

APRIL 20, 1955.

MR. ELMER G. BAGGALEY, Secretary,

*Consolidated Police and Firemen's Pension Fund Commission and Police and Firemen's Retirement System of New Jersey.*State House Annex,  
Trenton, New Jersey.

## FORMAL OPINION—1955. No. 18.

DEAR MR. BAGGALEY:

You have asked our opinion as to the responsibilities of the Consolidated Police and Firemen's Pension Fund Commission and the Police and Firemen's Retirement System of New Jersey in considering retirement applications from

- "(a) persons under departmental charges
- (b) persons under indictment for a crime of moral turpitude and
- (c) persons convicted or dismissed under either circumstances."

We shall deal first with the problem relating to persons already dismissed upon departmental charges, or who were convicted in court as referred to in your category (c) above.

A leading case which establishes the principle that pension rights are to be denied to a public employee who has been convicted of a crime is *Walter v. Police and Fire Pension Commission of the City of Trenton*, 120 N. J. L. 39 (Sup. Ct. 1938). The opinion in that case opens as follows:

"Does a police officer, who continues in service after having served twenty years and after having attained the age of fifty years, forfeit his right to a pension under 2 Rev. Stat. 43:16-1 (Pamph. L. 1920, ch. 160, p. 324), by reason of his conviction for malfeasance in office, the malfeasance having occurred after the police officer had become eligible for the pension? We think so."

The court further stated (p. 42):

"Deductions from salary, moreover, create no vested right to a pension. *Bader v. Crone*, 116 N. J. L. 329; 184 Atl. Rep. 346. A pension is, in effect, but the taxpayer's reward, given pursuant to legislative mandate, for honest and efficient service. *Plunkett v. Pension Commissioners of Hoboken*, 113 N. J. L. 230; 173 Atl. Rep. 923; affirmed, 114 N. J. L. 273; 176 Atl. Rep. 341. To bestow that reward upon one whose record of public service is marred by a conviction for malfeasance in office would be to place premium upon dishonesty and inefficiency; to burden the taxpayer with the necessity of providing for one who has betrayed the trust imposed upon him. Such a result will never be countenanced by any word, act, or judgment of this court."

The court in this case also stressed R. S. 2:160-9, which is now 2A:135-9, and reads as follows:

"Any person holding an office or position, elective or appointive, under the government of this State or of any agency or political subdivision thereof, who is convicted upon, or pleads guilty, non vult or nolo contendere to an indictment, accusation, or complaint charging him with the commission of a misdemeanor or high misdemeanor touching the administration of his office or position, or which involves moral turpitude, shall forfeit his office or position and cease to hold it from the date of his conviction or entry of plea . . ."

In discussing the applicability of the above-cited statute to the retirement rights of a member of the police department under R. S. 43:16-1, the court stated (p. 41) :

“. . . It is clear that under R. S. 43:16-1, in order for an officer to retire with pension, he must have been a member of the police department at the time his application is made. And it is equally clear that this prosecutor was not, on March 15, 1937, when he applied for a pension, a member of the police department of the city of Trenton. His office had been forfeited on March 20, 1935, because of his conviction for malfeasance in office.”

Since the old R. S. 2:160-9 is still in effect as N. J. S. A. 2A:135-9, it must be held to have the same effect upon applications for retirement under N. J. S. A. 43:16-1, et seq., and N. J. S. A. 43:16A-1, et seq., which also limit benefits thereunder to “members” of the police and fire departments. One who has forfeited his office or position under N. J. S. A. 2A:135-9 cannot, obviously, be any longer considered a “member” of a police or fire department.

*Plunkett v. Pension Commissioners of Hoboken*, 113 N. J. L. 230 (Sup. Ct. 1934), affirmed 114 N. J. L. 272 (E. & A. 1934) deals with the pension rights of a fireman who was dismissed upon departmental charges of misconduct. In denying pension rights to such a person who had, concededly, reached voluntary retirement age, the court stated (p. 233) :

“And it cannot be gainsaid that the applicant is confessedly guilty of misconduct of a disqualifying character. His conduct, while a member of the fire department, did not meet the standard prescribed by the statute. ‘Honorable service’ is that 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. He is entitled to honor or high respect. *The New Century Dictionary*. One who embezzles funds entrusted to his care does not, therefore, render the service that is an essential prerequisite to the awarding of a pension under the act. This offense involves moral turpitude, and palpably justifies the denial of a pension to one so offending. Such misconduct afforded ample justification for the removal of prosecutor from the department. He thereby forfeited his right of membership, and, by the same token, his offense characterized his service as dishonorable.

