

**IN INTEREST ARBITRATION PURSUANT TO SECTION 1111
OF THE SAN JOSE CITY CHARTER**

In The Matter of Interest Arbitration
Between

CITY OF SAN JOSE,

Employer,

and

SAN JOSE POLICE OFFICERS'
ASSOCIATION,

Association.

Involving disputes over Successor
Memorandum of Agreement wages and other
terms

JAMS REF# 1110015552

**DECISION AND AWARD OF THE
ARBITRATION BOARD**

Judicial Arbitration Mediation Services
(JAMS)

Before: Hon. John A. Flaherty (Ret.), Chair
And Neutral Arbitrator,

Alex Gurza, City Board Member

James Unland, SJPOA Board Member

Hearing Dates: May 6-8, 2013

PRELIMINARY STATEMENT AND INTRODUCTION

As the City of San Jose (“City”) stated in its Post-Arbitration Brief, it is a fact that “neither side wins in interest arbitration.” In issuing this Opinion and Award, the Arbitration Board (“Board”) is constrained by the provisions of San Jose City Charter Section 1111 enacted by the voters in 2010.¹ Consequently, the average five-year tax revenue growth of 1.24% limits the Board’s authority to award compensation in excess of this amount, in spite of the legitimate wage equity and officer retention issues acknowledged by both the City and the San Jose Police Officers’ Association (“SJPOA”). This Board finds that it is unfortunate that the City and SJPOA have been unable, to date, to reach a negotiated agreement on a successor Memorandum of Agreement (“MOA”). A negotiated agreement would not be constrained by the limitations in Charter Section 1111, and would permit the beginning of the restoration of the reduced SJPOA wages and benefits resulting from the severe fiscal challenges the City faced between 2008 to 2012. This Board will issue the following Opinion and Award, as it is required to do under the San Jose City Charter, based on the inability of the City and SJPOA to reach a negotiated agreement for a successor MOA. These disputes arise as the consequence of the parties’ inability to reach a negotiated successor MOA for 2013-14 on wages and other MOA terms. Pursuant to the parties’ written agreement of December 7, 2011, and in accord with the provisions of the San Jose City Charter, the parties submitted these disputes to interest arbitration. The SJPOA Arbitration Board member is Jim Unland and the City Arbitration Board member is Alex Gurza. The City and SJPOA mutually agreed on retired Superior Court Judge John Flaherty as the neutral Arbitration Board member, who serves as the Chair. Pursuant to Charter Section 1111, the Arbitration Board decides each issue presented for arbitration separately, by majority vote.

The interest arbitration hearing was held in San Jose, California, on May 6-8, 2013. During the course of the hearing, both the SJPOA and the City were provided full opportunity to examine and cross-examine witnesses and to introduce relevant evidence and exhibits. The parties filed opening briefs on the interest arbitration process on April 29, 2013. Both parties filed Post-Arbitration Briefs on June 5, 2013, and Reply Briefs addressing factual inaccuracies

¹ This is the first Interest Arbitration under Charter Section 1111 as amended by San Jose voters in 2010.

on June 10, 2013. All issues were deemed submitted upon receipt of the briefs from the SJPOA and the City.

APPEARANCES:

On Behalf of the San Jose Police Offices Association:

Gregg McLean Adam
Jonathan Yank
Carroll, Burdick and McDonough LLP
44 Montgomery Street, Suite 4000
San Francisco, CA 94104

On Behalf of the City of San Jose

Jonathan Holtzman
Steven Shaw
Renne Sloan Holtzman Sakai LLP
350 Sansome Street, Suite 300
San Francisco, CA 94104

ISSUE

Shall the Arbitration Board adopt the last offers proposed by the City of San Jose or the last offers proposed by the San Jose Police Officers' Association?

THE PARTIES' LAST OFFERS OF SETTLEMENT

The San Jose City Charter provides for "issue by issue" and "last offer" interest arbitration. The parties submitted a last offer of settlement on each of the issues in dispute on May 22, 2013. This Interest Arbitration Board voted separately on each issue, selecting the last offer of settlement that most closely meets the criteria and limitations specified in the Charter.

The City and SJPOA reached impasse on the following successor MOA terms and proposed the last settlement offers listed below under Charter Section 1111(e):

Issue	City of San Jose	San Jose Police Officers Association
1. Term of Memorandum of Agreement	One year	Two Years
2. Wages	Status quo (1.24% - 4% retirement and health care cost increases = 0%)	4% July 1, 2013 3% January 1, 2014 3% July 1, 2014 with contingency to delay this increase to January 1, 2015 only

Issue	City of San Jose	San Jose Police Officers Association
3. Vacation Accrual Cap	Status quo	Suspend vacation accrual cap with re-opener when 1250 sworn officers
4. Leave Balance Buydown	Status quo	Annual 80 hour cash-out with contingency. Contingency for one year only.
5. Overtime	Employee option to be paid for overtime or credited with compensatory time, subject to request during pay period when overtime worked and Departmental overtime budget	Eliminate cap on cash payment for overtime Employee option to receive compensatory time off in lieu of cash payment
6. Premium Pay While On Leave	No premium pay when on paid or unpaid leave for more than one pay period (except for canine premium pay)	Status quo
7. Sick Leave Payout – Current Employees	Hourly balance and hourly rate frozen as of June 23, 2013. Future sick leave use based on “last in, first out.” Sick leave accrual after June 23, 2013, not eligible for payout	Freeze sick leave balances effective June 30, 2013 July 1, 2013 – After bank of 300 sick leave hours, annual cashout of 50 hours if employee uses less than 30 hours sick leave during fiscal year. Future sick leave use based on “last in, first out.” No changes to sick leave payout for 5 years.
8. Sick Leave Payout – New Employees	No sick leave payout for new employees	July 1, 2013 – After bank of 300 sick leave hours, annual payout of 50 hours if employee uses less than 30 hours sick leave during fiscal year (same as for current employees)

After listing the applicable San Jose City Charter Section 1111 criteria and limitations for evaluating each of the last offers of settlement, the Board will address each of the contested issues separately.

SAN JOSE CITY CHARTER CRITERIA GOVERNING THE BOARD'S DECISION

This is the first interest arbitration conducted under City Charter Section 1111 as amended by San Jose voters in 2010 through Measure V. Because Charter Section 1111 as amended imposed significantly different criteria and limitations for interest arbitration awards than prior to amendment, set out below are the relevant verbatim provisions that govern this Board's decision and award:

(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.

The Board is required to follow these Charter standards and, if it were to fail to do so, a party would be entitled to seek a writ of mandate in Superior Court to set aside the Board's Decision and Award as in violation of the City Charter:

(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.

As stated in *Creighton v. City of Santa Monica*, 160 Cal. App 3d (1984):

A city's charter is, of course, the equivalent of a local constitution. It is the supreme organic law of the city... Within its scope, such a charter is to a city what the state Constitution is to the state. (citations omitted)

AWARD ON CONTESTED ISSUES

ISSUE 2: WAGES²

City Last Offer

ARTICLE 5 WAGES AND PREMIUM PAY

5.1 ~~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~~ **There shall be no wage increases and the salary range shall remain the "status quo" during the term of this award 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 Although Wages is Issue 2 as a submitted last settlement offer, as the largest economic issue it is relevant or dispositive for all other contested issues and accordingly is addressed by the Board first.

