IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

REBECCA BARNES and GEORGIA ASSOCIATION OF EDUCATORS, **Plaintiffs,** **v.** **BOBBY BEARDEN, Chair of the Fannin County Board of Education, in his individual capacity et al.,** **Defendants.**	**CIVIL ACTION FILE NO. 2018CV301254** **Hon. Belinda E. Edwards**

ORDER

On November 29, 2022, the above-styled case came before the Court on the State Defendants' Renewed Motion to Dismiss, filed August 8, 2022, Plaintiffs' Motion for Summary Judgment and Permanent Injunctive Relief, filed June 7, 2022, and the Cross Motion for Summary Judgment of Defendants Bobby Bearden, Lewis Dewesse, Terry Bramlett, Chad Galloway, Steve Stanley, and Michael Gwatney, filed August 8, 2022.[1] The Court, having reviewed the Motions, the briefs and evidence in the record, the arguments of counsels at the hearing, and the applicable law, hereby finds as set forth below.

Findings of Fact

Plaintiffs are the Georgia Association of Educators ("GAE") and Rebecca Barnes ("Plaintiff Barnes"). Amended Complaint, ¶ 1. Plaintiff Barnes is an educator who worked as a

[1] Note: The State Superintendent and State Board Members are collectively referred to as the "State Defendants." The Chair of the Fannin County Board of Education, Vice Chair of the Fannin County Board of Education, and Fannin County Board Members are collectively referred to as the "Local Defendants."

teacher for 18 years prior to her dismissal by the Fannin County School System ("FCSS"). Id. Plaintiff Barnes earned the protections of the Fair Dismissal Act ("FDA") when the Fannin County Board of Education offered, and she accepted, a fourth consecutive contract of employment at the beginning of the 2003-2004 school year. Id., ¶ 2.

Under the Fair Dismissal Act, a teacher who accepts employment with a Georgia school system, successfully completes a probationary period of 3 years' continuous employment, and accepts the school system's offer of an employment contract for a fourth year, earns two basic employment protections: (1) protection against discharge for any reason other than those specified in the statute; and (2) the right to notice, a hearing before the Board of Education, and an appeal before the State Board of Education in the event that a school decides to discharge the teacher for one of the statutory reasons.[2]

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[2] O.C.G.A. 20-2-940 states the following in relevant part:

(a) Grounds for termination or suspension. Except as otherwise provided in this subsection, the contract of employment of a teacher, administrator, or other employee having a contract for a definite term may be terminated or suspended for the following reasons:

(1) Incompetency;
(2) Insubordination;
(3) Willful neglect of duties;
(4) Immorality;
(5) Inciting, encouraging, or counseling students to violate any valid state law, municipal ordinance, or policy or rule of the local board of education;
(6) To reduce staff due to loss of students or cancellation of programs and due to no fault or performance issue of the teacher, administrator, or other employee. In the event that a teacher, administrator, or other employee is terminated or suspended pursuant to this paragraph, the local unit of administration shall specify in writing to such teacher, administrator, or other employee that the termination or suspension is due to no fault or performance issues of such teacher, administrator, or other employee;
(7) Failure to secure and maintain necessary educational training; or
(8) Any other good and sufficient cause.

On October 14, 2014, FCSS petitioned the State Board of Education to become a charter school system. Id., ¶ 35. During their April 2, 2015, meeting, the members of the State Board of Education voted to approve the FCSS petition. Id., ¶ 36. On June 11, 2015, FCSS and the State Board of Education entered into a charter agreement that would be in force from July 1, 2015, until June 30, 2020. Id. The charter agreement granted FCSS "the maximum flexibility allowed by state law from the provisions of Title 20 of the [Georgia Code] and from any state or local rule, regulation, policy, or procedure established by the Local Board or the Georgia Department of Education." Id., ¶ 37; State Defendants' Answer, ¶ 37; Local Defendants' Answer, ¶37. The charter does not specifically exempt the Fair Dismissal Act from this "maximum flexibility" waiver. Id.

By letter dated May 12, 2017, FCSS notified Plaintiff Barnes that it was terminating her employment. Local Defendants' Statement of Material Undisputed Facts, ¶ 18. FCSS did not provide Plaintiff Barnes with notice of the reasons for her termination and did not provide her an opportunity for a hearing to challenge those reasons. Id., ¶ 20. At the end of the 2016-2017 school year, Plaintiff Barnes' employment terminated with FCSS. Id., ¶ 19. Plaintiff Barnes sought unemployment benefits. Amended Complaint, ¶ 46. FCSS challenged her entitlement to such benefits, stating vaguely that she was terminated because she "did not meet the standard of conduct [her] employer has the right to expect by displaying unprofessional conduct." Id.

