

**SB**

**110**

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

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State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

March 12, 2007

**SUBJECT:** Is it constitutional in Alaska to forfeit a public official's or public officer's pension because the official or officer has been convicted of a felony? (SB 110; Work Order No. 25-LS0725A)

**TO:** Senator Hollis French  
Attn: Cindy Smith

**FROM:** Dan Wayne  
Legislative Counsel

You have asked for a constitutional analysis of SB 110. The bill raises several constitutional issues. It is not possible to predict with certainty, but the court would probably resolve most of them in favor of the bill.

**1. Accrued state retirement benefits shall not be diminished or impaired.**

Article XII, sec. 7 of the Constitution of the State of Alaska says:

Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

A right to benefits under a state retirement system vests immediately upon the employee's enrollment in the system.<sup>1</sup> While the retirement system may be changed to permit the pension system to make adjustments, the modifications must be reasonable and any change that results in a disadvantage to employees must be offset by comparable new advantages.<sup>2</sup> Rights that are protected by the constitution include not only the amount of benefits, but also the requirements for eligibility.<sup>3</sup> Both eligibility and amount are at issue in SB 110.

SB 110 would diminish accrued benefits, but only those benefits accrued on or after the date of the criminal offense. An argument can be made that those after-acquired benefits are tainted by the offense, either directly or indirectly, depending on the facts of a case.

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<sup>1</sup> Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska 1981).

<sup>2</sup> Hoffbeck at 1057.

<sup>3</sup> Hoffbeck at 1058.

A state employee, for example, can be terminated instantly upon the discovery of work-related felony conduct. If the employee's felony is undiscovered and the employee continues to work, it may be said that the benefits accrued from the work are not legitimately acquired because they were acquired by the employee's concealment of a work-related felony. The state's interest in maintaining the public's trust in government is substantial. In this type of case, and in others, the court may find that this substantial government interest outweighs a person's constitutional right to an undiminished benefit, particularly when the diminishment is limited as in SB 110.

**2. Equal rights are guaranteed.**

Article I, sec. 1 of the Constitution of the State of Alaska says:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

The court resolves constitutional issues by using a balancing test to weigh the state's interest against the interest of the person or persons impacted by the state's proposed action. The test used depends on the constitutional provision at issue.

[T]he Alaska Constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment. To implement Alaska's more stringent equal protection standard, we have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at stake: first, we determine the weight of the individual interest impaired by the classification; second, we examine the importance of the purposes underlying the government's action; and third, we evaluate the means employed to further those goals to determine the closeness of the means-to-end fit.<sup>4</sup>

In this instance it can be argued that persons who may be subject to forfeiture if the bill becomes law -- legislators, legislative directors, and public officers<sup>5</sup> -- are entitled as much as other persons to enjoy the rewards of their own industry, in this case a pension. SB 110 creates a special class of person and denies them something all persons in the state are guaranteed; therefore, in order to survive a challenge if it becomes law, it will

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<sup>4</sup> Malabed v. North Slope Borough, 70 P.3d 416, 420 - 421 (Alaska 2003).

<sup>5</sup> In the bill, "public officer" means: a public employee, a member of a board or commission, or a state officer designated by the governor to act as trustee of the trust or a person to whom the trustee has delegated trust duties.

have to withstand the highest of the three levels of scrutiny in the three-part balancing test applied by the court.<sup>6</sup>

**3. Cruel and unusual punishment is prohibited.**

Article I, sec. 12 of the Constitution of the State of Alaska says:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

Our courts have found this section entitles a convicted offender to a fair sentence. In fashioning a fair sentence, judges are required to take into consideration a number of things, including the ones listed in this section, but also things like the offender's prior criminal history or lack of one, the need to deter others from offending, and the principle that sentences for like offenders should be similar. Our court is not likely to find that constitutional fairness requirements at sentencing can be relaxed because the state's interest in preserving public trust in government is so great as to outweigh the right of a legislator or public official to a fair sentence; however, in the civil case the person would arguably have less at stake than freedom from incarceration. The court could find that a person's right to a pension is outweighed, in the context of a felony-based pension forfeiture, by the governmental interest at stake.

