



425 E. Santa Clara St., #300
San Jose, CA 95113
(408) 286-8718
(408) 286-2577 fax

SAN JOSE

FIRE FIGHTERS & POLICE OFFICERS



1151 N. Fourth Street
San Jose, CA 95112
(408) 298-1133
(408) 298-3151 fax

December 13, 2011

VIA EMAIL AND REGULAR MAIL

Alex Gurza
Deputy City Manager
Office of the City Manager, City of San Jose
200 E Santa Clara St
San Jose, CA 95113

Re: Response to the City's Letter of December 9

Dear Alex:

We are in receipt of the City's letter of December 9. In it, the City announces it is "amenable to continuing the discussions regarding all retirement issues, including the related ballot proposition, in mediation." The City also confirms that it has already approved a ballot measure for the June 2012 election.

Illegal City Action

The City Council's vote to approve a ballot measure was illegal. The City did not fulfill its obligation to meet and confer in good faith—a mandatory prerequisite before it could vote to place the ballot proposal on the June ballot.

The bargaining obligation in California, even involving *Seal Beach* negotiations, extends until the parties either reach agreement or impasse. But no agreement was reached with respect to the ballot proposition, nor was impasse declared. Instead, the City simply moved ahead as it had planned, and voted on December 6. Yet the law is clear that where no agreement or impasse exists, a public entity has no right to place a measure on the ballot. (See *Santa Clara County Correctional Peace Officers' Association v. Santa Clara County* (2010) 34 PERC ¶ 97 ["the County breached its duty to meet and confer in good faith when it failed to bargain the Prevailing Wage Measure to agreement or impasse prior to placing it on the ballot"]; *Santa Clara County Registered Nurses Professional Association v. County of Santa Clara* (2010) 34 PERC ¶ 109 ["mere fact that the County thought the inclusion of the measure on the November 2004

ballot was desirable does not constitute a compelling operational necessity sufficient to set aside its bargaining obligation”].¹)

The parties were not at impasse. The Unions are aware of no declaration of impasse by the City. And any effort to retroactively declare impasse is defeated by the reality that further negotiations were required over at least two significant developments:

- (1) Subsequent to the November 15-16 mediation, the POA and Local 230 presented two new proposals to the City, dated November 17 and December 2. The first proposal agreed to (a) abandon a proposed move to CalPERS in favor of seeking equivalent savings under the City plan, and (b) work towards giving the citizens ultimate control over pension benefit increases and decreases. The second proposal set forth a 75% plan. Those proposals have not been discussed, let alone bargained over.
- (2) The City itself significantly revised its ballot proposition on November 22. (See 11/22/11, 5:28 p.m., email from City Manager Debra Figone to “All City Employees” [describing revised ballot proposition as “proposal going to the City Council is far different than the earlier versions...”].) And the City issued yet another revised ballot proposition on December 5. No negotiations took place over either “far different” revision.

In addition to both sides’ voluntary changes in their bargaining position, on December 1, the Police and Fire Retirement Board adopted a report by its actuary, Cheiron, which establishes that the City’s police and fire retirement contribution for Fiscal Year 2013 (“FY 13”) would be \$55 million *less than* had been previously projected. Much higher projections for future pension contributions were the underpinnings of both the City’s Fiscal Reform Plan and its bargaining position throughout negotiations and mediation. Thus, the parties would return to the table facing a significantly lower target, and one eminently more reachable through negotiations.

Taken individually or in totality, these changes would have broken impasse even if the City had declared it. (It did not.)

But putting aside the question of impasse, we on the side of the Unions believe all of these positive changes present a “shot in the arm” for a bargained solution to the City’s pension cost challenges. For example, the City rejected the

¹ We note that the City’s retained outside counsel firm represented the County in both the cited cases.

police/fire CalPERS proposal because it did not want to move to CalPERS. Additionally, the City felt the proposal did not save enough money. As stated above, however, the Unions already abandoned a move to CalPERS, and the Cheiron report establishes that the City does not need to save as much money as it initially estimated. It also shows that the Unions' actuaries' savings estimates, which the City rejected as exaggerated, were even more conservative than Cheiron's projections.

