

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

DATE: September 12, 2006
TO: The Board of Administration
FROM: Roxanne Story Parks, Interim General Counsel
SUBJECT: September 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.

Harold Cox: Judge Raymond Zvetina (Ret.) (JAMS) heard Mr. Cox's application on August 22, 2006. Mr. Cox represented himself. SDCERS was represented by Associate Counsel Sheila M. Jacobs. Judge Zvetina's decision is pending.

Windy Jones: Judge Kevin Midlam (Ret.) (JAMS) has recommended that Ms. Jones application be denied. She did not file an objection to the recommended decision. The matter will be presented to the Disability Retirement Committee in October 2006.

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.

The following hearings have been calendared: Donovan Knapp, September 7 (JAMS); Alan Fragoso, September 12 (OAH), continued due to illness of the applicant; Constantino Delimitros, October 5, 2006 (JAMS); Francisco Torres, October 26, 2006 (JAMS); Linda LaChusa October 31, 2006 (JAMS); Michael Wahl, December 7, 2006 (OAH); and Robert Neal, December 11, 2006 (OAH);.

The following matters have completed the pre-hearing process, but have not been calendared for hearing: Norma Diaz, Harvey Kitchel, Debra Mattie, Scott Naliboff, and Raul Padilla.

The following applicants have been referred for hearing, but no dates have been set: Brad Ruff, Felix Zavala and Peter Hepburn.

The following applications were withdrawn by the applicant prior to hearing: Alfonso Dobyne, James Clem, Timothy Barkett, Fred Dean, Joe Rainbolt and Michael Williams.

II. LITIGATION

Superior Court - Disability Cases

Mark George v. San Diego City Employees' Retirement System Board of Retirement, San Diego Superior Court Case No. 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. An O.S.C. hearing has been set for September 29 at 8:30 a.m. 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 Bernstein, Litowitz, Berger and Grossman is representing SDCERS.

SDCERS v. City of San Diego & City Attorney, Michael Aguirre, San Diego Superior Court Case No. 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. The case is assigned to Judge Jeffrey Barton. Seltzer Caplan McMahon & Vitek ("SCMV") represents SDCERS.

The City Attorney has filed a cross-complaint on behalf of the City seeking declaratory relief. After various challenges, the cross-complaint is now in its sixth version. SDCERS has filed an answer to the Fifth Amended Cross-Complaint.

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 was granted on March 6, 2006. 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. The City filed a Motion for Summary Judgment on its Fourth Amended Cross-complaint (notwithstanding it had been superseded by the Fifth Amended Cross-complaint), the SDCERS complaint in case No. GIC851286, and the various unions' complaints in intervention. The Court denied the City's Motion for Summary Judgment. The City has filed a Petition for Writ of Mandate with the Fourth District Court of Appeal. The Court of Appeal requested letter briefs from all real parties in interest; however, they have not stated whether they would hear the writ.

SCMV also filed a compulsory cross-complaint to the City's cross-complaint. 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 answered SDCERS' compulsory cross-complaint on April 25, 2006.

Trial is set to commence on October 6, 2006.

SDCERS v. City of San Diego, San Diego Superior Court Case No. 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 paying contested retirement benefits to its members. The lawsuit was filed on July 26, 2005, and has since been consolidated with Case No. GIC841845 before Judge Jeffrey Barton.

SCMV filed a Motion for Summary Judgment on the GIC851286 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 No. 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. After various pleading challenges, 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 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.

The Court and the parties 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. Trial has now been rescheduled for April 3, 2007.

Aaron, et al. v. Aguirre, et al., Case No. '06CV1451. On July 18, 2006, the attorneys for the POA filed a class action lawsuit on behalf of the members of the POA in the Southern District of California naming SDCERS. The case was assigned to the Honorable James Miller, but it probably will be transferred to Judge Huff's court as a related matter. The lawsuit is essentially identical in substance to the POA's representative action, though some of the allegations have been reworded, and other allegations have been added in an attempt to satisfy the class action pleading requirements. The primary difference between the class action and the representative action is that class members are permitted to seek their individual alleged damages from defendants, which is an amount that far exceeds what the POA could seek as a representative body. SCMV is representing SDCERS.

The class representatives filed a motion to certify the class on August 25, 2006. That motion is set for hearing on September 22, 2006. Two motions for Summary Judgment filed by the POA have been calendared for mid-October. The first motion requests an adjudication of the issue of whether the benefits granted to POA members should be deemed vested property interest. The second motion seeks an accounting from SDCERS of all economic activity going back to 1996. SCMV plans to oppose the second motion.

