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.

--AUDIO DIFFICULTIES--

>> David Bacigalupi: ... Mr. James Jeffers. Donna.

>> Ronald Daly, police officer, is requesting a change in status to a service-connected disability based on stroke. He's 53 years old with 28.62 years of service. There's medical reports are listed in your file. Work restrictions are he cannot perform moderately vigorous physical activity. He cannot pursue and apprehend suspects. He should be limited to a semi sedentary position. He is service-retired effective 12-26-09. At the time of separation and at the time of application he was on modified duty, and there's no permanent modified duty available. Also want to note that this case was heard -- started to be heard in the February 10 meeting and continued to have more medicals which we have since received. But since we have new board members we probably need to rehear it as if it's not continued.

>> David Bacigalupi: Thank you, Donna. Dr. Das, do you have anything to add to the information in the packet?

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

>> David Bacigalupi: Okay. Mr. Jeffers, did you have something to add?

>> (inaudible) question about the connection of work stresses and development of Mr. Daly's hypertension which contributed to the stroke. I believe the report from Dr. Ing, the May 13th report, satisfies that connection. But I'd be glad to entertain any questions the board might have.

>> David Bacigalupi: Okay, questions by the board. Yes, Mollie.

>> Mollie Dent: I just wanted to make a comment for the record. This matter was deferred, so it's before the board brand-new. So you need to look at the entire record and consider it all in its merits for what's before you now.

>> David Bacigalupi: Okay, thank you, Mollie. Okay. Scott, I think your button is --

>> Scott Johnson: Oh, okay.

>> David Bacigalupi: Go ahead.

>> Scott Johnson: Thank you. Dr. Das, can you speak of you know the issue I know this is an item that was deferred. But in the past we did talk about the work connection. And just for clarification for the record, can you speak to the memo that was referred to by the attorney? And the connection to the medical reports as it relates to the connection related to the job?

>> I'm not sure -- I'm not sure that I can -- I understand, I think, the essential element of the question, which is there work, what's the service connection of the disorder. But there is -- in terms of relating it to which reports I'm a little bit confused in terms of the attorney's memo or --

>> Scott Johnson: Yeah, the attorney referenced that, it's May 15th.

>> Oh, you meant the -- you mean Dr. Ing's report of may 13th?

>> Scott Johnson: Right.

>> Essentially what Dr. Ing is saying is there's studies that show that there is a relationship between stress and elevated blood pressure at the time. There's also an association between perceived stress and elevated blood pressure. And so the idea is that the stress that someone perceives can cause elevated blood pressure at the time. And that if someone has ongoing stress, that that can maybe lead to elevated blood pressure and perhaps the diagnosis of hypertension. The type of stroke that Mr. Daly experienced is specifically due to hypertension. There are two types of strokes that you can experience. One is a hemorrhagic stroke where

basically the capillaries in your brain burst due to the elevated blood pressure and they bleed. And these typically occur in the brain stem, in the brain stem it can cause visual loss and/or death. And typically, you have a good prognosis after those kinds of strokes, if you survive. But the survival is also a little bit more difficult. The other type of stroke you can experience is, a cerebrovascular accident in which the clot breaks off from the carotid artery and migrates or travels up into the blood vessels that supply oxygen to the brain. That is another type of stroke. That is not typically linked -- directly linked to hypertension. That's due to coronary artery disease or atherosclerosis. So the type of stroke that Mr. Daly experienced is directly attributable to hypertension, meaning that that was due to elevated blood pressure at the time that he had the stroke. And then Dr. Ing reviews some studies, you know, he gives excerpts from the studies that support a role for perceived stress and hypertension. Does that help, or --

>> Scott Johnson: Yes, that helps. Also, can I reference Dr. Ing's memo, on page 11 of 12? And it talks about, the second to the last paragraph, that's described above, believe that his work contributed to his hypertension which in turn led to his Lacunar infarction. Then it goes on to talk about the event that occurred when he experienced additional physical stress on the job and also a characterization that something special about this case is that he was allowed to return to work, even though he had suffered findings suggestive of a stroke. So I guess what I'm asking is, would you agree with these conclusions from Dr. Ing based on your evaluation, that there is an association related to work?

>> Dr. Das: Well, I mean I think that Dr. Ing makes a reasonable argument. How can I put it? It's not -- it's an area of controversial, and I think that good and smart people are on different ends of the spectrum with respect with that. But what he said is not unreasonable. So that's typically what I go -- when I do an assessment I look to see if it's plausible. And there are things that are plausible that I don't necessarily agree with one way or the other but as long as it seems reasonable from a medical standpoint I'm not going to dispute it strongly.

>> Scott Johnson: Okay, thank you very much.

>> David Bacigalupi: Conrad were you next? Okay, Rose.

>> Rose Herrera: I guess I just want a clarification also. Page 6 of 12 or page 16, however we're looking at it here. It says 50% of his hypertensive heart disease was said to be industrial and 50% was said to be nonindustrial. So from your perspective, Dr. Das, how should I be interpreting that? What weight, I mean?

>> Dr. Das: Well, you know, it's an arbitrary number thrown out by the physician. There's no criteria for establishing risk factors per se to assign a percentage. So it's more akin to throwing a dart at a dart board than it is there is really any true scientific basis for that. So I mean honestly the things we do know, are genetics, there is a genetic predisposition, his family level, exercise level of intensity, nutritional status. Those are the things we know risk factors that we can quantify that have been well demonstrated. Stress or perceived stress is definitely known to transiently elevate blood pressure. The key is whether that isolated stressful events caused a persistent elevated blood pressure or can cause hypertension. That is where the controversy lies. There is you know, the idea is that we release stress hormones when we're -- and those contribute to evaluated blood pressures, if we have continual stress or perceived continual stress are those hormones continually raised? Is that raised, a different set point in our blood pressure? It is not an easy thing to evaluate and that is why the percentages -- I don't know what basis he used to come up with 50-50 as far as that goes. I think the idea is that there is -- that if you feel the perceived stress contributes to it, and there is medical evidence that it definitely can contribute, the issue is in terms of what are the identifiable risk factors that we know can cause it and what are the potential risk factors. I can't comment on the 50% but you know, so I'm not sure exactly what Dr. Lorac uses his criteria. It's just outside of a medical opinion.

>> Rose Herrera: I'm just wondering how we should look at that.

>> Dr. Das: I'm sorry.

>> Rose Herrera: It's an educated guess?

>> Dr. Das: Yes.

>> David Bacigalupi: Dr. Das -- I'm sorry go ahead. I thought you were --

>> Rose Herrera: And my other question is he also has a history of diabetes. How does that factor? How do we weigh that versus hypertension? It looks like family history, he doesn't have significant family history for hypertension. I mean, I don't know. Brother and sister have it so I guess in terms of the family history which is talked about on page 29, do you have any thoughts on that? And then the question about diabetes, is that -- how does that relate to all those?

>> Dr. Das: Well, diabetes is an independent risk factor for hypertension as well. So he's got -- if you want to look at it, you are looking at, there's industrial and nonindustrial contributors to his current problem, and the issue is how do we want to weigh or rank them. And it's very difficult to assign a percentage, especially if we're looking at an aggravation issue where you're looking at well he may have had you know with his identifiable risk factors, he had this level of control but what Dr. Ing is suggesting is he had something else that was the straw that broke the camel's back kind of event. So we're looking at you know, is that if direct contributor or indirect contributor to his situation? So I.T. not fair medically to ask that question. But we have to, in this kind of a forum. But the issue is, we have certain risk factors that we know that can directly contribute. We have evidence in the report from Dr. Ing that suggestion a contribution from specific events and from the literature showings a situation between perceived stress and elevated blood pressure. And so trying to, you know, it's very difficult -- it's somewhat arbitrary to assign percentages like that.

>> Rose Herrera: Does also say there is no family history of heart disease, stroke or cancer. So it is kind of a mixed bag of the evidence here. But certainly he had stressful events as a police officer. I don't think it's hard to make a judgment that it could elevate somebody's blood pressure. Isn't it true, I don't know if it's in the literature, sort of spike blood pressure is kind of bad for you if you have sort of the issue of it going up kind of spiking is not a good thing and could that happen from police work?

>> Dr. Das: The issue is how high can it go around for how long. If you're at the threshold, 200 millimeters systolic, I mean, that's very, very high. And you're worried about a stroke, and so I think that's what Dr. Ing was referred to, saying this could transiently increased it and caused the vessel to burst. Any event could cause your blood pressure, that is not necessarily a bad thing, when you're doing exercise, your blood pressure could go up transiently. It all depends on context. If you are not exercising and your blood pressure is going up because of mental stress, or something like that, that could be considered a little bit worse per se because you're running and exercising and trying to pump out more blood.

>> Rose Herrera: So he did have systolic blood pressure in those ranges then? The critical ranges, right?

>> Dr. Das: If he had a lacunar infarct, I would say he definitely had a --

>> Rose Herrera: But I mean preceding that. I'm trying to say if Dr. Ing is making that point, then that does suggest that some of that activity could have caused that, right?

>> Dr. Das: That he would have had a significantly elevated blood pressure prior to the event, yes.

>> Rose Herrera: Okay. And I guess my other question, I don't know if it's in here, and I don't know if it's appropriate, tell me if it's inappropriate or not. The diabetes, was that under control? Was that being -- if somebody has diabetes and they're not taking care of it would that contribute more to hypertension and blood pressure whereas if somebody's under control and they're monitoring it then it wouldn't be so -- I guess I'm wanting to hear whether that was being controlled by medication and all that.

>> Dr. Das: I don't recall from the reports and I don't remember whether his blood pressure was under good control, his diabetes was under good control at the time, but it would absolutely have a bearing on the progression of atherosclerosis if he was in poor control. But like I said the Atherosclerosis is a different mechanism --

>> Rose Herrera: Than the hypertension.

>> Dr. Das: The type of stroke that you would have, that would be a breaking off, and as opposed to a lacunar infarct, yes. It would be an ischemic infarct as opposed to lacunar.

>> Rose Herrera: I think there's enough evidence to show it's related and I would make a motion to approve this.

>> David Bacigalupi: All right, I have a motion, is there a second?

>> I'll second.

>> David Bacigalupi: I have a motion and second. Any further discussion?

>> Scott Johnson: Looking at the memo dated January 19th, unclear to me, there is a statement based on the restrictions listed above we would not have a position available for Mr. Daly. However, that was dated January 19th 2010, but it's not clear whether or not at the date that he retired, whether or not a physician would be available. Because if I'm reading this correctly, when he retired, he was working in a modified position in the personnel unit of the police department.

>> David Bacigalupi: Lieutenant Bastillos is here from the apartment. You can probably answer that.

>> Yes he was working in a permanent modified position. Remember that these medical restrictions came in after his retirement, had those medical restrictions been in plate the intent of the memo would have been to state woe not have been suitable for that position either.

>> Scott Johnson: Okay, thank you very much for the explanation.

>> David Bacigalupi: Any further discussion? We have a motion and second. All in favor say aye, all opposed, motion carries. Ron, good luck to you. Okay item number 3B it's an application from retired police officer John Quayle. It's a request for change in status from service retirement to service connected disability retirement effective January 31st, 2005 with 25.0 years of service. And this was continued from August 5th, 2010. And for the record, retired police officer John Quayle is present and is represented by Mr. Boyle. Donna.

>> John Quayle is police officer requesting a change in status to service connected disability based on a heart condition. He's 54 years old with 25 years of service, medical reports are in your file. His work restriction is he should not engage in strenuous physically demanding activity such as pursuing and apprehending suspects. He is currently service retired 1-31-05. At the time of separation and at the time of application, he was working full duty according to a memo from the department. There is modified duty available for him.

>> David Bacigalupi: Thank you Donna. Dr. Das, do you have anything to add?

>> Dr. Das: No, I don't. Actually I have one thing. After I received the memo I received his medical chart from archives. There was nothing -- I couldn't -- there was nothing in the medical record that had any bearing on his cardiac status because we had not had the surveillance exams hadn't been done and even upon hire we didn't have an EKG and that was before my time.

>> David Bacigalupi: All right, questions by the board. Scott.

>> Scott Johnson: Thank you. Dr. Das, I'm looking at your supplemental report. And you note that Mr. Quayle was diagnosed with boarder line hypertension as far back as 2005. And this might be a similar discussion that we just previously had. But how does that relate to the disability retirement?

>> Dr. Das: You know, I have to admit, from a medical standpoint, hypertension is a risk factor for progressive heart disease and like as we discussed before. Left ventricular hypertrophy, which can lead to poor blood supply to the heart. If you look at the cardiac catheterization report, it looks like he had significant atherosclerotic

disease, which indicates that he was not getting enough blood to the heart because blood vessels were blocked and so it's kind of a chicken or egg phenomenon, in terms of dealing with this hypertension and heart disease, yes, they're both related. In terms of trying to say that the -- you know that one caused the other, the best I can say is that they were both going on simultaneously. Because you can have increased blood pressure because of the atherosclerotic disease, you can also have high blood pressure because of other things such as renal stenosis or essential hypertension where your blood pressure just goes up, and you don't necessarily have significant atherosclerotic disease. And you can have both of those things going on at the same time. You know, the issue is, I guess, his blood pressure was elevated but is at the time but I don't know that he was disabled from it. Because there were no exercise restrictions, there was no limitations in his abilities at the time. So I would say that he, at that time, woe not be considered disabled. And even if he had an elevated blood pressure, you know, of 140 over 90 or 160 over 90, that doesn't necessarily mean that he's disabled, as well. Because if it is controlled, he can certainly engage in all active lifestyle. The issue is whether he has left ventricular hypertrophy, and some of the sequelae associated with elevated blood pressure, kidney damage, if he has those kinds of problems, then I would -- then you could argue that there was certain things that he needed to be restricted of or be careful of. But we don't have any information about left ventricular hypertrophy back then.

