

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE MANDATE REDETERMINATION:
SECOND HEARING: NEW TEST CLAIM
DECISION FOR:

Public Resources Code Section 5164(b)(1) and
(b)(2);

As amended by Statutes 2001, Chapter 777

*Local Recreational Areas: Background
Screenings, 01-TC-11*

As Alleged to be Modified by:

Statutes 2010, Chapter 719 (SB 856)

Filed on May 20, 2013

By the Department of Finance, Requester.

Case No.: 12-MR-02

*Local Recreational Areas: Background
Screenings, (01-TC-11)*

STATEMENT OF DECISION
PURSUANT TO GOVERNMENT
CODE SECTION 17500, ET SEQ.;
CALIFORNIA CODE OF
REGULATIONS, TITLE 2, DIVISION
2, CHAPTER 2.5, ARTICLE 7.

(Adopted January 24, 2014)

(Served January 30, 2014)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this mandate redetermination during a regularly scheduled hearing on January 24, 2014. Michael Byrne and Susan Geanacou appeared for the Department of Finance.

Government Code section 17570 and section 1190 et seq. of the Commission's regulations establish the mandate redetermination process. In addition, the law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., title 2, California Code of Regulations 1181 et seq., and related case law.

The Commission adopted the proposed decision as its new test claim decision, granting the request for redetermination and approving the request to end reimbursement for the test claim activities by a vote of 7 to 0.

Summary of the Findings

The Commission finds the state's liability pursuant to article XIII B, section 6(a) of the California Constitution, for the *Local Recreational Areas: Background Screenings, 01-TC-11* mandate has been modified based on a subsequent change in law, and that a new test claim decision must be adopted to supersede the previously adopted test claim decision. Specifically, Statutes 2010, chapter 719 (SB 856) provided local agencies with the authority to charge a fee on

prospective employees or volunteers to cover all costs attributable to the mandated background check activities under Public Resources Code section 5164, and Government Code section 17556(d) proscribes a finding of costs mandated by the state where the local government has fee authority sufficient to cover the costs of the mandate. Pursuant to Government Code section 17570, the Commission approves the request for redetermination and concludes that the *Local Recreational Areas: Background Screenings*, 01-TC-11 program does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17556(d), beginning July 1, 2011.

COMMISSION FINDINGS

Chronology

12/09/2005	The Commission adopted the test claim statement of decision for <i>Local Recreational Areas: Background Screenings</i> , 01-TC-11. ¹
06/26/2008	The Commission adopted parameters and guidelines. ²
10/19/2010	The Legislature enacted SB 856, which added subdivision (b)(3) to Public Resources Code section 5164, providing for fee authority. ³
05/20/2013	The Department of Finance filed a request for redetermination on test claim 01-TC-11. ⁴
05/29/2013	Commission staff deemed the filing complete.
09/17/2013	Staff issued a draft staff analysis and proposed statement of decision for the first hearing. ⁵
09/30/2013	The State Controller's Office (SCO) submitted written comments on the draft staff analysis for the first hearing. ⁶
10/08/2013	The Department of Finance (Finance) submitted written comments on the draft staff analysis for the first hearing. ⁷
12/06/2013	The Commission heard and decided at the first hearing on the request for redetermination that Finance made an adequate showing. ⁸

¹ Exhibit B, Test Claim Statement of Decision.

² Exhibit C, Parameters and Guidelines.

³ See Exhibit A, Request for Redetermination.

⁴ Exhibit A, Request for Redetermination.

⁵ Exhibit D, Draft Staff Analysis, First Hearing.

⁶ Exhibit E, SCO Comments on Draft Staff Analysis, First Hearing.

⁷ Exhibit F, Finance Comments on Draft Staff Analysis, First Hearing.

⁸ Exhibit G, Adopted Statement of Decision, First Hearing.

