

City of Gilroy

7351 Rosanna Street
GILROY, CALIFORNIA
95020

Telephone (408) 846-0202
FAX: (408) 846-0500
<http://www.ci.gilroy.ca.us>

Don Gage
MAYOR

September 10, 2013

Honorable Brian C. Walsh
Presiding Judge
Santa Clara County Superior Court
191 North First Street
San Jose, CA 95113

Dear Judge Walsh:

Thank you for the opportunity to review the 2012-2013 Santa Clara County Civil Grand Jury's Report regarding ***The State of Public Safety Disability Retirement Rates in the County*** dated June 27, 2013. I am writing to you on behalf of the Gilroy City Council. This will serve as the City of Gilroy's formal response to the June 27, 2013 report. The City Council has reviewed this letter and has authorized that it be sent at their meeting of September 9, 2013. The City of Gilroy shares the Grand Jury's concerns and very carefully administers its obligations under the Government Code regarding public safety disability retirements.

The following are a few points to note in evaluating the data for Gilroy included in the report:

- Gilroy has the third lowest number of public safety industrial disability retirements at six over the five year time period. Three were for fire personnel and three were for police personnel. The agencies which had a lower overall number of industrial retirements were agencies that only provide law enforcement services while Gilroy provides both law enforcement and fire/EMS services to the Gilroy community.
- Over the time period in question, Gilroy had a relatively low number of overall retirements (14) which can make the volume seem much higher when evaluated on a percentage basis versus just a number basis.
- Four of the six industrial disability retirements were initially filed as service retirements. Therefore, only two of the six retirements were industrial disability retirements granted by the city prior to the employee separating employment. This equates to a rate of 14.2% over the five year period and is the second lowest number for the county. The Government Code allows an employee to file for a service pending industrial retirement whereby the employee retires under a normal service retirement and then later provides medical evidence that indicates that the employee would not have been able to return to their public safety position had they not retired. The city must accept this post-employment medical information and render a decision as required by the Government Code. Given that these

FILED

SEP 23 2013

DAVID H. YAMASAKI
Chief Executive Officer/Clerk,
Superior Court of CA County of Santa Clara
BY STEPHANIE WONG

employees are at or over their normal retirement age, the medical doctors appear to be willing to issue permanent work restrictions tied to essential functions and date those back to the employee's service retirement date.

- With a public safety head count of 103, 6 industrial retirements equates to less than 6% of the public safety work force. Given that the 6 retirements took place over a five year period, the result is an average of 1.2 public safety industrial disability retirements per year or 1.2% per year (1.2 average per year/103 public safety employees employed annually).
- Gilroy has taken significant steps to reduce retirement costs and was one of the first agencies in the county to implement a second tier retirement plan for public safety personnel prior to the state-wide pension reform. In addition, in 2010 Gilroy shifted the full employee contribution for pension to the public safety employees to pay as a payroll deduction.
- Gilroy has a robust safety training program for our public safety employees that specifically emphasizes the prevention of injuries and illnesses.

Finding 1 – Averaged over the past five years, the city of Gilroy has the second highest IDR rate in the county at 43%.

City Response: Disagree in part. Gilroy had 6 public safety industrial disability retirements over a five year period. Gilroy had the third lowest number of public safety industrial disability retirements. To only look at the number in comparison to the total number of retirements provides a skewed view as Gilroy had a low number of retirements overall during this same time period. The number of overall retirements can be influenced by many factors such as age of overall work force, the economy, the cost of retiree health care (the city of Gilroy does not cover healthcare cost for retirees as is offered by other agencies), etc.

Recommendation 1a – The City of Gilroy should identify what factors influence its IDR rate.

City Response: Agree. The city of Gilroy currently evaluates each and every public safety industrial disability retirement very carefully and will continue to do so. The current Government Code does not provide the city with a basis to deny the applications that are filed by public safety employees as all are filed with clear medical reports by medical providers which indicate that the employee is permanently unable to perform the essential functions of their public safety position. Further, the Government Code does not require the employee to accept alternate, non-safety employment offered by the employer and the Government Code allows employees to file a service pending industrial disability retirement application which often means that the city receives a medical report months or even a year after the employee has retired which indicates that the employee would not have been able to continue working in their usual public safety position. While the city can offer alternate work to the retiree and ask them to come out of retirement, the public safety employee is allowed to decline that employment offer.

