

**BLANCHE T. EYERS,**  
Petitioner,  
v.  
**BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES’  
RETIREMENT SYSTEM,**  
Respondent.

Decided February 25, 1980

**Initial Decision**

SYNOPSIS

Petitioner, the wife of a deceased public employee, appeals from a decision of the Public Employees’ Retirement System denying her pension survivorship benefits due to the alleged dishonorable service of her husband, who had been convicted of a crime involving moral turpitude.

While recognizing that decedent’s convictions rendered his service dishonorable, making him, if living, ineligible for benefits, the administrative law judge determined that the Legislature did not intend to punish an employee’s designated beneficiaries by a complete loss of pension benefits. No significant lessening of the “inducement” to render honorable service would result from a holding that an innocent beneficiary is entitled to survivorship benefits. Noting that pension statutes are remedial in nature and thus should be liberally construed and administered in favor of the individuals intended to be benefited, the administrative law judge determined that petitioner should receive survivor benefits computed on the basis of decedent’s service up until the time of his misconduct.

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**Stephen S. Weinstein, Esq.**, for Petitioner

**Prudence H. Bisbee**, Deputy Attorney General for Respondent, (John J. Degnan, Attorney General of New Jersey, Attorney)

**MILLER, ALJ:**

Blanche T. Eyers (petitioner), widow of the late Roger F. Eyers (decedent), appeals from a decision of the Board of Trustees of the Public Employees’ Retirement System denying her survivorship benefits on account of the alleged dishonorable service of her deceased husband.

On June 28, 1979, this matter was referred to the Office Administrative Law as a contested case, pursuant to *N.J.S.A. 52:14F-1 et seq.* A hearing was held on January 17, 1980. At the hearing, the court requested

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memoranda of law from counsel. Deputy Attorney General Bisbee declined to submit any memorandum on behalf of the Board of Trustees. Petitioner's attorney, however, filed a memorandum of law with the court on February 21, 1980, which date is taken to be the date that the hearing was concluded.

Petitioner was the only witness to testify at the hearing. She declared that she married decedent in 1950 and is his widow and sole survivor. There were no children born of the marriage. She is 74 years old and lives in the same five-room home in Morris Plains, New Jersey, which she and her late husband first built and occupied in 1950. Petitioner was dependent on decedent, not having been gainfully employed during her marriage.

In or about 1965, according to petitioner, her husband retired from his job in the private sector and became a full-time plumbing inspector for the Township of Parsippany-Troy Hills. Prior to 1965, decedent had worked for the Township on a part-time basis. Altogether, decedent had worked as a plumbing inspector for Parsippany-Troy Hills for 38 years prior to his retirement. Before decedent was indicted in 1978, there was never any suggestion of impropriety or illegality on his part. Quite to the contrary, decedent had been a respected citizen of the community, having been elected as a member of the Board of Directors of the Par-Troy Bank, active in a number of charitable and social organizations, and having been honorably discharged after military service in World War II.

Petitioner stated that she now receives \$531.70 per month from Social Security as well as dividends (unspecified in amount) which she receives from stock which she owns in three banks. She owns a 1970 automobile. She is covered by Medicare and, in addition, has her own health insurance policy. From the time of decedent's retirement in early 1976, until his death in May 1979, she and decedent lived entirely on their Social Security payments plus his monthly retirement allowance. Prior to his death, decedent was seriously ill, underwent two operations, and spent a total of twenty-two days in the hospital. Many of the extensive medical bills thus incurred were paid by Medicare and insurance, but petitioner was still required to pay from her own resources medical bills running "into the thousands" of dollars. Upon her husband's death, petitioner collected \$1500 of insurance proceeds from a policy which decedent had obtained through his former private employer and \$1,000 from an insurance policy written by Metropolitan Life Insurance Company. She has received nothing in the way of insurance or other benefits from PERS or the State of New Jersey, which she feels she needs because of the possibility of future illness or incapacity.

Petitioner acknowledged that she is not now under a doctor's care; that she feels "pretty good"; that she eats "adequately"; that so far she has been

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able to pay her bills; and that "right now" she is not having financial problems.

