



Mark A. Hovey
Chief Executive Officer

February 3, 2011

Honorable Mayor Jerry Sanders
City of San Diego
202 C Street, 11th Floor
San Diego, CA 92101

Dear Mayor Sanders:

This letter is in response to City Attorney Jan Goldsmith's letter dated January 25, 2011 regarding corrections to Purchased Service Credit (PSC) contracts required by the appellate court's June 7, 2010 ruling in *City of San Diego v. San Diego City Employees Retirement System*, 186 Cal.App.4th 69 (2010).

In his letter, the City Attorney opines that for those City employees who entered DROP after November 20, 2007¹ and who are currently still in DROP, SDCERS has discretion, in limited circumstances constrained by case law, to allow the employee to rescind or reform his or her DROP contract. SDCERS does not, however, have the authority to allow an employee to work outside of their DROP period. The City Attorney further opines that the decision to allow an employee to work outside of DROP rests with the executive branch of City government or, in other words, your office.

Based on the above, I am formally requesting that you advise SDCERS whether or not the City will allow approximately 220 Active DROP participants the option to rescind or reform their DROP contracts by converting some or all of their DROP service back to active *Creditable Service*², in order to provide these employees the full range of available PSC correction options.

The effects of such a decision could include:

- Member's years of service credit originally granted for the underpriced PSC would be reduced (correcting the underpriced PSC),

¹ The City Attorney has opined that SDCERS should seek a clarifying order from the court on the applicability of the judgment for members who entered DROP before November 20, 2007. SDCERS will seek clarification from the court. If the court finds that these members are subject to the judgment, the same rationale regarding their ability to rescind or reform a DROP contract would apply equally to these members.

² *Creditable Service* is defined as "[S]ervice rendered for compensation as an employee or officer . . . of the City . . . only while he or she is receiving compensation from the City . . . and is a Member of and contributing to this System.

- The years of employment while in DROP, equal to the PSC reduction, would be reclassified as active service credit,
- The member would forfeit an associated amount of their accumulated DROP account balance,
- The member would owe active member contributions to SDCERS for the years of reclassified service credit, and
- The member's retirement benefit would be recalculated using the new retirement age

BACKGROUND

When adopting Board Resolution No. 2010-02, the SDCERS Board of Administration ("Board") considered its authority to rescind or reform a DROP contract pursuant to the principles outlined in *Hittle v. Santa Barbara County Employees Retirement Assn.*, 39 Cal.3d 374 (1985). (Board Resolution 2010-02 enclosed.)

In *Hittle*, the California Supreme Court explained that a pension system owes a fiduciary duty to deal fairly and in good faith with its members, which includes a duty to fully and adequately apprise a member of his or her options under the plan. Because the plan administrator in *Hittle* failed to fully advise Mr. Hittle of his options before he withdrew contributions, he was found not to have waived his statutory rights and the retirement system was ordered to allow him to redeposit contributions and file the application.³

When it adopted Board Resolution No. 2010-02, the Board considered *Hittle* and decided that for those employees who can affirm that "but for the lack of information regarding the impact of the affected PSC contract" they would not have entered DROP, the Board could allow those members to rescind or reform their DROP contracts, subject to the City's agreement to allow DROP rescission or reformation. (See paragraphs 10 and 11 of Board Resolution No. 2010-02.) This finding was incorporated into Board Rule 4.90 at paragraph 2, Option 5. (A copy of Board Rule 4.90 is enclosed.)

