

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

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**DATE:** November 8, 2005

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

**FROM:** Loraine Chapin, General Counsel

**SUBJECT:** November Legal Services Division Report

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**I. BOARD MEMBER APPOINTMENT AND RESIGNATION**

On October 31, 2005, the City Council appointed James Hearty to the SDCERS Board. Mr. Hearty was approved by a vote of 5-1 with Council Member Frye voting against his nomination. Mr. Hearty's credentials are exceptional. He brings 27 years of investment and management experience. Currently he is the Managing Director of marketing and client services for Relational Investors. His prior experience includes service as a Board Member for the Massachusetts Pension Reserves Investment Management Board (PRIM), a \$32 billion pension fund for state employees and teachers. Prior to joining PRIM, he was a Managing Director at Lehman Brothers, where he was responsible for the public finance and tax-exempt divisions. In addition, Mr. Hearty brings 15 years of financial industry experience from the Bank of Boston and the Commonwealth of Massachusetts. With Mr. Hearty's appointment, the seven appointee positions on the Board have now been filled.

Also on October 31, 2005, the City Manager accepted the resignation of Bill Lopez, the Manager's appointee to the Board. Bill served on the SDCERS Board from November, 2004 through October, 2005. With the recent merging of the Human Resource functions with those of Risk Management into one department, Bill suggested and the Manager agreed there could be a perception of a conflict of interest since labor negotiators would report to him. The Manager accepted Bill's resignation effective immediately and stated he would not fill the position. Instead, the new Mayor will appoint this position. We will discuss this with the Manager in light of the fact the Charter mandates this appointment is to be made by the City Manager and further that this appointee serves at the pleasure of the City Manager.

With Bill's resignation the Board is down two members. We have begun the process to conduct the election necessary to fill the General Member vacancy created by John Torres' resignation last month.

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

Max Camberos: Mr. Camberos' application was heard, in part, by administrative law judge, Stephen Hjelt (OAH) on October 5. The hearing will conclude on December 14, 2005.

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 requested for additional time to file her objections, which was granted. Judge Zvetina (Ret.) is now considering Ms. Estrella's objection to the recommendation. Once the objection process is completed, the matter will appear on the Board's agenda for final decision.

Heleodoro Lopez: Administrative Law Judge Alan Alvord heard Mr. Lopez' application on August 30. His decision is pending.

Sherry Mallard: On September 21, Judge Robert O'Neill (ADR) heard Ms. Mallard's request to be found eligible to apply for industrial disability retirement. The Board contends Ms. Mallard did not timely file an application within 3 years of ceasing membership in SDCERS. Judge O'Neill (ADR) agreed with SDCERS and has recommended that the Board deny Ms. Mallard's request for eligibility. The matter will appear on the Board's December agenda.

Herman McFeely: Judge Carolyn Magnuson (OAH) heard Mr. McFeely's application for industrial disability retirement on June 3. A decision is pending. An inquiry has been made into the reason for the long delay between hearing and the recommendation. Mr. McFeely, however, is retired and collecting his service retirement.

Louis Rodriguez: Judge Greer Knopf (OAH) heard Mr. Rodriguez' claim on September 28<sup>th</sup>. A second morning of hearing has been calendared for December 7 for the purpose of allowing Mr. Rodriguez' counsel to cross-examine a police department employee on facts set forth in a sworn declaration by the employee. Closing arguments will be submitted in writing after December 7.

The following hearings have been calendared: Fernando Mercado, October 31 (JAMS); Kenneth Hawkins, November 14 (JAMS); Jon Kern, November 16 (OAH); Ralph Basquez, December 6 (JAMS); Louis Rodriguez (2<sup>nd</sup> day), December 7, OAH; Max Camberos (2<sup>nd</sup> day, December 14, OAH); Sharon Bergan, January 25 (ADR).

The following pre-hearings have been calendared: Philip Thren (October 10); Robert O'Donnell (October 11); John Garcia (October 28); Theresa Rice (November 7); and Windy Jones (November 14).

The following matters have completed the pre-hearing process, but have not been calendared for hearing: Robert O'Donnell ; John Garcia; Alphonso Dobyne; Samuel Campbell, Constantino Delimitros, Alan Fragos, Emilio Romero, Francisco Torres, Bridget Tubbs, and Raul Padilla.

The following applicants have been referred for hearing, but no dates have been set: Robert Neal, Maria Collin, Joe Rainbolt, Harvey Kitchel, Donovan Knapp, Linda LaCrusa, Scott Naliboff, Brad Ruff, Debra Mattie, Michael Wahl, James Clem, Carlos Guzman, Michael Williams, Harold Cox, and Felix Zavala.

