

COMMISSION ON STATE MANDATES

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May 19, 2008

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Ms. Jacqueline M. Gong
County of Napa
1195 Third Street, Suite 301
Napa, CA 94559

And Affected State Agencies and Interested Parties (see enclosed mailing list)

Re: **Draft Staff Analysis and Proposed Parameters and Guidelines**
Binding Arbitration, 01-TC-07
Code of Civil Procedure, Sections 1281.1, 1299, 1299.2, 1299.3
1299.4, 1299.5, 1299.6, 1299.7, 1299.8, and 1299.9
City of Palos Verdes Estates, Claimant
County of Napa, Co-Claimant

Dear Mr. Burdick and Ms. Gong:

The draft staff analysis and proposed parameters and guidelines for the above-named program are enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by Monday, **June 2, 2008**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing on Thursday, **June 26, 2008** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about June 12, 2008. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

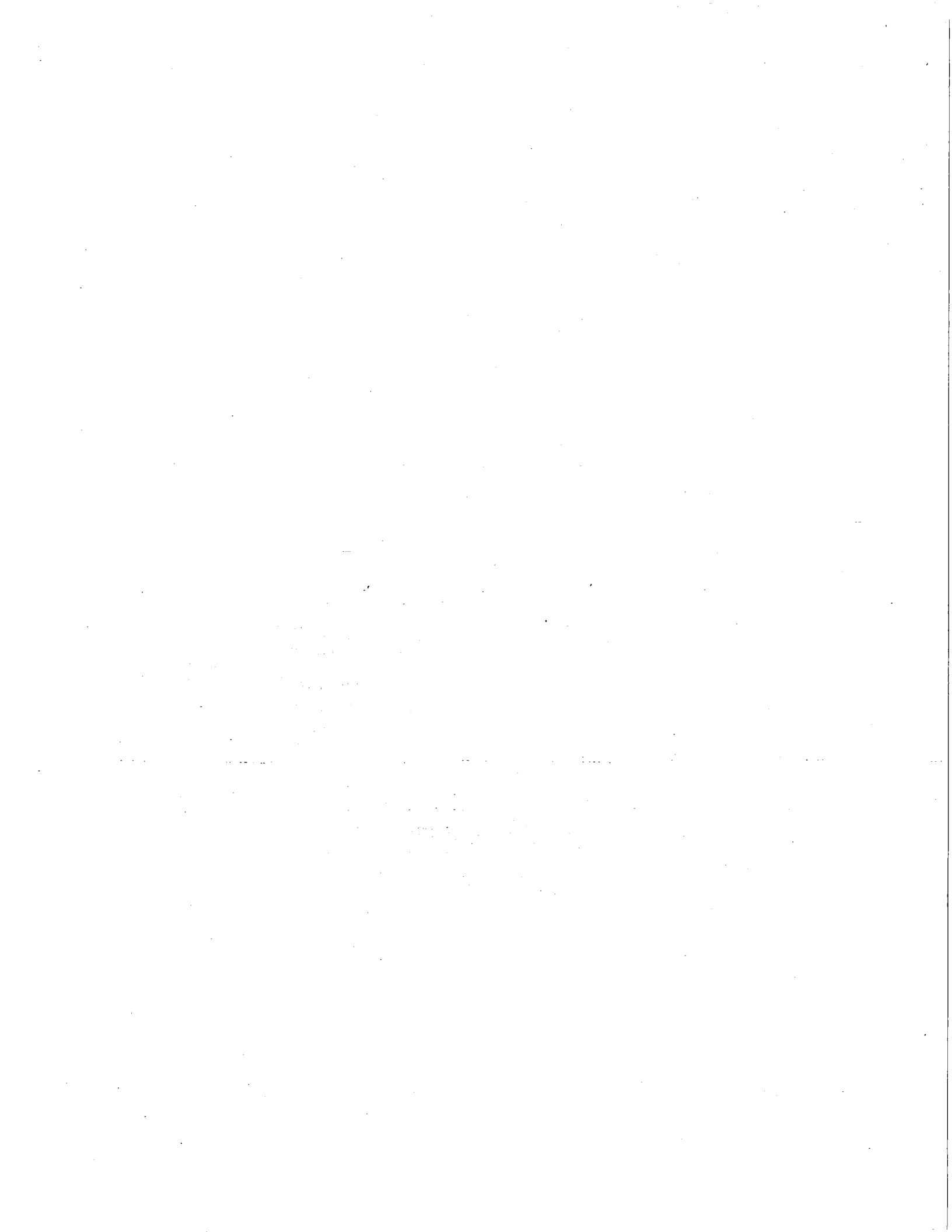
Please contact me at (916) 323-8217 if you have questions.

Sincerely,

A handwritten signature in black ink that reads "Nancy Patton".

NANCY PATTON
Assistant Executive Director

Enc. Draft Staff Analysis and Proposed Parameters and Guidelines



ITEM __
DRAFT STAFF ANALYSIS
PROPOSED PARAMETERS AND GUIDELINES,
AS MODIFIED BY STAFF

Code of Civil Procedure
Sections 1299.2, 1299.3, 1299.4, subd. (b),
1299.5, subdivision (a), 1299.6, subdivision (a),
1299.8 and 1299.9, subdivision (b)
Statutes 2000, Chapter 906

Binding Arbitration,
01-TC-07

County of Napa, Claimant

EXECUTIVE SUMMARY

Background

The test claim statutes added Title 9.5 to the Code of Civil Procedure, providing new procedures to govern the resolution of impasses reached in collective bargaining between public employers and employee organizations representing firefighters and law enforcement officers.

The statutes provided that if an impasse is declared after the parties exhaust their mutual efforts to reach agreement over matters within the scope of the negotiation, and the parties are unable to agree to the appointment of a mediator, or if a mediator agreed to by the parties has been unable to effect settlement of a dispute between the parties, the employee organization can, by written notification to the employer request that their differences be submitted to an arbitration panel.

The arbitration panel is required to meet with the parties within ten days after its establishment, or after any additional periods of time mutually agreed upon. The panel is authorized to meet with the parties, to make inquiries and investigations, hold hearings, and take any other action including further mediation, that the panel deems appropriate. Five days prior to the commencement of the arbitration panel's hearings, each of the parties is required to submit a last best offer of settlement on the disputed issues. The arbitration panel may, for purposes of its hearings, investigations, or inquiries, subpoena witnesses, administer oaths, take the testimony of any person, and issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records. Preexisting statutory provisions apply unless otherwise provided in the test claim statutes. Among other things, these general arbitration provisions provide procedures for the conduct of hearings, e.g., notice of hearings, witness lists, admissible evidence, subpoenas, and depositions.

The panel decides the disputed issues separately, or if mutually agreed, by selecting the last best offer package that most nearly complies with specified factors. The panel then delivers a copy of its decision to the parties, but the decision may not be publicly disclosed for five days. The decision is

not binding during that period, and the parties may meet privately to resolve their differences and, by mutual agreement, modify the panel's decision. At the end of the five day period, the decision as it may be modified by the parties is publicly disclosed and binding on the parties.

The test claim statutes in their entirety were declared unconstitutional by the California Supreme Court on April 21, 2003, as violating portions of article XI of the California Constitution. The basis for the decision is that the statutes (1) deprived the county of its authority to provide for the compensation of its employees as guaranteed in article XI, section 1, subdivision (b); and (2) delegate to a private body the power to interfere with local agency financial affairs and to perform a municipal function, as prohibited in article XI, section 11, subdivision (a).

Commission's Decision

On March 29, 2007, the Commission on State Mandates (Commission) reconsidered the Statement of Decision on the *Binding Arbitration* test claim, finding that the prior Statement of Decision adopted on July 28, 2006, was contrary to law. The Commission adopted a new decision and approved reimbursement for the following state-mandated activities pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514.

1. Selecting an arbitration panel member (Code Civ. Proc. § 1299.4, subd. (b)).
2. Submitting the last best final offer of settlement to the arbitration panel (Code Civ. Proc. § 1299.6, subd. (a)).
3. Once arbitration is triggered under Code of Civil Procedure section 1299.4, the following activities required by the arbitration panel or to participate in the arbitration process:
 - a. Meet with the arbitration panel (Code Civ. Proc. § 1299.5, subd. (a)).
 - b. Participate in inquiries or investigations (Code Civ. Proc. § 1299.5, subd. (a)).
 - c. Participate in mediation (Code Civ. Proc. § 1299.5, subd. (a)).
 - d. Participate in hearings (Code Civ. Proc. § 1299.5, subd. (a)).
 - e. Respond to subpoenas and subpoenas duces tecum (Code Civ. Proc. § 1299.5, subd. (b)).
 - f. Respond to or make demands for witness lists and/or documents (Code Civ. Proc., § 1299.8).¹
 - g. Make application and respond to deposition requests (Code Civ. Proc., § 1299.8).²
 - h. Conduct discovery or respond to discovery requests (Code Civ. Proc., § 1299.8).³

Because the test claim statutes were declared unconstitutional on April 21, 2003, the reimbursement period was limited to January 1, 2001 through April 20, 2003.

¹ Incorporating by reference Code of Civil Procedure section 1282.2, subdivision (a)(2).

² Incorporating by reference Code of Civil Procedure sections 1283 and 1283.05.

³ Incorporating by reference Code of Civil Procedure section 1283.05.

Draft Proposed Parameters and Guidelines and Proposed Modifications

Commission staff issued the adopted Statement of Decision and staff's draft proposed parameters and guidelines on May 10, 2007.⁴ The proposed reimbursable activities were limited to those approved in the Statement of Decision.

On June 11, 2007, the County of Napa proposed new reimbursable activities and clarifying changes to the draft parameters and guidelines and provided a declaration to support their position that the draft [of the Reimbursable Activities section] does not accurately reflect the full reality of the *Binding Arbitration* Program.⁵ For each mandated activity, the County identifies *who* implemented the mandate, and also proposes additional reimbursable activities that are the most reasonable methods of complying with the mandate.⁶

The Commission has the authority when adopting parameters and guidelines to include activities that are considered "the most reasonable methods of complying with the mandate."⁷ Therefore, staff reviewed each of claimant's proposed changes in order to advise the Commission whether County's proposed activities and modifications are "the most reasonable methods of complying with the mandate."

Recommendation

Staff recommends that the Commission adopt the Draft Parameters and Guidelines, as modified by the claimant and staff (beginning on page 19), and allow reimbursement for the most reasonable methods of complying with the mandate.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

⁴ See Exhibit A.

⁵ See Exhibit B.

⁶ See Attachment 1 for Napa County's Chronology: Collective Bargaining Process, Mediation, and Binding Arbitration.

⁷ California Code of Regulations, title 2, section 1183.1, subdivision (a)(1)(A)(4).

Chronology

10/24/2001	Test claim filed by the City of Palos Verdes Estates
07/28/2006	Commission adopted Statement of Decision denying test claim
08/16/06	Request for reconsideration filed with the Commission
10/04/06	Commission granted the request for reconsideration
01/23/2007	County of Napa joined as co-claimant
03/29/2007	Commission adopted Statement of Decision on reconsideration
05/10/2007	Commission staff issued draft proposed parameters and guidelines
06/11/2007	County of Napa filed comments on staff's proposed parameters and guidelines
05/15/2008	Commission issues draft staff analysis and proposed parameters and guidelines

Discussion

Commission staff issued the adopted Statement of Decision and staff's draft proposed parameters and guidelines on May 10, 2007.⁸ The proposed reimbursable activities were limited to those approved in the Statement of Decision.

On June 11, 2007, the County of Napa proposed new reimbursable activities and clarifying changes to the draft parameters and guidelines and provided a declaration to support their position that the draft [of the Reimbursable Activities section] does not accurately reflect the full reality of the *Binding Arbitration* Program.⁹ The declaration by Deputy County Counsel Jacqueline Gong describes the County's rationale for the steps taken to comply with the Binding Arbitration statute. The County explains that "[a]t each step of the arbitration process, any number of individuals spend time and resources as a necessary part of participation in the program." Thus, for each mandated activity, the County identifies *who* implemented the mandate, and also proposes additional reimbursable activities that are the most reasonable methods of complying with the mandate.

The Commission has the authority when adopting parameters and guidelines to include activities that are considered "the most reasonable methods of complying with the mandate."¹⁰ Therefore, staff reviewed each of claimant's proposed changes in order to advise the Commission whether County's proposed activities and modifications are "the most reasonable methods of complying with the mandate."

The test claim statute added new section 1281.1 of the Code of Civil Procedure which states that any request to arbitrate made pursuant to subdivision (a) of section 1299.4 shall be considered as made pursuant to a written agreement to submit a controversy to arbitration. Further, section 1299.8 of the Code of Civil Procedure specifies that unless otherwise provided in this title, Title 9 (commencing with Section 1280) shall apply to any arbitration proceeding undertaken pursuant to the test claim statute. Further, section 1282.4, subdivision (a), Code of Civil Procedure, states that a party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in

⁸ See Exhibit A.

⁹ See Exhibit B.

¹⁰ California Code of Regulations, title 2, section 1183.1, subdivision (a)(1)(A)(4).

arbitration. Throughout this staff analysis, references are made to section 1299.8 and specific Title 9 sections that are incorporated in by reference and that are applicable to the binding arbitration proceeding.

Section IV. Reimbursable Activities

The County of Napa proposed amendments to clarify the activities and costs that are reimbursable. The **bold text** is staff's original proposed language (as approved in the Statement of Decision) and the underlined text is claimant's proposed modification. Staff's findings and recommendations follow:

- 1a. **Selecting an arbitration panel member which includes attorney, staff and negotiator time to research potential members, prepare for the selection, and brief the panel member.**
(Code Civ. Proc., § 1299.4, subd. (b))

The County proposes that language be added, clarifying that reimbursement for "selecting an arbitration panel member" includes reimbursement for "attorney, staff, and negotiator time to research potential members, prepare for the selection, and brief the panel member." According to County,

In January 2001, [the Napa County Deputy Sheriff's Association] DSA requested that disputed economic issues under negotiations with the County be submitted to arbitration pursuant to California Code of Civil Procedure Section 1299 et seq ... After consultation with other agencies, and meetings between the County's Human Resources Director and legal counsel, the County designated its arbitration panel member. The selection of the partisan member is key as this member represents the employer's perspective. Strategically, the County sought a panel member who would have a fundamental knowledge about the collective bargaining process and an understanding of County operations and funding, including county structures, staffing patterns, law enforcement operations, this member needed to enhance the neutral arbitrator's understanding of the technical aspects of the County's economic positions. For these reasons, the County spent some time researching, consulting, and evaluating who best would represent the County.¹¹

The test claim statute establishes the arbitration panel consisting of three members; two representing the parties and one impartial person acting as chairperson.¹²

The Commission found that once arbitration is triggered under Code of Civil Procedure section 1299.4, the activities initiated by the local public agency employer to participate in arbitration are not discretionary. Selection of the County's panel representative is key to the arbitration proceeding. Therefore, staff finds that the proposed activities "to research potential members and prepare for the selection" are necessary to perform the mandated activity of selecting the agency panel member and constitute reasonable methods of complying with the mandated program.

Once the panel member is selected, staff finds that the activity to brief the member is reasonably necessary for the local agency public employer to participate in the arbitration. Although the Commission recognized that this activity was not expressly required by the test claim statute, staff finds that it is a reasonable method of complying with the mandated program and thus should be reimbursable.

¹¹ See Exhibit B, Declaration of Jacqueline M. Gong (County's Declaration), Paragraph 2.

