

**SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM**  
**MEMORANDUM**  
**LEGAL DIVISION**

**DATE:** January 5, 2009

**TO:** The Board of Administration

**FROM:** Elaine W. Reagan, General Counsel



**SUBJECT:** January Legal Services Report

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**I. LEGAL PROJECTS**

**Board Charters, Policies, Resolutions and Rules:** Legal continues to work on updating and revising of the Board Rules and is on track for completion of this project as part of the FY09 Action Plan. All proposed Rules are reviewed by each member of the Executive Staff for appropriate input prior to being brought to the Business and Governance Committee for review.

**Overpayments/Underpayments:** Legal continues to work closely with Benefits Administration, Finance and the Internal Auditor to ensure that all mistakes in member calculations resulting in overpayments and underpayments are promptly resolved and reported to the Board. We are currently working on 28 cases, the majority of which are under \$10,000.

**Sloan/Lopez Calculations:** As a result of a settlement in the *Sloan v. City of San Diego* and *Lopez v. City of San Diego* cases, Roxanne Story Parks is assisting Benefits Administration with issues arising out of the need to recalculate pensionable salary for 41 canine and motorcycle officers. Of the 41 officers involved in the litigation, 9 were not covered by the settlement agreement because they did not fall within the time frames set forth in the agreement. Benefits Administration has completed calculations for 29 of the 32 officers affected by the settlement and provided that to the attorney for the members. The remaining 3 did not sign papers agreeing to participate in the settlement. We have received additional contributions owed from 24 of the officers and payment in the amount of \$214,559.27 from the City for all 29 of the officers who signed waivers.

In December, I met with the City's attorneys to discuss correction of the 117 officers who received canine or motorcycle pay during the applicable time period but who were not part of the settlement agreement. We are asking that the City identify those officers so that SDCERS can commence correction of their records to reflect correct pensionable salary and to ensure that SDCERS has received correct employee and employer contributions. The City's attorneys contend that SDCERS should not correct the accounts of the officers not involved in the litigation and have agreed to provide us with documentation to support that contention. I will report further when I have received documentation from the City.

**Legal/Compliance Group Meetings:** The Legal/Compliance Working Group consisting of SDCERS' General Counsel, Chief Compliance Officer and Internal Auditor meets weekly to discuss common issues. The 2009 Audit Plan developed in this working group was adopted by the Board at its December meeting. Roxanne Story Parks presented the Fraud Policy for initial review in December and we will continue to revise that policy for final presentation in February.

## **II. LEGISLATIVE DEVELOPMENTS**

Congress has passed H.R. 7327 which contains the "fix" for the market rate of interest problem for DROP interest crediting created by the amendment to the Pension Protection Act. H.R. 7327 provides that any interest rate adopted by law or administrative rule for governmental plans will be considered a market rate of interest. As a result, any rate of interest that the Board adopts, by Board Rule, for DROP interest crediting will comply with federal law.

## **III. LITIGATION**

The status of all current litigation is shown in the attached chart. SDCERS was served with the Italiano/MEA vs. SDCERS lawsuit on December 22, 2008. Plaintiffs are represented by Ann Smith. Ms. Smith has stipulated to an extension of time to February 5, 2009 to file a response to that complaint.

## **IV. PUBLIC RECORDS REQUESTS**

During the month of December, Legal Services received two requests and responded to one for public records. All non-public, private and/or confidential member information was withheld or redacted pursuant to applicable laws.

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

In December, Sally Nadeau, the community property and benefits legal assistant handled 48 phone calls and met with 5 members. She filed 1 joinder response. She reviewed 24 Domestic Relations Orders, 21 Judgments and Marital Settlement Agreements, and 46 member files. She sent 49 letters and e-mails to members, outside counsel and others, along with 3 community property information packages, and 15 community property inquiry letters. She also prepared 8 member indemnity agreements and 2 releases of interest and reviewed 138 beneficiary designations for community property issues.

She reviewed and approved 1 power of attorney. She reviewed 3 death benefit matters with operations staff, and prepared 3 Probate Declarations. She reviewed 3 name changes. She worked on 1 member files in preparation for disability hearings before adjudicators, and helped prepare 5 disability files to pass on to outside counsel.

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**VI. STAFF TRAINING AND DEVELOPMENT**

None.

