

PUBLIC OFFICIALS—PENSIONS—DETERMINATION OF DISHONORABLE SERVICE AS BASIS FOR BENEFIT FORFEITURE REQUIRES BALANCING APPROACH—*Uricoli v. Board of Trustees*, 91 N.J. 62, 449 A.2d 1267 (1982); *Eyers v. Board of Trustees*, 91 N.J. 51, 449 A.2d 1261 (1982).

Traditionally, New Jersey's public employees, particularly police officers and firefighters, have not become eligible to receive pension and related benefits unless they have rendered honorable service during their tenures in office. This principle was significantly modified by the New Jersey Supreme Court's recent decisions in *Uricoli v. Board of Trustees*¹ and *Eyers v. Board of Trustees*.² The court held in *Uricoli* that the accidental disability provision³ of the Act establishing a police and firemen's retirement fund⁴ does not mandate automatic forfeiture of benefits when an employee has been convicted of misconduct relating to the performance of his official duties.⁵ Based upon its perception of the policies underlying the legislative provision of pensions for public employees, the court adopted a balancing approach to ascertain any reduction of pension benefits and formulated guidelines to be considered in future pension forfeiture cases.⁶ In *Eyers*, the court applied this balancing approach to determine whether survivor's benefits, payable under the public employee pension statute, should be forfeited as a result of the employee's misconduct.⁷ The *Eyers* court went on to hold that the dependent widow of a public employee was

¹ 91 N.J. 62, 449 A.2d 1267 (1982).

² 91 N.J. 51, 449 A.2d 1261 (1982).

³ N.J. STAT. ANN. § 43:16A-7 (West Cum. Supp. 1983-1984); see *infra* note 82 for partial text of statute.

⁴ N.J. STAT. ANN. §§ 43:16-1 to :16A-68 (West 1962 & Cum. Supp. 1983-1984).

⁵ *Uricoli*, 91 N.J. at 76, 449 A.2d at 1274. Misconduct in office sufficient to deny pension benefits has been held to include malfeasance, see *Fromm v. Board of Directors*, 81 N.J. Super. 138, 195 A.2d 32 (App. Div. 1963) (ticket-fixing by policeman); nonfeasance, see *Hozer v. State*, 95 N.J. Super. 196, 230 A.2d 508 (App. Div. 1967) (policeman allowed known gambling activities to continue over five year period); and moral turpitude, see *Ballurio v. Castellini*, 29 N.J. Super. 383, 102 A.2d 662 (App. Div. 1954) (city street department employee subject of abortion charge).

⁶ *Uricoli*, 91 N.J. at 77-78, 449 A.2d at 1275. Public employees' pensions have generally come to be considered provisions for financial security during retirement as well as inducements to accept lower salaries than those available in the private sector. See generally *Cohn, Public Employee Retirement Plans—The Nature of Employees' Rights*, 1968 U. ILL. L.F. 32 (discussion of bases for provision of pensions to public employees); Reich, *The New Property*, 73 YALE L.J. 733 (1964) (pensions and other governmental payments as forms of property or entitlements).

⁷ *Eyers*, 91 N.J. at 55, 449 A.2d at 1263. Benefits were to be payable to a public employee's surviving beneficiary under an option contained in the pension statute. *Id.* at 54, 449 A.2d at 1263; see N.J. STAT. ANN. § 43:15A-50 (West Cum. Supp. 1983-1984).

entitled to receive survivor's benefits despite the employee's conviction for acts constituting dishonorable service.⁸

Eugene J. Uricoli was hired by the City of Orange as a patrolman on November 14, 1952, and had advanced through the ranks of sergeant, lieutenant, and detective to become chief of police in 1970.⁹ A 1975 Special Grand Jury investigation of corruption in Orange's municipal government resulted in Uricoli's indictment on eight counts of alleged misconduct in office.¹⁰ The indictments contained a variety of charges, including illegally disposing of traffic tickets, unlawfully influencing a subordinate officer to refrain from arresting gambling suspects, and extortion.¹¹ Uricoli was prosecuted for fixing a traffic ticket and bill-padding, and pleaded not guilty to both counts.¹² On April 9, 1976, Uricoli was found guilty on the ticket-fixing charge and was given a one year suspended sentence and probation pending his payment of a \$1,000 fine.¹³ The trial judge suspended the jail term as unnecessary for rehabilitation, deterrence, or punishment, finding that Uricoli's loss of his position, combined with the damage to his reputation, was a sufficient sanction.¹⁴ Uricoli was removed from the police force in June, 1976.¹⁵

The New Jersey Superior Court, Appellate Division affirmed the conviction¹⁶ and a petition for certification to the New Jersey Supreme

⁸ *Eyers*, 91 N.J. at 62, 449 A.2d at 1267.

⁹ *Uricoli*, 91 N.J. at 64-65, 449 A.2d at 1268; Brief in Opposition to Petition for Certification at 1, *Uricoli v. Board of Trustees* [hereinafter cited as Brief in Opposition].

¹⁰ 91 N.J. at 82, 449 A.2d at 1278; Supplemental Brief on Behalf of Respondent-Respondent at 3, *Uricoli v. Board of Trustees* [hereinafter cited as Supplemental Brief].

¹¹ 91 N.J. at 82, 449 A.2d at 1278; Supplemental Brief, *supra* note 10, at 3. Uricoli was also charged with attempting to persuade other members of the force to cover up matters under investigation by the city prosecutor and with falsifying his expense account. Supplemental Brief, *supra* note 10, at 3.

¹² Supplemental Brief, *supra* note 10, at 3-4. Uricoli's trial on the charge of accepting money from the city exterminator in a bill-padding scheme resulted in a hung jury. *Id.* at 4.

¹³ 91 N.J. at 65, 449 A.2d at 1268. Uricoli's contention that he did not profit monetarily from the action was never disputed by the state. *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 82, 449 A.2d at 1278; see Brief in Opposition, *supra* note 9, at 3. This action was taken pursuant to a statutory provision that:

a. A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:

(1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above . . . ;

(2) He is convicted of an offense involving or touching such office, position or employment. . . .

N.J. STAT. ANN. § 2C:51-2 a.(1)-(2) (West 1982).

¹⁶ Brief in Opposition, *supra* note 9, at 3.

Court was denied.¹⁷ The United States District Court for the District of New Jersey subsequently denied Uricoli's petition for a writ of habeas corpus, and no appeal was taken.¹⁸ All other indictments against Uricoli were dismissed on February 1, 1979, after the prosecutor indicated that justice had been adequately served by Uricoli's sentence for the ticket-fixing conviction, in conjunction with his removal from office and the loss of all pension benefits.¹⁹

Uricoli submitted an application to the Board of Trustees of the Police and Firemen's Retirement System (PFRS Board) on June 15, 1979, for accidental disability retirement benefits.²⁰ He based his claim on various back injuries incurred between 1963 and 1972 during ordinary police work.²¹ The portion of the application completed by the Orange Police Department regarding his salary level and length of service indicated that Uricoli's employment had been terminated on the basis of his indictment and conviction for malfeasance.²² After obtaining and reviewing copies of the indictment and the judgment of conviction,²³ the PFRS Board in September of 1979 concluded that Uricoli was ineligible for any retirement benefits since the conviction rendered all of his service dishonorable.²⁴

Uricoli appealed the PFRS Board's decision, but an administrative law judge concluded that Uricoli's actions indeed constituted dishonorable service,²⁵ and thus warranted the forfeiture of his pension benefits.²⁶ In May of 1980, the PFRS Board adopted the determinations of the administrative law judge and reaffirmed its decision not to process Uricoli's application.²⁷ The New Jersey Superior Court, Appellate Division upheld the PFRS Board's denial, reiterating that

¹⁷ State v. Uricoli, 75 N.J. 610, 384 A.2d 840 (1978).

¹⁸ Brief in Opposition, *supra* note 9, at 3.

¹⁹ 91 N.J. at 82, 449 A.2d at 1278.

²⁰ *Id.* at 65, 449 A.2d at 1269. These were the only retirement benefits for which Uricoli was eligible since at the time of his dismissal he was 49 years of age and therefore did not meet the minimum age requirements of any of the other pension provisions. See generally N.J. STAT. ANN. §§ 43:16-1 to :16A-68 (West 1962 & Cum. Supp. 1983-1984).

²¹ 91 N.J. at 65, 440 A.2d at 1269.

²² Brief in Opposition, *supra* note 9, at 3.

²³ *Id.*

²⁴ 91 N.J. at 65, 449 A.2d at 1269. The Board of Trustees made its determination without considering the merits of Uricoli's application. Brief in Opposition, *supra* note 9, at 3.

²⁵ Brief in Opposition, *supra* note 9, at 4. The court in Plunkett v. Board of Pension Comm'rs, 113 N.J.L. 230, 173 A. 923 (Sup. Ct. 1934), *aff'd per curiam*, 114 N.J.L. 273, 176 A. 341 (Ct. Err. & App. 1935), defined honorable service as "that [behavior] characterized by or in accordance with principles of honor. One so serving is scrupulously upright, and shows a fine regard for obligations as to conduct." *Id.* at 233, 173 A. at 924.

²⁶ 91 N.J. at 65, 449 A.2d at 1269.

²⁷ Brief in Opposition, *supra* note 9, at 4; see also 91 N.J. at 65, 449 A.2d at 1269.

the conduct of which Uricoli was convicted constituted dishonorable service.²⁸ Uricoli's petition for certification was granted by the New Jersey Supreme Court,²⁹ which held that his misconduct was not sufficiently egregious to render his twenty years of service so dishonorable as to require forfeiture of all pension benefits.³⁰

The *Uricoli* court noted that judicial evolution of the forfeiture doctrine had been a long, uneven process whereby the courts had attempted to implement the shifting objectives of the legislature in providing pensions to public employees.³¹ A pension was traditionally considered to be a gratuitous allowance, "a bounty springing from the appreciation and graciousness of the sovereign."³² In this context, the courts viewed a pension as an incentive to persons employed in positions of public trust to maintain good conduct and to render efficient service.³³ Since a pension was considered a reward, it seemed only logical that this reward could be withheld if all conditions for receiving it were not met by the employee.³⁴ According to the courts, a primary condition for the grant of a public employee's pension was his having rendered honorable service in his official capacity.³⁵ The accepted view was that benefits should be forfeited by those providing

²⁸ Brief in Opposition, *supra* note 9, at 4; *see also* 91 N.J. at 65, 449 A.2d at 1269.

