

Mail Date: DEC 13 2011

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF ROSS A. SCARANTINO  
DOCKET NO.: 2009-14  
CLAIM OF ROSS A. SCARANTINO

OPINION AND ORDER OF THE BOARD

Claimant, the former superintendent of the Pittston Area School District, timely requested an administrative hearing as to whether he is subject to the forfeiture of his annuity under the Public Employee Pension Forfeiture Act ("Forfeiture Act"), 43 P.S. § 1311 et seq., as a result of his guilty plea to a violation of the Federal statute, theft or bribery concerning programs receiving Federal funds, 18 U.S.C. §666(a)(1)(B).

The parties waived the right to a hearing and stipulated to certain facts pursuant to Sections 35.101 and 35.155 of the General Rules of Administrative Practice and Procedure, 1 Pa. Code §§35.101 and 35.155. Claimant and PSERS filed briefs in support of their respective positions. After consideration of the legal arguments of both parties and based upon the stipulated facts, the Hearing Officer determined that Claimant was not subject to the Forfeiture Act because the Federal offense to which Claimant pled guilty is not substantially the same as one of the offenses enumerated in the Forfeiture Act as a "crime related to public office or public employment." More specifically, the Hearing Officer concluded that "[c]onsideration is a necessary element of the state statute; it is not a necessary element under federal law. It is this distinction which robs the federal violation of the "substantially similar to" comparison to 18 Pa. C.S. §4701." (Proposed Adjudication and Order, p. 10)

PSERS filed exceptions with respect to this conclusion arguing that the Hearing Officer erred: (1) when she concluded that the Federal crime to which Claimant pled guilty does not require a showing of consideration; and (2) when she compared the Pennsylvania bribery statute to the language in the Federal sentencing guidelines, rather than to the statutory language of 18 U.S.C. §666(a)(1)(B) to which Claimant pled guilty.

The Board has carefully and independently reviewed the entire record of the proceeding, including the Proposed Adjudication and Order of the Hearing Officer, PSERS' Brief on Exceptions and Claimant's Brief Opposing Exceptions. Based on its independent review, the Board finds the following:

I. FINDINGS OF FACT

1. Claimant, born on September 13, 1945, was enrolled as a member of PSERS effective January 1967 by virtue of his employment with the Pennsbury School District. (Stip. 1<sup>1</sup>).

2. Beginning September, 1967, Claimant was continuously employed by the Pittston Area School District through June 29, 2009, as an elementary school teacher, principal, assistant superintendent and beginning September 1, 2005, as its superintendent. (Stip. 2).

3. By form dated June 8, 2001, Claimant elected to change his then current PSERS membership class from T-C to T-D as established in Act 2001-9. (Stip. 3).

4. As of June 30, 2001, Claimant accumulated approximately 34.50 years of service credit with PSERS, made member contributions of approximately \$76,006.55 and earned approximately \$51,730.72 in interest on such contributions with a present value of \$992,258.79 based on Class T-D service. (Stip. 4).

5. By Employment Agreement entered into on June 3, 2005, effective September 1, 2005, Claimant was appointed as the Superintendent of the Pittston Area School District for a five-year term. (Stip. 5, Exhibit 1).

6. On April 16, 2009, a Criminal Complaint was filed against Claimant in the United States District Court for the Middle District of Pennsylvania. (Stip. 6, Exhibit 2).

7. The Criminal Complaint alleged that Claimant, in his capacity as Superintendent of Schools for the Pittston Area School District, did "knowingly, intentionally and unlawfully corruptly accept and agree to accept, thousands of dollars in

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<sup>1</sup> "Stip." refers to the Stipulations of Fact filed on December 23, 2010 by the parties.

cash from another person, for the benefit of the [Claimant], intending to be rewarded in connection with the awarding of contracts by the Pittston Area School District.” (Exhibit 2)

8. On May 5, 2009, Claimant tendered his resignation from his position as Superintendent of the Pittston Area School District effective August 3, 2009. (Stip. 7).

9. On May 20, 2009, Claimant and the United States Attorney for the Middle District of Pennsylvania entered into a Plea Agreement wherein Claimant agreed to plead guilty to the charges set forth in the Information “which will be filed against [Claimant].” (Stip. 9; Exhibits 4 and 5)

10. The Plea Agreement further states that the Information “will charge [Claimant] with a violation of Title 18, United States Code, Section 666(a)(1)(B), corrupt receipt of reward for official action concerning program receiving federal funds.” (Exhibit 4, pp. 1-2)

11. On May 20, 2009, the United States Attorney’s Office in the Middle District of Pennsylvania filed an Information against Claimant charging him with a violation of 18 U.S.C. §666(a)(1)(B) as follows:

