

# POLICE AND FIRE DEPARTMENT RETIREMENT PLAN

## Minutes of the Board Meeting

THURSDAY

SAN JOSÉ, CALIFORNIA

September 2, 2010

### CALL TO ORDER

The Board of Administration of the Police and Fire Department Retirement Plan met at 8:42 a.m. on Thursday, September 2, 2010, in regular session at City Hall in the Council Chambers, 200 East Santa Clara Street, San José, California 95113.

### ROLL CALL

#### PRESENT:

David Bacigalupi      Chair  
Conrad Taylor        Vice Chair  
Rose Herrera         Trustee – arrived at 8:50 a.m.  
Sam Liccardo         Trustee – Absent  
Scott Johnson        Trustee  
Sean Kaldor          Trustee

#### ALSO PRESENT:

Russell U. Crosby	-SECRETARY	Ron Kumar	-Staff
Donna Busse	-Staff	Veronica Niebla	-Staff
Mollie Dent	-City Attorney Office	Maria Loera	-Staff
Russ Richeda	-Attorney	Ryan Jusko	-Staff
Thomas J. Boyle	-Attorney	Toni Johnson	-Staff
Lt. Mark Bustillos	-SJPD	Jennifer Holmboe	-Staff
Jesselle Holcomb	-Staff	Roger Pickler	-Staff
Rajiv Das	-Board's Medical Director	Mike Sung	-HR
Bruce DeMers	-Retiree P&F	Christopher Platten	-Counsel IAFF 230
Amanda Ramos	-Staff	Jay Wendling	-Retiree P&F
Jeanne Groen	-HR	John Quayle	-SJPD
Aracely Rodriguez	-OER	Jim Jeffers	-Attorney
Michael Moehle	-Staff	Ronald Daly	-Retiree P&F
Bruce Toney	-Retiree P&F	Jeffrey Weber	-Retiree Fire
John Tennant	-Counsel Local 230	Gina Donnelly	-OER

### REGULAR SESSION

*Chair Bacigalupi* called the meeting to order at 8:42 a.m.

#### ORDERS OF THE DAY

*Chair Bacigalupi* stated that Trustee Liccardo will be absent and noted that the Civil Service Commission Representative position is vacant.

#### RETIREMENTS

1. Service - NONE
2. Disabilities - NONE

Trustee Herrera arrived at 8:50 a.m.

**3. Change in Status**

- a. **Ronald T. Daly**, Retired Police Officer, Police Department. Request for change in status to Service-Connected Disability Retirement effective December 26, 2009; 28.62 years of service. Mr. Daly was present and represented by Attorney *Jim Jeffers*. The following reports were presented to the Board:

MEDICAL REPORTS - DR' S NAME	DATED
JONATHAN NG, M.D.	5/13/10
S. YOKOYAMA, M.D.	9/21/09 (2)
JUAN LARACH, M.D.	11/19/06

MEDICAL REPORT FROM BOARD' S DIRECTOR	DATED
RAJIV DAS, M.D.	8/16/10
RAJIV DAS, M.D.	1/13/10

**(M.S.C. Herrera/Taylor) Motion to approve. 5-0-1 (Liccardo – Absent)**

- b. **John P. Quayle**, Retired Police Officer, Police Department. Request for change in status to Service-Connected Disability Retirement effective January 31, 2005; 25.00 years of service. *(Continued from 8/5/10)*  
 Mr. Quayle was present and represented by Attorney *Thomas J. Boyle*. The following reports were presented to the Board:

MEDICAL REPORTS - DR' S NAME	DATED
C. ARULANANDAN, M.D.	3/3/10 (2), 1/8/07, 10/12/05
JONATHAN NG, M.D.	11/20/09, 8/5/09 (4), 6/26/09

MEDICAL REPORT FROM BOARD' S DIRECTOR	DATED
RAJIV DAS, M.D.	8/16/10
RAJIV DAS, M.D.	5/11/10

*Ms. Dent and Mr. Richeda* explained that San Jose Municipal Code Section 3.36.920.A. 4 establishes a general rule that applicants seeking disability retirement cannot file after one year from separation from City service. There is a limited exception where there is a preponderance of evidence that the disability is due to disease resulting from exposure to workplace factors or conditions related to City service that had no previous medical basis to be considered harmful. In addition, San Jose Municipal Code Section 3.36.920.A, 2, establishes that the applicant has to have been disabled prior to separation from City Service. The Board discussed whether there was a preponderance of medical evidence that had not previously been discovered or that the cardiovascular disease was directly related to work as well as the capability of the applicant to perform the permanent modified duty position available in the department.

