

## ONCE AND ALWAYS LABOR LAWYERS

By Janine Olikier

On April 6, 2015, **Messing Adam & Jasmine LLP** opened its doors. **Gary Messing, Gregg Adam** and **Jason Jasmine**, taking with them **Jonathan Yank, James Henderson, Jennifer Stoughton, Lina Cockrell**, and staff, began – or rather continued – a law practice that focuses on the representation of public employee associations. While the name is new, the crew is the same, with attorneys who have collectively practiced labor law for more than 100 years.

But our history is greater than merely the sum of our years. Carroll, Burdick & McDonough formed in 1948, and before it became the international law firm it is today with emphasis on product liability and class action litigation, its attorneys were primarily plaintiffs' attorneys. In the early 1950's, its attorneys started representing labor organizations. And in 1974, **Chris Burdick** and **Ron Yank** helped create the first prepaid legal defense plan in the country. That plan has grown into today's PORAC Legal Defense Fund. Our labor forefathers at CBM represented the Vallejo firefighters in the first organized strike in California by a public safety association. We and they have fought for collective bargaining and retirement protections in hundreds of precedential cases.

Messing Adam's attorneys are the recipients and also the vessels of this continuity. They have had the privilege to practice alongside these trailblazers and now play it forward as a new generation of attorneys have joined the good fight.

Messing Adam has six months now under its belt

and is greatly appreciative of the support it has received from our clients who unhesitatingly accepted the wisdom of this venture and followed us to this place. But why wouldn't you? We are the same attorneys, with the same long history and experience that you have known for years. We look forward to focusing our practice on these priorities on which it was built and continuing to represent you in all of your labor needs.

We are very excited to continue the tradition of the Labor Beat with this inaugural issue.

## TENTATIVE SETTLEMENT OF SAN JOSE PENSION LITIGATION—CHUCK REED'S MEASURE B TO BE ABANDONED BY THE CITY OF SAN JOSE

By Gregg Adam

The City of San Jose and its police and fire unions have reached a settlement agreement to end their five-year battle over pension reform. The agreement must be endorsed by other non-safety unions. If that happens, the City, **San Jose Fire Fighters Local 230**, and the **San Jose Police Offices' Association** would ask a Santa Clara County Superior Court Judge to invalidate the entire 2012 ballot measure based on the City's failure to fulfill its bargaining obligation under the Meyers-Milias-Brown Act prior to putting the measure before the voters.

This is a huge victory for the Unions—and an untimely blow to Chuck Reed as he tries to take his toxic brand of pension reform statewide through a November 2016 Ballot Measure.

As Scott Herhold, an editor at the San Jose Mercury News, and one of the biggest supporters of Measure B, concluded in a devastating column on the City's abandonment of Measure B: "[POA president **Paul**] **Kelly's** statement underscored a growing consensus about Measure B: Never mind. We didn't really need our long civic nightmare."

## Background

In July 2011, then-San Jose Mayor Chuck Reed presented a proposed ballot measure to the City's unions. The City of San Jose had seen a dramatic increase in its pension costs as a result of the financial downturn. San Jose is a charter city with its own pension system. As a result of the stock market collapse and the layoff of hundreds of city employees, employer contribution rates had reached in excess of 60% for safety employees. Both sides recognized something had to be done, but Reed's Measure was unprecedented. Among its extreme proposals were:

- It required existing employees to either opt into a significantly lower pension benefit or pay up to 16% more in contributions to cover unfunded liabilities—previously these were, by ordinance, the sole obligation of the City to pay;
- It gave the City the power to reduce or eliminate retirees' COLAs in any period the City determined that a financial emergency existed;
- It decimated disability retirement protections for police and firefighters—employees would be entitled to a disability retirement only if they were incapable of performing "any gainful employment"

for the City—images abounded of parayzed cops being forced to work in evidence rooms;

- It required a new, non-vested (meaning it could be reduced in the future) retirement benefit for new police officers and firefighters capped at 2% at 60;
- It required the retirement board to give equal consideration to taxpayer interests as member interests in performing its fiduciary obligations in administering the retirement plan.