ARTICLE 5 WAGES AND PREMIUM PAY

5.1 Effective June 26 ~~30, 2011~~2013, the 2011-2013 salary reduction for all salary ranges for employees represented by the POA ~~were decreased by approximately 10% shall sunset~~. 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 "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.

5.1.1 Effective July 1, 2013, all salary ranges for employees represented by the POA shall be temporarily decreased by approximately 6%.

5.1.2 Effective January 1, 2014, the reduction described in 5.1.1 shall sunset and be replaced by a temporary 3% decrease in salary ranges for employees represented by the POA.

5.1.3 Effective July 1, 2014, the reduction described in subsection 5.1.2 shall sunset and salary ranges for employees represented by the POA shall be fully restored to July 1, 2009 levels.

5.1.4 Contingency – Fiscal year 2014-15 Only: if the anticipated increases in City revenues from sales tax and property tax at the time of the May 2014 City Manager's Proposed Operating Budget do not, combined, exceed the levels predicted in the City Manager's February 28, 2013 Budget Request by 1.75%, the sunset described in 5.1.3 shall be delayed until January 1, 2015 (thereby fully restoring salary ranges to July 1, 2009 levels on January 1, 2015). This contingency shall be voided if, before July 1, 2014, the City prevails on its litigation with the County of Santa Clara over funds of the former Redevelopment Agency.

The City's Position

The City Council in November 2010 approved the budgetary goal of reducing total ongoing employee compensation by 10%, as well as other cost-saving measures such as retirement reform, sick leave payout, disability leave supplement, and compensation structure. The City and SJPOA began bargaining for a successor Memorandum of Agreement in January 2011, and reached a Tentative Agreement on June 3, 2011, that was ratified by the SJPOA and approved by the City. The Tentative Agreement included a 10% base wage reduction, which the City contended should be ongoing while the SJPOA asserted the 10% base wage reduction should end after one year. The City and SJPOA could not reach agreement on whether the 10% base wage reduction was temporary or ongoing, and agreed in June 2011 to submit the issue to interest arbitration pursuant to Charter Section 1111.³ The City and SJPOA scheduled interest arbitration for December 12, 2011, but reached a negotiated agreement avoiding the December 2011 interest arbitration.

The City-SJPOA Agreement reached on December 7, 2011, provided:

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.

The City and the SJPOA agreed to begin negotiations for the successor MOA by January 1, 2013, and to begin interest arbitration pursuant to Charter Section 1111 by May 1, 2013, with an award by May 31, 2013.⁴

As a result of negotiations that were continuing when the interest arbitration hearing commenced on May 6, 2013, the City proposed wages and compensation exceeding the Charter Section 1111 cap. The City's initial wage offer included the addition of a 2.5% step at the top of the salary range for two years. The City later revised its wage proposal to include a 2% general wage increase or an additional step of 2.5%; plus 80 hours of leave balance buydown; plus City

³ Measure V amending Charter Section 1111 to its current provisions was passed in November 2010 and was in effect in June 2011.

⁴ These timelines were extended by mutual agreement.

payment of 50% of the long-term disability premium; and increasing the uniform allowance to \$900. This offer represented an approximate 5.44% increase in compensation, at a City cost of approximately \$8.45 million dollars.⁵ The SJPOA's last proposal prior to interest arbitration was for a 10% wage increase in year 1; plus a 3% increase in year 2; plus removal of the caps on vacation accrual and overtime; plus ongoing leave buydown of 80 hours; and increasing the uniform allowance to \$1000. At minimum, the cost of the POA's proposal was approximately \$33.1 million over 2 years before adding the vacation and overtime costs, nearly four (4) times the costs associated with the City's proposal.⁶

For Fiscal Year 2013-14, the City projected a small General Fund shortfall. Built into the 2014-2018 General Fund Forecast for 2013-14 was a set-aside for salary adjustments City-wide in the form of an Employee Compensation Planning Reserve of \$11.1 million. The primary reason the City was able to factor in the Employee Compensation Planning Reserve is that some elements of the Fiscal Reform Plan (approximately \$20 million dollars in General Fund savings) had been implemented and included as part of the City's Fiscal Year 2013-14 budget. Without these savings, the City would not have been able to include this Reserve in its Proposed Budget. This \$20 million dollars in savings is currently the subject of litigation and it is possible that the savings will not be realized in whole or part.

Negotiations between the City and SJPOA continued after the conclusion of the interest arbitration hearing on May 8, 2013. On May 16, the City provided SJPOA with a package proposal for settlement prior to the submission of Last Offers to this Arbitration Board. The City's proposal was a 2-year contract term, including a 2.5% general wage increase in year 1 and a 2.5% general wage increase in year 2, plus a 4% non-pensionable retention bonus towards the end of year 2. After the conclusion of the arbitration hearing, the Budget Office received additional information on May 17, 2013, allowing it to recommend establishing an earmarked reserve fund for the full amount of this proposal. This City proposal exceeded the maximum that this Arbitration Board can award pursuant to Charter Section 1111(g). It stated that the City's last offer in interest arbitration must be consistent with Section 1111(g) limitations.

⁵ 2.54% of the wage increase was ongoing.

⁶ 2.54% of the wage increase was ongoing.

The total general fund shortfall between 2002-03 and 2012-13 was \$670 million dollars. Over the ten-year period from 2002 to 2012, approximately 2000 City jobs were eliminated due to budget constraints. The current employee count is the same as the City's staffing level in 1998-99, when the City had 200,000 fewer residents.

The San Jose Police and Fire Department Retirement Board's independent actuarial study documented an increase in the City's retirement contribution rate between 2003 and 2014 from 12.01% to 70.55%; the employee contribution rate increase during the same period was 8.44% to 11.67%. Some of the many cost saving measures the City was required to implement to address the general fund shortfall included wage freezes and a 10% total compensation reduction for all City employees; reduction in public safety and other municipal services; and modifying medical and retirement benefit plans.

The factual determination of the increase in revenues from sales tax, property tax, utility tax and telephone tax averaged over the last 5 years is dispositive for this interest arbitration. The tax revenues from 2006-07 were used as the base year, with the five subsequent fiscal year figures used to determine the change in revenue. The average revenue increase for the 5 years prior to the arbitration is 1.24%.⁷ The percentage that the City will be paying toward police retirement contributions is going up from 65.7% in 2012-13 to 73% in 2013-14. This means that the City's compensation costs in 2013-14 will increase 4% over 2012-13 costs based solely on the increased retirement contribution.

99% of the Police Department's budget is funded by the General Fund. The Police Department's budget has increased by 9% from 2008-09 to 2013-14 fiscal years, which is despite a 13% decrease of staffing in the same time period. A top-step police officer will receive total compensation of \$193,868 in 2013-14, up 21% from \$160,635 total compensation in 2008-09.

As mentioned above, the City's 2013-14 Proposed Budget included an Employee Compensation Planning Reserve of \$11.1 million to support approximately 2% compensation increases for police, fire and all other City employees paid through the General Fund. Subsequent to the interest arbitration hearing, the receipt from the County Assessor's office of revised property tax projections for future years allowed the City Manager's Budget Office to

⁷ Telephone tax revenue is excluded from this calculation due to the lack of five years of data; however, there was no significant growth in telephone tax revenue over the two years for which data is available. The City contends that if the telephone tax data were included, the 1.24% figure would actually decrease.

recommend an earmarked (almost) \$10 million dollar reserve for 2013-2014 to fully fund the City's May 16 proposal to SJPOA.⁸ If the 10% across-the-board compensation reduction was restored for all City employees, the general fund cost would be approximately \$55,410,000. If the 10% reduction was restored only for the SJPOA, it would cost approximately \$21,250,000. The budgetary impact of immediately restoring the 10% compensation reduction to all employees, or even to just the SJPOA, would be detrimental to the City's efforts to gradually and responsibly restore wages to all of its employees, as the City also gradually restores services and service levels to its residents.