¹² Code of Civil Procedure section 1299.4, subdivision (b).

Therefore, staff recommends approval of County's proposed language.

1b. This also includes attorney, staff, and negotiator time to vet and select a neutral arbitrator

County also proposes reimbursement for attorney, staff, and negotiator time to "vet and select a neutral arbitrator, as the third panel member."

The test claim statute provides a procedure for the panel members (arbitrators selected by the parties) to select a neutral chairperson, an impartial person with experience in labor and management dispute resolution.¹³ And, in the event the *parties are unable or unwilling to agree upon a third person to serve as chairperson, an alternate* process specifies that the two members of the arbitration panel shall jointly request from the American Arbitration Association or the California State Mediation Service, a list of impartial and experienced persons who are familiar with matters of employer-employee relations. If after five days of receipt of the list, the two panel members cannot agree on which of the listed persons shall serve as chairperson, they shall, within two days, alternately strike names from the list, with the first panel member to strike names being determined by lot. The last person whose name remains on the list shall be chairperson.¹⁴

Code of Civil Procedure section 1280, subdivision (d) defines "neutral arbitrator" as an arbitrator who is (1) selected jointly by the parties or by the arbitrators selected by the parties or (2) appointed by the court when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them.

In the test claim proceeding, claimants sought reimbursement for time of the agency negotiators, staff and counsel in vetting and selecting a neutral arbitrator. The Commission's decision concludes that the test claim statutes require the arbitration panel members selected by the parties, rather than the employer or employee organization to select the neutral third panel member to act as chairperson. *However, the decision is silent as to activities that may occur if the two panel members allow the parties to select the neutral third panel member to act as chairperson.*

In her declaration, Deputy County Counsel Jacqueline Gong states:

In preparation of selecting a neutral arbitrator, legal counsel conducted extensive research on prospective neutral arbitrators: analyzing their backgrounds and arbitration experience, gathering former decisions and contacting agencies who had participated in arbitration hearings with them. It was essential for the County to vet the prospective arbitrators. Strategically, due to the complicated data analysis the County anticipated it would need to present at the hearing, the County evaluated arbitrators for their ability and comfort with handling extensive factual information and analysis and for a liberal approach to admitting evidence. After further discussions between the County's [arbitration panel member] Human Resources Director and legal counsel, the County planned its approach in participating in the joint selection of the neutral arbitrator. The County and DSA jointly selected a neutral arbitrator.¹⁵

According to this declaration, "[i]t was essential for County to vet the prospective arbitrators." This is consistent with the Commission's Statement of Decision, that "activities initiated by the local

¹³ Code of Civil Procedure section 1299.4, subdivision (b).

¹⁴ Code of Civil Procedure section 1299.4, subdivision (c).

¹⁵ See Exhibit B, County's Declaration, Paragraph 3.

public agency employer to participate in arbitration are not discretionary.” Since the mandated program could not proceed without selection and participation of a neutral arbitrator as the third panel member and chairperson, staff finds that County’s participation in the selection process is necessary to participate in the arbitration process, and thus should be reimbursable.

Staff also finds that it was reasonably necessary for the County or any other local agency employer to “vet” a person who is proposed for nomination or appointment as neutral arbitrator. Since the arbitration panel is a three-person panel, the neutral chairperson’s “ability and comfort with handling extensive factual information and analysis and for a liberal approach to admitting evidence” were critical to the outcome of the binding arbitration. The County would not be able to make this assessment without “vetting” persons proposed for nomination or appointment as neutral arbitrator. Thus, staff finds that the County’s proposed activities of “vetting and selecting a neutral arbitrator” are the most reasonable methods to implement the binding arbitration process. Therefore, staff recommends approval of the additional activities to allow reimbursement for the County’s participation in the selection of the neutral third panel member to act as chairperson.

2. **Submitting the last best final offer of settlement to the arbitration panel which includes attorney and staff time to prepare for and draft the last best final offer for submission as well as attorney, staff and board members’ time for consultation with governing board** (Code Civ. Proc., § 1299.6, subd. (a)).

The County requests reimbursement for attorney and staff time to prepare for and draft the last best final offer for submission as well as attorney, staff and board members’ time for consultation with the governing board. In her declaration, Deputy County Counsel Jacqueline Gong stated:

In April 2001, the parties and legal counsel met with the arbitration panel to submit their last best final offers of settlement ... At this meeting, the parties further settled on two economic proposals. In preparation for the meeting, staff and legal counsel prepared and drafted the County’s last best final offer for submission after consultation with the County’s Board of Supervisors.¹⁶

Code of Civil Procedure section 1299.6, states, in relevant part, as follows:

(a) Once the arbitration process is triggered, the arbitration panel shall direct that five days prior to beginning its hearings, each of the parties shall submit the last best offer of settlement as to each of the issues within the scope of the arbitration ... made in bargaining as a proposal or counterproposal and not previously agreed to by the parties prior to any arbitration request made pursuant to subdivision (a) of Section 1299.4. ... (Emphasis added.)

(b) Notwithstanding the terms of subdivision (a), the parties by mutual agreement may elect to submit as a package the last best offer of settlement made in bargaining as a proposal or counterproposal on those issues within the scope of arbitration, as defined in this title, not previously agreed to by the parties prior to any arbitration request made pursuant to subdivision (a) of Section 1299.4. ...

The Commission’s decision on reconsideration states that “the test claim statutes do not, however, require the local public agency employer to prepare for and consult with the governing board regarding the last best offer of settlement. Thus, the only activity required is to *submit* the last best

¹⁶ See Exhibit B, County’s Declaration, paragraph 4.

final offer of settlement to the arbitration panel, and, therefore, that activity alone is state-mandated and subject to article XIII B, section 6.” (Emphasis in Statement of Decision..)

The *last best offer of settlement* is limited to the issues within the *scope of arbitration made in bargaining as a proposal or counterproposal and not previously agreed to by the parties prior to any arbitration request*. *Scope of arbitration* means “economic issues, including salaries, wages and overtime pay, health and pension benefits, vacation and other leave, reimbursements, incentives, differentials, and all other forms of remuneration.”¹⁷ Thus, based on the statutory description, the last best offer of settlement pre-exists any arbitration request made pursuant to subdivision (a) of section 1299.4, because it was made in bargaining as a proposal or counterproposal and not previously agreed to. Therefore, staff finds that claimant’s proposed new activity to “prepare for and draft the last best final offer for submission as well as attorney, staff and board members’ time for consultation with the governing board” should be denied because as defined, the *last best final offer* preexists the mandated activity.

However, staff finds that if during the arbitration process, the local agency’s last best final offer of settlement changes, and the arbitration panel directs the parties to resubmit their offers, that it is reasonably necessary to respond to the panel and to update the “last best final offer of settlement.” If this occurs, then it would also be reasonably necessary for the local agency’s staff, negotiator, and attorney, to confer with the governing board in closed session before revising and submitting an updated offer. Thus, staff recommends approval of claimant’s proposed reimbursable activities, as modified by staff below, because the proposed reimbursable activities are reasonably necessary to carry out the mandated program.

If directed by the arbitration panel to resubmit the last best final offer:

- Attorney and staff time to redraft and resubmit the “last best final offer.”
- Attorney, staff, and board members’ time to consult with the governing board regarding modifications to the last best final offer.

3. Once arbitration is triggered under Code of Civil Procedure section 1299.4, the scope of which is defined in Code of Civil Procedure section 1299.3, subdivision (g), the following activities required by the arbitration panel or to participate in the arbitration process:

The Commission recognized that Code of Civil Procedure section 1299.8 states that, unless otherwise provided in the test claim statutes, the general provisions regarding arbitration found in the Code of Civil Procedure (§ 1280 et seq.) are applicable to binding arbitration proceedings under the test claim statutes. The relevant portions of these general arbitration provisions establish procedures for the notice and conduct of hearings, witness lists, admissible evidence, subpoenas, and depositions. (§ 1282 et seq.) Section 1299.9, subdivision (b) states that, unless otherwise agreed to by the parties, the costs of the arbitration proceeding and the expense of the arbitration panel, except those of the employer representative, shall be borne by the employee organization. Thus, the public agency employer is responsible for costs of its agency panel member, but not the cost of the proceeding or the other panel members.

¹⁷ Code of Civil Procedure section 1299.3, subdivision (g).

In the Statement of Decision, the Commission made the following findings:

Once arbitration is triggered under Code of Civil Procedure section 1299.4, the arbitration panel within the scope of its authority, may direct the parties to perform specified activities. Since the arbitration proceeding, once triggered, is mandatory, the Commission finds that the activities directed by the arbitration panel or activities initiated by the local public agency employer to participate in arbitration are not discretionary. As noted ... the arbitration panel's authority includes meeting with the parties or their representatives, making inquiries and investigations, holding hearings and taking any other action including further mediation that the arbitration panel deems appropriate, as well as subpoenaing witnesses, administering oaths, taking the testimony of any person, issuing subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any subject matter before the panel.

The plain language of the test claim statutes does not require the local public agency, or its staff or governing board to prepare for hearings, prepare expert witnesses, prepare a closing brief, or consult with its panel member prior to the issuance of the award. Nor does the plain language of section 1299.7, subdivision (a), require the local public agency or its staff or governing board to negotiate with the employee organization representatives based on the award. Further the plain language of the test claim statutes does not require the employer's arbitration panel member to participate in pre-arbitration meetings with local agency staff, consult with local agency staff prior to issuance of the award, consult in closed session with the arbitration panel, or consult with local agency staff and the governing board regarding the award. However, to the extent that any of the above activities are directed by the arbitration panel within the scope of its authority, the activity is state-mandated.

Thus, once arbitration is triggered under Code of Civil Procedure section 1299.4, the Commission determined that the following activities to participate in the arbitration process or as required by the arbitration panel are state-mandated and subject to article XII B, section 6:

- A. Meet with the arbitration panel.
- B. Cooperate in inquiries or investigations.
- C. Participate in mediation.
- D. Participate in hearings.
- E. Respond to subpoenas and subpoenas duces tecum.
- F. Respond to or make demands for witness lists and/or documents.
- G. Make application and respond to deposition requests.
- H. Conduct discovery or respond to discovery requests.

The state-mandated activities identified above were included in staff's draft proposed parameters and guidelines. The County of Napa proposed changes to each activity; clarifying who performs the activity and identifying related activities that are reasonably necessary to implement the mandated program. The original state-mandated activities (**bold text**) and County's amendments (underlined text) were reviewed by staff and are discussed below.

County proposes adding activities that were denied in the Commission's decision because they were not expressly required by statute. However, the Commission also determined that to the extent that any of the specified activities are directed by the arbitration panel within the scope of its authority,

the activity is state-mandated. Thus, it is necessary to review the proposed activities and to determine if they are directed by the arbitration panel or are reasonably necessary to implement the mandated program. Otherwise, County's proposed additional activities would be inconsistent with the Commission's Statement of Decision and should be denied.

- A. **Meet with the arbitration panel which includes attorney, staff, agency panel member and negotiator time to prepare for and to meet with the panel. This also includes agency panel member time for consulting in closed session with the panel; attorney, staff, agency panel member and negotiator time to consult with the panel member prior to the issuance of the award; and attorney, staff, agency panel member, governing board and negotiator time to consult regarding the award.**¹⁸ (Code Civ. Proc. § 1299.5, subd. (a).)
- B. **Participate in inquiries or investigations which include attorney and staff time to prepare for and respond to inquiries or investigations.** (Code Civ. Proc. § 1299.5, subd. (a).)
- C. **Participate in mediation which includes attorney and staff time to prepare for and participate in the mediation process.** (Code Civ. Proc. § 1299.5, subd. (a).)

The County proposes clarifying changes which expand the mandated activities and specify which agent or representative of a local agency may be reimbursed for performing the mandated activity.

The Commission found that once triggered, the arbitration proceeding is mandatory, and the activities directed by the arbitration panel or activities initiated by the local public agency employer to participate in arbitration are not discretionary. Section 1299.5, subdivision (a), provides that the arbitration panel, shall, within 10 days of its establishment or any additional periods to which the parties agree, meet with the parties or their representatives, either jointly or separately.

Nothing in the Commission's Statement of Decision, the test claim statute, or mandates case law restricts an eligible claimant from being reimbursed for increased costs incurred for the cost of attorney, staff, or negotiator time for this program. Further, section 1282.4, subdivision (a), Code of Civil Procedure, states that a party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration.

Thus, staff finds that it is reasonably necessary for a local agency to assign state-mandated activities for the purposes of this mandated program to an attorney, staff, or negotiator to perform. Staff also finds that it is reasonably necessary to "prepare" for meetings, inquiries or investigations, mediation, hearings with the panel, and to consult with the agency panel members jointly or separately.

Section 1299.9, subdivision (b) states that unless otherwise agreed to by the parties, the costs of the arbitration proceeding and the expenses of the arbitration panel, except those of the employer representative, shall be borne by the employee organization.

The Commission's decision states:

The plain language of the test claim statutes does not require the employer's arbitration panel member to participate in pre-arbitration meetings with local agency staff prior to the issuance of the award, consult in closed session with the arbitration panel, or consult with local agency staff and the governing board regarding the award. However, to the extent that

¹⁸ The analysis of last activity proposed by County is on page 14 of this analysis.

any of the activities are directed by the arbitration panel within the scope of its authority, the activity is state-mandated.

Section 1299.5, subdivision (a), provides that the arbitration panel, shall, within 10 days of its establishment or any additional periods to which the parties agree, meet with the parties or their representatives, either jointly or separately, make inquiries and investigations, hold hearings, and take any other action including further mediation, that the arbitration panel deems appropriate. Additionally, section 1299.8 states that, unless otherwise provided in the test claim statutes the general provisions regarding arbitration found in the Code of Civil Procedure are applicable to binding arbitration proceedings under the test claim statutes.

Staff also finds that it is reasonably necessary to “prepare for, respond to, or participate in inquiries or investigations, mediation, and hearings with the panel.

Therefore, staff recommends approval of County’s proposed language as described above.

Depositions and Discovery Requests

D. **Make application and respond to deposition requests which includes attorney and staff time to research, prepare to make or respond to requests, gather responsive documents, meet with witnesses and others to obtain responses or responsive documents or requests and draft and serve responses or requests.** (Code Civ. Proc., § 1299.8.)¹⁹

E. **Conduct discovery or respond to discovery requests which includes attorney and staff time to research, prepare to make or respond to requests, gather responsive documents, meet with witnesses and others to obtain responses or responsive documents or discovery requests and draft and serve responses or discovery requests.** (Code Civ. Proc., § 1299.8.)²⁰

Section 1299.8 states that, unless otherwise provided in the test claim statutes the general provisions regarding arbitration found in the Code of Civil Procedure are applicable to binding arbitration proceedings under the test claim statutes. Section 1283.05 of the Code of Civil Procedure sets forth detailed procedures regarding the rights of parties to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, as if the arbitration were pending in a civil action in superior court, subject to the limitations as to depositions set forth in section 1283.05, subdivision (e). State law also gives arbitrators the power to enforce the rights, remedies, procedures, duties, liabilities and obligations of discovery, by the imposition of the same terms, conditions, consequences, liabilities, sanctions, and penalties as can be or may be imposed in a civil action by a superior court, except the power to order the arrest or imprisonment of a person.

According to the County’s declaration:

As with any arbitration process, the County, through its staff and legal counsel, prepared and responded to requests for discovery and other inquiries for information, served and drafted responses/responsive documents....²¹

¹⁹ Incorporating by reference Code of Civil Procedure sections 1283 and 1283.05.

