

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

**FILE:** W:\ATTY\BOARD\LSDReports\2006\May.doc  
**DATE:** May 9, 2006  
**TO:** The Board of Administration, via David Wescoe, Retirement Administrator  
**FROM:** Roxanne Story Parks, Interim General Counsel  
**SUBJECT:** May 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. 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. Her objection to the recommended decision was overruled. The matter will be presented to the Disability Retirement Committee in June 2006.

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

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

Heleodoro Lopez: Judge Alan Alvord (OAH) has recommended that the Board approve Mr. Lopez's application. Based on an error of law, the Board filed an objection to the recommended decision. Mr. Lopez's responded to that objection. Judge Alvord's final recommendation is pending.

Louis Rodriguez: Judge Greer Knopf (OAH) has recommended that the Board deny Mr. Rodriguez's application. Mr. Rodriguez filed an objection to which the Board responded. Judge Knopf's final recommendation is pending.

Phillip Thren: Mr. Thren failed to appear for hearing before the OAH on April 10. At the request of the judge, Ms. Debra Odom-Kuttner (on behalf of the Board) presented its evidence. Mr. Thren was provided notice of the proceedings and time to respond. He

did not respond. The recommendation is to deny the application. The matter will appear on the Disability Committees' June 2006 agenda.

Alphonso Dobynes: Despite many requests by the Board to schedule the matter for hearing, Mr. Dobyne declined. In early 2006, with written notice to Mr. Dobyne, the Board set the matter for hearing before the Honorable Judge Geary Cortes. The Board requested Mr. Dobyne to seek a continuance, if needed, from Judge Cortes. In addition, based upon strong evidence supporting denial of the application and to avoid further expense to the Board, the Board requested that Mr. Dobyne withdraw his application. In April 2006, Mr. Dobyne, who is currently employed by the City of Escondido, agreed to withdraw his application. The file has been closed.

Emilio Romero: Mr. Romero's application was heard April 17 by the Office of Administrative Hearings (OAH). Debra Odom-Kuttner represented the Board. A decision is pending.

The following hearings have been calendared: Donovan Knapp, April 6 (OAH: continued); Emilio Romero, April 17, (OAH); Windy Jones, May 4 (JAMS: continued); (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) Linda LaChusa (June 20); and Scott Naliboff (June 27).

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: Brad Ruff, Felix Zavala and Timothy Barkett.

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

## **II. LITIGATION**

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

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](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. 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. The Court granted Mr. Torres' demurrer and motion to strike, but granted the City Attorney leave to amend. The Court denied SDCERS' joinder stating it was untimely. On May 3, 2006, the City Attorney filed a Fifth Amended Cross-complaint which superseded the Fourth Amended Cross-complaint. Responses are due on or before June 5, 2006.

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 City filed an answer to SDCERS' compulsory cross-complaint on April 25, 2006.

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 was held on April 28, 2006 at 9 a.m. and the Court took the matter under submission. On May 3, 2006, the Court entered his filing ruling denying the City Attorney's motion for reconsideration. The Petition for Writ of Mandate filed on April 3, 2006 by the City Attorney seeking to set aside Judge Barton's ruling is still pending.

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.

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. 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.

Various motions are pending regarding the various deposition subpoenas issued by the City Attorney's Office, as well as the issue regarding Mr. Aguirre's authority to bring the Fourth Amended and now the Fifth Amended Cross-Complaint regarding the legality of benefits without the City Council's approval.

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.

On April 17, 2006, SDCERS filed its Answer to the POA's Third Amended Complaint. Mr. Aguirre, the City Council and the individual City Council Members and Employees appealed the portions of the District Court's denial of their respective Motions to Dismiss with respect to the Qualified Immunity Doctrine. That matter is now pending before the 9<sup>th</sup> Circuit Court of Appeals. The District Court did not stay the proceedings upon notice of the appeals.

Additionally, Mr. Aguirre, the City Council and the City Council Members and Employees filed another round of Motions to Dismiss and/or Strike portions of the Third Amended Complaint, along with Requests to Stay the District Court proceedings pending the outcome of the appeals. SDCERS joined in the requests for a stay. The POA has opposed those motions. The Court will hear those motions on May 15, 2006.

Most recently, the POA's attorneys have indicated their intention to commence depositions. It is anticipated that they will take approximately 32 depositions in or around the middle to later part of June 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.

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. On May 3, 2006, the City filed a demurrer to SDCERS' complaint. The hearing on the demurrer is set for June 23, 2006.

Newsome v. San Diego City Employees' Retirement System, San Diego Superior Court case no. GIC856841. On November 14, 2005, William Newsome, a former employee of the City of San Diego, filed a complaint against SDCERS and the City of San Diego for Breach of Fiduciary Duty, Aiding and Abetting and Conspiracy. The case originally was assigned to Judge Patricia Cowett. Mr. Newsome filed a peremptory challenge and the case was reassigned to Judge William Nevitt. Seltzer Caplan McMahon Vitek is representing SDCERS. On January 25, 2006, SDCERS filed an answer to the complaint and filed a cross-complaint against the City of San Diego for declaratory relief. Discovery is ongoing.

