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RE: Request for advice regarding proposed amendment to Teachers Retirement System's COLA rule

Dear Mr. Ezell:

This letter is in response to your request for advice regarding a proposed amendment to the Teachers Retirement System of Georgia's ("TRS") rule governing cost-of-living adjustments ("COLAs") for its retirees. You have asked whether TRS may lawfully amend its COLA rule so that the granting of COLAs would be done only at the Board's discretion rather than be granted automatically every six months, and you have asked related questions regarding the standards for the actuarial soundness of the system. I will answer each of your questions herein.

History of TRS COLAs

In 1969, the General Assembly first enacted a statute that authorized the TRS Board of Trustees "to adopt a method of providing for post-retirement benefit adjustments for the purpose of maintaining essentially no less purchasing power for a beneficiary in his post-retirement years." 1969 Ga. Laws 391, § 1. The statute went on to provide that:

> Such method of adjustment may result in the adoption by the Board of a method of financing other than that described in subparagraphs (a), (b) and (c) of subsection 2 of section 8, and shall be based upon:
>
> (1) a recommendation of the Board's actuaries;
>
> (2) maintaining the actuarial soundness of the system;

> (3) its application to the retirement income of any beneficiary retiring on or after the adoption of such method by the Board of Trustees.
>
> The Board may specify a minimum age which a beneficiary must have attained in order to be eligible for the post-retirement benefit adjustment.

Id. In 1971, the legislature amended the statute to delete the third enumerated factor above. 1971 Ga. Laws 573, § 1. This TRS COLA statute is now codified at O.C.G.A. § 47-3-126.

In its Supplemental Appropriations Act for Fiscal Year 1983-84 and its General Appropriations Act for Fiscal Year 1984-85, the General Assembly included language indicating its intent to limit COLAs for TRS (and ERS) retirees to $25 per month. The Attorney General opined, however, that "the General Assembly cannot, solely through language in an Appropriations Act, place a ceiling or limit on the amount of a cost-of-living increase granted to a retiree of the ERS or TRS. . . ." 1984 Op. Att'y Gen. 84-19, p. 42-43. The Attorney General explained:

> . . . With respect to both retirement systems, cost-of-living increases (postretirement benefit adjustments) can be granted by the respective boards of trustees based upon actuarial recommendations and the primary concern of maintenance of the actuarial soundness of the systems. See O.C.G.A. § 47-2-29 (ERS) and O.C.G.A. § 47-3-126 (TRS). Neither the ERS Act nor the TRS Act sets any ceiling or limit on the amount or percentage of granted cost-of-living increases. In both cases, the decision as to the amount or the percentage is left to the discretion of the governing board of trustees based on the actuary's recommendation and subject to the fundamental concern for the maintenance of the actuarial soundness of the system. . . . [A]ppropriations Acts cannot constitutionally alter a discretionary authority for the expenditure of that money which the General Assembly has granted an agency by general law.

Id. at p. 43-44.

In 1984, 1986 and 1988, the General Assembly amended the TRS statutes to provide for one-time increases in retirees' benefits. 1984 Ga. Laws 990, § 1; 1986 Ga. Laws 620, § 3; and 1988 Ga. Laws 343, § 2. Those amendments are codified at O.C.G.A. § 47-3-126.1, § 47-3-126.2 and § 47-3-126.3, respectively.

In 1993, the legislature enacted O.C.G.A. § 47-1-31, which provides:

> Any other provision of this title to the contrary notwithstanding, any discretionary postretirement benefit increase granted on or after July 1, 1993, by the board of trustees of any public retirement system pursuant to the authority to grant such increases within the limits of actuarial soundness granted by general law shall be subject to reduction by subsequent legislation and shall not be considered an element of any contract of employment.

According to records provided by TRS staff, it appears that the TRS Board of Trustees created a method for awarding COLAs soon after the 1969 enactment of the COLA statute. It appears that the Board adopted "Proposed Guidelines for Implementing the Post-Retirement Adjustment of Benefits," which provided for the first COLA to be granted effective January 1, 1969. It provided that a COLA "will be granted two times a year on January 1 and July 1 to be determined" by the calculation of a ratio between the current Consumer Price Index ("CPI") average and a base index. If the calculated ratio was greater than 1.005, "the retirement benefits would be adjusted by the ratio; however, in no event w[ould] the retirement benefit be increased by more than 1½% for any six month period." If the calculated ratio was "between 1.000 and 1.005, no adjustment w[ould] be made in the retirement benefit." If the calculated ratio was less than 1.000, the retirement benefit could be reduced by no more than 1½% for any six month period.