²⁰ Incorporating by reference Code of Civil Procedure section 1283.05.

²¹ See Exhibit B, County’s Declaration, paragraph 7.

As agreed to with the arbitration panel, the County prepared its response to DSA's request for budgetary documentation and the evidentiary exhibits for the hearing. This preparation entailed considerable time and resources, not only of legal counsel and County Human Resources staff, but of staff from the County Executive Office and Auditor-Controller. The compilation of fiscal data and analysis far exceeded what the County typically gathered in preparation of its routine negotiations, including past & present annual budgets and projections, budget updates, information on wage increases for employees over the span of ten years, data demonstrating revenue losses and gains, debt service levels, County funding priorities, data on general reserve set-asides and other budget and spending limitations.²²

Based on the application of section 1283.05 to the arbitration proceeding, through section 1299.8, staff finds that County's proposed changes to the activities related to depositions and discovery are reasonably necessary to participate in the state-mandated arbitration proceeding. Therefore, staff recommends approval of County's proposed language, as stated above.

Subpoenas, Witnesses, and Hearing

- F. **Respond to subpoenas and subpoenas duces tecum which includes attorney and staff time to research, prepare to respond to subpoenas, gather responsive documents, meet with witnesses and others to obtain responses or responsive documents, draft and serve responses.** (Code Civ. Proc. § 1299.5, subd. (b).)
- G. **Respond to or make demands for witness lists and/or documents which includes attorney and staff time to research, prepare to make or respond to demands, gather responsive documents, meet with witnesses and others to obtain responses or responsive documents or demands and draft and serve demands or responses.** (Code Civ. Proc., § 1299.8.)²³
- H. **Vet, select and prepare expert witnesses as well as prepare general witnesses (attorney, staff and negotiator time).** (Code Civ. Proc. § 1299.5, subd. (a).)
- I. **Participate in hearings which include attorney, staff, witness and negotiator time to prepare for and participate in the hearings ...**²⁴ (Code of Civ. Proc., § 1299.5, subd. (a).)

Staff finds that the changes proposed by County, clarify and are consistent with the Commission's decision, specify whose time is reimbursable, and are reasonably necessary to implement the binding arbitration mandate. Therefore, staff recommends approval of County's proposed language for the following reasons:

Code of Procedure section 1299.8 states that, unless otherwise provided in the test claim statutes the general provisions regarding arbitration found in the Code of Civil Procedure are applicable to binding arbitration proceedings under the test claim statutes.

Code of Civil Procedure section 1299.5, subdivision (b) authorizes the arbitration panel to subpoena witnesses, administer oaths, take the testimony of any person, and issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records,

²² See Exhibit B, County's Declaration, paragraph 5.

²³ Incorporating by reference Code of Civil Procedure section 1282.2, subdivision (a)(2).

²⁴ Ibid.

books, or papers relating to any subject matter before the panel. Section 1282.2 prescribes these hearing procedures for arbitrations and includes specific procedures regarding witness lists.

Staff finds that claimant's proposed changes to the activity "to respond to or make demands for witness lists and/or documents" and the proposed reimbursable activities, "Vet, select and prepare expert witnesses as well as prepare general witnesses" are reasonably necessary to comply with the procedures set forth in Code of Civil Procedure section 1282.2, subdivision (a)(2) which is incorporated by reference in section 1299.8. County's proposed new activities are reasonably necessary to participate in arbitration hearings and are consistent with the Commission's decision.

Moreover, County Counsel Gong, states in her declaration:

"The three-day hearing involved attorney, staff and witness time to prepare and participate in the hearing... To effectively participate in the arbitration hearing, the County searched for and retained expert witnesses to analyze the fiscal impact of proposed economic issues on the County and its ability to pay, as well as to study the comparability of the County's economic proposals to similarly situated agencies. Expert witnesses developed analytical studies and prepared for testifying at the arbitration hearing with the assistance of legal counsel. General witnesses were also identified and prepared for testifying about County budgets, revenue and financial commitments.²⁵

Staff finds that pursuant to section 1283.2 of the Code of Civil Procedure, except for the parties to the arbitration and their agents, officers and employees, all witnesses appearing pursuant to subpoena are entitled to receive fees and mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in the superior court. The fee and mileage of a witness subpoenaed upon the application of a party to the arbitration shall be paid by such party. The fee and mileage of a witness subpoenaed solely upon the determination of the neutral arbitrator shall be paid in the manner provided for the payment of the neutral arbitrator's expenses, and is not reimbursable under this mandate.

The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed. On request of any party to the arbitration, the testimony of witnesses shall be given under oath.

AFTER THE ARBITRATION HEARING (Additional Activities Proposed by County)

1. Prepare and submit additional written evidence and closing brief (attorney and staff time).

The County proposes adding "prepare and submit additional written evidence and closing brief" to the Reimbursable Activities.

However, the Commission made the following finding in its Statement of Decision:

Further, the plain language of the test claim statute does not require the local public agency, or its staff, or governing board ... to prepare a closing brief ... However, to the extent that any of the above activities are directed by the arbitration panel within the scope of its authority, the activity is state-mandated.

²⁵ Exhibit B, County's Declaration, paragraph 6.

In paragraph 7 of her declaration, County Counsel Gong stated:

... The three-day hearing involved attorney, staff and witness time to prepare and participate in the hearing. Following the hearing, legal counsel and staff *at the direction of the arbitration panel* prepared the submission of additional written evidence and closing briefs.

The County prepared and submitted additional written evidence and closing brief following the arbitration hearing. Based on the County's declaration, staff finds that these activities were directed by the arbitration panel, and thus are state-mandated. Therefore, staff recommends approval of claimant's proposed reimbursable activities, as modified by staff, because they are state-mandated.

2. Attorney, staff, agency panel member and negotiator time to consult with the agency panel member prior to the issuance of the award.
3. Attorney, staff, agency panel member, governing board, and negotiator time to consult regarding the award [subd. (b)]. (Code Civ. Proc. § 1299.5, subd. (a).)

The County proposes two new activities that follow the arbitration hearing. After the hearing, the panel decides the disputed issues separately, or if mutually agreed, by selecting the last best final offer package that most nearly complies with statutory factors.²⁶ The statutory factors are as follows:

- The stipulations of the parties.
- The interest and welfare of the public.
- The financial condition of the employer and its ability to meet the costs of the award.
- The availability and sources of funds to defray the cost of any changes in matters within the scope of arbitration.
- Comparison of matters within the scope of arbitration of other employees performing similar services in corresponding fire or law enforcement employment.
- The average consumer prices for goods and services, commonly known as the Consumer Price Index.
- The peculiarity of requirements of employment, including, but not limited to, mental, physical, and educational qualifications, job training and skills, and hazards of employment.
- Changes in any of the foregoing that are traditionally taken into consideration in the determination of matters within the scope of arbitration.²⁷

The panel then delivers a copy of its decision to the parties, but the decision may not be publicly disclosed for five days. The decision is not binding during that period, and the parties may meet privately to resolve their differences and, by mutual agreement, modify the panel's decision. At the end of the five day period, the decision as it may be modified by the parties is publicly disclosed and is binding on the parties.

The Commission did not make a finding on the County's proposed activities and the test claim statute does not expressly require the attorney, staff, agency panel member, governing board, or

²⁶ Code of Civil Procedure section 1299.6, subdivisions (a) and (b).

²⁷ Code of Civil Procedure section 1299.6, subdivision (c).

negotiator to consult prior to the issuance of the award or regarding the award. However, staff finds that the proposed activities are reasonably necessary to perform the mandated activity to participate in the arbitration process and are reasonable methods of complying with the mandated program. Without consulting with any of the parties identified above, there is no way for the County to determine if by mutual agreement, the panel's decision can be modified before the end of the five day period or if the panel's decision will be binding. Therefore, staff recommends approval of the County's additional proposed activities, as modified by staff.

Staff Recommendation

Staff recommends that the Commission adopt the Draft Parameters and Guidelines, as modified by claimant and staff (beginning on page 19), and allow reimbursement for the most reasonable methods of complying with the mandate.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

Chronology: Collective Bargaining Process, Mediation, and Binding Arbitration

July 2000	Napa County begins collective bargaining process with Deputy Sheriff's Association.
November, December, January, February	Mediation – four occasions
Jan. 16, 2001	During mediation, the DSA requested economic issues be submitted to binding arbitration
	County consulted with other agencies; the County's Human Resources Director met with legal counsel.
February 20, 2001	Last day of mediation ... County designated its Human Resources Director as its partisan panel member; DSA designated its panel member.
	Discussions between the County's Human Resources Director and legal counsel, the County planned its approach in participating in the joint selection of the neutral arbitrator.
March	County and DSA jointly designated impartial chairperson.
April 17, 2001	Parties met with arbitration panel. <ul style="list-style-type: none"> • Identified the disputed economic issues • Established hearing timetable for exchange of requested information, exhibits, witness lists • Agreed on hearing dates. Parties settled on two economic proposals on retirement and dental benefits.
April 17 – May 22	Parties conducted discovery and exchanged documents as agreed to with the arbitration panel: Responses to discovery requests involved staff time and resources from the Human Resources Division, County Executive Office and Auditor-Controller's Department. County also incurred costs for legal counsel, both in-house and retained outside counsel. County searched for and retained expert witnesses to analyze the fiscal impact of proposed economic issues on the County and its ability to pay, as well as to study the comparability of the County's economic proposals to similarly situated agencies.

	<p>Expert witnesses developed analytical studies and prepared for testifying at the arbitration hearing with the assistance of legal counsel.</p> <p>General witnesses were also identified and prepared for testifying about County budgets, revenue and financial commitments.</p> <p>Legal counsel drafted county's last best final offer for submission after consulting with the Board of Supervisors.</p>
May 17	(5 days before hearing) Parties submitted last best final offer from negotiations.
May 22	<p>Parties participated in hearing – 3-days</p> <p>Legal counsel, staff, expert and general witnesses.</p>
	At the direction of the arbitration panel, County through its staff and legal counsel prepared the submission of additional written evidence and closing briefs.
	Panel selects the party's last best offer on each disputed economic issue that most nearly adheres to specified factors under CCP 1299.6.
September 2001	<p>Panel issued its decision</p> <p>5 Days later, binding decision was made public by the county.</p>

**DRAFT PARAMETERS AND GUIDELINES, AS PROPOSED FOR
MODIFICATION BY CLAIMANT AND MODIFIED BY STAFF**

Code of Civil Procedure Sections 1299.2,
1299.3, 1299.4, 1299.5, 1299.6, 1299.8 and 1299.9

Statutes 2000, Chapter 906

Binding Arbitration,
01-TC-07

Reimbursement Period: January 1, 2001, through April 30, 2003

I. SUMMARY OF THE MANDATE

On March 29, 2007, the Commission on State Mandates (Commission) adopted a Statement of Decision on the *Binding Arbitration* test claim, finding that the prior Statement of Decision adopted on July 28, 2006, was contrary to law, and, in applying the appropriate law to the test claim, the test claim statutes mandate the following activities:

1. Selecting an arbitration panel member (Code Civ. Proc. § 1299.4, subd. (b)).
2. Submitting the last best final offer of settlement to the arbitration panel (Code Civ. Proc. § 1299.6, subd. (a)).
3. Once arbitration is triggered under Code of Civil Procedure section 1299.4, the following activities required by the arbitration panel or to participate in the arbitration process:
 - a. Meet with the arbitration panel (Code Civ. Proc. § 1299.5, subd. (a)).
 - b. Participate in inquiries or investigations (Code Civ. Proc. § 1299.5, subd. (a)).
 - c. Participate in mediation (Code Civ. Proc. § 1299.5, subd. (a)).
 - d. Participate in hearings (Code Civ. Proc. § 1299.5, subd. (a)).
 - e. Respond to subpoenas and subpoenas duces tecum (Code Civ. Proc. § 1299.5, subd. (b)).
 - f. Respond to or make demands for witness lists and/or documents (Code Civ. Proc., § 1299.8).¹
 - g. Make application and respond to deposition requests (Code Civ. Proc., § 1299.8).²
 - h. Conduct discovery or respond to discovery requests (Code Civ. Proc., § 1299.8).³

¹ Incorporating by reference Code of Civil Procedure section 1282.2, subdivision (a)(2).

² Incorporating by reference Code of Civil Procedure sections 1283 and 1283.05.

³ Incorporating by reference Code of Civil Procedure section 1283.05.

The Commission found that these activities constitute a "program" as well as a "new program or higher level of service." Furthermore, the Commission found that the activities impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514.

II. ELIGIBLE CLAIMANTS

Pursuant to Code of Civil Procedure section 1299.2, any city, county, and city and county employing firefighters and/or law enforcement officers, as defined in Code of Civil Procedure section 1299.3, that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs, except a city, county, or city and county governed by a charter that was amended prior to January 1, 2001, to incorporate a requirement for resolving employment disputes via binding arbitration (Code Civ. Proc., § 1299.9, subd. (a)).

III. PERIOD OF REIMBURSEMENT

Government Code section 17557, subdivision (e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The test claim was filed on October 24, 2001, establishing eligibility for fiscal year 2000-2001. However, the operative date of the test claim statutes, as enacted by Statutes 2000, chapter 906, is January 1, 2001. Moreover, the test claim statutes were declared unconstitutional by the California Supreme Court on April 21, 2003. *Therefore, the reimbursement period for costs incurred pursuant to Statutes 2000, chapter 906, is limited to January 1, 2001, through April 30, 2003.*

Actual costs for one fiscal year shall be included in each claim. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given fiscal year do not exceed \$1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

A. Selection of Local Agency Panel Member and Neutral Chairperson

1. Select an arbitration panel member, which includes attorney, staff and negotiator time to research potential members, and prepare for the selection,
2. Brief the panel member, which includes panel member, attorney, staff, and negotiator time.
3. Vet and select a neutral arbitrator which includes attorney, staff and negotiator time to research potential candidates for neutral chairperson. (Code Civ. Proc. § 1299.4, subd. (b), subd. (c), § 1299.8.)

B. Arbitration Process (includes agency panel member, attorney, staff, and negotiator time)

Once the arbitration is triggered under Code of Civil Procedure section 1299.4, the scope of which is defined in Code of Civil Procedure section 1299.3, subdivision (g), the following activities are reimbursable to participate in the arbitration process and when directed by the panel:

1. Prepare for and meet with the arbitration panel in open or closed session, either jointly or separately. (Code Civ. Proc., § 1299.5, subd. (a)).
2. Submit the last best final offer of settlement to the arbitration panel, five days before the hearing, or as may be mutually agreed to by the parties.
3. Conduct discovery or respond to discovery requests, which includes time to research, prepare to make or respond to requests, gather responsive documents, and meet with witnesses and others to obtain responses or responsive documents or discovery requests and draft and serve responses or discovery requests. (Code Civ. Proc., § 1299.8.)⁴
4. Prepare for, respond to, and participate in inquiries or investigations Code Civ. Proc., § 1299.5, subd. (a)).
- 4.5. Respond to subpoenas and subpoenas duces tecum, which includes time to prepare to respond to subpoenas, gather responsive documents, meet with witnesses and others to obtain responsive documents draft and service responses. (Code Civ. Proc., § 1299.5, subd. (b).)
6. Respond to or make demands for witness lists and/or documents, which includes time to research, prepare to make or respond to demands, gather responsive documents, and meet with witnesses and others to obtain responses or responsive documents or demands and draft and serve demands or responses. (Code Civ. Proc., § 1299.8.)⁵
7. Prepare for arbitration panel hearing(s) vet, select, and prepare expert and general witnesses.

