

SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM
STAFF REPORT
LEGAL SERVICES DIVISION

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DATE: August 9, 2005

TO: The Board of Administration, via Lawrence B. Grissom, Retirement Administrator

FROM: Loraine Chapin, General Counsel

SUBJECT: August Legal Services Division Report

I. SOCIAL SECURITY

The House and Senate adjourned on July 29 for the August recess. Social Security reform although heavily debated did not move because Republicans and Democrats disagree over whether the system's assets should be invested in individual accounts. Congress returns to work September 6. We will continue to monitor.

II. ADMINISTRATIVE DISABILITY HEARINGS (Unless otherwise noted, Sheila Jacobs, Esq. represents the Board in administrative hearings.)

Jayne Ashton: The Honorable Thomas Murphy (Ret.) (JAMS) has recommended denial of Ms. Ashton's application for industrial disability retirement. The applicant has filed an objection to which the Board has responded. A final recommendation is pending.

Maria Estrella: The Honorable Raymond Zvetina's (Ret.) (JAMS) decision is pending.

Alfred Jackson: The Honorable Kevin Midlam (Ret.) (JAMS) heard Mr. Jackson's claim on June 13. A decision is pending.

Herman McFeely: Judge Carolyn Magnuson (OAH) heard Mr. McFeely's application for industrial disability retirement on June 3. A decision is pending.

The following pre-hearings have been calendared: Ralph Basquez (August 1); Sharon Bergan (August 29) and Richard Maler (September 12); Francisco Torres, Bridget Tubbs; and Constandino Delimitros all (August 25).

The following matters have completed the pre-hearing process, but have not been calendared for hearing: Alphonso Dobyne; Jon Kern; Max Camberos; Theresa Rice;

Raul Padilla (David Hopkins); Boyd Malm (Debra Odom-Kuttner); and Fernando Mercado (Debra Odom-Kuttner).

The following hearings have been calendared: Heleodoro Lopez, August 30 (OAH) and Louis Rodriguez [DROP participant], September 28 (OAH).

The following applicants have been referred for hearing, but no dates have been set: Philip Thren, Robert Neal, Alan Fraguso, Kenneth Hawkins, Maria Colin, Samuel Campbell, Emilio Romero, Windy Jones, Sherry Mallard (eligibility only); Joe Rainbolt, Robert O'Donnell, John Garcia, Harvey Kitchel, Donovan Knapp, Linda LaCruza, Scott Naliboff, Brad Ruff, and Michael Williams.

III. LITIGATION

Superior Court - Disability Cases

Sergio Alcala v. San Diego City Employees' Retirement System Board of Retirement, San Diego Superior Court Case number GIC847606. SDCERS Answer to Alcala's Petition for Writ of Mandate was filed on June 30, 2005. The matter has been transferred from Judge C. Wickersham to Judge William Pate. The Court has not yet set a briefing schedule. Matt Davis, Esq. is representing Mr. Alcala.

Superior Court – Miscellaneous

Michael Abramsky, et al. v. Alstom S.A. et al.: 03-CV-6595 (VM) United States District Court, Southern District of New York (Manhattan): SDCERS has been appointed co-lead plaintiff, along with 3 other public retirement funds in this securities fraud class action lawsuit against the French corporation, Alstom and a number of its affiliates. Plaintiffs' First-Amended Complaint was filed April 30, 2004. Several motions by the defendants to dismiss the complaint are pending. Bernstein, Litowitz, Berger and Grossman represents the Board.

People of the State of California v. Lawrence Grissom, et al., San Diego Superior Court case number GIC850246. On July 6, 2005, the City Attorney brought this action against the administrator, general counsel, and several former trustees alleging a violation of the State's Political Reform Act of 1974. The case has been assigned to the Honorable Charles Wickersham. A Demurrer will be filed on behalf of the administrator and general counsel on the grounds that no disqualifying financial interest exists where the basis of the conflict is pension benefits. Seltzer, Caplan, McMahon & Vitek is representing SDCERS.

SDCERS v. City of San Diego & City Attorney, Michael Aguirre, San Diego Superior Court No. GIC841845: On January 21, the Board voted unanimously (9-0) to file a lawsuit against the City of San Diego and its City Attorney, Michael Aguirre seeking judicial declaration that SDCERS is entitled to retain its own legal counsel and demanding return of SDCERS' privileged documents seized from a SDCERS Board member's City office. The lawsuit was filed on January 27, 2005. A copy of the complaint is available on the SDCERS website under Publications, Recent Events at www.sdcers.org. The case has been assigned to the Honorable Jeffrey Barton.

