

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

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**DATE:** January 10, 2006

**TO:** The Board of Administration, via Bob Wilson, Assistant Retirement Administrator

**FROM:** Roxanne Story Parks, Acting General Counsel

**SUBJECT:** January Legal Services Division Report

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**I. BOARD COMPLAINT WITH SAN DIEGO ETHICS COMMISSION**

The previous Board complaint against former Trustee Diann Shipione, filed with the Ethics Commission on November 30, 2004, has been dismissed. The dismissal letter states that the Ethics Commission determined that educational remedies were more appropriate at this point than pursuing an enforcement action.

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

Ralph Basquez: Mr. Basquez's application for industrial disability retirement was heard by the Honorable Judge Kevin Midlam (Ret.) on December 6, 2005. Mr. Basquez represented himself. Judge Midlam has recommended that the application be denied. No objections were filed. The matter will appear on the Disability Committee's February 3, 2006 agenda and the Board's February 17, 2006 agenda.

Max Camberos: Mr. Camberos' application was heard, in part, by administrative law judge, Stephen Hjelt (OAH) on October 5. Due to the illness of the Board's medical witness, the parties have agreed the hearing will conclude on February 27, 2006.

Kenneth Hawkins: Judge Kevin Midlam (Ret.) heard Mr. Hawkins application on December 15, 2005. Mr. Hawkins represented himself and SDCERS was represented by Ms. Debra Odom-Kuttner. Judge Midlam's decision is pending.

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

Jon Kern: Judge Steven Adler (OAH) heard Mr. Kern's application on November 16. Closing arguments were filed December 15, 2005. Scott O'Mara, Esq. represents Mr. Kern. Judge Adler's decision is pending.

Herman McFeely: Judge Carolyn Magnuson (OAH) heard Mr. McFeely's application for industrial disability retirement on June 3. In December, she issued a recommendation that the application be granted. The matter will appear on the Disability Committee's February 3, 2006 agenda.

Fernando Mercado: Judge Steven Adler (OAH) heard Mr. Mercado's application on December 19 & 20<sup>th</sup>, 2005. Judge Adler requested briefing on the "going and coming" rule which is due next month.

Robert O'Donnell: Mr. O'Donnell's application was heard by the Honorable Geary Cortes (Ret.) on December 10. Mr. O'Donnell represented himself. Judge Cortes' decision is pending.

Louis Rodriguez: Judge Greer Knopf (OAH) heard Mr. Rodriguez' claim on September 28<sup>th</sup>. A second morning of hearing took place on December 7. Closing arguments will be filed January 13, 2006.

The following hearings have been calendared: John Garcia, January 24, (OAH); Sharon Bergan, January 25, (ADR); Sam Campbell, February 7 & 8, (ADR); Joe Rainbolt, March 2, (JAMS).

The following pre-hearings have been calendared: Carlos Guzman (January 12, 2006); Christopher Smith (February 21, 2006.).

The following matters have completed the pre-hearing process, but have not been calendared for hearing: Alphonso Dobyne; Constantino Delimitros, Alan Fragoso, 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 Colin, Harvey Kitchel, Donovan Knapp, Linda LaCrusa, Scott Naliboff, Brad Ruff, Debra Mattie, Michael Wahl, James Clem, Michael Williams, Harold Cox, and Felix Zavala.

### **III. LITIGATION**

#### **Superior Court - Disability Cases**

Sergio Alcalá v. San Diego City Employees' Retirement System Board of Retirement, San Diego Superior Court Case number GIC847606. SDCERS Answer to Alcalá's Petition for Writ of Mandate was filed on June 30, 2005. The hearing on the Writ is set for March 24, 2006. Matt Davis, Esq. is representing Mr. Alcalá. 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 judgment of dismissal was vacated on December 2, 2005. The City Attorney filed an amended complaint on Monday, December 12, 2005. This case has been reassigned to Judge Steven Denton due to Judge Wickersham's move to juvenile court. A demurrer and motion to strike the complaint are being prepared and will be heard on February 17, 2006 at 10:30 a.m. A case management conference also is scheduled for February 17, 2006.