The Board also considered case law on whether or not the City may choose one course of action for some of the affected 220 members and a different course of action for the rest. It is SDCERS' belief that (absent some rational basis for treating employees differently) if the City agrees to retain any of these employees, then it must agree to retain all active DROP employees affected by this decision where SDCERS determines that it can grant the employee's request to reform or rescind their DROP contract. To do otherwise would deny employees their constitutional rights to equal protection. See, US CONST. amend. 14, §1, CAL. CONST., art. I, §7, *Mansur v. City of Sacramento*, 39 Cal.App.2d 426, 430 (1940) [When classifying individuals for legal discrimination, the classification: "[S]hall be neither arbitrary nor capricious. It must not rest upon the personal, physical, or even mental characteristics pertaining solely to the individual to be affected, but rather upon the *relation* which such individual may bear to society. Further . . . the classification 'must rest upon some substantial, inherent, intrinsic difference or

³ In the plan at issue in *Hittle*, County employees were no longer considered members entitled to any benefits under the plan once contributions were withdrawn and could not redeposit those contributions unless they were reemployed by the plan sponsor.

Honorable Mayor Jerry Sanders

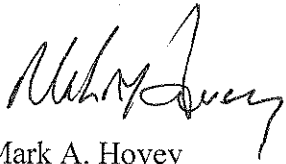
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distinction . . . towards the lives, safety, property, health, happiness or convenience of the public, when contrasted with the relation, duties, responsibilities, position or situation of other persons or classes toward the same matters of public concern."']. The City should consult with the City Attorney for further advice on this issue.

Because this matter is time-sensitive and SDCERS needs to correct these contracts as rapidly as possible, I am requesting that you provide a response to this request no later than Friday, February 18, 2011.

Sincerely,



Mark A. Hovey
Chief Executive Officer

cc: SDCERS Board of Administration
Jan Goldsmith, City Attorney
Tony Young, Council President
Jay Goldstone, Chief Operating Officer
Scott Chadwick, Labor Relations Director
Andrea Tevlin, Independent Budget Analyst

Enclosures

1. January 25, 2011 Letter from Jan Goldsmith
2. SDCERS Resolution No. 2010-02
3. SDCERS Rule 4.90



JAN I. GOLDSMITH
SAN DIEGO CITY ATTORNEY

January 25, 2011

Via Facsimile Transmission, Electronic Mail
and U.S. Mail

Mark A. Hovey, Chief Executive Officer
San Diego City Employee Retirement System
401 West A Street, Ste 400
San Diego, CA 92101
(619) 595-0357

Elaine W. Reagan, General Counsel
San Diego City Employee Retirement System
401 West A Street, Ste 400
San Diego, CA 92101
(619) 595-0357

Dear Mr. Hovey and Ms. Reagan:

Enclosed is a letter to Ann Smith dated January 25, 2011, that addresses issues raised by SDCERS and Ms. Smith.

SDCERS has plenary authority to administer the pension system. We cannot and will not assume SDCERS' obligations to administer the plan according to the law. There are some areas, however, in which the City is willing to provide input and be helpful without assuming SDCERS' obligations or waiving its rights.

Six months ago the City won a final judgment which contains an order precluding SDCERS from requiring the City to pay the underfunding costs. We expect that final judgment and order to be followed. Moreover, the City may not simply agree to assume obligations and cover the cost of undercharged service credits for the 2200 individuals affected by this judgment. That broad brush approach would likely constitute an increased benefit and gift of public funds. The cost would add to the City's annual structural deficit.

However, there are two categories of individuals that can be addressed without the City voluntarily assuming the cost of covering undercharges six months after winning a court order to the contrary.

1. Those who were in DROP on November 20, 2007.

The City's petition and the judgment did not apply to individuals who were retired as of November 20, 2007. There were about 280 employees who were already in the DROP program

January 25, 2011

at that time and the terms of DROP precluded them from leaving the program. What's more, DROP requires termination of their employment after five years. As a result, on November 20, 2007, these individuals were "trapped" in DROP and could not correct the service credit problem by leaving the program and resuming normal employment.

The petition and judgment are silent as to whether these individuals are included in the judgment (as normal employees) or excluded (as retirees). We agree that the judgment should be clarified, but that decision lies with the Judge Nevitt, the judge who rendered the judgment. It is my understanding that SDCERS will file a motion requesting that clarification.

