

ASSOCIATION OF LEGAL PROFESSIONALS (ALP)

December 9, 2011

DELIVERED VIA E-MAIL

Gina Donnelly
Deputy Director of Employee Relations
City of San Jose
200 East East Santa Clara Street
San Jose, CA 95113-1905

Re: ALP's Response to the City's December 7, 2011 Letter Regarding Retirement Reform and Ballot Measure Mediation

Dear Ms. Donnelly:

This responds to your letter of December 7, 2011, in which you ask ALP if it is:

... interested in re-engaging in the mediation regarding retirement reform and related ballot measure with other bargaining units representing employees in the Federated City Employees' Retirement System, using the enclosed framework.

The "enclosed framework" refers to a letter submitted by IFPTE Local 21 that includes a "commitment to waive any impasse procedures." The City gave ALP just 2 days to respond.

ALP responds to the City's December 7, 2011 letter as follows:

- The City has not complied with its obligation to meet and confer with ALP over the revised ballot measure adopted by the City Council on December 6, 2011, which is so radically different and introduced without benefit of the alleged "fiscal emergency" that it is now effectively a new ballot measure triggering a new duty to meet and confer on the part of the City ("New Ballot Measure");
- The City's "invitation" to "re-engage in mediation" under the circumstances contained in its December 7, 2011 letter constitutes improper conditioned bargaining;

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- Without waiving its right to assert that the City has already violated its obligation to meet and confer by adopting the New Ballot Measure, ALP is prepared to “re-engage in mediation” provided that ALP will not agree to waive impasse or any of its other bargaining rights or constitutional rights; and
- The request to “re-engage in mediation” regarding retirement reform issues other than the ballot measure is inappropriate with regard to ALP because the parties are not a impasse and have not engaged in any mediation over the “other” retirement issues.

The remainder of this letter explains each of ALP’s responses in more detail.

I.

The City has *not* complied with its obligation to meet and confer over the revised ballot measure.

The City has acknowledged its legal obligation under the *Seal Beach* case to meet and confer with ALP over ballot measures that effect employee compensation.

The City met and conferred with ALP over a previous version of the ballot measure at the end of September and during October. The City and ALP engaged in mediation over the previous version of the ballot measure on November 17, 2011. The mediation lasted a couple of hours and did not achieve ALP’s goal of obtaining the City’s agreement to propose a legal ballot measure on pension reform.

On November 22, 2011, about a week after mediation, the City Manager e-mailed all City employees updating them on retirement reform. In that e-mail, the City Manager cautioned that “[t]he proposal going to the City Council is far different than the earlier versions. . . .” Indeed, the link in the City Manager’s e-mail revealed a very different ballot measure than the one over which the City and ALP had “met and conferred.”

Following the City Manager’s e-mail, ALP requested the City to meet and confer over the new proposed ballot measure. The request was made via e-mail dated November 22, 2011 to the Office of Employee Relations. **The City has never responded to ALP’s request.**

On Tuesday, December 6, 2011 the Council voted to place yet a different ballot measure on the June, 2012 ballot – the New Ballot Measure. The New Ballot Measure contains a number of significant changes from the previous versions of the proposed ballot measure. One of the more significant changes involves the elimination of any “fiscal emergency” under MMB or the state or federal constitutions. Previous versions of the proposed ballot measure were drafted with the declaration of a “fiscal emergency” being the justification of impairing vested rights. The legal basis for declaring a “fiscal emergency” had always been suspect. By December 6, 2011, any legal basis that may have existed evaporated with the release Cheiron’s pension plan report showing that

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the City's police and fire pension contribution next year would be at least \$55 million dollars less than the \$160 million previously "predicted."

Taken together, all of the changes to the proposed ballot measure resulted in what is effectively a new ballot measure. Meeting and conferring over one ballot measure and then proceeding with a significantly different, new ballot measure does not comply with the City's meet and confer obligations under *Seal Beach*.

The City's request to "re-engage in mediation" over the New Ballot Measure is based on the City Council's assertion that the New Ballot Measure can be revised yet again before the deadline for submitting it to the registrar of voters for the June, 2012 ballot. However, mediating over the New Ballot Measure before having engaged in any discussions over it does not cure the fact that the City has not complied with its "meet and confer" obligations under *Seal Beach*. Moreover, given that the City has already approved the New Ballot Measure for placement on the June, 2012 ballot, it is questionable how serious the City really could be about engaging in serious discusses over it.

