

Pennsylvania Public Pensions And Public Pension Forfeiture Part II: Current Forfeiture Law And Proposed Amendments

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ABSTRACT

This is the second article in a two-part series on the laws regulating public pensions and pension forfeitures in the Commonwealth of Pennsylvania. The first part discussed the historical development of public pensions and the corruption that necessitated the Pennsylvania pension forfeiture law. This part will examine the development and application of the Pennsylvania pension forfeiture law.

THE PENNSYLVANIA PUBLIC EMPLOYEE PENSION FORFEITURE ACT

In 1893, the Pennsylvania General Assembly adopted a law that provided for the establishment of municipal pension plans for police officers.³ The Act, which was

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3. Act of May 24, 1893 (P.L.129, No.82).

signed into law by Governor Robert E. Pattison on May 24, 1893, was the first law adopted in Pennsylvania to provide for public pensions.

The Act included provisions for the forfeiture of such pensions for a variety of causes, including “conviction of a crime or misdemeanor, becoming an habitual drunkard, becoming a non-resident of the State, or failing to comply with the same general regulation relating to the management of said fund which may be made by ordinance. . . .”⁴ A 1921 law authorizing cities of the third class to establish firemen’s pension funds, enacted on April 18, 1921, included similar forfeiture provisions.⁵ However, such forfeiture provisions were generally not included in the many other pension laws that were enacted over the years covering state, school district and municipal workers.⁶

It was not until July 8, 1978, near the end of the corruption-plagued administration of Governor Milton Shapp,⁷ that the Public Employee Pension Forfeiture Act was adopted.⁸ The act provided that “no public official or public employee⁹ nor any beneficiary designated by such public official or public employee shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment.”¹⁰ Although enacted in 1978, the law was made retroactive to December 1, 1972.

Between 2005 and 2015 approximately 200 individuals . . . lost their public pensions because of crimes related to public office or public employment.

The following crimes are specifically enumerated in the law: criminal offenses committed by a school employee against a student; deception; theft by extortion; theft of services; theft by failure to make required disposition of funds received; forgery; tampering with records or identification; misapplication of entrusted prop-

4. *Id.* at 130-31.

5. The law provided that once a person became entitled to receive benefits from the firemen’s pension fund, he could be deprived of such pension only for “[c]onviction of a crime or misdemeanor; becoming an habitual drunkard; becoming a nonresident of the State; or failing to comply with the same general regulation relating to the management of said fund which may be made by ordinance and which may provide that a failure to comply therewith shall terminate the right to participate in the pension fund. . . .” Act of April 18, 1921 (P.L.148, No.95).

6. See Part I of this article in the January 2018 issue of the *Pennsylvania Bar Association Quarterly* for a synopsis of those laws.

7. “About 60 people under Gov. Milton J. Shapp, including four Cabinet members, were convicted in the 1970s of wrongdoing, including taking money for speaking engagements, giving false testimony under oath, fraud and extortion.” *A Guide to Pa.’s Long History of Government Corruption*, PENNLIVE (Jul. 5, 2016), http://www.pennlive.com/midstate/index.ssf/2016/07/capitol_corruption_parade.html. So many officials were charged with criminal offenses that the administration became known as “the Crook of the Month Club.” Steve Esack, *Is 2015 the Worst Year in Pennsylvania Political History?*, MORNING CALL (Dec. 12, 2015), <http://www.mcall.com/news/nationworld/pennsylvania/mc-pa-worst-year-in-state-politics-20151212-story.html>. Governor Shapp was never personally charged with any wrongdoing.

8. 43 P.S. §1311-1315 (West 2009).

9. “Public official or public employee” was defined in the act as “[a]ny person who is elected or appointed to any public office or employment including justices, judges and justices of the peace and members of the General Assembly or who is acting or who has acted in behalf of the Commonwealth or a political subdivision or any agency thereof including but not limited to any person who has so acted and is otherwise entitled to or is receiving retirement benefits whether that person is acting on a permanent or temporary basis and whether or not compensated on a full or part-time basis.” 1978 PA. LAWS 753. Independent contractors and their employees and agents working for the Commonwealth or a political subdivision of the Commonwealth were excluded.

