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November 6, 2006

Mr. Allan Burdick
DMG-Maximus
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

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

Re: **Draft Staff Analysis for Reconsideration of Prior Decision and Hearing Date**
Binding Arbitration (01-TC-07)
City of Palos Verdes Estates, Claimant
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

Dear Mr. Burdick:

The draft staff analysis for this reconsideration is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **November 27, 2006**. 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, January 25, 2007** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about January 11, 2007. 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 Deborah Borzelleri at (916) 322-4230 with any questions regarding the above.

Sincerely,

PAULA HIGASHI
Executive Director

Enc. Draft Staff Analysis/Transcript and Statement of Decision adopted July 28, 2006

MAILED: _____ FAXED: _____
DATE: 11/6/08 INITIAL: ✓
CHRON: _____ FILE: _____
WORKING BINDER: _____

J:/mandates/01-TC-07/Reconsideration/DSA
Hearing: January 25, 2007

ITEM ___

DRAFT STAFF ANALYSIS FOR RECONSIDERATION OF PRIOR FINAL DECISION ADOPTED JULY 28, 2006

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

As Added by Statutes 2000, Chapter 906

Binding Arbitration (01-TC-07)

Executive Summary

This is a reconsideration of a prior final decision that was adopted on July 28, 2006, on the *Binding Arbitration* test claim, requested by the Commission Chairperson. Government Code section 17559 and section 1188.4 of the Commission's regulations provides authority for this action.

Background

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

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

If the Commission grants the request for reconsideration, staff prepares and issues an analysis addressing whether the prior final decision is contrary to law and, if so, to recommend how to correct the error of law. A hearing is held to make the determination, and a supermajority of five affirmative votes is required to change a prior final decision.

The *Binding Arbitration* statutes, in the context of labor relations between local public 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.

On July 28, 2006, the Commission adopted a Statement of Decision denying the 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.*

At the hearing, however, claimant modified the test claim significantly by withdrawing its request for reimbursement for litigation, employee compensation and compensation enhancement costs. 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 via other methods.

The Statement of Decision was mailed to the claimant, interested parties, and affected state agencies on August 7, 2006. On August 16, 2006, the Chairperson of the Commission directed staff to prepare a request for reconsideration of the Statement of Decision in order to apply the relevant case law to the test claim as it was revised at the July 28, 2006 hearing. On October 4, 2006, the Commission granted the request, and staff prepared this analysis on 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?

Staff Analysis

Staff finds that the prior final decision on this test claim was contrary to law and should be amended to reflect the analysis applying appropriate case law to the amended test claim. Staff further finds that, although the test claim statutes mandated certain activities for the period of January 1, 2001 through April 21, 2003, and did constitute a "program" as well as a "new program or higher level of service," the statutes did not impose "costs mandated by the state" pursuant to Government Code section 17514 because there is no evidence in the record to indicate that the claimant incurred any costs to comply with the mandated activities during the limited reimbursement period in question (January 1, 2001 through April 21, 2003).

Conclusion

Staff finds that the prior Statement of Decision adopted on July 28, 2006, was contrary to law. Staff further finds that, in applying the appropriate law to the test claim, the test claim statutes do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, because there is no evidence in the record to show that the claimant incurred "costs mandated by

the state" to comply with the mandated activities during the limited reimbursement period of January 1, 2001 through April 21, 2003.

Recommendation

Staff recommends the Commission adopt this analysis — finding that the prior Statement of Decision adopted on July 28, 2006, was contrary to law and to correct the error of law as set forth in the analysis — and deny the test claim.

STAFF ANALYSIS

Chronology

07/28/06	Commission adopted Statement of Decision
08/07/06	Commission mailed Statement of Decision to claimant, interested parties, and affected state agencies
08/16/06	Request for reconsideration was filed with the Commission
10/04/06	Commission granted the request for reconsideration
11/--/06	Commission staff issued draft staff analysis

Background

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

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[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).

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]

Under the Meyers-Milias-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 statutes[15] 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

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[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 Associatio*n (1989) 207 Cal.App.3d 1568.

[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).

> 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 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

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[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.*

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, 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

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[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, staff makes no finding with regard to it.

[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*).

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]

Thus, the analysis addresses only the period during which the test claim statutes were presumed to be constitutional, January 1, 2001 through April 21, 2003.

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 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

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[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 Commission staff makes no finding with regard to it.

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

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

Claimant's Position

The 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.

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

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.
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, 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.

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 asserts 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 those 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."

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[36] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[37] "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 responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[38] 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.[39] 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.[40]

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.[41] 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.[42] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[43]

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[36] 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."

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

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

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

[40] *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*).

[41] *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).

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

[43] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 877.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[44]

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.[45] 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."[46]

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 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.

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[44] *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.

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

[46] *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.

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.

Staff 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.[47]

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;

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

6) preparing for and participating in negotiations, mediation and arbitration hearings; and
7) costs of litigating interpretation of the test claim statutes.

Training Costs

Staff 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

Staff 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 if necessary. Sections 1281.1 and 1299.8 make these provisions applicable to binding arbitration proceedings set forth under the test claim statutes. Staff 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. Staff 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 require 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.

Staff 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."[48] For the

[48] Code of Civil Procedure section 1299.5, subdivision (a).

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."[49]

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 Procedure[50] 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.[51]

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, staff 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

[49] Code of Civil Procedure section 1299.5, subdivision (b).

[50] Code of Civil Procedure sections 1280 et seq.

[51] Code of Civil Procedure sections 1282 et seq.

deems appropriate,[52] 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.[53]

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, consult with its panel member prior to issuance of the award, or 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, 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, subd. (a)(2)).
7. Make application and respond to deposition requests (Code Civ. Proc. §§ 1283, 1283.05).
8. Conduct discovery or respond to discovery requests (Code Civ. Proc. § 1283.05).

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. Staff 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, staff finds the following activities are state-mandated, and therefore subject to article XIII B, section 6:

[52] Code of Civil Procedure section 1299.5, subdivision (a).

[53] Code of Civil Procedure section 1299.5, subdivision (b).

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)).
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, subd. (a)(2)).
    g. Make application and respond to deposition requests (Code Civ. Proc. §§ 1283, 1283.05).
    h. Conduct discovery or respond to discovery requests (Code Civ. Proc. § 1283.05).

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. [54] 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. Staff 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."[55]

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

[55] Code of Civil Procedure section 1299.

Although strikes by law enforcement officers and firefighters are illegal, there is evidence in the record indicating that such strikes nevertheless occur.[56] Thus, the intent of these statutes is to prevent strikes by local safety officers thereby providing a service to the public.

Therefore, staff 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.[57] 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, staff 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 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 ..."[58] Thus, the claimant initially provided

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[56] Reporter's Transcript of Proceedings, July 28, 2006, pages 98-99.

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

[58] 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

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 Commission hearing for this test claim, under oath, that the claimant did not get to a stage in negotiations where binding arbitration was triggered.[59] Since no activities are reimbursable prior to the point at which binding arbitration is triggered under Code of Civil Procedure section 1299.4, claimant 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).

Therefore, staff finds that the activities mandated by the test claim statutes *do not* 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

Staff finds that the prior Statement of Decision adopted on July 28, 2006, was contrary to law. Staff further finds that, in applying the appropriate law to the test claim, the test claim statutes do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, because there is no evidence in the record to show that the claimant incurred "costs mandated by the state" to comply with the mandated activities during the limited reimbursement period of January 1, 2001 through April 21, 2003.

Recommendation

Staff recommends the Commission adopt this analysis — finding that the prior Statement of Decision adopted on July 28, 2006, was contrary to law and to correct the error of law as set forth in the analysis — and deny the test claim.

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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.

[59] Reporter's Transcript of Proceedings, July 28, 2006, pages 115-116.

CERTIFIED COPY

PUBLIC HEARING

COMMISSION ON STATE MANDATES

--oOo--

TIME: 9:30 a.m.

DATE: Friday, July 28, 2006

PLACE: State Capitol, Room 126
Sacramento, California

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

--oOo--

Reported by: Daniel P. Feldhaus
California Certified Shorthand Reporter #6949
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A P P E A R A N C E S

COMMISSIONERS PRESENT

ANNE SHEEHAN
(Commission Chair)
Representative for MICHAEL GENEST
Director
Department of Finance

PAUL GLAAB
City Council Member
City of Laguna Niguel

FRANCISCO LUJANO
Representative for PHILIP ANGELIDES
State Treasurer

SARAH OLSEN
Public Member

SEAN WALSH
Director
State Office of Planning and Research

AMY HAIR
Representative for STEVE WESTLY
State Controller

J. STEVEN WORTHLEY
Supervisor and Chairman of the Board
County of Tulare

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I N D E X

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CHAIR SHEEHAN: And a second.

All those in favor, say aye.

(A chorus of ayes was heard.)

CHAIR SHEEHAN: Opposed?

(No audible response.)

CHAIR SHEEHAN: The motion passes unanimously. Thank you.

Okay, now we all have to get our other books.

