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Judges "On the Take:" A Formula For Financial Security

While serving as a superior court judge, plaintiff was indicted for criminal conspiracy and bribery. Following indictment he was "disqualified from acting as a judge pending criminal proceedings," pursuant to article VI, section 18, subdivision (a), of the California Constitution. Subsequently, upon defeat in a general election for a succeeding term in office but prior to judgment on the criminal charges, plaintiff requested a disability retirement and pension under sections 75060 and 75060.6 of the California Government Code.¹ The Commission on Judicial Qualifications, notwithstanding the existence of a disability,² found plaintiff to be ineligible for statutory retirement by reason of his disqualification from office. Plaintiff brought the present action seeking a writ of mandate against the Commission and the Chief Justice to compel approval of his retirement request. He was successful at the trial level. While the mandamus proceeding was in progress, plaintiff was convicted on four counts of bribery.

Justice Burke, writing for a unanimous California Supreme Court in *Willens v. Commission on Judicial Qualifications*,³ reviewed the sufficiency of the medical evidence in support of the disability claim

1. The *Judges' Retirement Law* is contained in Chapter 11 of the California Government Code. Article 3, consisting of Sections 75060 through 75060.6, deals with eligibility and benefit allowances for disability retirement. Under Section 75060, judges having a serious mental or physical disability which is or is likely to become permanent may seek a disability retirement by obtaining the consent and approval of the Chief Justice and the Commission on Judicial Qualifications. Under Section 75060.6, a judge retired by reason of disability is entitled to receive a pension at half salary for the remainder of his life.

2. Pursuant to subdivision (c) of Section 75060, the judge had submitted written statements by three doctors who concluded that Willens was mentally and physically disabled and unable to function efficiently as a judge. One doctor, a neurosurgeon, reported spastic weakness of legs and feet subsequent to a 1970 operation for spinal cord compression. A second doctor, an internist, reported neurological and cardiovascular problems. A third doctor, a psychiatrist, reported memory impairment. 10 Cal. 3d 451, 454, 516 P.2d 1, 3, 110 Cal. Rptr. 713, 724 (1973).

3. 10 Cal. 3d 451, 516 P.2d 1, 110 Cal. Rptr. 713 (1973).

and concluded that the Commission's denial of plaintiff's request had been in error. A criminal indictment was held to be no ground for denial of retirement disability benefits, and a later conviction no ground for their forfeiture.

The first issue with which Justice Burke dealt was a construction of the provisions of the *Judge's Retirement Law*.⁴ The statutory construction of the retirement provisions in effect lay the foundation for the ultimate holding of the case. The court found no specific provision within the *Judges' Retirement Law* for denial of Section 75060 retirement by reason of criminal indictment. The court noted that the legislation has been liberally construed⁵ and that the purpose of Section 75060 was: ". . . to protect a disabled judge and his dependents from economic insecurity through a loss of salary."⁶ In support of its position, the court stated that the purpose of Article VI, Section 18 of the California Constitution is to ". . . protect the public and preserve the integrity of the judicial office pending resolution of criminal charges, rather than punish financially an indicted judge . . ."⁷ Furthermore, a legislative intent to deprive a judge of disability retirement benefits prior to conviction would be to ignore the precept that the accused is presumed innocent until proven guilty. The court pointed out that although an indicted judge is disqualified from holding office, he is maintained at full salary during the period of disqualification and is removed from office and deprived of his salary only upon final conviction.⁸ The presumption of innocence in criminal proceedings was recognized as an underlying basis of these constitutional provisions. This presumption was fundamental to the court's holding that indictment could not justify a denial of pension benefits.

Justice Burke then turned to the second of the two principal issues raised in the decision: ". . . whether a disabled judge should

4. *Supra*, note 1.

5. The court specifically cited *Gorman v. Cranston*, 64 Cal. 2d 441, 413 P.2d 133, 50 Cal. Rptr. 533 (1966), which directs liberal construction of pension benefits under the *Judges' Retirement Law*.

6. 10 Cal. 3d 451, 456, 516 P.2d 1, 3-4, 110 Cal. Rptr. 713, 715 (1973).

7. *Id.* at 456, 516 P.2d at 4, 110 Cal. Rptr. at 716.