As early as December 1968, the report of the Board's actuary (then, George B. Buck Consulting Actuaries, Inc. in New York) began to account for the payment of retiree COLAs in determining "the employers' contribution rate as the level rate required to produce a stable fund at the end of a period of approximately 40 years from the valuation date." The minutes of the January 1969 TRS Board of Trustees meeting then apparently indicate that the Board set the necessary employer contribution rate to account for the expected passage of the statute allowing for COLAs for future retirees, "[a]fter a very careful discussion of the Actuary's Report."

It is my understanding that the Board's actuaries and the Board itself have continued since that time to factor in the expectation that retirees will receive COLAs of 3% per year when setting contribution rates and evaluating the actuarial soundness of the system. It is my further understanding based on information provided by TRS that, in that sense, TRS has been "pre-funded" for COLAs, meaning that each year contributions have been made in the amount the actuary has calculated to be necessary to fund the COLAs under actuarial standards.

In 1987, the TRS Board promulgated and filed with the Secretary of State its "Policy for Post-Retirement Benefit Adjustments." It still provided that a COLA "will be granted

two times a year on January 1 and July 1 to be determined" by the calculation of the ratio between the current CPI average and the base index, but the various ratio thresholds for benefit adjustments were different from the original rule. Under this version, if the calculated ratio was greater than 1.001, "the retirement benefits would be adjusted by the ratio; however, in no event w[ould] the retirement benefit be increased by more than 1½% for any six month period." If the calculated ratio was "between 1.000 and 1.001, no adjustment w[ould] be made in the retirement benefit." If the calculated ratio was less than .975, the retirement benefit could be reduced by no more than 1½% for any six month period. "In no event w[ould] the retirement benefits be reduced by an amount exceeding all previously granted cost-of-living adjustments."

In 1997, the TRS Board of Trustees amended its COLA rule to provide that if the calculated CPI ratio was "equal to or greater than 1.000, the retirement benefits would be adjusted by 1½ %" If the calculated ratio was less than .975, the retirement benefit could be adjusted down by no more than 1½%. Other than a change in the date when a retiree can first receive a COLA, the TRS COLA rule remains the same today.

The proposed amendment to the rule would change the initial language of the rule from, "A cost-of-living increment **will** be granted. . . ." to "A cost-of-living increment **may** be granted. . . ." It would change the wording from "If the ratio in (c) above is equal to or greater than 1.000, the retirement benefit **would** be adjusted **by** 1½%" to "If the ratio in (c) above is equal to or greater than 1.000, the retirement benefit **may** be adjusted **up to a maximum of** 1½%."

Legal context of TRS COLA issues and impairment of contract issues

The United States Constitution prohibits states from passing any "Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10. The Georgia Constitution similarly prohibits "laws impairing the obligation of contract." GA. CONST. of 1983, art. I, § I, ¶ X.

Applying both the state and federal constitutional prohibition on impairment of contractual obligations in the context of public pensions, the appellate courts in Georgia have consistently held that:

> . . . a statute or ordinance establishing a retirement plan for government employees becomes a part of an employee's contract of employment if the employee contributes at any time any amount toward the benefits he is to receive, and if the employee performs services while the law is in effect; and that the impairment clause of our constitution . . . precludes the application of an amendatory statute or ordinance in the calculation of the employee's retirement benefits if the effect of the amendment is to reduce rather

> than increase the benefits payable. It is not necessary for an application of this rule that the rights of the employee shall have become vested under the terms of the retirement plan while the amendment is in effect. Rather, if the employee performs services during the effective dates of the legislation, the benefits are constitutionally vested, precluding their legislative repeal as to the employee, regardless of whether or not the employee would be able to retire on any basis under the plan.

Withers v. Register, 246 Ga. 158, 159 (1980) (citing *Burks v. Bd. of Trustees of the Fireman's Pension Fund*, 214 Ga. 251 (1958); *Bender v. Anglin*, 207 Ga. 108 (1950); and *Trotzier v. McElroy*, 182 Ga. 719 (1936)). *See also Alverson v. Employees' Retirement Sys.*, 272 Ga. App. 389, 391-92 (2005); *Malcom v. Newton County*, 244 Ga. App. 464, 467-68 (2000); *Parrish v. Employees' Retirement Sys.*, 260 Ga. 613, 613 (1990); *Swann v. Bd. of Trustees of Joint Municipal Employees' Benefit Sys.*, 257 Ga. 450, 454 (1987); *City of Athens v. McGahee*, 178 Ga. App. 76, 77-78 (1986); and *Webb v. Whitley*, 114 Ga. App. 153, 156-57 (1966) (holding the same).