MS. HIGASHI: I was going to suggest that we take a five-minute break at this time, especially for our reporter.

(A recess was taken from 10:53 a.m. to 11:04 a.m.)

CHAIR SHEEHAN: We would like to reconvene the meeting of the Commission on State Mandates.

And we are on Item --

MS. HIGASHI: Number 10.

CHAIR SHEEHAN: Item 10, all right. *Binding Arbitration* test claim.

MS. HIGASHI: That's correct. And Commission Counsel Deborah Borzelleri will present this test claim.

MS. BORZELLERI: Thank you.

This test claim deals with legislation that establishes a mandatory binding arbitration process for local governments and their law enforcement officers and

firefighters.

Under that legislation, when an impasse in employer/employee relations was declared, the parties would be subject to binding arbitration if the employee organization so requested.

The test claim statute became effective on January 1, 2001, but was declared unconstitutional by the California Supreme Court on April 21st, 2003, in the County of Riverside case which was filed in early 2001, as violating the home rule provisions of the California Constitution.

Because the Supreme Court did not address whether or not its ruling was retroactive to the original effective date of the test claim statute, staff's analysis addresses whether the statute, while it was believed to be constitutional, created a reimbursable state-mandated local program. This is an issue of first impression for the Commission.

Staff finds that applying the Court's ruling of unconstitutionality retroactively to the original date of the effective legislation could have the effect of forcing programs and costs on local governments without the state paying for them, which is contrary to the stated purpose of Article XIII B, Section 6, of the Constitution. So because binding rights or obligations

in the form of reimbursable mandates could have been created while the test claim legislation was presumed to be constitutional -- and we're talking about between January 1, 2001, and April 21st, 2003 -- staff finds that a full mandates analysis on the merits needs to proceed to determine whether the test claim legislation did, in fact, mandate a new program or higher level of service and impose costs mandated by the state during that period of time.

Therefore, staff finds that based on the purpose of Article XIII B, Section 6, legislation deemed unconstitutional, in this case by the Court, could create a reimbursable state-mandated program during the time the legislation was presumed to be constitutional.

However, staff finds that the test claim statute at issue here did not constitute a new program or higher level of service. This statute required the local agency to engage in a process that the claimant contends resulted in increased costs for employee compensation or benefits. The cases have consistently held that additional costs for increased employee benefits and compensation in the 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 Constitution. And since strikes by law enforcement officers and fire services personnel are prohibited by law, no, successful argument can be made that this test claim statute affects law enforcement or firefighting service to the public.

Staff recommends the Commission adopt the staff analysis and deny the test claim.

Will the parties please come forward and state your name?

MR. LIEBERT: My name is John Liebert. I'm an attorney with the law firm of Liebert Cassidy Whitmore, representing the claimant.

MS. STONE: Pamela Stone on behalf of the City of Palos Verdes Estates.

Mr. DREILING: Daniel Dreiling, Chief of Police for the City of Palos Verdes Estates.

MS. GEANACOU: Susan Geanacou, Department of Finance.

CHAIR SHEEHAN: All right, do you want to start, Mr. Liebert?

MR. LIEBERT: Please.

This claim is, as indicated, pursuant to Code of Civil Procedure sections 2099 through 2099.9. And

that was a section, while it was in effect, that provided for binding interest arbitration, a procedure that had been found to be in violation of the preexisting California law.

In order to put this in context, let me say just a few words in terms of how this fits in with other law.

In the Government Code, as distinguished from the Code of Civil Procedure, there are sections which are generally referred to as the Meyers-Milias-Brown Act, which spells out the labor relations, or the employer-employee relations system for local agencies. And that is the part of the labor relations system that has been in effect and remains in effect in California.

The CCP section -- that is, the Code of Civil Procedure section -- that was added in a different code, provided a unique and new program which was indicated was binding interest arbitration. Now, binding interest arbitration is a form of arbitration that only comes into play when there is a deadlock or an impasse in negotiations between an employee organization and the employer. The section refers to, as indicated, law enforcement or fire service -- or did indicate -- or did at that time; and provided that in that kind of an arbitration, known as "interest arbitration" -- that is,

an arbitration where there's a disagreement in negotiations -- that an outside labor arbitrator, in essence, would make the final decision as to how that impasse would be resolved. The code section referred to economic items.

We will -- or I will address myself only to that portion, obviously, of the staff analysis where we disagree, and that is that last portion.

The issue, of course, therefore, is, did the state mandate onto local agencies a new program or a higher level of service in an existing program onto the local agencies that requires reimbursement.

The staff analysis in this area has concluded no, in the negative. And I think they're doing that for two reasons, and I think that's just been confirmed in the presentation.

The first reason is that cases have consistently held where there is a cost that is traceable to an increase in employee benefits, that that type of a piece of legislation would not qualify for reimbursement under the constitutional language.

We don't take exception to that part; but we point out that this claim is simply not a claim that is seeking to be reimbursed for the costs of increased employee benefits.

The staff analysis has a list of 23 items that are being claimed. Of those, two could be seen as seeking that kind of an increase. And I am here, stipulating that those two we are prepared to withdraw at this time.

The other 21 do not relate to that kind of a reimbursement that is the cost of increased benefits; and, therefore, to that extent, our position is that that contention is simply not relevant.

Incidentally, the listing of the items of claim that have been made appears on pages 6 and 7 of the staff analysis.

The other basis that is being asserted that would prevent reimbursement is, in essence, as we understand it, all claims must somehow involve service to the public. We respectfully disagree with the staff in that regard. We don't not believe that that is correct.

Our reading of the law is as follows: The law interpreting that constitutional language was addressed in a case that is cited in the staff analysis called County of Los Angeles v. State of California. The citation on it is 43 Cal.3d, 46. That case spelled out the approach of determining whether or not a claim is subject to reimbursement. And they did so, essentially

in a two-step process. It disappears on page 56 of that case.

Step 1 is, the court held that the intent of that constitutional provision was to reimburse the local agency for any new program or any higher level of existing program.

The next stage of the analysis that the Court went into was to recognize that there is no definition of the word "program." So they address the issue of, "What do we mean by 'program'?" And what they held was, in order to qualify for reimbursement, one of two standards or findings have to be established:

Number one, programs that carry out the governmental function -- the governmental function of providing services to the public. That's one.

Or alternatively, number two, laws which implement a state policy impose unique requirements on local governments that do not apply generally to all residents and entities in the state.

So those were the two that, either one of which would entitle to reimbursement if other standards are met.

Now, in the Los Angeles case that I've referred to, the Court held that neither one was met, because that involved an increase in workers' compensation benefits.

And the court held that, number one, workers' compensation is not a governmental function and, number two, it is not unique to government because, after all, workers' compensation applies generally.

In any event, that was the approach that was spelled out in the case that has been cited in subsequent cases.

Very important is the fact that the law also is, as I've indicated, only one of these two findings have to be met in order to qualify for the reimbursement. And that is provided for in a case -- first of all, in a case called Carmel Valley Fire Protection District v the State. The cite is 190 Cal.App.3d, 521. And the language appears at pages 537 and 538. So either one of those standards.

Another case that has been cited quite a bit in the staff analysis, that is San Diego Unified School District versus your Commission, that is, the Commission on State Mandates. That case in a number of places refers to these as alternative findings. And that appears in that case.

The Carmel Valley case, as a matter of interest, involved the question of whether there could be reimbursement for safety protective clothing and certain safety equipment, and the holding was yes.

And the San Diego Unified School District case, which is somewhat analogous to our situation, there, the issue was where there was a mandate in connection with hearings to be conducted involving student expulsions where there was the issue of the student having possession of a firearm, where there were various hearing requirements and items in connection with the hearings, there again, the Court found that there was a reimbursable mandate.

Another case that also holds that same proposition, and one that is a great deal more timely, is the one that, in fact, is referred to in your Item Number 20 today, and that is Commission decision case number 00-TC-17/01-TC-14. And that is a case that involves an agency fee situation; and there, the Commission held that the item was reimbursable. Now, in that case, the issues involved, or the *Agency Shop*, and specifically the costs of fee deductions -- that is, agency fee deductions, the cost of preparing a list of home addresses for the union, the costs of making up a list for union elections, all of those were held by your Commission to be reimbursable.

Now, clearly, those were properly, I think, reimbursable under that second finding, just as I think it is quite clear that the claim that is before you now

is similarly entitled to reimbursement under that second finding that I referred to.

I think there will be some additional references made in that regard by Pam Stone in just a moment.

The only other thing that I would add -- and here, what I would ask you to do is, if you would open the staff analysis to page number -- let me see here -- to page number four. And on page number four you will find the certain legislative intent language.

What that language stands for is, there is absolutely no doubt that if we, here today, say, for the sake of argument -- let us say for the sake of argument that the position is correct that all claims must have -- must involve a service to the public, if we just acknowledge that for the sake of argument, there's no question that the claim here involves a service to the public.

And the reason I say that is, of course, all you need to do is read the intent language of the Legislature itself, when they adopted this law. Let me read just the first part of it to emphasize it:

"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," et cetera.

