DISTRICT COURT, DENVER COUNTY, COLORADO

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Plaintiff(s): GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS and LISA SILVA-DEROU, on behalf of themselves and those similarly situated,

v.

Defendant(s): STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR BILL RITTER, MARK J. ANDERSON and SARA R. ALT, in their official capacities only.

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Case Number: 2010CV1589

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PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Colo. R. Civ. P. 65(a), Plaintiffs Gary R. Justus, Kathleen Hopkins, Eugene Halaas, Jr., and Robert Laird, Jr.[1], have moved for partial summary judgment on Count I of their amended complaint, and request that the Court find that the provisions of Senate Bill 10-001 decreasing the annual pension increases to the pensions of the Plaintiffs and Putative Class Members violate the Contract Clause of the Colorado Constitution. [2]

Plaintiffs request that the Court consider this motion now, shortly after this case has been put at issue, because (1) the case of Police Pension and Relief Board of the City and County of Denver v. McPhail, 139 Colo. 330 (1959), is directly on point and (2) if the Plaintiffs prevail on its Colorado Constitution Contract Clause claim, it will materially advance the litigation and may obviate the need for much of the expected discovery and the filing dispositive motions on other claims. Thus, Plaintiffs believe that the Court's ruling on this motion will avoid enormous expenditure of time, fees and costs from all concerned.

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[1] Plaintiffs have filed a motion leave to file a Second Amended Complaint that withdraws Lisa Silva-Derou and adds Robert Laird, Jr., as a named plaintiff, corrects the numbering of the paragraphs, and withdraws Count II and any claims for monetary damages under 42 U.S.C. § 1983. No other substantive changes to the Complaint have been proposed.

[2] Plaintiffs' filed their motion for class certification on April 27, 2010. Defendants moved for a stay of the briefing on that motion, and requested discovery in advance of that briefing. On July 7, 2010, the Court granted the stay, ruling: "Further class certification briefing is stayed until after class discovery is complete," and "Class discovery will commence after this Court has entered a case management order addressing the scope and timing of class discovery." The parties are in the process of working out a schedule for class discovery and briefing on the class certification motion, and it is Plaintiffs' position that this motion for partial summary judgment may be decided before the class certification motion. See also Barbara J. Rothstein & Thomas E. Willging, Managing Class Action Litigation: A Pocket Guide for Judges (Second Edition, Federal Judicial Center, 2009) ("The amended rule [23] allows [courts] to rule on motions to dismiss or for summary judgment before ruling on class certification.").

I. CERTIFICATION OF COMPLIANCE UNDER C.R.C.P. 121, §1-15(8)

Prior to filing this motion, counsel for Plaintiffs conferred in good faith with Defendants' counsel regarding this motion. Defendants will oppose the motion.

II. INTRODUCTION

Plaintiffs and the Class they represent (collectively, "Retirees"), which is comprised of approximately 50,000 retired Colorado public sector employees, were promised certain specified pension benefits, including an annual cost-of-living adjustment ("COLA"), in exchange for their service. Retirees have already held up their end of the bargain by rendering years of service. Having done so, they reasonably expected that the promised pension benefits would sustain them throughout retirement. Defendants, however, have broken that promise.

Retirees are members of the Public Employees Retirement Association of Colorado ("PERA"). PERA includes former public school teachers who taught millions of Colorado's children; retired state judges who enforced the state's laws; retired police officers who put themselves in harm's way to protect Colorado's citizens; and other retired state, county and local government workers who were employed in the various sectors of Colorado government.

Retirees worked in public service for many years, often at a lower wage than they could have earned in the private sector. Throughout their working lives, they made contributions to Colorado's Retirement Systems required by state law. Under well- established Colorado case law, the Retirees acquired rights to fully vested pension benefits, including the annual COLA in effect under the law when they became eligible to retire. McPhail, supra; Police Pension and Relief Bd. of City and County of Denver v. Bills, 148 Colo. 383 (1961). Indeed, PERA itself repeatedly assured them that they could count on the annual COLA during retirement.