The Union's Position

The City's financial condition is recovering quickly and the City has the actual ability to pay the SJPOA wage proposal. Recent revisions to the 2013-14 City budget show an upward projection of an additional \$10.85 million in property tax revenues. Police officer pay should be prioritized over other City budget goals in the best interests of the residents of San Jose.

The primary question is whether the 10% total compensation the SJPOA agreed to as concession in June 2011 and continued for a second year should sunset. The SJPOA has provided a balanced approach for the City to balance its financial recovery while restoring police officer salaries by July 2014. The SJPOA, unique among City bargaining units, preserved the right to arbitrate whether a sunset of the 10% wage concession is justified before the next MOA takes effect.

Charter Section 1111 restrictions on salary increases are not implicated because the sunset is a salary restoration and the POA is not seeking a wage increase under the new MOA.

The SJPOA and City have historically had better labor relations. Police officers are resigning in large numbers because it is too expensive for them to work in the City. The number of officers has decreased from 1400 to below 1100. Each time one of the 150 officers who resigned in the past two years left, the City lost \$170,000 in training costs for each officer.

Ballot Measure B requires an additional 4% retirement contribution effective June 2013, and the City and the bargaining units, through a stipulated agreement approved by the Court,

⁸ The SJPOA Employee Compensation Planning Earmarked Reserve for compensation increases to the SJPOA discussed in Budget Director Maguire's May 29 memorandum to the Mayor and the City Council includes a substantial portion of the additional projected property tax revenues and combines that amount with the SJPOA's estimated share of the \$11.1 Employee Compensation Planning Reserve that had been earmarked to be distributed to all General Fund employees.

agreed to postpone it to January 2014 due to the pending litigation. The City says it wants to retain a competitive workforce of police officers, but has not made any proposals over the last two years to retain officers. The City Manager recommended going to the voters with a half-cent sales tax increase in 2012 and the City Council turned it down. If the increase had passed, it would have brought in \$60 million. City budgeting involves balancing priorities and there are hundreds or thousands of possible budget scenarios that would allow funding of the POA proposal.

The budget process in San Jose is competing political viewpoints applied to a legislative process. The bamboo courtyard renovation is an example of this. The City Manager's proposed budget shows that there are financial resources available to address the police compensation issues. The City is setting aside \$13.7 million for a budget stabilization reserve that may or may not be necessary. The City is pre-paying down debt service payments voluntarily, which is not more important than retaining police officers. Services funded in 2012-13 on a one-time basis are being continued which means they are prioritized above public safety.

The City's revenue projections are too conservative, and there are multiple common sense options to finance the sunset of the 10% wage concession. A budget is a spending plan, and does not reflect the financial health of a city. San Jose underestimates revenues and overestimates expenditures, and has increased tax investment in capital resources. The median market value for residential properties increased modestly in 2013 for the first time since 2009. Quarterly sales tax receipts have rebounded and exceed pre-recession levels. The City has unrestricted fund balances of approximately 25% of total revenues it can spend on whatever it wants. Unemployment in the Bay area is dropping and wages are rising. Personal income is growing in San Jose, as is the gross domestic product. Housing prices are increasing along with taxable sales.

There has been a spike in POA resignations from typical single figures to 64 and 69 in 2011 and 2012, with officers going to other Bay Area jurisdictions. San Jose is unable to attract new lateral officers, and resignations and retirements are forcing mandatory overtime and staffing problems. San Jose is being used as a training ground by entry-level police officers. Employee pension contributions will go from 13% to 27% by July 2016, and officer take home pay will drop. Most officers have left San Jose because of the pay reductions and uncertainty.

Take home pay of officers is 21% below market and the City's comparison showing San Jose 25% above market is not relevant because it doesn't apply to take home pay.

Arbitration Board Discussion

The Union presented credible evidence that the 10% wage reduction in 2011 and continuing uncertainty about when police officer wages will return to their 2009 level has resulted in substantial increases in resignations and retirements over the last two years. The City does not dispute the fact that the wage and benefit impacts on police officers has been significant and that there is a compelling need to increase wages within a reasonable time period. While the City's position is that Charter Section 1111 governs its last offer in interest arbitration, the City acknowledges that it can negotiate a wage increase that is not limited by the Charter calculations. Notwithstanding that the parties have exchanged multiple offers, the City has not proposed full restoration of the 10% wage reduction nor has the SJPOA agreed to accept anything less than full restoration of the 10% reduction as part of the new collective bargaining agreement. While there is undoubtedly a number that will begin to restore wages to their prior level and allow the City to do so in a fiscally responsible manner, the parties have not been able to agree on that number. Therefore, Charter Section 1111 criteria and limitations must be applied to the parties' last offers of settlement.

Although there are additional criteria and limitations in Charter Section 1111 for evaluating last offers of settlement, Charter Section 1111(g)(1) provides that the Arbitration Board "shall not" issue an award that:

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.

The undisputed average five year percentage increase is 1.24%.⁹ It follows that any settlement offer that increases the cost of compensation by more than 1.24% is *per se* in violation of Charter Section 1111(g).

"Compensation" as defined by the Charter includes City retiree and health care costs, and pension costs, in addition to wages. In 2013-14, City costs for pension and retiree health care

⁹ As mentioned by the City, this figure excludes telephone tax calculations because of the lack of five years of data; however, the inclusion of the available telephone tax data would lower the 1.24% figure rather than increase it.

Dissenting Opinion (Unland)

The parties' sideletter agreement—a product of its current MOA—contemplated both in its original June, 2011 form and its revised December 2011 form, that the 10% total compensation concession agreed to by SJPOA *could* sunset, *if* an arbitrator determined it was appropriate. Measure V, and the changes to section 1111 it created, were never intended by the parties to prevent a sunset of that concession. But the Panel Majority has chosen to hide behind a flawed reading of the sideletter that makes a sunset impossible as a matter of law. The old axiom of “no good deed goes unpunished” is often cited in Labor Relations, but never more appropriately than here. The Panel Majority has allowed the City to perform a “bait and switch”—agreeing initially that the sunset of the 10% concession would be subject to arbitration, then arguing that it could not be because of Measure V. 150 San Jose police officers have already resigned and gone to other police departments in the past 27 months. It is the fear of SJPOA that many others who could leave but previously chose not to, based on the expectation that, with the realization of significant economic recovery, the City would restore the 10% concession, will, with today's decision by the Panel Majority, decide that they, too, should leave. Police officer pay in San Jose will remain at approximately 2005 levels, with the cost of living (in what is the highest cost of living county in the United States) having risen consistently in the meantime. The City Manager testified that making police officer pay competitive in the marketplace was a key goal for the City. Today's award by the Panel Majority sets that laudable aspiration back dramatically.

ISSUE 1: TERM OF AGREEMENT

City Last Offer

ARTICLE 1 TERM

- 1.1 This Memorandum of Agreement (hereinafter, "Agreement") shall become effective July 1, ~~2011~~ 2013, except where otherwise provided, and shall remain in effect through June 30, ~~2013~~ 2014. No amendment or change to the provisions of this Agreement shall be valid or binding unless reduced to writing and signed by duly authorized representative(s) of the parties.

