SENATE……..No. 2074

The Commonwealth of Massachusetts

Report of the Special Commission on Pension Forfeiture

(pursuant to Section 151 of Chapter 133 of the Acts of 2016, as amended by Section 19A of Chapter 5 of the Acts of 2017)

May 18, 2017

Chapter 133 of the Acts of 2016

Special Commission on Pension Forfeiture

Report

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His Excellency Governor Charles D. Baker
Senate President Stanley Rosenberg
Speaker of the House Robert DeLeo
House Clerk Steven James
Senate Clerk William Welch

Pursuant to Chapter 133 of the Acts of 2016, the Special Commission on Pension Forfeiture is pleased to provide the following report. This Commission, comprised of representatives of the Legislature, Attorney General, State Treasurer, District Attorney's Association, the Retirees' Association, PERAC, and retirement boards, was charged with reviewing "the decision of the Supreme Judicial Court in *Public Employee Retirement Administration Commission v. Edward A. Bettencourt*". Furthermore, the Special Commission was directed to "make recommendations, including any proposed legislation, and to file its recommendations to the Legislature."

The Special Commission, chaired by PERAC Executive Director Joseph Connarton, began its work in October of 2016 and met on six occasions. In addition to an extensive review of the history of the Commonwealth's forfeiture law, the Commission also reviewed the extensive case law that has been generated by the statute, including the *Bettencourt* case. As you know, in the *Bettencourt* case the Supreme Judicial Court ("SJC"), found for the first time, that the Commonwealth's pension forfeiture statute is a fine under the 8th Amendment to the United States Constitution. The SJC then found the fine to be excessive in Bettencourt's case, halting his pension forfeiture. The Commission also conducted a comprehensive review of forfeiture statutes in other states, comparing and contrasting the scope and severity of those statutes with the Massachusetts law.

As you will see in this report and the legislative recommendations that follow, the Commission spent considerable time discussing, among many issues, the current inclusion of misdemeanor crimes in our statute, the impact of the forfeiture statute on other family members and on health care benefits, whether certain crimes should be enumerated in the statute, and the impact of pension forfeiture in a non-social security system.

One of the main recommendations of our report is to remove misdemeanor crimes from the scope of the forfeiture statute. This was a significant factor in the SJC's decision in *Bettencourt*, that the forfeiture penalty assessed to Bettencourt was not proportional to the crimes committed, misdemeanors, and therefore was an excessive fine pursuant to the 8th Amendment.

Other recommendations include automatic forfeiture for child pornography-related convictions in the case of employees whose primary responsibilities involve working with children, partial forfeiture of varying degrees as recommended by the retirement board, increased involvement by District Attorneys and the Attorney General, as well as appeal rights to Superior Court for members whose pensions are forfeited by a retirement board. In addition, the Commission has rewritten and updated the entire forfeiture statute, which was originally created in 1945 and last significantly updated in 1987.

The members of the Special Commission would like to pay tribute to one of our members, State Senator Kenneth Donnelly, who passed away on April 2nd of this year. Senator Donnelly, a career firefighter in the Town of Lexington, also served for many years as the Secretary-Treasurer of the Professional Firefighters of Massachusetts, and as a PERAC Commissioner representing public employees. Upon retiring as a firefighter, Ken was elected to the Massachusetts Senate in 2009 and served until his passing. In each of his roles, Ken brought intelligence, commitment, integrity, and passion. He fought unfailingly for the rights of all workers and the protection of the most vulnerable in our society. These traits were on display in his commitment to this Special Commission, where he was a passionate participant on behalf of employees, their families, and the integrity of the Commonwealth's pension system. Ken attended each meeting of the Commission, while simultaneously undergoing cancer treatments, and attended his final meeting just a few weeks prior to his passing. The recommendations contained in our report reflect the commitment that Ken exhibited on behalf of public employees and the Commonwealth's pension system.

Finally, I want to thank Patrick Charles, PERAC's Associate General Counsel, who not only staffed the Commission but provided tremendous insight in our recommendations, largely due to his comprehensive research and analysis.