Despite these assurances, the Colorado Legislature in 2010 enacted Senate Bill 10-001 (the "2010 Pension Legislation"), the statute that reduced the promised pension benefits by scaling back the annual COLA and postponing its payment from March until July. By so doing, the Legislature diminished Plaintiffs' vested rights in violation of Contract Clause of the Colorado Constitution. As such, based on the undisputed material and relevant facts, summary judgment should enter in favor of the Plaintiffs on Count I.

III. PROCEDURAL HISTORY

Plaintiff Gary R. Justus and Kathleen Hopkins commenced this lawsuit on February 26, 2010, three days after Governor Ritter signed the 2010 Pension Legislation into law. Plaintiffs filed a First Amended Complaint on March 18, 2010, adding George Halaas and Lisa Silva-Derou as plaintiffs. The First Amended Complaint includes eight counts, including counts alleging violations of the Contract Clause (Claim I) and Article V, § 48 (Claim II) of the Colorado Constitution, and counts alleging violations of the Contract (Claim III), Takings (Claim IV), and Due Process (Claim V) Clauses of the United States Constitution. The First Amended Complaint also requests injunctive relief and money damages (including under 42 U.S.C. § 1983) against the individual Defendants for violations of the Contract (Claim VI), Takings (Claim VII) and Due Process (Claim VIII) Clauses of the United States Constitution.

Plaintiffs moved for Class Certification on April 27, 2010. Shortly thereafter, Defendants filed a motion to stay briefing on class certification until completion of class discovery, which request the Court granted by Order dated July 7, 2010.

On May 10, 2010, Defendants filed Motions to Dismiss the First Amended Complaint. Plaintiffs opposed the motions as to all counts except for Count II, and also conceded that the request for monetary damages against state officials under 42 U.S.C. § 1983 could be dismissed.

On September 14, 2010, the Court denied Defendants' Motions to Dismiss, except as to the parts of the First Amended Complaint that Plaintiffs admitted should be dismissed. On November 19 Plaintiffs filed an unopposed motion for leave to amend the complaint to (1) withdraw Lisa Silva-Derou and add Robert Laird, Jr. as a named plaintiff, (2) remove Count II as well as the claims for monetary damages against state officials under 42 U.S.C. § 1983, and (3) correct the numbering of the paragraphs.

IV. FACTUAL BACKGROUND

A. Background on PERA and the Plaintiffs

Defendant PERA **"**provides retirement and other benefits to the employees of more than 400 government agencies and public entities in the state of Colorado. PERA is the 21st largest public pension plan in the United States." PERA Website at http://www.copera.org/pera/about/overview.htm (last visited 10/22/10). "Its membership includes employees of the Colorado state government, public school teachers in the state, many university and college employees, judges, many employees of cities and towns, state troopers, and the employees of a number of other public entities." Id. "PERA is a substitute for Social Security for most of these public employees. Benefits are pre-funded, which means while a member is working, he or she is required to contribute a fixed percentage of their [*sic*] salary to the retirement trust funds." Id.

State law provides that members of PERA who have "met the age and service requirements in the statute . . .*shall*, upon written application of the board, receive service retirement benefits, according to the benefit formula set forth in 24-51-603 (1) (a), (2), and (3)." Colo. Rev. Stat. § 24-51-602 (2010) (emphasis added).

Plaintiff Gary R. Justus is a Colorado resident who worked for more than 29 years for the Denver Public Schools ("DPS") before retiring in 2003. Until December 31, 2009, he received his pension through the Denver Public Schools Retirement System ("DPSRS"). On January 1, 2010, DPSRS became part of PERA, and since then Mr. Justus has been a member of PERA. He currently receives pension benefits from PERA. Affidavit of Richard Rosenblatt, attached as Exhibit 1; Affidavit of Gary Justus, attached as Exhibit 2.

Plaintiff Kathleen Hopkins is a Colorado resident who worked for 15 years for the State of Colorado before retiring in 2001. Since retiring, she has received pension benefits from PERA. Affidavit of Kathleen Hopkins, attached as Exhibit 3.

Plaintiff Eugene T. Halaas, Jr. is a California resident who worked over 27 years as a judge for the State of Colorado before retiring in 1999 and is a retired PERA member. He currently receives pension benefits from PERA. Affidavit of Eugene Halaas, attached as Exhibit 4.