SJPOA Last Offer

ARTICLE 1 TERM

- 1.1 This Memorandum of Agreement (hereinafter, "Agreement") shall become effective July 1, ~~2011~~ 2013, except where otherwise provided, and shall remain in effect through June 30, ~~2013~~ 2015. No amendment or change to the provisions of this Agreement shall be valid or binding unless reduced to writing and signed by duly authorized representative(s) of the parties.

The City's Position

The City's last proposal of maintaining the status quo for wages is compelled by the voters' adoption of the City Charter because the parties were unable to reach agreement, but does not reflect what the City proposed as a wage increase during negotiations or its interest in reaching a negotiated agreement with a sustainable wage increase. If the Board selects the City's last wage offer maintaining the status quo, it serves neither party to extend the status quo beyond the first opportunity for negotiating a successor MOA after one year.

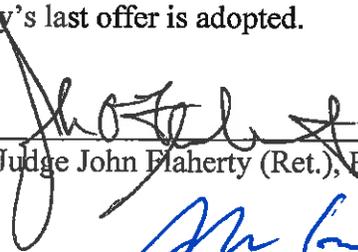
The Union's Position

Police officers need stability in determining whether to remain with the San Jose Police Department. A two-year proposal would offer certainty, preferably together with the SJPOA wage proposal. There has been non-stop bargaining in recent years, with financial and relationship costs. However, each side's wage and term proposals should be considered as a package and there should not be a split decision on these two issues.

Arbitration Board Discussion

Since the Board is awarding the City's last wage offer, as discussed above, the parties are in agreement that the term should be one year. If the parties are unable to reach a negotiated agreement providing for a wage increase for police officers, the status quo award should be revisited at the earliest opportunity.

The City's last offer is adopted.

	 _____ Judge John Flaherty (Ret.), Board Chair	<u>7/1/13</u> _____ Date
<input checked="" type="checkbox"/> Concur	 _____ Alex Gurza, City Board Member	<u>7-1-2013</u> _____ Date
<input type="checkbox"/> Dissent		
<input type="checkbox"/> Concur	 _____ Jim Unland, SJPOA Board Member	<u>7/1/13</u> _____ Date
<input checked="" type="checkbox"/> Dissent		

ISSUE 3: VACATION CAP

City Last Offer

Status Quo- no change to current cap.

SJPOA Last Offer

30.1.2 Vacation Leave

Effective July 1, 2013, there shall be no cap on vacation accrual. This is subject to reopener in the event that sworn staffing reaches 1250. ~~Employees shall not be allowed to accrue vacation in excess of two times their annual vacation accrual rate. Once the maximum accumulation has occurred, vacation will cease to accrue until the employee's vacation balance has fallen under their maximum accrual amount.~~

The City's Position

The last offers on vacation accrual are subject to the same Charter Section 1111(g) revenue limits as the wage proposal, because they are "compensation" under the City Charter. Increasing the vacation accrual cap would increase compensation in excess of the calculated cap of the 1.24% average revenue increase minus the 4% additional City payments for retirement contributions, or 0% (status quo) available for increased compensation. The City's last offer on the vacation accrual cap is the only one that conforms to the Charter's requirements.

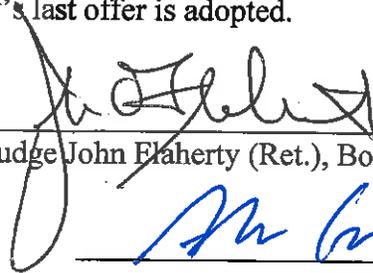
The Union's Position

Suspending the vacation cap is a reasonable response to the increasing inability of officers to secure vacation time. Vacation leave is deferred compensation, and there has only been a cap since 2008-09 when there were 1400 officers. As the number of officers declines, supervisors will not be able to grant vacation leave without creating the need for overtime. There should be a limited cost to the City because there are only a few officers who have exceeded the cap. However, more officers may reach the cap and lose vacation leave.

Arbitration Board Discussion

Vacation is included in the definition of "compensation." Therefore, the same limit as for Issue 2 on wages applies and removing the cap would violate Section 1111(g) of the Charter.

The City's last offer is adopted.



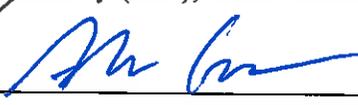
Judge John Flaherty (Ret.), Board Chair

7/1/13

Date

Concur

Dissent



Alex Gurza, City Board Member

7-1-2013

Date

Concur

Dissent



Jim Unland, SJPOA Board Member

7/1/13

Date

Dissenting Opinion (Unland)

Any added cost to the City through suspending the vacation cap is entirely speculative. SJPOA's proposal would not change the parties' previously agreed upon vacation accrual rate.

Application of Charter section 1111(g)'s restrictions to this proposal is a strawman. Under the Panel Majority's award, the City will enjoy a windfall as more and more officers are, through the understaffing of the department, unable or not permitted to take vacation.

ISSUE 4: LEAVE BALANCE BUYDOWN

City Last Offer

Status quo

SJPOA Last Offer

Concept:

- **Annual 80-hour cash out (CTO and/or Vacation); same model as three other City unions who have it;**
- **Contingency – Fiscal Year 2014-15 Only: if the anticipated increases in City revenues from sales tax and property tax at the time of the May 2014 City Manager’s Proposed Operating Budget do not, combined, exceed the levels predicted in the City Manager’s February 28, 2013 Budget Request by 1.752%, the annual 80-hour cash out shall be suspended during Fiscal year 2014-15, but shall resume effective July 1, 2015 unless otherwise agreed to by the parties or changed pursuant to Charter Section 1111. This contingency shall be voided if, before July 1, 2014, the City prevails in its litigation with the County of Santa Clara over funds of the former Redevelopment Agency.**

Language

Subject to agreement between the parties if POA proposal is selected by the Arbitration Panel.

The City’s Position

The last offer on leave balance buydown is subject to the same Charter Section 1111 revenue limits as the wage proposal, because it is “compensation” under the City Charter, unless there is a negotiated agreement on MOA terms that is not submitted for an interest arbitration award. Providing for an ongoing leave balance buydown would increase compensation in excess of the calculated cap of the 1.24% average revenue increase minus the 4% additional City payments for retirement contributions, or 0% (status quo) available for increased compensation.

The City's last offer on the leave balance buydown is the only one that conforms to the Charter's requirements.

The SJPOA's Position

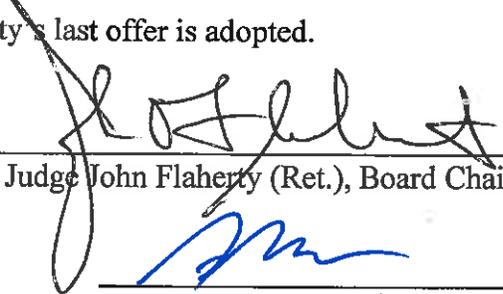
The leave balance buydown proposal would permit the annual cashout of 80 hours of comp time or vacation time, based on the same model as three other City unions with this benefit. Leave balance buyout in 2014-15 is contingent on revenue exceeding the City Manager's projections by 1.75%, or approximately \$7.5 million.

