FRANK J. SCARAFILE,
Petitioner,
v.
BOARD OF TRUSTEES OF THE POLICE AND FIREMEN'S RETIREMENT SYSTEM,
Respondent.

Initial Decision: March 5, 1986
Final Agency Decision: March 17, 1986

Approved for Publication by the Director of the Division of Pensions, Douglas R. Forrestor: December 1, 1986

SYNOPSIS

Petitioner appealed from the decision of the Board of Trustees of the Public Employees' Retirement System requiring him to forfeit his pension rights based upon his criminal conviction and ordering him to repay the retirement allowance he had received since 1980.

The administrative law judge assigned to the case found that petitioner had been convicted of racketeering, mail fraud, wire fraud, extortion and filing false income tax returns for which he was sentenced to seven years in prison. In applying the 11 factors of *Uricoli v. Bd. of Trustees,* 91 *N.J.* 62 (1982), the judge determined that although the numerical majority of those factors weighed in favor of petitioner, forfeiture of the pension was justified where, as here, the seriousness of the fewer evil factors outweighed the good.

In addition, the judge rejected petitioner's argument that his wife was entitled to a one-half interest in his pension since any claim she might have to his pension was derivative of any right petitioner himself had to a pension benefit.

Accordingly, the judge affirmed the denial of petitioner's pension rights and ordered repayment of any amounts received as a retirement allowance.

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

Thomas A. DeClemente, Esq. and **John C. Caniglia,** Esq., for petitioner
Kathleen O. Curley, Deputy Attorney General, for respondent (W. Cary Edwards, Attorney General of New Jersey, attorney)

FOLEY, JR., ALJ:

On September 24, 1985 and October 8, 1985, hearings were held on the appeal of petitioner, Frank J. Scarafile, from a decision of respondent, Board of Trustees of the Police and Firemen's Retirement System, dated January 28, 1985. In its decision, respondent determined that petitioner's conviction of crimes of moral turpitude warranted a total forfeiture of his pension. The respondent further determined that petitioner was required to repay to the pension fund approximately $54,711.30, representing the retirement allowance and cost of living adjustments paid to him since 1980, less any contributions remitted during his active period of membership after his criminal conduct commenced.

The case was the subject of a telephone prehearing conference on May 16, 1985, that culminated in the entry of a prehearing order on May 17, 1985, as amended by my letter to counsel for petitioner dated June 10, 1985. The record was closed on January 30, 1986, with the filing of petitioner's posthearing memorandum. It was reopened and again closed on February 13, 1986, with the filing of a letter from counsel for respondent requesting that certain portions of petitioner's posthearing brief be stricken. In view of my initial decision, such action will not be required.

The following facts were stipulated by counsel:

1. Petitioner's date of birth is August 18, 1928.
2. Petitioner commenced public employment as a patrolman with Union City on August 22, 1952.
3. Petitioner's appointment became permanent on August 22, 1952.
4. Petitioner was enrolled in the Police and Firemen's Retirement System on September 1, 1952.
5. Petitioner was elected a member of the Board of Education of Union City on February 13, 1974. Petitioner became private secretary to the Mayor of Union City on November 6, 1980.
6. Petitioner became private secretary to the Director of the Division of Public Safety in Union City in 1981.
7. On September 22, 1980, petitioner submitted an application for

a special retirement to the Police and Firemen's Retirement System with the effective date of November 1, 1980, at which time he was Deputy Police Chief of Union City.

8. Petitioner's application for a special retirement was not approved until December 15, 1980 in order for the Board of Trustees of the Police and Firemen's Retirement System to determine the outcome of an indictment that had been handed up against the petitioner in 1977. The Board learned that this indictment was dismissed on April 27, 1979.
9. On June 29, 1981, a 46-count indictment was filed in the Federal District Court for the District of New Jersey against the petitioner and others. The indictment charged petitioner and others with conspiracy to conduct and actually conducting an enterprise through a pattern of racketeering which involved multiple acts of mail fraud, wire fraud, obstructing commerce by extortion, attempted extortion, interstate travel in aid of racketeering, bribery, aiding and abetting and making and filing false income tax returns.
10. On March 26, 1982, petitioner and others were convicted on 28 counts of conspiracy to conduct and of actually conducting an enterprise through a pattern of racketeering. Petitioner was convicted of 15 counts of mail fraud, five counts of wire fraud, two counts of obstructing commerce by extortion, one count of attempted obstruction of commerce by extortion, one count of interstate travel in aid of racketeering, and two counts of making and filing false income tax returns.
11. On May 10, 1982, petitioner was sentenced to seven years in prison by Judge H. Lee Sarokin.
12. As a result of this conviction, petitioner was made to forfeit his public office as a member of the Board of Education of Union City pursuant to *N.J.S.A.* 2C:51-2, effective May 10, 1982.
13. Petitioner's appeal to the Third Circuit Court of Appeals resulted in an affirmance of the judgment of conviction.
14. A further appeal to the United States Supreme Court resulted in a writ of certiorari being denied on July 2, 1984.
15. On January 14, 1983, petitioner resigned as private secretary to the Director of the Department of Public Safety in Union City.
16. At its meeting of October 22, 1984, the Board of Trustees of the Police and Firemen's Retirement System reconsidered the

status of petitioner's pension allowance, applying the 11 factors of *Uricoli v. Police and Firemen's Retirement System,* 91 *N.J.* 62, 77-78 (1982) and determined that total forfeiture was warranted. Additionally, the Board requested petitioner to repay approximately $54,711.30, representing the retirement allowance and cost of living adjustments paid to petitioner since 1980, less the contributions remitted during his active period after the criminal conduct began.

17. The Board's determination of October 22, 1984 was stayed and pension benefits were reinstated on December 5, 1984, until such time as petitioner had the opportunity to be heard by the Board of Trustees of the Police and Firemen's Retirement System.
18. At the Board's meeting on January 28, 1985, Thomas DeClemente, Esq., appeared with Mrs. Scarafile and Frank Scarafile, Jr., petitioner's son, at which time the Board again determined that total forfeiture was warranted and again requested that petitioner repay approximately $54,711.30.
19. A timely appeal was filed on February 28, 1985.
20. Petitioner was incarcerated in the Federal Hospital in Springfield, Missouri, on January 14, 1985 and he agreed to surrender on January 4, 1985.
21. A motion to reduce petitioner's sentence was denied by Judge Sarokin in approximately December 1984.

On October 8, 1985, Mary A. Scarafile testified that she is the wife of petitioner and has been married to him since September 1977. This was the second marriage for both, their spouses having died. The witness testified that in 1952 her husband became a police officer in Union City and subsequently a deputy chief. In 1980, because of a heart condition that ultimately led to open heart surgery, petitioner applied to retire as a Union City police officer. In 1980 petitioner had a triple bypass operation. Additionally, his application for retirement was approved and he was given a pension.

Mrs. Scarafile stated that her husband was indicted in 1981 and he went to trial in November 1981. The witness said that the principal witness for the government at the trial was Rudolph Orlandini, and although Mr. Orlandini knew petitioner was a police officer, he acted with her husband only as a Board of Education member. Further, although he was the principal witness at the trial against her husband, the sum and substance of his testimony was that, as a contractor who built additions to certain schools, he made kickbacks.

Mrs. Scarafile stated that her husband's trial lasted approximately five months, that she was present every day except one when her husband went to the doctor, and that there was no single allegation made by any government witness that her husband used his position as a police officer for any illegal activity. She added that it would be true to say it was only her husband's activities as a Board of Education member that were involved. Mrs. Scarafile testified that her husband was elected to the Board of Education in 1974 and he resigned in 1982. She stated that to the best of her recollection Orlandini alleged he began to have some kind of relationship with her husband in 1978, although he had known him or had met him briefly once or twice before.