### **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. Sheila Jacobs' is representing the Board.

#### **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. In September 2004, the defendants filed 10 motions to dismiss, which plaintiffs' opposed in December 2004. Reply briefs were filed in January 2005.

In September 2005, Judge Victor Marrero heard argument on the motion to dismiss for lack of subject matter jurisdiction on all claims brought on behalf of foreign (i.e. non-US residents or citizens) purchasers of Alstom securities on foreign exchanges. As a general rule, US courts have subject matter over securities claims of foreign purchasers on foreign exchanges when fraudulent conduct in the US is more than "merely preparatory" to the fraud and/or the fraud has a significant effect on US investors. Dan Berger (Berstein Litowitz Berger & Grossman, New York) argued the motion on behalf of plaintiffs. Judge Marrero's decision is pending.

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 was dismissed by Judge Charles Wickersham on September 30. Seltzer, Caplan, McMahon & Vitek represented Mr. Grissom and Ms. Chapin. The City Attorney may appeal the decision to the Appellate Court.

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](http://www.sdcers.org). The case was assigned to Judge Jeffrey Barton. Seltzer Caplan McMahon & Vitek (SCMV) represents SDCERS.

In July, 2005, the City Attorney filed a cross-complaint alleging numerous causes of action alleging such things as fraud, misrepresentation, illegal benefits and receivership. SCMV filed a demurrer. On August 23, 2005, Judge Barton ruled on SDCERS' Demurrer and held SDCERS is an independent entity entitled to retain its own counsel. The City Attorney was not granted leave to amend his cross-complaint on this issue. With respect to other issues raised by the City Attorney, the court granted leave to amend the stated pleading deficiencies. The City Attorney filed a Third Amended Cross-Complaint. SCMV has responded with a Demurrer and a Motion to Strike to the Third Amended Complaint. In addition, SCMV has filed a Motion for Summary Adjudication on the issue of who is SDCERS counsel. All of these motions, as well as the City's Motion to Consolidate certain "pension-related" cases has been set for January 13, 2006 at 9:00 a.m. in Department 69.

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. Seltzer, Caplan, McMahon & Vitek (SCMV) is representing SDCERS. The case was originally assigned to Judge Jay Bloom. Judge Bloom has since recused himself from all City cases. This case has been assigned to Judge Steven R. Denton. The hearing originally set for 11:00 a.m. on December 9, 2005 in Department 70 to hear the City's Motion to Strike the Complaints of the Intervenors has been vacated.

SDCERS et. al. v. Delphi Corporation, Case No. 05-CV-2656(NRB): In or about April 2005, the Board authorized SDCERS' securities litigation counsel to seek co-lead plaintiff status in the above-referenced matter. Subsequent events, including but not limited to, the ongoing U.S. Attorney and S.E.C. investigations and District Attorney

action against former Board members have lead to the conclusion that SDCERS should not be among those funds seeking co-lead plaintiff designation. SDCERS, however, will monitor the litigation and file claims for recovery of losses as necessary.

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. By Stipulation, the administrator has been dismissed from this action. Seltzer Caplan McMahon Vitek (SCMV) will handle this matter on behalf of the Retirement System.

On November 1, 2005 there was a hearing in federal court on the POA's Motion for Preliminary Injunction and the Motions to Dismiss filed by the City and SDCERS. Due to time and pleading constraints, SDCERS joined the City's Motion to dismiss for several causes of action. On November 5, 2005, the Court issued its ruling. The Court denied the POA's Motion for Preliminary Injunction. The Court also denied several of the Motions to Dismiss filed by the City and SDCERS. The Motion to Dismiss based on the Contracts Clause was denied as to the City but granted as to SDCERS with Leave to Amend.

In sum, the POA must amend its complaint again by 12/02/05. SDCERS and the other defendants have until 01/09/06 to respond. The hearing date for further Motions to Dismiss has been set for 02/06/06. The hearing will be held at 10:30 a.m., in Courtroom 13, Federal Court, Judge Marilyn Huff presiding. SCMV will continue to discuss with POA's attorneys the issue of dismissing SDCERS completely.

### **Court of Appeal**

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

### **Other Cases of Interest:**

City of San Diego v. Callan Associates, Inc., Gabriel Roeder Smith & company, San Diego Superior Court Case number GIC852419. On August 16, 2005, the City of San Diego filed a Complaint for Damages against SDCERS investment consultant and actuary for professional negligence, intentional fraud-affirmative misrepresentation and intentional fraud-concealment. The case has been assigned to Judge Kevin A. Enright. SDCERS is not a party to this case.