Based upon the testimony of petitioner, the stipulations made by counsel, and the joint exhibits admitted into evidence, I make the following **FINDINGS OF FACT:**

1. Decedent's date of birth was June 23, 1906.
2. Decedent served in the military service of the United States from November 18, 1942 to October 3, 1945 and obtained "veteran" status for purposes of pension statutes.
3. Decedent's employment as plumbing inspector for the Township of Parsippany-Troy Hills, was terminated by retirement on December 31, 1975, at which time he had accumulated 38 years of service with this employer.
4. Decedent's discharge from military service was honorable.
5. The total base salary earned by decedent during his last year of employment (1975) for Parsippany-Troy Hills was \$12,596.
6. Decedent was enrolled in the Public Employees' Retirement System (PERS) effective January 1, 1955.
7. On December 10, 1975, decedent executed and subsequently filed an Application for Service Retirement, on which he elected to retire, effective February 1, 1976, under an Option II type retirement, designating his wife Blanche T. Eyers as his beneficiary for any benefits due after his death.
8. Decedent's pension contributions for the last three quarters of 1975 totalled \$315.54.
9. On February 4, 1976, the Board of Trustees approved decedent's application for service retirement effective February 1, 1976, with an Option II selection.
10. Decedent's monthly retirement allowance totalled \$441.61, consisting of a pension portion of \$401.86 and an annuity portion of \$39.65; decedent contributed a total of \$4,177.13 towards the aforesaid allowance.
11. Under the Option II type of retirement selected by decedent, there was provided an annual survivorship benefit of \$5,299.32 and an insurance benefit of \$2,361.75 (payable if decedent died after age 60).
12. In or about 1978 decedent was indicted by a State Grand Jury in Morris County (Indictment No. SGJ 45-78-1 (2)) on one count of misconduct in office (*N.J.S.A.* 2A:85-1) and three counts of taking money unlawfully (*N.J.S.A.* 2A:105-1); said illegal acts allegedly having occurred between April 1, 1974 and June 25, 1975.
13. On May 16, 1978, decedent was found guilty by a jury of all four counts of the indictment. On June 23, 1978, the court vacated the conviction

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of misconduct in office on the ground that it had merged with the three separate offenses for taking money unlawfully. On each of the three offenses for taking money unlawfully, decedent was sentenced to jail for 364 days, sentence suspended, placed on probation for two years, and fined \$1,000.

14. On March 15, 1978, the Board of Trustees considered suspending decedent's retirement allowance as a result of the aforesaid indictment, notifying decedent by letter, dated March 22, 1978, and advising him of his right to a hearing prior to "the formal suspension" of his pension.

15. On May 5, 1978, decedent's attorney advised the Board of Trustees of decedent's disagreement with any suspension of his retirement allowance and requested a hearing.

16. By letter, dated May 26, 1978, the Board of Trustees advised decedent's attorney that the matter had been referred to the senior hearing officer of the Division of Pensions.

17. Decedent died on May 9, 1979.

18. By letter, dated May 16, 1979, decedent's attorney advised me (at the time senior hearing officer of the Division of Pensions) that decedent had "passed away during the last week" and stated that he would like to be informed "in writing that this matter is now disposed of."

19. By letter, dated May 24, 1979, decedent's attorney advised that decedent's appeal was being withdrawn "solely with the understanding that it will not affect the rights of the widow, Blanche Eyers, to receive any and all benefits to which she would be entitled."

20. On June 20, 1979, the Board of Trustees determined that decedent's service was "dishonorable in view of the fact that he was convicted of a crime which constituted moral turpitude," and, therefore, that there would be no survivorship benefits payable to petitioner. Decedent's attorney was notified of said determination by letter, dated June 28, 1979.

21. Decedent collected his retirement allowance on a monthly basis until May 1, 1979. The total amount of money received by decedent by way of retirement allowance until March 1, 1978, was \$11,040.25.

22. Petitioner is the widow and sole survivor of decedent, was substantially dependent upon him during his lifetime, and is the designated beneficiary of all pension and insurance benefits payable by PERS.

The issues to be resolved in this matter are:

(1) Did decedent's conviction of misconduct in office and taking money illegally constitute dishonorable service and thereby disentitle him to pension benefits?

(2) If so, should petitioner, as decedent's designated beneficiary, be denied the pension and insurance benefits to which she would otherwise be

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entitled?