In a criminal forfeiture, property is taken before conviction occurs and often not returned unless the state fails to prove the criminal case. In SB 110 forfeiture is not automatic. For example, it will not occur unless a hearing officer hears evidence and argument in a new civil proceeding, separate from the criminal case, under the Administrative Procedure Act. The state will have to prove that the conduct upon which the conviction was based was "in connection with the person's official duties."<sup>7</sup>

**4. No conviction shall work corruption of blood or forfeiture of estate.**

Part of art. I, sec. 15 of the Constitution of the State of Alaska says, in part: "No conviction shall work corruption of blood or forfeiture of estate." This stands for the principle that the punishment for a crime should not reach beyond the offender, or affect the right to property that has been acquired legitimately. SB 110 allows some or all of a

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<sup>6</sup> For example, the Alaska Supreme Court has said Alaska has a substantial governmental interest in campaign finance reform that justifies some restriction on First Amendment freedoms. *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), cert. denied, 528 U.S. 1153, 120 S. Ct. 1156 (2000).

<sup>7</sup> Under the evidence rules described in AS 44.62.460 of the Administrative Procedure Act, the state would have the burden of proving its case by a preponderance of the evidence.

Senator Hollis French

March 12, 2007

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pension that would otherwise be forfeited to be awarded to dependents of the convicted person, as the hearing officer determines.<sup>8</sup> This partially addresses the constitutional issue concerning the forfeiture's reach beyond the convicted person, and SB 110 would probably be upheld with regard to that issue. SB 110 also protects from forfeiture benefits accrued before the date of the offense. This makes it less vulnerable to a constitutional challenge on the basis that legitimately acquired benefits are at stake.

You asked if the term "dependent," on page 2, line 23, includes a spouse. The terms "dependent" and "spouse," which appear in the bill in AS 37.10, are not defined in SB 110, and therefore it would be up to the hearing officer or the court to interpret their meaning. Since SB 110 relates to pension forfeiture, to the extent the legislature does not take the opportunity to clarify the term "dependent," a hearing officer or court would likely refer first to words and phrases applicable to the general pension provisions for public employees, codified in AS 39.35.010 - 39.35.680 (defined benefits) and AS 39.35.700 - 39.35.990 (defined contributions). In both instances, "dependent" appears as a modifier of "child" in the phrase, used throughout the chapter, "dependent child"; in the same body of material, AS 39.35, a "spouse" is referred to as a "surviving spouse." The differences between AS 39.35 and the bill's choice of the term "dependent" provides no definitive clue as to what the legislature is intending. At least arguably, it is more likely than not that the hearing officer or court would equate the rights of a "surviving spouse" as at least the equivalent of the rights accorded to a "former spouse" and make some provision for payment of a partial reward to a current spouse. If that is the outcome, then the administrative officer or court would in effect be extending to the "current spouse" the status of a "dependent," notwithstanding the absence of a clear statement on the point.

Rather than leave the outcome to chance, while the bill is under consideration, the legislature should step up and clarify direction on this point.

Finally, in reviewing the bill for this memo it occurred to me that the term "convicted," on page 2, line 7, might need to be defined in order to avoid confusion about its meaning in situations involving appeals, conviction reversals, plea-bargains, suspended imposition of sentences, and pardons. There might be a particular constitutional issue, and other legal and logistical problems, in connection with a forfeiture in any one of these situations. A definition might say: under this section a person is convicted if they have been sentenced and the time for filing of a merit appeal has expired; however, a person is not convicted if pardoned by an act of executive clemency or if the trial court order or judgment of conviction is reversed or expunged.

If I may be of further assistance, please advise.

DCW:ljw  
07-128.ljw

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<sup>8</sup> SB 110 could be clearer as to whether or not a dependent has the same right to a hearing or an appeal as the convicted legislator does.