The Georgia courts have not expressly declared whether an administrative rule adopted by a board becomes a part of the pension contract in the same manner that a statute enacted by the legislature does. The courts have routinely held, however, that pension-related ordinances enacted by local governments create binding contract terms for their members/retirees. Ordinances regarding local pension systems are passed pursuant to home rule authority regulated by the legislature (pursuant to Article IX, Section II, Paragraph III(a)(14) of the Georgia Constitution of 1983) or pursuant to statute. As a result, courts could also conclude that administrative rules enacted by state agencies pursuant to legislatively delegated authority also create binding pension contract terms.

When the Georgia Court of Appeals adjudicated a dispute regarding an age reduction factor rule enacted by ERS in *Alverson v. Employees' Retirement Sys.*, 272 Ga. App. 389 (2005), it upheld the ERS Board's authority to create benefit tables applying age reduction factors to the pension benefits of those who retiree prior to age 65, and the Court made clear that they are binding on retirees. It can be inferred from that decision that the Court would also conclude that a benefit conferred by a retirement system board (such as COLAs) is a binding term of the pension contract that cannot be unilaterally reduced, but the Court in *Alverson* did not address that issue directly.

Courts in at least two other states have spoken more directly on the subject and have concluded that administrative rules do become part of the pension contract and are not to be impaired. *See McMullen v. Bell*, 128 P.3d 186, 190-91 (Alaska 2006) (holding that "employee's vested benefits arise by statute, from the regulations implementing those statutes, and from the division's practices"); *Madden v. Contributory Retirement Appeal Bd.*, 729 N.E.2d 1095, 1098 (Mass. 2000) (holding that member/retiree has "general

contractual expectation that all retirement regulations in effect when she entered the system would be applied to her in accord with the law").

The Georgia Supreme Court's decision in *Bender v. Anglin*, 207 Ga. 108 (1950), serves as a simple illustration of the law surrounding the prohibition on impairment of contractual obligations. The plaintiff in that case had been a firefighter employed by the City of Atlanta. At the time of his employment in 1915, the terms of the Firemen's Pension Fund of the City of Atlanta required him to pay a percentage of his monthly salary into the fund and, in return, entitled him to retire after 25 years of service and receive thereafter a monthly pension of $100 for the rest of his life. In 1935, however, the rules were amended to lower the monthly pension payment amount to $75 per month. When he retired in 1942 and was only paid $75 per month, he sued, seeking the $100 monthly payments that the rules had provided for when he began his employment with the city. The Supreme Court ruled in his favor, holding that a binding contract was formed between the firefighter and the city when he began working and contributing to the fund in 1915 and that the terms of that contract were dictated by the fund's rules as of the beginning date of his employment. As a result, the city's attempt to lower the monthly pension payments unconstitutionally changed the terms of – and impaired the obligations of – the contract.

The Georgia Supreme Court has more than once rejected arguments that economic duress justified an impairment of the compensation agreement with public employees. In a series of pension cases going back to the Depression era, the City of Atlanta unsuccessfully argued that the General Assembly was free under its general police power to change pension policy because of the state of the economy, saying: "If the legislature has imposed impossible burdens upon [Atlanta] which can not be supported by the taxpayers, due to changed economic conditions, the legislature can remove those burdens by subsequent legislation." *Trotzier v. McElroy*, 182 Ga. 719, 722 (1936); *see also Atlanta v. Anglin*, 209 Ga. 170, 172 (1952); *Bender v. Anglin*, 207 Ga. 108, 110 (1950); *West v. Trotzier*, 185 Ga. 794, 798 (1938). More recently, the Board of Regents of the University System made such an argument in the case of *Busbee v. Ga. Conference, American Assoc. of Univ. Professors*, 235 Ga. 752 (1975). There, after the general appropriations act had become law, the Board of Regents entered into individual contracts with its faculty members, awarding them raises. After the contracts had been executed, however, the legislature held a special session and reduced appropriations for the coming year. Upon receiving lower appropriations than it had expected, the Board of Regents rescinded the raises awarded in its faculty contracts. A group of professors brought suit seeking to enforce the salary provisions of their contracts, and the Supreme Court ruled in their favor, holding that the Board of Regents' rescission of the professors' raises was an unconstitutional impairment of contract.

