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6
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8 INTEREST ARBITRATION

9 BEFORE JOHN A. FLAHERTY (RET.) – JAMS

10 In The Matter of Interest Arbitration
11 Between

12 CITY OF SAN JOSE,

13 Employer,

14 and

15 SAN JOSE POLICE OFFICERS'
16 ASSOCIATION,

17 Association.

**SAN JOSE POLICE OFFICERS'
ASSOCIATION'S BRIEF REGARDING THE
INTEREST ARBITRATION PROCESS**

Date(s): May 6, 7, & 8, 2013
Time: 9:00 a.m.
Location: San Jose City Hall
200 W. Santa Clara St.
Room 118-120
San Jose, CA

Arbitrator: Hon. John A. Flaherty (ret.)

18
19 **I**

20 **INTRODUCTION AND FACTUAL SUMMARY**

21 The Arbitration Board will conduct what is known as "interest arbitration" in
22 accordance San Jose City Charter Section 1111 ("Section 1111"). Unlike what is
23 typically referred to as "rights" or "grievance" arbitration, wherein an arbitrator is called
24 upon to interpret and enforce existing contract rights, in interest arbitration (described in
25 greater detail below) an arbitrator actually creates the parties' rights by selecting between
26 their competing proposals. Thus, this Arbitration Board will act in a legislative or quasi-
27 legislative capacity.

1 agreement.” (Gov. Code § 3505.1—part of the Meyers-Milias-Brown Act [“MMBA”],
2 Gov. Code § 3500 *et seq.*, which governs local public sector labor-management relations.)
3 In deciding such “grievances,” the arbitrator’s authority is quasi-judicial—derived from
4 the collective bargaining agreement and limited to construing and enforcing the terms of
5 the agreement.

6 Interest arbitration is a different matter entirely. In interest arbitration, the
7 arbitrator performs a legislative function by deciding what contractual terms will govern
8 the parties’ future relations and conduct, traditionally after bargaining impasse. (*County*
9 *of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 341–342.) In *County of*
10 *Sonoma*, the Court of Appeal aptly explained the differences between grievance and
11 interest arbitration:

12 Interest arbitration concerns the resolution of labor disputes over the
13 formation of a collective bargaining agreement.... It differs from
14 the more commonly understood practice of grievance arbitration
15 because, unlike grievance arbitration, it focuses on what the terms
16 of a new agreement should be, rather than the meaning of the terms
17 of the old agreement.... Put another way, interest arbitration is
18 concerned with the acquisition of future rights, while grievance
19 arbitration involves rights already accrued, usually under an existing
20 collective bargaining agreement.... An interest arbitrator thus does
21 not function as a judicial officer, construing the terms of an existing
22 contract and applying them to a particular set of facts.... Instead,
23 the interest arbitrator’s function is effectively legislative, because
24 the arbitrator is fashioning new contractual obligations.

25 (*Id.* [internal quotations and citations omitted]; see also *Hess Collection Winery v.*
26 *Agricultural Lab. Rel. Bd.* (2006) 140 Cal.App.4th 1584, 1596 [“Interest arbitration,
27 unlike grievance arbitration, focuses on what the terms of a new agreement should be,
28 rather than the meaning of the terms of the old agreement. Thus, the arbitrator is not
acting as a judicial officer, construing the terms of an existing agreement and applying
them to a particular set of facts. Rather, he is acting as a legislator, fashioning new
contractual obligations.”].)

The MMBA defines the scope of the parties’ bargaining obligation, which is
normally coextensive with the Arbitration Board’s authority:

1 The scope of representation shall include all matters relating to
2 employment conditions and employer-employee relations,
3 including, but not limited to, wages, hours, and other terms and
4 conditions of employment, except, however, that the scope of
representation shall not include consideration of the merits,
necessity, or organization of any service or activity provided by
law or executive order.

5 (Gov. Code § 3504.) Under the MMBA, local impasse procedures, including interest
6 arbitration, are considered part of the bargaining process. (See Gov. Code § 3505, ¶ 2.)

7 Charter Section 1111 (attached hereto as Exhibit 2) is just such a local
8 procedure, requiring the parties to submit this bargaining dispute to interest arbitration²:

9 All disputes or controversies pertaining to wages, hours, or terms
10 and conditions of employment which remain unresolved after good
11 faith negotiations between the City and either the fire or police
12 department employee organization shall be submitted to a three-
member Board of Arbitrators upon the declaration of an impasse
by the City or by the recognized employee organization involved in
the dispute.

13 (See Charter § 1111(c); *City of San Jose v. International Assn. of Firefighters* (2009) 178
14 Cal.App.4th 4088.)

15 Section 1111(g) purports to place the limitations on the Arbitration Board's
16 authority, disallowing an award that:

17 1. increases the projected cost of compensation for the bargaining
18 units at a rate that exceeds the rate of increase in revenues from the
19 sales tax, property tax, utility tax and telephone tax averaged over
the prior five fiscal years; or

20 2. retroactively increases or decreases compensation, including, but
21 not limited to, enhancements to pension and retiree health benefit
22 for service already rendered, but excluding base wages; or

23 3. creates a new or additional unfunded liability for which the City
24 would be obligated to pay; or

25 4. deprives or interferes with the discretion of the Police Chief or
26 Fire Chief to make managerial, operational or staffing decisions,
27 rules, orders and policies in the interest of the effective and efficient
28 provision of police and fire services to the public.

² The parties agree that the current dispute is properly subject to interest arbitration under
Charter section 1111.

1 While the first three limitations ostensibly circumscribe the Arbitration Board’s authority
2 on monetary benefits³, the fourth merely restates a limitation already imposed by the
3 MMBA—that “the scope of representation shall not include consideration of the merits,
4 necessity, or organization of any service or activity provided by law or executive order.”
5 (Gov. Code section 3504.) Thus, subject to the financial limitations purportedly imposed
6 by Section 1111, the Arbitration Board has authority to rule on all matters within the
7 MMBA’s scope of bargaining.

8 **B. Matters to Be Considered by the Arbitration Board**

9 Interest arbitrators have historically considered a number of factors in electing
10 between disputing parties’ proposals. These considerations will vary, depending on the
11 type of proposal under consideration. Section 1111(e) requires the Arbitration Board to
12 consider “factors traditionally taken into consideration in the determination of wages,
13 hours, and other terms and conditions”⁴ Traditionally, factors and evidence
14 considered in interest arbitration include: 1) bargaining history of the parties, including
15 prior contracts; 2) interests and welfare of the employee group; 3) interests and financial
16 ability of the employer; 4) prevailing wages and benefits of employment of comparable
17 employee groups; 5) changes to cost of living; and 6) public health, safety, and welfare.
18 (Fordham Law Review, Vol. 56, No. 2, *Interest Arbitration: The Alternative to the Strike*,
19 A. Anderson & L. Krause, p.158 fn 35.)

22 ³ It is an open question whether these limitations are lawful under the MMBA, which
23 preempts local charter rules that conflict or interfere with the MMBA’s purposes and
24 requirements. (See *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach*
25 (1984) 36 Cal.3d 591.) Because interest arbitration is an extension of the MMBA
bargaining process, a charter rule that purports to limit the terms and conditions of
employment that will be subject to interest arbitration arguably is unlawful.

26 ⁴ In addition to generally referencing “factors traditionally taken into consideration in the
27 determination of wages, hours, and other terms and conditions”, Section 1111(e)-(f)
28 specifically references the “interests and ... welfare of the public”, “wages, hours, and
other terms and conditions of employment of other employees performing similar
services”, “changes in the average consumer price index for goods and services”, the
City’s ability to pay, and other”

1 **1. Consideration of the Parties' Bargaining and Contract**
2 **History**

3 The "status quo"—i.e., the immediate contract history—of the parties
4 necessarily does the most to inform both the parties' proposals and an interest arbitrator's
5 decision-making, at least when the subject matter of a proposal is already covered by the
6 parties existing agreement. Under those circumstances, an arbitrator will look for some
7 justification for departing from the existing term of employment. Such justification will
8 typically involve a showing of one or more of the considerations discussed below. Other
9 relevant factors may be whether a given proposal governs subject matter that was
10 previously traded away by the requesting party in exchange for something else in the
11 bargaining process.

12 **2. Consideration of the Interests and Welfare of the**
13 **Employee Group**

14 Consideration of the interests and welfare of the employee group is sort of a
15 catch-all that can include other factors specified below, such as cost of living. However, it
16 will include any subject that has a substantial impact on working conditions or on the
17 welfare and wellbeing of employees, whether monetary or otherwise. Thus, the types of
18 evidence and considerations that may come into play may vary greatly.

19 **3. Consideration of the Employer's Ability to Pay**

20 Obviously consideration of the employer's ability to pay for any financial
21 proposal is an important consideration. Thus, in this regard, an interest arbitrator may be
22 asked to consider the testimony of economists, accountants, and others with general
23 knowledge of the economy and economic trends and specific knowledge of the finances
24 of the employer, its budgeting process, revenue streams, and fiscal reserves. Because a
25 public employer is typically required to publish information about these matters, with
26 information provided by the parties' evidence and witnesses, an interest arbitrator will
27 have the ability to project to a substantial degree of accuracy the employer's ability to pay
28 for the union's financial proposals.

1 **4. Consideration of the Pay/Benefits for Comparable**
2 **Employees**

3 The pay and benefits of comparable employees in the same of similar lines of
4 work, particularly those in comparable jurisdictions, are critical factors when considering
5 the parties' financial proposals. This is true not only for reasons of fairness and equity,
6 but also because these considerations are critical to maintaining competitiveness for
7 skilled and reliable employees as between other comparable jurisdictions. In regard to
8 comparability, it is usual for the parties to submit evidence of the pay of other employees
9 in identical or similar classifications, both in nearby jurisdictions and in municipalities of
10 comparable size and other characteristics, such as cost of living.

11 **5. Consideration of Changes to the Cost of Living**

12 For obvious reasons, changes in the cost of living in a jurisdiction are critical
13 in weighing the parties' financial proposals. Considerations of fairness, equity, and
14 employees' ability to simply afford to live and raise families in or near the jurisdiction in
15 which they work is obviously a critical consideration. Their ability to maintain their
16 existing quality of living is also a crucial consideration. Because labor contracts typically
17 span two or more years, an interest arbitrator must consider not only cost of living
18 changes over the past several years, but must also consider trends in this area in
19 determining what upward adjustments in pay and benefits are appropriate.

20 **6. Consideration of the Public Safety and Welfare**

21 Consideration of public safety and welfare is another broad category that may
22 involve any number of considerations. One such consideration often involves a
23 determination of whether money spent on personnel costs may have a negative impact on
24 the safety and welfare of the public within the jurisdiction of the public employer if that
25 money could have had salutary impacts if spent elsewhere. However, in the context of
26 negotiations and arbitration over pay and benefits for public safety employees, such as
27 police officers, an interest arbitrator is in the unusual position of considering that such
28 expenditures may have a positive impact on public safety and welfare, due to the fact that

1 maintaining or increasing pay and benefit levels for safety personnel may have the
2 salutary impact of recruiting and retaining quality public safety employees.

3 **7. The Interaction / Interrelation of These Factors**

4 Typically, each proposal under consideration by an interest arbitrator will
5 involve consideration of a number of the factors discussed above (and perhaps others).
6 The SJPOA attaches for the Arbitration Board's review and consideration two interest
7 arbitration awards—both issued under Section 1111—one involving the SJPOA (Exh. 3)
8 and the other involving the San Jose Fire Fighters, IAFF Local 230 (Exh. 4). These
9 awards should help illustrate to the Board how the above-discussed factors may play into
10 an arbitrator's consideration of various proposals and ultimately inform an award.

11 **C. The Award**

12 At the conclusion of evidence, which will typically include the presentation of
13 evidence, including examination and cross-examination of both parties' witnesses, the
14 parties will submit their remaining disputes to the Arbitration Board for a decision.

15 Pursuant to Section 1111(e):

16 At the conclusion of the arbitration hearings, the Arbitration Board
17 shall direct each of the parties to submit, within such time limit as
18 the Board may establish, a last offer of settlement on each of the
issues in dispute. The Arbitration Board shall decide each issue by
majority vote

19 The Arbitration Board's determination as to the applicable terms and conditions of
20 employment will govern the parties' relations going forward for a time period that will
21 also be determined by the Board, as between the parties' respective proposals.

22
23 Dated: April 29, 2013

24 CARROLL, BURDICK & McDONOUGH LLP

25
26 By _____

Gregg McJean Adam
Jonathan Yank

27 Attorneys for San Jose Police Officers'
28 Association

EXHIBIT 1

**City of San Jose
and
San Jose Police Officers' Association**

**Tentative Agreement on Wages and Term
December 7, 2011**

The following represents the Parties' agreement to settle the terms of the interest arbitration provided for in Section 5.1 of the June 3, 2011, Tentative Agreement between the parties.

1. **Wages.** Effective June 26, 2011, all salary ranges for employees represented by the POA were decreased by approximately 10%. This resulted in the top and bottom of the range of all classifications represented by the POA being 10% lower. The parties agree that the 10% wage reduction shall remain the "status quo" unless and until it is modified through mutual agreement or through the decision of an arbitrator pursuant to Section 1111 of the San Jose City Charter.
2. **Term.** The term of the POA MOA will be two years and shall expire on June 30, 2013.
3. **Interest Arbitration.**
 - a. The parties agree that the issues of any successor agreement should be resolved prior to the expiration of the MOA (June 30, 2013). To that end, the parties agree
 - i. The parties will begin negotiations no later than January 1, 2013.
 - ii. In the event that no agreement has been reached prior to April 30, 2013, the parties shall begin interest arbitration under Section 1111 no later than May 1, 2013, and the arbitrator shall issue a decision no later than May 31, 2013.
 - iii. The parties shall preselect the arbitrator, who shall certify his or her ability to meet the timelines indicated above, and shall complete or waive mediation before April 30.
 - b. If the City Council exercises its prerogative to place a ballot measure eliminating interest arbitration on the ballot, the parties shall immediately begin negotiations, Interest arbitration shall be scheduled to begin no later than thirty (30) days prior to the effective date of the ballot measure and the arbitration award shall issue before the measure's effective date.
4. **Limitations.** This tentative agreement is intended to apply only to the specific terms in this agreement and shall not affect any other terms of the MOA or its side letters, including agreements to reopen on specific, topics.

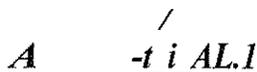
This agreement is still considered tentative and shall not be considered final or binding until ratified by the membership and approved by the City Council. This document sets forth the full agreement of the parties reached during these negotiations. Anything not included in this document is not part of the Tentative Agreement.

For the City:



December 7, 2011

For the Association:



December 7, 2011

EXHIBIT 2

City of San Jose Charter Section 1111

Compulsory Arbitration for Fire and Police Department Employee Disputes.

(a) It is hereby declared to be the policy of the City of San José that strikes by firefighting and peace officers are unlawful in the state of California and not in the public interest and should be prohibited, and that a method should be adopted for peacefully and equitably resolving disputes that might otherwise lead to such strikes.

If any firefighter or peace officer employed by the City of San José willfully engages in a strike against the City, said employee shall be dismissed from his or her employment and may not be reinstated or returned to City employment except as a new employee. No officer, board, council or commission shall have the power to grant amnesty to any employee charged with engaging in a strike against the City.

(b) The City, through its duly authorized representatives, shall negotiate in good faith with the recognized fire and police department employee organizations on all matters relating to the wages, hours, and other terms and conditions of City employment, including the establishment of procedures for the resolution of grievances submitted by either employee organization over the interpretation or application of any negotiated agreement including a provision for binding arbitration of those grievances. Unless and until agreement is reached through negotiations between the City and the recognized employee organization for the fire or police department or a determination is made through the arbitration procedure hereinafter provided, no existing benefit or condition of employment for the members of the fire department or police department bargaining unit shall be eliminated or changed.

(c) All disputes or controversies pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations between the City and either the fire or police department employee organization shall be submitted to a three-member Board of Arbitrators upon the declaration of an impasse by the City or by the recognized employee organization involved in the dispute. All issues concerning the scope of the arbitration Board's authority, jurisdiction or powers shall, upon the request of either party, be resolved by petition to the Superior Court.

(d) Representatives designated by the City and representatives of the recognized employee organization involved in the dispute, controversy or grievance shall each select one arbitrator to the Board of Arbitrators within three (3) days after either party has notified the other, in writing, that it desires to proceed to arbitration. The third member of the Arbitration Board shall be selected by agreement between the two arbitrators selected by the City and the employee organization, and shall serve as the neutral arbitrator and Chairman of the Board. In the event that the arbitrators selected by the City and the employee organization cannot agree upon the selection of the third arbitrator within ten (10) days from the date that either party has notified the other that it has declared an impasse, then either party may request the Superior Court of the County of Santa Clara to appoint an arbitrator who shall be a retired judge of the Superior Court.

Any arbitration convened pursuant to this section shall be conducted in conformance with, subject to, and governed by Title 9 of Part 3 of the California Code of Civil Procedure to the extent that such procedures do not conflict with this Charter Section. Unless otherwise mandated by state or federal law, all arbitration hearings shall be open to the public and all documents submitted in arbitration shall be public records. Notwithstanding any other provision of this Charter to the contrary, the authority, jurisdiction and powers of the Board of Arbitrators are limited by the provisions of this Section.

(e) At the conclusion of the arbitration hearings, the Arbitration Board shall direct each of the parties to submit, within such time limit as the Board may establish, a last offer of settlement on each of the issues in dispute. The Arbitration Board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds by the preponderance of the evidence submitted to the Arbitration Board satisfies section (f) below, is in the best interest and promotes the welfare of the public, and most nearly conforms with those factors traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment, including, but not limited to, changes in the average consumer price index for goods and services, the wages, hours, and other terms and conditions of employment of other employees performing similar services.

City of San Jose Charter Section 1111

(f) In all arbitration proceedings conducted pursuant to this section, the primary factors in decisions regarding compensation shall be the City's financial condition and, in addition, its ability to pay for employee compensation from on-going revenues without reducing City services. No arbitration award may be issued unless a majority of the Arbitration Board determines, based upon a fair and thorough review of the City's financial condition and a cost analysis of the parties' last offers, that the City can meet the cost of the award from on-going revenues without reducing City services. The arbitrators shall also consider and give substantial weight to the rate of increase or decrease of compensation approved by the City Council for other bargaining units.

"Compensation" shall mean all costs to the City, whether new or ongoing, for salary paid and benefits provided to employees, including but not limited to wages, special pay, premium pay, incentive pay, pension, retiree medical coverage, employee medical and dental coverage, other insurance provided by the City, vacation, holidays, and other paid time off.

(g) Additionally, the Board of Arbitrators shall not render a decision, or issue an award, that:

(1) increases the projected cost of compensation for the bargaining units at a rate that exceeds the rate of increase in revenues from the sales tax, property tax, utility tax and telephone tax averaged over the prior five fiscal years; or

(2) retroactively increases or decreases compensation, including, but not limited to, enhancements to pension and retiree health benefit for service already rendered, but excluding base wages; or

(3) creates a new or additional unfunded liability for which the City would be obligated to pay; or

(4) deprives or interferes with the discretion of the Police Chief or Fire Chief to make managerial, operational or staffing decisions, rules, orders and policies in the interest of the effective and efficient provision of police and fire services to the public.

(h) Compliance with the provisions of this Section shall be mandatory and enforceable pursuant to section 1085 of the Code of Civil Procedure; failure to comply with these provisions shall also constitute an act in excess of jurisdiction.

(i) After reaching a decision, the Arbitration Board shall mail or otherwise deliver a true copy of its decision to the parties. The decision of the Arbitration Board shall not be publicly disclosed and shall not be binding until ten (10) days after it is delivered to the parties. During that ten-day period the parties may meet privately, attempt to resolve their differences, and by mutual agreement amend or modify any of the decisions of the Arbitration Board. At the conclusion of the ten-day period, which may be extended by mutual agreement between the parties, the decision of the Arbitration Board together with any amendments or modifications agreed to by the parties shall be publicly disclosed and shall be binding upon the parties. The City and the recognized employee organization shall take whatever action is necessary to carry out and effectuate the award.

(j) The expenses of any arbitration convened pursuant to this section, including the fee for the services of the Chairman of the Arbitration Board, shall be borne equally by the parties. All other expenses which the parties may incur individually are to be borne by the party incurring such expenses.

(k) This Section shall be effective immediately upon passage by the voters, and shall apply to any arbitration in which hearings commence after November 2, 2010.

(l) The voters declare that the provisions of this Section are not severable, and none would have been enacted without the others. Should any portion of this Section 1111 be enjoined or declared invalid, all provisions shall be deemed invalid and inoperative and there shall be no compulsory arbitration for fire and police department employee disputes.

Added at election November 4, 1980
Amended at election November 2, 2010

EXHIBIT 3

BONNIE G BOGUE
Arbitrator
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Albany, California 94706-1421
(510) 527-7205 (Phone and FAX)

Arbitrator's Case No.
42197-A
CSMCS Case No.
96-1-689

IN ARBITRATION PROCEEDINGS PURSUANT TO
IMPASSE RESOLUTION PROCEDURES IN THE CITY CHARTER

In the Matter of a Negotiations Impasse between

CITY OF SAN JOSE,
Employer

and

SAN JOSE POLICE OFFICERS' ASSOCIATION and
INT'L ASSOCIATION OF FIREFIGHTERS, LOCAL 230
Employee Organizations

Involving negotiations impasse over
Retirement Benefits

Decision of the
Board of Arbitration

November 17, 1997

APPEARANCES:

On behalf of the Unions:

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AND

Christopher E. Platten
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On behalf of the City of San Jose:

George Rios
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BOARD OF ARBITRATION

Bonnie G. Bogue
Neutral Arbitrator

Darrell Dearborn
Board Member for the City of San Jose

Ken Heredia
Board Member for the Unions

TABLE OF CONTENTS

Procedural Background	2
<u>Issue 1: 3%/60% Proposal</u>	<u>4</u>
I. Charter Criteria	5
II. Comparison of Benefits for Comparable Employees	5
A. Comparable Employees and/or Agencies	6
1. Union position	6
2. City position	6
3. Board conclusions	8
B. Comparable Retirement Benefits	10
1. Union position	10
2. City position	12
3. Board conclusions	14
C. Arbitration Board Conclusion on Comparisons	16
III. Cost and Total Compensation	19
A. Union position	19
B. City position	20
C. Board conclusion on cost and total compensation	21
IV. Arbitration Board's Conclusions and Award	22
<u>Issue 2: DROP Proposal</u>	<u>23</u>
I. Scope of Arbitrability of DROP Proposal	23
II. Parties Positions on Cost of DROP Proposal	24
III. Arbitration Board's Conclusion and Award	27
<u>Issue 3: Expanded Reciprocity Proposal</u>	<u>28</u>
I. Union position	29
II. City position	26
III. Arbitration Board's Conclusion and Award	29
<u>Issue 4: Retiree Medical Benefits Proposal</u>	<u>30</u>
I. Union position	31
II. City position	31
III. Arbitration Board's Conclusion and Award	32
<u>Issue 5: Employee Assistance Proposal</u>	<u>32</u>
I. Union position	32
II. City position	32
III. Arbitration Board's Conclusion and Award	32
<u>Issue 6: Term of Agreement and Effective Dates</u>	<u>33</u>
I. Parties Offers and Positions	33
II. Arbitration Board's Conclusion and Award	33
<u>Tentative Agreements</u>	
<u>Cost of Benefit Modifications</u>	34
	35

This Award arises in an Arbitration Proceeding to resolve a negotiations impasse between the City of San Jose (hereinafter the City) and the San Jose Police Officers Association (hereinafter the SJPOA) and the International Association of Firefighters Local 230 (hereinafter IAFF Local 230), collectively referred to as the Unions.

The City and the Unions entered into a memorandum of agreement (MOA) governing retirement benefits for employees in the two bargaining units represented by the two Unions, for the period February 4, 1992, through February 3, 1996. This Tripartite MOA provides for resolution of disputes in Article 7, which provides in part that "Disputes over any new Memorandum of Agreement would proceed directly to Charter Section 1111." (Jt.Ex. 2) The Charter section, in pertinent part, provides:

Section 1111. Compulsory Arbitration for Fire and Police Department Employee Disputes.

All disputes or controversies pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations between the city and either the fire or police department employee organization shall be submitted to a three-member Board of Arbitrators upon the declaration of an impasse by the City or by the recognized employee organization involved in the dispute.

At the conclusion of the arbitration hearings, the Arbitration Board shall direct each of the parties to submit, within such time limit as the Board may establish, a last offer of settlement on each of the issues in dispute. The Arbitration Board shall decide each issue by majority vote by selecting whichever last offer of settlement on the issue it finds most nearly conforms with those factors traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment, including, but not limited to, changes in the average consumer price index for goods and services, the wages, hours, and other terms and conditions of employment of other employees performing similar services, and the financial condition of the City and its ability to meet the cost of the award.

A dispute over the arbitrability of issues being submitted to arbitration was decided by a February 28, 1997, majority ruling of the Arbitration Board. An evidentiary

hearing on the merits of the issues at impasse¹ was held in San Jose, California, on June 5, 6, 17, and 18, 1997. A transcript of the proceeding was prepared. Final offers were submitted to the Board on August 5, 1997. Opening and reply post-hearing briefs were filed in a timely manner, and the matter submitted to the Board for decision as of September 19, 1997. The documents and testimony in the record and the parties' briefs were fully considered individually by the three members of the Board and jointly in Executive Session of the Board prior to preparation of this decision and award.

