

## ASSOCIATION OF LEGAL PROFESSIONALS (ALP)

September 6, 2011

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Re: City of San Jose/ALP Negotiations

Dear Mr. Holtzman and Ms. Donnelly:

This is written in response to the City of San Jose's five proposals provided to the Association of Legal Professions ("ALP") by the City's negotiating team on August 11, 2011. Each of the five City proposals generally involves various and separate aspects of retirement reform. They are entitled:

1. Supplemental Retiree Benefit Reserve (SRBR) ("City 1");
2. Healthcare Cost Sharing, including Kaiser Permanente Benefit Plan 3800 attachment ("City 2");
3. Retirement Service Credit ("City 3");
4. Retiree Healthcare Benefits for New Employees (City 4); and
5. Retirement Benefits for New Employees ("City 5).

### Background

It is important to consider the five separate proposals made by the City in context.

In the fall of 2010, the City conducted a special election related to retirement reform. At the special election the City asked the electorate to approve a City charter amendment that would allow the creation of a "second tier" retirement system for new City employees. The electorate approved that ballot measure on November 2, 2011.

During labor negotiations following the November, 2011 special election, ALP repeatedly asked the City if it had any specific proposals regarding a "second tier" retirement system. The City has none.

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ALP executed the Tentative Agreement on May 27, 2011, which Agreement was approved by Council on May 31, 2011. The Tentative Agreement includes a limited re-opener, which states, in relevant part:

The terms and conditions contained in this Tentative Agreement represent the full, complete, and entire understanding of the parties regarding the matters set forth herein. . . . It is understood that neither party may require the other party to meet and confer over any subject covered by this Tentative Agreement except as provided herein. Notwithstanding the foregoing, each party agrees to meet and confer over the following issues within ten (10) days of written notice from the other party . . . 1. The Supplemental Retiree Benefit Reserve program . . . 2. Retirement Reform . . . 3. Sick Leave Payout for current and future employees to the extent that this benefit falls within the scope of representation.

Approximately two weeks before the City and ALP executed the Tentative Agreement, Mayor Chuck Reed issued a proposed ballot measure. The proposed ballot measure, which would amend the charter, is aimed at implementing a number of changes to employee compensation and benefits. The proposed ballot measure includes extensive and significant changes to employee retirement and healthcare benefits. There is mounting consensus and a significant body of California constitutional and case law that much of the proposed ballot measure is not legal. Our previous letters to OER and the Council explain the law we rely upon.

The City Manager's website on the status of labor negotiations states:

In June and July 2011, the City met with the bargaining units in an effort to reach an agreement on a framework for concurrent negotiations related to retirement reform and proposed ballot measure negotiations.

ALP takes issue with the accuracy of this statement – at least as to ALP.

On Monday, June 13, 2011 the City invited ALP to a meeting along with several other bargaining units to discuss the Mayor's proposed ballot measure. At the meeting OER representatives discussed a proposed timeframe for negotiations regarding the ballot measure and demanded a commitment from the units regarding the timeframe. ALP's representative specifically asked if the City was exercising its reopener in ALP's

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Tentative Agreement in order to discuss the retirement benefits topics. The OER representative the City was not exercising the reopener.

Three days later at 4:20 p.m. OER e-mailed to ALP what it referred to as "the City's **proposed** Framework for Retirement Reform and Proposed Ballot Measure Negotiations." (Bold/Italics added.) OER asked for a response by Monday, June 20, 2011.

Although ALP believed that allowing two business days to respond to the City's proposed "framework" for negotiating retirement reform was utterly unreasonable given the complexity of the issues, ALP provided OER with an e-mail on June 20, 2011 setting forth our bargaining group's "initial comments." ALP's response included objections to one provision that was substantially similar to one that ALP has repeatedly objected to during negotiations over the tentative agreement. The City knew, or certainly should have known, that at least that language would be objectionable to ALP.

OER responded by letter on June 22, 2011. Without any further discussion on the framework and without any specific response the issues raised by ALP, OER's response concludes:

We had hoped that the framework we provided, which has been adopted by the POA, IAFF, AEA, AMSP and CAMP, would provide for concurrent discussion of both issues. . . [] . . . Since we have not reached an agreement on the framework, we will, of course, provide you with drafts of proposed ballot measures regarding retirement as they are developed and would be happy to schedule time to meet and confer regarding these drafts upon request.

OER did not engage in any further discussions of the framework with ALP.

At the City Council meeting on June 21, 2011, OER informed Council that ALP would not sign the ground rules, but failed to inform Council that ALP was ready willing and able to discuss retirement issues with the City as well as ground rules for such discussion. Ms. Donnelly sent ALP a letter on June 22, 2011 stating that because "the response you [ALP] provided does not address a number of key City interests" and to "establish an adequate timeline to ensure that negotiations regarding retirement reform and related ballot measures are completed in a timely manner", we {City} "will provide you with drafts of proposed ballot measures" and will "meet and confer upon request."

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On July 7 and July 22, 2011, after a series of letters wherein ALP inquired about whether the City was exercising its reopener and being told that the City was not, the City finally informed ALP that it was exercising the reopener and that it now desired to enter into negotiations over retirement reform. The July 22 letter from the City specifically stated that it was reopening negotiations over retirement reform and SRBR only, and that the ballot measure would remain "separate and apart" from the retirement reform negotiations. ALP responded on July 26, 2011 that the ballot measure squarely falls within the retirement reform reopener provision in the TA, and is not "separate and apart" as claimed by the City.

After scheduling discussion among the parties, the parties met on August 11, 2011. During the negotiations on August 11, after repeatedly being told that any ballot measure discussion was separate and apart from a discussion of retirement issues, ALP has been told that the City now desires to also meet and confer over the Council majority's proposed ballot measure in addition to proposals City 1 through 5. The parties have not met since that time, despite representations on August 11 that the City would schedule a meeting in about two weeks upon the return of one of the City team members.

