

# 2017-36216 / Court: 190

NO. \_\_\_\_\_

HOUSTON FIREFIGHTERS' RELIEF  
AND RETIREMENT FUND

Plaintiff,

VS.

CITY OF HOUSTON, SYLVESTER  
TURNER, KELLY DOWE, CHRIS B.  
BROWN, BRENDA STARDIG, JERRY  
DAVIS, ELLEN COHEN, DWIGHT  
BOYKINS, DAVE MARTIN, STEVE LE,  
GREG TRAVIS, KARLA CISNEROS,  
ROBERT GALLEGOS, MIKE LASTER,  
LARRY GREEN, MIKE KNOX,  
DAVID ROBINSON, MICHAEL  
KUBOSH, AMANDA EDWARDS,  
AND JACK CHRISTIE

Defendants.

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

\_\_\_\_\_ JUDICIAL DISTRICT

**PLAINTIFF HOUSTON FIREFIGHTERS' RELIEF AND RETIREMENT FUND'S  
ORIGINAL PETITION FOR DECLARATORY JUDGMENT**

Plaintiff Houston Firefighters' Relief and Retirement Fund (the "Fund") files this Original Petition for Declaratory Judgment against Defendants The City of Houston (the "City") and the following City officials each sued only in his or her official capacity: Mayor Sylvester Turner, Finance Department Director Kelly Dowe, City Controller Chris B. Brown, and Council Members Brenda Stardig, Jerry Davis, Ellen Cohen, Dwight Boykins, Dave Martin, Steve Le, Greg Travis, Karla Cisneros, Robert Gallegos, Mike Laster, Larry Green, Mike Knox, David Robinson, Michael Kubosh, Amanda Edwards, and Jack Christie.

Created in 1937, the Fund is a public pension system authorized and governed by the Texas Constitution and Texas Revised Civil Statutes Art. 6243e.2(1) (hereinafter, "Article

6243e.2(1)"). The Fund provides retirement, disability, and survivor benefits to eligible City firefighters.

As further discussed below, Article XVI, Section 67 of the Texas Constitution vests in the Fund the sole authority and discretion to "select legal counsel and an actuary and adopt sound actuarial assumptions to be used by the system or program." Despite this clear constitutional directive, the Texas Legislature has passed Senate Bill 2190 ("SB 2190") by a margin in each house sufficient for it to take effect on July 1, 2017. SB 2190 fixes an initial assumed rate of return at 7% and purports to grant authority in part to the City and the City's actuary to determine other actuarial assumptions, including future assumed rates of return. By doing so, it directly violates the Texas Constitution's directive that the adoption of actuarial assumptions is the sole purview of the Fund. SB 2190 also purports to require the Fund to take actions in accordance with its unconstitutional scheme even before it becomes effective (assuming that it does) on July 1, 2017.

## **I. DISCOVERY CONTROL PLAN**

1. Any discovery in this case should be conducted under Level 3 of Texas Rule of Civil Procedure 190.3.

## **II. PARTIES**

2. Plaintiff Houston Firefighters' Relief and Retirement Fund is a public pension system that provides retirement, disability, and survivor benefits to eligible Houston firefighters. The Fund is located at 4225 Interwood North Parkway, Houston, Texas 77032-3866.

3. Defendant City of Houston is located in Harris County, Texas, and may be served with process by serving City Secretary Anna Russell, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

4. Defendant Sylvester Turner is Mayor of the City and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

5. Defendant Kelly Dowe is the City's Director of the City Finance Department and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

6. Defendant Chris B. Brown is the City's Controller and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

7. Defendant Brenda Stardig is a City Council Member, Position District A, and a resident of Harris County, Texas. She may be served with process at her place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

8. Defendant Jerry Davis is a City Council Member, Position District B, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

9. Defendant Ellen Cohen is a City Council Member, Position District C, and a resident of Harris County, Texas. She may be served with process at her place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

10. Defendant Dwight Boykins is a City Council Member, Position District D, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

11. Defendant Dave Martin is a City Council Member, Position District E, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

12. Defendant Steve Le is a City Council Member, Position District F, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

13. Defendant Greg Travis is a City Council Member, Position District G, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

14. Defendant Karla Cisneros is a City Council Member, Position District H, and a resident of Harris County, Texas. She may be served with process at her place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

15. Defendant Robert Gallegos is a City Council Member, Position District I, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

16. Defendant Mike Laster is a City Council Member, Position District J, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

17. Defendant Larry Green is a City Council Member, Position District K, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

18. Defendant Mike Knox is a City Council Member, Position at Large 1, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

19. Defendant David Robinson is a City Council Member, Position at Large 2, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

20. Defendant Michael Kubosh is a City Council Member, Position at Large 3, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

21. Defendant Amanda Edwards is a City Council Member, Position at Large 4, and a resident of Harris County, Texas. She may be served with process at her place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

22. Defendant Jack Christie is a City Council Member, Position at Large 5, and a resident of Harris County, Texas. He may be served with process at his place of business, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002.