>> David Bacigalupi: Thanks, Sean.

>> Sean Kaldor: So Dr. Das, it was noted that he had borderline high blood pressure. There are a number of ranges for high blood pressure, right, and where does borderline hypertension fit into that?

>> Dr. Das: Well, you know, if you talk to cardiologists today, the appropriate blood pressure is 120 over 80. And so there's not a whole lot of give. So his blood pressure at the time would not be -- under today's criteria would not be considered borderline, it would be considered elevated blood pressure.

>> Sean Kaldor: So at that time he was diagnosed with borderline hypertension could it be reasonably have anticipated that he would need quadruple bypass?

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

>> Sean Kaldor: Thank you.

>> David Bacigalupi: Mr. Boyle, did you have anything to add?

>> Briefly. It seems that when we were hear last time, we continued the hearing, and there were two issues: one, can he file more than one year beyond the time that's required. And that had to do with whether or not there was demonstratable disability or something that he should have filed his disability retirement earlier. Dr. Das has testified I believe that that's not the case. Dr. Ing and Dr. Das's reports reflect that the cardiovascular disease watt not discovered until 2008 and the left ventricular hypertrophy was also not discovered until 2008 or 2009. So I believe we've overcome that hurdle. And then the second hurdle is Lieutenant Bastillos has said there is a modified position, Article 39, exempt officer position, tow hearing officer, can officer Quayle do that? Our position is that the duty manual requires gun, badge, and I.D. for all police officers. He would conduct hearings. On page 13 you have the job description. He isn't isolated. He deals with public, he deals with people who are coming in, objecting to their cars being towed. He also has to go out on the street, go to the District Attorney's office and other public buildings around the police department. So if he's out there, he's a police officer. He must keep the peace. And so our position is that Dr. Das restricts him from not engaging in strenuous, physically demanding activities such as pursuing or apprehending suspects and because of that and because he's a police officer we believe he could not do the job offered by the police department.

>> David Bacigalupi: Thank you. Rose and Conrad and Mollie.

>> Rose Herrera: I just wanted to hear from Mollie. Because what I remember last time was the issue of timing when he applied. And so I want to know how these facts presented, these additional facts relate to that from your perspective Mollie.

>> David Bacigalupi: Mollie, would you answer, that's what Conrad wanted to know, too.

>> Mollie Dent: Okay. We were looking at code section 3.36.920, and because this application was filed more than one year after he separated from service, we were specifically looking at item 4. But I think I'm going to look at this whole code section, I'm deed with item 4 first but you also need to look at item 2 as well. With respect to the date of the filing of the milks, there's -- item 4 sets up a general rule that you're not supposed to file an application more than one year after you've separated from service. That's the general rule. That's placed in the code in 2000 and then there was a window period after which that rule became the rule. There's a limited exception to that rule and the exception has to do where the person demonstrates by a preponderance of the evidence that the disability is due to diseases and/or conditions caused by workplace factors and or conditions that at the time of separation from city service had no previous medical basis to be considered harmful. And that exception is meant to -- is meant to allow someone who did not know, not who did not know that a workplace factor, or condition, could lead, cot harmful. In other words, for example, there are cases of cancer. If, at the time they left service, it was not known that a particular toxin caused cancer, that would not -- they would not have a medical basis to think that that condition caused the cancer. So that's how this section seems to flow through to me. And Russ Richeda can weigh in if he wants. I think you -- and the reason I think you need to look into this in the whole context is, you have in Item 2 a requirement that the person must show that the disability occurs while they are with us. Even if you didn't have the one year filing deadline, there's -- the disability has to -- they have to be disabled before they separate from service. That's the key criteria. You can't have it -- so if you read A, it says no person shall be entitled to a disability retirement where the disability occurred before he or she became a member of the system, or the disability occurred after he or she became a member of the system, where the disability occurs while on leave of absence except under certain conditions. So the burden always the applicant has to show that they were disabled while they were still in service. And so the filing deadline is kind of, I think, you need to think of that as a way to deal with situations where it's unclear where the disability did occur, maybe. And so it's kind of an additional block, but it is not the only -- it's not the only issue. Does that help?

>> David Bacigalupi: Any questions for Mollie? Russ. Turn your mic on.

>> I think that that's the best reading of the code. Number one, that this exception -- now, apparently we haven't been able to find a legislative bargaining history that would elaborate on the language of the code. But if you just look at the language of the code, I think it is as Mollie indicated, it's where you come up with a disease, or condition, and at the time you had no knowledge at all that that condition was caused by something you were exposed to at work. But after that point, yep, that solvent you were exposed to causes cancer, and here is the study that establishes it, you have cancer, now you can apply, and the one year wouldn't -- now you have a medical basis for applying and the one-year limitation would not stop you from applying. That's how I read this and in the absence of any bargaining or legislative history I think that's the reasonable interpretation of this language as I said at the last meeting and I think Mollie is correct to emphasize not only A-4 but A-2. A-2 says you have to be disabled, not just a condition that in the nature of things is progressive and in a few years after you leave city service will result in a disability. This says you have to be disabled on or before you terminate city service. And you just heard from Dr. Das his medical opinion on that issue.

>> David Bacigalupi: Mollie.

>> Mollie Dent: So I do want to confirm I did look at the records. This is a fairly recent ordinance. There wasn't -- it was bargained, there is a record that it was bargained for but that's about it.

>> David Bacigalupi: Okay. Any other questions by the board?

>> Mr. Chairman, can I say one further thing?

>> David Bacigalupi: Certainly.

>> It seems like from what we were just told that no one could develop cancer or heart disease or other problems after separation and claim it as a disability, retirement, and convert unless they were disabled after retirement. And that absolutely makes no sense to me but that just makes no sense. That means that that paragraph, both of those paragraphs, seem to be only applying to someone who has serious disability and then,

say, John had his coronary artery disease then he would have to apply within the year. So -- or cancer or some other condition. These are things that manifest themselves after the year of the statute go by. Why would the provision be in there? That interpretation that you were given doesn't make any sense unless the people who bargained by that don't know what they were doing.

>> David Bacigalupi: Can't comment on that but thank you. Sean and Rose and Conrad. Good, Rose.

>> Rose Herrera: I think I asked this last time Molly Mollie but have there been exceptions to allowing extending last year deadline I think the answer is no but --

>> Mollie Dent: I don't know. I did not undertake a review of our disability retirement since 2002. I'm not -- staff and Mr. Richeda may be better able to speak to it than I am because I know Mr. Richeda has been doing the work for the board longer than I have and I know staff has been attending the hearings but I don't know if the one year has come up before.

>> I personally cannot think of any. You know perhaps the board might want some review of it but I can't think of an example of excess. Unfortunately I don't think it is a matter of interpretation. If Mr. Boyle would like to comment on the language of A-2 I don't see any ambiguity. I would like to see ambiguity to it. I think there is a basis for receiving disability retirements where the condition manifests itself after you see city service. But I don't think that is in the code now, and it's not a matter of interpretation by counsel. It is pretty darn clear language. Now if the board is dissatisfied with that result I am not sure if I'm satisfied with it then the board might as a body request that the bargaining parties consider amending this to provide for some sort of extended pert where the condition had to be occurring during employment, but the, you know, full manifestation of it and the resulting disability doesn't occur until after separation from city service. That might be something the board might want to request, the bargaining parties to consider, to consider amending the code to provide for. Right here we are between a rock and a hard place on this issue.

>> Rose Herrera: What I'm trying to understand and I think we need to be clear on it to make this decision, how this is different than for example the case we just heard before it. In the previous case there was manifestation of that while the individual was working. There was evidence of disability, modified work, et cetera. So that it may have exacerbated and got worse once employment was discontinued but there was definitely -- it was there while the individual was working. So I'm -- we have to make tough decisions up here. This is one of those cases. And I'm very hesitant to set precedent with this case. I think in the future if there needs to be discussion to modify things that certainly can happen. But I don't think this case rises to -- I don't think the facts presented here are sufficient enough for us to modify what the code is saying. And so I would -- I will not be supporting this or approved this -- I would not be willing to approve this and I would make a motion to reject it.

>> David Bacigalupi: Okay I have a motion and Scott you're a second. Next speaker is Conrad.

>> Conrad Taylor: I have a couple of questions here. On page 7, Dr. Das, just for clarification. It looks like it says 10% of his cardiac disease through his employment after separating from the city of San José. Does that mean 90% was caused before, while he was employed by the City of San José? Page 7 number 3 second sentence.

>> Dr. Das: I think he actually, what he is referring to is his work as a helicopter pilot if I recall. After separating -- yeah, the -- it was because he indicated it was stressful flying a helicopter in Hawaii. That there is -- that he has two industrial contributions, I believe. Let me just -- I'll look at the report, real quick. Two industrial contributions from the City of San José and flying the helicopter as well.

>> Conrad Taylor: 10% goes to the helicopter, does that mean 90% is while he was employed by the City of San José?

>> Dr. Das: Let me look to see if he apportioned any to nonindustrial. No, he doesn't -- he aportion, he says it's all 100% industrial so 90% goes to San José.

>> Conrad Taylor: So he is apportioning 90% of his injury or illness while he was an officer. Also in 2000 he had borderline -- he had hypertension with borderline left ventricle hypertrophy. That was diagnosed when he was a police officer.

>> Dr. Das: I believe that's 2000 -- is that referring to a report earlier?

>> Conrad Taylor: Number 4 page 8, top of the page where it looks like they diagnosed him with hypertension, with borderline left ventricle hypertrophy. And it also says the presence of left ventricle hypertrophy would disqualify a person from serving as a safety officer. At the top of the page.

>> Dr. Das: I believe Dr. Ing did that electrocardiogram in 2009. I don't think he is referring to a prior electrocardiogram. Mr. Quayle may recall if he had an echocardiogram in 2000 --

>> Conrad Taylor: No, that's 2009 he's referring to?

>> Dr. Das: 2009, yes.

>> Conrad Taylor: Okay, and then another thing on the ordinance, Mollie and Russ, I guess what this is going to cause, is I mean, there's diseases that manifest -- I mean, I know there's current legislation out there now that could go 15 years, that people are going to file within 15 years for different cancer presumptions. But what this may cause though is that everybody that's going to retire because we're exposed to numerous chemicals that are out there, everybody is going to be filing a form for disability even though they don't have it now. I mean that would be a protective blanket for them so when they do a regular service connected retirement also file a form for a disability. I mean based on that ordinance, just to protect them for down the road. And he -- this individual here is being penalized because he did not do that, he didn't know he had it until after he retired.

>> Mollie Dent: You go ahead.

>> Whenever you have filing deadlines any individual thinking of their own situation has to take certain actions. Once the bargaining parties impose this, remember you didn't impose this. I agree, the rational thing is going to be to file. Remember, they are going to have to have evidence, under A-2 unless that's changed. They will have to have evidence of not only diseased but that they were disabled when they were employed by the city. That's a hard standard. Some might say it's a harsh standard but it's there in black and white until its changed or modified or supplemented and that's why I made the remarks I made earlier that the board may want to recommend that it be modified. And you can also deal with retroactive dates.

>> Conrad Taylor: The definition of disabled does that mean modified duty would be disabled?

>> You have a definition in the code and it basically -- it is incapacity. They kind of combine the two. Some other systems, they separate disability for incapacity. But our definition -- and again, even there it talks about -- while the members of the system, which renders a person physically or mentally incapable of assuming the responsibilities and performing the duties of the position then held by him, et cetera. You know, it's a -- so they -- so it isn't just that it's a condition that may give rise to incapacity. They didn't have to necessarily write it this way, but they wrote it in a pretty hard manner.

>> Mollie Dent: I would agree with that. The -- that's why I was pointing out the provision in A-2. Well, the provisions in A-1, 2 and 3. The member have to be disabled while they're still in service. And disability does mean incapacity from performing their work. So even if we had a different filing deadline and -- or even if people did want to put an application in just to get around the filing deadline if they weren't disabled when they left service, they wouldn't meet the criteria for a disability retirement. The criteria is that they be disabled from performing work when they left -- when -- while they were still in service.

>> Conrad Taylor: So if Mr. Quayle would have been on modified duty wouldn't have been able to perform his duties as a regular police officer this would be different because he would have had a modified duty he would have been disabled and then we would have had an exception?

>> Mollie Dent: Yes, if he had been on some form of modified duty and had work restrictions, and the department could not, you know, accommodate those work restrictions, then that's our normal application.

>> David Bacigalupi: Sean.

>> Sean Kaldor: So I guess you can have an officer or firefighter their 30th year of their career sustain some injury or be exposed to some gas that could conceivably result in disability, but does not while they're in service, they retire, and a year later, two years later, year and a day later they discover they have a debilitating life-altering disease that is well-known to have been caused by what they're exposed to but because they didn't have a disability before they retired, they're forever exempt from making that claim? So then you get into everyone wanting to file on retirement for a disability listing everything you were possibly exposed to and trying to keep that case open for as long as possible while you gather the evidence and prove and see if you have any claims to make. It seems a harsh standard. If that's the standard that's been laid out then I mean we're bound to follow that, if that's how it's interpreted. I guess the challenge I see in all this is, we're reading through a lot of rules and I think if we went through the last two or three years or how far does this go back? That it was implemented?

>> Mollie Dent: Well, the one-year provision was implemented in 2002. The rest of the code language has been in there for a very long time.