SDCERS v. City of San Diego & City Attorney, Michael Aguirre, San Diego Superior Court case number GIC841845. 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 have been set for January 13, 2006 at 9:00 a.m. in Department 69. Mr. Grissom and Ms. Chapin, both previously named in the City Attorney's cross-complaint, have been dismissed from that action.

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 for the City's Motion to Strike the Complaints of the Intervenor originally scheduled on January 6, 2006, has been re-scheduled to January 20, 2006 at 10:30 in Department 73. A case management conference also is scheduled for January 20, 2006 at 11:00.

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. Following a hearing on demurrers filed by the defendants, the City Attorney has dismissed this action.

People of the State of California v. Cathy Lexin, et. al., 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 started on November 28, 2005. It is currently underway in Department 26 of the Superior Court.

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**

SDCERS v. City of San Diego (Legality of benefits)	1/20/06	<ul style="list-style-type: none"> <li>• City's Motions to Dismiss Complaints of Intervenors</li> <li>• Case Management Conference</li> </ul>
SDCERS v. City & City Attorney (Attorney for SDCERS)	1/13/06	<ul style="list-style-type: none"> <li>• Motion to Consolidate</li> <li>• Motion for Summary Adjudication</li> <li>• Demurrers and Motion to Strike 3<sup>rd</sup> Amended Cross-Complaint</li> </ul>
SDPOA v. Aguirre, et al. (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. (Criminal case)	11/28/05	<ul style="list-style-type: none"> <li>• Preliminary Hearing underway in Department 26</li> </ul>
People v. Grissom, et al. SDCERS v. City of San Diego (Legality of benefits)	02/17/06	<ul style="list-style-type: none"> <li>• Demurrers and Motion to Strike 2d Amended Complaint</li> <li>• Case Management Conference</li> </ul>
	1/20/06	<ul style="list-style-type: none"> <li>• City's Motions to Dismiss Complaints of Intervenors</li> <li>• Case Management Conference</li> </ul>

#### **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 placed 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**

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. The deadline for submitting distribution choices was December 1, 2005. As of that date, over 95% of SDCERS' DROP participants had responded. Staff is very pleased with the success of this project.

#### **VI. PURCHASE OF SERVICE CREDIT AND DEFERRED COMPENSATION**

Recently, the IRS issued a Private Letter Ruling (PLR) regarding the use of an affidavit certifying corresponding service with another employer as a means of allowing purchases of service credit with deferred compensation funds. Tax Counsel will be reviewing to see how this PLR relates to our specific concerns. I will provide recommendations to the Board on this issue at the February Board meeting.

#### **VII. PUBLIC RECORDS REQUESTS**

Legal Services Division continuously receives California Public Records Act requests; However, the volume has decreased substantially in the last month. In December, we received only eight requests. These requests were for Board meetings dating back to 1995, 1998 and 2002. In addition, we received requests pertaining to retirement benefits that have been, are, or will be received by Grissom, Saathoff, Torres, Wilkinson, Webster, Lexin, Herring, and Chapin; applications for PSC and contracts and also documents involving legal costs associated with indemnification of all SDCERS' employees and Board members arising out of the Federal, State, County of San Diego

and/or City investigations. Merlita Hilario, our legal assistant, assists with the handling of public records requests.

### **VIII. COMMUNITY PROPERTY AND BENEFITS**

In December, the senior legal assistant handled 51 telephone calls, met with 7 members, and had 13 conferences with staff. Fifteen domestic relations orders, final judgments and marital settlement agreements were reviewed and acted upon. Seventeen member files were reviewed for legal issues. Thirty letters and e-mails to members, outside counsel, and others were prepared, along with 4 community property packages, and 15 staff memos. Three probate declarations were prepared and reviewed. One overpayment was resolved. Nine public records searches were done at the request of operations staff. Sally Nadeau, our senior legal assistant, assists with the handling of community property and benefits issues.

### **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 was here December 6, 7, and 8 to work on the operational compliance of the TDL and VCP. Ice Miller and SDCERS staff established a work plan for the first quarter of 2006. This is a significant project requiring the participation of all divisions of SDCERS Staff.

RSP:dmc