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COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF DENNIS L. BRUNO
DOCKET NO. 2011-15
CLAIM OF DENNIS L. BRUNO

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Stipulations of Fact, Briefs and the Proposed Opinion and Recommendation of the Hearing Officer. We note that none of the parties filed Exceptions to the Proposed Opinion and Recommendation of the Hearing Officer.

This Board finds appropriate the Hearing Officer's Procedural History, Proposed Findings of Fact, Proposed Conclusions of Law, Discussion, and Recommendation and, we hereby adopt them as our own, and accordingly:

IT IS HEREBY ORDERED that,

- (1) Claimant's request that his annuity with the Public School Employees' Retirement System not be subject to forfeiture under the Public Employee Forfeiture Act is DENIED; and
- (2) Claimant's entire pension otherwise payable by the Public School Employees' Retirement System, except for the return of his contributions without interest, which Claimant has already received, is hereby forfeited.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: April 26, 2013

By: Melva S. Vogler
Melva S. Vogler, Chairman

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

ACCOUNT OF DENNIS L. BRUNO : Docket No. 2011-15
: :
CLAIM OF DENNIS L. BRUNO : MMS No. 0187225

RECEIVED

MAR 01 2013

PSERS
EXECUTIVE OFFICE

BEFORE: Debra K. Wallet, Esquire
Hearing Officer

HEARING DATE: No Hearing - Stipulated Facts

APPEARANCES: For the Public School Employees' Retirement System:
Kathrin V. Smith, Assistant Deputy Chief Counsel

For the Claimant:
Arthur T. McQuillan, Esquire
Maureen McQuillan, Esquire

PROPOSED OPINION AND RECOMMENDATION

I. PROCEDURAL HISTORY

Dennis L. Bruno [hereinafter Claimant] filed a timely appeal from the July 14, 2011 decision of the Public School Employees' Retirement System [hereinafter PSERS] that Bruno's entire pension should be forfeited because of having pled guilty to a federal crime which was deemed to be substantially the same as a state crime which required forfeiture. Claimant requested a hearing and the undersigned was appointed to serve as the Hearing Officer by letter dated June 14, 2012.

Claimant is represented by Arthur T. McQuillan, Esquire and Maureen McQuillan, Esquire. PSERS is represented by Kathrin V. Smith, Assistant Deputy Chief Counsel.

After the grant of a joint request for continuance of an August 22, 2012 hearing, the Claimant and PSERS executed joint stipulations of fact with six exhibits attached. These stipulations and exhibits were admitted to the record by Order dated September 25, 2012. The parties waived the right to a hearing and stipulated to relevant facts pursuant to Sections 35.101 and 35.155 of the General Rules of Administrative Practice and Procedure. 1 Pa. Code §35.101 and §35.155.

Both Claimant and PSERS filed briefs in support of their respective positions.

After full consideration of the legal arguments of both parties and based upon the stipulated facts, the Hearing Officer enters the following proposed Opinion and Recommendation:

II. PROPOSED FINDINGS OF FACT

1. Claimant was enrolled as a member of PSERS in January 1977 by virtue of his employment with the Altoona Area School District. (Stipulations at ¶1).
2. In July 1997, Claimant began his employment with the Glendale School District in Clearfield County, Pennsylvania as a technology coordinator. (Stipulations at ¶ 2).
3. From approximately March 2004 to August 5, 2008, Claimant was the Superintendent of the Glendale School District. (Stipulations at ¶ 3).
4. Effective August 6, 2008, Claimant retired from school employment. (Stipulations at ¶ 6).
5. Claimant was an active member of PSERS from January 1977 through August 5, 2008. (Stipulations at ¶ 7).

6. Claimant began receiving monthly retirement benefits from PSERS effective as of his date of retirement. (Stipulations at ¶ 8).

7. On May 9, 2011, a criminal action was filed against Claimant in the United States District Court for the Western District of Pennsylvania. (Stipulations at ¶ 9).