Clearly, this is language that makes quite clear that we are talking about a claim that does, indeed, involve service to the public.

Now, the staff analysis says, "Well, yeah, but they're against the law. Firefighters and law enforcement officers are not allowed to strike."

Well, one aspect of this is, there's a law that says you can't strike, and the other reality is, do you have strikes, nonetheless?

And I can tell you from personal experience that in the case of firefighters, for example, where there is a Labor Code section 1962, which has been on the books for decades, there have been a number of strikes by firefighters, notwithstanding the fact that it is against

the law. One involving the City of Sacramento.

In the case of law enforcement, as was pointed out in the staff analysis, ever since 1989 and in an appellate court decision out of Santa Ana, that made it against the law for law enforcement officers, in essence, to go on strike. And yet, clearly, there have been strike-type activities since that time.

So the reality is that there can be strikes notwithstanding that it's against the law. And, indeed, the admission is right in the legislative intent language itself. It says, "We are adopting this law to avoid those types of strikes." And that law was enacted, of course, long after they became illegal.

Therefore, I will wind up by saying that we respectfully submit that the claim, other than those two items we have agreed should be withdrawn, that the claim does meet all of the requirements of the constitutional mandate for a new program that does entitle -- that is entitled to a mandate.

CHAIR SHEEHAN: Right.

I have one question.

MR. LIEBERT: Please.

CHAIR SHEEHAN: Are you recommending that we ignore that appellate court decision and the statute that outlaws strikes by firefighters and public safety and in

making our decision?

MR. LIEBERT: No, because tongue in cheek a little bit, you're not firefighters or law enforcement. In other words, what I'm asking you to do --

CHAIR SHEEHAN: But we have a claim before us that affects them.

MR. LIEBERT: Right. What I'm requesting is that you recognize the reality that notwithstanding that -- as recognized by the Legislature also -- that you recognize the reality that there can and have been strikes, notwithstanding that it is against the law for them to do that.

CHAIR SHEEHAN: I appreciate that.

I'm having a hard time reconciling the oath I take when I sit in various entities to uphold the statutes and the laws and the Constitution of the State in making the decision. So that's why I ask that question.

Ms. Stone?

MR. LIEBERT: I would add that every member of the Legislature took the same oath, I suspect, as you did. And they, in the language that I have quoted --

CHAIR SHEEHAN: I cannot speak for their intent in voting for that. I can only address my actions taken today.

MR. LIEBERT: Right, okay.

CHAIR SHEEHAN: Ms. Stone?

MS. STONE: Thank you very much.

At this time, I am presenting some exhibits to the Commission, of which I would like administrative notice taken. I'd also want to make sure that your counsel and the Department of Finance has copies of these.

These are all decisions that have been rendered by your commission pertaining to labor matters wherein the labor process has been found to be reimbursable. And trust me, I am not going to read from all of these, but if you'll give me one moment so that these may be passed out. There are some provisions I would like to stress with regard to these.

CHAIR SHEEHAN: I'm sure staff would help to pass those out while you testify.

MS. STONE: Yes. I want to make sure that your counsel and the Department of Finance have a copy, as soon as everybody else does as well, as a matter of courtesy.

I gave out everything. I think I was missing one Exhibit 2.

CHAIR SHEEHAN: We can share. Don't worry. Go ahead.

MS. STONE: Okay, I'm only going to refer directly to three exhibits. But as you will note, that these are all either Statements of Decision, parameters and guidelines, or statewide cost estimates on various labor matters which you have approved in the past. And I would like to address just a couple of them very briefly, because you have the same consideration here. And you're also now dealing with employees -- you're now dealing with employee matters.

I would like to direct your attention to Exhibit 2. These are the parameters and guidelines for *Agency Shop* on page 2. Actually, this particular test claim was presented by my esteemed colleague, Mr. John Liebert, some 19 years ago, in 1987.

And you found that the reimbursable activities they were to review recognized employee organizations' proposal to establish agency shop, as well as meeting and conferring with recognized employee organizations on the issue of agency shop and current bargaining agreement. The second exhibit I would like you to look at just very briefly -- and trust me, I am not going to read this one because we would be here for the afternoon. And I don't know about -- I believe your Commission would like lunch today -- and that is Exhibit 6. These are the consolidated parameters and guidelines adopted by the

Commission which have been amended over the years pertaining to *Collective Bargaining* and *Collective Bargaining Agreement Disclosure*. *Collective Bargaining* was originally adopted by the Board of Control. Your Commission has amended the Parameters and Guidelines and consolidated them with *Collective Bargaining Disclosure* for any number of occasions over the years.

This, again, provides reimbursement for labor negotiations and collective bargaining with regard to teachers.

And lastly, I'm going to refer to *Agency Fee Arrangements*, which Mr. Liebert referred to. And I'm referring to Exhibit 1, which was the Statement of Decision which, again, on page -- I have the conclusion -- it's the last page. My copy was not numbered. I pulled this off your website. And, again, it has specific employee representational issues which your Commission has found to be reimbursable.

When Mr. Liebert previously discussed -- and I'm just thrilled to be here with the labor guru of the state of California, beyond all belief -- that we are conceding two particular points with regard to the activities, we are conceding the issue of increase in salaries that would be warranted by this legislation to the actual employees, as well as the litigation costs. What we are

seeking here for reimbursement are the labor process costs that must be incurred.

My copy has a little different pagination, but it is pages 6 and 7. Basically, you're talking about the time of agency negotiators, staff, and counsel.

Very similar to those costs which you have allowed in *Collective Bargaining* for schools. And we believe that the decision is without a difference with regard to this particular mandate. Although I would like to insert parenthetically that your Commission should be relieved on a cost basis that this particular legislation was declared unconstitutional only a couple of years after its passage.

And thank you very much for your time.

CHAIR SHEEHAN: Thanks.

Any questions for Ms. Stone?

Mr. DREILING: I have nothing. I'm here to answer questions, if you have some.

CHAIR SHEEHAN: Right. Thanks.

Ms. Geanacou?

MS. GEANACOU: I think I'd like to hear the Commission staff respond to some of the points of the claimants before we respond, if that's appropriate.

CHAIR SHEEHAN: Sure. Go ahead.

MS. BORZELLERI: Thank you.

First of all, Mr. Liebert cites to the case of County of Los Angeles. That case actually stands for -- in the tests that he was laying out, it stands for whether a test claim statute is a program. And we have agreed with them that it is, in fact, a program. What we disagree with is that it is a new program or higher level of service, which is the second prong of the test, I'm sure you're aware.

And just to read from the San Diego Unified School District case, which is a 2004 case, several cases are summarized in that case, and I think we need to rely heavily on this case for making this determination. And I will read to you from pages 876 to 877 from the San Diego Unified School District case.

MS. STONE: If you'd like to, we have copies for everybody of the San Diego --

MS. HIGASHI: Let me just say, there's a copy already in your binder under Item 22, under tab A.

MS. STONE: Oh, okay. We were concerned about that, so we made copies.

Susan, would you like a copy?

MS. GEANACOU: Sure.

MS. BORZELLERI: The case is rather long, so I don't know what your pagination is.

Do you have a cross-reference there, so they

can read with me?

MS. STONE: What page are you reading from?

MS. BORZELLERI: It's page 876 to 877.

MR. LIEBERT: Eight? Did you say 8?

MS. BORZELLERI: 876 to 877.

In this, they're citing to the City of Richmond case following the County of Los Angeles case, which concluded that requiring local governments to provide death benefits to local safety officers under both the Public Employees' Retirement System and the Workers' Compensation system did not constitute a higher level of service to the public.

The Court of Appeal arrived at that determination even though, as might have been argued in County of Los Angeles and City of Sacramento, such benefits may generate a higher quality of local safety officers and thereby, in general and indirect sense, provide the public with a higher level of service by its employees.

The next paragraph: "Viewed together, these cases" -- and they're citing the County of Los Angeles, City of Sacramento, City of Richmond, and they also cite to the City of Anaheim - "illustrate the circumstance that simply because the state law or order may increase the costs borne by local government in providing

services, this does not necessarily establish that the law or order constitutes an increased or higher level of the resulting service to the public under Article XIII B, Section 6."

And then it goes on to cite what does constitute a higher level of service. And they use the example of Carmel Valley Fire Protection, which Mr. Liebert cited, where the executive order he required the county firefighters to be provided with protective clothing and safety equipment because this increased safety equipment apparently was designed to result in more effective fire protection. The mandate evidently was intended to produce a higher level of service to the public, thereby satisfying the first alternative set out in the County of Los Angeles.

Similarly, Long Beach, in an executive order, required school districts to take specific steps to measure and address racial segregation in local public schools. The Appellate Court held that this constituted a higher level of service to the extent the order's requirements exceeded federal constitutional and case law requirements by mandating school districts to undertake defined remedial opinions and measures that were merely advisory under prior law.

Those later cases really do identify an actual

public service; and I think in this instance we do not have that. That's what we based our analysis on. Secondly, because the Commission has in the past ruled on some similar cases, those are not binding, as the Commission well knows, on cases going forward. We do need to rely on the case law. We do look at those previous cases in making our analysis. But in this case I think we do need to rely on the San Diego case, which is a Supreme Court case.