²⁹ *Uricoli v. Board of Trustees*, 87 N.J. 404, 434 A.2d 1082 (1981).

³⁰ 91 N.J. at 78-79, 449 A.2d at 1275-76; *see also infra* notes 80-81 and accompanying text.

³¹ 91 N.J. at 67, 449 A.2d at 1269; *see infra* notes 92-104 and accompanying text.

³² *Hozer v. State*, 95 N.J. Super. 196, 199, 230 A.2d 508, 510 (App. Div. 1967); *Ballurio v. Castellini*, 29 N.J. Super. 383, 389, 102 A.2d 662, 666 (App. Div. 1954); *see also Moran v. Firemen's & Policemen's Pension Fund Comm'n*, 20 N.J. Misc. 479, 483, 28 A.2d 885, 888 (Hudson County Cir. Ct. 1942) (pension not contractual obligation but gratuitous allowance).

³³ *See Plunkett v. Board of Pension Comm'rs*, 113 N.J.L. 230, 233, 173 A. 923, 924 (Sup. Ct. 1934) (fundamental purpose of public pensions "is to secure good behavior and the maintenance of reasonable standards of discipline during service"), *aff'd per curiam*, 114 N.J.L. 273, 176 A. 341 (Ct. Err. & App. 1935); *see also Mount v. Trustees of the Pub. Employees' Retirem. Sys.*, 133 N.J. Super. 72, 80-81, 335 A.2d 559, 564 (App. Div. 1975) (public pensions are "inducement to conscientious, efficient and honorable service"); *Hozer v. State*, 95 N.J. Super. 196, 199, 230 A.2d 508, 510 (App. Div. 1967) (same); *Ballurio v. Castellini*, 29 N.J. Super. 383, 389, 102 A.2d 662, 666 (App. Div. 1954) (same).

³⁴ *See Walter v. Police & Fire Pension Comm'n*, 120 N.J.L. 39, 42, 198 A. 383, 384 (Sup. Ct. 1938) (policeman's position and pension benefits forfeited by conviction for malfeasance in office); *accord Plunkett v. Board of Pension Comm'rs*, 113 N.J.L. 230, 233, 173 A. 923, 924 (Sup. Ct. 1934) ("[o]ne who embezzles funds entrusted to his care does not . . . render the service that is an essential prerequisite to the awarding of a pension . . ."), *aff'd per curiam*, 114 N.J.L. 273, 176 A. 341 (Ct. Err. & App. 1935).

³⁵ *See Mount v. Trustees of the Pub. Employees' Retirem. Sys.*, 133 N.J. Super. 72, 80, 335 A.2d 559, 564 (App. Div. 1975); *see also Board of Trustees v. Board of Freeholders*, 87 N.J. Super. 187, 194, 208 A.2d 440, 443 (Law Div. 1965) (pension is reward for service), *aff'd*, 47 N.J. 132, 219 A.2d 526 (1966); *Sganga v. Police & Firemen's Pension Fund Comm'n*, 2 N.J. Super. 575, 579, 64 A.2d 650, 651-52 (Law Div. 1949) (pension is granted in recognition of meritorious service).

dishonorable service because providing pensions for such individuals "would be to place a premium upon dishonesty and inefficiency."³⁶

In addition to viewing public pension rights as a reward, many courts held that such rights, having been created by legislative enactments, were subject to legislative modification³⁷ and that employees had no rights except those provided under the statute governing the particular fund.³⁸ By contrast, the contractual nature of private plans was viewed by the courts as permitting the vesting of a participant's right to benefits upon his meeting the plan's requirements.³⁹ Such vested rights could not be modified or abridged by unilateral discretionary acts of the plan's managers or by the legislature.⁴⁰

³⁶ *Walter v. Police & Fire Pension Comm'n*, 120 N.J.L. 39, 42, 198 A. 383, 384 (Sup. Ct. 1938).

³⁷ *See Spina v. Consolidated Police & Firemen's Pension Fund Comm'n*, 41 N.J. 391, 197 A.2d 169 (1964) (legislative modification of pension statute not an abridgment of plan participants' contractual rights since no such rights existed); *Laden v. Daly*, 132 N.J.L. 440, 40 A.2d 780 (Sup. Ct. 1945) (statutory change in basis for receipt of disability pension while member's application pending held valid), *aff'd per curiam*, 133 N.J.L. 314, 44 A.2d 212 (Ct. Err. & App. 1945); *Bader v. Crone*, 116 N.J.L. 329, 184 A. 346 (Sup. Ct. 1936) (legislative increase in deductions from pension benefits upheld).

³⁸ This position was reaffirmed by the appellate court in *Chausmer v. Commissioners of the Employees' Retirem. Sys.*, 150 N.J. Super. 379, 375 A.2d 1205 (App. Div. 1977). The court held that "[w]e have no legislative authority to expand the meaning and effect of the statute. This court has noted the principle with respect to a pension statute that 'an employee has only such rights and benefits as are based upon and within the scope of the provisions thereof.'" *Id.* at 383, 375 A.2d at 1207 (quoting *Matthews v. Board of Educ.*, 31 N.J. Super. 292, 296-97, 106 A.2d 346, 348 (App. Div. 1954)).

³⁹ Such a relationship arose only when the members' contributions were made on a voluntary basis. The initial case in this area was *Ball v. Board of Trustees*, 71 N.J.L. 64, 58 A. 111 (Sup. Ct. 1904), which viewed a teacher's voluntary contributions to a private annuity fund as creating a contractual relationship with the fund's Board of Trustees. *Id.* at 66, 58 A. at 111-12. When such contributions were compulsory, however, no such relationship existed. *Pennie v. Reis*, 132 U.S. 464 (1889), dealt with the issue of compulsory contributions to a policemen's life and health insurance fund which was created to provide a cash payment upon death or upon retirement for disability, but not pension benefits *per se*. *Id.* at 466. The Court refused to adopt a contract theory and upheld the legislature's right to amend the plan prior to vesting. *Id.* at 471. The Supreme Court of New Jersey subsequently expanded the *Pennie* rationale to include compulsory payments to pension funds. *See Spina v. Consolidated Police & Firemen's Pension Fund Comm'n*, 41 N.J. 391, 197 A.2d 169 (1964); *see also Salley v. Firemen's & Policemen's Pension Fund Comm'n*, 124 N.J.L. 79, 11 A.2d 244 (Sup. Ct. 1940) (compulsory contributions to pension plan created no contractual rights in members); *Walter v. Police & Fire Pension Comm'n*, 120 N.J.L. 39, 198 A. 383 (Sup. Ct. 1938) (no vested right to pension); *Bader v. Crone*, 116 N.J.L. 329, 184 A. 346 (Sup. Ct. 1936) (same).

⁴⁰ *Ball v. Board of Trustees*, 71 N.J.L. 64, 66, 58 A. 111, 112 (Sup. Ct. 1904). Although the Board of Trustees in *Ball* had been created by legislative enactment, the New Jersey Supreme Court held that since the pension fund did not depend on state appropriations, an attempted legislative modification was not supported by consideration and was therefore invalid. *Id.*

Private pension plans are now directly governed by the Employee Retirement Income Security Act, which provides that benefits based upon employee contributions to the plans are

Public employees' pension plans in New Jersey have never been viewed as conferring the same type of nonforfeitable property rights as private pension plans. Originally, the courts held that all public employee pension benefits, even those directly attributable to the employee's contributions, were forfeitable.⁴¹ During the 1940's, however, the courts recognized that an employee had a property right in any pension payment which had actually become payable; such right could not be arbitrarily abrogated.⁴²

In 1955 the New Jersey Supreme Court initiated a change in the manner in which public pensions were viewed by holding that a public employee's pension was in the nature of deferred compensation for past services.⁴³ In spite of this developing view that a public pension was more than a mere gratuity, the courts refused to acknowledge public employees' expectations in their pension benefits as vested property rights.⁴⁴ Nine years later the Supreme Court of New Jersey expanded public employees' rights to their pension benefits by stating that the employees' contributions constituted a property interest which could not be confiscated by the state.⁴⁵ The court, however, specifically rejected the argument that a contractual relationship existed between the plan and its members, since the existence of such a

not subject to forfeiture once vested, and that those based upon the employer's contributions are lost for limited circumstances, none of which involve employee misconduct. An example would be the employee's leaving his position prior to fulfilling length of service vesting requirements. See 29 U.S.C.A. § 1053 (a)(D)(iii) (West 1975).

⁴¹ See *Connelly v. Municipal Employees Pension Comm'n*, 130 N.J.L. 101, 31 A.2d 488 (Sup. Ct. 1943). Connelly had been dismissed from his position as a clerk in a municipal finance department for a conviction for false pretense. At that time there was a specific statutory provision that refund of an employee's contributions to the pension fund was not to be made to any employee who had been separated from service for charges which prohibited his reappointment. *Id.* at 102-03, 31 A.2d at 489; see N.J. REV. STAT. § 43:13-10 (1937).

⁴² See *Sganga v. Police & Firemen's Pension Fund Comm'n*, 2 N.J. Super. 575, 579, 64 A.2d 650, 652 (Law Div. 1949) ("right to a pension installment which has matured cannot be denied"); *Moran v. Firemen's & Policemen's Pension Fund Comm'n*, 20 N.J. Misc. 479, 483, 28 A.2d 885, 888 (Hudson County Cir. Ct. 1942) (vested right in due pension payments).

⁴³ See *Salz v. State House Comm'n*, 18 N.J. 106, 112 A.2d 716 (1955). The court stated: "A 'pension' is a stated allowance or stipend in consideration of past services or of the surrender of rights or emoluments to one retired from service." *Id.* at 112, 112 A.2d at 719.

⁴⁴ See *Pfizinger v. Board of Trustees*, 62 N.J. Super. 589, 163 A.2d 388 (Law Div. 1960). Pfizinger had applied for a service retirement pension while suspended on charges of misconduct in office. *Id.* at 597, 163 A.2d at 392. He was found guilty on 26 of the charges, dismissed from service, and denied any pension benefits. *Id.* at 592-97, 163 A.2d at 389-92. The court found no merit in Pfizinger's argument that his pension rights vested upon meeting the minimum statutory age and length of service requirements, stating that "[h]ad the Legislature intended to make the vesting of a pension absolute or indefeasible as to persons having 20 years' service and had [sic] reached retirement age they would have so provided." *Id.* at 601, 163 A.2d at 394.