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.

Discovery is ongoing. Upon request, the Court has moved the trial date from January 5, 2007 to February 9, 2007.

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 is assigned 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 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 City filed its Opposition papers on July 25, 2006, and SDCERS replied on July 28, 2006. Prior to the hearing on the demurrer, the City voluntarily dismissed the action without prejudice.

Court of Appeal

On July 31, 2006, the City Attorney filed a Petition for Writ of Mandate in Case No. GIC 841845 regarding Judge Barton's denial of the City's Motion for Summary Judgment on the legality of the benefits granted in 1996 and 2002. The Court of Appeal has not indicated whether it will hear the City Attorney's Petition; however it requested and received letter briefs on the issue from the parties.

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 filed his Notice of Appeal in the Appellate Court. Alcala's opening brief is due in mid-September.

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.

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. On August 2, Judge Roger Kravel issued a tentative ruling upholding Judge Link's decision.

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. Although a tentative settlement was purportedly reached in this case, it has not been finalized.

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. Although a formal settlement has not been approved, this case has tentatively been settled with the City paying a portion of Ms. Chapin's legal fees and the action being dismissed.

Upcoming Hearing Dates

SDCERS v. City of San Diego (Legality of benefits) consolidated with SDCERS v. City & City Attorney (Attorney for SDCERS)	9/15/06	Court ordered status conference
	09/22/06	Hearing on SDCERS' and Intervenors' Motions for Summary Judgment
	09/28/06	Hearing on Peters' Motion to Disqualify (D-69 1:30 PM)
	09/29/06	Trial Readiness Conference (D-69 11AM)
	10/06/06	Trial (D-69 8:45 AM)
SDPOA v. Aguirre, et al. (Declaratory & Injunctive Relief)	03/26/07	Pretrial Conference (10:30 AM Dept. 13); and Hearing on motions in limine
	04/02/07	Trial Status Conference (10:30 AM Dept. 13)
	04/03/07	Trial (9 AM, Dept. 13)
Newsome v. SDCERS et al.	10/13/06	Hearing on Conger's discover motion and SDCERS' Motion to Compel
	10/25/06	Case Management Conference
SDCERS v. City of San Diego (Indemnity)	01/12/07	Trial Readiness Conference (D-74 11 AM)
	02/09/07	Trial (D-74 9 AM)

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. On August 23, David Wescoe and I met with representatives from the Mayor's office, the City Attorney's Office, SDCERS Tax Counsel (Ice Miller), and Tax Counsel retained by the City Attorney.

IV. PUBLIC RECORDS REQUESTS

In August, the Legal Services Division received 8 and responded to 7 California Public Records Act requests. In all cases, non-public, private and/or confidential member information was withheld or redacted to the extent allowed by California law. The requested records include: a request for public records evidencing any bonuses, incentive-based salary increases, salary supplements for purchase of service credits or reimbursements for purchase of service credits or Board approved compensation packages awarded to former Administrator, Larry Grissom, between 1987 and 2005; several requests for SDCERS' VCP tax filing; a request for former City Attorney Casey Gwinn's pension allowance and years of service credit; a request for documents evidencing former City Councilman Ron Roberts' retirement allowance, as well as a request for information regarding pension reciprocity laws; and a request for documents detailing the pensions being paid to Mayor Jerry Sanders (none currently) and former City official Ernie Anderson.

V. COMMUNITY PROPERTY AND BENEFITS

August was an extremely busy month for the Legal Division. The community property/benefits legal assistant handled 98 phone calls, met with 8 members about community property issues, and had 35 conferences with internal staff. Legal reviewed 47 member files, and acted upon 12 domestic relations orders, final judgments and marital settlement agreements. Three responses to joinders were filed with the court. Three community property introduction packages were mailed out, along with 11 community property inquiry letters. In addition, 11 retiring member files were checked for outstanding legal issues. Ninety-six letters, formal memos, and e-mails were sent to members, staff, outside counsel, and others. Three Indemnity Agreements and Releases were prepared. Three probate declarations were prepared. One repayment of an overpayment was completed. One child support "stop garnishment" was reviewed and stopped. Forty-five beneficiary designation changes were reviewed for community property issues. Staff researched 2 court files and 3 public records. Sally Nadeau, our senior legal assistant, assists with community property and benefits issues.

RSP/SMJ/mrh