# Alaska State Legislature

**SENATOR  
GENE THERRIault**

**Mailing Address:**  
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**Senate**

**While in session**  
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**SENATE DISTRICT F**

**To: Senator Hollis French, Chairman  
Senate Judiciary Committee**

**From: Senator Gene Therriault  
Minority Leader**

**Date: March 7, 2007**

**Re: Request for Hearing on SB 110**

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I respectfully request Senate Bill 110 be scheduled for hearing before the Senate Judiciary Committee.

SB 110 would deny a public pension to a public officer, legislator, legislative director, who is convicted of certain felony offenses in connection with the official duties of their office. The forfeiture of pension provisions would apply to those offenses committed on or after the affective date of this Act.

Thank you for your consideration.

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## MEMORANDUM

March 29, 2007

**SUBJECT:** Constitutional issues related to SB 110  
(Work Order No. 25-LS0725A)

**TO:** Senator Gene Therriault  
Attn: Heather Brakes

**FROM:** Dan Wayne   
Legislative Counsel

You have asked for a constitutional analysis of SB 110. The bill raises several constitutional issues. It is not possible to predict with certainty, but the court would probably resolve most of them in favor of the state if the bill becomes law.

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related felony conduct. If the employee's felony is undiscovered and the employee continues to work, it may be said that the benefits accrued from the work are not legitimately acquired because they were acquired by the employee's concealment of a work-related felony. The state's interest in maintaining the public's trust in government is substantial. In this type of case, and in others, the court may find that this substantial government interest outweighs a person's constitutional right to an undiminished benefit, particularly when the diminishment is limited as in SB 110.

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have to withstand the highest of the three levels of scrutiny in the three-part balancing test applied by the court.<sup>6</sup>

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Finally, there are a couple of drafting issues I would like to bring to your attention. The term "convicted," on page 2, line 7, might need to be defined in order to avoid confusion about its meaning in situations involving appeals, conviction reversals, plea-bargains, suspended imposition of sentences, and pardons. There might be a particular constitutional issue, and other legal and logistical problems, in connection with a forfeiture in any one of these situations. A definition might say: under this section a person is convicted if they have been sentenced and the time for filing of a merit appeal has expired; however, a person is not convicted if pardoned by an act of executive clemency or if the trial court order or judgment of conviction is reversed or expunged.

Also, I recommend the inclusion of the term "spouse" after "dependent" on page 2, line 23, and adding "14.25.075" on page 2, line 19, following "AS 14.25.055."

If I may be of further assistance, please advise.

DCW:ljw  
07-174.ljw

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# LEGISLATIVE RESEARCH REPORT

FEBRUARY 13, 2007



REPORT NUMBER 07.105

## LOSS OF PENSION FOR PUBLIC OFFICIALS UPON CONVICTION OF A FELONY RELATED TO PUBLIC DUTIES

PREPARED FOR SENATOR GENE THERRIAULT

BY ROGER WITHINGTON, LEGISLATIVE ANALYST

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You asked for information regarding the pensions of public officials. Specifically, you wished to know which states currently have a law that denies a public official his or her retirement pension if the official is convicted of a felony in connection with their public office. You asked for examples of this legislation, and if any other states are currently considering similar legislation. You also wished to know of the states that do have, or are considering, a law that denies a public official his or her retirement pension, how many have a Constitutional provision similar to Alaska's provisions found in Article 12, Sections 6 and 7.<sup>1</sup>

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<sup>1</sup> Article 12, Section 6 of Alaska's Constitution (Merit System) states that "the legislature shall establish a system under which the merit principle will govern the employment of persons by the State." Section 7 (Retirement Systems) states that "Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired."