⁴ Incorporating by reference Code of Civil Procedure section 1283.05.

⁵ Incorporating by reference Code of Civil Procedure section 1282.2, subdivision (a)(2).

8. Make application and respond to deposition requests, which includes time to research, prepare to make or respond to requests, gather responsive documents, and meet with witnesses and others to obtain responses or responsive documents or requests and draft and serve responses or requests. (Code Civ. Proc., § 1299.8.)⁶

9. Participate in hearings (Code Civ. Proc. § 1299.5, subd. (a)).

10. Consult with the panel, either jointly or separately prior to the award. (Code Civ. Proc., § 1299.5, subd. (a).)

11. Consult with local agency panel member, board of governors, negotiator, attorney, or staff regarding the award. (Code Civ. Proc., § 1299.5, subd. (a).)

12. When directed by the panel:

(a) Submit *updated* last best final offer of settlement to the arbitration panel, including time to prepare for and redraft the last best final offer, and time for consultation with governing board. (Code Civ. Proc. § 1299.6, subd. (a).)

(b) Prepare for and participate in mediation (Code Civ. Proc. § 1299.5, subd. (a).)

(c) Prepare and file closing briefs. (Code of Civ. Proc., § 1299.5, subd. (a).)⁷

C. Non-Reimbursable Activities

The following activities are not reimbursable:

1. train agency management, counsel, staff and members of governing bodies regarding binding arbitration;
2. restructure bargaining units to accommodate binding arbitration;
3. perform discovery activities, as set forth in Code of Civil Procedure sections 1281.1, 1281.2 and 1299.8, when such activities are engaged in outside the binding arbitration process triggered by Code of Civil Procedure section 1299.4;
4. collect and compile comparability data, handle two track negotiations or participation in mediation, when such activities are engaged in outside the binding arbitration process triggered by Code of Civil Procedure section 1299.4;
5. negotiate with the employee organization representatives based on the arbitration panel's award, pursuant to Code of Civil Procedure section 1299.7, subdivision (a); and
6. litigate interpretation of the test claim statutes.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

⁶ Incorporating by reference Code of Civil Procedure sections 1283 and 1283.05.

⁷ Incorporating by reference Code of Civil Procedure sections.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant, expert witness, and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter⁸ is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

⁸ This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.

PAGES 26-100 LEFT BLANK INTENTIONALLY

COMMISSION ON STATE MANDATES

880 NINTH STREET, SUITE 300

SACRAMENTO, CA 95814

PHONE: (916) 829-9662

FAX: (916) 446-0278

E-mail: osminfo@osm.ca.gov



May 10, 2007

Mr. Allan Burdick

MAXIMUS

4320 Auburn Blvd., Suite 2000

Sacramento, CA 95841

Ms. Jacqueline M. Gong

County of Napa

1195 Third Street, Suite 301

Napa, CA 94559

*And Affected State Agencies and Interested Parties (see enclosed mailing list)*Re: **Adopted Statement of Decision and Draft Parameters and Guidelines***Binding Arbitration, 01-TC-07*

Code of Civil Procedure, Sections 1281.1, 1299, 1299.2, 1299.3

1299.4, 1299.5, 1299.6, 1299.7, 1299.8, and 1299.9

City of Palos Verdes Estates, Claimant

County of Napa, Co-Claimant

Dear Mr. Burdick and Ms. Gong:

The Commission on State Mandates adopted the attached Statement of Decision on March 29, 2007. State law provides that reimbursement, if any, is subject to Commission approval of parameters and guidelines for reimbursement of the mandated program, approval of a statewide cost estimate, a specific legislative appropriation for such purpose, a timely-filed claim for reimbursement, and subsequent review of the claim by the State Controller's Office.

Following is a description of the responsibilities of all parties and of the Commission during the parameters and guidelines phase.

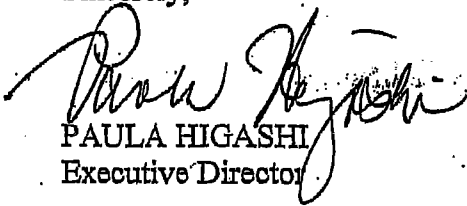
- **Draft Parameters and Guidelines.** Pursuant to California Code of Regulations, title 2, section 1183.12 (operative September 6, 2005), the Commission staff is expediting the parameters and guidelines process by enclosing draft parameters and guidelines to assist the claimant. The proposed reimbursable activities are limited to those approved in the Statement of Decision by the Commission.
- **Claimant's Review of Draft Parameters and Guidelines.** Pursuant to California Code of Regulations, title 2, section 1183.12, subdivisions (b) and (c), the successful test claimant may file modifications and/or comments on the proposal with Commission staff by **June 11, 2007**. The claimant may also propose a reasonable reimbursement methodology pursuant to Government Code section 17518.5 and California Code of Regulations, title 2, section 1183.13. The claimant is required to submit an original and two (2) copies of written responses to the Commission and to simultaneously serve copies on the state agencies and interested parties on the mailing list.
- **State Agencies and Interested Parties Comments.** State agencies and interested parties may submit recommendations and comments on staff's draft proposal and the claimant's modifications and/or comments within 15 days of service. State agencies and interested

parties are required to submit an original and two (2) copies of written responses or rebuttals to the Commission and to simultaneously serve copies on the test claimant, state agencies, and interested parties on the mailing list. The claimant and other interested parties may submit written rebuttals. (See Cal. Code Regs., tit. 2, § 1183.11.)

- **Adoption of Parameters and Guidelines.** After review of the draft parameters and guidelines and all comments, Commission staff will recommend the adoption of an amended, modified, or supplemented version of staff's draft parameters and guidelines. (See Cal. Code Regs., tit. 2, § 1183.14.)

Please contact Nancy Patton at (916) 323-3562 if you have any questions.

Sincerely,


PAULA HIGASHI
Executive Director

Enclosures

WORKING BINDER: _____
CHRON: _____
FILE: _____
DATE: _____
INITIAL: sh/s
MAILED: _____
FAXED: _____

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE RECONSIDERATION OF PRIOR
FINAL DECISION:

Code of Civil Procedure Sections 1281.1, 1299,
1299.2, 1299.3, 1299.4, 1299.5, 1299.6, 1299.7,
1299.8, and 1299.9;

Statutes 2000, Chapter 906

Filed on October 24, 2001, by the City of
Palos Verdes Estates, Claimant; joined by
County of Napa, Co-claimant on
January 23, 2007.

Case No.: 01-TC-07

Binding Arbitration


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 on March 29, 2007)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter with the following technical corrections, highlighted with strike-out for deleted text and double underlining for added text:

- Pages 2, 7, 8, 12, 19, and 20 – clarified that the original claimant was the City of Palos Verdes Estates;
- Page 16 – added citation to Code of Civil Procedure section 1299.7, subdivision (a);
- Pages 17, 18, and 21 – added citation to Code of Civil Procedure section 1299.8;
- Pages 17 and 20 – changed an incorrect citation to Code of Civil Procedure, *from* section 1299.4, subdivision (b) *to* the correct reference, section 1299.6, subdivision (a); and
- Page 20 – corrected a reference to the July 28, 2006 hearing, which previously reflected the original hearing date incorrectly as July 25, 2006.


PAULA HIGASHI, Executive Director

May 10, 2007
Date

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE RECONSIDERATION OF PRIOR
FINAL DECISION:

Code of Civil Procedure Sections 1281.1, 1299,
1299.2, 1299.3, 1299.4, 1299.5, 1299.6, 1299.7,
1299.8, and 1299.9;

Statutes 2000, Chapter 906

Filed on October 24, 2001 by the City of
Palos Verdes Estates, Claimant; joined by
County of Napa, Co-claimant on
January 23, 2007.

Case No.: 01-TC-07

Binding Arbitration

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 on March 29, 2007)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided the reconsideration of this test claim during a regularly scheduled hearing on January 25, 2007. Pamela Stone from MAXIMUS and Judy Smith from City of Palos Verdes Estates appeared on behalf of claimant. Jacqueline M. Gong from County of Napa appeared on behalf of co-claimant. Donna Ferebee and Carla Castaneda appeared on behalf of the Department of Finance.

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 sections 17500 et seq., and related case law.

The Commission adopted the staff analysis at the hearing by a supermajority vote of 7-0 to change the prior final decision adopted on July 28, 2006, and to partially approve this test claim.

Summary of Findings

This is a reconsideration of a prior final decision that was adopted on July 28, 2006, to deny the *Binding Arbitration* test claim. Government Code section 17559 and section 1188.4 of the Commission's regulations provide authority for this action. A supermajority of five affirmative votes is required to change a prior final decision.

The *Binding Arbitration* statutes, in the context of improving labor relations between local agencies and their law enforcement officers and firefighters, provide that, where an impasse in negotiations has been declared, and if the employee organization so requests, the parties would be subject to binding arbitration. The test claim statutes were effective on January 1, 2001, but were declared unconstitutional by the California Supreme Court on April 21, 2003, as violating the "home rule" provisions of the California Constitution.

In the original test claim, the claimant City of Palos Verdes Estates sought reimbursement for employee compensation costs. The Commission's prior decision to deny the test claim was based on case law holding that additional costs alone for employee compensation and litigation, in the absence of some increase in the actual level or quality of governmental services provided to the public, do not constitute a new program or higher level of service. Moreover, since strikes by law enforcement officers and fire services personnel are prohibited by law, the Commission found that no successful argument could be made that the test claim statutes affect law enforcement or firefighting service to the public.

However, the test claim was modified at the July 28, 2006 hearing to withdraw the reimbursement request for employee compensation and for litigating the constitutionality of the test claim statutes. Testimony was also provided at the hearing that, even if strikes by public safety personnel are illegal, strikes do still occur in the less obvious form of "blue flu" or via other methods. Thus, the Commission reconsidered the claim in light of the modification and analyzed the activities expressly required by the test claim statutes.

The Commission, on reconsideration, finds that the Statement of Decision adopted on July 28, 2006, was contrary to law. The Commission further finds that the test claim statutes mandate certain activities, constitute a "program" as well as a "new program or higher level of service," and also impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. Because the test claim statutes were declared unconstitutional on April 21, 2003, however, the reimbursement period is limited to January 1, 2001 through April 20, 2003.

On January 23, 2007, the County of Napa joined as co-claimant on this test claim, pursuant to California Code of Regulations, title 2, section 1183, subdivision (h), and provided a declaration signed under penalty of perjury outlining costs incurred as a result of the test claim statutes. The County declared that, after the passage of the test claim statutes and during the reimbursement period of January 1, 2001 through April 20, 2003, the County did engage in binding interest arbitration with the Napa County Deputy Sheriffs' Association to the final award of a decision by the arbitration panel. The County asserts that the costs to engage in this process exceeded \$10,000.

BACKGROUND

Jurisdiction on Reconsideration

Government Code section 17559, subdivision (a), grants the Commission, within statutory timeframes, discretion to reconsider a prior final decision. That section states the following:

The commission may order a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party. The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of the 30-day period, the commission may grant a stay of that expiration for no more than 30 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

By regulation, the Commission has provided that any interested party, affected state agency or Commission member may file a petition with the Commission requesting that the Commission reconsider and change a prior final decision to correct an error of law.¹

Before the Commission considers the request for reconsideration, Commission staff is required to prepare a written analysis and recommend whether the request for reconsideration should be granted.² A supermajority of five affirmative votes is required to grant the request for reconsideration and schedule the matter for a hearing on the merits.³

If the Commission grants the request for reconsideration, a second hearing must be conducted to determine if the prior final decision is contrary to law and to correct an error of law.⁴ Prior to that hearing, Commission staff prepares and issues for public comment a draft staff analysis.⁵ Any comments are incorporated into a final staff analysis and presented to the Commission before the scheduled meeting.⁶ A supermajority of five affirmative votes is required to change a prior final decision.⁷

Binding Arbitration Test Claim

In the context of labor relations between local public agencies and their law enforcement officers and firefighters, the test claim statutes provide that, where an impasse in negotiations has been declared, and if the employee organization so requests, the parties would be subject to binding arbitration.

Since 1968, local public agency labor relations have been governed by the Meyers-Milias-Brown Act.⁸ The act requires local agencies to grant employees the right to self-organization, to form, join or assist labor organizations, and to present grievances and recommendations regarding wages, salaries, hours, and working conditions to the governing body. The California Supreme Court has recognized that it is not unlawful for public employees to strike unless it has been determined that the work stoppage poses an imminent threat to public health or safety.⁹

Employees of fire departments and fire services, however, are specifically denied the right to strike or to recognize a picket line of a labor organization while in the course of the performance of their official duties.¹⁰ Additionally, the Fourth District Court of Appeal has held that police work stoppages are per se illegal.¹¹

¹ California Code of Regulations, title 2, section 1188.4, subdivision (b).

² California Code of Regulations, title 2, section 1188.4, subdivision (f).

³ *Ibid.*

⁴ California Code of Regulations, title 2, section 1188.4, subdivision (g).

⁵ California Code of Regulations, title 2, section 1188.4, subdivision (g)(1)(B).

⁶ California Code of Regulations, title 2, section 1188.4, subdivision (g)(1)(C).

⁷ California Code of Regulations, title 2, section 1188.4, subdivision (g)(2).

⁸ Government Code sections 3500 et seq.; Statutes 1968, chapter 1390.

⁹ *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564.

¹⁰ Labor Code section 1962.

¹¹ *City of Santa Ana v. Santa Ana Police Benevolent Association* (1989) 207 Cal.App.3d 1568.

Under the Meyers-Milius-Brown Act, the local employer establishes rules and regulations regarding employer-employee relations, in consultation with employee organizations.¹² The local agency-employer is obligated to meet and confer in good faith with representatives of employee bargaining units on matters within the scope of representation.¹³ If agreement is reached between the employer and the employee representatives, that agreement is memorialized in a memorandum of understanding which becomes binding once the local governing body adopts it.¹⁴

The test claim statutes¹⁵ added Title 9.5 to the Code of Civil Procedure, providing new procedures that could be invoked by the employee organization in the event an impasse in negotiations has been declared. Section 1299 states the following legislative intent:

The Legislature hereby finds and declares that strikes taken by firefighters and law enforcement officers against public employers are a matter of statewide concern, are a predictable consequence of labor strife and poor morale that is often the outgrowth of substandard wages and benefits, and are not in the public interest. The Legislature further finds and declares that the dispute resolution procedures contained in this title provide the appropriate method for resolving public sector labor disputes that could otherwise lead to strikes by firefighters or law enforcement officers.

It is the intent of the Legislature to protect the health and welfare of the public by providing impasse remedies necessary to afford public employers the opportunity to safely alleviate the effects of labor strife that would otherwise lead to strikes by firefighters and law enforcement officers. It is further the intent of the Legislature that, in order to effectuate its predominant purpose, this title be construed to apply broadly to all public employers, including, but not limited to, charter cities, counties, and cities and counties in this state.

It is not the intent of the Legislature to alter the scope of issues subject to collective bargaining between public employers and employee organizations representing firefighters or law enforcement officers.

The provisions of this title are intended by the Legislature to govern the resolution of impasses reached in collective bargaining between public employers and employee organizations representing firefighters and law enforcement officers over economic issues that remain in dispute over their respective interests...

