

The following transcript is provided for your convenience, but does not represent the official record of this meeting. The transcript is provided by the firm that provides closed captioning services to the City. Because this service is created in real-time as the meeting progresses, it may contain errors and gaps, but is nevertheless very helpful in determining the gist of what occurred during this meeting.

>> Sean Kaldor: We'll call to order the October 30th, 2012 Special meeting of the San José Police and Fire retirement board of administration. We have present today myself Sean Kaldor, the chair, Dick Santos, the vice chair, David Bacigalupi, trustee, Sean Bill is absent. Damon Krytzer is absent. Drew Lanza trustee is present, James Mason, trustee, is present, Bettina Rounds, trustee is present, and Vincent Sunzeri trustee is present. We also have present our nonvoting board member Councilmember Pete Constant and attending by phone, Jeffrey Rieger our counsel from the firm Reed Smith. Under orders of the day, 1.1C should have a note this is continued from our September 6th, 2012, meeting. For the record not all of us were present at that meeting so we'll have a full hearing of that case. And then as the board members were notified item 1.2C the change in status to service connected disability retirement for Philip J. Mallvini has been deferred so we'll not be hearing that today. I mentioned earlier that we have it as a policy that if an applicant wants to ask a closed session they can do that. We will meet in closed session to determine whether their application meets the requirements for a closed session or if it can be accommodated in open session. And then we'll either hear it in closed session or return to open session to hear it. We do have one request today, item 1.1D and we'll go through the agenda in order. So we will begin with item 1.1, our disabilities, item 1.1, service connected disabilities, 1.1A, the service connected disability application for Tina R. Boales, police officer for the police department effective -- I assume we would raise -- I assume you -- so I'm not trying to add an agenda item. We received a memo last night from the City Manager's office, deputy City Manager's, raising several requests so I'm not going to add an agenda item at this late in the process. I will raise that case if they would like to raise that memo they can raise that memo as related to that case and we can raise that there.

>> I could make a --

>> If I could make a suggestion, we could also just move public comments up to be heard at the beginning if anybody from the city is there and wants to speak as a public comment, that would be fine as well.

>> Sean Kaldor: Is the board okay with it? I'm fine to do it that way.

>> Vincent Sunzeri: I'm okay with that but I do believe that this is an important memo that we should address and not just skip over regardless of the timing. We've waived sunshine for a lot of different things in the past.

>> Sean Kaldor: Sure, I just want to be respectful of adding agenda items and make sure we had due notice. We have a solution which is great. We'll move public comments up to the front and would the deputy City Manager like to address the memo that was received late last night and was distributed this morning, thank you.

>> Alex Gurza: Good afternoon, Alex Gurza deputy City Manager City Manager. Thank you for the opportunity to address this board this afternoon. I did issue a memo to the board yesterday. Did want to mention that some of the issues that we raised in this memo are not new issues. They're issues that we have raised in this board previously naming on August 1st the City Manager issued a memo to the ad hoc disability subcommittee. And we know the boards have revisited this issue about how to handle disability retirements, clearly have a very large backlog of disability retirements and specifically you've discussed how to handle them in light of the upcoming changes related to measure B. But I did want to take an opportunity to explain my memo because it might not be interpreted the way that we intended it. First, clearly, if it's up to the board, of course, whether to move forward today, and make the decisions on these disability retirements as well as the ones that you have on your regular meeting on Thursday. But we did want to point out a couple of things. One is, there are things that are related to measure B and things that are completely independent of measure B. Related to measure B on disability retirements there are two sort of separate changes that it makes. One is, changing the definition of disability, what is it take to be determined to be disabled? That is not something that was discussed in my memo or is being brought forward for discuss today. The separate issue in measure B is, who determines disability? Who hears them? And what measure B says is it should be an independent panel of medical experts. And although we have discussed it before and we have urged the board to go down that path, independent panel of medical experts, you have decided not to do that, and I think there's still some continuing changes about how you're going to be hearing these disability retirements. What our memo would want you to know is we would be moving

forward to with an ordinance changing the process to have it be the independent panel of medical experts by the beginning of next year, by January. That does not mean that that will include the change of the definition of disability, but at least that part that disabilities it as an independent panel of medical experts. We wanted to be sure that you were aware of that as you heard these variety of medical case he. Separate from that, I think you know when any employee is disabled and has work restrictions, there is obligations to look at those work restrictions and do two things. Number one, determine whether or not the employees current job condition accommodated so they can continue to perform the essential function of that job. That is the process that retirement services goes through when they send a memo to the employee's department and that department responds back. But beyond that an employer also should be looking for other jobs that the person could still perform. That are beyond their current job. And what we are indicating to you in this memo is there are outer jobs if answer applicant so desires. Right now it's not required. That's another key point, right now it's not required. To look at other jobs where they could continue to be employed by the city in a different capacity. Again that is another issue we are mentioning in this memo but right now under the current rules it is not a requirement that if offered a job an applicant for disability retirement doesn't have to accept it. So I hope at a that clarifies the points that we were making in the memo.

>> Sean Kaldor: Thank you for those clarifications. Other questions or comments?

>> Jeffrey Rieger: This is Jeffrey Rieger here. If I could just briefly, I do want to be sensitive to the Brown Act here. As I view the presentation it's probably fairly considered a public comment which I think we just took it as a public comment and I think it also relates to the board's consideration of each and every one of the applications that are on the calendar today. So I think it was okay for the board to hear that. Because it does -- it's essentially a request to defer all of the applications. Do I have that right, Mr. Gurza? Is this a request to defer all the applications that are on the agenda today?

>> Alex Gurza: We suggested that as an alternative that the board consider.

>> Jeffrey Rieger: Okay, so if I could just provide some comments as legal counsel here. The applicants before the board today have earned benefits under the currently existing Municipal Code. They're applying for benefits under those terms. I understand that at some point in the future, the Municipal Code might be changed in a way that impacts members' applications to this system. And that that is pursuant to measure B. Because there's a half century of legal precedent regarding members' vested rights to the terms of the retirement plan in place at the time they provide service it is my understanding that a lot of measure B is structured so that its terms will go into place after enabling ordinances have been duly enacted by the city council after a trial court has entered a judgment declaring those provisions valid and enforceable. That legislative and legal process will take several months, if not years. And at the end of that legal process, it's entirely possible, I'm not trying to predict how it will come out but it's certainly a possibility that a court would strike down some of those changes. Now, as far as which ones are -- need to go through that process, which changes need to go through it and which don't, irrespective of which ones we're talking about, the fact of the matter is we have an existing municipal code now and we don't know exactly how and when it might change. So we have a backlog of disability applications. Over the last few months this backlog has been discussed publicly. The board has publicly discussed the fact it would be holding this specialty meeting like the one that it's holding today. It's my understanding that the fact that this meeting would go forward has been publicly known for some time. The applicants are here. I understand some of them have lawyers. I assume they are also here. The board members are here. So last night, at -- after business hours I understand the board received this memo asking the board to defer all of these applications. If anybody thinks I have the facts wrong, please let me know, but I think that's a fair articulation of the facts in the request. The municipal code says that if the medical reports and the other available evidence says to the satisfaction of the medical board that the member is incapacitated for the performance of his duty and if such member is otherwise eligible to retire for disability pursuant to the provisions of this chapter, the board shall forthwith retire him for disability. The two phrases I'd like to emphasize are pursuant to the provisions of this chapter and forthwith. Pursuant to the provisions of this chapter means the chapter as it exists today. Forthwith means not sometime later when the new law may or may not may or may not become effective. It means once if board has the information that it needs to make a determination. As far as the accommodations, the municipal code says what it says right now. And it says that a member is disabled,

when he has a condition which renders the person physically or mentally incapable of assuming the responsibilities or performing the duties of the position then held by him and of any other position in the same classification of positions to which the city may offer to transfer him. So as I understand it there's a process in place as part of this disability process where the accommodations are considered. And in the ordinary course. Whatever the standard may be, after measure B is implemented and whoever may be making those decisions after it has been implemented, it has not been implemented yet. So our advice, Harvey and my vice to the board is move forward with these applications in due course, we believe the board fiduciary obligation to do so. If it needs any more information on a particular application, it can certainly defer consideration, until it has that information. So if the board feels like it doesn't have enough information from a factual standpoint or a legal standpoint, it absolutely should seek that additional information before it makes a decision. But other than that if the board has all the information it needs to make a determination we think it should move forward in the ordinary course. And I'm here to answer any questions on this subject. I do want to be careful about the Brown Act. You know this was not really agendized for a full discussion. But obviously, it does relate to each of the applications before the board today. So I think it's fair to discuss it as it impacts those applications, so I'm here to answer any questions.

>> Sean Kaldor: So questions and comments from the board? Trustee Sunzeri.

>> Vincent Sunzeri: Well, the comment I was going to make and it might be a question as well for staff, is that we have a considerable amount of debate going on within this board that has not been resolved on how we're going to handle disabilities. The disability committee has not brought forward something that's been satisfactory to the entire board on how to handle the process. So I think we need to seriously consider if we can't do it now at our board meeting coming up, how we're going to resolve this going forwards. What this does in my mind with these cases in front of us is, there was a significant surge in number and the number was significant because some of these individuals from what I understand were being impacted and that they were going to be losing benefits outright exception. If every one of these individuals falls into that category I think we have an obligation to consider these cases. If in fact some of these cases are not time-sensitive then I think we need to wait until the disability committee or this board ask determine how we're

going to handle this going forward. So my question for staff is, of these nine cases in front of us, how many of them are time-sensitive and urgent that we have to hear them today?

>> Donna Busse: I don't know, Tony has that information. I thought though that the direction from the board was not only hearing cases that were time-sensitive. I thought that was a prioritization tool. So I might need some -- you might have the information.

>> With regard to the ones that were actually sensitive it would generally be all the ones listed under service connected disability. Those are people who are currently employed with the city or have recently been released. The others are change in status, so while they are critical, not as critical, because they are in fact disabled.

>> Sean Kaldor: Any other questions or comments?

>> Mr. Chair.

>> Sean Kaldor: Someone leaning against the light switch. There you are, thank you. Please.

>> I had comments, you know, Mr. Sunzeri's comments we obviously have had a lot of discussion as a board as to how we're going to go through disabilities and hear those. And I think we need to continue to have that discussion and figure out a game plan for the future. I would say however in slight disagreement with Mr. Sunzeri, I believe all the people on the list whether it be a list here today or a list going forward next month that for them it would be time sensitive, weather whether they're current in a modified position or not. They all have a need to move on with their lives and figure out what they're going to be doing after police work or fire work. So I would suggest that all the cases are time-sensitive in their own nature.

>> Sean Kaldor: Trustee Lanza.

>> Drew Lanza: You know, Alex, I sympathize with what you're saying. I mean from day 1 it's been very frustrating to see really talented people in their 40s and 50s who love this city and want to contribute say, I can't chase suspects anymore, I can't run in and out of burning buildings anymore, I'm frustrated that I have to retire when I really don't want to. But we did make this conscious decision in February and the board went round and round on this with regards to measure B or anything else like it. Should we modify what we're doing in anticipation of this? Having talked to our previous counsel, Russ Richeda and our current counsel, Harvey Leiderman, we clearly all voted unanimously that we would stay the course and let the political side of this with measure B work its way out. So I hear what you're saying Vince and I feel frustrated, I know Dick feels frustrated too that we have a process here that is not necessarily working well for our members. Our goal is to provide the best service to our members, there's no question about that. We have a process that is suboptimal. I think Dick's doing a good job about how to fix that but as I think Dick's discovered, not everybody agrees about how to fix that. So I think we ought to stick to this notion that we're relatively apolitical. If this is the way we're supposed to do that today, let's do it today. I hear what you're saying Vince and I wish this process was easier to streamline this. I will tell you, members of the audience, I don't think we're doing as good a job as we can and should do for you ain making sure that these things are heard in a timely professional fashion and that you're accorded the respect that you deserve. We are here to serve many different constituencies. You are clearly one of the core constituencies. So I think we have to stick to what we said before. Which is the rules are the rules, we will hold to those until somebody tells us otherwise. We don't make the rules, we just follow them.

>> Sean Kaldor: Trustee Rounds.

>> Bettina Rounds: Yes I agree with trustee Lanza. But the only thing I would add is that I think that our counsel, we're fairly clear, as Mr. Rieger just was, that this is our obligation currently, as it's written. And that we can't, I think that's the forthwith part, that right now, we have to do this. This is our obligation. It's not a matter of choice so much as what we are supposed to be doing as trustees. Though I understand certainly Mr. Gurza your position but I think that we have no choice.

>> Sean Kaldor: Any other discussion or questions on this point of comment? Seeing none, are there any other points of public comment? Seeing none from the public, we'll resume with the agenda. Item 1.1, service connected disabilities. Item 1.1A Tina R. Bowles, police officer, police department, effective October 30th, 2012, with 25.09 years of service. Tony.

>> Tina Bowles is a police officer who made application for service connected disability based on her left shoulder -- excuse me her left and right shoulders. She is aged 49 with 25.09 years of service. She is currently on modified duty, and her work restrictions are that she should avoid shoulder level and above activity, she should not carry a firearm and she should not drive a city vehicle. Permanent modified duty is not available.

>> Sean Kaldor: Thank you, Dr. Das, do you have anything to add?

>> Dr. Das: No, I don't.

>> Sean Kaldor: And you are represented by counsel. Mr. Swift do you have anything to add?

>> I do. Ms. Bowles has 25 plus years of service as a police officer. She has been unable to work full duty since May of 2010. She initially injured her right shoulder in 1987. Which is on page 60 of your packet. She was pursuing a suspect on PCP who knocked her over with a shopping cart. She injured her level shoulder initially three months later that's page 59. Then the injury report's not in your packet, but it's referred to on 9-9 of '03, while attempting to apprehend a suspect while she was in her patrol vehicle she was rear ended twice from behind, injuring her shoulder. And then on 5-24-10 which is page 57 of your packet, she injured her right shoulder, chasing a suspect, climbing over a six foot fence and then falling to the ground. Then, on February 10th, 2011, both shoulders were injured in a motor vehicle accident which occurred on her way to her physical therapy appointment. And I should mention by the way because Dr. Das raised the issue. In workers comp that's called a compensable consequence. If you are injured to and from going to a medical appointment, to physical therapy, even to the pharmacy, that is considered a continuing consequence of the

original industrial injury and that has been accepted by the city in its blackletter state law. She had left shoulder surgery in 12 of 2005. Now, that's unfortunately Dr. Das did not have an opportunity to see that because for some reason the operative report was not in the packet but that's a fact. In October of 2010 she had right shoulder surgery, the operative report for some reason was also not in the packet but Dr. Das referred to it because it was referred to in other reports and in April 2011 she had her second right shoulder surgery. The operative report is on pages 32 and 34 of your packet. Dr. Coleman who was her surgeon declared her right shoulder to be permanent and stationary, in October of 2011. That's on pages 38 to 41 of your packet. He found weakness and fatiguability and pain on overhead movement.

>> Sean Kaldor: I'd ask whoever's bumping into light switches if you could please avoid doing so. We have facilities here trying to get a lighting adjustment. Please continue.

>> Thank you. On January 17th, 2012, which is on page 50 of your packet, precluded her from very heavy lifting, from prolonged or strenuous push-pull or from work above shoulder level. And on that same date on page 52 of your packet he provided the same restrictions for the left shoulder. Dr. Das as to the right shoulder agreed with Dr. Coleman that she should avoid any activity above shoulder level. As to left shoulder he did not provide restrictions. I think presumably because he was not aware of the prior surgery in 2005. Dr. Das raised the issue of the liability for the motor vehicle accident. I've already discussed that. That's clearly a continuing consequence of the original injury. She was unable to return to work after the first shoulder surgery anyway. So given the fact that she has restrictions which the department cannot honor, that I would ask that her application be granted.

>> Sean Kaldor: Trustee Rounds.

