

3773

2011-2012 Regular Sessions

I N A S S E M B L Y

January 27, 2011

Introduced by M. of A. GABRYSZAK -- 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 ASSEM-
BLY, 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;

23 (E) ANY OTHER CRIME DEFINED BY THE LAWS OF THIS STATE, A NECESSARY
24 ELEMENT OF WHICH, AS DETERMINED BY STATUTORY OR COMMON LAW DEFINITION OF

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

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1 SUCH CRIME, INCLUDES INTERFERENCE WITH THE ADMINISTRATION OF JUSTICE,
2 FALSE SWEARING, MISREPRESENTATION, FRAUD, DECEIT, BRIBERY, EXTORTION,
3 MISAPPROPRIATION, THEFT, PROHIBITED ACTION OR FAILURE TO ACT BY A PUBLIC
4 OFFICER OR EMPLOYEE;

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

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

12 3. "CHIEF ADMINISTRATOR OF THE RETIREMENT SYSTEM" SHALL MEAN THE COMP-
13 TROLLER OF THE STATE OF NEW YORK WITH RESPECT TO THE NEW YORK STATE AND
14 LOCAL EMPLOYEES' RETIREMENT SYSTEM AND THE NEW YORK STATE AND LOCAL
15 POLICE AND FIRE RETIREMENT SYSTEM AND THE BOARDS OF TRUSTEES WITH
16 RESPECT TO THE OTHER PUBLIC RETIREMENT SYSTEMS AND PENSION FUNDS OF THE
17 STATE AND THE CITY OF NEW YORK.

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

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

29 6. "RETIREMENT SYSTEM" SHALL MEAN THE NEW YORK STATE AND LOCAL EMPLOY-
30 EES' RETIREMENT SYSTEM, THE NEW YORK STATE AND LOCAL POLICE AND FIRE
31 RETIREMENT SYSTEM, THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM, THE
32 NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE NEW YORK CITY TEACHERS'
33 RETIREMENT SYSTEM, THE NEW YORK CITY POLICE PENSION FUND, THE NEW YORK
34 CITY FIRE DEPARTMENT PENSION FUND AND THE NEW YORK CITY BOARD OF EDUCA-
35 TION RETIREMENT SYSTEM.

36 7. "DEPENDENT CHILDREN" SHALL INCLUDE:

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

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

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

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

48 1. IN THE CASE OF A MEMBER OR RETIRED MEMBER WHO IS CONVICTED OF,
49 PLEADS GUILTY TO, PLEADS NOLO CONTENDERE TO, OR PLEADS GUILTY TO PURSU-
50 ANT TO SUBDIVISION TWO OF SECTION 220.10 OF THE CRIMINAL PROCEDURE LAW
51 ANY COVERED CRIME SET FORTH IN PARAGRAPH (A), (B), (C), (D), (E), OR (F)
52 OF SUBDIVISION TWO OF SECTION ONE HUNDRED FIFTY-SEVEN OF THIS ARTICLE,
53 THE COMMISSION OF WHICH IS RELATED TO THE PERFORMANCE OF OR FAILURE TO
54 PERFORM SUCH MEMBER OR RETIRED MEMBER'S OFFICIAL DUTIES AND RESPONSIBIL-
55 ITIES, AN ACTION MAY BE COMMENCED IN SUPREME COURT BY THE DISTRICT
56 ATTORNEY HAVING JURISDICTION OVER THE OFFENSE, OR BY THE ATTORNEY GENER-

1 AL IF THE ATTORNEY GENERAL BROUGHT THE UNDERLYING CRIMINAL CHARGE, FOR
2 THE FORFEITURE OF ALL OR A PORTION OF THOSE RIGHTS AND BENEFITS TO WHICH
3 SUCH PERSON IS OR WILL BE ENTITLED AS A MEMBER OR RETIRED MEMBER. SUCH
4 ACTION SHALL BE COMMENCED WITHIN SIX MONTHS OF SUCH CONVICTION. FOR
5 PURPOSES OF THIS ARTICLE, A COVERED CRIME IS RELATED TO THE PERFORMANCE
6 OF OR FAILURE TO PERFORM SUCH MEMBER OR RETIRED MEMBER'S OFFICIAL DUTIES
7 AND RESPONSIBILITIES IF IT:

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

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

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

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

15 (E) EVEN THOUGH COMMITTED OUTSIDE THE SCOPE OF SUCH MEMBER'S OFFICIAL
16 DUTIES OR RESPONSIBILITIES, INVOLVED ACTIONS OR CONDUCT BY WHICH SUCH
17 MEMBER OR RETIRED MEMBER INDICATED OR CONVEYED THAT HE OR SHE WAS ACTING
18 WITH THE AUTHORITY OF, OR UNDER COLOR OF THE AUTHORITY OF, ANY GOVERN-
19 MENTAL ENTITY.

20 2. WHERE THE ATTORNEY GENERAL, OR THE DISTRICT ATTORNEY OF THE COUNTY
21 IN WHICH THE MEMBER OR RETIRED MEMBER RESIDES IN THIS STATE, FINDS THAT
22 A MEMBER OR A RETIRED MEMBER HAS BEEN CONVICTED OF A COVERED CRIME AS
23 DEFINED IN PARAGRAPH (G) OF SUBDIVISION TWO OF SECTION ONE HUNDRED
24 FIFTY-SEVEN OF THIS ARTICLE, THE COMMISSION OF WHICH IS RELATED TO THE
25 PERFORMANCE OR FAILURE TO PERFORM SUCH MEMBER'S OR RETIRED MEMBER'S
26 OFFICIAL DUTIES AND RESPONSIBILITIES, AN ACTION MAY BE COMMENCED IN
27 SUPREME COURT BY THE ATTORNEY GENERAL, OR BY THE DISTRICT ATTORNEY OF
28 THE COUNTY IN WHICH THE MEMBER OR RETIRED MEMBER RESIDES IN THIS STATE,
29 FOR THE FORFEITURE OF ALL OR A PORTION OF THOSE RIGHTS AND BENEFITS TO
30 WHICH SUCH PERSON IS OR WILL BE ENTITLED AS A MEMBER OR RETIRED MEMBER.
31 SUCH ACTION SHALL BE COMMENCED WITHIN ONE YEAR OF SUCH CONVICTION.

32 3. PRIOR TO COMMENCEMENT OF SUCH ACTION DESCRIBED IN SUBDIVISION ONE
33 OR TWO OF THIS SECTION, THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL,
34 AS THE CASE MAY BE, SHALL PROVIDE NOTICE TO THE CHIEF ADMINISTRATOR OF
35 THE DEFENDANT'S RETIREMENT SYSTEM STATING THAT HE OR SHE HAS REASON TO
36 BELIEVE THAT THE PERSON CONVICTED COMMITTED THE COVERED CRIME RELATED TO
37 HIS OR HER OFFICIAL DUTIES AND RESPONSIBILITIES. WITHIN TWENTY DAYS OF
38 RECEIPT OF SUCH NOTICE, THE CHIEF ADMINISTRATOR OF THE DEFENDANT'S
39 RETIREMENT SYSTEM SHALL SUBMIT A NOTICE OF APPLICABILITY TO THE DISTRICT
40 ATTORNEY OR THE ATTORNEY GENERAL AS THE CASE MAY BE. THE NOTICE OF
41 APPLICABILITY SHALL CONTAIN A STATEMENT SPECIFYING WHETHER THE PERSON
42 CONVICTED IS OR HAS BEEN A MEMBER OR RETIRED MEMBER OF THE NEW YORK
43 STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM, THE NEW YORK STATE AND
44 LOCAL POLICE AND FIRE RETIREMENT SYSTEM, THE NEW YORK STATE TEACHERS'
45 RETIREMENT SYSTEM, THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, THE
46 NEW YORK CITY TEACHERS' RETIREMENT SYSTEM, THE NEW YORK CITY POLICE
47 PENSION FUND, THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND AND THE NEW
48 YORK CITY BOARD OF EDUCATION RETIREMENT SYSTEM AND SHALL DESCRIBE THE
49 RIGHTS AND BENEFITS TO WHICH SUCH PERSON IS OR WILL BE ENTITLED TO FROM
50 SUCH PUBLIC RETIREMENT SYSTEM.