The statutes provide that if an impasse is declared after the parties exhaust their mutual efforts to reach agreement over matters within the scope of the negotiation, and the parties are unable to agree to the appointment of a mediator, or if a mediator agreed to by the parties has been unable

¹² Government Code section 3507.

¹³ Government Code section 3505.

¹⁴ Government Code section 3505.1.

¹⁵ Statutes 2000, chapter 906 (Sen. Bill No. 402).

to effect settlement of a dispute between the parties, the employee organization can, by written notification to the employer, request that their differences be submitted to an arbitration panel.¹⁶ Within three days after receipt of written notification, each party is required to designate one member of the panel, and those two members, within five days thereafter, are required to designate an additional impartial person with experience in labor and management dispute resolution to act as chairperson of the arbitration panel.¹⁷

The arbitration panel is required to meet with the parties within ten days after its establishment, or after any additional periods of time mutually agreed upon.¹⁸ The panel is authorized to meet with the parties, make inquiries and investigations, hold hearings, and take any other action, including further mediation, that the panel deems appropriate.¹⁹ The arbitration panel may, for purposes of its hearings, investigations or inquiries, subpoena witnesses, administer oaths, take the testimony of any person, and issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records.²⁰

Five days prior to the commencement of the arbitration panel's hearings, each of the parties is required to submit a last best offer of settlement on the disputed issues.²¹ The panel decides the disputed issues separately, or if mutually agreed, by selecting the last best offer package that most nearly complies with specified factors.²² The panel then delivers a copy of its decision to the parties, but the decision may not be publicly disclosed for five days.²³ The decision is not binding during that period, and the parties may meet privately to resolve their differences and, by mutual agreement, modify the panel's decision.²⁴ At the end of the five-day period, the decision as it may be modified by the parties is publicly disclosed and binding on the parties.²⁵

The provisions are not applicable to any employer that is a city, county, or city and county, governed by a charter that was amended prior to January 1, 2001, to incorporate a binding arbitration provision.²⁶ The provisions also state that, unless otherwise agreed to by the parties,

¹⁶ Code of Civil Procedure section 1299.4, subdivision (a).

¹⁷ Code of Civil Procedure section 1299.4, subdivision (b).

¹⁸ Code of Civil Procedure section 1299.5, subdivision (a).

¹⁹ *Ibid.*

²⁰ Code of Civil Procedure section 1299.5, subdivision (b).

²¹ Code of Civil Procedure section 1299.6, subdivision (a).

²² *Ibid.*

²³ Code of Civil Procedure section 1299.7, subdivision (a).

²⁴ *Ibid.*

²⁵ Code of Civil Procedure section 1299.7, subdivision (b).

²⁶ Code of Civil Procedure section 1299.9, subdivision (a); this provision was modified by Statutes 2003, chapter 877, to change the date of the amended charter to January 1, 2004, but since that amendment was not pled in the test claim, the Commission makes no finding with regard to it.

the costs of the arbitration proceeding and the expenses of the arbitration panel, except those of the employer representative, shall be borne by the employee organization.²⁷

Preexisting general arbitration provisions are applicable to arbitration that is triggered by the test claim statutes, unless otherwise provided in the test claim statutes.²⁸ Among other things, these general arbitration provisions set forth procedures for the conduct of hearings such as notice of hearings, witness lists, admissible evidence, subpoenas, and depositions.²⁹

When a party refuses to arbitrate a controversy as requested under Code of Civil Procedure section 1299.4, subdivision (a), that party may be subject to a court order to engage in arbitration pursuant to section 1281.2.³⁰

The test claim statutes in their entirety were declared unconstitutional by the California Supreme Court on April 21, 2003, as violating portions of article XI of the California Constitution.³¹ The basis for the decision is that the statutes: 1) deprive the county of its authority to provide for the compensation of its employees as guaranteed in article XI, section 1, subdivision (b); and 2) delegate to a private body the power to interfere with local agency financial affairs and to perform a municipal function, as prohibited in article XI, section 11, subdivision (a).^{32, 33}

Accordingly, the analysis addresses only the period during which the test claim statutes were presumed to be constitutional, January 1, 2001 through April 20, 2003.

²⁷ Code of Civil Procedure section 1299.9, subdivision (b).

²⁸ Code of Civil Procedure section 1299.8.

²⁹ Code of Civil Procedure sections 1280 et seq.

³⁰ Code of Civil Procedure section 1281.1.

³¹ *County of Riverside v. Superior Court of Riverside County* (2003) 30 Cal.4th 278 (*County of Riverside*).

³² *County of Riverside* (2003) 30 Cal.4th 278, 282.

³³ Section 1299.7, subdivision (c), of the Code of Civil Procedure was subsequently amended to cure the constitutionality issue (Stats. 2003, ch. 877), by adding a provision allowing the local public agency employer to reject the decision of the arbitration panel:

The employer may by unanimous vote of all the members of the governing body reject the decision of the arbitration panel, except as specifically provided to the contrary in a city, county, or city and county charter with respect to the rejection of an arbitration award.³³

However, that statute was not pled in the test claim and the Commission makes no finding with regard to it:

The Commission's Prior Decision

The Commission denied this test claim, for the activities related to local government participation in binding arbitration, pursuant to Code of Civil Procedure sections 1281.1, and 1299 through 1299.9. The Commission concluded the following:

[T]he Commission finds that the test claim legislation does not constitute a new program or higher level of service. The test claim legislation requires the local agency to engage in a binding arbitration process that may result in increased costs associated with employee compensation or benefits. The cases have consistently held that additional costs alone, in absence of some increase in the actual level or quality of governmental services *provided to the public*, do not constitute an "enhanced service to the public" and therefore do not impose a new program or higher level of service on local governments within the meaning of article XIII B, section 6 of the California Constitution. Since strikes by law enforcement officers and fire services personnel are prohibited by law, no successful argument can be made that the test claim legislation affects law enforcement or firefighting service *to the public*.

The City of Palos Verdes Estates (claimant) had initially requested reimbursement for: 1) costs to litigate the constitutionality of the test claim statutes; 2) increased costs for salaries and benefits that could result from the binding arbitration award; 3) increased costs for compensation package "enhancements" that could be offered by the local agency as a result of vulnerabilities in its bargaining position; and 4) other costs related to binding arbitration activities.

At the hearing, however, the claimant withdrew its request for reimbursement for litigation, compensation and compensation enhancement costs.³⁴ Testimony was also provided at the hearing that regardless of the legality of strikes by public safety personnel, strikes do still occur in the less obvious form of "blue flu" or in other ways.³⁵ The claimant also presented exhibits at the hearing consisting of test claims and parameters and guidelines related to collective bargaining that were previously heard by the Commission.

Removing the costs for litigating the constitutionality of the test claim legislation and employee compensation significantly modified the test claim, causing the need for a reevaluation of activities that are required by the test claim statute (e.g., designating an arbitration panel member and participating in hearings) in light of the relevant case law.

The request for reconsideration alleged the following error of law:

The statement of decision relied upon cases supporting the concept that no higher level of service to the public is provided when there are increased costs for compensation or benefits *alone*. For example, *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, cited in the statement of decision, held that even though increased employee benefits may generate a higher quality of local safety officers, the test claim legislation did not constitute a new program or higher level of service; the court stated that "[a] higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public." However, *City of Richmond* was based on test claim legislation that

³⁴ Reporter's Transcript of Proceedings, July 28, 2006, pages 104-106.

³⁵ Reporter's Transcript of Proceedings, July 28, 2006, pages 98-99.

increased the cost for death benefits for local safety members, but did not result in actual mandated activities.

The statement of decision also relied upon *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, which summarized and reaffirmed several previous cases to illustrate what constitutes a "new program or higher level of service." However, none of the older cases cited [— i.e., *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, and *City of Richmond v. Commission On State Mandates, et al.* (1998) 64 Cal.App.4th 1190, —] denied reimbursement for actual activities imposed on the local agencies. In addition, *San Diego Unified School Dist.* did not address the issue of "new program or higher level of service" in the context of actual activities mandated by test claim legislation which increased the costs of employee compensation or benefits.³⁶

Claimant's Position

The City of Palos Verdes Estates (claimant) contends that the test claim statutes constitute a reimbursable state-mandated program within the meaning of article XIII.B, section 6 of the California Constitution and Government Code section 17514.

Claimant asserts that costs for the following activities will be incurred and are reimbursable:

1. Costs for training agency management, counsel, staff and members of governing bodies regarding SB 402 as well as the intricacies thereof.
2. Costs incident to restructuring bargaining units that include employees that are covered by SB 402 and those which are not covered by SB 402.
3. Increased staff time in preparing for negotiations in order to collect and compile comparability data specified in Code of Civil Procedure, section 1299.4.
4. Increased time of agency negotiators, including staff, consultants, and attorneys, in handling two track negotiations: those economic issues which are subject to SB 402 arbitration and those issues which are not subject to arbitration.
5. Time to prepare for and consult with the governing board regarding the last best and final offer to be submitted to the arbitration panel.
6. Time to prepare for and participate in any mediation process.
7. Consulting time of negotiators, staff and counsel in selecting the agency panel member.
8. Time of the agency negotiators, staff and counsel in vetting and selecting a neutral arbitrator.
9. Time of the agency negotiators, staff and counsel in briefing the agency panel member.
10. Time of the agency negotiators, staff and counsel in preparing for the arbitration hearing.
11. Time of the agency negotiators, staff and counsel in vetting, selecting and preparing expert witnesses.
12. Time of the agency panel member and attorney in pre-arbitration meetings of the panel.
13. Staff and attorney time involved in discovery pursuant to Code of Civil Procedure, sections 1281.1, 1281.2 and 1299.8.
14. Staff, attorney, witness and agency panel member time for the hearings.

³⁶ Request for Reconsideration, page 3.

15. Attorney time in preparing the closing brief.
16. Agency panel member time in consulting in closed sessions with the panel.
17. Time of the attorney, negotiators, and staff consulting with the agency panel member prior to the issuance of the award.
18. Time of the attorney, negotiators, staff, agency panel member, and governing board consulting regarding the award and giving directions to agency negotiators.
19. Time of the agency negotiators to negotiate with the union's negotiating representatives based on the award.
20. Costs of inevitable litigation regarding the interpretation of critical provisions of the law which are ambiguous, including the fact that the act covers "all other forms of remuneration," and covers employees performing "any related duties" to firefighting and investigating.

Claimant argued, in its April 13, 2006 comments on the first draft staff analysis, that "[a]s of January 1, 2001, local government officials had no alternative other than to enforce the provisions of this statute until it was declared unconstitutional, otherwise they would be subject to a writ of mandate to compel binding arbitration." Claimant further states that "[i]n fact, it was because the County of Riverside refused to engage in binding arbitration that the writ of mandate action was commenced against it, resulting in the decision of the Supreme Court which made this test claim statute invalid as being unconstitutional." Claimant believes the cases cited by Commission staff in the analysis are not on point.

Claimant also points out that as legislation goes through the process of being adopted "there are a plethora of committee hearings and analyses performed" and "if there is any risk for a statute being declared unconstitutional, it should be borne by the State, which has the resources for a full and complete analysis of pending legislation prior to enactment." Claimant concludes that "[l]ocal authorities have no alternative than to assume that legislation is valid until such time as it is declared unconstitutional by the courts of the State of California." Therefore, claimant contends, the Commission should find that Binding Arbitration was a reimbursable, mandated program from its effective date until it was declared unconstitutional.

Claimant also provided testimony that, regardless of the legality of strikes by public safety personnel, strikes do still occur by these personnel in the less obvious form of "blue flu" or via other methods.

Co-Claimant's Position

The County of Napa joined as co-claimant on January 23, 2007, alleging costs exceeding \$10,000 to engage in binding arbitration with the Napa County Deputy Sheriffs' Association. The County appeared at the January 25, 2007, hearing and provided testimony agreeing with the final and supplemental staff analyses.

Department of Finance Position

Department of Finance submitted comments on the test claim concluding that the administrative and compensation costs claimed in the test claim are not reimbursable costs pursuant to article XIII B, section 6 of the California Constitution, based on various court decisions and the provisions of the test claim statutes. Specifically, the Department asserted that:

- 1) the test claim statutes do not create a new program or higher level of service in an existing program, and the costs alleged do not stem from the performance of a requirement unique to local government;
- 2) alleged higher costs for compensating the claimant's employees are not reimbursable, since compensation of employees in general is a cost that all employers must pay; furthermore, allowing reimbursement for any such costs could "undermine an employer's incentive to collectively bargain in good faith;"
- 3) alleged cost for increased compensation is not unique to local government; even though claimant may argue that compensation of firefighters and law enforcement officers is unique to local government, the "focus must be on the hardly unique function of compensating employees in general;" and
- 4) Code of Civil Procedure section 1299.9, subdivision (b), provides that costs of the arbitration proceeding and expenses of the arbitration panel, except those of the employer representative, are to be borne by the employee organization; in the test claim statutes, the Legislature specifically found that the duties of the local agency employer representatives are substantially similar to the duties required under the current collective bargaining procedures and therefore the costs incurred in performing these duties are not reimbursable state mandated costs; and thus, during the course of arbitration proceedings, "there are not any net costs that the employers would have to incur that would not have been incurred in good faith bargaining or that are not covered by the employee organizations."

The Department provided additional comments on the draft staff analysis for reconsideration of the prior decision, concurring in Commission staff's findings recommending the test claim be denied. However, at the January 25, 2007, hearing, after the County of Napa alleged actual costs for engaging in binding arbitration, the Department provided testimony agreeing with the final and supplemental staff analyses.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution³⁷ recognizes the state constitutional restrictions on the powers of local government to tax and spend.³⁸ "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial

³⁷ Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

³⁸ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.³⁹ A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.⁴⁰ In addition, the required activity or task must be new, constituting a "new program," and it must create a "higher level of service" over the previously required level of service.⁴¹

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.⁴² To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.⁴³ A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."⁴⁴

Finally, the newly required activity or increased level of service must impose costs mandated by the state.⁴⁵

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.⁴⁶ 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."⁴⁷

³⁹ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

⁴⁰ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

⁴¹ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

⁴² *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*Los Angeles*); *Lucia Mar*, *supra*, 44 Cal.3d 830, 835).

⁴³ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 877; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

⁴⁴ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 877.

⁴⁵ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

⁴⁶ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

⁴⁷ *County of Sonoma*, *supra*, 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

This reconsideration poses the following issues:

- Is the final decision on the *Binding Arbitration* test claim, adopted on July 28, 2006, contrary to law?
- Are the test claim statutes subject to article XIII B, section 6 of the California Constitution?
- Do the test claim statutes constitute a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?
- Do the test claim statutes impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

Issue 1: Is the prior final decision on the *Binding Arbitration* test claim, adopted on July 28, 2006, contrary to law?

The *Binding Arbitration* test claim was denied based on the finding that it did not impose a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution. The test claim statutes were found to constitute a "program," since they impose unique requirements on local agencies that do not apply generally to all residents and entities in the state. However, since strikes by public safety personnel are illegal, and no other service to the public could be identified, the test claim statutes were not found to constitute an enhanced service to the public.

Because the City of Palos Verdes Estates claimant requested reimbursement for employee compensation costs in the original test claim, the analysis relied upon case law applicable to that situation, i.e., where reimbursement was sought for employee compensation or other benefit-related costs *alone* and no actual activities had been claimed. However, since the test claim was modified at the hearing to withdraw the request for reimbursement for employee compensation costs, the costs and activities that remain must be re-analyzed as a factual situation that can be distinguished from the situations in the case law originally cited.