At a May 11, 2017 meeting, the Special Commission on Pension Forfeiture voted to adopt and transmit both the proposed statutory changes and the Report to the Legislature, with a few additional changes. There was a roll call vote taken as follows:

Joseph E. Connarton, Chairman .....YES
Representative Christopher Walsh, Chair Public Service Committee Designee .....YES
Senator Patrick O'Connor, Senate Minority Leader Designee .....YES
Nicola Favorito, State Treasurer Designee.....YES
Catherine Sullivan, Attorney General Alternate Designee.....ABSTAIN
Norfolk County D.A. Michael W. Morrissey, MA Dist. Atty.'s Association Designee.....YES
Kathleen Kiely-Becchetti, MA Association of Contributory Retirement Systems (MACRS) .YES
William Rehrey, MA Retirees Association Designee .....YES

In closing, we urge the Governor and the Legislature to address the issues raised in the SJC's *Bettencourt* decision and to consider our comprehensive recommendations in that process. We stand ready to assist your respective offices in this important and necessary endeavor.

Sincerely,

Joseph E. Connarton, Chairman
Special Commission on Pension Forfeiture
Chapter 133 of the Acts of 2016

Section 151 of Chapter 133 of the Acts of 2016

There shall be a special commission on pension forfeiture to review the decision of the Supreme Judicial Court in Public Employee Retirement Administration Commission v. Edward A. Bettencourt, 474 Mass. 60 (2016). The commission shall consist of: the executive director of the public employee retirement administration commission or a designee who shall serve as chair; the house and senate chairs of the joint committee on public service; 2 members of the senate, 1 of whom shall be appointed by the minority leader; 2 members of the house of representatives, 1 of whom shall be appointed by the minority leader; the attorney general or a designee; the state treasurer or a designee; 1 person who shall be appointed by the Massachusetts District Attorneys Association; 1 person who shall be appointed by the Retired State, County & Municipal Employees Association of Massachusetts; and the president of the Massachusetts Association of Contributory Retirement Systems or a designee. The special commission shall make recommendations, including proposed amendments to section 15 of chapter 32 of the General Laws. The special commission shall file its recommendations, including any proposed legislation, with the clerks of the Senate and House of Representatives not later than May 1, 2017.

Special Commission on Pension Forfeiture Members

Joseph E. Connarton, Executive Director PERAC	Chairman
Vacant	House Chair Public Service Committee
Vacant	Senate Chair Public Service Committee
Representative Christopher Walsh	Speaker of the House Designee
Representative Todd Smola	House Minority Leader Designee
Senator Patrick O'Connor	Senate Minority Leader Designee
Senator Kenneth Donnelly (deceased)	Senate President Designee
Nicola Favorito, Executive Director	State Treasurer Designee
James O'Brien, Chief Trial Counsel	Attorney General Designee
Catherine Sullivan, Assistant Attorney General	Attorney General Alternate Designee
Michael W. Morrissey, Norfolk County D.A.	MA Dist. Atty.'s Association Designee
Kathleen Kiely-Becchetti, President	MA Assoc. Contr. Ret. Sys. (MACRS)
William Rehrey, Legal Counsel	MA Retirees Association Designee

Background

The Special Commission on Pension Forfeiture, established by Chapter 133 of the Acts of 2016, was created by the Legislature in the wake of the Supreme Judicial Court's ("SJC") decision, in *PERAC v. Bettencourt*, 474 Mass. 60 (April 6, 2016), which held that a pension forfeiture is a fine for the purposes of the 8th Amendment ("the 8th Amendment") to the United States Constitution. The SJC is the first state supreme court to conclude that a pension forfeiture is a fine under the 8th Amendment and to halt a pension forfeiture as a result.

The Special Commission was tasked with reviewing the *Bettencourt* decision and making recommendations, including proposed amendments to Section 15 of Chapter 32 of the General Laws, by filing a report with the Legislature by March 1, 2017, however, an extension of the reporting date to May 1, 2017 was approved as part of Chapter 5 of the Acts of 2017.

***Bettencourt* Decision**

On April 6, 2016, the SJC issued a determination in the matter of *Bettencourt v. PERAC*, 474 Mass. 60. This decision concluded an eight year legal battle involving six separate courts. The

SJC decided that a pension forfeiture is a fine within the meaning of the 8th Amendment. It also concluded that when a pension forfeiture is found to be excessive, it must be halted.