## LAWS REGARDING PENSION LOSS IN OTHER STATES

According to the National Conference of State Legislatures (NCSL), thirteen states currently have laws or constitutional provisions that allow for the denial of pension benefits to a legislator or public official who has been convicted of a crime in connection with the execution of their public duties. The thirteen states are California, Florida, Georgia, Massachusetts, Michigan, Missouri, New Jersey, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, and Wyoming. We summarize each state law or constitutional provision in Table 1. We provide the full text of each state law or constitutional provision in Attachment A.

**Table 1: Pension Revocation Laws in Other States**

| State         | Citation   | Summary   |
|---------------|--|---|
| California    | California Code Government Code § 1243                                 | Any elected public officer who takes office, or is reelected to office, on or after January 1, 2006, shall forfeit specified retirement benefits that accrue during his or her term of office if he or she is convicted of a felony arising from official duties, unless the governing body authorizes the public officer to receive benefits.  |
| Florida       | Florida Statutes § 112.3173  | Any public officer or employee who is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of his or her admitted commission, aid, or abetment of a specified offense, forfeits all rights and benefits under any public retirement system of which he or she is a member.   |
| Georgia       | Code of Georgia § 47-1-20 to § 47-1-22                                 | If a public employee is convicted of a public employment related crime, acting in the capacity of a public employee, the employee's membership in any public retirement system shall terminate on the date of final conviction, and the employee shall not at any time thereafter be eligible for membership in any public retirement system.   |
| Massachusetts | General Laws of Massachusetts Chapter 32 § 15                          | Provides that any member of the Public Employee Retirement System who has been found guilty of misappropriation of funds or property of any governmental unit in which he or she is employed, or was employed at the time of termination of service, forfeits his retirement allowance. Also provides for forfeiture of a retirement allowance in the case of a member who is convicted of a criminal offense involving violation of the laws applicable to his office or position. |
| Michigan      | Michigan Compiled Laws § 38.2701 to § 38.2705                          | A member of the public employee retirement system who is convicted of a felony arising out of his or her service as a public employee is considered to have breached the public trust and may forfeit his or her rights to an otherwise vested retirement benefit and all accumulated contributions   |
| Missouri      | Constitution of Missouri, Article XIII, Section 3                      | Any public official who is convicted in any court of a felony which occurred while in office or who has been removed from office for misconduct or following impeachment shall be disqualified from receiving any pension from the state of Missouri.   |
| New Jersey    | New Jersey Statutes § 43:1-3 to § 43:1-5                               | The receipt of a public pension or retirement benefit is dependent on honorable service by a public officer or employee.  |
| Pennsylvania  | Pennsylvania Statutes 43 § 22-1311 to 43 § 22-1315                     | Provides that "no public official or public employee ... shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment."  |
| Rhode Island  | General Laws of Rhode Island R.I. Gen. Laws § 36-10.1-1 to § 36-10.1-4 | A member of the public employee retirement system who is convicted of a crime related to public office or public employment, such as felony theft, felony embezzlement, and bribery, or any felony where the employee realizes a gain or advantage for themselves, forfeits of all or part of any retirement or other benefit to which he or she is entitled.   |
| Tennessee     | Tennessee Code § 8-35-124  | If a person who is elected to a public office of this state or any political subdivision thereof, is convicted in any state or federal court of a felony arising out of that person's official capacity, constituting malfeasance in office, that person will forfeit his or her retirement benefits from the Tennessee consolidated retirement system.   |
| Texas         | Texas Code Civil Statutes, Article 6220                                | No person confined to an asylum or penitentiary of the state, at the expense of the state, shall receive a pension. Inmates of the penitentiary shall forfeit their pension while incarcerated.   |
| Virginia      | Code of Virginia § 51.1-153  | Deferred retirement is not available to a member of the Virginia Retirement System if his or her employer certifies that his or her service was terminated because of dishonesty, malfeasance, or misfeasance in office.  |
| Wyoming       | Constitution of Wyoming, Article V, Sec. 6                             | Allows the Supreme Court of Wyoming, or a special supreme court (designed to act in the place of the court in any case involving the discipline or disability of a supreme court justice), to order the forfeiture of any pension or retirement benefit accrued after an offense that led to the removal of a judicial officer from office.   |

**Sources:** Ron Snell, Director of the State Services Division, National Conference of State Legislatures, 303-856-1534, LexisNexis, and individual state web sites.