The leave balance buydown was an item of near-agreement at the table and the SJPOA doesn't understand the City's justification for withdrawing the proposal. It is not a cost issue because under federal and state law all accrued benefits must be paid out, and the only issue is when. Allowing employees to cash out leave is one time money and reduces the future financial obligations of the employer.

Arbitration Board Discussion

Leave balance buydown would be a new annual ongoing cost and accordingly is within the definition of "compensation." Therefore, the same limitation in Section 1111(g) of the Charter as for Issue 2 on wages applies.¹⁰

The City's last offer is adopted.

		<u>7/1/13</u>
	Judge John Flaherty (Ret.), Board Chair	Date
<input checked="" type="checkbox"/> Concur		<u>7-1-2013</u>
<input type="checkbox"/> Dissent	Alex Gurza, City Board Member	Date
<input type="checkbox"/> Concur		<u>7/1/13</u>
<input checked="" type="checkbox"/> Dissent	Jim Unland, SJPOA Board Member	Date

¹⁰ Moreover, it bears mention that the City represented in its reply brief that no other City unions are receiving leave buydown benefits at this time.

Dissenting Opinion (Unland)

Again, Section 1111(g) is a strawman. The City is required by law to pay out to employees the full value of CTO and vacation, minimally upon separation. The question is one of timing. The City budgets vacation and overtime in its employee costs. Permitting a cash out of such accrued leave, like the one enjoyed by other employee groups, allows police officers to realize the value of these leave credits at a time when their salaries are dramatically below market, and saves the City accruing additional future liabilities. The Panel Majority misses an obvious opportunity to achieve a "win-win."

ISSUE 5: OVERTIME

City Last Offer

ARTICLE 13 HOURS OF WORK AND OVERTIME

13.6 An employee authorized or required to work overtime who works in excess of eight (8) hours per day, or ten (10) hours per day if assigned to a work schedule of four/ten-hour work days, or in excess of forty (40) hours per workweek, shall be compensated at the rate of time and one-half the employee's base hourly rate, except when such excess hours result from a change in such employee's workweek or shift or from the requirement that such employee fulfill his/her workweek requirement. Except as otherwise required by Article 14, 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 compensated to the nearest half-hour.

13.6.1 An employee assigned to work overtime may **either request to be paid for such overtime worked or be credited with compensatory time, provided that the employee makes such election during the pay period in which the overtime is worked, and provided further, that in the event the employee requests payment for such overtime, the applicable budget for the Department may accommodate such payment.** ~~elect to be paid in cash for such overtime up to a maximum of three (3) hours per pay period or be credited with compensatory time, as determined by the employee except as provided in provision 13.6.1.1 below. Any overtime payment beyond three (3) hours per pay period or as provided for in provision 13.6.1.1 below, shall be made at the City's discretion. Effective June 28, 2009, an employee assigned to work overtime may elect to be paid in cash for such overtime up to a maximum of six (6) hours per pay period or be credited with compensatory time, as determined by the employee except as provided in provision 13.6.1.1 below. Any overtime payment beyond six (6) hours per pay period or as provided for in provision 13.6.1.1 below, shall be made at the City's~~

~~discretion.~~ Payment for overtime worked, authorized pursuant to this paragraph, shall be made as soon after the pay period in which the overtime is worked as practical, but in no event longer than two pay periods after the pay period in which the overtime is worked.

SJPOA Last Offer

13.6.1 ~~An employee assigned to work overtime may elect to be paid in cash for such overtime up to a maximum of three (3) hour per pay period or be credited with compensatory time, as determined by the employee except as provided in provision 13.6.1.1 below. Any overtime payment beyond three (3) hours per pay period or as provided for in provision 13.6.1.1 below, shall be made at the City's discretion. Effective June 28, 2009, an employee assigned to work overtime may elect to be paid in cash for such overtime up to a maximum of six (6) hours per pay period or be credited with compensatory time, as determined by the employee except as provided in provision 13.6.1.1 below. Any overtime payment beyond six (6) hours per pay period or as provided for in provision 13.6.1.1 below, shall be made at the City's discretion.~~ Payment for overtime worked, authorized pursuant to this paragraph, shall be made as soon after the pay period in which the overtime is worked as practical, but in no event longer than two pay periods after the pay period in which the overtime is worked.

13.6.2 **Employees may elect to receive equivalent compensatory time in lieu of cash; however, t**The outstanding amount of accrued compensatory time owed to an employee shall not exceed 240 hours by the end of each calendar year. An employee may exceed the 240 limit during the year but shall be responsible for bringing the balance back to the 240 hour maximum level by taking the time off prior to the end of the calendar year. This time off must be pre-approved by the supervisor.

The City's Position

The City's offer on overtime pay addresses the SJPOA's concern about limiting overtime pay to 6 hours and requiring time exceeding 6 hours of overtime to be taken as compensatory time off. Officers working overtime have the option of being paid in full for all overtime hours worked or to take the time as compensatory time off, provided the election is made in the pay period during which the overtime hours are worked. Payment for overtime hours is subject to there being funds in the Police Department's overtime budget allocation to pay for such hours. This proposal allows officers to request and be paid for all overtime hours worked, rather than taking compensatory time off, up to the budgeted amount for police department overtime.

The SJPOA's offer to eliminate the current overtime cap and allow employees to elect compensatory time off at their sole discretion increases compensation and is not allowable under the Charter limitations.

The SJPOA's Position

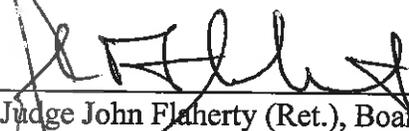
When an employee works overtime he/she will have an unlimited ability to select cash or compensatory time off for overtime. The Board's hands are tied on this issue because the City's proposal would violate the Fair Labor Standards Act. Under the FLSA, an employer is required to provide compensation at one and one-half times the regular rate of pay when an employee works overtime. An employer can only provide compensatory time off in lieu of pay when there is a collective bargaining MOA between the employees and the agency. The SJPOA does not agree to the City's proposal requiring compensatory time off when cash overtime is not budgeted for and the City's proposal is unlawful.

Arbitration Board Discussion

With regard to the SJPOA's proposal to eliminate the overtime cap regardless of the City's budget, the SJPOA's contention that the Board must eliminate use of compensatory time in lieu of overtime payments is incorrect. The SJPOA states that there is no agreement in place to allow payment for compensatory time and therefore it would violate the FLSA to allow the use of compensatory time. The terms of an expired MOA do not simply disappear; rather, those terms remain until modified by another agreement or interest arbitration. The role of the Arbitration Board is to set the terms/conditions of the successor MOA. The FLSA requires that compensatory time be awarded pursuant to the provisions of a collective bargaining agreement,

memorandum of understanding, or other agreement. (29 U.S.C. § 207(o)(2).) The fact that the Arbitration Board is determining the terms of the MOA does not preclude compensatory time. Removing the cap and allowing employees to choose cash or compensatory time without respect to the budget would increase the City's costs within the meaning of Charter Section 1111(f) and would therefore exceed the cap as calculated under Section 1111(g)(1).¹¹

The City's last offer is adopted.