2. Those who entered DROP after November 20, 2007.

Those who entered DROP after November 20, 2007, are clearly covered by the existing judgment. In past cases, SDCERS has exercised some discretion in rescinding a DROP contract, making the City whole as if the employee had not entered DROP and asking the City whether it will allow the employee to continue working outside of DROP.

Under case law, SDCERS may do so only in limited circumstances. What's more, the decision on whether to allow an employee to continue working outside of DROP is left to the executive branch of the City's government, not SDCERS or our office. Notwithstanding the limitations, this process has the potential to offer some possible resolutions that do not result in the City incurring the cost of undercharges, but allows DROP participants to get credit for their time of employment.

As for claims advanced on behalf of DROP participants, we note that under the DROP contract, participants enter the program completely at their own risk. They are urged to seek legal advice with regard to any questions. And, they sign complete releases of all known and unknown claims as against the City and SDCERS.

Other than clarification for 280 individuals who were already in DROP on November 20, 2007, and limited discretion of SDCERS to address individual circumstances of other DROP participants – without cost to the City – we do not see a legal basis for adjustments.

If you have any questions or need further information, please do not hesitate to contact us.

Sincerely,



JAN I. GOLDSMITH
City Attorney

JG:cbs
Enclosure

cc: Honorable Mayor
Honorable City Council members
Jay Goldstone, Chief Operating Officer
Andrea Tevlin, Independent Budget Analyst

**BOARD OF ADMINISTRATION
SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM
RESOLUTION NO. 2010-02**

**RESOLUTION IMPLEMENTING FOURTH DISTRICT COURT OF APPEAL
DECISION REGARDING SERVICE CREDIT PURCHASES UNDER SAN
DIEGO MUNICIPAL CODE SECTION 24.1312 AND COMPARABLE PLAN
DOCUMENT PROVISIONS**

WHEREAS, on June 7, 2010, the Fourth District Court of Appeal issued an opinion in *City of San Diego v. San Diego City Employees' Retirement System* 186 Cal. App. 4th 69 (2010) (the "PSC Decision"), in which it determined that SDCERS did not have the right to charge the City of San Diego ("City") for SDCERS' underfunding of service credits purchased under San Diego Municipal Code section 24.1312 (referred to in the PSC Decision as "air time") during a "window period" by continuing to use lower previously determined flat rates after the SDCERS Board of Administration ("Board") determined to increase those two flat rates to purchase service credit ("PSC") under that Municipal Code provision on August 15, 2003; and

WHEREAS, the court characterized its ruling in the PSC Decision as "very narrow," in that it applied only to the "window period" implemented by the Board after the Board had increased the two PSC purchase rates, and it applied only to the "air time" PSC provision in the San Diego Municipal Code that required employees to pay both the employee and employer cost of the PSC; and

WHEREAS, the court concluded in the PSC Decision that it was "not within SDCERS's authority to expand pension benefits beyond those afforded by the authorizing legislation." Specifically, the court determined that PSC contracts using the delayed "window period" flat rates were not authorized under Municipal Code section 24.1312, because SDCERS had no legal authority to continue to offer service credit at the old rates once the Board had determined that new higher flat rates were required to cover both the employee and employer cost of the service to be purchased.

WHEREAS, the court described various options potentially available to SDCERS to correct this situation, including "voiding contracts," "collecting arrears payments," "offering rewritten contracts," "spreading out additional payments," [and] "reducing benefits levels," and stated that the "only thing [SDCERS] may not do is charge the City for the underfunding that was the subject of the [trial] court's order"; and

WHEREAS, as a result of the PSC Decision, SDCERS is prohibited from requiring the City to make up the underfunded amount by including it in the City's unfunded actuarial liability ("UAL"); and

WHEREAS, as a result of the PSC Decision, SDCERS also has no legal authority to continue to provide benefits based on the service purportedly purchased by the underpriced PSC contracts, absent a member/beneficiary's selection of one of the

correction options set forth below. *Medina v. Bd. of Retirement*, 112 Cal. App. 4th 864, 870-71 (2003); and