⁴⁵ *Spina v. Consolidated Police & Firemen's Pension Fund Comm'n*, 41 N.J. 391, 402, 197 A.2d 169, 175 (1964).

relationship would prevent legislative modification, often necessary to keep such plans solvent.⁴⁶

Throughout the development of the property right concept, the courts consistently followed the view that the service rendered by an employee must be honorable in order to merit receipt of the expected benefits.⁴⁷ Although the requirement of honorable service was explicitly stated in only some of the New Jersey public pension statutes, early decisions found the requirement to be implicit in all such legislation,⁴⁸ particularly when the affected employees were police or firemen.⁴⁹ Moreover, the courts developed the principle that conviction of a public employee for a crime of moral turpitude or misconduct in office rendered his service *prima facie* dishonorable, and resulted in the loss of all pension benefits.⁵⁰

⁴⁶ *Id.* The plaintiffs in *Spina* argued that the 1952 amendment to N.J. REV. STAT. § 43:16-1 (1937) was an unconstitutional impairment of a contract created by the prior pension act which had established certain retirement benefits under existing police and firemen's pension plans. *Id.* at 393, 197 A.2d at 170. The court rejected the contractual argument, commenting that "[w]e think there is no profit in dealing in labels such as 'gratuity,' 'compensation,' 'contract,' and 'vested rights.' None fits precisely, and it would be a mistake to choose one and be driven by that choice to some inevitable consequence." *Id.* at 401, 197 A.2d at 174.

⁴⁷ In *Hozer v. State*, 95 N.J. Super. 196, 230 A.2d 508 (App. Div. 1967), the court affirmed an administrative determination by the Consolidated Police and Firemen's Pension Fund Commission which held that "appellant, even though he possessed the necessary age and service requirements, did not satisfy the condition of 'honorable service' and therefore was not entitled to a retirement pension." *Id.* at 200, 204, 230 A.2d at 511, 513; *see also* *Fromm v. Board of Directors*, 81 N.J. Super. 138, 195 A.2d 32 (App. Div. 1963).

⁴⁸ *See* *Ballurio v. Castellini*, 29 N.J. Super. 383, 102 A.2d 662 (App. Div. 1954), in which Judge (later Justice) Francis examined the 60 public pension statutes in effect in 1954. Although only nine of the statutes explicitly required honorable service, the court stated that "[c]onsideration of all these [pension] acts in the light of the *sui generis* character of a public pension inevitably leads to the conviction that 'honorable' service is implicit in every such enactment." *Id.* at 389, 102 A.2d at 666.

⁴⁹ *See* *Fromm v. Board of Directors*, 81 N.J. Super. 138, 195 A.2d 32 (App. Div. 1963). The court stated that a police officer "stands in the public eye as an upholder of that which is morally and legally correct." *Id.* at 143, 195 A.2d at 34 (quoting *In re Emmons*, 63 N.J. Super. 136, 140, 164 A.2d 184, 187 (App. Div. 1960)).

⁵⁰ *See, e.g.*, *Mount v. Trustees of the Pub. Employees' Retirem. Sys.*, 133 N.J. Super. 72, 85, 335 A.2d 559, 567 (App. Div. 1975). A worker's employment status at the time of conviction was generally considered by the courts to be immaterial on the presumption that he had never gained a vested interest in any greater portion of the pension than the installment or installments which had become due and payable. *See* *Moran v. Firemen's & Policemen's Pension Fund Comm'n*, 20 N.J. Misc. 479, 483, 28 A.2d 885, 888 (Hudson County Cir. Ct. 1942). The courts usually held that the pension board therefore had the discretion to deny an applicant's benefits entirely, *see* *Plunkett v. Board of Pension Comm'rs*, 113 N.J.L. 230, 173 A. 923 (Sup. Ct. 1934), *aff'd per curiam*, 114 N.J.L. 273, 176 A. 341 (Ct. Err. & App. 1935), to suspend payment of benefits already granted pending resolution of the question of honorable service, *see* *Mount v. Trustees of the Pub. Employees' Retirem. Sys.*, 133 N.J. Super. 72, 335 A.2d 559 (App. Div. 1975), or to revoke previously granted pensions upon the employee's conviction for incidents constituting misconduct in office or moral turpitude and occurring either prior or subsequent to the employ-

Notwithstanding its traditional reluctance to formulate policy regarding public employee pension forfeiture, the Supreme Court of New Jersey in 1978 significantly modified its stance on this issue. In *Makwinski v. State*,⁵¹ the court held for the first time that even though a public employee had been found guilty of misconduct directly related to his employment, total forfeiture of his pension benefits was not required.⁵² *Makwinski* involved a police chief who had become chairman of a committee to repair the municipality's fire-damaged Knights of Columbus hall.⁵³ The building was used free of charge by various community organizations as well as by law enforcement groups for in-service training sessions. In carrying out his function as chairman of the repair committee, Makwinski utilized a police officer as a carpenter during the officer's working hours.⁵⁴ The court held that since the misconduct was not of a venal nature, it did not automatically render all of Makwinski's prior service dishonorable even though the misconduct touched upon the administration of his office.⁵⁵ The court determined that since there had been no proof to the contrary, all of Makwinski's service up to the date of the misconduct had been honorable, and his pension benefits were to be granted on that basis.⁵⁶ The court also held, however, that he would not be permitted to collect pension benefits accruing for service rendered after the date of the misconduct.⁵⁷ Judge Conford, in his concurrence, maintained that the language of the applicable statute permitted vesting of a policeman's pension upon his reaching the age of fifty-one years and completing twenty-five years of honorable service.⁵⁸ Once these criteria were met, he argued, any subsequent incident of misconduct could not impair the employee's right to his pension, at least in relation to that portion represented by the qualifying term of service.⁵⁹ Justice Clifford's strongly worded dissent supported the

ee's retirement, *see* *Fromm v. Board of Directors*, 81 N.J. Super. 138, 195 A.2d 32 (App. Div. 1963); *Salley v. Firemen's & Policemen's Pension Fund Comm'n*, 124 N.J.L. 79, 11 A.2d 244 (Sup. Ct. 1940).

⁵¹ 76 N.J. 87, 385 A.2d 1227 (1978).

⁵² *Id.* at 92, 385 A.2d at 1230.

⁵³ *Id.* at 89, 385 A.2d at 1229.

⁵⁴ *Id.*

⁵⁵ *Id.* at 91, 385 A.2d at 1230.

⁵⁶ *Id.* at 92, 385 A.2d at 1230.

⁵⁷ *Id.*

⁵⁸ *Id.* at 94, 385 A.2d at 1231 (Conford, J., concurring). The statute provided that "[a]ny active member of a police department . . . who shall have served honorably in such department for a period of twenty-five years and who has reached the age of fifty-one years shall, on his own application, be retired on a service retirement pension" N.J. STAT. ANN. § 43:16-1 (West 1962) (amended 1964).

⁵⁹ 76 N.J. at 94, 385 A.2d at 1231.

lower court's adherence to the established forfeiture doctrine as being in accord with legislative intent,⁶⁰ and expressed the concern that the decision, although limited in nature, would set an unfortunate precedent.⁶¹

Two years later the court was confronted with the companion cases of *Masse v. Board of Trustees*⁶² and *Procaccino v. State*,⁶³ which dealt with the issue of forfeiture of public employee pension benefits for crimes of moral turpitude and for malfeasance in office. Again, the court departed from established precedent regarding the forfeiture of public pension benefits. In *Masse*, the applicant pleaded guilty to two counts of impairing the morals of a minor. According to the pension board, this rendered all service to the date of the pleas dishonorable.⁶⁴ The Appellate Division of the New Jersey Superior Court reversed the board's decision, holding that since the misconduct was not job-related, it did not render Masse's service dishonorable and forfeiture was not required.⁶⁵ The court reasoned that adding the civil penalty of total forfeiture of pension benefits to the criminal sanctions already imposed for the misconduct was harsh and arbitrary when the crime itself was not related to the employment and did not constitute a betrayal of the public trust.⁶⁶

The supreme court affirmed the appellate court's finding of honorable service.⁶⁷ The applicable criminal statutes required forfeiture of public office and permanent disqualification from holding any other such position only upon conviction of serious crimes or offenses involving dishonesty or touching upon employment.⁶⁸ Therefore, the

⁶⁰ *Id.* at 99, 385 A.2d at 1231 (Clifford, J., dissenting).

⁶¹ *Id.* at 101, 385 A.2d at 1235 (Clifford, J., dissenting). The court limited its decision to the case before it, considering Makwinski's intent to benefit the community as a primary factor in deciding that he should retain a portion of his pension benefits. *Id.* at 91-92, 385 A.2d at 1230.

⁶² 87 N.J. 252, 432 A.2d 1339 (1981).

⁶³ 87 N.J. 265, 432 A.2d 1346 (1981).

⁶⁴ 87 N.J. at 253-54, 432 A.2d at 1339-40. Masse pleaded guilty to charges brought pursuant to a statute which provided that "[a]ny person who forces or induces any child under the age of 16 years to do or to submit to any act which tends to debauch the child or impair its morals, is guilty of a misdemeanor." N.J. STAT. ANN. § 2A:96-3 (West 1969), *repealed by* N.J. STAT. ANN. § 2C:98-2 (West 1982).

⁶⁵ *Masse v. Board of Trustees*, 175 N.J. Super. 325, 333, 418 A.2d 1282, 1286 (App. Div. 1980), *aff'd*, 87 N.J. 252, 432 A.2d 1339 (1981).

⁶⁶ *Id.* at 332-33, 418 A.2d at 1285-86. Masse was given a suspended sentence, required to have psychiatric counseling and fined \$1,000. *Id.* at 331-32, 418 A.2d at 1285.

⁶⁷ 87 N.J. at 254-56, 432 A.2d at 1340-41.

