

# PENSIONS ARE NOT ENTITLEMENTS:

## THE MUTUAL CONSIDERATION BEHIND PUBLIC PENSIONS

By Matthew A. Peluso, Esq.



**“Pension:** a fixed amount, other than wages, paid at regular intervals to a person or to the person’s surviving dependents in consideration of past services.”

**“Entitlement:** the right to guaranteed benefits under a government program, [such] as Social Security or unemployment compensation.” [dictionary.reference.com](http://dictionary.reference.com)

**“Contract:** an agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as consideration.” [thefreedictionary.com](http://thefreedictionary.com)

The American poet James Russell Lowell reflected: “And what is so rare as a day in June? Then, if ever, come perfect days.” In the song from his musical *Carousel*, Oscar Hammerstein wrote that: “June comes bustin’ out all over/The saplin’s are bustin’ out with sap/Love he’s found my brother, Junior/And my sister’s even loonier/And my Ma is gettin’ kittenish with Pap... All because it’s June... June, June, June.”

Unfortunately, here in Jersey, times have clearly changed, and the once-beautiful month of June now bodes of darker days. This year we have again been hit with our annual bout of June “budgetitis.” In our state, as in many other states, this annual affliction involves the governing administration’s attempt to blame all of the financial mismanagement and economic favoritism at the municipal, county and state level (and even at the federal level if the sitting Governor has national political ambitions) on public pensions owed to teachers, law enforcement officers and other public servants.

When faced with a tough election campaign, partisan budget battle or decreasing favorability polling, the knee-jerk response from many politicians is to blame everything on public employees and their pensions. Even though government

spending on public pensions still constitutes a small percentage of our total annual state budget - for example, just \$1.5 billion out of the proposed 2015 budget of \$33 billion - the increasingly hostile political environment since 2008 has provided politicians with an easy scape-goat for all of our state’s economic problems: public employee pensions.

Despite prior promises, our Governor recently announced plans to take \$2.43 billion slated to fund public workers’ pensions and use it to fill the estimated \$2.75 billion state budget gap. Given the fact that the state’s public pension system already faces unfunded liabilities of approximating \$52 billion, this latest renegeing could lead to complete default in the near-future, additional credit down-ratings, and litigation by public unions, since the failure to make the full pension contributions violates the 2011 pension law previously signed by the Governor.

The Pension and Health Benefits Reform of 2011 made various changes to the manner in which, *inter alia*, the Public Employees’ Retirement System (PERS), the Police and Firemen’s Retirement System (PFRS), and the State Police Retirement System (SPRS) operate, and to the benefit provisions of those systems. Under that 2011 law, law enforcement officers covered by the Police

and Fireman’s Retirement System are now forced to contribute 10% (up from 8.5%) of their salary to their pensions. State police officers’ contribution rate similarly increased to 9% from a prior rate of 7.5%. In addition, all public employees, including law enforcement officers, are now required to contribute to their health insurance benefits and employees covered under public pensions will no longer be given cost-of-living-adjustments (“COLA”).

This law was the direct result of bi-partisan legislative support, but included a *quid pro quo* requirement that, in exchange for the higher contributions from public employees and a waiver of COLA, the current administration would make annual minimum mandatory funding payments to the state public pension fund. This promised funding is needed to ensure that the contractual pension benefits of all public employees, including law enforcement officers, will be available to them when they retire.

Yet, in the now-accepted vernacular of the debate over the funding of public worker pensions, be it in Trenton, Detroit or Madison, Wisconsin, the politicians arguing against the pension rights of public employees intentionally (and wrongfully) refer to pensions as government “entitlements.” However, as the above-

quoted definition indicates, government “entitlements” are more accurately limited to social welfare programs, such as Medicaid and Aid To Families With Dependent Children (AFDC).

From their inception, these “entitlement” programs were based on underlying moral beliefs and social concerns for the poor of our country, as well as the role that government should play in assisting them. The Great Depression of the 1930s decimated the American labor force and drove tens of millions into homelessness, poverty and malnutrition. To remediate this unprecedented mass-suffering, Congress, under the leadership of President Franklin D. Roosevelt, created the federally-funded programs, also later adopted by states, which are now commonly referred to as government “entitlements.” To be “entitled” to these social welfare programs, individuals do not have to “earn” their benefits through work of some sort. They only have to show that they are poor, homeless or in need of other governmental assistance.

