IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STEPHEN BORDERS, DON COLE, JAMES SCERENSCKO, SANDRA GRIFFIN, WILLIAM CLARK, QUINTON MITCHELL, and CAROLINE TANKSLEY, individually and on behalf of classes of all others similarly situated,	:	
Plaintiffs,	:	CIVIL ACTION FILE
v.	:	No. 2013-CV-239021
CITY OF ATLANTA, KASIM REED, in his capacity as Mayor of the City of Atlanta; CEASAR MITCHELL, in his capacity as President of the City Council; and CARLA SMITH, KWANZA HALL, IVORY LEE YOUNG, JR., CLETA WINSLOW, NATALYN MOSBY ARCHIBONG, ALEX WAN, HOWARD SHOOK, YOLANDA ADREAN, FELICIA MOORE, C.T. MARTIN, KEISHA LANCE BOTTOMS, JOYCE SHEPHERD, MICHAEL BOND, AARON WATSON, H. LAMAR WILLIS, in their capacities as members of the Atlanta City Council,	:	
Defendants.	:	

PLAINTIFFS' SUPPLEMENTAL BRIEF

This supplemental brief is submitted to address matters raised by the Court at the hearing on May 15, 2014.

1. Past Practice Demonstrates that the City Did Not Reserve the Right to Impair Employees' Retirement Benefits Unilaterally.

At the hearing, the Court asked whether the Plans had been amended previously in any way that might shed light on the Defendants' present contention that the enrollment provisions that were added to the Plans in 1980 were intended to reserve unto the City the right to impair employees' retirement benefits. Neither party knew the answer to this question at the hearing. Plaintiffs have researched this issue and, as set forth more fully below, the procedure that the City followed in connection with prior amendments to the Plans shows that the City did not reserve the right to impair employees' retirement benefits unilaterally.

The Plans were amended several times prior to the amendment at issue in this case. Significantly, unlike the amendment at issue in this case, the prior amendments were not imposed unilaterally on employees. Instead, employees were allowed to choose whether to be covered by the amendments. Employees who desired to be covered by the amendments were required to agree in writing to accept the benefits and obligations of the amendments, in the same manner as the employees did in *Hartsfield v. Mitchell*, 210 Ga. 197 (1953) and *Webb v. Whitley*, 114 Ga. App. 153 (1966). Employees who did not desire to be covered by the amendments were not required to consent to the changes and instead were allowed to continue to have their rights and obligations determined under the law as it existed prior to the amendments.

For example, the Plans were revised substantially in 1978 with the passage of the "1978 Pension Act." These revisions are reflected in Sections 6-37, 6-222 and 6-367 of the Plans,[1] and provide in pertinent part:

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[1] These provisions are attached as Exhibit "B" to the brief submitted by the Defendants in support of their motion to dismiss.

(a) The pension benefits provided by this section and the several subsections hereof shall be in lieu of like pension benefits provided by the existing provisions of this Act....

(b) (1) Any officer or employee coming under the terms of this Act who is in the employment of the city prior to the effective date of this amendment may elect to come under the provisions of this amendment by making written application to the board of trustees. The applicant must agree in writing to accept the benefits and obligations of this amendment, in lieu of other pension benefits and obligations under this Act, as amended.

All such officers and employees in the employment of the city on the effective date of this Act who do not in writing agree to accept the benefits and obligations of this amendment shall have their rights and obligations determined under the law as it existed prior to this amendment, even though such provisions of law are specifically repealed as hereinafter set forth.

All regular officers or employees of the city, eligible for participation in this Act, as amended, who shall be elected or employed after the effective date of this Act, shall be required to come under the provisions of this Act, as now amended, and shall have all rights and duties provided in the amended Act. Temporary and casual employees shall not be required to participate in this Act, as amended.

