



CITIZENS UNION OF THE CITY OF NEW YORK
Position on Pension Forfeiture for Certain Government Officials
Who Violate the Public Trust
March 23, 2011

I. Introduction and Summary of Position

The escalation of public corruption, illegal conduct and abuse of power by elected officials and other high-ranking government officials, as well as the accompanying increase in public disgust over such corruption has prompted Citizens Union to examine the need for greater penalties for those who have violated their oath of office and dishonored the public trust with which they were charged to protect.

Most disturbing in New York State is the rising number of high profile cases of elected officials who have pled to, or been found guilty of, felony crimes related to their public duties yet still are eligible to receive tax-payer financed pension benefits, such as former Comptroller Alan Hevesi and former State Senator Vincent Leibell. Given that pensions awarded to such officials are paid for with taxpayer dollars, Citizens Union has carefully reviewed the issue of whether and how pension forfeiture would be an appropriate punishment for certain officials in state government.

Citizens Union believes that state elected officials, judges and state agency heads convicted of felonies related to the holding of their office should no longer enjoy the privilege of continuing to receive automatically a tax-payer funded pension. State law and the constitution need to be changed to authorize judicial discretion in the sentencing process to determine whether certain public official criminals should forfeit part of or their entire state pension.

Including pension forfeiture among the range of penalties to be assigned may provide for some deterrence in the amount of public corruption that occurs and help assure the tax-paying public that they are no longer on the hook to automatically fund the livelihood of elected and certain other public officials convicted of felonies.

Below is a summary of Citizens Union's analysis and research on this issue, followed by our full position.

II. Pension Forfeiture and its Application in Other Jurisdictions

The argument in favor of pension forfeiture starts with the notion that public employees hold positions of public trust, and thus should be held to a higher standard when they use their positions to commit crimes that involve public funds or the exercise of undue influence. It is unseemly to many to allow officials convicted of crimes who abuse the public trust to receive a public pension which is funded by the taxpayers. Instances where those convicted of such crimes have continued to be eligible for, or have received, their pensions have been a source of public anger and discontent, and in some ways has become a head-shaking symbol of what is wrong with New York State government.

Arguments against forfeiture generally focus on mandatory forfeiture, because a blanket punishment may not be proportional to the crime, in that public employees who embezzle a small amount might forfeit a pension many times that amount. Automatic forfeiture has the further problem of imposing a much greater penalty on a long-time government employee than a short-term employee who commits the same offense. It may also unfairly financially affect the family members of public employees who had no role in the wrongdoing. Finally, it is argued that there are other sufficient ways of punishing public employees in the criminal justice system and that removing someone's pension is not an appropriate punishment as it is deferred compensation that should be protected. There is also a concern that there is a different standard for private sector employees, whose pensions are protected by the Employee Retirement Income Security Act (ERISA). Therefore, public and private employees who commit the same crime may face different penalties.

For these reasons above, Citizens Union settled upon looking only at the issue of pension forfeiture for elected officials, judges and agency heads, given that these people hold a much higher level of public trust due to their office and responsibilities.

Practices in other jurisdictions

Several states, including Michigan, Washington, New Jersey and Connecticut, among others, either authorize or mandate forfeiture. The federal government mandates forfeiture under the Hiss Act for all federal employees for certain crimes related to espionage and the Honest Leadership and Open Government Act of 2007 for members of Congress who are convicted of bribery, perjury, conspiracy or other related crimes in the course of carrying out their official duties as a member of Congress.¹

At the state level, several states authorize forfeiture but do not make it mandatory, such as Michigan and New Jersey. New Jersey specifically requires discretion to be used to evaluating a pension plan member's misconduct to determine whether it constitutes a breach of honorable public service and whether full or partial forfeiture is appropriate.² Some of the conditions enumerated in the law are the member's length of service, the duties of the member, the member's employment history, the nature of the crime or misconduct and whether it was continuing or isolated, and the "quality of moral turpitude or the degree of guilt or culpability."³

Some discretion regarding spouses and dependents is also used in the states and at the federal level. The State of Washington provides its state pension board discretion regarding awarding of benefits to dependents.⁴ Under the Honest Leadership and Open Government Act, the Office of Personnel Management (OPM) was directed to issue regulations regarding possible payment to the spouse or children of affected members of Congress.⁵ Regarding military personnel, those guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies, forfeit benefits, including pensions. The Secretary of Veterans Affairs, however, has the discretion to pay any part of the forfeited benefits to the employee's dependents.⁶

¹ Maskell, Jack. "Status of a Member of the House Who Has Been Indicted for or Convicted of a Felony," Congressional Research Service. October 2, 2007. Available at: <http://www.fas.org/sgp/crs/misc/RL33229.pdf>

² N.J.S.A. 43: 1-3

³ Id.

⁴ Revised Code of Washington, RCW 41.20.110

⁵ 5 U.S.C. § 8318

⁶ 38 U.S.C. §6104

III. Recommendations

Citizens Union supports pension forfeiture as a sanction available to a court when an elected official, head of a state agency, or judge commits a specifically enumerated crime that is related to the holding of one's office. Imposition of the forfeiture penalty should be discretionary with the sentencing court, which must consider a list of specified factors. Those whose pensions are forfeited should be entitled to receive back their own contributions to the plan with interest. Their medical and disability benefits should not be affected. Spouses and other beneficiaries who otherwise would be entitled to some or all of the pension should not lose those rights.

Citizens Union's rationales for certain components of the recommendation are provided below.

- **Judicial discretion** – We believe that authorizing forfeiture subject to judicial discretion under the framework provided above will create an important incentive for public officials to uphold the public trust, while balancing concerns of proportionality in relation to the crime. Such discretion is an essential element of forfeiture, as automatic forfeiture could lead to both unfair and unduly harsh results. A judge should weigh a specific set of factors in considering whether forfeiture is an appropriate punishment and, if so, what amount is suitable.
- **Application to elected officials, agency heads and judges** – Citizens Union considered whether all public servants or certain categories of public officials should be covered by any legislation. In tailoring our recommendation to a limited number of public employees – elected officials, agency heads and judges – we focused on public officials who have substantial authority and whose positions are imbued with a greater degree of public trust. We believe that these officials in particular should face the risk of pension forfeiture should they commit crimes that violate the public trust.
- **Limitation to specifically enumerated crimes** – Citizens Union is concerned that using general language, such as “crimes against the public trust,” would create ambiguity in the implementation of the law. By listing enumerated offenses, as is done in some other states, such as New Jersey, public officers would be on clear notice of what offenses would result in forfeiture and the statute would not be used in an overly inclusive or abusive manner.

Citizens Union supports forfeiture statutes that would apply to all elected officials, agency heads and judges who are members of the pension plan, seeing no reason why currently-employed public officers should be exempted from the forfeiture requirement should they commit one of the specifically enumerated crimes. It has generally believed that the State Constitution prevents pension forfeiture once the contractual right to the pension attaches.⁷ Citizens Union would support a constitutional amendment to remove that limitation. In the absence of a constitutional amendment, we would support a forfeiture statute which operates only prospectively, should it have the other provisions as recommended above.

⁷ See NYS Constitution, Article V, Section 7.