51 4. NO FORFEITURE ACTION MAY BE COMMENCED BY THE DISTRICT ATTORNEY OR
52 THE ATTORNEY GENERAL UNTIL RECEIPT OF THE NOTICE OF APPLICABILITY AS SET
53 FORTH IN SUBDIVISION THREE OF THIS SECTION. IN DETERMINING WHETHER TO
54 SEEK FORFEITURE OF A PORTION, RATHER THAN ALL, OF SUCH RETIREMENT BENE-
55 FITS, THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL MAY CONSIDER MITI-
56 GATING FACTORS INCLUDING, BUT NOT LIMITED TO: THE NATURE AND SERIOUSNESS

1 OF THE OFFENSE COMMITTED IN RELATION TO THE AMOUNT OF THE FORFEITURE
2 PENALTY; WHETHER THE DEFENDANT'S CONDUCT IN COMMITTING THE OFFENSE WAS
3 WILLFUL OR MALICIOUS; WHETHER THE DEFENDANT MADE ANY SUBSTANTIAL GOOD
4 FAITH EFFORTS TO PREVENT OR MITIGATE THE HARM CAUSED BY THE OFFENSE;
5 WHETHER THE DEFENDANT'S PARTICIPATION IN THE CRIME WAS UNDER DURESS,
6 COERCION OR INDUCED BY OTHERS; THE IMPACT OF THE CRIME ON THE STATE OR
7 LOCAL GOVERNMENT AND THE NUMBER OF YEARS OF THE DEFENDANT'S PUBLIC
8 SERVICE PERFORMED WITHOUT CRIMINAL CONDUCT; THE PECUNIARY BENEFIT TO THE
9 DEFENDANT FROM THE CRIME; AND WHETHER AND TO WHAT EXTENT THE DEFENDANT'S
10 FAMILY IS DEPENDENT UPON THE DEFENDANT'S PRESENT AND FUTURE RETIREMENT
11 BENEFITS. THE DISTRICT ATTORNEY OR THE ATTORNEY GENERAL MAY SEEK AN
12 ORDER FROM THE COURT THAT SOME OR ALL OF THE FORFEITED PENSION BE PAID
13 FOR THE BENEFIT OF ANY DEPENDENT CHILDREN AS JUSTICE MAY REQUIRE, AFTER
14 TAKING INTO CONSIDERATION THE FINANCIAL NEEDS AND RESOURCES AVAILABLE
15 FOR SUPPORT OF SUCH CHILDREN. FURTHER, IN THE EVENT OF ANY FORFEITURE,
16 SUCH MEMBER OR RETIRED MEMBER SHALL BE ENTITLED TO A PRO RATA RETURN OF
17 HIS OR HER CONTRIBUTION PAID INTO THE RELEVANT RETIREMENT SYSTEMS, IN
18 ANY AMOUNT PROPORTIONATE TO THE AMOUNT OF ANY FORFEITURE, WITHOUT INTER-
19 EST.

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

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

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

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

52 9. UPON A FINDING BY THE COURT THAT THE DEFENDANT HAS COMMITTED A
53 COVERED CRIME THAT IS RELATED TO THE PERFORMANCE OF OR FAILURE TO
54 PERFORM SUCH DEFENDANT'S OFFICIAL DUTIES AND RESPONSIBILITIES, THE COURT
55 SHALL ISSUE AN ORDER TO THE APPROPRIATE RETIREMENT SYSTEM FOR THE
56 FORFEITURE OR RECOUPMENT OF ALL OR A PORTION OF THE DEFENDANT'S RIGHTS

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

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

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

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

26 S 2. This act shall take effect on the thirtieth day after it shall
27 have become a law.