>> Sean Kaldor: Understand, so the one-year provision, if we go back eight years or seven years, I would be concerned that we haven't applied that as strictly, and this candidate for disability retirement would be bearing the brunt of that. And it leads to concerns about making sure we are unfairly -- we are fairly and impartially applying all the standards to everyone who is coming before us. I would rather see if we could look at what we've done in the past, make sure we're consistent and going forward, and sure we have that clearly laid out. This should be to me lot of these cases check boxes. Was there a disability on this date? Was it when you applied? Is there a preponderance of medical evidence that it was industrial-related? These should be fairly straightforward decisions and we shouldn't have to make a judgment call that may have gone one way to some people and one way to other people. I would like the process go more that direction reign be -- feel like we may not have done something

here that we may have done in the past five years. I'm not sure whether we may or may not, being a new board member.

>> David Bacigalupi: It seems impossible for a case like this, there are too many des out there. Scott you're next then Rose.

>> Scott Johnson: The reason I seconded the motion is specifically to --

>> David Bacigalupi: I don't think we have a motion.

>> Scott Johnson: We did have a discussion.

>> David Bacigalupi: Sorry lost track of it.

>> Scott Johnson: Is because according to our code there must be -- we must find an exception where there was a preponderance of evidence caused by workplace factors. I'm looking specifically at this case, not whether or not someone was exposed to chemicals or had cancer or had chemicals or anything like that. I think there is an issue with regards to our code, but specific to this case and the application that Mr. Quayle has brought forward, I haven't seen anything that was presented in the information we were given that would show me there was a preponderance of evidence that the unfortunate medical condition is caused by workplace factors. In addition, Mr. Quayle must have been disabled prior to leaving city service. So for those two main requirements I don't see where we as board members can approve the application going forward.

>> David Bacigalupi: Rose you're next.

>> Rose Herrera: We have to decide these on case-by-case basis. My question earlier has this been done before where we have made a decision different from the code, the answer was to the recollection, no. So I think generally, I mean I haven't seen us go outside of it since I've been on the board. But I think our new board

member makes a good point about needing to have the process be as uniform and as fair as possible. And I think the board member before you, blanking on his name right now, said the same thing. Keith, that's right, Keith, all right I'm forgetting. Keith made the same point, in fact asked for you know, some further information about how we do the process, some training I think kind of getting to the point where we'd like to make a few more things standardized so we all are kind of viewing these from the most fair and equitable platforms. So I think your point about that's well taken. Because sometimes I think we're put in very difficult positions when we sort of have to sift through medical information, and weigh things that, you know, none of us are doctors up here. So the more I think standardized we can make it the better. So I agree with your check-box idea but I think today in terms of the information we're looking at, I just for me, the data isn't there. I'm not hearing the facts, that show me that this happened while he was working, and then the additional Muni code is just an additional fact, and it's not the main thing, it's the whole cake.

>> David Bacigalupi: Mr. Boyle did you have something to add?

>> Only to address Mr. Johnson's concern about an industrial relationship. Dr. Ing, the agreed medical examiner, which I believe Dr. Das has previously commented he agrees upon, indicated that 90% of his coronary artery disease is related to work without the presumption.

>> David Bacigalupi: Okay, thank you.

>> Mollie or Russ, if the labor organizations do have this changed, because it does feel very harsh and unfair, can this individual come back retro-- come before the board and have it say it doesn't get approved today can they come back retroactive and change it or is he just stuck with the decision that's today?

>> Mollie I think you could get back. I think it's partly a function of how it's drafted and the retroactive date. You could say application submit on or after X, the new rules apply to and make sure X is the day after officer Quayle's application. Obviously those are policy calls.

>> Mollie Dent: I would agree if the code -- you know, that the code can state what date the ordinance is effective. And can state that it applies to applications filed after that date. I suppose it could even address reapplications.

>> It's no doubt it's work related. We have it from the medical. It's just the ordinance that's holding this up.

>> David Bacigalupi: Mollie, they could put in the -- if the labor groups and the city get together to change the ordinance, and not make it so difficult or harsh, they could include language that would allow for anybody that has applied, and been subjected to this, within the last few years, to be able to reapply, correct? Could they put that into the ordinance?

>> Mollie Dent: I think you're asking -- excuse me -- if the ordinance could allow someone who is application has been previously rejected, to re-apply on a different basis, then -- in other words, it would have --

>> David Bacigalupi: If the language of the code precludes somebody from having -- having their application approved, you know, obviously retired officer Quayle is in this position. If that happens, and the groups, the bargaining units and the city agree that this is a mistaken language, this has happened in the past, something's come out in the code that was interpreted different than what the intention was, could they include language to give an applicant a chance to come back?

>> Mollie, my view would be yes you could, and a drafting assignment to do it clearly. We have window periods all throughout the code. Lots of window periods. The window period we would have here, would perhaps depending on what the parties decide, be limited to situations where I guess we'd have to cover both, submit an application denied or failed to submit an application because the disability did not manifest itself during employment and/or the applicant applied after the one-year, and then weed have to refine that.

>> Mollie Dent: What I'm hesitant to -- I'm really hesitant to speculate on how the code could be amended at this point. It could be amended, you could have window periods. I'm really hesitant to speculate on the substance of

that amendment though. Because we do have some tax issues with how you structure disability retirements and entitlement to disability retirements. So I'm -- I'm not going to speculate on what kind of code amendment folks might be able to come up with. That's really my problem. Because this particular -- you've got different things going on here. You've got the question of whether the disability actually happened while the person weighs -- whether they were disabled. I'm not talking about whether he did or didn't have hypertension but whether or not he was disabled. You've got that going on, as well as the one-year time frame. So I'm having difficulty really -- I would want to go -- I would -- we would have to go back and research really what you could do about those two provisions. That's I think my point.

>> David Bacigalupi: Okay, thank you Mollie. Any other questions? Okay, hearing no further discussion the motion is to deny the application. Hearing no further discussion, all in favor, all opposed, motion carries. We have three ayes and two noes.

>> Mollie Dent: I was just looking at the governance ordinance. Because the question arises as to whether or not you are going to be able to take action on this one because the vote requirement of course is for three votes, under the current ordinance it would be four votes under the governance ordinance. And I believe -- I don't think the governance ordinance has gone into effect yet.

>> So if I understand, we just voted to not denial, we have not voted to accept --

>> Mollie Dent: To grant, right. So --

>> David Bacigalupi: So the motion fails as I understand it, based on the current governance of this board.

>> Mollie Dent: Oh, this motion fails for sure.

>> David Bacigalupi: Okay, so I can entertain another motion. The motion's already been denied. I'm willing to accept another motion.

>> Can I make a motion that we just pull this, right today? Until we resolve this ordinance issue?

>> David Bacigalupi: Do I have a second?

>> If I can make a friendly amendment maybe that we could defer this, if you're willing to keep your application in. To the point that we could research what our past practice has been since the implementation of the one-year rule to be sure we're being consistent and fair and see what that gives us as well, if there's a need for any input. We have an ordinance so we don't need input as to whether the bargaining groups thought that's what it was intended to say the but to make sure we're being consistent.

>> That's fine.

>> David Bacigalupi: To the amended motion is that as well --

>> Can I second my friendly amendment? Yes.

>> David Bacigalupi: Okay, I have a motion and second. Mollie?

>> Mollie Dent: I just wanted to make sure are we continuing the hearing again so that we know that we're keeping the testimony that's been presented so far as part of the hearing? Thank you.

>> David Bacigalupi: Okay.

>> That's fine with us.

>> David Bacigalupi: So we have a motion and second. Rose.

>> Rose Herrera: No, I appreciate the second motion. Because I think it is really important that we look at being consistent. So I'd be very interested in finding out who if results are of this research.

>> Scott Johnson: Mr. Chair, can we get clarification of the motion?

>> Want me to attempt to reword? That we continue the review of his case, pending the staff review of our approval and rejection of prior disability claims, since the implementation of the one-year rule, specific to whether anyone has been denied or allowed to file their claim in violation of that one-year rule, or without regard to that one-year rule.

>> David Bacigalupi: Okay.

>> Did I kind of get that right? I'm sorry.

>> David Bacigalupi: If there are no other questions, all in favor, say aye, all opposed, the motion carries. John, your application will be deferred until we get that report back.

>> Thank you.

>> David Bacigalupi: It would be nice to have something back from the labor groups as far as what was being thought of when that ordinance was written, as well, and the city and labor groups, maybe we can get that too as a part of that. Item 3C. It's an application from retired Police Lieutenant Bruce Toney, it's a request for change in status from service to service-connected disability effective January 13th, 2007. 27.55 years of service. This was deferred from August 5th, 2010, at the applicant's request and for the record, retired police lieutenant Bruce Toney is in the audience and represented by Mr. Jim Jeffers. Donna.

>> Hands wrist heart and high blood pressure issues and cancer. He is currently 57 years old with 25.55 years of service. Medical reports are listed in your packet. His work restrictions are, he should avoid forceful gripping, he

should avoid altercations as well as pursuing and apprehending suspects. He is currently service retired effective 1-13-07. At the time of separation at the time of application he was on modified duty and there's no permanent modified duty available.

>> David Bacigalupi: Okay. Dr. Das, do you have anything to add to the medical reports in our file?

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

>> David Bacigalupi: Okay, Mr. Jeffers did you want to --

>> Thank you. Bruce Toney was a well-meaning, hard-working cop. He got along with everyone, was a team worker. Some people would describe him as a cop's cop. He has three conditions here before you. One dealing with his hands and wrists, the other with his prostate cancer and the other with his heart. All three conditions existed at the time he left. His heart condition was discovered as part of the exit program offered by the city for retiring officers.

>> David Bacigalupi: Offered by the retirement board.

>> Thank you. Dr. Shaw, the heart doctor, the treating doctor, says he should not be a police officer. Dr. Duncan says that 90% of his heart condition is work related. As a police officer he works with his hands. He's limited as far as his ability to grab, grasp and pull. Dr. Stanford, his cancer doctor has said that he should not be a police officer as a consequence of his urinary problems. Woo would request that his application be granted.

>> David Bacigalupi: Okay. Questions by the board? Dr. Das, I have a question. The information on the heart, you don't show any restrictions other than the two that I see listed on page 5 of the report. It seems like -- did you get the information on the other medical conditions?

>> Dr. Das: I think there's overlap between the cancer restrictions and the heart restrictions. And if you refer -- the restrictions once again would get into the preclusionary versus prophylactic restrictions. But with Mr. Toney his doctor provided prophylactic restrictions and I went ahead and used them as a basis so he should avoid altercations as well as pursuing and apprehended suspects. I believe that that incorporates the hypertension -- the cardiovascular. Or is that --

>> David Bacigalupi: Okay, thank you. Okay. Questions by the board? Rose? Oh. Okay, I'll entertain a motion if there's no further questions.

>> Rose Herrera: Move approval.

>> Second.

>> David Bacigalupi: Any further discussion? Hearing no discussion, all in favor, all opposed, motion carries. Bruce, good luck to you. It was a good career working with you, for all the years we worked together and stuff.

>> Likewise.

>> David Bacigalupi: Okay, item number 3D, it's an application from retired arson investigator, Jeffrey Weber, request for change of status from service to service connected disability effective January 10, 29, with 21.71 years of service. This also was deferred from August 5th, 2010 at the applicant's request. And for the record retired arson investigator Jeff Weber is in the audience and represented by Mr. Jeffers. Donna.

>> Arson investigator Jeffrey Weber is requesting a change in status to service connected disability based on heart neck and back, he's 56 years old with 27.71 years of service. Medical reports are listed in your packet. Work restrictions are he should avoid strenuous physical exertion, he should avoid frequent bending and stooping. He

is currently service retired effective 1-10-09. At the time of separation and at the time of application he was on full duty based on a memo from the department. And there's no permanent modified duty available.

>> David Bacigalupi: Thank you, Donna. Dr. Das, do you have any information to add to the medical reports in the file?

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

>> David Bacigalupi: Thank you. Mr. Jeffers, would you go ahead.

>> Thank you. I believe Dr. Das has correctly described Mr. Weber's restrictions as they are described by his treating physician. Dr. Bataglia, his heart doctor, says that he must avoid emotional and physical stress as well as physical exertion. Dr. McCreash, his treating doctor, provides restrictions as heavy lifting, repeated bending and stooping, no lifting over 30 pounds. All these restrictions would bar him from working as an arson investigator. We request that his application be denied and further, I think there was a mistake earlier. He was on modified duty at the time of his separation.

>> David Bacigalupi: Okay, thank you. On. Any questions by the board? Rose.

>> Rose Herrera: I just wanted to clarify that. So he was on modified duty, as I think I heard earlier they said he wasn't.

>> That's correct, he was.

>> Rose Herrera: Great, move approval.

>> David Bacigalupi: Do we have a second?

>> Second.

>> David Bacigalupi: We have a motion and second. Further discussion? Rose did you or did I just miss it? Okay. Hearing no further discussion, all in favor, all opposed, motion carries. Good luck to you Jeff.

>> Thank you.