Plaintiff Robert Laird, Jr. is a Colorado resident who as of February 28, 2010, was eligible to receive a full service pension benefit from PERA because he had met PERA**'s** age and service requirements, but had not yet retired. He retired from his position with Pikes Peak Community College in July 2010 and has since been receiving pension benefits from PERA. Affidavit of Robert Laird, attached as Exhibit 5.

B. Annual Increases to Plaintiffs' Pensions

For many years, Retirees were promised under state law that they would receive post-retirement annual adjustments to their pensions.

1. Non-DPS PERA Members

Prior to March 1, 1994, the state law that governed PERA provided that "[c]ost of living increases in retirement benefits and survivor benefits shall be made only upon approval by the general assembly." Colo. Rev. Stat. § 24-51-1001 (1992). In 1993, the Legislature amended this provision to make annual COLA increases granted on or after March 1, 1994 **automatic** and no longer dependent each year on approval by the legislature. H.B. 93-1324, § 7 (1993). Under the new law:

> (1) Annual increases in retirement benefits and survivor benefits **shall** occur on March 1 if said benefits have been paid for at least three months preceding March 1. Such increases in benefits shall be calculated in accordance with the provisions of sections 24-52-1002 and 24-51-1003 and shall be paid from the division trust funds.

Colo. Rev. Stat. § 24-51-1001 (1994) (emphasis added).

In Colo. Rev. Stat. § 24-51-1002 – the part of the statute that made annual COLA increases automatic -- the Legislature utilized language ("shall") that plainly showed that these yearly adjustments were mandatory:

> (1) The cumulative increase applied to benefits paid **shall** be recalculated annually as of March 1 and **shall** be the lesser of:
>
> > (a) The total percent derived by multiplying three and one-half percent, compounded annually, times the number of years such benefit has been effective after March 1, 1993; and
> >
> > (b) The percent increase in the consumer price index from 1992, or the year prior to the year in which the benefit becomes effective, whichever is later, to the year preceding March 1.

Colo. Rev. Stat. § 24-51-1002 (1994) (emphasis added). As a consequence of this amendment, from 1994 through 2000, pension benefits of PERA retirees were automatically and mandatorily increased under specific formulae.

In 2000, the Legislature amended Colo. Rev. Stat. § 24-51-1002 again, this time replacing the annual variable COLA adjustment with **a guaranteed 3.5%** annual increase effective March 1, 2001. Laws 2000, Ch. 186, § 7. As amended, the statute provided:

> The cumulative increase applied to benefits paid **shall** be recalculated annually as of March 1 and shall be the total percent derived by multiplying three and one-half percent, compounded annually, times the number of years such benefit has been effective after March 1, 2000.

Colo. Rev. Stat. § 24-51-1002 (2002) (emphasis added).

After the legislature passed this amendment, PERA published a booklet in October 2000 in which it described the change:

> **PERA will increase your benefit each year by 3.5 percent compounded annually from the date of your initial benefit.** This increase is recalculated on the last workday of each March and is based on your total benefit. Your first increase will be prorated for the number of months you have been retired.

"Your PERA Benefits", attached as Exhibit 6, p. 22.

In other communications with its members, PERA plainly informed Retirees that they will "[r]eceive an annual automatic increase of 3.5 percent in your monthly retirement benefit to help keep up with the cost of living." "Benefits at a Glance" (Revised July 2004), attached as Exhibit 7. Similarly, in the September 2004 issue of "Member Report," PERA explained how a "PERA account will grow from the `magic of interest compounding'" and stated that if a member chooses to receive a lifetime monthly benefit, he "will receive a benefit increase that is indexed for inflation at 3.5 percent." Member Report, p. 10, attached as Exhibit 8; see PERA Website – "Annual Benefit Increases" (accessed on Nov. 11, 2009), attached as Exhibit 9 ("If you begin PERA membership on or before June 30, 2005, you will receive an annual increase of 3.5 percent.").

