

CAUSE NO. _____

CITY OF HOUSTON	§	IN THE DISTRICT COURT
	§	
V.	§	HARRIS COUNTY, TEXAS
	§	
HOUSTON FIREFIGHTERS' RELIEF AND RETIREMENT FUND	§	_____ JUDICIAL DISTRICT
	§	

Plaintiff' s Original Petition and Application for Injunction

To The Honorable Court:

The City of Houston (Houston) files its original petition and application for injunction complaining of the Houston Firefighters' Relief and Retirement Fund (HFRRF or Fund) and would respectfully show as follows:

Introduction

1. Houston brings this suit asking for declaratory and injunctive relief because it has growing concerns about its long-term ability to meet its pension obligations and the manner in which those obligations are defined. Houston cannot and will not ignore the lessons to be learned from the recent Detroit bankruptcy and the financial difficulties related to pension obligations being experienced by municipalities throughout the country. Too much is at stake. Unique amongst all pension systems, with HFRRF, Houston pays millions of dollars each year into a firefighter pension fund over which it literally has no control. Fund members control the Fund, and their benefit levels, and receive retirement benefits far exceeding their contributions or salaries. Because the delegation of authority to HFRRF and its

board of trustees (the Board) by the Legislature violates the Texas Constitution, because the statute governing the pension system is a special law that violates the Texas Constitution, because the involuntary imposition of a pension system on Houston violates the Texas Constitution, and because the Fund' s lobbying efforts violate the Texas constitution, Houston seeks relief.

Discovery Control Plan

2. Discovery should be conducted under Level 3, Rule 190.4.

Parties

3. Houston is a Texas home-rule city operating under a municipal charter pursuant to Article 11, Section 5, of the Texas Constitution.

4. HFRRF is a public retirement system created by Tex. Rev. Civ. Stat., article 6243e.2(1). It is governed by its Board, which may be served with process through its Executive Director and Chief Investment Officer, Christopher E. Gonzales, at the Board' s usual place of business located at 4225 Interwood North Parkway, Houston, Texas, 77032, or wherever he may be found.

Jurisdiction and Venue

5. The Court has jurisdiction over this case and over HFRRF based on the Declaratory Judgments Act and the allegations of statutory and constitutional violations. In addition, this Court has jurisdiction based on chapter 65 of the Texas Civil Practice & Remedies Code.

6. Venue is proper in Harris County, Texas. Because HFRRF has its principal office in Harris County, the HFRRF Board controls the Fund from Harris County, and a substantial part of the acts or omissions giving rise to the claim occurred in Harris County.

Facts

A. HFRRF benefits at current levels create large pensions for Fund members but an unsustainable burden for Houston.

7. In fiscal year (FY) 2013, Houston contributed \$260 million into three employee pension funds, the HFRRF, the Houston Municipal Employees' Pension System (HMEPS), and the Houston Police Officers' Pension System (HPOPS). All three funds are managed and run by boards dominated by fund members and beneficiaries. In contrast to Article 6243e.2(1) (the HFRRF statute),¹ the statutes governing the other two pension plans contain meet and confer provisions. Through the meet-and-confer process, HMEPS and HPOPS have agreed during the past decade to changes in benefits on a going-forward basis. HFRRF, on the other hand, has increased its member benefits, and the HFRRF statute gives Houston no ability to control these increases, and no ability to control how much it must contribute to fund the increases.

8. The HFRRF statute creates and empowers an administration that is controlled by members who benefit from the increases they implement. By statute, HFRRF members and beneficiaries hold or control eight of ten board seats. The

¹ Tex. Rev. Civ. Stat. Ann. art 6243e.2(1).

