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>> Matt Loesch: Good morning. I'd like to call to order the October 14th meeting of the Federated employees retirement board. A few items to talk about on the schedule here. On item 5A, there's I believe a misspelling on the last name. It should be Archdeacon, A-r-c-h-d, so there should be an H between the C and the D. Item 13 is going to be pulled because that trip will not be happening. So cancelled. If we do not have Makita on board first we're going to move item -- which item? Item 17 to the front of the list. Other than that for the orders of the day, change of 5A, cancellation of number 13, moving of item 17 to the front of the list. And then whenever we can get Makita on the line we'll do all of item 21 as we can get them available. Can I get a motion for approval on the orders of the day? Motion and second, all in favor, aye, thank you. Is there a comment about what's going on with the facility here as to why we can't get Makita on or what the status is?

>> We're trying to get Makita to call in and we're trying to call them. For some reason the conference phone is not working, we'll keep trying.

>> Russell Crosby: For the record, we need to go on record about the express concern about this facility and the inability to get conference calls connected. We had the same with Police and Fire, here we are with Federated. Someone from the organization should perhaps come before the board perhaps Tom Manheim and explain why the systems don't work here when these board members were assured that this system would be adequate and this facility would be adequate for the board's needs.

>> Matt Loesch: All righty, thanks. Any other comments or -- we're going to move on first take item 17, that's the receipt of the report from the auditor's office titled, pension sustainability rising pension costs threaten the city's ability to maintain service levels. Alternatives for a sustainable future. The City Auditor is here. Ms. Erickson has a presentation.

>> Sharon Erickson: Thank you very much. Sharon Erickson City Auditor. We forwarded a copy of our report to you for your information. As you know from the title, our concern was that rising pension costs threaten the City's ability to maintain service levels. The recommendations in the report are primarily directed at the city council and the employee bargaining groups but I did want to point out three recommendations that have direct impact on the

boards. The first was recommendation 2, where we're recommending an actuarial audit of valuations every five years. If the actuary conducting the valuations has not changed in that time, this is because we had substantial changes in the valuation due to actuarial assumptions. We want to make sure that there was rotation among actuaries or a second look by other expert actuaries at valuations. It is my understanding that that's not an issue for this board, you've got a new actuary, and the previous actuary I believe was only here for five years. The recommendation number 5 was to ensure that the city council is fully informed, on retirement plan performance. That you not only forward the CAFRs, the comprehensive annual financial reports to the council, but perhaps request an opportunity to inform them perhaps in the committee session of the financial condition of the plans, to make sure the City Council is fully aware of what's going on. You have been preparing financial information for many, many years. I want to make sure that the city council members are really reading and receiving that information. And then secondly, that you do continue to provide an annual report to the city council, that includes updates on the financial status of the plans as part of the budget sessions. We believe that was very successful this year when staff members presented that to the city council during the budget process. And then the third recommendation I want to bring to your attention was recommendation 6, where we're recommending that you prepare a simple, plain language, annual summary of financial condition of the plans for plan members and get that to plan members and post it on your Website. And with that I'm happy to take any questions. But again the bulk of these recommendations really do go to the city council and the employee bargaining groups. Thank you.

>> Matt Loesch: Any comments or questions from members of the board? Mr. Andrews.

>> Arn Andrews: I would just like to thank you for the work that you provided as a new board member that's another interesting perspective of my responsibilities and the composition of the plan. And as you mentioned you know a lot of this is action items for council as opposed to ourselves but in relation to the recommendations you have about what we can provide more transparency through issuing more information about the composition of the plan, and performance of the plan, I'm in agreement with that. And once again I'd just like to thank you and your staff for the work that went into this.

>> Matt Loesch: Anyone else? I had a few comments, thoughts, reflections. And it's -- I've spent quite a bit of time thinking about this to be honest with you. And I've tried to think of how best to characterize my reception of the way the report was either written or the way that the numbers and information was characterized. As I look at it, does this report do the goal that it's supposed to do? And I think if I could summarize what I would take from it is that does the average person who's reading this or even average councilmember, because I would they have exposure to a bit more information than most, really come away of a full understanding of the status of the plans plural but also really understand the nuances around it. You don't need to know all the nitty-gritty about it as far as how everything was calculated or whatever. But I think there was some things that are characterized, and I'll use that word because I've really been struggling as to how to contain my thoughts as far as characterizing them clearly. There's things in here, there's backup information that's great and historical things that are listed that helps, as things, you understand how they were put together. But then when it comes down to like numbers and the way the numbers are portrayed, that's one of the things that kind of gets confusing. Because people will ask me are the numbers true? Everything in the report? There are no lies in the audit, the numbers are what the numbers are the way they're stated. But when you look back, especially as I've spent time around the pension a bit, is the stuff going back those are historical facts but it's when we're talking about numbers going to the future, unfunded liabilities, it's a number's listed and really, it's -- if -- it really should be more characterized as a reasonable range of what the numbers ought to be or what the numbers could be. Because any number of scenarios will move this thing. I was trying to think -- actually I finally came up this morning as kind of a way to I think characterize it a little bit is this is almost like curling, you know that fantastic Nordic sport where the big rocks are moving, and each rock is an individual person in this pension. And they kind of chart a course, this guy with his broom brushing furiously, trying to make the course smooth to where they're going to end up and apply the data to try to make sure that the course for that rock, that each individual stone is moving smoothly. So at the time we're brushing as furiously as we can to get it so that I think this is the right way to brush, so that the thing is moving. But things do happen that will change the course of that stone so that our assumptions at this given time are made with great expectation as to when that rock is going to end up. But we're talking 20, 30 years down the road. That's a very long trek for this stone to travel. So that really any nuance could affect that trajectory. Now, that being said, some of the backup information alludes to that idea, but the fact that we're really on a trajectory, so we're really predicting the future. So if a number is chosen in the report, it would appear that the number that's

presented is kind of the worst-case scenario or the worst possible number. And instead of saying, the way the OPEB unfunded liability is listed as 1.4 billion, I mean, I'm going to characterize and try not to memorize numbers in there. But it's characterized, doesn't break down the nuance as to really where the liability lies on the city, how it's broken down between the two plans. And so then folks can really understand that, okay, if it is -- it was reported at one time at \$1.4 billion. And that was based on the initial projections and without any kind of agreement at that time. Then agreements happened with some of the employees that affected that funded liability and reduced it quite bit and none of that is in the report to kind of characterize as to how that is. And then that unfunded liability and I know there's some disagreement between the administration as to how to characterize this. That the unfunded liability, OPEB let's just pick that one, half of it's on the employees. The employees are paying half the unfunded liability. Though it's stated in there the number is listed as the unfunded liability, listed to the city is the larger number. And so now we're talking going from like \$1.4 billion to the city liability on the Federated side I'll call it \$300 million, is in the ranges, in the ballpark of the unfunded liability on the OPEB. But no one would get that. And that a tremendous amount of progress has been made over the last four or five years, and granted, it's been a lot of heavy lifting, I mean, difficult decision have been made by folks. So that kind of information, to try to really understand, okay, things are -- and I'm not kidding you, there's stuff that needs to be worked on here and there's things that we need to fix. Are they sustainable, I don't think I can answer that. I don't think from the report you can definitively say that. I think the data presented in the report, though it's not wrong, certainly seems that that's the direction that we're going. But again, we're talking about future, it's where those stones are going from this date or actually from June 30th, 2009, because that's where the data ends 30 years down the road. So those stones could be moving quite a bit in that trajectory. So I was trying -- if the purpose of the report though this one is to the council, for them to truly understand these nuances, I don't -- I mean I don't think all of those pieces are not there for them to really grasp how those nuances could be in the play. Another example might have been where you talk about how possibly you know reducing the administrative costs by having the plans be administered by CalPERS. And I will ask Mr. Crosby a question in just a moment about that, but I mean, it was even characterized I think in the Police and Fire Board as CalPERS has a \$500 billion unfunded liability. Why would we want to go with them? Well, okay. That's been reported in the press, yes, and it was put out by a report, yes, by Stanford, that was in fact paid for by the Schwarzenegger administration. So, you know, it's like who paid for this report, and what is it being used for, and how is that data being characterized, and

how is it calculated? It was stated that that is a fact, even from the Police and Fire, there was a member who said that last week. Now, it is not in the report, but one of the recommendations here is to consider being administered by CalPERS, and then a comment was made last week. So there's a whole lot of things moving around in the press because of the political atmosphere right now that all these data points are being used as political ammunition. And that's why I try to be so very careful about the way things are characterized. If folks ask me my understanding of what the numbers are I try to be very careful. This is what the understanding is and this is how it's done not this is the number and I think right now these -- some of the numbers are being used as bludgeons in the press in particular, and so that's why how this stuff is characterized is very important. And so that's kind of my initial salvo, as far as how the numbers are presented are critical. Now if you're trying to make a particular argument yes. You could pick the numbers and use them as a bludgeon. But I just don't think folks, like the Federated employees and people who are concerned what's going on with the Federated plan, can't decipher through you'll the weeds, how to start parsing it because there are so many nuances. It could be a little bit better characterized to understand those nuances and how to partly the weeds. I'll let you answer if you choose to.

>> Sharon Erickson: Let me just say we've learned, me and my staff have learned a tremendous amount about the pension systems over the last several months. We actually were asked to do this audit and I explained this to city staff, we did a brown bag kind of straight talk for city staff where we invited city employees to come in and hear for themselves you know a presentation of the report. Because I wanted to make sure word got out straight from us, from my office to them. And the City Manager agreed and allowed me to do this. As to what the point was. We got asked to do this report and look at pensions, pension sustainability back in June of 2009. We finally started the project earlier this year, early in 2010. We actually ended up speeding up the last work on the project by a month or so, because we realized the election was coming up. So in the middle of our project, suddenly things were put on the ballot and this issue became much more political, than quite honestly I had ever expected. So we have been trying to skirt the politics on this. And that's because my role is to be an independent, objective observer of what's going on. We are neither experts in the pension system or experts in budgeting. But the story I've been told is sitting in those budget hearings, this is what I told to city staff, when the city council was in study session deciding who of us to lay off, how much to cut our pay, in order to fund increasing pension contributions, it became all employees' issue. And with the losses that have been sustained, it's an item of

concern for retirees, as well. And so my goal was to put the information out there. As far as forecast, we did try our best to simplify, and I think in every presentation we're doing, we are getting better at trying to sort out the ideas. Because what you all have to deal with on a day-to-day basis is an extraordinary complexity. Because yes, these projections are 30 years out. But they impact the rates that are being charged over the next few years.

And those rates, the best estimates we have -- and this is what I told city staff -- those are estimates. But that's why we opened our report with actual payments. So the very first graph in the report is what did the pension plans pay out? We know that, and we can see the trajectory on that. So those are actual payments. And then we tried to explain why that happens. So we've got many more retirees, we've got higher salaries. We've tried to step through that, but it is extraordinarily complex. And I agree completely, there are always ways that we could have improved -- improved that.

>> Matt Loesch: You're welcome to steal my curling analogy if you want. It was more current trend, people are interested in throwing the rock, I guess. I think the report began with a pretty good job in my opinion of separating a bit of the understanding between Police and Fire and Federated. And some folks want to throw fire on one or no pun intended throw fuel on one or whatever. Since I don't know much about the Police and Fire fund I don't really spend any time commenting on it because I haven't spent time trying to understand it. But I think you did a good job of some of the him things at the beginning but then as the report evolved it was more pension costs and that's fine because the pension cost is what goes to the city. The plural thing everything all encumbered. But I think to try to help understand because I don't think that whatever treatment needs to happen to the pensions I don't think it needs to be equal treatment nor I don't think it should be because they have different issues that are involved. They have different types of employees making different salaries, doing different jobs, different pay scales that matter quite considerably. Even the example there, the average salary was \$75,000 for a Federated employee, I'll quote the pension thing I think it was 68,000 for Police and Fire and I think 35 for Federated. So even there we're talking about different issues, different scale of moneys and so forth. A different treatment will be needed to be applied to each one. I don't think that was contemplated in the way it was present or here's some suggestions of what maybe could help Police and Fire more or it wouldn't necessarily do anything for Federated.

>> Sharon Erickson: If I could respond to that.

>> Matt Loesch: Absolutely.

>> Sharon Erickson: Yeah, Woo we should have probably made clear but we shouldn't be saying whether the city should be paying a \$35 pair of shoes or an \$80 pair of shoes. We just said there's a bill for this. So my goal quite honestly was just to get attention on the problem. It's impacting the General Fund. We had to lay off 200 people last year. We need to draw some attention to this. And when it came to the General Fund impact, it was, like you said, the combined impact of the two plans. It's -- we did not go in the direction and we determined early on that we weren't going to try to redesign this plan. That is in my opinion my job was to point out that there is a real financial fiscal issue here. It really is between the city, the city and the employee bargaining groups to determine how to redesign a plan, or whether or not how to design a second tier or who is impacted by that. And we tried to stay clear of that. We did recommend, based on what we'd seen, that something has to happen. We can't just continue down this path. So my goal, by the time we finished our work and we'd seen these numbers and been through them for many months, we said, something needs to be done but we wanted deliberately to stop short of trying to redo any redesign. So that's why we came up with that whole menu of options. And I included the CalPERS option because that is an option. We were not -- we were -- and I wanted to make the point that we're not necessarily recommending one or the other. But the council needs to have in front of it, all possible options, in order to move through this process and I'll figure out how to use the curling analogy.