The witness stated that her husband has no source of income other than that from the Police and Firemen's Retirement System. At present she works for the city of Union City. Her husband is in a Missouri prison hospital and has been diagnosed as having malignant hypertension. She testified that her husband was in the United States military during the Second World War. He has received nine commendations and one award for valor from the PBA in 1956.

On cross-examination, after being referred to the first joint exhibit, her husband's application for special retirement dated September 22, 1980, the witness agreed the document indicated that he applied for special retirement. She stated the only thing she knew was that her husband retired for health reasons. She did not know how the reference to "special" on the application got there or why it was there. She guessed that it would seem normal that although her husband may have retired for health reasons he chose a benefit that gave him the highest return.

Mrs. Scarafile testified that her husband was deputy chief from 1974 until he retired in 1980. He rose through the police ranks as a sergeant, lieutenant and captain. As to her understanding of a police officer's duties, the witness stated that if there were a discussion about taking bribes, she would expect him as a police officer not to participate in it. She stated further that her husband was convicted of that kind of activity.

On redirect examination, Mrs. Scarafile was asked, in terms of her husband's activities, what he was doing when he allegedly accepted bribes. She answered that she only knew that as a Board member his concern was getting the schools finished and his concern was also arguments with people because the schools were not finished. Mrs.

Scarafile testified there was never any evidence introduced at the trial that a group of people ever actually sat down to discuss taking bribes.

Dennis McAlevy testified that he is an attorney-at-law of New Jersey. He represented petitioner on a criminal indictment that was returned in Federal court in Newark. The witness was shown the second joint exhibit, the indictment on which he represented petitioner in the trial before Judge Sarokin. He stated that he was familiar with what was contained in the indictment.

Mr. McAlevy was referred to page one of the first count of the indictment where petitioner was identified as an elected member of the Union City Board of Education (hereinafter "Board of Education") and deputy police chief of Union City. He stated that he was familiar with the factual circumstances as alleged in the indictment. He added there was not one single allegation in the indictment as to petitioner's duties as a Union City police officer.

Mr. McAlevy testified that he was present during the trial and at extensive pretrial hearings and some posttrial hearings. He said that, to his recollection, during the entire pretrial, trial and posttrial stages there was no reference by any witness to petitioner's committing an improper or illegal act as a Union City police officer. His only recollection of a reference to petitioner's position as deputy police chief in Union City was in the first count of the indictment, and he also believed that Mr. Orlandini might have said that he knew that petitioner had been in the police department. However, he did not believe that either Mr. Orlandini or anyone else ever mentioned petitioner in his capacity as a police officer.

The witness was referred to the third joint exhibit, the judgment of committal and conviction, and he stated that he did not think that petitioner was convicted of any act that involved his duties as a Union City police officer. Further, he stated he could not recall that there was any evidence at the trial that petitioner sat down and discussed with other codefendants accepting and receiving bribes during the course of the conspiracy.

Mr. McAlevy testified that Mr. Orlandini was the head of construction for two high schools that were being modified in Union City, and he testified that he gave petitioner certain monies as a kickback for allowing Mr. Orlandini's corporation to do the construction on these two high schools. He added that he believed this was solely with respect to petitioner's membership at the time on the Board of Education. He explained that that was the thrust; namely, that petitioner acted in his capacity as a member of the Board of Education, as the

Board had to approve the construction contract and, according to Orlandini, this was part and parcel of the conspiracy.

Mr. McAlevy testified that he thought the construction on the high schools began in the spring of 1978.

On cross-examination, Mr. McAlevy testified that he was familiar with the duties of a police officer and he agreed it would absolutely be fair to say that a duty of a police officer is to prevent crime, to stop a crime that is taking place, and absolutely not to participate in it. The witness denied that the indictment and conviction in the instant matter indicated that petitioner, as a police officer, not only participated in but allowed others to commit criminal activities and did nothing about it. The witness then explained that petitioner was indicted on a myriad of charges along with other defendants and obviously, "we failed in our defense," as the jury found, in fact, that petitioner was guilty of those charges.

The witness testified he believed that Judge Sarokin imposed a seven-year concurrent sentence. He was informed it had been stipulated that a motion to reduce petitioner's sentence was denied by Judge Sarokin in approximately December 1984, and he added that, at that time, he did not represent petitioner. The witness further stated that there were 46 counts in the indictment, and it had been stipulated that petitioner was convicted on 28 counts. Asked what petitioner's maximum custodial sentence could have been, the witness testified that, if petitioner had been sentenced to the maximum on each count, he certainly would have been exposed to over 100 years in prison. Additionally, he testified that in addition to a custodial sentence, many of the statutory violations of which petitioner was found guilty called for the imposition of a fine, but the record did not reflect the imposition by Judge Sarokin of any type of fine whatsoever. Asked to approximate the fine on the 28 counts on which petitioner was found guilty, Mr. McAlevy replied that it would certainly have been substantial, and yet no fine was imposed on Mr. Scarafile.

On redirect examination, the witness testified that sentence is also discretionary with the judge except when there is a fixed term, such as is set forth in the Graves Act in New Jersey. He stated he believed that Judge Sarokin was aware of petitioner's financial plight at the time of sentence, and he thought the reason the judge did not impose a fine was probably because of petitioner's financial hardships. The witness represented that he was not paid for his services for the last three months of the trial. He said that petitioner faced considerably

more than seven years in prison, and he thought that some other judges might have sentenced him more harshly.

At the conclusion of Mr. McAlevy's testimony, petitioner rested his case.

Counsel for respondent indicated that her case would consist of the testimony of the two witnesses, the joint exhibits and the stipulations of fact. She then rested her case.

In this matter, petitioner has the burden of proving by a preponderance of the believable evidence that he is entitled to a special retirement allowance and that the decision of respondent was erroneous. Respondent concluded that a total forfeiture of petitioner's pension was warranted and that he was obligated to repay approximately $54,711.30, representing the retirement allowance and cost of living adjustments paid to him since 1980, less any contributions remitted during his active membership after the commencement of his criminal conduct as set forth in the indictment. *Atkinson v. Parsekian,* 37 *N.J.* 143, 149 (1962). I have listened to the testimony of the witnesses, have observed their demeanor, have assessed their credibility, have reviewed the three joint exhibits and have considered the arguments of counsel. I **FIND** as **FACTS** those that were stipulated by counsel at the prehearing conference, as subsequently amended, and, as amended, stipulated by counsel at the hearing, and I incorporate them by reference now as if they were again set forth in full. Additionally, I **FIND** as **FACTS** the contents of the three joint exhibits.

The parties are correct that *Uricoli v. Board of Trustees,* 91 *N.J.* 62 (1982) controls the instant matter. *Uricoli* was a four-three decision in which the majority (there were two concurring and one dissenting opinion) laid down for all cases a flexible balancing approach and test comprised of eleven factors that must be considered to determine whether there has been dishonorable service justifying the forfeiture of earned pension benefits. Petitioner contends that eight of these factors support his case, and that as to the three remaining factors (seven, eight and nine) there was no evidence to support respondent's initial determinations. Petitioner also contends that his wife is entitled to receive in her name, and at the very minimum, one-half of the pension he claims is due him. Respondent, argues that when the facts of this case are applied to the eleven factors in *Uricoli,* it will be concluded that petitioner is not entitled to a retirement benefit from the Police and Firemen's Retirement System, that total forfeiture is warranted, as petitioner was convicted of crimes of moral turpitude

that touched his public employment, and that petitioner has the duty to return the monies paid to him since 1980, less any contributions during his active membership after the commencement of his criminal activity. I agree with counsel for respondent.