>> Bettina Rounds: I have a question of the lawyers, of both you Mr. Rieger and you Mr. Swift. Because you referred to the -- I can still see you -- you refer to the workmen's comp rules that apply. Does that also apply to the disabilities that we're looking at or are they separate?

>> My opinion is yes. The only workers comp rules that don't apply are the presumptions, the presumptions for heart, pneumonia hernia cancer The retirement board is not bound by those presumptions. But other than that I'm not aware of any other aspects of workers compensation comp law regarding injury that do not apply to this retirement board.

>> Sean Kaldor: Mr. Rieger, would you like to weigh in on that?

>> Jeffrey Rieger: I'm sorry, could you -- I kind of heard the question but it was sort of hard to hear. Could you repeat?

>> Bettina Rounds: My question was, there was an injury that occurred on the way to therapy or recurred. And apparently in workmen's comp, that's a workmen's comp injury. My question is that for the purposes of the retirement services board, looking at disabilities, is that the same rule of law? For disability purposes?

>> Jeffrey Rieger: I would like to say, I don't think you can say that -- all rules are not the same. You know there are going to be different rules between workmen's comp and this board. But in terms of a specific question like that, I don't -- I don't have the background facts of this particular case, and have not had a chance to research any law relating to this particular case. So if there is an open question on an open legal question, in this case, I would encourage the board to make whatever factual findings it can make today and then if it has a legal question that needs to have a response on, before it makes other findings or before it approves the application, we could -- we can advise on that and get back to the board. I mean ordinarily when we first came on board with this board, we were not coming on board as a disability counsel. And I know there's some talk about getting the board some counsel in that regard. But it's not -- we don't normally review all this stuff before a meeting like this happen about so I'm happy -- we're happy to help out the board in any way we can but I'm not going to be able to provide a definitive answer over the phone here.

>> Sean Kaldor: If that's a sticking point that's something we'll have to have him come back on, if that's something on which the case will hinge.

>> Drew Lanza: Donna, you have been here a long time. Can you talk about this?

>> Donna Busse: It varies. When we had Russ here and Mollie here, they differed in their opinion of apportionment. Neither of them I don't think did a full analysis but there were opinions both ways as far as apportionment.

>> We may be able to bypass this issue depending on Dr. Das's answer. There were two surgeries to the right shoulder. One before the motor vehicle accident on the way to therapy. If there had not been the second surgery, and just the first surgery on the shoulder, would the restrictions be essentially the same?

>> Dr. Das: That's not a fair question. I honestly can't answer that appropriate -- because I don't know what the rehabilitation state was at the time. And it -- yeah, I can't fairly answer that question, yea or nay. I can try to review the medical records and see, but it sounds like she did not have a significant tear after the first surgery. And that there's likely you know in terms of the recovery, you have to just wait. So I -- yeah, I can't fairly answer that question yes or no. I really can't.

>> Sean Kaldor: Go ahead. Trustee Sunzeri.

>> Vincent Sunzeri: So having had fill therapy I know that when you make an appointment it's in a book or a ledger or it's on a computer. Do we have evidence here to show that she was in fact heading to an appointment, and at that organization, the time was consistent with the time of the accident?

>> Well, it's certainly not part of the packet. It was, I believe, established with the City's risk management personnel who, as a result, accepted the injury, but it's not in your packet and not -- I don't have it with me today. But I'm sure it's available in some manner.

>> Vincent Sunzeri: It would seem that that would be pretty important evidence to have, if we're saying that that is related to heading towards an appointment and this is all tied in.

>> James Mason: I'm not sure who I would be asking the question to, maybe Mr. Swift knows or Dr. Das knows. But the injury from the motor vehicle definitely that had subsequent surgery, was covered by workers comp, right?

>> Yes.

>> James Mason: The assumption. And again for me it's an assumption but maybe some can articulate, there is a risk management review of that injury. So at some point someone within risk management would have reviewed whether she was actually in fact en route to physical therapy. Otherwise the city would not have covered it.

>> Correct.

>> James Mason: Dr. Das, anyone, anyone from staff answer that question other than Mr. Swift? Who's representing the -- Mrs. Boales?

>> Sean Kaldor: Dr. Das, would you --

>> Dr. Das: I work with them but I don't know the extensive verification that's done so I mean I think the examiner or the adjustor you know, would know on that case. And maybe they may not be documented, but they just knew that she was on her way to therapy. But I don't know how well things are documented in order from a scrutiny standpoint.

>> Well, Ms. Boales can speak to that.

>> Yeah, after it occurred, I had just heard the time Aretriga, she did call the doctor's office and verified with their books and they also sent her a copy of the letter. And I also submitted a card that I was given with the appointment time. And they also got a copy of the police report at the time of the accident which was about seven minutes before the appointment time.

>> Sean Kaldor: Trustee Santos and then trustee Lanza.

>> Richard Santos: The way I look at it, is that my fiduciary responsibility is, is there enough medical evidence to to grant a service connected disability and my motion is that we do based on the medical evidence I've read here and the other important issues is you can't drive a city vehicle you can't raise your shoulder and you can't fire a weapon. Obviously this person is not going to be a police officer. So that's my motion.

>> Second.

>> Sean Kaldor: We have a motion and second. Discussions on the motion. Trustee Lanza.

>> Drew Lanza: I just want to verify that's correct. You can search the Internet quickly and it turns out that an injury, if you sustain an injury and you get in the car to drive to an appointment or pick up a prescription you can find it under Google in about five seconds, that's considered under workmen's comp. The question that Sunzeri raises is a very different question, in fact was that the case?

>> Sean Kaldor: Trustee Rounds.

>> Bettina Rounds: My question is not that it's workmen's comp, my question is does it relate to the service connected disability? I don't know. Our fiduciary responsibility is around the service disability, not around a workmen's comp question. So for me as a trustee, that's something that I really would like clarification on, at some point, from counsel. Other than the counsel representing the person.

>> Sean Kaldor: The applicant.

>> Bettina Rounds: Yeah, asking for the disability. Because I think I've been very confused as a trustee on the workmen's comp gets thrown out a lot and I'm not sure of the relationship to a service disability.

>> Sean Kaldor: I have a couple of questions. Under the documentation of mechanism of injury, Dr. Das you and your staff did a great job of getting us a summary of all the key points contained within sometimes very large case files. Under the documentation that was summarized for the documentation of mechanism of injury, there was no mention of the March 25th, 1987 injury report. There was no mention of the May 22nd, 1987 injury report. Are those irrelevant or why were they not identified as --

>> Dr. Das: I would have included them if I had the medical records describing them, that's why. They're very relevant.

>> Sean Kaldor: Okay. And both of those were shoulders, you had one shoulder injury, second shoulder injury, third shoulder injury, getting into surgery, then a drive that results in more significant damage. It's just a more complete view of what might have been happening here than the summary originally led me to believe.

>> Dr. Das: Oh yes, I mean, yeah. I -- the medical records summary is what I have available to include. I don't include records that I don't have.

>> Sean Kaldor: But these ones are in here, the City of San José employees -- employer's report of injury or illness, those forms?

>> Dr. Das: Those are not included for me. I don't get those from workers compensation. That's added to the packet afterwards.

>> Sean Kaldor: You're not informed at all about these other injuries they might have had if there's not a --

>> Dr. Das: I don't have access to the records, it's not given to me. Otherwise absolutely I would include them and it's relevant.

>> Sean Kaldor: Okay, thank you. That was my question.

>> I would note that it is very difficult to get records going back to the '80s these days. In terms of the medical records. The injury reports are here but getting the medical records is almost impossible.

>> Sean Kaldor: Understand, an injury going back that far I would have expected it manifested in injuries earlier than the time we're talking about now but it paints a more complete picture for me, thank you. Sunzeri.

>> Vincent Sunzeri: I think the point that trustee Rounds makes is very important. And we should have legal counsel provide us guidance on that so I'd like to make a substitute motion that we receive some legal opinion on how we process these types of disabilities before we move forward.

>> Sean Kaldor: So we have a substitute motion.

>> Richard Santos: Through the chair, discussion. The way I remember it when we had our legal counsel here he said workers comp issues and so on is a different issues, you just have in front of you the medical issues and deal with that. I don't know why we're going back to that because that was discussed prior to that on many occasions and we had a kind of a session that said don't forget, the medical evidence, it's not the politics, it's not the workers comp issues. Remember I asked when we had our subcommittee, workers comp person said yeah, you don't need to deal with that, you need to deal with the medical issues in front of you at the time.

>> Sean Kaldor: Trustee Rounds.

>> Bettina Rounds: That's actually what I'm trying to do. The thing -- and it may be because I get confused with the way things get written up about the way the injury was written up. The way I read this, the most recent injury was the one that was triggering the need for service disability and that was as a result of traveling to the postoperative physical therapy. What I'm hearing now is I misread the --

>> She was already off full duty on modified duty and in treatment at the time of the motor vehicle accident on the way to therapy, already having had one surgery to that same shoulder. So she was already off because of the first injury which is no question about.

>> Bettina Rounds: Right, I understood that part.

>> Okay.

>> Bettina Rounds: It's just that it's very difficult sometimes in reading these giant pacts, to understand at what point does somebody ask for service retirement disability? You know, is it at the time that they're injured, and -- I don't know. It's unclear to me sometimes.

>> Well, it is unclear, because it's a subjective question. As the person has surgeries they keep hoping they're going to recover enough to return.

>> Bettina Rounds: Right.

>> At some point in discussions with your doctors you give up hope.

>> Bettina Rounds: Right.

>> At which point you apply.

>> Vincent Sunzeri: Well we don't know that we're here yet. The question you posed to Dr. Das he was not able to answer. After the first injury would that be enough to grant a disability?

>> Partially because he didn't have the operative report from that surgery that preceded the motor vehicle accident which you know I can't explain why he didn't have it.

>> Sean Kaldor: So Dr. Das now that you -- do you that report now?

>> Dr. Das: No, I don't have the first operative report.

>> Sean Kaldor: Do we have that to provide to Dr. Das?

>> Yes, and maybe this is my bad. But it's -- when I find something and it's more -- it's less than one week before the meeting --

>> Sean Kaldor: Understood.

>> Then it doesn't do me any good to send it in because it can't be part of that packet.

>> Sean Kaldor: We extended that deadline to ten working days now to try and give you a little bit of a chance to do that. But I understand it is a fast process.

>> That's all right, I wasn't aware of that. I have it, I can give it to him now but is that --

>> Sean Kaldor: Probably a little too late at this point. We had a motion and second, we had a substitute motion that has received no second. So we're back to the original motion and second.

>> Richard Santos: Just to add that Mr. Chair, also when we have disability subcommittee meetings when we got to workers comp people didn't have what we call questionable care or operations, we say hey, it's immaterial, you guys are not into that, we're supposed to address the issues. We're all sensitive to the care and so on, whether we like it or not, so I call for the motion.

>> Sean Kaldor: So there's a call for the motion. I would -- I guess -- call the question. Thank you. All those in favor of approving the application, say aye. [ayes]

>> Sean Kaldor: Opposed?

>> Vincent Sunzeri: Nay.

>> Sean Kaldor: Request for a roll call vote. Trustee Lanza. Abstaining. Trustee Bacigalupi.

>> David Bacigalupi: Yes.

>> Sean Kaldor: Trustee Sunzeri.

>> Vincent Sunzeri: Nay.

>> Sean Kaldor: Trustee Kaldor, aye. Trustee Santos.

>> Richard Santos: Yes.

>> Sean Kaldor: Trustee Rounds.

>> Bettina Rounds: I'm abstaining also.

>> Sean Kaldor: Trustee Mason.

>> James Mason: Yes.

>> Sean Kaldor: Where does that leave us?

>> Three yeses. Four yeses.

>> Sean Kaldor: We need five to pass the motion so the motion fails. I'll submit a substitute motion that the application be approved contingent on word from our counsel Reed Smith on the applicability of a -- whether it should be considered, the injury that was sustained driving to physical therapy for a previous work-related injury.

>> Second.

>> Second.

>> Sean Kaldor: So we have a motion and second. Any discussion on the motion?

>> Jeffrey Rieger: Could I just, since you're going to be seeking our assistance on this I'd just like to make a suggestion because I'm not that familiar with the facts or even necessarily the legal question, at this stage. I'm afraid that if it's just posed as a -- you know Reed Smith will get back to us and then that will determine the outcome, it might be more complicated than that. I just don't know. So I think it would make more sense to just have the motion to be, to defer the consideration subject to receiving input from us. And that you know we can answer whatever questions are posed to us that the board believes it needs to complete this

process. But I -- but I think in this particular case, I'm not sure if every board member has exactly the same question or if it would impact their analysis in exactly the same way. So I think it would be helpful for us to get up to speed on the question, provide our input and then the board can consider the application at that time.

>> Sean Kaldor: So my intent with the phrasing the question that way is to avoid having every case come back to us every month for the next four months and the docket builds and builds and builds. If that was the only point of contention I was hoping that could be resolved and then we didn't have to rehear it. But if the board definitely would prefer to do it that way, absolutely.

>> Jeffrey Rieger: Yes if there is one single discrete question that the board -- that a majority of the board believes will govern the outcome of this case then I think you can proceed had a way. I just in dealing with matters like this all the time I just know sometimes it's not quite as simple as we think. But I guess I'll leave it to the board how to do it, how to carry it out.

>> James Mason: Mr. Rieger, trustee Mason here. Maybe we can clarify the question, make the question a little easier for you. The workers comp classifies an injury as a workers comp work related injury can the board automatically accept that on it's face as work related?

>> Jeffrey Rieger: That's -- I'm not 100% sure to the answer of that question. To be perfectly honest with you, Harvey and I don't do a whole lot of disability work. That may be a question I would know if we did more of the work. I know its a question we can answer. But by the end of the day, the ultimate governing law is going to be your municipal code. So it's going to be your municipal code, properly construed under the rules of statutory construction. Workers comp law may have some role there to resolve ambiguities. There may be some case law that deals with that but I really don't know the answer just sitting here today, I'm sorry.

>> Sean Kaldor: So we'll go back to the original motion that's been seconded unless there's further discussion it can be shot down and we can do another vote to just defer -- Vince Sunzeri for discussion.

>> Vincent Sunzeri: Since we're deferring it if you could just include the evidence, so that way we have a complete packet, I'd feel more comfortable as a trustee next time I'm voting. Evidence of the appointment time.

>> Sean Kaldor: Oh, so sorry, the motion wasn't to defer, the motion was to approve it pending their -- their legal opinion from Reed Smith on whether we should consider this trip to the doctor to be considered as a work related injury.

>> David Bacigalupi: Could the maker of the motion amend it to include what Vince is asking for, the documentation of the appointment?

>> Sean Kaldor: Yes, I'll accept the friendly amendment to also include further substantiation for the trip.

>> Drew Lanza: And an amendment to add the additional medical information.

>> Sean Kaldor: And a further friendly amendment to supplement the case record with the -- was it the doctor's report after the first injury?

>> The operative report.

>> Sean Kaldor: Postoperative report from the shoulder --

>> Not the postoperative report, the actual operative report from the first shoulder surgery. Let me add one thing to trustee Mason's question to the attorney. That's too broad a question. Because there are some

circumstances in which this board is not bound when it's determined to be workers comp, i.e. the presumptions. And we don't need his opinion on that issue.

>> James Mason: Sorry, I meant with the exception of the presumptions.

>> Sean Kaldor: I was just going to say, the question was not phrased as far as all workers comp or all rules or whether it applies to us. It was just specifically to this case and this fact pattern and San José municipal code. If we want to get into should we follow all workers comp rules, it's a bigger discussion and I'm sure it's going to take them more than a few weeks to come back with that analysis. So specific to this case and our current rules. And you can shoot me all down now. Any more discussion on the motion? All those in favor? Any opposed, none opposed the motion passes unanimously.

>> And will staff draft the specific question to be directed to the Attorney?

>> And then show it to you?

>> Hmm?

>> Donna Busse: And show it to you?