And as far as the other Commission decisions, Camille, did you want to add anything about those?

MS. SHELTON: No, not on that, other than the Supreme Court has repeatedly said that the whole purpose of Article XIII B, Section 6, was to prevent the state from shifting costs to local agencies to provide a service to the public. That's been the purpose since the earliest Supreme Court case in 1987, in County of Los Angeles.

CHAIR SHEEHAN: I want to ask Ms. Geanacou if she wants to make any comments first, and then we can go back and hear from some of the comments you may have.

MS. GEANACOU: Yes, Susan Geanacou, Department of Finance. Thank you.

The Department of Finance agrees with the final staff analysis as to this mandate for a couple of

reasons, one of which was just highlighted by the Commission staff counsel.

In this case, there is no higher level of service to the public from binding arbitration following impasse and bargaining.

In some of the cases just cited that I will not repeat, those recent cases within the last couple of years have confirmed at an appellate level that an alleged increased cost of providing services to the public does not equal an increased level of services to the public. Those are two entirely different things in the mandates world. That's confirmed in the most recent San Diego Unified School District case and the somewhat older City of Richmond case.

I'd also like to point out that many of the activities claimed in the test claim are not required by the legislation. I'm mindful, though, that the claimants agreed that they would waive or stipulate to waive withdrawal of some of those claimed activities. So nonetheless, I'd like to be on the record of saying many of those activities are not required by the test claim legislation.

And also, finally, the Commission staff analysis on page 15 points out importantly that strikes by fire and police personnel are illegal under California

law; and that should be taken into consideration significantly by the Commission members in determining whether there could even be a higher level of service to the public here from the claimed activities.

CHAIR SHEEHAN: Thanks.

Okay, questions -- were there questions of the witnesses?

(No audible response.)

CHAIR SHEEHAN: No?

All right, did you want to address a couple of things?

MR. LIEBERT: Yes. Let me just very briefly reference the Richmond case. The Richmond case stands for the proposition that if you have an increase in benefits that results in cost, that is not reimbursable. We've stipulated to that. That is what the Richmond case involved.

The Carmel case -- it's interesting that the opinion in the Carmel decision itself never makes reference to the assumption or presumption that there could have been the assumption that this was an increase in a level of service. And, indeed, probably the facts suggest that that is otherwise.

But the main point I think that I want to make is, the constitutional language talks about a new program

or a higher level of service. I think the arguments that we hear is the only relevant standard is the higher level of service. I think that is belied in a fair reading of the cases by the definition of "program." And you will note that the first element of the definition of "program" does refer to services to the public. That is, governmental functions of providing services to the public.

But then it provides the alternative, which does not pertain -- does not, in its terms, mention anything about service to the public. What it refers to is a unique requirement that the state imposes based on its policy, a unique requirement onto the local government.

We are submitting that this is a perfect example, this Code of Civil Procedure section series is a perfect example of the second element that is a law which implements a state policy and imposes unique requirements on local governments that do not apply to anybody other than local governments.

And in our opinion, that does not address the issue of a higher level of service.

Most of the cases, indeed, involve a higher level of service. That is, for example, in the case of San Diego Unified School District there was in existence a hearing

procedure that was utilized in the case of *Student Expulsions*. And the mandate was in addition to that policy in the case of the situation where you had student expulsions involving possession of firearms. And in the other case, and, indeed, in the Carmel case you might argue, as apparently that case did, that providing safety equipment is an additional -- a higher level of service because the service is fire protection, and now we can better protect the public against fire protection.

So the point, though, I'm trying to make is, those are two distinct elements. And the higher level of service element is not the one that we're relying on. We're relying on the second prong of the test, and that is, where the state mandates a unique policy onto local government.

MS. STONE: And, Madam Chairman, I'd just like to add a prior comment.

In my prior incarnation, I was a chief deputy county counsel, and part of that, a deputy county counsel to the County of Fresno. As a result of which, notwithstanding the Santa Ana case, which precludes and makes strikes by peace officers illegal, we were exposed to a severe case of "blue flu." Blue flu is when you have various and sundry representatives of your safety officers call in sick. Basically, you have a work

disruption, because these are unplanned absences. And it's sometimes difficult to prove you have the blue flu until it's been continuing for a while. But you have a major disruption to the organization of your -- in this case, it was the Sheriff's Department -- you have issues with regard to providing adequate services to the public because of the fact that you have to make arrangements to cover for these unplanned absences.

And this particular tactic, I have read, and it's in the materials, is utilized because peace officers are not allowed to strike.

So when you're talking about strike-type activities, even though strikes, per se, are illegal for both firefighters and peace officers, good employer-employee relations are incumbent in order to be able to protect the health and safety of the populace. And I think what we're trying to say through this is that it was the Legislature's intent that by creating this particular legislation, which was declared unconstitutional, it was to avoid some of the employee problems in the past which had put the public safety at risk.

So, therefore, whereas I totally agree with Mr. Liebert, that this has satisfied the prong of basically being unique to government, to discharge a legislative policy,

I also believe that this legislation was very clear in its intent to provide a service to the public which is clearly making sure that there were no employee disagreements that could affect the provision of both fire and police, which have been found in Carmel Valley and other cases to be two of the most primary governmental services which local government provides to its citizens.

Thank you.

CHAIR SHEEHAN: All right.

Did staff want to address any of those final issues? Specifically, the --

MEMBER WORTHLEY: The second prong.

CHAIR SHEEHAN: Yes, the second prong in terms of the general requirements.

MS. SHELTON: There are several elements to finding a reimbursable state-mandated program. And you have to satisfy each element to get reimbursed. And the first is that there has to be a mandated activity imposed on the agency. Second, those activities have to constitute a program. And Mr. Liebert correctly has defined what the program means.

Third, you have to have a new program or higher level of service. And there, repeatedly the courts have said it has to provide a service to the public, to make

that finding.

And then fourth, there has to be increased costs mandated by the state for the activities that are required by statute.

CHAIR SHEEHAN: What about --

MEMBER OLSEN: The assumptions.

CHAIR SHEEHAN: Exactly, the requirement -- or the issue that the mandate is not required across the board? They referred back to the workers' comp case. I don't know which one of you made that --

MS. SHELTON: I would need clarification of that.

MS. BORZELLERI: Could you repeat the comment? I didn't hear what you said.

CHAIR SHEEHAN: They keep talking about that it's not a requirement across the board -- you know, not unique to government.

MEMBER WORTHLEY: It is unique.

CHAIR SHEEHAN: I mean, it is unique to government.

MS. SHELTON: No, it is unique to government, and that satisfies the test that it's a program subject to Article XIII B.

CHAIR SHEEHAN: Right, because you get to the part of the local government or essentially the school

district.

MS. SHELTON: Right. You get to the next element, that it's a new program or higher level of service. And for that element, you need to show a service to the public.

CHAIR SHEEHAN: Right.

MR. LIEBERT: If I may say so, our disagreement on the law in this regard is that the higher level of service is one aspect of it. In other words, when you are providing a higher level of service to an existing program, the other element is that you are creating a new program. And when you create a new program, we respectfully disagree that in every case you have to have that new program provide services to the public. I don't think that the cases stand for that proposition.

The San Diego case, which has some language which arguably could be interpreted that way, is a case that involved a higher level of service to an existing program. It did not involve a new program. And so I think we have a bit of a legal disagreement on that.

CHAIR SHEEHAN: Okay, Camille?

MS. SHELTON: The courts have defined a new program or higher level of service the same. They both have to provide a service to the public. And when you're looking at that, you're just looking to see if that

activity that is newly required provides a service to the public.

CHAIR SHEEHAN: Okay. Did you have a question?

MEMBER WORTHLEY: No. I have a comment. I'm just holding my comment.

CHAIR SHEEHAN: Oh, okay.

Did you have a question?

MEMBER WALSH: I have a comment.

CHAIR SHEEHAN: Okay, does that clarify? Yes, because that was the one that I think some of the Members were getting. And maybe it was just the jargon or the wording that was being used in terms of that.

Did you want to address anything else?

(No audible response.)

CHAIR SHEEHAN: Okay, any other questions from the Commission members on this one?

But I think it helped clarify the issue that is made, thanks, in terms of higher level of service. I understand your comments on the strike issue. As I say, nonetheless, strikes are illegal, regardless of what may actually happen out there, I guess is the way I'm looking at the statute in that regard.

Ms. Higashi?

MS. HIGASHI: I'd like to get a clarification from the claimants' representatives, turning to page 7

of the staff analysis, the page that has the continuation of the bulleted activities that are sought for reimbursement.

CHAIR SHEEHAN: Right.

MS. HIGASHI: I just want you to clarify for us and designate exactly which bulleted activities that you are withdrawing officially today?

MR. LIEBERT: Let's see, the second, on page 7, the second one from the top, the last one on page 7, and Pam Stone also --

MS. STONE: Wait, it's this one.

