

**ATTORNEY GENERAL GUIDELINES  
FOR DECIDING WHETHER TO APPLY FOR A WAIVER OF  
FORFEITURE OF PUBLIC OFFICE PURSUANT TO N.J.S.A. 2C:51-2(e)**

I. Introduction and Overview

Public employees convicted of certain offenses and crimes are subject to the forfeiture of their public office or employment under the provisions of N.J.S.A. 2C: 51 -2. Forfeiture of public office is mandated for a conviction of any offense<sup>1</sup> that involves dishonesty or any offense that touches upon the defendant’s office, or for a conviction for any crime of the third degree or greater. N.J.S.A. 2C:51-2(a)(1); 2C:51-2(a)(2). Forfeiture of office is also required if the Constitution or a non-criminal code statute mandates forfeiture. N.J.S.A. 2C: 51-2(a)(3). Further, in cases where the offense touched the defendant’s public office, a permanent bar to any future government employment is also required. N.J.S.A. 2C: 51-2 d.

Under N.J.S.A. 2C: 51-2 (b)(1), forfeiture of office should be immediate upon a finding of guilt by the trier of fact or where the defendant entered a guilty plea to one of the offenses or crimes mentioned above. This section also provides for the possibility of the granting of a stay where the defendant makes a showing of good cause and the stay can extend to a hearing on the merits concerning forfeiture of office at the time of sentencing. The showing of good cause is restricted by the provisions of N.J.S.A. 2C: 51-2(c) and specifically prohibits a court from granting a stay of the order of forfeiture pending appeal of a conviction or appeal of the forfeiture of office order “unless the court is clearly convinced that there is a substantial likelihood of success on the merits.”

In practice, forfeiture of office upon conviction occurs in three ways. The first method is when a prosecutor immediately moves for forfeiture of office upon conviction. N.J.S.A. 2C: 51-2(b)(1). The second method is when the forfeiture is based upon a conviction of an offense in another state or of the United States and the county prosecutor or the Attorney General makes an application to order forfeiture of public office. N.J.S.A. 2C:51-2(b)(2). The third method of forfeiture of office occurs when the issue of forfeiture has not been raised at the time of the

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<sup>1</sup>An offense is defined under N.J.S.A 2C:1-4 to include petty disorderly and disorderly persons offenses with maximum sentences under 6 months. Offenses that subject the defendant to terms of imprisonment greater than 6 months constitute a crime.

finding of guilt and the courts may order forfeiture after application has been made by the Attorney General, county prosecutor or the defendant's public employer. N.J.S.A. 2C: 51-2(g).<sup>2</sup> Even in the absence of a court order, the appointing authority has the power to remove the defendant from public office.

Under the statute, waiver of forfeiture of office is permitted in cases where a defendant is convicted of either a petty disorderly or a disorderly persons offense that involves dishonesty or that has touched his public office. Under the provisions of N.J.S.A. 2C: 51-2(e), the county prosecutor or Attorney General may make an application to the court for a waiver of the forfeiture of office and/or permanent bar to future employment in these cases. The court may grant the application for good cause shown. Under the statute, it is an affirmative act by the Attorney General or county prosecutor that accomplishes waiver if the court approves the application.

There are practical problems in applying N.J.S.A. 2C:51-2(e). First, disorderly persons and petty disorderly persons offenses are predominantly prosecuted in municipal court where the State is mainly represented by a municipal prosecutor<sup>3</sup>. However, discretion to waive forfeiture is reserved by the statute exclusively to the county prosecutor and the Attorney General. Additionally, there is rarely any time delay between the date of conviction and sentencing date in municipal court as the municipal court judge generally sentences a defendant on the same day as the conviction is rendered. It is anticipated in the statute that the forfeiture of office order and permanent bar to future government employment, if applicable, would be entered at the time of sentencing upon motion of the prosecutor. Another problem that arises is that

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<sup>2</sup>The application to order forfeiture is done through filing a complaint in lieu of prerogative writ and is a civil action which requires a complex and lengthy filing of documents, including: Brief and Order to Show Cause; Affidavit of Service; Verified Complaint laying out the facts and procedural history of the case; Case Information Statement; and submission of transcript from the prosecution of the underlying offense. Additionally, if the defendant contests the complaint, a court appearance is required.