10. *Id.* at 753.

erty and property of government or financial institutions; bribery in official and political matters; threats and other improper influence in official and political matters; perjury; false swearing; unsworn falsification to authorities; false reports to law enforcement authorities; witness or informant taking bribe; tampering with or fabricating physical evidence; tampering with public records or information; intimidation of witnesses or victims; retaliation against witness, victim or party; obstructing administration of law or other governmental function; official oppression; and speculating or wagering on official action or information.¹¹ The act also covers “all criminal offenses as set forth in Federal law substantially the same as the crimes enumerated herein.”¹²

The law provides that “no public official or public employee nor any beneficiary designated by such public official or public employee shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment.”¹³ In addition, “no payment or partial payment shall be made during the pendency of an appeal.”¹⁴ Under the terms of the law, “[e]ach time a public officer or public employee is *elected, appointed, promoted, or otherwise changes a job classification*, there is a termination and renewal of the contract for purposes of this act.”¹⁵

A public official or employee who forfeits his or her pension under the Act is entitled to the return of his or her contributions. However, should the defendant owe restitution to the Commonwealth or any subdivision thereof, “all sums then credited to the defendant’s account or payable to the defendant including the [defendant’s pension] contributions shall be available to satisfy such restitution order.”¹⁶

In addition to the Public Employee Pension Forfeiture Act, the Pennsylvania Constitution includes specific forfeiture provisions regarding justices, judges, and members of the minor judiciary. It requires that “no salary, retirement benefit or other compensation, present or deferred, shall be paid to any justice, judge or justice of the peace¹⁷ who, under section 18 or under Article VI, is suspended, removed or barred from holding judicial office for conviction of a felony or misconduct in office or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute.”¹⁸

COMPARISON WITH OTHER STATES’ PENSION FORFEITURE LAWS

Some states, including Hawaii, Idaho, Nebraska, Oregon, and Wyoming, lack a public pension forfeiture law.¹⁹ Of those states that have such laws, the coverage and workings of the forfeiture laws vary significantly from jurisdiction to jurisdic-

11. *Id.* at 752-53. The crimes listed largely represented charges brought against Shapp Administration officials. The provisions regarding offenses against school students were added in 2004. The amendment was unanimously approved in both the House and the Senate.

12. *Id.* at 753.

13. 43 P.S. §1313 (Westlaw through 2018-82).

14. *Id.*

15. *Id.* (emphasis added).

16. 43 P.S. §1314 (Westlaw through 2017-82).

17. The office of justice of the peace is now magisterial district judge.

18. PA. CONST. art. V, §16; *see also* 42 Pa.C.S.A. §3352 (Westlaw through 2017-82).

19. State Pension Forfeiture Laws, <http://www.governing.com/gov-data/other/state-pension-forfeiture-laws.html>.

tion. Pennsylvania's law has been called "weak."²⁰ This is true in some ways, but the Pennsylvania law actually compares well with public pension forfeiture laws in some other states.

In several states, public pension forfeiture is limited to the survivors who cause the death of a member of a public pension system. Under Minnesota law, for example, "[o]n final conviction of a survivor of a felony that caused the death of a public pension plan member, of criminal liability for a death by wrongful act felony, or of conspiracy to commit a death by wrongful act felony, the entitlement of that survivor to receive a survivor benefit is forfeited." The law of the State of Washington provides that "[p]roperty that would have passed to or for the benefit of a beneficiary under one of the [public] retirement systems . . . shall not pass to that beneficiary if the beneficiary was a slayer or abuser of the decedent and the property shall be distributed as if the slayer or abuser had predeceased the decedent."²¹

In Texas, public pension forfeiture is restricted to members of the "elected class" which includes "persons who hold state offices that are normally filled by statewide election . . . members of the legislature; and district and criminal district attorneys . . ."²² The individual must have committed a "qualifying felony," meaning one or more of the following: bribery; the embezzlement, extortion, or other theft of public money; perjury; coercion of public servants or voters; tampering with governmental records; misuse of official information; conspiracy . . . or abuse of official capacity.²³