- a. [Claimant] was the Superintendent of Schools for the Pittston Area School District.
- b. As the Superintendent of Schools for the Pittston Area School District, [Claimant], made recommendations, formal and informal, relating to service and equipment contracts to the Pittston Area Board of Education.
- c. The Pittston Area Board of Education relied upon [Claimant’s] recommendations based on his knowledge and position within the school district and awarded contracts to those contractors recommended by [Claimant].
- d. In or about February of 2008, in Luzerne County, Pennsylvania and within the Middle District of Pennsylvania, [Claimant], in his capacity as the Superintendent of Schools for the Pittston Area School District, did knowingly, intentionally and corruptly accept and agree to accept

cash from another person, in the amount of \$5000 for the benefit of the [Claimant], *intending to be influenced and rewarded in connection with the awarding of contracts by the Pittston Area School District, involving a thing of value of \$5,000 and more* and within a one year period from the date of the commission of the offense, the Pittston Area School District received benefits in excess of \$10,000 under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance and other form of federal assistance. (Emphasis added) (Stip. 8, Exhibit 3).

12. On May 29, 2009, Claimant was arraigned and pled guilty to the charge contained in the Information. (Stip. 9, Exhibit 5, p. 20, lines 23-25).

13. On June 29, 2009, Claimant and the Pittston Area School District entered into a Settlement and Termination Agreement which provided for the termination of Claimant's employment and removal as Superintendent for cause effective June 29, 2009. (Stip. 10, Exhibit 6).

14. As of June 30, 2009, Claimant had accumulated approximately 41.50 years of service credit with PSERS, made member contributions of approximately \$129,594.51 and earned approximately \$107,528.87 in interest on such contributions. (Stip. 11, Exhibit 7).

15. By letter dated July 22, 2009, PSERS notified Claimant that he was subject to the Forfeiture Act because the Federal crime of theft or bribery concerning programs receiving Federal funds, 18 U.S.C. §666(a)(1)(B), is substantially the same as bribery in official and political matters. 18 Pa. C.S. §4701. (Stip. 12, Exhibit 8).

16. On August 21, 2009, Claimant timely filed an appeal and request for administrative hearing. (Stip. 13, Exhibit 9).

17. On September 14, 2009, PSERS filed its Answer to the Appeal. (Stip. 14, Exhibit 10).

18. By letter dated September 9, 2009, Claimant filed a supplement to his appeal. (Stip. 15, Exhibit 11).

19. On October 8, 2009, a judgment of guilty was entered and a sentence was imposed on Claimant. (Exhibit 12). A transcript was made of the October 8, 2009 Sentencing hearing held before the Honorable Thomas I. Vanaskie. (Stip. 16, Exhibit 13).

20. During all relevant times in his criminal proceeding, Claimant was represented by able counsel. (Stip. 17).

21. At no time did Claimant contact PSERS to inquire into whether a guilty plea to the Federal crime of corrupt receipt of reward for official action concerning program receiving Federal funds would result in a forfeiture of his pension with PSERS. (Stip. 18).

## II. DISCUSSION

The issue before this Board is whether the Federal crime of "theft or bribery concerning programs receiving Federal funds," 18 U.S.C. §666(a)(1)(B), is substantially the same as the Pennsylvania crime of "bribery in official and political matters," 18 Pa. C.S. §4701; specifically, whether consideration is a necessary element of Section 666(a)(1)(B).

The Forfeiture Act disqualifies public officials and public employees from receiving retirement benefits if they have been convicted of or pled guilty or no contest to any of the "crimes related to public office or public employment" enumerated in 43 P.S. § 1312.

### A. Public official/Public employee

The Forfeiture Act defines "public official" and "public employee" as:

any person who is elected or appointed to any public office or employment ... including but not limited to any person who has so acted and is otherwise entitled to or is receiving retirement benefits. . . [T]his term shall include all persons who are members of any retirement system funded in whole or in part by the Commonwealth or any political subdivision. For the purposes of this act such persons are deemed to be engaged in public employment. 43 P.S. § 1312.

At the time the crime was committed, Claimant was a superintendent for a public school district, and was, by virtue of his position, a member of PSERS. Claimant's public employment placed him in a position to commit the offense to which he pled guilty in Federal court. Claimant, therefore, is a public official or public employee for purposes of the Forfeiture Act. 43 P.S. §§1312 and 1313(c).

## B. Forfeitable Offense

The Forfeiture Act provides for the mandatory disqualification and forfeiture of benefits upon conviction or plea of guilty or no defense to any crime related to public office or public employment. 43 P.S. §§ 1311-1315. The Forfeiture Act leaves no discretion to any administrative agency once a triggering conviction or guilty plea has occurred. *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29 (Pa. Cmwith. 1999). After enumerating the crimes that define the term, "crimes related to public office or public employment," the Forfeiture Act provides: "In addition to the foregoing specific crimes, the term also includes all criminal offenses as set forth in Federal law substantially the same as the crimes enumerated herein." 43 P.S. § 1312.