<sup>3</sup> On occasion, indictable charges can be downgraded in Superior Court as part of a plea agreement, or a defendant can be found guilty in Superior Court for a lesser included disorderly persons offense. It should also be noted that the county prosecutor or the Attorney General can, in their exercise of discretion, prosecute a matter in municipal court under the provisions of N.J.S.A. 2B:25-7 and 2B-107; R. 7:8-8(b).

often the municipal prosecutor may not be aware that the defendant is a public employee or that his offense may have touched the defendant's public employment. And in some cases, because of turnover in the part-time positions of municipal prosecutor, the new municipal prosecutor may not be aware that the forfeiture of office should be applied for immediately at the time of conviction.

### James Flagg v. Essex County Prosecutor

The New Jersey Supreme Court recently examined the discretionary powers of the Attorney General and the county prosecutor in waiving the mandated forfeiture of office provisions contained in N.J.S.A. 2C: 51-2. James Flagg v. Essex County Prosecutor, 171 N.J. 561 (2002), established the standard for determining whether the Attorney General or a county prosecutor has properly declined to seek a waiver of forfeiture of public employment pursuant to N.J.S.A. 2C:51-2 following a public employee's conviction for a disorderly or petty disorderly persons offense. N.J.S.A. 2C:51-2 generally provides that a person holding any public office, position or employment who is convicted of an offense automatically forfeits such office or position. Mandatory disqualification from any future public employment attaches when a person is convicted of an offense which touches upon his office. N.J.S.A. 2C:51-2(e) nonetheless provides that:

Any forfeiture or disqualification . . . which is based upon a conviction of a disorderly persons or petty disorderly persons offense may be waived by the court upon application of the county prosecutor or the Attorney General and for good cause shown.

The intent of this waiver provision is to ameliorate the harshness of the otherwise mandatory job forfeiture requirement in cases where forfeiture and disqualification, as collateral consequences flowing from convictions for the most minor offenses, would be too severe. Flagg, 171 N.J. at 569.

The New Jersey Supreme Court concluded that the discretionary decision whether or not to apply for a waiver is different from the kinds of determinations typically made by prosecutors in their law enforcement capacity, and is more akin to prosecutorial discretion in sentencing-related determinations. Accordingly, the Court held that a prosecutor's decision under N.J.S.A. 2C:51-2(e) is subject to judicial review under an ordinary "abuse of discretion" standard. The Court noted that while this standard "defies precise definition, it arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." 171 N.J. at 571 (internal

quotations to federal authority omitted). The Court further noted that an abuse of discretion will be manifest if the defendant can show that a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment. *Id.* (quoting State v. Baynes, 148 N.J. 434, 444 (1997)).

The Court in Flagg made clear that a prosecutor may not adopt a per se rule of not applying for a waiver. Rather the Court held that the remedial purposes of the statute demands that each waiver application be reviewed by the prosecutor on a case-by-case basis. *Id.* at 574.

Since forfeiture of employment and future disqualification are such severe non-penal consequences, the Court further held that it would not sanction a decisional process that might yield ad hoc or arbitrary determinations. *Id.* at 577 (quoting from State v. Leonardis, 71 N.J. 85, 121 (1976)). To safeguard against such abuses, the Court directed the Attorney General to promulgate written guidelines for use by prosecutors in determining whether to seek a waiver of the forfeiture and disqualification requirements.<sup>4</sup> The following guidelines, which are binding on all county prosecutors, municipal prosecutors and the Division of Criminal Justice, are promulgated pursuant to the Court's express directive.