8. This is so provided in Article VI, Section 18, subdivisions (a) and (b) of the California Constitution. Subdivision (b) also provides that upon conviction the Supreme Court may suspend the judge from office without salary. If conviction is reversed, the suspension terminates and withheld salary becomes payable to the reinstated judge.

continue to receive disability benefits once he has been convicted and either suspended or removed from office.”⁹ Although this issue had not been ripe for litigation at the time of the trial proceedings, plaintiff’s criminal conviction had become final prior to the present appeal. Although no adversary briefs were before the court, it decided the issue was appropriate in order to avoid additional unnecessary litigation.¹⁰

Arguments were raised on both sides of the question. Section 75060.6 of the Government Code provides that if a disabled judge recovers from his incapacity he shall be a “judicial officer” of the state and his pension allowance shall be terminated if he refuses an assignment to a court by the Chairman of the Judicial Council. It was the Commission’s position that a judge convicted of bribery cannot be a judicial officer, cannot refuse that to which he cannot be assigned in the first place, and therefore, the foregoing provision might indicate legislative intent to exclude a convicted judge from initial disability benefits. The court did not agree with the Commission, and reasoned that a convicted judge no longer incapacitated could simply be deemed to have “refused” assignment. Another argument was that because benefits under Section 75060.6 are in lieu of salary, and because a convicted judge is no longer entitled to salary, he should not be entitled to Section 75060.6 benefits. This position was not persuasive. The court stated it was inequitable to allow a pension only to those later convicted judges who fortuitously became disabled while still in office. But a countering inequity was recognized in those instances in which, after a period of faithful service, a judge’s incapacity had actually contributed to or caused his guilty act. The argument most persuasive was basically the same as the one by which the first issue of the case had been decided: Because there is no express provision in the *Judges’ Retirement Law* relating to denial of Section 75060.6 benefits by reason of felony conviction, no such provision should be implied. Here the court relied principally upon the case of *Pearson v. County of Los Angeles*,¹¹ which held in part that a public employee’s accrued pension rights are vested and cannot be destroyed merely because of removal from office due to “misconduct.” That court reached its conclusion in light of Section 2604 of the California Penal Code, which provides: “No conviction of any person for a crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law”

9. 10 Cal. 3d 451, 457, 516 P.2d 1, 5, 110 Cal. Rptr. 713, 716 (1973).

10. *Id.*

11. 49 Cal. 2d 523, 319 P.2d 624 (1957).

If the case is assessed in its entirety, the necessary holding on the issue decided first is that an *indicted* but otherwise eligible judge has a vested and indefeasible right to receive Section 75060.6 benefits. When the court addressed the question of a *convicted* judge's eligibility for the retirement benefits, it assumed that the plaintiff already possessed a right to these benefits. The question was whether or not they should be continued. Limited by the holding on the indictment issue the question had only one possible answer. To have answered in the negative would have been to effectively declare a forfeiture of a vested pension right by reason of a criminal conviction. It will be demonstrated that the holding on the first issue was too broad; it preempted vital considerations which should have affected the outcome of the second.

A PROPOSED ALTERNATIVE

A better solution to the indictment issue would have been to recognize plaintiff's right to a temporary retirement and pension during the period of indictment only. The court could have ordered that a final determination of the right to a disability retirement be made at the conclusion of criminal proceedings, subject to the limitations and discretionary provisions of article 3 of the *Judges' Retirement Law*.¹² Such a solution would have been consistent with the policy reasons the court found behind Article VI, Section 18 of the California Constitution.

A termination of temporary benefits and denial of permanent benefits would preclude any forfeiture by reason of criminal conviction. Instead, temporary benefits would terminate at the conclusion of criminal proceedings regardless of whether or not there was a conviction, and permanent benefits could not be forfeited if they had never been granted.

The right to receive a disability retirement and pension is subject to discretionary review. Section 75060, subdivision (a), provides that a disabled judge "may" be retired "with the approval" of the Chief Justice and the Commission on Judicial Qualifications. The retirement is neither effective upon suffering the disability nor upon submitting a request, but only "upon approval." Although the right to the pension benefits is vested, "approval" is a condition

12. *Supra*, note 1.

subsequent¹³ to the actual realization of those benefits.¹⁴ The right is not absolutely vested.

Even without the foregoing argument, Section 2604 of the Penal Code would be inapplicable because the decision to grant or deny a pension does not depend on a criminal conviction. The Commission and Chief Justice, in the exercise of their discretion, are not bound by a guilty finding in a court of law, but are bound instead only by their own evaluation of the offense charged. Whether a conviction has been rendered may of course influence their decision. But perhaps more important will be the relevance of the offense charged to qualification for judicial office, and the existence of any mitigating circumstances. For example, as the *Willens* decision pointed out, the applicant's record of faithful service and the possibility that the disability may have contributed to the commission of a crime are factors which should be considered.