>> David Bacigalupi: Item number 4, deferred vested. Number 4A is a deferred vested application by -- it says retired police officer. Is that -- the application, or the -- I'm just noticing -- I didn't notice that earlier, but it says retired police officer, I think he was -- I think he resigned, as I recall. Alfred S. Duran, from the police department, effective September 6th, 2010. With 11.77 years of service. There's a application on file. I'll entertain a motion. I have a motion and second to approve the application. Any further discussion? Hearing no further discussion all in favor, all opposed, motion carries. Unfortunately next part of our agenda, death notifications. Notification of the death of Harold R. bounds, passed away on June 2nd some 2010, survivorship benefits to Caren B. bounds his spouse. Note and filed. Notification of death of William J. brown, retired police captain, retired January 17th, 1981. Died July 25, 2010. Survivorship benefits going to Marilyn Brown, his spouse. Note and filed. Item number 7, notification of the death of retired police sergeant Larry Dar, retired August 5th, 1992, died April 29, 2010. No survivorship benefits for note and file. Item number 8, notification of the death of James C. elder, retired fire engineer. Retired July 7, 1992, died July 9, 2010. No survivorship benefits, that will be note and filed. 9, notification of death of Charles Frates, retired firefighter, retired 11-2-82, died 8-17-10. Survivorship benefits to Renata Frates his spouse note and filed. 10, notification of the death of John Jacob, Sr., active police officer, passed away August 19th, 2010. Survivorship benefits to Diana Jacob his spouse and his children, John Jr, Nora, Delilah Jacob his children. Number 11, notification of the death of Sean Leslie, retired firefighter, retired March 1, 1972. Died 8-16-10. No survivorship benefits. Notification of the death of Jan Ozga, retired five-9-78, died August 3, 2010. No survivorship benefits. That will be note and filed. Notification of the death of Gary parks, retired fire engineer, retired 9-2-99, died 7-15-10, survivorship benefits to Joni parks, his spouse. We'll note and file that one. 14, notification of the death of Johnny L. periman, retired police sergeant, retired January 13, 1997, died June 18, 2010. No survivorship benefits. Note and filed. 15, notification of the death of De Wit Tranberg, retired

fire engineer, he retired March 3rd, 1995, passed away July 18th of 2010. Survivorship benefits to Nikki Tranberg, his spouse. And that will be note and file. And a very, very full part of the agenda I don't like to see. I'd request a moment of silence for the death of these dedicated police officers and firefighters. [Moment of silence.]

>> David Bacigalupi: Thank you. Okay, new business. Item number 16, discussion and action regarding change and pay reporting for labor code section 4850 disability payments and the impact on the retirement fund. And you have a memo in your packet that was issued. Issued to all the active employees. And since -- since that packet was issued, I received a copy of an e-mail -- well, the final one coming to the local 230's attorney, Mr. Chris Platten, from Alex Gurza from the city that there's meetings coming up on this. So how do we want to start the conversation on this? For those that aren't aware, what led up to this being put on the agenda was a report that there was an interpretation -- I'm guessing since this shows finance payroll Scott, that it was an interpretation by payroll -- that said that effective January 10th, retirement -- or disability time for an injured firefighter or police officer was not going to be pensionable. And that -- and through different sources, some of the comments made were that pension time will continue to grow, but no pension contributions will be put in. Which would create a terrible unfunded liability for the fund. And then, I'm not sure if there's been any further paperwork on this. Scott, maybe you can kind of clue us is in on what's going on here.

>> Scott Johnson: Mr. Chair, thank you. Scott Johnson. I guess I'll put my director of finance hat on here now. Let me clarify a couple of things. It is my understanding there was a change in the law. So with that change in the law we had to go back and look at the way that we were taking contributions out from paychecks for those that were receiving disability payments subject to section 4850. The finance department met with retirement staff. OER staff, and the city attorney's office. And based on that collaboration they all reviewed this memo prior to its being distributed. The finance department we actually mailed this notice to the individual -- all active city employees that were subject to this new law. So what we're doing here is we're basically implementing what's required, regarding the law. There is still some discussion with the attorney's office to your point in regards to whether or not those that are on 4850 will continue to receive service credit. But we have been advised to discontinue making contributions to the retirement plan for those folks that are receiving funds under section

4850, because it's a tax-deferred benefit now. And we were told that it's not pensionable. So the city attorney's office can probably speak more about it from a legal interpretation.

>> David Bacigalupi: Mollie shaking her head about what you're saying. Is there a written opinion about this Mollie?

>> Mollie Dent: No, I'm not -- I have not done a written opinion on this. That's how I'm going to state this. What the -- but the labor -- if you look at the letter that's in front of you, the labor code section was enacted, became effective January 1st of 2010. This particular provision in 4850. The issue though is that under our code, section 336.020.3 which is also sited in the letter, the definition of compensation excludes workers compensation payments. And that's just our code. And that is -- it is my understanding that that's what the labor groups and OER are going to be getting together to talk about in the very near future is whether or not there needs to be some modification to our code, now, to follow onto the labor code modification, so that we can go back to treating these payments the way we treated them before. So I -- I believe when you asked at the beginning how do we want to handle this, I think we want to probably let those parties have their discussions.

>> David Bacigalupi: Okay thanks Molly. You danced around that -- you didn't write an opinion. Did somebody write an opinion or sit something that -- do we need to get an opinion from our conflicts counsel? Is this a conflict for you?

>> Mollie Dent: I don't know if you need an opinion from your conflicts counsel or not. I mean it depends I suppose on -- but that's up to you if you want to ask Russ to write an opinion for you, you can ask Russ to write an opinion for you. If you want us to write -- if you want our office to write a public opinion you can ask us to write a public opinion. You can handle that however you want.

>> David Bacigalupi: My concern is while this is being discussed what's happening to the fund but I guess the labor lawyers will work that out.

>> Mollie Dent: My understanding of the facts are that the contributions are not being made and that because the contributions and the service credits are tied within the payroll system the service isn't being credited right now. But again that's just my understanding based on the way the system works.

>> David Bacigalupi: Okay, Sean.

>> Sean Kaldor: So I guess there's a few things that go on with this. The first I heard about this as retirement board member is one of the employees of the fire department handed me the memo they received in the mail saying that their disability doesn't count. I have since been assaulted or assailed, I should say, by multiple members, people who are months away from retirement, being given new estimates of their years of service and seeing that they're on a 50% disability right now, so they're only being forecasted to receive 50% disability going forward. And being given the realistic precaution that that could go back to January, and you could lose all that service time. So they don't know, can I retire, can I not retire? How much am I getting? I feel embarrassed that I was kind of -- this should have been someplace in a board meeting somewhere we should have been informed and discussed and made sure we had a good implementation process like you said right now we're not giving service credit but we are taking away the dollar amount. But that shouldn't be happening if that's not the decision if that's not the agreement. And then kind of getting back to how this all came out, kind of expect we sat down and figuring out how to implement it, a discussion about why this happened, who wrote up an analysis saying hey there is a law change here is how the law change impacts us. I assume that all was done around we should be able to sit there and look at it. And just understand, it could be totally logical, but we were without that information. We were just handed the rule saying we looked at the law and now we have to -- this is nondeductible. Even looking at it myself it doesn't look like the employee should be charged a deduction, but it shouldn't say there is no contributions maybe made. We're without information and that's very uncomfortable.

>> Mollie Dent: I appreciate that. And if you all want to have more information, on labor code section 4850, I think Russ and I can both provide it. I do think that it does go back to the language, though, that's in our code on compensation. And it's very old -- that language excluding the workers comp payments is very old so it didn't contemplate the amendment to labor code section 4850. And it is something that can be dealt with by the

city. And that's my understanding, that the bargaining units are aware now of the issue and are going to try to deal with it.

>> Sean Kaldor: Just to finish on that thinking real quick. It is exactly that, it is not just 4850, but it's the interaction between that and our MOAs and city charters and municipal code. How does that impact us, and are we making assumptions about how that impacts us, and could we have sat down proactively with the different bargaining groups and relations and kind of worked out saying this is how we see it and pull the different opinions together and worked through that. I'm not putting that all on you, but I feel we have to sort out now, none of that, we have to sort that out now, there is a meeting coming up, I don't know why we're implementing that change without having those issues resolved.

>> Mollie Dent: Well it goes back to the fact that the code reads the way the code reads now. I mean the code reads that the workers comp payments are not part of compensation and then that flows through into the contribution sections of the code. So that's why it's being implemented. When 4850 and the reason its going back to the January 1st date is because that's when 4850 became in effect. So I -- it -- I don't know the dates of the meetings but I know they're desperately trying to set them up.

>> Sean Kaldor: We've always had disability and we've had workers compensation. When somebody goes out of disability right now, they're paid out of the general financial fund. And after a year they switch over to workers compensation. So it seems like workers compensation met a different definition, and now we're saying it --

>> Mollie Dent: Right, when the labor code was changed to make that first year of payments mandatory payments, they became workers compensation payments is basically the -- and so it was an unforeseen consequence I guess of the amendment of labor code 4850. But it's one that we can deal with within the context of our code if we want to.

>> Sean Kaldor: So my last follow-on to that, can we get the documents that kind of went through that logical analysis and reached that conclusion? Were there meetings notes that happened or --

>> Mollie Dent: I won't be able to give you things that our office did on a confidential basis previously but if you want an opinion, if this board wants a public opinion from me or Russ they can ask for it.

>> David Bacigalupi: That was one of the things that I was looking for coming into this meeting but I'm also a recipient of an e-mail from Alex Gurza saying that meetings are already set up with the two labor attorneys. And fortunately they're both here. So since they're going to be part of the bargaining process, and this board is not, for the interpretation of this, I just think it is an insult to this board that there was no notification made to the board when this thing was implemented. Kind of reminds me of the FLSA changes and payments and withdraw of contributions and it was just done without any notification of this board and people come to us and ask us what's going on and we don't have an answer for them. Gentlemen, just one second. Rose did you have something to add?

>> Rose Herrera: Yes, I definitely think we should be getting all the information and stuff that means an opinion from the attorney maybe, I might be asking for that but I want to hear what the attorneys have to say here. At least to understand what's the potential impact to the fund if, later on, this decision, muni code changes? So, you know, how would that impact us financially? We're going to stop having contributions, I guess, that's what I'm saying here, because I understand we're going to comply with Muni code as it exists. But if things change and we decide -- that situation changes, then is there going to be an unfunded situation, or are we going to go back and get those contributions, and what would be that impact, I guess? I guess I'd like to know the potential time line and what potential impacts, and maybe that would be the information I'd want in the memo to us.

>> Mollie Dent: I think in part, it depends on what -- what is agreed to in terms of a municipal code change. The situation that existed before January 1st of this year was that, for the -- what was these contributions were being taken out, and service credit was being given. So if -- if the intent of everyone is that we have a seamless continuance of that, that we basically decide that we did not intend for the amendment of the labor code to affect our practices, then we would just return to the status quo and to what we were doing in December. And so in terms of your contributions and the impact on the plan if that was what was done it would be just what it was

before. If something else other than that was done it might have an impact on the plan. If you had a situation where contributions weren't being made but service credit was being given that could have an impact on the plan. If you have a situation where contributions aren't being made and service credits aren't being granted, that would be different, it would have a different impact. Does that answer your questions?

>> David Bacigalupi: Russ, I will get to you in a minute. Gentlemen, would you like to address the board?

>> Rose Herrera: So we're not doing that now with what we're proposing? The memo here that we're going to stop, we're going to refund, I just want to know what that impact, if that has any impact on the fund then? The proposal -- I guess Scott could answer.

>> Scott Johnson: Well, the direction that we were given from the parties I mentioned earlier, because obviously we don't work in a vacuum. So just for clarification of this board you know, it was a collaborative effort, and this memo, that was released by payroll, was reviewed by numerous departments you know within the city. And we were advised you know that it was required per the current Muni code and per the law that we had to do it. I think the challenge here is that with this change in labor code now these payments are tax deferred. And when you make contributions to retirement plans, those contributions are tax-deferred. And so I would imagine that, if the attorneys give an opinion they'll also include in there tax counsel's opinion in regards to IRS requirements for payroll reporting and what we're allowed to do. Because there would be a conflict in taking tax deferred contributions, but also with those -- that compensation being subject to being tax deferred or not nontaxable. You can't have it both ways. We're also applying it consistent with folks cannot make contributions to their deferred compensation plan from 4850 compensation because it's already tax deferred by nature based on the change in the labor code. So we're at this point, we're not taking out the contributions, we're not making contributions, for 4850 payments pursuant to the code, pursuant to the labor code, and we will continue to work with the city attorney's office, to continue to advise us on the proper treatment. Because we don't want to get into a situation where we're subject to an IRS audit in regards to inappropriate payroll reporting because then we're subject to other fines and penalties.

>> David Bacigalupi: John.

>> Chairman Bacigalupi, members of the retirement board, I'm John Tenant, general counsel for the San José Police Officers Association. I would just like to go through some history of this, and then my colleague, Chris Platten, the counsel for the firefighters union, will talk about next steps. So this issue, I think it arose back in 2003-2004, when I think a number of police officers and firefighters came to their unions and said, hey, our counterparts in PERS and other agencies, they can exclude from taxation their full year of disability payments under section 4850 of the labor code. Why the heck can't we do that? And if you read both the firefighters and the POA's MOU with the city, it talks about how a certain portion is paid in workers compensation payments, and the MOU does say workers compensation payments. I think this was representative Kaldor's point. And then there is a supplemental disability leave portion that is also added on to make up for the entire amount of salary for that year that one is off because of disability up to a year. We were told that there are various accountants, tax people if you will, say you can't deduct the whole amount. Why do our counterparts in PERS, why are they allowed to deduct the whole amount? We said we don't know. We will sponsor an ordinance to rectify things. So then councilpersons Dando and Cortese sponsored an ordinance that would have essentially defined the entire amount pay that one receives if one is off for an on-duty injury for that time. The San José analog, if you will, of 4850, that that would be considered workers compensation benefits pure and simple, and therefore there would be no problem with the tax man, it's excludable from incomes. The City Attorney at the time, Susan diVincenzi, in charge of this sort of issue, released an opinion dated December 15th, 2003, saying essentially can't do that, workers compensation that's the exclusive province -- I'm summarizing her opinion -- it's the exclusive province of the state legislature, got to go to the state legislature to make a change in the law. I had a number of conversations with Susan about this at the time, that's precisely what we did. We began to lobby the state legislature, we put forward our first effort in 2006 to essentially amend 4850 to include everybody. I had a conversation with Mollie Dent in July of '06 flagging we would be doing this. Nobody ever said, nobody's perfect here but nobody ever flagged hey by the way you're going to be screwing up the way we talk about workers compensation, retirement code. I would argue right now if this is really the interpretation, the MOUs and I quote from our MOU, it talks about the way it used to be. For the first 365 days of his or her disability leave of absence or for such portion of such 365 days as he she may be absent, he she shall be entitled to an amount of money

which, when added to the temporary disability compensation paid or payable to him for such period of time under the workers compensation provisions. In other words, this problem arguably existed under the prior way of doing business. Back to my history. In 2006, we sponsored legislation to amend 4850 pursuant to the sort of advice we were getting soto voce from the city attorney's office. We go and we do that, Governor Swarzenegger vetoes that bill for a different reason, and then the Police Officers Research Association of California takes up the cause on our and others behalf and amends the code that you now have before you as of January 1, 2010. So that is -- that's the history of this thing. This was all simply an intent to make sure that we, in San José, have the analog of what the vast majority of other police officers and firefighters receive and, that is, are to have up to a full year of disability earnings that they are paid because they were injured in the line of service for the public, that that should be excludable for taxable income but it should also clearly be included in terms of their service time. So I'm astounded by this result, one can easily imagine the City Attorney having rendered a similar opinion again under the existing MOU provisions. At least that two-thirds or the approximately whatever amount represents workers compensation payments, minus the supplemental disability leave portion. So that's the history of this thing. I know counsel platten has some comments as well.