1. Violation of theft or bribery concerning programs receiving Federal funds, 18 U.S.C. §666(a)(1)(B).

Essentially, Claimant argues that he was convicted and sentenced for receiving a reward, not for receiving a bribe. Claimant does not dispute the validity of the Information. Rather, Claimant and the Hearing Officer rely upon statements in the transcript of the Arraignment and Guilty Plea that: (1) the prosecutor agreed that Claimant's violation was accepting one gratuity of \$5,000 (Stip. Exhibit 5, pp. 16, 18); (2) the defense attorney stated that Claimant was pleading guilty to the crime of accepting one gratuity (Exhibit 5, p. 16); and (3) the Court's statement that Claimant was pleading guilty to having accepted one reward (Exhibit 5, p. 6) or one gratuity (Stip. Exhibit 5, p. 16) in concluding that Claimant pled guilty, and was adjudicated guilty, of receiving only one gratuity or tip.

Statements made by the prosecutor, defense attorney or even the judge, however, cannot alter the language of the Information to which Claimant unambiguously pled guilty. Indeed, the statements relied upon by Claimant were made in the context of *sentencing*, for which the parties agreed to characterize the offense as one involving receipt of a gratuity so that Claimant might be sentenced under U.S.S.G. § 2C1.2 (the reward guideline) rather than U.S.S.G. § 2C1.1 (the bribery guideline), the latter of which provides for a stiffer sentence. (Exhibit 4 at p. 8, ¶12; Exhibit 5 at p. 14, lines 4-25; p. 18, lines 21-22; Exhibit 13 at p. 3, lines 16-25) Not every criminal statute has a sentencing guideline that mirrors its language; the Federal guidelines contain a statutory index that simply

"specifies the guidelines section . . . ordinarily applicable to the statute of conviction." U.S.S.G. App.A, intro. In *United States v. Mariano*, 983 F.2d 1150 (1<sup>st</sup> Cir. 1993), the defendants claimed that they had given a gratuity, rather than a bribe, to a municipal official in violation of 18 U.S.C. §666(a)(2), and should be sentenced under the gratuity guideline, §2C1.2. The court rejected their argument and sentenced them under the bribery guideline, §2C1.1, because the offenses to which the defendants pled guilty "involved corrupt intent;" therefore, "the determination that their actions were more akin to bribe-giving than to gift-giving was not clearly erroneous." 983 F.2d at 1159.

This Board does not have the discretion or authority to look beyond the crime to which Claimant pled and was found guilty to determine whether the Federal crime is substantially the same as a forfeitable offense. It is the offense in the Information to which Claimant pled guilty that this Board must analyze when determining whether the Federal statute, theft or bribery concerning programs receiving Federal funds, 18 U.S.C. §666(a)(1)(B), is substantially the same as the Pennsylvania statute, bribery in official and political matters, 18 Pa. C.S. §4701. The sentence imposed, whether harsh or lenient, is irrelevant to this analysis.

Claimant pled guilty to the Information, which charged him with a violation of 18 U.S.C. §666(a)(1)(B), specifically that he "knowingly, intentionally and corruptly accept[ed] and agree[d] to accept cash from another person, in the amount of \$5000 for the benefit of the [Claimant], intending to be influenced and rewarded in connection with the awarding of contracts by the Pittston Area School District." (Exhibit 3, p.2) Section 666(a)(1)(B) states in pertinent part:

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

\* \* \*

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of \$ 5,000 or more; or

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(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of \$ 10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

The Information tracks the language of the statute, except that the Information uses the language "intending to be influenced **and** rewarded," while the statute states "intending to be influenced **or** rewarded." By using the word "and," the Information differentiates between being "influenced" and being "rewarded" and charges Claimant with both offenses. Consequently, in addition to pleading guilty to the crime of "corruptly . . . accepting . . . anything of value . . . *intending to be . . . rewarded . . .* in connection with any . . . transaction," Claimant also pled guilty to the crime of "corruptly . . . accepting . . . anything of value . . . *intending to be influenced . . .* in connection with any . . . transaction."

To establish a violation of Section 666(a)(1)(B), the government must prove that:

- (1) at the time alleged in the indictment, Claimant was an agent of the Pittston Area School District, 18 U.S.C. §666 (a)(1);
- (2) Claimant recommended a contractor to the Pittston Area Board of Education relating to service and equipment contracts (Exhibit 3 and 5, p. 18);
- (3) the Pittston Area Board of Education awarded such contracts to the contractor recommended by Claimant (Exhibit 3 and 5, p. 18);
- (4) Claimant corruptly accepted and agreed to accept \$5,000 cash from the contractor intending to be influenced in connection with his recommendations to the Pittston Area Board of Education, (Exhibit 3 and 5, p. 18), 18 U.S.C. §666(a)(1)(B); or
- (5) Claimant corruptly accepted and agreed to accept \$5,000 cash from the contractor intending to be rewarded in connection with his recommendations to the Pittston Area Board of Education, (Exhibit 3 and 5, p. 18), 18 U.S.C. §666(a)(1)(B); and
- (6) in a one-year period, the School received Federal benefits in excess of \$10,000, 18 U.S.C. §666(b).



