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Sub. H.B. 162 of the 130th General Assembly

(As Reported by House Judiciary)

Reps. Dovilla and Anielski

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ORSC RECOMMENDATION

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Summary of H.B. 162

H.B. 162 expands the offenses for which a member of any of the five public retirement systems,¹ the Cincinnati Retirement System (CRS), or a participant of an alternative retirement plan (ARP) may be subject to a forfeiture of a future retirement or disability benefit, other than a return of contributions, or termination of an existing disability benefit. The expanded offenses are:

- 1) Extortion or perjury;²
- 2) A federal offense of racketeering, theft or bribery concerning programs receiving federal funds, interference with commerce by threats of violence in violation of the "Hobbs Act,"³ or fraud.⁴

For the forfeiture to apply to a future retirement or disability retirement benefit, the member must have served in a position of honor, trust, or profit when the offense occurred and the offense must have occurred within the context of that position.⁵ In addition to the requirements above, for the termination of an existing disability benefit to apply, the disability for which the member is receiving the benefit must have arose out of the commission of the offense.⁶ The bill also modifies existing forfeiture provisions to clarify that they apply to a member who is retired and re-hired to a position covered by a public retirement system.⁷

The bill also permits (rather than requires) the Public Employees Retirement System (PERS), Ohio Police and Fire Pension Fund (OP&F), School Employees Retirement System (SERS), and Highway Patrol Retirement System (HPRS) to establish a program under which members may purchase long-term care insurance.⁸ This requirement was previously eliminated for the State Teachers Retirement System (STRS) under pension reform.⁹

Mechanism of forfeiture or termination

Under the bill, a member charged with the expanded federal offenses is required to send written notice of the charge to the Attorney General.¹⁰ On conviction or guilty plea, the member is to send an additional notice to the Attorney General.¹¹ Upon receipt of the notice, the Attorney General is to

¹ The five public retirement systems are the Public Employees Retirement System (PERS), Ohio Police & Fire Pension Fund (OP&F), State Teachers Retirement System (STRS), School Employees Retirement System (SERS), and State Highway Patrol Retirement System (SHPRS).

² R.C. 2929.192(D)(2).

³ The federal "Hobbs Act" prohibits robbery or extortion that affects interstate commerce. It is often used in public corruption cases where a public official uses threats to obtain property from another individual.

⁴ R.C. 2901.432(B).

⁵ R.C. 2901.432(A)(2) and 2901.433(B)(1)(b).

⁶ R.C. 2901.434.

⁷ R.C. 2901.43(B)(3)(b), 2901.432(B)(3)(b), and 2929.192(A)(3)(b).

⁸ R.C. 145.581, 742.53, 3309.691, and 5505.33.

⁹ S.B. 342 of the 129th General Assembly; R.C. 3307.391.

¹⁰ R.C. 2901.432(C). The offenses of extortion or perjury are enforced under existing provisions of law. Failure to report the charge or conviction is a misdemeanor of the fourth degree (R.C. 2927.28).

¹¹ R.C. 2901.432(D).

determine whether the federal court has ordered the forfeiture of or writ of garnishment on the retirement benefit of the member. If the federal court has not issued the order or writ, the Attorney General is to bring an action in the Franklin County Court of Common Pleas requesting that the court order a forfeiture of the benefit other than payment of the offender's accumulated contributions.¹²

The court is required to order the forfeiture if 1) the member has been convicted of or pled guilty to the expanded federal offenses; 2) the offense was committed within the context of the offender's public employment in a position of honor, trust, or profit; 3) at the time of the offense, the offender was a member of a retirement system; and 4) for a granted disability benefit, if the disability arose out of the commission of the offense. The offender may request a hearing, conducted by the court, under which the court determines if there is good cause for the forfeiture not to be issued.¹³ The offender may also request that a court determine if the disability was caused by the offense.

The mechanism for the expanded offenses of extortion or perjury is the same as under current law for other specified Ohio offenses.