### **III. JURISDICTION AND VENUE**

23. This Court has subject matter jurisdiction over this lawsuit pursuant to Texas Government Code Sections 24.007, 24.008, and 24.011 as well as Texas Civil Practice and Remedies Code Sections 37.003 and 65.011.

24. This Court has personal jurisdiction over Defendants because the City is located in Harris County, Texas and the remaining Defendants are residents of Harris County, Texas. Each Defendant is amenable to service of process by a Texas court.

25. Defendants are not immune from the Fund's claims, because the Fund is bringing a Declaratory Judgment Act claim for which immunity from suit and liability are waived. Furthermore, to the extent that Defendants act in reliance upon SB 2190, their immunity from suit is waived because any actions will be *ultra vires*, unauthorized, illegal actions and/or constitute the failure to perform a ministerial act. The requested relief is also proper because governmental immunity does not preclude official-capacity suits against government officials who are violating the Constitution, including the award of prospective remedies for such violations. *See City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009).

26. Venue is proper in Harris County, Texas because all or a substantial part of the events or omissions giving rise to the Fund's claims occurred and are occurring in Harris County. Additionally, venue is proper in Harris County, Texas because one or more of the Defendants resided in Harris County, Texas when the cause of action accrued.

#### IV. STATEMENT OF FACTS

**A. HFRRF is a statutorily created pension plan that provides benefits to the City's firefighters.**

27. The Fund exists to provide retirement, disability, and survivor benefits to "[e]ach person who becomes a firefighter" for the City. Art. 6243e.2(1), § 13(a). Article 6243e.2(1) governs the Fund's and the City's rights, duties, and obligations to and for the plan. The Board of Trustees (the "Board") manages and administers the Fund. *See id.* § 2(p).

28. Article 6243e.2(1) requires each member of the Fund to contribute a set percent of the member's salary. *Id.* § 13(c). The statute likewise requires the City to make contributions based on a "contribution rate certified by the board," which must be at least twice the amount contributed by Fund members and sufficient to ensure the long-term financial well-being of the Fund:

The municipality shall make contributions to the fund once every two weeks in an amount equal to the product of the contribution rate certified by the board and the aggregate salaries paid to members of the fund during the period for which the contribution is made. The board shall certify the municipality's contribution rate for each year or portion of a year based on the results of actuarial valuations made at least every three years. The municipality's contribution rate shall be composed of the normal cost plus the level percentage of salary payment required to amortize the unfunded actuarial liability over a constant period of 30 years computed on the basis of an acceptable actuarial reserve funding method approved by the board. Notwithstanding any other provision of this article, the contributions by the municipality, when added to any contributions with respect to a qualified governmental excess benefit arrangement maintained in accordance with Section 14(c) of this article, may not be less than twice the amount paid into the fund by contributions of the members.

*Id.* § 13(d).

29. While the Fund has been in existence since 1937, Texas voters amended the Texas Constitution in 1975 to add Article XVI, Section 67 of the Texas Constitution—which, among other things, expressly authorizes the Texas Legislature to enact general laws establishing non-statewide pension systems for public employees and officers, such as Article 6243e.2(1). Tex. Const. art. XVI, § 67(a)(1). Significantly, Texas Constitution Section 67(f) vests in the Board the sole authority to “administer the system or program of benefits,” “hold the assets of the system or program for the exclusive purposes of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the system or program,” and “select legal counsel and an actuary and adopt sound actuarial assumptions to be used by the system or program.”<sup>1</sup> This latter portion—vesting in the Board the authority to “select . . . an actuary and adopt sound actuarial assumptions to be used by the system or program”—is at issue

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<sup>1</sup> See, e.g., *West Orange-Cove Consol. ISD v. Alanis*, 107 S.W.3d 558, 563 (Tex. 2003) (“By assigning to the Legislature a duty, this section both empowers and obligates. It gives to the Legislature the sole authority to set the policies and fashion the means for providing a public school system.”) (emphasis added).

here. The current version of Article 6243e.2(1) complies with the constitutional mandate because it leaves to the Board the exclusive authority to appoint an actuary and determine the actuarial assumptions to be used by the Fund. Art. 6243e.2(1), § 13(d).