Following is the Board's decision and Award on each of the issues submitted for determination.

Issue I: 3%/80% Proposal

Unions' Final Offer:

The benefit provisions of the Retirement MOA (Article 6) shall be amended to provide that all Plan members will accrue three (3%) of final average salary per year of service after such members complete their twentieth year of service, to a maximum of eighty (80%) of final salary.

City's Final Offer:

The pension formula to remain as it currently exists in the retirement plan.

The Unions proposal is for a pension benefit enhancement. Currently, the retirement benefit is set at 2.5% of final average salary (hereinafter, FAS) for each year of service, up to 30 years, with a maximum benefit of 75% of FAS. The Unions' proposal is to increase formula to accrue at 3% per year of service, beginning with 20th year, and to also increase the maximum to 80% of FAS. This proposal is referred to herein simply as "3%/80%" and the existing formula for 2.5% to a 75% of FAS maximum is referred to as "2.5%/75%." It is undisputed that the cost of this proposed enhanced benefit is projected at 1.92% of payroll.²

¹ The parties had reached agreement on two issues: survivorship benefits for persons with less than 20 years of service and dental benefits (Jt. Ex. 11). Those issues were not presented to the Arbitration Board.

² Jt. Ex. 9.

H. Charter criteria

The City is not raising an inability to pay argument, but rather asserts that the benefit increase is very costly (1.92% of payroll) and should be rejected for that and other valid reasons.

The criteria under Charter Sec. 1111 that will govern the Board's decision are comparability of retirement benefits granted to similarly situated safety service employees, and "other factors traditionally considered", which in this instance include total compensation of unit employees and recent adjustments to compensation for these employees as well as other City's employees.

The City contends internal comparisons should be considered as a factor "traditionally considered" in interest arbitration. While the amount of any recent compensation increases to other, non-safety City employees is a factor to be considered in terms of equity and bargaining stability and the burden on the City to meet the costs of the instant award, the level of the benefit (i.e., 2.5%/75% as opposed to 3%/80%) that San Jose miscellaneous employees receive is not weighed under the comparable criteria, since non-safety employees in the City or elsewhere do not perform "similar services" to police and fire. Charter Sec. 1111 is express and unambiguous, and non-sworn employees do not perform similar services and do not work under similar conditions. Nor can internal comparison be a factor under the "traditional considerations" criteria, both because the intent of Charter is clear about which comparisons are to be made (to employees performing similar service), and because "traditionally" the distinctions between working conditions of safety service employees has led to their different treatment in many ways, including level of compensation, as recognized by the Brand and Goldberg interest arbitration awards which the parties have submitted to the present Arbitration Board.

II. Comparisons to benefits for comparable employees.

There is no consensus between the Unions and City, nor a consistent past practice, that establishes "comparable" agencies for purposes of the Charter requirement that the arbitrators consider wages and terms of employment for "other

employees performing similar service." The parties dispute what employees, agencies and what measures of benefit compensation should be considered comparable. There are in fact two questions encompassed in this dispute: (1) what agencies and/or employees should be considered to determine comparability, and (2) what measure of benefits shows comparability or lack thereof. The two questions are addressed separately.

A. Comparable agencies and/or employees

1. Union evidence and position regarding comparable agencies/employees:

Of the 128,000 state and local sworn law enforcement officers and firefighters in California, 663,500 or 49.6% are eligible for an 3%/80% retirement benefit. These employees are employed in the following agencies (UX 3, p. 1, 2, and RT I, Tamayo testimony):

Counties: Alameda, Contra Costa, Fresno, Kern, Los Angeles, Marin, Mendocino, Merced, Orange, Sacramento, San Bernardino, San Diego, San Joaquin, San Mateo, San Luis Obispo, Santa Barbara, Sonoma, Stanislaus, Tulare, and Ventura (20 out of 53 counties in state)

Cities: San Diego, San Rafael, Pittsburg

State: highway patrol, peace officers including correctional and parole officers, firefighters and other safety personnel.

The Unions note that three agencies included by the City in its various preferred lists of comparable already provide 3%/80%: Alameda County, San Mateo County, and City of San Diego.

2. City evidence and position on comparable agencies/employees

The City offered two lists of agencies (CX 15), contending they provide appropriate and relevant comparisons:

"14 Bay Area Agencies" include 11 cities (including San Jose) and 3 counties.³ These are all of the "larger" agencies that are geographically proximate to San Jose, and therefore agencies which share cost of living and recruitment factors with San Jose, making them appropriate for purposes of comparison for police and firefighters.

"10 Largest California Cities"⁴ (including San Jose) provide appropriate comparisons because of similarities in police and firefighting services such cities provide and the circumstances under which such services are provided, compared to those provided by San Jose, which is the third largest city in the state.

In addition, the City's actuarial expert, Johnson, provided data based on two Bay Area counties (Alameda and San Mateo) and four cities (Fresno, Los Angeles, San Diego, and San Francisco), plus three basic PERS plans, for purposes of comparing value of retirement benefits. (CX 25, Tab 2)

The City contends that the Unions' comparison to all police and fire personnel statewide is simply too broad for purposes of determining comparability. It notes that the peace officers included in Unions' comparability list (the universe of all law enforcement personnel in the state, UX 3) do not provide similar services under similar circumstances to those provided by San Jose police officers. State "peace officers" consist of correctional and parole officers (40% of total employees in Unions' survey), highway patrol (10% of total), and no evidence shows that their service is similar to that provided by San Jose urban police. Of the remaining half of the peace officers in the Union survey, most are county sheriffs in 20 counties, with only three out of approximately 470 cities in the state offering 3%/80%. Of those cities, only one (San Diego) is arguably comparable to San Jose in size and other factors affecting performance of law enforcement functions in a major city.

Of the firefighters in the Unions' survey, the City notes that more than one-third are state Department of Forestry employees, with no evidence their service is comparable to that provided by San Jose urban firefighters. The rest are county employees, not geographically proximate to San Jose, and one city (San Diego), the only truly comparable jurisdiction, it contends.

³ Cities: Berkeley, Concord, Fremont, Hayward, Mountain View, Oakland, Palo Alto, Santa Clara, San Francisco, and San Jose. Counties: Alameda, San Mateo, Santa Clara.

⁴ Anaheim, Fresno, Long Beach, Los Angeles, Oakland, Sacramento, San Diego, San Francisco, Santa Ana and San Jose.

3. Arbitration Board conclusion concerning comparable agencies/employees:

Without consensus or consistent past practice,⁵ the Arbitration Board must consider the evidence and argument provided by both parties to determine which employees can properly be deemed to be performing "similar service" in order to consider the benefits such employees receive. In so doing, the Board takes note of accepted practice among arbitrators of interest disputes. In the latest edition of the venerable treatise, Elkouri and Elkouri, *How Arbitration Works*, the authors note: "If the parties cannot reach agreement as to the basis of comparison, the responsibility is that of the arbitrator to determine, from the facts and circumstances of the case as indicated by the evidence, the appropriate basis for comparison." The authors reviewed recent awards that resolved disputes over selecting communities or employers as appropriate comparators and found arbitrators relied on factors such as geographic proximity, size of the department or city, population and its density, possible socio-political values of that population, common labor market, tax base, and other such factors, as well as the similarity of services performed.⁶

Here, the Unions have offered for comparison the universe of all safety service personnel in the state, with evidence that half of them have an 80% plan (UX 3). It contends this evidence is sufficient to satisfy the Charter Sec. 1111 requirement that the Board based its award on consideration of compensation paid to employees performing similar service. It also notes that an 80% plan exists in the agencies which the City contends are comparable, in that three of the 20 agencies in the City's combined lists⁷ provide a 3%/80% benefit: Alameda County, San Mateo County, and the City of San Diego.

⁵ The 1994 Goldberg award, involving firefighters salary, noted various selections of comparable agencies offered by the City and by the Union, and considered this veritable "snowstorm" of statistics, but did not establish a preferred list of comparison agencies for purposes of reaching its conclusions. The 1991 Brand award, involving a wide range of issues for the firefighters unit, recognized the importance of both internal and external comparisons, and noted the divergence of comparisons the parties had made, but did not establish any list of preferred agencies as appropriate for comparison.

⁶ Chap. 18, "Standards in Arbitration of Interest Disputes," in *How Arbitration Works*, 5th ed., pp. 1108 et seq.

⁷ Combining the list of 14 Bay Area cities and counties and 10 largest cities in the state, eliminating overlap in the two lists and eliminating San Jose itself.

The City rebuts this contention by asserting that the Unions' universe of all safety service employees statewide is much too broad to satisfy Charter Sec. 1111, particularly since most of the employees of the employees in UX3 are in no way truly "comparable" in terms of services rendered or other factors traditionally considered in determining comparability, since most of them are correctional or parole officers, or forest fire fighters. Also, it notes that the employing agencies are counties, state departments, or smaller cities, with San Diego being the only larger city that could be deemed "comparable" to San Jose in terms of the services provided by its police and fire suppression personnel.

To that, the Unions respond that, compared to employees of the 24 agencies in UX 3 (or 27 if the three state departments are counted as independent agencies), San Jose's urban police and firefighters can be presumed to work in more hazardous/stressful circumstances associated with urban crime and fire/emergency incidents, than many of these employees who have the superior retirement benefit, such as employees of suburban or rural counties and state service correctional and parole officers. Any differences in services rendered by San Jose compared to those rendered by such employees provides support for increasing San Jose safety personnel's compensation in consideration of the more demanding nature of the duties performed.

In turn, the City contends that the Unions' proposed universe of all safety service employees is simply "forum" shopping, designed to find some statistical basis for demanding a benefit that is not enjoyed by employees in comparable jurisdictions. It contends that established and accepted standards for determining comparability dictate that the Board rely for comparison on either the 10 largest cities, or the neighboring larger Bay Area cities and counties.

After considering all of this evidence and argument, the Board concludes that, although the Charter does not specify how to determine which employees are "performing similar service," the weight of arbitral authority supports the City's contention that agencies of similar size and demography and occupying a common labor market can be deemed to have safety service employees providing "similar service." Thus, its combined lists of the state's 10 largest cities and the 14 larger Bay

Area public employers clearly provides a reasonable basis for comparison that is well within the mandate of the Charter.

However, the Charter does not preclude the Board from considering evidence that the 3%/80% benefit is widely implemented, even though only a minority (three) of these comparable jurisdictions have implemented it to date. And the Board must take note that one reason the 2.5%/75% plan is more prevalent agency-by-agency is because PERS only allows the 2.5%/75% plan, and most of the comparable agencies in the City's survey are in PERS and do not have an independent retirement system, as does San Jose.

This conclusion does not solve the dispute, since the Charter also requires that the compensation itself be compared, and herein lies the parties' next area of dispute – comparability of benefits.

B. Comparable retirement benefits

1. Union evidence and position on benefit comparisons

The Unions contend that the Board must consider what "pensionable" compensation is included in determining final average salary, on which the 75% or 80% formula is calculated, in order to examine the comparability of the retirement benefit itself. It contends that the agencies to which the City is comparing do not include the same compensation elements as does San Jose for figuring FAS (compare UX 16 and CX 25).

The Union prepares yet another set of comparison agencies, the five largest within Santa Clara County itself (UX 16 as corrected), which are all in PERS. Its tabulation shows that "pensionable" compensation includes uniform allowance, special training premiums, educational premiums, regularly-scheduled FLSA overtime, hazardous duty pay, and night differentials. However, San Jose bases pension only on base salary plus EMT pay for firefighters, and POST pay for police. Therefore, the Unions argue the City cannot say that San Jose safety employees are "better off" in salary and pension than counterparts in these other local agencies within the County.

The Unions show that, since less is included in "pensionable compensation" in San Jose for calculating FAS, San Jose pension benefits (in monthly dollar amounts)

are below the average for safety pensions in these largest agencies in the County, including some which the City includes in its list of comparators. It notes this is true even under the PERS limit of 75% of FAS. The average for these local agencies is \$4,555/month under a 2.5%/75% plan, but even if 3%/80% were granted, San Jose firefighters' pension would still be less -- \$4,229/month. For police, 3%/80% would yield \$4,447/month in San Jose, compared to a local agency average of \$4,498 under a 2.5%/75% formula. (UX 16 corrected, Opening Brief, p. 9)

Responding to the City's contention that San Jose's "formula" is superior to that of Santa Clara agencies in UX 16 if one looks at presumed age/years of service at retirement, the Unions offer an addendum to UX 16 (attached to Unions' reply brief). This recalculation shows that if "actual" age/years of service experience in San Jose (i.e., age 53/28.37 years, drawn from CX 11) are used, the San Jose proposed benefit (3%/80%) will still yield a lesser benefit because of the differences in compensation factors included in FAS on which the benefit is based. The "average" current firefighters pension (at 53/28.37 years) is \$4,169, compared to San Jose's \$3,749 (a 11.19% difference). With the 3%/80% benefit, San Jose firefighters' monthly benefit would be \$3,912, reducing the difference to 6.57%. The difference is less for police, but the current difference is 4.38%, and at 3%/80%, it would be negligible (.07%), bringing San Jose above both Santa Clara County and Palo Alto.

Also, San Jose safety employees contribute nearly 10% to pension, as there is no employer pickup of employee contribution, whereas many PERS employers do pay member contributions.

The Unions contend that it does not matter whether, in certain cases of a particular age/years service retirement, that there are structural differences in the "formulas" used by San Jose and those used by other Santa Clara agencies, as the City argues. Rather, the issue is the Unions' proposal to increase final pensionable benefit received by San Jose retirees; therefore, the final pensionable benefits is the relevant comparator. UX 16 demonstrates that police and firefighters of other, larger Santa Clara County agencies receive a greater cash pension than do San Jose retirees because of PERS' more expansive definition of final pensionable compensation, even though the "formula" in those agencies is 75% of FAS.

2. City evidence on benefit comparisons

The City presented evidence to show that, through both external and internal comparisons, the City's current plan is superior, so that comparability factors simply do not warrant granting the Unions' proposal for 3%/80%.

The City contends that the Unions simply identified agencies that offer the 80% plan, but did not compare actual retirement formulas, so that their comparisons do not hold up. Using agencies in the Unions' list of all agencies granting 3%/80% (UX 3), and using the historically "average" retirement ages for San Jose police and San Jose firefighters, San Jose's pension benefit in terms of percent of FAS is higher than every agency on the Unions' list except San Diego. (Table in City Opening brief, p. 24-25, based on data in UX 3 and CX 37).

This is so because those plans use an age-based formula (CX 39), whereas San Jose does not. The Unions merely seek to gain the 80% maximum without also imposing the "age-graded" component in the formula (which could require employees to work longer to qualify for the maximum benefit), so that granting the 3%/80% formula for San Jose would not make its plan comparable to other 3%/80% plans. Evidence provided in UX 16 fails to consider these differences in formula. Also, the few agencies in that list are not representative of local agencies, but rather were selected because they provided inflated salaries which in turn inflates the final compensation figure. This exhibit assumes that all retirees in those selected agencies would qualify for all compensation components when figuring FAS, whereas that is not necessarily true.

The City contends that the conclusion the Unions draw from UX 16 is flawed. The Unions do not consider retirement formulas utilized by these selected jurisdictions. The "snapshot" of wage/benefit levels currently used to determine FAS cannot support projections as to what retirees would receive at time of retirement, since what in fact will be in FAS in these jurisdictions at time of retirement is unknown. The only probative comparison is retirement formulas, and Unions do not compare San Jose's formula to the formulas used by these jurisdictions.

If the Unions believe that pension benefits are lower than those received in other agencies because of what is included in FAS, the City contends they should have proposed to revise that aspect of the formula to make FAS comparable. They have not done so, so comparison of that factor is irrelevant to the issue of whether 3%/80%

should be granted. Also, the Unions assume, in their calculations showing relative value of final benefits, that every retiree in these other jurisdictions would qualify for ALL forms of pensionable compensation that go into FAS, which is a false assumption.

The City further notes that the Unions did not apply this reasoning concerning FAS to the jurisdictions it already presented as comparable in UX 3, so it must be assumed similar calculation of "retirement compensation" would not show San Jose lagging behind these agencies that grant 3%/80%.

The City claims that the salary survey of Santa Clara agencies in UX 16 (as corrected in CX 52) is slanted and incomplete, selecting only agencies that are the highest paying within the County, rather than all agencies in the County or the larger Bay Area jurisdictions. To illustrate, the City presented two salary surveys for firefighters in nine Bay Area jurisdictions and police in 10 Bay Area agencies, which show that San Jose compares favorably in terms of salary (its fire salaries being 5.72% above the mean for the nine agencies, and its police salaries being 6.54% above the mean for 10 agencies). (CX 53)

The 20 agencies that the City has relied on for comparison (10 largest cities combined with 14 largest Bay Area jurisdictions) are consistent with past comparisons and comport with traditional comparability criterion. An evaluation of the City's pension formula, compared to the formula used in those comparable jurisdictions, shows that the City's current pension formula is superior. Only 3 (San Diego, Alameda County and San Mateo County) offer more than 75% of FAS. Furthermore, Johnson, using the San Jose retirement plan actuary's predictions regarding retirement age, determined that more than 51% of active San Jose safety personnel will be eligible to retire with unreduced benefit at age 50, 32% will be eligible w/ 25 years of service between ages of 51 and 54, and 17% will be eligible at age 55. At the age and years of service when the majority of San Jose safety employees are expected to retire, the current formula ranks 30% above the average of all other formulas of those 19 agencies, including those which offer 3%/80% now. (CX 25, Johnson at RT IV, 32.)

Further the City contends, by looking at the percentage of FAS which the pension will be at age 50, or at age 55 w/ 25 or 30 years of services, San Jose retirees obtain a higher percentage of their FAS than the vast majority of contemporaries in comparable agencies. If the three retirement age/years of service comparison points

are tied together and weighted according to expected retirement eligibility, the City actuary Johnson figures that San Jose's current formula ranks higher than any comparable agency.

Specifically, comparing Alameda County, San Mateo County, Fresno, Los Angeles, San Diego, San Francisco, (using currently open tiers which are less beneficial to retirees than closed tiers) and three PERS levels, San Jose's plan is superior in terms of percentage of FAS at three age comparison points (50, 55, 60). (CX 25, p. 7). In terms of calculated "present value" of the presumed total retirement benefit, San Jose's current plan ranks above the average of those same agencies at each of three retirement ages, ranking the highest at age 50, fifth at age 55, and third at age 60. But when "weighted" to combine all three ages to reflect the expected eligibility, San Jose's current plan has a higher present value than any of those agencies. (CX 25, pp. 13-15; RT IV, Johnson's testimony.)

Another factor is that PERS local agencies are prohibited by statute (Gov. Code 21363) from exceeding the 2.5%/75% formula, meaning that no other cities than those in the Unions' surveys (3 in the police, 1 in the firefighters) can provide 3%/80%. Even assuming legislation passes that would enable local PERS agencies to grant 3%/80% (which is unlikely given failed prior attempts), future changes are irrelevant to the Charter requirement that the arbitrators relate the award to benefits now paid in comparable agencies. Also, even if legislation passed, the PERS formula differs (benefit varies by age, maximum COLAS differ, etc.), so that San Jose's formula remains superior at the ages when San Jose police and fire employees in fact will retire.

Finally, based on "internal comparability" with other San Jose employees, the majority of City employees are in the Federated Plan, which is inferior to the police and fire Unions' existing plan.

3. Arbitration Board conclusions on benefit comparisons

The above summary of the parties' evidence, and each side's criticism of the other party's evidence, makes it abundantly clear that there is a plethora of

comparisons that can be made. Both sides have accused the other of comparing apples to oranges. It is clear there is a lot of fruit in this basket.

The problem for the Arbitration Board is that there is no clear or compelling comparison that emerges from either party's evidence, so that it is not possible, based on the record, to make a completely accurate comparison of what benefits are provided in San Jose and the comparator agencies, either those the City has used, or those the Unions have used to show the prevalence of an 80% formula. Rather, many differing comparisons can be made, as summarized above, some showing San Jose in a better light and others showing San Jose in a worse light.

For example, the City has shown that the 2.5%/75% formula exists in all but three of the 20 comparable agencies in its combined list of largest cities and larger Bay Area jurisdictions. It also contends that, using historically average retirement ages for San Jose police and fire, the pension benefits in terms of percent of FAS is higher than every agency on the unions' list of those receiving an 3%/80% benefit, except the City of San Diego.

But the Unions have presented persuasive evidence that neither the percent of FAS nor the existence of an 75% or 80% formula, will provide a true measure of pension benefits, because of variations in how FAS is calculated, so that the "take-home" benefit, as it were, can be (and currently is) less with a 3%/80% formula in San Jose than with a 75% formula elsewhere. The City has not been able to refute that contention. Although it complains that the Unions' selected only the highest paid jurisdictions within Santa Clara County to illustrate this point, the City has not responded with any evidence to show that any different result would come if the same calculations were made for the 17 agencies in its preferred list of comparators that provide the 2.5%/75% benefit.

Rather, the City has offered evidence that, based on "present value" of the benefit that San Jose police and fire personnel will receive under the 2.5%/75% formula (based on assumptions of expected retirement age and service, as discussed above), San Jose's current plan has a higher present value than several agencies (but it does not include in this calculation all 20 of the agencies in its preferred lists of comparators). The Unions responded with its own calculation concerning expectations regarding age and service at retirement. The Unions asserted that the average age/years of service

will be 53/28.37, based on historic experience in San Jose, rather than the projected assumptions the City used for this argument, which further supports the Unions' contention about average "take-home" pension, showing it currently is about 11% higher for police and 6.5% higher for firefighters in the selected Santa Clara agencies compared to San Jose.

Thus, the evidence concerning comparability of the benefit itself provides support for both parties' positions.

C. Arbitration Board Conclusion on External Comparisons

The purpose of examining external comparisons in interest arbitration, and presumably the reason the drafters of the City Charter included this as a primary criterion, is to determine whether the existing compensation level for City employees lags behind that of comparable employees, so as to justify an upward adjustment. Or alternatively, whether the proposed improvement in a benefit would cause City employees to exceed compensation levels for employees performing similar services under comparable circumstances.

The barrage of comparisons, calculations, projections and arguments which the parties have offered here does not provide compelling evidence that San Jose police and fire are lagging significantly behind comparable employees in terms of this particular retirement benefit. But neither does it show that granting the proposed improvement would put San Jose out of line with comparable employees by granting benefits that are significantly greater than the prevailing standards, but rather would merely improve San Jose's comparative standing.

For the following reasons, the weight of this evidence does support the Unions' contention that retirement benefits received by other employees performing similar service justifies their demand for an 3%/80% formula:

(1) The 3%/80% benefit is not novel or innovative, but is implemented by three of the 20 agencies deemed to be comparable in size, demographics and location (San Diego, Alameda County and San Mateo County) for their safety service employees who clearly provide similar services under comparable circumstances to San Jose police and fire personnel. Of the universe of all law enforcement and fire suppression personnel in the state, approximately half have an 80% formula. There are

approximately 27 agencies statewide, including 20 out of 53 counties plus three departments of the State of California, that provide the 80% maximum benefit. Although these agencies and their employees are not similar to San Jose (within the meaning of the Charter provision), the differences in services rendered actually support the Unions' contention that San Jose safety personnel often provide services under more arduous circumstances than these "non-comparable" employees, which in turn supports the Unions' contention that San Jose's retirement benefit should be greater, not less, than that provided by these other agencies.

(2) The evidence does not show that the current 2.5%/75% formula for San Jose is comparable to the 2.5%/75% formula employed in the 17 agencies with such a plan to which the City compares itself. The Unions have shown that San Jose utilizes a definition of FAS which results currently in a lower pension payment than in other local agencies within Santa Clara County that also use the 2.5%/75% formula. The City has not rebutted that with any evidence to show that, if a similar comparison were run with its 17 comparable agencies with a 75% formula, the FAS components are the same as in San Jose, or that take-home pensions are comparable to San Jose's. Instead, it has presented evidence that the assumed "present value" of San Jose's pension is greater than for a selection of other agencies (however, not all of its 17 comparator agencies are included in this example). While that factor puts San Jose in a better comparative light, the Unions have shown that, in terms of what retirees see in a monthly pension, San Jose retirees receive less in a cash monthly pension under the current 75% plan than will retirees in other 75% plans.

(3) The Unions have shown that, even if the 80% proposal were granted, San Jose current take-home monthly pensions would still remain below that received in several jurisdictions with a 75% plan because of the differences in FAS. The City has not rebutted that with evidence to show a contrary result, in either the few local agencies to which the Union has compared to illustrate this point (in UX 16), or in the 17 agencies with a 75% formula to which the City compares itself. Rather, the City has contended this "current" calculation of take-home benefit may change over time and cannot be assumed to be accurate since both San Jose and other agencies may change the definition of FAS.

The City further contends that the Unions' remedy should have been to seek to negotiate a change in the definition of FAS because it is that, not the maximum percentage formula, that is causing the discrepancy with other 75% plans. But the Unions elected to modify the "take-home" level of pension benefit by seeking an 80% formula, rather than by tinkering with the definition of FAS, and it is that question that is presented in arbitration. Changing FAS to remedy the proven disparity is not a choice before this Board.

(4) Of the half of all fire and law enforcement personnel statewide who do not currently enjoy a 3%/80% benefit, most if not all are in PERS; thus, they are restricted by legislation from obtaining an 80% plan.

