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8 San Jose Police Officers' Association

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SANTA CLARA

11

12 SAN JOSE POLICE OFFICERS'
13 ASSOCIATION,

14 Plaintiff,

15 v.

16 CITY OF SAN JOSE, BOARD OF
17 ADMINISTRATION FOR POLICE AND
18 FIRE DEPARTMENT RETIREMENT
19 PLAN OF CITY OF SAN JOSE, and
20 DOES 1-10, inclusive,

21 Defendants.

22

23 AND RELATED CROSS-COMPLAINT
24 AND CONSOLIDATED ACTIONS

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Case No. 1-12-CV-225926
(and Consolidated Actions
1-12-CV-225928, 1-12-CV-226570,
1-12-CV-226574, 1-12-CV-227864,
and 1-12-CV-2335660)

**SAN JOSE POLICE OFFICERS
ASSOCIATION'S OBJECTIONS TO THE
TENTATIVE DECISION**

The Hon. Patricia Lucas, Dept. 2

Action Filed: June 6, 2012

1 INTRODUCTION

2 Plaintiff and Cross Defendant San Jose Police Officers' Association ("SJPOA")
3 objects to the Tentative Decision issued by this Court on December 20, 2013.

4 **OBJECTION NO. 1, SECTION 1509-A: THE TENTATIVE DECISION ERRS**
5 **REGARDING THE INTENDED, ORIGINAL PURPOSE OF ESTABLISHING**
6 **DISABILITY RETIREMENT BENEFITS, BECAUSE THE CITY PRESENTED NO**
7 **EVIDENCE OF THE PARTIES' MUTUAL INTENT**

8 The Tentative Decision determined that Police Officers had vested rights to the
9 disability retirement system they entered into and worked under. But it also ultimately
10 found Section 1509-A's redefinition of "disability" was a permissible modification of the
11 vested eligibility criteria for this benefit. (See Tentative Decision at pp. 18:6-20:18.) The
12 Court's determination included a finding regarding "the original purpose of disability
13 retirement," but the finding is erroneous. As a vested right, this is a contractual right, but
14 the 1946 Charter reflects, at most, the City's unilateral expectation – not the parties'
15 mutual intent. As the Tentative Decision correctly noted, a modification must "not
16 frustrate the reasonable expectations of the parties to the contract of employment." (Id. at
17 20:12-13, quoting *Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 782 [emphasis added].)
18 The City had no evidence of *mutual* intent and indeed presented none at trial.

19 SJPOA respectfully requests the Court **delete** the following sentences from the
20 Tentative Decision (at p. 19):

21 The eligibility changes in Section 1509-A are related to the successful
22 operation of the system, while loyal to the original purpose of disability
23 retirement: a benefit for those unable to work. The original definition
24 incorporated an expectation that the employee would be unable to perform
25 the functions of the employee's position or an alternative position provided
26 by the City. (Exhibit 5202, at SJ001731: "disabled from any cause".)

27 and **replace** them with the following:

28 The Court finds the eligibility changes in Section 1509-A are related to the
successful operation of the system, while loyal to the City's original purpose
of disability retirement: a benefit for those unable to work. The City's
original definition incorporated an expectation that the employee would be
unable to perform the functions of the employee's position or an alternative

1 position provided by the City. (Exhibit 5202, at SJ001731: "disabled from
2 any cause".)

3
4 **OBJECTION NO. 2: , 1509-A: THE TENTATIVE DECISION OMITTS ANY**
5 **FINDING WITH RESPECT TO HOW THE PURPORTED "COMPARABLE NEW**
6 **ADVANTAGE" OF A "REDUCED" TIME PERIOD COULD POSSIBLY OFFSET**
7 **ANY INJURY TO VESTED RIGHTS**

8 The Tentative Decision finds that a "reduced" waiting period under 1509-A is a
9 comparable new advantage that offsets injuries to the vested right to disability retirement
10 eligibility criteria. This does not consider the impact of the purported comparable, new
11 advantage on the individuals who suffer injury. Measure B does not provide a
12 "comparable, new advantage" because *no* individual whose rights are violated due to the
13 stricter criteria can possibly receive a purported comparable, new advantage from the
14 changed waited period. SJPOA asks the Court to address its improper inquiry and find that
15 Section 1509-A's changes can *never* be applied legally.