**B. The Texas Legislature passes Senate Bill 2190, which is unconstitutional.**

30. In 2017, the Texas Legislature passed SB 2190, which, among other things, substantively changes Article 6243e.2(1). A copy of SB 2190 is attached as Exhibit 1. SB 2190 seeks to alter the Board's exclusive authority to appoint an actuary and determine actuarial assumptions in several impermissible ways.

31. First, SB 2190 fixes an initial assumed rate of return at 7%, which could vary thereafter in accordance with actuarially assessed conditions. (Ex. 1, SB 2190 §§ 1.01(1-e), 1.14(13E), 1.17.) By statutorily fixing this rate, SB 2190 violates the Board's exclusive authority to adopt actuarial assumptions under Section 67(f) of the Texas Constitution.

32. Second, SB 2190 imposes a new procedure that requires the Board to consider, and compromise with, the City's actuarial assumption and the City's actuary in setting the City's contribution rate. Generally speaking, SB 2190 requires both the Fund's and the City's actuaries to conduct a "Risk Sharing Valuation Study" ("RSVS") which is used to set the City's contribution rate to the Fund. (Ex. 1, SB 2190 § 1.14(13B, 13C).) SB 2190 sets forth certain actuarial assumptions that must be applied by the Fund's and City's actuaries. With regard to any assumptions not specifically enumerated, the City's actuary can adopt its own actuarial assumptions for the RSVS. (*Id.* § 1.14(13C) (identifying no limitation on the City's actuarial assumptions). The Fund and the City's actuaries are expected to exchange their respective RSVSs, and if the difference between the estimated City contribution rate is less than or equal to two percentage points, the Fund's RSVS will be considered the final study for that fiscal year



setting forth the City's contribution rate. (*Id.* § 1.14(13B, 13C).) But if the estimated City contribution rate in the Fund and the City's RSVSs differ by more than two percentage points, the Fund's and the City's actuaries must then work together to "reconcile the difference[s]." (*Id.*) Reconciliation efforts cannot result in a further increase in the variance of the different calculation unless agreed to by both actuaries, thus further limiting the power of the Board to refine its assumptions and actuarial methods. (*Id.*) Finally, if reconciliation cannot be achieved, the City contribution rate will be established by averaging the Fund's and City's calculations. (*Id.*)

33. SB 2190 unconstitutionally infringes on the Board's exclusive authority to "select . . . an actuary" and "adopt sound actuarial assumptions" under Section 67(f) of the Texas Constitution. As reflected by the above, the City's contribution rate will ultimately be determined by actuarial assumptions set by both the Board and the City and their actuaries—not the Board's own determinations alone based on its actuary. SB 2190 provides the City equal and offsetting power to the Board in setting the actuarial assumptions because the City's independent determination of assumptions (as calculated by the RSVS prepared by the City's actuaries) can account for 50% of the equation under which the City's contribution rate is calculated.

34. Despite the constitutional infirmities with SB 2190—an issue recognized by the City prior to the filing of the bill and discussed in hearings in both the House and the Senate—the Texas Senate and the House of Representatives have voted to pass SB 2190, and the bill is presently before Governor Greg Abbott for his approval. Unless Governor Abbott vetoes SB 2190, SB 2190 will take effect on July 1, 2017, which coincides with the City's FY 2018 to begin July 1, 2017. However, by its very terms, SB 2190 purports to require the Fund and the City to take various actions even prior to its effective date.

35. The City has published its preliminary budget for FY 2018.<sup>2</sup> Although SB 2190 does not take effect until July 1, 2017, this preliminary budget is based on SB 2190. The City's budget for FY 2018 employs SB 2190's assumed 7% rate of return, which will result in a City contribution rate of approximately 30% of covered payroll. However, because SB 2190 is unconstitutional, the City's FY 2018 budget should instead employ the 7.25% rate of return certified by the Board under the existing Article 6243e.2(1), which results in a City contribution rate of 48.5% of covered payroll. The City's proposed budget indicates that the City plans to allocate approximately half of the amount that should be contributed under the current statute. Thus, the Fund had no option but to file this suit.