⁶⁸ *See id.* at 262, 432 A.2d at 1344. The specific provision regarding disqualification mandates that:

c. [i]n addition to the punishment prescribed for the offense, and the forfeiture set forth in 2C:51-2 a., any person convicted of an offense involving or touching on

court inferred that the legislature did not consider the total forfeiture of pension benefits to be an appropriate sanction when the misconduct was unrelated to employment.⁶⁹ Therefore, since Masse's misconduct was neither dishonest nor related to his employment, the court adopted the traditional position that remedial statutes, such as those creating public pensions, should be construed liberally, and affirmed Masse's entitlement to his full pension benefits.⁷⁰

Procaccino involved an individual who held two state positions, one full-time and one part-time. After he was convicted of misconduct related to his state part-time job,⁷¹ his application for a pension in connection with his full-time employment with a different state agency was denied by the pension board on the basis that his prior conviction constituted dishonorable service, thereby rendering him ineligible for any public pension.⁷² The appellate division affirmed the pension board's decision,⁷³ but the supreme court reversed, stating that the applicant's conviction did not render him ineligible for pension benefits from his full-time employment.⁷⁴ Since Procaccino's misconduct was unrelated to his full-time position and he had met the length of service requirements, the court held that he was entitled to have his application for pension benefits from that position processed by the pension board.⁷⁵

Justice Clifford, in his dissent, objected to the majority's determination that the forfeiture doctrine requires a connection between the employee's position and the conduct which constituted moral turpitude.⁷⁶ The dissent noted that the legislature had not modified the

his public office, position or employment shall be forever disqualified from holding any office or position of honor, trust or profit under this State or any of its administrative or political subdivisions.

N.J. STAT. ANN. § 2C:51-2 c. (West 1982); see *supra* note 15 for the portion of N.J. STAT. ANN. § 2C:51-2 a. dealing with forfeiture of public office.

⁶⁹ 87 N.J. at 259, 262, 432 A.2d at 1342, 1344.

⁷⁰ *Id.* at 264, 432 A.2d at 1345.

⁷¹ 87 N.J. at 267, 432 A.2d at 1347.

⁷² *Id.* Procaccino was employed by the Mercer County District Court as a constable on a part-time basis from 1954 until he was discharged in 1977, and he subsequently pleaded guilty to an indictment alleging misappropriation of funds collected by him in the course of his duties. *Id.* at 267-68, 432 A.2d at 1347. He was given an 18 month suspended sentence and was required to make restitution of the funds. *Id.* at 267, 432 A.2d at 1347.

⁷³ *Id.*

⁷⁴ *Id.* at 268, 432 A.2d at 1347.

⁷⁵ *Id.*

⁷⁶ See *id.* at 271, 432 A.2d at 1349 (Clifford, J., dissenting). Justice Clifford felt that decisions regarding honorable service should be left to the legislature and that the holding of the court represented "quirky policy." *Id.* at 269, 432 A.2d at 1348 (Clifford, J., dissenting).

pension statutes to include the judicially developed requirement of job-relatedness, despite ample opportunities to do so.⁷⁷ Therefore, Justice Clifford asserted, the practice of imposing forfeiture of pension benefits in all cases involving moral turpitude, regardless of job-relatedness, had been implicitly approved by the legislature and should have been applied in this case.⁷⁸ Justice Clifford concluded with a call for legislative action to effect any reforms needed and chided the majority for usurping the prerogative of the legislature.⁷⁹

The *Uricoli* court, in light of these prior decisions, attempted to formulate a comprehensive standard by which courts could determine when forfeiture of a public employee's pension benefits would be warranted. The court considered Uricoli's twenty years of honorable service, the fact that there was no continuing course of criminal conduct, that the misconduct did not result in personal gain, and that adequate alternative sanctions had already been implemented. It concluded that Uricoli's entire tenure was not rendered dishonorable.⁸⁰ The court also determined, however, that Uricoli would not receive pension benefits for service rendered in the years following the date of his misconduct.⁸¹

Uricoli first argued that honorable service was not a prerequisite to the granting of the pension benefits for which he was eligible since the applicable statute did not contain an explicit honorable service requirement.⁸² The court rejected this assertion, relying on precedent

⁷⁷ See *id.* at 272, 432 A.2d at 1349-50 (Clifford, J., dissenting).

⁷⁸ *Id.*

⁷⁹ *Id.* at 274-75, 432 A.2d at 1350-51 (Clifford, J., dissenting). The dissent noted that: [p]ension laws are peculiarly the prerogative of the Legislature. If drastic revisions are to be made in this area because of changing notions of the purpose to be served by public employee pensions, then those revisions should be wrought in another forum. It is one thing for the Court to disagree with the Legislature, to conclude that the body has acted unwisely, and then to seek to persuade by reasoned analysis. It is quite another thing to trespass boldly into the territory of legislative dominion by rewriting the settled and accepted law.

Id.

⁸⁰ 91 N.J. at 79, 449 A.2d at 1276.

⁸¹ *Id.*

⁸² 91 N.J. at 66, 449 A.2d at 1269; see *supra* notes 47-49 and accompanying text. The applicable pension statutes provided:

[a]ny member of such police or paid or part-paid fire department who shall have received permanent disability . . . shall be retired upon an accidental disability pension equal to 2/3 of his average salary if an application for such retirement is filed . . . within 5 years . . .

N.J. STAT. ANN. § 43:16-2 (West Cum. Supp. 1983-1984).

(1) Upon the written application by a member in service, by one acting in his behalf or by his employer any member may be retired, . . . on an accidental disability retirement allowance; provided, that the medical board . . . shall certify

establishing honorable service as an implicit prerequisite to receiving any public pension.⁸³ The *Uricoli* court viewed the issue before it as requiring a weighing of the seriousness of the misconduct against the harshness of depriving Uricoli of all pension benefits for which he was eligible as a result of his substantial number of years of unblemished service.⁸⁴

Justice Handler began by describing the original judicial formulation of the forfeiture doctrine as an attempt to effectuate the courts' perception of legislative intent, noting that the evolution of the forfeiture doctrine into an integral part of New Jersey's public pension system was the direct result of the various courts' changing views of legislative policy in the area.⁸⁵ He pointed out that a number of prior cases required the automatic forfeiture of pension benefits for any instance of misconduct in office.⁸⁶ The court also noted, however, that other courts had evaluated the nature of the misconduct in relation to the employee's official duties when considering the need for total forfeiture of pension benefits.⁸⁷ Misconduct touching upon the administration of the employee's duties or instances of moral turpitude were often seen as justifying the forfeiture of pension benefits.⁸⁸ The court observed, however, that recent decisions had adopted a more flexible approach in determining the nature of the misconduct which would require forfeiture in a given case.⁸⁹ Justice Handler noted that, for example, the court had held in both *Masse* and *Procaccino* that for-

that the member is permanently and totally disabled The application to accomplish such retirement must be filed within 5 years of the original traumatic event

N.J. STAT. ANN. § 43:16A-7(1) (West Cum. Supp. 1983-1984).

⁸³ *Id.* at 66 & n.1, 449 A.2d at 1269 & n.1 (citing *Masse*, 87 N.J. at 252, 432 A.2d at 1339; *Makwinski*, 76 N.J. at 87, 385 A.2d at 1227).

⁸⁴ 91 N.J. at 66, 449 A.2d at 1269.

⁸⁵ *Id.* at 67-69, 449 A.2d at 1269-71. The court noted that public employees occupy positions of trust which include a duty to the public to serve honorably. *Id.* at 69-70, 449 A.2d at 1271. A breach of that duty, the court maintained, should warrant forfeiture of pension benefits. *Id.* at 70, 449 A.2d at 1271.

⁸⁶ 91 N.J. at 67, 449 A.2d at 1269-70 (citing *Plunkett v. Board of Pension Comm'rs*, 113 N.J.L. 230, 173 A. 923 (Sup. Ct. 1934), *aff'd per curiam*, 114 N.J.L. 273, 176 A. 341 (Ct. Err. & App. 1935); *Fromm v. Board of Directors*, 81 N.J. Super. 138, 195 A.2d 32 (App. Div. 1963)).

⁸⁷ 91 N.J. at 68, 449 A.2d at 1270; *compare* *Plunkett v. Board of Pension Comm'rs*, 113 N.J.L. 230, 173 A. 923 (Sup. Ct. 1934) (fireman's embezzlement from relief fund warranted dismissal and loss of pension benefits), *aff'd per curiam*, 114 N.J.L. 273, 176 A. 341 (Ct. Err. & App. 1935) and *Pfitzinger v. Board of Trustees*, 62 N.J. Super. 589, 163 A.2d 388 (Law Div. 1960) (numerous infractions by employee required total forfeiture of pension benefits) *with* *Makwinski*, 76 N.J. at 87, 385 A.2d at 1227 (nonvenal misconduct does not warrant forfeiture); *see also supra* notes 51-79 and accompanying text.

⁸⁸ *See* 91 N.J. at 68, 449 A.2d at 1270; *supra* notes 41-50 and accompanying text.

⁸⁹ 91 N.J. at 68-69, 449 A.2d at 1270-71; *see supra* notes 51-79 and accompanying text.

feiture was inappropriate unless there was a direct connection between the misconduct and the employee's position.⁹⁰ In addition, the *Makwinski* court had accorded substantial weight to the employee's intent, holding that in spite of the direct relationship between Makwinski's misconduct and his official duties, total forfeiture was not warranted since the motivation for the misconduct was not venal.⁹¹

The *Uricoli* court observed that earlier decisions had emphasized the fiduciary relationship which existed between the public employee and the public. Those cases had found an honorable service requirement implicit in that relationship, and viewed meeting this requirement as a prerequisite to the employee's eligibility for a pension from the state.⁹² The court also recognized that public pensions were gratuitous in nature and were intended to serve as both an incentive for the employee to provide honorable service and as a deterrent against misconduct.⁹³ Justice Handler noted that if denial of those benefits was to be used to promote honorable service in public office, no contractual entitlement to the receipt of public pension benefits could exist.⁹⁴ The court also observed that certain jurisdictions regarded public pensions as deferred compensation,⁹⁵ thereby rendering those pensions contractual in nature and hence forfeitable only upon a specific legislative mandate to that effect.⁹⁶ Since the New Jersey

⁹⁰ 91 N.J. at 69, 449 A.2d at 1270-71; *see also Masse*, 87 N.J. at 264, 432 A.2d at 1345; *Procaccino*, 87 N.J. at 268, 432 A.2d at 1347.