#### Creation of Guidelines

The Supreme Court in the Flagg decision listed sixteen factors that should be considered by the Attorney General and county prosecutor when deciding whether to seek a waiver. As discussed earlier, forfeiture of office can occur in three ways: an order from municipal or Superior Court at the time of sentencing; if the conviction took place in another state, by application of the county prosecutor or Attorney General; or if the forfeiture was not raised at the time of a finding of guilt or sentencing, by order of a court upon application of the Attorney General, county prosecutor or public employer. These guidelines have been developed to address all three methods of forfeiture in a consistent and efficient manner.

However, it is important to note that these guidelines have a narrow application and need only be followed when the following conditions are met:

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<sup>4</sup>It should be noted that because the forfeiture of office should be immediate upon the finding of guilt, the municipal prosecutor in Flagg should have moved before the court to have the defendant's employment forfeited.

- a) person is a public employee and
- b) has been convicted of a disorderly persons or petty disorderly persons offense and
- c) such offense involved dishonesty OR touched upon or involved his office, position or employment.

## II. Application for Forfeiture of Office at the Municipal Court Level.

Due to the statutory provision of N.J.S.A. 2C: 51-2(b)(1) requiring the immediate forfeiture of office at the time of a public employee's conviction, and since the conviction and sentencing of a defendant in municipal court usually occur on the same day, decisions about waiver of forfeiture should be made in advance of adjudication. Therefore, a reasonable effort must be made as soon as practical to determine if the defendant is a public employee. If the arrest report does not specify the defendant's employer, the defendant should be asked to identify his employer at his first appearance or arraignment.

Whether the county prosecutor's office screens the municipal court cases or the municipal prosecutor directly handles charges filed in the municipal court, the decision to waive forfeiture must be made before adjudication of the case. If necessary, adjournment of the case should be sought for a reasonable time to allow for the preparation of the prosecutor's written statement of reasons. Upon learning that the defendant is a public employee, the municipal prosecutor should contact the assistant prosecutor who has been assigned as the supervisor for municipal prosecutors in that county to request a review of the file to determine if waiver will be considered. The municipal prosecutor should complete a written statement of reasons containing the factors in these guidelines in order to assist the county prosecutor in making the waiver decision. Upon completion of the review, the county prosecutor should provide the municipal prosecutor with the signed and complete written statement of reasons accepting or rejecting waiver. The review should be completed in an expeditious manner in order to insure a speedy resolution to the underlying matter.

Alternatively, if the case is pre-screened by an assistant prosecutor who learns that the defendant is a public employee before referring the case to the municipal prosecutor, the assistant prosecutor should ask the county prosecutor to review the file in order to determine if waiver is warranted. Upon completion of the review, the county prosecutor should provide the municipal prosecutor with the signed and complete written statement of reasons accepting or rejecting

waiver. The review should be completed in an expeditious manner in order to insure a speedy resolution to the underlying matter.

Upon receipt of a signed and completed written statement of reasons, the municipal prosecutor should move the case for trial or other disposition in municipal court. If the prosecutor rejects waiver of forfeiture, the statement of reasons should be submitted to the court and the defendant at the time of his conviction and sentencing. The municipal prosecutor should move immediately upon defendant's conviction to forfeit the defendant's public employment or office. Further, the municipal prosecutor shall generally oppose the granting of any stay of forfeiture requested by the defendant. Alternatively, in cases where the county prosecutor makes a determination to waive forfeiture of office after weighing the factors in these guidelines, the municipal prosecutor shall make application to the court for waiver of forfeiture at the time of sentencing as per N.J.S.A. 2C: 51-2(e). The written statement of reasons granting the waiver can be used by the municipal prosecutor to show the court the good cause needed to support the application for waiver.

In matters that involve state employees as defendants, the assistant prosecutor supervising the municipal prosecutor should contact the Division of Law in order to request the necessary employee information from the appointing authority. The Division of Law shall have a specific contact person responsible for expediting the request for information. The name and contact information for the appointed person will be provided to each Prosecutor's office.