>> Matt Loesch: It makes it interesting and the brooming thing is kind of interesting. One thing to the administration, because they were talking about administrative costs, and -- you know, the one thing that's drawn my attention about CalPERS in general in look what we've done in the last year or two, there's been seriously some considerably negative press around what's going on around CalPERS but also the cost and looking at their numbers and the return numbers. Was there any comment from staff about things we can do about administrative costs or whatever as far as the consideration about CalPERS?

>> Russell Crosby: Well two basic comments and I've shared those with Sharon already. Number one, is the -- yes, CalPERS does have a lower administrative cost because they're spreading their costs among a much larger

population. But when you take into consideration the other piece of the puzzle, which is the returns the trust funds have gained by being under management here in San José, just during the last two years it looks like we've paid for probably around 110 years of administrative costs. So part of what needs to be looked at is not just the administrative cost stand alone, but what is the benefit of having, say, a stand-alone plan. And that's one of the benefits, is that quite frankly, in the last couple of years, we've vastly outperformed CalPERS.

>> Sharon Erickson: If I could also point out that in comparison to other self-administered plans, we're doing quite well. So that's why we put the information in there that San José, at the time we reviewed it, was about two points -- your administrative cost was about 2.6% of total contributions, and that compared favorably to Sacramento County that was at 2.6%, and San Bernardino that was at 3%. So like your director said, I mean, CalPERS can do it because they can spread the cost -- they spread the cost across the state. But in comparison to other self-administered plans, it appeared you're in the ballpark.

>> Matt Loesch: Right. And I just want to be extra-clear here, that my perspective is not that nothing needs to be done. But I just think that if there's ways especially as the discussion moves forward and we're in such a political frenzy right now with the spotlight on what's going on with pensions and how they're compared or not compared across the states and even just in the municipalities in California, there's so much a lack of understanding of the differences between what they hear in the press and what they hear in -- and I'm just focusing on the Federated system and how it is considerably different, in many ways in a much better favor for the employees and for the city, in a much better scenario than many other municipalities in the country. And so to dispel some of the rumor mongering, that we could focus on, okay, where should we really spend our time to try to make improvements, so that both, you know, either reduce city contributions cost or the impact on the city but also to the employees and just to ensure that that money is there for the beneficiaries for the 4,000 stones that are sliding across the ice. I thank you personally for the time I got to participate in the interview and give you my thoughts prior to the report issuance. And also my thoughts here and hopefully you understand that it's not criticism but hopefully, constructive criticism that you know trying to make the process even better. Anyone else have anything they want to say? Mr. Andrews.

>> Ash Kalra: Thank you, Sharon, again, for the report. You know, it's interesting because very quickly after what happened on Wall Street attention turned very quickly to public employees and it was done I think in a very savvy political manner. Now, that being said, we all understand, I think we all of us up here certainly, that we need to take very important steps to get some of our structural issues in check and that includes the pension system something that city council has taken very seriously and rightfully so but you can't divorce what's happening outside of these walls politically from what is happening before us today and from this report, and I think it really, I appreciate the chair's comments because we want to come to a decision based on that yeah, it's very challenging when this issue is being used for more so than ever for political purposes. And you had mentioned one thing Sharon that you have sped up the process towards the end to finish this. At least a month in advance. What caused you to feel that sense of urgency, was there direction given to you or something you personally felt needed to be done why, rather than going through your time line and finishing it on a thorough manner on the time line that you set forth?

>> Sharon Erickson: We were prepared to issue for the November Public Safety committee meeting, that was our target and what we were shooting for. But then we realized that with the ballot measures that were on the ballot we would be issuing a report on pensions right after the voters had voted. And I didn't want to be accused withholding information. And then the city council initiated the General Fund structural deficit elimination plan task force, I think I got that right. And we realized, city staff had seen drafts of the report and realized that it provided historical information that would be helpful to that group. So we did push the report out a few weeks early. It would have otherwise been distributed I think November 14th. We pushed it out a few weeks early.

>> Ash Kalra: I have no problem with the report in terms of the task force, the historical data, that could have been delivered to them without a full report being done. That's a separate issue but the sense that it just seems like look, you know, I think it's great to get the information out as quickly as possible, as long as it's thorough. And it just seems like it's a very -- it's a political decision to have it come out sooner. It certainly was helpful whether it comes out now or November or two months ago. It's something that's helpful for everyone to take a look at. But the idea that it needed to be pushed out for a November ballot measure seems that politics was inherently taken into account in speeding up the process or I mean from your perspective it's the education of the voters. But the

ballot measure is clearly a very political entity and so I'm just curious as to why there was such a sense of urgency to get this out earlier. Based upon a blood measure. When it should be an apolitical report that's being done.

>> Sharon Erickson: And again it was the issue of transparency. So we had a basically a complete draft and I didn't want to be sitting on it during an election. And then be accused of not issuing until after.

>> Ash Kalra: It had already been done.

>> Sharon Erickson: Yes.

>> Ash Kalra: You just indicated you sped up the process to complete it.

>> Sharon Erickson: Yes there's normally a six week period for staff response, going back and forth and we short circuited some of that report.

>> Ash Kalra: The ordinary course was shortened to get it out earlier. The chair indicated it's not a matter of questioning the data or the facts cited in the report. It's that these reports right now are being used politically rather than in a marry that's informative. It makes us very frustrating because it is not just here in San José. It is something that's happening you can see in many jurisdictions where people are trying to make the employees look like they are the ones that have caused the fiscal crisis we're in, which is absolutely not the truth, or that somehow fixing the pensions is going to somehow tomorrow make our balance sheet good and rosy, and that's not true either. In that sense I agree with the chair, let's have an honest discussion and honest debate. That is something I always been and always going to be wanting to do have to do and have no choice to do. There is definitely significant and legitimate concern both from City Hall and those of us working at City Hall and those of the public as to what's going on with the pensions. That being said however, it's just very troubling that the timing of all these different reports and the timing of newspaper articles and the timing of everything of grand jury reports all seem to be so choreographed in such a manner that really makes our employees look like they're somehow

leaving City Hall as millionaires which is not true. But we hear that type of things from the public, I hear from the community and I certainly while being on this board as well as city council have taken steps and have vote affirmatively to make changes and I do so based on facts not on politics. I just bring that up because it's very curious to me that it was sped up in such a manner that clearly appears to be political rather than informative. But given the fact that the normal process was short circuited and -- was that normal process being short circuited based upon direction given to you or is that something that you felt was necessary?

>> Sharon Erickson: I felt it was necessary in consultation with city staff. They were preparing presentations for this -- for the General Fund structural deficit elimination plan task force. There are no good ways to simplify that name. And it seemed quite honestly -- it would be a duplication of effort. Because in our office, we don't release pieces of reports. I want everybody to have the full analysis at the same time. So when we release a report it goes out to everybody. So when I talk about there's an internal review process, that stays confidential within the city until we've got the report right and then we release it. And I wanted to make sure I didn't release it to the task force, before releasing it to the city council, the press, everybody gets it, the same day, the same time. So that's part of our role of being independent and objective, it's to keep the politics out of -- out of the report. So we have a chance to do our work almost in isolation in some ways. Then we can come back and report to everybody at the same time. I wanted to make sure that the task force had it. We didn't make it in time for the first task force meeting. But we made it in time for the second task force meeting. And I think that --

>> Ash Kalra: Why was that such a concern of yours if you have been working on this all year, the task force wasn't even in creation until the beginning of August.

>> Sharon Erickson: Right.

>> Ash Kalra: So it seems like at some point from the first week of August when the ballot measures were very hastily put on the a ballot, one evening of discussion rather than the months to put the other matter on the ballot. So they're hastily put on the ballot and then all of a sudden the first week of August you felt the urgency to get this out in a month. And so was -- and that was to inform the task force or it was just for the --

>> Sharon Erickson: Yes.

>> Ash Kalra: And it was also because the ballot measure was coming in November?

>> Sharon Erickson: Yes.

>> Ash Kalra: All right, thank you.

>> Matt Loesch: Mr. Perkins.

>> Jeffrey Perkins: I just want to weigh in. What's happening here is happening in every pension plan across the country, outside much pension plan, out of each people's households am the economic downturn really causes problems for everybody. Decisions were made based on a decision, an economic standpoint where everybody is at and that all fell off. I look at your report and I see two pages that just hit me between the eyes, page 24 you have kind of a graph of where the Police and Fire and Federated was on a relationship on a funded ratio and if you go back to about 2005 we were both around 100% give or take a few percentage points. And if you flip over to page 40 it's just a history of returns of when we were above our assumed rate and below it and you can see from about 2007 to 2009, we dropped like a rock, because of what was going on in the world of returns. And so now if you take a snapshot, look at 2009 and say okay, this is our problem. It is going to look bad because the whole world looks bad at 2009. So I would just caution people not to just weigh in and look at the worst possible moment in time and say okay, this problem is so broken, everything's got to get thrown out. Everybody has to adjust to it and everybody is and some are doing it in more success than others, within the pension world within the business world within our own households. We all face this. I just think that we all need to realize that this situation has happened and now we need to pull together and figure out a way out of it but don't believe that where we're at, at 2009, is where we're always going to be. Can you look at this chart on page 40 and you can see what happened in 2010 in terms of returns and you know so these things have a way of kind of righting themselves as long as we don't go too crazy one way or too crazy in the other. We are in a correctional

standpoint, we do want to make good decisions because we have a challenge but the world hasn't come to an ends. I think that's the point I would just make.

>> Matt Loesch: And if I could tell you what Mr. Perkins just said, I think that so often especially on this board I've talked about it frequently and we're working on getting there so often we focus on investment returns, investment returns. We're not just here to make money, we're here to match liabilities. So often we just worry about this box of money and what it's doing or not doing and so really again it's the stones that are going that matter, what position they're at and what position they are going to be at when we have to pay them. So we need to be focusing more on the liabilities an what they're doing and do everything we can to make sure our investments match them dollar for dollar. So we did that when we did some things to change our rate of return last year we became more modest in that. So to say that there are things that are going on, not saying you're saying that but it's out in the public that there's nothing going on we're just waiting this thing out and we take a ten year historical snap back looking from the worst possible scenario June 30th 2009, and take a ten year look back and this is the fund's performance. Okay if you did that 18 months before that if you shifted back 18 to 54 months before that it would look fantastic, ridiculously so. Just like if you look now, it looks bad, ridiculously so. That's why it's not a ten year plan, not a ten year back plan it's a perpetual plan, the overall returns long term matter. So yes if you look at some returns in 2006 and 7 they were about 14, 15%, very high. This last year was 15.9 gross. Fantastic. But that's not the day in, day out. It's the perpetual nature of these returns that matter. But what matters even more is what they're doing in tune to the liabilities. If the liabilities are growing in a sense that we need to do more things then that's the conversation that needs to be had. It's how we're matching our funds to the liabilities that we pay them out. Even if we make 20% if the liabilities are worse than that, then we need to do something different. That's where the analysis and the study needs to be not just look at the investment returns. It's really much more important than that. Your report alludes to that, what changes are made to plans or not. There's a comment about, the colas that were added and how they -- and that was one essence in one particular, I wish that was better explained as to what happened why that change was made and what it really did. It was almost like it was plopped into the report the cola was added 3% no longer tied to CPI. And no explanation as to why that was and what was the predecessor before that and I think that context matters a bit. Because it would, to explain, again, give the fuller picture to what is going on with the Federated plan so

people can understand it, what those nuances because that's really the biggest change besides domestic partners, things that have happened in 15 years that I can tell on the Federated side. Not much else has happened as far as added benefits. The cola thing wasn't really in an added benefit, because it was something that was there before. It was more changed in the nuance as to how it was being employed. So unless you have anything else to say, I don't see any board members that have anything else to say.

>> Sharon Erickson: Thank you very much.

>> Matt Loesch: Thank you for your time, I appreciate it. Okay, do we have Makita available on the phone?

>> Not yet. Trying to (inaudible) --

>> Matt Loesch: In ten minutes? I mean do we want to proceed and just have our investment staff give a presentation or are we going to keep waiting? I want Makita here on the phone I want to give Makita give a presentation on of their work. It's not fair to have them waiting on the phone.

>> I'm going to try again right now.

>> Matt Loesch: How about this, we'll keep moving on with the agenda, hold off a little bit more and see what happens there. We'll drop back to the consent calendar. Oh, I guess there's one more orders of the day thing that I should have mentioned I did not. We were going to attempt to take item 15, move that to the very end. And it's the continuance of disability study legal review, move that to the very end so other things aren't pending because of that so Ms. Dent.

>> Mollie Dent: Whatever order you want to take it in is fine with me.

>> Matt Loesch: Can I get a motion for that to be moved to the end? I've got a motion and second. All in favor, okay, great 15 will be moved to the end. So we're on consent calendar, items 14 through 13, I would like to pull

14B for a comment if I could. No, I'm sorry that's not on consent 14 through 13. Can I get a motion of items 4 through 13.

>> Matt, there's one error on the number 7 on the minutes. It looks like we had David Busse here, but he had been off by then.