8. On May 9, 2011, the United States Attorney's Office in the Western District of Pennsylvania filed an Information and Information Memorandum against Claimant. (Stipulations at ¶ 10, Exhibits 1 and 2).

9. The Information states that Claimant, as agent of the school district, "intentionally misapplied property . . . that was under the care, custody, and control" of the school district in the sum of approximately \$49,600.00. (Exhibit 1).

10. On May 9, 2011, Claimant waived his right to an Indictment by Grand Jury and pled guilty to 18 U.S.C. § 666(a)(1)(A), the charge set forth in the Information. (Stipulations at ¶ 11, Exhibits 3, 4, and 5).

11. The May 9, 2011 Transcript from the Change of Plea proceedings sets forth the following facts:

[F]rom on or about October 3rd of 2005 to on or about July 18th of 2006, Glendale School District received federal funds from the United States Department of Education totaling \$49,600 under the Funds for the Improvement of Education program.

There were three disbursements of funds from the Department of Education to Glendale School District on this grant. The first was on or about October 3rd of 2005, \$20,000 of the grant was disbursed to Glendale. Thereafter, on approximately October 12th of 2005, \$18,784 more dollars was disbursed to Glendale. And, finally, on or about July 18 of 2006 the final disbursement was sent to Glendale in the amount of \$10,816.

At that time, then employed by the Glendale School District as their superintendent was Dr. Bruno. He also was the applicant on the grant,

and he submitted and signed the paperwork for the grant in order for Glendale, as the organization, to receive those federal dollars.

Now, that grant money was to be spent on extending the high speed wireless internet network to all the students throughout the Glendale School District.

On the paperwork that was submitted and signed by Dr. Bruno, he stated that the funds were being used in accordance with the grant application, and he actually stated at one point that "the project has been very successful."

However, those funds which were clearly in excess of \$5,000 that came into the organization's hands at Glendale were intentionally misapplied by Dr. Bruno, in that he received those funds and diverted or applied those funds in various other ways that weren't in direct accordance with the funding, as required by the Department of Education when they allocated and gave that money to the Glendale School District.

(Exhibit 5 at pp. 31-32.)

12. Claimant, on the record, agreed that the facts set forth in Exhibit 5 at pages 32 and 33 were true. (Exhibit 5 at p. 33.)

13. Claimant, in his capacity as Superintendent, intentionally misapplied \$49,600.00 in Glendale School District funds between October 3, 2005 and July 18, 2006. (Stipulations at ¶ 12).

14. The \$49,600.00 in funds was grant money from the Fund for the Improvement of Education, a program funded by the United States Department of Education. (Stipulations at ¶ 13).

15. Claimant converted \$49,600.00 in school funds to his own personal use. (Stipulations at ¶ 14).

16. The Glendale School District suspended Claimant from employment in August 2008 for alleged misconduct, and, effective August 5, 2008, Claimant resigned from his position as Superintendent. (Stipulations at ¶ 4 and ¶ 5).

17. By letter dated July 14, 2011, PSERS notified Claimant that his right to receive retirement benefits from PSERS is subject to forfeiture as provided in the Public Employee Pension Forfeiture Act, 43 P.S. §1311 *et seq.*, because the offense to which he pled guilty is substantially the same as the Pennsylvania state crimes of 18 Pa.C.S. § 4113(a) (misapplication of entrusted property and property of government or financial institutions) and/or 18 Pa.C.S. § 3927 (theft by failure to make required disposition of funds received). (Stipulations at ¶ 15, Exhibit 6).

18. Claimant's last monthly retirement benefit check from PSERS was issued on or about July 29, 2011. (Stipulations at ¶ 8).

19. Prior to the Claimant's guilty plea to 18 U.S.C. §666(a)(1)(A), neither the claimant nor his counsel contacted PSERS regarding pension forfeiture. (Stipulations at ¶ 16).

