

**BEFORE THE BOARD OF TRUSTEES
TEACHERS' RETIREMENT SYSTEM OF THE STATE OF ILLINOIS**

In the Matter of:)
)
)
William Cochran)
)
Petitioner.)

PROPOSED DECISION RECOMMENDED
BY THE CLAIMS HEARING COMMITTEE IN THE
ADMINISTRATIVE REVIEW OF WILLIAM COCHRAN

I. Introduction

Pursuant to 80 Ill. Admin. Code 1650.640(e), Petitioner William Cochran agreed with System staff that his request for administrative review would be presented to the TRS Board of Trustees' Claims Hearing Committee solely upon the record agreed to by the parties. The Claims Hearing Committee met by telephonic conference on June 19, 2002, to consider Mr. Cochran's appeal. Present were Presiding Hearing Officer Ralph Loewenstein, Committee Chairman James Bruner and Committee members Sharon Leggett and John Glennon. Also present, was TRS Executive Director Jon Bauman, who was strictly an observer of the proceeding.

Teachers' Retirement System (TRS) member William Cochran has filed the instant administrative review to challenge the constitutionality of 40 ILCS 5/16-199, which provides as follows:

Felony conviction. None of the benefits provided for in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his or her service as a teacher.

This Section shall not operate to impair any contract or vested right acquired prior to July 9, 1955 under any law or laws continued in this Article, not to preclude the right to a refund. The System may sue any such person to collect all moneys paid in excess of refundable contributions.

All teachers entering or re-entering service after July 9, 1955 shall be deemed to have consented to the provisions of this Section as a condition of membership.

Specifically, Mr. Cochran argues §16-199 violates Amendments V, VIII and XIV of the United States Constitution and Article I, Section 2, Section 11 and Section 15 of the Illinois Constitution. Mr. Cochran also argues that the case of Kerner v. State Employees Retirement System, 72 Ill. 2d 507(1978) [cert. denied 441 U.S. 923 (1979)] has been superseded by the U.S. Supreme Court's decision in United States v. Bajakajian, 524 U.S. 321(1998). By letter dated January 22, 2002, Mr. Cochran's counsel agreed that his felony conviction involved his teaching service. As stated therein, "Be advised that the undersigned on behalf of William Cochran has decided to withdraw and abandon all claims that the conduct for which Cochran was convicted was not related to Cochran's duties as a teacher."

It is the System's position that Kerner is still the law of Illinois and the United States and specifically negates all but one of Mr. Cochran's constitutional claims; the one dealing with eminent domain cases being meritless because it is irrelevant to the situation at hand. With regard to Mr. Cochran's arguments concerning Bajakajian, the System responds that §16-199 is not an excessive fine because it is not criminal punishment. Rather, §16-199 is a contractual agreement between Mr. Cochran and the System providing that a condition of the right to receive a pension from the System is that the member must refrain from committing felonies involving teaching service. Mr. Cochran violated that provision of his contract.

After considering the Position Statements of the parties and the exhibits contained in the Claims Hearing Packet, the Committee finds in favor of the System and determines that §16-199 is constitutional in all respects. The Committee concurs with staff that §16-199 does not impose a criminal fine, but finds that, even if Bajakajian's gross proportionality test applies, Mr. Cochran's felony conviction for committing Aggravated Criminal Sexual Abuse upon a minor

student under his care and supervision as a teacher warrants a forfeiture of his TRS pension benefits.

II. Facts of the Case

- 1) On June 15, 2001, William Cochran pleaded guilty in Perry County Case No. 2001-CF-35 to one count of Aggravated Criminal Sexual Abuse, a Class 2 Felony for fondling the breast of a female student who was a participant in Cochran's Life Saver Program serving troubled students at DuQuoin High School.
- 2) Mr. Cochran's student/teacher relationship with his female victim was specifically alleged in the criminal count to which he pleaded guilty.
- 3) Mr. Cochran's TRS benefits were suspended under the provisions of 40 ILCS 5/16-199 on June 20, 2001.
- 4) Mr. Cochran's TRS benefits were terminated under the provisions of 40 ILCS 5/16-199 on July 6, 2001.
- 5) Mr. Cochran filed his request for administrative review January 2, 2002.

III. Discussion and Analysis

1) Continued Applicability of the Kerner Case.