Similarly, in 2005, the Firefighters' and General Employees' Pension Plans were amended to increase the multiplier,[2] but to place an 80% cap on the monthly benefit payment. In addition, the vesting period for all of the Plans was changed from 15 years to 10 years and a "30 and out" provision was added to the Plans allowing employees who have 30 years of service to retire at any age without penalty.[3] Again, employees were given a choice as to whether to come under the amendments. *See* Exhibit A to this brief and Affidavit of Donald C. Cole filed herewith; *see also* http://www.atlantaga.gov/index.aspx?page=214 (describing the amendments and stating "Each

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[2] The multiplier for the Firefighters' Plan was increased from 2.0 to 3.0, and the multiplier for the General Employees' Plan was increased from 2.0 to 2.5.

[3] The 2005 Amendments are attached as Exhibit "G" to the brief submitted by the Defendants in support of their motion to dismiss.

member [of the General Employees Pension Plan] will be required to either elect to join the new plan or decline to join the new plan[,]" and further stating that "Because of the 80% cap, all members of the General Employees and Firefighters Pension Funds **must** elect to be covered by the amendments or to decline to be covered by the amendments. Since the only change to the Police Officer's Pension Fund is the 10 year vesting, Police Officers will not have to elect or decline.") (emphasis original) (website last visited June 9, 2014).

"The construction placed upon a contract by the parties thereto, as shown by their acts and conduct, is entitled to much weight and may be conclusive upon them." *McKinley v. Coliseum Health Group, LLC*, 308 Ga. App. 768, 771, 708 S.E.2d 682, 685 (2011), *quoting Scruggs v. Purvis*, 218 Ga. 40, 42, 126 S.E.2d 208 (1962); *Cohen v. Sandy Springs Crossing Assoc., L.P.*, 238 Ga. App. 711, 712, 520 S.E.2d 17, 19 (1999) (same). It would have been unnecessary for the City to have given employees a choice as to whether to be covered by the above amendments if, as the City now contends, the Plans permitted the City to modify employees' benefits unilaterally. The fact that the City has consistently recognized that employees are not bound by amendments to the Plans unless they affirmatively elect to be bound by the amendments is convincing proof that the "as may be amended" clause found in the enrollment provisions does not reserve unto the City the right to impair employees' retirement benefits unilaterally.

2. The Meaning of the "As May Be Amended" Language in the Enrollment Provisions.

The Court asked about the significance of the "as may be amended" language in the Plans' enrollment provisions. We believe that the language should be read in context. Under the terms of the enrollment provisions, employees who elect to be covered by the Plans agree that they cannot withdraw from participation except by leaving employment.

It is an important aspect of pension money management that a plan be provided a steady flow of incoming funds and be protected from unexpected withdrawals. Investing for the long term produces far greater yields. If an employee who finds himself in need of funds can at any time give notice of withdrawal from the plan and demand a refund of contributions, the plan would need to maintain cash or make short-term investments in order to meet such demands, thus hampering the overall performance of the fund. Moreover, it is in the employee's interest that he not trade away pension rights that he will surely need in the future. The "as may be amended" language in the enrollment provisions makes it clear that an employee cannot claim a right to leave the plan and withdraw contributions because his plan has been amended.

At the hearing, counsel noted that no case could be found that addresses the use of the words "as may be amended" in the context of reservation of rights to diminish or terminate pension benefits. Surprisingly, the term "as may be amended" is not to be found in Words and Phrases. The issue of the vesting *vel non* of pension and other employee benefits under collective bargaining agreements, ERISA, the contract clause and the common law has been raised in many, many cases through the years. The inability to find any case that addresses the use of the term, "as may be amended" to convey a reservation of rights to diminish pension benefits should be viewed as compelling circumstantial evidence that a public or a private employer who intends to convey to employees a reservation of rights to diminish pension benefits must do so with unambiguous language that so states. Would not any competent lawyer who has been assigned the task of drafting an enforceable "reservation of rights clause" not emulate the language recognized by controlling authority to express a binding reservation of rights to diminish or terminate pension benefits?

