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# *Analysis*

## **Sub. S.B. 3 – Sen. Faber** *(As Enacted by the Ohio General Assembly)*

May 14, 2008

### **ORSC Position**

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Sub. S.B. 3 would make the following changes:

- Require a member of the Public Employees Retirement System (PERS), the State Teachers Retirement System (STRS), the School Employees Retirement System (SERS), the Ohio Police and Fire Pension Fund (OP&F), the Highway Patrol Retirement System (HPRS), or the Cincinnati Retirement System (CRS), or a participant in an Alternative Retirement Plan for higher education employees (ARP) who pleads guilty to or is convicted of a specified offense committed while serving in a position of honor, trust, or profit to forfeit the right to any benefit other than the member's accumulated contributions.<sup>1</sup>

Under current law, a public employee's retirement or disability benefit cannot be forfeited for employee misconduct.

- Prohibit a person from serving as a retirement system lobbyist if the person is convicted of or pleads guilty to committing any of the following felony offenses after the effective date of the bill:
  - bribery, intimidation, retaliation, theft in office, having an unlawful interest in a public contract, engaging in a pattern of corrupt activity;
  - any of the following if the person committed the violation while the person was serving in a public office and the violation was related to the duties of the person's public office or to the person's actions as a public official: tampering with records, intimidation of attorney, victim, or witness in a criminal case, perjury, tampering with evidence, obstructing official business, obstructing justice;
  - a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially equivalent to any of the above listed violations;
  - a conspiracy to commit any of the above listed violations.
- Give the Inspector General the authority to investigate the management and operation of the Office of the Attorney General to determine whether misconduct or wrongful acts or omissions have been committed or are being committed by the Attorney General or by present or former employees of or contractors with the Office of the Attorney General.

**Staff Comments** – Under the bill, a member of PERS, STRS, SERS, OP&F, HPRS, or CRS or a participant in an ARP who pleads guilty to or is convicted of a specified felony while serving in a position of honor, trust, or profit would forfeit the right to a pension, annuity, allowance, or any other benefit other than the member's accumulated contributions. If the convicted person is a reemployed retiree, the retiree would be eligible only for a refund of the person's contributions. These provisions apply when the crime was committed on or after the effective date of the bill.

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<sup>1</sup> The bill also contains provisions regarding the restoration of rights and privileges of persons convicted of certain criminal offenses. This analysis covers only those provisions relating to the public retirement systems.

The offenses specified in the bill are the following:

- Bribery (R.C. §2921.02);
- Engaging in a pattern of corrupt activity (R.C. §2923.32);
- Theft in office - third degree felony (R.C. §2921.41);
- A violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially equivalent to any violation listed above; and
- A conspiracy to commit, attempt to commit, or complicity in committing any violation listed above.

“Accumulated contributions” generally refers to the employee’s contributions plus interest, any amounts the employee paid to purchase service credit, and any additional voluntary contributions the employee has made to the retirement system.

“Position of honor, trust, or profit” is defined as the following:

- An elective office of the state or any political subdivision of the state;
- A position on any board or commission of the state that is appointed by the governor or the attorney general;
- A position as a public official or employee, as defined in R.C. §102.01 who is required to file a disclosure statement under R.C. §102.02;
- A position as a prosecutor, as defined in R.C. §2935.01;
- A position as a peace officer, as defined in R.C. §2935.01, or as the superintendent or a trooper of the state highway patrol.

When charges are filed alleging that a person committed an offense specified in the bill while serving in a position of honor, trust, or profit, the prosecutor who has been assigned the case must provide written notice to the retirement system of which the person is a member or the alternative retirement in which the person is a participant, whichever is applicable.

Once the system receives notice that the member has been charged with any of the specified offenses, the system is prohibited from (1) making any payment of the member’s accumulated contributions prior to the day the system receives a court copy of the journal entry of the member’s sentence if the member is convicted of or pleads guilty to the charge and forfeiture is ordered or the day the system receives final disposition of the charge if the charge is dismissed, the person is found not guilty or not guilty by reason of insanity and (2) processing any application for a refund prior to the final disposition of the charge.

If a member is sentenced for an offense specified in the bill while serving in a position of honor, trust, or profit, the court is required to order the forfeiture to the public retirement system or alternative retirement plan in which the offender was a member or participant of the right to a retirement allowance, pension, disability benefit, or other right or benefit, other than payment of the offender’s accumulated contributions. The court is required to send a copy of the journal entry imposing sentence to the appropriate retirement system or alternative retirement plan in which the offender was a member or participant.