Petitioner was charged together with others on 32 counts of a 46-count indictment filed in the United States District Court for the District of New Jersey on June 29, 1981. He was also individually charged on two other counts of the indictment. After a jury trial that lasted 21 weeks, petitioner was found guilty by a jury on 28 of the 34 counts in which he was named. On May 10, 1982, the Honorable H. Lee Sarokin sentenced petitioner to concurrent seven-year terms in a designated federal institution on counts 1, 2, 29, 30 and 31. Concurrent five-year terms were imposed on 21 additional counts and concurrent three-year terms were imposed on two additional counts. The judgment of conviction was affirmed, 715 *F.* 2d 822 (3rd Cir. 1983) and, on July 5, 1984, *certiorari* was denied, 82 *L.Ed.* 2d 883. A motion to reduce petitioner's sentence was denied by Judge Sarokin in approximately December 1984.

Count one of the indictment charged petitioner, identified as an elected member of the Union City Board of Education and deputy police chief of Union City, and eight others with conspiracy with each other and with Rudolph Orlandini and others known and unknown to the Grand Jury to conduct and participate, directly and indirectly, in the conduct of the affairs of "the enterprise," from on or about July 9, 1974 until on or about September 15, 1980, through a pattern of racketeering activity which conduct and participation involved multiple acts of mail fraud; wire fraud; extortion; interstate travel in aid of racketeering; bribery and aiding and abetting. Paragraphs seven and eight of count two charged petitioner together with Rudolph Orlandini and others known and unknown to the Grand Jury, with knowingly and willfully conducting and participating, directly and indirectly, in the conduct of the affairs of "the enterprise" from on or about July 9, 1974 until on or about September 15, 1980, through a pattern of racketeering activity involving multiple acts of mail fraud, wire fraud, extortion, interstate travel in aid of racketeering and bribery and aiding and abetting. Paragraphs 9 and 10 of count two of the indictment charge bribery and aiding, and counts thirty-nine and forty charge income tax fraud.

With respect to count one, 119 overt acts in furtherance of the conspiracy were alleged to have been committed by petitioner and his co-conspirators. The first overt act charges that, between on or about

July 9, 1974 and December 31, 1974, petitioner and another spoke with Rudolph Orlandini and another defendant (who as of the date of the affirmance of the judgment of conviction entered against petitioner by the United States Court of Appeals for the Third Circuit was a fugitive and had not been tried) about receipt of $50,000 in return for a tax abatement sought by Orlando Limited Partnership for the Bella Vista Housing Project. Petitioner was also charged in count one with committing 24 other overt acts in furtherance of the conspiracy, acts numbered 9, 15, 17, 20, 21, 23, 27, 29, 31, 34, 44, 49, 85, 87, 89, 94, 95, 97, 99, 100, 103, 110, 112 and 113. These overt acts were committed on diverse dates between the commencement of the conspiracy on or about July 9, 1974 until on or about July 31, 1980, when overt act number 113, the final overt act charged to petitioner, was committed.

The specific pattern of racketeering activity with which petitioner was charged in Count two consisted of his participating with others in forty-four of forty-nine acts of racketeering on diverse dates from July 1974 through July 1980. The acts of racketeering attributed to petitioner involving bribery and aiding and abetting are nine in number. The acts of racketeering attributed to petitioner involving bribery and aiding number five.

The remaining acts of racketeering with which petitioner was charged were 21 acts of mail fraud, counts 3-23; five acts of wire fraud, counts 24-28; three acts of extortion, counts 29-31, the latter count alleging attempted extortion but the pattern of racketeering activity was attempted obstruction by petitioner and two others of interstate commerce by extortion under color of official right between August 1979 and January 1980. Count 32 charged petitioner and others with interstate travel in aid of racketeering.

Petititoner was found guilty on all 34 counts on which he was charged except six mail fraud counts numbered 4, 5, 11, 12, 17 and 23.

In order to put the issue in this case in focus, it is necessary to define the crimes of which petitioner was convicted. The Hobbs Act, 18 *U.S.C.* § 1951 (1982), provides in pertinent part: "(b) As used in this section—(2) the term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

In *United States v. Walsh,* 700 *F.* 2d 846 (2d Cir. 1983) the court stated "To aid and abet the commission of a crime, a defendant must in 'some sort associate himself with the venture, participate in it as

something that he wishes to bring about, and seek by his action to make it succeed.' "

> *N.J.S.A.* 2A:93-6, repealed effective September 1, 1979, provided as follows: Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state or of any county, municipality or other political subdivision thereof, or of any public authority, is guilty of a misdemeanor.

Effective September 1, 1979, the New Jersey Legislature replaced *N.J.S.A.* 2A:93-6 with two new statutes, *N.J.S.A.* 2C:27-2 and *N.J.S.A.* 2C:27-6. *N.J.S.A.* 2C:27-2 provides, in pertinent part, as follows:

> A person is guilty of bribery if he directly or indirectly offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:
>
> a. Any benefit as consideration for a decision, opinion, recommendation, vote or exercise of discretion of a public servant, a party official or voter on any public issue or in any public election; or
> b. Any benefit as consideration for a decision, vote, recommendation or exercise of official discretion in a judicial or administrative proceeding; or
> c. Any benefit as consideration for a violation of an official duty of a public servant or party official; or
> d. Any benefit as consideration for the performance of official duties.

In New Jersey, the necessary *mens rea* for the offense of bribery is an intent to subject the official action of the recipient to the influence of personal gain or advantage rather than public welfare. *State v. Begyn,* 34 *N.J.* 35, 48 (1961). *See also, State v. Sherwin,* 127 *N.J. Super.* 370, 385 (App. Div. 1974).

> In *State v. Seaman,* 114 *N.J. Super.* 19, 31 (App. Div. 1971), the court stated, "Having by color of his office received money to which he was not legally entitled by reason of or in connection with his legal duties, defendant was guilty of the crime of extortion under our statute." *State v. Begyn, supra* at 47. There is a distinction between that crime and bribery; the latter offense consists in *offering* a present or *receiving* one, while the former

> consists in *demanding* an illegal fee or present by color of office. 31 *Am. Jur.* 2d, § 2, p. 902. See *State v. Begyn, supra,* at 45-48. The purpose of our extortion statute was simply to punish the officer who illegally took the fee. *Id.* at 46. In bribery both the officer and the recipient are guilty of the offense. *Id.* at 48.

N.J.S.A. 2C:2-6b(4) states that a person is legally accountable for the conduct of another person when "he is engaged in a conspiracy with such other person." This statute was effective on September 1, 1979, when *N.J.S.A.* 2A:85-14, "Aiders and abettors; principals," was repealed.

In *State v. Carbone,* 10 *N.J.* 329, 338 (1952), the court stated that

> In New Jersey, an agreement or combination between two or more persons to commit a crime constitutes a conspiracy punishable as a misdemeanor, if with certain exceptions there be an overt act in furtherance of the object of the agreement by one or more of the parties. *R.S.* 2:119-1, 2, *N.J.S.A.* The union is invested with a potentiality for evil that renders the plan criminal in itself, and punishable as such if an act be done to effect its object.

And in *State v. Cormier,* 46 *N.J.* 494, 508 (1966), it was stated that ". . . an overt act in furtherance is essential, apart from certain exceptions (*N.J.S.* 2A:98-2) for a conviction on a charge of statutory conspiracy."

N.J.S.A. 2A:85-14 provided that: "Any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal. Any person who wilfully causes another to commit a crime is punishable as a principal." As used in the statute the word "aid" means to assist, support or supplement the efforts of another, and the word "abet" means to encourage, counsel, incite or instigate the commission of a crime. The aider and abettor must share the same intent as the one who actually committed the offense, *State v. Metcalf,* 168 *N.J. Super.* 375, 380 (App. Div. 1979).

