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August 4, 2014

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VIA E-MAIL AND U.S. MAIL

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Re: Disability Ballot Measure
File No.: 040525

Dear Linda:

I find remarkable the position of the City, as asserted in your letter of today, said letter being sent by email and received at 4:43 p.m. on the day before the final City Council meeting before the statutory deadline to submit ballot language for the November 2014 election. The City's legal position articulated therein seems to be that by attempting to hold the City to the waiver it (the City) made in the MOA (Article 19) of the right to make changes within the scope of bargaining during the lifetime of the MOA, the POA itself has waived the right to bargain and—implicitly—the City is free to move forward unilaterally with its own ballot language.

Is the City deliberately being obtuse?

This particular process started on June 30, with Art's letter. He acknowledged (in his own way) the City Council's refusal to approve the June 16 Term Sheet, and asked Chris and me for our clients' positions on City's proposed changes to the disability retirement language in the Charter and the addition of new Charter language concerning (what I term as) the "right of return" for departed Tier 1 officers.

I responded for the POA on July 14, explaining that because said changes were within the scope of bargaining, they were covered by Article 19 of the MOA and the POA declined to agree to any such changes.

Neither the POA nor the undersigned received any written response or response of any kind until your letter today.

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I did write to Ed, and copied the City Council, because I heard the Mayor on NPR discussing the ballot measure late on Friday—the first indication at least that I had had since Art’s letter that the City had any illusions of unilaterally moving forward on these changes.

As I noted in my letter today—and to his credit—Ed expressly acknowledged in his memorandum that:

“The two proposed changes contained in the proposed Measure B Modifications ballot measure language **are within the scope of bargaining and therefore are subject to the meet and confer** process. As of the date of this memo, no agreement has been reached nor has the meet and confer process been completed.”
[Emphasis added; copy of memorandum attached.]

Let us look at what the parties agreed to in Article 19 of the MOA:

ARTICLE 19 FULL UNDERSTANDING, MODIFICATION AND WAIVER

...

19.2 Existing benefits within the scope of representation, provided by ordinance or resolution of the City Council or provided in the San Jose Municipal Code, or provided in the Memorandum of Agreement shall be continued without change during the term of this Agreement.

The language makes plain that the City, as well as the POA, have agreed to a waiver of changes within the scope of representation for the duration of the MOA—as stated the City has already conceded that these changes are within the scope of bargaining.

But putting aside the questions that the arbitrator will decide, if the City has authority for the proposition that exercising purported rights under a zipper clause constitutes a waiver of the right to meet and confer, then please provide it to me at your earliest opportunity, copying Janine Oliker, since, as you know, I will be vacationing beginning on Wednesday.

As you know, waivers of bargaining must be “clear and unmistakable”—hardly the case here.

As a form of compromise, given the apparently differing views of rights and obligations here, the POA proposes that we begin meeting-and-conferring as soon as

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possible over these changes. Simultaneously, the POA will file a grievance, and we can determine the parties' obligations under Article 19, if any. Of course, the need to arbitrate could be eliminated if the parties reach an agreement at the bargaining table. Alternatively, if the arbitrator rules for the POA, and the POA exercises its right to hold the City to its waiver, then there would be no need for further bargaining.

Let me reiterate that, aside from the Mayor's public comments on Friday, this was the first indication the POA had that the City intended to move forward on this proposal since Art's letter of June 30.

Very truly yours,

CARROLL, BURDICK & McDONOUGH LLP



Gregg McLean Adam

GMA:jo
Enclosure

cc: Ed Shikada, City Manager
Richard Doyle, City Attorney
Nora Frimann, Assistant City Attorney
Alex Gurza, Deputy City Manager
Jennifer Schembri, Deputy Director Employee Relations
Arthur A. Hartinger Esq.
Jim Unland, President, San Jose POA
John Robb, Vice President
Christopher E. Platten Esq.



