

PUBLIC OFFICIALS AND EMPLOYEES—PENSIONS—CRIMES OF MORAL TURPITUDE UNRELATED TO PUBLIC EMPLOYMENT FOUND INSUFFICIENT CAUSE FOR PENSION REVOCATION—*Masse v. Board of Trustees, Public Employees' Retirement System*, 175 N.J. Super. 325, 418 A.2d 1282 (App. Div.), *certif. granted*, No. 17698 (Nov. 10, 1980).

Crimes of moral turpitude, until 1980, were sufficient grounds for forfeiture of public employee pension rights. In *Masse v. Board of Trustees, Public Employees' Retirement System*,¹ the appellate division distinguished these crimes in terms of relation to public employment and resultant incarceration.² Holding that a crime of moral turpitude unrelated to public employment is insufficient cause for revocation,³ the court redefined "honorable service,"⁴ and reduced the discretionary component inherent in pension hearings.⁵

Mr. Masse began service with the Borough of Highlands in 1947.⁶ As Assistant Superintendent of the Water and Sewer Department, he became eligible for early retirement pension benefits by

¹ 175 N.J. Super. 325, 418 A.2d 1282 (App. Div.) *certif. granted*, No. 17698 (Nov. 10, 1980).

² Prior to *Masse*, it was generally held that pensions were revocable "where the criminal conduct touche[d] the administration of the public employee's office or position, or where the conduct involve[d] moral turpitude." *Makwinski v. State*, 76 N.J. 87, 90, 385 A.2d 1227, 1229 (1978). See note 48 *infra*.

³ 175 N.J. Super. at 330-31, 418 A.2d at 1284-85. Moral turpitude has been defined as an "act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Black's Law Dictionary* (4th ed. 1951). . . . But the attempt to apply these definitions to specific criminal acts . . . has demonstrated only the elasticity of the phrase and its necessarily adaptive character, reflective at all times of the common moral sense prevailing throughout the community.

State Bd. of Medical Examiners v. Weiner, 68 N.J. Super. 468, 483-84, 172 A.2d 661, 669 (App. Div. 1961). For a further discussion of moral turpitude, and related cases, see *id.* at 483-85, 172 A.2d at 669-70. See also *Brun v. Lazzell*, 172 Md. 314, 191 A. 240 (1937).

⁴ 175 N.J. Super. at 333, 418 A.2d at 1286. In *Plunkett v. Board of Pension Comm'rs*, 113 N.J.L. 230, 173 A. 923 (Sup. Ct. 1934), *aff'd*, 114 N.J.L. 273, 176 A. 341 (E & A 1935), the court described honorable service as "that [behavior] characterized by or in accordance with principles of honor. One so serving is scrupulously upright, and shows a fine regard for obligations as to conduct." *Id.* at 233, 173 A. at 924.

⁵ 175 N.J. Super. at 328, 418 A.2d at 1283. "The factual finding of dishonorable service for an award of public employee retirement benefits is vested in the Board of Trustees." Brief for Respondent at 12, *Masse v. Board of Trustees, Pub. Employees' Retirement Sys.*, 175 N.J. Super. 325, 418 A.2d 1282 (App. Div.), *certif. granted*, No. 17698 (Nov. 10, 1980).

⁶ 175 N.J. Super. at 327, 418 A.2d at 1283.

1973.⁷ In March of 1976, Mr. Masse's previously uneventful service was interrupted by an indictment for various morals charges under New Jersey Statutes Annotated §§ 2A: 96-3 & -4.⁸ He was convicted on two counts of debauching the morals of a minor,⁹ fined, designated for psychiatric counseling, and given concurrent suspended sentences.¹⁰

Prior to his conviction, Mr. Masse had been temporarily removed from employment, yet, within three weeks of his suspension he was reinstated to his former position.¹¹ Despite this reinstatement, the Board of Trustees (Board) unconditionally declared his thirty years of service "dishonorable," and annulled all pension credits thereby acquired.¹² The Board decided that Mr. Masse's past pension contributions would be refunded to him, and a new period of "honorable service"¹³ would commence. Mr. Masse appealed the final ruling of the Board of Trustees,¹⁴ and on August 4, 1980,¹⁵ his pension rights were restored by the appellate division.¹⁶

⁷ *Id.* at 332, 418 A.2d at 1285. Mr. Masse had fulfilled the minimum requirement of 25 years of service as designated in N.J. STAT. ANN. § 43:15A-41(b) (West 1962), which entitled him to receive at that point an annuity and a graduated pension. 175 N.J. Super. at 332, 418 A.2d at 1285.