>> Well, it would be nice to look at it just to make sure it covers the specific situation that we're in.

>> Jeffrey Rieger: And actually I'd like to know, I heard there were some supplements to the motion about additional evidence. Is that additional evidence just to -- just to complete the record? Because I think --

>> Sean Kaldor: Yes.

>> Jeffrey Rieger: Okay. Because the motion just now was to approve contingent upon a certain answer.

>> Sean Kaldor: Contingent upon both the applicability of the accident and the substantiation of the trip and what was the other thing? At the operative report.

>> So I can certainly answer the legal question. Part of -- my issue here is when you talk about substantiation, and when you talk about you know proving something, that ultimately is the board's function. It's not really our function as counsel to decide whether the evidence is satisfactory. So I mean we can certainly provide our analysis of whether you know under a fact pattern given, does that qualify, under your plan. That's certainly something we can do. But if there's any sort of you know if there's any ambiguity about the level of proof, that's not really -- I mean we can make a recommendation but we're really not in a position to make that decision for you.

>> Sean Kaldor: Councilmember Constant.

>> Pete Constant: Perhaps is there an option of approving with a contingency, Or deferring and having to hear it all over, simply keeping the record as-is, continuing this to the next meeting, the board seeing the evidence, getting the legal opinion and just taking a vote, without entertaining any new hearing.

>> Sean Kaldor: So Mr. Rieger, correct me if I'm wrong, we could do that with the two board members who are not currently present would not be able to have an opinion on that without rehearing the entire case?

>> Jeffrey Rieger: I think that's right. I mean I think you can bring it back under whatever conditions you think are appropriate. You don't need to have the whole discussion all over again. If you feel like certain aspects of this have been resolved you don't need to hear all of those aspects again. But if you're just looking for a legal analysis about a legal question and then some further information to substantiate a particular fact then I think you could bring it back for those limited issues to then take a vote. I mean it is a -- it is a little bit problematic I think to just sort of set it up as a conditional approval if you are leaving some of

the facts open. That's my concern. So for that reason if you really be bringing in new facts I think we may want to reconsider the motion under the terms I just gave.

>> Sean Kaldor: Councilmember Constant.

>> Pete Constant: Mr. Rieger, the members who are not here, my understanding is as long as they were to listen to the entire tape of the meeting, have all the documents that were presented here they could participate in the actual vote, is that correct?

>> Jeffrey Rieger: That might be right. Again I'm going to need to -- I know that's the case in some systems. We need to check the code for this system to make sure that that's the case. We could certainly look into that.

>> Donna Busse: Jeff, that's what prior counsel has said in the past.

>> Jeffrey Rieger: I'm sorry?

>> Donna Busse: That's what prior counsel has said in the past.

>> Jeffrey Rieger: It doesn't sound wrong to me. I answered a little hastily, in response to the last question. There probably are ways for them but we can look into that and make sure everything is done in compliance next time.

>> Sean Kaldor: Trustee Mason.

>> James Mason: Let me see if I get this right. Make a motion that we defer this to --

>> Sean Kaldor: Continue.

>> James Mason: Continue sorry.

>> Jeffrey Rieger: I think it should be a motion for reconsideration. Somebody who voted yes for the last motion should make that motion if that's what the board wants to do and then you would move to reconsider and if you approve that, then you would approve that motion.

>> Sean Kaldor: Motion to reconsider the motion at hand.

>> James Mason: A motion to reconsider the issue that was at hand pending review from legal counsel.

>> Second.

>> Sean Kaldor: Second from Bacigalupi, motion by Mason. Discussion. All those in favor? Aye.
Opposed, none, most passes unanimously. Floor is open to a new motion.

>> Pete Constant: Here's where you might want a motion to continue vs. defer.

>> Sean Kaldor: Okay, motion from trustee Santos to continue the hearing for the application of the applicant Tina Boales.

>> Second.

>> Sean Kaldor: We have a motion and second. Discussion on the motion? I would just ask that we ask that we're getting clarification of three things. Dr. Das will be provided with the operative report, second, there be substantiation that the relevance of the trip when she was injured the second time. And third we'll receive legal advice from our counsel regarding the work- relatedness to a trip to go receive treatment to her work related injury.

>> Drew Lanza: So will this be heard in November or December?

>> Sean Kaldor: This cannot be heard in November.

>> We're talking about a regular meeting not a special meeting.

>> Sean Kaldor: Correct. Let me just change that, let me say a meeting to be scheduled.

>> Pete Constant: When you continue I think you have to continue it to a time- certain I believe a specific meeting and is in a reason it can't be continued to the other November meeting?

>> It's only a day away.

>> Pete Constant: I guess that's why.

>> Donna Busse: To December 6th?

>> Sean Kaldor: Motion to continue to a date certain December 6th.

>> Why?

>> Sean Kaldor: Because it's day after tom. It's not agendized, it's Brown.

>> Pete Constant: It doesn't need to be agendized if it's continued.

>> That assumes --

>> Jeffrey Rieger: There is the real question about the two-day turn around for the questions asked as well.

>> Sean Kaldor: I appreciate the aggressiveness to this, but yes, it does come down to a quick turn around but Jeff it falls on you for quick turn around as well as Sam swift. I guess I should ask the question can both of you receive those three things -- one down -- Jeff can you have this by Thursday?

>> Jeffrey Rieger: You know I think it would make sense to continue this to December. Because there's working pieces here. And it's -- it's partly it's me. I don't know that I can. I mean frankly there was a lot of things I had to postpone because of this meeting. Dr. Das has to receive information. It seems unrealistic to me from two days from now. I think December seems to make sense. If someone needs to postpone it --

>> Sean Kaldor: Are you saying December is when you can deliver it or can you deliver --

>> Jeffrey Rieger: If it's coming down to me I don't think I can promise Thursday. If it's just a question of doing the legal research I probably could but it's never quite that easy. We might have to gather facts that we don't have. I don't know how the report is going to fit into the analysis. This additional evidence that the board is seeking might even fit into our analysis. It -- I don't think it's realistic.

>> Sean Kaldor: That was a long no. Okay.

>> Jeffrey Rieger: Sorry.

>> Sean Kaldor: That's all right. So I believe we had a motion and second and we were clarifying of the date then that will be December 6th.

>> Thank you.

>> Sean Kaldor: Thank you.

>> Did we vote on the motion?

>> Sean Kaldor: We'll have to vote on that. All those in favor of the motion? Opposed? Seeing none opposed, the motion passes unanimously. Thank you, we'll see you in a month. Moving to item 1.1B, the application for service connected disability for David J. Gonzales, police officer of the police department effective June 4th, 2011 with 12.24 years of service. Tony.

>> Officer David Gonzales is applying for a service-connected disability based on his right knee. He is 43 years old with 12.24 years of service. At the time -- he's currently on administrative leave, sorry, he's currently separated from city service as of 6-4-2011. He -- his work restriction is that he should avoid extended weight bearing on his right leg. Permanent and modified duty is not available.

>> Sean Kaldor: Thank you, Mr. Swift -- sorry Dr. Das do you have anything to add to the record?

>> Dr. Das: No I don't.

>> Sean Kaldor: Mr. Swift.

>> When we were last here on September 6th, the issue was, that was raised was - -

>> Sean Kaldor: Sorry just to be clear. This was also continued from or deferred from September 6th or continued?

>> I have no idea.

>> We never discussed it.

>> Sean Kaldor: It was deferred. But then how would there be an issue so it's deferred, thank you.

>> There was a long discussion, more information was needed we agreed to get more information and we've supplied it.

>> Sean Kaldor: Thank you.

>> So the question was the work relatedness of the right knee condition. And Dr. Das had referred to an osteochondral defect that might be nonindustrial and suggested that more information might be needed or work relatedness. The -- with regard to the mechanism of injury, which is sort of explained in the prior packet. But essentially Mr. Gonzales was at a scene on the side of the freeway in the dark of night with uneven ground and stepped into a depression and fell forward striking his knee and hands on the ground. And one of the questions that Dr. Das raised was, well were there immediate symptoms? On page 27 of your packet, according to Dr. Coleman, in his report of April 5th, 2012, quote, after the injury he had acute pain and subsequent swelling in his knee, unquote. Now as to the nature of the condition, on page 27 of your packet, Dr. Coleman, according to Dr. Coleman, the MRI showed a chondral lesion with associated bone edema and some cystic changes in the underlying bone consistent with a traumatic lesion. Those are the magic words in terms of that reading of the MRI report. He also said, on page 28 of your packet, that Mr. Gonzales was a QIW which means he can't go back to his job, but that's really not at issue here. He also said on page 28 of your packet that the sole cause of the disability was the specific work related injury and there is no nonindustrial apportionment. Now we've talked before about apportionment. Apportionment means is there some other nonindustrial reason to cause this problem? And according to Dr. Coleman the answer is no there is not. Dr. Cohen, we got a report from him. Dr. Coleman who did the surgery retired and turned the case over to Dr. Cohen. Dr. Cohen on page 37 of your packet in his report of August 30, 2012, so that is new, said the condition of his knee was due to a one-time injury, the injury to the knee when he fell. All right. Then we got a supplemental report from Dr. Coleman which is on page 39 and 40 of your packet. That report is dated September 20th, 2012. He was the surgeon. He explains the findings on his exam and at surgery, and concludes that the mechanism of injury with the fall that we just described, would

in fact produce this kind of condition that required surgery, and the subsequent work restrictions. Dr. Coleman had previously provided work restrictions of no prolonged kneeling squatting or stair climbing, Dr. Das provided work restrictions of no extendweight bearing and we know the department has no modified duty. So it is the applicant's hope that the comments from Dr. Coleman and Dr. Cohen which were not previously provided to you, would now resolve the issue of this being more likely than not, a result of the traumatic incident that he had at work and that has clearly been accepted as an industrial injury.

>> Sean Kaldor: Thank you. Dr. Das did you want to respond? Is your report updated to reflect this new information?

>> Dr. Das: If you look at where the new -- it's at the back. At the back of the packet. So if you look at the medical records my supplemental's just before the reports by Dr. Coleman and Dr. Cohen. If it helps I agree with Sam.

>> I'm sorry could you repeat that?

>> Dr. Das: I agree with Sam. As far as the --

>> Page 36.

>> Sean Kaldor: 36, thank you. That addresses the key concern we had last time raised by the summer report where you said additional information from the treating physician to determine if treatment was necessary.

>> Dr. Das: With those osteochondral defects, it is typically more due to a degenerative change but it can occur acutely.

>> Sean Kaldor: Discussion or questions?

>> David Bacigalupi: Mr. Chair.

>> Sean Kaldor: Bacigalupi.

>> David Bacigalupi: Based on the medical evidence presented, and the fact that the police department has reduced the officers exempt program, where modified duty officers were found locations to work, based on their restrictions, and according to lieutenant rose from the police department in his memo page 9 dated August 16th that the positions are full and they can't accommodate the restrictions listed in the medical evidence, I make a motion to approve the application.

>> Second.

>> Sean Kaldor: Motion by Bacigalupi, second from Mason with a question from Santos. Trustee Santos.

>> Pete Constant: Can you talk into your mic?

>> Richard Santos: I thought I was but will do that. Other issues I understand about the right knee and so on, also the epidural injections, they had something here on page 21, page 1 of 3, this is page 21 where it says the patient also has a history of spinal trauma from work related motor vehicle accidents. I didn't see any information, I thought maybe you wanted to expand on that and what is GERD?

>> GERD is gastroesophageal reflux disease usually called heartburn. The original application included the back but we are going exclusively on the restrictions provided for the knee. And in fact the back was amended out of the application some time ago.

>> Sean Kaldor: Any other questions or discussion? Seeing none all those in favor of the motion? Aye.
Any opposed?

>> Abstain.

>> Sean Kaldor: Abstain one an extension from trustee Sunzeri. The motion passes.

>> Richard Santos: Mr. Chair, I'll wait for Mr. Bacigalupi to say a few words first but I want to make a comment.

>> Sean Kaldor: Please.

>> David Bacigalupi: Dave, I know that you got hurt early on and stuff and you couldn't finish the career like you had planned on. We never had a chance to work together but I know other people you had worked and stuff and the department -- it's the department's loss circulation in your personal life so I wish you good luck.

>> Sean Kaldor: Trustee Santos.

>> Richard Santos: Yes, thank you David. I know a person with four young children sure would want to stay in this job. I had been fortunate to know this person as a child and had an opportunity to work with him. When I was retiring he was a police officer came from San Francisco down here had a chance working about four years with him. David, it's too bad you had to leave. Best to you and your family.

>> Thank you.

>> Sean Kaldor: All right, we'll continue with item 1.1C, the application for service connected disability for Steve maraldo, firefighter with the fire department. Effective April 14th, 2012, with 6.12 years of service. Tony.

>> Steve maraldo is a firefighter who is making an application based on his back. He's applied for a service connected disability. He is 30 years of age with 6.12 years of service. He is currently on disability leave, and his work restrictions are that he should avoid repeated bending and heavy lifting. The department has indicated that they do not have modified duty available.

>> Sean Kaldor: Thank you. Dr. Das do you have anything to add?

>> Dr. Das: No I don't.

>> Sean Kaldor: Mr. Maraldo is represented by Mr. McBride. Mr. Mick McBride.

>> Yes, when we were last here, there were two areas of questions raised. One was put it in my terms, why isn't he on pain medication if he's disabled and in constant pain. The other was whether there was sufficient evidence of the injury causing the current pain. We obtained, actually Steve obtained a subsequent report that you have from his treating doctor which I think addresses both of those issues. If you look at the first page of that document, down it says the following are also referenced in the same report. And he goes through and lists the specific injuries or residual injuries that are there, including significant spurring, scar tissue, and further goes on in the second page to explain that his philosophy, with most of his patients at least, is to try to avoid continuous drug treatment if they can tolerate the pain. And I'm sure that we all recognize certain people have lesser or more tolerance. Steve has chosen to follow that route but I don't think it in any way lessens the fact that he is and has been and will be in the future disabled as a firefighter. He can't do it. And I think there's clear, the causation is there and Dr. Coleman's first report, or pardon me, yeah, Dr. Coleman's first report. He indicates it as when he was in the process of lifting and twisting of a patient he had immediate pain. Although there is some indication in Dr. Das's summaries, that that isn't the case. In fact, it's in your records. So I think Steve would like to make a statement also.

>> Sean Kaldor: Mr. Maraldo.