16 A Police Officer in San Jose who is injured or ill and cannot return to her specific
17 job would have qualified pre-Measure B for disability retirement. But now she will not
18 qualify for disability retirement unless she can show her injuries prevent her from
19 completing *any work* within the Police Department, whether a position is available or not.
20 She receives *no* offset from the purported "comparable new advantage" of a "reduced"
21 waiting period to become eligible for the disability retirement pension, because her
22 eligibility is already foreclosed.¹ (Tentative Decision at p. 18:10-11; Measure B Section
23 1509-A(b)(i)2.) Moreover, *no* employee can possibly experience an offset to this injury
24 to his or her vested rights from the "reduced" waiting period.

25
26 ¹ The purported advantage is meaningless for those 54 years of age when Measure B takes effect,
27 because there is no comparable new benefit where the waiting period is exactly the same length
28 under the old benefit (age 55) and the new (one year). Further, the changed waiting period causes
disadvantages, not an advantage, to individuals 55 and over, by imposing a waiting period and by
foreclosing any temporary disability pension for injuries lasting less than one year.

1 It is unclear to SJPOA whether the Court's decision improperly considers the
2 benefit in the aggregate and allows the City to offset some individual's losses via new
3 advantages provided to others. (Tentative Decision 20:9 [finding a comparable new
4 advantage even though the advantage "may not apply in every case."].) Such a finding
5 would be erroneous. For example, in *Abbott v. City of Los Angeles* (1958), 50 Cal.2d 438,
6 the California Supreme Court addressed whether a salary increase could offset the
7 reduction of vested pension benefits. The Court concluded it could not, because the
8 individual employees who were disadvantaged by the pension cuts were not provided the
9 offsetting advantage. (*Id.* 449.) The City Charter amendment in *Abbott* was therefore
10 illegal.

11 Here, too, a vested right to that eligibility criteria is permanently injured as to **all**
12 individuals who lose out under Section 1509-A's more stringent eligibility criteria.

13 To correct the Court's conclusions, SJPOA requests that the Court **delete** these
14 sentences from the Tentative Decision at p. 20:

15 Plaintiffs argue that the "advantage" of reducing the waiting period for eligibility is
16 "meager" and may not apply in every case. (POA Post-Trial Brief, at 17:10-17.)
17 However, the analysis does not require that a new advantage be equivalent: "a
18 precise dollar balance between benefit and detriment" is not necessary. *Frank,*
19 *supra*, 56 Cal.App.3d at 244. "It is enough that modification does not frustrate the
20 reasonable expectations of the parties to the contract of employment." *Lyon v.*
21 *Flournoy* (1969) 271 Cal.App.2d 774, 782. This is, of course, consistent with the
22 notion that, prior to retirement, "the employee does not have a right to any fixed or
23 definite benefits but only to a substantial or reasonable pension." *Wallace v. City of*
24 *Fresno* (1954) 42 Cal.2d 180, 183.

25 Section 1509-A is a permissible modification of disability retirement benefits.

26 **and replace** them with these sentences:

27 Plaintiffs receive no comparable "advantage" from the changed waiting period for
28 eligibility. As an initial matter, the changed waiting period creates a *new* waiting
period for individuals 55 and over and benefits individuals 54 years of age not at all
It also imposes on individuals 55 and over: (1) a new waiting period; and (2) denial
of any temporary disability benefit coverage for disabilities lasting or expected to
last less than a year (those requirements replace the minimum age of 55
requirement.. More fundamentally, the changed waiting period ***never*** can offset