The prior final decision relied upon cases supporting the concept that no higher level of service to the public is provided when there are increased costs for compensation or benefits *alone*. For example, *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, cited in the Statement of Decision, held that even though increased employee benefits may generate a higher quality of local safety officers, the test claim statutes did not constitute a new program or higher level of service; the court stated that "[a] higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public." However, *City of Richmond* was based on test claim statutes that increased the cost for death benefits for local safety members, but did not result in actual mandated activities.

The prior final decision also relied upon *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, which summarized and reaffirmed several previous cases to illustrate what constitutes a "new program or higher level of service." However, none of the older cases cited — i.e., *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, and *City of Richmond v. Commission On State Mandates, et al.* (1998) 64 Cal.App.4th 1190, — denied reimbursement for actual activities imposed on the local

agencies. In addition, *San Diego Unified School Dist.* did not address the issue of "new program or higher level of service" in the context of actual activities mandated by test claim statutes which increased the costs of employee compensation or benefits.

Although there is no case law directly on point for the situation where the test claim statutes impose activities that are unique to local government but do not clearly provide a service to the public, prior test claims have allowed reimbursement in such circumstances. Furthermore, since testimony was provided at the hearing that strikes by public safety personnel do occur, albeit in the less obvious form of "blue flu" or by other means, the legislative purpose for the test claim statutes must be reevaluated in the analysis to determine whether the provisions result in an increase in the level or quality of governmental services provided.

The Commission finds that the prior final decision for this test claim is contrary to law, and the Statement of Decision should be replaced to reflect the following new analysis and the resulting findings.

Issue 2: Are the test claim statutes subject to article XIII B, section 6 of the California Constitution?

Do the Test Claim Statutes Mandate Any Activities?

In order for a test claim statute or regulation to impose a reimbursable state-mandated program under article XIII B, section 6, the language must mandate an activity or task upon local governmental agencies. If the language does not mandate or require local agencies to perform a task, then article XIII B, section 6 is not triggered.⁴⁸

As amended at the hearing on this test claim, claimant is seeking reimbursement for the following activities: 1) costs for training on the test claim statute; 2) costs for restructuring bargaining units; 3) discovery activities pursuant to Code of Civil Procedure sections 1281.1, 1281.2 and 1299.8; 4) selecting the agency panel member and neutral arbitrator, and briefings; 5) preparing for and consulting with governing board regarding the last best and final offer; 6) preparing for and participating in negotiations, mediation and arbitration hearings; and 7) costs of litigating interpretation of the test claim statutes.

Training Costs

The Commission finds that training agency management, counsel, staff and members of governing bodies regarding binding arbitration is *not required* by the plain language of the test claim statutes. Therefore, these costs are not state-mandated or subject to article XIII B, section 6.

Costs for Restructuring Bargaining Units

The Commission finds that the plain language of the test claim statutes *does not require* bargaining units to be restructured. Therefore, any costs associated with such restructuring are not state-mandated or subject to article XIII B, section 6.

Discovery Activities Pursuant to Code of Civil Procedure Sections 1281.1, 1281.2 and 1299.8

When one party refuses to engage in arbitration, section 1281.2 establishes grounds for a court to determine whether there is a legal requirement to engage in arbitration, and to compel arbitration

⁴⁸ *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783 (*City of Merced*).

if necessary, Sections 1281.1 and 1299.8 make these provisions applicable to binding arbitration proceedings set forth under the test claim statutes. The Commission finds that activities related to discovery, pursuant to these sections, are not required.

Under the test claim statutes, arbitration is compelled when an impasse has been declared and the employee organization initiates arbitration. The only party that would refuse to engage in binding arbitration under this scenario is the local public agency employer, and such a decision to refuse to engage in arbitration is discretionary. Any discovery activities claimed by these provisions would be triggered by that discretionary decision, and thus are not state-mandated or subject to article XIII B, section 6.

Selecting Agency Panel Member and Neutral Arbitrator

Code of Civil Procedure section 1299.4, subdivision (b), states that:

Within three days after receipt of the written notification [triggering binding arbitration], each party shall designate a person to serve as its member of an arbitration panel. Within five days thereafter, or within additional periods to which they mutually agree, the two members of the arbitration panel appointed by the parties shall designate an impartial person with experience in labor and management dispute resolution to act as chairperson of the arbitration panel.

Subdivision (c) further states:

In the event that the parties are unable or unwilling to agree upon a third person to serve as chairperson, the two members of the arbitration panel shall jointly request from the American Arbitration Association a list of seven impartial and experienced persons who are familiar with matters of employer-employee relations. The two panel members may as an alternative jointly request a list of seven names from the California State Mediation and Conciliation Service, or a list from either entity containing more or less than seven names, so long as the number requested is an odd number. If after five days of receipt of the list, the two panel members cannot agree on which of the listed persons shall serve as chairperson, they shall, within two days, alternately strike names from the list, with the first panel member to strike names being determined by lot. The last person whose name remains on the list shall be chairperson.

Claimant is seeking reimbursement for: 1) consulting time of negotiators, staff and counsel in selecting the agency panel member; 2) time of the agency negotiators, staff and counsel in vetting and selecting a neutral arbitrator; and 3) time of the agency negotiators, staff and counsel in briefing the agency panel member. The Commission finds that the plain language of the test claim statutes requires only that the public agency employer select an agency panel member. The test claim statutes require the arbitration *panel members* selected by the parties, rather than the employer or employee organization, to select the neutral third panel member to act as chairperson. Moreover, nothing in the test claim statutes requires the public agency panel member to be briefed.

Thus the only activity required is the selection of an agency panel member, and, therefore, that activity alone is state-mandated and subject to article XIII B, section 6.

Prepare for and Consult with Governing Board Regarding Last Best Offer of Settlement

Code of Civil Procedure section 1299.6, subdivision (a), requires that, once the arbitration process is triggered, the arbitration panel shall direct that five days prior to the commencement of its hearings the local public agency employer and employee organization shall submit "the last best offer of settlement as to each of the issues within the scope of arbitration ... made in bargaining as a proposal or counterproposal and not previously agreed to by the parties prior to any arbitration request ..." The test claim statutes *do not*, however, require the local public agency employer to prepare for and consult with the governing board regarding the last best offer of settlement. Thus the only activity required is to *submit* the last best final offer of settlement to the arbitration panel, and, therefore, that activity alone is state-mandated and subject to article XIII B, section 6.

Prepare for and Engage in Negotiations, Mediation and Hearings

The claimant is seeking reimbursement for increased costs associated with collecting and compiling comparability data specified in Code of Civil Procedure section 1299.4, handling two-track negotiations (for economic issues that are subject to arbitration and economic issues that are not subject to arbitration), and preparing for and participating in mediation.

The Commission finds that the plain language of the test claim statutes *does not require* the local public agency to collect and compile comparability data in preparation for negotiations, to handle "two-track" negotiations, or to participate in mediation, when such activities occur outside the arbitration process. Therefore, any costs associated with such preparation or negotiations prior to the arbitration process being triggered are not state-mandated or subject to article XIII B, section 6.

However, once the arbitration process is triggered — by declaration of the negotiation impasse and the employee organization's request for arbitration — the arbitration panel can direct the parties to take various actions. The panel may "meet with the parties or their representatives, either jointly or separately, make inquiries and investigations, hold hearings, and take any other action including further mediation, that the arbitration panel deems appropriate."⁴⁹ For the purposes of its hearings, investigations or inquiries, the panel may also "subpoena witnesses, administer oaths, take the testimony of any person, and issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any subject matter before the panel."⁵⁰

Additionally, Code of Civil Procedure section 1299.8 states that, unless otherwise provided in the test claim statutes, the general provisions regarding arbitration found in the Code of Civil Procedure⁵¹ are applicable to binding arbitration proceedings under the test claim statutes. The relevant portions of these general arbitration provisions establish procedures for the conduct of hearings such as notice of hearings, witness lists, admissible evidence, subpoenas, and depositions.⁵²

⁴⁹ Code of Civil Procedure section 1299.5, subdivision (a).

⁵⁰ Code of Civil Procedure section 1299.5, subdivision (b).

⁵¹ Code of Civil Procedure sections 1280 et seq.

⁵² Code of Civil Procedure sections 1282 et seq.

Section 1299.9, subdivision (b), states that, unless otherwise agreed to by the parties, the costs of the arbitration proceeding and the expenses of the arbitration panel, *except those of the employer representative*, shall be borne by the employee organization. Thus, the public agency employer is responsible for costs of its agency panel member, but not the cost of the proceeding or the other panel members.

Claimant is seeking reimbursement for the following remaining activities:

1. time of the agency negotiators, staff and counsel in preparing for the arbitration hearing;
2. time of the agency negotiators, staff and counsel in vetting, selecting and preparing expert witnesses;
3. time of the agency panel member and attorney in pre-arbitration meetings of the panel;
4. staff, attorney, witness and agency panel member time for the hearings;
5. agency panel member time in consulting in closed sessions with the panel;
6. attorney time in preparing the closing brief;
7. time of the attorney, negotiators, and staff in consulting with the agency panel member prior to the issuance of the award;
8. time of the attorney, negotiators, staff, agency panel member, and governing board consulting regarding the award and giving directions to agency negotiators; and
9. time of the agency negotiators to negotiate with the union's negotiating representatives based on the award.

Once arbitration is triggered under Code of Civil Procedure section 1299.4, the arbitration panel, within the scope of its authority, may direct the parties to perform specified activities. Since the arbitration proceeding, once triggered, is mandatory, the Commission finds that the activities directed by the arbitration panel or activities initiated by the local public agency employer to participate in arbitration, are not discretionary. As noted above, the arbitration panel's authority includes meeting with the parties or their representatives, making inquiries and investigations, holding hearings, and taking any other action including further mediation, that the arbitration panel deems appropriate,⁵³ as well as subpoenaing witnesses, administering oaths, taking the testimony of any person, and issuing subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any subject matter before the panel.⁵⁴

The plain language of the test claim statutes does not require the local public agency, or its staff or governing board, to prepare for hearings, prepare expert witnesses, prepare a closing brief, or consult with its panel member prior to issuance of the award, ~~or negotiate with the employee organization representatives based on the award.~~ Not does the plain language of section 1299.7, subdivision (a), require the local public agency, or its staff or governing board, to negotiate with the employee organization representatives based on the award. Further, the plain language of the test claim statutes does not require the employer's arbitration panel member to participate in pre-

⁵³ Code of Civil Procedure section 1299.5, subdivision (a).

⁵⁴ Code of Civil Procedure section 1299.5, subdivision (b).

arbitration meetings with local agency staff, consult with local agency staff prior to issuance of the award, consult in closed session with the arbitration panel, or consult with local agency staff and the governing board regarding the award. However, to the extent that any of the above activities are directed by the arbitration panel within the scope of its authority, the activity is state-mandated.

Thus, once arbitration is triggered under Code of Civil Procedure section 1299.4, only the following activities, *to participate in the arbitration process or as required by the arbitration panel*, are state-mandated and subject to article XIII B, section 6:

1. Meet with the arbitration panel (Code Civ. Proc., § 1299.5, subd. (a)).
2. Cooperate in inquiries or investigations (Code Civ. Proc., § 1299.5, subd. (a)).
3. Participate in mediation (Code Civ. Proc., § 1299.5, subd. (a)).
4. Participate in hearings (Code Civ. Proc., § 1299.5, subd. (a)).
5. Respond to subpoenas and subpoenas duces tecum (Code Civ. Proc., § 1299.5, subd. (b)).
6. Respond to or make demands for witness lists and/or documents (Code Civ. Proc., § ~~1282.2~~, subdivision (a)(2) 1299.8).⁵⁵
7. Make application and respond to deposition requests (Code Civ. Proc., § ~~1283~~ and ~~1283.05~~ 1299.8).⁵⁶
8. Conduct discovery or respond to discovery requests (Code Civ. Proc., § ~~1283.05~~ 1299.8).⁵⁷

Costs of Litigating Interpretation of the Test Claim Statutes

Claimant is seeking "[c]osts of inevitable litigation regarding the interpretation of critical provisions of the law which are ambiguous," including the fact that the act covers "all other forms of remuneration," and covers employees performing "any related duties" to firefighting and investigating. The Commission finds that litigating any aspect of the test claim statutes is *not required* by the plain language of the test claim statutes. Therefore, these costs are not state-mandated or subject to article XIII B, section 6.

Summary of State-Mandated Activities

In summary, the Commission finds the following activities are state-mandated, and therefore subject to article XIII B, section 6:

1. Selecting an arbitration panel member (Code Civ. Proc., § 1299.4, subd. (b)).
2. Submitting the last best final offer of settlement to the arbitration panel (Code Civ. Proc., § ~~1299.4~~, subd. (b) 1299.6 subd. (a)).

⁵⁵ Incorporating by reference Code of Civil Procedure section 1282.2, subdivision (a)(2).

⁵⁶ Incorporating by reference Code of Civil Procedure sections 1283 and 1283.05.

⁵⁷ Incorporating by reference Code of Civil Procedure section 1283.05.

3. Once arbitration is triggered under Code of Civil Procedure section 1299.4, the following activities required by the arbitration panel or to participate in the arbitration process:

- a. Meet with the arbitration panel (Code Civ. Proc., § 1299.5, subd. (a)).
- b. Participate in inquiries or investigations (Code Civ. Proc., § 1299.5, subd. (a)).
- c. Participate in mediation (Code Civ. Proc., § 1299.5, subd. (a)).
- d. Participate in hearings (Code Civ. Proc., § 1299.5, subd. (a)).
- e. Respond to subpoenas and subpoenas duces tecum (Code Civ. Proc., § 1299.5, subd. (b)).
- f. Respond to or make demands for witness lists and/or documents (Code Civ. Proc., § ~~1282.2, subdivision (a)(2)~~ 1299.8).
- g. Make application and respond to deposition requests (Code Civ. Proc., § ~~§ 1283 and 1283.05~~ 1299.8).
- h. Conduct discovery or respond to discovery requests (Code Civ. Proc., § ~~1283.05~~ 1299.8).

These activities are only state-mandated for the time period in which the test claim statutes were presumed constitutional, January 1, 2001 through April 21, 2003.

Do the Mandated Activities Constitute a Program?

The courts have held that the term "program" within the meaning of article XIII B, section 6 means a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.⁵⁸ Only one of these tests must be met in order to find that the test claim statutes constitute a "program."

Here, the test claim statutes establish new binding arbitration activities for local public agency employers who employ peace officers and firefighters. The Department of Finance asserts that the costs alleged do not stem from the performance of a requirement unique to local government. The Commission disagrees with the Department, since the test claim statutes are *only* applicable to local public agency employers who employ peace officers and firefighters, and there is no other requirement statewide for employers to engage in binding arbitration with employee organizations. Hence the test claim statutes do not apply generally to all residents and entities in the state.

Moreover, based on the plain language of the test claim statutes, the Legislature's intent in enacting the statutes was to "protect the health and welfare of the public by providing impasse remedies necessary to afford public employers the opportunity to safely alleviate the effects of labor strife that would otherwise lead to strikes by firefighters and law enforcement officers."⁵⁹ Although strikes by law enforcement officers and firefighters are illegal, there is evidence in the

⁵⁸ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles*).

⁵⁹ Code of Civil Procedure section 1299.

record indicating that such strikes nevertheless occur.⁶⁰ Thus, the intent of these statutes is to prevent strikes by local safety officers thereby providing a service to the public.