MR. LIEBERT: That's last one.

MS. STONE: Yes, the last one.

MS. SHELTON: The second one says time of the agency negotiators to negotiate --

MR. LIEBERT: Are we talking about -- I'm talking about page 7. Do we have a different --

MS. HIGASHI: I'm on page 7.

MEMBER WORTHLEY: The third bulleted point.

MS. STONE: This is why we have different paginated copies.

MS. HIGASHI: So why don't you read it to us?

MS. STONE: The last paragraph that says, "Additional intangible cost element at the last best offer phase of negotiations involving enhancements to

compensation packages that may be added when the local agency perceives possible vulnerabilities," et cetera. "We are also" --

MEMBER WORTHLEY: Costs of implementing the award.

MS. STONE: -- "costs of implementing the award above and the cost of inevitable litigation" --

CHAIR SHEEHAN: So the last three bullets?

MS. STONE: No, I take that back. Just "the costs of implementing the award," above those and "any additional -- and additional intangible costs." Those two.

MS. GEANACOU: Leaving in "costs of inevitable litigation"?

MS. STONE: Yes.

MS. SHELTON: Can I just ask a clarification, too?

Are you still seeking reimbursement for the litigation costs?

MS. STONE: Pardon?

MS. SHELTON: Are you still seeking reimbursement for the litigation costs to deem that statute unconstitutional?

MS. STONE: Yes.

MS. SHELTON: I'll just state for the record

that that activity is not mandated by the state.

MS. STONE: Right. We will concede that it is not mandated by the state --

MR. LIEBERT: So apparently we are withdrawing it.

MS. STONE: We are? Okay.

MS. SHELTON: You are?

MS. STONE: Sorry. Yes.

MR. LIEBERT: So we're withdrawing three of the elements.

MS. HIGASHI: Okay, so it's the last three.

CHAIR SHEEHAN: The last three.

MR. LIEBERT: Not the last three.

MEMBER WORTHLEY: The litigation costs, the first bullet point.

MS. STONE: The first one.

CHAIR SHEEHAN: The very first litigation costs?

MS. HIGASHI: Right. Yes, sorry.

CHAIR SHEEHAN: So that is the amended claim.

MS. HIGASHI: On page 6.

MS. STONE: Now, we've got clarification. I apologize to the Commission.

CHAIR SHEEHAN: Just so that we understand in terms of those.

Are there any other questions from -- or comments?

MEMBER WORTHLEY: I'd like to make a comment.

CHAIR SHEEHAN: Reflections on the discussion?

MEMBER WORTHLEY: We focused on the increase and the actual level, but the other language there says "or quality of governmental services provided to the public." And I understand that, in a citation that was read, that increased costs do not necessarily reflect increased quality.

Now, I would submit to anybody if the state passed a law that says every agency has to pay their law enforcement officers a beginning salary of $100,000 apiece, we would be hard pressed to say that that wouldn't increase the quality of the people that would apply for the work.

Where do you draw this line? I'm afraid -- I mean, how can you disassociate increased costs with no affect on quality?

Another affect is that if by increased costs, you affect quality the other way. Because now all of a sudden, you've got X-number of dollars for the governmental entity to spend on law enforcement or any other kind of requirement, and now you impose additional costs on that county, there's no additional money coming

in so, therefore, you have to cut, and you actually have a reduction in services.

I just really struggle with this concept that there is not a correlation between increased costs and that especially when it benefits the employee. In this case we're talking about arbitration. What's the whole point of binding arbitration? Well, certainly the employees are trying to increase their income or their benefits. And what does that do? It means a higher quality person applies for the work.

If you go back -- I also looked at that language from the State Legislature, and it talked about as a -- you could refer to that as being, the existing situation is that people are unhappy in their work. So you have an issue of quality about how they're affecting their job, how they're doing their job because they're unhappy about their pay.

So as we increase their compensation, then hopefully we're fixing that problem. That's an enhancement. That's a qualitative issue; and I really struggle with the idea that we somehow divorce that. And I don't care about court decisions because I think the courts haven't had the right kind of case to decide when do you make that decision.

It seems to me compensation is right on the

mark, in terms of quality and affecting quality of service.

MS. BORZELLERI: Well, I think with binding arbitration you could end up either way. I mean, you may end up with enhanced salary or not.

MEMBER WORTHLEY: Well, may I say to that, the counties are the ones who oppose binding -- and the state agencies oppose binding arbitration, not the employee groups. That should tell you something right there. If it were the other way around, then the governmental agency wouldn't care.

MS. BORZELLERI: Right. Except we don't really have any direct facts on the record about that. It's a difficult issue, I agree with you.

MS. SHELTON: I just need to state that the Supreme Court in the San Diego case said that those same arguments were raised in the prior cases that they reviewed. And they said even though there could be a higher quality of service provided to the public, there is still no higher level of service because it's just a benefit to the employee.

MEMBER WORTHLEY: What's the purpose of saying that word then, "quality"? I don't understand --

MS. SHELTON: I'm on page 876 of the decision, and I can read it.

MEMBER WORTHLEY: Well, I'm reading your analysis that just says that cases have consistently held that additional costs, blah, blah, blah, in the absence of some increase in the actual level or quality of governmental services.

MS. SHELTON: Right, and then go on with the decision on page 876 where the Court is reviewing the Richmond case, and it says that the Court there -- or the legislation there did not constitute a higher level of service to the public. The Court of Appeal arrived at the determination even though this might have also been argued in the County of Los Angeles and City of Sacramento that the benefits may generate a higher quality of local safety officers and thereby in a general and indirect sense provide the public with a higher level of service by its employees. And it was rejected. It was not approved as a reimbursable state-mandated program.

MEMBER WORTHLEY: Which case was that again?

MS. SHELTON: It was summarized by the Supreme Court in the San Diego Unified School District case.

MS. HIGASHI: It's in your record, Item 22, Tab A, page 111, the top right-hand corner.

CHAIR SHEEHAN: All right.

MEMBER OLSEN: Madam Chair?

CHAIR SHEEHAN: Ms. Olsen?

MEMBER OLSEN: It seems to me that the issue here is the directness of the correlation between the things, and I think we're faced with this constantly here. In some way, everything government does ultimately affects a public outcome.

So from my perspective, binding arbitration -- you don't require binding arbitration to directly increase benefits to employees. You provide binding arbitration to provide a way of dealing with a conflict between employees and employers.

Now, ultimately, that may result in higher benefits, but that's not a direct outcome of requiring binding arbitration. I think for me the issue is the directness of this construct here.

CHAIR SHEEHAN: Okay, did you want to comment, Mr. Walsh?

MEMBER WALSH: I'm ready to vote.

CHAIR SHEEHAN: Did you want to add something now?

Why don't you introduce yourself?

MR. BURDICK: Allan Burdick on behalf of CSAC SB 90 Service.

You just wanted to make a couple of comments related to this and some clarifications, because this

test claim was actually filed at the request of the California State Association of Counties and the League of California Cities as they were proceeding with their lawsuit, and felt that in the event that they had not been successful in that lawsuit, they wanted to make sure they were then protected for their reimbursement of these particular costs from going on, which included -- as everybody knows, an extremely major piece of legislation and public policy issue, one in which the state government has chosen not to apply to itself but only uniquely to local government.

So this is clearly a unique program that was placed on local government.

I think at this point I just wanted to comment on the cost issues, because I think we're saying this is the process issues that are being claimed in here, as it is an expansion and a complication, if you will, of the collective bargaining process by adding binding interest arbitration. This makes a major difference in that bargaining process.

And so like the Meyers-Milias-Brown Act which Mr. Liebert referred to, which was adopted in 1979, I think would have been a reimbursable state mandate had it been after 1975. And I think every time Commission members talk and cite about increased costs, in this case

of a benefit or not a public service, then that cost shouldn't be reimbursed. But I think Paul Gant turns over in his grave every time he hears that particular comment because, obviously, that was the intent if you're placing a cost on local government that they should be reimbursed.

I think I just wanted to point out that the cost issue right now is one that is being litigated. You continue to test claim on the basis that that's the primary issue of the litigation before you on a CSAC Excess Insurance Authority that is being challenged. I know you may have discussed that today in your public session. So I just kind of wanted it to clarify that, we're looking at areas that I don't think it's not a position that costs -- and would agree with Commissioner Worthley, that if you increase the cost and a benefit to somebody, obviously, that's a benefit, as well as an increased cost that was intended under here.

So I just wanted to kind of clarify that as to why that is and the importance of this as you go back and look and say, "Well, you know, this is just a couple years of time between when the law was enacted until the court case." But this is very critical because of the precedential nature.

And I might say that the Attorney General, as

this legislation was going through the process, issued opinions which indicated that had, you know, binding interest arbitration for their perspective, that not only the process would have been reimbursable; but if the finding was greater than the final last, best offer of the local agency, that that increased cost would have been reimbursable.

So, you know, I'm not an attorney and I know there's a lot of discussion going on out there; but I wanted to remind you that this issue is before you, that you did continue a test claim on that particular basis, and that local government does not agree that an increased cost is not a -- should not be reimbursed if you're basing it simply on the costs.