20. On August 12, 2011, Claimant filed a timely appeal and request for administrative hearing on the issue of the forfeiture of his retirement benefits. (Stipulations at ¶ 17).

21. Claimant and PSERS entered into stipulations of fact and waived the right to an administrative hearing. (*See* Stipulations).

III. PROPOSED CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter.
2. Claimant's appeal was timely filed. (Stipulations at ¶ 17).
3. The Public Employee Pension Forfeiture Act, 43 P.S. §1311 *et seq.*,

[hereinafter Forfeiture Act] was effective as of July 8, 1978.

4. "No public official or public employee . . . shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment." Forfeiture Act, 43 P.S. § 1313(a).

5. The Board is without legal authority to decline to implement the forfeiture and other sanctions provided for in the Forfeiture Act with respect to Claimant. *Apgar v. State Employees' Ret. System*, 655 A.2d 185, 189 (Pa.Cmwlth. 1994).

6. Claimant, in his capacity as Superintendent of Glendale School District, was a public official or employee for purposes of the Forfeiture Act. 43 P.S. § 1312.

7. Claimant's public employment placed him in a position to commit the crime to which he pled guilty. Forfeiture Act, 43 P.S. § 1312.

8. Claimant committed the offense to which he pled guilty through his public office or position. Forfeiture Act, 43 P.S. § 1312.

9. The definition of "crimes related to public office or employment" includes "all criminal offenses as set forth in federal law substantially the same as the crimes enumerated" in Section 1312. Forfeiture Act, 43 P.S. § 1312.

10. Claimant pled guilty to a federal offense, 18 U.S.C. 666(a)(1)(A), that is "substantially the same as" 18 Pa.C.S. § 3927, which is one of the Pennsylvania criminal offenses enumerated in Section 1312 of the Forfeiture Act as a crime "related to public office or public employment." 43 P.S. § 1312(4).

11. Alternatively, Claimant pled guilty to a federal offense, 18 U.S.C. 666(a)(1)(A), that is substantially the same as 18 Pa.C.S. § 4113, which is one of the offenses enumerated in Section 1312 of the Forfeiture Act as a crime “related to public office or public employment.” 43 P.S. § 1312(7).

12. Claimant bears the burden of establishing the facts necessary to sustain his claim that his pension is not subject to forfeiture. *See Gierschick v. State Employees’ Ret. Bd.*, 733 A.2d 29, 32 (Pa.Cmwlth. 1999); *pet. for allow. of appeal den’d* Feb. 2, 2000, 2000 Pa. LEXIS 265.

13. Forfeitures are not favored in the law and are to be strictly construed. *Mazzo v. Board of Pensions and Retirement of the City of Philadelphia*, 531 Pa. 78, 84-85; 611 A.2d 193, 196-97 (Pa. 1992).

14. Each time Claimant was elected, appointed, or promoted, or otherwise changed job classifications, there was a termination and renewal of his contract for purposes of the Forfeiture Act. 43 P.S. § 1313(c).

15. Claimant’s guilty plea was a breach of his contract with his employer. 43 P.S. § 1313(b).

16. Except for the return of his contributions without interest, Claimant permanently forfeited his right to any and all retirement benefits from PSERS, including any benefits associated with his employment at the Altoona Area School District, and is otherwise subject to the sanctions and remedies of the Forfeiture Act. 43 P.S. § 1313(a); *Shiomos v. State Employees Ret. Bd.*, 533 Pa. 588, 626 A.2d 158 (Pa. 1993).

17. The pension that accrued on all of Claimant's service is subject to forfeiture effective May 9, 2011, the date of Claimant's guilty plea. 43 P.S. § 1313(b).