Otto Kerner, who served as Governor of the State of Illinois, was convicted of felonies involving his gubernatorial service. Governor Kerner raised all but one of the constitutional arguments now raised by Mr. Cochran. In upholding the State Employees Retirement System's (SERS) administrative decision to terminate Governor Kerner's SERS pension benefits, the Illinois Supreme Court found:

We have also reviewed plaintiff's claim relating to corruption of blood and forfeiture of estate (Ill. Const. 1970, art. I, sec. 11) cruel and unusual punishment (U.S. Const., amend. VIII) and due process (Ill. Const. Art. I Sec. 2; U.S. Const.,

Amends. V, XIV). We hold that the termination of payments here violates none of these provisions. (Kerner at p. 833).

The U.S. Supreme Court denied certiorari in the Kerner case in 441 U.S. 923 (1979). By doing so the U.S. Supreme Court upheld the Illinois Supreme Court's decision that the felony forfeiture provisions of the Illinois Pension Code do not violate amendments V, VIII or XIV of the U.S. Constitution nor Article 1, Section 2 or Section 11 of the Illinois Constitution of 1970. The Committee finds that the Illinois Supreme Court's ruling negates Cochran's arguments (1), (2), and (3) regarding the U.S. Constitution and (1) and (3) regarding the Illinois Constitution.

Furthermore, more recently the U.S. Court of Appeals for the Tenth Circuit Court has held in Hopkins v. Oklahoma Public Employees Retirement System, 150 F. 3d 1155 (1998) that a pension forfeiture provision similar to those found in the Illinois Pension Code does not run afoul of the United States Constitution. Hopkins cites the Kerner case with approval. Hopkins demonstrates that there is no need to revisit Kerner.

Kerner was also looked upon favorably in the recent Illinois case of Shields v. Judges Retirement System, 2001 Ill. App. Lexis 826 (November 5, 2001).

As stated therein:

It is well settled in Illinois that public employee pensions are a matter of contractual right. Stillo v. State Retirement System, 305 Ill. App. 3d 1003, 1007, 714 N.E. 2d 11, 239 Ill. Dec. 453 (1999). However, the State legislature has the power to take action to deter felonious conduct in public employment by affecting the pension rights of public employees convicted of a work-related felony. Stillo, 305 Ill. App. 3d at 1007. The underlying purpose of a pension forfeiture statute is to discourage official malfeasance by causing a forfeiture of benefits to which a public official would otherwise be entitled. Kerner v. State Employees' Retirement System, 72 Ill. 2d 507, 513, 382 N.E. 2d 243, 21 Ill. Dec. 879 (1978).

Section 18-163 of the Pension Code provides, in pertinent part:

“None of the benefits herein provided shall be paid to any person who is convicted of any felony related to or arising out of or in connection with his or her service as a judge.

This Section shall not operate to impair any contract or vested right acquired before July 9, 1955, under any law or laws continued in this Article, nor to preclude the right to a refund.

All participants entering service subsequent to July 9, 1955, are deemed to have consented to the provisions of this Section as a condition of participation.” 40 ILCS 5/18- 163 (West 1992).

The plain language of section 18-163 (40 ILCS 5/18-163 (West 1992)) indicates that a member of the pension fund who is convicted of a felony shall thereafter receive no pension benefits, with only an entitlement to a contribution refund...

Kerner has been followed in other states as well. As stated by the Supreme Court of West Virginia in West Virginia Pub. Emp. Ret. System v. Dodd, 183 W. Va. 544 (1990):

A case from another jurisdiction which is nearly on all fours with the case now before us is Kerner v. State Employees’ Retirement System, 72 Ill. 2d 507, 382 N.E. 2d 243, 21 Ill. Dec. 879 (1978), aff’g 53 Ill. App. 3d 747, 368 N.E. 2d 1118, 11 Ill. Dec. 510 (1977), cert. Denied, 441 U.S. 923, 731, 99 S. Ct. 2032, 60 L. Ed. 2d 397 (1979), 550 involving the forfeiture of the state pension rights of the late federal judge and former governor of the State of Illinois, Otto Kerner, on account of federal convictions relating to Judge Kerner’s service as governor. The statute in that

case disqualified a public employee from receiving a pension if convicted of any felony relating to or arising out of or in connection with service as a public employee. The statute was in effect prior to the conduct leading to the felony convictions. The forfeiture was upheld. The intermediate appellate court of Illinois and the Supreme Court of Illinois rejected the claim that the public pension forfeiture statute was unconstitutional as an impairment of contract, as an ex post facto law, as a forfeiture of estate for a conviction, as cruel and unusual (disproportionate) punishment or as a denial of substantive due process.

The Committee notes the Kerner decision has survived for 24 years and must be overruled for Cochran to prevail. Kerner has served public policy well in Illinois, and there is no trend in the law demonstrating any reason to allow wrongdoing public employees, especially ones who criminally sexually abuse children entrusted to their care as students, to keep their public pension benefits in spite of breaking the public trust.

