

SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM
M E M O R A N D U M
LEGAL SERVICES DIVISION

DATE: July 7, 2006
TO: The Board of Administration
FROM: Roxanne Story Parks, Interim General Counsel
SUBJECT: July Legal Services Report

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

Max Camberos: Judge Stephen Hjelt's (OAH) decision is pending.

John Garcia: The hearing was completed in May. Judge Donald Cole (OAH) has recommended approval of the application. Mr. Garcia was represented by L. Forrest Price, Esq. SDCERS was represented by contract counsel Debra Odom-Kuttner. The matter will be presented to the Disability Retirement Committee in August 2006.

Windy Jones: Judge Kevin Midlam (Ret.) (JAMS) heard Ms. Jones' application on June 1, 2006. Ms. Jones was represented by David Dugan, Esq. SDCERS was represented by contract counsel, Debra Odom-Kuttner. Judge Midlam's recommendation is pending.

Heleodoro Lopez: Judge Alan Alvord (OAH) has recommended that the Board approve Mr. Lopez's application. Mr. Lopez was represented by Scott O'Mara, Esq. 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 was represented by Scott O'Mara, Esq. Mr. Rodriguez filed an objection to which the Board responded. Judge Knopf's overruled the objection and has sustained her recommendation. Applicant's counsel requested a 60-day continuance. The matter will be presented to the Disability Retirement Committee in September 2006.

Emilio Romero: Mr. Romero's application was heard by Judge Gary Brozio (OAH) on April 17, 2006. Mr. Romero was represented by Scott O'Mara, Esq. Debra Odom-Kuttner represented the Board. Judge Brozio has recommended approval of the

application. The matter will be presented to the Disability Retirement Committee in August 2006.

Theresa Rice: Judge Gary Brozio (OAH) heard Ms. Rice's application on June 13, 2006. Ms. Rice represented herself. SDCERS was represented by Sheila M. Jacobs. Judge Brozio has recommended that the Board deny Ms. Rice's application. The matter will be presented to the Disability Retirement Committee in August 2006.

Carlos Guzman: Judge James Ahler (OAH) heard Mr. Guzman's application on June 28, 2006. Mr. Guzman was represented by Alan Hahn, Esq. SDCERS was represented by contract counsel, Debra Odom-Kuttnauer. Judge Ahler's recommendation is pending.

The following hearings have been calendared: Harold Cox, August 22 (JAMS); Donovan Knapp, September 7 (JAMS); Alan Fragoso, September 12 (OAH); Constantino Delimitros, October 5, 2006; and Francisco Torres, October 26, 2006 (JAMS).

The following pre-hearing has been calendared: Scott Naliboff, July 26, 2006.

The following matters have completed the pre-hearing process, but have not been calendared for hearing: Harvey Kitchel, Debra Mattie, Robert Neal, Raul Padilla, Michael Wahl and Linda LaChusa.

The following applicants have been referred for hearing, but no dates have been set: Michael Williams, Brad Ruff, Felix Zavala, Timothy Barkett, Fred Dean and Peter Hepburn.

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. SCMV no longer represents Mr. Grissom and Ms. Chapin. They each have their own counsel.

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. Both SCMV and the City filed demurrers. On August 23, 2005, Judge Barton granted SDCERS' Demurrer and denied the City's demurrer holding SDCERS is an independent entity entitled to sue and be sued. 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. On June 2, 2006, SCMV filed a demurrer and motion to dismiss as to the Fifth Amended Cross-complaint. Mr. Torres and the other cross-defendants also filed a demurrer and motion to strike. The hearing on those motions was on June 23, 2006, with oral argument occurring on June 26, 2006. The City voluntarily dismissed the individual cross-defendants from the Fifth Amended Cross-complaint. Accordingly, their motions were taken off calendar. The Court denied SDCERS' Motion to Dismiss and took the demurrer under submission. Although SDCERS had filed two discovery motions that were scheduled for hearing on June 23, 2006, those motions were taken off calendar after an informal resolution was reached.

The City also had filed a Motion for Summary Judgment on its Fourth Amended Cross-complaint, the SDCERS complaint in case No. GIC851286 and the various unions' complaints in intervention. The hearing on that motion was set for June 23, 2006 at 9:00 a.m. with oral argument set for June 26, 2006. The Court took the matter under submission and has not yet issued a ruling.

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 was denied.