1 injuries caused by Section 1509-A. The changed waiting period may benefit
2 employees overall under some circumstances, but the benefit vests in the **individual**
3 and for the new advantage to be valid, the individual must receive advantages from
4 the offset . Thus, Section 1509-A is illegal. (*Abbott v. City of Los Angeles* (1958),
5 50 Cal.2d 438, 449 [comparable new advantage must outweigh disadvantages,
6 when considered from the **individual viewpoints of members**]; e.g., *Teachers*
7 *Retirement Board v. Genest* (2007) 154 Cal.App.4th 1012, 1037-38 (“The
8 replacement of an express obligation to pay [the member] a fixed sum of money
9 with a promise to pay the sum *if you prove you need it* and, even then, *only if you*
10 *need it before a specific date*, is not a comparable new advantage.”); *Orange*
11 *County Empl. Assoc. v Bd. of Admin.* (1974) 39 Cal.App.3d 825 [finding an
12 individual, vested rights violation where an alleged, comparable new advantage
13 could not benefit injured employee].)

14 This is, of course, consistent with the notion that, prior to retirement, "the employee
15 does not have a right to any fixed or definite benefits but only to a substantial or
16 reasonable pension." *Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 183. The
17 modification here is unreasonable because under *no* circumstance can an individual
18 denied disability retirement due to the narrowed criteria of Section 1509-A receive
19 an offset to that injury from the changed time period to qualify for benefits if the
20 criteria are met. Accordingly, Section 1509-A is unlawful and invalid.

21 **OBJECTION NO. 3, SECTION 1511-A: THE TENTATIVE DECISION LACKS**
22 **FINDINGS WITH RESPECT TO WHAT THE CITY KNEW OR SHOULD HAVE**
23 **KNOWN ABOUT FUNDING THE SUPPLEMENTAL RETIREE BENEFIT RESERVE**

24 Addressing the Supplemental Retiree Benefit Reserve (“SRBR”), the
25 Tentative Decision refers to an analysis under an “unforeseen burdens doctrine” (at
26 p. 27:9). SJPOA asks the Court make factual findings regarding the matter of
27 whether the City knew or should have known the cost of removing excess earnings
28 from the SRBR funds.

29 The Tentative Decision finds the cost of removing excess earnings from SRBR
30 “was not taken into account until 2011 when actuaries assigned and subtracted a cost for
31 the SRBR. (RT at 290-92 (Lowman); 96768, 971-72 (Bartel).)” The evidence controverts
32 this. Mr. Bartel testified costs were calculated from the beginning, even if they were not
33 calculated to allow for proper funding due to insufficient rigor in determination of the
34 impact of SRBR on contribution rates. (RT 966:27-967:12.) Furthermore, Mr. Lowman
35 testified that a cost had been assigned to the SRBR from its beginning. (RT 301:8-311:2.)

1 Assignment of specific costs, however erroneously such costs were calculated, indicates
2 the City knew or should have known the impact of skimming funds in times of plenty
3 without adding funds when the trust was underfunded.

4
5 **OBJECTION NO. 4, SECTION 1512-A.3: LOW COST RETIREE HEALTHCARE**
6 **PLAN AND THE IMPAIRED, VESTED RIGHTS OF POLICE OFFICERS WHO**
7 **WERE EMPLOYED JULY 27, 1984 THROUGH JULY 31, 1998**

8 As to Police Officers employed under the Police and Fire Plan after the City
9 implemented Ordinance 21686 on July 27, 1984 (Ex. 6 [former SJMC 3.36.1930]), and
10 before implementation of Ordinance 25615 on July 31, 1998 (Ex. 9 [amended SJMC
11 3.36.1930]), the Tentative Decision refers to their vested rights as if the matter of vesting is
12 a non-contested issue. (Tentative Decision at 29:28-20:1.) The Court's analysis of Section
13 1512-A(c) ("low cost plan") in the Tentative Decision incorrectly states it is undisputed
14 that employees hired between July 27, 1984 and July 31, 1998 have a vested right to
15 payment of healthcare premiums that are the lowest cost plan premiums under Police and
16 Fire. (*Id.*) But although that may have been the City's litigation position, as a *factual*
17 matter the City in fact denied the existence of such vested rights and even violated them.