A teacher, administrator, or other employee having a contract of employment for a definite term shall not have such contract terminated or suspended for refusal to alter a grade or grade report if the request to alter a grade or grade report was made without good and sufficient cause.

Procedural History

Plaintiffs filed their initial Complaint on February 14, 2018, seeking declaratory and injunctive relief. On March 19, 2018, Plaintiffs filed an Amended Complaint containing two Counts: violation of the Anti-Retroactivity and Anti-Impairment-of-Contract Clauses of Article I, Section I, Paragraph X of the Georgia Constitution, respectively. On May 18, 2018, Defendants filed Answers to the Amended Complaint. State Defendants filed their Motion to Dismiss contemporaneously with the Answer. The Honorable Judge Constance Russell held a hearing on said Motion and entered a Final Order denying State Defendants' Motion to Dismiss based on sovereign immunity, denying State Defendants' Motion to Dismiss based on official immunity as to Plaintiff GAE and granting the Motion as to Plaintiff Barnes, granting State Defendants' Motion to Dismiss based on failure to state a claim, and dismissing the action against the Local Defendants sua sponte for failure to state a claim. Plaintiffs appealed.

In an Order dated September 4, 2019, the Court of Appeals transferred the appeal to the Supreme Court because it appeared that the trial court "necessarily ruled on the parties' competing claims as to the proper interpretation of Paragraph X and its applicability to this case." The Georgia Supreme Court returned the appeal to the Court of Appeals because it decided that the trial court did not rule on a constitutional question. Pursuant to the Court of Appeals' Remittitur, the judgment was reversed in part, vacated in part, and the case remanded. The Remittitur resolved several issues. This Court notes that the Court of Appeals did not reverse or vacate the Court's ruling denying the State Defendants' Motion to Dismiss based on sovereign immunity. The Court of Appeals declared abandoned Plaintiff Barnes' request for a declaration

that her termination retroactively and injuriously affected [her] vested rights and impaired [her] contractual rights in violation of Article I, Section I, Paragraph X of the Georgia Constitution. This is because, on appeal, Plaintiff Barnes did not present any argument or citation of authority to support this form of requested relief. The Court of Appeals further held that Plaintiff Barnes' request for injunctive relief enjoining the State Appellees from further interference with her FDA rights and for reinstatement were not barred my official immunity. However, the Court of Appeals held that Plaintiff Barnes' claim for back pay is barred by official immunity. The Court of Appeals noted that the trial court did not dismiss Plaintiff GAE's claims against the State Appellees based on official immunity. The Court of Appeals declined to affirm the dismissal of GAE's claims on the alternative ground urged by State Defendants. The Court of Appeals left the issue to be addressed on remand. Finally, the Court of Appeals vacated the Court's ruling that Barnes and the GAE failed to state a claim for violation of Article I, Section I, Paragraph X, and remanded for the trial Court to consider the constitutional question.[3]

Plaintiffs filed their Motion for Summary Judgment and Permanent Injunctive Relief on June 7, 2022. Local Defendants filed their Cross Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment on August 8, 2022. On August 8, 2022, State Defendants filed their Renewed Motion to Dismiss.

[3] Such a constitutional question must first be addressed in the trial court, not on appeal. See DeKalb County v. City of Decatur, 297 Ga. App. 322, 325 (2009). Thereafter, any appeal from the trial court's ruling on the constitutional issue should then be directed to the Supreme Court. See Ga. Const. of 1983, Art. VI, Sec. VI, Par. II.

I. STATE DEFENDANTS' RENEWED MOTION TO DISMISS

Legal Authority and Analysis

As a preliminary matter, Plaintiffs agree that dismissal of the former members of the State Board of Education (Mike Cheokas, Barbara Hampton, Vann K. Parrott, Kevin Boyd, Lee Anne Cowart, Trey Allen, and Larry Winter) is appropriate.

To begin with, a motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof, and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. Scouten v. Amerisave Mortg. Corp., 283 Ga. 72, 73 (2008). In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor. Stendahl v. Cobb County, 284 Ga. 525, 525 (2008).