>> Matt Loesch: Okay with that change Mr. Busse not being present at the September 9th meeting, motion for approval of the consent calendar. Motion and second. All in favor? Aye. Thank you. Item 14, moment of silence for those who have passed. [Moment of silence.]

>> Matt Loesch: Thank you. I don't often like to pull folks off especially for death notification to make one more important than the others, Mr. Kerber, I actually sit in his chair presently in the survey section. He was my predecessor. So when he retired, I walked into his chair, so I -- not that I replaced him, because he was --

>> Are you there?

>> Matt Loesch: -- irreplaceable. So -- we have some comments coming through, but -- so I'd like to thank Mr. Kerber for his contributions to the survey world. Sounds like we have some voices coming through. Okay. Moving on to item 16, approval to rescind the retirement application of Greg D. Schultz, approved September 9, 2010.

>> We can kind of hear an echo over here.

>> Move approval.

>> Matt Loesch: Motion and second, all in favor, thank you.

>> Can you hear us?

>> Matt Loesch: We can hear you, can you hear us? No. All right. We're going to keep moving here. We've done 17 we're on to No. 18. Consideration and action on the application of rehearing of Shirleen Lilly. Number 18 is deferred. Item 19, adoption of resolution 669 too denying the application for Raul Guerrero for service connected disability after rehearing. Ms. Dent.

>> Mollie Dent: I just want to point out that this -- that board member Kalra was not here for the rehearing. So unless he listened to the tapes, he shouldn't vote on the motion for adoption of the resolution. But you do have enough board members to take action on it.

>> Matt Loesch: Got it. I having a motion. Do I have a second? Second, all in favor, aye, opposed none. Mr. Kalra's abstaining. Number 20, consideration and recommendation to the city council on an ordinance amending the San José municipal code, section 3.28.365 relating to Real Estate investments, to allow the board to take title to Real Estate and Real Estate related debt instruments, through a title holding corporation satisfying the requirements of internal revenue code section 501 (c) 2, or through a limited liability company.

>> Russell Crosby: This was done for plaintiff many years ago and never done for Federated and we would like to wrap the one remaining property into an LLC.

>> Matt Loesch: Ms. Dent.

>> Mollie Dent: Yes, Mr. CBOs is correct, another vehicle for holding property in an indirect manner that plaintiff implemented years back wasn't implemented for Federated. I believe the investment advisor has recommended that for the one remaining piece of real estate you have.

>> Matt Loesch: Got it, any questions or comments from the board?

>> Move approval.

>> Matt Loesch: All in favor, opposed, on 21, are we there? Laura, can you hear us?

>> This is Laura.

>> Matt Loesch: What we're going to do is right now we have item 21A, if you have your agenda just so we can call?

>> We don't.

>> Matt Loesch: One thing we need to do and then it's all yours I believe. 21A summary of the minutes of the August 26th, 2010 investment committee meeting. Can I get a motion for approval? Motion and second, all right, 21B this is the approval to reallocate \$135 million of the plan's current global equity allocation equally between two active global value equity managers and for the secretary to negotiate and execute agreements with tradewinds global investors and artisan partners. Ms. Weirich do you have anything you want to say on that? Is Makita still on?

>> Oh, yes we're, I'm sorry.

>> Matt Loesch: Okay, did you need to say anything about the global value equity managers?

>> Not unless there are any questions from the board.

>> Matt Loesch: Okay, any comments or questions from the board? Mr. Overton?

>> Edward Overton: Looking at the selection of Tradewinds, it's probably somewhere in the report, but I certainly didn't see it, and I would be interested in knowing why we picked a firm that appears to have only \$171 million in the asset class with two years of experience. And the lowest staffing ratio.

>> Sure. Well, tradewinds has only a small asset amount in that particular strategy, but the firm and the CIO, Dave Ivan, has been managing I believe about 4 billion in similar strategies for quite some time. So they're very experienced in this particular strategy.

>> Matt Loesch: So I think what might help Laura, sorry this is Matt again if you could give a quick summary of what we're trying to do because obviously many of these firms had an international capacity and had a domestic capacity and now we're going for a global value so we're looking for the combo of the two and that is a relatively new entity. Maybe if you could give a few minutes summary of that.

>> Sure, Matt you're absolutely right. You know I think we've discussed in the past that Makita investment group and research has shown that a manager who is skilled in selecting stocks can add more alpha if they're able to look at a broader opportunity set both in the U.S. and internationally. As many corporations operate around the world now. It makes sense to allow competitions, competition between stocks in the portfolio in both places. So it's an area that the retirement system combined, domestic and international assets into the global equity asset class, part of the new asset allocation and we believe that tradewinds is one of the foremost managers in that space.

>> Matt Loesch: Mr. Perkins do you think that -- not to put you on the spot but do you think that characterizes what we did on the development community, particularly looking at tradewinds we asked very similar questions to Mr. Overton's?

>> Yes, exactly, with Makita on boards and with staff additional strength in staff to be able to go out and look at these people, since they brought back a number of qualified finalists, as Laura said, this is -- this asset category is fairly new in the world as global, and people start mixing this, and there is economies of scale in terms of how they go about they're look at different companies and the world gets smaller and smaller so this global strategy is one that's relatively new. So the ones they brought forward the decision of the investment committee level was that these two recommended managers were a good complement to not only this strategy, but other things that we have going on, as we try to balance our overall you know equity and our allocation of assets. So at the

investment committee level there were a lot of questions. We had the two come in and present to us in terms of their strategies. And it was very clear to us that they did, they had two 22 approaches to an asset class that were different. The complementary in the terms of us getting the best possible returns out of that asset class which is part of our asset allocation.

>> Matt Loesch: Thank you. I get my interest not to try to persuade Mr. Overton but kind of enlighten the discussions we had in the investment committee right in line with the questions that you were asking. I don't know if Dr. Imury has anything he would like to add to the things, the nuances we missed, or do you have anything to add?

>> No, I mean, the concept of the global allocation is relatively new. Dave Ivan has been in the business I'm getting the feedback for a long time and the tradewinds is part of a big new asset management. So the concept of global allows the manager to invest wherever they see performance. Therefore that specific strategy is relatively younger. But the total experience of the firm is close to 30 years.

>> Matt Loesch: Does that answer your questions Mr. Overton?

>> Edward Overton: I'm fine, I appreciate the work that the committee did as well as staff and the consultant. But when I look at the numbers, talking to the auditor about what numbers say and what they don't say. And looking at the other candidates it's just I have a curiosity as to why we picked the -- one of the lowest participants in this in terms of assets under management or performance, all seem similar and they all have two years of data to present to us.

>> What we looked at was First Eagle in New York, which is a really good firm, and I don't think it was brought up during the meeting. But one of the issues I had personally with First Eagle is they have 20 to 30% in gold as a type of asset allocation in their portfolio. Now, I think it's a great investment at a personal level, yes, a manager who can adjust their gold holdings or cash holdings but for a pension plan we already have commodities and other allocation. So I wanted to find a manager who does a -- specifically what they do which is investing in

negotiable allocation. Global equities. And that's the reason we do not go with First Eagle. I don't know who were the other managers that was provided to you since I don't have a list in front of me. But between the type managers that we picked, trade wind and artisans are the ones that have really experience in picking a manager on the global arena.

>> Edward Overton: Okay, I was particularly looking at First Eagle as well and wondering why they haven't --

>> They are a top firm on the top of the list for the last 30 years. They are very good to allocating part of their assets to cash and looking at the macroeconomics of going from cash to gold to commodities, dog asset allocation. It's a great firm. If you are going to go in that direction I would recommend it. But for pension plan that's different than what you do as just a manager on the global equity. They are not a global equity manager. They are global equity plus gold plus cash managers. And that's not our focus of our direction.

>> Edward Overton: Okay, does Makita know that when they included them in the field?

>> Yes, and I have met with them, met with First Eagle in New York personally and we went through the detail of the portfolio. And their portfolio still did very well but we talked that additional complexity is in contradict to the way we manage the pension. We didn't want to hire a manger who does multiple asset classes under one umbrella.

>> Matt Loesch: Mr. Andrews.

>> Arn Andrews: I was just going to say to the board member, we asked almost verbatim the exact questions that you're currently asking. When I first saw the thing, the \$171 million also jumped out at me. But on you further review from presentation from artisan in particular, I think we're actually discussing artisan on the \$171 million front, they are a \$43 billion firm and even though the global as we have been described is a relatively new asset allocation space some of the materials that were provided and discussed in our investment meeting, their international equity division dates back to 2002, and since 2002 it is a top decile performer versus peers for every meaningful time period. So once we bore into what it was they had actually been doing and what they were

contemplating doing, we were comfortable with the fact that even currently it is a small dollar amount, these are individuals who have very relevant, very deep experience managing large sums of money. And so once they walked through it for us, we got to a comfort level that hopefully the other board members would come to based on the advice of the investment committee.

>> Edward Overton: I'm very familiar with Artisan. I encountered them during my stint as director, and they are a great firm. But to go with the chair's analogy of a sports thing, I don't want a second baseman trying to play center field. And so this was my concern. Is that we do have an expertise in this area that gives me comfort and I think hearing from the committee members as well as the consultant and staff I'm comfortable to go forward with artisan.

>> Matt Loesch: Anything further from Makita on this topic?

>> No.

>> Matt Loesch: All righty, we have a motion for approval, do I have a motion for approval?

>> Second.

>> Matt Loesch: I have a motion and second. Any further discussion on item 21B, seeing none all in favor, aye, opposed, none, thank you. 21C, this is a status for the investment program. The chairman of the investment committee, asked kind of give a synopsis of what's going on with our asset allocation and the transition from passive to active. I don't know if Mr. Perkins had anything to say before we asked Makita to make the presentation.

>> Jeffrey Perkins: Yes, we had bent on this asset allocation, we asked Makita to help us with this. We have been working through a strategy to implement it. I just asked to get kind of an update for the board's benefit for

everyone's benefit how far along we are in that process what work we have left to be done and I believe this report is a good overview so maybe we'll let Makita comment on that.

>> Matt Loesch: Okay.

>> Pretty -- I'm sorry.

>> Matt Loesch: It's okay Laura if you're ready to go, we have your report in front of us, October 1st memo on the transition update.

>> Do you have the memo or do you have the slides?

>> I believe we have both.

>> Okay, great. So I'll just go through the slides I think to make it a little bit more streamlined and then answer any questions on the memo of course as well. So as you know, at the February 11th Board of Trustees meeting, a new asset allocation was adopted. And the main components of it were moving from domestic and international equity, as we just discussed, to global equity, lowering the fixed income allocation, and increasing alternative assets which previously had only been in real estate and private equities. So since this was adopted in February the staff and the investment community has really and the board have made great progress moving towards the new asset allocation. You can see on page 2 the old target asset allocations, the new transition was undertaken in April and it was moved to a lot of passive asset classes a lot of passive strategies in order to implement the new asset allocation until active managers could be hired. If you want to flip to 3. You can see the actual current allocation as of July 31st. You can see here that the global equity allocation is very close to its new target, fixed income is higher, and alternatives are lower, because assets reserved for alternatives investments are more (inaudible) than fixed income. Since July as you know the board has approved additional investments in opportunistic and real assets and commodities. So this has changed and will be reflected in the September report that the current asset allocation is even closer to the new target. And then on page 4 you can just see the

(inaudible) target allocation, we expect that within the next six months as the opportunistic and real assets are implemented and also as we discuss hedge funds and other asset classes that the current allocation should move much closer to the target. Then on page 5 can you see the global equity asset class. So I point out here that the progress has been made since the adoption of the new asset allocation, RS investments was hired for the domestic small and micro-caps and then global value as you know you just approved artisan and tradewinds, they were interviewed by the investment committee in September. And then the next two asset classes that we plan to bring to the investment committee and then the board are foreign small cap managers of the upcoming October investment committee meeting and then emerging markets managers up in November investment committee meeting. So those manager searches have already been completed by staff and Makita investment group and we hope to have progress on manager hirings in these spaces shortly. Looking to the next page, page 6 you can see the fixed income managers. In the high yield space, Makai Kiels and Sykes were retained. They had been hired previously, and then the core government and fixed mandates are intended to remain passive, because those are efficient asset classes. So the only space in fixed income area that still needs to be hired is the investment grade credit manager, which we expect to complete the search for over the next few months. Flipping to 7, alternative asset classes here, those managers were retained, but here a lot of progress has been made recently, in the opportunistic asset class in terms of direct lending managers three different managers were hired recently, GSO, Medley and White Oaks. And then as you know in the real asset space, two risk parity commodities managers, Credit Suisse and First Quadrant, were also recently hired. Hedge funds here, which is in the lower right slice of the pie, are -- the hedge fund searches are expected to begin with the December meeting, after you know we talked to foreign small caps and emerging market managers at the next two meetings. Flipping to the last page, I've already gone over most of this information. And just to clarify the active managers remaining to be hired here are listed in the table at the bottom. As you know, foreign small cap and emerging markets are upcoming searches, so the only two remaining after that are for active investment grade credit and hedge fund. Just to summarize we think there's been really a lot of big progress being made since the asset allocation was adopted and expect the entire implementation to be completed shortly. I'm happy to answer any questions.