Background

Prior to the 127th General Assembly, loss of a retirement benefit was limited to restitution for theft in office, certain sex offenses, for payment of child support, or pursuant to a division of property order.¹⁴ The member receives the remainder of any benefits to which the member is entitled.

Forfeiture of a benefit beyond restitution was first allowed in 2008 with S.B. 3 of the 127th General Assembly. It was then expanded by H.B. 123 and again by S.B. 341 and 343 of the 129th General Assembly. The Ohio Retirement Study Council (ORSC) has consistently recommended that the General Assembly approve these forfeiture-related bills, with minor amendments.¹⁵

S.B. 3 of the 127th General Assembly provides that a member of PERS, OP&F, STRS, SERS, SHPRS, CRS, or a participant in an ARP is subject to a forfeiture of future retirement benefits, except a return of contributions, if the member was convicted of or pled guilty to a felony offense that was bribery, engaging in a pattern of corrupt behavior, or theft in office or conspiracy. The felony must have occurred when the member was in a position of honor, trust, or profit. The sentencing court is provided with discretion to determine if there is good cause not to issue the forfeiture order.

H.B. 123 of the 129th General Assembly expands the forfeiture under S.B. 3 to include the forfeiture of an already granted disability benefit if that benefit was granted based on a disability that resulted from the felony offense. That bill

¹² R.C. 2901.433(B) and 2901.434(C).

¹³ R.C. 2901.433 and 2901.434.

¹⁴ R.C. 145.27, 145.56, 742.41, 742.47, 2329.66, 3307.20, 3307.41, 3309.22, 3309.66, and 5505.22.

¹⁵ The ORSC previously recommended that the General Assembly approve H.B. 323 of the 129th General Assembly (Reps. Dovilla and Anielski), with certain amendments. That bill was substantively similar to H.B. 162, which includes those ORSC recommendations.

also expands and clarifies the positions of honor, trust, or profit¹⁶ subject to the forfeiture provisions of S.B. 3. The sentencing court determines if the disability was caused in the commission of the offense.

S.B. 341 and 343 of the 129th General Assembly provide for the forfeiture of a disability benefit granted to a PERS or SERS member (not limited to a position of honor, trust, or profit) based on a disability that resulted from any felony offense. (This provision does not exist in the laws governing OP&F, STRS, or SHPRS).

H.B. 162 of the 130th General Assembly would expand the felony offenses committed by a member of PERS, OP&F, STRS, SERS, SHPRS, CRS, or an ARP participant who is in a position of honor, trust, or profit that may result in the forfeiture of a future benefit or termination of an existing disability benefit. The sentencing court is provided with discretion to determine if there is good cause not to issue the forfeiture order.

Staff comments

The public policy issue raised by these bills is the extent to which employee misconduct should affect the receipt of public retirement benefits. Most public employees in Ohio do not contribute to Social Security and, therefore, rely solely on the benefits provided by the public retirement system for retirement income.

The principal reason behind the exemption of 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 and their dependents. This interest has historically outweighed other competing interests.¹⁷ However, there are instances when an offense reaches a level that forfeiture of the benefit is warranted.

The question then is what type of offenses are so egregious as to warrant forfeiture of a benefit to which the person is otherwise entitled and to what extent is the loss. For a comparison, an outright termination of benefits is not common under the Social Security program. Under Social Security, a benefit is

¹⁶ As currently defined, and unchanged by H.B. 162, a “position of honor, trust, or profit” includes all of the following:

- 1) An elective office of the state or any political subdivision of the state;
- 2) A position on any board or commission of the state that is appointed by the governor or the attorney general;
- 3) A position as a public official or employee who is required to file a financial disclosure statement;
- 4) A position as a prosecutor;
- 5) A position as a peace officer or as the superintendent or a trooper of the state highway patrol;
- 6) A position in which in the course of public employment, an employee has control of the expenditure of public funds of \$100,000 annually (R.C. 2929.192).