In New York State, cases involving any public official²⁴ "who stands convicted, by plea of *nolo contendere* or plea of guilty to, or by conviction after trial, of any crime related to public office, an action may be commenced . . . for an order to reduce or revoke the pension to which such public official is otherwise entitled for service."²⁵ Among the factors to be taken into consideration by the court in determining the amount of any pension reduction are "[t]he severity of the crime related to public office of which the defendant stands convicted; [t]he amount of monetary loss suffered by such state or municipality as a result of such crime related to public office; [t]he degree of public trust reposed in the public official by virtue of the person's position as a public official; [i]f the crime related to public office was part of a fraudulent scheme against the state or a municipality, the role of the public official in such fraudulent scheme against such state or a municipality; [t]he defendant's criminal history, if any; [t]he impact of forfeiture, in whole or in part, on defendant's dependents, present or former spouses, or domestic partners; [and] [t]he proportionality of forfeiture of all or part of the pension to the crime committed."²⁶

A newly approved Constitutional Amendment took effect in New York on January 1, 2018.²⁷ "The amendment allows, but does not require, a judge to strip or reduce the pension of a public official convicted of a felony related to their official duties."²⁸

20. PennLive Editorial Board, *Here's an Easy One: Fix Pa.'s Weak Pension Forfeiture Law* (Dec. 11, 2017, 1:11 PM) http://www.pennlive.com/opinion/2017/12/heres_an_easy_one_fix_pensions.html.

21. WASH. REV. CODE ANN. §41.04.273 (Westlaw through 2017 Third Special Session).

22. TEX. GOV'T CODE ANN. §812.002 (Westlaw through 2017).

23. TEX. GOV'T CODE ANN. §810.002 (Westlaw through 2017).

24. "Public official" under the New York law includes paid state employees, but not unpaid workers.

25. N.Y. RETIRE. & SOC. SEC. §157 (McKinney 2014).

26. *Id.*

27. Matthew Hamilton, *Pension Forfeiture Constitutional Amendment Passes* (Nov. 7, 2017) <http://blog.timesunion.com/capitol/archives/278540/pension-forfeiture-constitutional-amendment-passes/>.

28. *Id.* (NY Const. Art. V, §7).

As is the case with the Pennsylvania public pension forfeiture law, New Jersey's statute requires conviction of one or more specified crimes.²⁹ These are criminal coercion; theft by deception, if the amount involved exceeds \$10,000; theft by extortion; theft by failure to make required disposition of property received, if the amount involved exceeds \$10,000; commercial bribery; money laundering; false contract payment claims; bribery in official matters; threats and other improper influence in official and political matters; unlawful official business transaction where interest is involved; acceptance or receipt of unlawful benefit by public servant for official behavior; offer of unlawful benefit to public servant for official behavior; perjury; tampering with witnesses; tampering with public records or information; compounding; official misconduct; speculating or wagering on official action or information; or pattern of official misconduct.³⁰

The New Jersey statute includes a notice provision not currently in the Pennsylvania law.³¹ It requires that "[w]henver any State or local public employer takes formal disciplinary action against an officer or employee who is a member of any State or locally-administered pension fund or retirement system by removing that officer or employee from office or employment, it shall inform the board of trustees of the fund or system of its action in writing so that the board may consider the member's conduct. . . ."³²

West Virginia enacted its "Disqualification for Public Retirement Plan Benefits" statute in 1976.³³ The State Legislature declared "that honorable service is a condition to receiving any pension, annuity, disability payment or any other benefit under a retirement plan."³⁴ Less than honorable service was defined in the Act as "[i]mpeachment and conviction of a participant or former participant under the provisions of section nine, article four of the Constitution of West Virginia, except for a misdemeanor;" "[c]onviction of a participant or former participant of a felony for conduct related to his or her office or employment which he or she committed while holding the office during the employment; or [c]onduct of a participant or former participant which constitutes all of the elements of [such a] crime . . . but for which the participant or former participant was not convicted because . . . he or she made a plea bargaining agreement pursuant to which he or she pleaded guilty to or *nolo contendere* to a lesser crime . . . or . . . having been indicted or having been charged in an information for the crime, he or she was granted immunity from prosecution for the crime."³⁵ The West Virginia Circuit Courts were granted jurisdiction to deter-

29. The New Jersey law applies to any "person who holds or has held any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof. . . ." N.J. STAT. ANN. §43:1-3.1 (Westlaw through P.L.2017, c.276 and 278 and 2017 JR-19).