>> Thank you. On October 26th, 2010 My engine company responded code 3 to an emergency medical call. When we arrived we found an elderly man having a medical emergency in his bathtub. The bathtub was in a small shower enclosure and the patient weighed approximately 210 pounds. Without disassembling the entire enclosure, or removing walls, in practical feats the time would not allow, it was impossible for more than one rescuer to fit into the tub. One of us would have to enter and lift the patient unaided by the rest of the engine company. As the physically strongest member of the crew I volunteered to be the one and climbed into the tub. This patient was undressed, wet, disoriented and completely unable to assist me by supporting any of his weight. I used the best safest lifting techniques the situation would allow. I bent my legs, attempted to keep my leg straight and wrap my arms around the man lifted him straight up and turned to pass him to my partner who was waiting outside the tub. It was an awkward and extremely strenuous lift. Obviously, the conditions were not ideal. But that is often the reality of the job of firefighter. Handing the patient off I felt immediate pain in my lower back. Shortly after the call, my lower back began to spasm. I hope this was just a muscular strain and that it would resolve itself with rest. I stayed on duty and I completed my shift. Unfortunately, my back spasms and pain did not improve. In fact they worsened daily. I went to see Dr. John Coleman, a well-known orthopedic surgeon and sports medicine specialist. X rays were taken and I was diagnosed with an acute lumbosacral sprain. He prescribed Celebrex and physical therapy. I did not want to stop work and requested to remain on full duty while undergoing treatment. I attended physical therapy sessions, took all the prescribed medications and saw Dr. Coleman a week later. Since my injury had not improved an MRI was ordered. In all I kept working for a month following the injury. When my MRI results result came back, Dr. Coleman told me I had significant damage to both my L-4, L-5, and L-5, S-1 discs. I learned I had an acute disk herniation/extrusion at L-5 S-1 that was displacing the central right S-1 nerve root. I was told that the only recommended treatment for this injury was surgery and I was referred to Dr. Jeffrey Coe an experienced orthopedic spine surgeon. At the time I met Dr. Coe I was extreme reluctant to undergo surgery. Dr. Coe prescribed comprehensive physical therapy program, along with medications, I followed his orders to the letter but unfortunately my condition continued to get progressively worse. Experienced pain and numbness down my right lateral posterior thigh calf and foot. Every day tasks such as leaning over a sink to shave or rolling out of bed became agonizing. Dr. Coe recommended surgical intervention of the L-5 S-1 disk. He told me performing surgery would necessity a

double fusion which was not likely to return me to work. Since my goal was to continue my career as a firefighter, Dr. Coe requested approval of microdiscectomy, laminectomy, foraminotomy of L-5 S-1 but his request was denied by workers comp. My medical records were then sent to Dr. Stephen Jenist, a newer surgeon. I never met or spoke to Dr. Jenist. He only reviewed my records. In Dr. Jenist's report he indicated that my MRI bequeath showed an L-4 L-5 disk herniation with flattening of the L-5 nerve route plus facet arthropathy, as well as an L-5 S-1 right side disk extrusion four to five millimeters in size with displacement of the right S-1 nerve root. He goes on to state he agreed with the quote the requested L-5 S-1 right disk removal but would also advise L-4 L-5 removal since there's a disk herniation at that level compressing the L-5 nerve root and operating on one with do nothing to alleviate the other so they both should be operated on end quote. However since Dr. Jenist did not evaluate me, did not realize my goal was to return to work, a third doctor was contacted to act as an agreed million examiner and give a final medical opinion. I was evaluated by the agreed medical examiner Dr. Randall Segal. His diagnose was disk extrusion, right L-5 S-1 displacing the nerve root, annular tear, right sciatica with radiculopathy numberness. And Dr. Segal's report he stated, "the objective findings are significant for the MRI findings above. There is a significant disk herniation on the right at L-5 S-1 which compresses/dorsally displaces the right L-5 S-1 nerve root. There is a broad based annular tear at L-4 L-5 without neurologic compression. His right side straight leg raising is associated with nerve root irritation. He goes on to state based on the subjective symptoms, objective finds, a right sided microdiscectomy at L-5 S-1 is indicated for Steven maraldo, end quote. Dr. Segal also noted that because my goal was to quote return to work as a firefighter end quote he would be in favor of quote performing the least amount of surgery to help this man return to work including the L-4 L-5 would most likely not improve his buttocks/leg symptoms, a discectomy at this level will most likely not improve his midline low back pain. It cannot be stated with certainty how much his L-4 L-5 midline tear is contributing to his lumbosacral pain. Surgery to address both levels will not likely return him to his usual and customary job. I strongly recommend the microdiscectomy at L-5 S-1 excepting the fact that there is some unknown factor regarding the amount of improvement to be expected in his axial back pain. He is in agreement with this plan and realizes this is his best likelihood to return to his usual and customary occupation." The following Dr. Segal's report three separate doctors have now agreed that surgery was necessary at L-5 S-1 and I received approval for the procedure. On April 28th, 2011 I

underwent a right sided L-5 S-1 laminotomy, foraminotomy, medial fast facetectomy, microdiscectomy and nerve root decompression. An attempt to reconstruct the annulus fibrosis with the with the Annular reconstruction system was made along with these procedures installation of steroid right side L-5 S-1 epidural catheter was also performed. In Dr. Coe operative report herniation this was an extrusion but not a sequestration as it was in contact with the remainder of the disk space. Dr. Coe also goes on to state the disk herniation could be removed and loosened at least partially with a nerve hook. We then removed two large pieces of disk with a micropituitary Rongier. The first piece of disk measured half centimeter by three centimeters. The second piece of disk measured half centimeter by four and a half centimeters, several other much more smaller pieces of disks were removed by placing a pituitary Rongier in the disk space." In plain-speak, what this means is the doctors made an incision in my lower back and they cut away tissue and bone to expose the disk. Then they removed a tremendous amount of center disk material that had squeezed out of the tear in the disks and was crushing the L-5 S-1 nerve root. My surgeon commented to me that the amount of extruded disk material was much larger than he expected based on the previous MRI. I was given postoperative restrictions of no bending stooping twisting or lifting anything greater than five pounds. I was prescribed high dose prednisone, which is a strong antiinflammatory and narcotic pain medications. Muscle relaxers were also prescribed for my ongoing multiple spasms. My only allowed exercise for the following two months would be walking and I should walk often to speed the healing process. Now, I took walks through my neighborhood twice each day. And it was slow and painful. But I tried to keep a positive outlook. Focusing on the fact that I was doing everything I could to get me back to work and a normal life. My wife, who was already working full time as a teacher while caring for our two-year-old son and four months pregnant with our second child now had the burden of caring for me. I wanted to help around the house to help with our son and do my share but it was difficult to do much of anything at all. This was an incredibly low point in my life. As a husband and a father, I've never felt so powerless to help the people that I love. I still feel a great sadness about it. I can never erase that experience from our lives but I was able to take from it a stark lesson. It showed me how quickly things in life can change and how one's health should never be taken for granted. When my doctor finally cleared me to start driving again, I found I was unable to drive my car due to the extreme pain it caused. The low seat height and stiff suspension sent a jolt of pain through my back every time I hit a bump in the road. After a short drive, my

right foot would become numb and the leg would feel like hot liquid was being poured on it. I remember reaching down to touch my ankle convinced that fluid from the vehicle had somehow leaked down through the fire wall and soaked my leg. But it was dry. All I was experiencing was damaged nerves. A friend lent me their car for nearly a month as I searched for another option. Eventually I sold my car at a huge loss to purchase a different vehicle with more ergonomic seats and softer suspension hoping it would aid my recovery as I was driving to and from doctor and physical therapy sessions. Despite all recommended treatment options I continued to have low back pain, constant posterior gluteus and hamstring pain that burned and increased with activity. It was difficult to sit or stand for long periods, and frequently I was forced to lie down. The numbness in my right calf and foot continued as well. More physical therapy was prescribed. I did therapy in a swimming pool. I performed therapy on land. The physical therapist I worked with tried numerous modalities none of which gave me ongoing relief of my symptoms. Medications and muscle relaxers were equally ineffective. As time went on I became extremely frustrated with the lack of progress towards recovery. Throughout this time I'd continuously ask for further treatment options and everything so far had been unsuccessful in resolving my symptoms. My goal of returning to my job as a firefighter began to look further and further from my reach. Seeking a fresh perspective I insisted on yet another opinion. Dr. Coe was agreeable, and I was referred to Dr. Justin Lowe, a well nonanesthesiologist and main management specialist. I remember telling Dr. Lowe do everything you can to get me back to work. I'm not willing to give up on my career with San José fire and if there's any treatment available I want to do it and Dr. Lowe understood. Physical therapy was continued and spinal injections were ordered. The injections were denied by workers comp pending a postoperative MRI. In October of 2011 six months following my surgery a postoperative MRI with contrast was performed. This means they took pictures of my spine with and without an injected contrast media. I was again sent to the agreed medical examiner Dr. Segal for a second opinion on further surgery. Dr. Segal's report indicated that, quote, the neurologic examination of the lumbar spine lateral foot and ankle in an S-1 distribution. He also goes on to state, deep tendon reflexes are absent at the right ankle and 1 plus/2 at the left ankle. Mr. Maraldo is not capable of performing the usual duties of a firefighter and would be considered at risk for reinjury. He has difficulty simply lifting his children and is unable to place his child in a car seat. These abilities are not consistent with the duties of a firefighter, unquote. Both Dr. Segal and Dr. Lowe agreed that no further surgical treatment

was warranted at this time. Multiple spine fusion or disk replacement could become necessary in the future should my disks or spine continue to deteriorate. However, both procedures carry significant risks. And neither would offer the improvement needed to return me to work as a firefighter. Following the MRI and surgical second opinion approval for epidural cortisone injections was granted and I received the injection. Unfortunately they did not help. Not in the slightest. Having exhausted all recommended and approved treatment options, Dr. Lowe declared I had reached maximum medical improvement. Dr. Lowe stated that my injury poses a liability and safety hazard to myself, my crew and the public I am sworn to serve. He said my injury permanently prevents me from safely and effectively performing my job. He told me that regardless of how much pain I was willing to tolerate he could not release me back to work as a firefighter. This was a hard thing to hear and an even harder thing to accept. I was in denial about it for a long time. My career means so much to me. My God father, a fire engineer, helped direct the course of my life and started me on the path to the fire service. I have been dedicated to this pursuit from a young age. By 18, I was working as an EMT on an ambulance in two counties. And I had already been a volunteer firefighter for two separate departments. Three years later on my 21st birthday I earned my paramedic license. Public service runs deep in my family. My mother is a nurse. My wife is an elementary school teacher. My brother is not just a firefighter, he is a San José firefighter. My hope was always we would have long careers and maybe even retire together but that isn't going to be the case. Still I'm thankful for the time I had. One of my favorite parts of this career was the opportunity to make a positive impact on others' lives. I'll never forget one particular call. When my engine company, engine 25, responded to a four month old girl not breathing. Upon arrival we found the infant was without a heartbeat. As I began to treat the little girl her mother approached from behind, and placed both her hands on my shoulders and began praying for her daughter. We worked as a team and by the time we reached the hospital the infant's heart was beating again. I was humbled to have witnessed the worst day of a family's life and feel I had the opportunity to make a difference. All firefighters have these calls. They are the ones that you remember. And the once that really mattered. I'm thankful for every one of them. I just wanted the chance to have more. Losing my career is hard. It's also hard to face how this injury has affected my life at home. Like watching my wife, have to lift heavy items for me. On our wedding day I carried her across the threshold of our first home. Now I have to rely on her to lift our children out of their car seats. My first child was born a year and a half before my

injury. I stayed in the hospital for several days, spending time bonding with my new son and assisting my wife with baby duties. Six months after my surgery, we welcomed the birth of our second son. This time, I was unable to stay with my wife and newborn child. I could not sleep on the fold-away beds so each evening I had to leave my wife alone. I felt like I was failing my family. My oldest son is now three and a half years old. I still remember his riding on my shoulders while walking through the local park. He also recalls visiting my fire station. Sitting on the wheel of the -- sitting at the wheel of the fire engine and wearing my helmet twice the size of his head. My youngest son will never know me as a firefighter. Those memories are reserved for my oldest and they are quickly fading. And that brings me to what I want to say most of all. The events of the last two years have impacted my family as much as me. I am eternally grateful to my wife who, while caring for my first son, pregnant with our second, also cared for me. She is an amazing woman. I would also like to thank all my family and friends for the help and generosity they have displayed. I am fortunate to have you all my life.

>> Sean Kaldor: Thank you. We appreciate all the information you provide in addition to the printed record we have to go through. We know it's difficult. It's not enjoyable for us to be sitting here and going through all this either, so I appreciate you doing that. Are there questions from the board? One of the things we have to do is make sure it meets all the requirements, all the legal qualifications. It's the tough part of our job.

>> Richard Santos: Comment.

>> Sean Kaldor: Trustee Santos.

>> Richard Santos: Last time this firefighter was here we asked for further information. And I listened to him very carefully and I think on page 7 it kind of summarizes everything to me, it is a long paragraph and I'm not going to read it. It basically says this young man cannot be a firefighter. Is not going to improve with surgeries or anything else. It just goes on and on. There's no modified duty. I don't think anybody wants to

see somebody who has been a couple of years on leave, who has a couple of children, it's sad, those things do happen. And so with that I'll make a motion to grant this young man a service connected disability.

>> Second.

>> Sean Kaldor: We have a motion and second. Discussion on the motion? Seeing no discussion on the motion, all those in favor of granting the service connected disability say aye. Aye. Any opposed? Seeing none opposed, the motion passes unanimously.

>> Thank you.

>> Sean Kaldor: Thank you for your service. I know you, I know your brother. I appreciate what you've done for the department, for the community. Thank you.

>> Thank you very much. I really appreciate it.

>> Sean Kaldor: Okay, so the next part of our agenda takes us to a closed session. We'll take a five-minute break, for all the trustees and then we'll reconvene, where are we --

>> Donna Busse: Have to go upstairs.

>> Sean Kaldor: So we're upstairs. Okay. So take --

>> Donna Busse: We couldn't use it if the council is in session.

>> Sean Kaldor: We'll meet, in say call it ten minutes. Take the elevator outside there we'll have someone leading you to OER, this is start of a closed session, the first thing we'll discuss is whether this application should be heard in a closed session or not. If it is then we'll continue and we'll continue to hear it in closed

session. Each of these are taking somewhere from 15 to 45 minutes. We don't really have an exact time we will be back. It could be very quick or it could be the full length of that time. Thank you.

>> Jeffrey Rieger: Mr. Chair, do you need me to call into that closed session or do you want to call me --

>> Sean Kaldor: Yes.

>> Jeffrey Rieger: Okay, do I have information for that call? I think I do.

>> Donna Busse: I think you do.

>> Jeffrey Rieger: I have the number. So I guess I should just call in, in ten minutes.

>> Sean Kaldor: Yeah, we'll set up a line up there.

>> Jeffrey Rieger: I have the number. Okay, thanks. [Closed session]

>>> To people who've already retired and I have a change of status. This is a change of status to service connected disability.

>> Mr. Chair?

>> Trustee Bacigalupi.

>> As a trustee but also as the applicant in this case, I recuse myself from the board. I'm gonna leave the board. Will not be making any board discussion nor board decisions on this next case.

>> Thank you trustee Bacigalupi. So I'll read this into the record. We'll explain that just briefly. Item 1.2A -- David A. Bacigalupi, police sergeant for the police department effective July 12th, 2008 with 32.61 years of service. Uh, trustee Bacigalupi sits on this board and as all members of this board are affected by the plan, we've consulted a legal council, insured he has no role in the evaluation of his disability application, but like all members of the plan, he has to be heard by this board. So --

>> Mr. Chair, if I could just interject. I just wanted to state for the record that the city charter, the city municipal code, the city council policy, and administrative policies all refer to conflicts of interest and appearance of conflict of interest and I think it's really important the board the seriously considers that. I know you may have spoken to your attorney on this, but there are also possible 10-90 issues that have serious ramifications if it's later determined that there's a violation of 10-90 by the board, whether advertent or not advertent, inadvertent -- And the penalties are quite frankly draconian here in California. And I know that there's also -- Unfortunately we found out at the council level, you can't simply rely on the opinion of your attorney as a defense if you violate 10-90. So I just encourage you to proceed cautiously if you decide to proceed because, like I said, the policy manual, the city council policy about appearance of conflict of interest are pretty clear. The 10-90 issues are draconian and that's why many other boards have policies and procedures for when one of their board members have an application pending that it goes to another board or some outside process. I think it's important that you all know, going into it with your eyes wide open.

>> I appreciate that. It's an important point to raise, and so for all the board members who haven't had a chance to talk with council on this. Mr. Reager, are you with us?