City of San Diego v. San Diego City Employees' Retirement System, San Diego Superior Court case no. GIC865543. On May 5, 2006, the City Attorney, in the name of the City of San Diego, filed a new complaint against SDCERS seeking a administrative mandate for an immediate stay of SDCERS administrative decisions and declaratory relief. The complaint alleges the SDCERS' Board improperly approved payment of criminal defense costs for Mr. Grissom, the former SDCERS' administrator, and Ms. Chapin, the former SDCERS' general counsel. The case has been assigned to Judge Charles Hayes. Seltzer Caplan McMahon Vitek is representing SDCERS. A response to the complaint is due on June 7, 2006.

### **Court of Appeal**

As stated above, on April 3, 2006, the City Attorney filed a Petition for Writ of Mandate with the Fourth District Court of Appeal regarding Judge Barton's ruling on SDCERS' Motion for Summary Adjudication. The Appellate Court has not yet granted or denied the Petition.

### **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.

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) <b>consolidated with</b> SDCERS v. City & City Attorney (Attorney for SDCERS)	6/1/06	<ul style="list-style-type: none"> <li>Hearing on City's Motion to Compel Deposition of Ann Smith</li> </ul>
	6/14/06	<ul style="list-style-type: none"> <li>Hearing on Demurrer / MTS Fifth Amended Cross-complaint</li> </ul>
	6/16/06	<ul style="list-style-type: none"> <li>First Expert Exchange</li> </ul>
	6/23/06	<ul style="list-style-type: none"> <li>City's Motion for Summary Judgment</li> </ul>
	6/30/06	<ul style="list-style-type: none"> <li>City's Motion to Consolidate (Newsome and McGuigan)</li> </ul>
	7/7/06	<ul style="list-style-type: none"> <li>Second Expert Exchange</li> </ul>
	7/13/06	<ul style="list-style-type: none"> <li>Hearing on Motion to Quash various Legislators' deposition subpoenas</li> </ul>
	9/6/06	<ul style="list-style-type: none"> <li>Discovery Cut-off</li> </ul>
	9/22/06	<ul style="list-style-type: none"> <li>Trial Readiness Conference</li> </ul>
	10/6/06	<ul style="list-style-type: none"> <li>Trial</li> </ul>
SDPOA v. Aguirre, et al. (Declaratory & Injunctive Relief)	5/15/06	<ul style="list-style-type: none"> <li>Hearing on Motions to Dismiss and Motions to Stay</li> </ul>
	11/13/06	<ul style="list-style-type: none"> <li>Pretrial Conference</li> </ul>
	11/14/06	<ul style="list-style-type: none"> <li>Hearing on any Motions in Limine</li> </ul>
Newsome v. SDCERS et al.	5/17/06	<ul style="list-style-type: none"> <li>Case Management Conference</li> </ul>
	6/9/06	<ul style="list-style-type: none"> <li>Hearing on Newsome's Motion to Compel City responses</li> </ul>

### **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**

For the month of April, Legal Services Division received and responded to five California Public Records Act requests. These requests have sought information concerning: requests to rescind Purchase of Service Credit received by SDCERS from any participant since December 2004; recalculation of purchase of service credit; January 30, 2006 Board meeting regarding indemnification of Grissom and Chapin; February 15, 2006 Navigant Committee report; Board Resolutions; Legal Billing Guidelines; Adjudicators reports and recommendations related to any application for industrial disability retirement for the past 12 months; and a transcript of the disability committee meeting of April 7, 2006. Merlita Hilario, our legal assistant, assists with public records requests.

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

In April, staff handled 57 telephone calls, met with 9 members and beneficiaries, and had 22 conferences with staff. Eighteen domestic relations orders, final judgments and marital settlement agreements were reviewed and acted upon. Five responses to joinders were filed with the court. Forty-one member files were reviewed for community property legal issues. Sixty-two beneficiary designations were reviewed for community property issues. Thirty-one letters and e-mails to members, staff, outside counsel, and others were prepared, along with 3 community property packages, and 21 staff memos. Eighteen community property inquiry letters were sent to members. Two family law

subpoenas were received and 3 document productions were processed. Five Releases of interest and indemnity agreements were prepared. Two child support garnishments were processed. Five powers of attorney were reviewed and approved. Two overpayments were processed. Sally Nadeau, our senior legal assistant, assists with community property and benefits issues.

#### **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. Ice Miller will be providing a comprehensive status report at the June Board meeting. This is a significant project requiring the participation of all divisions of SDCERS Staff.

RSP:dmc