30. *Id.* In deciding whether "a member's misconduct to determine whether it constitutes a breach of the condition that public service be honorable and whether forfeiture or partial forfeiture of earned service credit or earned pension or retirement benefits is appropriate," the following factors are considered: "the member's length of service; the basis for retirement; the extent to which the member's pension has vested; the duties of the particular member; the member's public employment history and record covered under the retirement system; any other public employment or service; the nature of the misconduct or crime, including the gravity or substantiality of the offense, whether it was a single or multiple offense and whether it was continuing or isolated; the relationship between the misconduct and the member's public duties; the quality of moral turpitude or the degree of guilt or culpability, including the member's motives and reasons, personal gain and similar considerations; the availability and adequacy of other penal sanctions; and other personal circumstances relating to the member which bear upon the justness of forfeiture." N.J. STAT. ANN. §43:1-3 (West 2015).

31. A bill that is currently before the General Assembly would add similar provisions to Pennsylvania's Public Employee Pension Forfeiture Act. See discussion *infra*.

32. N.J. STAT. ANN. §43:1-5 (Westlaw through P.L. 2017, c. 276 and 278 and 2017 JR-19).

33. W.VA. CODE §§5-10A-1 to 5-10A-11 (Westlaw through 2017 Third Extraordinary Session).

34. W.VA. CODE ANN. §5-10A-1 (Westlaw through 2017 Third Extraordinary Session).

35. W.VA. CODE ANN. §5-10A-2 (Westlaw through 2017 Third Extraordinary Session).

mine whether “the participant or former participant rendered less than honorable service.”³⁶

APPLICATION OF THE PUBLIC PENSION FORFEITURE LAW IN PENNSYLVANIA

Between 2005 and 2015, approximately 200 individuals—ranging from judges to police and state and municipal workers to teachers and members of the General Assembly—lost their public pensions because of crimes related to public office or public employment.³⁷ Others avoided forfeiture on various grounds. It is not clear how many employees in locally administered pension plans—which often operate with less oversight—should have had their pensions forfeited but did not. Unfortunately space limitations will not allow for more than a few specific examples.

Jerry Sandusky, a former Pennsylvania State University assistant football coach, retired from Penn State in 1999. At the time of his retirement, he elected to receive “a lump-sum severance payment of \$168,000.00, complimentary season tickets to PSU football and basketball games, free access to PSU fitness and training facilities, [and] a PSU office and phone.”³⁸ Sandusky also continued work with a Penn State-related charity, The Second Mile, following his retirement.

In 2012, Sandusky was found guilty of indecent assault and involuntary deviate sexual intercourse in cases involving several young boys. The Pennsylvania State Employees’ Retirement Board held that Sandusky had forfeited his pension because he was a *de facto* employee of Penn State at the time the crimes were committed. The forfeiture was overturned by the Commonwealth Court, which held that Sandusky’s continuing work with The Second Mile did not make him a *de facto* employee of the university.³⁹

Robert Mellow served 40 years in the Pennsylvania State Senate before announcing that he would not seek reelection in 2010.⁴⁰ In 2012, he pled guilty to a federal conspiracy charge and to filing a false tax return,⁴¹ and was sentenced to 16 months in prison.⁴² He was also initially stripped of his State pension. However, Mellow twice appealed the forfeiture of his pension, claiming that the federal crimes for which he was convicted were not comparable with the crimes enumerated in the Pennsylvania Public Employee Pension Forfeiture Act.⁴³

In a 6-5 decision issued on November 6, 2017, the Board of the State Employees’ Retirement System restored Mellow’s pension, allowing him to receive his \$20,510

36. W.VA. CODE ANN. §5-10A-4 (Westlaw through 2017 Third Extraordinary Session).

37. Mark Scolforo, *Pension Seizure Law Affects Nearly 200 Pennsylvanians* (Dec. 14, 2014), <https://www.nbcphiladelphia.com/news/politics/A-Look-at-the-Seizure-of-Public-Employee-Pensions-in-Pennsylvania-285758391.html>. At the time the article was written, 104 State Employees’ Retirement System and 77 Public School Retirement System pensions had been seized over the preceding decade under the public pension forfeiture law.

38. *Gerald and Dorothy A. Sandusky v. Pennsylvania State Employees’ Retirement Board*, 127 A.3d 34, 38 (Pa. Cmwlth. Ct. 2015).