Counts 39 and 40 charged the petitioner with income tax fraud. Title 26, *U.S.C.,* § 7206(1) states that

> Any person who (1) Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Beth Israel Medical Center v. Smith, 576 *F. Supp.* 1061, 1064-1066 (D.C., N.Y. 1983) was a case seeking treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 *U.S.C.* § 1961(1) *et seq.* Defendant Smith and three others moved to dismiss the complaint or portions of it on various grounds, most importantly for failure of the RICO allegations to state a claim upon which relief could be granted. As predicate RICO acts, the complaint alleged violations of the federal mail and wire fraud statutes, 18 *U.S.C.* § 1341, 1343 (1976), and of a state law criminal fraud provision, *New York Penal Law,* § 190.65 (McKinney, Supp. 1982-83) and state law claims of commercial bribery and bribe receiving. The court stated that RICO's substantive prohibitions state, in relevant part:

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section. 18 *U.S.C.* § 1962(b)-(d) (1976).

The four defendant-movants argued that the complaint's allegations of mail and wire fraud and of state law criminal fraud did not adequately allege a "pattern of racketeering activity" as defined in RICO. The court stated that a " 'racketeering activity' consists of any act which is indictable under specified provisions of federal law, including the mail and wire fraud statutes, or any act involving specified state-law crimes, including acts involving bribery, which is punishable by imprisonment for more than one year." 18 *U.S.C.* § 1961(1). The court continued that a " 'pattern of racketeering activity' consists of the commission of two or more such acts within 10 years of each other." 18 *U.S.C.* § 1961(5) (1976). In *Beth Israel Medical Center, supra,* the movants contended that, because the charges of mail and wire fraud arose out of a common nucleus of facts, they comprised only one predicate act under RICO and could not be considered separate acts comprising a pattern of racketeering activity. The court

stated that this contention was without merit and had been specifically rejected by the Courts of Appeals of at least two circuits, for reasons which are clear. First, the plain language of the statute refers to "any act which is indictable" under the mail or wire fraud statutes, without a qualification that each act must occur in a different factual situation. Second, it would contradict the requirement of a "*pattern* of racketeering activity" to hold that the acts making up the pattern must take place in unconnected factual circumstances. The court said that it follows that the instant complaint, by alleging violations of both the mail and wire fraud statutes, adequately alleged the two predicate RICO acts required to establish a pattern of racketeering activity. *Id.,* at 1066.

Racketeering activity, applicable to the instant matter, means "(A) any act or threat involving bribery which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: § 1341 (relating to mail fraud), § 1343 (relating to wire fraud), § 1951 (relating to interference with commerce or extortion), § 1952 (relating to racketeering)" 18 *U.S.C.* § 1961(1). A pattern of racketeering activity requires at least two acts of racketeering activity, one of which must have occurred after October 15, 1970 and the last of which must have occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. 18 *U.S.C.* § 1961 (5).

Mail fraud is set forth in 18 *U.S.C.* § 1341 as frauds and swindles and in 18 *U.S.C.* § 1343 as fraud by wire, radio, or television. In *United States v. Haimowitz,* 725 *F.*2d 1561 (11th Cir. 1984), Haimowitz was convicted of conspiracy to commit mail fraud, extortion, attempted extortion and obstructing and attempting to obstruct interstate commerce by extortion. Specifically, he was convicted of using the postal service to execute a scheme to defraud and to obtain property by means of false and fraudulent representations in violation of 18 *U.S.C.* § 1341 and of conspiring to commit mail fraud in violation of 18 *U.S.C.* § 371. 18 *U.S.C.* § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit

> or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned for not more than five years, or both.

The *Haimowitz* court stated that a conviction of mail fraud under 18 *U.S.C.* § 1341 requires proof:

1. Of the participation by the defendant in a scheme to defraud;
2. Of the use of the mails in furtherance of the scheme; and
3. That the defendant connected with the scheme used or caused the use of the mails. *Haimowitz,* at 1568-1569.

Haimowitz's convictions for conspiracy to commit mail fraud and for substantive mail fraud were affirmed.

The *Haimowitz* court also dealt with Haimowitz's guilt for conspiracy to extort, extortion, and attempted extortion. It stated that under the Hobbs Act, it is a crime to obstruct or affect interstate commerce by obtaining the property of another through extortionate means. 18 *U.S.C.* § 1951. Section 1951(a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

The court stated that " 'Extortion' is defined as 'obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.' 18 *U.S.C.* § 1951(b)(2)." The court continued that "The fear experienced by the victim does not have to be the consequence of a direct threat. Rather, extortion is found if the circumstances render the victim's fear reasonable. The defendant does not need to have caused the fear; the statute is satisfied if he or she intended to exploit the fear." *Haimowitz,* at 1571-1572.

The *Haimowitz* court continued by citing *United States v. Quinn,* 514 *F.*2d 1250, 1266-1267 (5th Cir. 1975), *cert. den.,* 424 *U.S.* 955 (1976) where the court stated that "the Hobbs Act forbids attempted

extortion as well as actual extortion. Therefore, in a case where the FBI foils the actual offense, it is possible for one to commit attempted extortion." *Haimowitz,* at 1572. Finally, in *Haimowitz,* the court rejected Haimowitz's contention that the government did not establish the effect on interstate commerce required under 18 *U.S.C.* § 1951. The court stated that "the statute defines commerce in broad terms, 18 *U.S.C.* § 1951(b)(3), and the Fifth Circuit has indicated that a showing of a minimal effect on interstate commerce will sustain jurisdiction under the statute." *Haimowitz,* at 1573.

18 *U.S.C.* § 1343, entitled "Fraud by wire, radio, or television," states that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The essence of the crime of fraud by wire is a fraudulent scheme furthered by use of interstate telephone calls, *United States v. Brien,* 617 *F.*2d 299, 310 (1st Cir. 1980), *cert. den.*, 100 *S. Ct.* 1854 (1980). The *Brien* court further stated, at 310, that 18 *U.S.C.* § 1343, like 18 *U.S.C.* § 1341 a Federal general antifraud statute, applies to interstate wire communications in furtherance of *any* scheme to defraud, as 18 *U.S.C.* § 1341 applies to mail. The court continued that if a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright. These are criminal statutes, not tort concepts. The only issue is whether there is a plan, scheme or artifice intended to defraud, *Brien, supra,* at 311.

In *United States v. Clemente,* 640 *F.*2d 1069, 1076 (2d Cir. 1981), rehearing denied (1981), the court stated that extortion, as defined in the Hobbs Act, consists of the use of wrongful means to achieve a wrongful objective. The applicability of the Hobbs Act depends on whether the statutorily identified means (actual or threatened force, violence, or fear) have been put to wrongful use; that is, have been employed to obtain property to which the alleged extortionist has no lawful claim.

18 *U.S.C.* § 1952(a) (1982), the Travel Act, prohibits travel in interstate commerce with the intent to promote "any unlawful activi-

ty." In *United States v. Stevens,* 612 *F.*2d 1226, 1231 (10th Cir. 1979), rehearing denied (1980), the court stated that the elements of a Travel Act violation under 18 *U.S.C.* § 1952(a)(3) are the use of facilities of interstate commerce, with intent to promote, manage, establish, carry on or facilitate any unlawful activity, and performance of or an attempt to perform that unlawful act. *Stevens,* at 1231.

The undersigned has set forth in detail the definitions and elements of the single enterprise conspiracy which petitioner and others knowingly and willfully conducted and in which they participated from on or about July 9, 1974 until on or about September 15, 1980, through a pattern of racketeering activity and also in which they committed bribery and aiding and abetting, mail fraud, wire fraud, extortion, attempted extortion, and interstate travel in aid of racketeering. Petitioner was also convicted on two counts of income tax fraud.

