

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202</p> <p>GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS and ROBERT P. LAIRD, on behalf of themselves and those similarly situated, <i>Plaintiffs.</i></p> <p>v.</p> <p>STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR JOHN HICKENLOOPER, CAROLE WRIGHT and MARYANN MOTZA, in their official capacities only, <i>Defendants.</i></p>	<p>COURT USE ONLY</p>
	<p>Case No.: 2010CV1589</p> <p>Division: 209</p>
<p>ORDER</p>	

This matter comes before the Court on PERA Defendants Motion for Summary Judgment. The Court has reviewed the motion, response, reply, and reply in joinder filed by the State Defendants as well as all other legally relevant material; is fully advised on the matter and makes the following findings and Order.

This case arises from the passage of Senate Bill 10-001 (the "Bill"), signed into law by Governor Ritter on February 23, 2010. The Bill was designed to allay PERA's severe underfunding. It modifies employee/employer contributions, places a cap on cost of living increases for retirees, creates new contributions for working retirees, and increases the age and service requirements of certain groups of employees before they are eligible to receive retirement benefits. Specific to the issues in this case, Sections 19 and 20 modify the cost of living

adjustments (“COLA”) received by Plaintiffs. Depending on the sub class to which a specific Plaintiff belongs, the COLAs were modified from an annual increase of 3.25% or 3.5% to an annual increase to be calculated under a different formula and capped at 2%.

Plaintiffs request judicial declarations finding Sections 19 and 20 of Senate Bill 10-001 in violation of the Contract clause of the Colorado Constitution (Claim I); Article V, § 48 of the Colorado Constitution (Claim II – which was dismissed on September 14, 2010); and the Contract (Claim III), Takings (Claim IV), and Substantive Due Process (Claim V) Clauses of the United States Constitution. In addition, Plaintiffs seek relief pursuant to 42 U.S.C. § 1983 against the individual defendants in their official capacities for violations of the Contract (Claim VI), Takings (Claim VII) and Substantive Due Process (Claim VIII) Clauses of the United States Constitution.

Statutorily created in 1931 to provide retirement and other benefit services to state employees, the Public Employees’ Retirement Association (“PERA”) now serves employees of more than 400 government agencies and public entities and over 440,000 public employees. PERA acts as a substitute for social security for most of its members and is pre-funded by working members and their employers with the amount of contribution defined by statute. C.R.S. § 24-51-401, et seq. (2010). When a member retires, their monthly base benefit is calculated using the member’s age at retirement, years of service, and their highest average salary (which also has its own calculation). C.R.S. § 24-51-602-603 (2010).

Much of Plaintiffs’ argument in their First Amended Class Action Complaint is based upon the assumption that a base pension and a specific COLA are both protected by the Contract Clause of both the Colorado and United States Constitutions. In that vein, Plaintiffs argue that public pension benefits vest when an employee becomes eligible to retire, that a specific increase in the cost of living is a part of that vested right and consequently, Senate Bill 10-001 which modified the COLA formula violates the rights of the class. Plaintiff argues that “[b]y making the requisite contributions to PERA and attaining the age and service credit required for retirement, public employees acquire a vested right to their pensions.” (Plfs.’ First Am. Compl., 6 ¶ 30.) Included in this vested pension right is the cost of living adjustment, because such rights

were guaranteed by PERA and DPSRS since 1994 and 1969 respectively – to increase annually. (Id. ¶31.)

Defendants claim that, “[t]hat this is not a case of the state abrogating contracts to save money and to balance the budget.” (Def.’ Opp. to Plfs.’ Mtn. for Summ. J., 4.) “Senate Bill 10-001 did not take any money from the PERA pension system. Rather, it increased contributions to the PERA pension system and reduced present COLA payments in order to create a larger pool of investable funds and thus provide for sustainable pension benefits in the future.” (Id.) Furthermore and more importantly for purposes of this motion, Defendants claim that a cost of living adjustment can be distinguished from a base pension, which is constitutionally protected. Instead, Defendants maintain that the COLA is in name a modifiable number and that Plaintiffs’ cannot prove a clear and unmistakable right to a specific non-adjusting COLA exists (it was modified at many times during Plaintiffs’ retirement); it follows then that 10-001 was not inconsistent with Plaintiffs’ reasonable expectation; and, given the global economic catastrophe, that the downward COLA adjustment was not unreasonable, unnecessary, or not for a legitimate public purpose. *See In re Estate of DeWitt*, 54 P.3d 849, 853 (Colo. 2002).