The Charter's comparability criterion does not mean that an award must assure that San Jose conforms to the statutory PERS standard. Indeed, the existing San Jose plan does not conform, as the Unions have shown, since San Jose does not factor in as many forms of compensation as do PERS jurisdictions when calculating pensionable salary. Nor, as the City has shown, does it conform to PERS in the formula used to calculate pension benefits, which for PERS is an "age-related" formula but for the City is not. If the existing San Jose 2.5%/75% plan had been a mirror image of the PERS 2.5%/75% plan, then a stronger case could be made under the comparability criterion for rejecting the Unions' proposal because it would not keep San Jose in line with the half of the safety service population that has a 2.5%/75% plan. But the evidence shows that the 2.5%/75% is only one way in which the San Jose plan is similar to the PERS plan, whereas in other ways San Jose's plan is different and in some ways less beneficial to retirees.

(5) The Charter's comparability criterion does not require that any plan granted by the Arbitration Board be one already in existence in a majority of comparable agencies or even for the majority of employees in the state performing similar services. Of course, the more evidence that the key elements of a proposal are already in existence in a significant proportion of comparable agencies or for a significant number of employees performing similar service would strengthen the Unions' case to grant a comparable benefit, under this Charter criterion. But, the requirement that the Board consider comparability evidence means exactly that -- consider and weigh such

evidence. It does not mean that a benefit can be awarded only if it is a "majority" benefit.

(6) The evidence of other public employers' retirement plans provides support for the Unions' contention that proposed improvement in the retirement formula will overcome a situation wherein the take-home benefit of San Jose's current 2.5%/75% plan is measurably less than it is for other employees with a 2.5%/75% plan, whereas an 3%/80% formula would still not cause San Jose police and fire to enjoy a superior retirement benefit in terms of take-home compensation, compared to other police and fire personnel in comparable public agencies. Although the benefit will improve San Jose's relative "standing" among other public employers, it will not cause San Jose to exceed the benefit levels enjoyed by employees in comparable agencies performing similar services. In reaching this conclusion, the Board is aware that the present-value method of evaluating San Jose's plan already puts it in a superior position, but the Board places greater weight on the measure of the pension value which the individual retirees sees in his or her monthly benefit.

III. Cost and Total Compensation

Since the Unions' proposal can be justified under the comparability factor in the Charter's mandate, the remaining consideration is whether it is justified given its cost and in light of recent adjustments in total compensation for these and other city employees, as compared to increases in the consumer price index.

The cost of granting the 3%/80% proposal is projected to be 1.92% of payroll. The parties are not in dispute on this projection.

A. Union position on cost and total compensation

The Unions contend that, since the City is not raising an ability to pay defense to the 3%/80% proposal, and since the retirement plan has a surplus of \$232 million in current market value, which has resulted in a marked decline in the City's but not the employees' contribution rate (and may result in the City stopping contributions), the City can meet the cost of the 3%/80% proposal.

They note that the CPI and recent pay increases, while appropriately considered by the Arbitration Board, are largely irrelevant since the Unions have met the criteria of Charter Sec. 1111, that is, they have shown the City possesses the "ability to meet the cost" of the 3%/80% proposal, and that relevant retirement benefits of external employees "performing similar services" surpass those of San Jose's police and firefighters.

Further, they contend the 1992 retirement enhancement should be given no weight, given the length of time since the City agreed to that benefit improvement, and since the Unions agreed to it in exchange for a zero percent pay increase.

No evidence supports the City's stated concern that granting the proposed benefit would discourage turn-over, which in turn might negatively affect the City's ability to diversify its ranks through increased hiring opportunities.

B. City position on cost and total compensation

The City contends the high cost of the proposed 3%/80% benefit, combined with the recent compensation adjustments for these units, compel a conclusion that the 3%/80% proposal is not warranted. In support of its position, the City notes that:

(1) The CPI for this area increased only 2.3% in 1996, compared to the 4% salary increase for 1996-97, and the fact that salaries have increased in the past five years more than has the CPI: a total 5-year increase in area CPI was 9.1% compared to a 15% increase in police salary, and an 18% in fire salary. (CX 47).

(2) Other city bargaining units over the same period have received salary increases of less than 10% and have received no retirement enhancements.

(3) The City has no recruitment/retention problems, quite the contrary, which indicates no upward adjustment in benefits is warranted to attract or keep employees.

(4) Merely because the City has not claimed "inability to pay" does not mean the benefit should be granted; rather, ability to pay is a defense to an otherwise justified increase, and this increase is not justified on any grounds.

(5) The current good earnings performance of the retirement plan and the related reduction in employer contribution rates does not mean that any benefit

requested must be granted. The proper consideration is the financial condition of City, not the financial condition of retirement fund.

(6) The positive performance of the plan can change, as evidence of other jurisdictions demonstrates, but once vested, retirement benefit cannot be reduced to accommodate funding shortfalls, for which the City will be liable. So appropriately it's the City's contribution rate that is lowered owing to any actuarial surplus in the fund itself.

C. Arbitration Board's conclusion on cost and total compensation

In traditional bargaining, total compensation (both pay and benefits) and non-economic terms are weighed in the balance when the parties attempt to negotiate new contract terms. Therefore, those factors must be considered by the Arbitration Board under Charter Sec. 1111, requiring consideration of "traditional factors" when deciding whether retirement adjustments are warranted. Furthermore, Union representatives formally acknowledged that the recent negotiated increases in compensation would be considered by this Arbitration Board as part of the total compensation package when considering proposed changes in retirement benefits (CX 5, CX 6).

Equity among bargaining units is a factor which employers consider when negotiating compensation increases for a particular unit, and is, therefore, a factor which this Board must also bear in mind in weighing the appropriateness of the parties' proposals.

The evidence of recent compensation adjustments for police and firefighters is as follows: Both units negotiated a 4% salary increases in 1996-97 and in 1997-98. Both units also negotiated increases in uniform allowance. (CX 7, CX 8, RT III, 116, 123). The last retirement MOA in 1992 resulted in various enhancements, including a lowering of minimum age requirement (from 55 to 50 w/ 25 years service), inclusion of holiday pay in FAS calculations, sick leave pay-out for retirees, and a retirement adjustment. (Jt.Ex. 2, CX 32.)

The most compelling evidence the Unions have offered, to support their burden of persuasion, is that the benefit is not beyond the City's financial means, in light of its admitted ability to pay, and particularly in light of its reduced retirement contribution

obligations prompted by the superior financial condition of the retirement plan. The most compelling evidence the City has offered to rebut that evidence is that the 3%/80% proposal bears a very big price tag, which simply cannot be justified given the recent substantial pay increases these two units have negotiated in their 1996-98 contracts.

IV. Arbitration Board's Conclusion and Award

Grant Unions' final offer.

The Unions have borne their burden of persuasion on this issue. The evidence concerning external comparisons, as detailed above, supports the Unions' position that the current 2.5%/75% formula does not provide a comparable benefit to that of other 2.5%/75% formulas for employees similarly situated, granting the 3%/80% benefit would not skew the comparison of San Jose's retirement plan to that of comparable agencies, and finally, that the 3%/80% benefit is not unique, but is already enjoyed by other employees who are similarly situated to San Jose's police and fire personnel, as well as by a significant number of safety service personnel who arguably have less onerous working conditions.

The structure for negotiating compensation in San Jose is unusual in that negotiations, including arbitration for resolving impasses, separates pay and other compensation elements from retirement benefits. Thus, the parties are not able to present as many options to the arbitration board for resolving bargaining impasses, since the only components before this board are retirement improvements. Nonetheless, this Board has given due consideration to total compensation evidence to determine whether this proposed enhancement to the retirement should be granted in addition to other compensation adjustments already achieved.

The Board concludes that the evidence concerning the cost of this proposal, the level of recent compensation adjustments compared to increases in the CPI, and the bargained-for compensation of other City employees is not sufficient to defeat the conclusion that an improvement in retirement benefits is warranted by the external comparison evidence and by the ability of the City to meet the cost of the proposal.

ISSUE 2: DROP Proposal

Unions' Final Offer:

A Deferred Retirement Option Program ("DROP") will be implemented effective July 1, 1997, as described in detail in Exhibit A to the Unions' Final Offer.

City's Final Offer:

Since DROP was proposed by the Unions solely as the funding mechanism for 80% of final average salary, DROP should also not be awarded

The Unions proposal is to institute a modification to the retirement plan, permitting eligible employees to opt to participate for up to three years in a deferred retirement plan (DROP). The details, as outlined ultimately in the Unions' final written offer, are not reiterated here, but are referred to in the context of the discussion below to the extent necessary to explain the parties' positions and the Board's determinations.

I. Scope of Arbitrability of DROP proposal

The arbitrability award issued February 28, 1997, in this proceeding provided that the DROP proposal was arbitrable only because it was counter-offer to the City's assertion that the 3%/80% proposal was too costly, a counter-proposal which the Unions averred would save enough money to pay for a 3%/80% proposal. Therefore, the threshold question for the Board is whether it will "save" money in the magnitude of 1.92% of payroll. If it will not, then it is not a matter properly before Board, and Board will not grant DROP regardless of any other consideration under Charter criteria. If it is "cost-saving" then will be considered by other Charter criteria and parties arguments as to whether it should be granted as part of package including 3%/80% proposal, if that proposal should be granted itself.

Board does not accept Union's framing of the issue, which is that, since the City concedes ability pay for the 3%/80% proposal, there is no need to show that DROP pays that proposal's cost and that DROP is a "stand-alone" independent issue to be accepted on its merits. DROP was allowed "on the table" under specified circumstances, over the City's most strenuous objection, and the Unions will be held to

their position that DROP was offered solely because it would fund 3%/80% and that it was not a "new issue" introduced after declaration of impasse.

Therefore, for the DROP proposal to be arbitrable, the evidence must show it is more like than not that DROP as proposed will be cost saving. And, to be granted, the Union must show DROP is more likely than not to produce cost saving sufficient to substantially offset estimated cost of the 3%/80% proposal, i.e., 1.92% of payroll.

II. The Parties' evidence and position on cost of DROP

The Unions offer three reasons that DROP is more likely than not to result in the requisite cost savings to City through lower employer contribution rates to plan (Union Opening Brief, p. 22):

(1) For employees retiring on or before 30 years of service, the actuarial value of the lump sum employees would get under DROP is less than the actuarial value of the annuity under either the 3%/80% or the current 2.5%/75% retirement plan; therefore, the contribution rates for the City will be less because they will be funding a benefit of lesser value.

(2) Employees will work longer, an estimated 1.8 years (on average), than they would without DROP, in order to maximize the lump sum they would accrue under DROP. Therefore, the City will have lower contribution rates because the retirement system will have longer to fund the same benefit (plus only interest earned during the three-year DROP period). (It is the "same benefit" the employee would have gotten if he/she actually retired instead of entering DROP, because FAS and years of service are "frozen" as of the date of DROP election.)

(3) 50% or more of eligible employees will elect DROP, which is the participation level that will result in no net cost to the City for combined package of the 3%/80% proposal and DROP.

The City does not refute the Unions' point (1).

The City disagrees that eligible employees will work nearly 2 years longer in order to participate DROP, so it contends that the Unions' point(2) is not true. Also, if

employees who do participate work more than 33 years, (i.e., stay on AFTER the DROP period ends) the City cost begins going up again, offsetting any savings.

The City agrees that the Unions' point (3) would be true (i.e., no net cost if 50% participate), but disagrees that 50% of employees will in fact elect to do so.

So the question for the Arbitration Board is whether to accept the Unions' points (2) and (3).

A. Union evidence and argument regarding employees working longer under DROP:

Union actuary Lowman "assumed" that employees who elect DROP would work 1.8 years longer by assuming that all who entered DROP would stay in for the full 3 years allowed, unless they had to leave because of disability or death. Based on ACTUARIAL ASSUMPTIONS about disability and death, that would result in an "average" increase of 1.8 years longer service than if there is no DROP to entice them to stay on beyond their planned retirement date. (RT I, 106-7, UX 1, p. 18a, 18b) (i.e., the Plan's current assumptions is that employees work an average of 4.5 years after first eligible to retire, so Unions project employees who elect DROP will work an average of 6.3 years after first eligible to retire).

Union DROP expert Sugarman testified to personal knowledge of experience (no hard evidence offered) in existing DROP programs elsewhere, which indicates employees do work longer under a DROP plan, that is, in a 5-yr DROP, employees usually stay 3-4 years beyond their "normal" retirement date. So he agreed that Lowman's assumption of 1.8 years in this proposed 3-yr DROP plan is reasonable assumption. (RT II, 72 et seq.)

From this evidence, the Unions argue that those who (under current experience/assumptions) retire as soon as eligible, would be encouraged to stay an average of 1.8 years longer to accrue a DROP lump sum. Also, those who retire at 30 years service (since they earn no further pension benefits after 30 years), would be encouraged to work longer to gain the lump sum. Likewise, those who target their retirement date based on when monthly retirement income reaches a certain amount would be encouraged to stay on to get the additional lump sum. The Union rejects as

unrealistic the City's contention that employees might continue to work after their DROP period, although acknowledging that if they did, that would increase costs.

B. City evidence and argument regarding employees working longer under DROP.

In its actuarial analysis of the DROP proposal (CX 15, tab 3), the City offered no evidence regarding DROP experience elsewhere that would refute the Union's assumptions or Sugarman's testimony about his general knowledge. Rather, the City merely contended Lowman's assumptions are not reasonable. To illustrate the unreasonableness of his assumption, the City uses his figures (UX1, 18a,b) to show he is anticipating that, of those eligible to retire at age 50, instead of only 52.6% of them still working at age 54 (the current experience), under DROP, he expects 84.1% to still be working at 54, a decrease of 30.5% in the retirement rate for this group. For those eligible to retire at 55, Lowman assumes a 42.3% decrease of those retiring within 4 years of their eligible retirement date. The City contends this is too drastic a change in employee behavior to be accepted as a reasonable assumption.

The City offers its own expert's assumption as more reasonable: Employees who would have retired at ages 50 to 52, but who delay to enter DROP as soon as eligible at age 50, would then retire at the end of their DROP period, which would be age 53. That only adds one year to their service, not nearly two years that the Union projects. (RT IV, 63, CX 15, p. 30). There is no evidence that a one-year extension of service (City's estimate) would produce a sufficient reduction in the City's contribution rates to produce the requisite savings. The City also points to a statement made by a POA official that police officers are interested in early retirement and would not likely work longer as a result of DROP. (RT III, 103). The City also contends that if employees continued to work after DROP period and postponed retirement, that there would be an added cost, not a savings.

C. Union evidence and argument regarding a 50% participation rate

The Unions' actuary based his "no net cost" projection for (3%/80% combined with DROP) on an assumption that 50% of eligible employees would opt for DROP. He acknowledged this was a "comfortable" guess, that no one will know the actual

participation rate until it happens. He noted that the Baltimore DROP gets 90% participation, but acknowledged that plan has many "bells and whistles" that make it more attractive than the San Jose "stripped down" version. Since the San Jose plan is "unique," he said there is no pragmatic evidence available of participation rates in any similar plan. (RT I, 200-01)

The reason for Lowman's assumption is the perceived attractiveness of lump sum to retirees. The Unions acknowledge that DROP has lower actuarial value for the retiree than an annuity under the 3%/80% formula, but dispute that employees will not opt for DROP because of that lesser actuarial value. They contend the difference in value is approximately 4%, not a "significant" difference, and that a majority of employees will be more interested in the lump sum than in the probability of earning a 4% greater annuity if they do not take DROP and instead take the 3%/80% standard retirement.

D. City evidence and argument regarding a 50% participation rate.

The City notes there is no evidence to support Lowman's 50% assumption, because there simply is no comparable plan from which to deduce experience. It finds it unreasonable to assume that a majority of eligible employees would take DROP since it has a significantly lesser actuarial value than a basic pension annuity under the 3%/80% formula.

III. Arbitration Board's Conclusion and Award

Deny the Unions' final offer.

For two reasons, the Unions have not met their burden of proving that adoption of the DROP program as proposed is more likely than not to produce savings of a magnitude approximate to the cost of the 3%/80% proposal:

(1) The Unions cannot show it is more likely than not that participation in DROP would meet the 50% "break even" level, since no comparable DROP plan exists from which to deduce participation rates, and there are incentives for employees NOT to opt for DROP as proposed (i.e., lesser true value of benefit to employee).

I. Union evidence and argument

While the PERS "reciprocity" ordinance was being considered and before it was adopted, the City and Unions both understood it would apply to past service of all employees, not just those hired after the date of the ordinance. But when passed, the ordinance did not cover existing employees. The cost to grant full reciprocity is estimated at 0.11% to 0.33% of payroll, which is a negligible cost item (stipulated, RT III, 51, UX 11B). Contrary to the City's claim, the Unions' final offer does not add a "new element" of extending to service in other "PERS reciprocal" systems; the proposal adds no new retirement plans or systems to those already covered by the San Jose Plan's current reciprocity provision, since it already applies to both FERS and PERS reciprocal systems (RT III, 182).

II. City evidence and argument

The evidence shows that other large agencies with independent plans like San Jose do not offer full reciprocity. (Gurza, RT IV, 193-94), nor do "normal comparator" agencies. The Unions have offered no evidence of agencies that do offer full reciprocity. The reciprocity in the ordinance is as defined by PERS, that is, not "full." (CX 43, 44, 45). The purpose of the ordinance is to remove disincentives for new employees to come to San Jose from PERS systems by assuring they would not lose PERS service credit; that purpose is not served by granting the benefit to employees already here. There was no "agreement" with Unions prior to ordinance passing to grant "full" reciprocity. The cost, of up to .33% of payroll, is far from "negligible" (.33% of payroll is approximately \$500,000). Also, the Unions' final offer adds a previously unmentioned component, to allow members to combine time at agencies which utilize "PERS or *other reciprocal retirement systems*." That additional element should not be considered by Board because it was not included in the Unions proposals that were before the Board in the evidentiary hearing.

III. Arbitration Board's Conclusion and Award

Deny the Unions' final offer.

The purpose of the ordinance was to enhance portability of benefits to encourage employees from PERS systems to come San Jose. That purpose is not served by extending the benefit to those already employed in San Jose. The only purpose served is one of internal equity, that is, providing the same reciprocity benefit for employees already here as is provided under the ordinance of those employed after its effective date. The purpose of the ordinance was also to grant the same reciprocity that PERS itself does, but the Unions' proposal would do more than the PERS plans do in terms of reciprocity. Under the Charter requirement to consider comparable benefits to similarly situated employees, there is no evidence to support this proposal. Also, given the cost of this arbitration package which includes the 3%/80% proposal, at a cost of 1.82% of payroll, there is no justification for adding another cost item to the award.

ISSUE 4: Retiree Medical Benefits Proposals

Unions' final offer:

Retiree Medical Benefits: Plan to pay 90% of lowest priced plan, retiree pays difference if elects higher cost plan, but with \$100 cap on monthly premium with Plan paying difference between \$100 and actual cost of plan.

City's final offer:

Increase the employee's benefit regarding payment of premiums for medical insurance for future retirees to the 100% of the lowest plan option. The 100% of the lowest priced plan option is essentially as follows:

Premiums for medical insurance coverage provided in the Police & Fire Department Retirement Plan shall be paid as follows:

- (1) The Retirement Plan Shall pay that portion of the premium which represents an amount equivalent to the lowest of the premiums for single or family medical insurance coverage for which the member or survivor is eligible and in which the member or survivor enrolls under the provisions of the Police & Fire Department Retirement Plan, which is available to an employee of the City at such time as said premium is due and owing.

(2) Members or Survivors Shall be required to pay that portion of the premium which represents the difference between the cost of the premium for the medical plan selected by the employee or their survivors and the portion paid by the retirement Plan. Such premium as is required to be paid by a member or survivor shall be deducted from the allowance payable to such member or survivor under the Police & Fire Department Retirement Plan as provided in the Municipal Code.

The above language is to be interpreted as has been interpreted by the City with regard to Federated retirees.

I. Union evidence and position

The City's proposal is actually more costly than is the Unions' proposal (0.06% of payroll for the City's, compared to 0.04% for the Unions'). The City proposal also forces retirees living outside Kaiser-service area to pay for "cadillac plan" from their own pocket, whereas the Unions' proposal would alleviate that burden by facilitating their ability to live outside the area without suffering an adverse financial impact.

II. City evidence and position

While the City does not believe that any cost items are warranted, it has made a proposal, the cost of which is .06% of payroll, to provide future police and fire retirees the same benefit as is currently provided to retirees in the Federation plan, in order to provide internal consistency between police, firefighters, and miscellaneous employees. The Retirement Plan already offers better health care benefits than a significant number of comparative jurisdictions, and no comparable agencies have a "\$100 cap" component as proposed by Unions. Several plan options already exceed the \$100 cap, so the City would be responsible for any future increases, and employees would have no disincentive to opt for lower-priced plans. Once negotiated, the \$100 cap would become vested and could not be negotiated upward. There is no reason for retirees to have a better benefit than active members.

III. Arbitration Board's Conclusions and Award

Grant City's final offer.⁹

The Board notes that the City's proposal is, in itself, a benefit enhancement. The cost element is not dispositive, since the difference between estimated cost of Unions' proposal and the City's proposal is negligible. Factors that make the City proposal more acceptable to the Board include the lack of evidence regarding comparable benefits to that proposed by the Unions for similarly situated employees, internal consistency (i.e., parallel to Federated plan benefits and comparability to active employees' benefits), and the potential problems with locking in a vested right to the \$100 cap, with a likely future cost impact.

ISSUE 5: Employee Assistance Program Proposal

I. Unions' final offer:

Employee Assistance Program ("EAP") for Retirees: Retirees shall receive the same psychological counseling services enjoyed by active employees, retroactive to the effective date of the agreement.

II. City's final offer:

To provide to future retirees the same Employee Assistance Program as is provided to active sworn members of the Police and Fire Departments.

III. Arbitration Board's Conclusion:

Because of information that came to attention of the Board of Arbitration after conclusion of the hearings and submission of post-hearing briefs, the Board has determined that EAP benefits for retirees are apparently not within the jurisdiction of the Retirement Board to provide. Therefore, the Arbitration Board has determined that the issue is outside the jurisdiction of this Arbitration Board, which makes no award on the parties' proposals.

⁹ The increase in contribution rates caused by this benefit enhancement is to be calculated so that the City and the employees pay the cost of the enhancement on a 50:50 basis from the effective date of the enhancement.

The parties have agreed to grant the undersigned neutral Arbitrator jurisdiction over the parties' efforts to negotiate a side letter for a benefit extending EAP benefits to retirees.

ISSUE 6: Term of the Agreement and Effective Date of Benefit Enhancements

I. Parties' final offers and positions

The Unions proposed a three-year term, from 2/4/1996 through 2/3/1999. The Unions also propose that all benefit enhancements be retroactive to the effective date of the agreement, that is February of 1996.

The City proposes a four-year term, from 2/4/1996 through 2/3/2000, as being consistent with past practice of four-year agreements. The City has raised some concerns some terms being made retroactive to February 1996.

II. Arbitration Board's Conclusions and Award

The term of this agreement will be four years, effective February 4, 1996 through February 3, 2000.

This award is consistent with the parties' past practice on duration of the Retirement MOA. The Unions have presented no reason to depart from the status quo with regard to contract duration. Furthermore, the Board notes that this contract will grant substantial benefit enhancements, this impasse resolution process will not be resolved until nearly the end of the second year of the contract, and there are no "open" issues needing to be addressed, all of which militates against a shorter, three-year contract duration.

Retroactivity to February 1996 is not a "separate" issue, but rather has to do with the effective date of the benefit changes and enhancements. The Board has considered various potential problems with "retroactive" effect back to the effective date of the contract, and has determined that the following effective dates will apply to the enhancements and changes ordered in this Award.

(1) The 3%/80% formula. The new benefit will be effective as of the February 4, 1996, effective date of this MOA.

To afford the parties the opportunity to fully address the question of how to cover the cost of making this benefit change retroactive from the date of this award to the effective date of the MOA, the Board retains jurisdiction over this question in order to receive argument and such evidence as may be necessary to support that argument. The City and the Unions are directed to submit arguments on this question to the Board of Arbitration, in a briefing schedule to be set by the Board. The Board will issue a supplemental award addressing this specific question.

(2) Medical Benefits. For employees who retired after the February 4, 1996, effective date of this contract, the benefit enhancement is effective for premiums paid for coverage beginning on the first of month following the date of this Award.

Tentative Agreements

Prior to impasse, the parties had reached agreement on two benefit issues. They stipulated that the terms of those agreements, as set out in Joint Exhibit 11, were to be incorporated into the Award, as follows:

I. Survivorship Benefits

Survivorship benefits of persons retired after the effective date of this agreement shall be equal to 37-1/2% of the retirees final average salary; provided, however, that if the retiree has retired with less than 20 years in this Plan but has

aggregated his or her years of membership in PERS with those in the City Plan to be eligible to receive benefits from the City Plan, survivorship benefits shall be equal to $1.875\% \times \text{final average salary} \times \text{years in City Plan}$.

The intent of this proposal is to calculate survivorship benefits for persons eligible for reciprocity who have less than 20 years in the San Jose Plan using the same method used for survivors of deferred vested retirees, and avoid a survivor receiving a greater benefit than the retiree. There is no actuarial impact on the contribution rates for the employees or the City from this proposal.

II. Dental Benefits

The Plan should be clarified to ensure that retiree eligibility for dental insurance benefits is determined on the same basis as eligibility for medical insurance benefits. There is no actuarial impact on the contribution rates for the employees or the City from this proposal.