#### Piecemeal or Package Proposal?

Upon presentation of the City's proposals on August 11, City negotiators did not state whether the City's proposals are a package proposal. If they are not, we ask the City to provide ALP immediately with any other proposals. ALP needs to consider all City proposals together to appropriately understand and consider the impact of the total package upon our bargaining unit. We are unable to make a counter proposal without an understanding of the totality of the City's proposals. Please clarify the City's intent.

Although we are unable to make a counter proposal until the City informs ALP of the totality of the circumstances of its proposal and provide the information requested of the City in our August 11 session, as well as the attached request for information, we note the following issues with the City's current proposals:

#### Healthcare Cost Sharing - City 2

City 2 does not define the Plan well enough to determine impacts and premium costs to unit members, specifically whether the expected premiums of the "bare bones" plan would exceed the current 85% that the City is paying. Additionally, minimum Plan requirements are undefined. ALP also has no information regarding reduction in contribution rates that could be expected as a result of reduction of health coverage and

how those savings will benefit employees. Nor is there anything in the proposal that limits the City from changing the Plan.

#### Retirement Service Credit - City 3

City 3 impairs a vested benefit of City employees. The manner in which service credit is calculated is a very basic factor of the vested retirement benefit calculation. The City proposal would reduce retirement service credit by as much as 20% for each employee on an annual basis, with no offer by the City of anything equivalent in return to its employees. We have already informed the Council and the Office of Employee Relations in previous communications of the significant body of case law regarding vested benefits of public employees and of the reasonable modification doctrine for such vesting benefits. This proposal is similar to cases where the employer improperly attempted to reduce the percentage benefit to public employees. This proposal is unlawful and is not properly the subject of collective bargaining.

#### Retiree Healthcare Benefits for New Employees - City 4

Under the guise of changes to retiree healthcare benefits for new employees, the City has thrown into its proposal a section entitled "Non-Duplication of Benefits." The Non-Duplication of Benefits section of City 4 states: "A retiree may not be simultaneously covered by City sponsored plan-provided medical benefits as a retiree, and as a dependent of another City retiree or City employee." This language affects current employees and retirees in that a retiree who now receives the City healthcare benefit would be precluded from receiving that benefit if their spouse or domestic partner works for the City. This language unlawfully affects a vested benefit of current employees and retirees. The "Rights" section at the end of the City proposal does not cure this fatal flaw in the City's proposal and does not provide the City with any protection against vested benefits claims of new employees.

#### Retirement Benefits for New Employees - City 5

City 5 is clearly intended to terminate new enrollment in the current City Federated Retirement System ("Tier 1") and thereby "close" the Plan. On August 11, ALP asked the City negotiation team to provide it with the calculations and actuarial information on the impact to the financial soundness of the Tier 1 plan moving forward for 20 to 30 years, and on projected Tier 1 employee contribution rates for that period of time. Surely, the City Council and the Retirement Board could not agree to a proposal that would jeopardize the financial viability of the Tier 1 system without this information. That would be a breach of the fiduciary duty to employees and retirees. But we have

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yet to obtain the requested information from the City on the impacts to the Tier 1 plan or its beneficiaries.

#### Conflicts with Proposed Ballot Measure

Additionally, City 3, among the other City proposals, directly conflicts with provisions in the Council majority's proposed ballot measure. To the extent that the City 1 through City 5 are different than proposed ballot measure provisions, the City needs to inform ALP which proposal it is actually negotiating with ALP. How does the City intend to resolve these conflicts? In the event that the City and ALP agree to a resolution of City 1 through City 5, what happens with the conflicting ballot measure?

#### Timing

The City Council placed Measure W, on the ballot in November 2010 after completely failing to meet and confer with ALP as required by law over the impacts of the ballot measure. Measure W authorized the City to create a second tier system of benefits for new employees. Since passage of the ballot measure last November, the City did absolutely nothing to propose a second tier system for new employees until August of this year. From the outset of negotiations in February 2011 with our bargaining unit, we have asked if the City had any second tier proposals. We received none from the City. Rather, the City lay in wait until after our Tentative Agreement was approved by Council on May 31, 2011, and then less than one month later, tells us that it desires to open negotiations over retirement reform, including new employee benefits. Now, after one meeting on August 11, and no response to ALP's request for information, the City insists upon an agreement to conclude negotiations by the end of October so that the City can declare impasse.

More ridiculous is that it took the City over nine months to come up with a second tier proposal which is simply Social Security plus a 1% deferred compensation contribution by the employer that vests upon five years of City employment. What level of thought went into this proposal? And as discussed above, if this is part of the solution to the City's future liabilities, why is staff unable to even discuss the financial impact on the current plan and the expected ability of the City and the Plan members to pay for a "closed" plan?

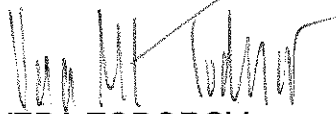
#### Conclusion

Obviously, ALP will continue to engage in collective bargaining with the City over those matters that are properly the subject of the reopener in the Tentative Agreement between the City and ALP. However, ALP needs to be informed of the City's intent with

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regard to the totality of the City's proposals as expressed above, the totality of the City's proposals with regard to all items that are the subject of the reopeners in the TA, needs a response to its request for information, and needs to understand from the City how conflicting items in City 1 through City 5 and the proposed ballot measure will be resolved. ALP needs this basic information from the City prior to being able to provide the City with a counter-proposal.

Very truly yours,



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President

ASSOCIATION OF LEGAL PROFESSIONALS

cc: Gary Messing, Esq.