Fund-member-controlled Board dictates how much Houston must pay into the fund every year, based on recommendations by its hand-picked actuary. The statute requires Fund members to contribute 9% of their salary per year.² By statute, Houston must contribute *at least* twice that much: 18% of member payroll, *plus* any additional amount required by the Fund' s Board. Houston' s rate of contribution has been increased by the Board a number of times,³ and the impact to Houston has been significant. For FY 2015, Houston' s projected contribution rate is over 34% of member payroll (which is almost four times what the members contribute); in other words, Houston will contribute more than \$90 million dollars (\$90,000,000).

9. The HFRRF statute provides that a Fund member who works 30 years receives a monthly pension benefit of 80% of his average monthly salary.⁴ In the other funds sponsored by Houston, and for most if not all firefighter plans outside Houston, the average monthly pension benefit is calculated using base salary—without overtime. Not so in the HFRRF statute. The Fund member' s average monthly salary is based on his highest 78 biweekly pay periods, *including* overtime. The inclusion of overtime significantly increases a member' s pension benefit.

10. In addition, after a member reaches 20 years of service, he can elect to continue working and enter into a deferred retirement option plan (DROP). That

² They are not required to make social security or Medicaid contributions. It should also be noted that a number of other Texas public safety pension funds have excellent benefits, but most have higher employee contributions (Austin at 15.70%, El Paso at 15.28%, and San Antonio at 12.32%).

³ The HFRRF statute allows the Board to increase contribution rates only once every three years. Tex. Rev. Civ. Stat. Ann. art. 6243e.2(1) § 3(d).

⁴ This 80% does not include the deferred retirement option plan, explained in paragraph 10.

plan creates a DROP account, into which the Fund deposits—while the member still continues to work and earn a monthly salary—the monthly benefit amount the member would have been paid had he retired. He can continue to work and contribute to the DROP account for 10 years. During the years that this bucket of money is accumulating from the monthly deposit of deferred pension payments, it is also earning an automatic 3% cost of living adjustment (COLA) per year and a guaranteed interest rate of five to ten percent per year, compounded. Upon retirement, a member who participates in DROP for the full 10 years receives an extra 20% of the original pension benefit—meaning he could receive a monthly pension benefit approximating or exceeding his pre-retirement base salary for the rest of his life—but will *also* receive a lump sum payment of this DROP account. And, although the Fund has refused to provide detailed information about these DROP amounts to Houston, Houston calculates that a member's DROP account will contain \$500,000 to \$1 million. It is not surprising, then, that HFRRF's 2013 Comprehensive Annual Financial Report shows that 65% of members who participate in DROP do so for the full 10 years.

11. For example, a member who joined the fire department at age 25 in 1978 and stayed for 35 years, participating fully in DROP his last ten years, would retire at age 60 with a lump sum payment from DROP that probably exceeds \$500,000 and possibly reaches \$1,000,000. That lump sum would be worth many times what the member contributed in real dollars. And in retirement, because a fund member's pension is based on a salary number that includes overtime, the member

would likely receive more than his average base salary plus a 3% COLA compounded annually. Assuming he lived another 27 years, his life expectancy, he would receive millions of dollars, the present value of which would, again, be worth many times what the member contributed. Under these circumstances, the total amount paid out to a fund member bears no reasonable relationship to the fund member's contributions and length of service, as required by law. The chart attached as Exhibit A demonstrates the difference in comparative expense to Houston for benefits required to be paid to a member who simply retires at age 50, a member who continues to work but does not participate in DROP, and a member who both continues to work and participates in DROP.

12. No social security, 401k plan, or any other municipal pension system in Houston or in this State can compete with such a pension.