The Court will first analyze State Defendants' Motion to Dismiss Count 1, Plaintiffs' claim for violation of the Anti-Retroactivity Clause of Article 1, Section I, Paragraph X of the Georgia Constitution. According to the Plaintiffs' Amended Complaint, the charter agreement between FCSS and the State Board of Education grants FCSS "the maximum flexibility allowed by state law from the provisions of Title 20 of the [Georgia Code] and from any state or local

rule, regulation, policy, or procedure established by the Local Board or the Georgia Department of Education."

As an initial matter, the Court acknowledges that the State Defendants are correct in concluding that Article I, Section I, Paragraph X of the Georgia Constitution applies to the passage of *laws*.[4] Essentially, the Court must determine whether OCGA 20-2-2065(a) of the Charter Systems Act is unconstitutional *as-applied* to Plaintiff Barnes (and similarly situated employees) that earned tenure rights pursuant to Georgia's Fair Dismissal Act (OCGA §§ 20-2-940 through 20-2-948) prior to FCSS's conversion into a charter school system. An as-applied challenge "addresses whether a statute is unconstitutional on the facts of a particular case or to a particular party." Hertz v. Bennett, 294 Ga. 62, 66 (2013). Those challenging a statute as-applied must exhaust their available administrative remedies before bringing an as-applied constitutional challenge. See Georgia Department of Human Services v. Addison, 304 Ga. 425, 432 (2018). Thus, the Court finds that Plaintiffs have properly presented their as-applied challenge to the Charter Systems Act of 2007.

State Defendants argue Georgia courts have repeatedly held that public tenure statutes do not create contractual rights to indefinite tenure. Newsome v. Richmond County, 246 GA. 300, 301 (1980). In considering the constitutional question the Court must analyze whether Plaintiff

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[4] Article I, Section I, Paragraph X of the Georgia Constitution provides the following:

Paragraph X. Bill of attainder; ex post facto laws; and retroactive laws. No bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed.

Barnes, and similarly situated educators, have vested and contractual rights to the Fair Dismissal Act's protections. [5] The appellate courts of this state have not had occasion to consider this inquiry. It is therefore necessary for this Court to conduct a vested rights analysis.

The Court will start with the observation that State Defendants concede Hatcher v. Bd. of Pub. Educ. & Orphanage for Bibb County, confirms that tenured public-school teachers have a *property* right in Fair Dismissal Act protections while working in a non-charter public school. [6] Hatcher v. Bd. of Pub. Educ. & Orphanage for Bibb County, 809 F.2d 1546, 1550 (1987). [7] Therefore, the Court will analyze whether FDA protections are "vested" or "divestible" property rights.

The Supreme Court of Georgia explained the following in Goldrush II v. City of Marietta:

> "To be vested, in its accurate legal sense, a right must be complete and consummated, and one of which the person to whom it belongs cannot be divested without his consent. A divestible right is never, in a strict sense, a vested right." [Cit.]. It has also been said that: "the term 'vested rights,' which cannot be interfered with by retrospective laws, means *interests which it is proper for the state to recognize and protect and of which the individual cannot be deprived arbitrarily without justice.*"

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[5] The Judicial Review Clause is merely a constitutional recognition of the inherent authority of a court to resolve conflicts between the Constitution itself and the statutory law when the resolution of such conflicts is essential to the decision of a case already properly before the court. Lathrop v. Deal, 301 Ga. 408, 432 (2017).

[6] See State Defendants' Reply Brief in Support of Renewed Motion to Dismiss, p. 3.

[7] See Goldrush II v. City of Marietta, 267 Ga. 683, 695 (1997) ("[t]o have a property interest ..., a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.") Citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Goldrush II v. City of Marietta, 267 Ga. 683, 694 (1997).