>> Thank you, Mr. Chairman, members of the board, everything that Mr. Tenant, my friend, has said is absolutely accurate with respect to the history. I just want to point out a couple of things and the reason for my letter to the chairperson today. You now have a clear conflict situation. The sponsor of this plan the City of San José has told us not directly, they didn't send a memo to the board, they didn't send a memo to the POA. They didn't send a memo to local 230. They sent a note out to the actives saying we're no longer going to count particular time as service credit, we're not going to take contributions. That's a conflict now between the city and this plan. Because of that we urge you to engage your conflict counsel of counsel to become engaged and involved and issue an opinion with respect to this, number one. Number two, this is outrageous. This is outrageous. A memo goes out to the employees saying we're now interpreting the plan a different way and therefore we're not going to give you service credit or make the contribution in your behalf for a particular time? And because it is so outrageous, Mr. Gurza, upon receipt of my letter yesterday, immediately set a meeting for next week on the 9th between myself, representatives of local 230, Mr. Tenant, representatives of POA, to resolve what Mr. Tenant has accurately described historically. If it is a problem, it was preexisting by virtue of the way we've treated disability leave prior

to this point in time. So I think the board and the plan is in conflict position with the city right now over the interpretation. And I don't think that the city has the authority or the right to simply declare to the employees, bypassing the collective bargaining representatives, bypassing this board, that we're no longer going to make the contributions that we've been making for 40 years under the plan. So all we're asking at this point Mr. Chairman, is to inform you, one, that we will be meeting next week with Mr. Gurza to see if we can resolve this thing, as it should have been done before any decision was issued by the city. And I will be very interested to learn by the way when the recommendations were made on this. Because if it goes back several months, I will be chagrined at a minimum, deeply disappointed at a maximum, that the matter wasn't brought to the bargaining parties at that point in time. And number two, we ask that the board engage conflicts counsel so that we are ensured that we are going to look at this very carefully. Because if there are some legitimate tax concerns -- and I'm not suggesting there aren't, then we need to collaboratively work towards that to resolving issues that we think may exist. But as of this moment, as I stand before you, local 230, and I think I can speak for Mr. Tenant for the POA on this, no one has received any explication other than the memo that was given to the individual employees as to why this decision has been made by the city.

>> David Bacigalupi: Thank you. Mollie, would you like to respond to that?

>> Mollie Dent: I know that Mr. Tenant probably misspoke when he said he spoke to me in 2006. You probably met Ms. diVincenzi. Because --

>> No, I did mean you. She was away, and I spoke with you. I can give you the date of the phone call --

>> Mollie Dent: Wow, did I do it that long ago?

>> You did.

>> Mollie Dent: I don't even remember being here in 2006. I'm sorry.

>> July 18, 206 is the date.

>> Mollie: Wow, I didn't even know I'd done it back then when Susan was out.

>> Yes.

>> Mollie Dent: So -- but with respect to the conversation about the need to amend labor code section 4850, we still believe that the amendment to labor code 4850 was needed. We do think state legislation was needed. I -- with respect to the issue of whether our code also needs to be amended, I don't think anybody looked at it at that time. I think the focus at that point was on whether or not we could simply declare something to be workers compensation. And we don't think we can declare something to be workers compensation but our code uses the word workers compensation so it is something that we have to deal with. Scott has certainly raised an issue with making sure that whatever we do going forward works on a tax basis for the finance department, in terms of their function. But we will also need to make sure that it works on a tax basis for the retirement plan, too. So to the extent that the board is going to ask for legal opinion from Russ or from me or in anybody, I would urge you to make sure that we do coordinate it with our tax counsel.

>> David Bacigalupi: I think that's good advice. Russ, you're next and quite honestly Mollie with some of the information you've talked about there's no -- there's opinions that have been discussed that you can't bring to this board. I think it's pretty clear cut this is one of the instances that we have a conflict. Russ, go ahead, you go next and I'll speak after.

>> Just thought you probably already got a glimmer -- at least I've gotten a glimmer now -- of the complexity of this issue going back a number of years involving a number of different sort of basis of legal raw materials, whether it's the relevant MOUs, the amendment to 4850, but obviously lots of other things, including past practice under this section as well as the section of the code as well as other items. I -- and the first thing obviously, I mean I guess the very first thing is, that the board and it probably goes without saying but it doesn't hurt to make it formal, bringing the parties up to speed. Hopefully, one meeting will resolve that, but that may not always be the

case. That process may take a number of meetings. Obviously if resolution is achieved there that's satisfactory to the bargaining parties that resolution may also be satisfactory to the board and you don't have to expend money on me. But -- and the board may want to continue this for a month just to give the bargaining party a chance to do that. But to the degree you want a legal opinion, either by -- from me or from Mollie or both, separately, I think you'll want to ask all the relevant parties to provide all the relevant information as soon as possible to the board. That would include a request to local 230 and the POA to provide any information they have including if they have handed you a copy much Susan's what was it '03 memo. There may be other discussions on the city side, including that the retirement staff are involved in. And the board may also, to the degree any legal research was done, that the city attorney's office on its own can't provide, the board may wish to request the holder of the attorney client privilege to consider waiving that privilege. It's really better to have everybody have everything, including in terms of legal analysis. Because that will just help get to a better result. You know, we're not trying to play gamesmanship or oneupsmanship. We're trying to just get --

>> David Bacigalupi: No, this board's just trying to protect the fund. And what are we operating on here?

>> But you're trying to find the best answer, and hopefully everyone will agree that it's the best answer. Interpreting provisions of the code are -- depending on the language, are not always that easy. They're not always that apparent. There's often, at least in my experience, room for doubt. There's room for more than one reasonable interpretation, and maybe we'll encounter that here. And just thinking that through is one reason why I hope the bargaining parties can resolve it. Because my hunch is there's going to be legal ambiguity here, with more than one interpretation of this. And fine and dandy, if that's where we have to go. But then we'll just be faced with confusion, not maybe as bad as some of our disability retirement applications and where you have to resolve that kind of confusion in medical evidence, but they will be awkward legal issues that will be difficult for the board to deal with. And that doesn't mean I think you still have the responsibility to deal with them, difficult or not. But to the degree the bargaining units can pull the rabbit out of the hat, on this difficult issue.

>> David Bacigalupi: My concern is timing involved too. This could go into long term negotiation and what's the impact on the fund during that process? How does the fund protect itself and stay whole?

>> If I may Mr. Chairman, the city has now informed employees they are not going to take contributions out of employees who are on workers compensation disability. I think Mr. Richeda is correct generally in his recitation in terms of what would be nice to happen would be perfect if everybody shared the information, and I'm all for that. Here's the unique problem that confronts the plan at this instant, which is you're not getting contributions which heretofore you've been getting, one. Two, these employees are on disability. They're not going to be taking the contributions out of their paychecks. How do we going to deal with that, if we resolve this one month, two months, six months down the road? How are we now going to get the contributions out of the employees?

>> David Bacigalupi: Yeah, how are we going to get that money?

>> How are you going to get the money -- how are you going to get the money out of the city and their contributions? You've lost investment growth on that you've lost interest growth on that. I mean it's a disaster. It seems to me that that calls for -- and I hate to turn it back to Mr. Richeda -- it calls for conflict counsel to look at that issue independently now, because it's a matter of urgency.

>> David Bacigalupi: And that's true. I mean, every day that goes by that's one of the things we talk about is investment losses or gains. I mean it's just, how do you make the system whole again? It's so much easier if all this had happened before it was implemented and just done. Scott, did you leave your light on?

>> Scott Johnson: Yes. I just wanted to make a clarification. The memo from payroll does not speak of service time credit. And when this memo went out, Mr. Gurza did call me to definitely to inform me that there were discussions that were going to be taking place with the bargaining group along with the city attorney's office, in regards to the issue of service credit and clearly, as a board member, you know, there is the question that is raised is, well, this creates, if we're not taking contributions not paying contributions and there's going to be service credit related to this, who pays for that unfunded liability that's being created. But the challenge, unfortunately, that we have putting back my finance hat on is payroll, we're forced to comply with the law. The law is what it is currently today -- well, actually as of January 1st. And according to the advice from attorneys that we

cannot, you know, take the contributions, we cannot make the contributions. So I'm -- I'm very interested in getting this resolved as soon as possible.

>> David Bacigalupi: Okay Scott thank you. Rose then Sean.

>> Rose Herrera: Yeah, I think it's clear there's a conflict here. As poor Scott is having to put one hat on and put the other hat on. So I definitely think we need some legal help, the board does. And that was my original question, maybe I didn't ask it clearly enough, is just exactly the question that's been raced now. What happens to the fund if we create this unfunded liability? It seems clear to me then that the issue -- I'm not an attorney. One issue that's being brought up here is the tax implications on the practical basis for the city. But it sounds like we're going towards wanting to continue to fund and count for service credit people on disability. And that would be counted, in that we would want those contributions, it sounds like it's going to end up going in that direction. How can we plan for this so we don't end up in a difficult position for the fund? And I agree with the comments about sharing informing and all that but I do think that we need some legal opinion here to resolve that problem. So I don't know if we need a motion or what we need here but so I make a motion that we do engage whatever appropriate legal assistance here in terms of resolving this conflict and that we also definitely get some tax representation as well.

>> David Bacigalupi: I have a motion, and a second. Would -- can I also ask the maker of the motion, to include in their motion, asking the city attorney's office if they would waive their conflict and be able to help us with this? I mean obviously --

>> I will certainly work with Mr. Richeda, obviously, and I will work with the -- I believe we're going to be probably part of the meeting --

>> Mayor Reed: I was thinking more than working with, because I think we've established it as a conflict. But I think there's -- you've raised an issue of attorney-client privilege, I mean, if the city would waive that, that would help Russ and us understand why the finance department issued the memo, and how it came about, and what was discussed.

>> Mollie Dent: Our office can't waive the attorney-client privilege, but I can certain explain to Mr. Richeda the rationale behind the thinking that the current 4850 pay is a form of -- is workers compensation. I can certainly do that, and I would -- we have -- our office has the -- has the contract with tax counsel. So the plan's tax counsel hasn't been consulted on that as all. So we will consult with the plan's tax counsel if the motion passes, and Mr. Richeda is always in all of those calls with me with tax counsel.

>> David Bacigalupi: Okay, thanks, Mollie.

>> Mr. Chair, if I may, remember the holder -- attorney cannot waive the attorney-client privilege. The holder of the privilege can waive the privilege. So I would suggest, depending on your inclination, that if you wish to see whatever is available that you ask Mollie or you ask staff to ask whoever, the holder, whoever the memo was done for, and ask if they'll waive the privilege. They may or may not, but it would certainly I think advance the analysis and respond to the urgency. If we could have as much that's already been done as opposed to starting from crash.

>> David Bacigalupi: Memo was done?

>> It might have been the manager, might have been the counsel, might have been the finance director. I personally don't know.

>> Rose Herrera: So what is appropriate, in terms of this motion, to ask of the holder of the --

>> That they release the memo.

>> Rose Herrera: That they release it, so I'll put that as part of my motion.

>> David Bacigalupi: Agreed to by the second?

>> Rose Herrera: And I also want to add that all information -- I guess we can't -- I would just like to say this in a motion, we need to get information to this board. It's a little disconcerting that it feels like we're the last to know about all this, yet we're responsible. I don't know how we could compel anybody to do that, but we --

>> I would also ask that the maker and the second clarify who's to do this. Right now, I think it said appropriate legal counsel and that always raises -- it could be -- depending on your understanding of the issue, and the conflict in it, it could be my office.

>> David Bacigalupi: I would ask the maker of the motion -- I think Rose started off that this is definitely a conflict. It's conflicts counsel.

>> Rose Herrera: It's a conflict, so it's the board's attorney.

>> David Bacigalupi: Mollie said she would work with you, but this is in your lap.

>> Mollie Dent: Yes, my understanding is you have asked Mr. Richeda to write an opinion. We write opinions too, we write opinions sometimes and we may write one.

>> David Bacigalupi: And it may be an opposing opinion --

>> Mollie Dent: And it may be that we both come up with the same answer, and he's the one -- and I don't write a separate opinion, it really --

>> David Bacigalupi: The direction of the motion is to conflict counsel.

>> Rose Herrera: To conflict counsel. Obviously we hope there is going to be collaboration and we work this. But I think we do need the opinion from the board's counsel.

>> David Bacigalupi: Sean you are next.