IV. DISCUSSION

This appeal requires the statutory interpretation of certain provisions of the Public Employee Pension Forfeiture Act, 43 P.S. §1311 *et seq.* [hereinafter Forfeiture Act]. The actual forfeiture of the public employee pension is set forth in 43 P.S. §1313(a). That provision states:

Notwithstanding any other provision of law, no public official or public employee nor any beneficiary designated by such public official or public employee shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is convicted or pleads guilty or no defense to **any crime related to public office or public employment.**

(Emphasis added).

The Forfeiture Act sets forth very narrow and clearly defined grounds for forfeiture. Such forfeitures are not favored in the law and are to be strictly construed. *Mazzo, supra.* The phrase "crimes related to public office or public employment" is defined to include 18 Pa.C.S. § 3927 (theft by failure to make required disposition of funds received) and 18 Pa.C.S. § 4113 (misapplication of entrusted property and property of government or financial institutions), if "committed by a public official or public employee through his public office or position or when his public employment places him in a position to commit the crime." 43 Pa.C.S. § 1312 (4) and (7). "Crimes related to public office or public employment" is also defined to include federal criminal offenses that are "substantially the same." 43 Pa.C.S.

§ 1312. Claimant's conviction for a crime committed while he was a superintendent of a public school is indisputably the result of a crime "committed by a public . . . employee through his public office or position." Therefore, the determinative issue in this case is whether the federal crime of 18 U.S.C. § 666 (a)(1)(A), to which Claimant pled guilty, is "substantially the same" as any of the Pennsylvania offenses enumerated in Section 1312 of the Forfeiture Act.

The federal crime of 18 U.S.C. § 666 (a)(1)(A) is:

§ 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--

(i) is valued at \$ 5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency. . .

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of \$ 10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

To determine whether two crimes are "substantially the same," Pennsylvania courts have considered the elements of the crimes, the burden of proof, and the *mens rea*. See *Roche v State Employes' Ret. Bd.*, 731 A.2d 640 (Pa.Cmwlt. 1999); *Merlino v. Philadelphia Bd. of Pensions and Retirement*, 916 A.2d 1231 (Pa. Cmwlt. 2007); *In re Terlecki*, 2006 Pa. Dist.

& Cnty. Dec. LEXIS 434 (C.P. Allegheny 2006), *aff'd without op.*, 935 A.2d 936 (Pa. Cmwlth. 2007).

The case of *Merlino, supra*, may provide the best explanation of when two crimes are “substantially the same” for purposes of pension forfeiture. In *Merlino*, the police officer pensioner was involved in a drug investigation. 916 A.2d at 1233. During the investigation, Merino falsely stated that a trained police dog and his handler signaled the presence of narcotics in two boxes when those boxes were inside a truck. *Id.* That information was used to secure a search warrant. *Id.* Merlino later repeated the false story to an Assistant U.S. Attorney. *Id.* Merino was later charged with, and pled guilty to, making a false statement to a federal agency under 18 U.S.C. § 1001(a). *Id.* The Philadelphia Board of Pensions and Retirement found Merlino’s pension to be forfeited, finding that the federal crime of making false statements as a police officer to federal authorities during an investigation is substantially similar to two state crimes that are enumerated in the Forfeiture Act, namely the crimes of unsworn falsification to authorities and false reports to law enforcement authorities. The Commonwealth Court agreed, concluding that 18 U.S.C. § 1001(a)(2) is “substantially the same” as 18 Pa.C.S. § 4906(b)(1). The Court explained that the federal statute makes it a crime if a person “knowingly and willfully ‘makes any materially false, fictitious, or fraudulent statement or representation’ in any matter within the jurisdiction of the . . . federal government,” and the Pennsylvania statute provides that a person commits a misdemeanor of the third degree if he or she “reports to law enforcement authorities an offense or other incident within their concern knowing that it did not occur.” *Id.* at 1236. Thus, “[b]oth statutes require a false statement knowingly made to law enforcement authorities.” *Id.* at 1236.