In 2004, the Legislature amended Colo. Rev. Stat. § 24-51-1002 *for future PERA members only* (effectively grandfathering past members at the 3.5 percent level). Thus, the 2005 legislation provided that the annual increase for persons who became members on or after July 1, 2005 shall be the lesser of 3% or the actual increase of the consumer price index ("CPI"). Laws 2004, Ch. 214, § 9 (codified at Colo. Rev. Stat. § 24-51-1002(a.5)(I) (2005)). Two years later, the Legislature included individuals who were PERA member as of June 30, 2005, but who were members as of December 30, 2006, among those PERA members who would receive a COLA of CPI up to 3%). Laws 2006, Ch. 308, § 40 (codified at Colo. Rev. Stat. § 24-51-1002(3)(a) (2007)). After the 2006 amendment and until the effective date of the 2010 Pension Legislation, the following language governed annual increases for Class members:

> (1) For benefit recipients whose benefits are based on the account of a member who was a member, inactive member, or retiree on December 31, 2006, the cumulative increase applied to benefits paid shall be recalculated annually as of March 1 and shall be the total percent derived by multiplying three and one-half percent, compounded annually, times the number of years such benefit has been effective after March 1, 2000. . . .

Colo. Rev. Stat. § 24-51-1002(1) (2007).

2. DPS Members

Until it merged with PERA, the DPSRS had been providing some form of guaranteed annual adjustment to member pensions since at least 1981—when DPSRS began increasing pensions annually by 3.0% (non-compounding). See "Significant Facts," DPSRS, p. 5, attached as Exhibit 10. In 1985, DPSRS raised the yearly adjustment to 3.25% (non-compounding); and in 2000, DPSRS began to compound interest. Id. at pp. 5-6.

When DPSRS became a part of PERA on January 1, 2010, PERA assumed DPSRS' obligation for the guaranteed 3.25% (compounded) annual increase for DPS Subclass Members. Colo. Rev. Stat. § 24-51-1732 (effective January 1, 2010).

C. The 2010 Pension Legislation

Earlier this year, the Legislature passed the 2010 Pension Legislation, which Governor Ritter signed into law on February 23, 2010. The 2010 Pension Legislation modified PERA in several respects. Among other things, it increased employer and employee contributions; it raised service eligibility requirements for PERA members hired after January 1, 2011; and it changed the formula for calculating the Highest Average Salary for PERA members not eligible to retire as of January 1, 2011.

Most importantly for purposes of this lawsuit, *the 2010 Pension Legislation eliminated the guaranteed automatic 3.5% annual COLA increase for the PERA Public Employee subclass and the 3.25% annual COLA increase for DPS retirees*. Under the 2010 Pension Legislation, the yearly COLA is no longer guaranteed at a specified percentage increase. Instead, the act established a new formula based on the Consumer Price Index ("CPI"), capped at 2%, that could—and in 2010 did—yield a 0% increase. In its current form, Colo. Rev. Stat. § 24-51-1002 in pertinent part reads:

> (1) For benefit recipients whose benefits are based on the account of a member who was a member, inactive member, or retiree on December 31, 2006, or for benefit recipients whose benefits are based on the account of a DPS member or DPS retiree, **the increase applied to benefits for the year 2010 shall be the lesser of two percent or the average of the annual increases determined for each month, to the nearest one-tenth of a percent, as calculated by the United States department of labor, in the national consumer price index for urban wage earners and clerical workers for each of the months in the 2009 calendar year.**
>
> (2) **Beginning in the year 2011**, subject to the provisions of section 24-51-1009.5, for benefit recipients whose benefits are based on the account of a member who was a member, inactive member, or retiree on December 31, 2006, or for benefit recipients whose benefits are based on the account of a DPS member or DPS retiree, **the increase applied to benefits paid shall be the lesser of two percent or the average of the annual increases determined for each month, to the nearest one-tenth of a percent, as calculated by the United States department of labor, in the national consumer price index for urban wage earners and clerical workers during the calendar year preceding the increase in the benefit.** Notwithstanding the provisions of this subsection

> (2), the increase shall be the maximum permitted under this subsection (2) and section 24-51-1009.5 unless the association's annual audited return on investments is negative for the preceding calendar year, at which point the annual increase for the subsequent three years shall be the lesser of two percent or the average of the annual increases determined for each month, to the nearest one-tenth of a percent, as calculated by the United States department of labor, in the national consumer price index for urban wage earners and clerical workers during the calendar year preceding the increase in the benefit. The increase applied to such benefits shall be recalculated annually as of July 1, and shall be the compounded annual percentage of the annual increases applied to such benefits. In the first year that the benefit recipient is eligible to receive an annual increase pursuant to section 24-51-10001, the annual increase shall be prorated.