### III. Application for Forfeiture of Office for Downgraded Charges at the Superior Court Level.

Cases involving indictable crimes which are downgraded to disorderly persons or petty disorderly persons offenses in the Superior Court are generally prosecuted by an assistant prosecutor, or, in some instances, by a deputy attorney general. In these cases, waiver of forfeiture of office should be considered upon written request by the defendant. Therefore, if an application for a waiver is not received at the time of conviction, an assistant prosecutor should move for forfeiture of office pursuant to N.J.S.A. 2C:51-2.

If an application for waiver is received after conviction, but before sentencing, a signed written statement of reasons rejecting or approving waiver, after consideration of the relevant factors, is required for both assistant prosecutors and deputy attorneys general. The defendant and the court should be provided with a copy of the written statement of reasons at sentencing. In

cases where waiver of forfeiture will not be sought, the assistant prosecutor should provide the written statement of reasons to the court in order to show the decision not to seek waiver was based on the applicable guidelines. Additionally, the assistant prosecutor should generally oppose a stay of forfeiture. Alternatively, where waiver of forfeiture will be sought, the assistant prosecutor shall move at the time of sentencing for waiver, pursuant to N.J.S.A. 2C:51-2(e), and provide the written statement of reasons in order to show the court the good cause needed to grant the waiver.

If the defendant did not request a waiver of the forfeiture provisions at any time, an assistant prosecutor may still move for waiver when the county prosecutor, after considering the appropriate factors, deems waiver appropriate. Under this scenario, an assistant prosecutor can request that the county prosecutor review the file in order to determine if waiver is warranted. If the county prosecutor determines that waiver is appropriate after consideration of the factors in these guidelines, the assistant prosecutor should request waiver upon conviction or sentencing. A written statement of reasons should be presented to both defendant and the court.

In matters that involve state employees as defendants, the assistant prosecutor should contact the Division of Law in order to obtain the necessary employee information from the appointing authority. The Division of Law shall have a specific contact person responsible for expediting the request for information. The name and contact information for the appointed person will be provided to each Prosecutor's office.

IV. Required Consideration of Factors Prior to Filing An Application for Forfeiture of Office Pursuant to N.J.S.A. 2C: 51-2(b)(2) and N.J.S.A. 2C:51-2(e)

Where forfeiture of office was not applied for at the time of a public employee's conviction or entry of a guilty plea for disorderly and petty disorderly persons offenses, the assistant prosecutor or deputy attorney general assigned to the case should review the facts and circumstances of the conviction. This review should examine whether the conviction is appropriate for forfeiture of office or for permanent bar to future governmental employment under the statute. The assigned assistant prosecutor or deputy attorney general should request a review of the relevant factors by the county prosecutor or Attorney General to determine if waiver of forfeiture of office will be pursued. In cases where forfeiture of office or a permanent bar to employment applies and where no waiver will be sought, pursuant to N.J.S.A. 2C: 51-2(e), a written statement of reasons denying waiver

with appropriate supervisory review should be submitted to the defendant and the court at the time of the filing of the complaint in lieu of prerogative writ for forfeiture of office.

V. Required Approval by County Prosecutor or Designated Supervisory Personnel

All decisions whether or not to waive under N.J.S.A. 2C: 51-2(e) will be made by the county prosecutor or a designated senior assistant prosecutor who has been authorized in writing by the county prosecutor to make such decisions. In the event that the disorderly persons or petty disorderly persons conviction was prosecuted by the Division of Criminal Justice, the decision whether or not to apply for a waiver of forfeiture of public office pursuant to N.J.S.A. 2C:51-2(e) shall be made by the Attorney General, or by an assistant or deputy attorney general designated in writing by the Attorney General to make such determinations. In the event that the forfeiture of office is being sought by the Division of Law as a representative of a public employer and pursuant to the provisions of N.J.S.A. 2C: 51-2(g), these guidelines shall apply and the decision whether or not to apply for a waiver of forfeiture of public office pursuant to N.J.S.A. 2C:51-2(e) shall be made by the Attorney General, or by an assistant or deputy attorney general designated in writing by the Attorney General to make such determinations.