The purpose of a C.R.C.P. Rule 56 motion for summary judgment is to prevent the unnecessary expense associated with a trial when the outcome can be settled purely as a matter of law. *See Morlan v. Durland Trust Co.*, 127 Colo 5, 252 P.2d 98 (Colo. 1952); *Peterson v. Halsted*, 829 P.2d 373 (Colo. 1992). Summary judgment is a drastic remedy and should not be granted unless it is apparent that no genuine issue of material fact exists. *See McCormick v. Diamond Shamrock Corp.*, 175 Colo. 406, 487 P.2d 1333 (Colo. 1971). The standard for issuance of summary judgment dictates that judgment shall be rendered in favor of the moving party “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” C.R.C.P. 56(c). A genuine issue of material fact exists only if “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Andersen v. Lindenbaum*, 160 P.3d 237 (Colo. 2007). The moving party has the burden to demonstrate the absence of a triable issue, and any doubts as to

the existence of such an issue must be resolved against that party. *See Primock v. Hamilton*, 452 P.2d 375, 378 (Colo. 1969).

The motion for summary judgment is granted as to all of Plaintiffs' claims. While Plaintiffs unarguably have a contractual right to their PERA pension itself, they do not have a contractual right to the specific COLA formula in place at their respective retirement, for life without change. Plaintiffs' takings and due process claims likewise are premised on the existence of a constitutional right to an unchangeable COLA formula and necessarily fail because no such right exists. The 42 U.S.C. § 1983 claims fail because the underlying constitutional claims fail. All material facts are undisputed and found in the public record. The COLA provisions themselves establish that Plaintiffs have no contract right to a COLA frozen at retirement and the latest COLA changes do not impair the parties' reasonable expectations.

In 2002, the Colorado Supreme Court definitively set forth the test to determine whether a challenged statute is constitutional under both the Colorado and United States Contract Clauses. *See In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002). The *DeWitt* decision set forth the test for challenges to both the Colorado and federal Contract Clauses and Plaintiffs in the instant matter must prove all elements of what is considered the modern test. According to *DeWitt* and, in fact, under all Colorado authority, Plaintiffs must first establish that they have a clear and unmistakable right to an unchangeable cost of living adjustment for the rest of their lives. This they cannot do, even for purposes of surviving this motion. Once this Court determines, as will follow, that Plaintiffs have no contract right to a particular COLA for life without change and that the latest modification to the COLA formula contained in Senate Bill 10-001 does not violate the Colorado or United States Contract Clauses, the Plaintiffs' Contract Clause claims fail without any need for this Court to even consider the remaining two elements of the *DeWitt* test. The Court's determination, which deals only with COLA and not with base retirement benefits, relies heavily on the plain language of the PERA and Denver Public School Retirement System ("DPSRS") COLA provisions which have never included durational language stating or suggesting that a particular COLA provision formula (and there have been many) was for life without change. For four decades the COLA formulas as applied to retirees have repeatedly changed and have never been frozen at the date of retirement. Decades of history and legislative

language do not support Plaintiffs' position that they are contractually and constitutionally entitled in perpetuity to the cost of living adjustment in effect at the time of their respective retirements. Historically, and based on undisputed facts of public record, for the past forty years the General Assembly has repeatedly modified the COLA formula for existing retirees. A review of statutory provisions over the decades reveals the following to be beyond dispute.

From 1970 to 1973, the base COLA was the lesser of 1.5% noncompounded or the consumer price index increase ("CPI") in the prior year. C.R.S. §§111-1-36 (state division); 111-2-17 (local government and school divisions). During that time frame, PERA retirees from the judicial division did not receive a COLA. The calculation of the COLA beginning in 1970 also involved a "banking" component that offered protection against high inflation. From 1974 to 1992, the base COLA was the lesser of 3% noncompounded or the CPI increase. C.S.R. §§ 111-1-36 (state division), 2-27 (local government and school divisions). PERA judicial retirees began to receive a COLA in 1974, but their COLA was the lesser of (a) 1.5% noncompounded, or (b) the increase in the consumer price index in the prior year. C.R.S. § 111-6-14(1973), C.R.S. § 24-51-614 (1975-1979).

From 1975 to 1978, supplemental COLA "catch up" payments were appropriated from the General Fund and paid in addition to the base COLA formula. C.R.S. §24-51-136 (state division),-224 (local government and school divisions) (1975). This catch-up COLA supplement was paid on a yearly basis from the General Fund in addition to the base COLA and represented a considerable portion of the total COLA received by retirees.