In this case, PSERS likens the federal crime of federal program theft in violation of 18 U.S.C. § 666(a)(1)(A), the crime to which Claimant pled guilty, to the state crimes of misapplication of entrusted property and property of government or financial institutions, 18 Pa.C.S. § 4113(a), or theft by failure to make required disposition of funds received, 18 Pa.C.S. § 3927. Claimant argues that neither of these statutes is “substantially the same” as required by 43 P.S. § 1312.

In its brief, PSERS relies more heavily on the similarity with “theft by failure to make required disposition of funds received.” This comparison will be considered first.

THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS RECEIVED

This offense under state criminal law is defined as follows:

(a) Offense defined.--A person who obtains property upon agreement, or subject to a known legal obligation, to make specified payments or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he intentionally deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the failure of the actor to make the required payment or disposition.

18 Pa.C.S. § 3927(a).

Claimant argues that this crime of theft by failure to make required disposition of funds is not “substantially the same as” the federal crime to which Claimant pled guilty because the federal crime: (1) requires proof that the school district received federal funds exceeding \$10,000 during the relevant time period; (2) requires proof that the school district sustained a loss in excess of \$5,000; (3) does not include presumptions that permit an inference of intent;

and (4) does not require that the defendant benefit from the crime. Essentially, Claimant argues that the elements of the two crimes are dissimilar. Claimant also argues that the crimes are not substantially the same because the “remaining elements [of Section 3927] are established ‘if a person acts intentionally, knowingly or recklessly.’”

While it is obvious that the elements of the crime are not identical, using the analysis of *Merlino*, the elements of both statutes must be compared with respect to their purpose. First, Claimant contends that the federal crime is different because it requires proof that the school district received federal funds exceeding \$10,000 during the relevant time period and requires proof that the school district sustained a loss in excess of \$5,000. Nevertheless, both statutes criminalize the conduct of a public official in making a misapplication of funds when he or she acts as a public official. The more stringent dollar thresholds in the federal statute do not constitute a sufficient basis to conclude that it is dissimilar to 18 Pa.C.S. § 3927(a).

Next, Claimant contends that the federal statute does not include presumptions that permit an inference of intent. In that regard, the state statute appears to permit conviction in *more* instances than the federal statute; that is, the state statute allows for the application of presumptions to require *less* evidence with respect to the element of knowledge. Claimant’s argument would be stronger if the state statute required more, not less, evidence. In *Roche v State Employees’ Ret. Bd.*, 731 A.2d 640 (Pa.Cmwlth. 1999), the Commonwealth Court relied heavily upon the mental state of the employee as required by the state perjury and the federal false declaration statutes in determining the two crimes were not substantially the same. *Id.* at 648. In *Roche*, the Court held that the federal crime “false declaration before grand jury or court” was not substantially the same as the Pennsylvania crime of “perjury” and gave great

weight to the fact that the comparison statute prohibited conduct which required *less* culpability than the state statute.

The *mens rea*, with respect to the proscribed acts under both the federal and state statutes, require that the defendant act “intentionally.” The federal crime requires proof that the defendant “intentionally” misapplied the property of the government or agency. The state crime requires proof that the defendant “intentionally” dealt with the property obtained as his own.¹ Under Pennsylvania state law, a person acts “intentionally”:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

18 Pa.C.S. § 302(b)(1)(i) and (ii).

The Model Jury Instructions for the United States District Court for the Western District of Pennsylvania, the jurisdiction in which Claimant pled guilty, and the United States Court of Appeals for the Third Circuit contain an equivalent test:

The offense(s) of (*state offense or offenses that include intentionally or with intent*) charged in the indictment requires that the government prove that (*name of defendant*) acted “intentionally” [*“with intent”*] with respect to an (*certain*) element(s) of the offense(s). This means that the government must prove beyond a reasonable doubt either that (1) it was (*name’s*) conscious desire or purpose to act in a certain way or to cause a

¹ “The phraseology . . . that a person is guilty of theft by failure to make required disposition of funds if he ‘deals with property as his own’ does not require that the defendant actually use the property of another. Rather the word ‘deals’ in the context of this statute means that the actor treated the property or funds of another, designated to be used for a specific purpose, as if it were his or her own property.” *Commonwealth v. Wood*, 637 A.2d 1335, 1344 (Pa.Super. 1994) (citations omitted).

certain result, or that (2) (name) knew that (he) (she) was acting in that way or would be practically certain to cause that result.