## PROPOSED LEGISLATION REGARDING PENSION LOSS

Using NCSL's State Legislation Database on Ethics Issues and *Lexis*, we identified fourteen pieces of legislation introduced recently in ten states that appear to propose denying a public official his or her retirement pension if the official was convicted of a crime in connection with his or her public office. We summarize each bill in Table 2. The legislation listed in Table 2 introduced in 2005 are no longer active; all other bills are active. We provide the full text of each bill in Attachment B.

**Table 2: Proposed Pension Revocation Bills in Other States**

| Year Introduced   | State       | Bill Number  | Summary   |
|---|-------------|--|---|
| 2005  | Connecticut | SB 35  | Provides for forfeiture of retirement benefits of state officials or employees committing crimes associated with state employment; penalizes a state official or employee who commits a crime related to his or her state employment.                     |
|   |             | SB 93  | Allows a court that has sentenced a public official for government corruption to revoke or reduce the public official's retirement or other state benefits.   |
|   |             | SB 483   | Provides for forfeiture of the pensions of state employees convicted of felonies against the state.   |
|   | New Jersey  | A 3753   | Provides for mandatory forfeiture of retirement benefits of elected officials convicted of crime involving office held.   |
|   |             | A 3990   | Requires that public officers or public employees convicted of crimes involving their office or employment be sentenced to mandatory prison terms and forfeit pension benefits.   |
| Tennessee   | SB 2414     | Limits retirement benefits to all state employees or officials convicted of a felony arising out of such person's employment or official capacity.   |   |
| 2006  | Illinois    | HB 159   | Provides that a person who is convicted of any felony relating to, arising out of, or in connection with his or her service as a participating member of any retirement system or pension fund may not receive any benefits provided for in Illinois law. |
| 2007  | Connecticut | HB 5980  | Provides for forfeiture of pensions and health insurance benefits of public officials and state employees convicted of felonies arising from their official duties; holds public officials and state employees accountable for their actions.             |
|   | Hawaii      | SB 1070  | Provides for forfeiture of a public employee's pension benefits if the employee is convicted of a felony in connection with his or her duties.  |
|   |             | SB 1089  | Places a question on the general election ballot of whether public employees' retirement benefits may be forfeited for conviction of a felony related to the employee's duties.   |
|   | New York    | A 366  | Provides that an elected public officer who is convicted of a felony pursuant to article 195 or 200 of the penal law shall forfeit all benefits of his position which are paid by his employer, including salary and that portion of his retirement.      |
|   |             | A 3019   | Provides that a member shall forfeit his or her retirement rights and benefits if he or she is convicted of or pleads to certain crimes related to public employment.   |
|   |             | S 1976   | Provides that a member shall forfeit his or her retirement rights and benefits if he or she is convicted of or pleads to certain crimes related to public employment.   |
| Oregon  | HB 2492     | Provides that full value of beneficiary's interest in the retirement plan is subject to execution for purpose of satisfying judgment for restitution in criminal action if defendant was convicted of felony, judgment of restitution is in favor of defendant's employer and retirement plan was at least partially funded by contributions made by employer that was victim of the felony. |   |
| <b>Sources:</b> National Conference of State Legislatures, State Legislation Database on Ethics Issues, <a href="http://www.ncsl.org/programs/ethics/ethicsbills.cfm">http://www.ncsl.org/programs/ethics/ethicsbills.cfm</a> ; LexisNexis; and individual state web sites. |             |  |   |

## CONSTITUTIONAL PROVISIONS IN OTHER STATES

Using *Lexis*, we searched the constitutions of the states identified in Tables 1 and 2 for provisions similar to those found in Article 12, Sections 6 and 7 of Alaska's constitution, which restricts the diminishment of pay or retirement benefits.<sup>2</sup> We identified four states—Illinois, Michigan, New York, and Pennsylvania—with similar provisions to those found in Alaska. Please use caution when considering this information, as there can be a great deal of disparity between the state constitutions with respect to references to public employee benefits. We include, as Attachment C, copies of the constitutional provision from each of these four states, as well as any case notes offered by our source of this information, *Lexis*.

