EDMUND A. GRIMES,
Petitioner,

v.

BOARD OF TRUSTEES OF
THE PUBLIC EMPLOYEES’
RETIREMENT SYSTEM,
Respondent.

Initial Decision: July 13, 1984 Final Agency Decision: August 15, 1984

Approved for Publication by the Director of the Division of Pensions,
Douglas Forrester: March 6, 1985

SYNOPSIS

The Board of Trustees of the Public Employee’s Retirement System
denied petitioner’s application for a deferred retirement pursuant to
N.J.S.A. 43:15A-38 and after petitioner’s request for a hearing the
matter was transmitted to the Office of Administrative Law as a con-
tested case.

The administrative law judge assigned to the case found that peti-
tioner had been a member of the retirement system since April 1, 1970
upon his employment as a city councilman. Petitioner became a double
enrollee in the system on July 1, 1974 when he began employment with
the county as a purchasing agent. In July, 1981, a Federal grand jury
charged petitioner with criminal activity pursuant to a five count indict-
ment and in February of 1982, petitioner was found guilty on all counts.
Petitioner resigned from his position as a city councilman in February of
1982. In March of 1982 petitioner was sentenced to eight years in prison
which was subsequently reduced to one year based upon petitioner’s
ongoing cooperation with the United States Attorney’s Office.

The administrative law judge determined that N.J.S.A. 43:15A-38
provides that should a member of the retirement system be removed for
cause, he may not elect to receive his deferred retirement benefits and
the pension is forfeited.

As to the position of city councilman, petitioner argued that he was
not precluded from receiving a deferred retirement allowance by virtue
of the removal for cause provisions because he voluntarily resigned from
that position one month before sentencing, which was the effective date
of his removal from office pursuant to N.J.S.A. 2C:51-2.
The judge rejected this argument noting that to read the provisions of *N.J.S.A.* 2C:51-2b in connection with *N.J.S.A.* 43:15A-38 to permit a public employee to resign after a jury verdict or plea of guilty and before sentencing in order to avoid the forfeiture provisions of *N.J.S.A.* 43:15A-38 would be to create an absurd result.

The judge noted that even if appellant were not disqualified from receiving deferred retirement benefits by virtue of his "removal for cause", would nevertheless be prevented from claiming those benefits because of having failed to complete 10 years of service in the system.

Upon review, this decision was adopted by the Board of Trustees of the Public Employees' Retirement System.

Steven D. Altman, Esq., for appellant (Benedict and Altman, attorneys)

David M. Katzenstein, Deputy Attorney General, for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

Initial Decision

DUNCAN, ALJ:

This matter concerns the appeal of Edmund A. Grimes from the October 18, 1983 decision of the Board of Trustees of the Public Employees' Retirement System wherein it denied his application for deferred retirement pursuant to *N.J.S.A.* 43:15A-38. By letter dated November 17, 1983, petitioner's counsel requested a hearing on his behalf, and on December 19, 1983, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

Hearing dates which were scheduled for March 19, 1984 and March 30, 1984, were adjourned at the request of petitioner's counsel. The matter was rescheduled and was heard on May 3, 1984, at the Trenton office of the Office of Administrative Law. Following the conclusion of testimony, the record remained open for written submissions. Petitioner's letter memorandum was received on May 17, 1984. Respondent's letter memorandum was received on May 31, 1984, whereupon the record closed.

**FINDINGS OF FACT**

Prior to the commencement of testimony, the following stipulations were made by and between counsel.

1. Petitioner's date of birth is February 25, 1928.
2. Petitioner commenced employment as a city councilman with the town of Kearny on November 30, 1969. His permanent appointment and date of enrollment in the Public Employees' Retirement System with respect to that position was April 1, 1970.

3. Petitioner commenced employment as a purchasing agent with the County of Hudson and became a dual enrollee in PERS on July 1, 1974.

4. Petitioner last contribution into PERS was made approximately on March 1, 1982.


6. On March 12, 1982, petitioner filed his application for deferred retirement. Such application was filed in a timely manner.