18 SJPOA presented evidence that the rights of Retired Police Officers employed
19 between July 1984 and July 1998 were violated because--in 2013, for the first time--the
20 amount they paid for premiums was *significantly higher* than that paid by active Police
21 Officers on the same health plan. (*E.g.*, POA Post-Trial Brief at 25:21-26:13, citing RT
22 196:1-10; 206:15-19; 70:6-8, 73:23-76:25, 78:2-28, 84:3-8, 91:20-93:1; Post-Trial Brief at
23 32:22-33:6 [Pete Salvi testified he had the same low cost plan available to active police
24 officers in 2012 and 2013 but paid premiums in 2013 far greater than he would pay if the
25 "low cost premium" available to active Officers actually were the amount the City paid for
26 Salvi's premiums].) In its Post-Trial Brief, the City has stated *all* retirees are entitled to
27 receive *only* the "lowest cost coverage" available Citywide, thereby overlooking the
28 language of former SJMC 3.36.1930, Ordinance 21686, effective July 27, 1984.

1 (Tentative Decision at 29:23-31:22; e.g., City's Post-Trial Brief at 58:26-28 [failing to
2 address SJPOA's argument that express vested right benefitting police and fire
3 employees].) SJPOA asks the Court to find that Ordinance 21686 gave rise to express
4 vested rights for Police Officers who worked between July 27, 1984 and July 31, 1998,
5 which were violated by the City's increase in the amount of premiums beyond what an
6 active Police Officer pays.

7 To correct the Court's conclusions, SJPOA requests that the Court **delete** the
8 following sentences to the Tentative Decision at 29:27-30:2:

9 The City does not contest that this created an express vested right benefitting police
10 and fire employees hired between July 27, 1984 and July 31, 1998, the
11 implementation date of Ordinance 25615 (the pre-Measure B version of SJMC
12 3.36.1930). Ordinance 25615 provided:

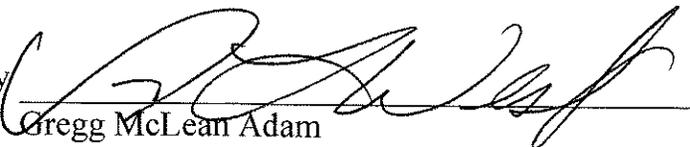
13 **And replace** them with:

14 Accordingly, Police Officers, active or retired, who worked between July 27, 1984
15 and July 31, 1998 have the express, vested right to retiree healthcare benefits based
16 on payment of premiums "in the same amount as is currently paid by an employee
17 of the City in the classification from which the member retired."

18 In 1998, Ordinance 25615 provided:

19
20
21 CARROLL, BURDICK & McDONOUGH LLP

22 Dated: January 6, 2014

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24
25 By 

26 Gregg McLean Adam

27 Gonzalo C. Martinez

28 Amber L. West

Attorneys for Plaintiff and Cross-Defendant

San Jose Police Officers' Association

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PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 44 Montgomery Street, Suite 400, San Francisco, CA 94104.

On January 6, 2014, I served true copies of the following document(s) described as **SAN JOSE POLICE OFFICERS ASSOCIATION'S OBJECTIONS TO THE TENTATIVE DECISION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Carroll, Burdick & McDonough LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at San Francisco, California.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address jgonsalves@cbmlaw.com to the persons at the e-mail addresses listed in the Service List. The document(s) were transmitted at or before 5:00 p.m. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 6, 2014, at San Francisco, California.



Joan Gonsalves

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SERVICE LIST

San Jose Police Officers' Association v. City of San Jose
No. 1-12-CV-225926 (and consolidated actions)

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