Thank you.

CHAIR SHEEHAN: Thanks.

MS. GEANACOU: I have a question. There's no request to continue this matter pending this matter; is there?

MR. BURDICK: No, no, this was a matter today, the County of Los Angeles, and the issue was simply on the basis of the increased cost in that particular case.

MS. SHELTON: Well, that case dealt with workers' compensation. So it was more aligned to the program that's pending on appeal.

MR. BURDICK: But the issue there is increased costs.

MS. SHELTON: Right, it's the same issue.

MS. HIGASHI: I just had a couple of comments that I wanted to offer, and then just a question I wanted to ask the claimants' representatives.

First, I just wanted to point out for the record that the *Collective Bargaining* decision that has been discussed, the test claim decision on the Rodda Act, that was actually a decision made before any of this case law that's being cited to today had appeared. And the substance of that decision is basically one or two sentences saying that it was approved. And the Commission has never revisited any of those issues. They have certainly added to it by adding one additional test claim that was related to that program.

CHAIR SHEEHAN: Okay.

MS. HIGASHI: I'd also like to ask the claimants the question, since this test claim was filed relatively early, after the law was enacted, I wanted to find out if there was any report as to how many jurisdictions actually did participate in binding arbitration, and whether or not the claimant had actually entered into binding arbitration as a result of this statute, just because there's no evidence in the record

as to that issue.

MS. STONE: There is evidence that I am personally aware of, of one county being forced into binding interest arbitration, which resulted in an award higher than the last, best, final offer.

Other entities had other negotiations leading up to it but did not enter. They did the pre-stages but did not enter into the stage of binding interest. They didn't get as far as an arbitration decision.

MS. HIGASHI: So if your position were approved, are you suggesting that there might only be one claimant?

MS. STONE: There would be some claimants -- it's my understanding that there would be some claimants with regard to the initial start-up cost, but there was only one agency that went the whole way.

I'm sorry, I don't know if I broke it *(pointing to microphone)*.

Thank you.

CHAIR SHEEHAN: Did that clarify?

MS. HIGASHI: That's all.

CHAIR SHEEHAN: Okay.

MR. LIEBERT: I guess just one.

CHAIR SHEEHAN: Sure.

MR. LIEBERT: Just to clarify. Our primary

concern are the costs related to the process.

CHAIR SHEEHAN: Preparing for it, right. And on your bullets, as you go through that, at least it's clear to this member, and I'm sure to the other members, that it lays out those issues, yes. Not what may result at the end, but the preparation, training, those issues, yes.

MR. LIEBERT: Right.

MR. BURDICK: If I could just make one comment to clarify on Paula's point.

If this is approved and we get to parameters and guidelines and go through that process and these activities are there, there may be a number of agencies that qualify for increased costs related to that process in the event that binding interest arbitration may have been raised by the labor unions or other things they were doing dealing with this. So I don't think we want to say that it is a single agency may be the only one.

I do not think there will be substantial claims in this particular process. But, obviously, there are going to be some one-time costs going through -- of the law, and preparing the people, what happens, you know, the change in the law and what this program does. And I think, you know, actually we have a gentleman sitting at the table who initiated this, who provided

some substantial training to local agencies so they would be able to comply with this.

CHAIR SHEEHAN: If I understood what Paula said, it was that there was -- the clarification that there was actually one entity that resulted in an arbitration decision -- or that had an arbitration decision that resulted in increased costs, regardless of the prep cost and all of that. I think people --

MS. STONE: Right, right, that's correct. But there are a lot of agencies that had the initial prep costs, and it looked like they were starting to go into the process, who started the process.

CHAIR SHEEHAN: And then it got --

MS. STONE: And then for whatever reason, it evaporated, yes.

But there's only one entity that I'm aware of that went through the whole way.

CHAIR SHEEHAN: Right, and got the --

MS. STONE: The final arbitration decision.

CHAIR SHEEHAN: Right. I think we understood what she was saying.

Paula, did you want to add anything?

MS. HIGASHI: Well, I just wanted to note that this analysis really doesn't go into a detailed analysis of whether the allegations raised by claimant are, in

fact, mandated by the statute or if the Commission were to approve a test claim on their behalf, whether they would, in fact, still be reasonably necessary to implement the mandate.

CHAIR SHEEHAN: Right, right. A different issue.

All right, any other discussion on this?

(No audible response.)

CHAIR SHEEHAN: If not, then the Chair would entertain a motion.

MEMBER WALSH: So moved.

CHAIR SHEEHAN: Okay, so Mr. Walsh moved the staff recommendation.

Is there a second?

MEMBER GLAAB: Second.

CHAIR SHEEHAN: All right, we have a motion and a second to adopt the staff recommendation.

All those in favor, say "aye."

(A chorus of "ayes" was heard.)

CHAIR SHEEHAN: Opposed?

MEMBER WORTHLEY: No.

CHAIR SHEEHAN: Mr. Worthley -- I think that was it -- is voting no.

So the motion carries.

Thank you all.

MS. STONE: Thank you very much.

MS. HIGASHI: This brings us to Item 11.

CHAIR SHEEHAN: The Proposed Statement of Decision. Go ahead.

MS. BORZELLERI: Yes, the only issue before the Commission is whether the Statement of Decision reflects the Commission's decision.

We will reflect issues that have been dealt with here in the -- Camille, help me out here.

MS. SHELTON: Just to indicate that the claimant here today waived their request for the certain costs for litigation and the benefit costs. We will note the testimony in the Statement of Decision.

CHAIR SHEEHAN: That it will be amended to reflect that.

So with that --

MEMBER OLSEN: So moved.

CHAIR SHEEHAN: -- noted, we have a motion by Ms. Olsen --

MEMBER WALSH: Second.

CHAIR SHEEHAN: -- and a second by Mr. Walsh.

All those in favor, say "aye."

(A chorus of "ayes" was heard.)

CHAIR SHEEHAN: Opposed?

MEMBER WORTHLEY: No.

CHAIR SHEEHAN: Mr. Worthley is reflected as voting no.

So Item 12 and 13 have been postponed.

MS. HIGASHI: Yes. This brings us to Item 14.

CHAIR SHEEHAN: The *Modified Primary Election* test claim.

MS. HIGASHI: Correct. And this item will be presented by Commission Counsel Katherine Tokarski.

MS. STONE: I'm still here.

CHAIR SHEEHAN: Right.

MS. STONE: And I'm going to be here again.

CHAIR SHEEHAN: The timing is good on these.

Okay. And, Katherine, you're doing this one?

MS. TOKARSKI: Yes.

CHAIR SHEEHAN: Great.

MS. TOKARSKI: Good afternoon. This test claim filed by Orange County deals with changes to the partisan primary system in California. In 1996, the voters adopted Proposition 198 of the Open Primary Act.

Statutes of 2000, Chapter 898, largely repealed and reenacted the Elections Code sections that had been amended by Prop. 198 following the U.S. Supreme Court decision finding that that process~~ing~~ was unconstitutional.

However, by amending a few of the Elections

REPORTER'S CERTIFICATE

I hereby certify that the foregoing proceedings were duly reported by me at the time and place herein specified;

That the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said caption.

In witness whereof, I have hereunto set my hand on August 21, 2006.

Daniel P. Feldhaus

Daniel P. Feldhaus
California CSR #6949
Registered Diplomate Reporter
Certified Realtime Reporter

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM: 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.	**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 July 28, 2006*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 28, 2006. Pamela Stone, Dan Dreiling, and John Liebert appeared on behalf of claimant City of Palos Verdes Estates. Susan Geanacou 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 section 17500 et seq., and related case law.

The Commission adopted the staff analysis at the hearing by a vote of 6-1 to deny this test claim.

Summary of Findings

This test claim involves legislation regarding labor relations between local agencies and their law enforcement officers and firefighters, and provides 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 legislation was effective on January 1, 2001, but was declared unconstitutional by the California Supreme Court on April 21, 2003, as violating "home rule" provisions of the California Constitution. The claimant requests reimbursement from the effective date of the legislation (January 1, 2001) until the court determined the legislation unconstitutional on April 21, 2003.

Thus, this test claim presents the following issues:

- Can legislation deemed unconstitutional by the court create a reimbursable state-mandated program during the time the legislation was presumed constitutional?
- Does the test claim statute impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

The purpose of article XIII B, section 6, is to prevent the state from forcing programs on local governments without the state paying for them. Applying the court's ruling that the test claim legislation is unconstitutional retroactively to the original effective date of the legislation could have the effect of forcing programs and costs on local governments without the state paying for them during the time the test claim legislation was presumed constitutional (from January 1, 2001, through April 20, 2003). Because binding rights or obligations in the form of reimbursable mandates *could have been created* while the test claim legislation was presumed to be constitutional, an analysis on the merits is conducted in order to determine whether the test claim legislation did in fact mandate a new program or higher level of service and impose costs mandated by the state during that period of time.

