Metropolitan Cases

***AFSCME Local 1902 v. Metropolitan* (MOU Hearing Officer Appeal)**

On October 24, 2009, Hearing Officer Jonathon S. Monat issued his decision in response to an appeal of Metropolitan's denial of two consolidated grievances. The AFSCME grievances challenged the outcome of two internal job audits. The job audits, performed by Human Resources staff, concluded that two employees should remain classified as Senior Administrative Analysts. At the hearing, AFSCME failed to meet its burden of establishing a violation of the AFSCME MOU. Accordingly, Mr. Monat upheld Metropolitan's denial of the grievances, and in so doing determined the grievants have been correctly classified as Senior Administrative Analysts for the relevant time period. The Legal Department represented Metropolitan in this matter.

***Metropolitan v. AFSCME Local 1902* (Los Angeles Superior Court)**

As reported earlier this year, Hearing Officer Bonnie Prouty Castrey issued a decision on July 4, 2009, granting the grievances of several System Operators who maintained that over time their duties expanded to the point where they performed a majority of the significant duties of the Assistant Chief System Operator and/or Chief System Operator. With her ruling, Ms. Castrey overturned job audits and reevaluations conducted by Human Resources in 2000 and 2006, which determined the System Operators have been appropriately classified. The parties engaged in discussions concerning how Ms. Castrey's decision can be implemented, but an agreement could not be reached. On October 2, Metropolitan filed with the superior court a petition for writ of administrative mandamus challenging certain aspects of Ms. Castrey's decision. The petition alleges: (1) that certain of Ms. Castrey's findings are not supported by substantial evidence; (2) that the decision is not supported by the findings; and (3) the remedy awarded usurps management's prerogative on administering promotions. (See General Counsel's July 2009 Activity Report)

***Jena Minor v. Metropolitan* (Los Angeles County Superior Court)**

On June 23, 2009, Metropolitan employee Jena Minor filed a complaint in Los Angeles County Superior Court against Metropolitan. Plaintiff alleged one cause of action: unlawful retaliation in violation of the Fair Employment and Housing Act (FEHA) for having engaged in the protected activity of complaining about gender and race discrimination and sexual harassment, and for having complained about retaliation. Plaintiff served the summons and complaint on Metropolitan effective August 26, 2009. Metropolitan's Legal Department is providing legal representation for Metropolitan in the case, and the Legal Department has retained an outside investigator who is investigating the allegations. On September 1, 2009, Metropolitan served requests for production of documents to plaintiff. On September 25, 2009, Metropolitan filed its answer containing a general denial and affirmative defenses. Plaintiff did not respond to the requests for production of documents, resulting in a waiver of all objections including privilege. At plaintiff's request (apparently due to the waiver), the court dismissed the action without prejudice on October 16, 2009. Metropolitan expects plaintiff to refile the action. (See General Counsel's June, July and August 2009 Activity Reports)

***Andrew James Ellsworth, Jr. v. Metropolitan, et al.* (Los Angeles County Superior Court)**

On September 8, 2009, Metropolitan employee Andrew Ellsworth filed a complaint in Los Angeles County Superior Court against Metropolitan and four employees. Plaintiff alleged eight causes of action: discrimination based on race, national origin, ancestry, and age in violation of FEHA; wrongful failure to promote in violation of public policy; harassment based on race, national origin, ancestry, and age in violation of FEHA; retaliation for opposing discrimination and harassment in violation of FEHA; disability discrimination and failure to accommodate in violation of FEHA; failure to engage in the interactive process in violation of FEHA; failure to prevent harassment, discrimination, and retaliation in violation of FEHA; and defamation. All causes of action are asserted

against Metropolitan, and the harassment and defamation causes of action are also asserted against the individual defendants. Plaintiff served the summons and complaint on Metropolitan on October 5, 2009. Plaintiff served the summons and complaint on each individual defendant between October 2 and 23, 2009. Metropolitan's Legal Department is providing legal representation for all defendants in the case, and the Legal Department has retained an outside investigator who is investigating the allegations. The Legal Department will file each defendant's response to the complaint within 30 days of service. The first Case Management Conference is scheduled for January 6, 2010. (See General Counsel's September 2009 Activity Report)