>> Matt Loesch: Any comments or questions from the board? Mr. Crosby.

>> Russell Crosby: Yes would I like to note -- hello? Okay, I'd like to note that there's substantial delay in between when you think you've hired a manager, for example, the three direct lending managers, the two commodity managers, those contracts are still not done. We're still going through the process of finalizing all of the contracts. I think we're very close with the three direct lending. We've still got a ways to go with the two commodity managers.

>> Matt Loesch: Is there a follow-on comment about that?

>> Russell Crosby: No, it's the nature of what we're having to deal with. And particularly, the contracting process is relatively slow.

>> Matt Loesch: Are you seeing impacts because of the time, the time it's taking or something we need to address?

>> Russell Crosby: There's nothing you can do to address it. It's partly the nature of negotiating contracts with investment managers, and being particularly with the direct lending managers, we're one of the first public plans to go through, and actually hire direct lending managers. Others are doing it at this point, but we're one of the first ones through the chute. So it's just a development process and it takes a little bit -- yeah. And I don't want people to think that just because the board and the investment committee have approved something, that it's implemented automatically. It often takes a month or two or even three to get the contract finalized and actually get the money.

>> Matt Loesch: Do we have -- while we have Makita on the line I want to ask if there's any questions from the board or comments to their presentation. At all?

>> The only thing I would add regarding the hedge fund allocation at the first quarter of 2011, I will not see that as a completion date. Hedge fund is a much more complex asset class which very expensive fees. So I am personally being much more hesitant. We've been -- I've been doing a lot of work in terms of looking at the

different hedge funds, who fits within the portfolio for our portfolio. And my conclusion is if you go slow, you will do better than if you go fast. So the first quarter of 2011, it's a good aim. But I want to make sure that they hire a manager that I feel comfortable rather than just having a deadline.

>> Matt Loesch: Thank you. Mr. Perkins.

>> Jeffrey Perkins: I would concur with that approach because this is an area that I think we -- you know it's one of those opportunistic one of those ones but I just want to make sure that we go about this the right way because that's an area we just need to be cautious with. So thank you.

>> Matt Loesch: Any other questions or comments for Makita? I just want to express my thanks because let's say we're relatively wrapped up by let's say the second quarter of 2011, amazing progress. And I understand the amount of output we're asking from both our staff and from Makita. Both in the challenges and trying new things like direct lending or things that other folks -- it's not new necessarily but it's new to the public plan space. We're trying things that are innovative. It did a great job for us last year and we're hoping, obviously we're not expecting that year in and year out to the nice but the A effort that's gone involved, getting involved in doing all this work is pretty amazing so I'd like to thank you.

>> Russell Crosby: And again I'd like to point out that the staff is stretched to the limit right now. We've got a custom people out on maternity leave and it is -- we are operating beyond our capacity at this point.

>> Matt Loesch: All right, thank you, Makita, appreciate it, you guys have a good day.

>> Thank you, you too.

>> Matt Loesch: I'd like to move on get through 22, note and file on the education and training. If anybody has any questions, that will be a note and filed. Future agenda items, our usual second Thursday of the month of November falls on Veterans Day so our meeting will be held the previous -- the day-before Wednesday so it will

not be on the Thursday. So if folks are looking at schedules and availability and use of facilities, it may be important to note that we're moved to Wednesday next month. Besides any public retiree comments what we'll talk about with the disabilities, is there any comments in general from the public and retiree comments? Don't see any so okay.

>> Edward Overton: Did someone check to see if that room is available on that Wednesday?

>> Matt Loesch: I think --

>> Russell Crosby: In worst-case, we'll move into the committee rooms next door.

>> Mollie Dent: The meeting would be on the 11th of November?

>> Matt Loesch: No, no, we're not having the meeting on November -- it's moved to the wed, day before that, the 10th. No, Veterans Day. If I did, I misspoke. It's Veterans Day. So we're moving back to item 19, continuance of the disability process study session, legal review. For those -- and if there was not enough communication with you, we need to work on something on that. But we had been talking many times, especially since I'm on the board, I know it's been going on before that, about commenting about what is going on with our disability process and how we process our disabilities. And there's always questions and concerns of the board. We're at this critical position, we have to make a choice. We have some input from different folks on ways to possibly improve it. So a way to start that discussion we thought was to have a study session which the first phase of it because of calendars was done on October 4th, where we had a three-hour session on the Monday, October 4th to discuss some aspects of it where we talked about what HR is doing what retirement staff is doing what the medical staff is doing and then also, possibly what some other areas are considering or thinking about. And one other critical aspect is also the legal aspect of it. And again the one thing I'd pushed last time, as we are here to absorb what the process is now and gather some ideas on the disability and then possibly come out with a direction today, with what we might be thinking to move forward about possibly changing things about the process. Really it's open ended, it came out of the October 4th thing it was more absorbing the information. And at this point right now we

are at the continuance of absorbing that information. Ms. Dent and Mr. Richeda had worked real hard on a presentation on some of the legal stuff which I think you have in front of you up on the screen. And do we have it here on the screen as well? I believe it's new video. So --

>> Mollie Dent: So I will be doing the presentation and Mr. Richeda will add his comments as we go along. I think it will be more efficient for us to go through the presentation and take board questions afterwards but if you feel the need to ask a question as we're speaking of course you should do so. I also have hard copies so I'll hand them out for the board and also put some out for the public.

>> Matt Loesch: On our study session for the 4th we had some folks in the audience for lack of a better word ask some questions at the same time. So if you have comments or questions please feel comfortable. We left it up to the presenter whether it was interrupting their prejudices to ask the question at the end, or leave it to the end. Ms. Dent has alluded she would prefer for us to leave it until the end unless it's critical.

>> Mollie Dent: Before we get started I'm not real familiar with PowerPoint and I'm not a great typist so I apologize in advance. I hope this substance is going to make up for any of the other issues. And I think I have to tell them to advance the slides so would you go to slide 2, please. So this is an outline. We have a lot to cover. I'm going to go through some of the slides fairly quickly, because there's a lot of detail on them that I don't -- that I think the board may want for background information. But based on our conversations at the last study session, I think that the areas that we're going to want to focus on really are more along the lines of the definition of the benefit and how some of that might be construed by courts and has been construed by courts. And I know that you do want to talk about some operational changes and next steps at the bottom. So next slide, please. So the Federated system disability process consists of these six steps. An application, a medical examination, a disability subcommittee hearing, a board hearing, then after the board hearing, there are two post-hearing processes that can occur. A rehearing and then a filing of a petition for writ of mandate by the applicant if they believe the board's denial was incorrect. I would note that there's actually a fairly recent case that indicates that the employer can file a petition for writ of mandate as well if they believe that the applicant was granted incorrectly. So in terms of the application, the second point I think is one that maybe is most significant for the board, that the board can retire a

member for disability on its own motion. The reason I bring that up is that frequently you'll have a service-connected disability application, but the board may find that although the person is disabled, it's not service-connected. The board can convert that to a non-service connected disability application. It's always obviously preferable to get the applicant's consent to that, but the board can retire a member on its own motion. And you'll also note that not -- that other people can file the application. But that's not common. Almost all of our applications are made on the basis of a -- almost all of our disabilities are heard on the basis of an application filed by the member. There is somewhat of a time limit on the application. But if the disability has been continuous since the member stopped rendering service the four month time limit doesn't apply. Next slide, please. We had -- you all know that the board's medical doctor examines applicants. That's actually mandatory in the code, except where the disability, the retirement is initiated by the board. And in that case it's permissive. The applicant can also submit medical reports outside of what Dr. Das gathers. And actually, all medical information under the control of the city or member is required to be made available to the medical director, and the board, upon their request. So the board and the medical director are supposed to be able to get all medical information that they seek. I want to -- next slide, please. -- take a minute to talk about the disability subcommittee. Board member Overton, may know that this idea or may recall that this idea of options has been before the board before. Actually, the disability subcommittee I believe was established some time in the late '90s in order -- of course it looks like similar reasons that the board is looking at the disability process now, the time that it took to hear disability retirement applications, and the efficiencies of what was going on. The members of the disability subcommittee are the retirement services director and assistant director, the subcommittee holds hearings on applications, takes evidence and prepares a report, recommending approval or denial of the application for the board. Next slide, please. So under our code the board is required to hold a hearing on the disability applications. And make a finding as to whether there is a disability, whether it is service connected or whether it is not service connected. If the disability subcommittee recommends denial of an application then the board hearing holds a full hearing, and that does meet due process requirements. I want to make that clear, that we actually have -- we actually have a case, that holds that the board's process meets due process hearing requirements in San José. If the disability subcommittee recommends approval of the application the board can pull the application for the full hearing and in fact the board would have a fiduciary duty to deny an application if evidence does not show that the applicant is entitled to a disability retirement. So even though the disability retirement subcommittee may recommend

retirement, the board should look carefully at those applications carefully, as well. That process through the board hearing results in a resolution either approving or denying the application. If the application is denied you'll see that the resolution comes back to you at the next board meeting. I do want to take a moment here to explain why the resolution comes back to you at the next board meeting. It is for the purpose of having the board members who voted on the disability retirement to ensure that the resolution reflects their motion and their findings. You can't prepare a resolution in advance for something on which you're supposed to make an adjudicatory decision. So it is -- the board should be looking at the resolutions and if the resolution includes a finding that is inconsistent with what you think your motion was it should be pulled and it should be discussed. So once a resolution has been adopted denying benefits an applicant may file a request for rehearing within 30 days after notice of board determination has been sent. The grounds for re-- this is a grounds for rehearing and you had one of these on your agenda today. It's been deferred to next month. This is for it to come back to you. The -- there are four grounds for rehearing. The last two are really the most significant ones, and the most -- and I don't know - - I won't say common, but evidence is not justified the decision, simply means the evidence that was submitted in the original hearing they think you made a mistake, and do you agree that you looked at the evidence incorrectly and you want to look at it again. That's, do we want to look at the same evidence again? The fourth basis is that the applicant has discovered new evidence which could not have been procured or discovered with reasonable diligence for the original hearing. And that would require them to actually provide you with the new evidence. Now, the rehearing is not for -- you rule on the application for rehearing for the purpose of bringing the matter back for rehearing. There are two steps. If you found that the applicant did have additional evidence you wouldn't necessarily hear it at that hearing, you'd bring them back and rehear it all over again. Applicants also have an opportunity to file a petition for writ of mandate at the superior court. The scope of review in those superior court actions requires the court to look at whether the board proceeded without or in excess of its jurisdiction, whether the board provided a full hearing and whether the board abused its discretion. I'm going to just really address the abuse of discretion ground because it's really the primary grounds for writs of mandate. An abuse of discretion is shown if the board did not proceed in the manner required by law, the board decision is not supported by the findings, or the findings in the decision are not supported by the evidence. So one reason it's important to look at the resolution is that the resolution contains the findings and the court will look at the resolution. And then, the resolution does have to have support in the record. And the -- again, I'll hone in on what

is the most common claim on a petition for review. And that is, that is the not supported by the evidence, that's frequently what applicants will argue. So the court uses what's called the independent evidence standard of review. They review the evidence produced by the agency, and you'll also notice that the court can review, under category B on the slide here, on the second bullet, new evidence. And this is the same standard for new evidence that is on your petition for rehearing. So that's why, when you do get a petition for rehearing that is made on the basis of new evidence, you might want to take a very close look at it. Because a court might allow that new evidence to come in under this standard. And then, evidence that has been improperly excluded by the agency is that actually has happened in a Police and Fire board case. And it resulted in the -- at the trial court level when the board being ordered to grant the retirement. So that's why it's very important for applicants to be able to testify, to be able to cross examine witnesses, and not to be cut off in their testimony. You're holding an adjudicatory hearing and it's important for you to hear what they want to say. Now, the court must afford a strong presumption of correctness to the board findings. Now, you might think this was inconsistent with being independent, but it's not. And the courts do accord a strong presumption of correctness to retirement board findings. And the burden imposed on the party challenging the decision is a burden of proof and not just a burden of producing evidence. It is not enough for the person to simply say there was some evidence for a contrary decision, it is their burden of proof to show that your decision was not supported by the evidence. And I included this last comment, because it's something that seems like it comes up with the boards frequently. And a court may accept the relevant and considered opinion of one expert, medical expert over other inconsistent medical opinions. And this isn't -- this isn't just in disability cases but it's in other cases involving this standard of review. And when we get back to the discussion of the case law at the end, there is, though, a retirement disability case where that occurred. So let's -- next slide, please. The next one, two, three, the next three slides describe the system disability benefits. And I'm going to go through these really quickly, because I don't want to get into the formula for how the benefit is calculated, but I do want to make a couple of points about the disability benefits that sort of allow you to distinguish between the types. Next slide. So for a service-connected disability benefit, the three things I want to emphasize that the allowance a minimum of 40% of final comp, regardless of years of service. There is an exception if they're less than 55 years from the date of requirement they'll get a reduction if they have outside earnings. But the other significant part of the service connected disability allowances are the that the medical and dental benefits are automatic and all or a portion of their allowance is nontaxable. Next slide,

please. For a non-service connected disability allowance, the minimums are less. And there are more -- more reductions. The medical and dental benefits are not automatic. And the allowance is fully taxable. Next slide please. So now we're going to get into the heart of the disabilities. Whose our definition of disability? And what are the elements of the disability? Of a disability? What needs to be shown in order to be entitled to a disability allowance? So part A of code section 3.28.1210 defines disability. And so this is the definition that would define disability for both service-connected and nonservice-connected. You start here, is the person disabled, before you go to, is it service-connected or nonservice-connected? So it's of a permanent or extended and uncertain duration, occurring while the member is an employee in the Federated city service, as a result of injury or disease which renders the member physically or mentally incapable of continuing to satisfactorily assume the responsibilities and perform the duties and functions of the position then held by him. And of any other position in the same classification of positions to which the city may offer to transfer him. And then there's a last sentence in section A which actually is fairly significant because it's pretty unusual. It does not mean physical or mental inability to assume said responsibilities or perform said duties. So when we go to looking at how this compares to other statements disability definitions you'll see that some of these words are used in other systems and some of them are not. And that does become significant, in terms of being able to look at whether other -- whether cases decided by courts involving other systems would apply to this system. For the definition of service connected disability, it means a disability as defined above. So again, you have to find they meet the disability definition above first, which arises and results from an injury or disease arising out of and in the course of Federated service. So that language is actually used in other statutes and so there is -- it's fairly similar to language in other statutes. Next slide please. I include the disability exclusion only because it's interesting that the code actually in two places says you can't get a disability benefit, if you weren't disabled while you were in -- if you weren't disabled at the time you left city service. It says it in the disability definition, that the disability must occur while you're a member of the system, and it says it in code section 3.28.420. You must be permanently disabled while you're in the city service. This is the disability, this is not the injury. It doesn't say -- it's not just that the injury must occur while you're in city service. The disability must occur while you're in city service. Your disability can't occur after you cease to be a member of the system except where it is while you are a member of a reciprocal system. I'm not going to go through reciprocity but we do have provisions for automatic disabilities under certain

circumstances where reciprocal systems have granted the disability. So I -- it -- it's in two places in our code. That it's not the injury, it's the disability that must occur while you're in the city service. Next slide please.