Victor Masse enrolled in the Public Employees' Retirement System (PERS) on January 1, 1955, and was granted an additional six and one-half years of veteran service credit. Petition for Certification at 3, *Masse v. Board of Trustees, Pub. Employees' Retirement Sys.*, 175 N.J. Super. 325, 418 A.2d 1282 (App. Div.), *certif. granted*, No. 17698 (Nov. 10, 1980) [hereinafter cited as *Petition for Certification*]. See also *Watt v. Mayor of Franklin*, 21 N.J. 274, 280, 121 A.2d 499, 502 (1956).

⁸ 175 N.J. Super. at 327, 418 A.2d at 1283.

⁹ *Id.* Both counts arose under a statute providing that: "[a]ny person who forces or induces any child under the age of 16 years to do or to submit to any act which tends to debauch the child or impair its morals, is guilty of a misdemeanor." N.J. STAT. ANN. § 2A:96-3 (West 1969).

¹⁰ 175 N.J. Super. at 327, 418 A.2d at 1283. The actual sentence handed down by Judge Shebell read,

[H]e is hereby sentenced to: the New Jersey State Prison for a term of not less than one year and not more than three years on each of counts seven and nine to run concurrently. Sentence suspended and the defendant placed on probation for a period of two years . . . fine[d] . . . \$1,000.00 . . . [and Masse] must have psychiatric care.

Brief for Plaintiff-Appellant at Appendix 8 (Judgment of Conviction), *Masse v. Board of Trustees, Pub. Employees' Retirement Sys.*, 175 N.J. Super. 325, 418 A.2d 1282 (App. Div.), *certif. granted*, No. 17698 (Nov. 10, 1980).

¹¹ 175 N.J. Super. at 331, 418 A.2d at 1285. Mr. Masse was originally appointed Assistant Superintendent of the Water and Sewer Department in 1965. He still occupies the same position, although its title has been changed to Foreman. *Petition for Certification*, *supra* note 7, at 3.

¹² 175 N.J. Super. at 327, 418 A.2d at 1283.

¹³ *Id.* See also *Connelly v. Municipal Employees' Pension Comm'n*, 130 N.J.L. 101, 31 A.2d 488 (Sup. Ct. 1943).

¹⁴ 175 N.J. Super. at 326, 418 A.2d at 1282.

¹⁵ *Id.* at 325, 418 A.2d at 1282.

¹⁶ *Id.* at 334, 418 A.2d at 1287.

Stating that it was not bound by any prior supreme court decisions on this issue,¹⁷ the *Masse* court delivered an opinion which contravened almost 50 years of established case law.¹⁸ The court reasoned that the factual circumstances of this case, specifically, that *Masse's* conviction was unrelated to his employment,¹⁹ mandated a discerning overview of similar issue-related decisions.

The revocation of pension rights issue had been previously considered at the appellate level in *Plunkett v. Board of Pension Commissioners*.²⁰ In *Plunkett*, a fireman convicted of various charges of misconduct, including the embezzlement of monies from the Hoboken Fireman's Relief Association,²¹ was dismissed from the fire department without pension.²² Although *Plunkett* met the minimum age and length of service requirements,²³ the court upheld denial of his pension on the grounds that his crime of moral turpitude rendered all past employment dishonorable.²⁴

Honorable service as "an essential prerequisite"²⁵ was justified on several grounds. According to the *Plunkett* court, "honorable service" acted as an inducement for virtuous and efficient employment, particularly after minimum pension standards had been attained.²⁶ The court went on to state that, "[i]t [was] not incumbent upon a

¹⁷ *Id.* at 326, 418 A.2d at 1282.

¹⁸ The court reaffirmed the principle of requiring honorable service for pension eligibility established in *Plunkett v. Board of Pension Comm'rs*, 113 N.J.L. 230, 173 A. 923 (Sup. Ct. 1934), *aff'd*, 114 N.J.L. 273, 176 A. 341 (E. & A. 1935), but overruled the contention that crimes of moral turpitude, *per se*, render such service dishonorable. *See, e.g.*, *Makwinski v. State*, 76 N.J. 87, 385 A.2d 1227 (1978); *Mount v. Trustees, Pub. Employees' Retirement Sys.*, 133 N.J. Super. 72, 335 A.2d 559 (App. Div. 1975); *Hozer v. State*, 95 N.J. Super. 196, 230 A.2d 508 (App. Div. 1967); *Pfitzinger v. Board of Trustees*, 62 N.J. Super. 589, 163 A.2d 388 (App. Div. 1960).