The first issue noted above must be answered in the affirmative. Honorable service is a *sine qua non* for the granting of a pension. *Plunkett v. Pension Comm'rs of Hoboken*, 113 N.J.L. 230, 232 (Sup. Ct. 1934), aff'd 144 N.J.L. 230 (E. & A. 1953). That this statute does not explicitly by its terms make honorable service a condition precedent to the granting of a pension is of no consequence. It is settled law that such a requirement is implicit therein. *Ballurio v. Castellini*, 27 N.J. Super. 113 (Law Div. 1953), aff'd 29 N.J. Super. 383 (App. Div. 1954); *Fromm v. Board of Directors of PFRS*, 87 N.J. Super. 138 (App. Div. 1963). It has been consistently held that even though a person serves honorably for the minimum number of years set forth in the statute, no vested property right to a pension accrues. The requirement of honorable service has been held to continue during the entire period of active service. See, *Plunkett v. Commrs. of Hoboken*, *supra*,; *Hozer v. State, etc., Police & Firemens' Fund*, 95 N.J. Super. 166 (App. Div. 1967). Furthermore, dishonorable service may be found in an activity totally unrelated to public employment, if that activity involves moral turpitude. So, in *Ballurio v. Castellini*, *supra*, a city employee was denied retirement on pension because of his conviction of the then crime of performing an abortion, even though he satisfied statutory requirements of age and service.

Generally, condemnation of the inculpatory act sufficient to cause loss of pension rights is found in cases where the conduct touches the administration of the employee's office or position, or where the conduct is said to involve moral turpitude. *Gauli v. Board of Trustees, Police & Firemens' Retirement System*, 143 N.J. Super. 480 (App. Div. 1976).

Clearly, the crime of misconduct in office not only "touched," but went to the heart of, the administration of decedent's duties and position as Plumbing Inspector for the Township. So, too, did the crime of taking money unlawfully; as alleged in the second, third and fourth counts of the indictment, decedent "by color of his public office, willfully and unlawfully did receive and take (from named persons) a sum of money . . . being a fee and reward not allowed by law . . . for performing his duties as a public officer. . . ."

Under the well settled case law cited above, decedent's convictions render his service as plumbing inspector dishonorable and thus would disentitle him, if he were living, to pension benefits.

## II.

The second issue is more difficult. I am not aware of any New Jersey case on point. Counsel for the Board of Trustees argued that, as decedent's

beneficiary, petitioner in effect stands in his shoes and that her rights can rise no higher than his.

Under contract theory, petitioner may be said to be a third party beneficiary. A party cannot enforce provisions of a contract to which he is not privy, unless it is clear that the parties to the contract first intended to confer upon him the right to enforce it. *First National State Bank v. Carlyle House, Inc.*, 102 N.J. Super. 300 (Ch. Div., 1968), aff'd 107 N.J. Super. 389 (App. Div. 1969). A third party creditor beneficiary may have enforceable rights created by a contract even though he is not the sole person to be benefited by performance. *Republic Factors, Inc. v. Carteret Work Uniforms*, 24 N.J. 525 (1957). In ascertaining the rights of a third party beneficiary, the primary concern is to discover the intention of the parties to the contract out of which the third party rights emanate. *Graybar Electric Co. v. Continental Casualty Co.*, 50 N.J. Super. 289 (App. Div. 1958). But it is well settled in contract law that if a promise is conditional upon performance of some act or conduct by the promisee, the promisor is not bound unless that condition is met. See, *Duff v. Trenton Beverage Co.*, 4 N.J. 595 (1950); *State Farm Mutual Auto Insurance Co., v. Anderson*, 70 N.J. Super. 520 (App. Div. 1962); *Moorestown Management Inc. v. Moorestown Book Shop Inc.*, 104 N.J. Super. 250 (Ch. Div. 1969).

Thus, if it is assumed that a contract was made between decedent and PERS whereby decedent agreed to render service to his employer for a certain number of years and to make contributions to the system, and that in return PERS promised to pay him a retirement allowance with certain survivorship benefits to his designated beneficiary, and if the benefits were *conditioned upon* the rendering by decedent of honorable service, it is clear, under strict contract law, that the promise of PERS to pay these benefits is not enforceable by petitioner because the condition precedent of "honorable service" had not been met.

Nevertheless, as pointed out by Judge Conford in his carefully analyzed and well reasoned concurring opinion in *Makwinski v. State*, 76 N.J. 87, 96 (1978), the concept of the nature of public pensions has changed. It is no longer considered a reward by the State. Rather, pensions are a form of "delayed wages or salary to compensate the employee during his declining years. . . ." *Watt v. Mayor and Council of Borough of Franklin*, 21 N.J. 274 (1956). The State's contribution to a pension fund compensates in part for services already rendered and is also a reward for services to be rendered over the required minimum number of years. In both respects, the contribution is *compensatory* in nature. *Spina v. Consolidated Police, etc. Pension Fund Commission*, 41 N.J. 391, 401 (1964).