Laws 2010, Ch. 2, § 29; Colo. Rev. Stat. § 24-51-1002 (2010) (emphasis added); see Senate Bill 10-001 Provisions, attached as Exhibit 11.

The 2010 Pension Legislation also provides a 0.25% increase to the 2.0% cap if the actuarial value of PERA's assets exceeds an actuarial funding ration of 103% and a 0.25% decrease if the asset value subsequently falls below 99%. Laws 2010, Ch. 2, § 23; Colo. Rev. Stat. § 24-51-1009.5 (2010). The legislation also changes the traditional date for implementing annual COLA increases, moving it back by three months, from March to July. Colo. Rev. Stat. § 24-51-1001 (2010).

IV. LEGAL ARGUMENT

A. Legal Standard

Pursuant to C.R.C.P. 56(c), a party is entitled to summary judgment when based upon the pleadings, admissions, depositions, answers to interrogatories, and affidavits, "there is no disputed issue of material fact and the moving party is entitled to judgment as a matter of law." BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 71 (Colo. 2004). Pursuant to C.R.C.P. 56(d), "the court may grant a *partial* summary judgment as to material facts existing without substantial controversy and reserve disputed facts for subsequent proceedings." City of Westminster v. Church, 167 Colo. 1, 15 (1968) (emphasis added). The moving party has the burden of establishing the non-existence of a genuine issue of material fact. Continental Airlines, Inc. v.

Keenan, 731 P.2d 708, 712 (Colo. 1987). If the moving party meets the initial burden of production, then that burden shifts to the non-moving party to show "relevant and specific facts that a real controversy exists." Ginter v. Palmer & Co., 196 Colo. 203, 206 (1978). If the Court determines that no triable issue of fact exists, summary judgment should be entered as a matter of law. Casebolt v. Cowan, 829 P.2d 352, 364 (Colo. 1992).

B. The Contract Clause of the Colorado Constitution Protects Plaintiffs' Rights to a Pension.

The Colorado Constitution protects contracts by and between the government and its citizens. In what is known as the "Contract Clause," Article II, Section 11 instructs: "No *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly."

The Colorado Supreme Court has consistently found that "rights which accrue under a pension plan are contractual obligations which are protected under article II, section 11, of the Colorado Constitution ..." Colorado Springs Fire Fighters Ass'n, Local 5 v. City of Colorado Springs, 784 P.2d 766, 770 (Colo. 1989) (en banc) (citing McPhail). In McPhail, an *en banc* court considered whether the City's repeal of an "escalator clause" in a city charter and ordinance, which promised post-retirement increases equal to one-half of any future wage increases, violated the state Contract Clause. Finding that the repeal of the "escalator clause" did indeed contravene the Contract Clause, the Court held that contributory pensions were not gratuities, but were contractual in nature. McPhail, 139 Colo. at 340-42. A unanimous court held:

> "Retirement pay is defined as 'adjusted compensation' presently earned, which, with contributions from employees, is payable in the future. The compensation is earned in the present, payable in the future to an employee, provided he possesses the qualifications required by the act, and complies with the terms, conditions, and regulations imposed on

> the receipt of retirement pay. Until an employee has earned his retirement pay, or until the time arrives when he may retire, his retirement pay is but an inchoate right **but when his retirement pay becomes a vested right of which the pension entitled thereto cannot be deprived; it has ripened into a full contractual obligation."**

Id. at 342 (emphasis added) (quoting Retirement Board of Allegheny County v. McGovern, 174 A. 400 (Pa. 1934)).

The McPhail Court then went on to find that the escalator clause in the Charter and Ordinance of the City and County of Denver:

> specifically provided that if plaintiffs fulfilled all conditions they would receive a pension which would be subject to increase or decrease based upon the salary of the rank which they occupied as of the date of retirement. It would be unjust and contrary to our basic notions concerning the validity of contracts to hold that this provision could be changed by the lawmakers.