B. HFRRF has the ability to increase benefits and raise Houston's contribution rates without Houston's approval.

13. As stated, the HFRRF statute also allows Fund members to increase their own benefits if an actuary hired by the member-controlled Board is willing to claim that raising benefits will not have any impact on the solvency of the Fund. The statute gives Houston no input into whether benefits are raised despite the fact that Houston must fund the system. In 2001, the actuaries selected by the Board were willing to make the case allowing Fund members to vote to significantly increase their own benefits. The Board then obtained approval from the Pension Review Board and

increased the benefits. Two years later, the rose-colored projections of the Fund' s actuaries were proven wrong and the Fund' s actuaries had to admit that based on the elevation of benefits and stock market woes, the Fund faced a substantially larger discrepancy than projected between funds in trust and funds to be paid out over time. As a result, Houston' s contribution rate increased. Rather than vote to decrease these benefits, Fund members kept the benefits they voted to award themselves in 2001. And notwithstanding the turnabout by their actuaries, Fund members did not modify their benefit levels on a going-forward basis, even in the face of growing unfunded liabilities.

14. This system of pension funding leaves Houston completely out of the decision-making process. Although Houston must pay vast sums into the system, it has no control over the amount of funding it must provide, or the benefits provided to members. To make matters worse, Houston has no ability to revise the plan going forward to address new employees as it has been able to do with the other pension systems.

C. The exponential growth of pension benefits in the past 30 years.

15. The pension system was not always so lopsided and unstable. In 1937, the Legislature established a general law creating a pension for firemen funded by companies conducting the business of fire insurance. The maximum benefit payable

was \$100 per month.⁵ Firemen who elected to participate paid in 1-3% of their monthly salary.

16. In 1975, after Texas voters passed a constitutional amendment ensuring some local control over county and municipal pension systems, the Legislature imposed on Houston a new pension system requiring that Houston contribute twice what each fund member contributed. That statute gave members with 20 or more years a benefit of 50% of their average salary for the highest three years of service. It also provided for a COLA based on the consumer price index; that adjustment could never decrease the pension and was capped at 3% annually, not compounded.

17. By 1997, when the Legislature imposed the current statute on Houston, and *only* Houston: 1) a version of the DROP had been established, 2) the Board of the fund consisted of ten trustees, eight of whom were either elected or appointed by fund members, 3) the Board controlled Houston's contribution rate, set at twice the fund members' contribution rate plus an additional sum as determined by the Board, 4) fund members had the ability to increase their own benefits independently of Houston, and 5) members who retired after 30 years received a benefit of 80% of average monthly salary, defined as the highest three-year average, including overtime. Further amendments to the statute have sweetened DROP, allowed DROP participants to receive well over 100% of their average salary on retirement, and strengthened fund members' control over the system to the exclusion of Houston.

⁵ The current statute has no maximum.

18. As a result, the HFRRF statute creates an unsustainable burden for Houston and its citizens.

Count 1

Unconstitutional delegation of authority violating art. 3, § 1, Texas Constitution

19. Article 3, section 1 of the Texas Constitution prohibits the Legislature from delegating legislative power to any other body or authority. The HFRRF statute impermissibly delegates legislative power to the Fund. The statute is unconstitutional because it violates the non-delegation doctrine derived from Article 3, section 1 of the Texas Constitution, both on the face of the statute and as applied to Houston.

20. For purposes of the non-delegation doctrine, the Fund is a private entity. There is no provision in the HFRRF statute that the Board must publish rules in accordance with state requirements. There is little or no oversight of the Board by the State. The statute impermissibly delegates legislative power to self-interested private parties.

21. The delegation is unconstitutional because: a) the Board's actions are not subject to meaningful review; b) Houston is not adequately represented in the decision-making process; c) the statute allows the Board to decide legal and factual matters, to construe, amend, and fix its own governing statute, and to enforce its own rules, and the Board claims that these provisions foreclose any participation by Houston in determining contributions or benefits; d) fund members may increase their own benefits unilaterally if a Board-majority-anointed actuary says the increase

will not materially affect the fund' s ability to pay; e) a Board quorum consists of Fund members having a direct, substantial pecuniary interest, creating a conflict with the fiduciary duties imposed on them as trustees to other Fund members, to future Fund members, and to Houston; f) the presence of confidentiality provisions that the Board claims forbid any disclosure of data material to the plan and its administration prevent any accountability; g) the Legislature has not provided sufficient standards to guide the Board in its work; and h) the delegation is open-ended in duration and allows the Board unfettered authority.

