



Memorandum

TO: RULES AND OPEN GOVERNMENT COMMITTEE **FROM:** Councilmember Donald Rocha
SUBJECT: DISABILITY RETIREMENT & MEASURE B **DATE:** March 26, 2014

Approved: Don Rocha Date 3/26/14

RECOMMENDATION

That the Rules Committee agendize the below action for Council consideration under item 3.4 on the April 8th Council Meeting, as an option for the Council to consider in addition to the proposed recommendation.

1. Direct staff to return in 30 days with a proposal to amend the Charter's disability retirement provisions for the purpose of resolving employee retention issues that arise from the current disability retirement rules. Staff's proposal should be comparable with CalPERS, and should allow for the Council to potentially place a measure on the ballot in November 2014.
2. Direct staff to return to Council on the same timeframe as in item 1 with draft language for potential amendments to the City Charter that achieve the goals listed below. It's important to note that we'd only be asking for preliminary analysis—the Council would of course retain discretion as to whether to pursue meet and confer and potentially place charter amendments on the ballot in November 2014.
 - a. Eliminate section 1514-A, which requires the Council to cut employee compensation if section 1506-A(b) is struck down.
 - b. Revise section 1508-A to allow retirement at age 62 for Federated employees and 57 for public safety employees and to allow an accrual rate of 2.5% for public safety employees and 2% for Federated employees, consistent with the CalPERS second tier.
 - c. Confirm that if benefit parameters were increased by the voters as recommended above, the Council would be able to increase Tier 2 benefits without returning to the voters.
 - d. Amend section 1508-A (h) to provide that employees do have a vested right to Tier 2.
 - e. Amend the charter to provide that employees who have left City service in Tier 1 may return to city service in Tier 1 instead of going into Tier 2.
 - f. Develop a truly voluntary election program that could survive legal scrutiny and potentially gain the support of our bargaining units.
3. Take action to agendize an open session Council decision as to whether to pursue an appeal of the Measure B ruling.

ANALYSIS

"I do now remember a saying: 'The fool doth think he is wise, but the wise man knows himself to be a fool.'"

—Shakespeare, *As You Like It*

Members of this Council have not been shy to trumpet their own wisdom on the subject of Measure B while at the same time criticizing the foolishness of others. Past Councils in particular have come in for criticism. Their poor decisions are supposedly responsible for landing us in pension trouble. Oddly enough, future Councils have also been criticized, even though they don't exist yet. Their crime: having the *potential* to make poor decisions (this is supposedly why Measure B was written into the Charter, to foreclose the possibility of any decisions whatsoever.) Despite all this wise criticism of Councils past and future, some of us didn't realize that we ourselves—the Council of the present—might not be as wise as we thought we were, and that our work on Measure B might not be perfect.

As the flaws in our pension reform effort become increasingly apparent, I hope that we will have the wisdom to acknowledge our own past mistakes. When I say we made mistakes, I don't mean that the whole effort was a failure. It was a necessary effort, and as Councilmember Khamis has said numerous times, we can be thankful that the current Mayor, Council and staff did the difficult work to make it happen. I do believe, though, that on some issues we landed in the wrong place. I was very clear before I voted on Measure B where I thought the flaws were, and I'm in almost exactly the same place today. Luckily mistakes can almost always be forgiven so long as we take responsibility for correcting them. That's the purpose of this memo: correcting the apparent mistakes in Measure B.

The Problem

Before I start talking about my proposed solutions, let's take a moment to look at exactly where we went wrong. I think the below statement is a good example of our fundamental error. It was made by Alex Gurza at the January 25th 2011 council meeting during discussion of retirement reform:

We do believe it's important to recruit employees. Recruit employees who are interested in a career in public service. Now there are some cases where that means a choice to forgo greater income and in some cases maybe they may be making more here, but the key is to focus on people who are looking for a career in public service, and specifically, to come to work in San José. The other thing we think it's important to remember, is San José is a major employer. We have more employees even today with our reduced staffing than every city in Santa Clara County combined. *So one of the things that we want to point out is that San José can drive the market.*

After the experience of the last two years, it's startling with what little seriousness the issue of competitiveness is addressed here. The idea that San Jose could "drive the market" for public employees seems more fairytale than policy argument. My intent is not to pick on any one individual, but to offer an example of an approach shared by many others at the time. Staff and many councilmembers seemed to believe that controlling pension costs was the *only* legitimate policy goal. Those of us who raised other concerns, such as competitiveness, were treated as unserious at best, and morally suspect at worst. The problem wasn't that the Council attempted to reduce pension costs, it was that it didn't pay attention to anything else.