In 2004, Edward Bettencourt ("Bettencourt"), then a lieutenant in the Peabody Police Department, while acting as Watch Commander, inappropriately accessed information stored in the Commonwealth's Human Resources Division's website. He created 21 bogus accounts on the website to view the Civil Service examination scores of other police officers, including his competitors for the Captain's exam. He was convicted in 2008 of 21 counts of violating G.L. c. 266, Section 120F, *Unauthorized access to [a] computer system*. The judge fined him $500 per count, for an aggregate fine of $10,500, and did not impose any jail time. Bettencourt also lost his job because of his convictions.

Massachusetts General Laws, Chapter 32, Section 15(4) provides that a member may not receive a retirement allowance if he has been convicted of a criminal offense related to his position. The statute does not differentiate between a "misdemeanor" and a "felony." When Bettencourt applied for his superannuation retirement allowance in 2008, the Peabody Retirement Board ("the Board") approved the application. PERAC, reviewing the approval, reversed the Board's decision, concluding that Bettencourt was not eligible to receive a retirement allowance because he had been convicted of criminal offenses related to his position. Bettencourt sued PERAC in Peabody District Court, thus beginning a years-long judicial quest to recieve his retirement allowance.

PERAC prevailed on the issue of whether these crimes were related to Bettencourt's position. When the Appeals Court made that determination in 2012, it returned the case to the Peabody District Court on the sole issue of whether the forfeiture of Bettencourt's pension constituted an excessive fine under the 8th Amendment.

The amount of pension to be forfeited in this case was $659,000, plus an unknown amount for health insurance.

The 8th Amendment, ratified in 1791, provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Excessive Fines Clause has rarely been used, and the first time the Supreme Court of the United States ("SCOTUS") used it to halt a particular forfeiture was 1998, in the case of *United States v. Bajakajian*, 524 U.S. 321.

The *Bajakajian* case established a three-prong test for determining whether a payment is an excessive fine for purposes of the 8th Amendment: As noted in *MacLean v. State Board of Retirement*, 423 Mass. 339 (2000), *Bajakajian* requires "us to consider first, whether there was an extraction of payments, second, whether any extraction was punitive, and third, whether any punitive extraction was excessive." *Id*., at 346.

The *MacLean* case arose fairly soon after the decision in *Bajakajian*, and the SJC in *MacLean* conducted its Excessive Fines analysis entirely on the third prong of *Bajakajian*, "assuming, without deciding" that the 8th Amendment would be applicable to a pension forfeiture. *See*, *MacLean* at 346. Accord *Maher v. Retirement Board of Quincy*, 452 Mass. 517, 522 (2008), and *Flaherty v. Justices of the Haverhill Division of the District Court*, 83 Mass. App. Ct. 120, 123 (2013). In each of these cases, the courts decided the loss of the pension was not excessive.

In the *Bettencourt* case, PERAC argued, among other things, that there was no forfeiture here because there was nothing to "extract." It is not a payment to the sovereign of money already possessed by the member. The SJC wrote:

> … We disagree with PERAC that the phrase "extract payments ... in cash or in kind," as used by the Supreme Court in *Austin*, 509 U.S. at 609–610, 113 S.Ct.

2801, and *Bajakajian*, 524 U.S. at 328, 118 S.Ct. 2028, means that there literally must be a physical transfer of tangible property from the individual to the State; "property" exists in tangible and intangible form. *Bettencourt,* at 69.

The SJC also determined that the forfeiture constitutes punishment, as it only happens following a conviction "and it cannot be imposed on an employee who is not convicted of committing such an offense." *Id*., at 71.

Finally, the SJC decided that, as to Bettencourt, the fine was excessive and he should be allowed to receive his pension. All such future cases will be decided on their particular facts, and the SJC also invited the Legislature to act to possibly amend the pension forfeiture law.

Commission's Analysis

The Commission met multiple times over a seven month period to consider the current state of pension forfeiture in Massachusetts and throughout the rest of the United States. The Commission compared forfeiture statutes from numerous states with special focus on the six states that do not participate in Social Security. Massachusetts public employees do not participate in Social Security and often have only their retirement allowance as a source of income when they finish their careers. Members subject to pension forfeiture, because they do not participate in Social Security, lose all of their guaranteed retirement income. Public employees in jurisdictions that participate in Social Security do not lose their Social Security benefits when subject to state pension forfeiture. In fact, a person in the private sector does not lose their Social Security when convicted of a crime.