***Colorado River QSA Coordinated Cases* (Sacramento Superior Court)**

As previously reported, the parties filed numerous dispositive motions aimed at limiting the scope of trial, all but one of which were denied on procedural grounds. One party, Cuatro del Mar, subsequently petitioned the Court of Appeal to review the denial of its motion, which related to the constitutionality of certain funding commitments made by the State, but that appeal was summarily rejected. As a result, over 100 issues remain to be tried during Phase 1 of this litigation, which consists of three sub-phases: Phase 1A addresses the validity of the Quantification Settlement Agreement (QSA) and its related agreements; Phase 1B addresses CEQA claims related to the QSA Programmatic Environmental Impact Report (EIR); Phase 1C addresses CEQA claims related to the IID Transfer Project EIR. On September 28, the parties filed opening trial briefs for each of these sub-phases; opposition trial briefs were filed on October 29.

Several parties opposing the QSA have indicated that they intend to call live witnesses and rely on other extra-record documents at trial. Twelve persons have been identified as potential witnesses, including two former Metropolitan employees (Ron Gastelum and Adan Ortega). Metropolitan, Coachella Valley Water District, Imperial Irrigation District, San Diego County Water Authority, and the State all believe that the introduction of such evidence is entirely improper and have filed various motions aimed at precluding its use. A hearing on those motions is scheduled for October 4. The current schedule for trial is as follows: Phase 1A is scheduled to start on November 9 and conclude by December 2; Phase 1B is scheduled for December 14 through 18; and Phase 1C is scheduled to start on January 4, 2010 and conclude by January 26, 2010. Any remaining unresolved claims or issues will be tried in subsequent phases, which have not yet been scheduled. (See General Counsel's September 2009 Monthly Activity Report)

Matters Involving Metropolitan

***Central Delta Water Agency, et al. v. Department of Water Resources* (Case No. 34-2009-80000269, Sacramento County Superior Court)**

This state lawsuit challenged the process for developing of the Bay Delta Conservation Plan (BDCP). This case is related to a federal case, *Central Delta Water Agency v. United States Fish and Wildlife Service*, involving the same subject matter. After the federal court's dismissal of the related case because such a challenge was determined to be premature, or "unripe," the petitioners voluntarily dismissed their state case. (See General Counsel's August 2009 Activity Report)

***Central Delta Water Agency, et. al. v. Department of Water Resources* (Case No. 34-2009-80000354, Sacramento County Superior Court)**

After dismissing their direct challenge to the BDCP process discussed above, the Central Delta Water Agency filed a new lawsuit. This new challenge is to the environmental compliance document for the Department of Water Resources' in-water drilling project. The results of this drilling project will provide information that will be used in the engineering and environmental studies for the development of the dual conveyance facilities, which are part of the BDCP. This challenge is nearly identical to the RD 999 case, see below.

Reclamation District 999 v. California Department of Water Resources (Case No. 34-2009-80000343, Sacramento County Superior Court)

This case is a challenge to the Department of Water Resources' ("DWR") compliance with the requirements of CEQA for its in-water drilling project. The results of this test drilling project will be used in the future engineering and environmental studies for the development of the dual conveyance facilities, which are part of the BDCP. The petitioners, RD 999, filed an application for a temporary restraining order, and a hearing was held before Judge Connelly. The court denied the temporary restraining order because RD 999 was not likely to succeed on the merits of their CEQA claim and there was little evidence of potential irreparable injury to the fishery. The drilling activities will continue throughout October, at which time the drilling project may be complete or there may be additional drilling in 2010.