**(M.S.C. Johnson/Herrera) Motion to deny. 2-3-1 (Bacigalupi, Taylor, and Kaldor – No's; Liccardo – Absent)**

Motion failed. The Board discussed continuing the hearing pending further review of the 1-year rule, specifically to research past practices related to the 1-year rule to ensure consistency.

*(M.S.C. Taylor/Kaldor) Motion to continue the hearing pending staff review of the Board's decisions on prior disability claims since the implementation of the 1-year rule, specifically reviewing if any applicants have been allowed to file their claims without regard to the 1-year rule. 5-0-1 (Liccardo – Absent)*

- c. **Bruce Toney**, Retired Police Lieutenant, Police Department. Request for change in status to Service-Connected Disability Retirement effective January 13, 2007; 27.55 years of service.  
*(Deferred from 8/5/10)*

Mr. Toney was present and represented by Attorney *Jim Jeffers*. The following reports were presented to the Board:

MEDICAL REPORTS – DR' S NAME	DATED
THAO PHAM, M.D.	1/7/2010 (FOUR REPORTS) : 12/20/07 : 3/16/06 : 7/7/05
KEITH SHAH, M.D.	11/18/09 (TWO REPORTS) : 7/20/09 (TWO REPORTS)
ROBERT SANFORD, M.D.	9/18/08 (FOUR REPORTS) : 5/8/08 : 11/15/06
MATTHEW DUNCAN, M.D.	2/9/09
EDWARD DAMORE, M.D.	9/13/06 : 6/22/06 : 5/4/06
CLIFFORD HARRIS, M.D.	6/13/06
NALINI BHAT, M.D.	5/3/06

MEDICAL REPORT FROM BOARD' S DIRECTOR	DATED
RAJIV DAS, M.D.	5/13/2010

**(M.S.C. Herrera/Kaldor) Motion to approve. 5-0-1 (Liccardo – Absent)**

- d. **Jeffrey Weber**, Retired Arson Investigator, Fire Department. Request for change in status to Service-Connected Disability Retirement effective January 10, 2009; 27.71 years of service.  
*(Deferred from 8/5/10)*

Mr. Weber was present and represented by Attorney *Jim Jeffers*. The following reports were presented to the Board:

MEDICAL REPORTS – DR' S NAME	DATED
1. KENNETH BATTAGLIA, M.D.	2/25/10 (X2),
2. PATRICK MCCREESH, M.D.	10/19/09 (X4), 8/23/08 (X4), 5/5/08, 2/8/07,
3. MARK CULTON, M.D.	10/29/07, 9/1/05
4. ROBERT MILLARD, M.D.	9/23/05, 2/2/05,
5. NAME ON REPORT IS ILLEGIBLE	DATED: 12/19/03
6. MOHAMMED QAYYUM, M.D.	11/4/03
7. THOMAS ALLOGIAMENTO, M.D.	11/3/03
8. NAME ON REPORT IS ILLEGIBLE	DATED: 10/31/03
9. RAMAVTAR SINGH, M.D.	10/31/03
10. KELLY CRAWFORD, M.D.	10/31/03

MEDICAL REPORT FROM BOARD' S DIRECTOR	DATED
RAJIV DAS, M.D.	7/9/10

**(M.S.C. Herrera/Kaldor) Motion to approve. 5-0-1 (Liccardo – Absent)**

4. **Deferred Vested**

- a. **Alfred S. Duran**, Retired Police Officer, Police Department, effective September 6, 2010, 11.77 years of service. (With reciprocity)