Therefore, the Commission finds that the activities mandated by the test claim statutes constitute a "program," within the meaning of article XIII B, section 6, under either of the tests set forth in *County of Los Angeles*.

Issue 3: Do the test claim statutes constitute a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?

A test claim statute or executive order imposes a "new program or higher level of service" when the mandated activities: a) are new in comparison with the pre-existing scheme; and b) result in an increase in the actual level or quality of governmental services provided by the local public agency.⁶¹ The first step in making this determination is to compare the mandated activities with the legal requirements in effect immediately before the enactment of the test claim statute and regulations.

Prior to the enactment of the test claim statutes, local public agency employers were required to meet and confer in good faith with recognized employee organizations under the Meyers-Milias-Brown Act. The test claim statutes added new state-mandated activities relating to binding arbitration. Thus, the program is new in comparison with the pre-existing scheme.

Because the Legislature's intent in enacting test claim statutes was to prevent strikes by local firefighters and peace officers, and the statutes require local public agencies that employ these local safety officers to engage in new activities to prevent such strikes, the statutes result in an increase in the actual level or quality of services provided by the local public agency.

Therefore, the Commission finds that the activities mandated by the test claim statutes constitute a "new program or higher level of service" within the meaning of article XIII B, section 6.

Issue 4: Do the test claim statutes impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

For the test claim statutes to impose a reimbursable, state-mandated program, the new activities must impose costs mandated by the state pursuant to Government Code section 17514. Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service.

The claimant City of Palos Verdes Estates stated in the test claim that "[t]he activities necessary to comply with the mandated activities cost well in excess of \$200.00 per year ..."⁶² Thus, the

⁶⁰ Reporter's Transcript of Proceedings, July 28, 2006, pages 98-99.

⁶¹ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 877; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

⁶² At the time the test claim was filed, Government Code section 17564, subdivision (a), stated that the no test claim or reimbursement claim shall be made unless the claim exceeds \$200. That section was subsequently modified in Statutes 2002, chapter 1124, to increase the minimum to \$1,000. If this test claim is approved, any reimbursement claims must exceed \$1,000.

claimant City initially provided evidence in the record, signed under penalty of perjury, that there would be increased costs as a result of the test claim statutes. However, new evidence was provided at the July 25²⁸, 2006, Commission hearing for this test claim, under oath, that the claimant City of Palos Verdes Estates did not get to a stage in negotiations where binding arbitration was triggered.⁶³ Since no activities are reimbursable prior to the point at which binding arbitration is triggered under Code of Civil Procedure section 1299.4, the claimant City of Palos Verdes Estates did not in fact incur any costs mandated by the state to comply with the mandated activities during the limited reimbursement period in question (January 1, 2001 through April 21, 2003).

On January 23, 2007, co-claimant County of Napa provided a declaration stating that the binding arbitration process was triggered in that county, pursuant to Code of Civil Procedure sections 1299 et. seq., and County staff participated in the process during the reimbursement period by: 1) engaging in mediation; 2) designating an arbitration panel member; 3) meeting with the arbitrators; 4) gathering and exchanging requested information, exhibits, and witness lists; 5) conducting discovery; and 6) participating in a three-day arbitration hearing.⁶⁴ Therefore, the County of Napa did engage in some of the state-mandated activities. The County further stated that its costs to participate in these activities exceeded \$10,000. Thus, there is now evidence in the record, signed under penalty of perjury, that there are increased costs mandated by the state pursuant to Government Code sections 17514 and 17564 of at least \$1,000.

Government Code section 17556 lists several exceptions which preclude the Commission from finding costs mandated by the state. The Commission finds that none of the exceptions are applicable to deny this test claim.

Accordingly, the Commission finds that the activities mandated by the test claim statutes do impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

CONCLUSION

The Commission finds that the prior Statement of Decision adopted on July 28, 2006, was contrary to law, and, in applying the appropriate law to the test claim, the test claim statutes mandate the following activities:

1. Selecting an arbitration panel member (Code Civ. Proc., § 1299.4, subd. (b)).
2. Submitting the last best final offer of settlement to the arbitration panel (Code Civ. Proc., § ~~1299.4, subd. (b)~~ 1299.6, subd. (a)).
3. Once arbitration is triggered under Code of Civil Procedure section 1299.4, the following activities required by the arbitration panel or to participate in the arbitration process:
 - a. Meet with the arbitration panel (Code Civ. Proc., § 1299.5, subd. (a)).
 - b. Participate in inquiries or investigations (Code Civ. Proc., § 1299.5, subd. (a)).
 - c. Participate in mediation (Code Civ. Proc. § 1299.5, subd. (a)).

⁶³ Reporter's Transcript of Proceedings, July 28, 2006, pages 115-116.

⁶⁴ Declaration of Jacqueline M. Gong, Deputy County Counsel, Office of County Counsel, County of Napa, page 3.

- d. Participate in hearings (Code Civ. Proc. § 1299.5, subd. (a)).
- e. Respond to subpoenas and subpoenas duces tecum (Code Civ. Proc. § 1299.5, subd. (b)).
- f. Respond to or make demands for witness lists and/or documents (Code Civ. Proc., ~~§ 1282.2, subdivision (a)(2)~~ 1299.8).⁶⁵
- g. Make application and respond to deposition requests (Code Civ. Proc., ~~§ § 1283 and 1283.05~~ 1299.8).⁶⁶
- h. Conduct discovery or respond to discovery requests (Code Civ. Proc., ~~§ 1283.05~~ 1299.8).⁶⁷

These activities constitute a "program" as well as a "new program or higher level of service." Furthermore, the activities impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514. Because the test claim statutes were declared unconstitutional on April 21, 2003, however, the reimbursement period is limited to January 1, 2001 through April 20, 2003.

⁶⁵ Incorporating by reference Code of Civil Procedure section 1282.2, subdivision (a)(2).

⁶⁶ Incorporating by reference Code of Civil Procedure sections 1283 and 1283.05.

⁶⁷ Incorporating by reference Code of Civil Procedure section 1283.05.

DRAFT PARAMETERS AND GUIDELINES

Code of Civil Procedure Sections 1299, 1299.2,
1299.3, 1299.4, 1299.5, 1299.6, 1299.8 and 1299.9

Statutes 2000, Chapter 906

Binding Arbitration,
01-TC-07

County of Napa, Claimant

I. SUMMARY OF THE MANDATE

On March 29, 2007, the Commission on State Mandates (Commission) adopted a Statement of Decision on the *Binding Arbitration* test claim, finding that the prior Statement of Decision adopted on July 28, 2006, was contrary to law, and, in applying the appropriate law to the test claim, the test claim statutes mandate the following activities:

1. Selecting an arbitration panel member (Code Civ. Proc. § 1299.4, subd. (b)).
2. Submitting the last best final offer of settlement to the arbitration panel (Code Civ. Proc. § 1299.6, subd. (a)).
3. Once arbitration is triggered under Code of Civil Procedure section 1299.4, the following activities required by the arbitration panel or to participate in the arbitration process:
 - a. Meet with the arbitration panel (Code Civ. Proc. § 1299.5, subd. (a)).
 - b. Participate in inquiries or investigations (Code Civ. Proc. § 1299.5, subd. (a)).
 - c. Participate in mediation (Code Civ. Proc. § 1299.5, subd. (a)).
 - d. Participate in hearings (Code Civ. Proc. § 1299.5, subd. (a)).
 - e. Respond to subpoenas and subpoenas duces tecum (Code Civ. Proc. § 1299.5, subd. (b)).
 - f. Respond to or make demands for witness lists and/or documents (Code Civ. Proc. § 1299.8).¹
 - g. Make application and respond to deposition requests (Code Civ. Proc., § 1299.8).²
 - h. Conduct discovery or respond to discovery requests (Code Civ. Proc., § 1299.8).³

The Commission found that these activities constitute a "program" as well as a "new program or higher level of service." Furthermore, the Commission found that the activities impose "costs

¹ Incorporating by reference Code of Civil Procedure section 1282.2, subdivision (a)(2).

² Incorporating by reference Code of Civil Procedure sections 1283 and 1283.05.

³ Incorporating by reference Code of Civil Procedure section 1283.05.

mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514.

II. ELIGIBLE CLAIMANTS

Pursuant to Code of Civil Procedure section 1299.2, any city, county, and city and county employing firefighters and/or law enforcement officers, as defined in Code of Civil Procedure section 1299.3, that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs, except a city, county, or city and county governed by a charter that was amended prior to January 1, 2001, to incorporate a requirement for resolving employment disputes via binding arbitration (Code Civ. Proc. § 1299.9, subdivision (a)).

III. PERIOD OF REIMBURSEMENT

Government Code section 17557, subdivision (e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The City of Palos Verdes Estates filed the test claim on October 24, 2001, establishing eligibility for fiscal year 2000-2001. However, the operative date of the test claim statutes, as enacted by Statutes 2000, chapter 906, is January 1, 2001. Moreover, the test claim statutes were declared unconstitutional by the California Supreme Court on April 21, 2003. Therefore, the reimbursement period for costs incurred pursuant to Statutes 2000, chapter 906, is limited to January 1, 2001, through April 20, 2003.

Actual costs for one fiscal year shall be included in each claim. Estimated costs of the subsequent year may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given fiscal year do not exceed \$1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are reimbursable:

1. Selecting an arbitration panel member (Code Civ. Proc. § 1299.4, subd. (b)).
2. Submitting the last best final offer of settlement to the arbitration panel (Code Civ. Proc. § 1299.6, subd. (a)).
3. Once arbitration is triggered under Code of Civil Procedure section 1299.4, the scope of which is defined in Code of Civil Procedure section 1299.3, subdivision (g), the following activities required by the arbitration panel or to participate in the arbitration process:
 - a. Meet with the arbitration panel (Code Civ. Proc. § 1299.5, subd. (a)).
 - b. Participate in inquiries or investigations (Code Civ. Proc. § 1299.5, subd. (a)).
 - c. Participate in mediation (Code Civ. Proc. § 1299.5, subd. (a)).
 - d. Participate in hearings (Code Civ. Proc. § 1299.5, subd. (a)).
 - e. Respond to subpoenas and subpoenas duces tecum (Code Civ. Proc. § 1299.5, subd. (b)).
 - f. Respond to or make demands for witness lists and/or documents (Code Civ. Proc., § 1299.8).⁴
 - g. Make application and respond to deposition requests (Code Civ. Proc., § 1299.8).⁵
 - h. Conduct discovery or respond to discovery requests (Code Civ. Proc., § 1299.8).⁶

The following activities are not reimbursable:

- training agency management, counsel, staff and members of governing bodies regarding binding arbitration;
- costs associated with restructuring bargaining units to accommodate binding arbitration;
- discovery activities, as set forth in Code of Civil Procedure sections 1281.1, 1281.2 and 1299.8, when such activities are engaged in outside the binding arbitration process triggered by Code of Civil Procedure section 1299.4;
- collect and compile comparability data, handle two track negotiations or participation in mediation, when such activities are engaged in outside the binding arbitration process triggered by Code of Civil Procedure section 1299.4;
- negotiating with the employee organization representatives based on the arbitration panel's award, pursuant to Code of Civil Procedure section 1299.7, subdivision (a); and

⁴ Incorporating by reference Code of Civil Procedure section 1282.2, subdivision (a)(2).

⁵ Incorporating by reference Code of Civil Procedure sections 1283 and 1283.05.

⁶ Incorporating by reference Code of Civil Procedure section 1283.05.

- costs to litigate interpretation of the test claim statutes.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the

rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter⁷ is subject to the initiation

⁷ This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.

Commission on State Mandates

Original List Date: 10/26/2001

Mailing Information: Notice of adopted SOD

Last Updated: 1/4/2007

List Print Date: 05/10/2007

Mailing List

Claim Number: 01-TC-07

Issue: Binding Arbitration

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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COUNTY of NAPA

OFFICE OF COUNTY COUNSEL

RECEIVED
JUN 11 2007
**COMMISSION ON
STATE MANDATES**

ROBERT WESTMEYER
County Counsel

Sent by fax and U.S. mail

June 11, 2007

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Chief Deputy

SILVA DARSINIAN
Chief Deputy

LAURA J. ANDERSON
Deputy

JACQUELINE M. GONG
Deputy

ROBERT C. MARTIN
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CHERI HUBER
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LINDA HOLBROOK
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SUSAN M. INGALLS
SORA O'DOHERTY
Paralegals

Ms. Paula Hagashi
Executive Director
Commission on State Mandates
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Sacramento CA 95841

Re: *Binding Arbitration* (01-TC-07) – City of Palos Verdes Estates Test Claim
Comments on Proposed Parameters & Guidelines and Supporting Declaration

Dear Ms. Hagashi:

Enclosed please find the County of Napa's Comments on the Proposed Parameters and Guidelines, together with a Declaration in Support of these Comments. Please let me know if you have any questions or require any further information.

Sincerely,

Jacqueline M. Gong
Deputy County Counsel

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COUNTY of NAPA

OFFICE OF COUNTY COUNSEL

COUNTY OF NAPA

COMMENTS ON PROPOSED PARAMETERS AND GUIDELINES

Binding Arbitration (01-TC-07)

Code of Civil Procedures Sections 1281.1, 1299, 1299.2,
1299.3, 1299.4, 1299.5, 1299.6, 1299.7, 1299.8 and 1299.9
As Added by Statutes 2000, Chapter 906

The County of Napa respectfully submits the following in response to the proposed Parameters and Guidelines issued by the Commission staff on May 10, 2007.

The proposed Parameters and Guidelines as currently set forth include only those activities specified in the statutes at issue and do not accurately reflect the full reality of the Binding Arbitration Program. At this stage of the test claims process, the Commission may consider "the most reasonable methods of complying with the mandate" which includes "methods not specified in statute or executive order that are necessary to carry out the mandated program." (2 C.C.R. § 1183.1(a)(4).) At each step of the arbitration process, any number of individuals spend time and resources as a necessary part of participation in the program. Therefore, the County proposes the following changes:

1. Selecting an arbitration panel member which includes attorney, staff and negotiator time to research potential members, prepare for the selection, and brief the panel member. This also includes attorney, staff and negotiator time to vet and select a neutral arbitrator. (Code of Civ. Proc. § 1299.4, subd. (b)).

2. Submitting the last best final offer of settlement to the arbitration panel which includes attorney and staff time to prepare for and draft the last best final offer for submission as well as attorney, staff and board members time for consultation with governing board. (Code of Civ. Proc. § 1299.6, subd. (a)).

3. Once arbitration is triggered under Code of Civil Procedure section 1299.4, the scope of which is defined in Code of Civil Procedure section 1299.3, subdivision (g), the following activities required by the arbitration panel or to participate in the arbitration process:

a. Meet with arbitration panel which includes attorney, staff, agency panel member and negotiator time to prepare for and to meet with the panel. This also includes agency panel member time for consulting in closed session with the panel; attorney, staff, agency panel member and negotiator time to consult with the panel member prior to the issuance of the award; and attorney, staff, agency panel member, governing board and negotiator time to consult regarding the award. (Code of Civ. Proc. § 1299.5, subd. (a)).