>> yeah, I -- And there's two main conflict of interest provisions that I would look to here and one is the Political Reform Act. And under the Political Reform Act, that deals with just conflicts of interest generally for public officials. And the Political Reform Act has -- You have the fair political practices commission provokes regulations under the Political Reform Act. Um, and those regulations identify -- They help you identify when there's a conflict of interest and when it's a problem. And there is a regulation -- It's two Cal-

Code Regs -- 18702.4, that's one of those regulations, and that says that you don't have a problem if an official appears before the board that the official sits on in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function, solely to represent himself or herself on a matter which is related to his or her personal interest. So, boiled down to its essence, it means that if you're a member of the system and you're applying to the board for a benefit like any other member of the system under the same rules and procedures as any other member would, the regulations put forth by the FPPC say that that's okay. Obviously, the member, as the trustee has just indicated, he is not voting on his own application. He's not tried to persuade any of the other board member as a board member. I mean, he's obviously an applicant, so he has a right to make his case, but he's only presenting as an applicant. Um, the other issue, the 10-90 issue that was just raised is -- 10-90 relates to conflicts of interest in contracts. And I don't think there's really -- You can have -- A contract can be expressed or implied. It doesn't necessarily have to be in writing, so we could have situations this board could get into where there would be a contract at play. There was -- The Lexon case was a California Supreme Court case that dealt with this just a couple years ago. But in this particular case, I don't believe we have a contract as issue. This is just an application for benefits under the normal -- Under this board's normal authority. It would be covered by the Political Reform Act, but I just went through that. But I don't think you have a contract here for 10-90. But even if you did have a contract for 10-90, 10-90 follows the same, basic rules. It is different and you can have different outcomes from the Political Reform Act, I want to certainly acknowledge that. But the general structure is basically the same, and in this particular case, we have government code section 1091.5A3 which is an exception to the ordinary requirements of 10-90. Sometimes if you find 10-90 problem, the board can't act at all, even if the member recuses himself. But you have exceptions to 10-90, and 1091.5A3 allows the board to proceed when the official, here, trustee Bacigalupi, is a recipient of public services generally provided by the public body or board on which he is a member on the same terms and conditions as if he were not a member of the body or board. And again, I think that's very similar to the Political Reform Act, same basic concept. He's a member of the system, he's entitled to apply for benefits. Again, he does have to recuse himself because if he's sitting on the board voting, he's not acting like any other member of the public, but he has done that. I will just say -- Just so everybody understands -- These concerns were raised by members of the city attorney's office with me

about -- I think they looked at the agenda, they were concerned that trustee Bacigalupi might be voting on his own application, so they raised these concerns with me and I have had discussions with them and I have confirmed with them that -- Their only concerns were that he not vote, and they agreed with my reading of the California code of regulations. They also agreed with my reading of government code section 10-90. I don't have anything in writing on that point, but I can just tell you that the concerns that were raised were just that he not vote on his own application. As far as the charter is concerned, nobody has raised that particular issue with me and I don't -- I have not specifically looked at that, but I think what I've just heard is that there's just this question of whether there's an appearance of impropriety and I think that's ultimately a question for trustee Bacigalupi and the board itself to address. I mean, I think he is a member of the system. He is entitled to apply. I will say, as we just heard, some other systems do have procedures in place to deal with this. I believe some county systems have sort of arrangements with other county boards where they can sort of send their own trustees over to those boards so they can avoid having to make determinations based on the trustees that they work with every month. So that is an option if the board wants to explore it, but right now, I don't see any problem under 10- 90 or the Political Reform Act, so I think I would leave it to the board and trustee Bacigalupi to determine -- Nobody else is raising any express prohibitions in the charter to me, so I'm not aware of any other express prohibition other than this potential appearance of impropriety. But I think that the board can move forward based on its best judgment.

>> Okay, just to add to that, I'll speak and then trustee Lanza -- When this was brought to my attention as an application, I consulted with our attorneys to ask "What should we do," and was basically advised -- He's a member of the plan applying and there's a process to apply and any alternate process we came up with wouldn't be in keeping with the municipal code about how applications are to be heard. So we've been going down this route in terms of getting him scheduled. Trustee Lanza.

>> So the rule of thumb where I come from is that if anybody raises the question of even the appearance of conflict of interest or impropriety, you have to address it, so good job. And to hear that the city attorney has also potentially raised the issue but maybe been laid to rest, this is a problem for me. And if I ever on any board where the question even comes up, then wheels start to turn. So I think -- Dave's package is the most

through, well documented case we've seen, so clearly I think that Dave is sensitive to making sure that this is as open and shut and straightforward as it can possibly be. I see you're nodding your head. You come from the same world I do. That's the rule of thumb, isn't it?

>> Yeah. I just feel the same way that drew does, that the question's been raised and once a question's raised, it's on public record, it's raised. Um, I don't know what the alternatives are, but I think that it's something that -- And I'm sorry to -- I know that these cases have all been waiting for a long time, but I do think that we have to be -- We have to err on the side of great caution. And if, you know -- When Harvey is back, also, and -- I just think we need to delay it and get more information about it. If there's another process that it can go through for everybody's sake.

>> So I just want to relay what I'm hearing back from both members here and the concerns from council member constant. The concern is trustee Bacigalupi is a trustee of a plan, on the plan, and it's a person that we'd have to rule on his application while he's a trustee of the plan. That's the concern?

>> As a colleague as well. I think that's --

>> The only concern is that somebody has raised the issue of the appearance of conflict of interest.

>> I feel that we could all be completely objective. But the issue has been raised. And with a warning attached to it. I mean, the draconian messages --

>> But I think you've seen the process as I'm used to seeing it which is this is not the first time this has been raised. It's been raised a couple of times. And each time it's raised, it's addressed. So -- Jeff has mentioned, so the attorney said this, so I talked to the city attorney, the city attorney is now fine. But Pete has raised the question from the council's perspective. So we have to address that. Maybe we will hear his case or maybe we could resolve this now, but -- Help us here, Pete.

>> Well, my concern, quite frankly, is for the draconian affects of government code 10-90. And I know every time that comes up with us on the council, the only thing, quite frankly, you can rely on is -- You can't rely on your council's opinion because that's not defense, the only thing you can do is ask the Attorney General to apply and that's something that we do at the council level when we have an issue. And from my limited search of aging opinions, there's nothing addressing this one particular issue. So that would be my concern. And to ask if I were sitting in your shoes while everyone's making the decision, asking our council, your council, if they've done that search thoroughly and if they've inquired to the AG and things of that nature, just to protect everybody.

>> We certainly don't want to get in trouble as a board and overstep our bounds. In the past, we have ruled on disability applications for people who were previously members of the board, correct? Yeah, so we've heard Mark Skeen when he applied, right? And he was previously the chairman of this board and then was no longer chair and we ruled on his disability application without any problems. So is that the concern, that he's a member of the board or that we know him at all, 'cause we've certainly ruled on people that we've known at all.

>> I think it's a member of the board. For me, having worked with the board that I worked with in private life, it would be that he's a member of the board.

>> Yeah, I don't have any problems with this when I read Baci's package and I'm ready to go, but the second anybody says, "There may be the appearance of conflict of interest," that's waving a red flag in front of a bull in my eyes and has to be addressed and wrestled to the ground. And this is not the first. This has been going on over the last couple of months -- "Well, is Baci going to recuse himself? Is he gonna do this? Is he gonna do that?" So I think as each of these has come up, we've kind of knocked it down and now there's a new one.

>> I just want to give all credit to trustee Bacigalupi. He absolutely raised this as an issue. He absolutely brought it up to reed smith saying "what should we do" and he's following the application advice he was

given as a trustee of the plan from our conflicts council. So I appreciate him trying to just follow the rules that were recommended to him by our council.

>> Well and I guess the only other thing I would say is that he's -- This has been waiting for four years. Um, and we would like to have the matter heard, but I can't say what your comfort level is. I mean, the attorneys have given their opinion and they've said it's safe to proceed. But then they throw it back to you about whether you feel comfortable or not and I can't address that. All right --

>> Mr. Bacigalupi?

>> I've never been short of words, so let me speak here for a moment. When this came up, I was not surprised that this was coming up and I even, at that time, said I would resign from the board. Unfortunately, it's just my nature not to shirk my duties. I have one month left on my term and we have people that, you know, expect the board to finish their terms and make their decisions. We have heard change of status and disability applications from people that served on this board in the past and that was never a problem because, like myself, they're not sitting there voting and applying. I would ask you if you ask our attorney that represents us who has conferred with the city attorney, that it wasn't necessary for me to resign from the board, but I put to you today that I more than willing -- I apologize to the members for not finishing my term, but I would be willing to resign my board position effective immediately to increase the comfort level of this board. The other thing I would say is if you look in the municipal code, there is no other method to deal with this situation. It might be nice to have one, unfortunately, there's a lot of things that we learn as we go along, we need to address that. We need a code of conduct. We need a code of ethics. But if we don't hear my case -- I think you all know I came specifically back at my own expense for part of discomfort, for my family situation, and people that I expected to be with right now instead of being here, I could have presented myself on the telephone had I not had my own application here. But I think this board deserved the respect for me to be here and I would request that you hear my case today. If this board feels more comfortable, please accept my resignation from the board if that raises your level of any proposed or

appearance of impropriety because I don't want to tarnish the board. But I think I've done everything I could and within the code, I deserve to have my application heard today please.

>> Thank you. Trustee rounds?

>> Because of the -- Understanding more clearly now that there is no provision in the municipal code for this to happen and there have been precedents before where the chair of the board's case was heard.

>> The previous chair that resigned.

>> -- that resigned. But it was heard before he resigned, correct?

>> No.

>> He resigned.

>> So it was getting to the point of whether -- I raise that because is it that we have an acquaintance with him, because we've certainly ruled on people with whom we've had a working relationship before. Or is it that he's a member of the board because we've ruled on people who were previously members that we have a working relationship with, but we have not ruled on somebody who's a seated member of the board.

>> And if I could just jump in here -- The other board members don't have any financial interests in this application because I just want to make sure we're all clear on that right now. There's no financial -- None of the board members who are going to vote on this application are going to benefit financially from the application being granted. So there's no conflict of interest in that regard. So then just having a personal relationship -- That happens all the time. That's the nature of these boards. You have active and retired members who know some of these applicants. I think we heard some of that even today. Just personal relationships. That's not disqualifying from the board members' votes. So the question here is -- As I've

already articulated, the Political Reform Act and government code section 10-90, I think, contemplates some of these situations. 10-90 would be the one that would actually prevent the board from acting, but because you have an exception here, I don't think the board is prevented from acting. I think all this other discussion is good discussion to have. The non-voting board member, Mr. Constant, raised the question -- He made some comments about policies and charters. I'd like to hear more about those if there are specific policies that he thinks are at play here because the city attorney did not raise those with me. And so, I mean, if we need to flush that out, then we should. But other than that, I think it's just a question of this board's comfort level and I think you're having the discussion you need to have right now.

>> Trustee Santos? Oh, I'm sorry. Trustee rounds?

>> I'm comfortable with everything our attorney has just said in proceeding. So I -- But I think the municipal code -- I don't know how one makes a motion that something needs to be addressed so that this kind of situation doesn't happen again.

>> We have to propose an agenda item so I've already made a note. Both for the governance committee might need to address this in general and request a code change. Trustee Santos?

>> I'm a little confused because the perception is whether the person is whether the person is active or non-active or still was in a responsible position. So example -- So let's just say when mark skin retired, councilman constant, did you then address the same issues then?

>> It was different because he wasn't on the board and government code 10-90 doesn't apply just to the individual. It applies to the entire board that's taking action. And I will take exception with what the council said. I'm not a lawyer, but it's not whether each of you have a financial interest in it, it's whether the board can act when one member has a financial interest. And that, I think, is the key difference. And then there is the charter, the council policy manual, the city administrative manual that don't apply to all of you, but the

council policy and the administrative manual policies apply to the active employees who are sitting on the board as well. So there's just multiple levels to look at.

>> The idea is that this board -- Not this current board, but the just got through doing this. Our president has been set. Whether it's good, better, and different than we've done in the past. And the other thing that probably frustrates me the most is that David brought this up and no one legally said a word other than, "Just follow the rules. Everything's okay." I wish someone then would have said, "Well, by the way, you got 10-90, you've got this, you've got that." I'm sure you would have said, "Okay, I resign and I'll do blah, blah, blah." But no one addressed that so I just, like everyone else, am sitting here saying "Let's just keep on working" because you've brought this up numerous times, whether it be our legal council, Mr. Constant, or anybody that said "Hey, by the way, if he's gonna be up in change of status, it's not gonna happen." Like I said, what he's saying here to me is that he paid his own way and he's been prepared for this. We've had enough notice, not today, but to do something and not -- I'm assuming, like the rest of you, I never thought anything was wrong. I just figured it'd come with the evidence like everyone else and you'd give a fair hearing. I never looked at him as a chair, vice chair or whatever. So that's just my opinion. I think if Mr. Constant brings up a point and our attorneys can't address that, then it's real. But if it's not, let's take the action and do what we've got to do.

>> Trustee mason?

>> Based on what our lawyer has said, what past president has apparently stated, I would make a motion that we accept Baci's resignation and we vote on the matter.

>> I'll second that.

>> So would that address your concerns over the conflict of interest?

>> You know, I don't know. That's why I brought them up because I know they're a bit of concern. Other boards that I sit on, and we've always gone and made sure we were really clear on it. So that'd be a question for council if resigning right before it clears the 10-90 issue. I don't know.

>> Jeff, does that have any materiality?

>> Well, look -- First of all, I want to make clear -- I do not disagree with the comments that were just made about 10-90. I agree that when there is a 10- 90 problem, it can disqualify the whole board. I think I said that before, but I want to make sure I'm clear on that. I agree with that point. The point I was making though is that number one, I don't think there's a contract here, so I don't think you're in 10-90 at all. And number two, if you are in 10-90, there is an exception. It's 1091.5A3, that -- A recipient, if public service is generally provided by the public body or board of which he or she is a member on the same terms and conditions as if he or she were not a member of that body or board, so that's why I think we're comfortable under 10-90. As far as -- There's been some references to city policies that I'm not familiar with -- To be honest, and I'm sorry, I don't know how much Harvey has looked at this because he's just not here and available at the moment. All I can tell you is that I've been dealing with this issue when it was raised by the city attorney's office and I can tell you that they only issues they raised with me were the Political Reform Act and 10-90 and I think I've addressed those. As far as other policies or other municipal code provision and San José, I don't know the extent that Harvey's looked at those and I don't know exactly what is being referred to. If there's concerns about those, certainly this could be put over until after the trustee -- His term's expired. As far as him resigning, I think that would be relevant. I think if he's no longer member of the board -- You know, whether that resolves every potential appearance, concern that might apply under the policies, I can't tell you, honestly, just right here on the phone. I can't tell you. But, I think, as I've mentioned, the Political Reform Act and government 10-90, I think the fact that he's not voting and not participating as a board member does protect him and the board from those.

>> Thank you. Trustee rounds?

>> Do we have another option? I mean, we discussed this earlier with the continuing -- That we could go to Thursday and not, you know, when Harvey's back who I believe -- No disrespect, Jeff, 'cause I know how much work you did. But Harvey's obviously been aware.

>> I don't want to push anyone past their comfort level. I think if, trustee, if Mr. Bacigalupi resigns, he is the same as everybody else out there. We've certainly heard multiple other applicant's who've sat on this board over the years for their disability, so if he resigns now and we hear him today, if we hear him in November, if we hear him in December, if we hear him in five years, we're still hearing someone who was previously a member of the board. I can't see how, once he's resigned, any conflict remains. The only possible accusation of conflict I could see, if he's a seated member of the board, is saying, "Well, we don't want to rule against him 'cause then he's gonna rule against us in the future." Knowing that he has one more meeting left with this board and then he's gone, I'm not especially afraid of that. He has been a long-time servant of this board, of the members of police and fire retirement plan of the city of San José with 32 years of service as a fire -- Sorry, a police officer, and his service -- Ongoing service as a retiree, coming back here, month after month, dealing with the countless hours we all know here -- For him to step up one more time and offer to step down, to get out of the way, to eliminate a conflict for the rest of us, to me, is a very magnanimous -- Is a great offer. [Laughter] And I think it does remove that. And I can't see, just 'cause he was a previous member and now we have to rule on him, how there can be a conflict that would still remain past that. And I think that would remove the concern that people have been expressing here. But if people still aren't comfortable, we need a unanimous agreement to hear this and unanimous vote for anything to happen today 'cause there are five of us.