However, the history of public employee pensions in this country arose from completely different concerns and motivations. “Following the rise of military pensions, retirement plans were extended to state and local employees... in the nineteenth century, and many public workers were not offered pensions until after World War I. After 1850, several large cities began providing disability and retirement benefits to employees in their police and fire departments.” Clark, R.L., Craig, L.A. and Wilson, J.W., “A History of Public Sector Pensions in the United States,” (Univ. of Penn.) 2003, p. 6. Pensions were “introduced in the public sector to help public administrators attract and retain quality workers, to provide them with performance incentives, and to retire them in an orderly fashion.” *Ibid* at p. 9.

This was the same underlying basis for the creation of New Jersey’s “Police and Firemen’s Pension Act” (Title 43), which created a statewide pension system for full time police and firemen designed to ensure the uniform protection of all such public officers through pensions payable from a fund maintained upon a sound actuarial basis. *Seire, et al. v. Police & Fire Pension Commission of Orange, et al.*, 6 N.J. 586,

591, 80 A.2d 97 (1951). Since its enactment, courts in our state have found that there is a strong legislative policy in favor of providing for public employees. *See Eyers v. State of N.J., Bd. Of Trustees of PERS*, 91 N.J. 51, 449 A.2d 1261 (1982). “A fundamental purpose underlying the pensioning of civil servants is to secure good behavior and the maintenance of reasonable discipline during service.” *Uricoli v. Police & Fire Retirem. Sys*, 91 N.J. 62, 449 A.2d 1267 (1982). *See also, Masse v. Public Employees Retirem. Sys*, 87 N.J. 252, 432 A.2d 1339 (1981) (a primary objective in establishing public pensions is to induce able persons to enter and remain in public employment, and to render faithful and efficient service while so employed); and *Plunkett v. Bd. Of Pension Com’rs of City of Hoboken*, 113 N.J.L. 230, 173 A. 923 (1934) (a basic consideration is that a guarantee against want, when the years of productivity have ended, will enhance the quality of the service rendered).

Further, unlike pure “entitlements,” New Jersey law enforcement officers have been involved for decades in contractually negotiated agreements between the PBA or FOP, and the particular government employer at the municipal, county or state level. All such parties have been represented by legal counsel in these negotiations over the years, and both the unions and the government have at least *de jure* (if not *de facto*) equal bargaining leverage.

For a couple of hundred years, contracts have required mutual “consideration” to be binding. In any binding agreement, the mutual consideration exchanged by the parties to the contract is best described as the “what do I get” part of the deal. Under New Jersey law, “no contract is enforceable... without the flow of consideration - both sides must ‘get something’ out of the exchange.” *Continental Bank of Pennsylvania v. Barclay Riding Academy, Inc.*, 93 N.J. 153, 170 (1983), quoting *Friedman v. Tappan Development Corp.*, 22 N.J. 523, 533 (1956).

Part of the “consideration” for becoming a law enforcement officer in the first place is the promise that is made by the government of this state to each prospective officer that he or she will be paid a pension at the end of their public service. Thus, for law enforcement officers, part of their promised

compensation for years of public service is payment of a pension and health benefits in their later years. As many law enforcement officers readily admit, without this promise of a pension, they would not have chosen to become cops, and this, in turn, would undermine the important underlying public policy of encouraging individuals to provide the necessary, but dangerous, public service that law enforcement officers provide to the residents of this state.

Prior to the 2008 recession, there were few complaints about public pensions, especially for law enforcement officers. The reality was that, when the private sector was booming, no one wanted to be a cop or a teacher, since many Americans believed that they were destined to make millions on Wall Street. However, after their dreams blew-up, too many residents and politicians in our state looked to place blame on everyone other than themselves. It’s now time for these residents to look elsewhere for our state’s continuing economic problems, and to ensure that those who have served the public through good and bad times are paid what they are legally due.

*Matthew A. Peluso, Esq. is an attorney based in Princeton. He has over 20 years of experience in numerous types of complex litigation, including employment, insurance and business*



*law. Mr. Peluso has successfully represented police officers in employment and contract disputes involving wrongful termination, failure to promote, race, gender and age discrimination, hostile work environment and whistle-blower actions. Mr. Peluso is a graduate of the University of Miami School of Law and George Washington University. He can be reached at: 609-306-2595. His e-mail address is: mpeluso@live.com. His experience can be reviewed on LinkedIn.com and on his firm website: <http://mpeluso@live.com>. The opinions expressed by Mr. Peluso in his article are not intended to provide legal advice. Anyone interested should consult a qualified attorney prior to making any significant employment or legal decision.*