>> Notice that definition means, the way we've defined it in the code means incapacity. Not merely you have something going on. But that has incapacitated you.

>> Mollie Dent: Right. And when we go to the case law at the end we'll talk a little bit about what some of those words in our statute mean. So the next slide is the burden of proof. Yes, thank you. The burden of proof is on the applicant to establish the occurrence or nonoccurrence of the conditions necessary to establish entitlement to a disability retirement benefit. In other words if an applicant is applying for a non-service connected disability retirement, they must establish each and every element of the disabled definition. If the applicant is applying for a service connected disability benefit, they must establish each and every element not only of the disability definition but of the service connected definition. So -- and if there is something that would preclude them from getting the disability retirement like the timing of when the disability occurred they must establish that aspect also. That's the nonoccurrence of the condition. So the burden of proof is on the applicant. It's not on the system. And they're to come forward with evidence that is satisfactory to the board to establish the elements. Next slide please. So I wanted to turn now to the rules of statutory construction, which are the rules that courts use to construe municipal ordinances as well as state statutes, federal laws. I've included -- this is not an exhaustive list of the rules of statutory construction. I have a 35-page little booklet in my office that our office put together many years ago on the rules. This is really focusing on three of them that I think get to some of the concerns the board has with -- has expressed with your statute in the past. So pension legislation is liberally construed in favor of the applicant. The legislative purpose is paramount, but the rule of liberal construction cannot be permitted to eradicate the legislative purpose, or allow eligibility for those for whom it is obviously not intended. So when we say we're construing things liberally towards the applicant, a court would do that. That's not an incorrect statement. But it cannot be to the point where you're granting a benefit to someone for whom it was not obviously intended to be granted. In other words it has to fall within the parameters of what the statutory authority is. It's not something that you can have a -- your own interpretation of when and how a disability should be granted. The second rule is that prior judicial construction of a statute maybe adopted buy court when construing another

statute containing identical or similar language. So to the extent that our code has identical or similar language to other pension statutes and a court has ruled on what that means, courts would likely look to that. And the third item is that every word, phrase and provision is presumed to have some meaning and perform some useful function. A construction which would render language surplusage is to be avoided. And I do fight this one because of the language in the Federated statute about mere inability. It is unusual language. But it's not -- it cannot be simply read out of the statute. It is in the statute and you can't simply ignore it. (inaudible)

>> What does "surplusage" mean?

>> Mollie Dent: Extra. It can't be presumed that they just threw it in there for no reason. The legislature put that language in the statute. They must have had a reason for putting it in the statute is how the courts look at it. I wanted to test how I could say it, somehow I look at it.

>> Edward Overton: You wanted to make sure you could say it.

>> Mollie Dent: I wanted to remember it for scrabble.

>> That's a lot of letters for scrabble.

>> Mollie Dent: I'm not going to read these definitions. These are definition governing other pension systems. The first pension system and governing specifically disability and service connected disability retirements. The two pension systems are CERL and PERL. The Public Employees Retirement Law and the County Employees Retirement Law. A couple of comments. They do use similar "arising out of" language to what we use. They do not use identical language in terms of the factors for the disability. You'll see that -- you'll see for example, in the county employees retirement law, one of the definitions requires you to be permanently, unable permanently to engage in any substantial gainful employment. So --

>> Which is harder than Social Security disability standards.

>> Mollie Dent: Yes which is harder than the Social Security disability standards. In terms of disability standards for monetary benefits, I mean, Social Security has one system, for providing benefits to a disabled person. These public pension plans that I'm -- that we're looking at here are most similar to what this system provides. You know, one might ask, well why not look at workers compensation law. Well, there's two reasons that I'm not looking at workers compensation law here. Workers compensation is not a pension system and courts normally would look at definitions they used in similar -- for similar statutes. And the second reason, actually, has -- is that workers compensation law, since the legislative amendments in 2004, where the -- the board -- where did boards were directed to go to the AMA guidelines for ratings, looks at what -- they look now at what is called whole body impairment. Which means that you can get a rating for things that do not affect your work at all. So in the workers compensation system, they're not looking for the same thing that our statute says you're to look at. Now that's not to say that you ignore workers compensation, that there's no analogy in workers compensation law. And we're going to turn next to the cases and we'll talk about that a little bit.

>> Mollie, just a quick one. There was a period of about 15 years in which 20 cases including major public jurisdictions like San Diego and San Francisco where the issue arose in case after case whether a prior workers comp decision bounds the retirement board. And the cases rather split particularly early on but the final result of that doctrine was no, and just supports Mollie's conclusion.

>> Mollie Dent: I will add that I looked briefly at some of the other systems, like San José, that have their own rules. For example, the City of San Diego absolutely has its own rules. Their code does not -- their charter and code do not read anything like ours does. City of Los Angeles, City of San Francisco. I so when we talk about the selected disability cases which starts on slide 22, I didn't -- it -- most of-d I believe that it's really most relevant to look at the county employees retirement cases and the PERL cases because you have to have an in depth knowledge of how the other systems' definitions work. San Diego I will just say has a very different definition. They basically require the disability to be solely caused by your work, so that's a different definition. Just like the one CERL definition we looked at that says you can't engage in any gainful employment is different than our definition. So I tried to focus -- and these are selected cases. This is by no means all of the disability

retirement cases out there. I tried to focus on some of the case that address issues that seem to be frequently confronting the board in terms of contradictory evidence and opinions. So the first thing I looked at was the availability of modified duty or ability to accommodate work restrictions as precluding a disability retirement. There are lots of cases on this. This is very, very common. The cases hold that the person need not be able to perform any and all duties performed by persons in his job category. And that persons that -- that a person should not be retired if he can perform duties in a given, permanent assignment. The courts uniformly hold that the claimed disability must be of such a nature that it becomes necessary for the employee to retire. They use the word necessary. And the applicant's post-injury history is relevant, although not conclusive. Now, these are not hard and fast rules, obviously, and these are not going to tell you what to do in a particular disability case. But they do show that it is -- that your challenges in confronting the question of whether the person could have kept working or performed in an alternative work category are maybe some of the most frequent questions that courts have in the disability retirement context. So it is your job to listen to all of the evidence, and make a decision, based on the evidence, whether or not you think the person could have kept working. That really is the very first cut decision. It -- the disability for the purpose of a disability retirement is not the same thing as disability for other purposes. It's not like Social Security disability retirement and it's not like workers comp disability retirement -- disability. It's somewhere in between. And that's your job within your definition to figure out that somewhere in between. So next slide please. So slide 23 talks about two other areas where I know the board frequently has issues. Temporary work restrictions versus permanent work restrictions. This is -- the discussion here is of a case where an employee had received temporary work restrictions and had been told that the -- by the employer that the restrictions were not compatible with her modified duty temporary assignment. Nonetheless, the retirement board in that case denied a service connected disability retirement, based on the opinion of the system panel doctor that the employee had not been truthful with her medical doctor and there was no evidence of substantial impairment, no objective evidence, therefore no permanent restrictions because there was no objective basis for any level of disability. Now this was a trial court decision. It is a trial court decision though that is cited in an appellate court decision that arose in the context of an effort of the employee to get back pay. So a trial court decision is not something that you can cite as precedent. But it was instructive to me in showing that -- how courts apply those rules that I talked about, back there in the independent judgment standard, the panel's medical doctor testimony was strong and the court accepted it. That even though she had temporary work restrictions that

they had said they could not accommodate. Her permanent work restrictions, they're doctor found no need for permanent work restrictions because looked at the evidence and said there's no objective basis for work restrictions. The next item is the conflicting doctor's opinions. And again this is an example of a court -- and this is an appellate court case, upholding the trial court decision of accepting the report of one medical doctor who expressed doubt that heart condition was due to job stress and instead cited other factors such as family history of coronary artery disease and cigarette smoking and the denial of the disability retirement was upheld. This was two doctors against one I believe if you're just looking at numbers. Next slide, please. So, now, the cause -- this is getting to the causation for a service connected disability retirement allowance. Government code section 31.720 which is the county employees retirement law says there must be substantial evidence of some connection between the job and the disability that is real and measurable. And the Supreme Court rejected in one case the board's contention that substantial means more than 50% industrial causation. There is some similarity in the language, in our code, and CERL. So some of these causation cases there may be some indication that the court would be with our language, you know, saying that no, we don't have to show that it's 100% industrial. I do mention that the courts have sometimes looked at workers compensation law as precedence for guidance in dealing with issues of causation in disability retirement cases. However, very interesting California Supreme Court case decided under PERL, holding that the workers compensation law requirements were showing that a psychiatric injury as work-related did not apply in determining whether the same injury should be treated as an industrial injury for disability pension purposes. Now, this is a real interesting case, because actually workers comp law requirements in this case were harder for the psychiatric injury than the PERL requirements. And in -- under PERL there is a process where the workers compensation appeals board actually hears disability retirements and they're directed to hear them under the same process that they use for workers comp cases. But the court very clearly stated, the same process doesn't mean the same rules. So just because you workers comp appeals hearing board are hearing a disability retirement hearing disability retirement case you don't get to apply your rules to that case. You must apply the system's rules to that case. And then of course this language cites the language that Mr. Richeda mentioned at the beginning about no res judicata or collateral estop due to workers compensation board findings where the determinations are different. That's a fairly consistent thread throughout the cases. But I thought this one was an especially interesting one, because the workers compensation appeals board was actually hearing this case, and they still couldn't use their own rules. And then this is sort of the

opposite side of the spectrum. One court specifically found that a 6% disability rating due to industrial causation did not preclude BART board finding that applicant was capable of performing his job as a BART police officer. So we've got 6% at one end and maybe 50% at the other end. And you're not going to get probably a lot more specifics from that, from look at the case law. So I want to go back now to our definition of disability after we've looked at those cases really quickly. And again, that is slide 14 please. So a couple of things that I think the board needs to keep in the back of its mind when it's looking at the disability applications, you're looking for a disability which occurs. There has to be an injury, yes. There has to be an injury that occurs during the course and scope of employment. But the inquiry doesn't stop there. The inquiry has to be the injury or disease has to become disabling. So you have to look at whether or not the disability is there as well and whether it occurred while the person was a city employee. The causation, it is safe to say, of the injury need not be 100%. The causation of the disability probably need not be 100%, but the person must be 100% disabled from performing their job. And it must be incapable, not mere inability. Now what do we mean by incapable and not mere inability? Incapable is more in tune with the statutes that are looking at complete exclusion from being able to perform the work. Not being able to perform any work, but complete exclusion from being able to perform this particular work. Or the alternative work that they maybe offered. But they are functionally incapable of performing the work. Mere physical or mental inability could mean, for example, that the person has a fear of pain and they don't want to do the work because they think it will hurt. That's not going to be necessarily an incapability of performing the work. It may be a mental inability to perform it, I suppose. But you are, in each case, going to have to look at that. And it is a case-by-case determination that you have to make. And it's a hard job. It is a hard job and there's lots of case law out there to prove how hard it is.