City of San Diego v. Richard Murphy, Michael Zucchet and Ralph Inzunza, San Diego Superior Court case number GIC854373. On September 23, 2005, the City attorney filed a Complaint for Declaratory Relief, violations of Government Code section 1090 and the Political Reform Act (Government Code sections 87100, et. seq., against the above referenced individuals. The case has been assigned to Judge Richard Y. Montes. According to the first paragraph of the Complaint, he brought this action “on behalf of the citizens of San Diego and all beneficiaries of the San Diego Employees’ Retirement System. The primary thrust of this complaint is the City Attorney’s contention that elected officers need 10 years of creditable service to vest. SDCERS is not a party to this suit.

People of the State of California v. Cathy Lexin, et. al., San Diego Superior Court case number CD190930. The District Attorney filed felony conflict of interest charges against five former and one current SDCERS Board Member(s) alleging a violation of California Government Code section 1090. The case was assigned to Judge Frederick Link. SDCERS is not a party to this suit. The Preliminary Hearing has been continued to November 28, 2005.

McGuigan v. the City of San Diego, San Diego Superior Court case number GIC849883. Plaintiff William J. McGuigan filed the complaint on June 28, 2005. Plaintiff claims Defendant City of San Diego failed to fund the retirement plan as required by the City Charter and SDMC § 24.0801. The case is assigned to Judge Richard Strauss.

**Upcoming Hearing Dates**

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|---|----------------------|---|
| SDCERS v. City of San Diego<br>(Legality of benefits)         | 12/9/05<br>(vacated) | <ul style="list-style-type: none"> <li>• City’s Motions to Dismiss Complaints of Intervenors</li> </ul>   |
| SDCERS v. City & City Attorney<br>(Attorney for SDCERS)       | 1/13/2006            | <ul style="list-style-type: none"> <li>• Motion to Consolidate</li> <li>• Motion for Summary Adjudication</li> <li>• Motion to Strike 3<sup>rd</sup> Amended Complaint</li> </ul> |
| SDPOA v. Aguirre, et al.<br>(Declaratory & Injunctive Relief) | 2/6/06               | <ul style="list-style-type: none"> <li>• Motions to Dismiss</li> </ul>  |
|   | 10/23/06             | <ul style="list-style-type: none"> <li>• Pretrial Conference</li> </ul>   |
|   | 11/13/06             | <ul style="list-style-type: none"> <li>• Hearing on any Motions in Limine</li> </ul>  |
|   | 11/14/06             | <ul style="list-style-type: none"> <li>• Trial</li> </ul>   |
| People v. Lexin, et al.<br>(Criminal case)                    | 11/25/05             | <ul style="list-style-type: none"> <li>• Preliminary Hearing</li> </ul>   |
| People v. Grissom, et al.                                     | 11/23/05             | <ul style="list-style-type: none"> <li>• Motion to Set Aside Dismissal</li> <li>• Motion for Reconsideration</li> </ul>   |
|   | 12/16/05             | <ul style="list-style-type: none"> <li>• Hearing re: Attorneys fees and costs</li> </ul>  |

#### **IV. DISABILITY RECOMMENDATIONS**

There are three recommendations regarding the disability retirement process on November's agenda. They are discussed individually and in detail in your agenda and are summarized here.

First, staff recommends that the Board appoint a Disability Committee of five Board members to publicly consider staff and adjudicator recommendations on disability retirement matters. All public comment and argument would take place at the committee level during the committee's monthly public meeting. The committee would then make a recommendation to the full Board. Second, staff recommends the Board authorize staff to investigate potentially fraudulent disability retirements and further, to recommend that the Board file civil lawsuits under the False Claims Act (Govt. Code section 12650 et. seq.) or to refer the case to the District Attorney for criminal prosecution whenever appropriate. Third, staff strongly recommends the Board order random re-examination and evaluation of disability retirement recipients as required by SDMC section 24.0510.

#### **V. 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 placed on the City Council docket for adoption. The fate of this ordinance remains uncertain. It is still with the City Attorney's Office.

#### **VI. MINIMUM DISTRIBUTION RULES**

On October 17, 2005, Staff mailed informational packets to DROP participants regarding the amendments made to the DROP distribution Board Rules. These amendments were recommended by Staff and approved by the Board to bring SDCERS into compliance with the Final Regulations issued under Internal Revenue Code section 401(a)(9). The Final Regulations were issued on June 14, 2004. They take effect January 1, 2006.