>> So Pete, you're the one that raised it. The way I'm used to dealing with it is someone raises conflict of interest and you tackle it. It's happened two or three times and Jeff said the city attorney -- So you've raised it. So what do we need to do to make you comfortable?

>> I don't have to be comfortable. You do. I don't vote. I have no exposure here. I just brought it up for you guys to be aware.

>> Through the chair -- It's no different than the memo you got from Ellie today. That's his perception how things should be. But we took responsibility to do our job, and I think we should be doing that today. But if y'all are not comfortable, one of us is gonna be gone. So it's real simple through the chair if we're gonna hear this case or not. We don't have to keep on beating around the bush. I hope we do.

>> Mr. Bacigalupi?

>> Mr. Chair, just to make it official so we don't talk in what-ifs -- I regretfully, because I do like to fulfill my responsibilities, but I regretfully resign my position from the Board of Trustees for the Police and Fire Plan after almost 12 years. [Chuckles] Effective immediately.

>> Previous trustee, Bacigalupi. Mr. Bacigalupi, on behalf of this board, as chairman of this board, I thank you for your 12 years of service to this plan, the retirees and the active members. I accept your resignation at 4:50 p.m. on October 30th, 2012. I regret deeply that it has come to this.

>> If you need a motion --

>> They don't. He's resigned.

>> No, no, not to resign. To go ahead forward with this application, then so be it.

>> So, yeah, so as trustees, are we willing to hear this and vote on this? Or is anyone still uncomfortable and going to abstain from making a vote?

>> If I could, and I'm sorry to delay anything further, but we do have others on calendar, if you do what me to check with Harvey to find out if there's any other, you know, background contacts that I'm not aware of, I

can probably get him on the phone between now and the end of this agenda. If the board would like to do that, we could just tackle the next three issues and, hopefully, I can get Harvey in the meantime.

>> Tackle the next three issues with Mr. Bacigalupi on the board or not on the board?

>> Well, I think he just resigned.

>> That is done.

>> So I think it would be without him. But I'm just suggesting, you know, that if you want to move forward, I can probably -- I think he's out of his meeting now. I can probably try to get him on the phone, just to make sure there's no context I'm missing because I did jump on this.

>> So we proceed with the hearing of Mr. Cox and Mr. Zappata and then return to Mr. Bacigalupi at the end.

>> I think we'd all feel better.

>> In particular, Jeff, ask Harvey if what David has done is material.

>> Yes, and also, I just want to make sure that there's, you know, in terms of the other policies that have been referenced -- I just want to make sure we're comfortable with all that. So, if you don't mind, I might not be -- you know, I might not be reachable for the next couple minutes, but you can proceed. If you need me, let me know later.

>> We will call you by cell phone if we need legal aide on the next two cases.

>> And I apologize -- I apologize to you, David, and I apologize to the board. I come from a universe in which, when somebody even raises the specter of it, we go after it and tackle it. And I know how hard

you've worked, Dave, in your packages. The best package I've ever seen, but that's the universe I come from.

>> I'm going to be here. I'm going to have you on speaker and mute. I just want to let you know. So I'll be here. I'm just going to call Harvey and see if I can rope him in, okay?

>> Understood. And with that we'll move item 1.2A, the service connect disability, for David Bacigalupi to the end of the agenda and continue with item 1.2B, the change of status for service connect disability for David A. Cox, fire engineer with the fire department, effective November 28th, 2009 with 28.26 years of service. Miss Johnson.

>> David Cox retired as a fire engineer. He's making applications for service connect disability based on his right knee and lower back. I had 28.26 years of service at the time of his retirement. He -- at the time of his separation, was on temporary disability. His work restrictions are that he should avoid sustained weight-bearing activities with his right knee. Permanent modified duty is not available.

>> Thank you. Dr. Daws, do you have anything to add to the record?

>> No, I don't.

>> Thank you. Mr. Swift.

>> Thank you. Based on Mr. Cox's 28 years of service, he had significant problems with various body parts, but we've limited this application to his right knee and his low back. He was, in fact, on disability at the time his service retired back in November of 2009. With respect to his knee, in addition to the wear and tear of 28 years, he did have three specific injuries. On page 57 of your packet there's an injury on July 20th, 2005 in which he was off work for two months. On page 50 there's a report of an injury on February 23rd, 2009. There's actually another injury on November 1st, 2009, which is not in your packet but is referred to in the

doctor's first report work injury on page 20. He then had surgery by Dr. Delamajury on 4-29-10. That's on pages 27-29 of your packet. It was extensive surgery due to meniscus tear medial plica and osteochondral injury to the lateral femoral condial and lateral tibial plateau. He then had a second surgery to that same knee on June 1st of 2011. The operative report is, unfortunately, not in the packet, but it's referred to in the various reports. Dr. Delamajury provides work restrictions for his knee on page 34 of your packet. It includes no climbing, no uneven ground, no squatting, kneeling, crouching, crawling or pivoting. Dr. Daws provide work restrictions of no sustained weight-bearing and the department has no permanent modified duty. I can regale you with the problems that he has with his low back, but I don't think that's necessary. Treating doctors gave him work restrictions. Dr. Daws did not. Rather than argue about that, I would base the application on the condition of his knee. And that's to be granted.

>> Mr. Chair?

>> Thank you, trustee Santos.

>> Reading all the information and -- I was in a position to know David Cox. He worked for me for years as an excellent engineer and had a lot of expertise. Let's go back to the information I got on page eight that says, Judith Pepto, PAC, she describes Mr. Cox experiencing low grade -- low back pain after strenuous activities. She indicates that he is retired and totally disabled due to the right knee surgery, along with the back and so on. I can go on and on, pick out all the little things that you already know, I would just say that the motion is to change that service retirement to service connect disability.

>> We have a motion and a second. Any discussion on the motion?

>> Point me to the pages where he's permanent and stationary or medically improved or whichever term we're using.

>> I read all these but Dr. Delamajury, on page 34, I believe.

>> All right. Yeah, good, great, I'm done.

>> Any further discussion or questions? We have a motion and a second. All those in favor?

>> Aye.

>> Any opposed? None opposed, the motion passes unanimously.

>> Thank you, Mr. Chair. I want to say that Dave and I worked together for a long period of time. We won't get into all the different -- but I can tell you about some really dangerous issues of people really been -- you know, expiring and so on. And this guy had the technical experience of, every time we had a dump truck or a person was killed, it was tough. But people all around don't realize how bad it really is, and I won't get into all the gory things, but when you have the tools and all the things that lift us out and get somebody out during this emergency, that's the difference. And David had the skills -- you think a firefighter's life is glamorous, but he will say it here, and haven't seen him in years -- But his little children had cerebral palsy when they were just little babies, and I just asked him -- they're 19 today. So you don't know what another family goes through. There's heartaches and stuff in the early years. David did and still came to work and did his job. It was a tough time, but David -- hearing about your children again, now they're all men, and your family, just the best to you.

>> Thank you. Thank you, Captain Santos. Outstanding truck captain for a crew to have. Thank you.

>> Thank you.

>> We'll move to item 1.2d, change of status service connected to disability for Louis P. Zapata -- police officer of the police department effective December 15th, 2007 with 26.26 years of service. Ms. Johnson --

>> Louis Zapata was a police officer who retired -- with a service retirement effective December 15th, 2007. At the time of his retirement he was on full duty, and had 26.26 years of service. Mr. Zapata's work restrictions are that he cannot perform physically strenuous work, he should not drive a city vehicle, and he should not carry a firearm. The department has indicated that modified duty is available.

>> Thank you. Dr. Dawes, do you have anything to add to the record?

>> No, I don't.

>> Thank you. Mr. Boyle?

>> Thank you, Mr. Chairman. The application as you heard is based on the back - - low back and cancer. The first low back injury occurred on March 20th, 1996. Picking up a motorcycle, that's on page 140 of your materials, and then officer Zapata returned to patrol. On page 144 is the second back injury on October 26th, 1998. He fell while riding the motorcycle, and he again returned to patrol. The third back injury was on April 21st, 2004, on page 148 of your materials. He was riding a bicycle on the obstacle course and fell with the bike. Since 2002, officer Zapata worked at the San José international airport as a police officer, and had not done any patrol duty since 2002. On October 2nd of 2007 he filed the claim for worker's comp benefits due to cancer, which was filed with the city. Mr. Zapata's last day of work was September 15th, 2007. He had been diagnosed with stage four cancer, large cell, non-Hodgkin's lymphoma. He was not given long to live, and immediately applied for retirement. His date of retirement, as you heard, is December 15th, 2007. Treatment for the cancer involved chemotherapy at the highest doses for eight months. He took morphine for pain for a year and had six months to detox from the morphine. For his cancer, Dr. Ing on page 161, the agreed medical examiner in the worker's comp case, says that he cannot do the duties of a police officer, and he has chronic fatigue. For the back, Dr. John Coleman on page 112-119 in his report of October 31st, 2008, he is an orthopedic surgeon, and also an agreed medical examiner in the worker's comp case, says 80% of his low- back problem is due to work injuries and 20% to non-industrial degenerative changes. Further, Dr. Coleman says officer Zapata's lost 50% of his capacity for lifting, carrying, bending, stooping,

and performing other activities of comparable physical effort. Officer Zapata must take oxymorphone for his symptoms. On page 136 David Chekaria, the back doctor, his treating doctor for Mr. Zapata says that Mr. Zapata takes anti-inflammatories and rescue narcotics for his condition. If symptoms persist, or reticular symptoms return, then surgery would be an option. On page 169, Dr. Dawes finds restrictions. They are as follows, he cannot perform physically strenuous work, he should not drive a city vehicle, he should not carry a firearm. On page 168 in Dr. Dawes' comments in his supplemental report, he says that it is plausible and reasonable for Mr. Zapata to experience fatigue, which will make it difficult for him to work in a full time position on a day in and day out basis. On page 171 Lt. John Rose has indicated at the time of his retirement, all positions in the exempt officer program were not filled, and so they could have accommodated Mr. Zapata. The real question here is can he do this modified job? That's what I see as the real question, and I would like to ask Lt. Rose some questions in regards to page 171 in his letter of September 26th, 2012.

>> Lt. Rose? Oh, I'm sorry. I was looking back in the audience for you. I was like where'd you go?

>> I told him^-- I told him ahead of time I was gonna ask him some questions, so he knew he had to be here.

Lt. Rose are the exempt officer positions the article 39 positions full time work, four days, ten hour days?

Oh, I don't think your mic is on.

>> Thank you, councilman.

>> Thank you, councilmember. Yes, it's a 40 hour work week. It could be four ten-hour days, or five eight-hour days. But, they are full 40 hour work weeks.

>> Considering Dr. Dawes' statement on page 168 of the material, that it's "plausible and reasonable for Mr. Zapata to experience fatigue, and it would be difficult for him to work in a full time position on a day in and day out basis," do you have any part time work in the exempt officer program?

>> We do not have any part time work.

>> Turning to page 155 of the materials, which is the description of the Megan's Law registrant coordinator, do you have a copy of that?

>> Yes, Mr. Boyle, I do.

>> All right. I want to ask you a question, is a police officer who does this job as an exempt officer considered a sworn police officer, even though they're not wearing a police uniform.

>> Yes, they are.

>> Would the officer be required to carry his badge, I.D., and gun?

>> Yes, he would be for this position.

>> Then, since Dr. Dawes has precluded him from wearing -- from carrying his gun, using his gun. Then, would you be able to accommodate him without his gun?

>> There are positions in the exempt officer program where they're not required to carry a gun. In this particular instance, this position that you've inquired about, the Megan's Law position, that is not one of the positions that you would be able to be into and not carry a gun.

>> Okay. And then, under the physical requirements of the job on the bottom of page 155, it says that he has to walk to the D.A.'s office, jail or courts, and drive a car. So, driving a car is a requirement of this job.

>> Yes, sir, it is.

>> Okay. And Dr. Dawes has precluded him from driving a city vehicle. So, would he be able to do this particular job with being unable to drive? Would he be able to do this job?

>> No, he would not.

>> Okay. All right, based on Lt. Rose's answers, I would move that officer Zapata cannot do the article 39 job that was described, and would have difficulty because of his chronic fatigue, in doing any article 39 job for full time as required, and so on that basis, we would request that you consider changing his disability -- his service retirement to a disability retirement.

>> Thank you.

>> I'll start off with a question for -- I'm sorry. Trustee Mason, I jumped -- a question for Lt. Rose. How do you reconcile the discrepancy between the availability of the position versus the questions that have just been answered there? Does -- need to be revised or does the department still support its memo?

>> No, the department still supports its memo.

>> Okay.

>> Okay, refresh my recollection, you're regarding that there is an available position, is that what you're saying?

>> Correct, whether there was an available position at that time.

>> At this time --

>> It would be at the time he's filing for it, right? December 15th, 2007.

>> Right, he would have to apply for a position that did not require the carrying of a gun. And -- and yes, there is a position due to his seniority.

>> So, I'm sorry. There's two letters here. There's one on page 16, there's another which is an updated one, page 171. And your letter says the positions were not all filled, so therefore, you would have had a position for him. And Mr. Boyle's making the point that you would not have been able to accommodate.

>> Because he couldn't have -- he couldn't carry his gun, and he can't drive a city vehicle. And he may not be able to work full time.

>> Physically -- yeah, understood.

>> Okay, would you like --

>> Yes, please.

>> Okay, so with regards to the letter, yes, there are other positions that do not require to drive a car and other positions that do not require him to carry a gun. And he has seniority that he would be able to go into one of the those positions. Regarding Mr. Boyle, and regarding the Megan's Law position, he would not be able to enter that position because of the requirements of that position. And, regarding all positions in the exempt officer program, yes you must be able to work full time, 40 hours a week to be in that position, in any of these ten positions available currently.

>> So then, that goes to Dr. Dawes, you gave him a restriction for physically strenuous work, but Mr. Boyle's making the point about working a full 8-hour or 10-hour shift.

>> Well, we're talking about the basis for the fatigue, and what I have as a basis is anemia and there could -- which would probably reflect more physical ability and physical endurance. So, it would also depend on how physically demanding the particular job was, even if it's an exempt officer position. Perhaps he needs to walk quite a bit from one room to another versus being in a sedentary position. That would be an element, there's not really any specific preclusions of that. So, it all depends on the particular position, and of course, Mr. Zapata's tolerances, because based upon his condition, it's going to likely increase or worsen based on the underlying problem, number one. And then, number two, the treatment. And chemotherapy can cause progressive problems, so, we're dealing with something way back when, and I'm providing restrictions for something now. So, it's a little bit of an issue. So -- it all depends on the particular position, and, of course, Mr. Zapata's -- I mean, my evaluations from a while ago. And so, I couldn't really fairly comment as to whether he should be able to do something or not be able to do something based upon that, but based on the condition, that's the cancer, chemotherapy, presence of anemia, it's reasonable and plausible that he would have problems.

>> Thank you. Trustee mason?

>> I would say based on the medical information and the restrictions that appear that he would have had back then, even though there was available article 39 positions open, it appears he would not have been able to work a full day, I would make a motion to grant his service connected disability.

>> Second.

>> We have a motion and a second. Discussion on the motion. Trustee lanza.

>> Dr. Dawes, what's your sense that the back injuries are permanent and stationary?

>> I feel that it likely is at this point. I don't see that there's any additional medical treatment. He's got -- in my perspective, he's got bigger problems than the back. And I didn't provide restrictions for the back, so.

>> But you think the back's kind of gone as far as it's gonna go?

>> Yes.

>> Yeah, okay. Great, thanks.

>> So, my issues here -- I don't debate you can't back on the line, for sure. And I don't -- I can't make a strong argument that you could fulfill one of these positions where you're gonna have to be there for ten hours a day. You have dealt with serious sickness, and I fully appreciate that. What I am looking at is the work-relatedness of it. And this disease of cancer, relating it to benzene and filling fuel in the vehicles, I'd ask Dr. Dawes if you could -- for this board, I understand worker's compensation world, the presumption is very black and white. But for this board, how should we consider the medical evidence that ties this to fueling of vehicles.