**(M.S.C. Taylor/Herrera) Motion to approve. 5-0-1 (Liccardo – Absent)**

## **DEATH NOTIFICATIONS** (Moment of Silence)

### ***The items listed below are Note & File***

5. Notification of the death of **Harold R. Bounds**, Retired Police Sergeant, retired 7/5/97, died 6/2/10. Survivorship benefits to Caren B. Bounds, spouse.
6. Notification of the death of **William J. Brown**, Retired Police Captain, retired 1/17/81, died 7/25/10. Survivorship benefits to Marilyn Brown, spouse.
7. Notification of the death of **Lawrence A. Darr**, Retired Police Sergeant, retired 8/5/92, died 4/29/10. No survivorship benefits.
8. Notification of the death of **James C. Elder**, Retired Fire Engineer, retired 7/7/92, died 7/9/10, No survivorship benefits.
9. Notification of the death of **Charles W. Frates**, Retired Firefighter, retired 11/2/82, died 8/17/10. Survivorship benefits to Renata Frates, spouse.
10. Notification of the death of **John Jacob, Sr.**, Active Police Officer, died 8/19/10. Survivorship benefits to Dianna Jacob, spouse and John Jr., Noah, Cara and Delilah Jacob, children.
11. Notification of the death of **Sean R. Leslie**, Retired Firefighter, retired 3/1/72, died 8/16/10. No survivorship benefits.
12. Notification of the death of **Jan Ozga**, Retired Fire Engineer, retired 5/9/78, died 8/3/10. No survivorship benefits.
13. Notification of the death of **Gary Parks**, Retired Fire Engineer, retired 9/2/99, died 7/15/10. Survivorship benefits to Joni Parks, spouse.
14. Notification of the death of **Johnny L. Periman**, Retired Police Sergeant, retired 1/13/97, died 6/18/10. No survivorship benefits.
15. Notification of the death of **Dewitt C. Tranberg**, Retired Fire Engineer, retired 3/3/95, died 7/18/10. Survivorship benefits to Nikki Tranberg, spouse.

## **NEW BUSINESS**

### **16. Discussion and action regarding change in pay reporting for Labor Code Section 4850 Disability Payments and Impact on Retirement Fund.**

*Chair Bacigalupi* explained that an amendment to Labor Code Section 4850 was effective January 1, 2010 and Payroll interpreted the amendment to establish that disability time for injured fire fighters or police officers was not going to be pensionable. While their pension service time will continue to grow, no pension contributions will be made, which in effect further increases the unfunded liability of the fund.

*Trustee Johnson* explained that the amendment to Labor Code Section 4850 led Payroll to review how contributions are withdrawn from paychecks for members receiving disability payments subject to Labor Code Section 4850. A memorandum regarding the amendment to Labor Code Section 4850 was distributed to all active City employees. Finance has been advised to discontinue contributing to the retirement plan for those employees receiving funds under Labor Code Section 4850 because the funds are now considered a tax deferred benefit and, thus, not pensionable.

*Ms. Dent* stated that she has not written an opinion regarding the amendment to Labor Code Section 4850, which became effective January 1, 2010. A major issue is that the San Jose Municipal Code Section 3.36.02.03 definition of compensation excludes workers compensation payments. The Labor Groups and the Office of Employee Relations will be discussing possible modifications to the San Jose Municipal Code to confirm the disability payments to pensionable income.

*Chair Bacigalupi* asked what happens to the fund while the discussions take place.

*Ms. Dent* explained that her understanding is that the contributions are not being made and, because the contributions and service credits are tied within the payroll system, the service is not currently being credited.

*Trustee Kaldor* stated that the Board should have been provided with background information regarding the implementation of the amendment to Labor Code Section 4850.

*Ms. Dent* stated that the Attorney's Office and the Board's conflicts counsel could prepare written opinions regarding the amendment to Labor Code Section 4850. However, the San Jose Municipal Code Section 3.36.02.03 is the driving issue, which has language excluding workers compensation from pensionable income.

*Trustee Kaldor* asked why the change is being implemented now without prior discussion.

*Ms. Dent* explained that the San Jose Municipal Code Section 3.36.02.03 reads that workers compensation payments are not part of compensation, which flows through into the contribution sections of the San Jose Municipal Code, which is why the new amendment to Labor Code Section 4850 is being implemented.