Given all these developments, it was illegal for the City to insist on voting on December 6 for a ballot measure that need not be finalized until March 9.

Resumption of Bargaining

The proper solution is to return to the bargaining table. The revised ballot proposition, the Unions' revised proposals, and the recalibrated financial outlook and projected pension costs present a golden opportunity to try to reach a bilateral agreement. Moreover, we believe that a court or administrative agency would be compelled to order the City to resume bargaining based on this record.

The City's Offer of Mediation is Unconvincing

In what appears to be a throwaway line at the end of the December 9 letter, the City holds the door open on "mediation regarding retirement reform and related ballot measure collectively, using the framework referenced above." But the City is sending a mixed message: on one hand, this offer to mediate seems a half-step in the right direction; on the other, the solidifying of specific ballot measure language three months in advance of the deadline suggests the City has already set its final course, prompting the question: *If the City has already determined the language of the ballot measure, what is left to mediate?*

In any case, bargaining openly and publicly is a superior method of addressing these issues—and it is required by state law, as described above. The City has prided itself on "sunshine"—posting proposals as they are made and keeping the citizens informed of the progress of discussions. Yet now, on perhaps the defining labor relations issue of these times, it seeks to meet "behind closed doors" in a secretive process.

Moreover, the "framework referenced above," as cited in the December 9 letter, has already failed—twice in fact: one with retirement negotiations, and once with the POA's MOA.

A Robust, "Skin in the Game" Mediation Proposal

Although further bargaining is legally mandated, we fear that the City will decline our request to bargain, and instead set up a legal fight. But in an effort to avoid this undesirable scenario, and assuming mediation is the only forum in which the City will reengage with our Unions, we offer the following mediation proposal²:

1. The parties will mutually agree to use a high-level, professional mediator, preferably a retired judge. We suggest using a retired judge who has “go to” talent with respect to mediating “bet the company” type cases—someone whose professional reputation depends on his or her ability to persuade disagreeing parties to settle matters of the magnitude of this pension dispute. Our idea is akin to the justification used by the Mayor for Measure V, which requires a retired judge unless the City and the Unions agree otherwise. Heavy-hitter mediators can be costly, but such costs pale in comparison to the astronomical costs to city taxpayers of a legal dispute. Having to invest—put “skin in the game”—will be an enormous impetus on both sides to try to reach a deal.
2. The mediator will be able to retain his or her own financial expert. Some of our dispute has come down to “dueling actuaries.” The mediator needs to have the ability, through the use of a retained, neutral financial expert, to bring the parties out from behind the cover of their actuaries.
3. Parameters of mediation. We propose that mediation begin *during the week of January 9, 2012*; that mediation occur weekly; and that it initially *aim to conclude by March 1, 2012*. Either party remains free to withdraw from mediation at any time.
4. Either party can ask the mediator to issue a proposed mediator’s solution at the end of the mediation, which shall be advisory only.

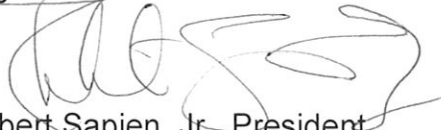
² But we hereby reserve our right to seek judicial and administrative relief to require the City to resume bargaining and to seek to revoke the illegal action taken on December 6.

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The City's desire to re-engage in mediation is not misplaced. But we believe that the above-described proposal, wherein the parties use a mediator whose reputation depends upon the parties potentially reaching agreement, provides our best hope for resolving amicably what has until now been a protracted dispute. It is in that spirit—a hope towards mutual resolution of the parties' differences over retirement issues which meets the needs and interests of both San Jose's citizens and its public safety employees—that we submit this proposal.

Very truly yours,

SAN JOSE FIRE FIGHTERS, IAFF LOCAL
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Robert Sapien, Jr., President

And

SAN JOSE POLICE OFFICERS'
ASSOCIATION



Jim Unland, President

cc: Jonathan Holtzman, Esq.