The parties met and conferred over the Summer and Fall of 2011. The City continued to roll out revised versions of the Measure. After an initial mediation in November 2011, the City continued to revise the Measure but, wanting to make sure it could choose when to put the measure before voters, it refused to further meet and confer with the Unions. This turned out to be its greatest error. Additional revised versions of the Measure were issued by the City in December 2011 and February 2012, but it still refused to further meet and confer.

This was all a huge lost opportunity. The police and fire union leaderships recognized that something significant had to be done to reduce costs. They put forward 3 significant counter-proposals, the last of which, in early March 2012, would have guaranteed the City savings of hundreds of millions of dollars through an-opt-in reduced benefit (3% at 55) and pay cuts for current employees. Ignoring the union's proposal, on March 6, 2012, the City Council voted, by an 8-3 majority, to put Measure B to the voters on June 6, 2012.

The measure passed 70%-30%. The unions did not fight it politically. At that time, in San Jose, the voters would have approved anything called pension reform. It was on to the courts.

### The Legal Battles

The unions were in court the next day. A stay was implemented in state court to prevent Measure B from being implemented until its legality could be determined. The City sued the unions in federal court seeking a quick validation of the Measure, but the federal judge dismissed the lawsuit.

Ultimately in February 2014, after a trial in the summer of 2013, a Santa Clara Superior Court judge invalidated the central portions of the measure as unconstitutional. Some aspects were upheld and both sides appealed.

Separately, both the POA and Local 230, which had bargained in coalition at the same negotiating table, had filed charges that the City failed to meet and confer in good faith before putting Measure B before the voters. Under the Meyers-Milias-Brown Act, whereas firefighters are under the jurisdiction of the Public Employment Relations Board with respect to unfair labor practice allegations, peace officers are not, and generally must go to court with unfair practice charges.

However, because this action concerned a municipal election, the POA was required to first secure the approval of the California Attorney General to give it leave to sue the City in a *quo warranto* action (more on this below). Approval was given in late 2012 and the POA filed suit in Santa Clara Superior Court. In November 2014 (just days after the mayoral election—see below), our

colleague **Chris Platten**, of Wylie, McBride, Platten & Renner, secured, on behalf of Local 230, a tentative 68-page decision from a PERB administrative law judge finding that the City had violated its bargaining obligation with respect to placing Measure B on the ballot. The ALJ ruled that the Resolution through which Measure B was placed before the voters was invalid.

*(Note: PERB has recently held that, while it has the statutory authority to determine a City violated MMBA, it does not have the authority to itself order a City to invalidate a charter amendment. That power rests with a judge.)*

That's when the politics kicked in.

### The Politics of Measure B

Scott Herhold was not exaggerating when he described Measure B as San Jose's civic nightmare. Hundreds of employees have left, across all city departments, taking with them hundreds of years of institutional knowledge of running the City of San Jose.

They left not only because other agencies paid more, but also because of the particularly vindictive approach Chuck Reed took. He portrayed the City's employees as the enemy, infamously telling police officers that "the gravy train was over."

In the police department alone, 500 cops left over 5 years. San Jose PD had historically lost 5 or 6 police officers per year to resignation—by the height of the crisis, officer were leaving at the rate of 12 or 13 per month. If one considers that the cost of fully training a police officer over his or

her first 2 or 3 years is something to the order of \$250,000, one starts to see the financial magnitude of these departures.

Reed's 2% at 60 second tier was a complete disaster. Academy classes that could hold 60 struggled to fill 15 places.

Recruits left as soon as they graduated. As the number of San Jose police officers plummeted from 1400 to below 900, public safety became the number one issue dominating last year's San Jose Mayor's race between Reed's prodigy Sam Liccardo and County Supervisor Dave Cortese.

Labor went all in on Cortese but Liccardo prevailed by less than a percentage point—about 2,000 votes. Nonetheless, it was clear that, notwithstanding his pledge to litigate to the California Supreme Court, Measure B would be an anvil around the new Mayor's neck unless he resolved it.

