



PROFESSIONAL & TECHNICAL ENGINEERS, LOCAL 21, AFL-CIO  
*An Organization of Professional, Technical, and Administrative Employees*

**Sent via E-mail**

March 5, 2015

Norberto Dueñas  
Interim City Manager  
City of San Jose  
200 East Santa Clara Street  
San Jose, CA 95113

Dear Norberto,

We have received and reviewed your correspondence dated February 11, 2015, regarding Measure B.

Although we welcome the City's stated objective of working to "settle the issues surrounding Measure B," the City has not proposed a workable process to do so. Unfortunately, the letter proposes additional concessions in order to meet the City Council's goal of restoring services to "at least the levels as of January 1, 2011" without crediting the sacrifices already made by City workers to balance the budget. Those sacrifices include over \$25 million (elimination of SRBR, implementation of Tier 2 retirement benefits and reductions in retiree healthcare benefits) to help address budget shortfalls. In addition, employees took a 10 percent cut in total compensation coupled with their pension and retiree healthcare contributions sharply increasing.

In addition, your letter then goes on to imply that absent a stipulation to delay implementation of Measure B, the City intends to attempt to implement the first phase of a 16 percent pay cut specified in Measure B beginning July 1, 2015. This is the wrong approach and we urge you to reconsider.

As we expressed verbally at our January 29, 2015, meeting, AEA, AMSP and CAMP / IFPTE Local 21 strongly believes resolution of Measure B cannot be further delayed. To do so will only accentuate and hasten the exodus of committed and talented employees and undermine efforts to restore essential City services.

AEA, AMSP and CAMP / IFPTE Local 21 joins with other unions in calling upon the City to demonstrate a commitment to the goal of resolving issues surrounding Measure B, retiree healthcare and our respective contracts in 2015 without going back to the ballot, and utilizing the California Public Employment Relations Board (PERB)/quo warranto process to implement any agreed upon settlement. The process to implement a deal is detailed in the IAFF Local 230 correspondence to you dated February 23, 2015, and the SJPOA correspondence dated March 2, 2015.

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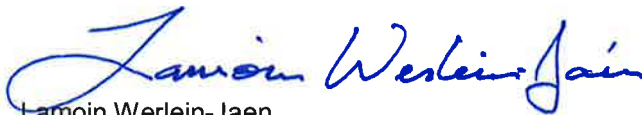
By making a commitment to its workforce that the City shares the goal of resolving these issues in 2015 without going back to the ballot, the settlement discussions can begin immediately. Further delay is not in anyone's best interests.

As we are all aware, the City of San Jose is a starved and stressed organization facing big challenges. From deteriorating public health and safety services to disintegrating roads and infrastructure, the signs of a City in distress are everywhere. In order to restore services, the City must stabilize and rebuild its workforce. According to the City Auditor's report dated December 2, 2014, over the past 10 years staffing levels have dropped from about 7,200 to 5,560 positions. This translates to about 5.7 City employees per 1,000 residents, fewer than any large city in the state.<sup>1</sup> The 2014-2015 mid-year budget review notes that as of January 5, 2015, the City had 593 vacancies City-wide and as a consequence personnel expenditures are below budget and tracking to end the year with savings.<sup>2</sup> Meanwhile, the City faces an estimated \$1 billion in deferred maintenance and infrastructure upkeep.<sup>3</sup>

The two correspondences referenced above are attached to this letter. It is time to get back to the bargaining table and work on solving the problems that Measure B created. We are committed to doing so and hope the City can make that commitment as well.

Thank you.

Sincerely,



Lamoin Werlein-Jaen  
IFPTE Local 21 Lead Representative

attachments

Cc: John Mukhar  
Steve Contreras  
Kara Capaldo  
City Council  
Chris Platten, Esq.