The Court must therefore determine whether "it is proper for the state to recognize and protect" the property interest conferred by the FDA and whether "the individual cannot be deprived arbitrarily without justice." It is undisputed that the state recognized and protected the FDA protections earned by Plaintiff Barnes during her employment with FCSS prior to its conversion to a charter system. It is also undisputed that Plaintiff Barnes' FDA protections (and those of similarly situated employees) could not be deprived arbitrarily without justice during her employment with FCSS prior to its conversion. Based on the definition of "vested" provided supra, it is easy for the Court to conclude that Barnes' FDA rights "vested" during the time she worked for FCSS (prior to its conversion to a charter system).[8]

For purposes of the state constitutional prohibition against retroactive application of statutes that injuriously affect vested rights of citizens, *private* rights may become vested in particular persons, and when they are vested, the constitution does not permit those rights to be denied to those persons by subsequent legislation; but this principle does not apply with respect to *public* rights, which are shared by the People in common, and which can be modified by the People, through their elected representatives, as they see fit. See generally Deal v. Coleman, 294 Ga. 170 (2013). [9] In general, property rights and contract rights are viewed as private rights.

[8] This same conclusion applies to similarly situated employees.

[9] American law long has distinguished between the "public rights belonging to the people at large" and the "private unalienable rights of each individual." Deal at p.178.

Moreover, "[a]lthough legislation which involves mere procedural or evidentiary changes may operate retrospectively, legislation which affects substantive rights may operate prospectively only." Hargis v. Department of Human Resources, 272 Ga. 617 (2000) Citing *Enger v. Erwin*, 245 Ga. 753, 754 (1980). Substantive law is that law which creates rights, duties, and obligations. Polito v. Holland, 258 Ga. 54, 55 (1988). Procedural law is that law which prescribes the methods of enforcement of rights, duties, and obligations. Id. As explained supra, *vested private* rights cannot be interfered with by retrospective laws.[10] To the extent the Charter Systems Act works to eliminate previously vested private rights, it operates retrospectively.

In accordance with the foregoing, the Court finds that the allegations of the Complaint do not disclose with certainty that the claimants would not be entitled to relief under any state of provable facts asserted in support thereof; and the movant has not established that the claimants could not possibly introduce evidence within the framework of the Complaint sufficient to warrant a grant of the relief sought.[11] Thus, the Court DENIES the State Defendants' Motion to Dismiss Count 1. As such, Plaintiffs' claim for violation of the Anti-Retroactivity Clause will proceed against the Fannin County Defendants and the remaining State Defendants.

Next, the Court will analyze State Defendants' Motion to Dismiss Count 2, Plaintiffs' claim for violation of the Anti-Impairment-of-Contracts Clause of Article I, Section I, Paragraph

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[10] In other words, Plaintiff Barnes (and similarly situated employees) cannot be divested of FDA rights without consent.

[11] Here, Plaintiffs seek preliminary and permanent injunctive relief pursuant to OCGA 9-5-1 and 9-5-8 enjoining FCSS and the State Board of Education from denying the FDA rights of educators who earned the protections prior to FCSS's conversion into a charter system. Plaintiffs are also seeking costs and attorneys' fees.

X of the Georgia Constitution. According to Plaintiffs' Amended Complaint, "FCSS, acting pursuant to its charter with the State Board of Education, terminated Plaintiff Barnes' employment without providing the notice, hearing, and appeal rights that Barnes earned pursuant to the Fair Dismissal Act prior to the July 1, 2015, conversion of FCSS into a charter school district." Plaintiffs further allege that "FCSS's termination of Plaintiff Barnes without honoring the rights that Barnes earned under the Fair Dismissal Act prior to the July 1, 2015, conversion of FCSS into a charter system, impaired Barnes' contractual rights in violation of Article I, Section I, Paragraph X of the Georgia Constitution." State Defendants argue that they did not interfere with any FDA rights Plaintiff Barnes had because those rights ended when FCSS converted to a charter system and Plaintiff Barnes chose to accept further employment with FCSS after its conversion.

To determine whether a law unconstitutionally impairs a contractual relationship under the Contracts Clause, a court considers, at the first level of its inquiry, the following: whether a contractual relationship exists, whether the change in law impairs the contractual relationship, and whether the impairment is substantial. Polo Golf and Country Club Homeowners Association, Inc. v. Cunard, 306 Ga. 788, 792 (2019). Therefore, the Court must analyze whether Plaintiffs have a contractual right to the protections of the FDA. The Court finds persuasive Plaintiffs' argument that FDA protections are analogous to a statute or ordinance establishing a retirement plan for government employees. In Swann v. Bd. of Trustees of Joint Mun. Employees Benefit System, the Supreme Court of Georgia held, "[w]here a statute or ordinance establishes a retirement plan for government employees, and the employee contributes toward