39. *Id.* at 53.

40. THE INTELLIGENCER, *Forfeited Pension Could Be Restored* (May 5, 2017), <http://www.theintell.com/33724b0b-e432-5887-8fbc-e2b57e9ad0b8.html>. One of the most powerful Democrats in Harrisburg, Mellow served for a time as President *pro tempore* of the Senate.

41. Brad Bumsted, *Former State Dem Leader Mellow Pleads Guilty in Corruption Case* (May 9, 2012), <http://triblive.com/state/pennsylvania/1563839-74/state-mellow-former-senate-federal-attorney-charges-convicted-corruption-culture>.

42. THE INTELLIGENCER, *Forfeited Pension Could be Restored*, *supra* note 40.

43. PennLive Editorial Board, *Here’s an Easy One: Fix Pa.’s Weak Pension Forfeiture Law* (Dec. 11, 2017) http://www.pennlive.com/opinion/2017/12/heres_an_easy_one_fix_pensions.html.

monthly pension plus payments and interest for the time it was forfeited.⁴⁴ It was the first time in eleven years that the Board had made such a decision.

A former high school principal, Frank Michaels, likewise retained his pension. He had been “charged with two forfeitable crimes of perjury and false swearing for lying under oath during a 2015 trial resulting from a sex crime perpetrated by a teacher on a student.”⁴⁵ Michaels pleaded guilty to a felony count of child endangerment, a nonforfeitable crime, and the other charges were dismissed. He receives a \$5,000 a month pension.

One of the worst examples of corruption on the part of public officials occurred in Wilkes-Barre, Luzerne County. There, two judges of the Court of Common Pleas conspired to send juveniles who had committed relatively minor offenses to a private detention facility in exchange for cash kickbacks. One of the men later pleaded guilty: at his sentencing, Michael T. Conahan expressed remorse for his wrongdoings.⁴⁶ The other, Mark Ciavarella, denied responsibility for his actions.

On February 18, 2011, a jury found Ciavarella guilty of multiple counts of racketeering, money laundering, conspiracy and tax evasion.⁴⁷ Sentenced to 28 years in federal prison, Ciavarella never apologized to his victims.⁴⁸ He remains in prison to this day. Ciavarella lost his pension, but federal prosecutors did agree to allow his attorneys to collect legal fees from \$231,732 that he had contributed to a state pension fund.⁴⁹

An earlier example of avoidance of forfeiture occurred in 1987 when former State Treasurer R. Budd Dwyer, who had been convicted in a bribery scheme and had exhausted his appeals, publicly committed suicide the day before his planned sentencing. The State Employees’ Retirement Board subsequently ruled that, because Dwyer had not been sentenced, his conviction was not final and therefore his family was entitled to his pension.⁵⁰

FIXING FLAWS IN THE PUBLIC EMPLOYEE PENSION FORFEITURE ACT

A. Municipal Pension Oversight

In March 2017, it was revealed that certain executives at Capital Area Transit (CAT), a Harrisburg-based public transportation service, were eligible for two pen-

44. Liz Navratil, *INQUIRER, Pa. Officials Restore Six-Figure Pension for Former Senator Convicted of Corruption* (Dec. 5, 2017), <http://www.philly.com/philly/news/politics/state/in-rare-move-state-officials-restore-pension-for-convicted-former-senator-20171205.html>.

45. Sen. John DiSanto, Senate Co-Sponsorship Memoranda (Mar. 27, 2017), <http://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20170&cosponId=23402>.

46. William Ecenbarger, *KIDS FOR CASH: TWO JUDGES, THOUSANDS OF CHILDREN, AND A \$2.6 MILLION KICKBACK SCHEME* at 227-28. Of course, no apology could undo the damage that was done to these young people.

47. *Id.* at 214.