7. Because of pending litigation, respondent did not act upon the application until October 25, 1983.

8. At all times during his employment with the town of Kearny and with the County of Hudson, petitioner made the necessary contributions to PERS.

9. In evidence, as a joint exhibit, is a copy of a criminal indictment issued against petitioner in the United States District Court for the District of New Jersey on July 20, 1981. Also in evidence, a copy of petitioner's letter of resignation to the Town of Kearny, dated February 10, 1982, is a joint exhibit as well.

In addition to the foregoing stipulations, the remaining relevant facts are not in dispute, and I therefore FIND the following as uncontested facts.

On or about July 20, 1981, the United States District Court Grand Jury in and for the District of New Jersey charged petitioner with criminal activity pursuant to a five-count indictment. The indictment alleged that commencing in November 1979, petitioner had committed the following criminal acts: conspiracy to commit extortion, attempted extortion, extortion, and obstruction of justice by concealing information and conveying false information to federal law enforcement agents in conjunction with a grand jury investigation. In early February 1982, after a trial on the merits, a jury of his peers found petitioner guilty on all counts.

On February 10, 1982, petitioner submitted the following letter of resignation to the Kearny Town Clerk:

As I had stated at the first council meeting after the Federal indictment was issued that one of two things would happen; a jury comprised of my peers would either find me guilty or innocent. After a fair and impartial trial my
peers have found me guilty. In order to save the Town of Kearny any further embarrassment due to this verdict, I hereby render my resignation, effective immediately as Councilman from the First Ward, Town of Kearny.

Petitioner did not submit a letter of resignation to Hudson County or otherwise resign from his position as purchasing agent.

On or about March 16, 1982, petitioner was sentenced by the Honorable Herbert J. Stern, U.S.D.J., to a term of eight years in prison which commenced immediately thereafter. A second sentencing hearing in April of 1982, failed to result in an altered sentence for petitioner, and he returned immediately to prison. Thereafter, in return for petitioner’s voluntary cooperation with the United States Attorney, which cooperation resulted in indictments being issued against Harold Ruvoldt, the Hudson County Prosecutor, and James Testa, a former Kearny Township Councilman, and guilty pleas being entered by several developers and construction company owners in Kearny, the United States Attorney’s Office did not oppose petitioner’s motion for resentencing. Upon resentencing, petitioner received a sentence of one year for time served and was released on February 7, 1983.

Petitioner maintains an ongoing relationship with the United States Attorney’s Office, in that he has agreed to be on call to cooperate in future matters.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 43:15A-38, the statute pursuant to which the petitioner filed his application for deferred retirement, provides in pertinent part:

Should a member of the Public Employees’ Retirement System, after having completed 10 years of service, be separated voluntarily or involuntarily from the service, before reaching service retirement age, and not by removal for cause on charges of misconduct or delinquency, such person may elect to receive:

(a) The payments provided for in section 41b. of this act, if he so qualifies under said section or;

(b) A deferred retirement allowance, beginning at the retirement age.

It is clear from the language of the statute that if a member is removed for cause on charges of misconduct or delinquency, he may not elect to receive his deferred retirement benefits, and the pension is forfeited. Recognizing that the Legislature has provided for absolute forfeiture of benefits in these circumstances, the Supreme Court in the recent case Uricoli v. Police and Firemen’s Retirement System, 91 N.J. 62, 74-75, (1982) discussed the possible rational reasons for singling out early retirement benefits as the only occasion on which to attach an express provision for forfeiture. The Court noted that early retirement
forced by removal for cause differs from the case of an employee who has retired in due course and is subsequently found to have committed a misdeed. Accordingly, if petitioner was removed for cause, he may not elect to receive the benefits provided by N.J.S.A. 43:15A-38.