There are currently six states where no state public employees are covered by Social Security[1]. The five non-Social Security states in addition to Massachusetts are Alaska, Louisiana, Maine, Nevada, and Ohio. Several other states are hybrids, wherein state employees are covered by Social Security, but employees enrolled in teacher retirement plans are not covered by Social Security. Massachusetts has separate retirement plans for state employees and teachers but both plans are subject to the provisions of Chapter 32 of the General Laws and neither group of employees is covered by Social Security.

After reviewing the other non-Social Security states a number of differences with how those states and Massachusetts handle pension forfeiture became clear. Massachusetts is the only non-Social Security state that makes forfeiture possible for a member convicted of a misdemeanor as well as a felony. Massachusetts is also the only state that does not specify which types of crimes trigger forfeiture.[2] The only qualifier in Massachusetts is that a member must be convicted of a criminal offense involving violation of the laws applicable to his office or position. At the present time, a person can be convicted of a misdemeanor and still lose their pension.

The Commission not only decided that it needed to look at the actual forfeiture language but also the impact forfeiture has on the member and possible beneficiaries. When a public employee has their pension forfeited it means that they and their beneficiaries are no longer eligible for a retirement benefit but it also triggers the forfeiture of other benefits, specifically health insurance. A prerequisite for health insurance coverage after retirement is that the public employee be a retiree. If a member has their pension forfeited under Section 15 they are precluded from ever receiving a retirement allowance and their membership with the retirement system is severed. Once they are no longer eligible for a retirement allowance and in fact no

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[1] 2012 Comparative Study of Major Public Employee Retirement Systems; Wisconsin Legislative Council.

[2] G.L. c. 32, §15 (3) and (3A) list specific crimes however, subdivision (4) provides for forfeiture for any crime related to the member's office or position and subdivision (4) supersedes the provisions of (3) and (3A).

longer eligible for membership in the retirement system their eligibility for retiree health insurance is also terminated.

The Commission analyzed how other states handle the consequences of forfeiture for beneficiaries and found that three of the six states without Social Security coverage for their employees provide for a beneficiary to receive part of a forfeited pension while the other three, including Massachusetts, do not provide for a beneficiary to receive a benefit in lieu of a member who has had their pension forfeited. A number of other states that participate in Social Security in addition to a public pension plan provide for a beneficiary, usually a spouse, ex-spouse or dependent to receive at least a part of the retirement benefit that a member would be entitled to if they were not subject to pension forfeiture. The states that allow for the beneficiary to receive an allowance require that the beneficiary be an "innocent spouse," meaning that they were not involved in the criminal act which resulted in the forfeiture. Usually a determination regarding the beneficiary's involvement and knowledge of the crime must be made during the forfeiture proceedings.

Currently, Massachusetts' pension forfeiture law is an all-or-nothing proposition. There is no provision for a partial forfeiture of a member's retirement allowance. Retirement boards must determine whether a member was convicted of a criminal offense and whether that offense was related to the member's office or position. A board has no discretion and if they answer yes to both questions the member's benefit must be forfeited. Currently, the severity of the crime, the impact of the crime, the level of public trust that is violated, the monetary loss suffered, and the opinion of the prosecuting attorney is not considered when determining forfeiture.

Other states have provisions that allow for a partial forfeiture of the member's retirement allowance. As noted above, some states allow for a beneficiary to receive a portion of the retirement allowance but other states allow for the member to receive a partial pension. Connecticut provides that a court can order forfeiture or benefit reduction after it considers five factors:

1) the severity of the crime;

2) the amount of monetary loss suffered by the public entity or other person;

3) the degree of public trust reposed in the public official;

4) the role of the public official in the fraudulent scheme against the state or municipality; and

5) any other factors justice may require.[3]

Rhode Island's pension forfeiture statutes also provide for partial forfeiture and follow criteria almost identical to that of Connecticut.[4]

As noted above, Massachusetts applies pension forfeiture when a member is convicted of any crime related to the member's office or position. On the other hand, the criminal offenses that precipitate pension forfeiture vary widely from state to state. Some states have all-encompassing language which is similar to that of Massachusetts, while a number of states list specific crimes that must be committed in order to trigger forfeiture. Some states even restrict forfeiture further by requiring that a person convicted of an enumerated crime must be convicted of a felony rather than a misdemeanor.

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[3] General Statutes of Connecticut Chapter 11a, Section 1-110a.