⁹¹ 91 N.J. at 69, 449 A.2d at 1271; *see also Makwinski*, 76 N.J. at 91-92, 385 A.2d at 1230.

⁹² 91 N.J. at 69-70, 449 A.2d at 1271 (citing *Plunkett v. Board of Pension Comm'rs*, 113 N.J.L. 230, 173 A. 923 (Sup. Ct. 1934), *aff'd per curiam*, 114 N.J.L. 273, 176 A. 341 (Ct. Err. & App. 1935)).

⁹³ 91 N.J. at 70, 449 A.2d at 1271 (citing *Ballurio v. Castellini*, 29 N.J. Super. 383, 102 A.2d 662 (App. Div. 1954); *Hozer v. State*, 95 N.J. Super. 196, 230 A.2d 508 (App. Div. 1967); *Mount v. Trustees of the Pub. Employees' Retirem. Sys.*, 133 N.J. Super. 72, 335 A.2d 559 (App. Div. 1975)); *Masse*, 87 N.J. at 252, 432 A.2d at 1339; *see supra* notes 32-35 and accompanying text.

⁹⁴ 91 N.J. at 70, 449 A.2d at 1271. The possibility of a contractual relationship between the employee and the state, however, had been noted as a competing concept by the court in *Watt v. Mayor of Franklin*, 21 N.J. 274, 121 A.2d 499 (1956), wherein the court observed that:

[t]he basic philosophy underlying pensions to public officers fluctuates between the early view that they were mere gratuities bestowed by the sovereign in recognition of meritorious service previously rendered and the more modern concept that they are some form of delayed wages or salary to compensate the employee during his declining years . . . for his long and faithful service.

Id. at 279, 121 A.2d at 501 (quoted in *Uricoli*, 91 N.J. at 70, 449 A.2d at 1271); *see supra* notes 37-39 and accompanying text.

⁹⁵ 91 N.J. at 71, 449 A.2d at 1272 (citing *Willens v. Commission on Judicial Qualifications*, 10 Cal. 3d 451, 516 P.2d 1, 110 Cal. Rptr. 713 (1973); *Dorsey v. State*, 283 A.2d 834 (Del. 1971)).

⁹⁶ 91 N.J. at 71, 449 A.2d at 1272 (citing *Burello v. Commonwealth*, 49 Pa. Commw. 364, 411 A.2d 852 (Commw. Ct. 1980); *City of Frederick v. Quinn*, 35 Md. App. 626, 371 A.2d 724

Supreme Court had adopted neither the contractual nor the gratuity theory exclusively, the *Uricoli* court concluded that, when determining the extent of pension forfeiture required in cases involving misconduct of public employees, the proper approach was "one which incorporates and reflects the statutory purposes served by public pensions."⁹⁷

In determining those statutory purposes, Justice Handler first observed the growing judicial recognition that public employee pensions were not mere gratuities, but were rather intended by the legislature as a form of deferred compensation.⁹⁸ He noted further that public pensions are terms and conditions of employment which, by statute, cannot be altered through collective employment negotiations.⁹⁹ The court inferred from this exemption a legislative intent to provide public employees with financial stability and security.¹⁰⁰

The court next examined the manner in which the legislature had expressly dealt with pension forfeitures, in order to guide its interpretation of the lawmakers' intent where the statutes were silent on the subject.¹⁰¹ The majority noted that the Public Employees' Retirement System Act specifically provides for forfeiture of early retirement

(Ct. Spec. App. 1979); *Leonard v. City of Seattle*, 81 Wash. 2d 479, 503 P.2d 741 (1972)); see *infra* note 163 and accompanying text.

⁹⁷ 91 N.J. at 72, 449 A.2d at 1272-73. Justice Schreiber, in *Masse*, discussed the legislative and judicial bases for considering public employee pension benefits as a form of compensation. 87 N.J. at 260-62, 432 A.2d at 1344; *accord* Chamber of Commerce v. Leone, 141 N.J. Super. 114, 137, 357 A.2d 311, 324 (Ch. Div. 1976) (legislators' retirement benefits earned by service in office), *aff'd per curiam*, 75 N.J. 319, 382 A.2d 381 (1978); see *Spina*, 41 N.J. 391, 401, 197 A.2d 169, 174 (1964); see also *supra* note 43 and accompanying text. He also pointed out, however, that the legislature had provided forfeiture of position and disqualification from governmental employment as sanctions for public employee misconduct. 87 N.J. at 262, 432 A.2d at 1344; N.J. STAT. ANN. §§ 2C:51-2 a and c. (West 1982), *supra* notes 15 and 68. Justice Schreiber believed that these sanctions evidenced a legislative policy that job-related misconduct of public employees warranted more severe punishment than similar infractions by others. 87 N.J. at 262, 432 A.2d at 1344.

⁹⁸ 91 N.J. at 72, 449 A.2d at 1273. Justice Handler referred specifically to Justice Schreiber's discussion in *Masse* of the legislative policies behind the public pension statutes. See *supra* notes 68-70 and accompanying text.

⁹⁹ 91 N.J. at 73, 449 A.2d at 1273. The New Jersey Employer-Employee Relations Act, N.J. STAT. ANN. § 34:13A-5.1-21 (West Cum. Supp. 1983-1984), states, in pertinent part: "Nothing in this act shall be construed to annul or modify . . . any pension statute or statutes of this State." N.J. STAT. ANN. § 34:13A-8.1 (West Cum. Supp. 1983-1984).

¹⁰⁰ 91 N.J. at 73, 449 A.2d at 1273. The court stated that:

[i]t may be inferred that the removal of public pensions from the arena of mandatory negotiations . . . not only protects the fiscal integrity of the pension systems but assures public employees that their entitlement to pension benefits is secure and should not be threatened by the vagaries of labor negotiations.

Id.

¹⁰¹ *Id.*

benefits upon an employee's removal from office for misconduct,¹⁰² and that the New Jersey Code of Criminal Justice mandates removal of an employee from his position and permanent disqualification from holding any future governmental position upon conviction for specified types of misconduct.¹⁰³ The court therefore concluded that, since the legislature had elsewhere provided sanctions for the misconduct of public employees, it should not construe the section of the pension statutes applicable to this case as mandating automatic forfeiture when the legislature had not expressly so provided.¹⁰⁴

The court advanced two additional statutory construction arguments against forfeiture. First, the court asserted that as forfeiture is essentially a penalty, doubts regarding its application must be resolved in favor of the employee.¹⁰⁵ Second, the majority maintained that since a pension is basically remedial in nature, the pension statutes must be construed liberally in favor of their intended beneficiaries.¹⁰⁶ Justice Handler further maintained that the court, in determining the underlying legislative intent, could properly consider both legislative and public policy developments since the original statute was enacted.¹⁰⁷ He pointed out that there was no basis for inferring that an inflexible forfeiture rule was consistent with the legislative intent in providing public pensions, and that such an approach was "discordant with the times."¹⁰⁸ The court thus held that a flexible, equitable approach must be utilized in ascertaining whether total

¹⁰² *Id.* at 74, 449 A.2d at 1273. Early retirement benefits are specifically denied to members of PERS who are "remov[ed] for cause on charges of misconduct or delinquency." N.J. STAT. ANN. § 43:15A-38 (West Cum. Supp. 1983-1984); *accord* N.J. STAT. ANN. § 43:16A-11.2 (West Cum. Supp. 1983-1984) (dealing specifically with policemen and firemen).

¹⁰³ 91 N.J. at 75, 449 A.2d at 1273; *see* N.J. STAT. ANN. §§ 2C:51-2 a. and c. (West 1982); *see supra* notes 15 and 68 for text.

¹⁰⁴ 91 N.J. at 76, 449 A.2d at 1274.

¹⁰⁵ *Id.*, 449 A.2d at 1275; *see* Stapleton v. Two Million Four Hundred Thirty-Eight Thousand, One Hundred and Ten Dollars, 454 F.2d 1210, 1216 (3d Cir.), *cert. denied sub nom.* Stapleton v. United States, 409 U.S. 894 (1972); *State v. LaBella*, 88 N.J. Super. 330, 338, 212 A.2d 192, 196 (Law Div. 1965).

¹⁰⁶ 91 N.J. at 76, 449 A.2d at 1275; *see Masse*, 87 N.J. at 259, 432 A.2d at 1339; *supra* notes 64-70 and accompanying text; *Smith v. Consolidated Police & Firemen's Pension*, 149 N.J. Super. 229, 373 A.2d 685 (App. Div.), *certif. denied*, 75 N.J. 8, 379 A.2d 239 (1977); *In re Vaccora*, 131 N.J. Super. 264, 268, 329 A.2d 567, 569 (App. Div.), *aff'd per curiam*, 66 N.J. 151, 329 A.2d 555 (1974); *In re Application of Smith*, 57 N.J. 368, 374, 273 A.2d 24, 28 (1971); *Geller v. Department of the Treasury*, 53 N.J. 591, 597-98, 252 A.2d 393, 396 (1969).

¹⁰⁷ 91 N.J. at 77, 449 A.2d at 1275. This approach, he noted, was particularly relevant when it is reasonable for the court to believe that the legislature did not intend the statute to be isolated from changes. *See Renz v. Penn Central Corp.*, 87 N.J. 437, 435 A.2d 540 (1981) (Railroad Immunity Act strictly construed in light of abrogation of common law concept of contributory negligence).