North American Green Sturgeon Critical Habitat Critical Habit Designation

The National Marine Fisheries Service (NMFS) issued its final rule designating critical habitat for the southern population of the North American green sturgeon on October 9, 2009. The green sturgeon was designated as a threatened species in April 2006, and under the Federal Endangered Species Act (FESA), NMFS was required to designate critical habitat for the species. The habitat designated as critical for the sturgeon includes a portion of the lower Feather River, the Sacramento River to Keswick Dam and the Delta waterways, specifically excluding Clifton Court and the California Aqueduct Intake Channel. Designation of critical habitat can result in additional consultation responsibilities under FESA. However, NMFS already has issued a "Section 4(d)" rule applying the FESA "take" prohibitions to the green sturgeon and the species was included in the consultations leading to the NMFS biological opinion (also dealing with salmon and steelhead) providing the SWP with incidental take authorization. Existing restrictions on project operations in those biological opinions will protect the green sturgeon and it is unclear whether additional restrictions will result from the biological opinion. Metropolitan staff and other state water contractors will continue to monitor and participate in any additional activities, especially with respect to operations on the Feather River, to protect SWP operations and supplies.

DVL Hydroelectric Facility FERC Determination

On October 8, 2009, Metropolitan filed an application with the Federal Energy Regulatory Commission (FERC), requesting permission to reduce the installed capacity at the Diamond Valley Lake (DVL) hydroelectric facility from 39.6 MW to 29.7 MW. The reduction is designed to qualify the DVL units as renewable energy resources (i.e., small hydro) under California law. The FERC granted Metropolitan's application on October 16, 2009, enabling the disconnection work to occur during planned maintenance. The capacity reduction will entail the disconnection of three of the 12 pumping units and will enable Metropolitan to either count the units under any state or federal renewable resource procurement requirements or market the environmental attributes of the units as Renewable Energy Credits.

Cases to Watch

***Lexin v. The Superior Court of San Diego County* (California Supreme Court)**

We have periodically reported on a court of appeal case having the potential to fundamentally change the collective bargaining process for public agencies in California. That case, *Lexin v. Superior Court*, is under consideration by the California Supreme Court. Currently, the case is fully briefed and is scheduled for oral argument on November 4 in San Francisco. The Supreme Court typically issues a written decision within 90 days of oral argument.

Lexin arose out of the conduct of the San Diego City Employees' Retirement System Board of Administration to approve an increase in pension benefits for city employees while, at the same time, allowing the pension fund to become underfunded. The local district attorney criminally prosecuted certain members of the board, based on alleged violations of Government Code section 1090.

Section 1090 prohibits a public official or employee from participating in a decision in which the official or employee has a financial interest. In *Lexin*, the district attorney argued the board members who

are public employees have an indirect financial interest in the decision to increase the pension benefits because they are members of the bargaining units that would be affected by the change to the benefits. The board members argued in response that their decision fell within the salary exception to section 1090, which provides that participating in a decision affecting the official's or employee's own salary does not constitute a 1090 violation. The court of appeal did agree that pension benefits are part of an employee's salary for purposes of the salary exception. That court noted, however, that the salary exception contained its own exception where the decision "directly involves the department of the government entity that employs the officer or employee." In a case of first impression, the court of appeal found that a salary or benefit increase that goes to the entire work force still directly involves the officer's or the employee's department because that department would get the enhancement along with everyone else.

Prior to *Lexin*, the universal interpretation has been that "directly" means solely or exclusively. So, unless the benefit was going exclusively to elected officials or management, they could participate in contract negotiations with employee organizations. This has allowed elected officials and management to negotiate labor agreements even though they receive some of the same benefits. For example, typically pension plans require all agency employees, including management, to belong to the same plan.

A number of associations representing public agencies, including the League of California Cities, the California State Association of Counties, the Association of California Water Agencies and the California Special Districts Association, filed amicus briefs urging the Supreme Court to reverse the court of appeal's holding limiting the salary exception.