

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

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**DATE:** March 7, 2006

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

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

**SUBJECT:** March Legal Services Division Report

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

Sharon Bergan: Ms. Bergan's application was heard by Judge Anthony Joseph (Ret.) on January 25 and February 17, 2006. Ms. Bergan was represented by attorney, Dianna Davis. The following witnesses testified on Ms. Bergan's behalf: Ms. Bergan; her husband, Terry Bergan; and Dr. David Kupfer. Ms. Michelle Corbin; Sergeant Robert Mickschl and Dr. Drew Peterson testified on SDCERS' behalf. Closing arguments were filed March 3. Judge Joseph's decision is pending.

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, and calendar conflicts of counsel, the parties have agreed the hearing will conclude on March 14, 2006.

Sam Campbell: Mr. Campbell's application was heard February 7 by the Honorable Robert O'Neill (Ret.). David Dugan, Esq. represented Mr. Campbell. Mr. Campbell and internist, Richard Luros testified on his behalf. Cardiologist, Steven Gross testified on behalf of the Board. Judge O'Neill's decision is pending.

Kenneth Hawkins: Judge Kevin Midlam (Ret.) heard Mr. Hawkins application on December 15, 2005. Matthew Davis, Esq. represented Mr. Hawkins. SDCERS was represented by Ms. Debra Odom-Kuttner. Judge Midlam recommended that the application be denied and Mr. Hawkins' objection was overruled. The matter will be presented to the disability retirement committee in April 2006.

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, 2005. Scott O'Mara, Esq. represents Mr. Kern. Judge Adler recommended that the application be denied, but has not yet ruled on Mr. Kern's objection to the recommendation. It is anticipated the matter will appear on the disability retirement committee's April agenda.

Fernando Mercado: Judge Steven Adler (OAH) heard Mr. Mercado's application on December 19 & 20<sup>th</sup>, 2005. Judge Adler's decision is pending.

Joe Rainbolt: Mr. Rainbolt's hearing was calendared for March 2 before the Honorable Raymond Zvetina (Ret.). Based upon videotape obtained by the City's private investigators and sworn testimony which was contradicted by that videotape, SDCERS requested that Mr. Rainbolt withdraw his application. On March 1, through his attorney, Mr. Rainbolt withdrew the application and the hearing was taken off-calendar.

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. Judge Knopf's decision is pending.

The following hearings have been calendared: Max Camberos (2<sup>nd</sup> day), March 14, (OAH); John Garcia, March 28, (OAH); Bridgett Tubbs, April 3, (OAH); Donovan Knapp, April 6; Philip Thren, April 10, (OAH); Emilio Romero, April 17, (OAH); Windy Jones, May 4 (JAMS); and Alfonso Dobyne, May 22, (Judge Geary Cortes).

The following pre-hearings have been calendared: Harvey Kitchel (May 2); Michael Williams (June 19).

The following matters have completed the pre-hearing process, but have not been calendared for hearing: Debra Mattie, Robert Neal, Theresa Rice, Constantino Delimitros, Alan Fragoso, Francisco Torres, Raul Padilla, Michael Wahl and Carlos Guzman.

The following applicants have been referred for hearing, but no dates have been set: Linda LaCrusa, Scott Naliboff, Brad Ruff, Harold Cox, and Felix Zavala.

The following applications were withdrawn by the applicant prior to hearing: James Clem, Maria Collin and Joe Rainbolt.

## II. 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. Mr. Alcalá's memorandum of points and authorities in support of his petition was filed February 24. SDCERS' Opposition will be filed March 13. Matt Davis, Esq. represents Mr. Alcalá. Sheila Jacobs is representing the Board.

Mark George v. San Diego City Employees' Retirement System Board of Retirement, San Diego Superior Court Case number GIC860870. George's Petition for Writ of Mandate was filed February 3. SDCERS' responsive pleading is due March 24. SDCERS has asked George to dismiss his writ on the grounds he has recently told his physician he is able to work and may be attempting to return to work. This new evidence may subject George to a civil lawsuit under the False Claims Act, Govt. Code section 12650. His counsel, Amanda Benedict, has not yet responded to SDCERS' request to dismiss the writ but has agreed to discuss the issue with her client.

### **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 ("SCMV") 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 March 9, 2006 at 10:30 a.m. SCMV no longer represents Mr. Grissom and Ms. Chapin. Mr. Grissom is now represented by Irell and Manella LLP. Ms. Chapin is now being represented by Quinn Emanuel Urquhart Oliver & Hedges, LLP.

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 responded with a Demurrer and a Motion to Strike to the Third Amended Complaint. On January 13, 2006, the Court sustained SDCERS' Demurrer and held the City must be a party to the Cross-complaint. A Fourth Amended Cross-Complaint was filed and served on SDCERS on February 15, 2006. SCMV is evaluating the appropriate response to the Fourth Amended Cross-Complaint. Mr. Grissom and Ms. Chapin, both previously named in the City Attorney's cross-complaint, have been dismissed from that action.