These crimes and petitioner's convictions thereof have been set forth to demonstrate their gravity and substantiality, to demonstrate that they were multiple offenses of a continuing nature, replete with moral turpitude and with the highest degree of guilt and culpability, to demonstrate petitioner's venal and avaricious motives for personal gain, and to further demonstrate the essential differences between the crimes and convictions in this case as contrasted with the four most recent New Jersey Supreme Court cases on this subject, commencing in 1978 with *Makwinski v. State,* 76 *N.J.* 87 (1978), and concluding with *Uricoli, supra.*

Makwinski, a chief of police, was convicted of misconduct in office between June 1970 and April 1971. He was fined $250. There was no personal gain involved but his conduct touched the administration of his office. In *Masse v. Public Employees' Retirement System,* 87 *N.J.* 252 (1981) Masse was a public employee who pleaded guilty to impairing the morals of a minor and contributing to the delinquency of a minor, conduct involving moral turpitude but unrelated to his job performance. Concurrent terms of one to three years were suspended; Masse was placed on probation for two years and fined $1,000. In *Procaccino v. Public Employees' Retirement System,* 87 *N.J.* 265 (1981), Procaccino pleaded guilty to misconduct in office and improperly appropriating funds entrusted to him as a constable while in county employ. This conduct and plea was unrelated to his employment by the state as a title examiner. He received an 18-month jail term that was suspended subject to a one-year probationary period and restoration of the funds taken. Finally, Uricoli, also a police chief,

was found guilty of malfeasance in office, a single ticket-fixing incident for which he received no compensation. He was sentenced to one year in jail, which term was suspended, and he was placed on probation for two years unless and until he paid a fine of $1,000.

In *Uricoli,* Justice Handler viewed the issue as whether only one incident, involving an illegal disposition of a traffic ticket for no personal gain after 20 years of flawless service, was an infraction of sufficient magnitude to render the employee's career in the public service so dishonorable as to require the forfeiture of all pension benefits.

The court briefly reviewed the older cases commencing with *Plunkett v. Board of Pension Commissioners of Hoboken,* 113 *N.J.L.* 230 (Sup. Ct. 1934), aff'd o.b., 114 *N.J.L.* 273 (E. & A. 1935), and stated that the cases focused generally on two dimensions of employment conduct that could result in forfeiture; namely, the degree to which the misconduct "touches the administration of the public employee's office or position" and the degree of culpability or "moral turpitude" evident in the misconduct. The court then reviewed its more recent decisions, *Masse, Procaccino* and *Makwinski.* Justice Handler wrote that the Supreme Court's most recent cases demonstrated that the proper approach to the resolution of the problem of what constitutes dishonorable service justifying the forfeiture of earned pension benefits is one that calls for flexibility and the application of equitable considerations. He then wrote that the court held that in all cases, even where there is a relationship between the particular misconduct at issue and the performance of employment duties, a balancing approach is required in order to determine whether forfeiture is justified under all of the circumstances. He set forth the factors which must be considered and balanced in the application of such a flexible test. These 11 elements are:

1. the employee's length of service;
2. the basis for retirement, *i.e.,* age, service, disability, etc.;
3. the extent to which the employee's pension has vested;
4. the duties of the particular employment;
5. the employee's public employment history and record;
6. the employee's other public employment and service;
7. the nature of the misconduct or crime, including the gravity or substantiality of the offense, whether it was a single or multiple offense and whether it was continuing or isolated;
8. the relationship between the misconduct and the employee's public duties;

9. the quality of moral turpitude or the degree of guilt and culpability, including the employee's motives and reasons, personal gain, and the like;
10. the availability and adequacy of other penal sanctions;
11. other personal circumstances relating to the employee bearing upon the justness of forfeiture. *Uricoli,* at 78.

In Uricoli's case, Justice Handler concluded that total forfeiture was not warranted. He conceded that the court did not understate the wrongfulness of the particular infraction by Uricoli; that is, ticket fixing, or its direct and actual relationship to the performance of Uricoli's public duties. He noted, however, that Uricoli was convicted of having committed this wrongful act after 20 full years of honorable service and that there was no evidence that the criminal conduct was pervasive or chronic. Justice Handler wrote that Uricoli was found guilty of only a single infraction. There was no continuing criminal scheme or any showing of extensive corruption or breach of trust. He added that the evidence on the record amply supported the fact that there was no personal gain obtained from the transaction and that there was no indication of venality. He further stated that adequate alternative penal sanctions were available and had been applied. The court concluded that Uricoli's misconduct, on balance, should not result in the automatic forfeiture of all benefits.

In view of the fact that the *Uricoli* balancing approach is now our law, I will proceed to apply the facts of the instant matter to the 11 factors and elements set down in *Uricoli* in order to determine whether a forfeiture is justified under all of the circumstances.

Initially, it is important to note that *Uricoli* permits a total forfeiture even though there is no relationship between the misconduct and the employee's public duties. The latter is merely the eighth of 11 factors and elements in the balancing approach of *Uricoli.* From my review of the 28 counts of the 34 counts of the 46-count indictment on which petitioner was convicted and the nature and elements of the crimes of which he was convicted, I conclude, applying the *Uricoli* balancing approach, that total forfeiture is warranted and justified under all of the circumstances. Although I reach this conclusion without reference to the opinion of Judge Weis for the United States Court of Appeals, Third Circuit, in *United States v. Aimone, et al.,* 715 *F.*2d 822 (1983), rehearing and rehearing in banc den., September 19, 1983, *cert.* den. 82 *L.Ed.* 2d 883 (1984), affirming in all respects petitioner's and six others' judgments of convictions, resort to that opinion buttresses my conclusion that total forfeiture is warranted and

that petitioner has failed to successfully shoulder his burden of proving by a preponderance of the believable evidence that he is entitled to be maintained on pension at public expense. I take judicial notice of Judge Weis's opinion pursuant to *Evid R.* 9 (2)(b) (Anno. 1985) which states, in pertinent part, that "Judicial notice may be taken, without request by a party, of records of the court in which the action is pending and of any other court of this State or federal court sitting in or for this State. ." *See also, Rules of Evidence,* page 113, "Records of Courts of New Jersey and Federal Courts Sitting in or for New Jersey." In that commentary it was stated that "A trial court may rely on a reciting of the history of the controversy found in prior reported opinions of cases that dealt with the matter. *See, City of New Brunswick v. Borough of Milltown,* 191 *N.J. Super.* 467, 469 (Ch. Div. 1983)." Additionally, the thirteenth and fourteenth stipulations of fact are relevant.

As I read *Uricoli, supra,* at 77-78, a total forfeiture is warranted and justified if the evil in the factors and elements outweighs the good. This is so even if the evil factors and elements are fewer in number than the good. In my judgment, that is precisely the case here, the facts of which cry out for a total forfeiture of petitioner's pension. The 28 relevant counts of the indictment portray a continuing, pervasive and chronic RICO criminal scheme and pattern of extensively corrupt acts evidencing petitioner's breach of the public trust. The conspiracy and the pattern of racketeering acts, together with petitioner's two federal income tax fraud violations, culminated in petitioner's conviction on 28 counts, a victory for the public he betrayed that was affirmed by the Third Circuit Court of Appeals and that the Supreme Court of the United States declined to review.