¹⁹ 175 N.J. Super. at 330-32, 418 A.2d at 1285.

²⁰ 113 N.J.L. 230, 173 A. 923 (Sup. Ct. 1934), *aff'd*, 114 N.J.L. 273, 176 A. 341 (E. & A. 1935).

²¹ *Id.* at 231, 173 A. at 923. Some controversy exists as to whether *Plunkett's* crimes were employment-related. The Attorney General's office in supporting the Board's position in *Masse* appeared to be of the opinion that they were not. Petition for Certification, *supra* note 8, at 7. The *Plunkett* court, however, indicated otherwise, stating that *Plunkett* was convicted of offenses "in violation of departmental rules and regulations." 113 N.J.L. at 231, 173 A. at 923.

²² 113 N.J.L. at 231, 173 A. at 923.

²³ *Id.* at 231-32, 173 A. at 923. The court stated that *Plunkett* would have been eligible for his pension benefits "having attained the age of 50 years and having honorably served for a period of twenty years in the said Hoboken fire department." 113 N.J.L. at 232, 173 A. at 923.

Similarly, *Masse*, prior to his conviction, had acquired eligibility for early retirement benefits under N.J. STAT. ANN. § 43:15A-41(b) (West 1962). *See* note 7 *supra*.

²⁴ 113 N.J.L. at 233, 173 A. at 924.

²⁵ *Id.* at 234, 173 A. at 924.

²⁶ *Id.* at 232, 173 A. at 924. *See Makwinski v. State*, 76 N.J. 87, 385 A.2d 1227 (1978); *Connelly v. Municipal Employees' Pension Comm'n*, 130 N.J.L. 101, 31 A.2d 488 (Sup. Ct. 1943).

municipality, or other division of government, to establish a system of pensions. It [was] rather a question of public policy."²⁷ Therefore, a crime of moral turpitude, with its inference of dishonor, formed an adequate basis for revoking pension benefits.²⁸ The court concluded by asserting that no vested right to a pension accrued merely by the fulfillment of minimum retirement criteria.²⁹ This marked the beginning of judicial adherence to the policy that "honorable service is a *sine qua non*" for obtaining pension benefits.³⁰

Similarly, in *Ballurio v. Castellini*,³¹ the appellate division upheld the *Plunkett* standards³² when faced with the question of whether a public employee, discharged for moral turpitude, was entitled to a pension applied for prior to conviction and dismissal.³³ The court held that the granting of a pension was justifiably delayed pending conviction or acquittal³⁴ on illegal abortion charges,³⁵ but that "conviction would require denial thereof."³⁶

The *Ballurio* court reiterated the *Plunkett* exemplar, holding that "'honorable' service is implicit in every [pension] enactment,"³⁷

²⁷ 113 N.J.L. at 232, 173 A. at 924.

²⁸ *Id.* at 233, 173 A. at 924.

²⁹ *Id.* The *Plunkett* court expressly stated that:

[t]he rule is that compulsory deductions from the salaries of governmental employes, by the authority of the government, for the support of a pension fund, create no contractual or vested right between such employees and the government, and neither the employes, nor those claiming under them, have any rights except such as are conferred by the statutes creating and governing the fund. . . . The requirement of honorable service is not qualified by the provision of twenty years' minimum service as a prerequisite to retirement on pension.

Id. at 233-34, 173 A. at 924. See, e.g., *Mount v. Trustees, Pub. Employees' Retirement Sys.*, 133 N.J. Super. 72, 335 A.2d 559 (App. Div. 1975); *Hozer v. State*, 95 N.J. Super. 196, 230 A.2d 508 (App. Div. 1967); *Pftzinger v. Board of Trustees*, 62 N.J. Super. 589, 163 A.2d 388 (App. Div. 1960); *Salley v. Firemen's & Policemen's Fund Comm'n*, 124 N.J.L. 79, 11 A.2d 244 (Sup. Ct. 1940); *Walter v. Police & Fire Pension Comm'n*, 120 N.J.L. 39, 198 A. 383 (Sup. Ct. 1938).

³⁰ *Id.* at 232, 173 A. at 924. For additional cases following this policy, see note 18 *supra*.