Beginning on October 26, 2005, Staff conducted a series of workshops to educate DROP retirees and participants on the changes to the DROP distribution rules. To date Staff has completed the following presentations:

|                  |                                       |
|------------------|---------------------------------------|
| October 26, 2005 | War Memorial @ Balboa Park, 9AM & 1PM |
| October 27, 2005 | Local 127 Union Meeting, 5PM          |
| October 28, 2005 | War Memorial @ Balboa Park, 9AM & 1PM |
| October 31, 2005 | Firefighters Local 145, 10AM          |

|                  |                                       |
|------------------|---------------------------------------|
| November 1, 2005 | War Memorial @ Balboa Park, 9AM & 1PM |
| November 2, 2005 | San Diego Police Dept, 10AM & 2PM     |
| November 3, 2005 | War Memorial @ Balboa Park, 9AM & 1PM |
| November 7, 2005 | Firefighters Local 145, 8:30 AM       |

Another presentation is scheduled for November 16, 2005, UPD @ 8AM. In addition, SDCERS has started extended hours each weeknight (Monday-Thursday) from 5PM-7PM for walk-in appointments and counseling.

## **VII. 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. Tax Counsel advised a slight delay after learning that the IRS would be releasing a private letter (PLR) ruling very soon. Even though PLRs are only binding on those who requested them, they are relied upon to draft requests in a manner to be more favorably received by the IRS.

## **VIII. PUBLIC RECORDS REQUESTS**

The request for public records has continued at the same pace from last month. Legal Services Division responded to 5 requests. Those requests included, among other things, information concerning retirees from the police department receiving benefits above the rank of Lieutenant; all documents currently in possession of Board Member Steve Meyer; agendas, minutes, reports discussing votes taken in open and closed sessions from November 1, 2002 to present; all records pertaining to pension benefits of former City Attorney John Witt and Assistant City Attorney John Kaheny; copies of contract and invoices between Nuffer, Smith and Tucker, Inc.; statements from State Street Bank relating to balances in the SDCERS' financial statements for the years ending June 30, 1999 – 2003; and the engagement letter, work plan, scope of work, retainer letter between SDCERS and Navigant, Inc. Roxanne is handling these public records requests with the assistance of Merlita Hilario, our legal assistant.

## **IX. PROPOSED RULE FOR RESPONDING TO PUBLIC RECORDS REQUESTS**

At the October meeting, the Board adopted a general policy for responding to Public Records Requests, with the understanding that Staff would return to the Board with a proposed Board Rule this month. That proposed rule, Rule 7.90 is before the Board this month. It tracks the requirements of the Public Records Act. Staff recommends adoption. Staff's report, recommendation and proposed Board rule are in the November Operations Board packet.

## **X. COMMUNITY PROPERTY AND BENEFITS**

In October, legal staff handled 38 telephone calls, met with 7 members, and had 17 conferences with staff. Thirteen domestic relations orders, final judgments and marital settlement agreements were reviewed and acted upon. Seventeen member files were reviewed for legal issues. Thirty-eight letters and e-mails to members, outside counsel, and others were prepared, along with 3 community property packages, and 13 staff memos. Staff researched 5 court records, and conducted 9 public records searches at the request of operations staff. Roxanne handles community property and benefits issues, with the assistance of Sally Nadeau, our senior legal assistant.

## **XI. 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 on site November 8, 9, and 10, 2005 to work on the operational compliance of the TDL and VCP.

## **XII. REQUEST FOR LEGAL SERVICES**

Staff has completed its review of the responses to the Request for Proposals (RFP) for Legal Services. We are very pleased with the quality of responses received. The board President has indicated he will appoint a committee of the Board to interview the candidates for fiduciary counsel. We anticipate the interviews will be complete in time for a recommendation at the December meeting.

## **XIII. INDEMNIFICATION OF SDCERS STAFF**

Fiduciary Counsel has prepared a revised Board Resolution regarding the Indemnification and Defense of SDCERS employees. The report, recommendation, and revised Board Resolution will be mailed separately upon receipt. Fiduciary Counsel will be at the November meeting to present this report and resolution. He has indicated he will address Indemnification and Defense of SDCERS Trustees in a future report.

## **XIV. RESOLUTION FOR AUTHORIZED SIGNATORIES**

A revised Board Resolution regarding the designation of authorized signatories for the execution of contracts, agreements and financial documents for SDCERS is before the Board at its November Operations meeting. Revision is required to add Robert L. Wilson, Jr., the newly hired assistant retirement administrator. A copy of the revised resolution is in the November Operations Board packet.

**XV. NEW EMPLOYEE IN LEGAL SERVICES DIVISION**

We are pleased to announce the hiring of LeRoy Daniels as the new Retirement Legal Assistant. LeRoy fills the vacancy created by the promotion of Sally Nadeau to Senior Legal Assistant following the retirement in July of Jean Struiksma. LeRoy has 17 years of paralegal experience. He came to us from the City Attorney's Office, where he was on temporary assignment as a project paralegal. He will be working closely with Sheila and Sandra in the disability area of our operations. He will also assist Roxanne and Merlita with our increasing volume of public records requests.

LEC:dm