But it is said that when a member of such a department has rendered honorable service therein for a period of twenty years, and attained the age of voluntary retirement, a vested property right to the statutory pension accrues, and he cannot thereafter be deprived of this right by his dismissal from the department for reasons not ‘made by statute grounds for the termination of a pension.’ This contention is utterly lacking in substance. The rule is that compulsory deductions from the salaries of governmental employes, by the authority of the government, for the support of a pension fund, create no contractual or vested right between such employes and the government, and neither the employes, nor those claiming under them, have any rights except such as are conferred by the statutes creating and governing the fund.”

We now turn to the case of a person who, although not dismissed upon departmental charges or convicted in court, has departmental charges or an indictment pending against him. In *McFeely v. Board of Pension Commissioners of Hoboken*, 1 N. J. 212 (Sup. Ct. 1948), the court dealt with the problem of a person under indictment. It stated as follows (p. 217) :

“The statute lays upon the Pension Commission the clear and specific duty of affirmative action where there is a concurrence of the statutory factual

prerequisites. *Beronio v. Pension Commission of Hoboken*, 130 N. J. L. 620 (E. & A. 1943). While in some jurisdictions there is a specific statutory provision that action upon the application for a pension of this class shall be deferred until the disposition of a pending indictment against the claimant, there is none such in this state. Yet it is implicit in the statute that, in aid of the performance of their duty to determine the existence of the prerequisite condition of honorable service, these tribunals may, and in most cases should, certainly where the offense charged involves moral turpitude, stay action upon the pension claim awaiting the trial or other disposition of a pending indictment against the claimant; and, possessing as they do, in analogy to the authority of courts of general jurisdiction at common law, the inherent power of reconsideration, they may also, in the exercise of a sound discretion, vacate a pension grant and suspend further action on the claim until a pending indictment against the claimant is finally determined.

This power arises by necessary implication to serve the statutory policy. Inadvertent or premature or clearly erroneous action is not put beyond corrective measures by the tribunal itself. Apart from the inherent power of judicial tribunals, on their own motion, to correct injustice and prevent fraud or imposition upon the law, there is the added consideration that conviction of a misdemeanor touching the administration of one's office, or which involves moral turpitude, results in a forfeiture of the office. R. S. 2:160—9."

In *Ballurio v. Castellini*, 29 N. J. Super. 383 (App. Div. 1954), the question of a person under departmental charges was considered. In that case, the plaintiff sought a veteran's pension under N. J. S. A. 43:4—1 while under suspension pending a hearing on departmental charges which were preferred against him after he had been arrested on a charge of committing the crime of abortion. The court stated (p. 390):

"What then was the effect of Ballurio's suspension from employment prior to the application for retirement? The fact that he had veteran status, the age qualification, and the minimum service requirement, does not signify that he had a vested right to the pension and had become a special type of employee, no longer subject to discharge for cause. *Plunkett v. Board of Pension Commissioners of City of Hoboken*, supra. Obviously, suspension is not synonymous with discharge or dismissal; when it occurs the employment continues but becomes subject to the suspension. Cf. *Murley v. Township of Raritan*, 117 N. J. L. 357 (Sup. Ct. 1936). And in such case it must be considered that not only are the duties and obligations of the employment removed temporarily but the rights and privileges as well. Thus, the Civil Service Department rules define suspension as, among other things, 'removal preliminary to hearing and discharge from the service.' Rule 64.

Accordingly, when Ballurio was suspended, he was deprived of the privilege of obtaining a pension until the criminal charge was disposed of." . . .