Cost of Benefit Modifications

The parties also reached tentative agreement concerning the City's costs associated with the retirement benefit modifications that would result. The terms of that agreement, in Joint Exhibit 11, is as follows:

City costs associated with retirement benefit modifications included in this agreement for members of the units shall be explicitly recognized and considered by the parties and an arbitration board, as part of the total compensation package being provided to the units, in addition to the other factors required by City Charter Sec. 1111 (in its present form as of the date of this Agreement), and any subsequent proceeding to resolve disputes over salaries and other elements of compensation.

Total estimated City cost of benefit modifications approved in this Tripartite MOU, based on actuarial analyses, is \$ _____, or 1.98 % of the combined total compensation bases for both bargaining units.¹⁰ The total estimated employee cost of benefit modifications approved in this Tripartite MOU, based on actuarial analyses, is \$ _____, or .33% of the combined total of compensation bases for both bargaining units.¹¹

The parties will mutually request the Retirement Board to conduct an actuarial study of the cost of these benefits and the changes in contributions rates of the City and the employees necessary to implement these benefits, and will mutually request the Retirement Board to adopt the necessary contribution rate changes as soon as reasonably possible.

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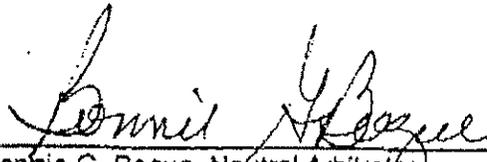
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¹⁰ Jt. Ex. 9, Itelson's costing: 80% proposal is costed at 1.92%, and the medical benefit at 0.06%, for total City cost of 1.98%. No dollar figures were provided to the Board.

¹¹ Jt. Ex. 9, Itelson's costing: 80% proposal is costed at 0.27% and the medical benefit at 0.06%, for total employee cost of 0.33%.



Bonnie G. Bogue, Neutral Arbitrator

Date: 11-17-97

(signature page attached)
Kenneth E. Heredia, Union Arbitrator

(signature page attached)
Darrell Dearborn, City Arbitrator

I concur and/or dissent to each issue, as follows (see separate Opinion attached):

Issue 1: 3%/80% Proposal

Dissent: _____

Assent: 1574

Issue 2: DROP Proposal

Dissent: 1574

Assent: _____

Issue 3: Expanded Reciprocity Proposal

Dissent: 1574

Assent: _____

Issue 4: Retiree Medical Benefits Proposal

Dissent: 1574

Assent: _____

Issue 5: Employee Assistance Proposal

Dissent: _____

Assent: 1574

Issue 6: Term of Agreement and Effective Dates

Dissent: _____

Assent: 1574

Kenneth E. Heredia
Kenneth E. Heredia, Union Arbitrator

Date: 11/17/97

I concur and/or dissent to each issue, as follows (see separate Opinion attached).

Issue 1: 3%/80% Proposal

Dissent:

Assent:

Issue 2: DROP Proposal

Dissent:

Assent:

Issue 3: Expanded Reciprocity Proposal

Dissent:

Assent:

Issue 4: Retiree Medical Benefits Proposal

Dissent:

Assent:

Issue 5: Employee Assistance Proposal

Dissent:

Assent:

Issue 6: Term of Agreement and Effective Dates

Dissent:

Assent:



Darrell Dearborn, City Arbitrator

Date: 11-14-97

EXHIBIT 4

OPINION AND AWARD
IN INTEREST ARBITRATION PROCEEDINGS PURSUANT TO
SAN JOSE CITY CHARTER SECTION 1111

In the Matter of:)
)
CITY OF SAN JOSE)
Employer)
)
and)
)
INTERNATIONAL ASSOCIATION OF)
FIREFIGHTERS, LOCAL 230, AFL-CIO)
Union)
_____)

OPINION OF THE CHAIR

C.S.M.C.S. Case No. ARB-04-3025

ARBITRATION BOARD MEMBERS:
Jerilou H. Cossack, Chair
Nora Frimann, City-Appointed Member
Randy Sekany, Union-Appointed Member

APPEARANCES:

On behalf of the City: Charles D. Sakai, Esquire
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On behalf of the Union: Christopher E. Platten, Esquire
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San Jose, CA 95125

OPINION

An Arbitration Board was convened pursuant to San Jose City Charter Section 1111, when the City of San Jose and the International Association of Firefighters, Local 230, were unable to reach agreement on the wages and terms and conditions of employment for a new collective bargaining agreement. Arbitrator Jerilou H. Cossack was selected as the neutral chairperson, Chief Trial Attorney Nora Frimann as the City-appointed member, and Union President Randy Sekany as the Union-appointed member. The neutral chairperson was selected from a list provided by the CALIFORNIA STATE MEDIATION AND CONCILIATION SERVICE.

At the outset of the proceedings, depending on exactly how one counted, there were between 36 and 39 outstanding unresolved issues. Hearings were held in San Jose, California, on November 20 and 21, December 4, 5 and 6, 2006, January 3, 4 and 5 and February 8, 2007. Interspersed among the formal hearing dates were several mediation sessions which resulted in the withdrawal of some proposals and achievement of tentative agreements on several others.¹ Both parties had full opportunity to present documentary and testimonial evidence and to examine and cross-examine witnesses. There remained 30 outstanding issues at the close of the formal evidentiary proceedings.

On February 13, 2007 both parties submitted their final proposals on the issues in dispute. On March 22, 2007, upon receipt of both briefs, this matter was taken under consideration. The final proposals of the parties as submitted were identical on two issues: Issue 4, EMT Pay, and

¹ Tentative agreements were reached concerning Article 26.1.2 (Sick Leave Usage), Article 28.6 (Employee Paid Plan Changes for Retirees), Article 29.5 (Hydrant Marker Maintenance), Article 37.2 (Wellness/Fitness Program Labor Management Committee), Article 40 (Substance Abuse Program), Article 1 (Term), and Articles 31.1 and 31.2 (Bereavement Leave).

Issue 6, Holiday in Lieu Pay. Prior to the completion of the Arbitration Board (hereafter Board) deliberations, the parties were able to reach accord on two additional issues: Issue 21, Establish Labor Management Committee on DROP; and Issue 8, Support Paramedics. There remain 26 issues in dispute.

The Charter

San Jose City Charter Section 1111 governs these proceedings. It states, in pertinent part,

At the conclusion of the arbitration hearings, the Arbitration Board shall direct each of the parties to submit, within such time limit as the Board may establish, a last offer of settlement on each of the issues in dispute. The Arbitration Board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most nearly conforms with those factors traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment, including, but not limited to, changes in the average consumer price index for goods and services, the wages, hours, and other terms and conditions of employment of other employees performing similar services, and the financial condition of the City and its ability to meet the cost of the award.

After reaching a decision, the Arbitration Board shall mail or otherwise deliver a true copy of its decision to the parties. The decision of the Arbitration Board shall not be publicly disclosed and shall not be binding until ten (10) days after it is delivered to the parties. During that ten-day period the parties may meet privately, attempt to resolve their differences, and by mutual agreement amend or modify any of the decisions of the Arbitration Board. At the conclusion of the ten-day period, which may be extended by mutual agreement between the parties, the decision of the Arbitration Board together with any amendments or modifications agreed to by the parties shall be publicly disclosed and shall be binding upon the parties.

Preliminary Statement

Charter Section 1111 provides general guidance to the Board in its evaluation of the various proposals submitted for resolution, but expresses no preference for one factor over another. It invites the Board to consider, among other things, comparisons between other groups of employees who perform similar services. Generally when making such comparisons,

arbitrators look to external comparisons between other jurisdictions and internal comparisons within an employer's own workforce.

Each party in these proceedings has proposed external comparison with other groups. The Union has focused primarily on what is known as the "Big Bay Four," consisting, in addition to the City of San Jose, of the City of Oakland, the City and County of San Francisco, and the County of Contra Costa. The Union also looks to other departments in Santa Clara County which serve populations greater than 100,000, i.e., Santa Clara City and Santa Clara County. The Union insists that only these jurisdictions have a sufficient population and significantly complex duties to warrant comparison. The Union also insists jurisdictions in southern California are not appropriately comparable because economic and demographic factors differ substantially between northern and southern California.

The Employer, on the other hand, does not dispute the relevance of the "Big Bay Four," but insists that universe is too small to provide valid comparables and the appropriate comparison must include jurisdictions geographically proximate to San Jose, or, alternatively, other jurisdictions throughout the state with similar service populations. The Employer raises the same objections to the Union's second proffered comparable universe consisting of the two jurisdictions in Santa Clara county serving populations of more than 100,000.

As arbitrators Bogue, Brand and Goldberg before me have opined, there is no completely comparable universe. As will be more fully discussed below with respect to specific matters in dispute, one must balance the dictates of the competing universes with respect to the imperatives of the issue under discussion.

By and large, both parties agree the appropriate group for internal comparison is the San Jose police force.

Neither party here has placed any emphasis on changes in the consumer price index (CPI) for goods and services. The wage proposals of both parties exceed changes in the CPI, although the City's proposals are closer than those of the Union.

While the City has not claimed it is unable to pay for the wage and benefit increases sought by the Union, it does contend that they would necessarily curtail the City's ability to fund other programs. The City points to program and staff reductions which occurred following the "dot com bust" and its desire to take advantage of its gradually improving economic condition to make restorations. The Union acknowledges the negative effect of the "dot com bust" on City coffers, but points to substantial and continuing improvement in the City's financial status.

The Charter also requires the Board to select the last offer of one party or the other. The Board cannot modify either party's last offer, nor may the Board devise its own solution to the particular matter in dispute. Thus, while the Board may not think either offer is very desirable, it must select one or the other. The party seeking change in the status quo bears the burden of proof and persuasion.

The various proposals submitted in these proceedings fall into four general categories: compensation, health insurance, retirement, and operations. The discussion which follows will address the proposals submitted in each category.

Discussion

Category 1: Compensation

ISSUE 1: GENERAL WAGE INCREASE (Article 5.1)

City Proposal

Effective ~~June 25, 2000~~ July 3, 2005, all persons represented by the IAFF shall receive a wage increase of ~~6% and a special market adjustment of 2.4% for a total increase of 8.4%~~ 1.5%.

Effective June 24, 2001 July 2, 2006, all persons represented by the IAFF shall receive a wage increase of 6% and a special market adjustment of 2.0% for a total increase of 8.0% 5.70%.

Effective June 23, 2002 July 1, 2007, all persons represented by the IAFF shall receive a wage increase of 6% and a special market adjustment of 1.0% for a total increase of 7.0% 5.70%.

Effective June 29, 2008, all persons represented by the IAFF shall receive a wage increase of 3.75%.

Any general wage increase during the term of the MOU will be reduced by the cost of any additional premium pay for Special Operations effective on or after the first pay period of that fiscal year.

The wage increases and special market adjustments are approximate in accordance with current City of San Jose payroll tables. Salary ranges are attached hereto.

Union Proposal

Effective June 25, 2000 July 3, 2005, all persons represented by the IAFF shall receive a wage increase of 6% and a special market adjustment of 2.4% for a total increase of 8.4% 1.5%.

Effective June 24, 2001 July 2, 2006, all persons represented by the IAFF shall receive a wage increase of 6% and a special market adjustment of 2.0% for a total increase of 8.0% 5.7%.

Effective June 23, 2002 July 1, 2007, all persons represented by the IAFF shall receive a wage increase of 6% and a special market adjustment of 1.0% for a total increase of 7.0% 5.7%.

Effective July 1, 2008, all persons represented by the IAFF shall receive a wage increase equal to the greater of 5% or the average of the increases in hourly compensation that are effective during the period from July 1, 2007 through the first payroll period of Fiscal Year 2008-2009 for the top step firefighter rank for firefighters employed by Oakland, San Francisco and Contra Costa County as expressed on a cost per hour basis. Cost per hour basis will be defined and calculated as follows: all cash compensation received for the first pay period of July, 2008, including, but not limited to, (1) base monthly salary, (2) uniform allowance, (3) holiday pay, (4) EMT pay, (5) Employee Paid Member Contribution (EPMC) for employee's pension, (6) FLSA pay received for regularly scheduled work, and (7) any other compensation for regularly schedule work as shown and calculated in Union Exhibit 5A and 5D attached hereto, divided by hours worked (i.e., scheduled hours less vacation hours).

~~The wage increases, and special market adjustments are approximate in accordance with current City of San Jose payroll tables. Salary ranges are attached hereto as "Exhibit I, II, and III".~~

Positions of the Parties

The City. The City has a longstanding history of using two survey universes: Bay Area jurisdictions with a population of over 100,000 and the 10 Largest California Cities. These survey universes strongly reflect the City's labor market.

The Union's Santa Clara County universe is different than any of the universes the Union has used in the past and lacks a logical basis. This is the first time the Union has presented a two-jurisdiction Santa Clara County universe and, as such, suffers the fatal flaw of inadequate sample size. Similarly, the Union's "Big Bay Four" survey is too small to be of value. While the City agrees with the Union that the three largest fire protection agencies in Northern California - San Francisco, Oakland, and Contra Costa County - are appropriate comparables, the small number of survey agencies makes this universe significantly susceptible to corruption by survey agencies which are markedly different than the others in the survey. The Union's "cost per hour" methodology fails to accurately reflect the actual cost per hour worked and omits a number of factors which are extremely important to the cost per hour methodology developed by the Department of Labor.

The long term effects of the "dot com bust" continue to negatively impact the City's ability to deliver services to its residents. Personnel costs make up approximately sixty percent of the City's general fund expenditures. To deal with the budget problems, the City found it necessary to take steps to cut personnel costs, including a hiring freeze, cutting 49 full-time equivalent positions, implementing unpaid furloughs, and limiting the growth of personnel expenses in both wages and benefits. In addition, the City cut significant services, including

library hours, Community Center programs and services, park maintenance, and public works and streets repairs and maintenance. During this time, firefighter wages have significantly exceeded the growth of the General Fund over the term of the expired contract. Moreover, unlike every other City department, including the Police Department, the Fire Department has experienced job growth, adding 19 positions.

A one percent increase in wages for the firefighter group is approximately \$900,000. Every one percent increase in firefighter compensation is equivalent to seven bargaining unit positions.

Changes in the Consumer Price Index for goods and services is a factor specifically enumerated in Charter Section 1111. During difficult financial times, firefighter wages have significantly exceeded the growth of the CPI. Since the 1996-1997 fiscal year, the CPI has risen an average of 3.4% per year. Although both the City and Union proposals exceed anticipated CPI changes, the City's proposal is far closer than that of the Union.

Recruitment and retention data are factors "traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment." In a recruitment for firefighters in 2006, over 3,000 people applied for 30 available positions. Fifty-four percent of the applicants were from outside the Bay Area. Almost all employees work their entire career for the San Jose Fire Department.

The retroactive 7/2/06 wage increase establishes "status quo" with firefighter top step base wages (including EMT and Holiday in Lieu pay) of \$97,443.35, which places San Jose firefighters above the average in total cash compensation for every historic survey presented in this arbitration. The City's proposal for 2007-2008 and 2008-2009 would result in a compounded

increase of 9.66 percent. The Union's proposal for 2007-2008 and 2008-2009 would result in a compounded increase of at least 10.99 percent.

The Union's salary formula is extremely problematic: It establishes the implication of ongoing status quo; it establishes a comparability universe ("Big Bay Four") to which the parties have never agreed; it utilizes a modified "cost per hour" approach which fails to include substantial cost factors for any organization (all measured by the DOL), including retirement benefits, health benefits, non-regularly scheduled overtime, and sick leave; it abandons the idea of a compensation survey for a survey limited to wage increases; it ignores the substantial 5.7 percent wage increase for bargaining unit members effective July 2, 2007; and it is flawed in that it will capture two (2) wage increases for the survey cities (one in July of 2007 and the second in the "first payroll period" of the 2008-2009 fiscal year).

The Union. The Union's compensation proposals rely on comparisons to the "Big Bay Four" departments and the only other departments in Santa Clara County that, like San Jose, serve populations greater than 100,000. They have been expressly approved in prior interest arbitrations granting the Union's wage proposals by Arbitrator Brand in 1991 and Arbitrator Goldberg in 1994. Both Arbitrators Brand and Goldberg also rejected the relevance of the consumer price index because the parties themselves have historically placed little, if any, emphasis on this factor in determining the appropriate wage increase and wages of firefighters in other jurisdictions were similarly derived without any correlation to this index.

Negotiating directly with then-Mayor Ron Gonzales in 2002, the Union consummated a three year contract for base wage increases totaling 23.4 percent. The Union attained an important market position on a cost-per-hour-worked basis as of the last salary increase effective July 2002: San Jose was ranked third out of the four large departments, and only 2.8 percent

behind the average compensation per hour worked by firefighters in the Big Bay Four; and San Jose was ranked third out all other departments in Santa Clara County, and only 2.52 percent behind the average compensation of the only other two departments, Santa Clara City and Santa Clara County, serving a population of over 100,000.

The Union's proposal not only "backloads" the contract, but more importantly, guarantees that in the final year of the 64 month agreement there will be no slippage in the position of San Jose firefighters vis-à-vis the Big Bay Four. This is especially true where, even under the Union's proposal effective January 2007, San Jose firefighters' compensation still trails the average of the agencies in the two comparable universes.

The City's proposal to reduce the basic wage increase by the cost of the specialty operations pay is both unjustified and insidious. It is unjustified because no other bargaining unit, especially the POA, offsets the premium assignment pay against the base wage. It is insidious because it exposes the City's unvarnished contempt of the bargaining process.

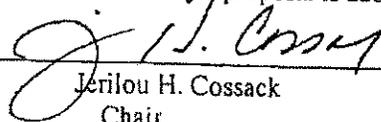
Discussion

The proposals of the parties are identical except for the last year. The Union proposes a radically different method for determining wage rates in that final year than the parties have ever before employed. It would tie the wage rate for San Jose's firefighters to those of the City of Oakland, the City and County of San Francisco, and Contra Costa County. It would establish a formula. As Arbitrators Brand and Goldberg before me have held, the greater the change the greater is the burden of proof to justify it.

While certainly the City of Oakland, the City and County of San Francisco, and Contra Costa County are relevant comparables, and have been used as such by the parties in the past, they have never been awarded the status of exclusive comparables by either the parties or prior

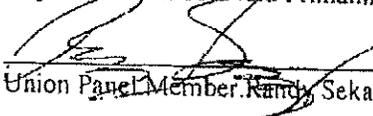
arbitrators. More significant, however, is the injection of a fixed formula into the wage process. While it is true contractual survey formulas are fairly common and to be found in many Bay Area firefighter labor agreements, there is no evidence or indication such formulae were imposed through arbitration rather than being embraced by the parties themselves. Nor is there any evidence the formula proposed by the Union is similar to that of any other jurisdiction. In fact, the Union's formula omits factors traditionally considered relevant in that computation, such as health insurance and pension costs used by the Department of Labor.

Even though the City's proposal to reduce the general wage increase by the cost of any additional Special Operations premium is short-sighted and not supported by any internal or external comparison, it is not sufficiently egregious to require acceptance of the Union's proposal on the general wage increase. The City's proposal is adopted.


 Jerilou H. Cossack _____ Date _____
 Chair

Concur
 _____ Dissent

 City Panel Member Nora Frimann _____ Date _____

_____ Concur
 Dissent

 Union Panel Member Randy Sekany _____ Date _____

ISSUE 2: WORKWEEK REDUCTION PAY/WORKWEEK COMPARABILITY
(Article 14.11.1)

City Proposal

Status quo. (Line personnel currently work an average of 56 hours per week and receive pay for 56 hours.)

Union Proposal

Effective January 1, 2007 the workweek of the fire suppression shall be reduced to the average workweek of fire suppression in San Francisco, Oakland and Contra Costa County.

In lieu of the workweek required above, for each biweekly pay period the City shall compensate each employee working a 56 hour work schedule eight (8) hours of pay at the employee's hourly rate based upon a 52 hour work schedule (i.e., employee's base annual salary, excluding premium pays, divided by 2704 hours).

This pay shall be deemed to satisfy the City's obligation for FLSA premium pay in each of the current FLSA cycles.

Those employees assigned to a 40-hour workweek shall receive in addition to regular salary an amount equivalent to the percentage increase provided herein to a 56-hour workweek employee.

Non-FLSA overtime shall be paid based upon a 52-hour workweek hourly rate, but shall include all premiums that are currently included in the 56-hour workweek hourly overtime rate of pay.

Positions of the Parties

The City. The 56 hour workweek is the most common workweek in California. The City of Oakland and the City and County of San Francisco are the only two California fire agencies any witness identified as having a different workweek.

Under the Union's proposal, San Jose firefighters would continue to work an average 56 hours per week but would have their salary converted to apply to an average of 52 hours per week and then be paid an additional four hours per week of straight time. This would result in an increase of 5.3% for 56 hour employees who would continue to work an average of 56 hours per week and a 7.7% increase for 40 hour employees who would continue to work 40 hours per week.

The Union has failed to demonstrate that its proposal would actually offset the City's FLSA liability. FLSA requires the City to pay overtime for hours worked in excess of 53 per

week or 212 in a 28 day work period. The Union proposes that under its proposal the City can stop paying overtime for regularly schedule hours worked in excess of 53. It is not clear how this would work. According to the Union, its proposal would lead to an increase in the employee's pay by either 5.3% or 7.7%. In any normal situation, that would lead to an increase in the employee's regular rate of pay for FLSA purposes.

Given that the City's wage proposal already exceeds CPI in the last two years of the agreement, the Union's proposal would simply push wage increases that much further above CPI. Comparability does not support an increase based on the 52 hour workweek assumption; Oakland and San Francisco are the outliers whose impact on the Union's three-jurisdiction is exaggerated by the very small sample size.

An increase of 1% in firefighter pay equates to seven positions. Since this proposal has a cost of up to 7.7% of salary, the proposal is the equivalent of nearly 54 positions.

This proposal should be rejected and the City's proposal of status quo should prevail.

The Union. Firefighters in San Jose work 56 hours per week. Firefighters in the Big Bay Four universe work, on average, 52 hours per week. The cost of this proposal is offset by the average current cost of the Fair Labor Standards Act (FLSA) premium pay earned as a result of regularly scheduled hours.

Under FLSA, firefighters who work more than 53 hours per week are entitled to extra half-time pay for each hour worked beyond 53. A firefighter who works 56 hours per week receives three hours of pay at half the hourly rate (or 1.5 hours of straight time pay) as FLSA premium pay. If firefighters worked every week of every year on a 56 hour workweek, FLSA premium pay would equal approximately 2.67% of salary.

Under Section 7(k) of FLSA regulations:

(1) Cities may establish a work period of 7 to 28 days. In San Jose, the FLSA work period is 28 days. Once the work period has been established, the employer is required to pay FLSA premium pay for all hours worked in excess of the applicable "floor" in the designated work period. There does not have to be any relationship between the designated work period adopted by the employer and the traditional work schedule of employees.

(2) For a designated 28-day work cycle, FLSA premium pay is incurred after 212 hours of work. San Jose firefighters do not work consistently more than 212 hours in every 28-day FLSA cycle due to vacation, sick leave, or job-incurred disability leave. San Jose firefighters receive, on average, 1.3-1.5% of base pay in FLSA premium pay, or \$114 per month.

The Union's workweek comparability proposal would result in a firefighter receiving \$575 per month, or approximately 5.3% of base pay for continuing to work a 56 hour workweek. All current scheduling practices would remain in place.

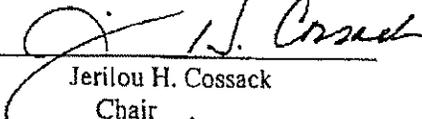
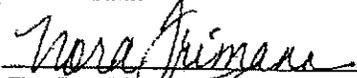
Discussion

This proposal by the Union is a unique and creative way in which to view the world in order to support a wage increase.² The collective bargaining process itself offers multiple opportunities to explore different approaches and methods. However, as Arbitrator Brand aptly observed in his 1991 Opinion, "last offer interest arbitration is not an innovative process." The appropriate place for innovation is through bargaining itself, where the parties are able to explore the ramifications of their actions and measure the risks of a new approach against the anticipated rewards.

² Union witness Randall Hudgins testified that although he knew of no other agency in California with a program like that proposed by the Union, he believed in the early to mid-1990's Oakland firefighters retained the 52-hour rate but agreed, through collective bargaining, to work 8.7 shifts at straight time.

San Jose firefighters work a 56 hour week, as do most firefighters throughout the state. As the Union points out, firefighters in the City and County of San Francisco, however, work a 48 hour week and those in the City of Oakland work a 52 hour week. The result is that San Jose firefighters necessarily earn less than those of Oakland and San Francisco on a per hour basis. That alone cannot justify imposing a system of wage determination on San Jose which so dramatically departs from the norm. The Union's proposal also would compel a defined universe consisting solely of the "Big Bay Four," a universe never agreed to by the City and never considered as the exclusive comparable by any Arbitration Board confronted with the question.

For these reasons the City's proposal prevails.

		_____
	Jerilou H. Cossack	Date
	Chair	
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	City Panel Member Nora Frimann	Date
<input type="checkbox"/> Concur		_____
<input checked="" type="checkbox"/> Dissent	Union Panel Member Randy Sekany	Date

ISSUE 3: TERRORISM/ANTITERRORISM PAY (Article 5.1.1).

City Proposal:

Status quo.