WHEREAS, based upon the PSC Decision and other applicable law, the Board makes the following findings:

1. If a PSC contract made under Municipal Code section 24.1312 was the result of a legally authorized offer made by SDCERS before the beginning of the August 15, 2003 window period (that is, before the Board determined that new flat rates should be charged), and the member signed and dated that contract before its 90-day expiration date, that contract was legally authorized and is not impacted by this Resolution. However, members who submitted PSC applications that requested a quote for PSC prior to the window period, but who were provided the "window" rate by SDCERS only after the Board had determined a new rate, are included within the scope of this Resolution as a result of the PSC Decision.
2. The PSC Decision was rendered based on the City's amended complaint against SDCERS, which specifically exempted any affected members who already had retired prior to the filing of that lawsuit on November 20, 2007. Consequently, the City has acquiesced to continuing to pay for the underfunding created by the PSC contracts of this group of retirees. This means that SDCERS members who retired from the City prior to November 20, 2007 are not impacted by this Resolution.
3. Although a very narrow ruling, the PSC Decision is to be applied to any "window period" purchase that SDCERS' Board previously unlawfully authorized with respect to a PSC contract subject to Plan Document provisions that required employees to pay both the employee and employer cost for the service credit ("Affected PSC Contract"). There may be other PSC contracts impacted by this Resolution that have not yet been identified. Any additional PSC contract types that may potentially be subject to this Resolution will be separately presented to the Board for action.
4. The "window periods" relating to "air time" purchases by employees of the San Diego Port District and San Diego Airport Authority commenced on April 16, 2004, and thus PSC contracts purchased during those window periods are also subject to this Resolution as "Affected PSC Contracts". Those employer plan sponsors have not yet formally advised SDCERS as to whether they will acquiesce to continuing to pay for any or all of the underfunding created by such PSC contracts, or if the employer plan sponsors will require that SDCERS follow the member correction procedures outlined in this Resolution.

5. The underfunding resulting from the underpricing of the Affected PSCs Contracts during the window period must be corrected before the full service credit originally intended to be granted by the Affected PSC Contracts may be provided to members.
6. Underfunding resulting from Affected PSC Contracts that are the subject of this Resolution can be corrected either by employers voluntarily making up the underpayment or, if not by the employers, then the members must voluntarily pay the difference or voluntarily rewrite their PSC contracts to have their service credit reduced to the amount for which they paid under the correct higher rate that was determined by the Board in order to retain any portion of the PSC intended to be purchased.
7. Alternatively, if members do not choose to reform their Affected PSC Contracts with SDCERS voluntarily in order to retain some or all of their PSC, then, after reasonable notice as set forth below, SDCERS will reduce their retirement service credit accounts accordingly, refund the member contributions made to purchase the underpriced PSC, together with interest credited to those contributions to date, and make any other necessary adjustments to member benefits in accordance with law.
8. All interest payments relating to the correction of Affected PSC Contracts calculated under this Resolution, both for payments to be made by SDCERS to members/beneficiaries and payments made to SDCERS by members/beneficiaries, will be set at the SDCERS actuarially assumed investment return rate in effect as of June 30 of each year, compounded annually. Interest payments for amounts owed to SDCERS by members/beneficiaries for repayment of overpaid retirement benefits required if a member declines or fails to exercise one of the corrective options to fully fund the service purchase will be set at the actuarially assumed investment return rate in effect as of June 30 of each year, compounded monthly, calculated through the date the member is sent a 90-day written Notice of Options by SDCERS.
9. To the extent that an active member with an Affected PSC Contract is currently in the Deferred Retirement Option Program ("DROP"), but declines to exercise one of the corrective options that would permit that member to retain sufficient service to remain eligible for DROP, SDCERS will deem the member's prior DROP election to be rescinded, subject to SDCERS collecting retirement contribution arrearages, unwinding the DROP benefit administered by SDCERS, and netting any amounts due to or from SDCERS and the member.
10. To the extent that an active member with an Affected PSC Contract is currently in DROP, but declines to exercise one of the corrective options that would permit that member to retain sufficient service to remain