However, the 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.*

BACKGROUND

This test claim addresses legislation involving labor relations between local agencies and their law enforcement officers and firefighters, and provides 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 agency labor relations have been governed by the Meyers-Milias-Brown Act.[1] 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.[2] 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

[1] Government Code sections 3500 et seq.; Statutes 1968, chapter 1390.

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

performance of their official duties.[3] Additionally, the Fourth District Court of Appeal has held that police work stoppages are per se illegal.[4]

Under the Meyers-Milias-Brown Act, the local employer establishes rules and regulations regarding employer-employee relations, in consultation with employee organizations.[5] 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.[6] 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.[7]

Test Claim Legislation

The test claim legislation[8] added several sections to the Code of Civil Procedure providing new, detailed procedures that could be invoked by the employee organization in the event an impasse in negotiations has been declared. Section 1299 stated 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

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[3] Labor Code section 1962.

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

[5] Government Code section 3507.

[6] Government Code section 3505.

[7] Government Code section 3505.1.

[8] Statutes 2000, chapter 906 (Sen. Bill No. 402).

> employers and employee organizations representing firefighters and law enforcement officers over economic issues that remain in dispute over their respective interests...

The legislation provided that if an impasse was declared after the parties exhausted their mutual efforts to reach agreement over matters within the scope of the negotiation, and the parties were unable to agree to the appointment of a mediator, or if a mediator agreed to by the parties was unable to effect settlement of a dispute between the parties, the employee organization could, by written notification to the employer, request that their differences be submitted to an arbitration panel.[9] Within three days after receipt of written notification, each party was required to designate one member of the panel, and those two members, within five days thereafter, were required to designate an additional impartial person with experience in labor and management dispute resolution to act as chairperson of the arbitration panel.[10]

The arbitration panel was required to meet with the parties within ten days after its establishment, or after any additional periods of time mutually agreed upon.[11] The panel was authorized to make inquiries and investigations, hold hearings, and take any other action, including further mediation, that the panel deemed appropriate.[12] Five days prior to the commencement of the arbitration panel's hearings, each of the parties was required to submit a last best offer of settlement on the disputed issues.[13] The panel decided the disputed issues separately, or if mutually agreed, by selecting the last best offer package that most nearly complied with specified factors.[14]

The panel then delivered a copy of its decision to the parties, but the decision could not be publicly disclosed for five days.[15] The decision was not binding during that period, and the parties could meet privately to resolve their differences and, by mutual agreement, modify the panel's decision.[16] At the end of the five-day period, the decision as it may have been modified by the parties was publicly disclosed and binding on the parties.[17]

Code of Civil Procedure section 1299.9, subdivision (b), provided 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, would be borne by the employee organization.

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[9] Code of Civil Procedure section 1299.4, subdivision (a).

[10] Code of Civil Procedure section 1299.4, subdivision (b).

[11] Code of Civil Procedure section 1299.5, subdivision (a).

[12] *Ibid.*

[13] Code of Civil Procedure section 1299.6, subdivision (a).

[14] *Ibid.*

[15] Code of Civil Procedure section 1299.7, subdivision (a).

[16] *Ibid.*

[17] Code of Civil Procedure section 1299.7, subdivision (b).

Test Claim Legislation Declared Unconstitutional

The test claim legislation in its entirety was declared unconstitutional by the California Supreme Court on April 21, 2003, as violating portions of article XI of the California Constitution.[18] The basis for the decision is that the legislation: 1) deprives the county of its authority to provide for the compensation of its employees as guaranteed in article XI, section 1, subdivision (b); and 2) delegates 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).[19]

Claimant's Position

The claimant contends that the test claim legislation constitutes 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:

- Costs for training agency management, counsel, staff and members of governing bodies regarding SB 402 as well as the intricacies thereof.
- Costs incident to restructuring bargaining units that include employees that are covered by S.B. 402 and those which are not covered by SB 402.
- Increased staff time in preparing for negotiations in order to collect and compile comparability data specified in Code of Civil Procedure, section 1299.4.
- 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.
- Time to prepare for and consult with the governing board regarding the last best and final offer to be submitted to the arbitration panel.
- Time to prepare for and participate in any mediation process.
- Consulting time of negotiators, staff and counsel in selecting the agency panel member.
- Time of the agency negotiators, staff and counsel in vetting and selecting a neutral arbitrator.
- Time of the agency negotiators, staff and counsel in briefing the agency panel member.
- Time of the agency negotiators, staff and counsel in preparing for the arbitration hearing.
- Time of the agency negotiators, staff and counsel in vetting, selecting and preparing expert witnesses.
- Time of the agency panel member and attorney in pre-arbitration meetings of the panel.
- Staff and attorney time involved in discovery pursuant to Code of Civil Procedure, sections 1281.1, 1281.2 and 1299.8.
- Staff, attorney, witness and agency panel member time for the hearings.
- Attorney time in preparing the closing brief.

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

[19] *County of Riverside* (2003) 30 Cal.4th 278, 282.

- Agency panel member time in consulting in closed sessions with the panel.
- Time of the attorney, negotiators, and staff in consulting with the agency panel member prior to the issuance of the award.
- Time of the attorney, negotiators, staff, agency panel member, and governing board consulting regarding the award and giving directions to agency negotiators.
- Time of the agency negotiators to negotiate with the union's negotiating representatives based on the award.
- 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 argues, in its April 13, 2006 comments on the draft staff analysis, that "[a]s of January 1, 2001, local government officials had no alternative other than to enforce the provisions of this legislation, 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 legislation 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, the Commission should find that Binding Arbitration was a reimbursable, mandated program from its effective date until it was declared unconstitutional.

At the hearing, claimant withdrew three of the activities originally claimed for reimbursement in the test claim: 1) litigation costs for determining the constitutionality of Statutes 2000, chapter 906, Senate Bill No. 402, including actions for declaratory relief, opposition petitions to compel arbitration, and resultant appeals; 2) costs of implementing any arbitration award. above those that would have been incurred under the agency's last best and final offer; and 3) the additional intangible cost element at the last best offer phase of negotiations, involving "enhancements" to compensation packages that may be added when the local agency perceives possible vulnerabilities in its negotiating position, estimated to be an overall 3% to 5% increase based on the most recent negotiations with the Palos Verdes Estates Police Officers' Association. Claimant's representative also testified she was aware of only one local agency that had engaged in a full binding arbitration process since the test claim statute was enacted.

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 legislation. Specifically, the Department asserts that:

1) the test claim legislation does 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 legislation, 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 those 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."

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[20] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[21] "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 responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[22] 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

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[20] 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."

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

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

an activity or task.[23] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[24]

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.[25] To determine if the program is new or imposes a higher level of service, the test claim statute must be compared with the legal requirements in effect immediately before the enactment of the test claim statute.[26] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[27]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[28]

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.[29] 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."[30]

This test claim presents the following issues:

- Can legislation deemed unconstitutional by the court create a reimbursable state-mandated program during the time the legislation was presumed constitutional?

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

[24] *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*).

[25] *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; *Lucia Mar, supra,* 44 Cal.3d 830, 835.).

[26] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[27] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[28] *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.

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

[30] *County of Sonoma v. Commission on State Mandates,* 84 Cal.App.4th 1264, 1280 (*County of Sonoma*), citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

- Does the test claim statute impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

Issue 1: Can legislation deemed unconstitutional by the court create a reimbursable state-mandated program during the time the legislation was presumed constitutional?

On April 21, 2003, the California Supreme Court issued its decision in the *County of Riverside* case and found that the test claim statutes violated the home rule provisions of article XI of the California Constitution as follows: "It deprives the county of its authority to provide for the compensation of its employees (§ 1, subd. (b)) and delegates to a private body the power to interfere with county financial affairs and to perform a municipal function (§ 11, subd.(a))."[31] Since the test claim statutes were found unconstitutional on April 21, 2003, local agencies are no longer subject to binding arbitration, when requested by law enforcement and firefighter employees, where an impasse in labor negotiations has been declared.

Nevertheless, the claimant requests reimbursement from the effective date of the legislation (January 1, 2001) until the court determined the legislation unconstitutional on April 21, 2003. The claimant argues that reimbursement should be allowed since local agencies are not authorized to declare a statute unconstitutional and generally cannot refuse to enforce a statute on the basis that it is unconstitutional pursuant to article III, section 3.5 of the California Constitution. The claimant states that local agencies had no alternative other than to "enforce the provisions of this legislation, otherwise they would be subject to a writ of mandate to compel binding arbitration."[32] Relying on the case of *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, claimant states:

> The court concluded: "As we shall explain, we conclude that a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional." *Lockyear* (sic), *supra.*[33, 34]

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[31] *County of Riverside, supra,* (2003) 30 Cal.4th 278, 282.

[32] Comments on Draft Staff Analysis by City of Palos Verdes Estates, April 13, 2006, page 2.

[33] *Id.*, page 4.