From 1980 to 1993, the base COLA for retirees continued to be the lesser of (a) 3% for the years before 1992 and 4 % for 1993, noncompounded, or (b) the increase in the CPI in the prior year. C.R.S. §§ 24-51-135 (state division),-225 (local government and school divisions). During this time, judicial retirees received the lesser of 1.5% or the CPI increase until 1988, when their rate was also raised to 3% and then 4% noncompounded for 1993. C.R.S. §24-51-614 (1980-1986); C.R.S. § 24-51-1002 (2) (1987-1993). From 1980 to 1992, every two years, the legislature approved a supplemental to the base COLA, paid from PERA pension funds (the Cost

of Living Stabilization Fund) to match past inflation. C.R.S. § 24-51-136 (1980-1986), -1006 (1988-1992).

For 1993, the base COLA was changed for one year to the lesser of 4% noncompounded or the CPI increase and in 1994, to reduce the cost of COLA and increase the actuarial soundness of the PERA pension plan, the General Assembly capped the total COLA payment to retirees, eliminating the Cost of Living Stabilization Fund and ending the biannual increase that provided a catch up to actual inflation that had been paid in full from PERA trust funds since 1980. C.R.S. §24-51-1005,-1006 (1994) (repealed effective March 1, 1994).

Thus, from 1994 to 2000, the base COLA was capped at the lesser of 3.5% compounded or the CPI increase. The Cost of Living Stabilization Fund and the biannual COLA increases it provided to catch up to actual inflation were eliminated and any prior “bank” against high inflation was reset to zero.

From 2001 to 2009, the COLA was modified to eliminate the variable component tied to inflation and was capped at 3.5% compounded annually. The banking provision and all accumulated “bank” against high inflation since 1994 were eliminated. C.R.S. §24-51-1002 (200-2009).

For 2010, the COLA returned to a variable rate tied to inflation at the lesser of 2% compounded or the CPI increase which resulted in no COLA for 2010. S.B. 10-001 §20; C.R.S § 24-51-1002 (2011).

For 2011 and forward, COLA is 2% compounded unless PERA has a negative investment return for the prior year in which case it is the lesser of 2% compounded or the CPI increase for the next three years. Automatic annual 0.25% COLA increases without limit will occur when the funding ratio reaches 103% and remains above 90% funded. C.R.S. § 24-51-1009.5 (2011).

The General Assembly has also repeatedly changed the effective date of the COLA calculation. From 1970 until 1986 cost of living increase adjustments became effective on May 1. C.R.S. § 24-51-135 (1985).

From 1986 until 1994, the COLA became effective on the earlier of May 1 or November 1 following a retiree's first anniversary of retirement. C.R.S. § 24-51-1001 (1994).

From 1994 until 2009, the COLA became effective on March 1. C.R.S. § 24-51-1001 (2006).

After passage of Senate Bill 10-001, the effective date for the COLA will be July 1 for all retirees. C.R.S. § 24-51-1002 (2) (2010).

In point of fact, not a single DPS retiree has received the "contractual" benefit on which, for example, Plaintiff Justus bases his Contract Clause claims, a frozen cost of living adjustment based on the date of retirement (or full vesting). Instead, every DPS retiree has a COLA benefit based on the most recent DPS COLA formula regardless of when he or she retired or became fully vested. Again, based on DPSRS Plan provisions that are beyond dispute, the DPS (which until January 1, 2010 operated as a separate retirement system) COLA provisions (called an Annual Retirement Allowance Adjustment ("ARAA")) changed repeatedly over the years. This can be summarized as follows:

1% noncompounded (1965-1973)

2% noncompounded (1974-1980)

3% noncompounded (1981-1984)

3.25% noncompounded (1985-2000)

3.25% compounded (2001-2009)

Adjustments to retiree benefits by set percentage or dollar amount (1976, 1980, 1983, 2001)

Base benefit reset in comparison with inflation increase (1995, 1998).

To further demonstrate the fluid nature of COLA, the same undisputed statutory provisions reveal that when Plaintiff Halaas became a PERA member in 1972, judicial retirees received no COLA. When he retired in 1999, the COLA was the lesser of 3.5 % compounded or the CPI increase. During his 27 years as a PERA member, the General Assembly changed the COLA provisions for judicial retirees countless times, including a 1994 modification that eliminated the Cost of Living Stabilization Fund and capped the retiree COLA at 3.5% compounded.

