

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

DATE: January 5, 2007
TO: The Board of Administration
FROM: Christopher W. Waddell, General Counsel
SUBJECT: January Legal Services Report

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

Adjudicator Hearings:

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

Constantino Delimitros: Judge Raymond Zvetina (Ret.) (JAMS) heard part of Mr. Delimitros case on October 5. The final hearing date is currently being calendared. Mr. Delimitros represents himself. SDCERS is being represented by Debra Odom-Kuttner.

Robert Neal: Administrative Law Judge Gary Brozio (OAH) heard Mr. Neal's application on December 11, 2006. Mr. Neal was represented by Attorney Scott O'Mara. Debra Odom Kuttner represented the Board. Judge Brozio's decision is pending.

Heleodoro Lopez: Administrative Law Judge Alan Alvord (OAH) has sustained his recommendation that the Board approve Mr. Lopez's application. The matter will appear on the Disability Retirement Committee's February agenda.

Francisco Torres: Judge Kevin Midlam (Ret.) (JAMS) has recommended that Mr. Torres' application for industrial disability retirement be denied. Mr. Torres did not file objections to the recommendation. The matter will be presented to the Disability Retirement Committee in February 2007. Debra Odom- Kuttner represented the Board.

The following applicants have been referred for hearing, but no dates have been set: Charlene Anderson, Daniel Bishop, Cathy Griggs, Ernest Mercado and Frank Montano.

Pre-hearing on Calendar:

Peter Hepburn, January 17, 2007

Adjudicator Hearings on Calendar:

Alan Fragoso, January 11, 2007 (OAH)

Michael Wahl, January 31, 2007 (OAH)

Donovan Knapp, February 1, 2007 (JAMS)

Scott Naliboff, February 28, 2007 (OAH)

Pre-Hearing Completed, Adjudicator Hearing to be Calendared:

Norma Diaz, Harvey Kitchel, Debra Mattie, Brad Ruff and Christopher Smith.

II. LITIGATION

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. Motions to Dismiss were also filed to the Second Amended Complaint. In late September 2006, the court denied the motions to dismiss. The court's decision allows the lead plaintiffs, including SDCERS, to proceed with claims against the individual defendants relating to fraud at ATI, and to proceed with discovery on the securities fraud claims against other defendants. The New York City office of Berstein, 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 a judicial declaration that SDCERS is entitled to retain its own legal counsel and demanding return of SDCERS' privileged documents seized from certain SDCERS' Board members' City offices. The case is assigned to Judge Jeffrey Barton. Seltzer Caplan McMahon & Vitek ("SCMV") represents SDCERS.

The City Attorney filed a cross-complaint on behalf of the City seeking declaratory relief regarding the validity of Manager's Proposals I and II and certain retirement benefits. 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.

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.

Trial of this action has commenced. The Court divided the trial into three phases; trial on Phase 1 began October 25, 2006 and finished on November 29, 2006. On December 14, 2006, the Court issued its proposed statement of decision on Phase 1. The Court ruled that the Unions had carried their burden and established that the City (1) is estopped by the Corbett judgment from challenging the MPI benefits; (2) is barred from contesting the benefits of MP2 as to those beneficiaries who were class members in the Gleason I litigation; and (3) cannot pursue a remedy against SDCERS for violation of debt limit laws. The Court ordered that prior to the City proceeding with the remaining relief sought in its Fifth Amended Cross-Complaint all necessary parties must be joined. The Court also found, without prejudice, that the Unions did not carry their burden on whether the matter constitutes a justiciable controversy. On December 27, 2006, the City filed an objection to the Court's proposed statement of decision and requested a hearing on the same. A hearing date has been set for January 11, 2007.

Phases 2, if necessary, and 3 will not go forward until the issues surrounding Phase 1 are resolved. A status conference has been set for January 18, 2007 at 3:00 p.m.

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. The Court granted judgment in SDCERS' favor, holding that SDCERS may continue to pay the challenged benefits until they are otherwise declared illegal.

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.

Through November, the parties have continued to exchange written discovery. In the last three months, there has been only one deposition – that of the POA's official representative, Steve McMillan. Very recently, the POA's attorneys contacted SCMV to re-notice the depositions of Messrs. Arce, McCullough, Lane and Ms. Wilson. It is likely that those depositions will proceed in February.

On January 3, 2007, SCMV filed a motion for summary judgment. The legal basis for that motion was that the applicable periods of limitation had run on the majority of the POA's claims pertaining to MP-2 (the Court has already dismissed claims pertaining to MP-1). The hearing on that Motion for Summary Judgment is set for Monday, February 5, 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 originally was assigned to the Honorable James Miller, but was transferred to Judge Huff's court as a matter related to the POA case.