eligible for DROP and the member affirms to SDCERS that, but for the lack of information regarding the impact of the affected PSC contract on the member's DROP election, the member would not have entered DROP, SDCERS will permit that member to reform his or her DROP contract to provide a different DROP beginning and end date, subject to SDCERS collecting retirement contribution arrearages, adjusting the DROP benefit administered by SDCERS. However, application of this paragraph 10 is conditioned on the member's employer's agreement to the reformation. (*Hittle v. Santa Barbara County Employees Retirement Assn.*, 39 Cal. 3d 374 (1985).)

11. To the extent that an active member with an Affected PSC Contract remains eligible for DROP, but affirms to SDCERS that, but for the Affected PSC Contract, the member would not have entered DROP, SDCERS will permit that member to rescind his or her DROP election, subject to SDCERS collecting retirement contribution arrearages, unwinding the DROP benefit administered by SDCERS, and netting any amounts due to or from the SDCERS and the member. However, application of this paragraph 11 is conditioned on the member's employer's agreement to the rescission. (*Hittle v. Santa Barbara County Employees Retirement Assn.*, 39 Cal. 3d 374 (1985).)
12. To the extent that a member with an Affected PSC Contract entered DROP, and thus fixed his or her retirement allowance amount before the City filed its lawsuit on November 20, 2007, and the member has since retired, SDCERS will specifically request that the City acquiesce to its continuing to pay for the underfunding created by the underpriced PSC contracts of this additional group of affected retirees.
13. SDCERS staff shall also meet with each of the affected employers to determine what (if any) assistance they might provide to members/beneficiaries impacted by Affected PSC Contracts.

WHEREAS, the above findings and correction methodology are implemented under the authority of Article 16, Section 17 of the California Constitution, which grants to SDCERS' governing Board "plenary authority and fiduciary responsibility" for administration of the fund; and

WHEREAS, the San Diego City Charter section 144 provides that SDCERS' governing Board "shall be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system..."; and

WHEREAS, San Diego Municipal Code section 24.0901 states: "The Board may make Rules it deems proper to administer the Retirement System consistent with its

fiduciary duties under Article 16, Section 17 of the California Constitution. The Board will identify the rules that are incorporated into this Article as part of the Plan document.”

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby formally adopts the above findings and conclusions and instructs staff to present for adoption a Board Rule, to be designated as part of the Plan document, containing the following provisions:

Board Rule No. _____ Regarding PSC Corrections

1) **Employer Correction Option:** SDCERS will provide each of its employer plan sponsors with sixty (60) days following the adoption of this Rule to formally advise SDCERS whether or not they will voluntarily pay for some or all of the underfunding caused by the Affected PSC Contracts through the UAL amortization, or such shorter time period that the employer may elect.

2) **Member Correction Options:** To the extent that the employer of a member with an Affected PSC Contract does not pay for that underfunded amount, then SDCERS will provide the following correction options to members/beneficiaries with respect to all Affected PSC Contracts, subject to the timeline set forth in item 3 below and subject to any changes or adjustments required by the Internal Revenue Service in order to preserve the qualified status of the plans:

Option 1: Member/beneficiary may rescind the original Affected PSC Contract and receive a refund of his or her PSC contributions, plus interest. SDCERS will reduce associated service credit accordingly. In addition, if the member already has retired, SDCERS will adjust the member’s retirement benefit prospectively and if retirement benefits have been overpaid as a result of the inclusion of the underfunded service credit in the member’s retirement benefit calculations, then SDCERS will recover those overpaid amounts, plus interest, as set forth in this Rule.

Option 2: If the member is in active service and eligible to purchase PSC currently, the member may rescind the original Affected PSC Contract and apply the full refund plus any applicable interest to a new PSC contract based on the current rates and the member’s current salary.