- 12/16/2013 Commission staff issued a draft staff analysis for the second hearing, and draft expedited parameters and guidelines.⁹
- 1/06/2014 The SCO submitted comments on the draft staff analysis and draft expedited parameters and guidelines.¹⁰

I. Background

Public Resources Code Section 5164 and Test Claim Decision

Public Resources Code section 5164 was enacted in 1993 (Stats. 1993, ch. 972) to prohibit a city, county or special district from hiring a volunteer or employee for positions having supervisory or disciplinary authority over any minor at specified local agency recreational areas if the employee or volunteer has been convicted of specified crimes. Section 5164 was enacted because of a volunteer coach's 1992 conviction for kidnapping and molesting a boy who was coached at Hoover Recreation Center in Los Angeles County. The coach was a registered sex offender whose background had not been inquired about by the recreation center.¹¹ The test claim statute at issue in 01-TC-11 (Stats. 2001, ch. 777, (AB 351))¹² amended Public Resources Code section 5164 to provide that a city, county, city and county, or special district, shall not hire a person for employment, or take on a volunteer, in a position having supervisory or disciplinary authority over any minor if that person has been convicted of any offense specified in Penal Code section 11105.3(h)(1) or (h)(3). Statutes 2001, chapter 777 (AB 351) further provides that the city, county, or special district shall require each prospective employee or volunteer to complete an application inquiring whether the individual has been convicted of any offense specified, and shall screen any such prospective employee or volunteer for that person's criminal background, including obtaining fingerprints and a Department of Justice record. Penal Code section 11105.3(h)(3), (now Pub. Res. Code, § 5164(a)(2))¹³ listed a number of crimes for which to screen prospective employees or volunteers who would have supervisory or disciplinary authority over minors, including, but not limited to, a number of permutations of assault crimes, sexual assault, sexual battery, unlawful sexual intercourse with a person under 18, corporal punishment or injury of a child, willful infliction of corporal injury, registerable sex offenses under section 290, or any other felony or misdemeanor conviction within 10 years of the

⁹ Exhibit H, Draft Staff Analysis and Proposed Statement of Decision; Exhibit I Draft Expedited Parameters and Guidelines.

¹⁰ Exhibit J, SCO Comments on Draft Staff Analysis and Draft Expedited Parameters and Guidelines.

¹¹ Assembly Committee on Local Government, Analysis of Assembly Bill 1663, as amended April 12, 1993 (1993-1994 Reg. Sess.), page 2.

¹² Section 5164 has been amended since the test claim filing by Statutes 2004, chapter 184, but the amendments are not part of this analysis.

¹³ Former Penal Code section 11105.3(h)(3), was amended by Statutes 2004, chapter 184, and moved to Public Resources Code section 5164(a)(2).

prospective employer's request if the person has a total of three or more misdemeanor or felony convictions within the immediately preceding 10 year period.¹⁴

The Commission found that the test claim statute imposed a reimbursable state-mandated program on local government for the following activities:

- Requiring each local agency to have each prospective employee or volunteer who would have supervisory or disciplinary authority over minors to complete an application that inquires as to whether or not the prospective employee or volunteer has been convicted of any offense specified in Public Resources Code section 5164(a). (Pub. Res. Code, § 5164, subd. (b)(1)). This means that local agencies must perform the one-time activity of revising and printing job applications that inquire as to the applicants' criminal history.
- Screening, pursuant to Penal Code section 11105.3, prospective employees and volunteers who would have supervisory or disciplinary authority over minors. The screening procedure for these individuals requires submitting the following to DOJ: (1) the prospective employee's or volunteer's fingerprints, (2) any other data specified by DOJ on a DOJ-approved form, (3) for prospective employees only, paying the DOJ's fingerprint processing fee (no fee is required for a prospective volunteer).¹⁵ (Pub. Res. Code, § 5164, subds. (b)(1) & (b)(2)).

The Commission further found that fingerprints "may be taken by the local agency," and if taken by the local agency, the agency "may charge a fee not to exceed \$10," and other entities may charge more. The Commission therefore concluded that taking fingerprints was permissive, and therefore not reimbursable.¹⁶

Mandate Redetermination Process Under Section 17570

Government Code section 17570 provides a process whereby a test claim decision may be redetermined and superseded by a new test claim decision if a subsequent change in law, as defined, has altered the state's liability for reimbursement. The redetermination process calls for a two-step hearing process; at the first hearing, the requester must make "an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior the claim decision, that may modify the state's liability pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution."¹⁷ At the second hearing, the Commission "shall consider whether the state's liability pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution has been modified based on the subsequent change in law alleged by the requester."¹⁸

¹⁴ Exhibit B, Test Claim Statement of Decision, at pp. 2-4.

¹⁵ Public Resources Code section 5164(b)(2).

¹⁶ Exhibit B, Test Claim Statement of Decision, at p. 7 [citing Penal Code section 13300].