In applying the facts of this case to the *Uricoli* flexible balancing approach and test, it will be seen that petitioner commenced public employment as a patrolman with Union City on August 22, 1952. His appointment became permanent on August 22, 1952, and he was enrolled in the Police and Firemen's Retirement System on September 1, 1952. Petitioner was elected a member of the Board of Education of Union City on February 13, 1974, and he became private secretary to the Mayor of Union City on November 6, 1980. He became a private secretary to the Director of the Division of Public Safety in Union City in 1981, which position he resigned on January 14, 1983. When petitioner executed his application for special retirement on September 22, 1980, he was deputy police chief of Union City and had served in the Union City Police Department for 28 years and 1

month. However, when petitioner's criminal conduct began on or about July 9, 1974, he was not eligible for a special retirement because, as of the date of the commencement of his criminal activity, he had not established 25 years of creditable service with the Police and Firemen's Retirement System, *N.J.S.A.* 43:16A-11.1. Respondent concedes that petitioner's current right to a pension benefit is vested, but argues that it is subject to divestment because the judgment of conviction entered against him warrants total forfeiture of that benefit. At the time petitioner was elected a member of the Union City Board of Education on February 13, 1974 he had been a police officer for that municipality since August 22, 1952. On September 22, 1980, when he applied for a special retirement, he was deputy police chief of Union City. Thus, for approximately six years and 22 days, the span of petitioner's criminal activity, he was not only an elected member of the Union City Board of Education, but he was also deputy police chief—police officer of Union City. As a result of the judgment of conviction entered by Judge Sarokin on May 10, 1982 that sentenced him to seven years in prison, he was made to forfeit his public office as a member of the Board of Education of Union City pursuant to *N.J.S.A.* 2C:51-2, effective May 10, 1982. A motion to reduce his sentence of seven years in a federal institution was denied by Judge Sarokin in approximately December 1984.

With respect to the seventh element of the flexible balancing approach and test of *Uricoli*; that is, the nature of the misconduct or crime, including the gravity or substantiality of the offense (whether it was a single or multiple offense and whether it was continuing or isolated), I have previously set forth the applicable case law and statutes and the violations of which petitioner stands convicted. These were multiple offenses that were grave and substantial and continuing in nature; that is, from approximately July 9, 1984 until approximately July 31, 1980 or September 15, 1980. Petitioner was a participant in 44 of the 49 acts of racketeering named in count 2 commencing in July 1974 and ending in July 1980. Of 119 overt acts in furtherance of the conspiracy in count 1, petitioner was involved in 25 from approximately July 9, 1974 until approximately July 31, 1980.

Petitioner was found guilty on fifteen of the 21 mail fraud counts committed on diverse dates commencing on or about October 7, 1977 through on or about January 8, 1980. He was convicted on all five wire fraud counts committed on diverse dates from on or about April 10, 1979 through on or about March 20, 1980.

The extortion of approximately $38,000 occurred approximately betweeen January 1978 and September 1978; the extortion of approximately $68,000 occurred between approximately April 28, 1978 and May 15, 1978; and the attempted extortion of approximately $125,000 occurred from approximately August 1979 to January 1980. The interstate travel in aid of racketeering occurred in approximately April 1980.

Finally, there were two income tax fraud convictions concerning petitioner's joint income tax return for the calendar year 1978 and his joint income tax return for the calendar year 1979.

When the actions of Messrs. Makwinski, Masse, Procaccino and Uricoli are compared with the grave, substantial and heinous crimes of which petitioner stands convicted, they pale in comparison and fade into obscurity. Petitioner's criminal conduct was pervasive and chronic. It consisted of multiple offenses with resultant convictions, and there was clearly a continuing criminal scheme replete with extensive corruption and breach of trust.

Although as previously stated total forfeiture is warranted and found to be fact without resort to Judge Weis's opinion for the Third Circuit, which affirmed in all respects the judgments of conviction entered against petitioner and others, I nevertheless refer to the opinion since it is a record of the Third Circuit Court of Appeals that I may judicially notice and since its contents are part of the factual picture at this initial level. There was evidence that petitioner obtained personal gain from his venal transactions and this fact can be gleaned from excerpts of Judge Weis's opinion and also from counts 39 and 40 of petitioner's two income tax fraud convictions. Again, my conclusion that total forfeiture of petitioner's pension is warranted and that he is obligated to repay the monies paid to him in the amount set forth is based on the facts found solely as they relate to petitioner's criminal activities and convictions and to no other individuals with whom he conspired and on the applicable case and statutory law. However, it is fitting to quote from Judge Weis's opinion because it reinforces my already expressed conclusion that total forfeiture and repayment are warranted. Judge Weis's opinion strongly convinces me of the grave and substantial nature of, and petitioner's guilt and culpability in committing, the multiple and continuing crimes of moral turpitude, which petitioner committed for motives and reasons including personal gain.

Petitioner contends that, as to factor eight in *Uricoli;* that is, the relationship between the misconduct and the employee's public duties,

there was no evidence whatsoever that petitioner's wrongdoing was in any way associated with his position of deputy police chief—police officer of Union City. This contention is frivolous. The evidence is to the contrary that the crimes arose out of Union City and involved petitioner's position as an elected member of the Union City Board of Education.

Assuming, *arguendo,* that there was no evidence of a relationship between petitioner's criminal misconduct and his public duties as deputy police chief-police officer of Union City, this is no plus for petitioner. He receives no bonus points for this because he was duty bound to be a law-abiding deputy police chief and police officer. That was expected of him. However, the fact that there was a relationship between petitioner's misconduct and his public municipal duties as an elected member of the Union City Board of Education is a devastating minus for petitioner and a factor that weighs heavily in favor of total forfeiture and the obligation to repay. As aptly stated by Justice Clifford in his dissent in *Procaccino,* at 274, "The public is entitled to expect its public employees to be trustworthy in dealing with money coming into their hands by reason of the public employment, and to expect further that failure to perform according to that fundamental tenet of honest behavior will result in the public servant not receiving a pension that rests on 'honorable service.' " Transcending all is the fact that petitioner was a police officer for Union City from August 22, 1952 until his special retirement was approved on December 15, 1980, at which time he was deputy police chief. Petitioner's criminal wrongdoing spanned approximately 6 years and 22 days, from about July 9, 1974 until about July 31, 1980 or possibly extending to about September 15, 1980. During every minute of this approximate six years and 22 days, petitioner remained a police officer and deputy police chief of Union City. He therefore had the constant duty not to commit crime and not to conspire with others to commit it. He also had the unceasing obligation, and the authority to arrest those who committed crime. For the period February 15, 1974, prior to the commencement of his criminal activity, until May 10, 1982, petitioner was also an elected member of the Union City Board of Education, which public office he was made to forfeit effective May 10, 1982 as a result of the judgment of conviction entered against him on that day. Extremely significant and applicable to this eighth factor and dispositive of it adversely to petitioner is the language of our Appellate Division in *Township of Moorestown v. Armstrong and N.J. of Civil Service,* 89

N.J. Super. 560, 566 (App. Div. 1965), certif. den., 47 *N.J.* 80 (1966) where the court said that

> It must be recognized that a police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public, particularly in a small community such as Moorestown.

Obviously, this language applies with equal force to petitioner and the municipality of Union City. Respondent correctly argues that petitioner's criminal activity as an elected member of the Union City Board of Education cannot be separated from his official duties as a police officer and deputy police chief of Union City. For petitioner to argue that his criminal conduct concerned only his elected public position as a member of the Union City Board of Education and not his position as police officer-deputy police chief is nothing more than fallacious and unsound reasoning. This assumption does not have to be indulged, because the fact is that there was a direct relationship between petitioner's criminal misconduct and his public duties as a police officer and deputy police chief of Union City, a unique kind of public employment. (Pause should be taken to consider precisely what the position of deputy police chief of a municipal corporation entails and means).

