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

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DATE: April 11, 2006

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

FROM: Roxanne Story Parks, Interim General Counsel

SUBJECT: April Legal Services Division Report

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. Judge Joseph has recommended that the Board deny the application on the grounds Ms. Bergan did not prove that she is permanently unable to work as a Harbor Police Officer. Once the objection process is completed it will appear on the Disability Retirement Committee's agenda.

Max Camberos: Closing arguments were filed April 7. Judge Stephen Hjelt's (OAH) decision is pending.

Sam Campbell: Mr. Campbell's application was heard February 7 by the Honorable Robert O'Neill (Ret.) Judge O'Neill's decision is pending.

John Garcia: Mr. Garcia's application was heard by Judge Stephen Cole (OAH) on March 28. Debra Odom-Kuttnauer represented the Board. A decision is pending.

Heleodoro Lopez: Judge Alan Alvord (OAH) has recommended that the Board approve Mr. Lopez' application. Based on an error of law, the Board will file an objection. The matter will be presented to the Disability Retirement committee once the objection process is completed.

Fernando Mercado: Judge James Ahler (OAH) has recommended that the Board deny Mr. Mercado's application. Once the objection process is completed, the final recommendation will appear on the Disability Retirement Committee's agenda.

Louis Rodriguez: Judge Greer Knopf (OAH) has recommended that the Board deny Mr. Rodriguez' application. Once the objection process is completed the matter will appear on the Disability Retirement Committee's agenda.

Bridgett Tubbs: Ms. Tubbs application was heard April 3 by Judge Stephen Adler (OAH). Debra Odom-Kuttnauer represented the Board. A decision is pending.

The following hearings have been calendared: Donovan Knapp, April 6 (OAH: continued); Philip Thren, April 10, (OAH: continued); Emilio Romero, April 17, (OAH); Windy Jones, May 4 (JAMS: continued); Alfonso Dobynes, May 22, (Judge Geary Cortes); Alan Fragoso, June 6 (OAH); and Theresa Rice, June 13, (OAH).

The following pre-hearings have been calendared: Harvey Kitchel (May 2); Harold Cox (June 7) and Michael Williams (June 19).

The following matters have completed the pre-hearing process, but have not been calendared for hearing: Debra Mattie, Robert Neal, Constantino Delimitros, 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, Felix Zavala and Timothy Barkett.

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 Alcala v. San Diego City Employees' Retirement System Board of Retirement, San Diego Superior Court Case number GIC847606. The hearing on the Writ took place on March 24, 2006. Judge Yuri Hofman denied Mr. Alcala's writ, thus sustaining the Board's decision to deny his application. Matt Davis, Esq. represented Mr. Alcala. Sheila Jacobs represented 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' filed its Answer March 24. The matter has been assigned to Judge Yuri Hofman. No briefing schedule has been set. 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. A second-amended Complaint was filed in March 2006. Discovery is continuing. The New York City office of Berstein, Litowitz, Berger and Grossman is representing SDCERS.

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. 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. A demurrer and motion to strike the complaint were heard on March 23, 2006. The Court granted Ms. Chapin's demurrer. She is now dismissed from the action. The Court overruled Mr. Grissom's demurrer. He remains in the action.

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

A Fourth Amended Cross-Complaint was filed and served on SDCERS on February 15, 2006. Mr. Grissom and Ms. Chapin, both previously named in the City Attorney's cross-complaint, have been dismissed from that action. SCMV answered the Fourth Amended Cross-Complaint and also joined in the applicable parts of Mr. Torres' demurrer and motion to strike. The hearing on the demurrer and motion to strike is set for April 14, 2006 at 9:00 a.m. SCMV also filed a compulsory cross-complaint to the City's cross-complaint. The SDCERS' cross-complaint seeks recovery of the all monies owed by the City to SDCERS but not paid because of Manager's Proposal I and II.

The hearing on the Motion for Summary Adjudication filed by SCMV was held on February 15, 2006. The Court's final ruling was issued on March 6, 2006. Judge Barton granted 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 City Attorney has filed a motion requesting the Court to reconsider granting SDCERS' motion. The hearing on the City Attorney's motion is set for April 28, 2006 at 9 a.m. In addition, on April 3, 2006, the City filed a Petition for Writ of Mandate seeking to set aside Judge Barton's ruling.