		<u>7/1/13</u>
	Judge John Flaherty (Ret.), Board Chair	Date
<input checked="" type="checkbox"/> Concur		<u>7-1-2013</u>
<input type="checkbox"/> Dissent	Alex Gurza, City Board Member	Date
<input type="checkbox"/> Concur		<u>7/1/13</u>
<input checked="" type="checkbox"/> Dissent	Jim Unland, SJPOA Board Member	Date

¹¹ The SJPOA's citation to *White v. Davis* (2003) 30 Cal.4th 528, 578 is inapposite. *White* addressed a budget impasse, and held that the state must timely pay nonexempt employees their full salary for straight time worked and one and one-half times their regular rate for overtime. *White* does not involve the use of compensatory time or any issues germane to the present dispute.

Dissenting Opinion (Unland)

The Panel Majority is willing to risk the City violating the federal Fair Labor Standards Act out of its deference to section 1111(g). While the City is correct that under the Charter, this award becomes the new collective bargaining agreement, the question remains whether the involuntary application of City Proposal #5 in the successor MOA constitutes a collective bargaining agreement as contemplated in 29 U.S.C. § 207(o)(2).

ISSUE 6: PREMIUM PAY WHILE ON LEAVE

City Last Offer

5.2 Premium Pay

Compensation for the benefits 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. **With the exception of canine pay, employees shall not be eligible for any of the premium pays below when on a paid or unpaid absence for more than one pay period.**

5.2.1 Bomb Squad

Each employee regularly assigned to the "Bomb Squad" on a full-time basis and who is responsible for disarming bombs and similarly fused explosive devices shall be paid an amount equivalent to a one-step increase under the biweekly pay plan during each biweekly period of such assignment.

5.2.2 Canine Officers

5.2.2.1 Each employee in the classification of Police Officer, Police Sergeant, and Police Lieutenant who is assigned to the duty of feeding, caring for and supervising police dogs, which duty is performed by the employee at his/her home and during hours when he/she is otherwise not on duty with the Police Department, and to each employee in the classification of Police Sergeant who is assigned the duties of coordinating the BFO Canine Unit, shall be paid an amount equivalent to a one-step increase under the biweekly pay plan during each biweekly period of such assignment.

5.2.2.2 Such additional compensation shall not be paid for any biweekly period or portion thereof when such additional duty is not performed by the employee, whether for the reason that the dog assigned to such employee is boarded at the kennel at City expense or otherwise.

5.2.2.3 This additional compensation is granted in recognition of the personal monetary investment, duties and responsibilities of the K-9 assignment including the time spent by the unit employee while on or off duty in the

care and maintenance of the assigned canine. This extra compensation is not to be considered premium pay. The City shall pay costs associated with the "Initial Basic Training of Handler and K-9" when an officer is assigned to canine duty.

5.2.3 Motorcycle Duty Pay

Each employee in the classification of Police Officer, Police Sergeant, and Police Lieutenant who is assigned to duty that customarily requires the employee to ride a two-wheel motorcycle during all or a portion of the hours when he/she is on duty with the Police Department, shall be paid an amount equivalent to a one-step increase under the biweekly pay plan during each biweekly period of such assignment, in addition to the salary fixed and established for said class title and number.

Such additional compensation shall not be paid to any person for any biweekly pay period during which the employee is assigned to said duty for less than one-half (1/2) of the working days of the employee in such biweekly pay period.

5.2.4 Training Officer Duty Pay

Each employee in the classification of Police Officer or Police Sergeant, who is assigned by the Chief of Police to perform, and does perform, the duties of a Training Officer shall receive an amount equivalent to a one-step increase under the biweekly pay plan during each biweekly period of such assignment, in addition to the salary fixed and established for said classification.

5.2.4.1 An employee who is assigned by the Chief of Police on a temporary basis to perform Training Officer duties, shall receive an amount equivalent to a one-step increase under the biweekly pay plan for all hours actually worked performing such duties.

5.2.5 MERGE Unit

Each employee in the classification of Police Officer, Police Sergeant, and Police Lieutenant, who is regularly assigned to the Mobile Emergency Response Group & Equipment, shall be paid an amount equivalent to a one-step increase under the biweekly pay plan during each biweekly period of such assignment.

5.2.6 Premium Pay While on Disability Leave

An Officer in a premium pay status referred to in Section 5.2.1, 5.2.3, or 5.2.5 above, shall not lose such premium pay while off on job related disability leave **on disability leave for more than one pay period shall not receive any premium pay for which they are eligible.** However, once **Once** the Officer is capable of returning to work, but in a job assignment not having a premium pay status, he/she shall **also** no longer be entitled to such premium pay. However, such Officer shall have the right to return to the previous pay status, at the first available opening in the assignment he/she left, once such Officer is available to return to such position. An Officer wrongfully refusing to take such "light duty" (non-premium pay) assignment may also be denied the premium pay by the City. Prior to ending the premium pay status of an employee wrongfully refusing to accept a light duty assignment, the City shall inform the Organization and give the Organization an opportunity to communicate with such employee.

5.2.7 Mounted Unit

The City shall provide feed for the horses in the mounted unit, as well as the shoes and shoeing for the horses.

5.2.8 Air Surveillance Unit

Employees assigned to the air surveillance unit shall be entitled to standby pay when ordered to stand by. Each employee when assigned to the Air Surveillance Unit shall be covered by a City provided \$250,000 life insurance policy, which shall cover aerial photography and aerial surveillance.

5.2.9 Bilingual Pay

Each full time employee who meets the eligibility requirements set forth herein shall be compensated at the rate of \$29.00 per biweekly pay period for each pay period actually worked.

5.2.9.1 The employee is or was selectively certified for a position which has been approved by the Director of Human Resources for selective certification based on Spanish-English bilingual ability or Vietnamese-English bilingual ability and is currently assigned to such position, or

5.2.9.2 The duties currently assigned to an employee and/or currently being performed by an employee require utilization of Spanish and/or

Vietnamese on a regular basis, to be determined and approved by the Director of Human Resources.

- 5.2.9.3 Such employee must be certified as bilingual according to the current established procedure. Before changing the current procedure, the City agrees to discuss any proposed change with the Organization.
- 5.2.9.4 If the Chief of Police determines that another foreign language is required in his/her department subject to the above criteria, he/she may recommend that the employee receive bilingual pay.
- ~~5.2.9.5 In the event an eligible employee is on a leave of absence, with or without compensation, for a period of one full pay period, the appropriate reduction in the above-mentioned compensation shall be made.~~

SJPOA Last Offer

Status quo

The City's Position

The San Jose City Auditor issued a report of its audit of Fire Department Injuries in September, 2012, including Recommendation 15:

We recommend that subject to meet and confer with the bargaining units, the City should discontinue its practice of paying Fire and Police employees' premium pay when the employees are off work due to a disability.

The County of Santa Clara does not pay fire employees premium pay when they are out on 4850 disability leave. The City's proposal is consistent with the Audit Report recommendation of paying premium pay only when the employee is actually capable of performing the extra services which justifies the premium pay (with the exception of canine officers, who continue to care for their dogs while on disability or leave.) Premium pay is not an entitlement, but rather is recognition of an employee performing specific duties. An employee who is not performing such duties should not receive compensation for those duties.

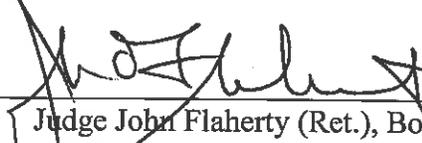
The SJPOA's Position

The Board should retain the current language governing eligibility for premium pay during paid leave. The City offered little justification for why it needed to eliminate this benefit received by officers only in specialty assignments. The proposal is unduly harsh, when the City has reduced disability rights for police officers. There are recent examples of officers being injured on the job and on disability for long periods of time and these officers would lose their premium pay under the City proposal.