Distributed on:

JUL 18 2014

City Manager's Office

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Edward K. Shikada

SUBJECT: UPDATE ON POTENTIAL
BALLOT MEASURES

DATE: July 18, 2014

INFORMATION

The purpose of this memorandum is to provide the City Council with an update on the potential ballot measures that the City Administration has been discussing with the City's labor unions. These potential ballot measures will be on the City Council meeting agenda for August 5, 2014, for council consideration.

Potential Measure B Modifications Ballot Measure

The City Council directed the City Administration to discuss with the bargaining units potential modifications to the Section XV A of the City Charter (Measure B). All correspondence noted below is available on the City's labor relations website at <http://www.sanjoseca.gov/index.aspx?NID=4406>.

The proposed change to Section 1508-A (g) regarding the rehired or reinstated employees would allow employees who leave or have left City service and are subsequently rehired or reinstated before January 1, 2017, to be placed into the tier of pension benefits that applied to them when they left. This would apply to both employees in the Federated City Employees' Retirement System and the Police and Fire Department Retirement Plan.

The proposed change to disability retirements for Police and Fire sworn employees creates the eligibility of a disability retirement for those employees who suffer a serious bodily injury from a single event, even if they may be able to do other work in the City.

These proposed amendments to the Charter are subject to the meet and confer process with the City's 11 bargaining units, specifically referred to as "Seal Beach" bargaining. "Seal Beach" bargaining refers to bargaining or negotiating over a proposed ballot measure that affects matters within the scope of representation prior to it being placed on a ballot for consideration by voters during an election.

On June 30, 2014, the San Jose Police Officers' Association and the San Jose Fire Fighters, IAFF Local 230, were sent a letter with the specific language the City is proposing to amend the City Charter related to returning employees and disability retirements. The letter noted that the changes would benefit their membership and that the City is not asking for any concessions in

return. In two communications on July 14 and 16, 2014, the POA responded rejecting this proposal and requested that the City withdraw or make it not applicable to POA members.

On July 1, 2014, the nine bargaining units representing employees in the Federated City Employees' Retirement System were sent a letter with the specific language the City is proposing to amend the City Charter related to rehired or reinstated employees. As of the date of this memo, IFPTE Local 21 representing the Association of Engineers and Architects (AEA), the City Association of Management Personnel (CAMP) and the Association of Maintenance Supervisory Personnel (AMSP), responded requesting to meet and confer over the proposed language. A meeting is in the process of being scheduled with IFPTE Local 21.

In addition, the City Administration offered to meet with the nine Federated bargaining units over the proposed changes to answer any questions and to get any feedback they may have. A meeting occurred on July 16, 2014, and present were representatives from the Association of Legal Professionals (ALP), the Municipal Employees' Federation (MEF, AFSCME Local 101), Confidential Employees' Organization (CEO, AFSCME Local 101), Operating Engineers, Local No. 3 (OE#3) and the International Brotherhood of Electrical Workers (IBEW). There was some feedback that the language was not specific enough regarding what would occur for employees who were currently in Tier 2. In addition, the overall feedback received was that the bargaining units would prefer that any changes to Measure B be done in the context of a global settlement.

The two proposed changes contained in the proposed Measure B Modifications ballot measure language are within the scope of bargaining and therefore are subject to the meet and confer process. As of the date of this memo, no agreement has been reached nor has the meet and confer process been completed.

Potential Retirement Board Governance Ballot Measure

All correspondence noted below is available on the City's Retirement Board Governance website at <http://www.sanjoseca.gov/index.aspx?nid=559>.

In 2012, the Federated City Employees' Retirement System and the Police and Fire Department Retirement Board contracted with Cortex Applied Research to evaluate the boards' governance models and to provide recommendations for improvement. At the April 8, 2014, Council meeting the City Council approved a memo that recommended that a City Charter amendment and ordinances be prepared to grant the retirement boards autonomy using the Council appointee model and to engage the stakeholders on the proposed retirement board governance changes. During the June 17, 2014, City Council meeting, the Council provided direction for the City Administration to continue working on the ballot measure and to bring forward ballot measure language at the August 5, 2014, City Council meeting.