Attachment

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## LITIGATION CHART

Case	Summary	Dispositive Rulings	Current Status	Upcoming Hearings
<b>DISABILITY LITIGATION:</b> Rochelle Glenn v. SDCERS SD Superior Court Case No. GIC 872600 Judge: Hon. Judith Hayes SDCERS' Counsel: Sheila Jacobs	Petition for Writ of Mandate challenging Board decision that Ms. Glenn failed to timely file application for disability retirement.	None	Answer filed.	None.
<b>GENERAL LITIGATION:</b> SDCERS v. City of San Diego and City Attorney, Michael Aguirre SD Superior Court Case No. GIC 841845 Consolidated with: SDCERS v. City of San Diego, GIC 851286 Judge: Hon. Jeffrey Barton SDCERS' Counsel: SCMV	<b>SDCERS Complaint:</b> Declaratory Relief on Right to Employ Counsel <b>City's Cross-Complaint:</b> Validity of MPI and MPII and certain retirement benefits. <b>SDCERS' Cross-Complaint:</b> Recovery of monies owed by City to SDCERS but not paid because of MPII	3-6-06: Granted SDCERS' Motion for Summary Adjudication (attorney issue) 10-25-06: Trial, Phase I: City is (1) estopped from challenging MPI benefits by <i>Corbett</i> , (2) barred from contesting benefits of MP2 as to class members in <i>Gleason I</i> , (3) cannot pursue a remedy against SDCERS for violation of debt limit laws. City to join all necessary parties.	On 12-9-08, the court again considered SDCERS' motion to dismiss, the City's motion to vacate the dismissal of the appeal and again dismissed the appeal as premature.	None.

Case	Summary	Dispositive Rulings	Current Status	Upcoming Hearings
		<p>8-14-07: City's 6<sup>th</sup> Amended Cross-Complaint dismissed as barred by Statute of Limitations</p> <p>11-15-08: Court of Appeal granted SDCERS' Motion to Dismiss Appeal</p> <p>11-17-08: City moved to "vacate" order dismissing appeal or alternatively seek review by extraordinary writ</p> <p>12-2-08: SDCERS filed opposition to City motion</p> <p>12-9-08: Court granted rehearing on dismissal of appeal on its own motion as, on review of the matter, Justice Benke determined she must recuse herself.</p>		

Case	Summary	Dispositive Rulings	Current Status	Upcoming Hearings
<p>SDPOA v. Michael Aguirre  U.S. District Court  Case No.: 05CV1581  Judge:  SDCERS' Counsel:  SCMV</p>	<p>Claims Alleged: unfair labor tactics and claims related to MP1, MPII and health care benefits, violations of Brown Act, Conspiracy, Conversion and Breach of Contract</p>	<p>12-9-08 SDCERS' Motion to Dismiss Appeal reconsidered by Justices O'Rourke, McConnell and Irion. Motion granted. Appeal dismissed as premature. SDCERS' request for sanctions denied.</p> <p>5-18-07: Ruling on City and SDCERS' MSJ: POA's unfair labor tactics claims dismissed. POA cannot pursue monetary damages against SDCERS. All claims against SDCERS dismissed except those relating to underfunding issues.  6-25-07: Court declined to exercise supplemental jurisdiction over remaining state law claims. Action dismissed as of 8-25-07.</p>	<p>POA's Appeal pending before 9<sup>th</sup> Circuit Court of Appeals.</p> <p>Oral Argument before the 9<sup>th</sup> Circuit Court of Appeals took place on October 23, 2008. On October 28, 2008, the Court requested further briefing regarding the impact of <i>McGuigan v. City of San Diego</i> on these proceedings, which the parties have filed.</p>	<p>It is unclear whether the 9<sup>th</sup> Circuit Court of Appeals will require a further hearing on the impact of <i>McGuigan v. City of San Diego</i> on these proceedings. Now that the <i>McGuigan</i> Appeal is final, we expect a ruling by the Court of Appeals, or a request for oral argument, shortly.</p>

Case	Summary	Dispositive Rulings	Current Status	Upcoming Hearings
<p>Aaron v. Aguirre  U.S. District Court  Case No. 06CV1451  Judge: Judge Huff  SDCERS' Counsel:  SCMV</p>	<p>Class Action on behalf of POA members in Southern District of Cal.  <b>Claims:</b> substantially same as in the POA case above but seeking individual damages on behalf of class members.</p>	<p><b>3-8-07:</b> SDCERS' Motion to Dismiss Third Amended Complaint as to causes of action for Breach of Contract, Interference with Contract, Conversion and Conspiracy granted in its entirety with leave to amend only as to the Conspiracy claim.  <b>6-11-07:</b> SDCERS' Motion to Dismiss Fourth Amended Complaint granted.  Conspiracy claims against SDCERS dismissed with prejudice.  <b>9-3-08:</b> Motions for Summary Judgment filed by SDCERS, Aguirre and the City granted. Federal claims dismissed based on issue and claim preclusion.  Court exercised discretion to dismiss remaining state law claims. Case dismissed in its entirety.</p>	<p><b>9-3-08:</b> Court's ruling on Summary Judgment. Motions granted. Case dismissed.  <b>10-1-08:</b> The group of plaintiffs represented by Jackson DeMarco filed their notice of appeal of the case. Plaintiffs' opening brief is due in January, 2009.  <b>10-1-08:</b> The group of plaintiffs represented by the Petersen Law Firm filed their notice of appeal of the case. Plaintiffs' opening brief is due in March, 2009.  <b>11-26-08:</b> The two separate appeals are consolidated by the Court of Appeals and placed on one briefing schedule.</p>	<p>None.</p>