¹⁷ For instance, under federal law, the rights of an employee to a pension are protected under the non-forfeitable provisions of the Employee Retirement Income Security Act (ERISA), which governs private plans (29 U.S.C. 1053). ERISA law does not generally apply to governmental plans like the five public retirement systems.

forfeited for espionage, sabotage, treason, sedition, or subversion.¹⁸ In the context of disability, an individual who is disabled as a result of committing a felony may not be eligible for disability payments in Social Security.¹⁹ Beyond these extreme offenses, Social Security generally prioritizes guaranteeing a source of income in retirement or as a result of a disability.

Social Security is more accepting of the suspension of a benefit. Under Social Security, a person guilty of a crime and incarcerated pays any restitution required and has the benefit suspended during the incarceration. When the person's restitution and incarceration are complete, the benefit is reinstated.²⁰

The forfeiture provisions of Ohio are stricter than those for Social Security but are limited in the following ways:

- 1) The list of offenses that may result in loss of retirement or disability retirement benefits are limited to felonies that are breaches of the public trust and are limited to felonies committed in the context of that public position;
- 2) Survivor benefits are protected by prohibiting a return of contributions unless a spouse provides written consent;
- 3) Disability benefits are terminated for a disability that occurred as a result of a felony offense (limited to specified individuals and felonies in STRS, OP&F, and SHPRS).

H.B. 162 continues the developing policy of Ohio retirement law requiring forfeiture of a benefit under the three conditions discussed above. It also continues to permit a guilty offender to: (1) seek a court hearing on if there is good cause not to issue the forfeiture; and 2) seek a court hearing on if the offense did in fact cause the disability.

Long-term Care Insurance

Existing law requires PERS, OP&F, SERS, and SHPRS to establish a program under which a member may purchase long-term care insurance (LTC). STRS formally was required to do so, but that requirement was made permissive under S.B. 342 of the 129th General Assembly. Because of the lack of insurance carriers willing to provide this coverage, at the July 11, 2013, meeting the ORSC voted 6-0 to recommend that the LTC coverage provisions be made permissive, rather than a requirement.

Actuarial Impact

Based on actuarial analyses from prior bills making similar changes, it is anticipated that there would be no measurable financial impact on the retirement systems.

ORSC recommendation

¹⁸ 42 United States Code 402(u)(1).

¹⁹ Social Security has found that a disability caused by a felony offense is not considered an eligible disability for benefit purposes. Social Security Ruling (SSR) 83-21. A similar finding applies to drug or alcohol addiction (SSR 82-60).

²⁰ 42 U.S.C. 402(x)(1) and 20 Code of Federal Regulations 404.468.

1. The ORSC recommends that the 130th General Assembly **approve H.B. 162**, based on the following existing forfeiture standards:
 - Felonies that are breaches of the public trust warrant the loss of a retirement benefit;
 - Survivor benefits should be protected by prohibiting a return of contributions unless a spouse provides written consent;
 - A member should not be granted a disability benefit if that disability occurred as a result of committing a felony offense.

2. The ORSC recommends approval of the LTC provision of H.B. 162, as it would implement a previously adopted ORSC motion to make such coverage permissive.

3. The ORSC recommends that the disability forfeiture provisions be standardized between the retirement systems to provide that no member of a public retirement system may receive a disability benefit if the disability arose from the commission of a felony. Currently, this provision exists only in PERS and SERS. In addition, the SERS provisions should be standardized with PERS to provide that a court, rather than the retirement system, determines if the disability was caused by the offense.²¹

4. The ORSC recommends that the General Assembly consider the permanency of the forfeiture provisions of current law. As the list of offenses for which a member is subject to forfeiture expands, ORSC recommends that the General Assembly consider, as is done in Social Security, if the forfeiture provisions of Ohio law should be modified to provide for a reinstatement of a retirement benefit under certain conditions and only after the offender's debt to society has been fully satisfied.

²¹ R.C. 2929.194 and 3309.39.