*Trustee Kaldor* asked about the seeming change in definition of workers compensation payments.

*Ms. Dent* responded that when Labor Code Section 4850 was amended January 1, 2010 so that disability mandatory payments became workers compensation payments, which was an unforeseen consequence of the amendment.

*Chair Bacigalupi* stated that he has received notification from the Office of Employee Relations that meetings are scheduled with the Labor Groups' attorneys. He further stated that the lack of notification to the Board regarding these changes is an insult to the Board.

*Mr. Tennant* explained that the issue arose in 2003-2004 when police officers and fire fighters notified their respective labor groups that their counterparts in CALPERS and other agencies were able to exclude from taxation the full first year of disability payments under Labor Code Section 4850. An ordinance was drafted for submission to City Council that would have defined the entire amount of disability pay for the first year as workers compensation benefits and, thus, excluded from income. The City Attorney's Office issued an opinion in 2003 stating that workers compensation is the exclusive province of the State Legislature; therefore, the State Legislature would have to make the changes. In 2006, the State Legislature was lobbied to amend Labor Code Section 4850 to include everyone. It went unnoticed that the amendment to Labor Code Section 4850 would affect the way workers compensation is dealt with in the San Jose Municipal Code. As of January 1, 2010 Labor Code Section 4850 was amended to ensure that San Jose has the same benefit as other agencies receive, which is that up to a full year of disability earnings can be excluded from taxable income, but can be included in service time.

*Mr. Platten* explained that the City did not inform the Retirement Board or the Labor Groups of the changes, but did inform the affected active employees and suggested that the Trustees to urge their conflicts counsel to prepare a written opinion.

*Ms. Dent* stated that a legal opinion should be coordinated with outside tax counsel.

*Chair Bacigalupi* asked about the impact to the Retirement Plan during negotiations.

*Mr. Platten* stated that the impact to the Retirement Plan is immediate. The Retirement Plan is not receiving all the contributions it was prior to the changes and the employees who are on disability are not having contributions taken from their paycheck. The Board's conflicts counsel should look at the issues created by these changes immediately as they raise questions regarding how the Retirement Plan will receive missing contributions when the issue is resolved.

*Ms. Busse* stated that Retirement Services was first informed of this issue in July and, thus, did not participate in any prior collaboration with the Finance Department. Staff requested that the issue be discussed at the August Board meeting, but the City Attorney's Office requested that the issue not go before the Board in August due to an attorney/client confidentiality issue.

*Ms. Dent* responded that when asked about agendaizing the discussion for the August board Meeting, the Finance Department was not ready for the memorandum to be distributed. However, the affected employees needed to be informed of the changes and Payroll had to make a decision.

**(M.S.C. Herrera/Kaldor) Motion to engage the Board's Conflicts Counsel to prepare a written opinion regarding the amendment to Labor Code 4850 as well as obtain outside tax counsel's opinion, and for the holder of the attorney/client privilege to waive the attorney/client privilege, and for everyone involved to treat this issue as urgent. 4-0-2 (Johnson – Recused; Liccardo – Absent) Noting his position as the City's Finance Director, Mr. Johnson recused himself.**

#### **OLD BUSINESS/CONTINUED-DEFERRED ITEMS**

##### **17. Review and recommendation on Ordinance to Implement Retirement Board Governance changes.**

- a. **Amending Section 2.08.130 of Part 1 Chapter 2.08 of Title 2 of the San José Municipal Code to revise provisions for removal of Retirement Board Members.**
- b. **Amending Part 12 of Chapter 2.08 of Title 2 and Section 3.36.330 of Part 3 of Chapter 3.36 of the San José Municipal Code to revise the structure of the Board Of Administration for the Police And Fire Department Retirement Plan, adopt minimum qualification criteria for public members of said Board, revise provisions for compensation of Board Members and revise the definition of a Board quorum.**

*(Continued from 8/5/10)*

*Ms. Dent* stated that the ordinances were adopted by Council with the revisions that the Board requested. *This item is Note & File.*