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.

In October, 2006, the POA filed its Second Amended Class Action Complaint. Despite the Court's strong recommendation that the POA limit the class it sought to have certified, the POA kept the broad class allegations that had appeared in the First Amended Complaint. The only real changes to the Complaint involved allegations pertaining to KPMG. Shortly after the Second Amended Complaint was filed, SCMV filed a Motion to Dismiss. That motion, along with motions filed by the City, Mr. Aguirre and KPMG were heard on December 4, 2006. The court granted SDCERS' Motion to Dismiss on nearly all grounds, most important of which was the dismissal of the Conspiracy Claim for Relief against SDCERS which alleged SDCERS had conspired with the City and Mr. Aguirre to violate the civil rights of the POA's members. The POA has been afforded the ability to amend its complaint, again, and it is believed that amendment will be forthcoming in the latter part of January.

The class representatives also filed a motion to certify the class on August 25, 2006. That motion was set for hearing on September 22, 2006, but the Court declined to formally rule on that motion due to the fact that the POA had filed an amended complaint.

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 was assigned to Judge Linda Quinn. Seltzer Caplan McMahon Vitek is representing SDCERS. At the Board's direction, SCMV dismissed this case without prejudice on November 22, 2006.

Court of Appeal

Sergio Alcala v. SDCERS, Court of Appeal No. D048569. The Alcala appeal arises from Judge Yuri Hofman's March 2006 denial of Mr. Alcala's Petition for Writ of Mandate. Mr. Alcala's writ followed SDCERS' February 2005 decision to adopt Judge Raymond Zvetina's (Ret.) recommendation to deny Mr. Alcala's application for disability retirement. In November 2006, the Court of Appeal dismissed Mr. Alcala's appeal for failure to timely file his opening brief. In December, the Court granted Mr. Alcala's motion to set aside the dismissal and reinstated the appeal. Mr. Alcala's brief was filed in late December. SDCERS' respondent's brief will be filed in late January 2007. Sheila Jacobs is representing SDCERS. Mr. Alcala is represented by Bernard Lafer.

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 City sought damages in excess of \$50 million. On November 29, 2006, the City and Callan announced that they had agreed to settle the case for a payment to the City by Callan or its insurance carrier of \$4.5 million, with no admission of liability by Callan. The payment is to be made to the City by December 18, 2006.

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. On September 25, 2006, the 4th DCA denied the defendants' petition for review. On November 29, 2006, the California Supreme Court ordered the 4th DCA to issue an order to show cause why the case should not be dismissed.

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. A settlement has been reached and on December 12, 2006, was entered as a Judgment.

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)	TBD	Trial (D-69)
	01/11/07	Hearing on City's Objection to Judge Barton's Proposed Statement of Decision
	01/18/07	Status Conference (3:00 PM D-69)
SDPOA v. Aguirre, et al. (Declaratory & Injunctive Relief)	02/05/07	Hearing on Motion for Summary Judgment (10:30 AM D-13)
	03/26/07	Pretrial Conference (10:30 AM D-13); and Hearing on Motions in Limine
	04/02/07	Trial Status Conference (10:30 AM D-13)
	04/03/07	Trial (9 AM, D-13)
Aaron et al. v. Aguirre, et al.		

III. PUBLIC RECORDS REQUESTS

Last month, Legal Services Division processed one request for documents made pursuant to the California Public Records Act. Non-public, private and/or confidential member information was withheld or redacted pursuant to applicable laws. The requested records include: (1) tape or electronic recordings for the following Board committees for the period November 2001 through December 2002: Investments, Business & Procedures and Executive. A second request for records related to Putnam Investments was withdrawn by the requesting party prior to its due date.

IV. COMMUNITY PROPERTY AND BENEFITS

In December, the community property/benefits legal assistant handled 53 phone calls, met with 9 members and had 11 conferences with internal staff. She reviewed 39 member files, 14 domestic relations orders, and 15 judgments. Fifty-three member files were reviewed for community property issues which resulted in 11 community property inquiries to members. Thirteen letters to members and opposing counsel were sent out. Twenty-one formal staff members were prepared, and 30 e-mails were sent to members, staff, outside counsel, and others. Four response letters to the Franchise Tax Board were prepared. One garnishment was approved and authorized, 2 powers of attorney, and 2 Trusts were reviewed and approved. One domestic partnership certificate was examined. Sally Nadeau, our senior legal assistant, assists with community property and benefits issues.

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