3. The Addition of a Reservation of Rights Clause to the Plans in 2011 Further Demonstrates that the Enrollment Provisions Were Not Intended to Function as Reservation of Rights Clauses.

The 2011 amendments to the Plans added the following provision purporting to reserve unto the City the right to modify the Plans: "The City may modify one or more of the DB Plans, the DC Retirement Plan, and/or any other aspect of the Retirement Plan in a manner that is consistent with applicable laws." *See* Section 6-2(i).[4] It would have been unnecessary for the City to enact this provision purporting to reserve the right to modify the Plans in 2011 if the enrollment provisions that were enacted in 1980 already had reserved unto the City the right to modify the Plans. The fact that the City chose to add this provision to the Plans in 2011 indicates that the City did not view the enrollment provisions to reserve unto the City the right to modify the Plans.

4. Any Attempt to Reserve the Right to Modify Employees' Retirement Benefits Would Be Ineffective as to Employees Whose Rights Vested Prior to the Amendment.

"[P]rior to the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1461[,] ... significant common-law precedent had developed in support of the view that an express and unqualified reservation of the power to amend or terminate a pension plan is only to be given effect up to the point at which an employee's rights under the plan vest."*McGrath v. Rhode Island Retirement Bd.*, 88 F.3d 12, 18 (1st Cir. 1996). Under this "emergent common-law rule[,]" "once an employee fulfills the service requirements entitling him or her to retirement benefits under a pension plan, the employee acquires a contractual right to those benefits, and the employer cannot abridge that right despite its aboriginal reservation of a power to effect unilateral amendments or to terminate the plan outright." *Id.* at 18-19.

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[4] A copy of Section 6-2 is attached as Exhibit "A" to the brief submitted by Defendants in support of their motion to dismiss. Subsection (i) is found on page 18.

Here, most of the named plaintiffs,[5] and presumably many members of the class, worked for the City for more than ten (10) years and thereby obtained a vested right to their retirement benefits, before 2011 when the amendments at issue in this case were enacted. Accordingly, even if the Court or the jury were to conclude that the enrollment provisions were intended to function as reservation of rights clauses, these provisions would be ineffective as to most of the named plaintiffs and many members of the class under the majority rule.[6]

5. A Ruling that the City Can Break Its Promises to Its Employees Would Adversely Impact Its Ability to Attract and Maintain a Qualified Workforce.

The Court asked searching questions about the City's argument that dire ramifications could flow if the City is bound by its pension benefit promises. Plaintiffs applaud the proposal by the Court to seek guidance from an independent actuary, as we suspect that sunshine will show that the City can afford to keep the promises it made to its police officers, firefighters and other employees who have dedicated their lives to public service, and who were promised guaranteed pension benefits upon retirement at an agreed upon cost during their working years.

The legal position for which the City advocates is not simply the right to make the change at issue, but the right to make any change at any time. This would grant the City the power to reduce or even terminate all pensions for all employees at any time.

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[5] According to the enrollment cards contained in Exhibit "C" to the brief submitted by the Defendants in support of their motion to dismiss, William Clark, Donald Cole, Quinton Mitchell, and Caroline Tanksley all worked for the City for more than ten (10) years prior to 2011.

[6] Whether Georgia will follow the majority rule on this point appears to be an open issue since it appears that this issue was not raised or addressed in *Pritchard v. Bd. of Comm'r of Peace Officers Ann. & Benefit Fund of Ga.*, 211 Ga. 57, 84 S.E.2d 26, 28 (1954), or in the line of decisions following *Pritchard* on which the Defendants rely.