Arbitration Board Discussion

Premium pay for special duties in the Police Department is in recognition of employee's performing the extra services which justifies the additional compensation. It is reasonable that an employee who is not actually performing these duties should not continue to receive the premium pay.

The City's last offer is adopted.



Judge John Flaherty (Ret.), Board Chair

7/1/13

Date

Concur
 Dissent



Alex Gurza, City Board Member

7-1-2013

Date

Concur
 Dissent



Jim Unland, SJPOA Board Member

7/1/13

Date

Dissenting Opinion (Unland)

The Panel Majority cloaks in terms of "reasonableness" a proposal that will reduce the compensation of police officers in the most dangerous assignments, who are injured or shot on duty, during their recovery. The City offered no projection as to savings from such a proposal, and in truth any savings are probably de minimus. But the effect on officer morale, at a time when the city is purportedly trying to retain its officers, of proposals that will be seen as spiteful and politically motivated, should not be underestimated.

ISSUE 7: SICK LEAVE PAYOUT- CURRENT EMPLOYEES

City Last Offer

31.1 Sick Leave Payout

For employees hired on or before July 6, 2013, sick Sick leave payout shall be given to full-time benefited employees who are members of the Federated City Retirement System and the Police and Fire Retirement Plan at the time of retirement or death under one of the following conditions:

31.2.1 Police and Fire Retirement Plan

The employee is a member of the Police and Fire Retirement System and retired under the provisions cited in the plan and credited with at least twenty (20) years of service in this retirement plan or credited with any service prior to a service-connected disability retirement.

31.2.2 Federated City Retirement System

The employee is a member of the Federated City Retirement System and retired under the provisions cited in the plan and credited with at least fifteen (15) years of service in this retirement plan or credited with at least ten (10) years of service prior to a service-connected disability retirement.

31.2.3 Terminated Employee with Vesting Rights

The employee has terminated service with the City in good standing, retained vesting rights in a retirement system according to the provisions of the San Jose Municipal Code and following such termination qualifies for retirement and retires under the provisions cited in the code and has at the time of retirement credit for at least;

- 20 years of service in the Police and Fire Retirement System
- 15 years of service in the Federated City Retirement System

31.2.4 Death During Service

The estate of any full-time employee who dies while in City service and prior to retirement, even though the employee is not credited with at least;

- 20 years of service in the Police and Fire Retirement System
- 15 years of service in the Federated City Retirement System

31.4 If a full-time employee at the time of his/her service retirement or upon the employee's death has 1,200 hours or greater of earned unused sick leave, he/she, or his/her estate, shall be paid a sum of money equal to 100% percent of his/her hourly rate at the time of his/her death or service retirement, whichever is earlier, multiplied by the total number of his/her accumulated and unused hours of sick leave as of the date of his/her 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. 100% service, 75% disability).

31.2.5.3.1 An employee who, at the time of his/her retirement, qualifies for benefits in the 800 to 1,200 hour category as provided in subsections 31.2.4.1 and 31.2.4.2 above, shall be credited, for insurance purposes only, with a value equal to twenty-five (25%) percent of his/her hourly rate of pay for those individuals in the seventy-five (75%) percent payment category or a value equal to twenty (20%) percent of his/her hourly rate of pay for those individuals in the eighty (80%) percent payment category at the time of his/her retirement or termination, whichever is earlier, multiplied by the total number of his/her accumulated and unused hours of sick leave as of the date of his/her retirement, or by 1,200 hours, whichever is less. The City shall pay the cost of health and/or dental insurance premium, for the type of coverage specified by the employee, for the employee or for the employee and his/her dependents under one of the health and/or dental insurance plans available at the time to regular full-time City employees, until such time as the total amount of such payments equals the total amount credited to such employee hereunder, or until the death of such employee, whichever is earlier.

31.5 Payment for Accrued Sick Time

Pursuant to 31.2.5, upon Upon retirement (Service or Service Connected Disability) an officer shall receive a lump sum cash payment for the total amount of accrued sick time hours.

31.6 Death of Terminated Employee

The estate of any full-time employee who had terminated service with the City in good standing but had retained vesting rights in a retirement system according to the

provisions in the San Jose Municipal Code and dies (on or after July 10, 1977) prior to becoming eligible for retirement allowances as cited under provisions of the San Jose Municipal Code and has at the time of death credit for at least;

- 20 years of service in the Police and Fire Retirement System
- 15 years of service in the Federated City Retirement System

For purposes of determining the total number of accumulated and unused hours of sick leave of a full-time employee at the time of his/her retirement or death, unused sick leave from prior periods of employment with the City shall be used. Such previously accumulated sick leave shall be credited to the employee for use during an employee's current employment period.

SJPOA Last Offer

31.2.8 Effective July 1, 2013, the sick leave payout described in Article 31.2 et seq. will be modified as follows:

(a) Employees will no longer be allowed to accrue additional sick leave hours that count towards the sick leave payout.

31.3 Effective July 1, 2013, employees will continue to accumulate sick leave at the rate provided for in section 31.1.1. Sick leave hours accrued after July 1, 2013 (which will be tracked in a separate sick leave bank) shall no longer be subject to the sick leave payout described in Section 31.2.

31.3.1 Sick leave hours accrued after July 1, 2013 will be subject to an annual sick leave payout as follows:

31.3.1.1 Employees must establish and maintain a core bank of sick leave hours in order to qualify for the annual sick leave payout. That core bank shall be a minimum of three hundred (300) hours. Sick leave hours accrued before and after July 1, 2013 shall be counted for purposes of establishing core hours.

31.3.1.2 **Once an employee has established his/her core bank of sick leave hours, he/she shall be entitled to an annual conversion of sick leave hours for pay out payment under the following conditions: If an employee utilizes thirty (30) hours or less of sick leave in a fiscal year, he/she shall be entitled to pay out for up to fifty (50) hours accrued during that fiscal year. If an employee utilized more than thirty (30) hours of sick leave in a fiscal year, he/she is not eligible for any sick leave pay out.**

31.3.1.3 **Sick leave hours donated to catastrophic sick leave bank(s) or used for authorized bereavement leave according to the Civil Service Rules shall not be considered sick leave utilization for purposes of this paragraph.**

31.3.1.4 **Payment of the cash out shall take place on an annual basis on the pay period closest to June 1 for each remaining fiscal year of this Agreement.**

31.3.1.5 **The aforesaid payments shall not be considered as part of an employee's salary for the purpose of computing retirement benefits or retirement contributions.**

31.4 **Sick leave will be used on a "last-in-first-out" basis. In other words, for employees who have accrued balances of sick leave earned before July 1, 2013 which is subject to the sick leave payout described in 31.2, sick leave credits earned after July 1, 2013 will be exhausted by the City prior to using any sick leave credits earned before July 1, 2013.**

31.4¹² The sick leave benefit levels and payout provisions in Article 31 shall be guaranteed until June 20, 2018, unless the POA agrees to different provisions.