the benefits he is to receive and performs services while the ordinance or statute is in effect, the ordinance or statute becomes part of the contract of employment and is a part of the compensation for the services rendered so that an attempt to amend the statute or ordinance and reduce, or eliminate, the retirement benefits the employee is to receive violates the impairment clause of the state constitution." Swann v. Bd. of Trustees of Joint Mun. Employees Benefit System, 257 Ga. 450, 453 (1987). In coming to its conclusion, the Supreme Court noted that retirement benefits are deferred compensation. Id. According to Black's Law Dictionary, compensation is defined as "[r]emuneration and other benefits received in return for services rendered." Black's Law Dictionary, p. 301 (8th ed. 2007). The Court is of the opinion that tenure rights are a benefit. The Court considers this conclusion appropriate in light of Plaintiffs' assertion that "[t]he opportunity to earn the protections of the Fair Dismissal Act upon satisfying the law's requirement was an inducement to accept employment with FCSS and to remain employed." As a result of the Court's interpretation of current jurisprudence, the Court finds that FDA protections earned by government employees while the FDA is in effect, becomes part of the contract of employment and is a part of the compensation for the services rendered. The Court further finds that the requirement that the employee accept employment from year to year is not inconsistent with claiming the benefits of the FDA because the FDA anticipates the employee's acceptance of the yearly renewed contracts.

Next, the Court will examine whether OCGA 20-2-2065(a) of the Charter Systems Act as applied to Plaintiff Barnes (and those similarly situated) impairs the contractual relationship. OCGA 20-2-2065(a) of the Charter Systems Act specifically provides approved charter systems

with a broad waiver of Title 20 provisions.[12] Consequently, except as provided for in a charter, the FDA protections of those who have acquired them are also waived by OCGA 20-2-2065(a) of the Charter Systems Act. It therefore follows that a broad waiver of the FDA impairs the obligation of charter system schools to comply with the FDA for those who have previously earned tenure rights. Consequently, the Court must assess whether this impairment is substantial. The Court finds substituting "for cause" termination for "at-will" termination is a substantial impairment. Even if a law causes a substantial impairment to a contractual relationship, a second level of inquiry requires a trial court to consider whether the law nonetheless is a reasonable way to advance a significant and legitimate public purpose. Polo Golf and Country Club Homeowners Association, Inc. at p. 792.

According to OCGA 20-2-2061, "[i]t is the intent of the General Assembly to increase student achievement through academic and organizational innovation by encouraging local school systems to utilize the flexibility of a performance-based contract called a charter." The Court finds that this public purpose is both significant and legitimate. Nevertheless, the means utilized to achieve this purpose (allowing charter system schools to unilaterally waive the FDA protections for those who have already acquired them) does not appear to be reasonable. While

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[12] OCGA 20-2-2065(a) states the following in relevant part:

> (a) Except as provided in this article or in a charter, a charter school, or for charter systems, each school within the system, shall not be subject to the provisions of this title or any state or local rule, regulation, policy, or procedure relating to schools within an applicable school system regardless of whether such rule, regulation, policy, or procedure is established by the local board, the state board, or the Department of Education;
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the Court can undoubtedly think of innovative ways to achieve the stated purpose, implementing a reasonable way to advance the stated purpose is a task reserved to the legislature.

In accordance with the foregoing, the Court finds that the allegations of the Complaint do not disclose with certainty that the claimants would not be entitled to relief under any state of provable facts asserted in support thereof; and the movant has not established that the claimants could not possibly introduce evidence within the framework of the Complaint sufficient to warrant a grant of the relief sought.[13] As such, the Court DENIES the State Defendants' Motion to Dismiss count 2. Plaintiffs' claim for violation of the Anti-Impairment-of-Contracts Clause proceeds against the Fannin County Defendants and the remaining State Defendants.

i. Conclusion

In accordance with the foregoing, it is hereby ORDERED, that the former members of the State Board of Education (Mike Cheokas, Barbara Hampton, Vann K. Parrott, Kevin Boyd, Lee Anne Cowart, Trey Allen, and Larry Winter) are dismissed from this action; and it is further

ORDERED, that the State Defendants' Motion to Dismiss Count 1, Plaintiffs' claim for violation of the Anti-Retroactivity Clause, is DENIED; and it is further

ORDERED, that the State Defendants' Motion to Dismiss Count 2, Plaintiffs' claim for violation of the Anti-Impairment-of-Contracts Clause, is DENIED.