¹⁷ Code of Regulations, Title 2, section 1190.05(a)(1).

¹⁸ Code of Regulations, Title 2, section 1190.05(b).

A subsequent change in law is defined in section 17570 as follows:

[A] change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law, except that a “subsequent change in law” does not include the amendments to Section 6 of Article XIII B of the California Constitution that were approved by the voters on November 2, 2004. A “subsequent change in law” also does not include a change in the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of Section 17551.¹⁹

If the Commission finds, at the second hearing, that the state’s liability has been modified based on a subsequent change in law, “it shall adopt a new statement of decision that reflects the modified liability of the state.”²⁰ If the Commission adopts a new test claim decision that supersedes the previously adopted test claim decision, the Commission “shall adopt new parameters and guidelines or amend existing parameters and guidelines...pursuant to Section 17557.”²¹

II. Position of the Department of Finance, Requester²²

Finance asserts that Statutes 2010, chapter 719 (SB 856) constitutes a subsequent change in the law, as defined in section 17570, which, when analyzed in light of section 17556, results in the state’s liability under the test claim statutes being modified. Finance argues that “local agencies may charge a fee to cover all of their costs attributable to the mandated activities in Public Resources Code section 5164,” and that therefore the state is no longer obligated to reimburse any costs for the mandated activities, pursuant to Government Code sections 17570 and 17556(d).²³

On October 8, 2013, Finance submitted comments on the draft staff analysis and proposed statement of decision for the first hearing, concurring with the recommendation to adopt the proposed statement of decision and proceed to a second hearing to determine whether to adopt a new test claim decision.²⁴ Finance did not comment on the draft staff analysis or draft expedited parameters and guidelines issued for the second hearing.²⁵

¹⁹ Government Code section 17570, as added by Statutes 2010, chapter 719 (SB 856).

²⁰ Code of Regulations, Title 2, section 1190.05(b)(1).

²¹ Government Code section 17570(i) (Stats. 2010, chapter 719 (SB 856)).

²² No other parties, or interested parties or persons have filed comments on this request for redetermination.

²³ Exhibit A, Request for Redetermination, at p. 6.

²⁴ Exhibit F, Finance Comments on Draft Staff Analysis, First Hearing.

²⁵ The SCO filed comments on the draft staff analysis and draft expedited parameters and guidelines, in which the SCO concurred with Commission staff’s recommendations. (See Exhibit J, SCO Comments, dated January 6, 2014.)

III. Discussion

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the increased costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a successful test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.²⁶ The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.²⁷ In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”²⁸

Under Government Code section 17570, upon request, the Commission may consider the adoption of a new test claim decision to supersede a prior test claim decision based on a subsequent change in law which modifies the state’s liability. If the Commission adopts a new test claim decision that supersedes the previously adopted test claim decision, the Commission is required to adopt new parameters and guidelines or amend existing parameters and guidelines.

A. Statutes 2010, Chapter 719 Constitutes a Subsequent Change in Law.

On December 9, 2005, the Commission adopted a test claim decision in *Local Recreational Areas: Background Screenings*, 01-TC-11, finding reimbursable state-mandated activities imposed by Public Resources Code section 5164, as amended by Statutes 2001, chapter 777 (AB 351). On June 26, 2008, the Commission adopted parameters and guidelines for reimbursement of claims under the statute, which outlined the reimbursable activities as follows:

1. Have each prospective employee or volunteer who would have supervisory or disciplinary authority over minors to complete an application that inquires as to whether or not the prospective employee or volunteer has been convicted of any offense specified in Public Resources Code section 5164(a). (Pub. Res. Code, § 5164(b)(1)). This is a one-time activity of revising and printing job applications that inquire as to the applicants’ criminal history.

²⁶ *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487; Government Code sections 17551; 17552.

²⁷ *County of San Diego v. State of California*, (1997) 15 Cal.4th 68, 109.

²⁸ *County of Sonoma v. Commission on State Mandates*, (2000) 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

2. Screening, pursuant to Penal Code section 11105.3, prospective employees and volunteers who would have supervisory or disciplinary authority over minors. The screening procedure for these individuals requires submitting the following to the Department of Justice (DOJ): (1) the prospective employee's or volunteer's fingerprints, (2) any other data specified by DOJ on a DOJ-approved form, (3) for prospective employees only, paying the DOJ's fingerprint processing fee (no fee is required for a prospective volunteer). (Pub. Res. Code, § 5164(b)(1) & (b)(2)).