Id. at 344.

McPhail thus holds that public pension benefits may not be reduced *for any reason* once plaintiffs attain eligibility for their pension or retire -- and McPhail is still good law. See Police Pension and Relief Bd. of City and County of Denver v. Bills, 148 Colo. 383, 38 (1961) (citing McPhail) (emphasis added) ("retirement rights [upon retiring or becoming eligible to retire] thereupon become a vested contractual obligation, **not subject to a unilateral change of any type whatsoever**."); City of Aurora v. Ackman, 738 P.2d 796, 800 (Colo.App. 1987) (citing McPhail) ("substantial adverse change cannot be made in the 'vested' pension rights of an employee who has already met the eligibility requirements of such a program."); McInerney v. Public Employees' Retirement Ass'n, 976 P.2d 348, 353 (Colo. App. 1998) (citing Bills) ("Retirement pay becomes a vested right when an employee has complied with the conditions imposed entitling the employee to the receipt of retirement benefits).

Significantly, in 2005, Colorado Treasurer Mike Coffman requested a formal opinion from the state Attorney General to the following question: "What, if any, limitations exist upon

the Legislature's ability to reduce the capacity of current employees to earn additional retirement benefits to assure the long term actuarial soundness of the plan?" First addressing the rights of those who had yet to qualify for retirement and whose benefits were "partially vested," then Attorney General Ken Salazar responded:

> The rate and amount of retirement benefits may qualify as a partially vested pension right protected by the contract clause of the constitution. An adverse change to a partially vested pension right is lawful only if it is balanced by a corresponding change of a beneficial nature, a change that is actuarially necessary, or a change that strengthens or improves the pension plan.

Attorney General Formal Opinion No. 05-04, pp. 2-3, attached as Exhibit 11. As for PERA members who had *fulfilled all of the requirements for the pension*, the Attorney General concluded:

> Once a PERA member fulfills all the statutory requirements for a pension benefit, retires and begins receiving a pension, **the member's fully vested pension right cannot be reduced by the General Assembly.**

Id. (emphasis. added) (citing McPhail). In the "Discussion" section, the Attorney General explained his answer as to those already vested in their benefits:

> Some vested pension rights cannot be eliminated. When a PERA member retires from active service and begins receiving a pension, the member's pension becomes a vested contractual obligation of the pension program that is not subject to unilateral change **of any type** by the General Assembly. *Police Pension & Relief Board of City and County of Denver v. Bills,* 148 Colo. 383, 366 P.2d 581, 584 (1961) (citing *Police Pension & Relief Board of the City and County of Denver v. McPhail*, 139 Colo. 330, 338 P.2d 694, 700 (1959)). **When an employee retires and begins receiving a pension, trustees may not adopt an amendment that reduces an employee's vested pension under the plan.** *Walker v. Board of Trustees of Regional Transportation District Pension Plan*, 69 Fed. Appx. 953, 2003 WL 21690534 (10th Cir. Colo.) (impairment of vested pension rights is arbitrary and capricious, a breach of contract, and a breach of its fiduciary duties) (citing *Police Pension & Relief Board of City and County of Denver v. Bills)*, 148 Colo. 383, 366 P.2d 581 (1961) (unpublished opinion).

Id. (emphasis added).

C. Because Plaintiffs were Vested in the Future COLA Increases upon Retirement or upon Attaining Eligibility for Retirement, Judgment should be Entered in their Favor on Count I.

As part of the Affirmative Defenses filed with their Answers, both sets of Defendants argue that "Plaintiffs have no contractual right to a particular COLA formula." PERA Defendants' Affirmative Defense #3; State Defendants Affirmative Defense #6. This argument is contrary to Colorado law.

