

CAUSE NO. D-1-GN-19-000710

DALLAS POLICE RETIRED  
OFFICERS ASSOCIATION,

Plaintiff,

v.

TEXAS PENSION REVIEW  
BOARD and JOSH McGEE, in  
his official capacity as Chair of  
the Texas Pension Review  
Board

Defendants.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

353RD JUDICIAL DISTRICT

**DEFENDANT TEXAS PENSION REVIEW BOARD'S**  
**AMENDED MOTION FOR PROTECTIVE ORDER**

Defendant, Texas Pension Review Board (the "Board") moves for protection from Plaintiff Dallas Police Retired Officers Association's ("DPROA") Notice of Intention to Take the Oral Deposition of Defendant Texas Pension Review Board and its accompanying Request for Production of Documents served on June 12, 2019, and attached here as **Exhibit A**. This Court should protect the Board and its witness because the Board objects to the time of the deposition, noticed for June 26, 2019, and because the discovery sought is overbroad, irrelevant, not calculated to lead to the discovery of admissible evidence, and would cause an undue burden and unnecessary expense to the Board. Additionally, a protective order should be issued to protect the Board from any discovery, including the June 12, 2019 deposition notice, because the Board is challenging the Court's subject matter jurisdiction over Plaintiff's claims against the Board and the State should not be required to respond to any discovery while that jurisdictional issue is pending.

Pursuant to Texas Rule of Civil Procedure 199.4, the Board is filing this Amended Motion for Protective Order within three business days after the date of service of the deposition notice, which entitles the Board to have the deposition notice automatically stayed pending a ruling from the Court on this Amended Motion for Protective Order.

### **BACKGROUND**

In this case, any discovery is unnecessary and unduly burdensome because all of DPROA's claims against the Board must be dismissed for a lack of subject-matter jurisdiction. DPROA has no standing to bring its UDJA claims against the Board, there is no justiciable controversy between DPROA and the Board, and any order against the Board will not resolve DPROA's complaint. The Board will be shortly filing a Plea to the Jurisdiction seeking the dismissal of all of DPROA's claims against it for lack of subject matter jurisdiction.

The Board also objects to the time for which the deposition is noticed because its attorney of record, Cynthia A. Morales, is under doctor's care for an injury suffered on Monday, June 10, 2019, and is set for follow-up treatment on June 26, 2019. Additionally, the discovery sought is overbroad, irrelevant, not calculated to lead to the discovery of admissible evidence, and because of the Board's small staff and the breadth of the information sought, this discovery request would cause an undue burden and unnecessary expense to the Board, especially when the Court has no subject matter jurisdiction over DPROA's claims over the Board and the case should be dismissed.

## ARGUMENT

Under Rule 192.6(b) of the Texas Rules of Civil Procedure, a court has broad discretion to protect a party with a protective order. A court can (1) prohibit the discovery sought in whole or in part, (2) limit the extent or subject matter of discovery, (3) order that discovery not be undertaken at the time or place specified, (4) set terms or conditions on the discovery, (5) order the results of discovery to be sealed or otherwise protected, and (6) make any other order in the interest of justice. Tex. R. Civ. P. 192.6(b). Rule 192.6(b) provides that a court may enter a protective order forbidding discovery if necessary to protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights. *Id.*; see also *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 707 (Tex. 2015). Such protection is necessary in this case.

The Board asks the Court for a protective order firstly because there is an outstanding issue on the Court's subject matter jurisdiction, which is a threshold issue. *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999) ("courts may limit discovery pending resolution of threshold issues like . . . jurisdiction . . ."). The Board objects to the deposition of the Board's representative and moves this Court for a protective order prohibiting any further attempts to notice depositions or serve any other discovery. The Board would incur unnecessary expense and be unduly burdened by having to prepare and appear at the noticed deposition and respond to the requests for production before a ruling has been made on jurisdiction. Tex. R. Civ. P. 192.4(a)–(b), 192.6(b); see *In re Alford Chevrolet-Geo*,

997 S.W.2d at 181. Allowing the litigation to proceed in the trial court through discovery and other proceedings, without a ruling on the forthcoming plea to the jurisdiction, would effectively deprive the Board of its sovereign immunity from DPROA's claims. *See City of Galveston v. Gray*, 93 S.W.3d 587, 591 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding) (A government unit's immunity from suit would be “effectively lost if the court erroneously assumes jurisdiction and subjects the government unit to pre-trial discovery and the costs incident to litigation.”).