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<sup>1</sup> City of San Jose Service Efforts and Accomplishments Report 2013-14, City Auditor, 12/2/2014, p.12

<sup>2</sup> 2014-2015 Mid-Year Budget Review, p. I-20

<sup>3</sup> City of San Jose Service Efforts and Accomplishments Report 2013-14, City Auditor, 12/2/2014, p.1

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February 23, 2015

Via E-mail ([Norberto.Duenas@sanjoseca.gov](mailto:Norberto.Duenas@sanjoseca.gov)) and U.S. Mail

Interim City Manager Noberto Duenas  
City of San José  
200 East Santa Clara Street  
San José, CA 95113

Dear Norberto,

We have received and evaluated your correspondence dated February 11, 2015.

As expressed in the earlier joint letter sent by IAFF Local 230 and the San Jose Police Officers' Association, Local 230 is committed to working with the City to restore services and make the City a competitive employer at an affordable cost.

In order to move forward on the ambitious goals outlined above we are in need of a commitment from the City that entails the following:

1. Acknowledgement from the City that it shares our goal to achieve a global settlement of our outstanding issues (Measure B, retiree healthcare cost savings, and our MOA) in 2015 without going back to the ballot.
2. After accomplishing 1 above, through negotiations, the City and Local 230 would end the Measure B litigation and implement our new agreements utilizing the California Public Employment Relations Board (PERB)/quo warranto process.

Some City Councilmembers have asked questions about the PERB ruling and how the remedy prescribed in the rulings could be implemented. Here is a summary of the law that we are providing to assist in your deliberations.

In *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal.3d 591, the California Supreme Court held that a city council must comply with the bargaining obligations required by the Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.) before proposing an amendment to the city charter concerning the terms and conditions of public employment. The Court's decision was unanimous. Hence,

the City of San Jose was required under the MMBA to meet and confer in good faith with all labor organizations over Measure B since it impacts the pension rights of city employees. (Gov. Code, §§ 3504, 3505.)

IAFF, Local 230, and IFPTE, Local 21, filed complaints with PERB alleging the city failed to bargain in good faith over Measure B before placing the amendment on the June 2012 ballot. An administrative law judge has issued proposed decisions in both complaints, finding that the city failed to bargain in good faith and ordering the city to rescind its resolution placing Measure B on the ballot. The city has filed "exceptions" to the ALJ's rulings with the PERB. But once upheld by the PERB, the judge's decisions will permit the two unions to file applications with the Attorney General to obtain leave to sue in quo warranto over Measure B. (See, *City of Palo Alto* (2014) PERB Dec. No. 2388-M.)

A writ quo warranto action attacks the regularity of proceedings by which the charter amendments are adopted. (See, *Int'l Ass'n of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 694.) Under these circumstances, the court will issue the writ invalidating Measure B in its entirety as null and void and of no legal effect. If enacted without compliance with the requirements of the MMBA, as to any one labor organization, then a writ quo warranto invalidates Measure B entirely. (Id.) The consequence of a non-negotiated rescission of Measure B will be costly and unnecessary.

There are two additional PERB cases awaiting proposed decisions by an ALJ in complaints brought by IUOE, Local 3 and AFSCME over the city's failure to bargain prior to placing Measure B on the ballot. The failure of other labor organizations to bring PERB charges merely constitute a waiver of their PERB cases, but not a waiver of their right to join in an application for leave to sue in quo warranto from the Attorney General once the PERB decisions become final. So again, the Local 230 PERB ruling will apply to all labor organizations.

As you are aware, the city has stipulated to delay several provisions in Measure B until July 1, 2015. Of special note are the 16% pay cuts, broken out at 4% per year for 4-years. The concept advanced by the City was that these were a way to "encourage" current employees into "volunteering" to move over into the Voluntary Election Program (VEP).

At the time Measure B was sold to the public, Local 230 warned that the VEP is not a real option, as it was unconstitutional and would not pass muster with the Internal Revenue Service. As you are aware, Judge Lucas, in her Measure B ruling, struck down the VEP. The IRS has rejected similar "opt-out" gambits (e.g., Orange County). The architects of Measure B dismissed our warnings on this issue. The proponents of Measure B misled the public about the viability of the VEP.

Just recently, City Attorney Rick Doyle publicly disclosed to our new Council that the "IRS has been sitting on a number of these", they "have been sitting around since 2006

or 2007,” and the time to expect IRS approval is “no time soon” because “quite frankly, it doesn’t look good.” In reality, the IRS interpretation of the law today is unchanged from 2012.