## 2. "Substantially the same as" standard

Although the statute does not define "substantially the same as," Pennsylvania court decisions have focused on the elements of the crime, the burden of proof, and the *mens rea* in determining whether the Federal crime is substantially similar to an enumerated state crime. *Roche v. State Employees' Retirement Board*, 731 A.2d 640 (Pa. Cmwlth. 1999), citing *Pappacena v. Dep't of Transportation*, 716 A.2d 714 (Pa. Cmwlth. 1998); *Merlino v. City of Philadelphia Board of Pensions and Retirement*, 916 A.2d 1231 (Pa. Cmwlth. 2007); *In re Terlecki*, 2006 Pa. Dist. & Cnty. Dec. LEXIS 434 (C.P. Allegheny 2006), *aff'd* without opinion, *In re Terlecki*, 935 A.2d 936 (Pa. Cmwlth. 2007) (unpublished).<sup>2</sup>

In *Roche v. State Employees Retirement Board*, a corrections officer from the State Correctional Facility at Graterford was called to testify before a Federal grand jury regarding allegations of prisoner abuse at his place of employment. As a result of his testimony, the corrections officer was later charged with and pled guilty to the Federal crime of false declaration, 18 U.S.C. § 1623. Following his guilty plea, the State Employees' Retirement Board forfeited the corrections officer's pension benefits, finding that the Federal crime of false declaration was "substantially the same" as the state crime of perjury, 18 Pa.C.S. § 4902. On appeal, the Commonwealth Court ruled that the two statutes were not "substantially the same" as required by Section 1312 of the Forfeiture Act. In so holding, the Commonwealth Court noted that the Federal crime of

<sup>2</sup> The Hearing Officer adopted Claimant's position that the phrase "substantially the same as," should be construed according to the common and approved usage of the words. 1 Pa. C.S. §1903(a). In so doing, the Hearing Officer concluded that the common and approved usage of the words "substantially" and "same" mean that the federal criminal offense must be basically, essentially or fundamentally identical to a state criminal offense enumerated in 43 P.S. §1312. The Pennsylvania court decisions interpreting the phrase "substantially the same as" have not adopted such an analysis. Nonetheless, even if this Board were to adopt the Hearing Officer's statutory construction analysis, the fact that the General Assembly chose to use the word "substantially" before "same" indicates that the General Assembly did not intend to require that the language of the Federal criminal statute be *identical* to the language used in the Pennsylvania statute as Claimant suggests. Otherwise, the General Assembly would have simply stated that the Forfeiture Act also applies to all criminal offenses set forth in Federal law that are *the same* as the crimes enumerated in the Forfeiture Act. 1 Pa.C.S. § 1921; *see also* 1 Pa.C.S. § 1901, "In the construction of the statutes of this Commonwealth, the rules set forth in this chapter shall be observed, *unless the application of such rules would result in a construction inconsistent with the manifest intent of the General Assembly.*" (Emphasis added)

false declaration had a lower degree of *mens rea*. Specifically, the Federal crime of false declaration required only that the declarant acted “knowingly,” while the state crime of perjury required the declarant to act “willfully.” Significantly, the *Roche* court noted that the Federal Crimes Code possesses a separate “perjury” statute, 18 U.S.C. § 1621, which has the same *mens rea* requirement as Pennsylvania’s perjury statute. As a result, if the corrections officer had been convicted of Federal perjury rather than false declaration, the “substantially the same” requirement found in Section 1312 of the Forfeiture Act would have been met.

In *Merlino v. City of Philadelphia Board of Pensions and Retirement*, 916 A.2d 1231 (Pa. Cmwlth. 2007), a City police officer was involved in a drug investigation that was later taken over by the Federal government. During the investigation, the officer falsely stated to another officer that a trained police dog and his handler responded positively for the presence of narcotics on two UPS packages when those packages were still inside the UPS truck. The other officer relied on the information in establishing probable cause to secure a search warrant for the boxes. Merlino had also repeated the false story to an Assistant U.S. Attorney and was subsequently charged with one count of making a false statement to a Federal agency under 18 U.S.C. §1001. The Pension Board forfeited Merlino’s pension with the City, finding that the Federal crime of making false statements as a police officer to Federal authorities during an investigation is substantially similar to the state crime of unsworn falsification to authorities and the state crime of false reports to law enforcement authorities, which are both included in the Forfeiture Act.<sup>3</sup> The Commonwealth Court held that 18 U.S.C. § 1001(a)(2), which makes it a crime if a person “knowingly and willfully ‘makes any materially false, fictitious, or fraudulent statement or representation’ in any matter within the jurisdiction of the . . . federal government,” is substantially the same as Pennsylvania’s statute, 18 Pa.C.S. §4906(b)(1), which provides that “a person commits a misdemeanor of the third degree if he or she ‘reports to law enforcement authorities an offense or other incident

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<sup>3</sup> On appeal, Merlino also argued that the Pension Board applied a “weakened” standard, “substantially similar to,” rather than the “substantially the same as” standard in the Forfeiture Act. The Commonwealth Court rejected the argument that there was a difference between a “substantially similar” standard and a “substantially the same as” standard.

within their concern knowing that it did not occur” because “[b]oth statutes require a false statement knowingly made to law enforcement authorities.” 916 A.2d at 1236.