48. When signing a law creating the Interbranch Commission on Juvenile Justice, Governor Edward G. Rendell said “[t]hese judges violated the rights of as many as 6,000 young people by denying them basic rights to counsel and handing down outrageously excessive sentences. . . The lives of these young people and their families were changed forever. But beyond the perversion of justice for the immediate victims, these crimes cast a shadow on our entire juvenile justice system and raise the question just how such an audacious plot could have gone on for years.” Gant Team, *Governor Rendell Signs Bill Creating Commission to Probe Juvenile Justice System* (Aug. 9, 2009), http://news.prnewswire.com/DisplayReleaseContent.aspx?ACCT=ind_focus.story&STORY=%2Fwww%2Fstory%2F08-07-2009%2F0005074011&EDATE. The authors would agree with a recent statement by Ivanka Trump that would apply to this tragedy: “There’s a special place in hell for people who prey on children.” <http://www.latimes.com/politics/washington/la-na-pol-essential-washington-updates-ivanka-trump-there-s-a-special-place-1510845172-htmstory.htm>.

49. *TIMES-TRIBUNE, Local Public Officials Lose, Keep Pensions* (Dec. 15, 2014), <http://thetimes-tribune.com/news/local-public-officials-lose-keep-pensions-1.1803063>.

50. See “*Family to Get \$1.28-Million Pension in Suicide of Pennsylvania Official*,” AP (April 16, 1987), http://articles.latimes.com/1987-04-16/news/mn-751_1_pension-benefit.

sions—the regular CAT employee pension and a second pension for top-level managers.⁵¹ That information came to light after a right-to-know request was filed by Cumberland County.⁵²

The executive pension plan had been established by CAT in 1977 “to compensate key executive personnel formerly with Harrisburg Railways who were not covered by an earlier employee pension plan established when CAT was incorporated by Cumberland County, Dauphin County and the City of Harrisburg in 1973.”⁵³ CAT officials did not explain “why additional workers were allowed to join [the executive pension plan] over the years, as eligibility for a rank-and-file pension plan became available.”⁵⁴

CAT Board Chairman Eric Bugaile denied that the pension plan had been somehow hidden, telling reporters that the executive pension had “been included in CAT financial audits and annual budgets for decades.”⁵⁵ However, after Cumberland County raised the issue, the CAT Board froze the executive pension, allowing no new members.⁵⁶

Issues involving the CAT executive pension might have been avoided with better oversight. However, the oversight of small municipal pensions has been difficult. Pennsylvania has three statewide pension plans: the Pennsylvania Public School Employees’ Retirement System, the Pennsylvania Municipal Retirement System and the State Employees Retirement System. As was described in Part I of this article, a statewide retirement system for public school employees had been established by Act 1917-343, approved July 18, 1917.⁵⁷ The State Employees’ Retirement Association and the State Employees’ Retirement Board were established in 1923.⁵⁸ In 1943 the Municipal Employees’ Retirement Law was adopted, creating the Municipal Employees’ Retirement System.⁵⁹

While a statewide retirement system was created pursuant to the Municipal Employees’ Retirement Law, no municipality or agency was required to join that system. As a result, many authorities, boards, and municipalities maintain their own retirement plans to this day.⁶⁰ According to the United States Census Bureau, Pennsylvania has 2,258 local public pension systems.⁶¹ This compares to 72 such systems in Maryland, 9 in New Jersey and 6 in New York.⁶²

Some of these pension plans cover only a handful of employees. This causes two major problems. First, a small public pension plan requires a relatively high per member administrative cost. According to a 2009 report prepared by the University

51. Sari Soffer, *Taxpayer money funds double pensions for CAT executives* (Mar. 7, 2017), <http://abc27.com/2017/03/07/taxpayer-money-funds-double-pensions-for-cat-executives/>.

52. *Id.*

53. Capital Area Transit, *CAT Says “Slamming” of Pension Plan is Old News* (Mar. 8, 2017), http://www.masstransitmag.com/press_release/12313756/cat-says-slamming-of-pension-plan-is-old-news.

54. Barbara Miller, *Capital Area Transit Executive Pension Frozen, but Still Drawing Questions from Cumberland County* (Mar. 8, 2017) http://www.pennlive.com/news/2017/03/capital_area_transit_executive.html. According to Cumberland County officials, CAT employees “contribute 4.5 percent to the rank-and-file pension, while the executive pension [was] free to employees but costs CAT four times as much as the other pension.” *Id.*

55. Capital Area Transit, *supra* note 53.

56. Barbara Miller, *supra* note 53.

57. The act of July 18, 1917 (P.L.1043, No.343).

58. The act of June 27, 1923 (P.L.858, No.331).

59. The act of June 4, 1943 (P.L. 886, No. 371).

60. While the 1943 Act allowed municipalities and other government bodies to opt out of the Municipal Employees’ Retirement System, once one joined the system it could not withdraw.