³¹ 29 N.J. Super. 383, 102 A.2d 662 (App. Div. 1954).

³² *Id.* at 389-90, 102 A.2d at 666.

³³ *Id.* at 386, 102 A.2d at 664.

³⁴ *Id.* at 387, 102 A.2d at 664. In refusing to process *Ballurio*'s pension application, the court followed the policy iterated in *McFeely v. Board of Pension Comm'rs*, 1 N.J. 212, 62 A.2d 686 (1948), that pension boards "may, and in most cases should, certainly so where the offense charged involves moral turpitude, stay action upon the pension claim awaiting the trial or other disposition of a pending indictment against the claimant." *Id.* at 217, 62 A.2d at 689.

³⁵ 29 N.J. Super. at 386, 102 A.2d at 664.

³⁶ *Id.* at 387, 102 A.2d at 665. This statement was originally derived from the opinion of the trial court, *Ballurio v. Castellini*, 27 N.J. Super. 113, 98 A.2d 902 (Law Div. 1953), but the appellate division repeated and reaffirmed that "conviction must be deemed to wipe out the temporarily inoperative privilege [of obtaining pension benefits] as of the date of suspension." *Id.* at 391, 102 A.2d at 666.

³⁷ 29 N.J. Super. at 389, 102 A.2d at 666.

whether or not the words "served honorably" appeared in the Act.³⁸ Moral turpitude offenses were acknowledged as constituting ample cause for denying pension privileges.³⁹ In final affirmation, the *Ballurio* court concluded that "[t]he fact that [defendant] had veteran status, the age qualification, and the minimum service requirement, d[id] not signify that he had a vested right to [a] pension."⁴⁰

Ballurio, although following *Plunkett's* standards for "honorable service,"⁴¹ primarily decided the issue of the timing of pension applications.⁴² Inherent in this decision, however, was the consideration that *Ballurio* was discharged for a crime of moral turpitude, unrelated to his employment.⁴³ The cessation of employment was the technicality which disqualified him from receiving pension benefits.⁴⁴ Significantly, in *Masse*, the superior court was presented with an analogous factual situation,⁴⁵ which additionally included the unusual aspect of an employee *not* discharged for a crime of moral turpitude.⁴⁶

³⁸ *Id.* See *Mount v. Trustees, Pub. Employees' Retirement Sys.*, 133 N.J. Super. 72, 81, 335 A.2d 559, 564 (App. Div. 1975); *Fromm v. Board of Directors*, 81 N.J. Super. 138, 142, 195 A.2d 32, 34 (App. Div. 1963).

³⁹ 29 N.J. Super. at 389, 102 A.2d at 666.

⁴⁰ *Id.* at 390, 102 A.2d at 666. See also *Pfizinger v. Board of Trustees*, 62 N.J. Super. 589, 163 A.2d 388 (1960).

⁴¹ See note 4 *supra*.

⁴² 29 N.J. Super. at 386, 102 A.2d at 664.

[W]hen *Ballurio* was suspended, he was deprived of the privilege of obtaining a pension until the criminal charge was disposed of. Acquittal would have restored the claim, plus the right to back pay during the intervening period. But conviction must be deemed to wipe out the temporarily inoperative privilege as of the date of suspension.

Id. at 390-91, 102 A.2d at 666.

⁴³ *Id.* *Ballurio* was employed as a foreman in the street department of the City of Vineland. There is no question that his conviction for committing an illegal abortion was unrelated to his employment. *Id.*

⁴⁴ *Id.* at 394, 102 A.2d at 668. The appellate division also acknowledged that a crime of moral turpitude, nonaffiliated with employment, may be cause for pension revocation, in *Gauli v. Board of Trustees*, 143 N.J. Super. 480, 363 A.2d 911 (App. Div. 1976). *Gauli* was remanded, however, for determination of whether or not the crime committed (unlawful possession of a weapon), involved moral turpitude. 143 N.J. Super. at 483, 363 A.2d at 912-13.

⁴⁵ See notes 7-8 *supra* and accompanying text.

⁴⁶ 175 N.J. Super. at 327, 418 A.2d at 1282. Unlike *Masse*, *Ballurio* was dismissed before his pension was denied. 29 N.J. Super. at 388, 102 A.2d at 665.