VI. Written Statement of Reasons

In order to alleviate any suspicion about the arbitrariness of the decisional process and to assist in judicial review under the abuse of discretion standard, the Attorney General or county prosecutor shall furnish to the court and to the defendant a written statement of the reasons for declining or seeking a waiver pursuant to N.J.S.A. 2C:51-2(e). The statement of reasons required by this Section shall describe all pertinent and available facts relevant to the factors enumerated in Section VII of these Guidelines. The statement of reasons should not simply repeat the relevant statute and waiver factors, but should be fact-specific and not vague. State v. Nwobu, 139 N.J. 236 (1995). The statement of reasons will help the county prosecutor show the court that they did not abuse their discretion by denying a waiver of forfeiture since the statement will disclose that the decision was based on a rational explanation founded in the established guidelines. Alternatively, in cases where waiver of forfeiture of office is sought, the written statement of reasons can be used for showing good cause to the court.

VII. Authorized Criteria

The county prosecutor and the Attorney General shall consider the following factors in deciding whether or not to seek a waiver of forfeiture of public office pursuant to N.J.S.A. 2C:51-2(e):

1. The totality of the circumstances surrounding the event;
2. The nature of the offense, including its gravity and substantiality, whether it was a single or multiple offense and whether it was continuing or isolated;
3. The quality of moral turpitude or the degree of guilt or culpability, including the employee's reasons, motives and personal gain;
4. The duties of the employee;
5. The relationship between the offense and the duties of the employee, including but not limited to, whether the criminal activity took place during work hours or involved work facilities, contacts, relationships, or equipment;
6. The employee's length of service;
7. The employer's desires;
8. The need and interests of the victim and society, including consideration of the victim's desires;
9. The extent to which the employee's offense constitutes part of a continuing pattern of anti-social behavior;
10. The employee's prior record of convictions and disciplinary infractions;
11. The threat presented to coworkers or the public if the employee is permitted to retain his or her position;

12. Any involvement of the employee with organized crime;
13. Whether the employee has been granted waiver on a prior occasion;
14. The impact of waiver on the employment status of codefendants as to avoid an injustice if similarly situated culpable individuals are tried in separate trials;
15. Whether waiver of forfeiture of office would undermine public confidence in the integrity of important governmental functions, including but not limited to law enforcement functions; and
16. Nature and scope of cooperation with the prosecuting authorities.

#### VIII. Burden of Proof

Pursuant to the Court's ruling in Flagg, the public employee bears the burden of proof to show that his or her request to the Attorney General or county prosecutor to apply for a waiver is supported by mitigating circumstances warranting a waiver. Given this allocation of the burden of proof, it is expected that neither the Attorney General nor the county prosecutor will ordinarily seek a waiver of forfeiture of public office pursuant to N.J.S.A. 2C:51-2(e) unless the available facts and circumstances relevant to the criteria set forth in Section VII militate in favor of seeking a waiver.

#### IX. Balancing Factors

Because the statute expressly grants the waiver decision to the Attorney General or county prosecutor, the relative weight to be assigned the criteria should be left to the prosecuting authority. If one factor is so severe, it may outweigh the other factors. Where no one factor dominates, the county prosecutor or Attorney General must use his/her discretionary powers to determine if waiver is warranted. However, the weighing of factors is more complex than a simple counting of the numbers of factors in support of granting or denying the waiver. The significance of each factor must be considered. The purpose of the statute can be effectuated only if each waiver application is reviewed in light of its surrounding facts, on a case-by-case basis.