On January 13, 2006, the Court also granted the City's motion to consolidate case no. GIC851286 (legality of benefits) with this case. Thus, case no. GIC851286 also now is being heard by Judge Jeffrey Barton.

The hearing on the Motion for Summary Adjudication filed by SCMV was held on February 15, 2006. The Court tentatively ruled in favor of SDCERS; however, it did not issue its filing ruling but instead took the matter under submission after oral argument. The Court's final ruling was issued on March 6, 2006.

Judge Barton ruled on SDCERS' Motion for Summary Adjudication on its first cause of action for a declaration that SDCERS is empowered to employ legal counsel of its own choosing for all purposes, separate and independent from the City of San Diego and Office of the City Attorney of the City of San Diego. The Court ruled: "Plaintiff SDCERS' Motion for Summary Adjudication to issue one is granted. On the first cause of action for declaratory relief in the complaint, SDCERS is empowered to employ legal counsel of its choosing separate and independent from the City and the Office of the City Attorney of the City of San Diego. This ruling is restricted to the totality of the facts that currently exist between the parties, including the City Charter, current City Ordinances, the California Constitution, existing case law and the panoply of adverse claims between the parties presented in this case and others."

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. This case has been consolidated with case no. GIC841845 (legal counsel) before Judge Jeffrey Barton. The hearing for the City's Motion to Strike the Complaints of the Intervenor also was heard on February 15, 2006 before Judge Barton. The Court denied the City's Motion to Strike.

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. The POA amended its complaint and SDCERS and the other defendants have filed Motions to Dismiss. The hearing on the Motions to Dismiss was held on February 6, 2006. The Court granted certain portions of the various parties Motions, but granted the POA leave to file its Third Amended Complaint on or before March 21, 2006. SDCERS response will be due on April 17, 2006 and hearings on any new motions to dismiss will be held on May 15, 2006.

The Court and the parties also participated in an Early Neutral Evaluation conference in which the parties discussed various issues including the status of pleadings, written discovery and depositions. 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 concluded and Judge Link has found that there is sufficient evidence for the matter to proceed to trial.

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) <b>consolidated with</b> SDCERS v. City & City Attorney (Attorney for SDCERS)	6/16/06	• First Expert Exchange
	7/7/06	• Second Expert Exchange
	9/6/06	• Discovery Cut-off
	9/22/06	• Trial Readiness Conference
	10/6/06	• Trial
SDPOA v. Aguirre, et al. (Declaratory & Injunctive Relief)	10/23/06	• Hearing on Motions to Dismiss
	11/13/06	• Pretrial Conference
	11/14/06	• Hearing on any Motions in Limine
People v. Grissom, et al.	3/9/06	• Demurrers and Motion to Strike 2d Amended Complaint • Case Management Conference

**III. SAN DIEGO MUNICIPAL CODE AMENDMENTS**

The following SDCERS-related ordinances and resolutions have been submitted to the City for action over the last couple of years: (1) Tax Compliance Ordinance (technical amendments to confirm SDCERS' compliance with key tax laws), (2) Domestic Partner Ordinance (to comply with state law), (3) Gleason Settlement Ordinance (to comply with current state law), (4) Resolution Clarifying Eligibility of Certain Beneficiaries to Corbett Retiree Benefit, and (5) Technical Corrections Ordinance (clarifying retirement provisions and renumbering obsolete provisions). Although none of these ordinances

and resolutions have been acted upon by the Council, we recently re-sent these matters to the Mayor's office.

#### **IV. PUBLIC RECORDS REQUESTS**

Legal Services Division continuously receives California Public Records Act requests. In February, we received 13 requests. These requests were calculations of mayor and city councils' benefits; annual investment report; 13<sup>th</sup> checks; calendars of Grissom, Chapin and Preovolos from January 1, 2005 to January 2006; minutes of January 2006 special board meeting; appointment of Lori Chapin as General Counsel for SDCERS; and list of all employees who have requested purchase of service credits. I handle public records requests with the assistance of Merlita Hilario, our legal assistant.

#### **V. COMMUNITY PROPERTY AND BENEFITS**

In February, the senior legal assistant handled 61 telephone calls, met with 9 members, and had 29 conferences with staff. Twenty-six domestic relations orders, final judgments and marital settlement agreements were reviewed and acted upon. Twelve member files were reviewed for legal issues. Forty-eight letters and e-mails to members, staff, outside counsel, and others were prepared, along with 5 community property packages, and 26 staff memos. Six indemnity agreements were prepared; 2 were approved and processed, and 2 Releases of Interest were prepared. Two child support garnishments were processed. Three probate declarations were reviewed and approved. Three death benefits were reviewed and processed. Three overpayments were reviewed. I handle community property and benefits issues, with the assistance of Sally Nadeau, our senior legal assistant.

#### **VI. 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 6-8, and will be here again March 21-23, to work on the operational compliance of the TDL and VCP. Ice Miller and SDCERS staff established a work plan for the first half of 2006. This is a significant project requiring the participation of all divisions of SDCERS Staff.

RSP:dmc