An interesting situation, where an employee sustained a service-connected disability pending pension denial, was presented to the appellate division in *Fromm v. Board of Directors*, 81 N.J. Super. 138, 195 A.2d 32 (App. Div. 1963). There, the court rejected plaintiff's application for disability pension because he committed a crime of moral turpitude prior to his disablement. *Id.* at 140-41, 195 A.2d at 33.

The unsuitability of the prior case law⁴⁷ demanded that *Masse* be decided on the basis of valid, independent reasoning. Of utmost importance to the court's decision was the absence of a statute expressly calling for revocation of *Masse's* pension.⁴⁸ The decision of the Board of Trustees had been based upon its "administrative practice of long standing."⁴⁹ The *Masse* court, finding that this practice was not of legislative origin, strictly limited its application to employment-related crime.⁵⁰ In so doing, the court did not dispute the contention that honorable service is a valid prerequisite for pensioned retirement.⁵¹ Accordingly, the court did not deny that dishonorable service justifies pension denial.⁵² Rather, the court held that *Masse's* crime, by its remoteness from employment, did not render his service dishonorable.⁵³ Referring to the situational aspects of *Masse's* case, the court ascetically asked, "should [an additional penalty] be imposed for appellant's wrongdoing although the municipality has not

⁴⁷ Prior case law, involving moral turpitude and denial of pension rights, was found to be inapplicable to *Masse's* situation. In some instances, the plaintiff was no longer employed under the pension system applied to. *Ballurio v. Castellini*, 29 N.J. Super. 383, 102 A.2d 662 (App. Div. 1954); *Walter v. Police & Fire Pension Comm'n*, 120 N.J.L. 39, 198 A. 383 (Sup. Ct. 1938). In other situations, the plaintiff's crime of moral turpitude was employment-related. *Daigle v. McLaughlin*, 193 F. Supp. 902 (D.D.C. 1961); *Mount v. Trustees, Pub. Employees' Retirement Sys.*, 133 N.J. Super. 72, 335 A.2d 559 (App. Div. 1975); *Hozer v. State*, 95 N.J. Super. 196, 230 A.2d 508 (App. Div. 1967); *Fromm v. Board of Directors*, 81 N.J. Super. 138, 195 A.2d 32 (App. Div. 1963); *Pfzinger v. Board of Trustees*, 62 N.J. Super. 589, 163 A.2d 388 (App. Div. 1960); *Plunkett v. Board of Pension Comm'rs*, 113 N.J.L. 230, 173 A. 923 (Sup. Ct. 1934), *aff'd*, 114 N.J.L. 273, 176 A. 341 (E. & A. 1935).

⁴⁸ 175 N.J. Super. at 334, 418 A.2d at 1287. The court repeatedly stressed this point, finding that "[t]here [was] absolutely nothing in the PERS law that provided for the cancellation of pension credits . . . in these circumstances," *id.* at 332, 418 A.2d at 1285, and therefore "an employee should not be deprived of pension credits . . . in the absence of an express statutory provision for such forfeiture." *Id.* at 334, 418 A.2d at 1287.

In addition, the court found N.J. STAT. ANN. § 43:1-2 (West 1962), dealing with "suspension of pension payments during . . . period[s] of incarceration for . . . crime[s] of moral turpitude," 175 N.J. Super. at 332, 418 A.2d at 1286, to be inapplicable because *Masse* was never incarcerated for his crime. *Id.*

⁴⁹ 175 N.J. Super. at 327, 418 A.2d at 1283.

⁵⁰ *Id.* at 333, 418 A.2d at 1286. Judge Botter stated that a court-made rule calling for the forfeiture of pension rights in cases not specified by the Legislature is suspect at the least. It should not go beyond the bounds of necessity. . . . In our view, criminal conduct unrelated to public service. . . . should not be the basis for forfeiture of pension credits.

Id. at 332-33, 418 A.2d at 1286.

⁵¹ *Id.* at 333, 418 A.2d at 1286.