Union Proposal:

Effective July 1, 2006, all persons represented by the IAFF shall receive a wage increase of 2.0% for antiterrorism training. This shall be pensionable.

Positions of the Parties

The City. San Jose firefighters are not involved in anti-terrorism activities and do not receive any anti-terrorism training. The Union's proposal is retroactive to July 1, 2006, despite

the fact the San Jose firefighters do not currently receive any anti-terrorism training. None of the documents introduced by the Union create new duties or responsibilities for San Jose firefighters and none create any kind of anti-terrorism training referenced in the proposal.

The anti-terrorism training pay received by San Jose Police has specific procedures and mandatory annual training. It was in response to higher than anticipated wage increases granted to the firefighters after the POA had settled its contract.

Given that the City's wage proposal already exceeds CPI in the last two years of the agreement, the Union's proposal would simply push wage increases that much further above CPI. The proposal would push the wage increase of firefighters to a compound 7.8% increase in 2006.

Of the 16 agencies surveyed by the parties, only San Francisco receives terrorism training pay, which is for terrorism response and not for anti-terrorism training. San Francisco has long agreed to "parity" between its police officers and firefighters. San Francisco firefighters have this benefit only because San Jose police officers received it several years ago.

There is no justification for a 2% increase retroactive to July 1, 2006 for anti-terrorism training San Jose firefighters have not had and will not take. The proposal has an ongoing cost of approximately \$2.2 million and is the equivalent of 14 bargaining unit positions. It is simply not justified.

The Union. The 2.0% anti-terrorism pay proposal is less costly than a 2.0% base wage increase because it does not drive roll-up pay enhancements like overtime. It provides additional pensionable compensation without increasing the overtime rate. It is not added to the base wage.

The proposal is justified because an additional 2.0% of compensation must be granted in order for San Jose firefighters to regain their market position vis-à-vis the two comparable universes.

As a "targeted city" San Jose firefighters receive additional training and bear additional work burdens due to identified terrorist security threats. For this increase in anti-terrorism readiness responsibilities, San Francisco firefighters receive an addition 1.0% of base pay. San Jose police officers receive additional anti-terrorism compensation equal to 5.0% of base pay.

Discussion

The initial references to this proposal entitled it "Terrorism Response Training Pay." (See note on Union Exhibit 5.) The final proposal is entitled "Terrorism/Antiterrorism Pay." The initial title more accurately reflects the documentary evidence introduced in support of it, i.e., Union Exhibits 21, 22, 23, 24 and 25.

Fire Department personnel were mandated to take training in addition to that required of all public employees by the Office of Homeland Security. All Battalion Chiefs and selected Captains were required to take the 27 hour Incident Command ICS-300 and 24 hour ICS-400 classes (Special Bulletin #292, dated June 14, 2006). Both were funded by Homeland Security funds. All personnel were required to complete the National Incident Management System (NIMS) introductory IS-700 training course (Special Bulletin #90, dated October 4, 2005). The course itself was to be completed online in one to one and one-half hours; the test was to be completed in hard copy and mailed to the Training Division. All personnel were required to complete the NIMS ICS-200 training course (Special Bulletin #296, dated June 26, 2006). The course itself was to be completed online in one and one-half to two hours; the test was to be completed in hard copy and mailed to the Training Division. All Battalion Chiefs and above and Senior Dispatchers and above and all those on the Battalion Chief's promotional list were directed to complete NIMS IS-800 course (Special Bulletin #297, dated June 26, 2006). The course itself was to be completed online in two to two and one-half hours; the test was to be

completed in hard copy and mailed to the Training Division. All uniform personnel were required to take three and one-half hours of Seldom Used Skills training (Special Bulletin #45, dated August 25, 2006).

Awarding the Union's proposal would undo the inequity resulting from the adopted City proposal which reduced the 2007 wage increase by the amount of the cost of any increase in Special Operations pay. As previously stated, that reduction is not supported by any internal or external comparison. A premium for acquisition of added skills and training to combat the very real threat of terrorist attack, on the other hand, is supported by internal comparison with the premium paid San Jose police and by external comparison with the premium paid San Francisco firefighters. The Union's proposal is adopted.

J. H. Cossack
 Jerilou H. Cossack
 Chair
 _____ Date

____ Concur
 Dissent
Nora Frimann
 City Panel Member Nora Frimann
 _____ Date

Concur
 _____ Dissent
Randy Sekany
 Union Panel Member Randy Sekany
 _____ Date

ISSUE 4: EMERGENCY MEDICAL TECHNICIAN (EMT) PAY (Article 5.3)

The parties are in agreement that the status quo should prevail.

 Jerilou H. Cossack
 Chair
 _____ Date

____ Concur
 _____ Dissent

 City Panel Member Nora Frimann
 _____ Date

____ Concur
 _____ Dissent

 Union Panel Member Randy Sekany
 _____ Date

ISSUE 5: LONGEVITY PAY (Article 5.1.2)

City Proposal

Status quo.

Union Proposal

Effective January 1, 2008 all persons with more than twenty (20) years of service shall receive a base pay increase equivalent to five and one-quarter percent (5.25%) of the eligible employee's base rate.

Positions of the Parties

The City. The Union presented no evidence in the arbitration hearings to support its longevity pay proposal. The proposal is unclear, since there is no definition of "years of service," which could refer to years of City service, years of bargaining unit service, or even years of service with a reciprocal agency. There has been no showing of an operational need for longevity pay, which is traditionally used to provide an incentive for employees to work longer. San Jose has no retention problem. The average bargaining unit member retires at age 56 1/2 with more than 29 years of service. Longevity pay was presented as a "placeholder" for the pension issue and is not supported by either party's proposal on pension, since both parties have proposed retirement formulae with 90% maximum benefits. The City's wage proposal already provides wages significantly in excess of any anticipated CPI increases. There is no evidence any comparable agency pays longevity pay. The cost of this proposal is unclear.

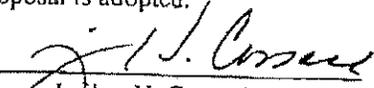
The Union. If the arbitrator is persuaded to award the City's proposal on the "Back 40" retirement proposal, fairness dictates adoption of the Union's proposal for longevity pay for several reasons. First, the "Back 40" formula does not match the relative benefit percentages at equal years of service under the universal market standard offered by CalPERS. This proposal closes the gap in an employee's accrual rate between the "Back 40" proposal and the CalPERS

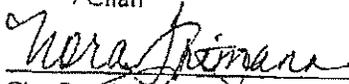
industry standard. Second, longevity pay will encourage employees to work longer by increasing pay and retirement benefits based on longer years of service. Third, the cost is minimal. City actuary John Bartel declared that implementation of the longevity pay proposal would increase the City's contribution rate by only 1.11 to 1.21%. Awarding the City's "Back 40" benefit formula (costed by Plan actuary Segal at 3.32%) with the Union's longevity pay proposal would generate a pension benefit with accrual rates closer to the market at a combined increase to the City's contribution rate of 4.53%.

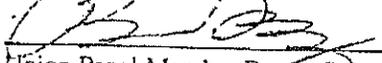
Discussion

For many years the parties have adopted a stand alone retirement plan and have decided not to be part of CalPERS. While benefit enhancements have occurred over the years as CalPERS benefits have increased, the San Jose system has never exactly mirrored CalPERS.

As the City points out, longevity pay is traditionally used to provide an incentive for employees to work longer. The evidence establishes San Jose firefighters, on the average, work more than 29 years. The effect of granting the Union's longevity pay proposal would be to increase the retirement payout to close to 95 percent for most everyone. That payout is substantially more than that received under CalPERS or any other jurisdiction and is not justified. The City's proposal is adopted.

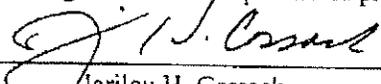
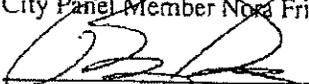

 Jennlou H. Cossack _____ Date _____
 Chair

Concur
 _____ Dissent

 City Panel Member Nora Frimann _____ Date _____

Concur
 _____ Dissent

 Union Panel Member Randy Sekany _____ Date _____

ISSUE 6: HOLIDAY IN LIEU PAY (Article 24.2)

The parties have agreed the status quo should prevail.

		_____
	Jerilou H. Cossack	Date
	Chair	
✓ _____		_____
_____	City Panel Member Nora Frimann	Date
✓ _____		_____
_____	Union Panel Member Randy Sekany	Date

ISSUE 7: SPECIAL OPERATIONS PAY (Articles 5.2 and 16)

City Proposal

5.2 Special Operations Hazardous Incident Team (HIT)

5.2.1 All employees assigned to the Hazardous Incident Team (HIT) program shall be paid an amount equivalent to a one (1) step increase under the biweekly pay plan, or approximately five percent (5.0) during each biweekly pay period of such assignment.

5.2.1 Relief personnel who are assigned to the HIT Unit during the absence of regularly assigned unit members shall be paid \$15.00 for such assignment during which four (4) or more consecutive hours are worked.

5.2.2 Prior to July 1, 2008, the City will provide Local 230 with the EOPP Section covering the HIT program amended to include the following:

- Skill-based bidding whereby employees with higher levels of skill and/or training applicable to the HIT Program will have priority in bidding into the Program and seniority will be used as a tiebreaker;
- A requirement that any individual assigned to the HIT Program will remain with the HIT Program for a period of three (3) years following the completion of any minimum skill and certification requirements;

- A requirement that all personnel assigned to the HIT Program will maintain and annually demonstrate required skills and complete any mandatory continuing education; and
- A restriction limiting shift trades and relief assignments for personnel assigned to the HIT Unit to other employees assigned to the Program or with qualified relief pool members who had completed the minimum skill and certification requirements.

The Department will adopt the revised EOPP effective July 1, 2008.

5.2.3 Effective the beginning of the first payroll pay period after the final adopted of the revised EOPP covering the HIT Program, qualified relief personnel who are assigned to the HIT Unit during the absence of regularly assigned unit members shall be paid \$25.00 for such assignment during which four (4) or more consecutive hours are worked.

5.2.4 On or about January 1, 2008, the City will provide Local 230 with a draft EOPP describing the USAR program. This draft policy will contain the following:

- Skill-based bidding whereby employees with higher levels of skill and/or training applicable to the USAR Program will have priority in bidding into the Program and seniority will be used as a tiebreaker.
- A requirement that any individual assigned to the USAR Program will remain with that Company for a period of three (3) years following the completion of any minimum skill and certification requirements.
- A requirement that all personnel assigned to the USAR Program will maintain and annually demonstrate required skills and complete any mandatory continuing education; and
- A restriction limiting shift trades and relief assignments for personnel assigned to a USAR Company to other employees assigned to the USAR Program or with qualified relief pool members who have completed the minimum skill and certification requirements.

Local 230 will review and comment on the draft EOPP describing the USAR program and may request bargaining over any matters within the scope of representation (not including items enumerated in this section) on or before March 1, 2008.

5.2.5 Effective the later of July 1, 2008 or the beginning of the first payroll pay period after the parties reach agreement on the EOPP describing the USAR program, all employees assigned to a USAR Company shall be

paid an amount equivalent to a one (1) step increase under the biweekly pay plan, or approximately five percent (5.0%) during each biweekly pay period of such assignment.

5.2.6 Effective the later of July 1, 2008, or the beginning of the first payroll pay period after the parties reach agreement on the EOPP describing the USAR program, qualified relief personnel who are assigned to a USAR Company during the absence of regularly assigned unit members shall be paid \$25.00 for such assignment during which four (4) or more consecutive hours are worked.

5.2.7 Any general wage adjustment effective on or after June 29, 2008 shall be reduced by the cost of any increased premium pay for Special Operations.

5.2.8 Any negotiations over the development of policies pursuant to section 5.2 or any subsection therefore, shall not be subject to arbitration under Charter Section 1111 or the any provision of the MOA.

ARTICLE 16 MANAGEMENT RIGHTS

16.3 The parties agree that OAG Section 240 shall contain the following language:

249.1 Transfers and Assignments

A. Authority

2. *****

Move from 240.1.11. All transfers of personnel within the JFD shall be made on the basis of seniority rights, except transfers made by mutual agreement, bi-lingual positions assignments, assignments to the HIT Unit, assignments to a USAR Company, and transfers for the good of the Department.

Union Proposal

5.2 Special Operations Pay. Compensation for the special operations assignments referenced below shall be calculated from the eligible employee's base rate. In the event that an employee is eligible for more than one such benefit, compensation for each shall be separately calculated from the base rate and shall not be compounded. Compensation for the benefits referenced below shall be pensionable.

~~5.2~~ 5.2.1 Hazardous Incident Team (HIT). Effective July 1, 2007, all employees assigned to the Hazardous Incident Team (HIT) program (i.e., Engine 29, Truck

29 and HIT 29) shall be paid an amount equivalent to a one (1) step increase under the biweekly pay plan, or approximately five percent (5.0%) during each biweekly pay period of such assignment.

5.2.1.2 Relief personnel who are assigned to the HIT Unit during the absence of regularly assigned unit members shall be paid \$15.00 for such assignment during which four (4) or more hours are worked. Article 5.2.1.2 shall become inoperable effective July 1, 2007.

5.2.2 Urban Search and Rescue Program Companies (USAR). Effective July 1, 2007 all employees assigned to USAR Program Companies (e.g., engine personnel and USAR personnel) shall be paid an amount equivalent to a one (1) step increase under the biweekly pay plan, or approximately five percent (5.0%) during each biweekly pay period of such assignments.

5.2.3 Airport Rescue Firefighting Program Companies (ARFF). Effective July 1, 2007 all employees assigned to ARFF Program Companies (i.e., Station 20 personnel and Support Engine or Truck Company personnel) shall be paid an amount equivalent to a one (1) step increase under the biweekly pay plan, or approximately five percent (5.0%) during each biweekly pay period of such assignment.

Positions of the Parties

The City. The proposals of both parties expand the City's Special Operations Pay; however, the Union's proposal is excessive. The City's proposal also requires the parties to meet and confer over and develop a policy and procedure covering the USAR companies prior to implementing additional pay for personnel regularly assigned to a USAR company. While the Union's proposal is purely economic, with no thought to the need for policies and procedures to govern assignment, the City's proposal requires the parties to each agree over the policies and procedures as a condition precedent to any increase in pay.

The lack of existing operational procedures for USAR and ARFF evince a need for negotiations over these procedures prior to implementing pay increases. If the Arbitration Board awards an expansion of premium pay to USAR and ARFF companies without any provision,

whatsoever, for the implementation of a policy consistent with the programs' needs, there will be no incentive for the Union to negotiate over the policies necessary to create effective programs.

There is no basis for extending premium pay to support companies. While support company personnel are an important aspect of any special operations company, it would be an extravagance to pay them the same as members of the primary company and would encourage personnel to bid for the support companies, where they could receive the same pay without the same level of training or emergency duties. There is no evidence any other comparable agency pays premium pay for members of support companies.

There is no evidence any ARFF unit in the country receives special operations pay and only one of the 16 jurisdictions surveyed by the parties, Santa Clara County, pays any kind of premium pay for USAR. Santa Clara County's premium is far less generous than that proposed by San Jose. Santa Clara County pays only for members of the "task force," which is trained in and responds to both USAR and HIT scenarios. San Jose already pays a premium for HIT and has proposed premium pay for members assigned to a USAR company.

The Union. In part, the Union's proposal is premised on internal comparison to the "special duties" pay received by San Jose police officers under the POA contract. San Jose police officers receive a one-step pay increase (5%) for specialty assignments for bomb squad, K-9 patrol, motorcycle duty, training officers assignment, MERGE (SWAT) unit, mounted (horse) patrol, and air operations. Arbitrator Brand explained the comparison to specialty pay for San Jose police officers is appropriate even though such pay is not generally accorded firefighters in the external labor market because "there are no effective external comparisons by which to judge [the] proposal."

Firefighters have trained and are trained to provide the specialty operations services in HIT, ARFF and USAR companies. Lack of compensation, at least in the USAR companies, has resulted in a significant vacancy rate approaching 25%. This is disheartening since San Jose is the only department in Santa Clara County with dedicated medium USAR companies.

The cost of the Union proposal is small. The City decides whether to engage in these special operations, and consistent with safe work loads, how many personnel to assign to them.

The Department is not required to have these special operations. However, if it does, firefighters, qua police officers, should be compensated where they have completed the training and bear the responsibility of providing the special operations employed by the Department.

Discussion ^{2A}

As a general matter, when employees acquire and use special skills above and beyond those normally required of their position, additional compensation is appropriate. Both parties recognize the legitimacy of the claim for additional pay for additional skills. They diverge on three major points: (1) whether or not support personnel should be compensated for having acquired the additional skills even though they are not the first line of persons called upon to use those skills; (2) whether those persons assigned to Airport duties should receive additional compensation; and (3) whether operation policies and procedures must be in place prior to the receipt of additional compensation.

No other jurisdiction in the state pays firefighters for additional airport responsibilities, although certainly firefighter duties have increased at every airport since September 11. There is no comparable justification for the Union's proposal to provide San Jose firefighters with a 5% premium for their Airport responsibilities. While the Union made the general assertion of

^{2A} I make no finding on the Panel's power to waive future bargaining over policies and procedures. (gk) (M) (BKS)

internal comparability with respect to certain San Jose police special assignments, there was no evidence in support of ~~that~~ ^{POA compensation for program support personnel} assertion introduced into this record.

(Handwritten initials and scribbles)

Certainly those firefighters who provide support back-up in the HIT and USAR teams must devote extra time and effort to maintain their special skills beyond the time and effort they must expend, generally, to maintain their overall skill levels. That time is compensated at their regular rate of pay. When they perform the HIT and USAR duties, the City's proposal provides additional compensation for the performance of those additional responsibilities.

Finally, the operational aspects of the City's proposal are reasonable. Policy and procedure are important aspects of any program.

The City's proposal is adopted.

	<u><i>J. H. Cossack</i></u>	_____
	Jerilou H. Cossack	Date
	Chair	
<input checked="" type="checkbox"/> Concur	<u><i>Nora Frimann</i></u>	_____
<input type="checkbox"/> Dissent	City Panel Member Nora Frimann	Date
<input type="checkbox"/> Concur	<u><i>Randy Sekany</i></u>	_____
<input checked="" type="checkbox"/> Dissent	Union Panel Member Randy Sekany	Date

ISSUE 8: SUPPORT PARAMEDICS (Articles 5.4 and 16)

Prior to completion of the Board's deliberations the parties reached the following agreement on this issue:

Article 5.4 PARAMEDICS

5.4 Paramedics. Each employee licensed by the State of California, accredited by the County of Santa Clara and assigned to front line or support paramedic duty as a paramedic shall be eligible for paramedic premium pay.

5.4.1 Paramedic premium pay for front line paramedics shall be an amount equal to eleven and one-half percent (11.5%) of top step firefighter base

biweekly pay for each pay period in which the employee is entitled to receive a salary. Beginning in pay period 19 of 1996 (August 25, 1996), paramedic premium pay for front line paramedics shall be an amount equal to twelve percent (12%) of top step firefighter base biweekly pay for each pay period in which the employee is entitled to receive a salary.

5.4.2 Paramedic premium pay for support paramedics shall be an amount equal to eight percent (8%) of top step firefighter base biweekly pay for each pay period in which the employee is entitled to receive a salary. Effective May 1, 2007, employees who are newly designated as support paramedics shall receive paramedic premium pay in an amount equal to five percent (5%) of top step firefighter base biweekly pay for each pay period in which the employee is entitled to receive a salary. Employees previously designated as support paramedics shall have their paramedic premium pay frozen and "Y-rated" and shall continue to receive that amount as paramedic premium pay until such time as that amount is either less than or equals five percent (5%) of top step firefighter base biweekly pay in which event that support paramedic shall continue thereafter to receive as paramedic premium pay an amount equal to five percent (5%) of top step firefighter base biweekly pay for each pay period in which the employee is entitled to receive a salary.

5.4.2.1 The City may assign up to a maximum of one-hundred forty-seven (14700) support paramedics. If a support paramedic fails to complete the required number of patient contact reports in any given calendar quarter, he or she shall not receive Support Paramedic premium pay until the beginning of the first payroll period after he or she completes at least three (3) patient contact reports in a calendar quarter.

5.4.3 Paramedic premium pay shall commence with the first full pay period following meeting all of the requirements in section 5.4 above. However, if all requirements are met on the first Sunday or Monday of a pay period, premium pay will begin in that pay period.

5.4.4 Paramedic premium pay shall not be considered "compensation" for the purpose of computing retirement benefits in accordance with the provisions of Section 3.36.020(C) of the City of San Jose Municipal Code. The Union agrees not to propose that paramedic premium pay be included in the definition of "compensation" in the 1996 Police & Fire Retirement Plan negotiations or the 1996 MOA negotiations.

5.4.5 If the performance or behavior of a front-line or support paramedic is under investigation by the Fire Department or City Medical Director, the employee shall be removed from paramedic duties during the

investigation, however, paramedic premium pay will not be suspended until the investigation is complete. If the investigation results in findings of misconduct, the employee will be removed from the paramedic program. Paramedic premium pay will immediately cease, and premium pay paid from the date the employee was unassigned from the City's paramedic program will be collected from the employee.

- 5.4.6 The Department reserves the right to assign up to one Support Paramedic position to each Company on each shift. The Support Paramedic position will be reserved for the most senior Support Paramedic that bids on a Company where no support paramedic exists on that Company. This process will normally be completed through attrition. However, the Fire Chief retains the right to reassign for the good of the department.

If no Support Paramedic bids for an open Support Paramedic position, the lease senior relief Support Paramedic will be assigned to that position.

~~After the program is fully implemented in July 1996, the City agrees to fill half of the next twenty eight (28) front line paramedic vacancies with City of San Jose firefighters if there are interested candidates who are deemed qualified by the Department.~~

- 16.3 The parties agree that OAG Section 240 shall contain the following language:

240.1 Transfers and Assignments

A. Authority

1. It is recognized and agreed that the primary obligation of the Department is to provide service of the highest quality to the public. The right to assign personnel is inherent to providing such quality service. Management also recognizes the desire of employees to periodically request changes in work assignments.
2. Officers may refuse any request for transfer of personnel within their command if in their opinion such transfer would reduce efficiency of the Department. Any such transfer and the reasons therefore shall be set forth in writing by the officer refusing the transfer and sent to the Fire Chief, through channels, with a copy delivered to the member requesting the transfer.

If the Chief denies the bid without a recommendation from the Chain of command, the reasons for such denial shall be given in writing to the employee. The employee requesting the transfer which has been refused shall have five (5) days from the receipt of the notice of refusal to file written objections with the Chief.

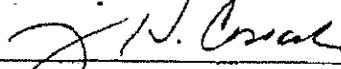
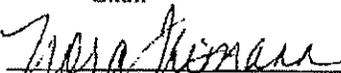
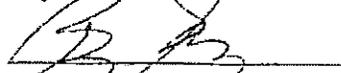
Move from 240.1(C)1. All transfers of personnel within the SJFD shall be made on the basis of seniority rights, except transfer made by mutual agreement, support paramedics, bi-lingual positions assignments and transfers for the good of the Department.

If the employee wishes to appeal the Chief's denial, the employee may within ten (10) working days, request a review by the City Manager or designee. Such request shall be in writing, and shall include reasons why the employee is not satisfied with the decision rendered. The City Manager has ten (10) working days in which to notify the employee of the results of such review. The decision of the City Manager or designee shall be final and binding.

The City shall amend the OAG to permit Inspectors in the Fire Prevention Bureau to bid within the Inspector Series by seniority once the position becomes vacant.

The Chief retains the right to deny a bid, change the location of a position, or change an assignment to meet workload demands.

This agreement is considered tentative and shall not be considered final or binding until either: (1) attached and incorporated into a final arbitration award; or (2) a final agreement on all terms has been reached and both ratified by union members and approved by the City Council. This tentative agreement shall not be precedential and shall not bind either party to propose or agree to any specific term for any future agreement.

		_____
	Jerilou H. Cossack	Date
	Chair	
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	City Panel Member Nora Frimann	Date
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	Union Panel Member Randy Sekany	Date

ISSUE 9: OVERTIME EXEMPTION (Articles 5, 10, 11, and 14)

City Proposal

ARTICLE 5 WAGES AND SPECIAL PAY

- 5.6 Administrative Assignment Incentive Pay. The City and Union acknowledge that certain employees in non-exempt positions as provided under the Fair Labor Standards Act and represented by the Union are needed to staff forty (40) hour per week assignments and that, while assigned to such duties, these non-exempt employees are limited in their ability to work Minimum Staffing, are not eligible for FLSA overtime based on their regular work schedule and do not receive the work schedule advantages afforded to those non-exempt employees on twenty four (24) hour shift assignments. Therefore, the City agrees to provide Administrative Assignment Incentive Pay in the amount of \$36 per pay period to those non-exempt employees assigned to forty (40) hour per week positions.

ARTICLE 10 CALL BACK PAY AND STANDBY PAY

- 10.1 Any employee in a non-exempt position as provided under the Fair Labor Standards Act who is called back to work after the employee has worked their scheduled shift and has departed from their place of employment shall be credited with overtime for the time worked, or for three (3) hours at the appropriate rate of compensation, whichever is greater. Such non-exempt ~~An~~ employee called back to duty shall be entitled to the three (3) hour minimum call back compensation only once per workday; for subsequent call backs during the same day, the non-exempt employee shall be credited with the time worked or for one-half (1/2) hours at the appropriate rate, whichever is greater.