In *In re Terlecki*, 2006 Pa. Dist. & Cnty. Dec. LEXIS 434 (C.P. Allegheny 2006), aff'd without opinion, *In re Terlecki*, 935 A.2d 936 (Pa. Cmwlth. 2007) (unpublished), a City of Pittsburgh employee pled guilty to one count of mail fraud for approving invoices of a vendor knowing that the work was not performed and paying such fraudulent bills through the United States mail. The Common Pleas Court held that the Federal crime of mail fraud and the Pennsylvania crime of theft by deception, 18 Pa.C.S. § 3922, are substantially the same for purposes of the Forfeiture Act because both crimes have similar *mens rea* requirements. The Federal crime of mail fraud requires “knowing and willful” conduct, which represents a higher level of *mens rea* than the state law crime of theft by deception, which only requires “intentional” conduct.

Accordingly, if a defendant pleads guilty to a Federal crime with a *mens rea* that is equal to or greater than the *mens rea* of the equivalent state crime, and all other elements of the crimes are the same, then the two are considered “substantially the same” for the purposes of the Forfeiture Act.

3. Substantially the same as the Pennsylvania statute, bribery in official and political matters, 18 Pa. C.S. §4701.

Claimant contends, and the Hearing Officer agreed, that consideration is not a necessary element of 18 U.S.C.S. §666(a) because it does not require that a thing of value be identified “as consideration for” any official action. The Hearing Officer further opined that the most persuasive factor is “that the wording and content of 18 Pa.C.S. §4701 differs substantially from the wording and the content of 18 U.S.C. §666(a)(1)(B) with respect to criminalizing the acceptance of anything of value from any person, intending to be influenced or rewarded.” (Proposed Adjudication and Order, p. 8) We agree that the Federal statute is stricter in defining acts of bribery than the Pennsylvania statute, bribery in official and political matters, 18 Pa. C.S. §4701, to the extent that Section 4701 does not contain language criminalizing rewards. Indeed, PSERS states in its Exceptions that if the Information stated that Claimant *only* pled guilty to “corruptly . . . accepting . . . anything of value . . . intending to be . . . rewarded . . . in connection with any . . . transaction,” then the “substantially the same” requirement might not be satisfied

because receiving a reward under Section 666(a)(1)(B) does not require something offered “in consideration for” an action. PSERS argues, however, that the charge “corruptly . . . accepting . . . anything of value . . . *intending to be influenced* . . . in connection with any . . . transaction” to which Claimant pled guilty, *does* require a finding of “corrupt intent,” which is substantially the same as the “in consideration for” element in the Pennsylvania statute.

In resolving the issue in the instant appeal, it is necessary to examine Federal case law interpreting 18 U.S.C. §666(a)(1)(B), just as Pennsylvania courts have done in the above cited cases.<sup>4</sup> Under subsection 666(a)(1)(B), a Federal offense occurs when an agent of an organization receiving Federal funds corruptly accepts or agrees to accept anything of value intending to be influenced or rewarded in connection with any transaction of the organization. The express language of the subsection encompasses *bribes and rewards* offered to state and local officials employed by agencies receiving Federal funds. Federal courts have distinguished the receipt of a reward under Section 666(a)(1)(B) from a bribe as a matter of intent.

Bribery under Section 666(a)(1)(B) requires proof that the payee acted corruptly with the *intent of being influenced* in any official act or to do or omit an act in violation of his official duties. See *United States v. Griffin*, 154 F.3d 762 (8th Cir. 1998); *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991). In this regard, the *mens rea* element required for bribery under Section 666(a)(1)(B) is corrupt intent. No corrupt intent to be influenced for official behavior is required for a reward. *Muldoon, Id.* See also, *United States v. Sun-Diamond Growers*, 138 F.3d 961, 966 (D.C. Cir. 1998) (“The bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, *although the gratuity was produced because of the official act* . . . in contrast to bribery, [a] gratuity and the [relevant] official act need not motivate each other.” (Emphasis is original)); *Griffin* at 764 (“The core difference between a bribe and a gratuity is . . . the *quid pro quo*, or the agreement to exchange cash for official action.”); *Mariano* at 1159 (“The essential difference between a

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<sup>4</sup> The Hearing Officer did not provide an analysis of Federal case law when concluding that the Federal statute did not require proof that the act was “in consideration for” any official action.

bribe and an illegal gratuity is the intention of the bribe giver to effect a *quid pro quo*.”). The paramount focus of bribery is the intent to be influenced, not just rewarded for past acts.

Section 4701 states:

(a) *Offenses defined.* —A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another.