##### **18. Discussion and possible action on 415(m) Benefit Replacement Plan.**

- a. **Memo from Alex Gurza to Russell Crosby dated August 10, 2010, regarding Section 415(m) Replacement Plan status.**
- b. **Memo from Ed Overton to P&F Retirement Board dated May 27, 2004, regarding Section 415(m) draft Ordinance.**
- c. **P&F Board Minutes, dated June 3, 2004, Pages 8 & 9 documenting Board's action on Section 415(m) draft Ordinance.**

*Ms. Donnelly* explained that the 415(m) benefit is an additional supplemental benefit that would be provided by the City; it is not a Retirement Board issue, as the cost would be born by the City.

*Mr. Richeda* stated that the Board could potentially become a party in a dispute if an employee had issues regarding the benefit and sought legal action.

*Trustee Kaldor* stated that there are members who would exceed the 415 cap and it would be useful to provide these members with advance notification. In addition, it might be worth investigating adjusting contributions as people reach higher salary ranges.

*Ms. Donnelly* explained that, as the additional cost of this benefit would be the City's responsibility, the City is reviewing the cost of the benefit and whether it could be undertaken given the overall scope of the City's budget.

*Ms. Dent* explained that at the Tax Presentation in October there will be discussion regarding the 415 limits.

*Chair Bacigalupi* asked if the Board making a recommendation for a 415(m) replacement plan would lessen that Board's chances of being involved in litigation around the 415 limitations.

*Ms. Dent* explained that the Board made the recommendation back in 2004 and the current Board could make the recommendation again.

*Ms. Busse* explained that there is a flag in the pension system that alerts staff if a member is close to the 415 limits. The actuary performs the calculation and staff notifies the member that he/she could have a potential 415 issue in the future.

*Chair Bacigalupi* stated that the Board has no power to implement a 415(m) replacement plan and it is unlikely that the City, due to fiscal restraints, will implement the benefit. Staff will contact the individual who requested this information and provide him with the status.

**19. Discussion and possible action regarding the continuation of Exit Physicals.**

**a. Discussion regarding exit physicals and possible extension of the program until further information can be gathered.**

*Ms. Busse* explained that staff was requested at that last Board meeting to pursue additional options regarding the Exit Physical and see if employees could receive the exit physicals through their insurance plans. Staff talked with the insurance providers and the insurance providers need more time to provide the information. Staff requests an extension of the exit physicals until the information is received and staff can provide a recommendation.

*Chair Bacigalupi* asked when staff anticipates being able to provide a recommendation.

*Ms. Groen* explained that the insurance companies did not provide a specific time frame, but would likely take a few weeks to provide the information to staff. Staff anticipates 3-4 weeks for turnaround with this kind of request.

**(M.S.C. Johnson/Herrera) Motion to approve staff's recommendation and defer the discussion until the next board meeting, continuing the exit physicals until the requested information is received. 5-0-1 (Liccardo – Absent)**

**20. Verbal update on status of Plan Tax Qualification Review.**

*Ms. Dent* explained that the tax study session is scheduled for October 20, 9am-3pm, and is a joint session

with the Federated Board and there are enough common areas of discussion.

*Chair Bacigalupi* requested that Labor Groups be invited to the study session.

**21. Verbal update on FLSA.**

*Ms. Niebla* explained that following the last Board meeting, Macias Gini & O'Connell, the Finance Department, and Retirement Services met to discuss the open items in the AUP, the largest one being the FLSA issue. MGO has met with the Finance Department on a regular basis and the majority of the FLSA issues have been cleared. Resolution of the FLSA issues is expected sooner than the total AUP and will be presented to the Board when complete. Staff anticipates agendizing the AUP in December.

**22. Review and recommendation on Ordinance amending San Jose Municipal Code 3.36.020 B.2 to correct the definition of final compensation.**

*Ms. Dent* explained that this ordinance discusses the 108% limit and its application.