⁵² *Id.*

⁵³ *Id.* at 330-31, 418 A.2d at 1285. "[T]he offense was unrelated to public employment and, in that sense, did not constitute dishonorable service and a betrayal of public trust." *Id.* *But see* *Makwinski v. State*, 76 N.J. 87, 385 A.2d 1227 (1978) (offense related to public employment held not to constitute dishonorable service).

considered it so dishonorable or embarrassing as to require his dismissal."⁵⁴

A basic premise of the court's discourse was the recognition that "pension credits represent[ed] to some extent deferred wages for services rendered."⁵⁵ Thus, the court dispensed with the outdated notion that "[a] pension [was] a bounty springing from the appreciation and graciousness of the sovereign,"⁵⁶ and indicated its approval of the judicial trend towards establishing pension rights.⁵⁷ The court decided that these rights could not be dismissed solely on a finding of moral turpitude,⁵⁸ since Masse had acquired sufficient pension rights to retire prior to his offense.⁵⁹

Drawing its distinction in terms of employment-relation, the court expressed the apprehension that a general standard of moral turpitude would produce inequity in case-by-case application.⁶⁰ Because of its fluctuating nature, moral turpitude, as an undefined punitive determinative, necessarily involved a considerable element of administrative discretion.⁶¹ It was this element of discretion, coupled with the realization that Masse had already been criminally reprimanded,⁶² that led the court to renounce the Board's decision as a harsh and arbitrary punishment.⁶³ Advocating a policy of restraint,

⁵⁴ 175 N.J. Super. at 332, 418 A.2d at 1285. It should be noted that, in a pension revocation hearing, "[t]he board is neither bound by an employer's actions regarding continued employment nor required to give any evidentiary weight to the employer's determination which may in fact involve considerations unrelated to the pension issue of honorable service." Brief for Respondent, *supra* note 6, at 12.

A question not considered in the case at bar, is whether or not the Borough of Highlands was required to dismiss Masse from employment pursuant to N.J. STAT. ANN. § 2A:135-9 (West 1969). Brief for Respondent, *supra* note 5, at 12-13.

⁵⁵ 175 N.J. Super. at 333, 418 A.2d at 1286. See *Watt v. Mayor of Franklin*, 21 N.J. 274, 279, 121 A.2d 499, 501 (1956); *Salz v. State House Comm'n*, 18 N.J. 106, 111-12, 112 A.2d 716, 718-19 (1955).

⁵⁶ 29 N.J. Super. at 389, 102 A.2d at 666. See, e.g., *Walter v. Police & Fire Pension Comm'n*, 120 N.J.L. 39, 198 A. 383 (Sup. Ct. 1938); *Hozer v. State*, 95 N.J. Super. 196, 230 A.2d 508 (App. Div. 1967).

⁵⁷ 175 N.J. Super. at 333, 418 A.2d at 1286. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (social security pensions); *Spencer v. Bullock*, 216 F.2d 54 (D.C. Cir. 1954) (policeman suspended); *Daigle v. McLaughlin*, 193 F. Supp. 902 (D.D.C. 1961) (fireman suspended for misconduct); *Willens v. Comm'n on Judicial Qualifications*, 10 Cal. 3d 451, 561 P.2d 1, 110 Cal. Rptr. 713 (1973) (right to disability benefits); *State ex rel. Kirby v. Board of Comm'rs*, 129 Conn. 419, 29 A.2d 452 (1942) (fireman denied pension); *Williams v. Smith*, 360 So. 2d 417 (Sup. Ct. Fla. 1978) (judge convicted of felonies); *City of Frederick v. Quinn*, 35 Md. App. 626, 371 A.2d 724, (Ct. Spec. App. 1977) (pension rights modified by legislature).

⁵⁸ *Id.* at 333, 418 A.2d at 1286.

⁵⁹ 175 N.J. Super. at 332, 418 A.2d at 1285.

⁶⁰ *Id.*

⁶¹ See notes 3-5 *supra*.

⁶² 175 N.J. Super. at 330, 418 A.2d at 1285.

⁶³ *Id.*

the court summarized its decision by saying, "[w]e ought not go too far in imposing civil sanctions for immoral, criminal conduct. . . . [o]ur sense of morality may not be a fair guide to determine which crimes require forfeiture of a pension and which do not."⁶⁴

Despite the *Masse* court's diminution of the prior case law,⁶⁵ the opinion, as it stands, represents a breakthrough in the field of pension rights. Without directly overturning a viable case on point,⁶⁶ the court seized this opportunity to reconsider the need of public employees to feel secure in their provisions for the future.⁶⁷

In this era of comprehensive pension programs, it is difficult to conceive of retirement benefits as rewards,⁶⁸ rather, portions of wages are surrendered to the employer in trust for the employee,⁶⁹ resulting in an investment to which a right accrues.⁷⁰ The public employee is not offered the option of investing these funds elsewhere.⁷¹ Remittance of these bare contributions⁷² upon the commission of a misdemeanor is clearly inequitable without the accompanying interest or inured benefits.⁷³

When a pension is revoked for misfeasance in office, there is some validity to the contention that the employee has injured the employer, and by so doing has justifiably incurred retribution.⁷⁴ Even

⁶⁴ *Id.* at 333, 418 A.2d at 1286.

