



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** RICHARD DOYLE  
City Attorney

**SUBJECT:** Ordinance Clarifying Role of  
Nonvoting Member of  
Retirement Boards and  
Correcting Provision for Stipend  
Payable of Police and Fire  
Department Retirement Board  
Members

**DATE:** September 14, 2011

## **RECOMMENDATION**

Consideration of ordinance amending Section 2.08.160 of Chapter 2.08 of Title 2 of the San José Municipal Code and adding a new section 2.08.170 to provide for the appointment of a Council member as nonvoting member of the Board of Administration of the Federated City Employees Retirement System and the Board of Administration for the Police and Fire Department Retirement Plan, and correcting Section 2.08.1270 of the Code to correct a drafting error related to the stipends payable to certain members Board of Administration of the Police and Fire Department Retirement Plan.

## **BACKGROUND**

### **Council Member as Nonvoting Board Member**

On February 9, 2010, Council approved revisions to the governance structure of the City's two Retirement Boards and directed the City Attorney's Office to draft an ordinance with the necessary revisions to the San José Municipal Code, based on the staff recommendations as contained in memoranda dated January 12, 2010 and February 2, 2010, as revised by recommendations contained in a memoranda from Mayor Reed and Council members Constant, Kalra, Liccardo and Herrera, dated February 4, 2010.

One of the recommendations in the February 2, 2010 memorandum was for the appointment of a "City Council liaison as a nonvoting member to each of the Retirement Boards." After adoption of the ordinance implementing the Board restructuring, questions arose concerning the scope of participation of the nonvoting member and

whether the City Council Policy on Council liaisons (Policy 0-36) applied to this position. A draft ordinance was submitted for the Council's consideration on March 22, 2011, which included a provision to clarify Council's intent with respect to the nonvoting member role. On March 22, 2011, Council voted to defer the portion of the draft ordinance dealing with the nonvoting member to May in order to allow that portion of the draft ordinance to be considered by the retirement boards. Both retirement Boards have now had an opportunity to review the ordinance dealing with the nonvoting member. The written comments of the Police and Fire Department Retirement Board are attached to this memorandum. See Attachment A. The Federated City Employees Retirement Board considered the draft ordinance, but did not submit any comments.

### **Stipend for Certain Board Members**

Effective March 28, 1997, Section 2.08.470 was added to the Municipal Code ("SJMC") allowing for compensation of certain members of the Police and Fire Department Retirement Plan. In August 1997, the section was renumbered to 2.08.1270 due to a renumbering of all of the sections related to the Retirement Boards in the SJMC. Both 2.08.470(A) and 2.08.1270(A) read as follows:

*"The member of the board who is neither a member of the City Council nor an employee of the Police Department or the Fire Department shall be paid, as compensation for services as a member of the Board, the sum of one hundred fifty dollars (\$150) per month."*

In 1997, the Board of Administration for the Police and Fire Department Retirement Plan was comprised of five members: one active Police member; one active Fire member; two City Council members; and one member of the Civil Service Commission. Therefore, under the structure that existed from 1997 to 2000, only the Civil Service Commission member of the Board received a stipend.

Effective March 10, 2000, the Board composition was changed to add two new members: One member who was retired under the provisions of the Police and Fire Department Retirement Plan and one member who held a position in the City Administration at least as high as a Deputy Department Head. This change was codified by Ordinance No. 26033, which was supposed to amend SJMC, Section 2.08.1270(A) to read as follows:

*"The member of the Board who is a member of the Civil Service Commission shall be paid, as compensation for services as a member of the Board, the sum of one hundred and fifty dollars per month."*

Unfortunately, the Municipal Code publisher did not incorporate Ordinance No. 26033 into the printed or online version for the Code. As a result, when the SJMC was recently changed to allow for the new structure of the Police and Fire Department

Retirement Board (Ordinance No. 28787, effective September 25, 2010), the language for Section 2.08.1270(A) was modeled after the original language for 1997 instead of the language that should have been in place. Accordingly, the Code now reads:

*“Any member of the Board who is neither a member of the City Council nor an employee of the Police Department or the Fire Department shall be paid, as compensation for services as a member of the Board, the sum of one hundred fifty dollars (\$150.00) per month.”*

In contrast, SJMC Section 2.08.1065 was amended in September 2010 to clearly provide that only the public members of the Federated City Employees Retirement Board are to receive the \$150 per month stipend.

## **ANALYSIS**

### **General**

The draft ordinance which has been posted for public review responds to Council direction, and clarifies Council's intent with respect to the nonvoting Council member positions on the Boards; the draft ordinance also corrects the drafting error that was made with respect to the stipend. Referral of this ordinance to the Retirement Boards for review and comment is not required under the Code, as only ordinances amending Title 3 relating to the Retirement Plan itself must be referred to the Boards for review and comment. However, the draft ordinance is identical to the draft ordinance related to the Council nonvoting member that was reviewed by both Boards in April, 2011, with the exception of language that has been added to address a concern raised by the Police and Fire Board. In addition, on August 4, 2011, the Police and Fire Board discussed the Code provision on Board member stipends, and voted to make a recommendation to Council against changing the Code.

### **Council Liaison as Nonvoting Nonfiduciary Member of Boards**

The draft ordinance also clarifies the role of the nonvoting Council liaison by:

- Clarifying that the nonvoting member liaison is not a fiduciary, as the function as the liaison as representative of Council to the Boards would be inconsistent with the obligations of a fiduciary; and further clarifying that the Council representative shall not be counted as a Board member for the purpose of determining what constitutes a quorum of the Board.
- Identifying the Council appointee as a representative to clarify the applicability of Council Policy No. 0-36 to the Retirement Boards' representative position.

- Clarifying that the representative may attend the meetings of the Board of Administration of the Federated City Employees Retirement System and may fully participate with the voting members of the Board in all matters pending before the Board, with the exception of quasi-adjudicatory matters and closed sessions, and further clarifying that the Council representative will be provided with a copy of the Board's public agenda packet at the same time as agenda packets are distributed to Board members, but will not receive closed session material. These provisions are necessary to preserve due process requirements for Board quasi-adjudicatory hearings; and the attorney-client privilege.

In response to the comments made by the Police and Fire Department Retirement Board (see Attachment A), the draft ordinance that was considered by Council in March has been revised to add a provision stating that "The Council representative shall not identify or represent himself or herself as a member of the Board of Administration of the Federated City Employees Retirement Plan except in meetings of the City Council and the Boards of Administration of the Police and Fire Department Retirement Plan and the Federated City Employees Retirement Plan." The purpose of this addition is to address the Police and Fire Board's concern that the Council representative might inadvertently convey the impression to third parties that the representative is a full voting member of the Board, a trustee for the Plan, or authorized to speak on behalf of, or with the concurrence of, the Board.

### **Stipend**

Due to the Code publishing error indicated above, the Code currently does not preclude the retired Police and Fire Board members from receiving a stipend, as it did before the Board was restructured to include public members. On August 4, 2011, the Police and Fire Department Retirement Board voted to allow the Retirement Fund to pay the stipend to retiree Boards members who request payment and to recommend to the Council that the Code be left as it currently reads, until a more global recommendation related to Board member stipends can be made after review by the Board's consultant and Board Governance Subcommittee.

It seems clear from the January 12, 2010 staff memorandum to the City Council concerning the Board changes, and the February 4, 2010 memo signed by the Mayor and four other Council members, that the City Council only intended that a stipend be provided to public members of the Board. However, unless the Code is corrected the stipend can be paid to the retiree Board members who request it.

**PUBLIC OUTREACH/INTEREST**

This memorandum and the proposed ordinance were posted on the City's website for the September 27, 2011 City Council agenda.

**COORDINATION**

Preparation of this memorandum and the draft ordinance was coordinated with the Department of Retirement Services, Office of Employee Relations and the City Clerk's Office.

**CEQA**

Not a Project; File No. PP10-068(b) (Municipal Code or Policy, new or revised).

RICHARD DOYLE, City Attorney

By   
MOLLIE DENT  
Senior Deputy City Attorney

cc: Debra Figone  
Russell Crosby  
Dennis Hawkins

For questions please contact MOLLIE DENT, Senior Deputy City Attorney,  
at (408) 535-1905.

# ATTACHMENT A

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*Department of Retirement Services*

Federated City Employees' Retirement System  
Police and Fire Department Retirement Plan

April 18, 2011

Honorable Mayor and City Council  
City of San Jose  
200 E. Santa Clara St, Tower 18<sup>th</sup> Flr.  
San Jose, CA 95113

Re: San Jose Police and Fire Department Retirement Plan Council Liaison Position

Dear Mayor and Members of the City Council:

I serve as chair of the Board of Administration of the San Jose Police and Fire Department Retirement Plan and am writing to you on behalf of the Board.

The Board is keenly aware and grateful for the time and energy that the Council has devoted to Board governance issues over the last several years. The Board recognizes the magnitude of the Council's involvement through the Council's acceptance of the report and findings of Cortex Applied Research regarding Board governance models and through the Council's subsequent extensive outreach efforts to all system stakeholders concerning the resulting implementation of the report by the Council.

It appears to the Board that one policy goal of the Council that emerged from this long and lengthy deliberative process was to minimize, although not eliminate, direct Council involvement in the day-to-day operations of the Board and of Board meetings. We think that this was a sound policy determination that will in the aggregate enhance the operations and functions of the Board and of the retirement system.

The Board understands that the Council is currently considering adding back to the Board a Council member in the role of a non-voting, non-fiduciary member. The Board respectfully requests that the Council reconsider this proposal and instead appoint a Council liaison to the Board in accord with Council policy 0-36.

The Board notes that under Council policy 0-36 and under Municipal Code section 2.08.160 the Council may appoint a liaison to each city board or commission. The Council liaison is to act as a transmitter of Board views to the Council and Council views to the Board. Such a role improves communication and coordination between the two entities to the enhancement of both. The Board also notes the wise policy directive in Council policy 0-36 to direct the Council member serving as a liaison to "not be an advocate" for the Board and, at the same time, not to "give direction or influence a decision" of the Board. While one could contend that such a distinction was inherent in the existing liaison structure, the Board considers it beneficial that the Council in policy 0-36 has stated this distinction with clarity and as a matter of express Council policy.

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P&F 05-05-11

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One could take the position that converting the Council liaison position into a non-voting member of the Board of Administration is only a matter of additional emphasis. The Board, however, respectfully disagrees.

The Board is of the view that words have meanings and connotations which influence perceptions and actions. The sense conveyed by the term "member", even if in the context of a non-voting member, is more robust than that of the term "liaison". To that extent, the use of the term "member" seems inconsistent with the reasoning and recommendations of the Cortex report and with the understandings of the stakeholders.

It does not seem far-fetched to envision a future Council member assigned to be a Board member, even if a non-voting Board member, to conclude that he or she is not bound by the salutary restrictions set forth in Council policy 0-36 since that policy by its terms would not apply to such a position. It may also be the case that voting Board members, if not now then perhaps in the future, responding to the meaning implicit in the term "member" might accord more influence to the statements and positions of the Council member than they would to a liaison, even though that might not have been the result desired by the Council. Moreover, outside stakeholders may, simply by virtue of the term, draw incorrect inferences as to the autonomy of the Board and its operations. These would not be desirable outcomes.

It seems unusual to some members of the Board to use the term "member" to describe an individual who is not intended to vote. Creating such an unusual status also generates uncertainty and confusion. It appears that the absence of a voting role and the fiduciary responsibility that accompanies a vote would have certain unexpected consequences that may not be considered desirable. For example, one result would appear to be that the individual would not be able to participate in closed sessions on real estate matters or litigation matters or disability hearings involving stigmatizing conditions since the individual would not be a necessary actor for Board deliberations.

The absence of a vote would also raise a question as to what degree, if any, the individual possessed a fiduciary responsibility to system members, retirees, and beneficiaries. It is also unclear whether in the unlikely event that the Board were to be sued for a breach of fiduciary duty to what extent the Council member, denominated a Board member, would be subject to the lawsuit, given the Council member's ability to comment and concur or oppose, although not vote, on the issue leading to the litigation. It is also not difficult to imagine issues coming before the Board that would raise difficult conflicts of loyalty between duties as a Board member versus duties as a Council member. Such situations did from time to time occur in the past when Council members sat on the Board. These are just some of the confusions and complexities that would be well to avoid and that can be avoided by not using the term "Board member" and instead relying on the established term "Council liaison". There are no doubt other difficult situations that will only emerge if the Board's request were to be denied and if such a Board member were to be added to the Board.

It also seems more than a theoretical possibility for a Council member to convey inadvertently to third parties the impression that he or she was acting on behalf of or with the concurrence of the full Board of Administration merely by invoking the term "Board member". Conveying such an impression could

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occur even when that was not the intent of the Council member. This is a possible consequence that, in the opinion of the Board, should be avoided.

It is of course not necessary to remind the Council that until just recently Council members served as full members on the Board. Accordingly there has never in the past been a Council liaison appointed to the Board. There is thus not any experience concerning how such a liaison position would function in the Board context. The Board considers it premature to conclude in the absence of experience that a liaison position would not meet all of the Council's expectations in this regard.

The Board and its current membership are excited by the prospect of enhancing the operations and activities of the Board. The Board believes that it would be an unsettling prospect to create a new and ambiguous status on the Board, the clarification of which will inevitably distract attention from more important matters and impede the development of the collegial atmosphere that is essential to the well-functioning of any board, including this board.

We look forward to receiving the Council's response to these views. We also look forward to working with the Council and City administration in a collaborative fashion with respect to the many types of complex retirement issues that will no doubt arise in the future.

Sincerely,



David Bacigalupi, Chair  
Board of Administration of the  
San Jose Police and Fire Department Retirement Plan

DB/md

cc: Chuck Reed	- Mayor	Debra Figone	- City Manager
Pete Constant	- District 1	Pierluigi Oliverio	- District 6
Ash Kalra	- District 2	Madison Nguyen, Vice Mayor	- District 7
Sam Liccardo	- District 3	Rose Herrera	- District 8
Kansen Chu	- District 4	Donald Rocha	- District 9
Xavier E. Campos	- District 5	Nancy Pyle	- District 10
George Beattie	- POA	Jeff Welch	- IAFF 230
Jay Wendling	- Association of Retired SJ Police Officers & Fire Fighters		
Alex Gurza	-OER		