[4] Rhode Island General Laws Chapter 36-10.1-3

All Crimes	Felony	Specific Crimes
MA, ME, NJ, RI	AZ, FL[5], IL, KY, LA, MI, TN, UT, VA, WV	AK, CA, CT, FL, GA, MA,[6] MO, NC, NV, NY, OH, OK, PA

As can readily be seen, pension forfeiture is handled differently from state to state. The Commission conducted extensive research into forfeiture statutes from more than 25 states. Many states do not appear to have forfeiture statutes, or forfeiture rules are left to individual plans, as those states do not have a unified retirement system.

After examining the *Bettencourt* decision and numerous pension forfeiture statutes from across the country, and specifically examining other non-Social Security states, the Commission has prepared draft legislation for consideration by the Legislature. The Commission has attempted to address the issues raised in the *Bettencourt* decision as well as a number of other areas of the law which directly impact or are impacted by pension forfeiture. The Commission is proposing a comprehensive redraft of the existing pension forfeiture statute contained in G.L. c. 32, §15, as well as amendments to several other sections of the General Laws.

The Commission is recommending that a tiered pension forfeiture system be implemented with multiple possible forfeiture amounts. As previously explained, Massachusetts currently has an all-or-nothing forfeiture law that requires full forfeiture. The majority of the Commission approved a tiered system without the possibility of full forfeiture for members who had ten or more years in the retirement system at the time of their offense. The option of full forfeiture, as part of the tiered system, was discussed and considered on multiple occasions but not adopted by a majority of the Commission and is therefore not included in the recommended legislation.

Attached to this Report is a summary of that legislation and the proposed legislation within the final section of the Commission's report.

Summary of Proposed Pension Forfeiture Legislation

The Commission was charged with presenting draft legislation to effectuate changes to the pension forfeiture provisions of the General Laws in light of the SJC's decision in *PERAC v. Bettencourt*, 474 Mass. 60 (April 6, 2016). Below is a summary of the proposed legislation.

SECTION 1

Amends Chapter 32, Section 5(1)(m) so that its provisions do not conflict with the provisions in the proposed Section 15(4).

SECTION 2

Amends Chapter 32, Section 10(1) to remove language relative to moral turpitude. Section 10(1) provides for a member's right to a superannuation retirement allowance in certain circumstances. Recently, the Contributory Retirement Appeal Board ("CRAB"), noted that the moral turpitude language in Section 10(1) may have similar constitutional issues as Section 15 forfeitures because the moral turpitude language in effect requires the forfeiture of a member's superannuation rights without a criminal conviction. See*, Barnstable County Retirement Board v. PERAC, CR-12-572 (2016).*

[5] Florida lists specific crimes such as bribery, theft and embezzlement but then also includes any felony committed with intent to defraud.

[6] G.L. c. 32, §15 (3) and (3A) list specific crimes however, subdivision (4) provides for forfeiture for any crime related to the member's office or position. However, subdivision (4) supersedes the provisions of (3) and (3A).

SECTION 3

Section 3 is a complete redraft of Section 15 of Chapter 32 of the General Laws. Below is a summary of each numbered paragraph of the redrafted Section 15 from the proposed legislation.

Section 15

(1) Initiation of forfeiture proceedings

The retirement board or PERAC may initiate forfeiture proceedings. The member must be notified by certified mail when proceedings are initiated. The hearing will be held within 90 days and shall be conducted pursuant to the provisions of 840 CMR 10.12.

(2) Forfeiture of a retirement allowance upon conviction

Forfeiture will occur only for felony criminal convictions under the proposed bill. Misdemeanors will no longer trigger pension forfeiture. The retirement board must determine whether the crimes for which the member was convicted involved the laws applicable to his or her office or position or if the crimes were committed while the member was in the course of his or her employment, the total value of the member's potential retirement benefits and the amount which shall be forfeited. Also included in this section is a specific list of criminal actions that trigger forfeiture when a member's primary job responsibilities involve contact with children, such as possession of child pornography, a sexually violent offense against a minor, or a sexual offense involving a child the member has contact with as part of his or her job duties.

(3) Forfeiture amount

This paragraph details the varying levels of pension forfeiture that will be available instead of the all-or-nothing approach currently in place. A retirement board has the discretion to reduce the member's retirement allowance by one-third, two-thirds or down to a minimum allowance. "Minimum allowance" is defined as the amount a member would receive if they retired at the minimum age for a group 1 member with 10 years of service. In the event of a forfeiture, a member will be unable to retire until they reach the minimum age for a group 1 employee notwithstanding any other provisions of Chapter 32. A member's allowance cannot be reduced below the amount that would be paid as the annuity portion.