61. PENSION POLICY ON BALLOTPEdia, *Public Pensions in Pennsylvania*, https://ballotpedia.org/Public_pensions_in_Pennsylvania.

62. *Id.*

of Pittsburgh Institute of Politics, pension plans with ten or fewer active members have an administrative cost of \$1,519.86 per member.⁶³ That administrative cost drops to \$1,002.99 for plans with 11 to 100 active members.⁶⁴ Plans with more than 100 active members have a per member administrative cost of \$362.76, and plans with more than 500 active members have an administrative cost of \$302.74 per member.⁶⁵ These costs may help explain why in January 2015 it was reported by the Auditor General that 562 municipality pension plans were “distressed” and underfunded by at least \$7.7 billion.⁶⁶

Second—and where the matter of forfeiture comes into this—is the oversight, or lack thereof, of these small pension systems. It has sometimes been possible for these pension plans to operate under the radar, allowing them to function without proper supervision as may have happened with the CAT executive pension.⁶⁷ Additionally, in instances where pensions should clearly be forfeited but are not as a result of local politics and backroom deals, the local taxpayers have been left with few options. Arguably, they have standing to file suit as an interested taxpayer to have the law enforced, but it is unlikely that this option would be used except in the most extreme cases. At one time local investigative newspapers might have closely scrutinized the operation of these municipal public pensions. However, such close scrutiny of both pension plan budgets and pension plan members has been disappearing with the decline of newspapers.⁶⁸ It thus becomes apparent that the ultimate protection for local taxpayers will fall onto the shoulders of a hopefully vigorous Auditor General, an unenviable job given the sheer number of pension systems to be supervised.

Oversight of these many municipal pension systems previously fell under the Public Employee Retirement Commission (PERC). That Commission was abolished in 2016.⁶⁹ The duties of municipal pension reporting and analysis were transferred to the newly created Municipal Pension Reporting Program (MPRP) within the Department of the Auditor General’s Office of Budget and Financial Management.⁷⁰

B. Enumerated Crimes

The major flaw in the Pennsylvania Public Pension Forfeiture Act is the requirement that a public official or public employee can lose his or her pension only upon conviction or a plea of guilty or no defense to one of the crimes specifically enumerated in the Act. Those who, like Senator Mellow and former principal Michaels, commit crimes not so enumerated—even very serious crimes—or who are permit-

63. UNIVERSITY OF PITTSBURGH INSTITUTE OF POLITICS, PENSIONS SUBCOMMITTEE REPORT: WHAT TO DO ABOUT MUNICIPAL PENSIONS, 16 (2009). Administrative cost is certainly a major issue with public pensions. However, it goes beyond the scope of this article and is mentioned here only for informational purposes.

64. *Id.*

65. *Id.* at 16.

66. PENNSYLVANIA DEPARTMENT OF THE AUDITOR GENERAL, REPORT ON MUNICIPAL PENSION FUNDS (Jan. 2015), http://www.paauditor.gov/Media/Default/Reports/Updated%20Municipal%20pension%20special%20report_01142015_FINAL.pdf.

67. Of course, these small pension systems could be forced into the Municipal Employees’ Retirement System, which would save significantly on administrative costs and allow for better oversight. Such a move is not currently in the works, but perhaps someday the General Assembly will entertain such a clearly needed bill.

68. As an example, Harrisburg’s *Patriot-News* has gone from a daily publication to publishing only three days per week: this in a capital city that once boasted multiple newspapers. Television stations, covering much larger markets, are often unable to adequately cover such small entities.

69. The Act of July 20, 2016 (P.L.849, No.100).

70. *Id.* Reports, data, documents and forms for municipal pensions are available on the PERC website: <http://www.paauditor.gov/municipal-pension-reporting>.

ted to plead guilty to non-enumerated crimes are permitted to retain their pensions regardless of which crime or crimes they may have actually committed.

