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Analysis

Sub. H.B. 8 – Rep. R. Hagan *(As Reported by the House State Government and Elections Committee)*

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ORSC Position

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Sub. H.B. 8 would require any 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 designated offense while the member was engaged in the performance of duties related to public employment to forfeit the right to receive a disability benefit or the pension portion of a retirement allowance.

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

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 any designated offenses committed while engaged in the performance of duties related to public employment forfeits the right to receive a disability benefit or the pension portion of a retirement allowance.

“Designated offense” is defined as a felony violation of the following:

- Extortion (R.C. §2905.11);
- Bribery (R.C. §2921.02);
- Perjury (R.C. §2921.11);
- Obstructing justice (R.C. §2921.32);
- Theft in office (R.C. §2921.41);
- Unlawful interest in a public contract (R.C. §2921.42);
- Engaging in a pattern of corrupt activity (R.C. §2923.32); and
- Conspiracy or attempt to commit one of the above-listed offenses.

The forfeiture is limited to the extent that, on the date the member pleads guilty or is convicted of the offense, the benefit or allowance has not vested pursuant to Ohio law, the plan document for a defined contribution plan, or federal law. The forfeited amount is retained by the retirement system of which the person is a member or the ARP in which the person is participating.

When a court sentences an offender for a designated offense committed on or after the effective date of the bill, the court is required to determine whether the offender committed the designated offense while engaged in the performance of duties related to public employment and whether the offender is a member of a public retirement system or a participant in an alternative retirement plan. If the court determines both of those criteria are met, the court is required to order the forfeiture to the public retirement system or alternative retirement plan of the offender's right to a disability benefit or the pension portion of a retirement allowance, to the extent that, on the date the member pleads guilty or is convicted of the offense, the benefit or allowance has not vested. The court must then send a copy of the journal entry imposing the sentence on the offender to the public retirement system or alternative retirement plan in which the offender is a member or participant. “Pension” is defined as the portion of a retirement allowance that

is derived from contributions made to a public retirement system or alternative retirement plan by an employer and earnings on those contributions.

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 system would be required to comply with a forfeiture order at the following appropriate times:

- If the offender has applied for, but is not yet receiving a retirement allowance or disability benefit, as soon as practicable;
- If the offender has applied for, but has not yet received a payment of accumulated contributions, as soon as practicable;
- If the offender has not applied for a retirement allowance, disability benefit, or payment of accumulated contributions, on application by the offender for a retirement allowance, disability benefit, or payment of accumulated contributions.

Under the bill, the forfeiture would not affect a member's right to a refund of the member's accumulated contributions; any portion of a retirement allowance or payment of accumulated contributions that is subject to withholding due to an order for restitution for theft in office, certain sexual offenses, or a division of marital property order; the eligibility of a member or the member's spouse or qualified dependents to receive health care coverage or long-term care insurance from a state retirement system; or payment of a survivor benefit to a member's spouse, beneficiaries, or qualified dependents. This would give beneficiaries of members who are subject to a forfeiture order greater protection than all other beneficiaries because it would guarantee benefits to individuals who otherwise might not be eligible for them. Under current law, if a member takes a refund of contributions, the member and the member's spouse/dependents are no longer eligible for health care or survivor benefits. This bill, however, would require the systems to provide health care and survivor benefits to the individuals affected by a forfeiture order.

By law, any health care costs borne by the retirement systems must be financed by employer contributions only. It is inconsistent to require members to forfeit employer – funded pension benefits (that are otherwise guaranteed by statute) but allow them to receive employer funded health care benefits (that are provided purely at the discretion of the retirement system). Furthermore, current law does not guarantee health care benefits for any retiree or beneficiary. Since 1974, the five state retirement boards have had broad discretionary authority to provide health care coverage to retirees and their dependents. The boards are authorized to change the premiums and eligibility requirements, as well as whether to continue to provide health care benefits at all. This discretionary nature has been upheld in court. (Ohio Association of Public School Employees, et al. v. School Employees Retirement System Board, et al.) This bill calls into question whether health care benefits are truly discretionary. Guaranteeing these benefits for a small set of beneficiaries would set a costly precedent for future retirees and beneficiaries. *We*

recommend that the bill be amended to remove the language that guarantees health care coverage and survivor benefits.

“Accumulated contributions” is defined in the bill by referencing the definition currently in each system’s law and 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. However, the definition under HPRS’ law has been omitted from the bill. *We recommend that the bill be amended to define accumulated contributions for HPRS as having the same meaning as in R.C. §5505.01.*

Sub. H.B. 8 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 give 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. Sub. S.B. 3, which the Council approved at the May 22, 2007 ORSC meeting, is similar to Sub. H.B. 8 but limits the list of offenses to bribery, engaging in a pattern of corrupt activity, theft in office, a violation of any similar city, state, or federal law, or conspiracy or attempt to commit any

of those offenses. Although the list of designated offenses in this bill includes several more offenses than Sub. S.B. 3, it is still consistent with Sub. S.B. 3.

Sub. H.B. 8 would limit the forfeiture to the pension portion of a retirement allowance, which is made up of employer contributions, plus earnings on those contributions. In addition, the bill does not require a member to apply for a refund of contributions. Therefore, a member subject to a forfeiture order could apply for an allowance based solely on the member's accumulated contributions if the member meets the age and service requirements instead of electing to take a refund of the accumulated contributions. However, current law does not provide for the receipt of this type of benefit and the bill does not indicate how this benefit would be calculated. It does not appear that this provision is consistent with the sponsor's intent of forfeiting an ongoing benefit from the retirement system. *We recommend that the bill be amended to require a member who is convicted of or pleads guilty to any of the designated offenses to forfeit the right to receive any payment under a pension, annuity, allowance, or other type of benefit under this chapter, other than a payment of the accumulated contributions standing to the person's credit under this chapter.* This is consistent with Sub. S.B. 3.

Fiscal Impact – The actuarial analysis submitted by each system is based on the as introduced version of the bill. The introduced version of the bill did not require the systems to provide health care benefits or survivor benefits to members subject to forfeiture. This change could have an impact on the actuarial analysis, however, the systems' actuaries have not reviewed the substitute bill.

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 as introduced would have no measurable financial impact on the system.

The SERS actuary, Buck Consultants, reviewed the as introduced version of the bill and found that 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 introduced version of the 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 introduced version of the 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 as introduced.

ORSC Position – At the June 13, 2007 meeting of the Ohio Retirement Study Council, the Council voted to recommend that the 127th Ohio General Assembly approve Sub. H.B. 8 upon the adoption of the following amendments:

- *An amendment to remove the language that guarantees health care coverage and survivor benefits;*
- *An amendment to define accumulated contributions for HPRS as having the same meaning as in R.C. §5505.01;*
- *An amendment to require a member who is convicted of or pleads guilty to any of the designated offenses to forfeit the right to receive any payment under a pension, annuity, allowance, or other type of benefit under this chapter, other than a payment of the accumulated contributions standing to the person's credit under this chapter.*