In support of its argument that the impairment was permissible due to the budget shortfall, the Board of Regents cited to a 1934 United States Supreme Court decision, *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934), in which that Court

approved a Minnesota law that, in light of the economic emergency of the 1930s, temporarily extended the time allowed for redeeming property from foreclosure and sale under existing mortgages. The state Supreme Court noted that it had previously declined to apply the *Blaisdell* holding in Georgia (principally because a similar Georgia law was not temporary in nature) and explained: "Again we decline to apply *Blaisdell* for the additional reason that no showing of economic necessity comparable to the depression of the 1930s has been made." The Court further explained: "When the General Assembly met in special session it had decisions to make. Those choices undoubtedly were extremely difficult. However, it has not been shown that the General Assembly had no choice but to depropriate sums already committed by contracts." *Busbee*, 235 Ga. at 763.

The Georgia Supreme Court did not reject the legal rationale upon which the United States Supreme Court decided *Blaisdell* under the federal constitution. In *Blaisdell*, the Court found a "necessary residuum of state power" which qualifies the prohibition against impairment in that situation. Two years after the Georgia Supreme Court decided the *Busbee* case and found insufficient justification in that situation for exercising such a residual state power, however, the United States Supreme Court issued its opinion in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), which has come to be seen as making clear that *Blaisdell* was not intended to interpret away the impairment prohibition. More importantly for present purposes, the impairment at issue was an impairment of a contract made by the State itself. The Court explained that "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose" and some judicial deference to legislative policy decisions is warranted. The Court cautioned, however, that in regard to state contracts "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake" and that if "a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.* at 25-26.

Since the *United States Trust Co.* decision, courts evaluating challenges to laws under the federal impairment clause have developed an analytical framework that includes the following steps in analysis "(1) whether the law substantially impairs a contractual relationship; (2) whether there is a significant and legitimate public purpose for the law; and (3) whether the adjustments of rights and responsibilities of the contracting parties are based upon reasonable conditions and are of an appropriate nature." *Vesta Fire Ins. Corp. v. Florida*, 141 F.3d 1427, 1433 (11th Cir. 1998) (citing *Energy Resources Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 410-13 (1983)).

The courts of a number of other states utilize a similar "comparative advantage" analysis when evaluating changes to their public pension systems. As described by the California Supreme Court, that approach allows modifications to vested contractual pension rights "to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system." *Betts v. Bd. of Admin., Public Employees Retirement Sys.*, 582 P.2d 614, 617 (Cal. 1978). To be approved, such alterations must be reasonable and

"must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." *Id.* "The comparative analysis of disadvantages and compensating advantages must focus on the particular employee whose own vested pension rights are involved." *Id.*

"Comparative advantage" analysis is not universally followed, and even when it is, it has been difficult to persuade courts to accept unilateral changes in pension systems. There is in fact a great variation in approaches to retirement cases in the courts of other states. It can be said conclusively, however, that it is now a near universal rule that increasing a member contribution rate without more is an unconstitutional impairment of contract. *See, e.g., Singer v. Topeka*, 607 P.2d 467, 476-77 (Kan. 1980); *Brazelton v. Kansas Public Employees Retirement Sys.*, 607 P.2d 510, 516 (Kan. 1980); *Collar Workers v. Wills*, 232 Cal. Rptr. 164 (Cal. App. 1986); *Ass'n of State Colleges & Univ. Faculties v. State Sys. of Higher Educ.*, 479 A.2d 962, 966 (Pa. 1984). Further, even if an amendment to a TRS rule would pass scrutiny under the federal standard or that of some other states, any changes to the TRS plan would have to survive scrutiny under the Georgia Constitution as interpreted by the Georgia Supreme Court. *See, e.g., Pope v. City of Atlanta*, 240 Ga. 177, 178 (1977) (explaining that "[q]uestions of the construction of the State Constitution are strictly matters for the highest court of this state" and that "construction of similar federal constitutional provisions, though persuasive authority, is not binding on this state's construction of its own Constitution").