¹⁰⁸ 91 N.J. at 77, 449 A.2d at 1275.

forfeiture is justified by all the facts of an individual case, even in those situations where the misconduct touches upon the administration of the employee's duties.¹⁰⁹ The court enumerated specific factors to be considered in the weighing process including length of service, the nature of the misconduct, and the availability of other sanctions.¹¹⁰ Applying those factors to the instant case, the court determined that total forfeiture of benefits was not warranted, and the case was remanded to the pension board with instructions to process Uricoli's application.¹¹¹

In his concurrence, Justice Pashman noted that pensions were no longer considered gratuities, but instead had become recognized as necessary for the support of public employees and their families during retirement.¹¹² Total forfeiture of such benefits, he maintained, would be an extreme punishment if it were imposed as a result of relatively minor infractions.¹¹³ He observed, however, that indefeasibly vested pensions would unjustly reward public employees who had seriously abused the public trust by committing misconduct while in office.¹¹⁴ Justice Pashman believed that the factually oriented approach proposed by the majority was the best way to resolve these conflicting considerations and that the standards developed would enable future courts to make reasonable decisions regarding forfeiture of pension benefits for dishonorable service.¹¹⁵

¹⁰⁹ *Id.*

¹¹⁰ 91 N.J. at 77-78, 449 A.2d at 1275-76. The factors which may be considered are: (1) the employee's length of service; (2) the basis for retirement, *i.e.*, age, service, disability, etc.; (3) the extent to which the employee's pension has vested; (4) the duties of the particular employment; (5) the employee's public employment history and record; (6) the employee's other public employment and service; (7) 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; (8) the relationship between the misconduct and the employee's public duties; (9) the quality of moral turpitude or the degree of guilt and culpability, including the employee's motives and reasons, personal gain, and the like; (10) the availability and adequacy of other penal sanctions; and (11) other personal circumstances relating to the employee bearing upon the justness of forfeiture.

Id. at 77, 449 A.2d at 1275-76.

¹¹¹ *Id.* at 78-79, 449 A.2d at 1276.

¹¹² *Id.* at 80, 449 A.2d at 1276-77 (Pashman, J., concurring).

¹¹³ *Id.*, 449 A.2d at 1277 (Pashman, J., concurring). For example, strict application of the forfeiture doctrine would theoretically exact the same penalty for ticket-fixing as for theft, arson or murder.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 80-81, 449 A.2d at 1277 (Pashman, J., concurring). Justice Schreiber, also concurring, pointed out that the only pension benefits for which Uricoli was eligible to apply were based on disability because he did not have either the requisite age or length of service for a regular pension at the time of his misconduct. *Id.* at 81, 449 A.2d at 1277 (Schreiber, J.,

Justice O'Hern, joined by Chief Justice Wilentz and Justice Clifford, dissented, expressing the opinion that honorable service remained an implicit prerequisite for the granting of any public employee's pension benefits.¹¹⁶ The dissent reaffirmed the court's reasoning in *Masse* and *Procaccino* that the pension rights of public employees were not subject to forfeiture so long as the misconduct was unrelated to the employee's position.¹¹⁷ Justice O'Hern maintained, however, that the fixing of a traffic ticket touched directly upon the administration of Uricoli's office and, as a fraud against the state, constituted an act of moral turpitude.¹¹⁸ He argued that the case before the court was readily distinguishable from *Makwinski*, which was unique in that it concerned misconduct performed for the general good of the community.¹¹⁹

Although the dissent acknowledged that forfeiture of Uricoli's pension benefits would result in personal suffering, Justice O'Hern saw no reason to forsake the forfeiture precedent when a nexus existed between the misconduct and the employee's duties.¹²⁰ He noted that the forfeiture provisions of the criminal statutes, upon which both the *Masse* and the *Procaccino* courts had relied, supported the conclusion that the legislature intended to impose harsher sanctions on public employees committing employment-related misconduct than on those employees guilty of offenses unrelated to their duties.¹²¹ The dissent also pointed out that Justice Pashman's concurrence in *Makwinski*, in concluding that "dishonorable service requires total forfeiture of pension rights,"¹²² had stressed the "paramount importance of public

concurring). Since his service had been honorable up to the time of the misconduct, Justice Schreiber believed that Uricoli was eligible to apply for disability benefits at any time up to that point. *Id.*

¹¹⁶ *Id.* at 82-83, 449 A.2d at 1278 (O'Hern, J., dissenting).

¹¹⁷ *Id.* at 83, 449 A.2d at 1278-79 (O'Hern, J., dissenting); see *supra* notes 64-79 and accompanying text.

¹¹⁸ 91 N.J. at 83-84, 449 A.2d at 1279 (O'Hern, J., dissenting).

¹¹⁹ *Id.* at 84, 449 A.2d at 1279 (O'Hern, J., dissenting); see *supra* notes 51-54 and accompanying text.

¹²⁰ 91 N.J. at 84-85, 449 A.2d at 1279 (O'Hern, J., dissenting).

¹²¹ See 91 N.J. at 85, 449 A.2d at 1279-80 (O'Hern, J., dissenting); *Masse*, 87 N.J. at 262, 432 A.2d at 1344; see *supra* note 15 for text of N.J. STAT. ANN. § 2C:51-2 a. (West 1982) (forfeiture of position required for conviction of misconduct).

¹²² 91 N.J. at 85, 449 A.2d at 1280 (O'Hern, J., dissenting) (quoting *Makwinski*, 76 N.J. at 93, 385 A.2d at 1231); see *supra* notes 34-36 and accompanying text. The Public Employees Retirement System Act provides for the vesting of either certain benefits, or a deferred retirement allowance, upon completion of 10 years of service. N.J. STAT. ANN. § 43:15A-38 (West Cum. Supp. 1983-1984). The Police and Firemen's Retirement System Act does not explicitly allow vesting of benefits, although the statute does provide for benefits similar to those available under the Public Employees Retirement System Act, after 10 years of service. N.J. STAT. ANN. § 43:16A-11.2 (West Cum. Supp. 1983-1984). Both Acts specifically disallow such benefits, how-

employees acting honestly in accordance with the public trust placed in them.' ”¹²³ Justice O’Hern expressed the further concern that the majority’s balancing process afforded pension boards too much discretion in determining an employee’s eligibility for public pension benefits.¹²⁴ The dissenters would have upheld the lower court’s finding that Uricoli’s misconduct had rendered his service dishonorable, and thus made him ineligible for any public pension.¹²⁵

Eyers v. Board of Trustees, decided on the same day as *Uricoli*,¹²⁶ presented the court with the related problem of determining the extent of forfeiture of survivor’s benefits called for when the deceased pensioner was a public employee who had committed misconduct in office.¹²⁷ Roger F. Eyers had been employed as a plumbing inspector by Parsippany-Troy Hills Township on both a part-time and a full-time basis for a total of thirty-eight years.¹²⁸ At the age of sixty-nine he applied for and was granted a regular service retirement pension, which began in February of 1976.¹²⁹ Mr. Eyers was subsequently indicted for his part in certain incidents constituting misconduct in office which had occurred between April 1974 and June 1975.¹³⁰ The indictment resulted in convictions on all counts, and, in 1978, Mr. Eyers was sentenced to one year in prison (suspended), two years’ probation, and a \$3,000 fine.¹³¹

During the course of the trial proceedings Eyers was notified by the Board of Trustees of the Public Employees’ Retirement System (PERS Board) of a pending hearing on the suspension of his retirement benefits, but he died before the hearing took place.¹³² Mr. Eyers had

ever, when the employee has been “remov[ed] for cause on charges of misconduct or delinquency.” N.J. STAT. ANN. § 43:15A-38 (West Cum. Supp. 1983-1984); accord N.J. STAT. ANN. § 43:16A-11.2 (West Cum. Supp. 1983-1984).

¹²³ 91 N.J. at 85, 449 A.2d at 1280 (O’Hern, J., dissenting) (quoting *Makwinski*, 76 N.J. at 93, 385 A.2d at 1231).

¹²⁴ See 91 N.J. at 84, 449 A.2d at 1279 (O’Hern, J., dissenting). The boards of trustees of New Jersey’s public pension funds exercise powers which are quasi-judicial in nature in that they have the responsibility of processing applications for pension benefits, which includes the determination of the honorableness of an applicant’s service as well as examining his general qualifications for benefits. See generally N.J. STAT. ANN. §§ 43:1-1 to 43:22-15 (West 1962 & Cum. Supp. 1983-1984).

¹²⁵ 91 N.J. at 85, 449 A.2d at 1280 (O’Hern, J., dissenting).

¹²⁶ 91 N.J. at 51, 449 A.2d at 1261.

¹²⁷ *Id.* at 55-56, 449 A.2d at 1264.

¹²⁸ *Id.* at 53, 449 A.2d at 1262.

¹²⁹ *Id.*

¹³⁰ *Id.* The indictment charged that Eyers had accepted bribes to ignore plumbing violations. One count was for misconduct in office, and the remaining three counts were for taking money unlawfully. *Id.*

¹³¹ *Id.*

¹³² *Id.*

opted for a retirement benefit plan which provided that his designated beneficiary should receive both a lump sum and an annual survivor's benefit upon his death.¹³³ The PERS Board determined that Blanche T. Eyers, his widow and designated beneficiary, was not entitled to any survivor's benefits since her husband's conviction had rendered his service dishonorable, and thus would have disqualified him from receiving the pension upon which her benefits claim was founded.¹³⁴

At a subsequent hearing, an administrative law judge decided that Mrs. Eyers should not be required to forfeit her survivor's benefits, even though her husband's service had been rendered dishonorable by his conviction.¹³⁵ The PERS Board, however, rejected the finding of the administrative law judge, reasserting that Roger Eyers' ineligibility to continue receiving his pension eliminated his designated beneficiary's survivorship rights.¹³⁶ The appellate division, in affirming the PERS Board's decision, held that an employee must render honorable service throughout the term of employment in order to be entitled to a public pension.¹³⁷ Since Mr. Eyers' conviction of misconduct in office had thus rendered his right to pension benefits nonexistent, the appellate division concluded that Mrs. Eyers had no basis for a claim to survivor's benefits.¹³⁸ Her petition for certification was granted by the New Jersey Supreme Court, which reversed the appellate division.¹³⁹

Justice Handler, writing for the court, based his analysis on the conclusion reached in *Uricoli* that a public employee's job-related misconduct does not automatically result in the forfeiture of all pension benefits unless the applicable statute specifically so provides.¹⁴⁰ The court, however, did not specifically address the question of whether Roger Eyers would have lost his pension benefits due to his

¹³³ *Id.* at 54, 449 A.2d at 1263. Eyers had selected Option 2 under the statute which provided "[u]pon [the member's] death, his retirement allowance shall be continued throughout the life of and paid to such person as he shall nominate" N.J. STAT. ANN. § 43:15A-50 (West Cum. Supp. 1983-1984) (emphasis added).

¹³⁴ 91 N.J. at 54, 449 A.2d at 1263.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 54-55, 449 A.2d at 1263; see *supra* notes 34-36 and accompanying text.