Secondly, the Board seeks a protective order because the discovery requested is overbroad, irrelevant, not calculated to lead to the discovery of admissible evidence, and would cause an undue burden and unnecessary expense to the Board. The Board has a current staff of eleven, is facing upcoming staff departures, and has no Information Technology staff. The Board would be significantly burdened by the discovery requests and it would take considerably longer than between the service of the deposition notice and the date set for the deposition for Board to be able to do a search for the items sought by DPROA to be produced at the noticed deposition. It would also be a significant misuse of state time and resources for the Board to have to respond to requests for production and prepare for a deposition when no subject matter jurisdiction exists for DPROA's claims against the Board.

Finally, the Board seeks a protective order because counsel for the Board, Cynthia A. Morales, is suffering from a medial collateral ligament (“MCL”) tear that occurred on June 10, 2019 and is currently working from home because of

limited mobility. She is required to wear a brace on her leg until her next medical examination on June 26, 2019, when her orthopedic doctor will assess the progress of the MCL recovery and expects to refer her for an MRI to determine whether her meniscus was also torn and whether surgery will be required to repair it. For this reason also, the Board objects to the Deposition Notice setting an oral deposition of a representative of the Board for June 26, 2019.

**PRAYER**

For these reasons, the Board asks the Court to grant this Amended Motion for Protective Order, and issue an order protecting the Board from the deposition notice served on June 12, 2019 and from any discovery by DPROA until the resolution of the question of this Court's subject matter jurisdiction over DPROA's claims against the Board.

Respectfully submitted.

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*Counsel representing Defendants*

### **CERTIFICATE OF SERVICE**

I hereby certify that on June 14, 2019, the foregoing ***Defendant Texas Pension Review Board's Amended Motion for Protective Order*** was filed and served on all parties of record via EFileTexas.gov.

David M. Feldman	Via EfileTexas.gov or david.feldman@feldman.law
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*Counsel representing Plaintiffs*

/s/ Cynthia A. Morales

CYNTHIA A. MORALES

Assistant Attorney General

**CAUSE NO. D-1-GN-19-000710**

<b>DALLAS POLICE RETIRED OFFICERS ASSOCIATION,</b>  <b>Plaintiff,</b>  <b>V.</b>  <b>TEXAS PENSION REVIEW BOARD and JOSH McGEE, in his official capacity as Chair of the Texas Pension Review Board</b>  <b>Defendants.</b>	§ § § § § § § § § § § § § § § § § §	<b>IN THE DISTRICT COURT OF</b>    <b>TRAVIS COUNTY, TEXAS</b>       <b>353RD JUDICIAL DISTRICT</b>
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**NOTICE OF INTENTION TO TAKE THE ORAL DEPOSITION OF DEFENDANT TEXAS PENSION REVIEW BOARD**

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TO: Defendants, Texas Pension Review Board and Josh McGee, by and through their attorneys of record, Cynthia A. Morales and Jennifer S. Jackson, Financial Litigation and Charitable Trust Division, Office of the Attorney General, P.O. Box 12548, Mail Code 017, Austin, Texas 78711.

Please take notice that, pursuant to Tex. R. Civ. P. 199.2(b)(1), Plaintiff will take the oral deposition of the designated representative of Defendant Texas Pension Review Board on **June 26, 2019 at 10:00 a.m.**, continuing from day to day until completed. The deposition will take place at the Office of the Attorney General, 300 W. 15<sup>th</sup> Street, Austin, Texas 78701, before a certified court reporter by stenographic means or by utilizing digital audio recording or any other alternative methods of capture. The deposition may also be videotaped.



Defendant Texas Pension Review Board must designate one or more individuals to testify on its behalf regarding the matters set forth on **Exhibit A** and is further requested, pursuant to Tex. R. Civ. P. 199.2(b)(5), to produce the documents listed on **Exhibit B**.