To this point, Georgia courts have generally only allowed public pension systems to unilaterally change the terms of a retirement plan if the governing statute has reserved the power to make changes. In such a situation, the potential for changes has been made a part of the terms of the contract from its inception. For example, in the case of *Pulliam v. Ga. Firemen's Pension Fund*, 262 Ga. 411 (1992), a retired firefighter challenged the termination of his disability benefits after he was found to be engaged in gainful employment. Because this termination was based on an amendment to the Georgia Firemen's Pension Fund that was enacted after he began his employment (and apparently even after he had retired), he claimed it to be an unconstitutional impairment of his contractual rights. The Supreme Court disagreed because the statute contained the following provision at the time the firefighter began his employment: "Benefits under this chapter shall be subject to future legislative change and revision and no member of this fund or any other person shall be deemed to have any vested right to any benefits. . . ." *Id.* at 411 (quoting O.C.G.A. § 47-7-121). The Court further explained:

> . . . The basis for the constitutional vesting of rights in pensions is that the pension rights are property and cannot be taken. However, they are property because they become part of the contract of employment, and as this court pointed out in *Pritchard* [*v. Board of Comm'rs of Peace Officers Annuity & Benefit Fund*, 211 Ga. 57 (1954)], the

> provision for subsequent amendment was part of the contract when [the plaintiff] entered into it. . . .

Id. at 413.

The Georgia courts have also indicated that changes to a public pension system may be binding on a member or retiree if the individual member or retiree voluntarily consents to the changes and the changes include new advantages for the member or retiree. For instance, in *Webb v. Whitley*, 114 Ga. App. 153 (1966), the widow of a retired firefighter challenged the amount of the monthly pension payment she received after her husband died because it was calculated under the terms of an amendment to his firefighter's pension plan that was enacted after he began his employment. The Georgia Court of Appeals, however, denied her claim and held that she was only entitled to the pension payment dictated by the amended terms of the plan. Her husband began his employment prior to the 1925 enactment of a pension plan that promised him, upon his retirement, a monthly benefit equal to 50% of his monthly salary and promised to his wife, upon his death, the same monthly benefit. In 1945, the plan was amended such that it would increase his monthly benefit to 55% of his monthly salary upon his retirement but decrease his wife's monthly benefit upon his death to 75% of the amount of his monthly retirement benefit. Later in 1945, he signed a statement that read, in pertinent part: "I hereby authorize City Comptroller to make deductions from my salary in order that I may participate in the 1924 Pension Act as amended. . . ." The Court of Appeals held:

> The fireman, however, by execution and delivery of a written statement by which he authorizes deductions from his wages for the express purpose of participating in the pension benefits provided by the statute as amended, irrevocably consents to the law as changed by amendment and surrenders any right to claim benefits as originally provided by the pension law, where in return for his consent he receives consideration by way of additional benefits and changed contributions.

Webb, 114 Ga. App. at 157 (citing *Hartsfield v. Mitchell*, 210 Ga. 197 (1953)). Because both parties expressly agreed to changes to the terms of their contract and both parties received a benefit from the revised agreement (the firefighter got a benefit set at 55% of his salary rather than 50%, and the city only had to pay his widow 75% of his retirement benefit rather than 100%), the Court found it to be a binding revision to the agreement.

Thus, under the existing Georgia case law, the terms of a public retirement system form a binding contract between the retirement system and its members and retirees, and a unilateral change of those terms by the system to the detriment of its members or retirees is generally barred by the constitutional prohibition on impairment of the obligations of contracts. The terms of that contract are set when the member/employee begins work and

gives the consideration required by law for participation.[1] A public retirement system generally may only change the terms of the contract to the detriment of its members or retirees if the governing statute specifically allows for such changes or, perhaps, where the individual member or retiree voluntarily consents to changes that also include a new benefit for him or her.[2]

1. Was the TRS Board policy adopted in 1969 (currently Administrative Rule 513-5-1-.16) and the Board's practice of not affirmatively reviewing actuarial soundness prior to granting cost-of-living adjustments each year pursuant to the rule an appropriate method of financing postretirement benefit adjustments as required by O.C.G.A. § 47-3-126?

Section 47-3-126 authorizes the TRS Board of Trustees "to adopt a method of providing for post-retirement benefit adjustments for the purpose of maintaining essentially no less purchasing power for a beneficiary in his post-retirement years." It also allows that the COLA method "may result in the adoption by the board of trustees of a method of financing other than that described in paragraphs (1) through (3) of Code Section 47-3-43." It then requires the method to be based upon "[r]ecommendation of the actuary" and "[m]aintaining the actuarial soundness of the system." I am not aware of any indication that the TRS Board has failed to follow these guidelines.