The City's Position

Sick leave payout paid by the City to SJPOA members who retired was approximately \$6,954,057 in 2009-10, approximately \$5,877,313 in 2010-11, and approximately \$3,676,307 in 2011-12. While sick-leave payout is not uncommon in public agencies, allowing a payout of 100% of sick leave is very high when compared to other agencies. The direction from the City Council was to eliminate sick leave payout, and proposals in prior bargaining with the SJPOA included the elimination of sick-leave payouts entirely. The City's last offer allows all current SJPOA employees to retain their right to cash out accrued sick leave upon retirement, but freezes the accrued sick leave hours and hourly rate as of July 6, 2013. Sick leave would continue to accrue after July 6, 2013 for both current and new employees, but would be available only when an employee is sick. Current employees would be able to draw on accrued sick leave on a "last in, first out" basis, so the full sick leave balance on July 6, 2013 would be available for cash-out unless an officer utilizes the hours for actual sick leave prior to retirement. The City's proposal is consistent with the original intent of providing sick leave in the first place- to provide employees wage security in the event of an illness, and not a deferred compensation account.

The SJPOA's offer on this issue does not address the increase in hourly rates that drive up the cost of sick leave payout, the reality that employees did not accrue their sick leave for payout at their current hourly rates, and provides for an ongoing annual payout for current and employees of 50 hours of sick leave that violates Charter Section 1111(g)(1).

The SJPOA's Position

On retirement, termination or death an employee is entitled to payout of his/her sick leave balances according to formulas in the MOA. When an employee accrues 1200 or more hours of sick leave he/she is entitled to payout of all hours at the current hourly rate. This is an admittedly generous formula that has existed for decades. The SJPOA is committed to scaling it back significantly. Sick leave balances would be frozen June 30, 2013. No additional hours will be

¹² There appears to be an inadvertent duplicate use of the numerical indicator "31.4" for the last two items in the SJPOA's last offer of settlement.

Dissenting Opinion (Unland)

SJPOA's proposal made a significant concession by ending application of the current sick leave cash out terms to new sick leave accruals. The proposal would have permitted the annual cash out of a reduced amount of hours—yet the Panel Majority is persuaded that the POA's proposal constitutes an “increase” subject to the limitations of section 1111(g). Given the current staffing model—where any sick leave call-in stretches coverage to the breaking point—it is reckless not to try to incentivize not calling in sick. The City's arguments are counter-intuitive: on one hand, retention and recruitment are “very important” to it; on the other, notwithstanding that other jurisdictions have some form of *prospective* sick leave payout, it proposes nothing.

ISSUE 8: SICK LEAVE PAYOUT- NEW EMPLOYEES

City Last Offer

31.2 Sick Leave Payout

Any employee hired on or after July 7, 2013, shall not be eligible for sick leave payout.

SJPOA Last Offer

POA's proposal # 7 applies equally to new hires – for sick leave earned after July 1, 2013, there is no distinction between how it will be treated for new hires and current employees.

The City's Position

New employees are not eligible for sick leave payout.

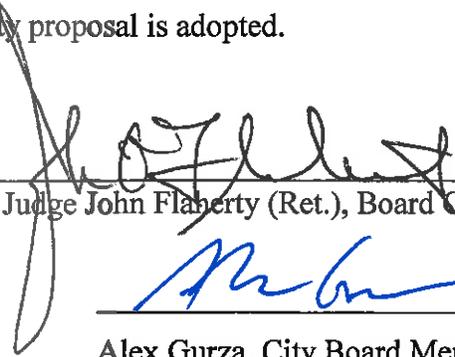
The SJPOA's Position

The City has no basis for treating new employees differently than existing employees for future sick leave accruals. New police officers are important to the staffing model and must be encouraged not to use sick leave unnecessarily.

Arbitration Board Discussion

The same analysis applies as for Issue 7. Allowing a cash out of sick leave on an annual basis compared to the current practice of providing a cash out only at retirement creates ongoing costs that are not allowed by the City Charter limitations.

The City proposal is adopted.

		<u>7/1/13</u>
	Judge John Flaherty (Ret.), Board Chair	Date
<input checked="" type="checkbox"/> Concur		<u>7-1-2013</u>
<input type="checkbox"/> Dissent	Alex Gurza, City Board Member	Date
<input type="checkbox"/> Concur		<u>7/1/13</u>
<input checked="" type="checkbox"/> Dissent	Jim Unland, SJPOA Board Member	Date

Dissenting Opinion (Unland)

New police officers, who will likely be replacing more defections of existing police officers, will become equally important to the staffing model. They, too, must be encouraged not to use sick leave unnecessarily.

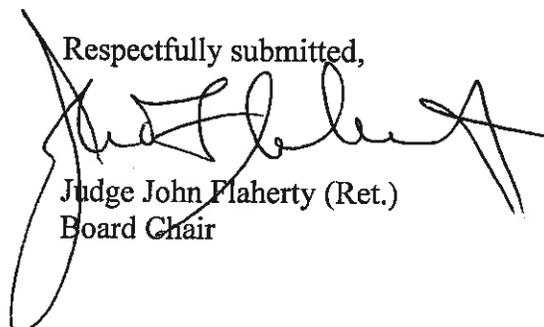
SUMMARY OF THE BOARD CHAIR

There is no dispute that the officers of the San Jose police department provide invaluable and devoted service to the residents of San Jose, and that equitable pay and positive labor relations are in the best interests of all. There is also no dispute that the City has had an extremely challenging fiscal crisis over the last several years, caused by both the Great Recession and the large increase in benefit costs, particularly retirement costs. With evidence of a recovering economy and City interest in restoring wages and benefits in a fiscally responsible manner, compromise on both sides should have resulted in a negotiated agreement. Because it did not, this Board is legally confined by the voters' amendment of Charter Section 1111 to a narrow review of the parties' last proposals, driven by the non-negotiable calculation of the five-year tax revenue increase preceding the arbitration.

Charter Section 1111(i) provides a final opportunity for the parties to reach a negotiated agreement prior to this Opinion and Award becoming public and binding. While the Board has seen offers on the table during negotiations between the parties that would substantially exceed the status quo on compensation, in the absence of a negotiated agreement, this Board is constrained by the limitations encompassed within Charter Section 1111, and accordingly, this decision will become final ten days after delivery if the City and the SJPOA do not agree through negotiations to modify some or all of the Board's decisions. It is my strongest possible recommendation that both the City and the SJPOA negotiate and agree on the terms of a new collective bargaining agreement and not require this Arbitration Board to make this final.

If this Award does become final, neither the City nor the SJPOA will have achieved their goal of providing wage increases to police officers. The City Charter's limitations make compromise through negotiations the only avenue to achieve that goal.

Respectfully submitted,



Judge John Flaherty (Ret.)
Board Chair

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: San Jose Police Officers Association vs. City of San Jose
Reference No. 1110015552

I, Kristianne Replogle, not a party to the within action, hereby declare that on July 01, 2013 I served the attached Decision and Award of the Arbitration Board on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at San Jose, CALIFORNIA, addressed as follows:

Charles D. Sakai Esq.
Renne Sloan Holtzman & Sakai LLP
350 Sansome Street
Suite 300
San Francisco, CA 94104
Phone: 415-678-3800
csakai@publiclawgroup.com
Parties Represented:
City of San Jose

Gregg M. Adam Esq.
Carroll Burdick & McDonough LLP
44 Montgomery St.
Suite 400
San Francisco, CA 94104
Phone: 415-989-5900
gadam@cbmlaw.com
Parties Represented:
San Jose Police Officers Association

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Jose,
CALIFORNIA on July 01, 2013.



Kristianne Replogle
kreplogle@jamsadr.com