A draft ballot measure was provided to the eleven (11) bargaining units on June 5, 2014, that contained the above amendments to the City Charter and others that may be subject to meet and confer, which included:

- Increasing the Federated Board from seven (7) to nine (9) members
- Employees and retirees directly appointing the employee and retiree representatives of both Boards
- At least one of the employee and retiree Board members must meet the minimum qualifications of an independent member
- All staff in the Department of Retirement Services would become unclassified and unrepresented, by attrition and not part of the City's Retirement Plan

One of the issues that arose during the discussion related to the proposed ballot measure was what items were subject to the meet and confer process (negotiations) with the City's bargaining units. The initial draft of the ballot measure had items in it that were subject to the meet and confer process, such as the changes impacting the employees in the Department of Retirement Services.

Due to the response of the stakeholders at the public meetings and the meetings held separately with the bargaining units regarding the June 5, 2014, draft ballot measure, the City revised the draft ballot measure to contain only the items from the Council direction that were not subject to the meet and confer process on June 11, 2014, and the four items above were removed from the ballot measure. However, the City indicated an interest in continuing to discuss those items.

A further revised draft ballot measure was provided to the bargaining units on June 20, 2014. This revised version contained the minor edits mentioned verbally at the June 11, 2014, Council meeting and also did not contain any items the City believes to be subject to the meet and confer process. Responses to this version of the ballot measure were received by multiple bargaining units, including feedback that portions of what remain in the ballot measure are subject to meet and confer. However, as noted above, the current version of the ballot no longer contains items that the City believes are within the scope of bargaining. In addition, concerns were received from the Association of Retired San Jose Police Officers and Firefighters.

The POA has also filed a grievance related to this issue and the City Administration and the POA are currently working through that process.

Potential Public Negotiations Ballot Measure

During the June 11, 2014, Rules and Open Government Committee meeting there was discussion surrounding a potential ballot measure for the November 2014 election which would mandate that labor negotiations be open to the public. At that time, the City Council had not yet decided whether or not to pursue a ballot measure and because this would be subject to meet and confer, the Rules and Open Government Committee referred the item for discussion in closed session with the City Council. The City Council subsequently directed City staff to discuss the issue with the City's bargaining units and bring the item back to City Council for consideration on August 5, 2014. All correspondence noted below is available on the City's labor relations website at <http://www.sanjoseca.gov/index.aspx?NID=4407>.

On or about July 2, 2014, all bargaining units were advised of a potential ballot measure which would require labor negotiations to be open to the public, in addition to being provided a draft of such ballot measure. Feedback has been received from multiple bargaining units. The bargaining units that responded were opposed to a Charter requirement that requires that labor negotiations be open to the public. The bargaining units indicated that they thought the issue should be discussed at the beginning of each bargaining cycle as part of a discussion on ground rules.

In addition, we have received a request from the POA and Local 230 to meet to discuss this further.

Mandating that labor negotiations be public is within the scope of bargaining and therefore subject to the meet and confer process. We have reached no agreement on this nor has the meet and confer process been completed.

Timeline

The City Council must approve putting a ballot measure before the voters 88 days in advance of the election in November. The election date is November 4, 2014, and 88 days prior to that date is August 8, 2014. Therefore, in order to put a ballot measure on for a November 4, 2014, election, the City Council must decide to put this matter on the ballot at its Council meeting scheduled for August 5, 2014.

Recent legislation in 2013 provides that a Council proposal to amend a Charter in a manner that would alter a right, benefit or employment status of a local government employee or retiree must go to the voters at a regularly scheduled general election. Therefore, if the City Council does not move forward with the modifications to Measure B for the November 2014 election, the City would not be able to make this change for approximately two years.



Edward K. Shikada
City Manager

For questions, please contact Jennifer Schembri, Deputy Director of Employee Relations, at (408) 535-8154.