Count 2

Unconstitutional special law violating article 3, § 56, and article 16, § 67, Texas Constitution

22. The HFRRF statute applies only to Houston and its firefighters. No provision of the Texas Constitution authorizes the Legislature to enact a special law mandating a public employee pension and benefits systems for a municipality. Tex. Const. art. 16, § 67(a)(1), restricts legislative authority to enacting general pension laws and requires that municipalities have a choice of whether to participate.

23. Article 3, § 56 of the Texas Constitution generally prohibits the Legislature from passing local or special laws regulating a city' s affairs. The HFRRF statute violates the Constitution because it applies only to Houston. Its predecessor, art. 6243e.2, also violated the Constitution because it applied only to Houston.

24. On its face, the HFRRF statute applies to cities with a population of 1,600,000 or more persons based on the last federal census. Only Houston is that large and only Houston was that large in 1997, when the Legislature created the current HFRRF statute. In 1997, as the next federal census approached, it appeared that Dallas or San Antonio might reach the population of 1,200,000 on which art. 6243e.2 was based (and applied only to Houston). Therefore, the Legislature repealed art. 6243e.2, which it had passed in 1975, and substituted the current HFRRF statute—art. 6243e.2(1)—so that the statute continued to apply only to Houston. The almost-40-year sustained effort to have a pension law that applies only to Houston violates the rule against special or local laws.

25. When there is no express constitutional authorization for a special law, the Legislature must show that a general law would not suffice and offer a reasonable basis for the special classification. There is no reasonable basis for treating Houston and its firefighters differently from the firefighters of other major Texas cities, though. And unlike most if not every other municipal pension law in the state, the HFRRF statute specifically provides that the Texas Trust Code does not apply to the fund, preventing Houston from even having the rights of a trust settlor. Because there is no reasonable basis for imposing a different, more onerous, firefighters' pension statute on Houston than the firefighters' pension statutes governing other major Texas cities, the HFRRF statute and its predecessor are unconstitutional special laws.

Count 3

Pension statute unilaterally imposed on Houston, violating art. 16, § 67, Texas Constitution

26. In violation of art. 16, § 67, the Legislature has imposed the HFRRF statute on Houston. The HFRRF statute provides that a pension system for firefighters “is established” in each municipality with a population of at least 1.6 million, applying only to Houston. The statute does not give Houston a choice in whether to join a pension system or a choice in the terms of the pension system. It simply imposes a system on Houston.

27. Although art. 16, § 67, Texas Constitution, allows the Legislature to enact general laws establishing pension systems, subsection (c) governs local retirement systems. That subsection limits the Legislature to providing for either: a) the creation by any city of a pension system, or b) the creation of a statewide pension system in which cities may voluntarily participate. The HFRRF statute is not a city-created pension system. Rather, in violation of art. 16, § 67, the Legislature has imposed a pension system on Houston rather than offered it a system in which Houston may voluntarily participate. Because the imposition of the HFRRF statute violates the Constitution, the article is invalid.

28. Further, art. 16, § 67, subsection (c)(2) provides that: “Benefits under these systems must be reasonably related to participant tenure and contributions.” As set by the Legislature, as applied, and as unilaterally increased by the benefitting fund

members, the benefits are not reasonably related and, therefore, have an unconstitutional basis.

Count 4

Lobbying activities violate statute and constitution.

29. Texas Government Code § 802.203 governs the standards by which governing bodies of public retirement funds operate. Trustees must discharge fiduciary duties for “ the exclusive purposes of (A) providing benefits to participants and beneficiaries and (B) defraying reasonable expenses of administering the system.”