>> Mollie, I'm not sure about you, I find it almost impossible to understand what distinction they're making here. It's obviously important, they're trying to tell us something that matters. I for one cannot figure it out. I understand incapacity, and they sort of make that a synonym with incapability, because they use both those words up above. Okay? I'm sort of on track. But how incapacity is different than any meaningful way from inability and how incapability is different in any meaningful way from inability, I think is very awkward to understand. I don't see what's added by the last sentence. I don't know, Mollie, if there's any way to get legislative history, or anything to tell us why that came, why they added that. I don't know if it dates from the beginning. At least, in terms of the

other definitions I've seen, I've never seen this kind of distinction that a statute or an ordinance tries to -- or a municipal code tries to implement.

>> Mollie Dent: Well, actually the case law kind of addresses that. The case law, under all of the statutes talks about being able to measure having some measurable and objective evidence. So there would be, for -- I'm not a doctor but you -- a person simply saying no, I can't do that, that's an inability. You look at the person and you say, they should be able to do that. There's no -- there is no physical evidence that would support their inability to do that. And I would --

>> I myself, I think inability could either be seen subjectively or objectively, just in the way we constantly deal with incapacity, whether it's subjective or objective in terms of pain.

>> Mollie Dent: The point is you can't read the sentence out of the statute. The sentence is there for a reason. It does require the board to look at that issue and I think it requires you to make a decision about whether or not their disability is an incapacity or an inability.

>> I think one thing it's telling us and Molly's absolutely right, it's there, you can't disregard it, you have to do something with it. What do you do with it? I think the best I can do is, it's telling you to buck up and find a higher level. If you were thinking inability was enough, think again. You've got to find incapability. Now I personally am not sure what that distinction is. But I know they're telling us be tough be hard be close and find incapacity. And I think if you do that you're not reading it out of the statute, if you don't know what it means.

>> I know I kind of brought this up earlier but I was going to throw that out there again as far as the competitive terms for inability and incapacity. I was wondering the inability to type 50 words per minute or lift 100 pounds and that job is out there and an individual at his best when he was normal could only lift 50 pounds, does that mean since the job was there requires him to lift 100 pounds he can't do it that means we give him a disability retirement because of that. That was kind of how I took it because I struggled with the difference between inability and incapacity, and I always throw back to what objectively -- you know, what's objective information that you use to

say you're unable to do something, versus subjective information, like the pain issue. So I was wondering if throwing that out there again helps clarify, or it just legally it has to be a disability inability, not a functional inability?

>> Mollie Dent: Well, I think the example of the typing is a good one. Obviously, the mere fact that you don't type very fast is not enough to get you a disability retirement. You may be unable to type any faster. But it may not be that you are incapable of typing any faster. You just may not be able to type that fast and I think you know you get a -- when you -- orthopedically, even with lifting, you might be capable of doing things you don't know you're capable of doing. There is a difference between inability, and incapability. Now, that isn't to say that it's an easy distinction to make in some of the harder cases that come before you. But it is -- you have to look at it, and your decision, I mean one of the things to look back on is, if you're doing a thorough job and you're exercising your fiduciary duty and you're looking at the things that this statute says you should look at, and you're making your decision, your decision is entitled to considerable deference. You should feel comfortable in looking at everything you're supposed to look at but if you look at everything you're supposed to look at and you make your judgment and you've thoroughly considered the matter, the rules on how a court would review these is going to be to defer to your decision to the extent -- as long as there's some evidence there to support it.

>> I think that's the real -- I think what Mollie said is the real point of the whole thing. Maybe this was trying to deal with some weird outliers. Like I used to have a job that required me to type but now they put in all these stupid computers and I cannot learn them. I have an inability to learn. Somehow I just can't do it. Would my inability to learn the new technology that's part of the ongoing job classification that I've been in, would that be enough to justify disability retirement? I think we'd all say that's ridiculous, unless I can somehow show a learning disability that's substantial enough to be considered an incapacitating situation. So maybe that's what this sentence has dealt with. But I think Mollie's points are the right points.

>> Mollie Dent: So I'm going to move on to slide 25 which is the review of potential operational changes. This is pretty open ended. I -- there's not a recommendation here or anything. Actually, as I said, the boards back in 1996 looked at this once before and these are the same options they looked back then. One would be to conduct the

disability retirement hearings at a separate board hearing. You potentially could schedule them every month, you could schedule them on some less frequent basis and they wouldn't be part of a regular -- it would still be a full board meeting but it would be a separate board meeting for disability retirements. You could revive the disability retirement committee composition and/or process. You could potentially have a board subcommittee, but that would require more board time in -- as a subset of the board in dealing with this disability matters. And you can't assign the function, the hearing function, you cannot delegate it. So to the extent that you have these committee processes inter15ing, they can cut down perhaps on the number of contested matters where there are matters that are going to be approved but it doesn't necessarily cut down on your having to hold hearings on the contested matters. In terms of the process, there -- you know, well first of all, talk about an outside hearing officer. In the absence of a Municipal Code change allowing the board to fully delegate the hearing function, the board would still have to hear the matter de novo if the applicant requested it. There are ways that you could use an outside hearing officer or a third party to expedite the process. But whether or not it would -- the value that you would get out of it would be worth what you would have to pay for it when you're still having to fully hear the matters is I think maybe open to question. So the third -- the revising the disability process or using an outside person, there would be ways in which the packet for disabilities could probably come to the board, in a manner that would maybe connect. Your -- connect the evidence to the findings that you need to make. And that -- I know the board has talked about that before. I think that that is a very time-consuming issue to try to pull through -- to go through a disability packet, look at the pages in the record that match up with each of the findings that you need to make and the pro evidence and the contrary evidence. But that is something that you know, could make it perhaps a little more smooth at the board meetings but it's not a major change in process.

>> Just to deal with that. I assume that all of us are doing what Mollie just described. That's what we have to do when we look through this stuff. So I personally would strongly recommend figuring out some -- assuming the hearings were going to remain before you, that a process be created in some sort of checklist or whatever you are going to call it be attached to facilitate the review that you have to do. So that you don't have to look through 100 pages. You look through the relevant pages on causation, if that's the only thing that's really in dispute and you zero in on what's important and then you read, hmm, is this persuasive to me or is this not persuasive to me? And

not waste your time on an awful lot of stuff we have in there that otherwise you just have to page through to figure out what those pages are on causation.

>> Russell Crosby: Isn't that essentially what is done now with Dr. Das's report?

>> He doesn't isolate where the contrary evidence is. His report I think is very useful on those issues, but he doesn't point out to you, you know, on page 47 of Dr. X's report there is Dr. X's discussion of causation. You have to find that yourself. I know this is a relatively minor point, but it might save time. But the more important point I think is on the outside hearing officers and whether you want to consider recommendation to the stakeholders, and eventually to the council, that the code be amended to permit outside hearing officers. There's obviously a variety of approaches. One approach is sort of the standard civil service commission model where there's outside hearing officers. The decision can be referred to the full commission who can adopt or reject and send it back or modify. But in other words, it's not a de novo hearing. You don't have to do everything all over again, before you, instead you get this nice tidy little decision and maybe whatever written evidence and then people come before you and argue one way or the other. But it's a much more truncated focused approach. I haven't discussed this with Molly.

>> Can I ask a question of number 2, if board members sit on that committee does that satisfy?

>> Mollie Dent: No, the full board would still have the hold it.

>> Russell Crosby: Unless of course the Municipal Code was modified.

>> Mollie Dent: Right, right. And in terms of the other jurisdictions that have outside third party hearing officers, the county employees retirement law specifically provides for it. The statute provides for them to do the referral. The City of San Diego also has a specific provision in -- for what they call adjudicators, individual hearing officers. The -- I didn't look at all of the other systems, unique systems and what they do. It is interesting that the public employees retirement system actually defers to the workers compensation appeals board on the matter of

whether or not the disability, they throw it to them on whether or not the disability is service connected, it's very interesting. But you know I think that's why -- let's go to next steps which is the next slide.

>> Can I ask you a question on the question that was asked right there, about making a change about necessarily having an outside hearing, we can just ask the council to do it but it still has to be negotiated correct? That element there --

>> Mollie Dent: I'm not prepared to address -- I'm not -- I don't-d it might be. That's -- I really didn't look yet.

>> Matt Loesch: The comment it would probably be in that realm most likely wouldn't you think?

>> Mollie Dent: I'm sure most people would say that it should be, yes. I haven't really looked at that particular issue but it certainly would require a municipal code change. And that's why when we go to -- on slide 26 when we go to conclusions and next steps I've made a couple of conclusions about what you know the main part of presentation, but in terms of the next steps you have options for operational changes. But further consideration of those options and process for implementation kind of depends on what options you're interested in. If you're interested truly in having an independent third party, hearing officer that takes testimony, listens to evidence and you -- that would be the due process hearing, you would need a municipal code change. If you are interested in something short of that, I think it would be important to focus on what you're trying to achieve, you know, what's the goal? Because there are two different kind of goals being articulated in looking at options. One is, efficiency. But the other is also, independent, outside expertise. So if you're trying to achieve both of those goals, then you can get some independent expertise, can you can get some more -- you can get someone else besides Dr. Das to give you a report, just like Dr. Das does, but ultimately it would come to you for decision and it would cost to get that expertise. So that's the end of my presentation and if anybody has questions, I guess --

>> Matt Loesch: So I guess let's first start with the board and then if staff, I see Mr. Demers is here and if folks from the audience have things they would like to ask or make statements on that's fine too. So I'll start with the board first and then we'll kind of work our way around. Okay, Mr. Overton.

>> Edward Overton: Couple of questions. Number 1, the issue of the writ. What is the board's role in avoiding being subject to the writ of mandate? We make determinations but none of us -- well one of us is a lawyer and I guess he left. But we need to make sure that all the Is are dotted and the Ts are crossed and if there are some succinct thing that legal can present that says you know make sure this happens or et cetera.

>> Mollie Dent: Well, I can -- I can very quickly, as I said when I went over the writ of mandate slide, one of the best ways you can avoid having a problem if a writ of mandate is filed is to make sure you've given the applicant every opportunity to present their testimony, to cross examine witnesses, and to participate in a hearing. The other -- getting back to the issue of the -- needing a code amendment. That's -- unless the code is changed you all need to hold the hearing because that's kind of item 1 under the scope of review. It would be in excess of your jurisdiction for you to allow someone else to make that decision for you. In terms of the abuse of discretion, it's reviewing the evidence, and making a decision based on the evidence that's in front of you, not based on things that you bring in from the outside but based on the evidence that is in front of you. And then connecting the evidence to the specific findings for disability, is the person incapacitated or merely unable?

>> Edward Overton: Does all that have to be articulated or does the result of the decision have to reflect that?

>> Mollie Dent: It is ideal that it be articulated, and the adoption of the resolution is that articulation. So to the extent that when the board looks at the resolutions when they come back, if they think there was some specific fact that they want included in the resolution, that's why the resolutions come back to you. So if the board, for example, only finds that the person is not -- if you start with the not disabled, you can stop there. You don't need to go on. You -- but you could find that the person is -- was disabled, but that they could work. So that could be your finding, too. So it is -- it is ideal if you articulate the basis for your findings. But again, the courts look at the -- look at the board's record and they look for whether or not you had evidence in the record to support your decision.

>> Ed, my -- I agree with what Mollie said. I myself would stress the third issue, the board's decision. When I do these for Fresno, city of Fresno systems, I personally did 20 or 30 oppositions to petitions for writ of administrative mandate over the last 20 years and routinely do the board decisions, I always try to think of them as being stapled to the petition by the other side and what I want in there that the court's going to see, to really show that the boards thought long and hard. So I'd quote from the doctor and say we found this one very persuasive, and then there is this other doctor, but he's a jerk. And try to put reasons why the board was not persuaded by the other medical evidence. Because the only hard ones are where you have rival medical evidence and somehow put in our decision at our level why we back this horse and didn't back the other horses. And we don't have that in ours now, but I think ours are perfectly satisfactory doing it this way. Mine happen to be a lot longer, but you know, there's disadvantages to that, too.

>> Edward Overton: Okay, my next question is, one of the key issues in the disability hearing process is the offering of alternative employment, or modified work. I believe it was at the last monthly meeting that we had, if not the last, the one before that, I think one of the counsels representing an applicant said that the applicant is not required to accept modified work under ADA. If that's true, then, because our code, and you stated in one of your slides, Mollie, I don't remember which one, that any other position the city offers to transfer that individual, and also, further, that the person did not have to be able to do all of the functions if his job functions required climbing, stooping and crawling, and you took out the climbing, he still would not be disabled. But under ADA, if I heard that correctly, they would not -- they'd say I don't want the job.

>> Mollie Dent: Well, right. The ADA is a statute that requires you to offer the person a job. It's not a statute that requires the employee to take the job. So under our disability definition, though, and first of all you have to look at whether the person could have performed the job that they were in when they were disabled. And we -- or when they claim to have been disabled. We frequently have people -- we frequently have applications before us, where at least the evidence from the department is that the person could have stayed in the exact job they were in, that we would have worked we would have been able to work around their work restrictions in the job they were in. If that's the finding you don't really need -- and you find that evidence credible you don't even get to the offer of a different job. But if there is an offer of a different job, again the same thing applies. If they're offering the person a

different job and they're saying that, yes, we would modify this job so that you could work in it, there is case law that says that that is adequate. That the individual, if there are jobs in the department that do not require them to do every single thing, the police jobs are very common on that. There's a lot of police case. If there are desk jobs, the fact that you've got a desk job means that the officer could do that desk job, means that the fact that he can't chase suspects doesn't make -- it means he's not disabled. Does that help any?