The VEP was not a real option under Measure B. Rather, the purportedly automatic 16% pay cuts are a punishment for not doing something that was never an option, and is an example of another one of the fundamental flaws of Measure B.

The problems facing the city and its employees are urgent and are critical. But Measure B commits us to the mutually assured destruction of city services, putting the residents we serve in peril.

There are four months between now and implementation of disability benefit changes and other deferred provisions of Measure B. We are committed to resolving this problem before July 1, 2015.

The information provided in your letter indicates a desire to restore city services back to “January 1, 2011” levels. We note with disappointment that such a date falls conveniently four months after the City decimated the fire department by:

- Closing Fire Engine 30
- Closing Fire Engine 33
- Closing Fire Engine 34
- Closing Fire Engine 35
- Closing Fire Truck 3
- Closing the Hazardous Incident Team
- Reducing firefighter staffing by 20% on each truck
- Eliminating many Support Paramedic positions
- And much more

With these cuts, the fire department is only able to contain fires to the room of origin 71% of the time, versus our service goal of 85%. While our goal is to arrive on time to Priority 1 emergencies 80% of the time, we only achieved that 68% of the time this past year.

While much is said about costs spiraling out of control, the San Jose Fire Department budget – including pension costs – is exactly the same as it was in FY2007-2008. There has been no growth in the department’s budget to reflect the growing population, increased housing developments, additional business – or even the rise in the cost of inflation.

Restoring service levels to January 1, 2011 is no real restoration of emergency response services for the residents of San José. Let us acknowledge this fact and commit to restoring service levels as provided to residents at the start of Fiscal Year 2011. Any later date is a meaningless target.

Service level targets that are substantive are important and realistic savings targets are equally important. You ask for an additional \$25 million in savings, we ask you to reflect upon the savings that already given by San Jose firefighters.

We appreciate your recognition that current and retired San José firefighters have made sacrifices to help the City address its budget deficits. As you may recall, our recent sacrifices include:

- Voluntarily agreeing to a 10% across-the-board pay cut in 2011– the first union to do so;
- Voluntarily agreeing to a 0% wage increase in 2009, 2010, 2012, and 2013 ... with none yet in 2014 as well;
- Voluntarily agreeing to pay 50% more toward our active employee healthcare;
- Voluntarily agreeing to increase the deduction from our pay for retirement healthcare from <1% to 10% of pay;
- Voluntarily agreeing to a lower cost healthcare plan with higher co-pays;
- Voluntarily agreeing to entirely reduce healthcare in-lieu payments by reducing them for all members, and entirely eliminating them for firefighters with dual coverage;
- Voluntarily agreeing to reduce the staffing on every truck by 20%;
- Voluntarily agreeing to eliminate member positions dedicated to staff the Hazardous Incident Team;
- Voluntarily agreeing to give up member pay associated with staffing USAR 16;
- Voluntarily agreeing to reduce support paramedic pay from 8% to 5%, entirely forgiving any back pay due to support paramedics, and ultimately agreeing to have only 10 out of 147 possible support paramedic positions paid;
- Voluntarily agreeing to a wellness “fit testing” program to reduce City healthcare costs and disability rates;
- Voluntarily agreeing to new two-person emergency response squads to find lower cost ways to improve service to the City;

These voluntary agreements omit additional sacrifices including:

- 49 firefighters laid off (walked out of the training grounds in their socks);
- Retiree healthcare benefits slashed saving \$228 million between police and fire;
- Implementation of the lowest defined benefit retirement plan in the state, which is also among the very most expensive;
- A crushing and escalating workload, with far fewer firefighters on duty each day now handling 30% more fires than just fire years ago;
- Ongoing displacement of firefighters while the City shuts down stations to fix significant mold problems caused by deferred maintenance;

Since 2008, San Jose firefighters' take-home pay has fallen a staggering 33% versus the local cost of living. Our members have lost their homes. Our members have filed bankruptcy. It is not unsurprising that we have had up to 62 firefighters retiring annually in the last 7 years, and more that have left to better paying, safer jobs with other cities.