Plaintiff Hopkins began as a PERA employee in 1985 and worked for 16 years, retiring in 2001. When she began, the COLA formula was the lesser of 3% compounded or the CPI increase. She purchased nine years of service credit and reinstated six other years in 2000 and 2001. During her 16 years of employment, the COLA formula was tied to the lesser of actual inflation or a noncompounded rate for eight years (3% from 1985 to 1992; 4% in 1993) and the lesser of actual inflation or a compounded rate of 3.5% for another seven years, from 1994 until March 2001. At the time she retired on August 1, 2001, the 3.5% compounding COLA formula to which she would claim a lifetime right had been changed so often that it had only been in place for a total of five months.

Plaintiff Laird became eligible for retirement with full benefits in 2007. He retired in 2010. During his 32 years of employment, the legislature had changed the COLA formula 11 times, including after he was eligible for retirement with full benefits.

In short, based on numerous and steady changes in the PERA COLA formula for retirees, Plaintiffs could not have had a reasonable expectation that the COLA formula that happened to be in place at the date of their retirement would be unchangeable for the rest of their lives.

In fact, Plaintiff Justus and other DPS retirees actually signed retirement documents that expressly acknowledged that the DPS COLA was subject to change during retirement. Ex 4 to Opp. To Pls.' Mot. For Partial Summ. Judgment.

It is impossible to establish a contractual right to a particular COLA for life without change where Plaintiffs could have no reasonable expectation to a COLA for life given that the General Assembly (as well as DPSRS) has changed the COLA formula for those retired numerous times over the past 40 years and where many Plaintiffs personally experienced a COLA change during their retirements and further, where DPS retirees actually signed documents at retirement expressly acknowledging that the COLA was subject to change during retirement.

This Court finds, based upon statutory provisions of the last 40 years, as well as legislative history and DPS plan language, that the General Assembly's most recent change to retiree COLA does not alter the fundamental mechanism for payment of pension benefits for PERA retirees. That has always been and remains to this day, a base benefit set at retirement. There has also been a separately calculated cost of living adjustment based on a formula that has always been fluid and repeatedly changed. For 40 years the COLA formula has been subject to significant change without ever unconstitutionally altering the base pension payment to retirees. Plaintiffs fail to point to any statutory language or provision, much less, unmistakable and clear language, establishing an intent to create a contractual right at odds with 40 years of history. Plaintiffs rely in part on the use of the word shall in various COLA provisions without acknowledging that every COLA formula over the last 40 years has contained the word "shall" and has been subsequently amended and applied to existing retirees. A robust legislative record is before this Court and a request for C.R.C.P. 56 (f) relief is unavailing. Plaintiffs concede that Colorado requires a clear intent to create an enforceable contract right and yet, the various PERA and DPS COLA provisions contain no durational language of any kind or language suggesting that a contract has been created. As a general rule, a contract right for purposes of the Contract Clause requires a clear indication that the legislature has intended to bind itself in a contractual manner. Absent that clear indication, "the presumption is that the law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Robertson v. Kulongoski*, 359 F. Supp 2d. 1094, 1099 (D. Or., 2004). "As a general rule, vested rights are not created by a statute that is later...modified by the Legislature if the Legislature did not covenant not to amend the legislation." *In re Certified Question*, 257 N.W. 2d 468, 474 (Mich. 1994).

Plaintiffs also argue that the 1994 COLA amendments create a contract right to a COLA for the first time. Yet, no such statutory language exists and the 1993 legislative history indicates that no member of the General Assembly expressed intent to create an unchangeable COLA from that date forward. (House Finance Committee Hearing on SB 93-1324, 1993 Legis., at 5:6-10 (Colo. Mar. 24, 1993).

What Plaintiffs are unable to explain is how one can have a reasonable expectation to an unchangeable COLA formula when the COLA formula changes repeatedly for retirees over the course of 40 years. None of the PERA or DPS COLA provisions over that 40 years contain language establishing a lifetime right to any particular COLA formula at retirement and no ambiguity exists as to the legislature's ability to constantly modify the COLA provisions for existing retirees. Plaintiffs cannot establish that the Colorado General Assembly and DPSRS ever created a contract right in retirees and their spouses to an unchangeable COLA formula for life. The General Assembly's latest modification of the retiree COLA formula is consistent with the historical pension benefit structure. It is and has always been a base benefit, plus a separately calculated cost of living adjustment that has repeatedly changed during retirement. The latest in a long line of legislative modifications to the COLA formula does not violate the Contract Clause of either the Colorado or United States Constitution.