2) **Cochran's Eminent Domain Argument**

Article 1, Section 15 of the Illinois Constitution states:

Right of Eminent Domain

Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

“Eminent domain” is defined as the right of the state through its regular organization, to reassert, either temporarily or permanently its dominion over any portion of the soil of the state on account of public good. In other words, eminent domain involves the condemnation of real estate for public purposes. The Committee finds there has been no taking in Mr. Cochran’s situation as contemplated in Article 1, Section 15 of the Illinois Constitution.

Furthermore, Mr. Cochran is entitled to a refund of his member contributions. His contributions are not being taken. Mr. Cochran's TRS benefits on the other hand are not his property unless and until he complies with his contract with the people of Illinois. Mr. Cochran breached this contract when he was convicted of criminally sexually abusing his students, a felony involving his teaching service. Mr. Cochran's benefits are now extinguished because they failed to vest in his possession due to his breach of contract with the System.

While TRS is an agency of the State; the assets of the TRS Trust belong to no person or group. They belong to the Trust. As stated in 40 ILCS 5/16- 197:

Sec. 16-197. Undivided interest. All assets of the System shall be invested as one fund and no person, group of persons or entity shall have any right other than to an undivided interest in the whole, and all references to the reserves shall be construed as not requiring a segregation of assets but only the maintenance of a separate account indicating the equities in the assets as a whole.

The Committee finds the System has taken no private property for public use. Rather, due to Mr. Cochran's contractual breach it is not paying out funds held by and in the name of Trust. The Committee finds Article 1, Section 15 of the Illinois Constitution has no relevance to Mr. Cochran's situation.

3) **The Bajakajian Case**

Cochran cites the U.S. Supreme Court case of United States v. Bajakajian, 524 U.S. 321 (1998) decided June 22, 1998, in support of his position that Kerner should be overruled. Bajakajian was a case involving the seizure of currency. Bajakajian was arrested transporting a substantial amount of currency out of the United States which he failed to report to federal authorities in violation of Federal currency laws. In Bajakajian, the Supreme Court focused on the fact that the defendant committed only a technical violation of the law. Had Bajakajian merely reported the amount of currency being transported out of the country, there would have been no violation. In striking down the forfeiture, the Supreme Court found a gross disproportionality between the forfeiture and the gravity of the defendant's offense.

While the Committee does not believe this to be an excessive fines case, if Bajakajian were determined to apply, the Committee finds the forfeiture herein is clearly not grossly disproportionate under the circumstances. Section 16-199 and its sister provisions found throughout the Pension Code were enacted by the General Assembly to discourage official malfeasance. Cochran, by his own admission in a court of law, agreed he criminally sexually abused a student with whom he held a student / teacher relationship. Unlike in Bajakajian where only minimal public harm was demonstrated by the government and the offense was unrelated to criminal activity and a mere reporting violation, Cochran's offense caused harm to an innocent minor student. The Illinois General Assembly has determined to constitute a Class 2 Felony, clearly a crime of serious gravity. In applying the Bajakajian gross disproportionality test, the Committee finds Cochran's §16-199 felony forfeiture to not be disproportionate, given Cochran's crime.

In People v. Jaudon, 307 Ill. App. 3d 427 (1999), the First District Appellate Court adopted the Bajakajian test. In finding the \$500 fine imposed by the City of Chicago upon owners of vehicles who lend their vehicles to individuals who place unlawful weapons within such vehicles to not be a grossly disproportionate fine, the First District observed:

We note, particularly with respect to Coach and Jaudon, if Jaudon had an ownership interest, that the fines were even more proportionate to the level of wrongdoing since Coach and Jaudon, unlike the plaintiffs / owners in Towers and unlike the vehicle owners whose cars were driven by defendants Lee and Cates in the instant case, were not innocent. They were the drivers of the vehicles and knew of the presence of the illegal contraband. (Jaudon p. 440).

Just like Coach and Jaudon, Cochran by his own admission was not an innocent party. Accordingly, applying the first District's Jaudon analysis, the Committee is further convinced that Cochran's forfeiture was not unconstitutional.

IV. Conclusion

Based on the foregoing, the Claims Hearing Committee finds in favor of the System in this matter. 40 ILCS 5/16-199 and Mr. Cochran's felony forfeiture are and were in fact constitutional in all respects.

V. Notice of Right to File Exceptions

Exceptions to the Claims Hearing Committee's Proposed Decision must be filed within fifteen (15) days of receipt by the Petitioner. A Final Decision will be issued by the Board of Trustees after it has considered the Claims Hearing Committee's Proposed Decision and any exceptions filed by the Petitioner.