⁶⁵ *Id.* at 329-30, 418 A.2d at 1284-85. The court briefly points out the major issues of various cases, but does not apply them in any extensive manner to the case at hand. *Id.* See note 47 *supra*.

⁶⁶ See notes 21, 44 & 49 *supra* and accompanying text.

⁶⁷ 175 N.J. Super. at 333-34, 418 A.2d at 1286-87.

⁶⁸ *City of Frederick v. Quinn*, 35 Md. App. 626, 371 A.2d 724 (Ct. Spec. App. 1977). The court stated:

[I]t is absurd to speak of a pension as "a bounty springing from the appreciation and graciousness of the sovereign". . . . The medieval or even colonial concepts of a compassionate and generous sovereign rewarding his humble, devoted subjects is completely alien to our modern views of a democratic government's obligations to its citizens.

Id. at 628, 371 A.2d at 726. See generally Reich, *The New Property*, 73 YALE L.J. 733 (1964).

⁶⁹ *Spina v. Consolidated Police & Firemen's Pension Comm'n*, 41 N.J. 391, 398 n.2, 197 A.2d 169, 173 n.2 (1964); *Mount v. Trustees, Pub. Employees' Retirement Sys.*, 133 N.J. Super. 72, 86, 335 A.2d 559, 567 (App. Div. 1975).

⁷⁰ *Spina v. Consolidated Police & Firemen's Pension Comm'n*, 41 N.J. 391, 402, 197 A.2d 173, 175 (1964). See also *Makwinski v. State*, 76 N.J. 87, 94, 385 A.2d 1227, 1231 (1978) (Conford, P.J.A.D. temporarily assigned, concurring).

⁷¹ See note 29 *supra*.

⁷² See note 13 *supra* and accompanying text.

⁷³ *Makwinski v. State*, 76 N.J. 87, 98-99, 385 A.2d 1227, 1233-34 (1978) (Clifford, J., dissenting).

⁷⁴ Brief for Plaintiff-Appellant, *supra* note 11, at 7-8. See *Makwinski v. State*, 76 N.J. 87, 92, 385 A.2d 1227, 1230 (1978).

in such a situation, the desirability of applying prorated penalties⁷⁵ is evident. Total revocation based on moral turpitude extrinsic to employment, however, is far more difficult to justify.⁷⁶ If the conduct of the employee has damaged the reputation of the employer, or betrayed the public trust,⁷⁷ an adequate and appropriate remedy lies in dismissing the employee.⁷⁸ To go beyond this remedy into the area of pension benefits, constitutes an absolute condemnation of past employment,⁷⁹ and is, in reality, little more than a form of unproductive revenge.⁸⁰

There is no evidence that revocation is a more effective deterrent to crime⁸¹ than dismissal, which at least serves a functional purpose in removing the wayward employee. Revocation, however, serves no such purpose.⁸² Furthermore, a vindictive quality is apparent where, as in *Masse*, the municipality has not seen fit to remove the employee from service.⁸³ If civil sanctioning was desirable,⁸⁴ logic would dictate the sensibility of discharging the employee,⁸⁵ but retaining the pension.

To date, the legislature has only provided for revocation of pension rights for crimes of moral turpitude necessitating incarceration, and then only for the duration of the confinement itself.⁸⁶ The Board's acquisition of quasi-judicial status⁸⁷ has casually expanded, occasionally in contradiction to legislative intent.⁸⁸ The Board should be subject to some form of timely, non-judicial supervision.⁸⁹ It is

⁷⁵ See note 53 *supra* and accompanying text.

⁷⁶ 175 N.J. Super. at 331, 418 A.2d at 1285. See *Makwinski v. State*, 76 N.J. 87, 98, 385 A.2d 1227, 1233 (1978) (Clifford, J., dissenting).

⁷⁷ See note 54 *supra*.

⁷⁸ See note 12 *supra* and accompanying text.

⁷⁹ It is difficult to perceive the manner in which pension revocation serves to assuage the employer's reputation, or to restore the public trust.

⁸⁰ See 113 N.J.L. at 233, 173 A.2d at 924.