The Court agrees with Defendants that having made this determination for purposes of summary judgment, the Court need go no further and need not examine the second and third parts of the *DeWitt* test nor must it attempt to determine whether the changes in the latest modification are reasonable and necessary to serve a significant or legitimate public purpose. The Court emphasizes that this determination only applies to the COLA and does not speak to any attempt by the legislature to alter the base pension benefit structure, which is not what SB 10-001 attempts to do.

The Court also finds, based on the above, that Plaintiffs' Takings Clause and Substantive Due Process claims necessarily fail because Plaintiffs' Contract Clause fails. In fact, Plaintiffs acknowledge as much in their response in opposition to Defendants' motion, relying on *Parella*

v. Retirement Bd. Of Rhode Island Employees' Retirement System, 173 F. 3d 46, 58-59 (1st Cir. 1999). Nor do they much quarrel with the proposition that Takings and Substantive Due Process Clause claims are routinely rejected where no contract right exists to support a Contract Clause claim. Any arguable property right here is premised on the notion that the Plaintiffs have a contractual right to a particular COLA and thus fails where there is no such right. *See R.I. Laborers' Dist Council v. Rhode Island*, 145 F.3d 42, 44 n.1 (1st Cir 1998) and *R.I. Bhd. Of Corr. Officers v. Rhode Island*, 264 F. Supp 2d 87, 103-04 (D.R.I. 2003). Absent a contractual right to a particular COLA, the allegation in this case is not compensable under the Takings Clause. *United States v. Sperry Corp.*, 493 U.S. 52 (1989).

Based on the conclusion that there is no contractual right to a specific or particular COLA in this instance (certainly no constitutionally created right), no corresponding and fundamental due process right is at issue here. *See Regents of the Univ. of Mich. V. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring). Based on the conclusion that no contractual right to a specific COLA exists, certainly no fundamental right is at stake and thus Plaintiffs' claim relies, at best, on the prospect of a finding that there is no rational basis for Senate Bill 10-001. *People v. Young*, 859 P2d. 814, 818 (Colo. 1993). As a matter of law, and based on the public record before the Court, it would be impossible to reach a conclusion other than that the challenged legislation bears a reasonable relationship to the legitimate governmental interest of reaching a one hundred percent funded ratio for PERA within the next thirty years. Preserving the solvency of PERA, on the face of the legislative history and public record, is a legitimate governmental interest. Plaintiffs themselves concede in their complaint that Senate Bill 10-001 bears a rational relationship to the General Assembly's legitimate objective of remedying PERA's unfunded liabilities that threaten its future viability, stating that PERA had experienced a significant drop in funding and the General Assembly passed Senate Bill 10-001 to address this serious problem. *See* Sec. Am. Comp. ¶¶ 43-45. In terms of rational basis review, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Am. Canine Found. V. City of Aurora, Colo.* 618 F. Supp 2d 1271, 1278 (D. Colo. 2009) (quoting *Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). The determination of whether there is any conceivable rational

basis “is a legal question which need not be based on any evidence or empirical data.” *Teigen v. Renfrow*, 511 F.3d 1072, 1084 (10th Cir. 2007).

Defendants correctly rely on the preamble to Senate Bill 10-001 and Plaintiffs’ own Complaint for the proposition that preserving the solvency of PERA is a legitimate public interest.

There is no contesting the fact that Plaintiffs’ §1983 claims fail on summary judgment if the underlying Contract Clause, Takings Clause and Substantive Due Process claims fail.

In granting Defendants’ Motion for Summary Judgment, it is important to note that this Court is not determining the reasonableness of any sort of legislative effort to alter or tamper with Plaintiffs’ right to their base PERA retirement plan benefits nor is the Court examining alternatives to this particular legislative mechanism for dealing with PERA underfunding. The Court’s task stops far short of such a judicial inquiry because this Court has examined the long history of modifications to the COLA formula, distinguishes the ever-changing COLA formula and finds only that there is no contract right to a specific COLA formula frozen at retirement for life. The Court, accordingly, and for the reasons articulated above, grants summary judgment to Defendants.

Done this 29th day of June, 2011.

By the Court:



Robert S. Hyatt
District Court Judge