In his opinion for the Third Circuit, Judge Weis wrote that the evidence at trial established to the jury's satisfaction the existence of an enterprise consisting of three of the nine named defendants (not petitioner), together with the Orlando Construction Company and Rudolph Orlandini. Two of these three defendants supervised and promoted the affairs of the enterprise through their control of the Orlando Construction Company and other entities formed to develop and manage construction projects in Union City and North Bergen, New Jersey. After referring to another named defendant, Judge Weis then referred to the other defendants who were all public officials, including petitioner, the Union City deputy police chief and a member of the Board of Education. He named four other public officials in addition to petitioner and stated that these five accepted bribes to use their offices and influence in furtherance of the enterprise's affairs and, through their assistance, the enterprise received city construction contracts, tax abatements, and payments of fraudulent work orders. The

city officials also cooperated with the enterprise in its attempt to have Union City purchase an office building at a grossly inflated price.

Judge Weis continued by stating that in 1974, the Orlando Limited Partnership, one of the related entities, began development of the Bella Vista senior citizen housing project in Union City. The enterprise agreed to a $50,000 bribe and actually paid $12,000 to petitioner so that another public official would arrange for a tax abatement and intercede with the state housing authority. Bribes were also paid to obtain similar treatment for other projects undertaken by the enterprise's related entities.

Judge Weis further wrote that a $40,000 bribe was paid to petitioner and two other public officials when the Orlando Construction Company was awarded contracts to renovate two Union City high schools in 1977. Further, between 1974 and 1978, the enterprise group participated in a number of other public projects, for which bribes were paid to petitioner and two other public officials. The court also stated that perhaps because of the size of the bribes, the enterprise was financially unable to complete some of the work. To secure additional funds, one of the named defendants, not petitioner, directed Orlandini to invest $300,000 in an office building in Union City. Judge Weis wrote that the plan was that $200,000 would then be paid to three of the public officials, including petitioner, to arrange a purchase of the building at the inflated price of $3.1 million. The judge stated that public opposition to the sale caused the purchase price and bribe to be reduced. Although petitioner received a $75,000 "advance" on the bribe, the sale of the building never took place because of an adverse vote in a referendum. After the election, Orlandini, two other defendants and petitioner agreed that $50,000 of the advance would be returned.

Judge Weis noted that the defendants raised a variety of issues on appeal but that only three merited discussion. Two of these issues concerned the selection of the grand jury forepersons and the action of the trial judge during jury deliberations and the announcement of the verdict. The third issue concerned the RICO convictions and defendants' contentions that the government drafted an indictment that lumped together six unrelated conspiracies. The defendants alleged that the prosecution sought to confuse the jury by producing massive evidence of diverse and distinct schemes. The defendants argued that the description of the "enterprise" as "a group of individuals and a corporation associated in fact" did not conform to the statute, which they emphasized described two different types of

enterprises; that is, certain designated legal entities and "any union or group of individuals associated in fact, although not a legal entity." The defendants contended that an enterprise must be in one category or the other, not a combination of both.

The court did not find this argument persuasive, stating it was convinced that a proper statutory enterprise was charged and proved. The court also rejected defendants' contention that the evidence showed more than one conspiracy and therefore there was a variance from the indictment, stating that the record supported a finding of a single enterprise conspiracy. Judge Weis wrote that the enterprise undertook construction projects for the enrichment of its members. To promote the projects, defendants committed bribery as well as mail and wire fraud in securing tax abatements, building contracts, public financing, and fraudulent work payments. The court found that there was adequate evidence for the jury to find that each of the defendants agreed to conduct, or participate in the conduct of, the enterprise's activities through the commission of predicate offenses.

Of the three principal grounds of appeal, only the latter went to the heart of the government's case. It is extremely significant that Judge Weis went on to state that the points pressed most strongly by defendants grew out of incidents that occurred during the jury deliberations and polling after the verdict was announced. One can therefore infer that the defendants did not raise on appeal the issue that the jury verdict was against the weight of the evidence and thus that the defendants held out no hope for reversal of the judgments of convictions on that ground.

The ninth element concerns the quality of the moral turpitude and the degree of petitioner's guilt and culpability. It was of the greatest amount. In *State Board of Medical Examiners v. Weiner,* 68 *N.J. Super.* 468, 483 (App. Div. 1961) the court stated:

> [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," and as, "in its legal sense . . . everything done contrary to justice, honesty, modesty or good morals." The United States Supreme Court, in connection with alien deportation proceedings, has held that, in addition to "crimes . . . of the gravest character," any crime in which fraud is an ingredient involves moral turpitude. (citations omitted).

In my judgment, the *Weiner* definition of moral turpitude embraces every crime of which petitioner stands convicted.

Also bearing significantly on factors 7, 8 and 9 of the *Uricoli* flexible balancing test is an opinion of Judge Sarokin that was filed on October 15, 1985, in the *United States of America v. Board of Education of the City of Union City et. als.* (U.S.D.C.N.J., Civil Action No. 83-2651). This was a civil action for damages from the defendants' including petitioner, following their criminal convictions. Judge Sarokin noted that there was little doubt that the defendants were civilly liable for their fraudulent scheme as disclosed during a five-month trial before him. He added further that no one could fault the policy of recapturing ill-gotten gains from convicted criminals. Although stating that whether to pursue such a remedy was a matter for the government and not for the court, Judge Sarokin observed that most of the defendants received substantial prison terms; some lost their professional licenses and their official positions; their businesses and reputations were affected; and each undoubtedly incurred substantial legal fees. He wondered whether the action seeking damages might be an instance of overkill, destined to adversely affect the defendants' innocent families, who undoubtedly had already suffered greatly.

In setting forth the background, Judge Sarokin noted that some of the defendants, former Union City officials and others, were successfully prosecuted for their part in a scheme to divert for their own use federal grant funds earmarked for improvements at the city's two high schools. They were convicted of multiple counts of racketeering, mail and wire fraud and other offenses, and most were sentenced to prison terms on May 10, 1982.

Judge Sarokin, writing that he had presided at the criminal trial, stated that he was familiar with the underlying facts. He stated that the city and Board of Education applied for funds from the federal Economic Development Administration (EDA) for the expansion and modernization of Union Hill and Emerson High Schools. The grant applications were signed by defendant Musto in his capacity as mayor. In so doing, he certified that the funds would be used according to specific regulations and statutes and that the city would provide accurate reports to the EDA concerning performance of the contract and disbursement of funds. The grants ultimately totalled $4,462,000. Defendant Powers accepted the grant offers with his signature, reaffirming previous certifications made by the city and promising to apply the grant funds only to the actual and eligible costs incurred in connection with the projects.

Judge Sarokin continued by stating that the government alleged in its motion for summary judgment on those counts of its complaints alleging false claims and common law fraud, that even before the construction contracts for Emerson High School were awarded, petitioner and three other named defendants had agreed to "bend the law" and assist the Orlando Construction Co., controlled by two other defendants, in order to cover items omitted from the company's bid. Once the EDA provided letters of credit to a Hudson County bank, the defendants, through yet another defendant, began advancing funds to Orlando on a fraudulent basis. Another of the four defendants who had agreed to "bend the law" certified the false reports as well as the false change orders submitted. Referring to the RICO charges proved at trial, Judge Sarokin stated in sum that there was "adequate evidence for the jury to find that each of the defendants agreed to conduct, or participate in the conduct of, the enterprise's activities through the commission of predicate offenses." *United States v. Aimone, supra,* at 828.