The cases under Point I – which deny pensions to persons whose service

has been deemed “dishonorable” by reason of misconduct in office or conviction of a crime of moral turpitude – are based on the rationale that public pensions “are an inducement to conscientious and efficient public service, which inducement would be immeasurably lessened if the employee could assert an indefeasible claim to the pension simply because the dishonorable conduct occurred after the employee had served the minimum number of years of service.” *Makwinski v. State*, 76 *N.J.* 87, 90 (1978) (majority opinion).

However, as noted by Judge Conford in the *Makwinski* case, the crucial question is one of legislative intent, *i.e.*, in the context of the pension statutes, to what extent did the Legislature intend to penalize an employee or his beneficiaries for his violations of the honorable service requirement. The majority in *Makwinski* found that the case was “unique on its facts” and ruled that the petitioner was entitled to a pension based upon his years of service until the time when his misconduct occurred. In reaching this decision, the majority found no corrupt motive or intent on the petitioner’s part and noted the disparity between the \$250 fine imposed on the criminal conviction and the potential loss of pension rights worth more than \$150,000. In his concurrence Judge Conford also pointed out the unfairness of a total forfeiture of pension rights under the circumstances, saying that the “‘punishment simply does not fit the crime’ – or at least not to the extent that we should assume the Legislature intended to impose it without so expressly declaring.” (at 97)

I am of the opinion that the Legislature never intended that the employee’s widow, children or other designated beneficiaries be punished by the complete loss of pension benefits worth many thousands of dollars. I can perceive no significant lessening of the “inducement” to render honorable service if it were held that the innocent spouse or children of a deceased employee is entitled to the survivorship benefits provided by the pension system. I can see no justice or reasons of sound public policy in visiting the sins of the employee upon his dependent spouse or children – and it is highly doubtful that the Legislature did either.

Indeed, the pension statutes clearly reflect a legislative concern for the spouse or other dependents of the public employee. *N.J.S.A.* 43:1-2, for example, prohibits the payment of a public pension “to any person for the period during which he is confined in a penal institution as a result of a crime involving moral turpitude,” but specifically allows “the payment of the pension for the sole benefit of the mother, father, wife or minor children of the person so confined,” if such pension is necessary for their maintenance. *See also*, *N.J.S.A.* 43:15A-49 (providing for the payment of very substantial benefits to the widow, widower, children or parents of a

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member who died as a result of an accident met in the actual performance of duty).

Finally, it must be remembered that pension statutes are remedial in character and, therefore, should be liberally construed and administered in favor of the persons intended to be benefited thereby. *Geller v. Department of the Treasury*, 53 N.J. 591, 597-598 (1969). In my judgment, the preponderance of the equities are with petitioner, and she should not be penalized so harshly for the misconduct of her late husband. See, *Geller v. Department of the Treasury*, *supra*, at 600. In balancing the equities and the considerations of public policy, as did the Supreme Court in *Makwinski*, *supra*, the scales tip in the petitioner's favor.

In accordance with the holding in *Makwinski*, *supra*, however, petitioner's benefits should be computed on the basis of decedent's service only until his misconduct in office commenced, *i.e.*, April 1, 1974, so that petitioner does not benefit pension-wise from service constituting misconduct thereafter.

In short, I **CONCLUDE** that the Legislature did not intend to deny survivorship benefits under the Public Employees' Retirement System Act to the beneficiary of a deceased member who did not meet the "honorable service" requirement, and, therefore, that petitioner is entitled to such benefits.

No opinion is expressed, or decision made, on the question of whether the Board of Trustees can recoup from decedent's estate the monies paid to decedent as a service retirement allowance prior to his death, since that question was not raised or considered by the Board of Trustees.

Accordingly, it is hereby **ORDERED** that the Board of Trustees pay to petitioner the Option II allowance provided by N.J.S.A. 43:15A-50 and the death benefit provided by N.J.S.A. 43:15A-48(c), said payment to be calculated on the basis of decedent's service until April 1, 1974.

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After reviewing this Initial Decision the Board of Trustees of the Public Employees' Retirement System on March 21, 1980 issued the following Final Decision:

The Board of Trustees of the Public Employees' Retirement System disagrees with Administrative Law Judge Miller's conclusion of law, "that the legislation did *not* intend to deny survivorship benefits under Public Employees' Retirement System not to the beneficiary of the deceased member who did not meet the 'honorable service' requirement, and therefore, that Petitioner is entitled to such benefits."

The decedent being convicted of a crime of taking money unlawfully,

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failed to meet the prerequisite of "honorable service." Thus the beneficiary designated by the decedent has no survivorship rights to his retirement benefit.