[34] Notwithstanding this rule cited in *Lockyer*, the *Lockyer* case also specifically distinguished the *County of Riverside* case — the case in which this test claim statute was declared unconstitutional — as an exception to that general rule.[34] Under the exception, the court cited examples where a local agency refuses to comply with the statute, forcing a lawsuit to challenge the constitutionality of the statute. The County of Riverside, in refusing to comply with the test claim statute, acted in accordance with the exception articulated in *Lockyer.*

In addition, while the *County of Riverside* case was under review, there were two other cases pending review regarding the constitutionality of Chapter 906, the test claim legislation: 1) *Ventura County v. Ventura County Deputy Sheriffs' Association* (Second District Court of Appeal, Case No. B153806); and 2) *City of Redding v. Superior Court Local Union 1934, Real Party in Interest* (Third District Court of Appeal, Case No. C03950). Had claimant found itself

Thus, the question is whether there can be a reimbursable state-mandated program from the effective date of the legislation until the date the legislation was deemed unconstitutional by the court (from January 1, 2001, through April 20, 2003), or whether the court's holding that the legislation is unconstitutional retroactively applies to the original effective date of the legislation. Although courts sometimes clarify whether the decision retroactively applies in the opinion declaring the statute unconstitutional, the Supreme Court did not do so in the *County of Riverside* case. In addition, no court cases regarding the effect of an unconstitutional statute in the context of California mandates law exist. Therefore, this issue is one of first impression for the Commission.

For the reasons below, the Commission finds, based on the purpose of article XIII B, section 6, legislation deemed unconstitutional by the court *may* create a reimbursable state-mandated program during the time the legislation was presumed constitutional.

The effect of an unconstitutional statute is a complex area of law, and no general rule can be cited with regard to the effectiveness of a statute while it was presumed constitutional. Oliver P. Field, in his treatise "The Effect of an Unconstitutional Statute," has stated:

> There are several rules or views, not just one, as to the effect of an unconstitutional statute. All courts have applied them all at various times and in differing situations. Not all courts agree, however, upon the applicability of any particular rule to a specific case. It is this lack of agreement that causes the confusion in the case law on the subject.[35]

The traditional approach was that an unconstitutional statute is "void ab initio," that is, "[a]n unconstitutional statute is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[36] Under the traditional approach, no reimbursement would be required for this test claim. This approach has been criticized in later decisions, however, and the trend nationwide has been toward a more *equity*-oriented view that binding rights and obligations may be based on a statute that is subsequently declared unconstitutional, and that not every declaration of unconstitutionality is retroactive in its effect.[37]

Under California state mandates law, the determination as to whether a mandate exists is a question of law.[38] As stated in *County of Sonoma*, the Commission must strictly construe

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in the position of being forced into binding arbitration as a result of the test claim statute, it could have refused, as the County of Riverside and the other local agencies did, and waited to be sued by the labor union. Presumably, any such lawsuit would have either been consolidated with and/or had the same result as *County of Riverside*. Thus, the *Lockyer* case does not support claimant's contention that it had no alternative but to comply with the test claim statute.

[35] Oliver P. Field, The Effect of an Unconstitutional Statute (1935), pages 2-3.

[36] *Norton v. Shelby County* (1886) 118 U.S. 425.

[37] *Chicot County Drainage District v. Baxter State Bank* (1940) 308 U.S. 371.

[38] *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1279, citing *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

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.[39, 40] Nevertheless, the purpose of article XIII B, section 6, as revealed in the ballot measure adopting it, was to prevent the state from forcing programs on local governments without the state paying for them. In 2004, the California Supreme Court in the *San Diego Unified School Dist.* case reaffirmed the purpose of article XIII B, section 6, as follows:

> The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIII B explained section 6 to the voters: 'Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them.' (citations omitted) (italics added.)[41]

Applying the court's ruling that the test claim legislation is unconstitutional retroactively to the original effective date of the legislation could have the effect of forcing programs and costs on local governments without the state paying for them. Because binding rights or obligations in the form of reimbursable mandates *could have been created* while the test claim legislation was presumed to be constitutional, an analysis on the merits should proceed in order to determine whether the test claim legislation did in fact mandate a new program or higher level of service and impose costs mandated by the state during that period of time.

Therefore, the Commission finds, based on the purpose of article XIII B, section 6, that legislation deemed unconstitutional by the court *may* create a reimbursable state-mandated program during the time the legislation was presumed constitutional.

Issue 2: Does the test claim statute impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

A. Does the Test Claim Legislation Constitute a State-Mandated Program?

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

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[39] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280; see also *City of San Jose v. State of California (City of San Jose)* (1996) 45 Cal.App.4th 1802, 1816-1817, citing *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.

[40] The doctrine of equity in this sense means the "recourse to principles of justice to correct or supplement the law as applied to particular circumstances..." Equity is based on a system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law when the two conflict. (See Black's Law Dict. (7th ed., 1999) p. 561, col. 1.)

[41] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 875.

a task, then article XIII B, section 6 is not triggered.[42] Further, 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.[43]

The Commission finds that the test claim legislation requires local agencies to engage in binding arbitration if, during employer-employee labor negotiations, the parties have reached an impasse and the employee organization notifies the agency it wishes to engage binding arbitration. The test claim legislation specifically requires local agencies to designate an arbitration panel member, submit a "last best settlement offer" on disputed issues, and participate in the arbitration hearings. These activities constitute a "program" subject to article XIII B, section 6 because they mandate a task or activity, and impose unique requirements on local governments that do not "apply generally to all residents and entities in the state." Thus, the analysis must continue to determine if these activities impose a new program or higher level of service.

B. Does the Test Claim Legislation Constitute a "New Program" or "Higher Level of Service?"

The courts have held that even though local agencies can show they have incurred increased costs as a result of test claim legislation, increased costs alone, without a showing that the costs were incurred as a result of a mandated new program or higher level of service, do not require reimbursement under article XIII B, section 6.[44] Test claim legislation imposes a "new program" or "higher level of service" when: a) the requirements are new in comparison with the preexisting scheme; *and* b) the requirements were intended to provide an enhanced service to the public.[45]

The test claim legislation requires local agencies to engage in binding arbitration if, during employer-employee labor negotiations, the parties have reached an impasse and the employee organization notifies the agency it wishes to engage binding arbitration. The test claim legislation specifically requires local agencies to designate an arbitration panel member, submit a "last best settlement offer" on disputed issues, and participate in the arbitration hearings. The law in effect prior to the enactment of the test claim statute did not require local agencies to engage in binding arbitration, thus the requirement is new in comparison with the preexisting scheme.

The new requirements, however, do not provide an enhanced service to the public as explained in the following analysis. The test claim legislation at issue here requires the local agency to engage in a process that may result in increased costs for employee compensation

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

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

[44] *County of Los Angeles, supra,* 43 Cal.3d at 56; *Lucia Mar Unified School Dist., supra*, 44 Cal.3d at 835.

[45] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

or benefits, but since strikes by law enforcement officers and fire services personnel are prohibited by law,[46] no successful argument can be made that the test claim legislation affects law enforcement or firefighting service to the public.

The cases have consistently held that additional costs, in the 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. The court in *City of Richmond*, for example, held that even though increased costs for employee benefits may generate a higher quality of local safety officers, the legislation did not constitute a new program or higher level of service.

> Increasing the cost of providing services cannot be equated with requiring an increased level of service under a[n] [article XIII B,] section 6 analysis. 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.[47]

The California Supreme Court reaffirmed and clarified what constitutes an "enhanced service to the public" in the *San Diego Unified School District* case. The court, in reviewing several mandates cases, stated that the cases "illustrate the circumstance that simply because a state law or order may increase the costs borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514" (emphasis in original).[48]

The Supreme Court went on to describe what *would* constitute a new program or higher level of service, as "not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided [to the public]. In *Carmel Valley Fire Protection Dist. v. State of California* [citations omitted], for example, an executive order required that county firefighters be provided with protective clothing and safety equipment. The safety clothing and equipment were new requirements mandated by the state. In addition, the court determined that the protective clothing and safety equipment were designed to result in more effective fire protection and, thus, did provide an enhanced level of service to the public.[49]

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[46] See footnotes 3 and 4.

[47] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App4th 1190, 1195-1196. See also, *City of Anaheim v. State of California* (1987) 189 Cal.App.3rd 1478, 1484, where the court determined that a temporary increase in PERS benefits to retired employees, resulting in higher contribution rates for local government, did not constitute a new program or higher level of service to the public; and *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67, where the California Supreme Court determined that providing unemployment compensation protection to a city's own employees was not a service to the public.

[48] *San Diego Unified School District, supra,* 33 Cal.4th 859, 877.

[49] *Ibid.*

Therefore, the Commission finds that the test claim legislation does not impose a new program or higher level of service and, thus, reimbursement is not required pursuant to article XIII B, section 6.

CONCLUSION

Based on the purpose of article XIII B, section 6, the Commission concludes that legislation deemed unconstitutional by the court *may* create a reimbursable state-mandated program during the time the legislation was presumed constitutional.

However, the test claim legislation does not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution and, thus reimbursement is not required.

Commission on State Mandates

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Mailing Information: Draft Staff Analysis

Mailing List

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