Time worked for minimum staffing and call back purposes shall begin when ~~an~~ a non-exempt employee arrives at the work site. Non-exempt employees shall be allowed one and one half (1.5) hours to arrive at the work site after receiving the call to report to duty.

- 10.2 Employees in non-exempt positions as provided under the Fair Labor Standards Act who are required to perform standby duty shall be credited with two (2) hours compensation at the appropriate rate for such standby duty performed on a regularly assigned work day and three (3) hours compensation at the appropriate rate for such standby duty assigned on regularly scheduled days off. When such non-exempt ~~an~~ employee assigned such standby duty is called back, the non-exempt employee shall be entitled to the compensation provided by Section 10.1 only, and to no compensation pursuant to this Section 10.2.

Employees in exempt positions as provided under the Fair Labor Standards Act are not entitled to call back pay under Section 10.1 or standby pay under Section 10.2.

ARTICLE 11 WITNESS LEAVE

- 11.2 Each employee of the City in a non-exempt position as provided under the Fair Labor Standards Act who is called from off-duty status to testify in an arbitration, administrative hearing or in court, under subpoena sought by the Cit or other

directive of the City on any subject connected with their employment, shall be credited with overtime for the time spent by the non-exempt employee in such arbitration, administrative hearing or court, or for three (3) hours, whichever is greater, less any and all witness fees which the non-exempt employee may receive thereafter.

ARTICLE 14 HOURS OF WORK AND OVERTIME

14.1 The work week shall be seven (7) days commencing at 12:01 a.m. Sunday and ending at 12:00 Midnight the following Saturday, unless an employee is assigned to a different FLSA workweek.

14.5 An employee in a non-exempt position as provided under the Fair Labor Standards Act who is authorized or required to work overtime who works in excess of eight (8) or nine (9) hours per day, or twenty four (24) hours per day is assigned to a work schedule of fifty six (56) hours per week, shall be compensated at the rate of one and one-half (1.5) the non-exempt employee's hourly rate, except when such excess hours result from a change in such employee's work week or shift or from the requirement that such employee fulfill their work week requirement. No overtime compensation shall be paid for overtime worked which does not exceed thirty (30) minutes per day. Overtime worked which exceeds thirty (30) minutes in any work day shall be computed to the nearest one-half (1/2) hour.

14.5.1 A non-exempt employee assigned to a fifty-six (56) hour work week required to work overtime for work regularly assigned to forty (40) hour work week non-exempt employees, or for the purpose of back filling an absence created by a non-exempt employee assigned to a forty (40) hour work week shall be compensated at the overtime rate of one and one-half (1.5) times the employees 1.4 rate for each overtime hour worked in the forty (40) hour position. In all other instances an employee assigned to a fifty-six (56) hour work week shall not be eligible for overtime at the 1.4 rate. An employee assigned to a fifty-six (56) hour work week shall not be eligible for overtime pay based on conversion to the forty (40) hour work week pay rate when assigned work which is part of the suppression line job function for their rank e.g., QAB's promotional interview boards, suppression line training, EMT proctoring, and special projects or committees.

An employee who is regularly assigned to a non-exempt position and is assigned to work in an exempt position as provided under the Fair Labor Standards Act will not be entitled to any overtime for work performed in excess of the exempt position's regularly scheduled work day or work week.

- 14.6 Overtime worked shall be compensated, at the one and one-half (1.5) rate, by compensatory time. However, the Department Head may authorize payment in lieu of compensatory time where providing such compensatory time would impair departmental operations or efficiency. Except in extenuating circumstances, once the non-exempt employee has received approval from the appropriate authority to take compensatory time off, payment for such approved time off shall not be authorized. A non-exempt employee who transfers from working a forty (40) hour per week assignment to working twenty-four (24) hour shifts, or vice versa, shall have the employee's unused compensatory time balance converted accordingly by a factor of 1.4.
- 14.7 Compensatory time credited to ~~an~~ a non-exempt employee, and which is not taken within twenty-six (26) pay periods following the pay period in which the overtime is worked, shall be paid to the non-exempt employee at the appropriate rate.
- 14.7.1 Compensatory time earned while on a forty (40) hour week assignment shall be converted to reflect a fifty-six (56) hour work schedule whenever the non-exempt employee is transferred to a fifty-six (56) hour work schedule. Compensatory time earned while on a fifty-six hour week assignment shall be converted to reflect a forty (40) hour work schedule whenever ~~an~~ a non-exempt employee is transferred to a forty (40) hour work schedule.
- 14.13 All employees assigned to fire line suppression duties shall receive ninety (90) minutes per shift for exercise or work-out needs in accordance with applicable Department policies, provided, however, that this provision shall not entitle any employee to overtime pay work for the purposes of exercising.

Union Proposal

Status quo.

Positions of the Parties

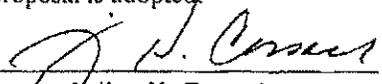
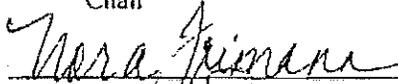
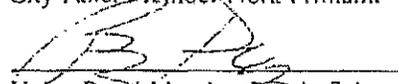
The City. The City's proposal is to clarify the MOA so that all references to overtime, administrative assignment incentive pay, call back and standby pay, and witness leave pay apply only to employees who are not exempt from FLSA. The City has not yet made a determination that any bargaining unit classification is exempt from FLSA. However, the City does not wish to pay exempt employees overtime. Since this is more of a clarification than a change in the status quo, the Charter factors do not have substantial impact on the proposal.

The Union. In 1991 the City proposed to remove battalion chiefs from the bargaining unit. Arbitrator Brand denied the City's demand, finding that among the four large fire departments in Northern California, three (including San Jose) had battalion chiefs in the unit and one (Contra Costa County) did not. Arbitrator Brand noted that removing battalion chiefs from the unit would be a significant change, since they had been in the unit since the beginning of collective bargaining. In the present arbitration, the City is proposing to leave the battalion chiefs in the bargaining unit but deny them significant contractual benefits. The City's own Fire Department operational expert, Scott Kenley, stated unequivocally that in his experience and to his knowledge battalion chiefs are paid FLSA overtime. The City's proposal must be denied.

Discussion

Battalion Chiefs have been in the bargaining unit, and receiving the wages and benefits bargaining for the entire bargaining unit, since the inception of bargaining between the parties. As the Union points out, in 1991 Arbitrator Brand rejected the City's attempt to remove them from the bargaining unit. The City's proposal in these proceedings would deny Battalion Chiefs the benefit of past bargains struck between the parties. The City has not met its burden of proof to establish why such a radical departure from historical norm should be awarded.

The Union's proposal is adopted.

		_____
	Jerilou H. Cossack	Date
	Chair	
<input type="checkbox"/> Concur		_____
<input checked="" type="checkbox"/> Dissent	City Panel Member Nora Frimann	Date
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	Union Panel Member Randy Sekany	Date

Category 2: Health Insurance

ISSUE 10: INSURANCE BENEFITS (Article 6)

City Proposal

ARTICLE 6 INSURANCE BENEFITS

6.1 Health Insurance Coverage

6.1.1 Eligible employees may elect health insurance coverage under one (1) of the ~~three (3)~~ plans for employee only or for employee and dependents. ~~As of the effective date of this Agreement, the plans include: Blue Shield, Kaiser, and Lifeguard.~~

6.1.2 The City will pay ninety percent (90%) of the full premium cost of the lowest cost plan for employee or for employee and dependent coverage, and the employee will pay ten percent (10%) of the premium of the lowest cost plan up to the maximum of \$25.00 per month. Any additional amount above the cost of the lowest priced plan, less \$25.00 per month, required for the premium of any plan other than the lowest priced plan shall be paid by the employee.

6.1.3 Effective the first pay period of payroll calendar year 2006, the City will pay ninety (90%) percent of the full premium cost of the lowest cost plan for employee or for employee and dependent coverage, and the employee will pay ten (10%) of the premium of the lowest cost plan up to a maximum of \$50.00 month. Any additional amount above the cost of the lowest priced plan, less \$50.00per month, required for the premium of any plan other than the lowest priced plan shall be paid by the employee.

6.1.4 Effective the first pay period of payroll calendar year 2007, the City will pay ninety (90%) percent of the full premium cost of the lowest cost plan for employee or for employee and dependent coverage, and the employee will pay ten (10%) of the premium of the lowest cost plan up to a maximum of \$100.00 per month. Any additional amount above the cost of the lowest priced plan, less \$100.00per month, required for the premium of any plan other than the lowest priced plan shall be paid by the employee.

6.1.5 Effective the first pay period of payroll calendar year 2008, the City will pay ninety (90%) percent of the full premium cost of the lowest cost plan for employee or for employee and dependent coverage, and the employee will pay ten (10%) of the premium of the lowest cost plan up to a maximum of \$150.00 per month. Any additional amount above the cost of

the lowest priced plan, less \$150.00 per month, required for the premium of any plan other than the lowest priced plan shall be paid by the employee.

6.1.6 Effective the first pay period of payroll calendar year 2009, the City will pay ninety (90%) percent of the full premium cost of the lowest cost plan for employee or for employee and dependent coverage, and the employee will pay ten (10%) of the premium of the lowest cost plan. Any additional amount above 90% of the cost of the lowest priced plan required for the premium of any plan other than the lowest priced plan shall be paid by the employee.

Union Proposal

ARTICLE 6 INSURANCE BENEFITS

6.1 Health Insurance Coverage

6.1.1 Eligible employees may elect health insurance coverage under one (1) of the three (3) plans for employee only or for employee and dependents. As of the effective date of this Agreement, the plans include: Blue Shield, Kaiser, and Lifeguard.

6.1.2 The City will pay ninety percent (90%) of the full premium cost of the lowest cost plan for employee or for employee and dependent coverage, and the employee will pay ten percent (10%) of the premium of the lowest cost plan up to the maximum of \$25.00 per month. Any additional amount above the cost of the lowest priced plan, less \$25.00 per month, required for the premium of any plan other than the lowest priced plan shall be paid by the employee.

6.1.3 Effective January 1, 2007, the City will pay ninety (90%) percent of the full premium cost of the lowest cost plan for employee or for employee and dependent coverage and the employee will pay ten (10%) percent of the premium of the lowest cost plan up to a maximum of \$100.00 per month. Any additional amount above the cost of the lowest priced plan, less \$100.00 per month, required for the premium of any plan other than the lowest priced plan shall be paid by the employee.

6.1.4 Effective January 1, 2008, the City will pay ninety (90%) percent of the full premium cost of the lowest cost plan for employee or for employee and dependent coverage and the employee will pay ten (10%) percent of the premium of the lowest cost plan up to a maximum of \$150.00 per month. Any additional amount above the cost of the lowest priced plan, less \$150.00 per month, required for the premium of any plan other than the lowest priced plan shall be paid by the employee.

Positions of the Parties

The City. The City splits health insurance premiums with its employees on a 90%/10% basis. The employee contribution has historically been capped at \$25.00. The City has negotiated a phased-in elimination of the cap, with an intent to eliminate it altogether in 2009. Every bargaining unit/employee group except the firefighters has agreed to increases in the cap to \$50.00 in 2006, \$100.00 in 2007, and \$150.00 in 2008. The Union's proposal falls short because it does not include the \$50.00 cap in 2006 agreed to by every other bargaining group and it does not ensure the goal of capping the employees' share at 10% of the cost of the premium. A percentage cap, as opposed to a monetary cap, is critical to ensure an equitable split of the increasingly expensive costs of health insurance. Workers in California pay an average of 12% of single coverage and 25% of family coverage. Moreover, 69% of large employers reported they were "likely to increase the amount employees pay for health insurance in 2007." The City's fiscal condition demands that cost sharing be implemented for firefighters as it has been for every other employee unit.

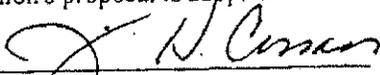
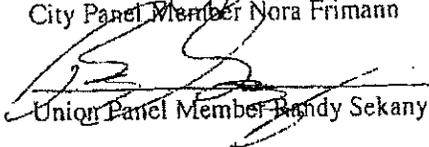
The Union. The Union has accepted the same increases to an employee's cost share for health premiums as those in place during the term of the POA collective bargaining agreement except the Union does not propose to retroactively implement the share split prior to January 1, 2007. The City's proposal to shift onto employees the full cost of 10% of all future health insurance premiums for the lowest priced health plan option beginning in 2009 is wholly unjustified by any labor market comparison. The City controls negotiation of plan provisions with health care providers. To shift onto firefighters liability for future unknown health insurance premium increases beginning in 2009 is unacceptable. It does nothing to collectively address the

forces driving health care costs. The City's proposal seeks to impose costs on firefighters not imposed on any other City employee unit.

Discussion

The Union's proposal tracks what exists in other bargaining units, none of which has, to date, agreed to accept a straight percentage allotment. As the Union points out, the City controls the negotiation of plan provisions and the Union has no ability to influence those negotiations. Just as it was inappropriate to burden the City with an unknown general wage increase, so it is inappropriate to burden the employees represented by the Union with unknown expenses over which they have no control.

The Union's proposal is adopted.

		_____
	Jehlou H. Cossack	Date
	Chair	
<input type="checkbox"/>	Concur	
<input checked="" type="checkbox"/>	Dissent	
		_____
	City Panel Member Nora Frimann	Date
<input checked="" type="checkbox"/>	Concur	
<input type="checkbox"/>	Dissent	
		_____
	Union Panel Member Randy Sekany	Date

ISSUE 11: HEALTH INSURANCE - PLAN DESIGN CO-PAPYS (Article 6.1.7)

City Proposal

6.1.7 Effective January 1, 2008, co-pays for all available HMO plans shall be as follows:

- a. Office Visit Co-pay shall be increased to \$10.
- b. Prescription Co-pay shall be increased to \$5 for generic and \$10 for brand name.
- c. Emergency Room Co-pay shall be increased to \$50.

Union Proposal

Status quo.

Positions of the Parties

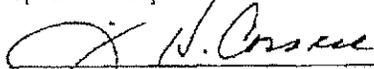
The City. In dealing with the skyrocketing cost of health insurance, employers must look not only at cost sharing but also at plan design. Because of their anticipated impact on employee behavior, plan design changes can reduce premiums while only modestly affecting employee service and choice. Under the City's current Kaiser HMO plan, there is no co-pay for normal office or emergency room visits and no differential between generic and brand name pharmacy prescriptions. The co-pays proposed are reasonable and consistent with the standard established by the vast majority of Bay Area jurisdictions. Of the eleven Bay Area jurisdictions surveyed, more than 90% have a \$10 co-pay for standard office visits, a \$5 co-pay for generic drugs, at least a \$10 co-pay for brand name drugs, and a \$50 co-pay for emergency room visits. The proposal is fiscally responsible and a necessary building block toward a more fiscally-sound approach toward managing health care costs.

The Union. This proposal is a radical change in benefits with cost implications affecting both active and retired firefighters. It will generate huge, undisclosed and unjustified cost savings to the City. The proposal seeks to impose costs on firefighters not imposed on any other City employee unit. It is unjustified.

Discussion

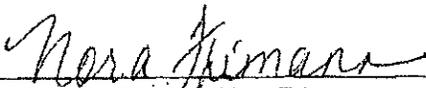
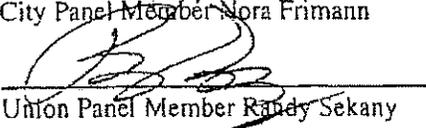
The cost of health care has been burgeoning in recent years. The proposal put forward by the City is not unreasonable. It is consistent with the practice in the vast majority of similar jurisdictions.

The City proposal is adopted.



Jerilou H. Cossack
Chair

Date

<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	City Panel Member Nora Frimann	Date
<input type="checkbox"/> Concur		_____
<input checked="" type="checkbox"/> Dissent	Union Panel Member Randy Sekany	Date

ISSUE 12: DENTAL INSURANCE - COST SHARING FORMULA (Article 6.2)

City Proposal

6.2 Dental Insurance

6.2.1 The City will provide the dental insurance coverage for eligible full-time employees and their dependents in accordance with one (1) of the ~~two (2)~~ available plans. ~~As of the effective date of this agreement, the plans include an indemnity plan, administered by Delta Dental, and a prepaid plan, insured through Dental Benefit Providers. The dental program provided shall include an option for either prepaid or indemnity coverage. The City shall pay whatever cost increases are incurred during the term of this Agreement for any improvements in dental and orthodontia coverage resulting from these discussions.~~

6.2.1.1 Effective January 1, 2001, each eligible full-time employee and dependents shall receive a lifetime maximum of \$2,000 orthodontia coverage in the Delta Dental Plan.

6.2.1.2 Effective January 1, 2001, each eligible full-time employee and dependents shall receive a lifetime maximum annual dental benefit of \$1,5000 under the Delta Dental Plan.

6.2.2 ~~6.2.2~~ Effective the first pay period of payroll calendar year 2006, the City will provide dental coverage in the lowest priced plan for eligible full time employees and their dependents. If an employee selects a plan other than the lowest priced plan, the City will pay ninety-five (95%) of the full premium cost for the selected dental coverage for eligible full time employees and their dependents and the employee shall pay five percent (5%) of the full premium costs for the selected plan.

6.2.3 Employees who retire will be eligible to continue dental coverage under the terms defined in the San Jose Municipal Code Section 3.36, et seq.

- 6.2.264 If the retiree who has selected the prepaid dental coverage option moves a significant distance away from a designated dental center, that employee may elect to be covered by the other available option(s).

Union Proposal

6.2 Dental Insurance

- 6.2.1 The City will provide the dental insurance coverage for eligible full-time employees and their dependents in accordance with one (1) of the two (2) available plans. As of the effective date of this agreement, the plans include an indemnity plan, administered by Delta Dental, and a prepaid plan, insured through Dental Benefit Providers. The dental program provided shall include an option for either prepaid or indemnity coverage. The City shall pay whatever cost increases are incurred during the term of this Agreement for any improvements in dental and orthodontia coverage resulting from these discussions.
- 6.2.1.1 Effective January 1, 2001, each eligible full-time employee and dependents shall receive a lifetime maximum of \$2,000 orthodontia coverage in the Delta Dental Plan.
- 6.2.1.2 ~~Effective January 1, 2001, each~~ the term of this agreement, all active, eligible full-time employee and their dependents shall receive a lifetime maximum of \$2,000 per eligible full-time employee and their dependents for orthodontic coverage and a maximum for annual dental benefit of \$1,500 per calendar year under the Delta Dental Plan.
- 6.2.1.3 Effective January 1, 2007, the City will provide dental coverage in the lowest priced plan for eligible full time employees and their dependents. If an employee selects a plan other than the lowest priced plan, the City will pay ninety-five (95%) of the full premium cost for the selected dental coverage for eligible fulltime employees and their dependents and the employee shall pay five percent (5%) of the full premium cost for the selected plan.
- 6.2.2 Employees who retire will be eligible to continue dental coverage under the terms defined in the San Jose Municipal Code Section 3.36, et. seq.
- 6.2.3 If the retiree who has selected the prepaid dental coverage option moves a significant distance away from a designated dental center, that employee may elect to be covered by the other available option(s).

Positions of the Parties

The City. Dental plan costs have also risen, although not as dramatically as health plan costs. The City has modified its dental benefits with every other employees, adopting a 95%/5% split in premium costs based on the lowest priced plan, effective January 1, 2006. There is no reason the firefighters should be granted a one year reprieve on such an adjustment where every other employee group agreed to a 2006 implementation date. Internal comparability demands that the firefighters accept the modifications to dental insurance agreed to by every other bargaining unit. Steps like this are necessary building blocks toward managing the dramatic increases in health care.

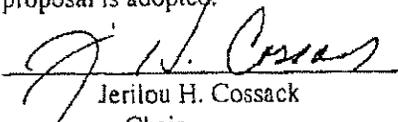
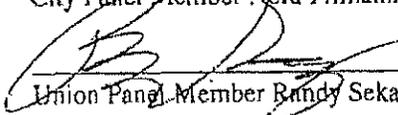
The Union. The parties' counter-proposals on dental insurance are substantively identical. The Union's proposal, however, makes the increase in employee costs effective January 1, 2007, whereas the City's proposal is retroactively effective January 2006. Given the extended period of these proceedings and accompanying litigation, there is no reason why the City's proposal should be adopted. Alternatively, if the justification for adoption of the City's proposal rests upon comparison to the police agreement, then all other City proposals regarding health coverage, plan design, cost sharing, etc. must be rejected for lack of parity with the POA agreement.

Discussion

The question is whether the effective date of the change is retroactive to January 2006 or January 2007. While it may be true that the effective date of the change of all other employee groups was January 2007, the matter is not thereby closed. The City in other areas, such as changes to the retirement benefit formula, does not propose to make its offer retroactive to the

same date as the benefit granted the police. There is no justification for penalizing employees by such a large retroactive increase in their contribution.

The Union proposal is adopted.

		_____
	Jerilou H. Cossack Chair	Date
<input checked="" type="checkbox"/> Concur <input type="checkbox"/> Dissent		_____
	City Panel Member Nora Frimann	Date
<input checked="" type="checkbox"/> Concur <input type="checkbox"/> Dissent		_____
	Union Panel Member Randy Sekany	Date

ISSUE 13: SICK LEAVE PAYOUT (Article 26.2.5)

City Proposal³

26.2 Sick Lead Payoff

- (c) If such full-time employee, at the time of retirement or death, shall have accumulated and has to their credit at least eight-hundred (800) hours, or one-thousand one-hundred twenty (1,120) hours for any full-time employee who is assigned to twenty-four (24) hour shifts, but less than one-thousand two-hundred one (1,201) hours, or one-thousand six-hundred eight (1,680) for any full-time employee who is assigned to twenty-four (24) hours shifts, of earned unused sick leave, the employee or their estate, shall be paid a sum of money equal to eight percent (80%) of the employee's hourly rate of pay at the time of death, retirement or termination, whichever is earlier, multiplied by the total number of the employee's accumulated and-unused hours of sick leave as of the date of death or retirement. This provision shall not apply to any employee who retires more than thirty (30) days after the date the arbitration award become final.

³ The City's original final offer had as the effective dates either June 30, 2007 or July 1, 2007. At the time the offers were prepared it was anticipated the process would have been complete in ample time to allow employees to consider their alternatives and the ramifications prior to being required to make their decisions regarding retirement. However, the process has continued past either party's expectation. In response to the Union's stated concern that bargaining unit members would not have any certainty regarding the sick leave payout prior to retiring, the parties agreed the City would change the effective dates in its proposal to thirty (30) days after the arbitration award becomes final.

(d) If a full-time employee, at the time of service retirement or death, has accumulated and has to their credit at least one-thousand two-hundred one (1,201) hours, or one-thousand six-hundred eight (1,680) hours for any full-time employee who is assigned to twenty-four (24) hour shifts, or greater of earned unused sick leave, the employee or their estate, shall be paid a sum of money equal to one-hundred percent (100%) of the employee's hourly rate of pay at the time of death or service, whichever is earlier, multiplied by the total number of accumulated and unused hours of sick leave as of the date of death or retirement. If after retirement the employee switches from service to disability retirement, the employee shall repay to the City the difference in sick leave payout between service and disability retirement (e.g. one-hundred percent (100%) service, eight percent (80%) disability. This provision shall not apply to any employee who retires more than thirty (30) days after the date the arbitration award becomes final.

(e) Effective thirty (30) days after the date the arbitration award becomes final, if such full-time employee, at the time of retirement or death, shall have accumulated and has to their credit at least eight-hundred (800) hours, or one-thousand one-hundred twenty (1,120) hours for any full-time employee who is assigned to twenty-four (24) hour shifts of earned unused sick leave, the employee or their estate, shall be paid a sum of money equal to seventy-five (75%) of the employee's hourly rate of pay at the time of death, retirement or termination, whichever is earlier, multiplied by the less of (1) the total number of the employee's accumulated and unused hours of sick leave as of the date of death or retirement or (2) twelve hundred (1200) hours for forty-hour employees or one-thousand, six-hundred and eighty (1680) for any full-time employee who is assigned to twenty-four (24) hours shifts.

The following chart summarizes sick leave payoffs effective July 1, 2007:

<u>40 Hour Employee</u>		<u>56 Hour Employee</u>	
<u>No. of Hours</u>	<u>Payout</u>	<u>No. of Hours</u>	<u>Payout</u>
<u>Less than 400</u>	<u>50%</u>	<u>Less than 560</u>	<u>50%</u>
<u>400-799</u>	<u>60%</u>	<u>560-1119</u>	<u>60%</u>
<u>800-1200</u>	<u>75% (capped at 1200)</u>	<u>1120-1680</u>	<u>75% (capped at 1200)</u>

Union Proposal

Status quo.

Positions of the Parties

The City. The City permits members of the bargaining unit to cash out up to one-hundred percent of accrued sick leave upon retirement, with no cap. This astoundingly generous benefit has allowed some employees to cash out over \$100,000 in sick leave upon retirement. The City's proposal attempts to place reasonable caps on the percentage of sick leave that can be paid out, as well as the number of sick leave hours that can be accumulated for payout purposes. The City's current sick leave payout is 140% to 257% of the average for other Bay Area jurisdictions. Even the City's proposal is far more generous than what employees in other jurisdictions receive. The existing sick leave payout program is extremely costly, resulting in what amounts to an additional severance package averaging \$20,000 to \$100,000. Given the City's current fiscal situation, there is no basis for continuing to pay this sort of benefit. The purpose of sick leave payout programs is to deter the use of sick leave, which has a cost to the employer. That purpose is a worthwhile one. The City is not trying to eliminate this program or reduce the incentives to save sick leave. The proposal is merely intended to reduce the "top tier" of benefits where sick leave is cashed out for extraordinary sums.