Model Jury Instructions, Chapter 5. Final Instructions: Consideration of Mental State at 5.03 (Oct 2011) at <http://www.ca3.uscourts.gov/criminaljury/tocandinstructions.htm> and <http://www.pawd.uscourts.gov/Pages/reference.htm>.

In addition, under both the Pennsylvania crime and the federal crime, there is a knowledge component. Section 3927 requires proof of a “known legal obligation.” For property to be “misapplied” under Section 666(a)(1)(A), the defendant similarly had to have known that his intentional application of the property was unauthorized or wrongful:

6.18.666A1A-3 Theft Concerning a Program Receiving Federal Funds – Stole, Embezzled, Converted, and Misapplied Defined

The third element the government must prove beyond a reasonable doubt is that (name) [. . . (intentionally misapplied)] property.

* * *

[To intentionally misapply money or property means to intentionally use money or property of (specific organization, government, or agency) knowing that such use is unauthorized or wrongful. Misapplication includes the wrongful use of the money or property for an unauthorized purpose, even if such use benefitted the (organization) (government) (agency).]

Model Jury Instruction 6.18.666A1A-3 at <http://www.ca3.uscourts.gov/criminaljury/tocandinstructions.htm> and <http://www.pawd.uscourts.gov/Pages/reference.htm> (emphasis in original).

Based upon this analysis, the federal crime is “substantially the same” as the Pennsylvania state crime of 18 Pa.C.S. § 3927, theft by failure to make required disposition of funds received. Even applying strict construction of the Forfeiture Act, Claimant’s violation of 18 U.S.C. §666(a)(1)(A) is substantially the same as a violation of 18 Pa.C.S. § 3927.

Having so concluded, it is unnecessary to consider the comparison with the state crime of misapplication of entrusted property, but in the event that the Board should disagree with the Hearing Officer's analysis, this crime will also be considered.

MISAPPLICATION OF ENTRUSTED PROPERTY AND PROPERTY OF GOVERNMENT OR FINANCIAL INSTITUTIONS

The state crime is defined as follows:

(a) Offense defined.--A person commits an offense if he applies or disposes of property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution, in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted.

(b) Grading.--The offense is a misdemeanor of the second degree if the amount involved exceeds \$50; otherwise it is a misdemeanor of the third degree.

18 Pa.C.S. § 4113.

On their face, both statutes make it a crime for a school district superintendent to apply his school district's property in a manner that is unauthorized. Claimant has admitted that the misapplied funds were for his own personal use (Stipulation, ¶ 14). This conduct is the kind of activity that Section 4113 criminalizes.

Section 4113 requires that the government prove that the funds are used "in a manner which [the defendant] knows is unlawful." 18 Pa.C.S. §4113. Section 666(a)(1)(A) requires that the government prove that the funds were *misapplied*. In other words, the federal government must show that the funds were used in an unauthorized or wrongful manner. See Model Jury Instruction 6.18.666A1A-3 at <http://www.ca3.uscourts.gov/criminaljury/tocand>

instructions.htm and *http://www.pawd.uscourts.gov/Pages/reference.htm*. If the federal government proves that the funds were *misapplied* under Section 666(a)(1)(A), then this federal crime has been committed.

So, too, is the purpose of 18 Pa.C.S. § 4113 to criminalize the misapplication of property which has been entrusted to him. Just as in *Terlecki*, 2006 Pa. Dist. & County Dec. LEXIS 434, “although the language of both statutes are not the same, the concept behind the crimes is strikingly similar.”