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I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

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<sup>2</sup> We searched the Constitutions of California, Connecticut, Florida, Georgia, Hawaii, Illinois, Massachusetts, Michigan, Missouri, New York, New Jersey, Oregon, Pennsylvania, Rhode Island, Texas, Tennessee, Virginia, and Wyoming.

# FISCAL NOTE

**STATE OF ALASKA**  
**2007 LEGISLATIVE SESSION**

Fiscal Note Number: SB110-DOA-RB-03-22-07  
 Bill Version: SB110  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_  
 Title An act relating to Public employees retirement  
benefits

Dept. Affected: Administration  
 RDU Centralized Administrative Services  
 Component Retirement and Benefits

Sponsor Senators Therriault, Dyson, Wagoner, Bunde  
 Requester \_\_\_\_\_

Component No. 64

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2008     | FY 2009    | FY 2010    | FY 2011    | FY 2012    | FY 2013    |
|------------------------|-------------|------------|------------|------------|------------|------------|
| Personal Services      |             | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Travel                 | 0.0         | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Contractual            | 58.8        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Supplies               | 0.0         | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Equipment              | 0.0         | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Land & Structures      | 0.0         | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Grants & Claims        | 0.0         | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Miscellaneous          | 0.0         | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| <b>TOTAL OPERATING</b> | <b>58.8</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> |

|                             |     |     |     |     |     |     |
|-----------------------------|-----|-----|-----|-----|-----|-----|
| <b>CAPITAL EXPENDITURES</b> | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
|-----------------------------|-----|-----|-----|-----|-----|-----|

|                               |     |     |     |     |     |     |
|-------------------------------|-----|-----|-----|-----|-----|-----|
| <b>CHANGE IN REVENUES ( )</b> | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
|-------------------------------|-----|-----|-----|-----|-----|-----|

**FUND SOURCE** (Thousands of Dollars)

|   |             |            |            |            |            |            |
|---|-------------|------------|------------|------------|------------|------------|
| 1029-PERS                               | 58.8        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| 1003 GF Match                           | 0.0         | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| 1004 GF                                 | 0.0         | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| 1005 GF/Program Receipts                | 0.0         | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| 1037 GF/Mental Health                   | 0.0         | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Other (Specify Type--Do not abbreviate) | 0.0         | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| <b>TOTAL</b>                            | <b>58.8</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> |

Estimate of any current year (FY2007) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

**POSITIONS**

|           |  |  |  |  |  |  |
|-----------|--|--|--|--|--|--|
| Full-time |  |  |  |  |  |  |
| Part-time |  |  |  |  |  |  |
| Temporary |  |  |  |  |  |  |

**ANALYSIS:** (Attach a separate page if necessary)

An Act denying public employee retirement pension benefits to legislators, legislative directors, and public officers and employees who commit certain offenses, and adding to the duties of the Alaska Retirement Management Board and to the list of matters governed by the Administrative Procedure Act concerning that denial."

Costs are attributed to Sec.310(d) which stipulates benefits may be awarded to a dependent or former spouse. This requires the creation of a second account and the costs are a one-time programming cost.

Prepared by: Melanie Millhorn, Director  
 Division: Retirement and Benefits  
 Approved by: Rachael Petro, Deputy Commissioner  
 Agency: Department of Administration

Phone 465-2200  
 Date/Time 3/22/07 4:15 PM  
 Date 3/23/2007 2:45pm

# LEGAL SERVICES

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## MEMORANDUM

March 12, 2007

**SUBJECT:** Is it constitutional in Alaska to forfeit a public official's or public officer's pension because the official or officer has been convicted of a felony? (SB 110; Work Order No. 25-LS0725VA)

**TO:** Senator Hollis French  
Attn: Cindy Smith

**FROM:** Dan Wayne  
Legislative Counsel

You have asked for a constitutional analysis of SB 110. The bill raises several constitutional issues. It is not possible to predict with certainty, but the court would probably resolve most of them in favor of the bill.