The City also has filed a Motion for Summary Judgment on its cross-complaint, the SDCERS complaint in case no. GIC851286 and the various unions' complaints in intervention. The hearing on that motion is set for June 23, 2006 at 9:00 a.m.

<u>SDCERS v. City of San Diego</u>, 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. This case has been consolidated with case no. GIC841845 (legal counsel) before Judge Jeffrey Barton. On February 15, 2006, the Court denied the City's Motion to Strike the Complaints in Intervention. Discovery has begun in full earnest. The depositions of Doug McCalla, Robin Oleskow and Dawne Clark have been taken by the

City Attorney and he has noticed several other depositions, including Scott Peters, Toni Atkins and Jim Maddaffer.

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 City and Mr. Aguirre have appealed certain portions of the Court's ruling on the Motions to Dismiss. The parties expect the Ninth Circuit Court of Appeal to take the matter up in the summer. The District Court did not otherwise stay the proceedings pending the appeal.

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. Depositions are expected to commence in April or May.

SDCERS v. City of San Diego, San Diego Superior Court case no. GIC861125, On January 20, 2006, the Board voted to file an action for subrogation seeking the recovery of monies paid by SDCERS for attorneys fees incurred in the *Gleason* litigation and the various City investigations on behalf of various former board members. The complaint

was filed on February 9, 2006. The case has been assigned to Judge Linda Quinn. Seltzer Caplan McMahon Vitek is representing SDCERS.

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 plain as required by the City Charter and SDMC § 24.0801. The case is assigned to Judge Richard Strauss.

The City of San Diego v. Loraine Chapin, San Diego Superior Court case number GIC863096. The City Attorney in the name of the City filed a complaint on March 21, 2006 against Ms. Chapin alleging violation of Government Code section 1090. The City alleges that Ms. Chapin as a City Attorney had a conflict of interest when she opined on whether SDCERS was entitled to legal counsel independent from the City Attorney's office. The case has been assigned to Judge Linda Quinn.

Upcoming Hearing Dates

SDCERS v. City of San Diego (Legality of benefits) **consolidated with** SDCERS v. City & City Attorney (Attorney for SDCERS)	4/14/06	• Hearing on Demurrer / Motion to Strike
	4/28/06	• Hearing on City's Motion for Reconsideration
	6/16/06	• First Expert Exchange
	6/23/06	• City's Motion for Summary Judgment
	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

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

In order to simplify the ordinance process, I prepared a combined ordinance to amend the Plan to comply with: (1) Federal Tax Law, (2) California law regarding Domestic Partners, and (3) the Gleason Settlement Agreement. On April 5, 2006, I forwarded the proposed Ordinance to Council President Scott Peters with a request that he docket it for action.

IV. PUBLIC RECORDS REQUESTS

The Legal Services Division this past month received twelve California Public Records Act requests. We have responded to twelve requests, producing pages of documents and copies onto compact discs. These requests have covered such subjects as formulas and calculations of benefits; transcript of disability committee meeting; comprehensive annual financial report for fiscal year ending June 30, 2001 and the annual reports summary for fiscal years 2001, 2002 and 2003; estimated monthly retirement allowances; adjudicator's proposed decision; tax determination letter and the voluntary corrections program filed by SDCERS to IRS; documents relating to decision on March 17, 2006, indemnifying Grissom and Chapin and pension calculations for former elected officials. Merlita Hilario, our legal assistant, and I handle public records requests.

V. COMMUNITY PROPERTY AND BENEFITS

In March, staff handled 62 telephone calls, met with 14 members and citizens, and had 19 conferences with staff. Twenty-seven domestic relations orders, final judgments and marital settlement agreements were reviewed and acted upon. Two responses to joinders were filed with the court. Twenty member files were reviewed for legal issues. Fifty letters and e-mails to members, staff, outside counsel, and others were prepared, along with 6 community property packages, and 20 staff memos. Two family law subpoenas were received and 1 document production was completed. Thirteen indemnity agreements were prepared; 4 were approved and processed. Two Releases of Interest were prepared; 4 were approved and processed. One overpayment was reviewed. Sally Nadeau, our senior legal assistant, handles community property and benefits issues, under my supervision.

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 again March 21-23, to work on the operational compliance of the TDL and VCP. Ice Miller will be providing a comprehensive status report at the April Board meeting. This is a significant project requiring the participation of all divisions of SDCERS Staff.

RSP:dmc:mrh