Legislation has been introduced into both the State House of Representatives and the State Senate this legislative session that would correct this flaw in the Act. House Bill 939, introduced by Representative Scott A. Petri,⁷¹ would add the following to the listing of enumerated crimes required to warrant the forfeiture of a public pension: “Any criminal offense under the laws of this Commonwealth classified as a felony or punishable by a term of imprisonment exceeding five years.”⁷² The legislation would likewise broaden the categories of federal crimes warranting the forfeiture of a public pension as follows: “(1) classified as a felony; or (2) punishable by a term of imprisonment exceeding five years.”⁷³ The bill also clarifies the definitions of “school employee” and “student,” with the latter being defined as “[a]n individual who is (1) instructed by a school employee; (2) supervised by a school employee; (3) counseled by a school employee; or (4) mentored by a school employee.”⁷⁴

C. Immediate Forfeiture Despite Stay or Appeal

Addressing the Budd Dwyer loophole, the bill would require that “benefits shall be immediately forfeited upon the public official’s or public employee’s entry of a plea of guilty or no contest or upon initial entry of a jury verdict or judicial order of guilty, with respect to any crimes related to public office or public employment. The forfeiture shall not be stayed or affected by pendency of an appeal or collateral attack on the plea, verdict or order, regardless of whether a court has entered or stayed the sentence pending the appeal or collateral attack.”⁷⁵

In addition, the bill would require that “[u]pon the finding of guilty of a public official or public employee, or upon the entry of a plea of guilty or no contest in any court of record by a public official or public employee, the court shall notify the appropriate benefits administrator of such finding or entrance of plea.”⁷⁶ The bill would further provide that “[u]ntil restitution is determined by a court, the appropriate benefits administrator shall not make payment of any refund of contributions applied for after the date of such finding or entry to the public official or public employee until the court notifies the appropriate benefits administrator that no restitution is due.”⁷⁷

Representative Petri’s bill passed the House on May 8, 2017.⁷⁸ As of this writing, it is before the Senate Committee on Finance. A companion bill, Senate Bill 611, has been introduced in the State Senate by Senator John DiSanto,⁷⁹ but has not yet gained Senate approval.⁸⁰ Governor Tom Wolf has urged passage of the bill, saying that “[p]roviding pensions to those who have committed crimes related to their elected office is a betrayal of the public’s trust.”⁸¹

71. Representative Petri represents the 178th Legislative District. He is Chairman of the House Urban Affairs and the House Ethics Committees.

72. House Bill No. 939, Printer’s No. 2955 (2017), pp. 2 and 4.

73. *Id.* at 4.

74. *Id.* at 5.

75. *Id.* at 5-6.

76. *Id.* at 7.

77. *Id.*

78. Myles Snyder, ABC 27 News, *Pa. House Votes to Change Pension Forfeiture Law* (May 8, 2017), <http://abc27.com/2017/05/08/pa-house-votes-to-change-pension-forfeiture-law/>.

79. Senator DiSanto represents the 15th Senatorial District, which includes Perry County and portions of Dauphin County. He is Vice Chair of the Senate Finance Committee.

80. Get to it, Pennsylvania Senate—adopt this bill!

81. Reading Eagle, *Wolf wants Convicted Officials to Forfeit Pensions* (Dec. 9, 2017), <http://www.readingeagle.com/news/article/wolf-backs-bill-to-force-convicted-officials-to-forfeit-pensions>.

CONCLUSION

Adopted in 1978 during a time when graft and corruption were particularly prevalent in Pennsylvania government⁸² and amended in 2004 to give added protection to school children, the Public Employee Pension Forfeiture Act has done much to prevent corrupt public servants from profiting from their misdeeds. Sometimes called a weak law, the Act is superior to similar laws in some states but is in need of revision.

The recent creation of the Municipal Pension Reporting Program in the Department of the Auditor General should increase state oversight of municipal pensions, particularly small municipal pensions where abuse—often unseen—has occurred. The elimination of the small pension plans and their incorporation into the Pennsylvania Municipal Retirement System would do even more to reduce abuse. The hoped-for passage of a bill amending the Act to include “any criminal offense under the laws of this Commonwealth classified as a felony or punishable by a term of imprisonment” and applying similar requirements for violations of Federal law would strengthen a law that has served Pennsylvanians reasonably well for almost 40 years.

82. Unfortunately, as was shown in the Part I of this article, graft and corruption have been all too common in Pennsylvania government.