The bill would allow the offender to request a hearing prior to sentencing to determine whether there is good cause for the forfeiture order not to be issued. If the court finds there is good cause for the forfeiture order not to be issued, the court shall not issue the forfeiture order.

The retirement system or alternative retirement plan in which the offender was a member or participant must comply with the order at the time the member or contributor applies for payment of his or her accumulated contributions. If a person who is ordered to forfeit his or her pension receives a refund of contributions, the person is barred from restoring the refunded service credit.

Sub. S.B. 3 raises a significant public policy issue: should employee misconduct affect the receipt of public retirement benefits. Current law generally provides that public retirement benefits are assignable or subject to attachment or other legal process only in the following cases:

- Restitution for theft in public office pursuant to a court withholding order;
- Restitution for certain sex offenses committed in the context of the offender's public employment;
- Payment of spousal support and child support pursuant to a court withholding order; and
- Payment to a former spouse pursuant to a division of property order.

This anti-assignment/alienation requirement has been recognized not only in Ohio's public retirement laws, but also under the Employee Retirement Income Security Act (ERISA) as applied to private pension plans. Therefore, Ohio law currently affords public sector employees the same protection as the federal law gives private sector employees with respect to retirement benefits.

The principal reason behind the statutory provisions exempting retirement benefits from legal process except in a limited number of circumstances is that society has an interest in ensuring that an adequate source of income exists for the support of members who are unable to earn income due to age or disability and that a source of income exists for the support of their dependents. This societal interest in securing these sources of income has historically outweighed other competing interests. It is important to note that public employees do not contribute to Social Security and, therefore, rely solely on the benefit provided by the public retirement system for retirement income. If the benefit is forfeited, the member and spouse could be in a position where they would have no source of retirement income.

This bill limits the list of offenses to egregious breaches of the public trust. Like the restitution provisions, the offenses for which a benefit may be forfeited must be committed in the context of the offender's public employment.

Under the provisions of the bill, the forfeiture is triggered when the member withdraws his or her contributions. Therefore, if a member who otherwise would have been eligible to receive a benefit dies prior to applying for a refund, the member's spouse and

dependents would still be eligible for survivor benefits. Current law provides that a member who is married at the time the member applies for a refund and is eligible for age and service retirement must obtain the written consent of his or her spouse before receiving a refund. Because a member subject to forfeiture would not be eligible for a benefit, this provision would not apply. *We recommend that the bill be amended to require written consent from the spouse of a married offender who would have been eligible for age and service retirement but for the forfeiture order.* This would provide additional protection to an innocent spouse and dependents.

We note there is a typo in line 1270, which would require a technical amendment. The code section should be “3307.372” not “3307.732.”

**Fiscal Impact** – According to the PERS actuary, Gabriel Roeder Smith & Company, there was no data available upon which to make a detailed actuarial analysis. However, it is their opinion that the bill would have no measurable financial impact on the system.

According to the SERS actuary, Buck Consultants, the number of affected members would be a very small percentage of the total membership, thus having almost no measurable impact on valuation results, given the magnitude of SERS’ overall liabilities.

According to the STRS actuary, Buck Consultants, the proposed legislation would affect too few members for there to be a measurable impact on the actuarial liabilities. Their conclusion is that the funded ratio and funding period would not change.

According to the OP&F actuary, Buck Consultants, the proposed legislation would affect too few members for there to be a measurable impact on the actuarial liabilities. Their conclusion is that the funded ratio and funding period would not change.

According to HPRS, it is their actuary’s opinion, Gabriel Roeder Smith & Company, that any actuarial impact that might occur would be negligible due to the limited application of the bill.

**ORSC Position** – At its meeting of May 22, 2007, the Ohio Retirement Study Council voted to recommend that the 127<sup>th</sup> Ohio General Assembly approve Sub. S.B. 3 upon the adoption of the following amendments:

- An amendment to require written consent from the spouse of a married offender who would have been eligible for age and service retirement but for the forfeiture order. *(This amendment was adopted by the House State Government and Elections Committee on 5-13-08)*
- A technical amendment to correct the code section reference in line 1270. *(This amendment was included in the Act.)*

**Effective Date** – May 13, 2008 (Emergency)