>> I mean, I just have to tell you, you know, just coming at this raw, without nothing anything, this 4850 time has been in the law for eons. The phrase in the Muni code has been in this code for eons, and for eons we have decided that the 4850 was in compensation. Now, I'm not sure that -- you know, again, I haven't been privy to everything that happened in the changes in the law.

>> David Bacigalupi: If I understand it right, San José just got included with the provisions of 4850 time. So eons of that code being there, it didn't impact us, because we had something similar but not the same.

>> So we had -- this, again, is the reinventing the wheel. Very good. That gives me the spoke.

>> David Bacigalupi: Sean.

>> Sean Kaldor: I see our role here as board members to, one piece is to protect the fund, ensure that it's not creating an unfunded liability. The other piece is to represent those members retired and active who are members of the plan to ensure their rights, and their interests, are being upheld. I support the measure. I think getting an outside opinion will be good for us. I know multiple members whose lives are on hold now with the current situation and the negotiations that they're looking to retire and they can't do that. So they literally can't decide whether to sell their house, whether to take their kids out of school, whether to leave, their lives are on hold so the quicker we can resolve this the better. Having an outside conflicts attorney would remove any appearance of any weight or sway or outside knowledge that all the members would feel good that someone from the outside came and gave us that opinion so I think that's a good way to go. I support having the letter, requesting -- we need to know who holds that privilege, the attorney-client privilege, but requesting them to waive that so we can see their thoughts behind it and have an open discussion about those thoughts. I think it's information good. And then finally the payments and the unfunded liability it creates, I understand we have authorized the city to make a lump sum payment, and I'm wondering if that lump sum payment already excludes any estimates of disabilities or if

that's just resolved at the true-up at the end of the year in which case there would already be a lump sum payment for all members and their anticipated wages for the year and the city's side of this contribution would still be basically happening. And I don't know to pose that question to.

>> David Bacigalupi: Thank you Sean. You know I'd also like to mention to Mr. Platten and Mr. Tenant, if you could keep us informed, obviously this all got implemented and nobody told the board. I would ask you to do better and keep us informed as much as you can.

>> We will go that Mr. Chairperson. And in addition, Mr. Tenant and I will forward to the board and to Mr. Richeda a summation of the history as we know it to be with respect to this issue so there's some factual record that's put before conflict counsel.

>> David Bacigalupi: And then, just for the record, your letter of August 31st, I have just received it, and the board has not yet seen it. After this meeting it will be distributed to the board, as well.

>> Thank you. If I may also ask, Mr. Chairman, apparently up until 60 days ago I was receiving the board packet by e-mail each month. That's been ceased. I'm wondering if -- whoever administratively I can ask to be put back on the list.

>> David Bacigalupi: We've had some staff changes and that could be the problem. But I'm sure we'll get that fixed.

>> I would echo that request.

>> David Bacigalupi: Really.

>> Yes, thank you.

>> David Bacigalupi: Okay. We have a motion and second on the floor, Scott.

>> Scott Johnson: Thank you. Because I was the seconder of the motion, I want to figure out if I have a conflict here. Because if I'm the holder of the confidential memo, if there is any, does that pose a conflict if I'm basically seconding a motion to say, waive, you know, the holder of the memo and I'm the holder of the memo that was issued to me.

>> Sean Kaldor: I can second the motion and remove any concern.

>> Scott Johnson: All right. So maybe I shouldn't be -- maybe I should recuse myself from this particular vote.

>> Mollie Dent: I might be -- it might be prudent for you to abstain on this vote.

>> Scott Johnson: Okay, thank you. And then the second point is just to make sure we're clear on the prefunding and the lump sum and the true up, we're not currently making because these are not considered pensionability earnings at this point there's no contributions being made on the employer or the city side. So it wouldn't be impacting the true up or the lump fund. So the employee and the employer, because they're considered nonpensionable compensation.

>> Sean Kaldor: If we estimate for the year that someone is going to go on disability the second half of the year, so I mean --

>> Scott Johnson: Yeah, we're only making contributions on pensionable earnings, so it wouldn't be part of the true-up. So I just want to make sure we all understand that. So it's on both sides that we're not making the contributions on. Thanks.

>> David Bacigalupi: Okay. Any other discussions on this?

>> Dave, I just wanted to state on the record from staff it's been represented on the record several times that we collaborated, that phrase was used. I just want you to know from the board, if you think we were holding back information from you, we participated and heard about this for the very first time in July, were told about this. Shortly after that time I wanted to put it on the agenda for the August meeting and was told by the city attorney's office that I could not because it was a confidential matter. So I'm not sure if that's considered collaboration or not. Scott's office sent us the letter that they were going to send to the members. It didn't mention anything about service credit instead of contributions, and so that was also a new issue that we're not aware of. I just wanted to say that for the record, because when it says we collaborated with retirement, it sounds like we knew about it all along and didn't tell you.

>> David Bacigalupi: Yeah, collaborated with, and then we handcuffed you and gagged you so you couldn't talk. Mollie, I don't understand that, I got to be honest, that doesn't sound right.

>> Sean Kaldor: They tell the staff something, but they can't tell us --

>> Mollie Dent: When we were asked about putting this on the board agenda in August, the finance department wasn't ready to do the memo yet. We said that as soon as this memo comes out, you need to let the board know. Because what the finance department was making its --

>> David Bacigalupi: Mollie, after the memo comes out let the board know, instead of before? That doesn't make sense.

>> Mollie Dent: You need to let -- the employees needed to be told what was going to happen. It was a decision that payroll needed to make. They -- payroll had to make a decision. So this was not out at the time of your last board meeting.

>> David Bacigalupi: I can't comment on that. That's -- it's -- we're going to do something. Then we're going to talk to the board.

>> Mollie Dent: There wasn't -- I can't stop staff from putting things on your agenda, take my word for it. There's lots of things on your agenda that I prefer were not on the agenda. I suggested to them I thought it would be better if there was a piece of paper for you to be looking at. So that's what they did, they put it on your agenda as soon as they got the paperwork from the finance department.

>> Mollie, do you or do you not attend the agenda sessions and do you or do you not have a very substantial say on every item and the wording of please Mollie.

>> Mollie Dent: Yes I do, and I don't believe this was ever on a draft agenda. I don't think it came up in agenda review.

>> Donna would you like to address that?

>> It did not come out in agenda review because the conversation happened before we were able to put out an agenda, that we could not put anything --

>> David Bacigalupi: It is very enlightening by this board that you're being told by the representative, our attorney of this board, to not bring something up to the board. And if this board decides not to address it at agenda or agenda review, that's one thing. But for you to be told, you know, all I can do is apologize. It's a terrible situation.

>> Mollie Dent: I did not tell anyone that they could not bring something up on the agenda. I said that an attorney-client -- that a document that was privileged, I couldn't -- that that -- that the person that wanted to release that did not have the ability to release that. That was what the conversation was around, was around attorney-client privilege. There was no piece -- so there was no paperwork to put before the board, before this memo came out. That's all.

>> David Bacigalupi: I think we've stranded off of the motion that's on the floor, and unfortunately, it brings out some really problems with the procedures, and the independence of this board, and the representation of this board. I'd like to get back to the motion. I have a list of speakers here is it in regards to the motion?

>> Yes.

>> David Bacigalupi: Okay. I have Russ next. And then Mollie then Sean then Rose.

>> I would like to speak after the motion if possible.

>> David Bacigalupi: Okay. Sean.

>> Sean Kaldor: It's been an interesting insight in this meeting hearing how we work in our relationship in the different departments in the city. What I'm hearing, though, is that it seems like the city has their privilege and are taking -- is it an adversarial position with certain information and releasing to us as they choose -- it makes me wonder if our conflicts decision should also be a privileged -- not an open or a public opinion, but a privileged opinion to us, and then we can sit and work through using our information to have the discussions with the city about how we think is the best way. I think that's a crazy way to go about things, but it seems where this is leading us. So my question to the motion is, would this be an open opinion, public opinion, or would this be privileged attorney-client conference -- confidential with us being the client?

>> My two cents is that it should not be. And the comment I was going to make, which is perhaps apropos, hopefully, is that I think we need some clarity on who or what are the participants who decide whether something's pensionable or comp or not. It is my understanding, and I think it is, however, a controversial opinion, not universally accepted, that this board administers the retirement provisions of the municipal code applicable to the Police and Fire system, and therefore the board makes the interpretation. Yes, they look to experts, their attorneys, to help them in coming to legal interpretations of the code. But it's ultimately the board's responsibility. Therefore I would have thought that you would have always been, at the minimum, a partner, and

perhaps, the lead partner, and perhaps the decision maker on this issue, rather than not even the tail on the dog. Obviously, other important municipal stakeholders disagree with my position. Because that is not what has happened here of course. It would be very good to get some clarity on that, not just for this issue, but on these kind of issues going forward. These come up periodically. They're always important. And I think we need to get as much clarity on the process for deciding them. And the board's role in that process as possible.

>> David Bacigalupi: Thanks Russ.

>> This should inherently be a public transparent process with all the stakeholders involved so with all respect to board member Kaldor --

>> David Bacigalupi: I agree with that as will, that's been the problem, the secret of things going on behind scenes and the implementation of things without exposure. I think the more exposure we get on this, more participants get involved. Maybe somebody, if this had been brought to this board, I'm not saying we're so bright, but maybe somebody on the board, one of our members, one of the labor groups might have said, wait a minute, isn't this going to cause a conflict here? And it could have been handled before all the action was taken, rather than just, you know, shooting the gun off and then trying to repair the damage afterwards. Rose, you're next.

>> Rose Herrera: I don't know if I have much more to add after all this discussion. I hope that we cannot make it more adversarial than it appears right now. I don't -- I would not like to see us withhold any information. I think that we want to get this thing resolved. And what I was going to add to the motion was just that we -- the sense of urgency, and our new board member mentioned, I mean we need to get this resolved because of its impact on members and figuring out whether they're going to retire and all that. I would add to the motion that this is urgent and we should get this resolved as soon as possible.

>> David Bacigalupi: And that's okay with the seconder, Sean?

>> Sean Kaldor: Yes.

>> David Bacigalupi: Next speaker is Scott.

>> Scott Johnson: I just want to add when we heard the chronology from the POA's attorney, this particular change in the law of the labor code, there was definitely intent going on for quite a number of years and I think it would be extremely helpful for this board that whoever is in charge of notifying the board of any changes in law that will affect retirement, then that should be brought forward. Because quite frankly, from an administrative perspective, we're forced to react to a law that went into place that we find out caught us off guard and then we have to implement it. I just think on this you know as we're collaborating that when people have information, new legislation, new laws that are going into effect, it's definitely better to learn about that before the fact rather than after the fact, and then we're having to react as opposed to being, you know, more proactive and responsive. So you know, I don't recall that we ever got a briefing on okay, this is the new law that's changing, 4850 now is going to be tax-deferred and therefore, what's the impact on the pension plan? So I think we need to just be more proactive and when laws are out there what's changing what's being proposed so that you know we can make sure we have that dashboard, I had a schedule, so a it really works better for us to collaborate in the future.

>> David Bacigalupi: The more information the better, I think you're right, you know.

>> Scott Johnson: Right, right.

>> David Bacigalupi: Okay, the motion -- okay, any other speakers? The motion as I understand it? Do you have notes on it?

>> Rose Herrera: Outside conflicts counsel.

>> David Bacigalupi: Outside conflicts counsel.

>> Rose Herrera: To also bring in our tax counsel as well.

>> Sean Kaldor: And request the waiving of the attorney-client privilege.

>> Rose Herrera: And request waiving of the privilege, and with a sense of urgency to get this done as soon as possible, with collaborating as much as we can.

>> David Bacigalupi: Any further discussion? Hearing no discussion, all in favor, all opposed, any opposed?

>> Scott Johnson: I think I'm recusing -- abstaining. Abstaining.

>> David Bacigalupi: I threw that out there. Old business, continued deferred items, item number 17. This has been continued from last month's meeting, it's a review and recommendation on ordinance to implement retirement board governance changes. A is amending section 2.08.130 of part 1 chapter 2.08 of title 2 of the San José municipal code to revise provisions for removal of retirement board members. And item B is amending part 12 of chapter 2.08 of time 2 and section 3 much 36.three 30 of part 3 of chapter 3.36 of the San José municipal code to revise the structure of the board of administration for the Police and Fire retirement plan, adopt minimum qualification criteria for public members of the board, revise provisions for compensation of board members and revise the definition of a board quorum. I guess this would go to you, Mollie.

>> Mollie Dent: Okay. You, I'm sorry it seems like the memo that came to you back in August, didn't get completely copied in your packet. But the revised draft ordinances that were adopted by council are included in your packet. The two issues that the board raised at the meeting last month were addressed by council and so the ordinance was adopted with I think the board had recommended. So at this point it's really for you just to report-back to the -- you can report-back to the council if you want but you don't have to report back to the council.

>> David Bacigalupi: It's already been implemented by the council?

>> Mollie Dent: It's already been implemented. If you didn't think we got what you were asking for, I guess you could put a report-back.

>> David Bacigalupi: I notice the two issues I was discussing last month were changed back, and so, you know, it's the pleasure of the board -- like I said the council has already adopted this so it's kind of moot what we do at this point. Rose.

>> Rose Herrera: Yeah, I believe I wrote a memo on it and led the effort to make sure that that did get through at city council.

>> Mollie Dent: Yes, it was Councilmember Herrera's memo that we made the revisions on.

>> David Bacigalupi: You had a handle on it and you knew what was agreed upon so thank you for correcting that. At this point unless there's a change from the board, since it's been adopted, note and file?

>> Sort of nickel and dime, page 8 and page 9 of the long ordinance -- I see aren't those -- it looks like Police and Fire on the respective pages are still deleted.

>> David Bacigalupi: Yes, it is deleted. It isn't still deleted, it was one of the issues.