(1) any pecuniary benefit as consideration for the decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter by the recipient;

(2) any benefit as consideration for the decision, vote, recommendation or other exercise of official discretion by the recipient in a judicial, administrative or legislative proceeding; or

(3) any benefit as consideration for a violation of a known legal duty as public servant or party official. (Emphasis added)

Like 18 U.S.C. § 666(a)(1)(B), the key element of bribery under Pennsylvania law is the existence of a *quid pro quo*, or “in consideration for.” See, *Commonwealth v. Moran*, 5 A.3d 273, 280 (Pa. Super. 2010). (“Plainly put, no person in public service may solicit a benefit as a *quid pro quo* for his exercise of the official discretion he holds.”) “*Quid pro quo*” is defined as “what for what; something for something. Used in law for the giving one valuable thing for another. It is nothing more than the mutual *consideration* that passes between the parties to a contract, and which renders it valid and binding.” Black’s Law Dictionary 1248 (8th ed. 2004) (Emphasis added). The elements of Section 4701 are satisfied and the crime is complete once the offer to confer the proscribed benefit is made, or once the agreement is made. *Commonwealth v. D’Angelo*, 585 A.2d 525 (Pa. Super 1991).

In *Commonwealth v. D’Angelo*, the Superior Court determined that the receipt of money in return for “investment ‘advice’ and distribution of public information [was] simply insufficient to constitute a violation of § 4701” because there was no evidence that the official offered to perform an illegal act or violate a known duty. The Court characterized such an act as “tipping” and relied on the comment to § 4701, which reads:

This section extends bribery to cover all public employees. Under this section the crime is limited to bribery in connection with decision-making; consequently, it does not apply to situations where the law contemplates payment of fees to the public servant for his services or to tips given to a public servant. While the practice of tipping is not condoned, it is recognized that such practice is widespread.

In *Commonwealth v. Wojdak*, 466 A.2d 991 (Pa. 1983), the Supreme Court held that there was no evidence that the defendant had the intent to influence an official decision because the defendant's actions took place after the official decision. The Court stated that "once the admission decision had been made favorably, there was no longer any suggestion of an intent to in any way influence that decision. . . . The offense of bribery was germane only to the alleged earlier efforts or anticipated efforts by Lynch to influence a favorable decision."

In both the Federal crime to which Claimant pled guilty and the state bribery statute, the essential elements are the conferring or agreement to confer a benefit with the intent to influence the recipient's decision-making authority. Here, according to the Information to which Claimant pled guilty, Claimant accepted and agreed to accept \$5,000 cash from the contractor intending to be influenced in connection with his recommendations to the Pittston Area Board of Education. This differs markedly from the concept of "tipping" which is a general gratuity without respect to any specific intent to influence, and more importantly, unilaterally given. Accordingly, this Board finds that there is no distinction between the corrupt intent element in 18 U.S.C. § 666(a)(1)(B) and the consideration element in 18 Pa.C.S. § 4701.

On a factual level, the evidence does not compel Claimant's assertion that he only pled guilty to receipt of a reward. Claimant pled guilty to the Information, which stated that Claimant "knowingly, intentionally and corruptly accept[ed] and agree[d] to accept cash from another person, in the amount of \$5000 for the benefit of the [Claimant], intending to be influenced and rewarded in connection with the awarding of contracts by the Pittston Area School District." The Court was free to sentence Claimant under the lesser reward guidelines rather than the bribery guidelines. See *Mariano*, 983 F.2d 1150. The imposition of a lesser sentence, however, does not alter the crime to which Claimant is guilty. In focusing on the term "rewarded" with regard to Claimant's sentencing, Claimant and the Hearing Officer ignore the phrase "intending to be influenced" in the charge. The

sentencing guidelines utilized by the Court are irrelevant as to whether Claimant pled guilty to a forfeitable offense. Based on the record before us, therefore, we must conclude that the inclusion in the Information of the crime of corruptly intending to be influenced distinguishes Claimant's actions from a reward or, more importantly, from a mere gratuity or tip.

For the reasons stated above, Claimant's PSERS pension should be forfeited under the Forfeiture Act because of his guilty plea to one count of theft or bribery concerning programs receiving Federal funds, 18 U.S.C. §666(a)(1)(A), as that Federal crime has been determined, in this instance, to be substantially the same as the Pennsylvania crime of bribery in official and political matters, 18 Pa.C.S. § 4701.

### **C. Constitutional Arguments**

Claimant asserts constitutional claims that: (1) the definition of "crimes related to public office or public employment" in the Forfeiture Act is unconstitutionally vague; (2) the Forfeiture Act's coverage of Federal crimes that are substantially the same as the enumerated Pennsylvania crimes is an unconstitutional delegation of legislative authority; and (3) the forfeiture of Claimant's pension is a cruel punishment or excessive fine in violation of Article I, §13 of the Pennsylvania Constitution or the Eighth Amendment to the United States Constitution.