Although the COLA statute allows the Board to adopt a method of financing other than the method outlined in § 47-3-43 for the pension accumulation fund generally, it is my understanding that the Board has not done so and that the Board has chosen to finance its adopted COLA method through the method in § 47-3-43, which provides in pertinent part that:

> The contribution of employers of members shall consist of a percentage of the earnable compensation of members to be known as the normal cost contribution and an additional percentage of such earnable compensation to be known as the unfunded accrued liability contribution. The rate of such contribution shall be fixed on the basis of the liabilities of the retirement system as shown by actuarial valuation, as

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[1] For example, a particular retirement plan may only require some period of employment and not a contribution. *See, e.g., Malcolm v. Newton County*, 244 Ga. App. 464, 467 (2000).

[2] On the other hand, a retirement system is generally free to increase benefits and/or decrease the costs for its members after their employment begins as the member's continued service will constitute sufficient consideration in exchange for the increased benefits or decreased costs. *See, e.g., City of Atlanta v. Anglin*, 209 Ga. 170, 174-75 (1952).

> provided for in Code Section 47-3-23, subject to the provisions of Code Section 47-20-10 [the Public Retirement Systems Standards Law].

O.C.G.A. § 47-3-43(1).

Based on actuarial reports, Board meeting minutes and other information provided by TRS, it is my understanding that the Board created the COLA method after receiving a valuation from the actuary regarding the effect of granting COLAs on the long-term stability of the system and that the Board set the employer contribution rate based on the actuary's recommendation of what amount would be necessary to keep the fund actuarially sound in light of the expectation of paying 3% COLAs annually. It is further my understanding that the Board's actuaries and the Board itself have continued since that time to factor in the expectation that retirees will receive COLAs of 3% per year when setting contribution rates and evaluating the actuarial soundness of the system. It is my further understanding that, in that sense, TRS COLAs are "pre-funded," meaning that each year contributions have been made in the amount the actuary has calculated to be necessary to fund the COLAs under actuarial standards.

The statutes that pertain to TRS and the other state retirement systems do not specifically define *actuarial soundness*;[3] nor have I found any Georgia case defining it for these purposes. The Public Retirement Systems Standards Law, O.C.G.A. § 47-20-1 *et seq.*, however, "[i]n order to assure the actuarial soundness of each retirement system," sets out in detail the formula for "the minimum annual employer contribution for each retirement system," O.C.G.A. § 47-20-10(a).[4] Based on information from TRS, it is my

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[3] The only actual definition of actuarial soundness I have found in the Official Code of Georgia is in Title 45 in regard to the Retiree Health Benefit Fund, which is administered by the Department of Community Health. There, *actuarially sound* is defined to "mean[] that calculated contributions to the fund are sufficient to pay the full actuarial cost of the fund. The full actuarial cost includes both the normal cost of providing for fund obligations as they accrue in the future and the cost of amortizing the unfunded actuarial accrued liability over a period of no more than 30 years." O.C.G.A. § 45-18-100(6). This definition is not included in Title 47, which contains the retirement systems' statutes.

[4] The Public Retirement Systems Standards Law appears to be in accordance with Article III, Section X, Paragraph V of the Georgia Constitution of 1983, which provides:

> It shall be the duty of the General Assembly to enact legislation to define funding standards which will assure the actuarial soundness of any retirement or pension system supported wholly or partially from public funds and to control legislative procedures so that no bill or resolution creating or amending any such retirement or pension system shall be passed by the

understanding that TRS has met the minimum employer contribution rate standards for actuarial soundness in § 47-20-10 each year.

Of course, I am not qualified to determine whether the TRS fund is in fact actuarially sound; that is for an actuary to evaluate. It is my advice from a legal standpoint, though, that it appears that the TRS Board has conformed to the authority granted by the General Assembly to create a method for awarding COLAs that is based on the recommendation of the actuary and on the actuarial soundness of the system.

2. If the administrative rule is changed and the Board does not grant a postretirement benefit adjustment or grants an adjustment less than 1-1/2% each July 1 and January 1, does the Board have an adequate defense to a possible claim of impairment, or breach of express or implied contract, or otherwise?

