



LINDABURY

McCORMICK, ESTABROOK & COOPER, P.C.

Attorneys at Law

EdLawAlert

By the EdLaw Group at Lindabury

July 15, 2011

The EDUCATION LAW GROUP at Lindabury has extensive experience in the area of school law. We serve as general counsel, special education counsel, and labor counsel for boards of education throughout the State.

ANTHONY P. SCIARRILLO
ATHINA LEKAS CORNELL
JEFFREY R. MERLINO
DENNIS MCKEEVER
JENNIFER A. OSBORNE
PAUL E. GRIGGS
JOSHUA S. SKLARIN
SCOTT D. ZUCKER

edlawgroup@lindabury.com

Westfield Office
P. O. Box 2369
53 Cardinal Drive
Westfield, NJ 07091
(TEL) 908-233-6800
(FAX) 908-518-2967

Summit Office
480 Morris Avenue
Summit, NJ 07901
(TEL) 908-273-1212
(FAX) 908-273-8922

Red Bank Office
331 Newman Springs Road
Suite 133
Red Bank, NJ 07701-6766
(TEL) 732-741-7777
(FAX) 732-758-1879

www.lindabury.com

New Jersey Public Employees Convicted of Misconduct Must Forfeit All Pension Accrued in the Enrolled System

By Joshua S. Sklarin

Public employees convicted of official misconduct must forfeit all monies accrued in the pension system in which they were enrolled at the time of the crime. That was the decision of the Superior Court of New Jersey, Appellate Division, in the matter of the *State of New Jersey v. Michael Steele* (Docket No. A-3295-09), decided on May 19, 2011, and approved for publication.

The pertinent facts are as follows: The former Mayor of Irvington, Michael Steele, pled guilty to two counts of a nine-count indictment alleging crimes between January 29, 2003, and December 27, 2007. In return for a plea, the State agreed to recommend two concurrent seven-year terms of incarceration with five years to be served without the possibility of parole. The agreement also recognized that the State would seek forfeiture of office, a bar against future employment and forfeiture of pension. In doing so, the judge ordered that the defendant's pension benefits earned from January 29, 2003, forward be forfeited, without prejudice to the Pension Board imposing a greater forfeiture. The State appealed, contending that the judge misapplied the law governing forfeiture of pension appeals.

At the time of defendant's misconduct, he was employed as a Business Administrator for the City of Irvington Board of Education. In that position, the defendant profited from two schemes involving public contracts. As to the defendant's pension, he had 28 years and 8 months of service accredited to the Teachers Pension and Annuity Fund ("TPAF") through May 1, 2008. That total included 12 years and 7 months service credit that he earned as a member of the Public Employment Retiree System ("PERS") from October 1, 1978, through May 1, 1991, and transferred said service to the TPAF pursuant to *N.J.S.A. 18A:66-15.1*. His service as a member of TPAF from May 1, 1991, through May 1, 2008, was credited to TPAF directly. That credit amounted to 16 years and 1 month, less an inactive period of 11 months.

The parties' objection to the pension forfeiture ordered by the trial judge required the Appellate Division to interpret (cont'd ►)

N.J.S.A. 43:1-3.1, which provided for “mandatory forfeiture of retirement benefits and mandatory imprisonment for public officers or employees convicted of certain crimes.” After finding that there was no question that the statute applied, the defendant was mandated to serve prison time and forfeit his pension.

How Much of Pension is Forfeitable?

Then the question became how much of Steele’s pension was actually forfeitable under the specific facts and the statute. A pertinent part of *N.J.S.A.* 43:1-3.1(a) provides that an employee “shall forfeit all of the pension and retirement benefits earned as a member of any state or locally administered pension fund or retirement system in which he participated at the time of the commission of the offense and which covered the office, position or employment involved in the offense.”

The Appellate Division agreed with the State, which had argued that the trial judge erred when he concluded that this statute permitted forfeiture only from the date of the offense going forward. The Appellate Division reasoned that the statute plainly and unambiguously requires forfeiture of “all of the pension or retirement benefits earned as a member of the pension fund...in which [the defendant] participated at the time of the commission of the offense and which covered the office, position or employment involved in the offense.”

The Appellate Division reasoned that this statute does not give a judge the discretion to limit the commencement of the forfeiture period to the date of the first criminal act alleged in the indictment. The Appellate Division explained that the plain meaning of the statute was to deny a person in the defendant’s situation all pension benefits earned as a member of the pension fund that

covered the office or employment involved in the crimes to which he had admitted.

The Appellate Division disagreed with the State’s argument, however, that the forfeited pension benefits should include that portion that the defendant earned under PERS due to his election to have the PERS credit transferred to TPAF. The Appellate Division reasoned that the legislature drew the line at benefits earned as a member of the system that covered the office or employment abused. Had the legislature intended the broader scope suggested by the State, it could have achieved that goal by eliminating the qualifying and restrictive language and simply mandated forfeiture of all pensions or retirement benefits earned as a member of any state or locally administered pension under the retirement system.

The Appellate Division reasoned that interpreting the statute in the way the State contended would make the forfeiture scope “entirely dependent upon the personal decision of the officer or employee unrelated to his abuse of public employment or position”; to wit: an employee who did not transfer funds would retain the benefits earned as a member of another system but one who elected to make the transfer would lose the benefits earned as a member of another system. The Appellate Division stated that it needed to avoid construction of statutory language that leads to results that are absurd given the purpose of the statute. As such, the Appellate Division remanded, ordering the trial court to vacate its original order and enter a new order forfeiting all of the benefits earned as a member of TPAF.

❧

The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Anthony P. Sciarrillo of the EdLaw Group at edlawgroup@lindabury.com.

Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision.

You may, if this letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, NJ 08625.