Claimant’s efforts to distinguish the two statutes must be rejected. He places great reliance on the lesser burden of proof imposed by the state statute and the comparison of the grading of the crimes. In order to obtain a conviction under the federal statute, it must be shown beyond a reasonable doubt that the defendant acted intentionally in misusing the federal funds. By contrast, to obtain a conviction under the Pennsylvania misapplication statute, it merely must be shown that the person acted knowingly. Claimant’s argument might be stronger if the federal crime to which he pled guilty is an easier crime to prove or if the federal statute carried a lower penalty. *See Roche, supra*. If one forfeits one’s pension for a state statute misdemeanor, then one would expect that a Class C felony, an even more serious crime, would also result in a forfeiture. Consequently, Claimant’s proposed distinctions must be rejected.

FORFEITURE OF THAT PART OF THE PENSION PRIOR TO THE ENACTMENT OF THE FORFEITURE STATUTE

Finally, the Claimant asks the Board to overlook the strict letter of the Forfeiture Act, and pursue instead “the spirit of the law,” relying upon *Fisher Estate*, 442 Pa. 421, 424, 276 A.2d 516, 518-19 (1971) (“[F]orfeitures are not favored in the law and are to be strictly

construed.”) and *Bilec v. Auburn & Associates, Inc. Pension Trust*, 403 Pa.Super. 176, 186, 588 A.2d 538, 543 (1991) (“[F]orfeitures are not favored in the law . . . especially in cases involving employee pensions.”). While strict construction is required, once the statutes are deemed to be “substantially the same,” the Board has no discretion to ignore the statute.

Claimant asserts that his right to receive his pension had vested prior to the commission of the criminal act to which he pled guilty and because he was actually receiving his retirement benefits prior to his conviction, forfeiture of that portion of his pension relative to his Altoona teaching years should be denied. Unfortunately for Claimant, each time Claimant changed job classifications, there was a termination and renewal of his contract for purposes of the Forfeiture Act. 43 P.S. § 1313(c). The statute itself allows for no distinction between his Altoona teaching years and the retirement benefits accruing after the effective date of the Forfeiture Act.

Claimant’s right to receive pension benefits was predicated upon his successful completion of his career without the commission of a forfeitable offense. *See Shiomis*, 626 A.2d at 162. He failed to do so. The Board is not free to ignore the strict letter of the law out of compassion for what may have been valuable public service on the part of the Claimant. Just as the Court stated in *Terlecki, supra*, the penalty of pension forfeiture may appear harsh, but the Board “must do what is demanded by the law.”

V. RECOMMENDATION

Because Claimant pled guilty to a federal offense, 18 U.S.C. 666(a)(1)(A), that is “substantially the same as” 18 Pa.C.S. § 3927, which is one of the Pennsylvania criminal offenses enumerated in Section 1312 of the Forfeiture Act as a “crime related to public office or

public employment,” 43 P.S. § 1312, the Board should hold that Claimant has forfeited his right to any and all retirement benefits from PSERS, including any benefits associated with his employment at the Altoona Area School District. Effective May 9, 2011, the date of Claimant’s guilty plea, Claimant permanently forfeited the pension that has accrued on all of Claimant’s service, except for the return of his contributions without interest.

Alternatively, Claimant pled guilty to a federal offense that is substantially the same as 18 Pa.C.S. § 4113, which is one of the offenses enumerated in Section 1312 of the Forfeiture Act as a “crime related to public office or public employment.” On that basis, effective May 9, 2011, the date of Claimant’s guilty plea, Claimant permanently forfeited the pension that has accrued on all of Claimant’s service, except for the return of his contributions without interest.

Claimant’s appeal is DENIED.

Respectfully submitted,



Debra K. Wallet, Esq.
Hearing Officer

Date: February 28, 2013