Petitioner argues that he was not removed for cause because he submitted his resignation prior to March 16, 1983, the date of sentencing. N.J.S.A. 2C:51-2, the statute which provides for forfeiture of public office as the result of convictions for certain offenses, states in pertinent part:

a. A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:

(1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime;

(2) He is convicted of an offense involving or touching such office, position or employment; or

b. The forfeiture set forth in subsection a. shall take effect:

(1) Upon finding of guilt by the trier of fact or a plea of guilty, if the court so orders; or;

(2) Upon sentencing unless the court for good cause shown, orders a stay of such forfeiture. If the conviction be reversed, he shall be restored, if feasible, to his office, position or employment with all the rights, emoluments and salary thereof from the date of forfeiture.

The Federal crimes for which petitioner was convicted, conspiracy to commit extortion, attempted extortion and extortion itself, all are crimes of the third degree or above under New Jersey law and/or are offenses involving dishonesty. State v. Musto 187 N.J. Super. 264 (Law Div. 1982), aff'd, 188 N.J. Super. 106 (App. Div. 1983). The conviction for obstruction of justice was pursuant to count five of the indictment which specifically recited that petitioner had willfully conveyed false information, and it, therefore, clearly involved dishonesty. In addition, petitioner's criminal activities involved or touched upon his position as city councilman in that petitioner engaged in the activities as the designated councilman-representative of the Kearny Planning Board. There is no evidence in the record of any court order pursuant to N.J.S.A.
2C:51-2b(1) following the jury verdict, and accordingly, upon sentencing on March 16, 1982, petitioner was automatically removed by operation of law from any public position he then held. Petitioner testified that he had not submitted any resignation concerning his position as purchasing agent in Hudson County prior to his sentencing and incarceration on March 16, 1982. Certainly, therefore, the statute operated to remove petitioner from that position on March 16, 1982. Petitioner's other arguments that he should be permitted to receive pension benefits from his Hudson County service since his conduct was totally unrelated to the Hudson County position are consequently irrelevant and need not be considered.¹

With respect to his position as city councilman, petitioner argues that he is not precluded from receiving a deferred retirement allowance by virtue of the "removal for cause" provision in the statute because he severed that employment relationship himself by resignation on February 10, 1982. Respondent argues that petitioner's resignation must nevertheless be deemed "removal for cause" barring the granting of a deferred retirement because had petitioner not resigned, the Legislature had provided for his removal at virtually the same point in time anyway.

It is clear from petitioner's testimony and from the text of his letter of resignation that petitioner resigned his position of city councilman only after the jury had rendered a guilty verdict. N.J.S.A. 2C:51-2b (1) provides that a forfeiture of the public position will occur following the finding of guilt by the trier of fact only if the court so orders. Apparently, in petitioner's case, there was no such order by the court. Therefore, the forfeiture of public office did not take place until March 16, 1982, the date of sentencing and incarceration. Assuming that petitioner's letter of resignation had been accepted by the city council prior to March 16,² the only public position petitioner would have held on March 16th was the Hudson County position.

Research has uncovered no legislative history with respect to the provisions of N.J.S.A. 2C:51-2b from which to discern the purpose of giving the court an option concerning the effective date of the forfeiture. Perhaps the Legislature contemplated situations in which an automatic forfeiture upon the finding of guilt would cause severe disruption

¹ Since petitioner commenced his Hudson County employment in 1974, even if he were not disqualified from filing for a deferred retirement allowance pursuant to N.J.S.A. 43:15A-38 by virtue of his removal for cause, he would nevertheless be precluded from filing by virtue of failing to satisfy the requirement of completing 10 years of service in that position.

² No evidence was offered concerning whether petitioner's resignation was accepted.
to some public body which would then be immediately deprived of any transition period for the removed employee to wind up his duties or put his office in order. In any event, the purpose of providing the court with such discretion was certainly not to permit the submission of a resignation and filing of an application, pursuant to N.J.S.A. 43:15A-38, during the period between the finding of guilt and the sentencing. The drafters of N.J.S.A. 43:15A-38 which was enacted in 1966 could not have contemplated this potentially anomalous result arising from the provisions of the forfeiture statutes, since these provisions were added to the criminal law in 1979 when N.J.S.A. 2C replaced the former provisions of N.J.S.A. 2A. Under N.J.S.A. 2A:135-9, the forfeiture of public office took place upon the date of conviction or entry of plea.