>> No, no we want it undeleted.

>> David Bacigalupi: No as I spoke last month although I personally believe it to be that way that is not what was agreed upon and it's now correct. In other words all the retirees will vote for the police retiree and all the retirees will vote for the --

>> I apologize, I'm sorry.

>> David Bacigalupi: Okay, any other questions on that? All right, item number 18. Discussion and possible action on 415 (m) benefit replacement plan and we have three replacement subsections, regarding section 415 (m) replacement plan status, Police and Fire retirement board date May 27th, 2004, regarding section 415 M draft ordinance and (c), Police and Fire board minutes dated June 3rd, 2004, pages 8 and 9, documenting board's action on section 415 (m) draft ordinance. Who do you have?

>> We have folks from --

>> David Bacigalupi: Are you here for this item? Would you be able to address -- Alex isn't here.

>> Good morning, Gina Donnelly, employee relations. Actually I was here for another item, and Mark Danaj, the human resources director, will be here momentarily. If the question is in regards to how 415 is being complied with, and I think that that is what the board -- the process it is going through right now, in terms of the maximum benefit that can be provided. Outside of that really is not a retirement system issue, so much as it is supplemental benefit that will be provided by the city.

>> Mr. Chair.

>> David Bacigalupi: Go ahead.

>> I think the board has only sort of a secondary interest in that if a member does not receive the full benefit that the member was thought being promised to the member, it is possible and I've seen it in other context that the member will take legal action and the board will be one of the parties. Now, I think the board is not the main party but there will be that kind of impact. So the board even though the board wouldn't necessarily have anything to do with the 415 M replacement plan, the board might at least want to go on record urging that the parties consider it and that action or at least that appropriate action be considered by those parties because you'll be secondarily involved in any disputes.

>> David Bacigalupi: Okay, thanks, Russ. Sean, you're next.

>> Sean Kaldor: So in looking through this, I would see that we have members, not a lot, but maybe more with time that would exceed the 415 cap and are making complete contributions to their pension plan and are expecting a complete payment and then this rule becomes an issue for them. So one of it's communication to the members to make sure they realize that. Another piece for us would be to see if we need to adjust contributions as people get up in their income ranges. The third piece is whether or not this -- as I understand from reading ought this it's up to -- it's not a pension plan issue. It would be the -- the city would have to offer this as a supplemental compensation in reading the August 10th memo, understanding the City's financial situation there is no incentive to go that direction. Is that your understanding of the City's thought on incurring the extra cost of offering a 415 (m) plan that it's not something they want to offer at this time?

>> Certainly the major factor is the additional cost would be completely borne by the city. That is something we need to take into consideration in determining in the overall scope of the city's budget we could undertake.

>> David Bacigalupi: So Mollie.

>> Mollie Dent: When we come forward with the presentation on tax qualification in October, there will be a discussion of the 415 limits, and so you'll be able to see how the changes that were made, actually the ordinance that was adopted in June did make some changes that allow for higher -- allow for a more favorable calculation to be done for the employees for the limit. The numbers that are in this memo are out of date. The numbers that are in the 2004 memo are out of date. So we've made some -- we've already approved an ordinance, tax ordinance that you approved in June and went to council in June, did go some ways in helping us to be able to make a calculation that would be more favorable than it otherwise would have been for the employees. But you'll get a full discussion of this from your tax council.

>> David Bacigalupi: Even with the changes Molly do we have high-earning individuals paying into the plan, the full payment into the plan, but not able to receive what they think they're going to receive?

>> Mollie Dent: I don't -- I think we may and I think if we don't there may be people that would not be able to receive their cola in future years.

>> Sean Kaldor: If I could address that, we did have one member who came to two meetings bringing up this that this was a specific issue for them. I don't know how many but there's one.

>> David Bacigalupi: If they're contributing a percentage basis, expecting a certain amount, and they can't do that because of the tax code what happens to that money?

>> Mollie Dent: Well, the contribute -- the limits are different in the tax code for contributions versus for benefits. And that -- we can go into more depth in this in our tax presentation. But basically the internal revenue code has much higher limits for contributions. You can continue to take contributions to a much higher level. Because the tax code does not -- doesn't -- they don't contemplate what percentage you're going to be paying out. And you're not -- your contributions are really to the plan. They're not for the individual exactly. They're contributions to the plan as a whole, we don't have anybody that is -- I don't think we have anyone that is contributing more than they're required to contribute under our plan and they're not contributing more than they're allowed to contribute under the tax code.

>> David Bacigalupi: I wasn't thinking that but if I was one of those high-income individuals, I wasn't at my level. But expecting to get 75% based on this wage and I can't because I reached some tax code limitation which the plan doesn't allow, I'm not getting everything I'm paying for and the city is also paying into. I'm just worried about this board being subject to litigation for that.

>> Dave, the points that come to my mind, any employee hired after the date the 415 limits were either added to the charter and/or added to the code, they have no vested rights argument along the lines you're mentioning. You know, the contributions are in one section. The benefits are in another. They're not coordinated. You just pay whatever the code says you're going to pay and you get the benefits elsewhere in the code. One of the limits are

on the 415 limits, they are part of the code, part of the plan. They have been a part of plan for a long time though I'm not sure when. So anybody hired after that clearly has no vested rights argument. People hired after that daylight are perhaps in a different category. Obviously in general this impacts very few people. But it still impacts --

>> David Bacigalupi: Just worried about this board being sued.

>> I'm worried about it too. The obvious solution is 415M replacement plans. If the plan sponsor does not feel that's appropriate for, you know, its cost benefit analysis of it, so be it. But then that does raise the prospect of litigation.

>> David Bacigalupi: Would this board make better its legal position to protect itself should civil litigation come as a result of this if this board made a recommendation, we think there should be a 415 (m) plan and you know it's not our job to put one in but we refer it to the bargaining units and to the city saying we think you should have this. Now if somebody sues are you in a better legal position?

>> I don't think it will improve one way or another our position in litigation. What we'd have to think about at that point is some sort of equitable contribution cause of action against the city. Because remember, the bottom line is, we can't pay this out of the system. So we don't want a judgment from a superior court judge saying yes, you are going to pay it out of the system, and at the same time, knowing that that is a -- would violate our tax qualified status. But this is more in the realm of the litigation we hope will never have to occur and there may be other defenses to the plaintiff's action in any such litigation. But the easiest solution is a 415(m) replacement plan. That's why it was discussed way back in 2003. Unfortunately nothing ever happened. The board was trying to be proactive then and succeed. But I think the board should recommend it because I think this is an issue of penny wise pound foolish, on the other hand, you know, obviously, we understand the context in which this would have to be brought forward and the context at the present time could probably hardly be worse for enacting such a program. And I understand that. And perhaps litigation is the only vehicle under which such a program can be

implemented. But there is a problem. There is an easy solution, and somehow, it would -- I think at least the board should recommend that easy solution.

>> David Bacigalupi: Okay, Mollie you're next.

>> Mollie Dent: Well, the board did make the recommendation back in 2004 so the board could certainly make that recommendation again. This new board could certainly make that recommendation again. That was my only comment, really.

>> David Bacigalupi: Okay, thank you. Scott.

>> Scott Johnson: Thanks just a couple questions because Russ what you were saying, seemed to conflict. So I just needed to get some clarification. Because I understand you're conflicts counsel. So what I think I heard you say because I was going to ask the question and then I heard you give the answer, was that our plan is clear in regards to the limitations, the IRS limitations, that's pretty clear in our plan, right? And so it's clear in our plan that you receive the benefits based on the IRS limitations. So what I don't understand then is why we would be subject to any potential litigation if we are clear in our plan documents what the level of the benefits are?

>> Scott, I mentioned it depends on the date of hire of the individual as opposed to the date of hire -- I'm sorry, the date of enactment both in the charter or in the municipal code whichever was earliest of the 415 limits. If you were hired after the 415 limits were part of the plan, then that's the plan you have a vested right in. So tough luck for you. If you were hired before the 415 limits were added to the plan, either by amending of the charter or amending of the muni code, whichever was earliest, then when you were hired, the plan that was in existence when you were hired did not include the 415 limits. That's the problem. Maybe I could argue maybe they were implicit, because -- I don't mean to put -- categorize all our legal defenses to that kind of litigation. Maybe we could say there's another section of charter that says we import all relevant laws, and therefore even if it wasn't in the code, it was in the internal revenue code, so it's imported, much more strained argument, and probably weaker. But that's the -- that's -- and I apologize for not being clear, but that's the distinction.

>> Scott Johnson: Okay.

>> You know we have an easy response if the individual is hired after the 415 limits were added to the plan. We have a much more problematic position if they were hired before that date.

>> Scott Johnson: Okay, thank you Russ for the clarification. My other question really relates to you know, unfortunately we experience this because we live in the Bay Area and we require higher incomes because the cost of living is higher here in the Bay Area and sometimes you know the IRS they put these hard-dollar limits that are applicable throughout the country regardless of the cost of living you know within the country. So the other concern I have is, to make sure that we're communicating properly to our members and our active employees. So the concern that was raised earlier about someone thinking they're going to get a certain level of benefit, they're getting ready to retire and they find out that that level of benefit is less than what they thought. So I think it's incumbent upon us, you know and staff and maybe Russell can respond to this --

>> Donna, do you want to talk about what kind of notification people receive along the way regarding this?

>> When people are -- we actually put a flag in our system and we set it artificially low so anybody who's going to be close is going to flag, as a possible 415 issue. And then we actually because it's a very complicated calculation. We actually have to go through the actuary, because there's portions of the posttax contributions they made prior to 1987 that is not included in the limit so we actually gather the data if somebody is going to fall into that problem and have the actuary calculate it and we do let them know that under the provisions of the code right now as it stands that even if they're under right now with the cola, or when they actually do retire and what their percentage is they could have a possible 415 issue in the future.

>> And aren't there additional notices that are embedded in the plan and in documents that come out from retirement services regarding this?

>> It's in the handbook but it's really incumbent upon our analyst to let them know when they come in which they do.

>> Scott Johnson: Okay so thanks Russell. Because I think that's really important and I know that we have a lot of literature that we provide folks as they're getting ready to retire. One of the other things that we might want to consider is you know the information that's on the Website you know how we can maybe provide additional communication to you know to our active employees and retirees in regard to plan benefits and so on and this definitely would be one that you know we should highlight but it also sounds like there is not that many folks that's subject to this limitation right now but depends on whether or not the IRS changes the limitation, the dollar limitations on a go forward basis and depends on how pay increase is moving forward.

>> There is a clunky $5,000 increment cola in the 415 limit so whenever external cola eventually gets up to the amount of 5,000 then the limit's raced here.

>> David Bacigalupi: And just for a point of clarification this is brought by a member of the plan, brought to this board. And thanks to Alex he responded back on this memo dated August 10th, page 2 second to laugh paragraph, they're aware of it but if they want to implement an ordinance but fiscally they're not going to. So this board has no power to implement it. I think our previous board has already made a recommendation. I guess there's some you know whether or not the draft ordinance ever got to the city. But I think it's pretty clear in here that the city doesn't have any intent of implementing it right now due to fiscal restraints. So I think we're at a standstill. There's nothing else that we can do at this point other than educate our members. Sean.

>> Sean Kaldor: Just two quick things. Are there other plans in the city that offer the 415 (m), or would this be the first? Do we have any other retirement plan in the city that have the supplemental for the employees that exceed the cap?

>> No.

>> Sean Kaldor: For the documentation I know we have a planned summary. As much as in the handbook, I know it could be overwhelming for some of the members, if that cap included 90% or whatever, at 30 years or 70 years you have to retire, one of the lines on that one-page summary was that cap I think you know that would brit to that many more people's attention and it wouldn't be a surprise when they hit the trigger, that's all.

>> David Bacigalupi: Okay. I don't see any further action for this board. Unless somebody else does. Could I ask staff to get ahold of our member that brought this to our attention? Don is not here today but we could send a letter out to him just explaining that the board discussed it where it stands and you know? Thank you. Item number 19.

>> Dave, I just wanted to point out, one other thing that was in the actuary's letter that they were requesting -- I'm sorry in the OER letter, is one of the hold back was a actuarial review. That was the only thing maybe that you guys could authorize if that -- I'm not sure did --

>> David Bacigalupi: I would ask that we contact OER and find out do they want the actuarial review some do we need to spend the money for that but if they're fiscally at such a point where they're not going to do it anyway there's no sense us spending the money for the actuarial review. I mean I think that's just being responsible. No sense spending --

>> Sean Kaldor: Would the actuarial review say how much it's going to cost? If we do the review and determine it's $2,000 a year that's okay, if we determine it's 500,000 or 5 million a year do they need that to make their decision?

>> Mollie Dent: I think there needs to be a conversation. I think you need to understand that these are not prefunded plans. You can't prefund a 415 (m) plan. They are pay as you go plans. We're both kind of confused about -- and maybe we would need to talk to the actuaries about whether they would really have any role in looking at -- they could probably do some cost projections for you, but it's not really an actuarial valuation.

>> Well, it would be an actuarial calculation of what the cost of the plan would be. But I think we can cut to the bottom line here. OER.

>> Certainly. I think it would be fiscally prudent at this point to hold off on any actuarial valuations, requesting anything at this time. Given the scope of the City's budget situation, what we have coming in the next five years. If something like that is to be considered it would have to be certainly know what the impact would be on an annual basis and moving forward what the future impact would be to the General Fund as it would be because they would be responsible for funding it. But I think at this time certainly when we're ready to do that we will request it of the board.

>> David Bacigalupi: Great, I think that's the answer we needed, thank you. Okay, did I miss anybody else? Item number 19, discussion and possible action regarding the continuation of exit physicals. A, discussion regarding exit physicals and possible extension of the program until further information can be gathered. Who's going to talk about that? Is that Roger or Donna?