II

The City is engaging in improper conditional bargaining.

The letter of December 7, 2011 indicates that the City's willingness to "re-engage in mediation" is based on ALP agreeing to the following 2 conditions:

1. To engage in coalition bargaining; and
2. To engage in bargaining within the framework submitted by IFPTE Local 21, which includes a commitment to waive any impasse procedures.

The City's interest in having ALP waive impasse procedures apparently arises from the City's attempt to avoid having to comply with new legislation that becomes effective on January 1, 2012. That legislation sets forth new fact finding requirements for impasse procedures. It's unclear why a City that has a declared commitment to transparency would want to avoid potential fact finding with regard to one of the most significant financial decisions that it is considering.

In any event, the City's actions amount to conditioned bargaining. Conditioned bargaining is a per se unfair labor practice.

III

ALP will *not* agree to waive its impasse rights.

When considered in context, the City's "invitation" for ALP to waive impasse rights as a condition of "re-engaging in mediation" is yet another stunning example of why the City's approach to labor relations fails.

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The City Council had to approve a ballot measure no later than its December 6, 2011 meeting in order to put the ballot measure before the voters in a March, 2012 election. The rush to put a ballot measure before the voters in March, 2012 was based on the purported "fiscal emergency." As discussed above, the legal basis for declaring a "fiscal emergency" has evaporated. Nevertheless, the City Council voted to put the New Ballot Measure before voters at the **June, 2012 election**.

The City Council was **not** required to vote on whether to approve putting any ballot measure on the June, 2012 ballot until sometime in March, 2012. For this reason – and because so much new information had just come to light – ALP and the other bargaining units asked the City Council to make the good will gesture of delaying the vote on any ballot measure for a couple of months. Delaying the vote would give everyone a chance to evaluate the new information, reassess their respective positions, and take a "short breather" before meeting in a less confrontational environment to make a renewed effort at reaching an agreement over pension reform. There was no downside to the City making such a good will gesture.

Yet, in its typical heavy handed approach to labor relations, the City rejected the idea of making even this modest good will gesture. Instead, the City voted to approve putting the New Ballot Measure on the June, 2012 election – a ballot measure that contains provisions that are patently illegal and that is premised on an opt in program that will take months or years, if ever, to determine if it can gain IRS approval. In the same breath, the City Council "invited" its labor groups to make the significant concession of waiving impasse rights! This is hardly a winning formula for gaining concessions.

ALP believes it would be against the interests of its members to waive impasse procedures or any other bargaining rights. Accordingly, ALP declines the City's invitation to do so.

IV

The City's request to "re-engage in mediation" regarding other retirement reform issues is inappropriate.

The request in the December 7, 2011 letter appears to encompass "re-engaging in mediation" over all retirement issues – not just the New Ballot Measure. This would include issues such as medical benefits for retirees and sick leave payout.

The City and ALP have engaged in negotiations over some of these "other" retirement issues. The City declared impasse with regard to some of these issues. ALP disagrees that the parties are at impasse. The vast majority of our negotiations sessions – particularly the last several – were devoted to the ballot measure because of the City's purported late November "immutable" deadline. Moreover, the City and ALP have never engaged in mediation over any of these "other" retirement issues.

In short, ALP does not believe that the parties are at impasse on these "other" retirement issues. Accordingly, the City's request to "re-engage in mediation" is

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improper and without basis because it assumes the City and ALP have already engaged in mediation over these "other" retirement issues.

Conclusion

Your letter states that "[i]t is critical that we move forward as quickly as possible." It is unclear why this is so given that even under the City's expressed timeline, the City has at least until March to come to an agreement with its workforce. Nevertheless, in the spirit of cooperation, ALP has made a special effort to comply with the City's unreasonably short time for responding to its request to "re-engage in mediation."

Finally, ALP has consistently demonstrated a willingness to meet with the City over the various pension reform issues. Consistent that willingness, ALP is prepared to "re-engage in mediation" over the New Ballot Measure. However, ALP will not waive its right to assert that the City has violated its meet and confer obligations as discussed in this letter, and will not waive impasse rights or any of its other bargaining rights or constitutional rights.

Very truly yours,



VERA TODOROV

President

ASSOCIATION OF LEGAL PROFESSIONALS

cc:

Debra Figone, City Manager
Alex Gurza, Deputy City Manager
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LaVerne Washington
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