The Commission found that the following activities are not reimbursable:

- Taking fingerprints.
- Paying DOJ's fingerprint processing fee for a prospective volunteer.²⁹

Paragraph (25) of the Legislative Counsel's Digest accompanying Statutes 2010, chapter 719 (SB 856) states:

Existing law prohibits a county, city, city and county, or special district from hiring a person for employment or a volunteer to perform services, at a county, city, city and county, or special district operated park, playground, recreational center, or beach used for recreational purposes, in a position having supervisory or disciplinary authority over a minor, if that person has been convicted of specified offenses. Existing law requires a county, city, city and county, or special district to require each of those prospective employees and volunteers to complete an application that inquires as to whether that person has been convicted of one of those offenses, and imposes a screening requirement on the county, city, city and county, or special district with respect to those prospective employees and volunteers.

This bill would authorize a county, city, city and county, or special district to charge those prospective employees and volunteers a fee *to cover all of the county, city, city and county, or special district's costs attributable to those requirements.*³⁰

Statutes 2010, chapter 719 (SB 856), effective October 19, 2010, added subdivision (b)(3) to Public Resources Code section 5164. The amended section now provides:

(a)(1) A county, city, city and county, or special district shall not hire a person for employment, or hire a volunteer to perform services, at a county, city, city and county, or special district operated park, playground, recreational center, or beach used for recreational purposes, in a position having supervisory or disciplinary authority over a minor, if that person has been convicted of an offense specified in paragraph (2).

¶...¶

²⁹ Exhibit C, Parameters and Guidelines, 01-TC-11, at p. 1.

³⁰ Statutes 2010, chapter 719 (SB 856) Legislative Counsel's Digest, paragraph (25) [uncodified].

(b)(1) To give effect to this section, a county, city, city and county, or special district shall require each such prospective employee or volunteer to complete an application that inquires as to whether or not that individual has been convicted of an offense specified in subdivision (a). The county, city, city and county, or special district shall screen, pursuant to Section 11105.3 of the Penal Code, any such prospective employee or volunteer, having supervisory or disciplinary authority over a minor, for that person's criminal background.

(2) A local agency request for Department of Justice records pursuant to this subdivision shall include the prospective employee's or volunteer's fingerprints, which may be taken by the local agency, and any other data specified by the Department of Justice. The request shall be made on a form approved by the Department of Justice. A fee shall not be charged to the local agency for requesting the records of a prospective volunteer pursuant to this subdivision.

(3) A county, city, city and county, or special district may charge a prospective employee or volunteer described in subdivision (a) a fee to cover all of the county, city, city and county, or special district's costs attributable to the requirements imposed by this section.³¹

Finance argues that the “2010 amendment to the Public Resources Code section 5164 is the “subsequent change in law” that allows the Commission to make a new test claim finding that the cost of the mandated program is not a cost mandated by the state.” Finance maintains that “[a]s a result of the subsequent change in law, local agencies may charge a fee to cover all of their costs attributable to the mandated activities in Public Resources Code section 5164.”³²

B. Section 17556(d) is Not Self-Executing, But Requires Commission Action Pursuant to Section 17570, Where a Commission Decision on the Test Claim Statutes Has Been Previously Adopted.

Government Code section 17556(d) provides that the Commission “shall not find costs mandated by the state, as defined in Section 17514” if the Commission finds that “the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.” The California Supreme Court upheld the constitutionality of Government Code section 17556(d), in *County of Fresno v. State of California*.³³ The court, in holding that the term “costs” in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the

³¹ Public Resources Code section 5164 (as amended by Stats. 2010, ch. 719 (SB 856)).

³² Exhibit A, Request for Redetermination, at p. 6.