1. Accrued state retirement benefits shall not be diminished or impaired.

Article XII, sec. 7 of the Constitution of the State of Alaska says:

Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

A right to benefits under a state retirement system vests immediately upon the employee's enrollment in the system.<sup>1</sup> While the retirement system may be changed to permit the pension system to make adjustments, the modifications must be reasonable and any change that results in a disadvantage to employees must be offset by comparable new advantages.<sup>2</sup> Rights that are protected by the constitution include not only the amount of benefits, but also the requirements for eligibility.<sup>3</sup> Both eligibility and amount are at issue in SB 110.

SB 110 would diminish accrued benefits, but only those benefits accrued on or after the date of the criminal offense. An argument can be made that those after-acquired benefits are tainted by the offense, either directly or indirectly, depending on the facts of a case.

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<sup>1</sup> Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska 1981).

<sup>2</sup> Hoffbeck at 1057.

<sup>3</sup> Hoffbeck at 1058.

Collective  
bargaining  
agreement

A state employee, for example, can be terminated instantly upon the discovery of work-related felony conduct. If the employee's felony is undiscovered and the employee continues to work, it may be said that the benefits accrued from the work are not legitimately acquired because they were acquired by the employee's concealment of a work-related felony. The state's interest in maintaining the public's trust in government is substantial. In this type of case, and in others, the court may find that this substantial government interest outweighs a person's constitutional right to an undiminished benefit, particularly when the diminishment is limited as in SB 110.

**2. Equal rights are guaranteed.**

Article I, sec. 1 of the Constitution of the State of Alaska says:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

The court resolves constitutional issues by using a balancing test to weigh the state's interest against the interest of the person or persons impacted by the state's proposed action. The test used depends on the constitutional provision at issue.

[T]he Alaska Constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment. To implement Alaska's more stringent equal protection standard, we have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at stake: first, we determine the weight of the individual interest impaired by the classification; second, we examine the importance of the purposes underlying the government's action; and third, we evaluate the means employed to further those goals to determine the closeness of the means-to-end fit.<sup>4</sup>

In this instance it can be argued that persons who may be subject to forfeiture if the bill becomes law -- legislators, legislative directors, and public officers<sup>5</sup> -- are entitled as much as other persons to enjoy the rewards of their own industry, in this case a pension. SB 110 creates a special class of person and denies them something all persons in the state are guaranteed; therefore, in order to survive a challenge if it becomes law, it will

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<sup>4</sup> Malabed v. North Slope Borough, 70 P.3d 416, 420 - 421 (Alaska 2003).

<sup>5</sup> In the bill, "public officer" means: a public employee, a member of a board or commission, or a state officer designated by the governor to act as trustee of the trust or a person to whom the trustee has delegated trust duties.

have to withstand the highest of the three levels of scrutiny in the three-part balancing test applied by the court.<sup>6</sup>

**3. Cruel and unusual punishment is prohibited.**

Article I, sec. 12 of the Constitution of the State of Alaska says:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

Our courts have found this section entitles a convicted offender to a fair sentence. In fashioning a fair sentence, judges are required to take into consideration a number of things, including the ones listed in this section, but also things like the offender's prior criminal history or lack of one, the need to deter others from offending, and the principle that sentences for like offenders should be similar. Our court is not likely to find that constitutional fairness requirements at sentencing can be relaxed because the state's interest in preserving public trust in government is so great as to outweigh the right of a legislator or public official to a fair sentence; however, in the civil case the person would arguably have less at stake than freedom from incarceration. The court could find that a person's right to a pension is outweighed, in the context of a felony-based pension forfeiture, by the governmental interest at stake.