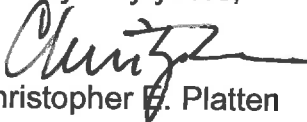
In 2008, San Jose firefighters retired with an average of 29.8 years of service – 23 of them had over 30 years of service, when they make pension contributions but have

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reached their benefit cap. By 2014, the average retiree's years of service has plummeted from 29.8 to only 23.8. Firefighters now quit, from a job they have loved for their entire career, the moment they qualify for retirement. We need to work together to reverse this trend, keeping experienced employees as leaders in the department and stabilizing services for our residents.

It is our hope that the City will take the necessary steps to begin negotiations and we await your reply.

Very truly yours,



Christopher E. Platten

cc: Joel Phelan, President, IAFF Local 230

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March 2, 2015

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## VIA E-MAIL AND U.S. MAIL

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**Re: Legal Issues Concerning the PERB/Quo Warranto Solution**  
File No.: 040326

Dear Rick:

It was good to discuss the above-referenced issues with you, Nora and Charles, telephonically, on Thursday.

I followed up our discussion by re-reviewing the Local 230 PERB Unfair Practice Charge Order. On page 64, it plainly orders rescission of City Resolution 76158, passed on March 6, 2012. Since this was the only Resolution used to put Measure B on the ballot, the rescission of it by PERB would invalidate Measure B *in toto*—that is, for all bargaining units, non-represented employees, etc.

As I said on Thursday, Charles' arguments about the Order solely affecting police and fire might have some teeth if multiple Resolutions had put different parts of Measure B on the ballot for different groups. But that did not happen: Measure B was effectively a one-size-fits-all measure, put forward through a single vehicle—Resolution 76158—which has been invalidated.

I also perused *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013), the United States Supreme Court case that invalidated California's same-sex marriage ban (Proposition 8). Re-reviewing it reaffirmed my belief, as described to you on Thursday, that if the City Council declined to appeal the Local 230 PERB ruling, or consented to a stipulated award in the POA *quo warranto* action, a taxpayer would not have standing either to appeal the ruling or to sue the Council.

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Richard Doyle  
Re: Legal Issues Concerning the PERB/Quo Warranto Solution  
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You will recall that in *Hollingsworth*, Governor Arnold Schwarzenegger and then-Attorney General Jerry Brown declined to defend Proposition 8 after a federal district court ruled that it was unconstitutional. Chief Justice Roberts ruled that the proponents of the initiative did not have standing to “stand in” the shoes of those state officials and appeal the ruling.

Arguably the lack of standing is *even more apparent* in this case than in *Hollingsworth*. Measure B, in contrast, was a *City Council-sponsored* measure. So, if the City Council chooses not to appeal any adverse rulings, *Hollingsworth’s* holding supports the view that it could neither be forced to appeal nor sued for not appealing by a taxpayer.

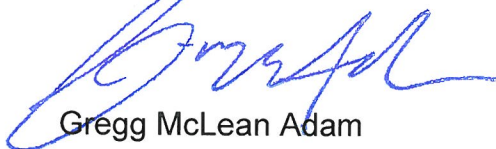
Finally, you asked me to clarify the POA’s position concerning a further ballot measure. The POA seeks a clear, unequivocal statement from the City Council that it is committed to negotiating a 2015 solution to Measure B that does not involve another ballot measure. If the *quo warranto* process that the POA has outlined is determined by a court to be impermissible for rescinding Measure B and replacing it with a negotiated pension agreement, then the POA will be willing to explore other options, including a ballot measure to achieve the same purpose.

During negotiations, the City is of course free to propose to go to the ballot to effectuate the changes, but in doing so must recognize that such a proposal may be a deal-breaker for the POA.

This should clarify all the main points we discussed.

Very truly yours,

CARROLL, BURDICK & McDONOUGH LLP



Gregg McLean Adam

GMA:jo

cc: Nora Frimann, Assistant City Attorney  
Charles D. Sakai Esq., Renne Sloan Holtzman & Sakai  
Paul Kelly, President, San Jose POA  
James Gonzales, Vice President, San Jose POA