It is my advice that although the TRS COLA statute itself does not bind TRS to grant COLAs at any specific level or even at all, it cannot be said definitively whether a Georgia court would find that the TRS Board rule indicating that 1½% COLAs will be granted twice per year (so long as the calculated CPI ratio is greater than 1.000) is not a binding part of the pension contract. In the absence of applicable case law in Georgia, however, it seems that courts would be more likely to conclude that TRS COLAs are part of the pension contract because the TRS COLA rule indicates that the COLAs will be granted twice per year without leaving any discretion to the Board to decide otherwise and without reserving the right to change those terms at a later date and because, as I understand it, the COLAs have been "pre-funded."

As explained above, § 47-3-126 provides that "[t]he board of trustees is authorized to adopt a method of providing postretirement benefit adjustments for a beneficiary in his postretirement years." It goes on to explain that "[s]uch method of adjustment may result in the adoption by the board of trustees of a method of financing other than that described in paragraphs (1) through (3) of Code Section 47-3-43 and shall be based upon: (1) Recommendation of the actuaries for the board of trustees; and (2) Maintaining the actuarial soundness of the system." O.C.G.A. § 47-3-126.

This statute gives TRS authority to create a method for awarding COLAs but does not require TRS to automatically award COLAs at any certain level. It gave TRS the discretion to set up a system for awarding COLAs if it could do so while maintaining the actuarial soundness of the system. *See* 1984 Op. Att'y Gen. 84-19 (opining in a different context that "the decision as to the amount or percentage [of a COLA] is left to the discretion of the governing board of trustees based on the actuary's recommendation and subject to the fundamental concern for the maintenance of the actuarial soundness of the

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General Assembly without concurrent provisions for funding in accordance with the defined funding standards.

system"). It is my advice that the TRS statutes give TRS the discretion to provide retirees with COLAs but do not on their own make COLAs a binding part of the members' pension contract, but that alone does not resolve the question. It would also need to be determined whether an amendment to the COLA rule to allow the Board to decide not to award COLAs or to award COLAs at a lower amount than 1½ % would potentially impair the pension contract vis-à-vis the method that TRS has established for awarding COLAs pursuant to its statutory authority.

The legislature has provided, in O.C.G.A. § 47-1-31, that any "discretionary postretirement benefit increase granted on or after July 1, 1993, by the board of trustees of any public retirement system pursuant to the authority to grant such increases . . . shall not be considered an element of any contract of employment." The statute, however, does not permit administrative retraction; the discretionary, post-retirement benefits are "subject to reduction by subsequent legislation." *Id.* It makes clear, at a minimum, that those members/retirees who became members of TRS after the enactment of § 47-1-31 in 1993 are not entitled as part of their pension contracts to keep any "discretionary postretirement benefit increase" that was (or will be) awarded after July 1, 1993. In regard to those who were members before that time, a court could likely determine that their increases were not discretionary and therefore could not be rescinded.

The General Assembly and the Georgia courts, however, have not provided direct guidance as to whether the COLA rules and methods that TRS administratively adopted pursuant to its statutory authority under § 47-3-126 form a binding part of the pension contract between TRS and its members or retirees. As a result, it cannot be said definitively at this time whether a change to the COLA rule would constitute an impairment of the pension contract, but it seems more likely than not that a court would find an administrative rule to be part of the members/retirees' contracts. As was explained above, Georgia courts have routinely held that pension-related ordinances enacted by local governments, which are also passed through legislatively regulated authority, create binding contract terms for their members/retirees. Also, the state Court of Appeals in *Alverson v. Employees' Retirement Sys.*, 272 Ga. App. 389 (2005), upheld the ERS Board's authority to create benefit tables applying age reduction factors to the pension benefits of those who retiree prior to age 65, and the Court made clear that they are binding on retirees. Finally, courts in at least two other states have clearly concluded that administrative rules do become part of the pension contract in those states. *See McMullen v. Bell*, 128 P.3d 186, 190-91 (Alaska 2006) (holding that "employee's vested benefits arise by statute, from the regulations implementing those statutes, and from the division's practices"); *Madden v. Contributory Retirement Appeal Bd.*, 729 N.E.2d 1095, 1098 (Mass. 2000) (holding that member/retiree has "general contractual expectation that all retirement regulations in effect when she entered the system would be applied to her in accord with the law"). From all this, one can conclude that Georgia courts likely would conclude that a benefit conferred by the TRS Board through an administrative rule (such as COLAs) are binding terms of the pension contract that cannot be unilaterally reduced.