Such reduced allowance will be paid for the life of the member. However, if the member selects option (c) then upon the member's death the beneficiary shall receive the full option (c) payment as if the member's allowance had never been forfeited. A beneficiary shall only be eligible for the full option (c) payment if the board determines that the beneficiary had no role in the illegal conduct, for which the member was convicted, did not have knowledge of the conduct, and finally did not commit or conspire to commit the murder or voluntary manslaughter of the member.

When determining the amount of the pension forfeiture the board must consider the following factors:

(1) the severity of the crime for which the member was convicted including the actual sentence imposed and the maximum sentence provided for by law;
(2) the amount of monetary loss suffered by the state, municipality, political subdivision, or by any other person as a result of the crime for which the member was convicted or the financial gain realized by the member;
(3) the degree of public trust reposed in the member by virtue of the member's office or position and the degree to which it was violated;
(4) if the crime was part of a fraudulent scheme against the state or political subdivision, the role of the member in the fraudulent scheme;

(5) any recommendation by the prosecuting Assistant Attorney General or District Attorney relative to the degree of forfeiture; and
(6) any such other factors as, in the judgement of the board, justice may require.

Any member subject to forfeiture shall be ineligible for membership in another retirement system and they shall cease to be an active member of the system in which their benefit was forfeited. Their benefit cannot be increased except for cost of living adjustments provided for in G.L. c. 32, Sections 102-103.

(4) Forfeiture for members having less than ten years of creditable service

Any member who has less than 10 years of creditable service as of the date of his or her offense shall forfeit all rights to a retirement allowance based upon any creditable service accrued prior to his or her conviction and shall receive a return of their accumulated deductions. The regular interest rate for a return of deductions under this paragraph will be zero. Upon forfeiture, the member shall cease to be a member of the retirement system and shall be ineligible for membership in any retirement system.

(5) Notification

The employer, Attorney General, Assistant Attorney General, or District Attorney shall notify the retirement board and PERAC upon a member's final conviction that may trigger forfeiture.

(6) Repayment of allowance

If a member has already been retired when they are finally convicted, the retirement board shall require the member to repay all benefits received after the date of the offense that were in excess of the allowable amount. The board may further reduce the member's allowance until all excess amounts are recovered.

(7) Misreported salary

If a member misreports or intentionally conceals their salary they will be prohibited from receiving a retirement allowance based upon the misreported or concealed salary amount. They shall receive a return of deductions for any amounts paid in excess. The board shall notify PERAC whenever proceedings are undertaken pursuant to this provision and PERAC must approve any calculation of a retirement allowance.

(8) Appeal of Forfeiture

Any person who is aggrieved by the board or PERAC's decision to forfeit a portion of the retirement allowance of a member may appeal to the Superior Court within 30 days of that decision. Appeals of forfeitures will no longer be handled by DALA, CRAB, or the District Court.

(9) Restitution

If a member has been found to have misappropriated funds or property of their employer, restitution may be made using the deductions of the member on account with the retirement system. If restitution is made using the accumulated deductions of the member on account with the retirement system then the annuity portion of any retirement allowance will be reduced when a retirement allowance becomes effective or when a retirement allowance is resumed, as the case may be.

SECTION 4 and SECTION 5

Amends Section 16 to effectuate the changes to appeal rights.

SECTION 6

Amends Section 105 of Chapter 32 to prohibit a member who has had a portion of his or her benefit forfeited under the provisions of Section 15 from being reinstated pursuant to Section 105 of Chapter 32.

SECTION 7

Amends Section 8 to prohibit a member who was retired for disability, and subject to pension forfeiture from returning to active membership in the retirement system if they are returned to service pursuant to Section 8 of Chapter 32.

AN ACT RELATIVE TO PENSION FORFEITURE

SECTION 1

Paragraph (m) of subdivision 1 of section 5 of chapter 32 of the general laws, as appearing in the 2014 Official Edition, is hereby amended in line 76 by adding after the word "contrary", the following:

"except as provided in section 15 of this chapter,"

SECTION 2

Subdivision 1 of section 10 of chapter 32 of the general laws, as appearing in the 2014 Official Edition, is hereby amended by striking the phrase "without moral turpitude on his part" in lines 6,9,84 and 126.