⁸¹ See note 79 *supra*.

⁸² See note 54 *supra* and accompanying text.

⁸³ See note 64 *supra* and accompanying text.

⁸⁴ "Confidence in government could be shaken if a public employee in a sensitive position is continued in office after being convicted of a crime of moral turpitude simply because the crime was unrelated to public employment." 175 N.J. Super. at 330, 418 A.2d at 1284.

⁸⁵ *Id.* See *Fromm v. Board of Directors*, 81 N.J. Super. 138, 145, 195 A.2d 32, 36 (App. Div. 1963).

⁸⁶ 175 N.J. Super. at 332-33, 418 A.2d at 1286. See N.J. STAT. ANN. § 43:1-2 (West 1962).

⁸⁷ See *McFeely v. Board of Pension Comm'rs*, 1 N.J. 212, 215-16, 62 A.2d 686, 687-88 (1948).

⁸⁸ Appeal to the courts is always available, however, in some situations, hardship may be suffered in the interim period itself. See *Mount v. Trustees, Pub. Employees' Retirement Sys.*, 133 N.J. Super. 72, 90, 335 A.2d 559, 569 (App. Div. 1975).

further submitted that the Board of Trustees, although a separate entity from the municipality,⁹⁰ should be bound to consider the municipality's evaluation of the employee.⁹¹

As a concept, moral turpitude has evaded positive legislative definition. Theoretically, it reflects the standards of the community at large.⁹² Realization, however, that the Board of Trustees alone makes the final determination of whether or not a crime involves moral turpitude,⁹³ leads to the inevitable conclusion that "moral turpitude" reflects the standards of the Board. Compounding this discretionary element further is the ability of the Board to annul any portion, or all, of a defendant's pension credits.⁹⁴

The general policy of total revocation followed by the Board⁹⁵ leaves little room for delineation on the basis of the seriousness of the offense; for example, theft may exact the same administrative sanction as murder.⁹⁶ Additionally, there exists the possibility that two employees, denied pensions for the same crime, may yet be punished to different degrees, depending upon how many years of service each has rendered.⁹⁷ The argument is well-made that, if the Board is to have disciplinary power at all, it should exercise such power consistently,⁹⁸ and adopt a system of proration⁹⁹ based upon the severity of the offense.

Masse was previously subjected to criminal punishment by the courts,¹⁰⁰ and the opportunity for civil castigation was rejected when the municipality chose to continue his employment.¹⁰¹ It is unconscionable that not only Masse, but his dependents,¹⁰² should be exposed to the possibility of another civil sanction. The Board of Trus-

⁸⁹ To date, the Board is not bound to give the slightest consideration to the employer's opinion. *See* note 54 *supra*.

⁹⁰ Brief for Respondent, *supra* note 5, at 12.

⁹¹ *See* note 3 *supra*.

⁹² *See* note 5 *supra*.

⁹³ *See* *Makwinski v. State*, 76 N.J. 87, 385 A.2d 1227 (1978).

⁹⁴ 175 N.J. Super. at 328, 418 A.2d at 1283.

⁹⁵ *Id.*

⁹⁶ "The rule applied by the PERS Board, . . . is inherently arbitrary and may often be unreasonable." *Id.* at 333, 418 A.2d at 1286.

⁹⁷ *Id.*

⁹⁸ *See* note 74 *supra*.

⁹⁹ *See* note 10 *supra* and accompanying text.

¹⁰⁰ *See* notes 8-10 *supra* and accompanying text.

¹⁰¹ *See* note 54 *supra* and accompanying text.

¹⁰² 175 N.J. Super. at 333-34, 418 A.2d at 1286-87. The court makes a brief reference to N.J. STAT. ANN. § 2A:152-2 (West 1971), regarding the "forfeiture of estate" clause. 175 N.J. Super. at 333-34, 418 A.2d at 1286-87.

tees and The Public Employees' Retirement System have incurred no injury,¹⁰³ therefore, they should not be permitted to exact a penalty. Pensions represent a method of providing enforced financial security for retired employees,¹⁰⁴ they should not be abused as disciplinary tools.

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¹⁰³ See State *ex rel.* Kirby v. Board of Comm'rs, 129 Conn. 419, 29 A.2d 452, 455 (1942).

¹⁰⁴ Spina v. Consolidated Police & Firemen's Pension Comm'n, 41 N.J. 391, 401-02, 197 A.2d 169, 174 (1964).