Option 3: Member/beneficiary may request that SDCERS reduce his or her service credit to the lesser amount of service that would have been legally purchased by the member’s actual contributions under the Affected PSC contract if the higher post-window rate had been applied. Thus, no additional payment would be made by the member/beneficiary to SDCERS as a result of this correction; provided, however, that if the member has retired, is subject to this Resolution, and the member’s former employer has not agreed to correct the underfunding, then any benefits erroneously paid out as a result of the Affected PSC Contract are to be recomputed, and SDCERS is to recover overpayments plus interest from the member/beneficiary made to the member/beneficiary and adjust the member’s retirement benefit prospectively; or

Option 4: Member/beneficiary may pay, with interest, the difference between the amount paid at the "old" rate and the amount that should have been paid at the then Board determined rate to fund the full service credit originally anticipated in the Affected PSC Contract. In the alternative and if necessary for a member to remain eligible for service retirement and/or DROP, a member/beneficiary may make a "partial purchase" of PSC by paying, with interest, the difference between the amount paid at the "old" rate and the amount that should have been paid at the then Board determined rate to fund sufficient service credit in the Affected PSC contract to retain such eligibility; provided, however, that corresponding adjustments are made to any past and future retirement allowances, contributions, and interest. Payments due under this option may be made by lump sum or through a payment plan, including without limitation an after-tax payroll deduction, whose duration is not to exceed the amount of time to be purchased and will carry additional interest.

Option 5 (DROP): To the extent that a member with an Affected PSC Contract entered into DROP prior to the adoption of this Rule, SDCERS will permit the DROP election to be rescinded or reformed, to the extent legally permissible and, if applicable, subject to the member's employer's agreement. The member may then elect one of the above correction options.

3) Timeline and Default Board Action: If, within sixty (60) days of SDCERS providing written Notice of Options Re Purchase of Service Credit Corrections by certified mail of the above five options, any member/beneficiary does not voluntarily select one of the five options, then SDCERS will make a reasonable effort to contact that individual directly to determine whether the member has made a decision. If within ninety (90) days of SDCERS providing the original Notice SDCERS is unable to contact the individual or if the member does not voluntarily select an option, and if the Board, in its sole and exclusive authority, does not extend the time period for individual's response based upon circumstances that may be presented to it by staff, then SDCERS will implement Option 1 above as to the member/beneficiary.

ADOPTED: _____, 2010

Raymond G. Ellis, Vice President
Board of Administration, San Diego City
Employees' Retirement System

ATTEST:

Mark A. Hovey
CEO

Rule 4.90 PSC Corrections

This Board rule implements the Court's decision in *City of San Diego vs. SDCERS*, 186 Cal.App.4th 69 (2010) (the "PSC Decision") in which the court determined that SDCERS did not have the right to charge the City of San Diego ("City") for SDCERS' underfunding of service credits purchased under San Diego Municipal Code section 24.1312. This rule is enacted consistent with Board Resolution 2010-02 adopted by the Board at its October 2010 meeting. This Rule is incorporated into Chapter 2, Article 4 of the San Diego Municipal Code as part of the Plan document.

- a. "Affected PSC Contracts" means any "window period" purchase that the SDCERS Board previously unlawfully authorized with respect to a PSC contract subject to Plan Document provisions that:
 - 1) Required employees to pay both the employee and employer cost
 - 2) Were purchased on or after August 15, 2003 at the "old" 15% rate for City General Members and 26% rate for City Safety Members, unless the contract was the result of a legally authorized offer made by SDCERS before August 15, 2003 and the Member signed and dated that contract before its 90-day expiration date.
 - 3) Were purchased on or after April 16, 2004 at the "old" 15% rate for UPD and Airport General Members, 23% rate for UPD Safety Member and 15% rate for UPD and Airport Executive Members, unless the contract was the result of a legally authorized offer made by SDCERS before April 16, 2003 and the Member signed and dated that contract before its 90-day expiration date.
 - 4) Affected PSC Contracts do not include contracts purchased for City service credit by any City Member who retired from City service on or before November 19, 2007.
- b. Correction Options: Affected PSC Contracts will be corrected as provided in the following options:
 - 1) **Employer Correction Option:** SDCERS will provide each of its employer plan sponsors with sixty (60) days following the ~~adoption of this Rule~~ date that SDCERS provides written notice to the plan sponsor of the unfunded liability related to the Affected PSC Contracts to formally advise SDCERS whether or not the plan sponsor will voluntarily pay for some or all of the underfunding caused by the Affected PSC Contracts through the UAL amortization, or such shorter time period that the employer may elect.
 - 2) **Member Correction Options:** To the extent that the employer of a member with an Affected PSC Contract does not pay for that underfunded amount, then SDCERS will provide the following correction options to members/beneficiaries with respect to all Affected PSC Contracts, subject to the timeline set forth in item