SECTION 3

Section 15 of chapter 32 of the general laws is hereby amended by striking everything after the title and inserting in place thereof the following new section 15.

Section 15.

(1) Initiation of Forfeiture Proceedings. Proceedings under this section may be initiated by the board or the commission. The board shall notify the member by certified mail when proceedings are initiated. If the member refuses the delivery of the mail, it shall be deemed to have been received. Unless otherwise agreed to by the parties, a hearing shall be held no less than ten days nor more than ninety days after the member has received notification. The board shall conduct the hearing pursuant to the provisions of 840 CMR 10.12. The board shall prepare and file with its clerk or secretary a certificate containing its findings and decision, copies of which shall be sent to the proper parties within fifteen days after completion of such hearing.

(2) Forfeiture of a retirement allowance upon conviction. Upon final conviction of a felony criminal offense involving violation of the laws applicable to a member's office or position or arising out of and in the course of their employment, a member shall be subject to the forfeiture provisions of this section. A retirement board, upon notification of such conviction of a member, must hold a hearing to determine whether the crimes for which a member was convicted involved the laws applicable to the member's office or position or if said criminal offenses were committed while the member was in the course of his or her employment, the total value of the member's potential retirement benefits, and the amount of said benefits which shall be forfeited. For purposes of this section, 'criminal offense involving violation of the laws applicable to a member's office or position,' shall also include, but not be limited to, in the case of a member whose primary job responsibilities involve contact with children or any member of the Massachusetts Teachers' Retirement System or a teacher who is a member of the Boston Retirement System, a conviction for knowing purchase or possession of visual material of a child depicted in sexual conduct under section 29C of chapter 272 of the general laws, or a conviction of a sex offense involving a child as defined in section 178C of chapter 6 of the general laws

whom the member has contact with as part of his or her official duties, or a conviction of any other sex offense or sexually violent offense, as those terms are defined in said section 178C, in which the victim was any person under the age of 18 whom the member had contact with as part of his or her official duties.

(3) Forfeiture amount. Any member with ten or more years of creditable service on the date of the offense who is subject to forfeiture under the foregoing paragraph (2) shall forfeit a portion of their retirement allowance as determined by the board. A member's allowance shall be reduced by one-third, two-thirds or to a minimum allowance, such minimum allowance being equal to that which a member would receive in group 1 having ten years of creditable service and at the minimum age for a group 1 employee; provided that in no event shall a member whose pension has been reduced to the minimum allowance be eligible for any retirement benefit prior to reaching the minimum age for a group 1 employee; and provided further that in no event shall a member's retirement allowance be reduced below the amount of the annual annuity portion. Such reduced allowance shall be payable for the life of the member; provided that, if the member retires having elected option (c) the beneficiary shall receive, upon the death of the member, the option (c) benefit as if forfeiture had not occurred, based on the age and actual creditable service at the time of the member's retirement, if the board determines that the beneficiary (i) had no role in the illegal conduct for which the member was convicted, (ii) did not have knowledge of the illegal conduct, and (iii) did not commit nor conspire to commit the murder or voluntary manslaughter of the member upon whom the retirement allowance is based. In determining the amount of the forfeiture the board must consider and make findings of fact relative to the following factors:

(1) the severity of the crime for which the member was convicted including the sentence imposed as well as the maximum sentence provided for by law;
(2) the amount of monetary loss suffered by the state, municipality, political subdivision, or by any other person as a result of the crime for which the member was convicted or the financial gain realized by the member;
(3) the degree of public trust reposed in the member by virtue of the member's office or position and the degree to which it was violated;
(4) if the crime was part of a fraudulent scheme against the state or political subdivision, the role of the member in the fraudulent scheme;
(5) any recommendation by the prosecuting attorney general or district attorney relative to the degree of forfeiture; and
(6) any such other factors as, in the judgment of the board, justice may require.

Any member who has had a portion of their retirement allowance forfeited under this paragraph shall be ineligible to become a member of a different retirement system and is also prohibited from increasing their allowance from the forfeited amount except by cost of living increases granted pursuant to sections 102 and 103.

Any member who has had a portion of their retirement allowance forfeited under this paragraph shall cease to be an active member of the retirement system and shall be ineligible for membership in any retirement system.