>> Well -- you answered the first question yourself, so you understand that there is a relationship between benzene and bone marrow disorders. So, that's -- there is. As far as the exposure, that I have -- would have to do a little bit more additional research to see what kind of threshold levels of exposure they use to link the two. And I did not do -- I did not look at the epidemiology with respect to threshold exposures and dose response relationships between the development of lymphomas and benzene exposure. So, I can't give you a good answer without doing a little bit of homework.

>> Is there a time for development of the cancer? Does it onset within a year? Within five years or 20 years?

>> The latency, I wouldn't be able to give you a good answer as far as latency, I can just tell you that there's a direct relationship between the two, and when we're talking about dose, we're talking about duration of exposure, and the concentration of exposure. And those are two different things, too. So, a low level

exposure over a long period of time could possibly trigger it and you'd have a different latency associated with that. Or, you could have a high dose exposure over a short duration of which could also cause a problem. So, that needs to be discerned as well. So, you could have different latencies depending on the type of exposure. Does that seem reasonable?

>> Yes.

>> Okay.

>> Mr. Boyle, for his time at the airport, that was the last five years of his career, is that right?

>> Yes, 2002 through 2007.

>> And so, in that environment, how many times are you fueling your vehicle, or how many miles are you putting on your vehicle in a day?

>> At the airport --

>> The airport wasn't an active, daily refueling the vehicles. Probably every other day.

>> So, every other day you're fueling a vehicle?

>> It was the prior years before that, especially in the --

>> And that's where the latency has an impact. Because, if this is something that develops over three or four years, then it would seem to be less likely related to the work at the airport. If it's something that really evolves over 15 years, then there's a long tenure there of doing that. But I wonder, if I look at other occupations that have a heavy usage of gasoline, so taxi drivers. Do we see higher instances of this cancer

among that population? And for squad police officers versus other police officers, is it a higher prevalence of this? I just -- I'm trying to tie that work causation to this.

>> I can't give you a very educated answer without doing the research but I believe it's more individuals in the refining arena as opposed to taxi drivers that would be the issue. And that's why I need to look and see what the occupational basis for that is, and we can kind of look and see if the focus on the benzene, and then if Mr. Boyle can get from Mr. Zapata kind of an idea of what the frequency of refueling was over the time period, duration of his career. And then I might be able to jumble some things together to kind of get a sense of a dose, and then look at if I can find stuff in the literature. The relationship between benzene is fairly solid, so there's probably a lot of information there to kind of see if we can maybe tie it together a little bit more scientifically. But, you know --

>> Thank you. Trustee Santos.

>> Yeah, I know, Sean, where you're going, 'cause you're just responding to what you see. You know, sometimes I wish that we could help write these reports. Because, to me, fueling a vehicle is just, not to use the best example, let's just say officer Zapata was the airport for five years filling his vehicle up. While he's there, he's smelling JP1. I worked there for years. That alone is gonna kill you. Number two is, I've had major fires for 10-15 hours at a crack. And guess who's out there pulling -- with no mask. The police officers. While I'm sitting in there trying to take care of my crew, those guys are sitting out there huffing and puffing, they're smoking flares, and they're sucking up the building keeping idiots out of the way. So, there's so many examples we can use, unfortunately, you guys don't put them down, I don't know why. To just say this is benzene from some vehicle -- any police officer, to go back to my time, you didn't wear the mask and I can go on and on. So, there's so many other things you can put on. I know he's not being argumentative, he's just trying to tie things in. But you all who don't work it ought to broaden your mind, there's a lot more to this. So, that's all I'm saying. And I know nobody's arguing the case, but I want to make sure you all know. There's more to it. These glamorous jobs are not as glamorous as people think. And then when they have cancer and they're dying, where's everybody -- where's everybody at? The mayor, the council, the people,

no. They shrivel up and die. Uh-uh. I been there. Too many of my friends are gone today over what? Smelling a gas tank? Try the airport for one day, you never want to go back.

>> Any other questions or discussion? Did we have a motion? Okay. So --

>> We had a second.

>> There was a motion and a second.

>> All right. So, that was discussion on the motion. So we'll do a vote. All those in favor.

>> Aye.

>> All those opposed. Opposed.

>> I'll let the officer say something and I'll make a closing.

>> It does not pass. So^-- it does not pass. It's 4-1. It takes a unanimous vote at this point for it to pass. So, what would make me feel a lot better^-- I wouldn't vote against^-- I wouldn't vote to deny this. I would just want to see the extra evidence that ties together the different type of exposures you've had. The benzene and the information about how benzene is^-- for that level of exposure could cause the cancer.

>> I'm sorry, what's the roll call for?

>> We can roll call vote.

>> You weren't able to get there on the back related issue, Sean?

>> He had no restrictions^-- this is good, I appreciate the discussion. There was no restrictions related to the back and he had been enduring the same level of back injury for the last several years of his career with no change in that level of injury. If there was something on the back that changed in the last year, that made it that much worse all of a sudden, I can see it on the back.

>> Here's my dilemma, I'm dealing with the lower back injury from years ago with symptoms that are described now. And so, while there may have been a progression of the problem since that time, at the time he separated from city service, there were no formal work restrictions as I understand it. So, even though I'm^-- if I see him and evaluate him now and look at the medical records, I may provide work restrictions at the time of the report. Looking back and reviewing the medical records, there weren't any provided at that time, so I didn't feel comfortable providing work restrictions at the time of separation. So that was my dilemma in addressing the lower back because there may have^-- back restrictions for his present state at the time may have been appropriate. But they weren't present at that time, and so I didn't add them.

>> Maybe there's additional medical records at that time when he left. Substantiated a change in the back pain to where he couldn't continue his service. That would certainly in and of itself be^-- I'm just looking for something that says this is why he stopped working on that day, and I get it with the cancer. I absolutely get it. I need to tie that to a work cause. For the back injury, I get the work cause, I just need to tie it to where it said, as of this date he couldn't come in anymore. That's what I'm looking for on that side.

>> The issue is, is that if this cancer is on, then he got this lower back pain. Let's just say he tries to work four hours. He's isn't going to be able to sit and do nothing. What's he going to do? It's just a matter of time. If it's today or it's tomorrow. The point of it not to get it out of the way. I want this man to live and enjoy some life. He's not going to enjoy it sitting at some desk. And even if he does, it's going to be one or two days and they're going to say get out. That's a shame. That's really heartache. I understand what you're doing. Let's regroup here and this guy doesn't need to go through this.

>> So^-- will it change my mind if someone can show me where the back changed at that point in time when he applied for disability, or if we can tie the non- Hodgkin's lymphoma to the degree of benzene exposure that he was having or given the time frames. And I know it's not going to be back and white.

>> If this helps, there is a one hit hypothesis in terms of, when you're talking about cancer, all it takes is one cell. And all it takes is one molecule to hurt that one cell to trigger the response. So, when we do the epidemiology looking at dose response, we're looking at it from a clinical standpoint of things that you can look in^-- things that you can evaluate. And we try to infer with dose response you would have. However, in terms if you're looking at the true, you know, the true physiology of, you know, toxins and cancer, there is a one-hit hypothesis. All it takes is one bad batch of DNA to cause one cell to replicate in an inappropriate manner, and that's cancer. So^--

>> So then, is there really no way for me to factually lay this out? We just have to go to the presumption? If that's why they've done it^--

>> Let me ask you a question, Doctor. You said that if somebody was working in a refinery, there would be a pretty clear relationship. And then, he said, you know, if you spent five years in the San José airport, which certainly at that time, probably wasn't a tremendously well insulated airport, as I recall. And so, I mean, I would say that there was a lot of fuel around for five years.

>> You know, how do I put it? From a common sense standpoint, you're exposed a lot to carcinogens in that area. The issue is, is whether the science^-- I don't even know what's in the particular components of the jet fuel. Whether, you know, how^--

>> It's bad.

>> I know it's bad. But, in terms of whether benzene is there or not, because that's why we have the presumption, because you're exposed to lots of stuff, and it's hard to tie it in scientifically. Benzene's the

one^-- one of the few chemicals that we've been ever to identify and show this nice link. And there's a dose response relationship, the cause and effect is there. So that's why everything is tied to benzene.

>> From 9/11, don't we know a lot from the amount of fuel that what happened to^--

>> Excellent point.

>> Well, they're exposed to a lot of junk, partially combusted things, and so, to tie it into one particular thing is very difficult. Were they exposed to carcinogens?^-- yes. What specific carcinogens? We can kind of break it down.

>> We can sort of move to think that there could be a relationship that might make^-- if that's where you're going, yes.

>> Yes.

>> Okay.

>> That's where I'm going.

>> Yeah, although we can't use the worker's comp presumptions here. There are reasons that cancer is a presumptive. There is a lot of information out there relating the correlation between the benzene and cancers and the exposure to everything that firefighters and police do. So, if you're requesting that they return with information about that, he could walk in here with --

>> Yeah.

>> -- a boat load of information that --

>> No.

>> -- we may not want to hear.

>> So, my point is not -- and this is maybe an academic exercise we can wrap up here. But, my point is not to go through this big thing that happened at some point when they had all the attorneys get in and 500 people and \$6 billion was spent to show all the case law and the medical evidence showing how they are related. We're not going to rehash that here. But, if we as board need to say it's --

>> Work related.

>> It's work related and that's going to be the way we're going to have to deal with some of these cases. That just makes it cleaner and more straightforward without. There is no perfect scientific evidence. And you do have the single cell theory and someone's always going to be able to make a case why it was. I guess I'm okay with that. It's just something we've got to accept as a board that that's the direction we're going in. We've said we're not going to use this presumptive stuff, but in reality, in some cases, we're going to have to -- to use that. So I ask you, Doctor, is this the type of cancer, and given the nature of his work, it's probably more logical to use the presumptive idea.

>> I would say that it's reasonable to attribute it to work. I don't necessarily like presumption, per say, because I don't consider it very scientific. But I don't -- I consider myself relatively conservative on attributing cause and effect, and I'm comfortable with it in terms of there's, you know -- benzene has been directly shown to cause this particular cancer which is, you know -- which right there is a huge step over most of what we see, because benzene get attributed to cause all the cancers that are occupationally related, and that's not appropriate as well. So, that's great there. Then, we've got scientifically plausible mechanism with^-- it doesn't take necessarily, take that much.

>> People expect they can make a pretty good case about this and there's no real case we can make saying, no it was something else.

>> I could sit in tom's seat.

>> You^-- sorry?

>> I could sit in tom's chair.

>> Okay. Okay. I'll -- I'll make the motion that --

>> We need to make that argument, yes.

>> I'll make the new motion to prove the service connected disability application for Louis Zapata. Okay. I can't because I voted no. Someone who voted yes needs to. Thank you.

>> I made the first voice, I'll make it again.

>> Okay, so we have a motion from -- to approve, to reconsider the previous motion. Trustee seconds that motion. A discussion, no discussion. All those in favor.

>> Aye.

>> So it passes unanimously to reconsider it. So I'll make the motion to approve the service connected disability conversion. Change of status to a service connected disability for --

>> Second.

>> Motion and second my mason. Any discussion on the motion? All those in favor.

>> Aye.

>> Any opposed? See none opposed. Passes unanimously. Thank you.

>> Yeah, unfortunately, I didn't have an opportunity to really know Mr. Zapata, since I came on the police department. But, thank you for your service and good luck with the rest.

>> Louis, I don't know you, but all do respect, viva Zapata!

>> Mr. Spence?

>> Yes, Jim Spence, I did work with Louis, he worked on my team for quite a while. He was a heck of a guy. He was someone you would always send to a school. He did really well with kids, he did a lot of community service and his career was one that was long and fruitful. And he was a great patrol officer and we're glad to see that he's well as can be expected and doing life now.

>> Thank you, Mr. Spence. 03:29:59

>> And I just wanna say that Lou talked me into becoming a reserve officer. And then later into a regular officer. I spent a lot of time in a patrol car with him, so best of luck, Lou.

>> Thank you and thank you for entertaining my thoughts.

>> Ah, Jeff, are you back on the line with us?

>> Yeah. If you could just give me about one more minute, I'll be right back.

>> Okay.

>> Is that okay? Thanks.

>> We'll -- you looking for a break?

>> No, I will. But, I just liked what Tina said in there, I just wanna make a point here. When 9/11[^] happened, no one was supporting the cancer related issues after. New York, as you know, went and said no. Today is just the opposite and I'm glad you brought that up. Today, it's overwhelming evidence that says, "Wait a minute. Those are related carcinogens from those fires." So, I think the point you made tonight, I appreciate that very much.

>> Okay, so will continue -- yeah, I'm gonna talk slowly. With item 1.2 change in this room goes to another group at 6:00 so we will--

>> Have dinner.

>> You buying?

>> No.

>> Change the status --

>> I don't get paid. Remember?

>> -- service connected disability. Item A, David A. Bacigalupi, police sergeant with the police department effective July 12, 2008 with 32.16 years of service. So, we're returning to this item. In the previous chapter

you'll recall, Mr. Bacigalupi resigned from the board and so he's simply a member applying for conversion of his retirement to a service connected disability. We asked Mr. Reiger to contact Mr. Leiderman and ascertain whether his resignation from the board resolves the possible conflict issues that could have been contemplated during this discussion. Jeff? Aw, I was talking slow. We'll give him another ten seconds. They're trying -- fudge it. Fudge it. While they're doing that I'll let you know, any member of the public, any member-any employee of the city, any retiree is always welcome to come here and sit through this meetings. I appreciate Mr. Spence doing that. And I think anyone who does that understands the questions we ask, the facts we look at, and can put together a reasonable set of information. So, I appreciate Mr. Bacigalupi. It's a well prepared packet. You know what it's like to go through these things. Things are in a logical order and well documented, which makes our job that much easier. It would almost serve as a model of the template I'd love to see other applicants use, so I appreciate that.

>> This is Jeff Reiger here. I'm sorry, I just got off the phone with Harvey. Can somebody bring me up to speed where we are?

>> So, we're just turning it over to you. And, we're looking for your answer about the points now that Dave Bacigalupi has resigned from the Police and Fire Retirement Board, is that material for resolving any possible conflicts?

>> Yeah. Look, I think, you know, Harvey had the same reaction I did. Which is that, I mean, we don't think he had to resign to begin with in terms of 1090 or the political reformat. So, I mean as far as 1090 and political reformat are concerned, we believe that this board can move forward. We of course believe that the trustee needed to recuse himself which he did do, and now he's gone a step further by resigning. I mean, we think that was sort of an irrelevant, unnecessary act, but I understand that he wanted to make the board members themselves feel more comfortable. As far as, if there's you know, as far as other city policies are concerned or whatever it is that's been referred to about other possible city policies -- Harvey and I do not know every single city policy. I can't provide any more information on that today. All I can say is that we do feel comfortable that you can move forward with this. If somebody thinks that there was a problem, if

somebody thinks that there was a policy violated, this has been a very public process that we've just conducted. And if somebody wants to bring that to our attention and they feel like something needs to be unwound, we can deal with that when it happens. But we believe that, you know this is something that the board can move forward on. You know, you've got, just to put this in context -- we do have sets of laws that deal with these kinds of things. The political reformat and 1090 cover these kinds of things. The Supreme Court just dealt with this a couple of years ago, and looked at it in a comprehensive way, and they harmonized 1090 with the political reformat. And part of what the Supreme said is that you have boards like this that by design have people on them that end up having some of the same interests as the membership. And the Supreme Court dealt with that, and ultimately it said, you know, the same thing that I've been saying here today, that so long as he only appears as an applicant, a member of the system, that's he treated no differently. He's got the same benefit formulas. The same standard applies to him and the board considers his application without bias and looks at it based on the facts, we believe you can move forward on this. Now, I can't speak to every board members level of comfort. If they -- If members of the board, you know, feel like they need to put this on hold for a moment to, you know, look into more city policies and check with the city attorney to see if -- again, the city attorney only raised 1090 in the political reformat with me. But, if you want us to follow up, we certainly can do that. I leave that to the Board's discretion. Harvey doesn't -- he didn't really have much to add beyond what I've already told you. There's no more context here, it just, but we do think you can move forward.