Respectfully submitted,

FELDMAN & FELDMAN, P.C.

By: /s/ David M. Feldman

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**ATTORNEYS FOR PLAINTIFF**



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this document was served upon the following counsel of record via email on June 12, 2019:

Cynthia A. Morales  
cynthia.morales@oag.texas.gov  
Jennifer S. Jackson  
jennifer.jackson@oag.texas.gov  
FINANCIAL LITIGATION AND CHARITABLE TRUST DIVISION  
Office of the Attorney General  
P.O. Box 12548, Mail Code 017  
Austin, Texas 78711  
**ATTORNEYS FOR DEFENDANTS**

/s/ David M. Feldman  
David M. Feldman

## **DEFINITIONS**

The following definitions shall have the following meanings, unless the context requires otherwise:

1. The terms “PRB” or “Defendant” shall mean defendant Texas Pension Review Board and its current and former employees, agents, attorneys, representatives and/or any other persons or entities acting or purporting to act with authority on its behalf including Defendant Josh McGee, in his official capacity as Chair of the Texas Pension Review Board.

2. The words “Plaintiff” or “DPROA” shall mean Dallas Police Retired Officers Association and its current and former employees, agents, attorneys, representatives and/or any other persons or entities acting or purporting to act with authority on its behalf.

3. “HB 3158” shall mean Acts 2017, 85th Leg., ch. 318 (H.B. 3158), art. 2, § 2.01, eff. May 31, 2017.

4. “Relating to,” “related to,” or “reflecting” means, without limitation, embodying, mentioning, or concerning, directly or indirectly, the subject matter identified in the request.

5. “Communication” means any oral or written communication of which Defendant has knowledge, information or belief, including electronic mail and text messages.

6. “Documents” includes copies of documents, where originals are not in Defendant’s possession, custody or control. “Documents” includes every non-identical copy of a document which contains handwritten or other notations, which otherwise does not duplicate the original or any other copy. “Documents” also includes any attachments or appendices to any document.

7. References to the singular include the plural and vice versa.

8. With regard to verb tenses, references to the past tense include the present and references to the present tense include the past.

9. The term “and” includes “or” and the term “or” includes “and.”

## **EXHIBIT A**

1. PRB's recommendations, policies, and procedures, and their implementation, to oversee Texas public retirement systems, both state and local, in regard to their compliance with state law.
2. PRB's recommendations, policies, and procedures, and their implementation, to ensure public retirement system benefits are equitable.
3. PRB's recommendations, policies, and procedures, and their implementation, to ensure public retirement system are properly managed.
4. Any analysis by PRB of HB 3158 during, and after the 85th Legislature.
5. PRB's recommendations, policies, and procedures, to implement HB 3158.
6. PRB's recommendations, policies, and procedures, to oversee implementation of HB 3158.
7. Any complaints received by PRB related to HB 3158.
8. PRB's policies and procedures related to complaints it receives arising from public retirement systems, both state and local.
9. PRB's policies and procedures, and their implementation, to provide technical assistance, training, and information to members of the boards of trustees.
10. PRB's policies and procedures, and their implementation, concerning appeals to the State Office of Administrative Hearings from a decision of a board of trustees relating to eligibility for or amount of benefits payable by a retirement system.

**EXHIBIT B**

1. All documents in Defendant's possession regarding HB 3158.
2. All documents reflecting PRB's analysis of Article XVI, § 66 of the Texas Constitution.
3. All communications between Defendants and any Texas pension system, state or local, related to HB 3158.
4. All communications related to PRB's analysis of HB 3158.
5. All communications related to PRB's analysis of Article XVI, § 66 of the Texas Constitution.
6. All documents related to the Dallas Police and Fire Pension System's implementation of HB 3158.
7. All communications between Defendant and the Dallas Police and Fire Pension System related to the implementation of HB 3158.
8. Defendant's Complaint Policy and Procedures.
9. Any training materials provided by Defendants to any Texas pension system related to HB 3158 or Article XVI, § 66 of the Texas Constitution.
10. Any recommendations or comments given by Defendants to the Texas Legislature regarding HB 3158.