Some additional factors related to the six Gilroy public safety industrial disability retirements over the five year period are:

- *Only one employee was below the normal retirement age at the time of the industrial retirement. This employee declined the city's offer of alternate non-safety employment.*

- *Five of the six employees worked full public safety careers prior to their industrial retirement meaning their injury and permanent work restrictions did not surface until they approached the very end of their public safety career.*
- *Four of the six employees filed a service pending industrial disability retirement meaning the employee retired under a regular service retirement initially and later qualified for an industrial retirement. Therefore, the actual rate of industrial disability retirements granted at the time of retirement is 14.2% (the second lowest in the county) with a count of 2 out of 14 total retirements over the five year period of the SCCCJ report. The Government Code allows a safety employee that qualifies for a service retirement to file a service pending industrial disability retirement. The retiree begins to collect their regular pension under a service retirement pending medical review of work related injuries or illnesses filed by the employee. If the medical doctor identifies permanent restrictions that would have prevented the employee from performing the essential functions of their public safety position then the Government Code provides that they are eligible for an industrial disability retirement unless the employer can offer them a permanent modified duty position. If the agency does not have permanent modified duty police officer or firefighter positions, then the employee can decline the city's offer of alternate, non-safety employment. Given the size of Gilroy's public safety work force, Gilroy does not maintain permanent modified duty police officer and firefighter positions and in all instances identified with the six Gilroy retirements the employees were not deployable in the field to perform public safety work essential to their position.*
- *A factor that may be influencing the IDR rate and number of IDRs for Gilroy might be the retiree wishing to attain a tax benefit. If the employee works a full career, but retires under an industrial disability retirement, the first 50% of the retirement allowance is deemed non-taxable when they figure their income taxes in future years. Under a regular service retirement, the full retirement allowance is taxable.*

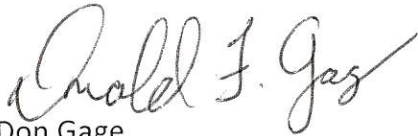
Recommendation 1b – The City of Gilroy should implement a plan to lower its IDR rate.

City Response: Agree. Gilroy would like to lower the number of public safety industrial disability retirements. The city will continue to provide a robust employee safety program to its public safety work force and train our employees to avoid injury whenever possible. Some illnesses and injuries that result in an industrial disability retirement are presumptive and benefits are automatically provided under the Government Code. Further, the Government Code allows public safety employees to service retire pending an industrial retirement determination, effectively making these IDR determinations a post-retirement determination through operation of the Government Code. This does not allow the employer to maintain the employment relationship and move the employee to alternate employment. Further, the Government Code allows the public safety employee to decline the city's offer of alternate, available non-safety employment without penalty to the employee. In addition, the criteria for medical providers to establish permanent job restrictions needs to be revisited as most medical doctors are patient advocates and prepare reports in favor of the patient/employee versus the employer. Changes to the Government Code are needed to reduce the rate and number of public safety industrial disability retirements. Finally, the fact that the first 50% of industrial disability retirement benefits paid are non-taxable is an Internal Revenue Code benefit that needs further evaluation as that may be the factor motivating some late-career industrial retirement applications.

All agencies are subject to the regulations contained in the California Government Code and income tax codes. Therefore, even if an agency is doing everything right to prevent public safety industrial disability retirements the agency must follow the law which may result in the provision of industrial disability retirements. In most cases, the employee has a legitimate injury that permanently prevents the employee from performing their public safety duties. Bottom line, there is risk of physical injury and illness when working as a police officer or firefighter. However, changing the law to require the acceptance of alternate, non-safety employment would surely have an impact on the number of public safety industrial disability retirements if all employers do what Gilroy does and carefully evaluate options and offer the employee an open, non-safety position that the employee is qualified to perform.

Please feel free to contact me or Gilroy City Administrator Thomas J. Haglund if you seek additional information or have any questions regarding this response to the SCCCGJ report.

Sincerely,

A handwritten signature in black ink that reads "Don Gage". The signature is written in a cursive style with a large, sweeping "D" and "G".

Don Gage
Mayor

Cc: Members of the City Council
Thomas J. Haglund, City Administrator
LeeAnn McPhillips, Human Resources Director