(M.S.C. Taylor/Kaldor) Motion to recommend to City Council for approval. 5-0-1 (Liccardo – Absent)

**STANDING COMMITTEE REPORTS/RECOMMENDATIONS**

**23. Investment Committee (Bacigalupi/Johnson/Taylor/Alternate: Kaldor)**  
*Next meeting September 16, 2010*

**24. Investment Committee of the Whole**  
*Next meeting November 18, 2010*

**CONSENT CALENDAR (Items # 25 through 32)**

Trustee Johnson pulled Item 28.

(M.S.C. Herrera/Taylor) Motion to approve the balance of the Consent Calendar. 5-0-1 (Liccardo – Absent)

**25. Approval of Minutes**

Monthly Board Meeting held on August 5, 2010.

**26. Approval of Travel/Conference Attendance**

- a. Toni Johnson – CalAPRS, “Course in Retirement Disability Administration” and “Roundtable: Benefits”, San Diego, CA - September 9 & 10, 2010.
- b. Mollie Dent – CalAPRS, Attorney’s Roundtable, San Diego, CA – September 10, 2010.
- c. Ali Amiry – Pension Forum, “The Changing Landscape of Defined Benefit Pension Plans”, San Francisco, CA – September 15, 2010.
- d. Ali Amiry – Tail Risk Management, New York City, NY – September 21-24, 2010.
- e. Ali Amiry – Institutional Investors Hedge Fund, San Francisco, CA – September 27-28, 2010.

**27. Approval of Monthly Expenses**

- a. Plan Expenses from July 2010.



29. **Benefits Review Forum** – None

30. **Return of Contributions**

- a. Voluntary
- b. Involuntary

31. **Investments**

- a. Adoption of Resolution 3679 for the period of June 1 through June 30, 2010.

32. **Communication/Information**

- a. Report on Investments as of June 30, 2010.

28. **Pending Action**

Pending Action Summary List – As of September 2010.

*Trustee Johnson* stated that at the last Committee of the Whole meeting changes had been discussed regarding a disability retirement committee and would like to have the discussion agendaized for the Board.

*Chair Bacigalupi* stated that this would be added as a future agenda item.

(M.S.C. Herrera/Taylor) Motion to approve. 5-0-1 (Liccardo – absent)

**PROPOSED AGENDA ITEMS**

*Chair Bacigalupi* proposed the following agenda item:

Discussion and possible action for creating a committee for disability retirement hearings.

*Trustee Kaldor* proposed the following agenda item:

Discussion and possible action for the process of reviewing disabilities for best practice/common practices to follow and recommendations from staff to bring black and white to the disability process.

*Chair Bacigalupi* proposed the following agenda item:

Staff to provide information regarding the Kaiser Senior Advantage plan possibly being a substitute for the \$25 co-payment plan as the lowest cost plan for retirees and/or active members over 65.

**PUBLIC COMMENTS - NONE**

**EDUCATION & TRAINING**

*The below items are Note and File*

33. **Notification of CalAPRS' Trustees Round Table**

- a. Trustees' Round Table, San Diego, CA – October 15, 2010.
- b. Trustees' Round Table, Double Tree Hotel, 2050 Gateway Place, San Jose, CA – January 28, 2011.

**34. Notification of IFEBP Training**

- a. 56<sup>th</sup> U.S. Annual Employees Benefits Conference, Honolulu, HI – Sunday, November 14, 2010 thru Wednesday, November 17, 2010.
- b. Foundations for Trustees 1, Hilton, San Diego, CA – Saturday, November 20, 2010 thru Sunday, November 21, 2010.
- c. Foundations for Trustees 2 Pensions, Hilton, San Diego, CA – Saturday, November 20, 2010.
- d. Investments Institute, Las Vegas, NV – Monday, April 11, 2011 thru April 13, 2011.
- e. Portfolio Concepts and Management, Philadelphia, PA – Monday, May 23, 2011 thru Thursday, May 26, 2011.
- f. Trustees and Administrators Institutes – New Trustees, Hilton, San Francisco, CA – Monday, June 13, 2011 thru June 15, 2011.

**ADJOURNMENT at 11:29 A.M.**



---

**CONRAD TAYLOR, VICE CHAIR  
BOARD OF ADMINISTRATION**

**ATTEST:**



---

**RUSSELL U. CROSBY, SECRETARY  
BOARD OF ADMINISTRATION**