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[13] Here, Plaintiffs seek preliminary and permanent injunctive relief pursuant to OCGA 9-5-1 and 9-5-8 enjoining FCSS and the State Board of Education from denying the FDA rights of educators who earned the protections prior to FCSS's conversion into a charter system. Plaintiffs are also seeking costs and attorneys' fees.

II. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTIVE RELIEF AND LOCAL DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

Legal Authority

"To prevail at summary judgment under O.C.G.A. § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law." Lau's Corp. v. Haskins, 261 Ga. 491, 491 (1991). "A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case." Ashton Atlanta Residential, LLC v. Ajibola, 331 Ga. App. 231, 232 (2015). "Where it has been demonstrate[d] that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case, the burden shifts to the nonmoving party to point out specific evidence giving rise to a triable issue." Avion Sys. v. Bellomo, 338 Ga. App. 141, 144 (2016) (citations omitted). In doing so, "the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue." Id. at p. 232. Furthermore, "[b]are conclusions and contentions unsupported by an evidentiary basis in fact are insufficient to oppose a motion for summary judgment." Capital City Developers, LLC v. Bank of N. Ga., 316 Ga. App. 624, 629 (2012).

Anti-Retroactivity Clause Analysis

The Court will first address Plaintiffs' Motion for Summary Judgment as it relates to Count 1, Plaintiffs claim for violation of the Anti-Retroactivity Clause of Article 1, Section I, Paragraph X of the Georgia Constitution. Georgia's Constitution forbids statutes that apply retroactively so as to injuriously affect the vested rights of citizens. See Barnes v. Bearden, 357 Ga. App. 99, 105 (2020). Here, the law Plaintiffs' challenge is the Charter Systems Act of 2007. It is undisputed that O.C.G.A. 20-2-2065(a) of the Charter Systems Act specifically provides approved charter systems with a broad waiver of Title 20 provisions.[14] Consequently, except as provided in a charter, the FDA protections of those who have acquired them are also waived by O.C.G.A. 20-2-2065(a) of the Charter Systems Act. Plaintiffs challenge the constitutionality of O.C.G.A. 20-2-2065(a) of the Charter Systems Act ("Charter Systems Act waiver") as-applied to employees that have earned FDA protections prior to the conversion of FCSS into a charter school system.

Here, Barnes began her employment with FCSS in the year 2000. She worked as a teacher for three consecutive years and accepted a fourth contract with FCSS. As a result of these actions, Barnes earned tenure rights under the FDA in 2003. In 2007, the legislature promulgated

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[14] O.C.G.A. 20-2-2065(a) states the following in relevant part:

> (a) Except as provided in this article or in a charter, a charter school, or for charter systems, each school within the system, shall not be subject to the provisions of this title or any state or local rule, regulation, policy, or procedure relating to schools within an applicable school system regardless of whether such rule, regulation, policy, or procedure is established by the local board, the state board, or the Department of Education;
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the Charter Systems Act. Passage of the act, in and of itself, did not affect Barnes' FDA rights. It was not until FCSS's conversion into a charter school system in July 2015 that Barnes' FDA rights were disregarded. At the end of the school year in 2017, FCSS applied the waiver provision of the Charter Systems Act to Barnes when it informed Barnes that her contract would not be renewed for the 2017-2018 school year. The injury complained of is Barnes' termination.

As a preliminary matter the Court must determine whether the waiver provision of Charter Systems Act is prospective or retrospective in nature. According to Black's Law Dictionary, a retrospective law is "[a] legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect." Black's Law Dictionary, p. 1343 (8th ed. 2007). There is no question that in 2015 FCSS sought to waive the FDA rights of those who had earned them prior to its conversion into a charter school system. This is evidenced by the termination letter FCSS provided to Plaintiff Barnes which failed to provide a reason for termination, a hearing, or the right to appeal. Consequently, Plaintiffs have shown that the waiver provision of the Charter Systems Act of 2007 has been applied retroactively.

The burden then shifts to FCSS to point to specific evidence giving rise to a triable issue. As analyzed supra, Plaintiff Barnes' FDA rights vested prior to FCSS's conversion into a charter school system. This leaves the Court to but one conclusion. That is, Plaintiff Barnes and the GAE have demonstrated that there is no genuine issue of material fact, and the undisputed facts, viewed in the light most favorable to FCSS, warrant judgment as a matter of law. As such, Plaintiffs' Motion for Summary Judgment as to Count 1 is GRANTED, and Local Defendants' Cross Motion for Summary Judgment as to Count 1 is DENIED.