An unfettered right to reduce or terminate pension benefits would not only threaten dire consequences to those workers who cannot now return to young adulthood and remake their career decisions, but the ability to unilaterally reduce or terminate pension rights, if clearly communicated both to prospective and existing employees, would substantially impair the City's power to attract and retain well-qualified police officers, firefighters and other employees and could substantially increase the City's employment costs. Generous, guaranteed pension benefits are a valuable tool in attracting and retaining well-trained, experienced employees. Without this tool, the City likely will have to pay more to attract, train and retain a qualified workforce.

Since 2008, employment opportunities have not been good, but good times appear on the horizon. Many of the City's best and brightest will have opportunities elsewhere at higher salaries and with benefits, including pensions and social security, that are protected by federal law. It is understandable why the City has elected not to tell its employees in clear, unambiguous language that it now claims a right to reduce or terminate their pension benefits.

Any police chief or fire chief will confirm the costs and difficulties that flow from the loss of trained and experienced police officers and firefighters. The City's cutback on its pension promises by this substantial increase in deductions from employee salaries, if allowed to stand, can be expected to hamper both retention and recruitment, and thereby increase payroll and training costs and impair the quality of City services in ways that may overshadow the City's anticipated savings from the impairment of the pension rights at issue in this case.

CONCLUSION

For the foregoing reasons and for those stated in Plaintiffs' prior briefs, Plaintiffs' motion for partial summary judgment as to the issue of liability should be granted, and the Defendants' motion to dismiss/alternative motion for summary judgment should be denied.

Respectfully submitted on this the 19th day of June, 2014,

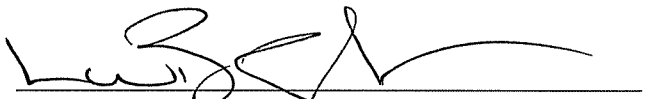

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EXHIBIT A

11/2/05

CITY OF ATLANTA FIREFIGHTERS' EMPLOYEE PENSION FUND
ENROLLMENT FORM FOR
PENSION ACT AS AMENDED IN 2005

COLE	DONALD	C.	M
Last Name	First Name	M.I.	Sex
254-06-4279	12/07/69	10/22/1995	
Social Security Number	Date of Birth	Date of Marriage	
07/04/1998	FIRE		
Date of Employment	Department		

I **ELECT** to be covered by the amendments adopted effective September 14, 2005 related to the change in benefits explained below. I understand that there will be no additional contribution required of me to obtain these benefits.

Donald C. Cole — 10/22/2005

Employee's Signature — Date

I **DO NOT ELECT** to be covered by the amendments adopted effective September 14, 2005 related to the change in benefits explained below.

Employee's Signature — Date

Amendments adopted effective September 14, 2005:

The Changes for the Firefighters Pension Fund are:

1. 10 year vesting
2. An increase in the multiplier to 3.0 for all years of service
3. Adoption of a "30 and out" provision (This allows employees with 30 years of service or more to retire now with no age penalty or age adjustment)
4. 80% (of salary) cap on the pension calculation

Once you have completed and returned this form, you will need to contact ASI at 2187 Northlake Pkwy. Bldg. 9 Suite 106 Tucker, GA 30084 770-934-3953 to start the retirement process.

Completion of this form will not start the retirement process.

RECEIVED
OCT 31 2005
A.S.I. ATLANTA

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **PLAINTIFFS' SUPPLEMENTAL BRIEF** upon opposing counsel by depositing same in the United States mail, postage prepaid and addressed as follows:

Cathy Hampton, City Attorney
Robin Joy Shahar, Chief Counsel
Kimberly Miller Patrick, Deputy City Attorney
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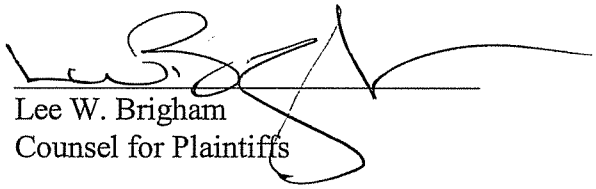
This the 19th day of June, 2014.



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