ROBERT WESTMEYER
County Counsel

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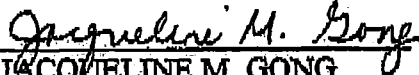
Page 2

- b. Participate in inquiries or investigations which includes attorney and staff time to prepare for and respond to inquiries or investigations. (Code of Civ. Proc. § 1299.5, subd. (a)).
- c. Participate in mediation which includes attorney and staff time to prepare for and participate in the mediation process. (Code of Civ. Proc. § 1299.5, subd. (a)).
- d. Participate in hearings which includes attorney, staff, witness and negotiator time to prepare for and participate in the hearings and attorney time to prepare the closing brief. This also includes attorney, staff, and negotiator time to vet, select and prepare expert witnesses as well as to prepare general witnesses. (Code of Civ. Proc. § 1299.5, subd. (a)).
- e. Respond to subpoenas and subpoenas duces tecum which includes attorney and staff time to research, prepare to respond to subpoenas, gather responsive documents, meet with witnesses and others to obtain responses or responsive documents, draft and serve responses. (Code of Civ. Proc. § 1299.5, subd. (b)).
- f. Respond to or make demands for witness lists and/or documents which includes attorney and staff time to research, prepare to make or respond to demands, gather responsive documents, meet with witnesses and others to obtain responses or responsive documents or demands and draft and serve demands or responses. (Code of Civ. Proc. § 1299.8).
- g. Make application and respond to discovery requests which includes attorney and staff time to research, prepare to make or respond to requests, gather responsive documents, meet with witnesses and others to obtain responses or responsive documents or requests and draft and serve responses or requests. (Code of Civ. Proc. § 1299.8).
- h. Conduct discovery or respond to discovery requests which includes attorney and staff time to research, prepare to make or respond to requests, gather responsive documents, meet with witnesses and others to obtain responses or responsive documents or discovery requests and draft and serve responses or discovery requests. (Code of Civ. Proc. § 1299.8).

The County respectfully requests the Commission direct staff to amend the proposed Parameters and Guidelines in accordance with the proposed changes as set forth above.

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on June 11th, 2007, in Napa, California.


JACQUELINE M. GONG,
Deputy County Counsel
County of Napa

**DECLARATION OF JACQUELINE M. GONG
IN SUPPORT OF AMENDMENTS TO THE PROPOSED PARAMETERS AND
GUIDELINES**

*Binding Arbitration
(01-TC-07)*

Code of Civil Procedures Sections 1281.1, 1299, 1299.2,
1299.3, 1299.4, 1299.5, 1299.6, 1299.7, 1299.8 and 1299.9
As Added by Statutes 2000, Chapter 906

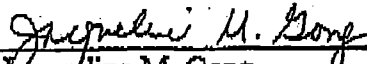
I, Jacqueline M. Gong, declare:

1. I am a Deputy County Counsel for the County of Napa, primarily assigned to employment law matters. From January through September 2001, I participated in the binding interest arbitration process between the County and the Napa County Deputy Sheriffs' Association ("DSA") to the final award of an arbitration decision on the disputed economic issues arising from negotiations. I have personal knowledge of the facts stated herein, and if called upon to testify, I could so competently.
2. In January 2001, DSA requested that disputed economic issues under negotiations with the County be submitted to arbitration pursuant to California Code of Civil Procedure Section 1299 et seq. ("SB 402"). After consultation with other agencies, and meetings between the County's Human Resources Director ("HR Director") and legal counsel, the County designated its arbitration panel member. The selection of the partisan member is key as this member represents the employer's perspective. Strategically, the County sought a panel member who would have a fundamental knowledge about the collective bargaining process and an understanding of County operations and funding, including county structures, staffing patterns, law enforcement operations; this member needed to enhance the neutral arbitrator's understanding of the technical aspects of the County's economic positions. For these reasons, the County spent some time researching, consulting and evaluating who best would represent the County.
3. In preparation of selecting a neutral arbitrator, legal counsel conducted extensive research on prospective neutral arbitrators: analyzing their backgrounds and arbitration experience, gathering former decisions and contacting agencies who had participated in arbitration hearings with them. It was essential for the County to vet the prospective arbitrators. Strategically, due to the complicated data analysis the County anticipated it would need to present at the hearing, the County evaluated arbitrators for their ability and comfort with handling extensive factual information and analysis and for a liberal approach to admitting in evidence. After further discussions between the County's Human Resources Director and legal counsel, the County planned its approach in participating in the joint

selection of the neutral arbitrator. The County and DSA jointly selected a neutral arbitrator.

4. In April 2001 the parties and legal counsel met with the arbitration panel to submit their last best final offers of settlement, to establish a hearing timetable for the exchange of requested information, exhibits and other evidentiary documents, witness lists, and hearing dates. At this meeting, the parties further settled on two economic proposals. In preparation for the meeting, staff and legal counsel prepared and drafted the County's last best final offer for submission after consultation with the County's Board of Supervisors.
5. As agreed to with the arbitration panel, the County prepared its response to DSA's request for budgetary documentation and the evidentiary exhibits for the hearing. This preparation entailed considerable time and resources, not only of legal counsel and County Human Resources staff, but of staff from the County Executive Office and Auditor-Controller. The compilation of fiscal data and analysis far exceeded what the County typically gathered in preparation of its routine negotiations, including past & present annual budgets and projections, budget updates, information on wage increases for employees over the span of ten years, data demonstrating revenue losses and gains, debt service levels, County funding priorities, data on general reserve set-asides and other budget and spending limitations.
6. SB 402 obliges the arbitration panel to select the party's last best offer on each disputed economic issue that most nearly adheres to specified factors under California Code of Civil Procedure Section 1299.6. To effectively participate in the arbitration hearing, the County searched for and retained expert witnesses to analyze the fiscal impact of proposed economic issues on the County and its ability to pay, as well as to study the comparability of the County's economic proposals to similarly situated agencies. Expert witnesses developed analytical studies and prepared for testifying at the arbitration hearing with the assistance of legal counsel. General witnesses were also identified and prepared for testifying about County budgets, revenue and financial commitments.
7. As with any arbitration process, the County, through its staff and legal counsel, prepared and responded to requests for discovery and other inquiries for information, served and drafted responses/responsive documents. The three-day hearing involved attorney, staff and witness time to prepare and participate in the hearing. Following the hearing, legal counsel and staff at the direction of the arbitration panel prepared the submission of additional written evidence and closing briefs.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 11th day of June, 2007, in Napa, California.


Jacqueline M. Gong
Deputy County Counsel
County of Napa

PROOF OF SERVICE

I am a resident of the United States and of the State of California. I am employed in the County of Napa. My business address is 1195 Third Street, Suite 301, Napa, California. My business telephone is (707) 253-4234; fax number (707) 259-8220. I am over the age of eighteen years. I am not a party to the within action or proceeding. On June 11, 2007, I served the following document(s);

**RE: BINDING ARBITRATION (01-TC-07) - City of Palo Verdes
Estates Test Claim**

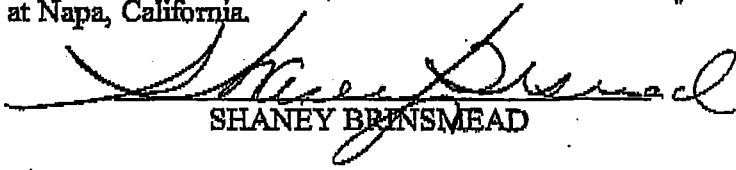
**COUNTY OF NAPA'S COMMENTS ON
PROPOSED PARAMETERS AND GUIDELINES**

**DECLARATION OF JACQUELINE M. GONG IN SUPPORT OF
AMENDMENTS TO THE PROPOSED PARAMETERS AND GUIDELINES**

I am familiar with the practice of Napa County Counsel's Office, for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with the ordinary course of business, the above-mentioned document(s) would have been deposited with the United States Postal Service on the same day on which it was placed at Napa County Counsel's Office.

- by placing, or causing to be placed, a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Napa County, California, addressed as set forth below. (CCP § 1012, 1013, and 1013(a))
- by personally delivering, or causing to be delivered, a true copy thereof to the person(s) and at the address(es) set forth below. (CCP §1011)
Time: _____ Person served: _____
- by personally delivering, or causing to be delivered, a true copy thereof to the office/court folder of the addressee.
- by causing a true copy thereof to be delivered to the person(s) at the address(es) set forth below, by and/or through the services of:
- a. United Parcel Service
 - b. Federal Express
 - c. Express Mail
 - d. Facsimile (Followed by First Class Mail; Rules of Court §2008) Pursuant to Rules of Court §2008(e), this document was sent by facsimile transmission and this transmission was reported as complete and without error. A copy of this transmission report shall be attached to this proof of service and kept with the file. (VIA FACSIMILE TO PAULA HIGASHI ONLY AT (916) 445-0278)

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on June 11, 2007, at Napa, California.


SHANEY BRINSMEAD

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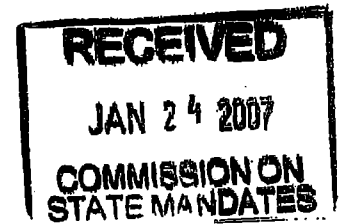
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CHERI HUBER, Privacy Officer

**REQUEST TO JOIN AS CO-TEST CLAIMANT
BY COUNTY OF NAPA**

Binding Arbitration
(01-TC-07)

Code of Civil Procedures Sections 1281.1, 1299, 1299.2,
1299.3, 1299.4, 1299.5, 1299.6, 1299.7, 1299.8 and 1299.9
As Added by Statutes 2000, Chapter 906



The County of Napa hereby requests that it be allowed to join the City of Palos Verdes Estates as a co-test claimant in the above-entitled test claim matter. It has recently come to the attention of the County of Napa that the Commission's Staff has recommended denial of the test claim based upon the fact that the City of Palos Verdes Estates did not have any costs associated with Chapter 402, Statutes 2000 ("SB 402"), and is so recommending for the hearing on January 25, 2007.


After the passage of SB 402, the County of Napa did engage in Binding Interest Arbitration with the Napa County Deputy Sheriffs' Association to the final award of a decision by the arbitration panel. To date, the County of Napa has not totaled its expenditures by all staff, counsel, and retained outside counsel, much less expenses, but knows these costs exceed \$10,000.00.

We understand that due to the statute of limitations, we cannot commence a test claim on our own, and unless we join in on the test claim brought by the City of Palos Verdes Estates, we will be forever precluded from recovering our costs incurred in complying with SB 402 from its inception until it was declared unconstitutional.

On January 23, 2007, the Napa County Board of Supervisors authorized this request to the Commission on State Mandates to allow the County of Napa to join in as a co-test claimant in this matter. To the extent that the City of Palos Verdes Estates has plead that SB 402 constitutes a reimbursable mandate, we join in and adopt its pleadings as though they were the County's.

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on January 23, 2007, in Napa, California.


JACQUELINE M. GONG,
Deputy County Counsel
County of Napa


DECLARATION OF JACQUELINE M. GONG

IN SUPPORT OF THE COUNTY OF NAPA
IN ITS REQUEST TO THE COMMISSION ON STATE MANDATES
TO BE JOINED AS CO-TEST CLAIMANT
IN THE TEST CLAIM OF THE CITY OF PALOS VERDES ESTATES

1. I have served in the Office of the Napa County Counsel as a Deputy County Counsel since November 1998, primarily assigned to personnel matters. From January through September 2001, I participated in the binding interest arbitration process between the County and the Napa County Deputy Sheriffs' Association ("DSA") to the final award of an arbitration decision on the disputed economic issues arising from negotiations. DSA is the employee organization representing law enforcement employees of the County.
2. Beginning in July 2000, I served on the County of Napa's bargaining team in its negotiations of a successor Memorandum of Understanding ("MOU") with DSA. Negotiations continued until the parties reached impasse in October of 2000. As provided in the County's Employer-Employee Relations Policy, the parties agreed to participate in mediation, meeting on four occasions in November, December, and then in January and February of 2001.
3. During the mediation process on January 16, 2001, DSA requested the disputed economic issues be submitted to arbitration pursuant to California Code of Civil Procedure Section 1299 et seq. (SB 402). The mediation process continued through February 20th at which time the County designated its partisan arbitrator. The DSA also selected its partisan arbitrator. In March the County and DSA then jointly designated an impartial arbitrator to serve on the arbitration panel as required by SB 402. The parties agreed to commence the arbitration hearing on April 17, 2001. Meeting with the neutral arbitrator, the parties identified the disputed economic issues and established a hearing timetable for the exchange of requested information, exhibits, and witness lists, and the parties agreed on hearing dates. Out of this meeting, the parties further settled on two economic proposals on retirement and dental benefits.
4. Pursuant to agreed upon timelines, the parties conducted discovery and exchanged documents before the hearing set to commence on May 22nd. This entailed not only the time of the negotiating team, but other county staff in gathering the requisite documents and in the conduct of discovery.
5. Five days before the hearing, the parties each submitted their last, best offer from negotiations as required under SB 402. A three-day hearing was held before the arbitration panel, followed by additional submissions of written evidence and legal arguments. In September 2001 the panel issued its decision. The parties made no amendments to the decision. Following a waiting period of five days, the binding decision was made public by the County.

6. The full cost of this interest arbitration process to the County is yet to be fully determined, but exceeds \$10,000.00 based alone on legal fees and expenses incurred. In the course of participating in the arbitration process, the County's Human Resources Director served on the arbitration panel. Responses to discovery requests involved extensive staff time and resources from the Human Resources Division, County Executive Office and Auditor-Controller's Department. The County also incurred costs for legal counsel, both in-house and retained outside counsel. Expenses were further incurred for a number of expert witnesses in the arbitration hearing.
7. I plan on attending the hearing of the Commission on State Mandates as the representative of the County of Napa, and will be available to provide additional testimony and answer any questions that the Commission Staff, interested state agencies, or the Commission itself may have.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on January 23, 2007, in Napa, California.


JACQUELINE M. GONG

PROOF OF SERVICE

I am a resident of the United States and of the State of California. I am employed in the County of Napa. My business address is 1195 Third Street, Suite 301, Napa, California. My business telephone is (707) 253-4521; fax number (707) 259-8220. I am over the age of eighteen years. I am not a party to the within action or proceeding. On January 23, 2007, I served the following document(s);

REQUEST TO JOIN AS CO-TEST CLAIMANT BY COUNTY OF NAPA

I am familiar with the practice of Napa County Counsel's Office, for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with the ordinary course of business, the above-mentioned document(s) would have been deposited with the United States Postal Service on the same day on which it was placed at Napa County Counsel's Office.

by placing, or causing to be placed, a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Napa County, California, addressed as set forth below. (CCP § 1012, 1013, and 1013(a))

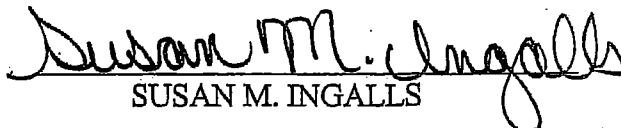
by personally delivering, or causing to be delivered, a true copy thereof to the person(s) and at the address(es) set forth below. (CCP §1011)
Time: _____ Person served: _____

by personally delivering, or causing to be delivered, a true copy thereof to the office/court folder of the addressee.

by causing a true copy thereof to be delivered to the person(s) at the address(es) set forth below, by and/or through the services of:

- a. United Parcel Service
- b. Federal Express
- c. Express Mail
- d. Facsimile (Followed by First Class Mail; Rules of Court §2008) Pursuant to Rules of Court §2008(e), this document was sent by facsimile transmission and this transmission was reported as complete and without error. A copy of this transmission report shall be attached to this proof of service and kept with the file.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on January 23, 2007, at Napa, California.


SUSAN M. INGALLS

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Commission on State Mandates

Original List Date: 10/25/2001
Last Updated: 1/4/2007
List Print Date: 05/19/2008
Claim Number: 01-TC-07
Issue: Binding Arbitration

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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