A VACATUR OF THE ORDER OF FORFEI-
26 TURE. UPON THE REVERSAL OR VACATUR OF THE CONVICTION OF A COVERED
27 OFFENSE, THE RIGHTS, PRIVILEGES AND BENEFITS OF THE APPROPRIATE PENSION
28 SYSTEM SHALL BE IMMEDIATELY RESTORED TO THE PERSON AND ANY AND ALL
29 ORDERS RESTRICTING OR INTERFERING WITH SUCH PENSION SHALL BE VOIDED.

30 18. EXCEPT AS OTHERWISE PROVIDED BY THIS ARTICLE, THE CIVIL PRACTICE
31 LAW AND RULES SHALL GOVERN THE PROCEDURE IN ACTIONS COMMENCED UNDER THIS
32 ARTICLE, EXCEPT WHERE THE ACTION IS REGULATED BY ANY INCONSISTENT
33 PROVISIONS HEREIN.

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

38 S 2. This act shall take effect immediately and shall only apply to
39 those members who initially join the retirement system on or after such
40 effective date.