The suggested alternative solution is not in conflict with the *Pearson* case, *supra*. The *Willens* decision relied upon *Pearson* in order to demonstrate the indefeasible character of plaintiff's pension rights. *Pearson*, however, does not compel the granting or sustaining of pension benefits in all instances. It only held that misconduct could work no forfeiture of accrued pension rights¹⁵ in

13. "The fact that a pension right is vested will not, of course, prevent its loss upon the occurrence of a condition subsequent. . . ." *Kern v. City of Long Beach*, 29 Cal. 2d 848, 853, 179 P.2d 799, 802 (1947). The condition subsequent in the present case is approval by the Commission on Judicial Qualifications and the Chief Justice. See 38 CAL. JUR. 2d *Pensions* §§ 11, 13 (1956).

14. "Forfeiture" under Section 2604 of the California Penal Code has been interpreted to mean a deprivation of a right to which one was entitled at the time the crime was committed. *In re Helwinkel's Estate*, 199 Cal. App. 2d 283, 18 Cal. Rptr. 473 (1962). In this case, the court found no absolute right to a statutory family allowance and, therefore, no right forfeited by commission of the crime.

15. In one sense "accrue" means to "arise as a growth" and to "periodically accumulate in the process of time." (Webster's Third New International Dictionary (unabr. ed. 1971)). Longevity retirement benefits under the Judges' Retirement Law are based, to a large degree, upon time in office. Under Section 75060 of the California Government Code, in order to be eligible for longevity benefits, judges must contribute a prescribed regular amount from their salaries to a designated fund. This plan is essentially similar to that contained in Section 32050 of the California Government Code, involved in the *Pearson* case. As to that portion of the pension already earned, by financial contribution or time in office, there is an accrued pension right which should not be subject to denial for any reason. On the other hand, disability benefits under Section 75060.6 do not require contributions and are not dependent upon time in office. Not having been earned, they are not due and therefore not enforceable until granted. See 38 CAL. JUR. 2d *Pensions* § 11 (1956).

the absence of a provision to that effect within the pension plan.¹⁶ Unlike the disability pension plan in *Willens*, the *Pearson* retirement plan applied to pension rights which had "accrued," in the sense of having been earned.¹⁷ A deputy sheriff was denied a longevity retirement after dismissal without hearing for allegedly having made false statements during a homicide investigation. The court found that the deputy had not been lawfully discharged, was entitled to a hearing on the charges, and that if found guilty would be entitled to retirement rights accruing up to his effective and proper discharge date.¹⁸ "Misconduct," in the absence of a valid charter provision, was found to allow no forfeiture of accrued longevity retirement rights.¹⁹ The facts in the case also included the deputy's simultaneous felony indictment relating to the removal of public records. However, the court recognized that the felony charges did not account for the denial of the pension rights.²⁰ Although convicted, no judgment was entered, and the felony charges were expunged after a period of probation.²¹ No proceedings had ever taken place to discharge the deputy from office or otherwise jeopardize his pension rights by reason of the conviction.²²

In the New Jersey case of *Ballurio v. Castellino*,²³ a foreman in a city street department, although otherwise eligible for retirement benefits, was held to be ineligible for a permanent award while criminal charges on abortion were pending which, if proven, would have justified his dismissal. The retirement statute did not provide for discretion in denying a pension to an otherwise qualified employee, nor was there any express good conduct requirement or other provision relating to the denial of benefits by reason of a criminal conviction. The court, however, held that the claim to retirement benefits was not infeasible; that abortion was a *crime of moral turpitude* which would violate an *implicit honorable service requirement* by reason of the applicant's position as a *public servant*.²⁴

16. 49 Cal. 2d 523, 543, 319 P.2d 624, 637 (1957).

17. *Id.* at 528, 319 P.2d at 627.

18. *Id.* at 543, 319 P.2d at 637.

19. *Id.*

20. *Id.* at 535, 537, 319 P.2d at 631, 632.

21. *Id.* at 529, 319 P.2d at 627-28.

22. *Id.* at 528, 319 P.2d at 627.

23. 29 N.J. Super. 383, 102 A.2d 662 (1954).

24. *Id.* 102 A.2d at 666.