The burden of proving a statute is unconstitutional is on the challenger. Furthermore, a statute is presumed constitutional and the burden of proving otherwise is heavy. *Morris v. Public School Employes' Retirement System*, 538 A.2d 1385 (Pa. Cmwlth. 1988); *alloc. den.* 557 A.2d 345 (Pa. 1989). Courts may not declare a statute unconstitutional unless it clearly, palpably and plainly violates the constitution. *Worly v. Public School Employes' Retirement Board*, 689 A.2d 334 (Pa. Cmwlth. 1997), *alloc. den.* 701 A.2d 580 (Pa. 1997).

The determination of the constitutionality of the Forfeiture Act is not a right this Board possesses. *Borough of Greentree v. Board of Property Assessments, Appeals & Review*, 328 A.2d 819 (Pa. 1974). Because, however, constitutional arguments may, and sometimes must, be raised at the level of administrative adjudication to preserve

the right to raise them on appeal, if necessary, the Board will address Claimant's constitutional arguments. *Cianfrani v. State Employees' Retirement Board*, 479 A.2d 468 (Pa. 1984); *Newlin Corp. v. Commonwealth, Dept. of Environmental Resources*, 579 A.2d 996 (Pa. Cmwlth. 1990).

1. The definition of "crimes related to public office or public employment" in the Forfeiture Act is not unconstitutionally vague.

Claimant argues that the Forfeiture Act's inclusion of Federal crimes that are substantially the same as the enumerated Pennsylvania crimes is unconstitutionally vague. A vague statute denies due process by not giving fair notice to people of ordinary intelligence that the contemplated activity may be unlawful. *Stephens v. Pennsylvania State Bd. of Nursing*, 657 A.2d 71 (Pa. Cmwlth. 1995). A statute is not void for vagueness in violation of due process if the statute in question contains reasonable standards to guide prospective conduct. *Baumgardner Oil Co. v. Commonwealth*, 606 A.2d 617 (Pa. Cmwlth. 1992). Legislation can be so vague as to deny due process in its enforcement when it limits the ability of those to whom the statute is directed to understand that which is prohibited or mandated. *Pennsylvania Medical Providers Ass'n v. Foster*, 582 A.2d 888 (Pa. Cmwlth. 1990). Under this analysis, the Forfeiture Act passes constitutional muster.

The standard for pension forfeiture involved here is the standard established by the enumerated Pennsylvania crimes in the Forfeiture Act. Claimant raises the concern that a member needs to scour all 50 titles of the United States Code to derive a listing of offenses substantially the same as the enumerated Pennsylvania crimes in the Forfeiture Act. We do not agree. A person charged with a Federal crime who is contemplating a guilty plea does not need to know all 50 titles worth of Federal crimes. Instead, he merely needs to compare the Federal crime with which he is charged to the state law crimes enumerated in the Forfeiture Act to evaluate if they are substantially the same. If the issue is whether a person who is contemplating criminal conduct cannot tell if it would result in a pension forfeiture if he is caught (ignoring of course any concern that the person needs this information only to inform him of the consequences of his breaking the law in addition to criminal penalties), he need only review the crimes



enumerated in the Forfeiture Act. The Pennsylvania crimes clearly indicate what conduct will cause forfeiture. Simply because the conduct is being prosecuted federally does not make the description of the conduct impermissibly vague. A reasonable person can review the Forfeiture Act and determine what conduct results in a pension forfeiture. *Commonwealth v. Balog*, 672 A.2d 319 (Pa. Super. 1996).

2. The Forfeiture Act's coverage of Federal crimes that are substantially the same as the enumerated Pennsylvania crimes is not an unconstitutional delegation of legislative authority.

Claimant argues that the Forfeiture Act embodies an unconstitutional delegation of legislative power, thereby violating Article II, §1 of the Pennsylvania Constitution. Article II, §1 provides that “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” Constitutional rule-making delegation requires that the basic policy choices involved in legislative power actually be made by the General Assembly. “The legislation must contain adequate standards which will guide and restrain the exercise of a delegated administrative function.” *Chartiers Valley Joint Schools v. Allegheny County Board of School Directors*, 211 A.2d 487, 493 (Pa. 1965). Claimant avers that Article II, §1 prevents the General Assembly from providing for a pension forfeiture for the commission of Federal crimes that are substantially the same as the enumerated Pennsylvania crimes. No such unconstitutional delegation has occurred in the Forfeiture Act.