>> Last month Sam Liccardo wanted us to pursue other options regarding exit physicals, could the health plan provide the service, could the retire East get this service from the healed plan? This is to say, we couldn't gather all that information this month. We did have calls with both plans with HR. We told the health plans what we were looking for but they need to get back to us with more information about whether they could do it, what the cost might be. And so we asked for an extension of the exit physicals current program until we can get all the information back and come back with more information.

>> David Bacigalupi: How long do you think before -- I mean, do you think we could have it by next board meeting?

>> I'm hoping so. We only spoke with the health plans last week. It is just a matter of how long it's going to take them to gather their information. I don't know. Jeannie from HR may have a better insight on that.

>> Good morning, Jeannie Groen from human resources. At the time that we talked to them they did not give us a specific to,e. They did say it would take a couple of weeks to go back and look and obtain that cost. So it's all based on when they get their actuarial analysis done of the services we're asking for and what the services would be. We anticipate we'll have it three to four weeks is what our typical turn around is for those kinds of requests.

>> David Bacigalupi: Okay, thank you. Scott.

>> Scott Johnson: Thank you, Mr. Chair. I'd just like to make the motion to approve staff's recommendation and defer this discussion until the next board meeting, but continue with the exit exams until they've been able to gather the information we requested.

>> David Bacigalupi: Okay, thank you, and can I have a second?

>> I'll second.

>> David Bacigalupi: I have a motion and second. Is there further discussion on the motion? Hearing no further discussion, all in favor, all opposed, the motion carries. Okay item number 20 verbal update on the status plan tax qualification review. Who's going to do this?

>> Mollie Dent: I think I probably already gave it. You're going to have the study session on tax in October. We selected the 20th. And it's going to be a joint session with the federated board. We've determined there are enough common areas that it will be a joint session.

>> David Bacigalupi: Okay. And have we put out a notice to the labor groups to invite them to that? Yeah, that would probably be good. Again have another set of eyes look at it and understand where we're going.

>> Scott Johnson: Mr. Chair, did we have a time on the 20th?

>> David Bacigalupi: I think it was until 3:00.

>> Mollie Dent: We are hoping it won't run all that time but we wanted to reserve that time.

>> David Bacigalupi: Me too. Item 21, verbal update on FLSA.

>> Hello.

>> David Bacigalupi: Hi, Veronica.

>> After our last meeting, Macis, Gini & O'Connell, retirement services and finance met to try and resolve some of the open items on the AUP. As you may recall the draft was on the last meeting. There were some open items in the Aup, the largest one is the FLSA portion that needs to be completed. Since then Macias has been able to meet with finance on a regular basis, and there are pieces that were related to FLSA. The correction that was after peoplesoft was implemented, the majority of those have been cleared. I understand that Macias is working with finance to get some of the prepeoplesoft pieces that have to do with the microfiche resolved. I believe there was a meeting yesterday and it's moving -- actually moving along now and we hope to have resolution to Flsa sooner than we have the rest of the AUP pieces. Unfortunately, we get into Macias's year-end time period and also retirement services and the city's year-end portion of it. But this is a very important issue that needs to get resolved. So I believe we can have the resolution for FLSA sooner than the total AUP portion. The total Aup portion, I understand this board wants the FLSA portion sooner than that so as soon as FLSA part is completed that part can be carved out and brought forward to the board.

>> David Bacigalupi: Okay, thank you. Mollie. Oh, okay. Sean.

>> Sean Kaldor: I had requested that update so I thank you very much for pursuing that and keeping things moving and giving us a time line for where things are going, thank you.

>> David Bacigalupi: Thank you. All right. Items number 22, review and recommendation on ordinance amending San José Municipal Code 3.36.020 (b).2 to correct the definition of final exception. And that one's from Mollie.

>> Mollie Dent: Yes, I apologize for the cover memo. The cover memo refers to just the governance ordinances, I'm sorry. But you have the draft ordinance in front of you. This goes back to discussions we've had a fair number of times now on the 108% limit and what that 108% limit applies to, and the intent behind this language was to clarify that we want to go back to the way this read, between 1970 and 1992, and that that was the intent all along that it read that way.

>> David Bacigalupi: Thank you, Mollie.

>> Mollie Dent: And so if the board wants this to move forward, to city council, the thing to do would be to recommend it to council for adoption.

>> David Bacigalupi: Brain a motion there this board to recommend it to city council for approval.

>> I'll make a motion.

>> David Bacigalupi: Motion and second. Any further discussion? Hearing no further discussion. All in favor, all opposed, motion carries. The approval investment committee, next meeting is September 16th, investment committee, next meeting is November 18th. Unless there is any further, the next item, consent calendar. If there's any item board member would like removed before it is approved please state so, I have a motion and second to approve the consent calendar. Any further discussion? Yes Scott.

>> Scott Johnson: Sorry, the pending action, summary list.

>> David Bacigalupi: Uh-huh. You want that removed?

>> Scott Johnson: I want it removed to add some to it.

>> David Bacigalupi: Okay, we'll make --

>> Rose Herrera: Motion to approve the balance.

>> David Bacigalupi: And second? Okay. To approve the consent calendar might us item 28, any further discussion. Hearing no further discussion all in favor, all opposed the motion carries. Item 2008, go ahead Scott.

>> Scott Johnson: Thank you. At our last investment committee of the whole, we had discussed some suggested changes in how we move forward, for example, on retirement disabilities and so on. And we were -- we discussed of putting that on the agenda for the full board to talk about. A new model or new concept in moving forward so I'd like to recommend that that be added on to a future item agenda for discussion of the full board.

>> David Bacigalupi: Okay.

>> Scott Johnson: I'm not sure if that --

>> David Bacigalupi: I thought that would be under proposed agenda item. But either way, I know what you would like to have.

>> Scott Johnson: Okay, thank you.

>> Dave, just while we're on this on item number 7 if you could put status, it's part of the pending tax review, the hero part amendments.

>> David Bacigalupi: Oh, okay.

>> Something's being done on that. It will be in the tax compliance proposed amendments.

>> David Bacigalupi: Okay, take care of that, thank you. Now I'll entertain a motion for item number 28. Okay, I have a motion and second. Any further discussion? Hearing no further discussion all in favor, all opposed, motion carries. Okay. Now we're on item the proposed agenda items and I think this is Scott where you wanted to be agendized for future discussion and possible action of creating a committee for disability retirement hearings.

>> Scott Johnson: Yes, and basically the board delegating that to our committee and creating a committee that would hear the disability retirements.

>> David Bacigalupi: Okay, we'll add that to next month's agenda. Any other board members, any other requested? Go ahead.

>> Sean Kaldor: We had mentioned previously around I think in other meetings about look at our process of reviewing disabilities. Talking about a formative change of the committee. But I don't know if it's process change but the mental process we go through the checklist we follow if we could get some information about best practices or common practices or procedures to follow if staff over the next couple of months could take some time to give some recommendations to us to help bring more black and white to our analysis process rather than the grayness that we struggle with.

>> David Bacigalupi: Russell can we put that on there?

>> Yes.

>> David Bacigalupi: I'll just say that back in 1992, I heard the same board ask for the same thing. And unfortunately, they're not black and white issues. I mean as long as we understand that.

>> Sean Kaldor: That may be the answer that it can't be done that way.

>> David Bacigalupi: As long as we're trying.

>> Sean Kaldor: That is a acceptable answer, to say that is not a good way to go about it, and there is not a good black and white process. And so everyone has adopted a standard that is much more iterative and discuss -- okay, if that's --

>> David Bacigalupi: I still think it wouldn't hurt for this board's education and for staff to help us to maybe try and clarify some of these issues. But I know this is -- it's one of the most difficult things this board does. Very important to our investments, but this impacts so many people's lives, and they're not easy decisions. They're very, very difficult. Scott.

>> Scott Johnson: To that note, I think that there was a request, an ongoing request to have some training in regards to disability retirement, so the board you know we have new board members and just get a better understanding, I'm not sure if a checklist is what we do but we definitely I think have been requesting some training on that subject.

>> David Bacigalupi: That would be a committee of the whole type training so everybody can understand the process.

>> Scott Johnson: I don't know if there's time on that study session that we're scheduling, but just suggesting, the sooner the better.

>> No, the study session, the tax issue is going to be a full day of nothing but tax. And right now we're going through this process with federated and have tentatively set up an early October meeting. Depending on how that one goes, then we'd like to roll it out for this board. But let's run it first with federated and then see how it goes.

>> Mollie Dent: But I was going to say once the disability study session with federated is set, there are some issues in common. So that if one of the board members wanted to attend that one, that would be fine. It's obviously going to be a public meeting.

>> Yes.

>> Mollie Dent: So there are some things that are in common with both boards on the disabilities.

>> David Bacigalupi: Russell can I ask that we know when that study session is going to be?

>> It's moving at this point. It was set for October 4th but we need to figure out a new date. Our conflict schedule.

>> David Bacigalupi: Rose, you're next.

>> Rose Herrera: I just ask that training, we've asked for training to be on there. Maybe if there's upcoming classes or we can have some sort of short training session that would at least put us all on the same page even will process we go through here. If there is some order in how we consider these things that would help us as we're thinking through the issues. I have to believe we can make improvements at least so I totally agree with our new board member there.

>> David Bacigalupi: Thank you. Mollie then Russ. Now Russ.

>> Just two things I was wondering on Scott's a lot of systems use outside hearing officers, yes we would have to see if that's compatible with provisions of the municipal code. But I wasn't sure if you wanted it restricted to a committee of board members.

>> Russ we're looking at this as part of our whole study and we'll talk about places that do it that do use the hearing officers and there are issues there too. There is no perfect system in this game certainly in public plan world.

>> Rose Herrera: We should try for continuous improvement just like we do in private sector for improvement process. Russ is what I'm hearing this federated session is going to discuss some of these issues then?

>> Yes.

>> Rose Herrera: I think it would be great if any of us are available, to go to them.

>> David Bacigalupi: Yes, I've asked Russell to notify the board when that happens, when they set the date so that anybody that's available can go to that. And just so I think it would be interesting for this board to see all the available options, versus committee versus hearing officer. History, I recall, a hearing officer came up in negotiations. So that may be a meet-and-confer item we'd have to involve the unions. Okay. Other proposed agenda items? I have one. I'd like to -- I'd like somebody Russell from our staff to contact the city. Item number 13 last month, on the August 5th agenda was setting of the lowest-priced plans for medical. And I got a phone call and you know I don't have the information in front of me to research it. But that there's a cheaper plan than what was presented, and it has to do with, instead of the $25 co-pay it's for senior advantage, Kaiser senior advantage, with no co-pay, and it was like $300 cheaper. And so the question is, is there such a thing? Is there such an option for our retirees? Is there such an option for and I don't think we have too many of them but an active member that's 65 years old? That would qualify for that? So can we just send them -- some of us feel like we're 65 but we're not there yet. Don't look at me like that. (inaudible).

>> David Bacigalupi: Oh yeah, yeah, I know. If we could have an answer back just --

>> That's on medical plans though. Usually the lowest cost plan is the under 65 plan. I'm not exactly sure what the question is.

>> David Bacigalupi: Kaiser senior advantage with the Medicare.

>> Mollie Dent: I think he's just asking for information. The Kaiser is cheaper than the Kaiser family plan. I don't know whether it's a zero co-pay plan but it is available to the retirees and we probably have some of them signed up for it.

>> And you have to be Medicare eligible.

>> Mollie Dent: You have to be Medicare eligible so you have to be over 65.

>> David Bacigalupi: I was told it was not included as one of the options.

>> Mollie Dent: It is probably not included for the active employees, because when you're still working you don't have to sign up for Medicare part B. That isn't to say that it couldn't be made available to them if HR wanted to do it but it is made available to retirees.

>> David Bacigalupi: Okay if we can get that back for next month just to clear up so I can answer a phone call. Any other proposed agenda items? Hearing number public comments, I'm sorry, go ahead Rose.

>> Rose Herrera: I want to say I heard the same thing from a retiree about Kaiser, senior advantage. It was actually cheaper than -- I actually had folks come to me so I'm glad you brought it up.

>> David Bacigalupi: It's spreading like wildfire. Glad you brought this up. Okay, this area is for public comment, anybody from the public you want to add. Thank you, staff for the excellent work you do every day. I know it's not a public comment, but thank you very much anyway. Okay, with that -- education and training, item number 33, notification of CalPERS, trustees round table, A, the trustees round table San Diego California October 15th, 2010. B, trustee round table Doubletree Hotel, 2050 Gateway Place, San José California, on January 28th,

2011. Any board member that can attend one of these sessions to improve their abilities to perform their duties is encouraged to do so, contact staff. And item 34. There are a few notifications, notification of IFEBP training, A is the 56th annual U.S. employees benefits conference, Honolulu, Hawaii, Sunday, November 14th, 2010, through Wednesday, November 17th, 2010. B is Foundations for trustees, Hilton, San Diego, California, sat, November 20, 2010, through Sunday, November 21, 2010. C is the Foundation for trustees 2, pensions, Hilton, San Diego, California, Saturday, November 20, 2010. D is the investments institute, Las Vegas, Nevada, April 11, 2011, through April 13, 2011. E is the portfolio concepts and management, Philadelphia, Pennsylvania, that's the Wharton school, correct?

>> That's the Wharton school.

>> David Bacigalupi: That's the Wharton School, that's highly recommended on that one. Monday, May 23, 2011 through Thursday, May 26, 2011. And F, trustee and administrators institutes, new trustees, Hilton, San Francisco, California, Monday, June 13, 2011, through June 15, 2011. All very good trainings. Staff goes through this and sorts out the best. Please discuss with staff. With no further, I'll adjourn the meeting. Thank you.