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.

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 over 22 other depositions of various persons. Motions are pending regarding the some of the various deposition subpoenas issued by the City Attorney's Office.

SCMV is filing a Motion for Summary Judgment on the complaint on Friday, July 7, 2006. The hearing on SDCERS' Motion is set for September 22, 2006 at 9:00 a.m. before Judge Barton.

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, former Retirement Administrator Larry Grissom, past and present members of the City Council, certain former SDCERS Board Members, the former City Auditor and the past and present City Manager. This case appears to be primarily based upon what the POA alleges have been unfair labor negotiation tactics by the city (e.g., docking police DROP participants 3.2% to match the decrease in the City "pick up" of employee contributions by active employees). In addition, however, it asserts claims related to MP1, MP11 and health care benefits. By Stipulation, Mr. Grissom has been dismissed from this action.

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 9th 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 denied the City of San Diego's Motion to Dismiss the Third Amended Complaint. The City unsuccessfully sought a stay of the action.

In the meantime, the POA has indicated its intent to take the depositions of 32 individuals, including 4 current SDCERS employees. Those depositions are expected to take place in mid-July; however, as stated below, all dates and deadlines have been extended, at the POA's request.

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. Significantly, any claim for money damages on behalf of POA members has been eliminated, leaving only a theoretical monetary claim by the POA itself, and a claim for declaratory relief. SCMV will continue to discuss with POA's attorneys the issue of dismissing SDCERS completely.

In November of 2005, the court issued a scheduling order containing various dates and deadlines, including a discovery cutoff of September 8, 2006 and a trial date of November 14, 2006. On June 29, 2006, the POA persuaded the Court to extend all dates – ostensibly due to the POA's inability to search and read electronic data produced to it by the City. An order will soon be issued extending all dates well into 2007.

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 was set for June 23, 2006 at 1:30 p.m. The Court in its tentative ruling overruled the City's demurrer and ordered the City to answer within 10 days of notice of ruling. The City submitted on the tentative ruling, which became the Court's final ruling. The City's answer is due on July 8, 2006. A case management conference is scheduled for July 7, 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. Although, discovery was ongoing, the case was stayed pending the results of the City's motion to consolidate/coordinate this case with the other SDCERS' cases in front of Judge Barton. The City's motion to consolidate/coordinate was taken off calendar and the parties stipulated to a stay of the case for 90 days or until sometime after October 1, 2006.

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. On June 5, 2006, SDCERS filed a demurrer as to all causes of action in the complaint, and a motion to strike the complaint in its entirety, or in the alternative to strike several allegations therein. The hearing on the demurrer is scheduled for August 4, 2006 at 2:00 p.m.

Court of Appeal

The Court of Appeal declined to hear the City Attorney's Petition for Writ of Mandate filed in matter GIC 841845.

Alcala v. SDCERS, San Diego Court of Appeal Case No. D048569: After the Board adopted an adjudicator recommendation to deny Mr. Alcala's application for industrial disability retirement, Mr. Alcala filed a Petition for Writ of Mandate in the Superior Court. The court denied the Petition, thus sustaining the Board's decision. Mr. Alcala has now filed a Notice of Appeal in the Appellate Court. Briefs have not yet been filed.

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 six former SDCERS Board Members 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. On May 26, 2006, a hearing on McGuigan's motion to compel was heard. Judge Strauss ordered the City to provide responses to Mr. McGuigan's

requests for admissions and sanctioned the City over \$20,000 for failing to comply with the Court's orders regarding discovery.

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)	06/16/06	First Expert Exchange
	06/23/06	Hearing on Demurrer / Motion to Dismiss Fifth Amended Cross-complaint City's Motion for Summary Judgment\ SDCERS Discovery Motions Torres et al. Demurrer / Motion to Strike
	06/30/06	City's Motion to Consolidate (Newsome and McGuigan)
	07/07/06	Second Expert Exchange
	07/13/06	Hearing on Motion to Quash various Legislators' deposition subpoenas
	09/06/06	Discovery Cut-off
	09/22/06	Trial Readiness Conference, Hearing on SDCERS' and Intervenor's Motions for Summary Judgment
	10/06/06	Trial
SDPOA v. Aguirre, et al. (Declaratory & Injunctive Relief)	11/13/06	Pretrial Conference
	11/14/06	Hearing on any Motions in Limine
Newsome v. SDCERS et al.	07/28/06	Hearing on Newsome's Motion to Compel City responses
	07/21/06	Case Management Conference