The case Claimant cites to support his argument, *Commonwealth v. Allison*, 91 York L.R. 201 (1978), is readily distinguishable. In that case, the General Assembly allowed Congress unfettered discretion to decide what conduct would be subject to Pennsylvania criminal sanctions.<sup>5</sup> In the instant case, there is no such delegation. In enacting the Forfeiture Act, the Pennsylvania General Assembly determined which types of criminal conduct will result in pension forfeiture. The Forfeiture Act provides a

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<sup>5</sup> At issue in *Commonwealth v. Allison* was Section 4522(a)(8) of the Pennsylvania Motor Vehicle Code, which has since been repealed, “No person shall drive a vehicle on any highway in violation of any provision of a federal statute or regulation relating to any type of equipment or documents used in the vehicle while engaged in interstate commerce.”

specific list of crimes and conduct that trigger the Forfeiture Act and provides no delegation or independent decision making to Congress or this Board. The enumerated Pennsylvania crimes clearly establish the scope of the impermissible conduct. The inclusion of the parallel Federal crimes does not constitute an impermissible delegation. It is designed to prevent conduct determined by the General Assembly to be impermissible from escaping the sanctions of the Forfeiture Act simply because it was prosecuted as a Federal crime rather than a Pennsylvania crime. Simply because the conduct is prosecuted federally does not abrogate the right of the Pennsylvania legislature to condition pension forfeiture on the conduct, nor does it, in any way, delegate anything to Congress.

The Pennsylvania Supreme Court has expressly recognized that Federal crimes will support forfeiture under the Forfeiture Act. In *Shiomos v. State Employees Retirement Board*, 626 A.2d 158 (Pa. 1993), the Court went out of its way to raise the issue, not raised by Shiomos, that because he was convicted of violating the Hobbs Act, the "substantially the same federal crime" aspect of the forfeiting crime definition was satisfied and the Forfeiture Act was applicable. *Allison*, therefore, is of limited precedential value because does not apply to the structure of the Forfeiture Act and is a Court of Common Pleas decision.

3. The forfeiture of Claimant's pension is not a cruel punishment or excessive fine in violation of Article I, §13 of the Pennsylvania Constitution or the Eighth Amendment to the United States Constitution.

Claimant asserts that the application of the Forfeiture Act constitutes an excessive fine and punishment when comparing the value of the pension benefits being forfeited to the gravity of his crime and Federal sentence as to be so disproportionate that it results in a "cruel punishment" and "excess fine" under Article I, §13 of the Pennsylvania Constitution. In essence, Claimant is forging the proposition that higher paid and longer-serving employees at some stage gain constitutional immunity from forfeiture because of disproportionality, while the lower paid, shorter-service employees would be subject to forfeiture for the same offense.

The Commonwealth Court has already addressed the issue of excessive fines and cruel punishment as it applies to Pennsylvania pensions in *Braig v. State*

*Employees' Retirement Board*, 587 A.2d 371 (Pa. Cmwlth. 1991) and this Board is bound by that decision. In *Braig*, the Court denied a cruel and unusual punishment argument concluding that the forfeiture language under Article V, §16 of the Pennsylvania Constitution was mandatory, and that if all the elements and prerequisites of a forfeiture occurred, then the forfeiture must occur. See also, *Kerner v. State Employees' Retirement System*, 382 N.E. 2d 243 (Ill. 1978); *Busbee v. Division of Retirement*, 685 So. 2d 914 (Fla. Dist. Ct. App. 1st Dist. 1996). The Forfeiture Act leaves no room for discretion. If a triggering crime has been committed and the member pled guilty, the sanctions of the Forfeiture Act are mandatory. *Apgar v. State Employees' Retirement System*, 655 A.2d185 (Pa. Cmwlth. 1994), *Shiomos*, supra.

### III. CONCLUSIONS OF LAW

1. No public official or public employee shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest if such public official or public employee is convicted or pleads guilty to any crime related to public office or public employment. 43 P.S. §1313(a).

2. Claimant is a public official or public employee for purposes of the Forfeiture Act. 43 P.S. §§1312 and 1313(c).

3. Claimant's public employment placed him in a position to commit the offense to which he pled guilty in Federal court.

4. The Federal crime of theft or bribery concerning programs receiving Federal funds, 18 U.S.C. §666(a)(1)(B), is substantially the same as bribery in official and political matters, 18 Pa. C.S. §4701.

5. Claimant pled guilty to a Federal offense which is substantially the same as one of the offenses enumerated in the Forfeiture Act as a crime "related to public office or public employment."

6. Claimant pled guilty to a "crime related to public office or public employment" as that term is defined in the Forfeiture Act. 43 P.S. §§1312 and 1313(a).

7. The pension accrued on all of Claimant's service is subject to forfeiture effective May 20, 2009.

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF ROSS A. SCARANTINO  
DOCKET NO.: 2009-14  
CLAIM OF ROSS A. SCARANTINO

ORDER

AND NOW, upon consideration of the entire record in this matter, IT IS HEREBY  
ORDERED THAT:

- (1) Claimant's request that his annuity with the Public School Employees' Retirement System not be subject to forfeiture under the Public Employee Forfeiture Act is DENIED; and
- (2) All retirement benefits otherwise payable to Claimant by the Public School Employees' Retirement System except for the return of his contributions without interest, which Claimant has already received, are hereby forfeited.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: DEC 13 2011

By: Melva S. Vogler  
Melva S. Vogler, Chairman