As noted, the McPhail case addressed the repeal of an escalator clause that was part of the Revised Municipal Code of the City and County of Denver, Charter (pp. 45-46) and that provided pension increases equal to one-half of any future pay increase for the rank that the retiree held at retirement:

> . . . and such member shall thereafter, during his life-time, be paid in equal monthly installments from the 'pension and relief fund' a pension equal to one-half (1/2) of the average monthly rate of salary which such member shall have received in such department during the one year preceding the date of the termination of the said member's twenty-five years of active service.
>
> . . . . In the event that salaries in the Denver police department shall be raised after the effective date of this amendment those members of said department who shall have previously been retired from active service and who are receiving a pension **shall be entitled to an increase** in the amount of their pension equal to one-half of the raise in pay granted in the rank said member held at the time he was retired…

McPhail, 139 Colo. at 334-35 (emphasis added).

The legislation at issue both here and in McPhail mandate certain specified post-retirement pension *increases*. The increases in McPhail were based on future wage increases for active employees, while the increases here are based on prescribed percentages. The salient point is that McPhail unequivocally holds that the state Contract Clause protects not only the right to the monthly pension in the amount determined at retirement, but it also protects any post-retirement increases provided by in the governing statute.

The McPhail Court began its analysis with a review of Pennsylvania cases, where the courts have held that participants in a public pension system have a vested, contractual right to their benefits. Id. at 342-343 (citations omitted). The Court then cited with approval the reasoning used by California courts in cases "dealing with almost the exact problem here presented and holding that a change from an escalator clause to a fixed amount can have no retrospective effect." Id. at 343 (citing Terry v. City of Berkeley, 263 P.2d 833 (Cal. 1953) and others). Based on this analysis, McPhail found that the pension board and retirees had a contract which required the city to make the post-retirement pension increases as called for by the ordinance in effect when the plaintiffs retired. Id. at 344.

Since McPhail unequivocally established the Colorado law on the issue for the past half-century, there is no need to look to sister states for guidance. Nonetheless, a review of decisions from other states shows that courts outside Colorado routinely find that a retiree's contractual right to a pension also encompasses—and protects from diminution—any post-retirement *increases* (e.g. COLAs) mandated by the law in effect when he vested.

For example, in United Firefighters of Los Angeles City v. City of Los Angeles, 210 Cal.App.3d 1095 (1984), the court held that where firefighters' rights to pension benefits had vested under a pension statute that provided uncapped post-retirement COLAs, the later imposition of a 3% cap on the COLAs violated the Contract Clause. Id. at 1108. Similarly, in Booth v. Sims, 456 S.E.2d 167 (W.Va. 1995), the West Virginia Supreme Court struck down a law reducing the pension COLAs from 3.75% to 2% for active State Troopers whose benefits had previously vested and who were eligible for retirement. See also Pasadena Police Officers Association v. City of Pasadena, 195 Cal.Rptr. 339 (Cal. Ct. App. 1983) (COLAs could not be capped for retired police officers who previously opted for pensions with uncapped COLAs in

lieu of a fixed pension); Clayppol v. Wilson, 6 Cal.Rptr.2d 77 (Cal. App. 3rd Dist. 1992) (striking down repeal of COLA).

Moreover, the statute governing the purchase of service credits, which many Class Members executed, supports Plaintiffs' claim that they vested in the previous COLA formula. The law governing these purchases clearly provides that benefit levels cannot be changed:

> **Service credit purchased** pursuant to this part 5 by members who were members, inactive members, or retirees on December 31, 2006, **shall be subject to the benefit provisions in effect for the existing member contribution account.** Service credit purchased pursuant to this part 5 by members who were not members, inactive members, or retirees on December 31, 2006, shall be subject to the benefit provisions in effect for such member at the time of the initiation of payment of the purchase.

Colo. Rev. Stat. § 24-51-502 (2010).

As such, Plaintiffs are entitled to receive COLAs at the level under the law at the time of their retirement (or upon becoming eligible to retire) –3.5% or CPI up to 3.5% for non-DPS members, and 3.25% or 3.0% for DPS members -- and to receive these adjustments in March of every year.

V. CONCLUSION

For these reasons, this Court should enter summary judgment as to liability in favor of the Plaintiffs on Count I.

Respectfully submitted on the 22nd day of November, 2010.

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Certificate of Service

I hereby certify that I have on this 22nd day of November, 2010, I have electronically filed **PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** via LexisNexis File & Serve that will electronically notify and serve all registered, interested parties to the case including the following:

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