(4) Forfeiture for members having less than ten years of creditable service. Any member, having less than ten years of creditable service on the date the offense is committed, who upon conviction is subject to the provisions of this section shall forfeit all rights to a retirement allowance based upon any creditable service prior to and after the date of the offense and shall receive a return of his accumulated total deductions; provided, however, that the rate of regular interest for the purpose of calculating accumulated total deductions shall be zero. The member shall thereupon cease to be a member in the retirement system and shall be ineligible to become a member of any retirement system.

(5) Notification. If a current employer, last employer, the attorney general or a district attorney becomes aware of a final conviction of a member of a retirement system under circumstances which may require forfeiture of the member's rights to a pension, or retirement allowance pursuant to this chapter, section 59 of chapter 30 or section 25 of chapter 268A, they shall immediately notify the retirement board and the commission of such conviction.

(6) Repayment of allowance. If a member's final conviction of an offense results in a forfeiture of rights under this chapter, the member shall forfeit, and the board shall require the member to repay all benefits in excess of the allowable amount received after the date of the offense of which the member was convicted. Following a member's conviction and partial forfeiture, the member's retirement allowance will be reduced, upon such terms and conditions as the board may determine, until all excess payment amounts are recovered.

(7) Misreported Salary. In no event shall any member be entitled to receive a retirement allowance under this chapter, which is based upon a salary that was intentionally concealed from or intentionally misreported to the commonwealth, or any political subdivision, district or authority of the commonwealth. If a member intentionally concealed compensation from or intentionally misreported compensation to an entity to which the member was required to report the compensation, even if the reporting was not required for purposes of calculating the member's retirement allowance, the member's retirement allowance shall be based only upon the regular compensation actually reported to that entity or the amount reported to the board, whichever is lower. Unless otherwise prohibited by law, such member shall receive a return of any accumulated total deductions paid on amounts in excess of the compensation actually reported, but no interest shall be payable on the accumulated deductions returned to the member. The board shall notify the commission of any proceedings commenced pursuant to this subdivision and shall provide any and all documents relating to said proceedings upon request of the commission. Notwithstanding the waiver provisions of paragraph (a) of subdivision 3 of section 21 of chapter 32 of the general laws any calculations performed pursuant to this section will be submitted to the commission for approval.

(8) Appeal of Forfeiture. Any person who is aggrieved by a decision made pursuant to this section regarding the forfeiture of any portion of a member's retirement allowance under this section may, within thirty days after the certification of the decision bring a petition in the superior court. This action shall be commenced in the superior court in which a member was convicted, or in Suffolk Superior Court, or in the Massachusetts Superior Court covering the geographic area in which a member resides. The court shall review all legal issues under a de

novo standard, but may base its determination either on the administrative record below, or may, in its discretion, request additional evidence.

(9) Restitution. If a member has been found to have misappropriated funds or property of their employer, restitution may be made using all or a portion of the total deductions of the member on account with a retirement system. If restitution is made using the accumulated total deductions of the member on account with a retirement system then the annuity portion of any retirement allowance will be reduced when a retirement allowance becomes effective or when a retirement allowance is resumed, as the case may be. The pension portion of the retirement allowance shall remain unchanged from the allowance determined using the accumulated total deductions in the member's account prior to restitution.

SECTION 4

Subdivision 3 of section 16 of said chapter 32 is hereby amended in line 63 by striking the phrase:

"or any member who is aggrieved by any action taken or decision of a board or the public employee retirement administration commission rendered with reference to his dereliction of duty as set forth in section 15,"

SECTION 5

Subdivision 3 of section 16 of said chapter 32 is hereby amended in line 113 by adding after the word "rendered":

, except decisions made or actions taken pursuant to section 15 of this chapter,

SECTION 6

Section 105 of said chapter 32 is hereby amended by adding the following paragraph;

(d) Any member having had any portion of their retirement allowance forfeited pursuant to section 15 of this chapter shall be ineligible for reinstatement to service under the provisions of this section.

SECTION 7

Paragraph (b) of subdivision (2) of section (8) of chapter 32 is hereby amended by inserting in line 105 after the word "compensation":

; provided, however, that any member who has had any portion of their retirement allowance forfeited pursuant to section 15 shall not become an active member of the retirement system upon reinstatement but shall contribute to the deferred compensation fund established by section 64D of chapter 29.