¹³⁸ 91 N.J. at 55, 449 A.2d at 1263.

¹³⁹ *Id.* at 55, 58, 449 A.2d at 1263, 1265.

¹⁴⁰ *Id.* at 55, 449 A.2d at 1263. Justice Handler admitted that Eyers' conviction was for a continuing course of conduct which involved a venal motive and which directly touched upon the administration of his office. He also pointed out, however, that the incidents had occurred at the end of a long career in public service unmarred by any other instance of wrongdoing, that Eyers had already retired and was receiving pension benefits, and that a hearing had never been held to determine whether his conduct warranted the loss of those benefits. *Id.*

misconduct, but rather focused on whether the survivor's benefits payable to his widow should be subject to forfeiture.¹⁴¹ Presented with such an issue, the court refused to hold that a survivor's benefits were directly dependent upon the pensioner's rights, stating that the proper approach to be taken in all pension forfeiture cases was "to balance and weigh all relevant considerations, with none being determinative."¹⁴² Since the benefits in question here were not those of the "errant employee,"¹⁴³ but rather those of his dependent spouse, Justice Handler decided that several additional factors would have to be considered in applying the *Uricoli* balancing test in this case.¹⁴⁴

The *Eyers* court first noted that, as previously discussed in *Uricoli*, the traditional goals of the forfeiture doctrine were to deter misconduct in office and to punish betrayals of the public trust.¹⁴⁵ Justice Handler observed that since Mr. *Eyers* had already died, the forfeiture of pension benefits in this case could not serve either the goal of punishment, or of individual deterrence.¹⁴⁶ Although the forfeiture of Mrs. *Eyers*' survivor's benefits still might serve to deter other potential wrongdoers, the court stated that this goal must be weighed against other public policy considerations raised by the fact that the intended beneficiary here was a dependent widow.¹⁴⁷

The fact that several New Jersey statutes specifically provide benefits for the surviving family members of public employees¹⁴⁸ led the court to conclude that there is a strong legislative policy in favor of ensuring the financial protection of "those most likely to be dependent upon a public employee."¹⁴⁹ Although Mr. *Eyers* did not have to designate a dependent as his beneficiary, Justice Handler stated that *Eyers*' decision to do so was a circumstance which had to be considered in determining the propriety of applying the forfeiture doc-

¹⁴¹ 91 N.J. at 55-56, 449 A.2d at 1263-64.

¹⁴² *Id.* at 56, 449 A.2d at 1264.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; see *supra* notes 92-94 and accompanying text for a general discussion of the goals of the forfeiture doctrine.

¹⁴⁶ 91 N.J. at 56, 449 A.2d at 1264.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 56-57, 449 A.2d at 1264-65; see N.J. STAT. ANN. § 43:15A-49 (West Cum. Supp. 1983-1984) (benefits to spouse or other dependents where public employee suffers accidental death while on duty); N.J. STAT. ANN. § 43:16-4 (West Cum. Supp. 1983-1984) (dependent's benefits where employee loses life while on duty); N.J. STAT. ANN. § 43:16A-12.1 (West Cum. Supp. 1983-1984) (increased pension benefits to widows and dependents of public employees); N.J. STAT. ANN. § 43:16A-9, :16A-10 (West Cum. Supp. 1983-1984) (allowance to beneficiaries where employee dies either on duty or while in service).

¹⁴⁹ 91 N.J. at 57, 449 A.2d at 1264-65.

trine.¹⁵⁰ The court held, therefore, that given the strong legislative concern with providing support for dependents of public employees, the inequity of requiring Mrs. Evers to forfeit her survivor's benefits outweighed any possible benefit which might be derived from the general deterrence aspect of the forfeiture doctrine.¹⁵¹ Accordingly, the decision of the appellate division was reversed and the matter remanded for a determination of Mrs. Evers' survivor's benefits based upon Mr. Evers' term of service up to the date of his misconduct.¹⁵²

Justice O'Hern, again joined by Chief Justice Wilentz and Justice Clifford, dissented for the same reason that he had in *Uricoli*: He adhered to the general rule that "[m]isconduct in office involving dishonorable service should result in a forfeiture of vested pension rights."¹⁵³ The fact that Evers was already receiving retirement benefits when his misconduct came to light was not sufficient to distinguish this case from *Uricoli*, according to Justice O'Hern, because it is clear under New Jersey law that the granting of a pension is a decision that may be reconsidered by a pension board.¹⁵⁴ The dissent maintained that, since Evers' pension would have been revoked had the PERS Board held a hearing on the matter, there was no logical reason to allow his widow to collect survivor's benefits based on that pension merely because her husband's death had prevented the hearing from taking place.¹⁵⁵ As stated by Justice O'Hern, "[a] dependent beneficiary has no greater right to a pension than the member who designated the beneficiary."¹⁵⁶

¹⁵⁰ *Id.*

¹⁵¹ *See id.* at 58, 449 A.2d at 1265.

¹⁵² *Id.* Justice Pashman's concurrence consisted merely of a reference to his concurring opinion in *Uricoli*. *See also Uricoli*, 91 N.J. at 80, 449 A.2d at 1276-77 (Pashman, J., concurring); *supra* text accompanying notes 112-15. Justice Schreiber also concurred, stating that since Evers would have been eligible for a pension had he retired immediately prior to his misconduct in 1974, the pension should be seen as having vested as of that date. 91 N.J. at 58-59, 449 A.2d at 1265 (Schreiber, J., concurring). Justice Schreiber would thus have reached the same result as the majority without having to reject the view that Mrs. Evers' benefits were derived from those of her husband. *Id.*

¹⁵³ 91 N.J. at 59, 449 A.2d at 1265 (O'Hern, J., dissenting); *see supra* notes 32-36, 47-50 and accompanying text.

¹⁵⁴ *See* 91 N.J. at 59, 449 A.2d at 1265 (O'Hern, J., dissenting); *Plunkett v. Board of Pension Comm'rs*, 113 N.J.L. 230, 233-34, 173 A. 923, 924-25 (Sup. Ct. 1934), *aff'd per curiam*, 114 N.J.L. 273, 176 A. 341 (Ct. Err. & App. 1935).

¹⁵⁵ 91 N.J. at 59, 449 A.2d at 1265 (O'Hern, J., dissenting).

¹⁵⁶ *Id.* at 60, 449 A.2d at 1266 (O'Hern, J., dissenting). Justice O'Hern pointed out that the statute upon which Mrs. Evers' claim for benefits was based, N.J. STAT. ANN. § 43:15A-50 (West Cum. Supp. 1983-1984), stated that "[u]pon [the employee's] death, his retirement allowance shall be continued throughout the life of and paid to" the designated beneficiary. 91 N.J. at 59, 449 A.2d at 1265 (emphasis added). The dissent viewed the phrase "shall be continued" as implying that a pensioner must himself be entitled to receive benefits before any payments could be "continued" to his beneficiary. *See* 91 N.J. at 60, 449 A.2d at 1266 (O'Hern, J., dissenting).

Justice O'Hern went on to criticize the majority's finding of a legislative concern for the welfare of dependents such as Mrs. Eyers.¹⁵⁷ He pointed out that the statute under which Mrs. Eyers claimed her right to benefits conferred that right merely because of a person's status as designated beneficiary, and did not evince a particular legislative concern for widows per se.¹⁵⁸ The dissent found the other statutes cited by the majority, such as the section of the pension statute providing for survivor's benefits to dependents where a public employee has been killed while on duty, simply inapplicable to the facts in *Eyers*.¹⁵⁹ Justice O'Hern concluded by stating that both the granting and the forfeiture of pension benefits should be done equitably, and that the conduct of the employee is the factor which guides those decisions.¹⁶⁰ The majority's decision, he noted, brought about the "unconscionable" result that widows such as Mrs. Eyers would receive benefits while widows of other public employees would not, based solely on the fact that the latter group of pensioners had "lived to see [their] benefits forfeited before . . . death."¹⁶¹

The *Uricoli* and *Eyers* decisions have reinforced the New Jersey courts' position that public employees' rights to their pension benefits combine elements of both the gratuity and the contractual theories. While expanding on prior decisions which recognized that public employees had a limited property interest in their pension benefits,¹⁶²

¹⁵⁷ 91 N.J. at 60-61, 449 A.2d at 1266 (O'Hern, J., dissenting).

¹⁵⁸ *Id.* at 61, 449 A.2d at 1266 (O'Hern, J., dissenting); see N.J. STAT. ANN. § 43:15A-50 (West Cum. Supp. 1983-1984); see *supra* note 156.

¹⁵⁹ See 91 N.J. at 60-61, 449 A.2d at 1266 (O'Hern, J., dissenting); see N.J. STAT. ANN. § 43:15A-49 (West Cum. Supp. 1983-1984); *supra* note 148. The dissent also rejected the majority's reliance by analogy on N.J. STAT. ANN. § 43:1-2 (West 1962), which provides in part:

that nothing herein contained shall prevent the payment of the pension for the sole benefits of the mother, father, wife or minor children of the person . . . confined in a penal institution if the board or commission administering the pension fund shall determine that such pension is necessary for their maintenance.

N.J. STAT. ANN. § 43:1-2 (West 1962).

Justice O'Hern maintained that the purpose of the statute was primarily to prevent duplication of payments and not, as the majority asserted, to provide for dependents of public employees. 91 N.J. at 60, 449 A.2d at 1266 (O'Hern, J., dissenting).

¹⁶⁰ 91 N.J. at 62, 449 A.2d at 1267 (O'Hern, J., dissenting).

¹⁶¹ *Id.* at 61-62, 449 A.2d at 1266 (O'Hern, J., dissenting).

¹⁶² See 91 N.J. at 71-76, 449 A.2d at 1272-75; see also *supra* notes 42-46 and accompanying text. By requiring application of the balancing test, the *Uricoli* court has implied that public employees have a property interest in the totality of their pension benefits rather than merely in their pension contributions and individual installments. See *Moran v. Firemen's & Policemen's Pension Fund Comm'n*, 20 N.J. Misc. 479, 28 A.2d 885 (Hudson County Cir. Ct. 1942) (vested right to pension installments payable); N.J. STAT. ANN. § 43:16A-3 (West Cum. Supp. 1983-1984) (refund of members' individual contributions upon resignation or dismissal).

the *Uricoli* court did not raise such rights to a contractual level. This approach provides greater pension security to employees while allowing the pension plan administrators to retain forfeiture of benefits as a deterrent to misconduct.¹⁶³ The court did not, however, clearly resolve the question of when or if a working member of a New Jersey public pension plan ever becomes indefeasibly entitled to pension benefits.