In a criminal forfeiture, property is taken before conviction occurs and often not returned unless the state fails to prove the criminal case. In SB 110 forfeiture is not automatic. For example, it will not occur unless a hearing officer hears evidence and argument in a new civil proceeding, separate from the criminal case, under the Administrative Procedure Act. The state will have to prove that the conduct upon which the conviction was based was "in connection with the person's official duties."<sup>7</sup>

**4. No conviction shall work corruption of blood or forfeiture of estate.**

Part of art. I, sec. 15 of the Constitution of the State of Alaska says, in part: "No conviction shall work corruption of blood or forfeiture of estate." This stands for the principle that the punishment for a crime should not reach beyond the offender, or affect the right to property that has been acquired legitimately. SB 110 allows some or all of a

<sup>6</sup> For example, the Alaska Supreme Court has said Alaska has a substantial governmental interest in campaign finance reform that justifies some restriction on First Amendment freedoms. *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), cert. denied, 528 U.S. 1153, 120 S. Ct. 1156 (2000).

<sup>7</sup> Under the evidence rules described in AS 44.62.460 of the Administrative Procedure Act, the state would have the burden of proving its case by a preponderance of the evidence.

**Senator Hollis French**

**March 12, 2007**

**Page 4**

pension that would otherwise be forfeited to be awarded to dependents of the convicted person, as the hearing officer determines.<sup>8</sup> This partially addresses the constitutional issue concerning the forfeiture's reach beyond the convicted person, and SB 110 would probably be upheld with regard to that issue. SB 110 also protects from forfeiture benefits accrued before the date of the offense. This makes it less vulnerable to a constitutional challenge on the basis that legitimately acquired benefits are at stake.

You asked if the term "dependent," on page 2, line 23, includes a spouse. The terms "dependent" and "spouse," which appear in the bill in AS 37.10, are not defined in SB 110, and therefore it would be up to the hearing officer or the court to interpret their meaning. Since SB 110 relates to pension forfeiture, to the extent the legislature does not take the opportunity to clarify the term "dependent," a hearing officer or court would likely refer first to words and phrases applicable to the general pension provisions for public employees, codified in AS 39.35.010 - 39.35.680 (defined benefits) and AS 39.35.700 - 39.35.990 (defined contributions). In both instances, "dependent" appears as a modifier of "child" in the phrase, used throughout the chapter, "dependent child"; in the same body of material, AS 39.35, a "spouse" is referred to as a "surviving spouse." The differences between AS 39.35 and the bill's choice of the term "dependent" provides no definitive clue as to what the legislature is intending. At least arguably, it is more likely than not that the hearing officer or court would equate the rights of a "surviving spouse" as at least the equivalent of the rights accorded to a "former spouse" and make some provision for payment of a partial reward to a current spouse. If that is the outcome, then the administrative officer or court would in effect be extending to the "current spouse" the status of a "dependent," notwithstanding the absence of a clear statement on the point.

Rather than leave the outcome to chance, while the bill is under consideration, the legislature should step up and clarify direction on this point.

Finally, in reviewing the bill for this memo it occurred to me that the term "convicted," on page 2, line 7, might need to be defined in order to avoid confusion about its meaning in situations involving appeals, conviction reversals, plea-bargains, suspended imposition of sentences, and pardons. There might be a particular constitutional issue, and other legal and logistical problems, in connection with a forfeiture in any one of these situations. A definition might say: under this section a person is convicted if they have been sentenced and the time or filing of a merit appeal has expired; however, a person is not convicted if pardoned by an act of executive clemency or if the trial court order or judgment of conviction is reversed or expunged.

If I may be of further assistance, please advise.

DCW:ljw  
07-128.ljw

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<sup>8</sup> SB 110 could be clearer as to whether or not a dependent has the same right to a hearing or an appeal as the convicted legislator does.