It might possibly be argued that since N. J. S. A. 43:15—1 et seq. which creates the Consolidated Police and Firemen's Pension Fund provides throughout for retirement for age and disability for firemen and policemen "who shall have served honorably", whereas N. J. S. A. 43:16A—1 et seq. which involves the Police and Firemen's Retirement System of New Jersey refers to merely "creditable service", some distinction can be made. However, this line of reasoning was disposed of in *Ballurio v. Castellini* (supra) in which the court stated (p. 389):

"The industry of counsel has supplied us with the statistical data that Title 43 of the Revised Statutes contains 60 separate pension acts. Of these, nine speak of 'honorable service' or use equivalent words, and 51 contain no such reference. In the nine instances, the employees affected are certain categories of policemen and firemen and municipal water department employees. The 51 others include a heterogeneous group of employees, including policemen and firemen. One class cannot be distinguished from the other on any rational basis. Study of the various groups discloses no legislative pattern from which the deduction may be made that a deliberate intention is manifested to demand honorable service in some employments and not in others.

Consideration of all these 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. A pension is a bounty springing from the appreciation and graciousness of the sovereign; it is an inducement to conscientious, efficient and honorable service. And its utility would be destroyed if a person who is properly subject to discharge because of guilt of a crime involving moral turpitude can be said to have an indefeasible claim to a pension simply because he has served the required length of time and reached the necessary age and happens to win a headlong race to file his application for retirement before the public authorities can try him on the charges pending against him arising from such crime."

In view of all the foregoing, it is our opinion that the Consolidated Police and Firemen's Pension Fund Commission of the State of New Jersey and the Board of Trustees of the Police and Firemen's Retirement System of New Jersey should deny applications for retirement to persons within your category (c) above, and should withhold action on applications for retirement within your categories (a) and (b) above until a decision has been reached upon the departmental charges or indictments pending against them.

Very truly yours,  
 GROVER C. RICHMAN, JR.,  
*Attorney General.*  
 By: CHARLES S. JOELSON,  
*Deputy Attorney General.*

csj;b

MAY 11, 1955.

MR. ELMER G. BAGGLEY, *Secretary,*  
*Consolidated Police and Firemen's Pension Fund Commission and*  
*Police and Firemen's Retirement System of New Jersey,*  
 State House Annex,  
 Trenton, New Jersey.

SUPPLEMENT TO FORMAL OPINION—1955. No. 18.

DEAR MR. BAGGLEY:

We hereby supplement Formal Opinion No. 18 of the year 1955 by calling your attention to R. S. 43:16—13, which provides as follows:

"No member of the police or fire department in any municipality or county in this State who shall have served honorably in any such department

for a period of twenty years shall be deprived of his pension privileges under chapter sixteen of Title 43 because of any violation of the rules and regulations established for the government of such department, but he may be fined, reprimanded or discharged. A member of the department found guilty before a court of competent jurisdiction may be dismissed or punished in any manner provided by law."

Under this statute, the application of which is limited to pensions under R. S. 43:16—1, et seq, any member who shall have served honorably for twenty years who is under departmental charges of "violation of a departmental rules and regulations", or who is adjudged guilty of such charges may, nevertheless, be granted pension privileges.

This statute is to be limited to such cases, and is not to be extended to cases where a member is brought under departmental charges because indicted for a crime, or is dismissed for conviction of a crime. In the former case, pension payments are to be withheld pending the outcome of the indictment pursuant to *McFeely v. Board of Pension Commissioners of Hoboken*, 1 N. J. 212 (Sup. Ct. 1948). In the latter case, pension payments are to be denied for the reasons set forth in our original opinion.

Will you please attach this Supplemental Opinion to the original Opinion so that the two may be treated together.

Very truly yours,  
GROVER C. RICHMAN, JR.,  
*Attorney General.*

By: CHARLES S. JOELSON,  
*Deputy Attorney General.*

CSJ;gc

APRIL 20, 1955.

HON. ARCHIBALD S. ALEXANDER,  
*State Treasurer,*  
State House,  
Trenton, New Jersey.

FORMAL OPINION—1955. No. 19.

DEAR TREASURER ALEXANDER:

You have sought advice relating to your power to promulgate regulations as to which persons may file returns with the Inheritance Tax Bureau, Division of Taxation, Department of the Treasury. Such returns must be filed as provided by statute (N. J. S. A. 54:33—1 to 54:36—7).

You have submitted to us in connection with your request a proposed code of regulations governing the conduct of District Supervisors in the Bureau of which Rule 8 is pertinent. This Rule limits persons who may file such returns by stating that:

"No District Supervisor, or other employee, shall accept an inheritance tax report on the estate of a resident decedent from or negotiate with any person with regard to resident decedent estate matters unless said person is: