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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 POST-ARBITRATION  
REPLY BRIEF TO ADDRESS FACTUAL  
INACCURACIES**

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

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

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20 The San Jose Police Officers' Association ("SJPOA") hereby submits the  
21 following corrections to factual inaccuracies contained in the City of San Jose's ("the  
22 City") Post-Hearing Brief re Successor MOA:

- 23 • Throughout its brief, the City represents that the Arbitration Panel may not  
24 implement any increase in compensation due to the fact that its retirement  
25 costs alone are increasing by 4%. (See, e.g., City's Brief at p.3 [last  
26 paragraph], p.11 [last paragraph], p.15 [top of page].) The City notes that,  
27 under Charter Section 1111(f), "Compensation' shall mean all costs to the  
28 City, whether new or ongoing, for salary paid and benefits provided to

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1 employees, including but not limited to ... pension, retiree medical  
2 coverage, ....” (Emphasis added.) But the City’s own witness, Margaret  
3 McCahan, admitted that the 4% calculation includes amounts the City pays  
4 for retirement benefits for current retirees that it did not fully fund  
5 previously (i.e., its unfunded liability). (Transcript of Proceedings (“TP”)  
6 176:2-180:22 [emphasis added].) These costs are not compensation “to  
7 employees.” The City cannot redefine “employees” to include retirees and  
8 then rely on its failure to pre-fund retirement benefits for long-separated  
9 employees as a basis to deny wage increases for its current employees.

- 10 • At several locations in its brief, the City represents that, between the 2008-  
11 09 fiscal year and the 2013-14 fiscal year, average police officer “total  
12 compensation” increased 21% from \$160,632 to \$193,868. (See, e.g.,  
13 City’s Brief at p.2 [last paragraph], p.12 [first paragraph], etc.) But as  
14 noted *supra*, the City includes in its compensation cost calculations the  
15 amounts it pays for retirement benefits for current retirees that it did not  
16 fully fund previously (i.e., its unfunded liability).
- 17 • The City asserts in the first paragraph on page 3 of its brief that Measure V  
18 was enacted “[i]n reaction to ever-increasing City employee and service  
19 cuts and concerns about prior interest arbitration awards that ignored the  
20 City’s fiscal situation and ability to fund and sustain the awards and which  
21 resulted in service cuts for residents ....” This statement contains no  
22 factual basis in the record. In fact, City Manager Debra Figone had no idea  
23 how many times, if any, the SJPOA had utilized interest arbitration under  
24 Charter Section 1111. (TP 257:1-3.)
- 25 • At page 10 (last paragraph) of its brief, the City asserts that “the first  
26 limitation in Charter Section 1111(g) is the central determinant of the  
27 Arbitration Board’s decision with regard to” Issue 5—Overtime. This is  
28 false. The federal Fair Labor Standards Act is preemptive of the San Jose

1 City Charter to the extent that it prohibits payment of compensatory time  
2 off in lieu of cash overtime without an agreement by the SJPOA. (See 29  
3 U.S.C. § 207(o)(2).)

- 4 • At page 11 (second paragraph) of its brief, the City asserts that it “was  
5 required” to implement various cost-saving measures, including “wage  
6 freezes and a 10% total compensation reduction for all city employees;  
7 reduction in public safety and other municipal services; and modifying  
8 medical and retirement benefits plans.” The evidence cited does not  
9 establish that any one of these steps “was required,” let alone all of them.
- 10 • At page 12 (last paragraph) of its brief, the City cites Jennifer Schembri’s  
11 testimony as establishing that, “[i]f the 80 hour buy-down is ongoing then it  
12 adds the 3.4 million as an additional cost every year.” But this baselessly  
13 assumes that, following the initial buy-down, all officers will have an  
14 additional 80 hours of unused vacation time in the subsequent year.
- 15 • At page 13 (top of the page) of its brief, the City asserts that the SJPOA’s  
16 proposal to remove the overtime cap “could cost the city quite a bit of  
17 money ... and it would really take away any control the City has on  
18 overtime costs.” This is false. As Sergeant John Robb testified, use of  
19 compensatory time off in lieu of cash overtime creates a liability on the  
20 City’s books that is equal to the amount it would pay in overtime, and  
21 allowing officers to utilize compensatory time off will sometimes create  
22 additional costs by requiring other officers to work paid overtime. (TP  
23 761:11-762:25.) In fact, the City essentially concedes that requiring  
24 additional overtime pay instead of compensatory time off is cost-neutral, as  
25 its own proposal would provide for more cash overtime instead of  
26 compensatory time off accruals. If its proposal was not cost-neutral, it  
27 would also run afoul of Section 1111(g) under the City’s own argument.  
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- At page 16 (first full paragraph) of its brief, the City claims that former SJPOA attorney John Tennant “understood that the wage concession would not ‘sunset’ ....” This is false. Mr. Tennant testified that the SJPOA agreed that it would not “automatically sunset,” but that it preserved its right to argue and demonstrate that it should sunset. (TP 428:18-429:15.)
- At page 16 (second full paragraph) of its brief, the City claims that the SJPOA has abandoned its argument that the 10% wage concession should sunset under the current MOA. This is false. The SJPOA continues to assert that it has met its burden of establishing that the 10% wage concession should sunset under the current MOU. Under the POA’s wage proposal, which was revised to address needs articulated by the City at the hearing, it would then be replaced under the new MOA by a 6% concession, which would later expire and be replaced by a 3% concession, which itself would later expire, whereupon officers’ pay would be restored to 2009 levels by July of 2014.
- At page 17 (top of page) of its brief, the City argues for the first time that the Arbitration Panel cannot order a term of more than one year, purportedly because it would not have the relevant data to do so. Effectively the City is arguing that Charter Section 1111 will never permit an MOA of more than 1 year. This is the first time the City has made this assertion, and it presented no evidence at hearing to support this construction of Charter Section 1111, even though it was the author of Measure V, which amended Section 1111 to its present form.
- At page 22 (last sentence of first full paragraph) of its brief, the City states that “[n]owhere during Guerra’s testimony did he identify any ongoing sources of revenue that the City could use for additional compensation increases without cutting City services.” This is false. At page 30 of his presentation, Mr. Guerra identified 3 such sources of funding: (1) Service

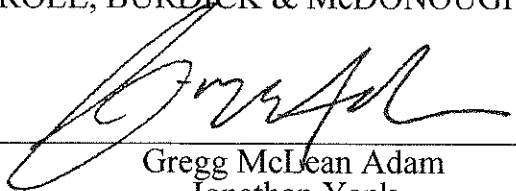
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Level Enhancements; (2) Essential Services Reserve; and (3) Employee Compensation Planning Reserve. (POA Exh. 24, p. 30.)

- At page 24 (first full paragraph) of its brief, the City asserts that “none of the testimony offered by the SJPOA’s witnesses disputed the revenue numbers provided by the City under Section 1111(g)(1) or demonstrated that compensation increases could be awarded from any ongoing revenues without the reduction of City services or eliminating the modest service restorations contained in the City’s budget.” This is false. Mr. Guerra disputed the City’s property tax and TOT revenue numbers at pages 16 and 17 of his presentation (POA Exh. 24, pp. 16 and 17), and one of the primary themes of Mr. Guerra’s testimony was that the 10% wage concession could sunset and restored wages could be funded from ongoing revenue, without impacting City services.

Dated: June 10, 2013

CARROLL, BURDICK & McDONOUGH LLP

By   
Gregg McLean Adam  
Jonathan Yank  
Attorneys for San Jose Police Officers’  
Association

1 *San Jose POA and City of San Jose Interest Arbitration for Successor MOA*  
2 JAMS # 1110015552

3 **PROOF OF ELECTRONIC SERVICE**

4 I declare that I am employed in the County of San Francisco, California. I am  
5 over the age of eighteen years and not a party to the within cause; my business address is  
6 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On June 10, 2013, I served  
7 the enclosed:

8 **SAN JOSE POLICE OFFICERS' ASSOCIATION'S**  
9 **POST-ARBITRATION REPLY BRIEF**

10 by electronic service. Based upon agreement of the parties to accept service by electronic  
11 transmission, I caused the documents to be sent to the persons at the electronic  
12 notification addresses listed below. I did not receive, within a reasonable time after the  
13 transmission, any electronic message or other indication that the transmission was  
14 unsuccessful.

15 Hon. John A. Flaherty (Ret.)  
16 Email: [jflaherty@jamsadr.com](mailto:jflaherty@jamsadr.com)  
17 [kreplogle@jamsadr.com](mailto:kreplogle@jamsadr.com)

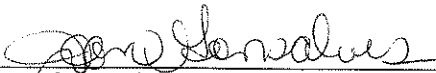
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San Francisco, CA 94104

1 I declare under penalty of perjury that the foregoing is true and correct, and  
2 that this declaration was executed on June 10, 2013, at San Francisco, California.

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6 Joan Gonsalves  
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