>> Edward Overton: Yeah, it does and I think that's the way I've been viewing it. But when the lawyer who was representing one of the applicants said that the person is not required to accept an accommodation, now, to me, that means if they can't do the full duties of the job that they were hired by the city to do, then you have to give them a disability. I was very troubled by that.

>> Ed, they're apples and oranges. It's one statutory scheme, the ADA. The ADA doesn't have a universal rule along the lines you just mentioned. It's part of the ADA, remember part of the ADA that says if you don't go through all this reasonable accommodation, then you've committed discrimination against the handicapped and you're in a jam and you could be liable for damages. So every employer including the City of San José goes through this complicated interactive process because the law says you have to do it and if you don't do it you can be sued for damages. That is part of the ADA. No part of the ADA creates a uniform rule of all applicable job classes and all other kind of benefits saying, I don't have to take the job. That's just an ADA concept. It doesn't carry over to here. And we have a different rule and different law. I don't think we have any cases in San José, but Mollie is right to say there are plenty of other cases that say if there's a permanent modified job over here and it fits your restriction and you don't take it you don't get the disability retirement.

>> Mollie Dent: I think it was probably to say under the ADA a person does not have to take the job. Is not -- you're right, it's not -- that's not really correct legal statement. The ADA doesn't require the person to take a job. But our code might. Would be a better way to put it.

>> Edward Overton: Okay, well when we have a lawyer from the other side make that kind of statement it would be helpful if you guys would jump in and say whoa, wait a minute, you're misinterpreting what the law is.

>> Another way to phrase it in the ADA the employer offers a job and the claimant doesn't take it, and it was one that fit his -- the claimant's restrictions and everything. Then the claimant can't sue. The claimant can't say well you offered me this job and I really wanted this other job and you should have offered me the other job. No, the employer has done everything he needed to do under the ADA notwithstanding the fact that ultimately the claimant didn't take the job so the claim and can't sue. That is kind of the ADA circle. Our world is totally different and dissimilar.

>> Matt Loesch: Mr. Andrews.

>> Arn Andrews: I just want to flip through a couple broad comments just to make sure I'm interpreting things correctly. And one of them was saying that it's totally within our purview to focus in on a single doctor whenever we're evaluating.

>> Mollie Dent: I don't want to give you that flat rule. You have -- and I did want to go back to something Mr. Richeda said. Having a summary in front of you or having someone point to the places in the record they think are relevant, as long as you're the decision maker, does not -- is not going to mean that you get to avoid looking at the entire record. If you find the one doctor's testimony to be most credible and more substantiated, yes, you can take that doctor's testimony.

>> Arn Andrews: And I meant to infer I read all the doctors but if I wanted in my subjective nature to focus in on one, that --

>> Mollie Dent: I don't know that I would call it subjective but if you read through everything and your -- and you - - it's a reasonable person's standard, you're reasonable person and you think this doctor makes the most sense, yes.

>> You just have to read them all and weigh them. If one just seems more credible, more persuasive, even though there's three, four, five, that they're kind of shallow and their reasoning is thin and they're older and they don't seem to really -- reviewed all the relevant records or whatever distinguishing factors they might be, then you certainly can -- or even if the other four are also pretty good or maybe they're very good but you think this one alone is just more persuasive, yes, you can go with that after weighing the others. Now, obviously the judicial review may be tougher on you if there are five credible ones that are really good really substantial and you picked this one. It might be a tougher case in a court given that case or within the subjective mindset of the court you might lose. But you have not done anything wrong by fairly, reasonably reviewing them all and deciding that the one as opposed to the other five is the one that you find persuasive. That's your job, I've done it right.

>> Arn Andrews: Okay, one other area I just want to make sure I'm clear on. You're stating that not only the injury but the disability has to occur during employment. That a disability that comes before the board that happens after, whether it's you know separation of service or whatever, you're saying that that can't be considered or --

>> Mollie Dent: The person has to be disabled from performing their job. Now obviously we realize that many workers when they become disabled are on temporary work restrictions. So it may not be known at the time that they leave the service that this disability is going to be a permanent disability. But still they must be disabled. And there is a possibility that a person could be disabled at the time they leave the service, and their application will come forward later. There can be a long delay. But the disability must have occurred while they were in service.

>> Arn Andrews: Okay, that answers my question. Because it appeared as if there could be a case where an employee is injured, they leave city service, down the road it appears as if the injury led to a permanent disability and I didn't want to -- okay.

>> Mollie Dent: It is not the timing of when you hear it. Clearly there is a lapse in the timing.

>> And you might find I think some very difficult ones. I'm encountered this elsewhere where a person retires on disability and then within a week keels over with a heart attack. Well obviously that heart condition subject to Dr. Das's correction was -- didn't occur in the six days between terminating employment and dropping dead. Obviously it's a multiyear disability condition that's ongoing. But under our definitions, you have to be incapacitated while in city service. And by definition, you were working full tilt on the last day you went out on service. Yes, you had something that was going to kill you and kill you very shortly after leaving with city service but as of the last day you were not incapacitated and I think emotionally this is a very difficult application to reject. But I think under these definitions you have to.

>> Matt Loesch: Mr. Andrews, do you have more?

>> Arn Andrews: And then just to go back to this. Could the individual keep working -- because at one point when I looked through your slide it's you know, I believe it's slide 22, I was starting to get the sense that that's a very relevant point for us in our consideration, could an individual keep working? So I just want to either confirm or for you to educate me further. I mean is that the strong sense, that is, we're walk ugh through whether you know if we tried to come up with this causation is one then the ask it an inability or an incapacity and then is there the capability to return to work or not return to work whether the, you know, return to work program has found proper placement for them?

>> Mollie Dent: So the return to work program isn't really the standard. The standard is, again, first of all, you look at whether given their conditions and their work restrictions, could they have worked in the job they were in on the day they left? I was -- and I'm a lawyer. And I go out. I don't know, drop a book on my toe in the library. I can't walk.

>> Paper cut.

>> Mollie Dent: Paper cut, I don't know, anyway. The that's the job you look at first. Given whatever restrictions I have and given my condition that arose out of that injury, could I have stayed in my job as a lawyer? Now

obviously I might have been out for an extended period of time, I might have needed to be out for an extended period of time. But did I need to stay away from my job permanently, from my job as a lawyer? Then if you find that yeah, she really couldn't have come back as a lawyer, was there another job that the city offered to transfer me to that I could have done? It's not, was there -- so you don't even really get to that return-to-work aspect until you find that they couldn't have done the job they were in. And oftentimes as I say you're looking at cases where there has been, in the Federated system, there is at least testimony that the job they were in could have been modified for them to stay in it. And then it is whether -- but if there is a return to work aspect to it, if, no, she couldn't have come back as a lawyer and we want to know whether she could have come back as a maintenance worker. Then the question is, was I offered that job?

>> And if you were and declined it.

>> Mollie Dent: Right.

>> Matt Loesch: So it has to be offered. Not necessarily that it's available in the city but the city has to actively offer that to the person.

>> Mollie Dent: It says may offer to transfer. We both I think read that as, if it is a different job than the one that you were in there needs to be an offer to put the person in the job.

>> Well, obviously the difficulty we found is where at the time, or close to separation, it is in a return to work context based on the restrictions offered by the applicant's doctors and both either the employer I mean the immediate appointing authority or the return to work coordinator said, we don't have anything for those restrictions, then months, perhaps years go by and Dr. Das comes up with lesser restrictions, and the appointing authority says, we could have accommodated those. Obviously the whole world has changed and there's no real job being offered to that person now, but we deny it because of what the employer tells us. And I think that was -- isn't that at least one of Mr. Constant's issues?

>> Mollie Dent: And frequently, that issue is also intermixed with the, what are the true permanent work restrictions? Because frequently the permanent work restrictions that Dr. Das comes up with may be different than the temporary work restrictions were. So there -- that can mean that there is not a good ability to offer an applicant an alternate job. But as I say you also have to -- you also have to look at, could they have simply stayed in the job they were in.

>> Arn Andrews: And then one last one, in the area where we were talking about case law. And you were saying that if an individual just has temporary work restrictions, that they can be denied a disability, that the threshold is permanent work restrictions.

>> Mollie Dent: Correct. The disability has to be of permanent or continued and uncertain duration. So you have to look at what their permanent work restrictions are, not their temporary work restrictions. Now, there can be different doctors have different opinions even on permanent work restrictions. But you're to be look at what their permanent work restrictions are and more specifically what their permanent work restrictions are based on their incapability rather than their inability.

>> Matt Loesch: I had two questions, more simple. An page 4, which I was not aware of, the application for the disability could be made by the member, but also could be made by, I'm assuming the City Manager, not the actual City Manager person or someone of her or his staff.

>> Mollie Dent: Well, no, actually it is either her, where the person has been very severely injured and could not make the application for example for their own behalf and may not have family to do it. I mean, I suppose there could be other ways that it could arise but that is one way in which it could arise.

>> I've seen it arise in situations where the facts and the permanence and severity, the incapacity are clear, the employee doesn't want to apply because of 4850 pay-type issues. They'd like to get a year of full pay, which is more than what they're going to get on disability retirement. The employer doesn't agree with that position, and the employer files.

>> Matt Loesch: In exactly -- I mean, would you have any ball park of that number why, if exact, how many like lawsuits or things that we have against the Federated system, and that's the last ten, 20 years. I mean, is it -- I've never heard of any since I've been on the board, but even in the past?

>> Mollie Dent: We've only had a couple that I know of. One -- yes, a couple that I know of. And I think we have had one recently filed.

>> Matt Loesch: Recently in the last few years or --

>> Mollie Dent: Yes.

>> Matt Loesch: Some of that goes to my thinking, also, about where we might be going. Obviously there's not the view in the public that we have some horrific problem here that could be some serious issues that we need to resolve. We have -- it seems like the more we're looking at it, seems like we have process things that could be improved to clarify and simplify the stuff we have in front of us if we're not going to pursue something further. I'll reserve some of my thoughts.

>> I mean, to the degree fairness in the process is one of the board's goals. I think one metric, if I'm using that word correctly, is the fact that many applicants, even those who you have denied, and you have denied more than one. Have not felt sufficiently aggrieved to file litigation. Yes, maybe they couldn't find a lawyer but usually people seem to be able to find a lawyer.

>> Matt Loesch: Is there anything for staff? I know Dr. Das you were going to raise your hand.

>> Dr. Das: I just had a quick question about vacancy. Like using Mollie's example, suppose you're injured, and you leave, and then your job is cut like during budget times or whatever, and there is no job for you to go back to, period. Now, even if there is minimal disability or if there are some restrictions the department would not have a

job for that individual and there's no vacancy, so the return to work coordinator cannot place that person anywhere, not because the person is incapacitated, but because there's no jobs available.

>> Mollie Dent: So let's start with the -- if they're not incapacitated, then the fact that they left their job, basically voluntarily, means that they're not entitled to a disability retirement. The fact that their job may have been cut after they left it still does not entitle them to a disability retirement. That's why I say you really have to look at the job they were in and I talked about the courts looking at whether it was necessary for them to retire. Did they leave because they were retiring or did they leave just because they wanted to look for another job, they didn't want to work there initial? Did they leave because they needed to retire? If they didn't leave because they needed to retire, then it doesn't matter what happened to that job after they left.

>> These are a bunch of independent filters, you know, or independent hurdles. Just because one hurdle has been taken off the field doesn't mean the other hurdles have been taken off the field. Go back to the curling.

>> Matt Loesch: Mr. Perkins.

>> Jeffrey Perkins: So to follow up on that, what is the employee's recourse in a situation where they're injured, and they're going through the process. The City's going through budget cuts, and so they're in an area when they've got, you know, four people and three of them are working and one's out on disability going through the process. So it's just easier, someone's gotta go, so that one goes. They go through the process and now we rule that they weren't disabled. And now their job is gone, so there's nowhere to go. So what happens in that situation? Do they have -- is that a different process they go through to protect themselves, rather than through the retirement system?

>> Mollie Dent: Well, sure, I mean, it's -- but it's -- it depends on the circumstances under which they went out, I guess would be the answer to what the process would be for them.

>> Mollie, might that be an ADA issue? And I'm not sure the analysis, they claim you laid me off because of my disability, and you did not satisfy your accommodations under the ADA to reasonably accommodate me. I don't know what the case law in the ADA is for like employer reorganization. But under the hypothetical you gave, I'm pretty sure they'd be stuck. Because you said they laid this guy off because he was injured. That isn't the way they do it.

>> Jeffrey Perkins: I'm sure they wouldn't say they laid him off because he was injured. They were saying, you know, you've got four people, you don't know if this person is coming back, anyway. So you wouldn't necessarily - I mean, would you say, okay, I got room for three, so I'm going to get rid of one of you two, and if that person comes back we're going to hold the job, and we don't know if they're coming back.

>> Mollie Dent: I'm not -- yeah, I really hesitate to speculate on this, but in a civil service system it actually would be done on the basis of seniority. So it wouldn't be that that particular individual was picked for a layoff. There are some non-civil service employees and you might have the list but generally speaking where most of our employees are in a civil service position, again test a position in councilman with four or five other people. And there are rules under which employees only do have a certain amount of time off, that's true, under their memorandum of agreement. But the employee's remedy, if they think the employer has done something wrong to them, isn't to get a disability pension. The disability pension is for a specific purpose, and you have to meet the requirements for a disability pension to get the disability pension. Does that help?