The Union. The City seeks to drastically reduce the cash payment employees will receive upon retirement for service for unused sick leave. Where, as here, there is no assertion of inability to pay, there is no justification whatsoever to reduce compensation or benefits previously attained through collective bargaining. The unused sick leave payout serves as an incentive for employees to work longer and a disincentive for employees to call in sick unless suffering from a bona fide illness or injury. It *lowers* overtime costs because it reduces employee absences. There is no comparable reduction for police officers; the current POA agreement is consistent with the existing benefit of a sick leave payout equal to 100% of unused sick leave.

Discussion

The existing sick leave benefit payout was achieved through the bargaining process. Aside from asserting that it has become too expensive, the City has offered no incentive to support its desire to reduce bargained for compensation. The City has not asserted an inability to pay the benefit. There has been no similar reduction to the benefit in the police contract.

The Union's proposal is adopted.

[Signature]
Jerilou H. Cossack _____ Date _____
Chair

Concur
 Dissent [Signature] _____ Date _____
City Panel Member Nora Frimann

Concur
 Dissent [Signature] _____ Date _____
Union Panel Member Randy Sekany

ISSUE 14: USE OF SICK LEAVE DURING DISABILITY (Article 26.1.5)

City Proposal

26.1.5 Anything in this Article to the contrary notwithstanding, an employee who, pursuant to the provisions of Article 27 of this Agreement, has been receiving temporary disability leave compensation and who has received the maximum allowable amount of such compensation pursuant to Article 27, and who is entitled to Workers' Compensation temporary disability benefits, other than the Workers' Compensation temporary disability benefits provided by Division I of the Labor Code of the State of California, and has exhausted all other accrued/available paid leave, shall be ~~permitted~~ required to utilize accrued sick leave subject to the following restrictions: Sick leave shall be utilized in ~~one-half~~ (1/2) hour fifteen (15) minute increments, but in no event shall an employee receive an amount, including any Workers' Compensation temporary disability compensation, in excess of such employee's regular base pay.

Union Proposal

Status quo.

Positions of the Parties

The City. Article 26.1.2 of the collective bargaining agreement allows employees to use sick leave for absences due to non-job related "illness or injury; routine medical or dental appointment; illness in the immediate family as defined herein, or absence of an eligible employee due to illness, injury or disability related to pregnancy or childbirth." Employees may integrate sick leave with their Workers' Compensation temporary disability benefits in a manner sufficient for them to receive up to their regular base salary during their disability period. The proposed changes, which are consistent with every other bargaining unit, memorializes the longstanding practice that City employees cannot integrate sick leave until they have used all other leaves and requiring bargaining unit members to integrate sick leave during their disability once those leave have been exhausted.

Sick leave is intended to prevent a loss of wages in the event of a non-work related disability. An employee who cannot work due to a work-related disability is provided State mandated benefits as well as supplementary pay from the City for a maximum of one year. After the one year period, an employee continues to receive the State mandated benefits but is responsible for both the employee and City costs for all health benefits. In order to continue the City's contributions toward health care, the City requires employees to utilize their available vacation balances. Requiring the use of sick leave during a period of Workers' Compensation Temporary Disability that extends past the one year supplement maintains the employee's active status and normal income through utilization of these available balances.

In addition, this is consistent with the purpose of sick leave as an insurance policy for injuries and not a savings account. Allowing employees to continue to bank their sick leave while on disability increases the overtime burden of the Department because the Department

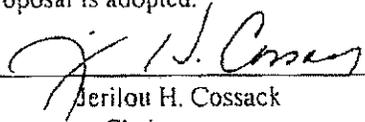
must cover both their absence while on disability and any later absences using sick leave. Likewise, the maintenance of a high sick leave balance, even through an extended absence, may allow an employee to cash out a higher percentage of sick leave upon retirement than they would otherwise be entitled.

The Union. Currently, an employee who has exhausted the temporary disability benefits provided by law has the option to use sick leave or long term disability insurance upon exhaustion of the Workers' Compensation benefits. There is no reason to reduce an employee's options. The limitation proposed by the City does not exist in the POA agreement, despite the fact that police officers and firefighters share identical benefits under the state's Workers' Compensation law for temporary disability arising from job incurred injuries and illnesses. Nor has the City provided any evidence for the firefighter labor market demonstrating that any other fire department requires employees to exhaust sick leave following exhaustion of temporary disability benefits under the Labor Code. Firefighters engage in the uniquely dangerous occupation which results in a high rate of injury. There is no evidence of comparability and the City has failed to demonstrate the need for such a radical change in existing benefits.

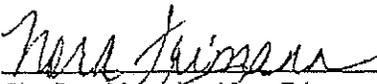
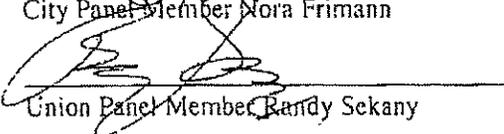
Discussion

As elsewhere discussed, the party proposing to change the status quo bears the burden of proof and persuasion. The City has not met its burden. The asserted fiscal impact is conjecture. The identical benefit which the City seeks to modify here remains in the police contract. The City has not provided any evidence of a similar requirement in other jurisdictions.

The Union proposal is adopted.


Terilou H. Cossack
Chair

Date

<input type="checkbox"/> Concur		_____
<input checked="" type="checkbox"/> Dissent	City Panel Member Nora Frimann	Date
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	Union Panel Member Randy Sekany	Date

Category 3: Retirement

ISSUE 15: RETIREMENT CLEANUP - ELIMINATE TRIPARTITE REFERENCES (Article 28.1)

City Proposal

ARTICLE 28 RETIREMENT

28.1 Benefits of the Police and Fire Retirement Plan System are to be paid in accordance with the provisions of the Plan, ~~and the Memorandum of Agreement on Retirement Between the City and the Union and the San Jose Police Officers' Association.~~

Union Proposal

No Change. Status Quo.

Positions of the Parties

The City. The referenced Memorandum of Agreement on Retirement no longer exists, having expired in June 2004. The current arbitration relates only to the expired MOA between the Union and the City, not the Tripartite Retirement MOU. Judge William Elfving, in Santa Clara County Superior Court case number 1-06-CV-057856, left no doubt that these current proceedings would result in a new bilateral agreement with regard to all issues, including retirement. The former Tripartite Retirement MOU has no relevance and reference to it should rightfully be stricken.

Section 17.1 of the 2000-2003 MOU, a non-disputed provision, states, "any or all prior or existing Memorandum of Understanding, understandings and agreements, whether formal or

informal, are hereby superseded and terminated in their entirety." A reference to the expired Tripartite MOA would run directly counter to Section 17.1

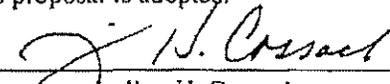
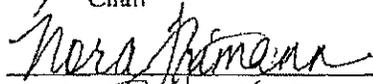
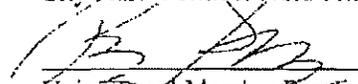
The Union. Although seemingly innocuous on its face, the City's proposal would effectively disconnect the historical collective bargaining relationship between the Union, the POA and the City. The retirement benefit provisions of the recently enacted agreement between the POA and the City do not contain language proposed here by the City to eviscerate and eliminate references to the pre-existing three-party retirement benefits agreement. Article 49 of the 2004-2008 POA Memorandum of Agreement contains multiple references to the Police and Fire Retirement Plan.

The language of the MOA referencing provisions of the three-party contract between the Union, the POA and the City is not outdated and should not be deleted.

Discussion

It may well be true, as the City claims, that reference to the tripartite Memorandum of Agreement has no relevance. However, in view of the fact that the police contract retains the reference which the City seeks to strike, such striking in the fire contract may be premature.

The Union's proposal is adopted.

		_____
	Jerilou H. Cossack	Date
	Chair	
<input checked="" type="checkbox"/> Concur		_____
<input checked="" type="checkbox"/> Dissent	City Panel Member Nora Frimann	Date
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	Union Panel Member Randy Sekany	Date

ISSUE 16: RETIREMENT SURVIVORSHIP BENEFIT (Article 28)

City Proposal

No Change. Status quo.

Union Proposal

ARTICLE 28 - RETIREMENT - SPOUSAL SURVIVORSHIP BENEFIT

28.7 Effective July 1, 2008, the spousal survivorship benefit shall be equal to fifty percent (50%) of the member benefit up to a maximum of forty-five percent (45%) of the member's final average salary.

Positions of the Parties

The City. The City currently provides a survivorship benefit equal to 50% of the member benefit up to a maximum of 42.5% of the final average salary. The Union's proposal is a substantial change to survivorship benefits, making them equal to 50% of the member benefit up to a maximum of 45%. This is different than the Union's proposal going into negotiations, which was simply to increase the maximum from 42.5% to 45%. There is no evidence as to what this benefit would cost. Segal Company costed a similar benefit proposal at 0.07%, or approximately \$63,000 per year.

The City's retirement program already has a 3% COLA, which is generally higher than CPI. The increase in survivor benefits is unnecessary in light of that COLA. Internal comparability does not support this change, since the San Jose POA agreed to maintain the existing maximum survivorship benefit at 42.5%. There is no evidence of what other jurisdictions offer in terms of survivorship benefits. Even at 0.07%, this benefit would have a negative impact on the City's budget.

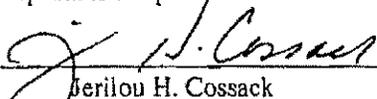
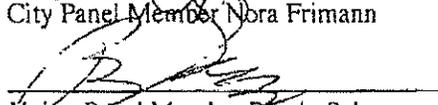
The Union. To provide consistency with the current survivorship maximum benefit formula and fundamental fairness, the Union proposes to increase the maximum spousal

continuance benefit from 42.5% (i.e., 50% of 85%) to 45% (i.e., 50% of 90%). The cost of this increase is miniscule: .07% increase to the City's contribution rate. It should be implemented consistent with an increase in the maximum pension benefit from 85% to 90%.

Discussion

The Union's proposal is consistent with an increase of maximum pension benefits to 90% and retention of the spousal survivorship benefit at the 50% level. Historically, the spousal survivorship benefit has been set at 50% of the retiree's maximum pension benefits. The cost to the City is minimal.

The Union's proposal is adopted.

			_____
		Jerilou H. Cossack	Date
		Chair	
_____	Concur		_____
<input checked="" type="checkbox"/>	Dissent	City Panel Member Nora Frimann	Date
_____	Concur		_____
<input checked="" type="checkbox"/>	Dissent	Union Panel Member Kandy Sekany	Date

ISSUE 17: RETIREE MEDICAL - PRE-FUNDING CONTRIBUTION (Article 28)

City Proposal

28.7.1 The parties agree that employees represented by IAFF continue to be responsible for one-half of the Actuarial Accrued Liability for retiree medical benefits.

28.7.2 The City may require that employee contributions toward retiree medical benefits be paid into a trust established for that purpose.

28.7.3 The Actuarial Accrued Liability for each party shall be determined from time to time by the Police and Fire Retirement Plan's Retained Actuary. If the City elects to make higher contributions than are required of the employees, those additional contributions will be attributed only to the City's share of the Actuarial Accrued Liability and will not reduce the employees' share of the Actuarial Accrued Liability.

Union Proposal

No change. Status quo.

Positions of the Parties

The City. The City's proposal regarding retiree medical pre-funding contributions reflects what is already required of the parties through the City's Municipal Code, which mandates that the City and employees make equal contributions toward retiree medical benefits. The proposal does three things: (1) it confirms the parties' obligation to share the unfunded actuarial liability; (2) it identifies the possibility of funding the liability for retiree medical benefits in a trust, rather than maintaining the funds either in the retirement plan or the general fund; and (3) it permits the City to accelerate payments for its share of retiree medical liability without affecting the split between employer and employee liability.

While the City's proposal does not represent a change in the way retiree medical benefits are funded, it is important because it recognizes the changing nature of the obligations under GASB statements 43 and 45. Under these new rules, a City must either fund its obligation toward non-pension post-retirement benefits (OPEB) or "book" that liability against the general fund. This decision has a very significant impact on the interest rate that actuaries will assume for the assets used to fund the benefit. Therefore, it is very important for the City to have the option to establish a trust into which these contributions can be made.

The City's proposal would accommodate the City's possible desire to accelerate its share of the retiree medical payment in order to ensure its bond rating under the recent GASB standards. Since the employee portion of the liability is different from the City's share, the City's decision to fund its share of the liability at a higher rate should not affect the employees' share. The proposed language simply makes it clear that should the City decide to make higher

contributions than what would normally be required under the 50/50 split, such contributions would be attributed only to the City's share of the liability would not reduce the employees' share.

The Union. This proposal by the City, made without prior bargaining between the parties, seeks to cement language with far-reaching consequences concerning the City's responsibility to report unfunded liabilities under GASB.

The problem with the proposal is simple: currently, the police and fire retirement plans' actuary does not separate liability between police officers and firefighters. There is no agreed upon methodology to be employed by the plans' actuary to separate and attribute assets between firefighters and police officers. In this very arbitration, the City refused to submit to the arbitration panel a different proposal by the Union to agree upon a costing methodology for separating firefighter retirement plan assets from police officer retirement plan assets.

The proposal is an invitation to chaos. The retiree medical benefit was constructed and negotiated by and for the benefit of three parties: the Union, the POA, and the City. If enacted, the City's proposal guarantees future disagreements over the method to be employed by the actuary to separately cost the benefits and value the assets. It does not provide any guidance to the actuary as to what method will be used to determine separate firefighter only actuarial accrued liability.

There is no identical or similar language in the City's contract with the POA. If adopted, the language guarantees litigation between the parties, including perhaps the POA, over what actuarial or costing methodology will be employed by the Plan's retained actuary in the event that separate actuarial accrued liability for retiree medical contributions of firefighters and police officers must be identified.

plan at the appropriate coverage level and the retiree will contribute 10% up to a maximum of \$150.

Union Proposal

No change. Status quo.

Positions of the Parties

The City. Currently, the City pays 100% of the medical premium for its retirees, which is more than it pays for active employees. The City proposes that employees who retire on or after July 1, 2007 pay the same share of medical and dental premiums (at the coverage level to which they are entitled under this MOA) as active employees represented by the Union. Current retirees continue to receive 100% of the single or family premium for the lowest priced plan.

Both the City and Union proposals on retirement formula establish a 90% retirement benefit, retired bargaining unit members will have a significant income with a built-in COLA of 3% per year. Since retiree incomes can be expected to grow in excess of CPI, the modest increase in retiree payments toward medical are entirely appropriate. Under the City's proposal, retiree medical benefits would be more comparable (albeit still much richer than) other surveyed jurisdictions. The City's proposal is a reasonable means to help control rising medical costs. This proposal is a small step toward addressing the significant cost of the generous retiree medical benefit.

The Union. If this proposal is adopted it would generate untold millions of dollars in savings to the City, not one penny of which has been identified or accounted for in the record. It severely reduces current retiree medical benefits for employees who retire on or after July 1, 2007. Current post-retirement medical benefits have been 50% paid for by employee contributions. This proposal breaks faith with current employees.

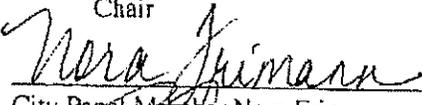
Only about 1.9% of payroll per year need be set aside over the course of the next few years to comfortably meet not only the GASB reporting requirements but also reduce the unfunded liability for police and fire retiree benefits.

No such similar reduction in post-retiree medical benefits exists in the agreement between the City and the POA.

Discussion

The City's proposal would deprive current employees who have already contributed to one-half of the cost of their anticipated post-retirement benefits. To grant the City's proposal would deprive them of the benefit of their contribution. This benefit continues only so long as employees continue their one-half contribution. As will be discussed later, the general area of medical benefits, including those of retirees, is ripe for meaningful discussion between the parties. That discussion has not been held. There has been no similar reduction in police retiree benefits. In addition, current retirees are not employees of the City. It is arguable whether their benefits may be addressed by Charter Section 1111.

The Union's proposal is adopted.

		_____
	Jerilou H. Cossack	Date
	Chair	
<input checked="" type="checkbox"/> Concur		_____
<input checked="" type="checkbox"/> Dissent	City Panel Member Nora Frimann	Date
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	Union Panel Member Randy Sekany	Date

ISSUE 19: RETIREE MEDICAL - BENEFIT CHANGES (Article 28)

City Proposal

28.8.1 Eligible employees hired before July 1, 2007 shall be entitled to a Plan contribution toward the premium for retiree medical insurance tied to the lowest priced plan at either the single or family coverage level.

28.8.2 Eligible employees hired on or after July 1, 2007, shall be entitled to receive a Plan contribution toward the premium for retiree medical insurance tied to the lowest priced plan at the single coverage level.

28.8.3 The actual Plan contribution for either the single or family coverage level shall be 100% of the lowest priced plan unless the contribution is further limited by another provision of the MOA.

Union Proposal

No change. Status quo.

Positions of the Parties

The City. Changes to the retiree medical benefits for future employees are also necessary to control insurance costs. Employees hired after July 1, 2007 will still be entitled to receive 100% of the single plan premium for the lowest priced plan. If they select the family plan, they would have to pay the difference.

Under the City's current system, retirees actually receive better medical benefits than active employees, since they make no contribution for either the single coverage or family coverage plan. This is highly unusual, as almost all other jurisdictions will fund 100% of single coverage, but not family coverage.

Because the City's proposal only applies to retirees hired after July 1, 2007, it will not affect current employees represented by the Union. It is reasonable and serves the dual purpose of fairly dealing with rising health care costs while at the same time bringing its retirement benefits more in line with the market.

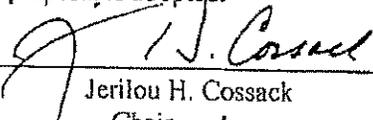
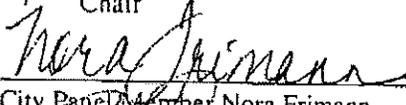
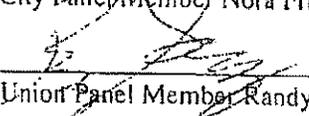
The Union. This proposal would create a second class of retiree medical benefits for employees hired on or after July 1, 2007. On that ground alone, it must be denied.

The proposal would eliminate paid family coverage for retirees. It is an insidious and dramatic reduction in retiree benefits. There is no comparable reduction negotiated between the City and the POA. It promises to save the City tens of millions of dollars, not one penny of which has been identified by the City in support of this proposal.

Discussion

The City's proposal represents a significant reduction in retiree medical benefits. Although two-tier wage and/or benefit systems are not desirable since they generally have a negative impact on employee morale, it may be the only way in which the parties can address the problems posed, to both of them, by escalating medical care costs. It does not appear there have been many, if any, discussions between the parties themselves. No similar reduction exists in the police contract. Under the circumstances, the City cannot prevail.

The Union's proposal is adopted.

		_____
	Jerilou H. Cossack	Date
	Chair	
<input type="checkbox"/> Concur		_____
<input checked="" type="checkbox"/> Dissent	City Panel Member Nora Frimann	Date
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	Union Panel Member Randy Sekany	Date

ISSUE 20: RETIREMENT - BENEFIT FORMULA (Article 28)

City Proposal

28.4 The current formula for calculating retirement benefits is two and one half (2 1/2%) percent of final compensation for each year of service with the City up to

twenty (20) years, plus three (3%) percent of final compensation for each year of service with the City between 21 and 25 years, and four (4%) percent from 26-30 years subject to a maximum of eight-five (85%) percent.

The enhanced benefit formula will be changed to two and one half (2 1/2%) percent of final compensation for each year of service with the City up to twenty (20) years, plus four (4%) percent of final compensation for each year of service with the City between 21-30 years subject to a maximum of ninety (90%) percent.

Service from a reciprocal agency may not be combined with the City service in order to earn four (4%) percent per year.

The enhanced benefit formula will be effective for all Fire Department employees who are members of the Police & Fire Department Retirement Plan and who retire on or after July 1, 2007.

In the event that the contribution rates for the enhanced benefit are not adopted by July 1, 2007, affected employees shall contribute to the retirement fund that portion of the contributions for prior service which is attributable to the contributions that would have been made as contributions for current service by members of this plan because of the increased benefits provided had the members made such contributions from July 1, 2007, to the effect date of the contribution rates adjustments. The rate of contribution for such prior service, expressed as a percentage of payroll, shall be the same percentage for all Fire Department members. The prior service costs payable by members of this plan shall be amortized over the same period of time as the city's contributions for prior service costs are amortized.

Union Proposal

ARTICLE 28 RETIREMENT

28.6 The current formula for calculating retirement benefits is 2 1/2% of the final compensation for each year of service with the City up to 20 years, plus 3% of final compensation for each of service with the City between 21 and 25 years, and 4% from 26-30 years subject to a maximum of 85%.

Effective July 1, 2008, the benefit formula will be changed to 3% of final compensation for year of service once an employee completes twenty (20) years of service to a maximum of 90%.

Positions of the Parties

The City. The City's proposal achieves the Union's stated goal of a 90% retirement benefit while avoiding the significant cost and unintended consequences of the Union's proposal.

Over the years, the City and the Union have negotiated a series of changes to their retirement formula, generally driven by changes made by the CalPERS retirement system. However, San Jose has always had a retirement formula which maintained a 2.5% benefit for the first 20 years of service. This formula reduces the "prior service cost" of the benefit, currently paid entirely by the City. It also encourages longevity because employees gain a higher benefit for every year they work at the City, which is a particularly important factor given the age of the City's workforce. The Union's proposal would undo the City's longstanding retirement formula and encourage earlier retirements.

San Jose's 3% COLA is sufficient to maintain pace with inflation even with no formula change. The City also provides a benefit known as the Supplemental Retiree Benefits Reserve (SRBR), which is a reserve fund created by excess earnings in the retirement plan. If the fund earns more than the actuarially-assumed rate, 10 percent of the excess is moved into the SRBR. The funds are then available for distribution to retirees.

The CalPERS retirement benefit is very expensive. The City has never blindly followed the PERS retirement formula. There are many ways to achieve a 90% retirement benefit. The City's proposal achieves this benefit at a lower cost than either the 3% at 50 CalPERS formula or the Union proposal.

The Union has failed to justify the higher cost of its retirement proposal. The City's proposal has a cost of 3.32% of payroll (roughly \$3 million per year), while the Union's proposal has a cost of 5.58% of payroll (more than \$5 million per year). In addition to the higher cost, the Union's proposal would encourage earlier retirements, leading to a "brain drain" and the need for the City to recruit and train more firefighters.

The Union. Every agency in the comparable universe provides firefighters with a pension benefit accruing at the rate of 3% per year of service capped at 90% at 30 years of service, the CalPERS formula. In contrast, under the City's plan, firefighters must have 25 years of service to retire at age 50 and accrue only 2.5% of FAS credit for each year of the first 20 years of service. In addition, San Jose firefighters have a maximum pension benefit of 85% of final average salary.

City actuary John Bartel opined that the City's contribution rate would increase by 11% to provide San Jose firefighters with a pension benefit formula and age/service retirement eligibility matching that of CalPERS. The Union's proposal adopts the 3% accrual/90% maximum benefit for employees with 20 plus years of service without changing the current vesting and age/service retirement eligibility rules. This compromise approach provides market equity on this core issue and would increase the City's contribution rate by 5.58%, or half the cost to the City of matching the CalPERS model in all specifics.

The Union proposal also provides for a dramatically delayed implementation until July 1, 2008, two full years after the City and POA negotiated implementation of the City's backloaded 90% benefit enhancement. This delay saves millions of dollars during the contract term.

No external firefighter comparable jurisdiction supports imposition of the City's pension benefit formula proposal. It is found only in the recently negotiated contract with the POA. Even here, however, the City's final proposal inexplicably delays implementation of the benefit for firefighters by one year until July 2007. The police received the proffered benefit enhancement effective July 1, 2006.

If the arbitrator is persuaded to award the City's proposal, fairness dictates adoption of the Union's proposal on issue number 5 for longevity pay. See Union position under issue 5. Relative

market equity for San Jose firefighters will be achieved only if the Union's longevity pay proposal is also granted. Together, the City's proposal and the Union's longevity proposal would increase the City's contribution rate to 4.53% - less than half the cost to match the CalPERS standard.

Discussion

Applying the Charter criteria to this issue, the Union correctly observes that no other firefighters in the state operate under a retirement plan like that of San Jose. Both parties agree the industry standard is CalPERS. The parties have never embraced the CalPERS model. It has driven modifications in their own plan, to be sure, but they have never adopted it. It is a much more expensive model.

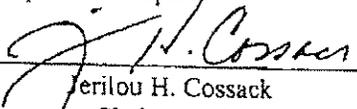
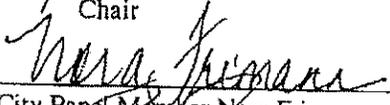
That leaves a comparison to be made between the internally comparable group of police. For some inexplicable reason, the City chose in this instance to not make its proposal comparable to that of the police. Instead of making the benefit enhancement retroactive to 2006, which was the date it was achieved by the police, the City made its proposal effective in 2007. In effect, then, the City's proposal is not internally comparable to the benefit accorded the police.

