

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

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DATE: September 7, 2005

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

FROM: Loraine Chapin, General Counsel

SUBJECT: September Legal Services Division Report

I. BOARD MEMBER APPOINTMENT AND OTHER CITY COUNCIL ACTIVITY

On September 6, 2005, there were two SDCERS Board-related items before City Council. First, Council Member Frye's Resolution to remove the SDCERS Board President (continued from the August 9th docket failed on a 3-3 vote. Council Members Madaffer, Peters and Young voted against the resolution. Council Members Frye, Maienschein and Deputy Mayor Atkins voted in favor. Second, the City Council confirmed the appointment of Thomas C. Hebrank to serve as a SDCERS Board Member. The vote was 5-1 with Council Member Frye voting against his appointment. Mr. Hebrank's resume shows he is well qualified to serve on the SDCERS Board. He is a CPA with 25 years of relevant experience. He is currently the Managing Director for Douglas Wilson Companies. His responsibilities include managing a wide range of receiverships, workouts, and forensic accounting projects.

Of note, the City Council did not consider the appointments of Diann Shipione Shea, Richard Rider or Ezekiel Cortez which were also listed on the September 6 agenda. Ms. Shipione Shea and Mr. Rider attached conditions to their appointments which could not be met by the Council. Ms. Shipione Shea indicated a willingness to serve only in the event there were 7 new Council appointments. Mr. Rider's willingness to serve was conditioned upon the removal of the Board President. Based upon advice of the City Attorney, their nominations were not considered. Mr. Cortez had sent a letter asking that his name be withdrawn. He indicated he appreciated the nomination but as a solo legal practitioner he felt he didn't have the time to serve on the Board.

Mr. Hebrank will take his oath of office at the Finance and Investment Meeting on September 16, 2005.

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. Ms. Ashton's objection was overruled. The matter will appear on the Board's October 2005 agenda.

Maria Estrella: The Honorable Raymond Zvetina's (Ret.) (JAMS) has recommended that Ms. Estrella's application be denied on the grounds her disabling back injury was not the result of her job. Ms. Estrella plans to file an objection. The matter will appear on the Board's agenda when the objection process is completed.

Alfred Jackson: The Honorable Kevin Midlam (Ret.) (JAMS) has recommended denial of Mr. Jackson's application on the grounds he is not permanently incapacitated. Mr. Jackson filed an objection to the decision, to which the Board will respond. The matter will appear on the Board's agenda when the objection process is completed.

Heleodoro Lopez: Administrative Law Judge Alan Alvord heard Mr. Lopez' application on August 30. His 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: Bridget Tubbs; and Constandino Delimitros all (August 25). Francisco Torres (September 7); Emilio Romero (September 21); Alan Fraguso (September 26); Sam Campbell (September 30); Robert O'Donnell (October 11).

The following matters have completed the pre-hearing process, but have not been calendared for hearing: Ralph Basquez; Sharon Bergan, Alphonso Dobyne; Theresa Rice; and Raul Padilla (David Hopkins).

Boyd Malm and Richard Maler each withdrew his application from further consideration.

The following hearings have been calendared: Sherry Mallard (eligibility only), September 21 (ADR); Louis Rodriguez [DROP participant], September 28 (OAH); Max Camberos, October 5, (OAH); Fernando Mercado, October 31, (JAMS), Jon Kern, November 16. (OAH).

The following applicants have been referred for hearing, but no dates have been set: Philip Thren, Robert Neal, Maria Colin, Windy Jones, Joe Rainbolt, John Garcia, Harvey

Kitchel, Donovan Knapp, Linda LaCruza, Scott Naliboff, Brad Ruff, Debra Mattie, Michael Wahl, James Clem, Carlos Guzman 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. Berstein, 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 was filed on behalf of the administrator and general counsel. The demurrer will be decided September 30. Seltzer, Caplan, McMahon & Vitek is representing SDCERS.

SDCERS v. City of San Diego & City Attorney, Michael Aguirre, On January 27, 2005, the Board filed 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. 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 heard SDCERS Demurrer to the City's 2nd Amended Cross Complaint and SDCERS' Motion to Strike the prayer for receivership in

the 2nd Amended Cross Complaint. Aguirre's Demurrer to the SDCERS Complaint, SLAPP motion and Motion to Quash the Deposition of Andrew Jones were also heard on the 23rd. Most importantly, the Court held that SDCERS is an independent entity and is entitled to retain its own legal counsel. Thus, the City Attorney is not entitled to represent SDCERS. The Court granted the City leave to amend its Complaint on other issues.

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. Since that time various employee unions have intervened in the case and will support SDCERS position in the lawsuit. The case was assigned to the Honorable Charles Wickersham. The intervening parties challenged Judge Wickersham and the case will be transferred to another department. 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's 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 Operations meeting. The Final Regulations were issued on June 14, 2004. They take effect January 1, 2006. Tax Counsel with Ice Miller in Indianapolis will be present at the September Operations Board meeting.

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. PUBLIC RECORDS REQUESTS

In August, Legal staff received 9 public records requests. Staff responded to 6 requests. These requests were calendars of Peter Preovolos from April 15 to August 5, 2005; Larry and Lori's from January 1 to August 5, 2005, letters and e-mails to Senator Bill Morrow, list of all active DROP participants including their names and DROP entry date, list of outside consultants and attorneys, copies of invoices, salary increases for Larry Grissom, Lori Chapin and Doug McCalla, annual actuarial valuations and comprehensive annual financial reports (CAFRs) for fiscal years 1990-91 to 1993-94, formation of an Executive Committee and Mercer's Audit Reports. Merlita is handling these requests.

VIII. COMMUNITY PROPERTY

In August, senior legal staff handled 65 telephone calls, met with 5 members and 2 outside counsel, and had 27 conferences with staff. Twelve domestic relations orders, final judgments and marital settlement agreements were reviewed and acted upon. Twelve member files were reviewed for legal issues. Twenty-eight letters and e-mails to members, outside counsel, and others were prepared, along with 5 community property packages, and 20 staff memos. Staff researched 2 court records, and conducted 14 public records searches at the request of operations staff. Roxanne handles community property issues, with the assistance of Sally Nadeau, our senior legal assistant.

IX. TAX DETERMINATION LETTER & VOLUNTARY CORRECTION PROGRAM

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. Tax Counsel will be present at the September Operations Board meeting.

X. REQUEST FOR LEGAL SERVICES

No change. There is still a pending Request for Proposal for legal services.

XI. 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. State law imposes a similar obligation.

In August, the City Council in a 4-2 vote (5 votes are needed) failed to assume its responsibility to defend, indemnify and hold harmless former members of the Retirement Board. This council decision has raised numerous concerns. We continue to work with outside litigation and fiduciary counsel to assess the best course of action. The Board has approved outside counsel SCMV to initiate litigation if necessary to seek reimbursement from the City of monies paid by SDCERS on behalf of former SDCERS Board Members. We have received additional tender requests from former trustees. We are still working on a report and recommendation to address this significant issue. We anticipate a report for the October Operations meeting.

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