Anti-Impairment-of-Contracts Clause Analysis

Next, the Court will address Plaintiffs' Motion for Summary Judgment as it relates to Count 2, Plaintiffs' claim for violation of the Anti-Impairment-of-Contracts Clause of Article I, Section I, Paragraph X of the Georgia Constitution. The Constitution… declares that no State shall pass "any law impairing the obligation of contracts." Hardeman v. Downer, 39 Ga. 425, 462 (1869). Those rules of construction, which have been consecrated by the wisdom of ages, compel us to say that these words prohibit the passage of any law discharging a contract without performance. Id.

The Court finds it appropriate to discuss Local Defendants' application of Newsome v. Richmond Cnty. et al., 246 Ga. 300 (1980), to the case at hand.

In Newsome, a 1937 local act created tenure rights for certain county employees, including the position of commission clerk held by Newsome. Id. at p. 300. The act provided for discharge "only for stated causes and provide[d] for right of hearing after statement of charges, if requested." Id. It also contained a provision that permitted the board of commissioners to abolish any position, but explicitly gave employees a cause of action for breach of contract if the abolition of their position was used as a subterfuge to discharge the employee. Id. A home rule ordinance adopted by the county commission in 1977 repealed the 1937 Tenure Act and substituted a different personnel system that did not cover the commission clerk position. Id. at p. 301. Two years later, another home rule ordinance abolished the position of commission clerk and substituted the position with a county administrator. Id.

Newsome sued, claiming that the repeal of the 1937 Tenure Act could not deprive him of the statutorily conferred right to bring a contract claim asserting that the abolition of his position was a subterfuge to discharge him. Id. In affirming the dismissal of his claims, the Georgia Supreme Court noted that their prior decisions, "which say that public employees have a property interest in their continued employment, merely hold that there are due process safeguards in dismissal cases. Those cases do not preclude the revision or repeal of civil service or tenure laws." Id. Unlike with retirement statutes, he "had no contractual right to insist that his status as a tenured employee . . . be continued." Id. Therefore, the legislative repeal of his right and remedy under the act "did not impair the obligation of any contract." Id.

Nevertheless, Newsome can be distinguished from the case presently before the Court. Firstly, in Newsome, the ordinance in question expressly reserved the county's right to abolish "any position." Secondly, the Supreme Court did not analyze whether the subsequent home rule ordinance was in violation of the Anti-Retroactivity Clause. Finally, while it is true the Supreme Court held "Newsome had no contractual right to insist that his status as a tenured employee under the Act of 1937 be continued," it should be noted that the case presently before the Court has facts that are more akin to Swann v. Bd. of Trustees of Joint Mun. Employees Benefit System, 257 Ga. 450, (1987).

In Swann v. Bd. of Trustees of Joint Mun. Employees Benefit System, the Supreme Court of Georgia held, "[w]here a statute or ordinance establishes a retirement plan for government employees, and the employee contributes toward the benefits he is to receive and performs services while the ordinance or statute is in effect, the ordinance or statute becomes part of the

contract of employment and is a part of the compensation for the services rendered so that an attempt to amend the statute or ordinance and reduce, or eliminate, the retirement benefits the employee is to receive violates the impairment clause of the state constitution. Swann v. Bd. of Trustees of Joint Mun. Employees Benefit System, 257 Ga. 450, 453 (1987). In coming to its conclusion, the Supreme Court noted that retirement benefits are deferred compensation. Id. According to Black's Law Dictionary, compensation is defined as "[r]emuneration and other benefits received in return for services rendered." Black's Law Dictionary, p. 301 (8th ed. 2007). The Court considers tenure rights a benefit.

In Swann, the Supreme Court acknowledged that the employees "contributed" towards the benefits and "performed services" while the statute was in effect. This is not what occurred in Newsome. In Newsome, the statute in question hadn't explicitly required the employees to perform actions in exchange for its protections. The sort of "give" and "take" present in Swann, and the case presently before the Court, did not exist in Newsome. Plaintiff Newsome had been afforded the protections of the Act simply because he was employed during its existence. Here, the FDA requires that an employee commit to a minimum of 4 years before the protections of the Act are extended. In essence, the undertakings of "completing" 3 school-year contracts and "accepting" a 4th, amounts to consideration in exchange for the benefit conferred (tenure rights). It is this exchange of performances (completion of 3 years plus the acceptance of a 4th in exchange for the employer's offer of tenure rights) that justifies the Act's incorporation into the employment contract. As such, the Court finds that the rights conferred by the FDA, once earned, become part of the contract for employment.