Judge Sarokin granted partial summary judgment to the government on defendants' liability for false claims and common law fraud as alleged in the first three counts of the government's complaint, but absent further clarification he was unwilling to award the government specific damages of double $940,280, the government's alleged losses as a result of the fraudulent transactions. He therefore directed the government to submit to him and the parties exactly how each claim resulted in a loss. Defendants were granted a period of time in which to respond, and unless they could establish that genuine issues of material fact existed, Judge Sarokin indicated that he would consider the matter of damages as one for summary judgment. Judge Sarokin's opinion is also most important for the following additional comments he made. He stated that, "In the instant case, the amount of evidence adduced at trial was 'staggering.' " *United States of America v. Union City Bd. of Ed., supra,* at 7-8. Further, he stated that in five of the mail fraud counts, the jury found that all of the defendants committed mail fraud in sending or causing to be sent to the EDA executed offers of grants, quarterly reports, construction contracts and other correspondence. Additionally, all defendants except Aimone and Genovese were found guilty of an additional count of mail fraud. Judge Sarokin noted Judge Weis's reference in his opinion to the fact that to promote the projects, the defendants committed bribery as well as mail and wire fraud in securing tax abatements, building contracts, public financing and fraudulent work payments. *Id.,* at 10.

Concluding this reference to Judge Sarokin's opinion, it should be noted that he stated the jury verdict established that the defendants conspired to submit grant applications and claims to the government to draw down the federal funds with the specific intent of achieving illicit profits. The false statements and certifications in those documents were contained in the court record and confirmed by the verdict. *Id.*, at 13-14. I take judicial notice of Judge Sarokin's opinion on the same authority that permits me to take judicial notice of the opinion of Judge Weis.

Respondent correctly argues that, notwithstanding that due deference and weight should be given to Judge Sarokin's opinion that the defendants received substantial prison terms (he having presided at the trial), the seven-year sentence imposed by Judge Sarokin is not so severe as to mitigate in favor of granting petitioner a pension. There is no question but that petitioner has been subjected to a penal sanction, a seven-year custodial sentence in the Federal Hospital in Springfield, Missouri, which he commenced to serve on January 14, 1985. His trial counsel candidly testified, when asked for his approximation of the sentence petitioner faced as a result of having been found guilty on the 28 counts, that "He's looking at over 100 years, that's for sure." Additionally, trial counsel testified that in addition to a custodial sentence, the statutory violations of which petitioner was found guilty called for the imposition of a fine. Counsel referred to the judgment of conviction and indicated that it did not impose a fine, but he approximated the amount of the fine on the 28 counts as being "certainly substantial." Petitioner's trial counsel also candidly stated that, speaking for himself, he thought petitioner received a fair sentence under the circumstances but that "He was looking at a lot more time." He added, "I think some other judges might have sentenced him more harshly." In my judgment, the tenth factor; that is, the availability and adequacy of other penal sanctions, does not run in petitioner's favor.

Finally, the eleventh factor and element concerns petitioner's personal circumstances that bear on the justness of forfeiture. Petitioner has been married to Mary A. Scarafile since September 1977. Additionally, he underwent triple bypass open heart surgery in 1980. His wife works for the City of Union City. Furthermore, petitioner served in the United States military in Germany during World War II. Among the nine commendations he received, one was the PBA valor award, which he received in 1956 and which his wife thought was one of the highest awards in the State. Petitioner was deputy

police chief from 1974 until he retired in 1980. He rose to that position through the ranks from patrolman, sergeant, lieutenant and captain.

Petitioner's contention that his wife is entitled to a one-half interest in his pension is without merit. In support of this argument, petitioner relies on *Kruger v. Kruger,* 73 *N.J.* 464, 466-470 (1977). *Kruger* held that federal military retirement pay and disability benefits are "property legally and beneficially acquired" during marriage and, accordingly, subject to equitable distribution upon divorce provided all conditions precedent to their receipt have been satisfied. The simple answer to this contention is that the instant matter is not a divorce case involving property subject to equitable distribution; and, secondly, petitioner has not satisfied, by a preponderance of the believable evidence, all conditions precedent to his future receipt and present retention of pension rights. Any interest Mrs. Scarafile may have in any pension benefit is derivative of and flows only from the right petitioner has to a pension benefit. There is no entitlement in petitioner and certainly none in his wife.

As previously stated, as I read *Uricoli, supra,* at 77-78, there are 11 separate and distinct factors and elements in the flexible balancing test to determine whether total forfeiture is justified and warranted under all of the circumstances. In my judgment, it matters not if the majority of the 11 factors and elements are found to be in favor of the petitioner, as I find them to be, if, when the flexible balancing test is made, the fewer evil factors outweigh the good. In my judgment, factors seven, eight and nine (the nature of the misconduct or crimes, including the gravity or substantiality of the offenses, whether it was a single or multiple offense and whether it was continuing or isolated; the relationship between the misconduct and petitioner's public duties; and the quality of moral turpitude or the degree of guilt and culpability, including the petitioner's motives and reasons) far outweigh the good factors that are in petitioner's favor.

In his dissent in *Uriocli,* Justice O'Hern, joined by Chief Justice Wilentz and Justice Clifford (the lone but steadfast dissenter in *Makwinski, Masse* and *Procaccino),* wrote that "Justice Pashman, concurring in *Makwinski* emphasized the 'paramount importance of public employees acting honestly in accordance with the public trust placed in them,' and reaffirmed support for the rule that 'dishonorable service requires total forfeiture of pension rights, even one which has 'vested.' " *Uricoli, supra,* at 85. I note that Justice Pashman in *Makwinski* continued by also emphasizing that, although Makwinski's service was not rendered dishonorable for purposes of this principle

by his single isolated improper act, his misconduct was serious enough to require the court's strenuous disapproval, and he expressed the hope that that point would be made by the court's termination of Makwinski's accrual of pension rights as of the date of his misconduct some five years before he retired. Justice Pashman concluded his concurring opinion by writing: "In a different factual setting a public employee should not expect to retain any part of his pension." *Makwinski,* at 93.

The instant matter presents an essentially different factual setting from *Makwinski.* In performing the *Uricoli* flexible balancing test through a consideration of the 11 factors and elements, and with that portion of Justice Pashman's concurring opinion in *Makwinski* in mind, I **CONCLUDE** that total forfeiture is warranted and justified under all of the circumstances of this case, and that respondent and the Division of Pensions of the State of New Jersey are therefore entitled to repayment from petitioner of approximately $54,711.30, representing the retirement allowance and cost of living adjustments paid to petitioner since 1980, less any contributions remitted during his active membership after he commenced his criminal conduct.

I therefore **ORDER** that the decision of respondent, Board of Trustees of the Police and Firemen's Retirement System, dated January 28, 1985, which concluded that: (1) petitioner's application for retirement could not be processed because, as a result of his convictions, he was not entitled to any retirement benefit; (2) that, under the circumstances, a total forfeiture of petitioner's pension benefit was mandated; and that (3) petitioner was obligated to reimburse the pension fund approximately $54,711.30, representing the retirement allowance and cost of living adjustments paid to him since 1980, less any contributions remitted during his active membership after his criminal conduct began be **AFFIRMED.**

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

The Board of Trustees, Police and Firemen's Retirement System of New Jersey, at their meeting held March 17, 1986, considered the following material in the appeal of Frank Scarafile:

(a) The transcripts of the hearings conducted on September 24, 1985 and October 8, 1986.
(b) All exhibits.
(c) The administrative law judge's report dated March 5, 1986.

The Board thereafter by unanimous voted accepted the recommendations of the administrative law judge and affirmed their initial decison which denied Mr. Scarafile's retirement pension due to convictions of crimes of moral turpitude and the reimbursement of pension funds in the approximate amount of $61,750.03.

The Board of Trustees, Police and Firemen's Retirement System hereby adopts the findings of act and conclusions of law in the report of the administrative law judge consistent with its original determination and further adopts the recommendations contained in this report, incorporating the same herein by reference.

Pursuant to New Jersey Court Rules, you have a period of 45 days from the date of service of this notice in which to file for an appeal with the Appellate Court from this Final Administrative Determination of the Board of Trustees.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.