## V. CAUSES OF ACTION

### A. Declaratory judgment.

36. The Fund incorporates by reference each of the foregoing paragraphs as if fully set forth herein.

37. An actual controversy has arisen and now exists between the Parties concerning their respective rights and obligations under Texas law. Pursuant to Texas Civil Practice and Remedies Code Sections 37.001 *et seq.*, the Fund seeks the following declarations:

- a. that SB 2190 is unconstitutional because it impermissibly infringes on the Board's exclusive authority to "select . . . an actuary" and determine "sound actuarial assumptions" under Section 67(f) of the Texas Constitution;
- b. that the City must allocate funding in the current and all future proposed City budgets in accordance with the current rather than the amended

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<sup>2</sup> See <http://www.houstontx.gov/budget/18budprop/index.html> (last visited 5/26/2017).

Article 6243e.2(1) which will include, among other things, the Board's adopted assumed rate of return, unless and until the Legislature modifies or supersedes the statute in compliance with the Texas Constitution.

38. These declarations are necessary to afford relief from uncertainty and insecurity with respect to the Parties' respective rights and obligations under Texas law.

39. The Fund respectfully requests expedited consideration of this matter.

**B. Permanent injunction.**

40. The Fund incorporates by reference each of the foregoing paragraphs as if fully set forth herein.

41. Upon information and belief, Defendants intend to adopt a budget and otherwise proceed in accordance with SB 2190, an unconstitutional statute. Defendants' conduct constitutes irreparable harm for which there exists no adequate remedy at law.

42. The Fund respectfully requests that the Court enter a permanent injunction enjoining Defendants from taking action pursuant to or in reliance on SB 2190, an unconstitutional statute.

**C. Attorneys' fees and costs.**

43. The Fund incorporates by reference each of the foregoing paragraphs as if fully set forth herein.

44. Pursuant to Texas Civil Practice and Remedies Code Section 37.009, the Fund seeks recovery of its costs of litigation and reasonable attorneys' fees. Texas courts have recognized that "by authorizing declaratory judgment actions to construe the legislative enactments of governmental entities and authorizing awards of attorney fees, the DJA necessarily waives governmental immunity for such awards." *Tex. Educ. Agency v. Leeper*, 893

S.W.2d 432, 446 (Tex. 1994); *see also City of Arlington v. Randall*, 301 S.W.3d 896, 908 n.7 (Tex. App.—Fort Worth 2009, pet. denied) (request for attorney’s fees from city “under the Declaratory Judgment Act is not barred by governmental immunity”).

## VI. NOTICE

45. Pursuant to Texas Government Code Section 402.010, the Fund is providing notice of this Original Petition for Declaratory Judgment to the Attorney General of Texas, Ken Paxton, by sending a copy of these papers to the Office of the Attorney General, 300 W. 15th Street, Austin, Texas 78701. The Fund further requests that the Court serve any requisite notice on the Attorney General as needed under Section 402.010.

46. The Fund is providing notice of this Original Petition for Declaratory Judgment to the City, by sending a copy of these papers to the City’s registered agent, City Secretary Anna Russell, City Hall Annex, 900 Bagby, First Floor, Houston, Texas 77002, and to the City Attorney, Ronald C. Lewis.

## VII. CONCLUSION AND PRAYER

47. For these reasons, the Fund asks that Defendants be cited to appear and answer, and that the Fund be awarded the following relief:

- a. Declaratory judgment as provided above;
- b. A permanent injunction as provided above;
- c. Attorneys’ fees;
- d. Court costs; and
- e. Any such other and further relief, at law or in equity, to which the Fund may be justly entitled.

Respectfully submitted,

**SHIPLEY SNELL MONTGOMERY LLP**

By: /s/ George T. Shipley

George T. Shipley  
State Bar No. 18267100  
Amy L. Snell  
State Bar No. 24002968  
712 Main Street, Suite 1400  
Houston, Texas 77002  
Telephone: (713) 652-5920  
Facsimile: (713) 652-3057  
gshipley@shipleysnell.com  
asnell@shipleysnell.com

**McGINNIS LOCHRIDGE**

Michael A. Shaunessy  
State Bar No. 18134550  
600 Congress Ave., Suite 2100  
Austin, Texas 78701  
Telephone: (512) 495-6061  
Facsimile: (512) 505-6361  
MShaunessy@mcginnislaw.com

COUNSEL FOR PLAINTIFF HOUSTON FIREFIGHTERS'  
RELIEF AND RETIREMENT FUND