X. Notification of Adverse Rulings to the Division of Criminal Justice

If any court finds that a county prosecutor has abused his or her discretion in refusing to seek a waiver of forfeiture of public office pursuant to N.J.S.A. 2C:51-2(e), the prosecutor shall immediately notify the Director of the Division of Criminal Justice in writing of such ruling.

XI. Effective Date

These Guidelines shall take effect immediately, and shall apply to all pending cases. These Guidelines shall remain in effect until such time as they may be revised or repealed by the Attorney General.

XII. Model Statement of Reasons

Attached is a model statement of reasons. This form may be customized to fit the needs of individual prosecuting agencies. However, a written statement of reasons must be completed and provided to the court and defendant.

DATED:

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David Samson  
Attorney General

ATTEST:

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Peter C. Harvey  
First Assistant Attorney General  
Director, Division of Criminal Justice

**MODEL STATEMENT OF REASONS**

**Case Name:** \_\_\_\_\_

**Include a brief description of all of the factors:**

**1) TOTALITY OF CIRCUMSTANCES SURROUNDING THE EVENT**

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**2) NATURE OF THE OFFENSE**

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**3) QUALITY OF MORAL TURPITUDE OR DEGREE OF GUILT OR CULPABILITY**

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**4) DUTIES OF EMPLOYEE**

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**5) THE RELATIONSHIP BETWEEN THE OFFENSE AND EMPLOYEE'S DUTIES**

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**6) EMPLOYEE'S LENGTH OF SERVICE**

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**7) THE EMPLOYER'S DESIRES**

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**8) THE NEED AND INTERESTS OF THE VICTIM AND SOCIETY, INCLUDING CONSIDERATION OF THE VICTIM'S DESIRES**

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**9) THE EXTENT TO WHICH THE EMPLOYEE'S OFFENSE CONSTITUTES PART OF A CONTINUING PATTERN OF ANTI-SOCIAL BEHAVIOR**

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**10) THE EMPLOYEE'S PRIOR RECORD OF CONVICTIONS AND DISCIPLINARY INFRACTIONS**

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**11) THE THREAT PRESENTED TO COWORKERS OR THE PUBLIC IF THE EMPLOYEE IS PERMITTED TO RETAIN HIS OR HER POSITION**

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**12) ANY INVOLVEMENT OF THE EMPLOYEE WITH ORGANIZED CRIME**

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**13) WHETHER THE EMPLOYEE HAS BEEN GRANTED WAIVER ON A PRIOR OCCASION**

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**14) THE IMPACT OF WAIVER ON THE EMPLOYMENT STATUS OF CODEFENDANTS**

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**15. WHETHER WAIVER OF FORFEITURE OF OFFICE WOULD UNDERMINE PUBLIC CONFIDENCE IN THE INTEGRITY OF IMPORTANT GOVERNMENTAL FUNCTIONS, INCLUDING BUT NOT LIMITED TO LAW ENFORCEMENT FUNCTIONS**

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**16. NATURE AND SCOPE OF COOPERATION WITH PROSECUTING AUTHORITIES**

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**DENIAL OF WAIVER OF FORFEITURE AND DISQUALIFICATION OF PUBLIC OFFICE**

**In determining whether to request a waiver of forfeiture or disqualification of office in accordance with N.J.S.A. 2C:51(2), I considered all of the above factors in accordance with the Attorney General Guidelines for Waiver of Forfeiture or Disqualification of Office and, for the foregoing reasons, hereby decline to seek waiver of forfeiture or disqualification of office.**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

**Submitted By:**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

**APPROVAL OF WAIVER OF FORFEITURE AND DISQUALIFICATION**

**In determining whether to request a waiver of forfeiture or disqualification of office in accordance with N.J.S.A. 2C:51(2), I considered all of the above factors in accordance with the Attorney General Guidelines for Waiver of Forfeiture or Disqualification of Office and, for the foregoing reasons, hereby agree to seek waiver of forfeiture and disqualification of office.**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

**Submitted By:**

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Signature

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Date