### The Settlement Framework

On July 15, 2015, the parties reached a Settlement Framework after 3 months of hard negotiations. The Settlement replaces Measure B with a negotiated settlement containing the following key terms:

- A competitive, vested Tier 2 model for new police officers and firefighters: 80% benefit, back-loaded but average accrual rate of 2.66%;
- The ability of former San Jose police officers or firefighters and "classic" PEPRA

employees to rejoin the department as Tier 1 employees;

- Restoring disability retirement to the prior system, with some systematic changes to protect against abuse;
- Reduced cost of retiree healthcare for Tier 1 employees (it had been 10% of salary);
- Closing the defined benefit retiree healthcare plan for new employees in favor of a Voluntary Employee Benefit Association (VEBA) account into which the employee will contribute 4% of salary.
- For Tier 1 employees, a one-time opt-in for Tier 1 employees to the VEBA.
- An attorney fee award to the Unions.

On August 14, 2015, the parties reached the second part of their Settlement Framework. The City has agreed to replace Measure B through the quo warranto proceeding described above. So long as the non-safety unions conclude their litigation with the City over Measure B in similar settlement agreements, the City will stipulate to the fact that it did not fully comply with its bargaining obligations and that, as a consequence, Measure B should be invalidated. Once a judge signs the order, the City will replace Measure B with ordinances and a retirement MOU reflecting the Settlement Framework.

If the other unions do not resolve their litigation, the City, Local 230 and the POA would take their agreement to the voters in November 2016 to replace Measure B. Last, but certainly not least,

the POA agreed to a one-year extension of its MOU. Officers will receive an immediate 5% one-time bonus, a 4% retention pay premium beginning on January 1, 2016, and a 4% general wage increase on July 1, 2016, as well as other sundry improvements.

## Conclusion

This is a massive victory for San Jose POA and Local 230, and for all San Jose employees. It is really a victory for all of San Jose, including the City, and the City Council deserves significant credit for having the courage to finally acknowledge that Measure B had not worked and needed to be replaced. Whether this portends a new day in San Jose remains to be seen. The dire situation will not be turned around overnight; however, this agreement provides a new foundation for the City to try to recapture former glories.

The San Jose POA won because it married political savvy, with legal victories, a cutting-edge public relations campaign, and a completely unified membership.

But this is perhaps an even bigger victory for collective bargaining. Reed rejected a collaborative approach (and a better offer than the City ultimately settled for) in favor of unilateral changes and litigation. He lost and this threatened to destroy the city. When a new City team meaningfully engaged in a collaborative approach, an agreement was reached. That the City of San Jose has so completely abandoned Chuck Reed's legacy can only undermine his efforts to bring that toxic brand statewide with his proposed ballot initiative.

## VESTED PENSION RIGHTS UNDER ATTACK AGAIN

By Jennifer Stoughton

Your pension rights are under attack again by a familiar foe, with a familiar proposal. After decimating the City of San Jose's workforce, former Mayor Chuck Reed wants to take his toxic brand statewide by amending the California Constitution to open public employee pensions to collateral attacks from anti-public employee groups. In 2013, Reed made a similar attempt but, after losing a battle with Attorney General Kamala Harris over the ballot title and summary, he folded with the promise to return.

Recently he and his allies made good on that promise and filed an initiative which, if sufficient signatures are collected, would appear on the November 2016 presidential ballot. Although ambiguous in some areas, his proposal appears designed to fundamentally change California law on vested pension rights. Reed has long championed giving employers the right to change retirement benefits prospectively for current employees.

We believe that this is Reed's ultimate goal. Beyond pensions, the initiative also seeks to undermine collective bargaining, by giving voters authority to determine compensation levels overturning decades-old California Supreme Court precedent.

## WHAT WE KNOW

➤ **No Increase to Pension Benefits Without Voter Approval:** The initiative forbids any pension benefit increase, no matter how insignificant,