³³ *County of Fresno v. State of California, supra*, 53 Cal.3d 482.

task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the “state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,” read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.³⁴

Accordingly, in *Connell v. Superior Court of Sacramento County*,³⁵ the Santa Margarita Water District, among others, was denied reimbursement on the basis of its authority to impose fees on water users. The water districts submitted evidence “that rates necessary to cover the increased costs [of pollution control regulations] would render the reclaimed water unmarketable and would encourage users to switch to potable water.”³⁶ The court concluded that “[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs.” Water Code section 35470 authorized the levy of fees to “correspond to the cost and value of the service,” and “to defray the ordinary operation or maintenance expenses of the district and for any other lawful district purpose.”³⁷ The court held that the districts had not demonstrated “that anything in Water Code section 35470 limits the authority of the Districts to levy fees “sufficient” to cover their costs,” and that therefore “the economic evidence presented by SMWD to the Board [of Control] was irrelevant and injected improper factual questions into the inquiry.”³⁸

Likewise, in *Clovis Unified School District v. Chiang*, the court found that the Controller’s office was not acting in excess of its authority in reducing reimbursement claims to the full extent of the districts’ authority to impose fees, even if there existed practical impediments to collecting the fees. In making its decision the court noted that the concept underlying the state mandates process that Government Code sections 17514 and 17556(d) embody is that “[t]o the extent a local agency or school district ‘has the authority’ to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost.”³⁹ The court further noted that, “this basic principle flows from common sense as well. As the Controller succinctly puts it, ‘Claimants can choose not to require these fees, but not at the state’s expense.’”⁴⁰

³⁴ *Id.*, at p. 487.

³⁵ *Connell v. Superior Court of Sacramento County* (Cal. Ct. App. 3d Dist. 1997) 59 Cal.App.4th 382.

³⁶ *Id.*, at p. 399.

³⁷ *Ibid.*

³⁸ *Connell, supra*, (1997) 59 Cal.App.4th at p. 401.

³⁹ *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, at p. 812.

⁴⁰ *Ibid.*

The amendments effected by Statutes 2010, chapter 719, providing local government with authority to charge a fee for costs associated with screening prospective employees or volunteers, implicate a section 17556(d) analysis, and therefore the amendments constitute a subsequent change in law, as defined. Thus, the only issue is whether the fee authority is sufficient to cover the costs of the mandated activities. Here, the plain language of the fee authority provision states that it is “to cover *all of the county, city, city and county, or special district's costs attributable to the requirements imposed by this section.*” Where there is fee authority sufficient to cover the costs of the mandate under section 17556(d), the Commission is proscribed from finding costs mandated by the state, within the meaning of section 17514.

Section 17556(d) further provides that the limitation “applies regardless of whether the authority to levy charges, fees, or assessments was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued. In the context of fee authority enacted *after the test claim decision* on the subject matter has been adopted, an analysis under section 17556(d) cannot be entertained absent the redetermination process provided in section 17570. The Commission’s process is the sole and exclusive venue in which eligible claimants vindicate the reimbursement requirement of article XIII B, section 6, and the Commission’s decision on a test claim is final and binding, absent judicial review.⁴¹ A later-enacted statute providing fee authority for a mandated program cannot, of its own force, undermine the Commission’s mandate determination in a prior test claim decision. Section 17570 thus provides the mechanism for considering section 17556(d) when there is a subsequent change in law, as defined, “material to the prior test claim decision, that may modify the state’s liability” pursuant to article XIII B, section 6. Finance has utilized the process called for in section 17570 to bring this test claim statute before the Commission for redetermination, and to permit a new analysis of section 17556(d) pursuant to the subsequent change in law.

Based on the foregoing, the Commission finds that there are no costs mandated by the state, as defined in section 17514, under Public Resources Code section 5164, as amended by Statutes 2010, chapter 719 (SB 856). Section 17570 provides that a request for adoption of a new test claim decision shall be filed on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year. This request was filed on May 20, 2013, establishing eligibility beginning July 1, 2011. Therefore, the activities approved for reimbursement in the prior test claim decision are no longer reimbursable as of July 1, 2011.

IV. CONCLUSION

Based on the foregoing, the Commission approves the request for redetermination and concludes that the *Local Recreational Areas: Background Screenings, 01-TC-11* program does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17556(d), beginning July 1, 2011.

⁴¹ *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, at pp. 1199-1200.

COMMISSION ON STATE MANDATES

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**RE: Adopted Statement of Decision**

Mandate Redetermination Request, 12-MR-02

Local Recreational Areas: Background Screenings, 01-TC-11

Public Resources Code Section 5164(b)(1), (b)(2), and (b)(3) as added or amended by
Statutes 2001, Chapter 777 (AB 351); Statutes 2010, Chapter 719, (SB 856)

California Department of Finance, Requester

On January 24, 2014, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Heather Halsey".

Heather Halsey, Executive Director

Dated: January 30, 2014