SDCERS v. City of San Diego (Indemnity)	06/23/06	Hearing on City 's Demurrer
City of San Diego v. SDCERS (Writ of Mandate / Defense of Grissom and Chapin)	08/04/06	Hearing on SDCERS' Demurrer

III. SAN DIEGO MUNICIPAL CODE AMENDMENTS

On April 5, 2006, I forwarded to Council President Scott Peters and Mayor Jerry Sanders a proposed ordinance to amend the SDCERS plan to comply with: (1) Federal Tax Law, (2) California law regarding Domestic Partners, and (3) the Gleason Settlement Agreement. We have been informed by the City Clerk's office that this ordinance will be introduced at Council on July 17.

IV. PUBLIC RECORDS REQUESTS

For the month of June, the Legal Services Division received and responded to 7 California Public Records Act requests. These requests have included requests for: documents pertaining to last known addresses, phone numbers and retirement/termination dates of former City employees; calculations, benefits and options selections; minutes of Board meetings for June 11, 1996, June 21, 1996, July 11, 2002 and November 15, 2002; employment agreement between SDCERS and its Retirement Administrator in 2004 and 2005, performance plan and fringe benefits; Annual Actuarial Valuation Reports (June 30, 1991 – June 30 2004); Experience Investigation Reports (July 1, 1990 – June 30, 2004); Actuarial Audits (Milliman June 10, 1999 and Mercer May 11, 2004); Callan Asset Allocation and Liability Study (October 1991, June 1994, August 1994, July 1997, June 2002 and August 2002); Navigant Report and audiotape of June 2, 2006 Disability Committee meeting. Sheila is handling these public records requests with the assistance of Merlita Hilario, our legal assistant.

V. COMMUNITY PROPERTY AND BENEFITS

In June, staff handled 61 phone calls, met with 5 members about community property issues, and had 17 conferences with staff. Staff reviewed and acted upon 41 domestic relations orders, final judgments and marital settlement agreements. Also, 22 retiring member files were checked for outstanding legal issues. Sixty-two letters, formal memos, and e-mails were sent to members, staff, outside counsel, and others. Eight

community property introduction packages were mailed out, along with 9 community property inquiry letters. Fifty-three beneficiary designation changes were reviewed for community property issues. Staff researched 13 court files and 6 public records. 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. We are nearing the end of our VCP filings, and have scheduled a meeting with the IRS in Washington, D.C. on August 10 to discuss the status of our applications.

VII. DISABILITY

In February 2006, the Board authorized staff to obtain affidavits from all non-service age eligible disability retirement recipients pursuant to SDMC section 24.0509. There are currently 294 non-service age eligible disability retirement recipients.

In addition, the Board authorized staff to medically re-examine 11 current disability retirement recipients pursuant to SDMC section 24.0510. The initial 11 re-examination cases were selected based upon specific information or concerns about those cases. A second group of cases for re-examination will be identified based upon the affidavits or upon other credible information received regarding a particular case.

Re-Examination Project: On or about April 14, 2006, the first group of re-examinees was sent notice of the re-examination project. Re-examinations have been scheduled in 10 of the 11 cases. It is anticipated the first medical reports and staff recommendations based on those reports will be presented to the committee in or about fall 2006.

The Board's February announcement regarding re-examinations resulted in SDCERS' receiving several credible "tips" regarding potentially invalid disability retirement claims. Staff anticipates requesting additional re-examinations as those tips are received and confirmed through SDCERS' investigation process.

Affidavit Project: On or about May 10, 2006, all non-service-age eligible disability retirement recipients were sent a notice regarding the affidavit project. In anticipation of their medical re-examinations, the 11 re-exam candidates were sent affidavits on May 11. 2 of the 11 have not returned the affidavit, and have been sent a second notice. The second group of affidavits were mailed June 1; with subsequent monthly mailings based on the recipient's birth date to follow.

Staff has created a tracking system to monitor the affidavit project. The tracking system allows staff to calendar response dates; retain notes regarding telephone calls; identify cases currently under investigation and track mailings related to the affidavit project. In the unanticipated event that a recipient or recipients refuse to submit a timely or complete affidavit, staff will present the Board's alternatives and make appropriate recommendations.

RSP/SMJ/mrh

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