Consequently, the Court must determine whether FCSS's application of the waiver provision of the Charter Systems Act works to discharge FCSS's obligation to comply with the FDA. Here, it is undisputed that the charter agreement between FCSS and the State Board of Education grants FCSS "the maximum flexibility allowed by state law from the provisions of Title 20 of the [Georgia Code] and from any state or local rule, regulation, policy, or procedure established by the Local Board or the Georgia Department of Education." According to the charter in question, FCSS can apply its waiver even if the FDA protections were earned prior to its conversion into a charter school system. Plaintiffs takes issue with the Charter Systems Act's discharge of FCSS's obligation to provide a reason for termination, a hearing, and the right to appeal for employees that have earned the protections prior to FCSS's conversion into a charter school system.

In this case, Plaintiff Barnes earned FDA rights in 2003. In 2007, the Charter Systems Act waiver was promulgated. FCSS converted into a charter school system in 2015 and adopted the broad waiver. In 2017, pursuant to the waiver provision of the Charter Systems Act, FCSS terminated Barnes' employment without providing a reason, hearing, and right to appeal. These facts are undisputed. Therefore, the Court finds that FCSS disregarded its contractual obligations to Plaintiff Barnes pursuant to the waiver provision of the Charter Systems Act. The burden then shifts to FCSS to point to specific evidence giving rise to a triable issue.

Within the Local Defendants' Statement of Material Undisputed Facts, they state that teachers were put on notice that the District was a charter system and had a broad waiver. See Local Defendants' Statement of Material Undisputed Facts, ¶ 15. Local Defendants also aver that

this notice was included at the top of the employment contract Plaintiff Barnes signed for the 2016-2017 school year. Id. at ¶ 16. It appears that Local Defendants are arguing that Barnes' signature on the employment contract for the 2016-2017 school year amounts to acceptance of the waiver of her tenure rights under the FDA. Yet, this argument fails as FCSS did not provide Plaintiff Barnes with a meaningful choice to preserve her rights under the FDA. As such, the notice provided amounted to a unilateral recission of the terms of the employment contract. Therefore, the Court finds that

FCSS has not met this burden.

Thus, Plaintiff Barnes and the GAE have demonstrated that there is no genuine issue of material fact, and the undisputed facts, viewed in the light most favorable to FCSS, warrant judgment as a matter of law. As such, Plaintiffs' Motion for Summary Judgment as to Count 2 is GRANTED, and Defendants' Cross Motion for Summary Judgment as to Count 2 is DENIED.

ii. Conclusion

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment and Permanent Injunctive Relief against Defendants is hereby GRANTED, and Local Defendants' Cross Motion for Summary Judgment is hereby DENIED.

The Court DECLARES that the waiver provision of the Charter System Act, O.C.G.A. 20-2-2065(a), is unconstitutional as applied to FCSS educators who have earned FDA rights prior to FCSS's conversion into a charter school system because it violates the Anti-Retroactivity and Anti-Impairment-of-Contract Clauses of Article I, Section I, Paragraph X of the Georgia Constitution.

It is ORDERED that the Defendants are to reinstate Plaintiff Barnes' employment.

Accordingly, the Court hereby PERMANENTLY ENJOINS Defendants from enforcing the FDA waiver provision of O.C.G.A. 20-2-2065(a) of the Charter Systems Act against Plaintiff Barnes and educators employed by FCSS who have earned the protections of the FDA prior to FCSS's conversion into a charter school system.

Plaintiffs' requests for costs of litigation and attorneys' fees are DENIED, as the general rule is that "an award of attorney fees and expenses of litigation are not available to a prevailing party unless authorized by statute or contract." SRM Group, Inc. v. Travelers Property Casualty Company of America, 308 Ga. 404, 405 (2020). Plaintiffs have made a citation to neither.

SO ORDERED, this the 1st day of February 2023.

Belinda E. Edwards

Judge Belinda E. Edwards
Superior Court of Fulton County
Atlanta Judicial Circuit

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