30. The Board violates these standards. It regularly misuses pension funds to pay lobbyists who lobby the Legislature to shut Houston out of the decision-making process, to continue the Board’ s control over the pension system, and to forbid any disclosure of data material to the plan and its administration, preventing any accountability. The lobbying expenditures are illegal because expending fund assets for lobbying is not reasonably related to the exclusive purpose of providing benefits to participants or defraying reasonable costs of administering the system. The lobbying effort not only violates the statute but also Texas Constitution, art. 16, § 67(f).

31. In addition, these actions are ultra vires. Trustees take an oath to diligently and honestly administer the affairs of the fund and not to violate the statute. The Board has acted and continues to act ultra vires when it appropriates pension fund monies without statutory authority to do so and in contravention of the oath of

office each trustee must take. The ultra vires actions of the Board damage the fund by misappropriating funds and harm Houston because the waste of fund monies directly translates into higher contribution costs for Houston to meet its liabilities under the statute.

32. Houston requests permanent injunctive relief enjoining the fund's ongoing practice of using pension fund monies to pay for political lobbying expenses, as these are not expenses which the Board may legally expend on behalf of the fund under section 802.203, Texas Government Code, and Article 16, § 67(f) of the Texas Constitution.

Prayer for Relief

A. Declaratory relief.

33. Houston incorporates the foregoing Paragraphs by reference as if set forth fully herein.

34. Houston requests that the Court declare that:

- the HFRRF statute, Tex. Civ. Stat. Ann. art. 6243e.2(1), and its predecessor statute, art. 6243e.2, are unconstitutional and invalid;
- Tex. Civ. Stat. Ann. art. 6243e, originally enacted in 1937 and as amended through 1973, is valid, except for Section 7(f) (which gives the members the power to increase benefits), originally added in 1967 and as revised in 1973, which is invalid;

– Tex. Civ. Stat. Ann. art 6243e, originally enacted in 1937, and as amended through 1973, with the exclusion of section 7(f), will be prospectively applied.

35. With such relief, the result will be a pension statute enacted prior to the enactment of art. 16, § 67, Texas Constitution, that does not include any power by the members to increase benefits, does not include a deferred retirement option plan, does not include overtime in the salary upon which retirement benefits are based, and provides a maximum contribution rate by Houston at twice the contribution by members.

B. Injunctive relief.

36. Houston incorporates the foregoing Paragraphs by reference as if set forth fully herein.

37. Houston requests that the Court issue an injunction enjoining HFRRF and its Board from any lobbying activity.

C. Attorney' s fees and costs.

38. Houston has asked for declaratory and injunctive relief. By statute, Houston is entitled to recover its costs and reasonable and necessary attorneys' fees from HFRRF.

39. All conditions precedent to Houston' s recovery of its costs and attorneys' fees have occurred, or will occur prior to entry of judgment in this suit.

40. Houston also asks for all other relief to which it may show itself entitled.

D. Relief not sought.

41. Houston does not seek any change in the pension benefits being paid to existing HFRRF retirees, nor will the above relief sought have the effect of doing so.

Respectfully submitted,

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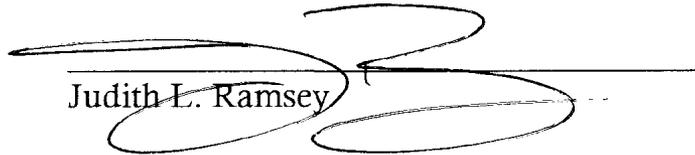
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Certificate of Service on Attorney General

As required by Tex. Civ. Prac. & Rem. Code § 37.006, the City is serving a copy of this suit on the Attorney General of the State of Texas by electronic service, facsimile, or certified mail delivered to:

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Judith L. Ramsey



I, Chris Daniel, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this January 22, 2014

Certified Document Number: 59336760 Total Pages: 17

Chris Daniel, DISTRICT CLERK
HARRIS COUNTY, TEXAS

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