New Jersey courts have consistently held that retired public employees have "vested" rights to any pension installment which has become payable.¹⁶⁴ The legislature has also statutorily provided for the refund of members' contributions upon withdrawal from the systems, with no distinction between the member's voluntary or involuntary separation from service.¹⁶⁵ Apparently, however, in the New

¹⁶³ 91 N.J. at 77-78, 449 A.2d at 1275-76; *see supra* notes 145-47 and accompanying text. A number of states, either through constitutional or statutory provisions, have made public employees' pension rights contractual in nature. *See, e.g.*, ALASKA CONST. art. XII, § 7 (membership in municipal pension systems contractual); ILL. CONST. of 1970 art. XIII, § 5 (same); MICH. CONST. art. 9, § 24 (same); N.Y. CONST. art. V, § 7 (same); MASS. GEN. LAWS ANN. ch. 32, § 25(5) (West 1966) (same). Once the contractual nature of the relationship has been established, the United States Constitution prohibits any state action which would impair that contract. U.S. CONST. art. I, § 10; *see, e.g.*, *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (state's ability to modify contracts limited by contract clause); *City of El Paso v. Simmons*, 379 U.S. 497 (1965) (same); *Dartmouth College v. Woodward*, 17 U.S. 518 (1819) (states may not legislatively impair contractual obligations). Some state courts have construed applicable constitutional provisions as providing vested pension rights only at retirement, thus allowing modification of public pension plans with respect to working members. *See Chun v. Employees' Retirem. Sys.*, 607 P.2d 415 (Hawaii 1980) (construing HAWAII CONST. of 1978, art. XVI, § 2) (pension benefits vest on date of retirement); *In re Enrolled Senate Bill 1269*, 389 Mich. 659, 209 N.W.2d 200 (1973) (construing MICH. CONST. art. IX, § 24) (increase in contributions by active members not impairment of vested pension rights). California has attempted to create a middle ground in construing public pension rights as contractual obligations while at the same time maintaining that the members have impliedly consented to reasonable modifications to those plans. *See Betts v. Board of Educ.*, 21 Cal. 3d 859, 582 P.2d 614, 148 Cal. Rptr. 158 (1978) (state's contractual obligations to public pension plans may be reasonably modified); *Miller v. State*, 18 Cal. 3d 808, 557 P.2d 970, 135 Cal. Rptr. 386 (1977) (same); *Wallace v. City of Fresno*, 42 Cal. 2d 180, 265 P.2d 884 (1954) (same); *Dryden v. Board of Pension Comm'rs*, 6 Cal. 2d 575, 59 P.2d 104 (1936) (same). Other states, such as New York, which have created contractual pension plan relationships in their constitutions, are faced with the task of amending the constitution in order to effect new provisions in their public pension plans. Such modifications affect only those employees entering the system after enactment of the amendments. *See Birnbaum v. New York State Teachers Retirem. Sys.*, 5 N.Y.2d 1, 152 N.E.2d 241, 176 N.Y.S.2d 984 (1958) (construing N.Y. CONST. art. V, § 7) (legislative modification of pension benefits after employee enters system prohibited). Thus, modification of the public pension plans, as well as application of the forfeiture doctrine, would have been severely restricted had the court imbued New Jersey's public employee pension benefits with contractual rights.

¹⁶⁴ *See supra* note 42 and accompanying text.

¹⁶⁵ *See* N.J. STAT. ANN. §§ 43:15A-41 and :16A-11 (West Cum. Supp. 1983-1984) (provision for refund of pension fund contributions). A member's right to obtain such a refund has not always existed. *See Connelly v. Municipal Employees Pension Comm'n*, 130 N.J.L. 101, 31 A.2d 488 (Sup. Ct. 1943) (dismissed revenue clerk denied refund of pension plan contributions).

Jersey public pension systems, working members' pension benefits do not vest prior to retirement except to the limited extent provided by the early retirement statutes.¹⁶⁶

The *Uricoli* court's inclusion of the "extent to which the employee's pension has vested"¹⁶⁷ as a factor to be considered in the determination of forfeiture therefore appears to be inapplicable to cases involving public employees who are currently working. Had the court simply held that all public employees have vested rights in their pension benefits once the minimum eligibility requirements of age and length of service had been met, as suggested by Justice Schreiber's concurrence in *Eyers*,¹⁶⁸ it would have eliminated the need for the application of the balancing process in cases where the misconduct took place after those requirements had been fulfilled. The pension boards' future determinations would have been simplified by a holding that in such cases, conviction for misconduct involving moral turpitude only ends the employee's entitlement to pension benefits accruing after the date of the incident. The deterrent function of forfeiture would still be served by this approach, since the pension rights of employees which had not vested prior to their misconduct would presumably still be subject to total forfeiture. A clear holding with regard to vesting would at the same time have advanced the legislative goal of ensuring financial security in retirement for public employees and their families.

The judicial development of the forfeiture doctrine as a means of enforcing, and in essence defining, the honorable service requirement of the pension statutes¹⁶⁹ has had the apparent approval of the legislature, since those statutes have not been amended regarding either forfeiture or honorable service.¹⁷⁰ The legislature has not, in fact,

¹⁶⁶ See *supra* note 122.

¹⁶⁷ 91 N.J. at 78, 449 A.2d at 1276.

¹⁶⁸ See 91 N.J. at 58-59, 449 A.2d at 1265.

¹⁶⁹ See *supra* notes 41-50 and accompanying text.

¹⁷⁰ See *Procaccino*, 87 N.J. at 272, 432 A.2d at 1349-50 (Clifford, J., dissenting). Since the original enactment of public employees' and police and firemen's pension legislation in 1962, there have been a substantial number of amendments to the plans. See, e.g., L. 1971, c. 213, eff. June 17, 1971 (codified as amended in scattered sections of N.J. STAT. ANN. §§ 43:15 and :15A); and L. 1981, c. 177, eff. June 19, 1981 (codified as amended in N.J. STAT. ANN. §§ 43:15A-38, :16A-11.2). The legislature has not, however, modified the judicially developed concepts of honorable service and the forfeiture doctrine. 87 N.J. at 272, 432 A.2d at 1349-50 (Clifford, J., dissenting). The acquiescence of the legislature to these formulations indicates that the judicial construction of the pension statutes is in accord with legislative intent. *Id.* (Clifford, J., dissenting); see *Lemke v. Bailey*, 41 N.J. 295, 301, 196 A.2d 523, 526 (1963) (judicial construction of tolling statute supported by legislature's inaction).

provided any specific guidance as to how or when application of the forfeiture doctrine is warranted, or as to what constitutes honorable service. In permitting the pension boards the discretion to determine the parameters of honorable service, the legislature has to a certain degree abdicated its function of policy formation in the area. The guidelines enumerated by the *Uricoli* court, which include a wide range of factors for the boards to consider when processing pension applications,¹⁷¹ will allow the pension boards even broader discretion in deciding when forfeiture of pension benefits is warranted. The language of the decision does not, however, mandate consideration of any minimum number of the listed factors, nor does it indicate the relative weight to be accorded each factor.¹⁷² If length of service is a primary consideration, at what point will the balance be tipped in favor of forfeiture when the employee has amassed, for example, over forty years of service? Will one sufficiently heinous incident be adequate to warrant forfeiture, or must the board find several other detrimental factors in order to overcome the weight of an extended term of otherwise honorable service?

The flexibility of the guidelines may well result in uneven application. For example, it would appear that, in considering all circumstances of a given case as required by the *Uricoli* court, a pension board could compel forfeiture on the basis of incidents for which a member had been indicted, but never convicted, thus circumventing the "innocent until proven guilty" presumption of our criminal justice system. The quasi-judicial nature of the pension boards would also expand, since it seems that evidentiary hearings would be necessary in order to determine the employee's "motives and reasons" for his action, to establish the connection between the offense and the position, and to ascertain the employee's "other personal circumstances," all of which apparently must be considered by pension boards, under the guidelines set out in *Uricoli*, in determining the extent of forfeiture required in a given case.¹⁷³

The court further complicated the pension boards' task in future forfeiture cases by its holding in *Eyers* that survivor's benefits of public employee's pensions are neither dependent upon nor derived from the member's benefits, but that the forfeiture criteria developed in *Uricoli* would nonetheless apply to such beneficiaries.¹⁷⁴ If Mrs. *Eyers*' survi-

¹⁷¹ See 91 N.J. at 77-78, 449 A.2d at 1275-76; see *supra* note 110.

¹⁷² See 91 N.J. at 78, 449 A.2d at 1276.

¹⁷³ *Id.* at 77-78, 449 A.2d at 1275-76.

¹⁷⁴ 91 N.J. at 56, 58, 449 A.2d at 1264, 1265. The decision indicated that factors in addition to those formulated in *Uricoli* were to be considered when determining forfeiture of survivor's

vor's benefits were not derived from her husband's pension benefits, it would seem that any forfeiture would be unwarranted since Mrs. Evers herself had committed no act upon which any reduction could be based. Indeed, if survivor's benefits are truly independent from those of the plan members, the application of the forfeiture doctrine to any extent would seem unjustified regardless of the beneficiary's relationship to the employee. The benefits could simply be granted based on the designated beneficiary's status as a survivor.

The New Jersey Supreme Court in *Uricoli* attempted to set out comprehensive guidelines to be followed by public pension boards in determining the extent of pension benefit forfeiture required in cases involving public employee misconduct. The flexibility of those guidelines may foster equitable results, while obviating the need for the extended judicial processes formerly required in situations involving employee misconduct or moral turpitude. That same flexibility, however, as well as the failure of the court to address the question of if and when public employee pension benefits actually vest, may in fact create additional confusion and increase the administrative workload involved in processing applications for those benefits. The need for a definitive, comprehensive policy statement by the legislature regarding the pension benefits of public employees has never been more evident.

Janet Pruden Bright

benefits. *Id.* at 56, 449 A.2d at 1264. The court did not, however, specifically identify those factors. *Id.*