

THE ASSOCIATION OF LEGAL PROFESSIONALS OF THE CITY OF SAN JOSE

January 19, 2011

Honorable Mayor and City Council
City of San Jose
200 E. Santa Clara St.
San Jose, CA 95113

Re: Council Labor Relations Guidelines - Council Agenda 1/25/2011 - Item 3.2

Dear Mayor Reed and Councilmembers:

The Mayor is proposing significant changes to Council Policy No. 0-39 on Council Labor Negotiation Guidelines. Although these changes are proposed in the name of good faith bargaining and transparency, they are, in fact, an attempt to limit the ability of the City Council, City officials and City employees from effectively communicating with each other, and more accurately described as a *gag order*. The proposal violates the rights of free speech and the right to petition the government contained in the First Amendment to the United States Constitution. The limitations are unnecessary and unwise. The process to achieve review of these changes has involved no outreach and none of the changes were available for public review until only a few days before the Council meeting. This proposal is the polar opposite of making the process more collaborative and transparent, a sentiment widely held within the community.

Although the title of the Policy includes the word "Transparency," no actual transparency is added to the process. Indeed, it is an attempt to censor both the scope and the forum of public discussion. Bargaining groups already have the right to speak at any Council meeting under California law commonly known as the Brown Act. Adding this specific provision to the Policy may seem fair on the surface, but, in reality it masks the fact that no new transparency is added to the process.

The real purpose of the change is the addition of paragraph 4, specifically the sentence:

"In order to avoid misunderstandings and potential unfair labor practices, unless requested by the City Manager, members of the City Council or Council staff or other Council Appointees should not *discuss* with any bargaining unit representative *or persons acting on their behalf* any matter

that is a subject of the negotiations while the City and the bargaining units are engaged in the negotiation process.”

Open communication can only reduce misunderstandings. How does limitation of discussion decrease the possibility of misunderstanding? By limiting all discussion to behind the scenes discussions led by the Office of Employee Relations at closed sessions, you will limit yourself to only their version of events. Why would the Council be afraid to hear those who believe that their concerns are not being adequately conveyed to City Council? Furthermore, limiting that opportunity through a one or two minute speech at a City Council meeting and prohibiting Councilmembers from asking questions or seeking more information or otherwise commenting at all, is hardly an adequate alternative to open and transparent communication. Much of what the employees were frustrated about in the past not only involved their good faith attempt to negotiate which fell on deaf ears at the bargaining table; but also the desire to discuss the unfairness of the way the process was being handled by the administration, the administration's denial of information and refusal to provide legal authority supporting the positions that the City's negotiation team was taking.

Why would discussion of our concerns with individual Councilmembers or with our Appointing Authority, the City Attorney, lead to misunderstandings or unfair labor practices when these are the results that our communications are trying to remedy? State law does not mandate this draconian approach to negotiation. The persons we would like the freedom to have discussions with are intelligent people, capable of understanding the difference between hearing our concerns about the process and avoiding actually negotiating contract terms with us. There was not a single instance in any communication in which anyone ever indicated to us that they could or would deliver any deal.

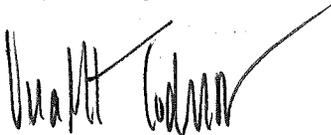
The proposal's prohibition on *discussion* is facially unconstitutional. It is a restriction of speech that violates the First Amendment freedom of speech and the right to petition. It also fails due to overbroad and vague language used in the proposed changes in that it is unclear and could be seen to prohibit communications that have any tangential connection to City employment. The attempted application of the prohibition to only the bargaining unit representatives or persons acting on their behalf is a violation of due process and equal protection as well. While the administration has weekly access to discuss labor issues at the City Council at Closed Session and in other behind the scenes discussions and meetings, bargaining units do not. While the general public is free to communicate and discuss the negotiations with their Councilmembers, under the proposal, the bargaining units and the voters who are perceived to be *acting on their behalf* would not. It does not take a constitutional scholar to detect the flaws in such a

policy. For example, only discussions with bargaining units are prohibited, but not discussions with others on the same issues. This is prohibited content based censorship by a government agency.

Having gone through the negotiation process last year for the first time, our negotiating team found that it was only after the discussion included the City Attorney that we were able to break through to an agreement with the negotiating team. A freer more open communication would only more likely lead to a mutual agreement this year as well and would go a long way toward making City employees feel more respected and valued by the City. Having demonstrated our reasonableness and willingness to look for solutions last year, we believe that we could play a constructive role in crafting changes to the Council policy that would be beneficial to the goal of good faith bargaining and mutual agreements between the City leaders and the City workers.

For the reasons stated above, we request that you do not adopt a policy that cuts off communications with your employees, many of whom are your constituents. But if you insist on moving forward with any policy change, please delay implementing any changes until a full discussion among all concerned parties has taken place.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Vera Todorov', with a long, sweeping flourish extending to the right.

VERA TODOROV

Vice President

ASSOCIATION OF LEGAL PROFESSIONALS