3 below and subject to any changes or adjustments required by the Internal Revenue Service in order to preserve the qualified status of the plans:

Option 1: Member/beneficiary may rescind the original Affected PSC Contract and receive a refund of his or her PSC contributions, plus interest. SDCERS will reduce associated service credit accordingly. In addition, if the member already has retired, SDCERS will adjust the member's retirement benefit prospectively and if retirement benefits have been overpaid as a result of the inclusion of the underfunded service credit in the member's retirement benefit calculations, then SDCERS will recover those overpaid amounts, plus interest, as set forth in this Rule.

Option 2: If the member is in active service and eligible to purchase PSC currently, the member may rescind the original Affected PSC Contract and apply the full refund plus any applicable interest to a new PSC contract based on the current rates and the member's current salary.

Option 3: Member/beneficiary may request that SDCERS reduce his or her service credit to the lesser amount of service that would have been legally purchased by the member's actual contributions under the Affected PSC contract if the higher post-window rate had been applied. Thus, no additional payment would be made by the member/beneficiary to SDCERS as a result of this correction; provided, however, that if the member has retired, is subject to this Resolution, and the member's former employer has not agreed to correct the underfunding, then any benefits erroneously paid out as a result of the Affected PSC Contract are to be recomputed, and SDCERS is to recover overpayments plus interest from the member/beneficiary made to the member/beneficiary and adjust the member's retirement benefit prospectively; or

Option 4: Member/beneficiary may pay, with interest, the difference between the amount paid at the "old" rate and the amount that should have been paid at the then Board determined rate to fund the full service credit originally anticipated in the Affected PSC Contract. In the alternative and if necessary for a member to remain eligible for service retirement and/or DROP, a member/beneficiary may make a "partial purchase" of PSC by paying, with interest, the difference between the amount paid at the "old" rate and the amount that should have been paid at the then Board determined rate to fund sufficient service credit in the Affected PSC contract to retain such eligibility; provided, however, that corresponding adjustments are made to any past and future retirement allowances, contributions, and interest. Payments due under this option may be made by lump sum or through a payment plan, including without limitation an after-tax payroll deduction, whose duration is not to exceed the amount of time to be purchased and will carry additional interest.

Option 5 (DROP): To the extent that a member with an Affected PSC Contract entered into DROP prior to the adoption of this Rule, SDCERS will permit the

DROP election to be rescinded or reformed, to the extent legally permissible and, if applicable, subject to the member's employer's agreement. The member may then elect one of the above correction options.

- 3) **Timeline and Default Board Action:** If, within sixty (60) days of SDCERS providing written Notice of Options Re Purchase of Service Credit Corrections by certified mail of the above five options, any member/beneficiary does not voluntarily select one of the five options, then SDCERS will make a reasonable effort to contact that individual directly to determine whether the member has made a decision. If within ninety (90) days of SDCERS providing the original Notice SDCERS is unable to contact the individual or if the member does not voluntarily select an option, and if the Board, in its sole and exclusive authority, does not extend the time period for individual's response based upon circumstances that may be presented to it by staff, then SDCERS will implement Option 1 above as to the member/beneficiary.