Both the City proposal and the Union proposal would achieve the goal of raising the retirement benefit payout to 90%. The Union's proposal, however, would make the retirement benefit more nearly resemble that enjoyed by firefighters covered by CalPERS. The City's proposal leaves the firefighters behind both those covered by CalPERS and the police.

It is pure conjecture on the City's part to assert adoption of the Union's proposal would have the unintended consequence of encouraging firefighters to retire earlier. There is no evidence any employee would prefer a retirement benefit of less than 90% and elect to retire before that level was achieved.

Under the Union's proposal, the retirement benefit formula would not change until July 1, 2008, one year past the effective date of the City's proposal and two years past the enhancement date of the police. The Union's proposal would generate a ^{one-time rate} savings for two years beyond what the City has been paying for the police retirement benefit enhancement. (R.B.)

The Union's proposal is adopted.

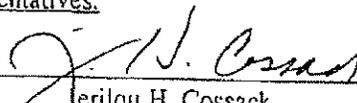
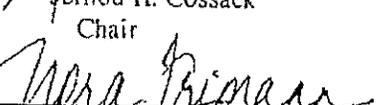
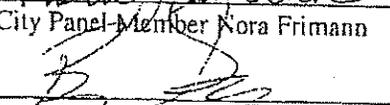
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	Jerilou H. Cossack	Date
	Chair	
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	City Panel Member Nora Frimann	Date
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	Union Panel Member Randy Sekany	Date

ISSUE 21: RETIREMENT - ESTABLISH LABOR MANAGEMENT COMMITTEE ON DROP (Article 37).

Subsequent to the submission of their briefs, the parties agreed to the following:

ARTICLE 37 LABOR MANAGEMENT COMMITTEE

37.3 Labor Management Committee on Deferred Retirement Plan ("DROP"). During the terms of this contract the City and the Union will, not later than 1/31/2008, convene a labor management committee to explore available options and implications of adopting a Deferred Retirement Option Plan (DROP). The Labor Management Committee shall be comprised of a maximum of three (3) members of City Administration and a maximum of three (3) designated Union representatives.

		_____
	Jerilou H. Cossack	Date
	Chair	
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	City Panel Member Nora Frimann	Date
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	Union Panel Member Randy Sekany	Date

ISSUE 22: RETIREMENT - PRIOR SERVICE COSTS (Article 28).

City Proposal

28.5 Changes in Unfunded Accrued Actuarial Liability (UAAL) attributable to the prior service costs for retirement benefit changes effective on or after the effective date of this agreement shall be shared equally between the City and employees represented by IAFF.

Union Proposal

No change. Status quo.

Positions of the Parties

The City. Both the City's proposal and the Union's proposal on Issue 20, Retirement Formula, will lead to an increase in prior service costs. The cost of a retirement benefit has two components: normal cost and the increase unfunded accrued actuarial liability (UAAL). Normal cost is the cost attributable to the coming year of service of the cost of the benefit on a going-forward basis. UAAL is the cost of the benefit for years which have already been worked but where the cost of the benefit was not paid. It is often referred to as the "prior service cost."

The City and employee share the normal cost of the retirement benefit on a 3/11 - 8/11 basis. The City is currently responsible for 100% of the increase in UAAL. There is no justification for requiring the City to pay the full cost of the benefit applicable to service rendered prior to the implementation date while the individual employees receive the retroactive benefit with no contribution toward that benefit.

UAAL is a significant portion of the cost created by the shift from an 85% retirement formula to a 90% retirement formula. More than two thirds of the cost of the City's retirement formula proposal (2.29%) is due to changes in UAAL.

Sharing of prior service costs occurs in agencies under the PERS system. This proposal will help offset the significant impact of the retirement formula change. The City's financial condition is tenuous. While the changing economic has prompted improved fiscal signs, the impact of an improved pension formula will be significant.

Maintaining the status quo would unfairly place the entire burden of the UAAL on the City with no justification. The City's proposal is more equitable.

The Union. Under the San Jose City Charter, the cost of retirement benefits is actuarially determined by two parts: normal cost and prior service or unfunded accrued actuarial liability (UAAL). Under the Charter, normal costs of a benefit are divided through a formula of 8/11 to the City and 3/11 to the employee. This proposal violates the City Charter by requiring the firefighters to "equally share" the cost of the UAAL for any benefit changes.

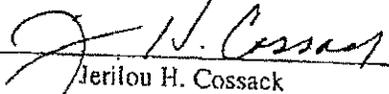
If the Panel awards the City's retirement formula proposal, this proposal would see their contribution rate increase by one-half of the increase in the City UAAL rate of 2.29%, or 1.145%. This is grossly inequitable since it violates the requirement of the City Charter that 100% of prior service cost be paid by the City. Further, the POA and the City did not negotiate such an enormous change in cost sharing when implementing the retirement benefit enhancement for police officers. Adoption of this proposal would expose firefighters to the potential of unlimited increases in contributions for a pension benefit otherwise inferior to the labor market standard and otherwise not required in the agreement providing the identical benefit, albeit at an earlier period of time, between the POA and the City.

This proposal, if adopted, would provide a windfall to the City in unknown millions of dollars since prior service cost fluctuates with investment performance. It is a shift in cost that is unprincipled under a defined benefit plan, which by design reduces risk to the employee.

Discussion

The City asserts sharing of prior service costs occurs in agencies under the PERS system but has provided no evidence in support of the claim. There is no sharing of prior service costs under the City's agreement with the police. This is yet another area in which there seems to have been virtually no dialogue between the parties prior to submission of this matter to arbitration. The sharing of the normal cost between the City and its employees is set forth in the Charter. The Union asserts, without contradiction, that the Charter requires the City to pay 100% of prior service cost.

The Union's proposal is adopted.


Jerilou H. Cossack _____ Date _____
Chair

Concur
 Dissent
City Panel Member Nora Frimann _____ Date _____

Concur
 Dissent
Union Panel Member Randy Sekany _____ Date _____

ISSUE 23: RETIREMENT - WORKERS' COMPENSATION OFFSET (Article 28).

City Proposal

28.4 In the event a member is retired for a service-connected disability and receives both a service-connected disability retirement allowance and a workers' compensation benefit for temporary disability, permanent disability or vocation rehabilitation temporary disability, then the service-connected disability retirement allowance shall be offset by the sum of all workers' compensation benefits as follows:

1. The offset shall apply only to the following persons:
 - a) Those persons whose application for a service-connected disability retirement was filed by any person authorized to file such application, on or after July 1, 2007; and

- b) Those persons retired on the retirement board's own motion, on or after July 1, 2007.
2. The applicable amount of the workers' compensation benefits shall be converted to a monthly equivalent. The monthly service-connected disability retirement allowance shall be reduced by the workers' compensation benefit monthly equivalent.
 3. The offset shall be in effect only during such time as concurrent retirement allowances and workers' compensation benefits are paid. In the case of the payment of a lump sum workers' compensation benefit (excluding payments for medical treatment), the offset shall apply only for such period of time as concurrent payments would have been made had the workers' compensation benefit been paid in installments.
 4. In no case shall the offset reduce the service-connected disability retirement allowance to an amount less than the sum of the maximum retired member contributions for medical, dental, life and accidental death insurance premiums, as determined by the City, plus one dollar. This limitation shall apply regardless of whether the retired member actually contributes toward the payment of such premiums.
 5. The offset shall not apply with respect to workers' compensation benefits paid for any injury or illness which did not cause or contribute to the disability for which the service-connected disability retirement was granted.

Union Proposal

No change. Status quo.

Positions of the Parties

The City. City firefighters who receive service connected disability retirements are also eligible for workers' compensation benefits for the same injury with no reduction. The City's proposal will partially eliminate the duplicate compensation and require that the service connected disability retirement benefits be offset by any Workers' Compensation payments for temporary or permanent disability payments. This will reduce the economic incentive to apply for disability retirement by eliminating the dual payment for a single injury. The proposal is carefully crafted to address only the problem of dual compensation for the same injury.

Labor Code Section 4850 provides for up to one year full salary paid leave of absence for firefighters, and other public safety officers in lieu of the regular state temporary disability benefit. With the exception of a few fire districts, coverage of Section 4850 is limited to those safety officers who are members of PERS or CERLS. Almost all cities and counties are members of PERS. The Section 4850 benefit, full wages, is considered to be tax free as a workers' compensation benefit and is payable for one year unless there is an earlier retirement. However, upon retirement, firefighters covered under Section 4850 and PRS do not receive any further temporary disability benefit.

The City has its own unique retirement system and is self-insured for workers' compensation. It does not participate in PERS. City firefighters receive a similar benefit of disability leave payable at full wages for up to one year. In addition to temporary disability, and retirement payment, San Jose firefighters also receive permanent disability payments.

No comparable agency allows its members to "double dip" and receive both a retirement allowance and a workers' compensation temporary disability payment for the same injury. Internal comparability also supports the City's position. Non-sworn retired San Jose employees have their retirement benefit offset by workers' compensation indemnity payments of temporary disability and permanent disability.

The Union. The City seeks to reduce disability retirement benefits to firefighters injured as a result of their job by integrating or reducing their retirement benefits by any award provided the employee under the workers' compensation system. This is a variant of a proposal made by the City before Arbitrator Brand and denied by him 16 years ago. The Union argued then, and argues now, that because firefighters are engaged in an inherently hazardous occupation whose

Union Proposal

No change. Status quo.

Positions of the Parties

The City. The proposal to eliminate references to staff costs is reasonable. The City Attorney's Office provides assistance and advice to the Police & Fire Department Retirement Plan. However, the MOA currently prohibits this service from being charged to the Plan. This is inconsistent with City practice where the City Attorney's Office costs are often funded by outside funds. As such the City asks that the prohibition of this offset be eliminated to allow proper charges where appropriate.

The Union. This proposal is also a rehash of a proposal considered and rejected by Arbitrator Brand 16 years ago. Since the issuance of the award by Arbitrator Brand, the voters of the State of California have adopted Proposition 162 establishing the absolute independent authority of the trustees to a public employee retirement plan to administer that plan in accordance with basic fiduciary duties. Accordingly, the Plan is no longer required to consider, nor accept, legal services from the City Attorney's Office. The Plan has hired its own independent legal counsel, Russ Richeda from the law firm of Saltzman and Johnson. There is no reason to require plan assets to be used for expenses not related to the fiduciary obligations of the Board of Administration. In fact, there is a legal prohibition against such use.

No provision of the POA agreement permits staff services from the City Attorney's Office to be charged to the Plan. The lack of comparability, the prior arbitral history, and the significant change in recognition of fiduciary duties and rights of the Retirement Board of Administration require rejection of this proposal.

Discussion

I am not persuaded that the costs for City Attorney
~~The City has not shown any instances where the services of the City Attorney's Office~~
services shall be paid for by the Plan. (see p. 12) (MS)
~~were sought by the Plan, or even where they appropriately might have been sought. The Union's~~

arguments are persuasive.

The Union proposal is adopted.

J. H. Cossack _____
Jerilou H. Cossack Date
Chair

Concur
 Dissent

Nora Frimann _____
City Panel Member Nora Frimann Date

Concur
 Dissent

Randy Sekany _____
Union Panel Member Randy Sekany Date

ISSUE 25: 48/96 WORK SCHEDULE (Article 14)

City Proposal

No change. Status quo.

Union Proposal

ARTICLE 14 HOURS OF WORK AND OVERTIME

14.11.2 Effective January 1, 2008 or as soon thereafter as practicable, the fifty-six (56) hour shift shall be worked on a 48/96 schedule for a period of one year. At any time during this year, the Union or the Department may elect to revert back to the current schedule from the 48/96 schedule.

Positions of the Parties

The City. Allowing Union members to experiment with a 48/96 work schedule would negatively impact workload, training, and administration. Since the Union membership was split on whether to pursue the 48/96 option, the conversion to that schedule would negatively impact morale for almost as many employees for whom the change would potentially increase morale.

There is a significant downside to the 48/96 schedule. It would increase firefighter fatigue, jeopardizing the employee's own safety as well as that of others. The fatigue problem would be especially acute in large departments such as San Jose. Many stations in the City experience a large volume of calls around the clock. Firefighters who need to respond to a late-night call during their first 24 hour shift benefit greatly from a day off to recover.

There are also significant operational problems associated with the 48/96 schedule. It would place a strain on training by limiting the number of days workers are available for that purpose. Managers are more likely to lose contact with those they supervise because workers are away for longer periods of time; special projects take longer.

The temporary nature of the Union's proposal does not make it any more palatable in light of the administrative burdens created by first changing to the new schedule and then changing back.

Finally, no comparable jurisdiction in the entire Bay Area has adopted the 48/96 schedule. Nor have any of the 10 largest California cities.

The Union. Under this proposal, employees would work two consecutive days and then have four days off for a trial period. This proposal would benefit firefighters by reducing their travel time and stress and benefit the environment. It recognizes that housing costs have driven employees farther and farther away from Santa Clara County.

The report prepared by Captain Martin Hoenisch and the Local 230 48/96 Schedule Committee in April 2003, as well as Captain Hoenisch's testimony in these proceedings, summarizes the findings about this schedule which led the Union membership to vote, by a close margin, to press for its adoption by the City. The 48/96 schedule allows employees more opportunity to recover from sleep deprivation and long-term fatigue by: (1) increasing the

number of four day rest periods from 40 to 60 a year; (2) increasing the number of "sleep in days" from nine to 15 per month, or by 60%; (3) reducing the number of days/hours employees spend getting ready for work and commute time by 50%; and (5) provides greater flexibility for employees working overtime or trades. The 48/96 schedule has either a neutral or positive effect on reducing sick leave usage. The report identified the following additional benefits for employees: more time at home with family and friends, 10 additional full weekends off a year, 20 additional "4 days" a year, and increased productivity at home.

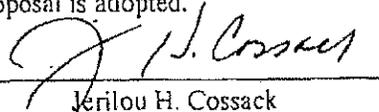
The April 2003 report identified the following benefits which would be achieved by the Department in adopting the 48/96 schedule: improved moral, increased productivity and project follow through on duty, better communication between shifts, less duplication of work, greater employee retention and more qualified applicants.

Discussion

As elsewhere pointed out, the real beauty of collective bargaining is its ability to explore new and different ways of resolving workplace issues. That give-and-take is inherent in the process. Arbitration, on the other hand, is not a good forum for experimentation and innovation.

It may well be that this schedule has all of the promise described in the 2003 report. However, such a radical departure from the existing method of operation should only be undertaken with the full support of both parties and should not be imposed by an outside third party absent compelling reasons to do so. There are no such compelling reasons present here. The City's arguments are persuasive.

The City's proposal is adopted.



Jerilou H. Cossack
Chair

Date

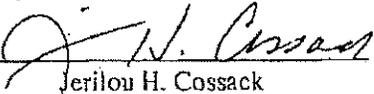
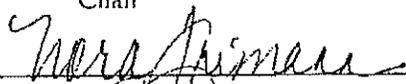
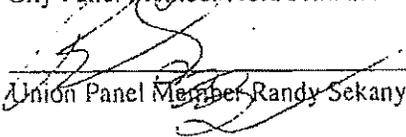
The Union. This, too, was an issued confronted by Arbitrator Brand 16 years ago. The City has failed to make any case in support of this proposal on the basis of a specific problem or concern.

If the City's proposal is intended to increase accountability, it fails to do that in any meaningful way. As Arbitrator Brand held when faced with virtually the identical demand by the City in 1991: "Rather, [the proposal] represents a fundamental change in the relationship between the Union and the Fire Chief. In effect, it makes the Union a mendicant, dependent upon the Chief for almost any time to properly represent bargaining unit members. Indeed, if the Chief were to deny the time, the Union would not even be guaranteed time to process a grievance about that denial. The proposal represents a fundamental and sweeping change in the relationship between the parties, for which no justification has been provided. Therefore, the City's position must be rejected."

Discussion

As Arbitrator Brand opined, the City's proposal would profoundly alter the relationship between the parties and would deprive the Union of necessary ability to perform functions within its obligations of representation. The City has not shown the hours spent on release time by any Union official were improper.

The Union's proposal is adopted.

		_____
	Jerilou H. Cossack	Date
	Chair	
<input type="checkbox"/> Concur		_____
<input checked="" type="checkbox"/> Dissent	City Panel Member Nora Frimann	Date
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	Union Panel Member Randy Sekany	Date

ISSUE 29: SAFETY OFFICER ASSIGNMENT (Article 19)

City Proposal

19.5 The Chief or designee may designate one or more qualified personnel to act as the Department Safety Officer for purposes of responding to incidents pursuant to the Illness and Injury Prevention Program ("IIPP"). Only the individual assigned to that function at the time of an incident will be required to respond under the IIPP. To the extent that this is inconsistent with any section of IPP or departmental policy, this language shall control.

Union Proposal

No change. Status quo.

Positions of the Parties

The City. Allowing the Chief to appoint more than one Safety Officer would lessen the burden placed on a single individual, who must remain on call 24/7 for two years. It has been the practice to have a Battalion Chief act as the lone Safety Officer. The proposal would expand the Fire Chief's authority to appoint more than one Safety Officer to reduce the workload of any single Safety Officer and to help ensure the availability of Safety Officers for multiple emergencies. It is intended to reduce the Safety Officer workload and to expand training opportunities for other employees to learn the important functions of the Safety Officer.

Most fire departments use a least two Safety Officers, one responsible for the injury and illness prevention plan and the other to oversee safety issues at fire scenes. Although under the City's current practice, the lone Safety Officer has the option to rotate on call duty with another qualified battalion chief, the pool of such employees is limited and it is often difficult. Furthermore, relying on such an informal arrangement can negatively affect accountability and could lead to confusion.

The proposal would lessen the burden placed on a single Safety Officer and would increase the number of Safety Officers who could respond to multiple emergencies at once and it would create better training opportunities for employees.

The Union. This proposal is offered simply to reduce the cost to the City of having to pay standby compensation pursuant to Article 10 of the contract to the Battalion Chief assigned responsibilities of the Department Safety Officer. As the record reflects, the City lost a grievance arbitration over this matter and seeks to avoid the impact of that award by permitting the assignment of the Departmental Safety Officer to be shared between unknown individuals without any guarantee these individuals possess the skills and experience to appropriately conduct the critical responsibilities of that position.

At its core, this proposal elevates dollars over safety. No evidence was provided to show there is an unreasonable burden placed on the 40-hour Battalion Chief historically assigned the duties and responsibilities on a 24/7 basis as the Department Safety Officer. No evidence was presented to show such assignments are not routinely shared among qualified Battalion Chiefs so that adequate time off is afforded the 40-hour Battalion Chief.

The only witness proffered by the City in support of this proposal stated he did not have any information relative to whether the current Safety Officer has been unable to locate someone to work the on-call duty.

Discussion

The City has not shown any problem actually exists. There has been no showing there has ever been any issue surrounding accountability or that confusion has ever resulted because of the current system. As with other proposals, it does not appear there was any discussion between the parties about this proposal prior to its submission to arbitration.

The Union's position is adopted.

J. H. Cossack
Jerilou H. Cossack
Chair

_____ Date

Concur
 Dissent

Nora Frimann
City Panel Member Nora Frimann

_____ Date

Concur
 Dissent

Randy Sekany
Union Panel Member Randy Sekany

_____ Date

ISSUE 30: CIVILIANIZATION OF FUNCTIONS (Article 42)

City Proposal

ARTICLE 42 CIVILIANIZATION OF FUNCTIONS

The City has the discretion to civilianize the positions listed below. Sworn incumbents may be transferred as other positions in the same classification become vacant or the City may delay implementation. If sworn incumbents are to be transferred, they will receive a minimum notice of ninety (90) calendar days. The City will give due consideration to the disabilities of employees occupying such positions and will make a reasonable effort to accommodate such disabilities, including the granting of reemployment rights in different job classifications under existing City programs that provide for maintaining pre-existing salary levels. At the City's sole discretion, civilianized positions may be filled temporarily by sworn personnel without the City waiving its right to civilianize such positions.

~~4.2.1 Fire Prevention - One Battalion Chief~~

4.2.1 Communications - One Battalion Chief

Union Proposal

No change. Status quo.

Positions of the Parties

The City. The City currently has the discretion to civilianize a Battalion Chief in Fire Prevention. The proposal eliminates the discretion of the Fire Chief of civilianize a Fire Prevention Battalion Chief and adds the discretion of the Fire Chief to civilianize the

Communications Battalion Chief. Therefore, there is no additional loss of a bargaining unit position. The proposal will provide the City with a civilian manager for an operation staffed by civilian employees and result in the Department's ability to better serve the public.

Because of the rotation of Battalion Chiefs in and out of the Division, the Department's dispatch operations have suffered from a lack of management experience and consistent management. From 1990 through 2005 there have been 13 different Battalion Chiefs assigned to lead Fire Communications. This rotation does not provide effective management because (1) there is a lengthy learning curve for new managers, (2) sworn personnel lack technical communications expertise, and (3) there is a lack of consistency when interacting with communications personnel from other departments and agencies.

The civilianization of this position would provide stability, allowing a full-time professional with expertise in the technology of computer aided dispatch to run the challenging operations of the Communications division. The Union has presented no evidence to support any phantom safety concerns.

Civilian management of the dispatch function is the standard in comparable communities. As of 2005, Sacramento Regional, San Diego, San Mateo County, Oakland and San Francisco all have civilian communications managers.

The Union. The City advances the notion that the key to running a public safety communications and dispatch system is continuity in management. The City's sole witness on this proposal acknowledged there was nothing in the MOA which would prevent the Chief from assigning a Battalion Chief to Fire Communication as a long-term assignment; such an assignment is within the Chief's discretion.

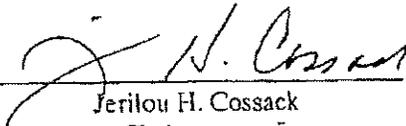
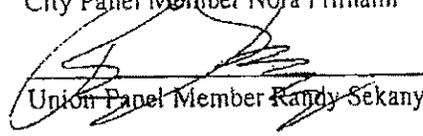
The failure to recognize the need for continuity and exercise managerial discretion to assign to assign a Battalion Chief to that position for a continuous period of time does not translate into a reason requiring the transfer of bargaining unit work.

Replacing a Battalion Chief as the supervisor of the Department of Communications with a lower paid civilian will save the City considerable funds in salary and benefits. However, unlike the positions civilianized in 1991, the job of Fire Communications is inextricably lined with issues of fire ground safety. The need for a Battalion Chief or a line fire officer in communications is paramount when multiple alarm situations are at hand. Unlike a computer or a civilian trained to follow pre-ordained protocols, a Battalion Chief with years of fire ground experience knows with precision which units should be dispatched or "moved-up" for safety reasons in combating fire ground emergencies.

Discussion

The City's rationale for this proposal is one, basically, of continuity. The Union points out that the duration of the assignment of a Battalion Chief to the Communications job is within the discretion of the Chief. The City has provided no explanation as to why management has not exercised the discretion it has to combat the problem identified. And while the City has labeled the Union's safety concerns as a "phantom issue," logic and common sense suggest that there should be someone at the Communications control who understands the problems, priorities and equipment capabilities when making decisions about which units to dispatch where. Even Supervising Public Safety Dispatcher Jim Seymour identified the role of the Battalion Chief as one of "coordinating with the Bureau of Field Operation."

The Union's position is adopted

		_____
	Jerilou H. Cossack	Date
	Chair	
<input type="checkbox"/> Concur		_____
<input checked="" type="checkbox"/> Dissent	City Panel Member Nora Frimann	Date
<input checked="" type="checkbox"/> Concur		_____
<input type="checkbox"/> Dissent	Union Panel Member Randy Sekany	Date

SUMMARY OF THE CHAIR

This has been a long and arduous process. While I know it is redundant, what must be emphasized here is that whereas the collective bargaining process envisions compromise and encourages innovation, the interest arbitration process does neither.

The parties in this dispute did not use the bargaining process to their advantage. There was precious little discussion between them about many of the proposals. It is axiomatic that there can be no meeting of the minds if there is no dialogue.

Although the Charter provides for issue-by-issue decisions, the result is a comprehensive agreement. Basic notions of equity and fairness require the balancing of compensation and benefits. It is not within the authority of the Arbitration Board to pick and choose various aspects of each party's proposal which the Board might find more palatable. In some cases the parties have overreached in one proposal in an effort to protect themselves from a possible adverse finding with respect to a different proposal.

The parties share a common interest. They share common problems. The biggest problem looming on the horizon is the ever-escalating cost of health care, which affects both current employees and retirees. Both parties should have an interest in addressing this vital area and, together, finding ways in which costs can be contained. Both the City and the Union's members

contribute to. Creative ways in which to structure and fund current and future benefits, such as the City-suggested trust for retiree medical benefits, must be explored.

Respectfully submitted,

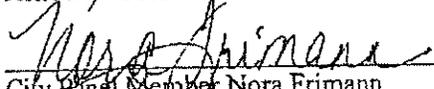
A handwritten signature in black ink, appearing to read "J. H. Cossack". The signature is fluid and cursive, with a large initial "J" and "H".

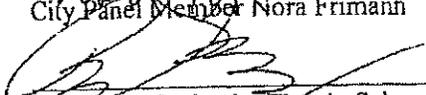
Jérilou H. Cossack
Arbitrator

Stipulation Regarding Delivery of Decision Pursuant to San Jose Charter Section 1111.

The parties agree that pursuant to section 1111, this decision was delivered to the parties on August 1, 2007.

 8/3/07
Jerilou H. Cossack, Chair

 8/3/07
City Panel Member Nora Frimann

 8/3/07
Union Panel Member Randy Sekany