>> Okay, so you didn't see a problem to begin with. And this goes an extra step beyond that, which you didn't think was necessary, but it does go an extra step beyond that.

>> Yeah, for whatever it's worth.

>> Okay.

>> I don't know if it's gonna make any difference. But, you know, he has resigned.

>> So, my perspective on it, we've certainly ruled as a board on people who were previous members of the Board. And, if we got in trouble, we haven't gotten in trouble yet, and it seems like it's our responsibility for doing this, and I don't have a problem with that. I think we've gotten --

>> The city's attorney reprehensive should be --

>> We've gone above and beyond to be proper in this process. So I don't have a problem at this point. Is everyone comfortable with ruling his application at this point or not? Because we all need to be comfortable.

>> I'm looking at Willie. He ain't saying nothing.

>> I'm thinking.

>> You don't have anything more specific than the generic fear of a conflict of interest?

>> Well, I think if 1090 is cleared, that clears the board members. The 1090 is the one with the draconian issues.

>> Are you comfortable with us deciding this today?

>> It's not up to me. You know, I'm not making the vote.

>> Okay, well --

>> 1090's the one with the problem. If he's no longer a board member, and that guarantees there's no problem, I just wanna make sure you guys all went into it with your eyes wide open. You know, the council policy that I referred to was, let me if I can, I have the note on the section here -- It's council policy 1.2.12.

That applies to the city employees serving on the Boards and of course the medical doctor who does the report for the Boards.

>> And what does it say? Or is ten pages?

>> It's long. But it talks about conflicts of interest and potential conflicts of interest and how people should avoid those.

>> So, the charges that for myself and trustee mason, that we would be charged with violation of the ethics acts for the city of San José?

>> I'm not saying that.

>> All right.

>> I'm just saying that's something you need to be aware of. That it's there.

>> All right.

>> Can I say something?

>> Mr. Swift.

>> Particularly to Mr. Lanza. If you're not comfortable today, when would you be comfortable? Because he's no longer on the board and it is gonna come before the board at some point. So, and the employee reps hear people's cases that they know every meeting. The investor folks don't, but they do and have voted against them.

>> It's a weird process. I feel comfortable when I can sort of scan the room and say, "Does anybody think there's a conflict of interest here?" And the various parties say, "No, I think you're okay." And it's a passive process because I'm used to waiting until somebody waves the red flag that I think they're might be a conflict of interest here. I'm not actively seeking those conflicts of interests, but over time we've seen, and you know, Jeff referred to the city attorney, and we saw before people saying, "Hey," you know? Yeah, I like Baci. I know Baci. You have to separate what who you know and who you like from doing your job. But, that happens of course everyday when you sit on the board. If you don't work closely with these people you don't get anything done. So, Pete raised the issue. I think he's more comfortable now. If he's more comfortable, then I'm more comfortable just as whether it was the city attorney or the city manager or somebody else raising that. So, I guess I'm good to go, although I might like to read that set of paragraphs. But I guess I'm good to go.

>> Just to explain my thought process a little bit. I guess myself and Mr. Mason are the ones probably most exposed on that then, and I know we've ruled on this stuff before for previous people who have sat on there. In fact, the previous Chair of the Board. I know city council members have sat at my side and also made rulings on the same applications. So, certainly between pass practice and the legal advice that I'm getting for our council, and my understanding of things, I feel like I've checked everything I can check other than to drag this out. And I don't know who to go ask next? The city attorney's office in talking with our council didn't even raise this as an issue. They just wanna make sure Boci recused himself from the vote. So, I'm feeling -- I feel comfort in doing it.

>> I don't have a photographic memory but I did read all of these when I joined the board and there is no alarm going off in my head. The only alarm that's going off in my head is when somebody else says, "Hey, wait a minute. We need to consider this." So, I think I read that stuff in enough depth and absorbed it enough, though I can't recite it verbatim to know if there was something there. There's no alarm going off in my head.

>> Everyone else good to hear this? Okay, okay. Mr. Swift, I think -- have we done everything here?

>> I don't know if Donna recited her stuff into the record or not.

>> Miss Johnson, please.

>> I think. No, no. Not yet.

>> Please.

>> Dave Bacigalupi was a police sergeant who retired on 7/12/2008. He is making application for a service connected disability based on neck, back, knees, right ankle, thumbs, wrist, and left shoulder. He is 62^years of age with 32.61^years of service when he tired. At the time of his retirement, he was off on disability. His work restrictions are-- that he should avoid running, standing greater than a hour, working on uneven ground, pivoting, and walking greater than two miles. He should avoid restraining individuals. He should avoid repetitive bending or stooping and heavy lifting. He should avoid overhead work with his left arm. He should avoid pushing, pulling more than 15 pounds. He should avoid lifting more than 35 pounds below shoulder level with his left arm. And, he should avoid strong pinching. The department has indicated that modified duty is not available.

>> Thank you. Dr. Doss, do you have anything to --

>> No, I don't.

>> Thank you. Mr. Swift.

>> I feel compelled to add the fact that no pinching does not mean that he should not make arrests. Sorry.

>> Boo.

>> Really?

>> All right. The details of his injuries are replete through, starting on page 139 and going through page 152. You'll probably note that six of them involved vehicles so they probably should have kept him away from those. But, it started in 1988 when he was rear-ended in his police vehicle, injuring his neck. And then, there's one that's not in your packet, but referred to in '94, where he was struck by a police vehicle while walking through the police parking lot which injured his legs, neck and shoulder. And then in '96, pages 150-151 -- he was at the training, training for motorcycle doing 360 degrees circles and the bike fell on him. And then five days later, in the same training, he fell numerous times during the motorcycle training. And then two years later, he fell to the ground again during motorcycle training. Each of those injuring his back, neck, right ankle, right leg, knee, left elbow, and left wrist. Then, in -- on October 9, 2002, pages 144-145 -- he was taking a combative suspect into custody into a motel parking lot, and injured his neck, left shoulder, left thumb, low back, and knees. And then in April of 2003, he happened to be rear-ended in the police vehicle, injuring his neck, shoulders, thumbs, low back, and knees. And then, the last injury was in July of 2004, page 139. Walking down a creek embankment to locate a dead body, and slipped and twisted his left ankle and foot. I'm sorry. That's not the last one. And then the last one, April 30th of 2008 -- pages 137-138, he managed to fall down the stairs injuring his low back, neck, wrist, thumbs, thumb, and knees. So, Dr. Doss' report on pages 8-16 details the treatment of his knees from 2002 to 2012, of his right ankle from 1996 to 2012, of his neck and his back from 1996 to 2011, of his left shoulder, most recently 2011-2012, and his hands, wrist and thumbs, from 2009 to 2011. The restrictions you've already heard, they apply to his knees, his right ankle, his spine, his left shoulder and his hands. I won't repeat them. Not surprisingly, the department does not have any permanent modified duty. That's on page 22 of your packet. And on that basis, I ask that his application be granted.

>> Thank you, Mr. Bacigalupi.

>> Thank you. I won't go through a long statement. I think the information in your packet is pretty informative. It is actually worse than that. There were a couple of accidents that were so old, they didn't have the reports in there but I was rear ended twice in one day. Once, by somebody just -- eased into the back of my patrol car and once by a drunk driver that was clocked at 45 miles an hour, celebrating the fact that they didn't put him in prison for all his prior arrests. And he was drunk and ran into the back of my patrol car. These were all in patrol cars. I was hired in '76. I was promoted to sergeant in January of '85. There were some good things and bad things about the job. We talked about it earlier, as far as what you see and what you have to deal with. It was the best job I could've ever asked for. I love the job. I think dick has mentioned before, in the past, that sometimes we didn't write up all the injuries. That just was part of the culture back in the old days and there were a lot of combative subjects that -- You know, you got a little bruised but you kept coming back. Even when I was in car accidents, you just keep coming back. I loved the job so much. Then, I think it was in 1998, when Chief Lansdowne was rehired buy the department from Richmond. I was on the promotional lieutenant's list and I turned the job down. First one in the history of the department. I loved being a patrol sergeant. Till the doctor said I couldn't do it anymore and it was time to call it quits. So, I'm asking for a change of status to a service-connected disability.

>> Thank you. Questions or discussion from the board?

>> I would make a motion that we grant change of status for David Bacigalupi to a service-connected disability, based on the medical evidence and the no availability of modified status.

>> Second.

>> So, we have a motion and second from Trustee Santos. Discussions on the motion?

>> So --

>> Like the -- yeah, like the --

>> So, let's -- let's go ahead and open up this process. I think the reason why David's package is so thorough is because he understands the process, so we have five or six things we really consider when we're looking at a disability and the four that are paramount in my mind that we talk about again and again and again is it work related? So, have we sort of gotten the maximum improvement of the injury? Are there work restrictions related to the injury or injuries that prevent this person from doing the job? And is there no alternate duty? So, the easiest one we can tackle in this case is the alternate duty. It's in the package. There is no alternate duty. Then, let's take the first three, in order. I'm doing this so it's on the record, right? So, is this work-related? Yeah, you're a big, wet mess, Bacci. There's no question that the shoulder injury is documented. That is a work-related injury. There are other work-related injuries but that's one that's pretty easy to get at. The shoulder is a really important part of getting anything done. The doctor indicates that you have work restrictions related to the shoulder. You have range of motion issues and so on that will prevent you from doing your job. And I'm assuming, Doctor, although I didn't see you specifically mention this, that he's sort of gotten as good as he's going to get with his shoulder. That's certainly what his doctor said, and I don't remember if you put it in there or not. That would be, sort of, the only question for me related to the shoulder.

>> With respect to the restricted range of motion, I don't think that that's going to improve.

>> Right.

>> Tendonitis or the chromeo-clavicular joint arthritis could improve, possibly, with a cortisone injection. But the range of motion is unlikely to improve.

>> Right, so let's take it by the numbers. There are many injuries here, but as regards to the shoulder, it was clearly a work related injury, he has maximally improved, it creates work restrictions that prevent him from doing his job and there's modified duty. And, I wish we could do this for every case that came before us. And I think the reason why we can do it in this case is because Dave knows the drill and has made sure

that all of the data we need to make a clear conclusion here is in front of us. So, from my prospective, we should rehire him to come back and help people write these things. But, it's crystal clear to me that, at least in the case of the shoulder, and there are probably other examples here, that he meets those four tests. There are other tests, but those are the four critical tests for work-related disability. Did I miss anything?

>> Pretty good job. Other discussion?

>> I think that, like Dave said, I'll wait until we say good-bye to him, but the idea is that he got a hernia probably from lifting this. But, like he said, the first eight or ten years when he didn't put anything in, this would be this thick. It's just the way the system was then. Then, as you get the twine out of your ears and realize you're not going to get -- you start documenting and doing things by the book, because your peers at the time when you do it, they're critical. So it was a different time, and sometimes, I wish some of those old ways would come over to today. Maybe people would last maybe to 32 years, 33 and so on. And then again, when I see these medications, you should've put down the ones you don't take and then I could understand. But, you'd just run out of paper. I'll wait for James to say something.

>> Mr. Mason.

>> We'll go ahead and vote. I'll wait until after.

>> So, I just want to say that the disadvantage of you going through this process is that I don't want to get in trouble for anything, and so, I went through this and went through this and went through this in more detail than the average applicant because I want to make sure I'm not missing anything. And there are so many little things, like we'll see applications where there's one or two doctors that have seen the patient, and I'm counting 11 different doctors that you've been through here and different body parts. As you mentioned, connecting all the dots and each body part, I stopped after three body parts, or I said, "Yes, there was an injury date, there is a result in injuries from that, there's work causation, there's a disability that prevents you from doing the job." It is permanent stationary, the department cannot meet the modified duty. I went

through of each of those. So, you know, I can't review an application more and all the information was in here, which I appreciate. And doctor as well, with that much medical evidence behind it, your summaries of the reports were helpful as well for me doing that analysis.

>> Just one of the short notes that I had for myself that I did want to mention to the board. I did mention that I love the job. I worked almost 33 years. My benefits maxed out at 30. And I worked through all those injuries for as long as I could. And like I said, there was no advantage to staying past 30. But I did because I loved it.

>> And then, all your time on the board. And we know this is not good on our backs.

>> Actually, it's the cardiologist that says this isn't good.

>> Yeah.

>> Mr. Chair, I was waiting, but I want to say that I want to -- Did you call for the motion?

>> No, so we can do the -- Sorry, so we'll do any further discussion on the motion? No? Take a vote then. All those in favor?

>> Aye.

>> Let's do a roll call vote. So Lanza, aye. Caldor, aye. Santos?

>> Yep.

>> Rounds.

>> Aye.

>> Mason.

>> Aye.

>> Unanimous vote, the motion passes. Dave, congratulations. Thank you for your service to the city, this department and for 12 years, this board.

>> The chair -- go ahead.

>> I'll say something real quick. I was lucky enough when I -- Over this agency 10 1/2 years ago to work around Dave. I'm not sure I actually worked for him, but I worked around him on a couple different day shift teams. A very nice guy. A guy that obviously devoted a lot of time to this Board as an active member and a retired member. But he devoted a lot of time to all of his officers and the police department in countless ways. So thank you very much for all the excellent service to the police department and the city and good luck with the rest of your life in Hawaii.

>> Thanks, Jay.

>> I want to say to the chair, you know, some of the Board members today, the civilians are learning what Dave and I have been talking about for the last couple of years that we've been together again. And it's easy to talk about in the past, but when we were trying to beat prop 162 way back when, Dave was a pioneer. And we both made the motion at the time. We talked to the other council people in the move from city hall to the 777 N. Fur St. It was like an act of congress. It sounds so simple today, but it wasn't. The first time we moved from city hall to our own private building. Then soon you know, Dave and I got together with council people with which we worked together with well. There was only five of us. And we bought the building that you're in today. Keep business in San José. Use your retirement money to purchase building

the jobs in here. That's what you have today. And we did those things. It's not being independent, we're being a collaborative, and we're saying we have to be fiduciary responsible people. And you got that memo today because I show you we're still way off. You civilians today are now learning what we've said. And you're saying, "Yeah, now how do we do it?" Well, I hope that we all can do a better job than we're doing because we're not so-called independent. We still don't have the responsibility that we should have, and the system still is not doing as well as it should have. But it will get better. And I just want to say to David -- thanks for those tough years when we were by ourselves. And you never gave an inch, you left and you came back and then later on we're here again. Thank you for all the time spent. Appreciate it.

>> Thank you, Dave.

>> Trustee Rounds.

>> As a civilian, I just want to thank you because I really have enjoyed meeting you and I have learned a great deal about not being a civilian from you. So thank you.

>> Thank you. Okay, if I could just -- I won't take your time up because I know you're running short.

>> It's only 6:00.

>> I know. I want to thank all of you. It's been a pleasure to work with you. I am somewhat regretful that I can't just finish the term, but I wish you all the very luck. I wish you the best in the future. We got some great ideas of what you're trying to do. Some of them, I hated to be in the room and saying, "We tried that, good luck, I hope you can get it through." But, I just, you know, keep going the straight road because don't let individuals' personal and political agendas get in your way. And I'll just remind you of the fact that it was last night Alex's memo came out. It was this morning the city attorney brought up the issue of a conflict of interest, and one of our council members brings it up at the last minute. That application has been on file

since the day I retired, since I filed it in July of '08. So now it becomes an issue. So, political? -- Yeah. So keep going the straight road and I wish you all the very best of luck.

>> Thank you, Dave.

>> Thank you, Dave.

>> Just -- Last quick items on here -- Posed agenda items, we will add onto, I guess our December meeting, a look at how we hear board member applications, and whether a co-change is required. We've already done public comments. Are there any other posed agenda items? I see none. We're adjourned. Thank you very much for coming and your extra day and your extra time.