Case	Summary	Dispositive Rulings	Current Status	Upcoming Hearings
<p>SDPOA v. Aguirre SD Superior Court Case No.: 37-2007- 00075432-CU-MC-CTL Judge: SDCERS' Counsel: SCMV</p>	<p>Claims: same as in other POA cases but filed on behalf of former (retired) and current members of POA.</p>	<p>None.</p>	<p><b>5-16-08:</b> SDCERS' Demurrer granted in part and overruled in part. POA filed an amended complaint on 6-23-08.</p> <p><b>10-31-08:</b> The court heard SDCERS' demurrer and motion to strike. During the hearing, the court stated it would not try the issues currently pending before Judge Barton. The parties agreed, therefore, to stay all proceedings in this case until there is a final judgment in Judge Barton's case. The parties have executed a stipulation to stay the case, and are awaiting the Court's order approving the stipulation.</p>	<p>None.</p>
<p>Aaron et al. v. City of San Diego, et al. SD Superior Court Case No: 37-2008-</p>	<p>Claims: Class action on behalf of POA members represented by Jackson DeMarco.</p>	<p>None.</p>	<p><b>10-02-08:</b> The complaint was filed on this date.</p> <p>To date, the Complaint</p>	<p>None.</p>

Case	Summary	Dispositive Rulings	Current Status	Upcoming Hearings
00093078-CU-OE-CTL SDCERS' Counsel: SCMV	Claims: Essentially the same as those filed in other POA cases.		has not been served on SDCERS. Opposing Counsel has suggested a stipulated stay of this case pending the outcome of the action before Judge Barton. The parties are currently negotiating that stay.	
Annis et al. v. City of San Diego, et al. SD Superior Court Case No: 37-2008-00092949-CU-BC-CTL Judge: Hon. Jay M. Bloom SDCERS' Counsel: SCMV	Claims: Class action on behalf of POA members represented by the Petersen Law Firm. Claims: Essentially the same as those filed in other POA cases.	None.	10-02-08: The complaint was filed on this date.  To date, the Complaint has not been served on SDCERS.	None.

Case	Summary	Dispositive Rulings	Current Status	Upcoming Hearings
<p>City of San Diego v. SDCERS SD Superior Court Case No.: 37-2007-00077604-CU-MC-CTL Judge: Hon. Jeffrey Barton SDCERS' Counsel: SCMV</p>	<p><b>MOU Effective Date:</b> City seeks judicial declaration that changes to municipal code eliminating certain benefits became effective on 7-1-05 and not 2-16-07 when the ordinance eliminating those benefits became effective.</p>	<p>None.</p>	<p><b>6-25-08:</b> City's First Amended Complaint filed designating Benjamin Vernon and Richard Haas as representatives of Class A and Class B (represented and unrepresented employees, respectively, who are impacted by litigation)</p> <p><b>7-30-08:</b> SDCERS' Answer filed.</p> <p><b>11-03-08:</b> Court denied City motion for test case procedure, set hearing for class certification motion. City has sought continuance of hearing until 03-09.</p>	<p>None.</p>
<p>City of San Diego v. SDCERS SD Superior Court Case No.: 37-2007-00081912-CU-WM-CTL</p>	<p><b>PSC:</b> City seeks declaratory relief to set aside Board's 11-16-07 vote regarding treatment of PSC costs.</p>	<p><b>11-13-08:</b> Court granted petition in part, vacating 11-16-07 Board vote as to employees who purchased service</p>	<p>Awaiting entry of judgment. Time for appeal will be 60 days from entry of judgment.</p>	<p>None.</p>

Case	Summary	Dispositive Rulings	Current Status	Upcoming Hearings
Judge: Nevitt SDCERS' Counsel: SCMV		credits between 08-15 and 10-31-03, and who were still employed by City as of 11-20-07. Court denied writ to extent it sought an order directing compliance with SDMC section 24.1312.		

<b>OTHER CASES OF INTEREST:</b>				
People v. Lexin San Diego Superior Court, Case No. SCD190930 Judge: Hon. Frederick Link	Felony conflict of interest charges against six former SDCERS Board Members based on a violation of Gov. Code Sec. 1090	None.	Defendants' Motion to Dismiss denied and upheld on appeal. Supreme Court has accepted review.	None.
USA v. Saathoff U.S. District court 06CR0043-BEN	Indictments against former SDCERS' Board members, Administrator and General Counsel for conspiracy to commit wire and mail fraud, mail fraud, aiding and abetting.	None.	Motion by prosecution to remove trial judge denied. Trial dates scheduled for March 2008 were vacated.	None.