To read the provisions of N.J.S.A. 2C:51-2b in connection with N.J.S.A. 43:15A-38 to permit a public employee to resign after a jury verdict or plea of guilty and before sentencing in order to avoid the forfeiture provisions of N.J.S.A. 43:15A-38 would be to create an absurd result. On February 10, 1982, when petitioner submitted his resignation, his removal for cause was an absolute certainty. It was not a question of whether he would be removed, but rather when he would be removed. Accordingly, I CONCLUDE that petitioner's separation from his employment with the City of Kearny must be deemed removal for cause, barring the granting of a deferred retirement.

Even if petitioner were not disqualified from receiving deferred retirement benefits by virtue of his "removal for cause," he would nevertheless be prevented from claiming those benefits because of his inability to meet the requirement of having completed 10 years of service in the system. Although the statute does not specifically recite that "honorable service" is a qualification for benefits, it has been consistently held that an honorable service qualification is implicit in every pension act. Two recent cases, Masse v. Public Employees Retirement System, 87 N.J. 252 (1981) and Procaccino v. Public Employees Retirement System, 87 N.J. 265 (1981) reviewed the history and the policy of the honorable service requirement. In Massa and Procaccino, the court held that conviction of a crime, even involving moral turpitude, does not result in forfeiture of vested pension rights so long as the misconduct was unrelated to the public employment in question. In Uricoli v. Police and Firemen's Retirement System 91 N.J. 62 (1982), the court held that, even where there is a relationship between the particular misconduct at issue and the performance of employment duties, a balancing approach is required in order to determine whether forfeiture is justified under all of the circumstances. The Uricoli Court set forth a flexible test and
enumerated 11 specific factors which should be considered and balanced, explaining:

These factors are illustrative of those which may properly be taken into account in determining the reasonableness of pension forfeiture. They must be balanced and then weighed in terms of the goals to be achieved under the pension laws. The balance to be achieved takes its bearings from the major purposes underlying public pensions—to induce people to enter public employment and continue faithful and diligent employment and to furnish public employees with employment stability and financial security. *Id.*, at 78.

The Court concluded that total forfeiture was not warranted in Uricoli's case, noting that the wrongful act had occurred after 20 full years of honorable service. They further noted that in no event should the calculation of service creditable toward such a pension include the service beyond October 1972, the date of Uricoli's misconduct, despite the actual employment termination date of 1976. In the present matter, petitioner's criminal conduct commenced at least as early as November 1979. Since petitioner's pension rights would have vested only after ten years of honorable service on or about April 1, 1980, and since the calculation of creditable service toward a pension may not include service beyond the date of the misconduct, petitioner has not completed the ten years of service required for filing a deferred retirement allowance application pursuant to *N.J.S.A. 43:15A-38*. Whatever mitigating effect his post-conviction cooperation with the United States Attorney's Office might otherwise have had in performing a balancing test under *Uricoli, supra*, is consequently irrelevant.

For all the foregoing reasons, respondent's denial of petitioner's application for deferred retirement benefits is hereby **AFFIRMED** and the within matter is **DISMISSED WITH PREJUDICE**.

**FINAL DECISION BY THE BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM:**

The Board of Trustees of the Public Employees' Retirement System at its meeting on August 15, 1984 considered the following in his appeal:

a. The transcript of the hearing conducted on May 3, 1984
b. All exhibits

c. The administrative law judge's report dated July 13, 1984
d. The exceptions of the administrative law judge dated July 27, 1984

and by unanimous vote accepted the recommendation of the administrative law judge and affirmed the denial of his application for deferred retirement.
The Board of Trustee's of the Public Employees' Retirement System hereby adopts the findings of fact and conclusion of law of the administrative law judge's report consistent with its original determination and further adopts the recommendations contained in the administrative law judge's report and incorporates the same herein by reference.