Prior to *Willens*, there were other California cases, such as *MacIntyre v. Retirement Board of the County of Los Angeles*,²⁵ which described another facet of the nature of pension rights. Persuasive counsel was taken of *MacIntyre* in the *Ballurio* case, as have decisions in Michigan,²⁶ Maryland²⁷ and West Virginia.²⁸ Likewise, most other jurisdictions presented with similar situations have made the same considerations as those expressed in *Ballurio* and *MacIntyre*.²⁹ In *MacIntyre*, police officers who were suspended from duty and dismissed after trial before the Board of Police Commissioners on charges of conduct unbecoming an officer were denied longevity retirement benefits. The pensions were subject to approval and to discretionary denial. The court explained the fundamental nature of and purpose behind statutory public employee pension plans:³⁰

It is assumed that upon acceptance of a position as an officer or employee of a governmental agency, an appointee will perform his duties conscientiously and faithfully It is never contemplated that an officer or employee guilty of conduct warranting dismissal should continue in office or be permitted to receive other emoluments offered as an inducement to honesty and efficiency. *The right to a pension is not indefeasible*, and an employee, though otherwise entitled thereto, may not be guilty of misconduct in his position and maintain his rights notwithstanding such dereliction of duty. (Emphasis added.)

CONCLUSION

It is suggested that under Section 75060 the Chief Justice and the Commission on Judicial Qualifications are expressly empowered and implicitly required, in the interest of preserving judicial integrity, to exercise discretion in granting the retirement status. It is suggested that until such time as approval is given, the applicant has a vested but not indefeasible right to the benefits arising from section 75060. Where an applicant under indictment has been granted disability benefits, it should be possible to exercise discretion to review such benefits, especially in circumstances involving

25. 42 Cal. App. 2d 734, 109 P.2d 962 (1941). See also *Taylor v. General Tel. Co.*, 20 Cal. App. 3d 70, 97 Cal. Rptr. 349 (1971); *Lawrence v. City of Los Angeles*, 53 Cal. App. 2d 6, 127 P.2d 931 (1942).

26. *Van Coppenolle v. City of Detroit*, 313 Mich. 580, 21 N.W.2d 903 (1946).

27. *Baltimore City Bd. of Trustees v. Comes*, 247 Md. 182, 230 A.2d 458 (1967).

28. *State v. Bd. of Trustees of Policemen's Pension*, 148 W. Va. 369, 135 S.E.2d 262 (1964).

29. An extensive annotation on the effect of misconduct on pension rights may be found in 76 A.L.R.2d 566 (1961).

30. 42 Cal. App. 2d 734, 735, 109 P.2d 962, 963 (1941).

moral turpitude in public office. The policy considerations expressed in *MacIntyre* and similar decisions undoubtedly reflect strong current popular attitudes³¹ and should be influential in California.

In the present case, plaintiff should have been awarded temporary pension benefits pending determination of the criminal charges against him. Once the Commission had sufficient information upon which to base a permanent decision, the request for a Section 75060 retirement should have been remanded for such decision.

It is suggested that Section 75060 be redrafted in part to provide (1) that a decision by the Commission on Judicial Qualifications be based on consideration of all factors relevant to eligibility for the retirement award, (2) that temporary retirement be granted if disability seems likely, pending the establishment of any such factors, and (3) that the Chief Justice not be allowed to overrule the Commission's decision except where discretion has been abused. The legislature now has the burden and should go forward in directing the court's attention to the discretionary provisions already a part of Section 75060.

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31. In the narrow area of judicial discipline in California, for example, there have been some remarkable changes within the last 15 years which are indicative of public policy. The Commission on Judicial Qualifications was established in 1961. Section 75060 of the California Government Code, enacted in 1959, has been amended four times and redrafted once. Art. VI, Sec. 10, subd. (a) of the California Constitution was repealed in 1966 in favor of Art. VI, Sec. 18. From 1959 to 1966, one other judge besides Wilens, and two justices of the peace have been removed from office for disciplinary reasons. *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973); *In re Trindall*, 60 Cal. 2d 469, 386 P.2d 473, 34 Cal. Rptr. 849 (1963). Three other judges were censured. *In re Chavez*, 9 Cal. 3d 846, 512 P.2d 309, 109 Cal. Rptr. 79 (1973); *In re Sanchez*, 9 Cal. 3d 844, 512 P.2d 302, 109 Cal. Rptr. 73 (1973); *In re Glickfeld*, 3 Cal. 3d 891, 479 P.2d 638, 92 Cal. Rptr. 278 (1971).

In comparison, only one judge had ever been removed from office prior to 1959. See Stewart, *Impeachment of Judge James H. Hardy, 1862*, 28 S. CALIF. L. REV. 61 (1954). Art. VI, Sec. 10, subd. (a), of the California Constitution enacted in 1938, provided for judges' removal from office by reason of a conviction of a crime of moral turpitude, but had not been instrumental in the removal of a judge. Removal by the legislature has been available since 1849, as provided in Art. IV, Sec. 18, and Art. VI, Sec. 10 of the California Constitution.