>> Edward Overton: I was just going to say that we're getting into human resources and bumping rules and return to work and all that kind of stuff.

>> Mollie Dent: Really not that familiar with all of that.

>> Matt Loesch: We've got enough in our hands. Anything else from staff wanted to add anything final? I mean, those that presented before, if they had anything else to say? Mr. Demers, if you had anything you wanted to add based on what we talked about? Okay, we have some folks from the audience that might want to say something,

or indicated to me that they did so -- and please just state who are so everybody else knows who you are, please just state who you are.

>> Hi, my name is Linda Didis and I'm a business agent for AFSCME, which represents one of the largest groups or the largest group in the city. Over the last -- and I've been doing this, being a business agent here in the city, for the last 12 years, and I don't have experience in other jurisdictions doing disability hearings but have gotten some experience over the years doing this. I think that I don't have any questions on Molly's report. But I guess I wanted to give an opinion on the attitude of giving every opportunity to an employee that is possible here on the Federated side. One of the things that I find when an employee finds me, if they can find me is that they are completely at a loss on the process. They don't -- they don't know what to do next and I think that you've -- the board has seen that over the years where employees have come forth forward on their own without representation, as far as legal representation or professional representation or union representation, where they're at a loss on how to present their case. And I think that doesn't help the board and that certainly doesn't help the employee. So I'd like to see the process improved. Whether or not it's an outside board or an outside entity that's going to do that, it sounds like and I don't have an opinion on the it works in San Diego or whether it works in Los Angeles. But I think I could find that out. If it works well I think it would set up a more private process for the employee. Some of the public you know streaming the public to the public, the employees complete medical history, you know has always been an issue from the employee's point of view and the union's point of view that you know there should be more privacy around what the employee has to testify to in a public hearing as they're fighting for their disability requirement. The other thing I would ask and I don't know how this would be done about the in the process that the employee goes through with the retirement employees, when they go to the retirement board and say I want to file a disability, is there any kind of you know paperwork that could be given to the employee that helps them through the process? And that would also include something that says you know you can if you need to get professional assistance, legal assistance, or go to your union. Because I don't know that, when I speak to some of the employees that are here by themselves and I say afterwards, they always say I didn't know, I had the ability to be able to do that. So I'm not saying that the employees need to recommend that but it needs to be part of the process. One of the things that the civil service commission is doing for instance is trying to get more information to the employees about the process in cases where employees are representing

themselves. So -- and my union doesn't have to take all cases to civil service. If they're disciplinary and the employee wants to go forward with them, where you know, either I would represent them or their attorney would represent them. They make a decision on their own. And it's a very formal hearing where they're kind of at a loss, and it's a very time-consuming process for the commissioners, you know, to try to get through a hearing like that where the employee's representing themselves. So they are trying to give more information to the employee in that same kind of a manner of giving them a heads-up of what the process is going to be like. I've sat through some of the --

>> Matt Loesch: I don't know, Donna, did you have feedback directly on that? Because we had some folks trying to indicate they want to talk. They might have feedback to you, that's why, if you mind letting me interrupt.

>> They can answer all my questions. I'm just giving you my experience, as what's available to them, what's told to them. I'm telling you what's told to me.

>> Matt Loesch: Gotcha.

>> I don't think they're supposed to be giving recommendations to attorneys to go find legal help. So I understand that, and I represent a lot of the employees that work in the retirement board. So I'm not trying to say that they're doing something wrong. I'm just trying to --

>> Matt Loesch: Sure, I'm just trying to help facilitate the discussion. If they have stuff that would either help on the point you're talking directly --

>> I have one more comment --

>> Matt Loesch: Okay, have at it.

>> -- and then she can help. I've also been to the disability committee meetings where I think that having -- where I said another recommendation for an outside hearing officer or hearing group would be good I think that having another medical opinion before this all gets to you would be helpful. I've sat in those meetings and you know, to be quite frank, if it was Ed and Tom they weren't medical experts, you know? They were completely relying on what was the paperwork, whoever was doctor before Dr. Das, asking questions that are not being asked with you know a medical background. It is again a very difficult process for me, I wasn't a medical person trying to get through the process. So I don't know, there's got to be a better way to do this. Because when I came here 12 years ago, there was tons of complaints from employees about this process. And it hasn't stopped. If anything, the complaints seem to get louder and more vocal about it. So then you can help me. Didn't mean to cut you off.

>> Matt Loesch: No, Mr. Andrews has a question or comment and then Tony, how about that?

>> Arn Andrews: I was just going to comment on the one point you mentioned about employee education. In our last study session it was an area we asked about, because we weren't sure at what point the employee, once they were engaged in the process, what was referred to them, or what was, you know, provided to them. And so your point is well taken and it's an area of concern of the board's also, it's an area we're thinking about. Because we don't know, by time the paperwork gets to us, you know, exactly what's transpired in terms of what the employee provided. And maybe sometimes when we're getting packets that appear to be a little disjointed, it could be because of a lack of knowledge on the employee's side and what would be relevant to us to hear. So I just wanted to comment that your point is well taken.

>> Good morning, Tony Johnson, senior analyst with retirement services. I just want to speak to what is provided to the employees. And also acknowledging that in the past there have been issues with employees in terms of what they were receiving. Currently what the employee receives is a checklist. Once they file an application with our office, a checklist is sent out of what should happen, when and where. They basically check off the items on the checklist to figure out when they are actually going to go forward in the disability process. Overall is when they reach maximum medical improvement. So when that happens they actually go forward in the disability process. In addition to the checklist the employees do have the opportunity to come into our office. Now not every employee

does come into our office. Some have been told by workers comp that they have to time an application. So they file it and it's like a file and run. And so we don't see the employee until much later in the process. If an employee does however come into our office they are told about the check list of, we go over everything in terms of what to expect and then in addition to that we let them know that they can have respective through the disability process. Some employees are reluctant to get service because it is costly. But they are told, the people that come into our office are told that is a possibility for them.

>> Matt Loesch: Mr. Overton and then Mr. Pope.

>> Edward Overton: I just wanted to make a statement on the privacy area. We were advised many years ago, and repeatedly, at that, that there are only certain disability retirements that could be taken in a private situation, and those were the ones that involve something related to social stigma or sexual assault or things of that nature. It is -- it would be to me off the disability retirements that are private because it gets touchy sometimes. But we would have to have legal to back up our ability to do that and to this point we have not gotten that.

>> Mollie Dent: So let me comment real briefly. As long as the hearings are in front of the board they are going to public. I haven't -- I believe what Ms. Didis was speaking of, was if you had an outside hearing officer holding the hearings. I don't know, and it would -- if the board is interested in you know more information about the hearing officer, I can take a look at whether or not that would be another reason, if you will, to consider an outside hearing officer, that the hearings would not be required to be public.

>> Edward Overton: But even at that time committee level.

>> Mollie Dent: That's right, because it is a committee of the board. I think there may, I'm not going to say there's a different rule but I think there may be a different rule if you truly have a third party hearing officer and I can certainly check on that if the board is interested in knowing the answer to that and if you know the answer feel free.

>> The other solution obvious even if not practical is to amend the Brown Act and have an exclusion. They for example have exclusions in the Brown Act for hardship hearings before deferred compensation committees. Our situation raises somewhat similar issues, but you could also say perhaps broader public issues and therefore such an amendment would not be good public policy. But that's the ultimate resolution this difficult issue.

>> Matt Loesch: Mr. Pope.

>> Good morning, Bill Pope. I'm the business agent for operating engineers. I represent the ones who do physical labor and the ones who are -- the discussion around inability and incapacity, they always have the ability to run their machinery, but they're not capable of doing it because of their injuries. But I can -- I can see that we need to change the process. And I've been struggling all morning, Chairman Loesch, trying to figure out how I could work your analogy in about curling. What I see is, I see three different boulders: The retirement board, workers comp, and return to work. And they're all intertwined somehow or other. Because in my experience, with the return to work, when they're made permanent and stationary, my heavy equipment operator, the department says we can't accommodate those restrictions. So then it's -- then you need to apply for a disability retirement, but he still has a workers comp claim going on. So it's like they're all intertwined, but -- and then six months later, they'll get a hearing. And then it will be, well, maybe we could do that, maybe we couldn't, who knows? But meanwhile it's just -- everything is just going on all around. I think we have to really look at the process. I don't fault the board in their decisions. I can understand them. I don't necessarily really agree with them, in some cases, but we're adults. But I think we need to look at the process. And I think an outside hearing officer is going to help the process out. It certainly will help you guys. In having to go through all the page by page by page, and then you know then they'll say well we want a continuance, I'll get another report and you have to go through the same thing over and over. I think we would be better served if we had an outside hearing officer. So that's all I have to say.

>> Matt Loesch: I think we're kind of at a point where we're going to wrap this up at least for today especially. But I do appreciate it's been going on for quite a bit today and from last time. I don't know if people

have specific requests or desires, what they were going to do, I don't think we were agendized to actually make anything happen today, obviously. I don't think that the intent. It was more just to absorb information on the 4th and absorb information now and kind of think about what we might want to be doing. I mean, it certainly could -- the recommendation could be, we come back next month, and establish something, if we want to. So I guess I'd just like to hear your thoughts. I mean we only have four of us here today. So --

>> I think to your point you know, like yourselves I think as a board we wanted to examine the process more which is why we scheduled the study session. And I think to the chairman's point, I'd like to ruminate on what we heard in the last study session and today and think internally about if I have any thoughts about what could benefit the process. In addition it seems like there is a little bit of follow-up actions that need to occur, specifically to having an outside hearing officer, it sounds as if legal counsel is going to check into a little bit more of what that would entail if we wanted to consider that as a possibility. And so in terms of today, yes, I think I don't have a motion or an action, but I would like to continue this dialogue and maybe place it as a discussion item on the agenda for the next meeting to go over as a board, after we've had an opportunity to think about both these study sessions, you know, what we think we want next steps to be.

>> Matt Loesch: Mr. Overton.

>> Edward Overton: I'd like legal to comment on the issue of whether or not the board can recommend on it's own on motion outside hearing officers or whether or not that is strictly a meet-and-confer issue, you don't have to do it right now, unless you want to.

>> Mollie Dent: You mean recommend it to the council?

>> Edward Overton: Yes, okay. Because there does seem to be some sentiment on the part of the largest employee organizations to go in that direction, and so we need to thoroughly explore that and have it come back to the board.

>> Matt Loesch: Mr. Perkins.

>> Jeffrey Perkins: I think what I'm hearing is there is the issue of making the decision, and I don't know, unless we change code, we're always going to get back the no matter whether they go outside hearing officer may make the process a little bit list challenging. But I think the other side of it is it's just the process of when someone gets into the system, that's, always is, is that triangle between I'm in workers comment I'm disabled, and you find, at least the ones you hear, the ones we always get are the ones that are really challenging, where you're sitting here, and you're going, like, well, really, the medical evidence doesn't really say they're disabled, but the situation has left him in a situation where there is no real good solution. They're just kind of left out without a direction. And you know, it's just tough on everybody. And I don't know if there's any way in the process that we can help people through that, just from my -- an educational -- I mean, obviously, there's a process about they can go and get the legal representation. But someone who is disabled is probably not going to come into the office to sit down and have that discussion until they are well into the process. And maybe if they had known early on that they had other ways to go, it might have been different. So I think there's a bigger issue here as to just walking somebody through from step A to where they get in front of us. The final decision on those tough ones is always going to be tough. It is just the way it is and I don't know that there's any way around that.

>> Matt Loesch: Sure, and sometimes the conversations we have here are about packet construction, just how this thing is that information is transmitted to us, to make that decision. Where others, who have many, many more hours to look at, examine the person physically and/or be around this whole process for months, we get a one-week process where we get a document where we have to kind of plow through and kind of make a good decision. Maybe there's a way that just one of the things is to just reconstruct the packet in a different way, reorient, not do create more way, a different way to make it simplified, doing more case management, which I think he beat about our heads very swiftly on the 4th that that is something that we ought to be think about, it speaks to the whole process. What does that mine? I don't know? Or an injury there and then comes into our realm, you know, how does that work, we'd have to talk about what structures or other places and then from them. Lord knows, I wouldn't want to be the first one to have to try to create that system. Yes I think the idea of Mr. Andrews alluded to of thinking about it for a month, agendizing it so we can make a decision, whether it's to

establish a subcommittee ad hoc for specific purposes, you know, a specific time. Because what I'd like to do is, one thing I was thinking is, I would like to have something that we kind of define the scope, define the time that that decision is going to be -- that decisions are made through that group and then brought back to us so we can push forward, so it is not something that lingers on for six, eight, twelve months, but something that kind of is a -- prescribe this thing so we can push it and make a decision, get the information in and then move on. So that the process that the folks are going through come to us is clear, concise, and fair. Because right now I'm suspect that all of those things are happening to everybody. Mr. Andrews, do you have something else to say here? Okay. So sounds like we just want an agenda item that we can do some things next month, talk about it. Any parting shots? We're adjourned.