At this point, we see clearly that while rising pension costs may be a threat to service delivery, so too is an inability to recruit and retain, both in the public safety and federated workforce. When I have to tell residents that we can't investigate their home burglary or that it will take six months to repair a streetlight, it's not only because of pension costs. It's also because people don't want to work here. If you doubt my say-so, just look the numbers from our Police Department:

Projected Police Staffing*

Year	Authorized Positions	Street Ready Sworn	Active Full Duty Sworn
2014	1109	970	906
2016	?	879	800

*Source: Salonga, R. (2014, March 20). Exodus continues from San Jose police. *San Jose Mercury News*, p.A12.

One might say that the recruitment and retention problem is now Public Enemy Number One.

Solutions

Now let me turn to solutions. In fixing Measure B, we shouldn't be guided by just one policy goal, but accept that the City has many goals and attempt to find a middle ground between them. What that means in practice is amending the Charter to allow this or future Councils the flexibility to remain a competitive employer. We should start by fixing the disability language in the Charter, as I recommend in item 1 above. The fixes proposed so far by ordinance are just band-aids. We need to make clear that we are committed to pursuing a complete fix.

Second, we should remove the automatic pay decreases triggered by the court striking down the Voluntary Election Program as I recommend in item 2a. This organization cannot endure more pay decreases. If they go forward, we will be the ones swallowing our own poison pill.

Third, we need to acknowledge that our competitiveness problem goes beyond the disability issue. As an example, consider that the CalPERS second tier establishes retirement ages of 57 for safety and 62 for non-safety employees (as it happens, these are the same ages I recommended when we were drafting Measure B.) Imagine that an employee who is vested in the CalPERS non-safety second tier is offered a job in San Jose. Given our retirement age of 65, accepting the job may mean significantly delaying their retirement. This is a structural competitiveness problem that could make it very difficult to recruit from CalPERS agencies over both the short and long term.

I know some of us have expressed contempt for CalPERS, but the fact is that with over one million members it truly does "drive the market" for public employees. We may not like it, but we need to acknowledge that if we are determined not to compete with CalPERS we may have trouble competing period.

What I propose in items 2b-f is that we consider amending the Charter to allow the Council the option to adjust retirement benefits. If we change the restrictions on retirement age and accrual rate in the Charter to align with the CalPERS second tier, we would at least be capable of increasing benefits should it become necessary to recruit employees and deliver services. I understand that some may be worried that the dreaded future Councils will make irresponsible decisions if we give them more flexibility. I would point out that less than two years after they passed, the Measure B restrictions we sought to impose on ourselves are already restricting our ability to make good policy on the disability issue. If we're having trouble living by our own

rules, perhaps we're not as wise we thought we were, and shouldn't seek to prevent our successors from making their own decisions.

Finally, I believe we need to make the decision on a Measure B appeal in public, as I recommend in Item 3. We have been told many times that "the voters want us to implement Measure B." This is true, as far as it goes—the voters did pass Measure B by a wide margin. It is equally true, however, that Measure B is not a suicide pact. If there are portions of it that degrade instead of enhance service delivery, both the Council and the voters may be open to changing them. Going forward with an appeal could make it much more difficult to make those changes. The voters should be able to listen to our deliberation and judge for themselves which option is wise and which is foolish.

What are we really after?

I will close by making an appeal that we all think carefully about what our goals really are. The ostensible goal of pension reform has always been delivering services to our residents. The other animating force, however, appears to have been a determined attempt to break the vested rights doctrine statewide. Some will of course argue that the two are related—breaking vested rights is about delivering services—but for myself it's not clear whether ideology is more central to this crusade than pragmatism. Is it pragmatic to endure years of crippling recruitment and retention problems as we slog towards the final vested rights showdown at the California Supreme Court? This question is important to future service delivery in San Jose. We need to discuss it where the public can see.