



# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** MAYOR LICCARDO  
COUNCILMEMBER CARRASCO

**SUBJECT:** SEE BELOW

**DATE:** NOVEMBER 18, 2020

**APPROVED**

**DATE** 11/12/20

## **MEASURE G WORKPLAN FOR EXPANSION OF THE AUTHORITY OF THE INDEPENDENT POLICE AUDITOR AND ARBITRATION REFORM**

### **RECOMMENDATION:**

1. In light of the passage of Measure G and prior Council direction, direct the City Manager and Independent Police Auditor to include discussions on the expansion of the authority of the Independent Police Auditor to include investigation of police misconduct as part of previous Council Direction on “Reimagining Public Safety”.
2. Further direct the City Manager, City Attorney, and Independent Police Auditor to report back to the City Council in public session by March 1, 2021 with a proposed workplan, policy formulation, possible budget impacts, and negotiation schedule for the expansion of the authority of the Independent Police Auditor to include investigation of police misconduct.
3. Direct the City Attorney and City Manager to include on the list of items to be negotiated in the upcoming Police Officers Association contract the reform of the arbitration process used to challenge disciplinary and termination decisions of the Chief of Police, to enable full transparency and accountability.

### **DISCUSSION:**

San José voters overwhelmingly passed Measure G on November 4, with more than 77% approval as of Monday, November 9. The matter of police misconduct and accountability remains of substantial public concern locally and nationally. With the commencement of new Police Officers Association (POA) contract negotiations and with the passage of Measure G, we have the opportunity to move forward with the second of the [nine reforms articulated in a plan](#) authored by Mayor Liccardo earlier this year: making investigations of police misconduct completely independent of the San José Police Department. Given prior Council direction, we seek to chart out a clear path toward the accomplishment of this goal.

## Arbitration Transparency and Accountability Reforms

As the saying goes, nobody hates a bad cop more than a good cop. San Jose — like most U.S. big-city police departments — has a police contract that has long enabled unaccountable arbitrators to issue binding decisions that can reverse the well-reasoned decisions of the Chief of Police and City Manager to fire or discipline officers.

In one such instance — our Chief’s 2016 termination of an officer who used his Twitter account to insensitively mock and menace advocates of the “Black Lives Matter” movement — resulted in a reinstatement of the same officer by the arbitrator. The San Jose Police Officers’ Association (POA) declined to offer him any defense, due to the nature of the conduct. The Department had no right to appeal the arbitrator’s decision because the contract makes it binding. The arbitrator was not accountable to any judge, nor any public agency, nor the public. We have no insight as to the reasoning of the arbitrator’s decision because it remains out of the reach even of a Public Records Act request.

Many city attorneys object that the very process of arbitrator selection inherently produces a biased pool of decision-makers. Unlike jurors selected through a similar “striking” process in which each side can “strike” disfavored candidates, prospective arbitrators repeatedly undergo the same selection process, and they actually seek to be selected. Many believe that this affects their decision-making as arbitrators, insofar as they have incentives to “consistently compromise on punishment to increase their probability of being selected in future cases.” See Stephen Ruskin, “Police Disciplinary Appeals,” 167 *University of Pennsylvania Law Review* 545, 576. As a result, the chiefs of police of nearly every major city complain about the impact of binding arbitration on their ability to fire bad cops, and to assess discipline.

The result: other officers see that a colleague who commits shameful conduct can continue to wear the same badge and receive the same salary. This has happened only rarely in recent years in San Jose, and [more frequently elsewhere](#). Regardless of the number of instances, even a small contagion can trigger an emotional pandemic. The process demoralizes the many good officers who serve with honor and high standards, and it enables those who do not. Public perception of police accountability suffers.

By no means does San Jose suffer uniquely from this defect. [Studies show troubling and consistent patterns of reducing and overturning of officer discipline in Chicago, Denver, Houston, Oakland, San Antonio, and several other cities](#), and [media accounts provide ample anecdotal evidence](#). In a [2017 comprehensive analysis by the Washington Post](#), 451 of the 1,881 police officers fired by 37 large American law enforcement agencies were ordered rehired by an arbitrator. Why this substantial pattern of reversal? Scholars point to the procedural elements of the arbitration process that have a significant effect on the outcomes.

We should ask what effect the challenges of the current disciplinary appeals process might have on upstream decision-making by police chiefs. For example, [virtually every large-city U.S. police department has Brady lists of officers](#) — individuals who cannot make arrests, investigate cases, or testify in court because of prior reports of wrongdoing that undermine their credibility as a witness, and subject them to impeachment on the stand — yet they continue to serve.

We can do better. Every police officer deserves due process for any disciplinary decision, and state law mandates as much. Yet the rules around the arbitration process have inherent defects that can undermine much of the good work that SJPD has done to improve officer conduct and accountability. If we cannot find a better process than arbitration, we must negotiate a means to make every arbitrators’ decision completely transparent and accountable. Many reforms have been discussed nationally, including improving the arbitrator selection process, lifting the veil of secrecy over the content of arbitration decisions, limiting the scope of the arbitrator’s review of prior factual findings, and allowing the City a right of appeal to a state court.

Any would offer improvement, and all appear worth exploration. Because these provisions have existed in our police contract for years, we must — pursuant to the state Meyers-Milias-Brown Act — negotiate changes at the bargaining table with our officers. We should prioritize this in upcoming contract negotiations.

While we have many priorities to juggle amid this pandemic, San Jose residents have spoken through the ballot box and on the streets in pushing for reform. We must push ahead.

*The signers of this memorandum have not had, and will not have, any private conversation with any other member of the City Council, or that member's staff, concerning any action discussed in the memorandum, and that each signer's staff members have not had, and have been instructed not to have, any such conversation with any other member of the City Council or that member's staff.*