



Metropolitan Cases

Supervisors Association, et al. v. Metropolitan (MOU Hearing Officer Appeal)

On January 21, 2010, Hearing Officer Robert Bergeson issued his decision in response to an appeal filed by the Supervisors Association and a former Team Manager, challenging the Team Manager's discharge from employment. Mr. Bergeson sustained the discharge. Mr. Bergeson found that Metropolitan met its burden of proof that the Team Manager had engaged in two incidents of failing to follow a work order and one incident of dishonesty, after earlier discipline for misconduct. Mr. Bergeson concluded that "[g]iven such a pattern of misconduct, the District was clearly within its rights to impose a discharge here." The decision followed several days of hearings with 12 witnesses, over 50 exhibits, and extensive legal briefing.

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

On February 1, 2010, the Los Angeles County Superior Court sustained defendant Metropolitan's demurrer to plaintiff Andrew Ellsworth's second cause of action, for wrongful failure to promote in violation of public policy, without leave to amend. On that date, the court also granted plaintiff's motion for leave to supplement the complaint to assert additional allegations, which defendants had not opposed. Plaintiff, a Metropolitan employee, filed his complaint against Metropolitan and four employees on September 8, 2009. Plaintiff alleged eight causes of action: discrimination based on race, national origin, ancestry, and age in violation of the Fair Employment and Housing Act (FEHA); wrongful failure to promote; 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. Metropolitan's Legal Department is providing legal representation for all defendants, and it has retained an outside investigator who is investigating the allegations. (See General Counsel's October and December 2009 Activity Reports)

Foxfire Constructors, Inc. v. W.A. Rasic Construction Company (Orange County Superior Court)

On January 27, 2010, Metropolitan was served with a cross-complaint in *Foxfire Constructors, Inc. v. W.A. Rasic Construction Company*. Rasic was the prime contractor for Metropolitan's Perris Valley Pipeline – North (PVP-N) construction project. Rasic has been sued by their tunneling subcontractor, Foxfire, for failure to pay. Rasic has filed a cross-complaint against Foxfire alleging that Foxfire is responsible for the delays in completion of the work and against Metropolitan, alleging that Metropolitan's specifications were defective, Metropolitan has breached the contract by failure to pay contract costs as well as for extra work, that Metropolitan has illegally withheld liquidated damages and disrupted and delayed the contractor. Contract completion was over a year late and Metropolitan is currently holding approximately \$3 million in liquidated damages. The cross-complaint seeks the release of the liquidated damages and over \$8 million in additional damages. The initial status conference is set for February 18. A member of the Legal Department with three members of the project staff interviewed several law firms and have selected the law firm of Theodora Oringer Miller & Richman PC to assist Metropolitan in this matter.

Matters Involving Metropolitan

State Water Resources Control Board Flow Criteria Proceeding

On January 7, 2010, SWRCB began its "public informational proceeding" to develop flow criteria

for the Bay-Delta ecosystem. The proceeding is required by SB7X-1, the "Sacramento-San Joaquin Delta Reform Act of 2009" enacted as part of the recent Delta legislative package. That legislation



directed SWRCB to establish new flow criteria to protect public trust uses in the Delta ecosystem by August 2010. The purpose of the new criteria is to inform planning decisions for the new Delta Plan to be developed under the legislation and the Bay Delta Conservation Plan. The January 7 meeting was a pre-proceeding conference to discuss the procedures to be followed in the hearings (scheduled for March 22 through March 24, 2010) in which SWRCB will receive testimony and evidence to support the new criteria. MWD staff is working with other state water contractors and federal export contractors on developing testimony and evidence that must be submitted to SWRCB February 15, 2010 for consideration in the March hearings.

Delta Smelt and Salmon Biological Opinions Litigation (*Metropolitan v. United States Fish and Wildlife Service; United States Bureau of Reclamation and California Department of Water Resources real parties in interest; San Luis & Delta Mendota Water Authority v. Salazar; State Water Contractors v. Salazar; Coalition for a Sustainable Delta v. U.S.F.W.S.; MWD v. U.S.F.W.S. and State Water Contractors v. Locke, et al; Kern County Water Agency, et al. v. Gary Locke, et al.*) (U.S. District Courts, Eastern District of California)

Judge Wanger will hold a hearing on February 2, 2010 on the motion for a temporary restraining order (TRO) in both the Delta smelt and salmon biological opinion cases. The TRO seeks to relax restrictions on Old and Middle River (OMR) reverse flows during the spring. OMR reverse

flows directly limit the amount of water that can be exported by the projects.

Judge Wanger also released to the parties a list of draft questions that he would like his court-appointed experts to address in the Delta smelt BiOp cases. The judge will entertain comments from the parties on his draft questions, and he may schedule a hearing to resolve objections to his questions. The judge's draft questions show a detailed understanding of the issues and arguments that have been made in the case. A hearing on a preliminary injunction in the Delta smelt BiOp cases is now tentatively set for March 31, April 1 and April 2, 2010. A hearing on cross-motions for summary judgment is set for April 28-29, 2010. (See General Counsel's August 2009 Monthly Activity Report)

NRC Proceeding on the Delta Smelt and Salmon Biological Opinions

A panel of the National Research Council (NRC) of the National Academy of Sciences held hearings at U.C. Davis on January 24-28, 2008 in connection with NRC review of the reasonable and prudent alternatives (RPAs) in the Delta smelt and salmon biological opinions. Metropolitan's expert witness, Dr. Deriso, gave a presentation to the NRC on his analysis of the scientific flaws in the Delta smelt biological opinion. Because of his current health limitations, Dr. Deriso gave his presentation via video-conference link. David Fullerton of Metropolitan's staff also gave a presentation to the NRC panel.

Cases to Watch

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

We have periodically reported on a case having the potential to fundamentally change the collective bargaining process for public agencies in California. The Supreme Court issued its decision in that case, *Lexin v. Superior Court*, on January 25, 2009. *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 conflict of interest 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 as long as the benefits in question are given to all employees. In a unanimous ruling, the Supreme Court agreed with the board members and dismissed the criminal charges against five of six defendants. With respect to the sixth defendant, the court noted that the City Council had approved a pension benefit that “uniquely applied to him” as the incumbent president of the firefighter’s union, allowing him to make pension contributions based on both his union and city salaries. Because of his unique situation, the court determined that he did not fall within the salary exception to section 1090, and

thus his criminal prosecution may continue. 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 successfully urging the Supreme Court to recognize the salary exception contained in section 1090. In light of this outcome, bargaining teams may continue to be staffed by employees of a public agency who qualify for the salary exception to section 1090. (See General Counsel’s October 2009 Monthly Activity Report)

Items of Interest

Administrative

A continuing legal education workshop was provided for staff on Testimony and Technology that covered the use of video depositions, internet streaming for depositions, and other new litigation support technology and tools.