On August 23, 2005, Judge Barton is scheduled to hear SDCERS' Demurrer to the 2d Amended Cross Complaint and SDCERS' Motion to Strike the prayer for receivership in the 2d Amended Cross Complaint. Aguirre's Demurrer to the SDCERS Complaint, SLAPP motion and Motion to Quash the Deposition of Andrew Jones are also scheduled to be heard on this date. SDCERS Motion to Disqualify Aguirre as counsel for cross complainants is scheduled for September 15, 2005. Seltzer, Caplan, McMahon & Vitek is representing SDCERS.

SDCERS v. City of San Diego, San Diego Superior Court case number GIC851286. On July 22, 2005, the Board voted unanimously (8-0) to file an action for declaratory relief seeking a judicial determination of the legality of payment of contested retirement benefits to its members. The lawsuit was filed on July 26, 2005. The case has been assigned to the Honorable Charles Wickersham. Seltzer, Caplan, McMahon & Vitek is representing SDCERS.

SDCERS et. al. v. Delphi Corporation, Case No. 05-CV-2656(NRB): SDCERS is seeking co-lead plaintiff status in this securities class action matter. Bernstein, Litowitz, Berger and Grossman represents the Board.

San Diego Police Officers' Association v. Michael Aguirre, et al., United States District Court case number 05CV1581. On August 9, 2005, the San Diego Police Officers' Association (POA) filed a complaint in federal court for Damages, Declaratory and Injunctive Relief against the City Attorney, City of San Diego, Retirement System, Retirement Administrator, past and present members of the City Council, certain former SDCERS Board Members, the former City Auditor and the past and present City Manager. Seltzer Caplan McMahon Vitek will handle this matter on behalf of the Retirement System and its Retirement Administrator.

Court of Appeal

The Board is not a party to any case pending before the Court of Appeal.

IV. SAN DIEGO MUNICIPAL CODE AMENDMENTS

There is no change. The Board approved a Technical Corrections Ordinance in August 2004, and directed legal staff to forward it to the City Manager and City Attorney, and work with the appropriate City personnel to have the ordinance place on the City Council docket for adoption. The fate of this ordinance remains uncertain. It is still with the City Attorney's Office.

V. MINIMUM DISTRIBUTION RULES

Staff continues to work on this item. Its recommendation to amend Board Rule 12.20 (regarding the payment of DROP benefits) to comply with the Final Regulations issued under Internal Revenue Code section 401(a)(9) regarding required minimum distributions will be before the board at its September meeting. The Final Regulations were issued on June 14, 2004. They take effect January 1, 2006.

VI. PURCHASE OF SERVICE CREDIT AND DEFERRED COMPENSATION

No change. We are seeking a Private Letter Ruling (PLR) to support the use of an affidavit certifying corresponding service with another employer as a means of allowing members to purchase service credit under SDMC § 24.1312 (5-year purchase) with 457 deferred compensation funds.

VII. DISABILITY EVALUATION PROCESS

At the Board meeting on July 29, 2005, Staff presented three recommendations to improve the disability retirement evaluation process. They included authorizing the Medical Review Officer to recommend denials or hearing referrals, eliminating the right to an automatic administrative hearing and conducting random follow-up investigations or evaluations of previously awarded industrial disability retirements for the purpose of decreasing fraud and confirming a recipient's continued eligibility. The Board discussed the first and second recommendations and voted 6-1 in support of them.

Since 7 affirmative votes are needed to approve any action item, Staff was asked to bring these recommendations back at the August Operations meeting for further consideration. Staff's report and recommendation are included in the packet of materials for the August 19, 2005 meeting. Pursuant to Board direction, the third recommendation will be further researched and submitted at a later date. Sheila and Sandra are handling this matter.

VIII. UNIFIED PORT DISTRICT RETIREMENT PLAN AND AGREEMENT

A Second Amendment to the Agreement to administer the UPD Retirement Plan and a Second Amended Retirement Plan are before the Board in August for approval. The Agreement between the UPD and SDCERS is being amended to bring the UPD Retirement Plan into compliance with California law, effective January 1, 2005, which extends retirement, death and survivor benefits for spouses to registered domestic partners. The amendment is also sought to clarify that the Board holds the assets of the UPD Plan in custody for the sole benefit of the UPD Plan Participants. This amendment was requested by the UPD.

Staff's report and recommendation to approve these amendments are in the Board materials for the August 19, 2005 meeting. Roxanne is handling this matter.

IX. COMMUNITY PROPERTY

In July, legal staff handled 64 telephone calls, met with 9 members, and had 11 conferences with staff. Eight domestic relations orders, final judgments and marital settlement agreements were reviewed and acted upon. Thirty-seven member files were reviewed for legal issues. Legal staff prepared 20 letters and e-mails to members, outside counsel, and others, along with 7 community property packages, and 14 staff memos. Legal researched 9 court records, and conducted 10 public records searches at the request of operations staff. Roxanne handles community property issues, with the assistance of Sally Nadeau, our senior legal assistant.

X. PUBLIC RECORDS REQUESTS

For the month of June and July, Legal staff received 20 public records requests. Staff responded to 16 requests. These requests were Board agendas from 1996 to current, certificates of retirement allowances for all disability recipients, copies of subpoenas for Larry, Paul, Lori, and Roxanne, proposed fiscal year 2006 budget summary, all reserves set aside for MP1 and MP2, tapes of meetings for April & May 2005, average monthly pension, number of employees paying into the system, transferred of City funds, Board minutes from 1997 to 2000, percentage of safety members collecting disability retirements, number of employees currently in DROP, use of 401(k)/SPSP to purchase time, and composition of the Retirement Board in the past. We expect the requests for public records to continue at the current pace. Merlita is handling these requests.

XI. TAX DETERMINATION LETTER FOR SDCERS

The Tax Determination Letter (TDL) and the Voluntary Correction Program (VCP) were filed July 12, 2005. Outside Tax Counsel (Ice Miller) is handling this matter for SDCERS. The operational review in conjunction with these applications is underway.

XII. REQUEST FOR LEGAL SERVICES

We issued a Request for Proposal for legal services in April. As of the May deadline, we had only received four responses. In light of the political environment and increased pending litigation resulting in significant demands on our time we have suspended review of the responses. We intend to reopen the process in the next 45 days.

XIII. PAYMENT OF OUTSIDE COUNSEL FEES

Pursuant to City Resolution R-297335, adopted November 18, 2002, the City has the responsibility to defend, indemnify, and hold harmless all past, present, and future members of the Retirement Board against all expenses, judgments, settlements, liability and other amounts actually and reasonably incurred by them in connection with any claim or lawsuit arising from any act or omission in the scope of the performance of their duties as board Members under the City Charter. Resolution R-297335 further authorizes the use of outside counsel when the City Attorney is unable or unwilling to provide for such defense.

On Tuesday, August 2, 2005, the City Council decided to not pay the legal defense fees for City employees named in civil lawsuits filed by Aguirre (People v. Grissom, et. al, case number GIC850246 and the cross-complaint filed by the City Attorney in SDCERS v. City Attorney, et. al, case number GIC841845). The vote to authorize the payment was 4-2 with Council Members Frye and Maienschein in opposition. Since it takes 5 affirmative votes to approve any action item, the matter failed. This was in direct contradiction to the outside counsel opinion provided to the City Council.

In the opinion provided by the firm of Procopio Cory Hargreaves & Savitch LLP, Steve Strauss indicated:

“Resolution R-297335 requires the City to provide a defense to the current and former SDCERS Board Members named in the two civil actions and also provides the City with the right to select the outside counsel to provide the defense. The City is also obligated to provide a defense to City employees under Government Code § 995, including the city auditor and Controller who is not a SDCERS Board member and therefore not covered by Resolution R-297335.

The City is not, however, obligated to provide a defense to the two individuals who are SDCERS employees, but are neither SDCERS Board Members nor City employees.”

The City Council’s decision to not indemnify its current or past employees has raised numerous concerns. We are working with outside litigation and fiduciary counsel to assess the best course of action. Subsequent to the Council’s decision we have received tender requests from two trustees as well as requests for payment of legal expenses from two former trustees. We are currently working on a report and recommendation to address this significant issue.

XIV. BOARD MEMBER APPOINTMENTS

On August 9, 2005, the City Council considered an extraordinary measure. Council Member Frye introduced a Resolution to remove the SDCERS Board President based on "alleged" good cause. Significantly, there was no second. Instead, there was a City Attorney report, public comment, City Council comment and ultimately a vote to continue which was unanimous with Council Member Madaffer not present at the time of the vote.

The alleged good cause was the SDCERS’ President's failure to ensure the issuance and auditing of accurate financial statements on an annual basis and his alleged refusal to conduct an illegal acts analysis. Several speakers urged the Council to vote in opposition to the Resolution calling for the removal of the SDCERS Board President. They accurately noted that the requested action was not lawful and violated the City of San Diego Charter, the State Constitution and the fundamental principles of independence.

In addition, there were 4 appointments to the SDCERS Board on the Council’s docket. They included Diann Shipione, Richard Rider, Ezekiel Cortes, and Thomas Hebrank. By letter dated 8/9/05, Ms. Shipione withdrew her name from consideration. These appointments were continued until September 6, 2005.