

ITEM _____
DRAFT STAFF ANALYSIS
PROPOSED PARAMETERS AND GUIDELINES

Government Code Sections 3502.5 and 3508.5

Statutes 2000, Chapter 901

California Code of Regulations, Title 8, Sections 32132, 32135, 32140, 32149, 32150, 32160,
32168, 32170, 32175, 32176, 32180, 32190, 32205, 32206, 32207, 32209, 32210, 32212, 32310,
32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050, 60070

Register 2001, Number 49

Local Government Employee Relations
01-TC-30

City of Sacramento and County of Sacramento, Claimants

EXECUTIVE SUMMARY

The test claim statute amended the Meyers-Milias-Brown Act (hereinafter the MMBA), created an additional method to establish an agency shop arrangement, and expanded the jurisdiction of the Public Employment Relations Board (hereinafter "PERB") over local agencies. Since 2001, PERB's new MMBA jurisdiction includes resolution of disputes and enforcement of statutory duties and rights of all local public employees except peace officers, management employees, and the City and County of Los Angeles. The test claim regulations adopted by PERB in 2001 established procedures for the new MMBA jurisdiction.

On December 4, 2006, the Commission on State Mandates determined that the *Local Government Employment Relations* test claim statutes and specified regulations, adopted in 2001, impose a reimbursable state-mandated program on local agencies.¹

On January 8, 2007, the claimant submitted proposed parameters and guidelines.² On February 2, 2007, the Department of Finance submitted comments on the claimant's proposed parameters and guidelines.³ Staff reviewed the claimant's proposal and the Department of Finance's comments. Non-substantive, technical changes were made for purposes of clarification, consistency with language in recently adopted parameters and guidelines, and conformity to the Statement of Decision. Also, staff reviewed and analyzed claimant's proposed new activities and recommends approval of those activities that are reasonably necessary to implement the state mandate.

¹ See Exhibit A, Statement of Decision.

² See Exhibit B, Claimant's Proposed Parameters and Guidelines.

³ See Exhibit C, Department of Finance Comments.

Recommendation

Staff recommends that the Commission adopt the proposed parameters and guidelines, as modified by staff, beginning on page 11.

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

Claimants

City of Sacramento and County of Sacramento

Chronology

08/01/02	Claimants files test claim with the Commission on State Mandates (Commission)
12/04/2006	Commission adopts statement of decision
12/07/06	Commission staff issues adopted Statement of Decision
01/08/07	Claimant submitted proposed parameters and guidelines
02/02/07	DOF files comments on the proposed parameters and guidelines
04/20/2009	Commission staff issues draft staff analysis and proposed parameters and guidelines, as modified by staff
05/11/2009	Comments may be filed
05/15/2009	Final staff analysis will issue
05/29/2009	Commission hearing

Summary of the Mandate

On December 4, 2006, the Commission on State Mandates determined that the *Local Government Employment Relations* test claim statutes and regulations impose a reimbursable state-mandated program on local agencies for the following activities:

1. Deduct from employees' wages the payment of dues or service fees required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5, and transmit such fees to the employee organization. (Gov. Code § 3508.5, subd. (b)).
2. Receive from the employee any proof of in lieu fee payments made to charitable organizations required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5. (Gov. Code § 3502.5, subd. (c)).
3. Follow PERB procedures in responding to charges and appeals filed with PERB, by an entity other than the local public agency employer, concerning an unfair practice, a unit determination, and representation by an employee organization, recognition of an employee organization, or election. Mandated activities as added by Register 2001, Number 49, are as follows:
 - a. Procedures for filing documents or extensions for filing documents with PERB. (Cal.Code Regs., tit. 8, §§ 32132, 32135);
 - b. Proof of service. (Cal. Code Regs., tit. 8, § 32140);
 - c. Respond to subpoenas and investigative subpoenas. (Cal. Code Regs., tit. 8, §§ 32149, 32150);
 - d. Conduct depositions. (Cal. Code Regs., tit. 8, § 32160);

- e. Participate in hearings and respond as required by PERB agent, PERB Administrative Law Judge, or the five-member PERB. (Cal. Code Regs., tit. 8, §§ 32168, 32170, 32175, 32176, 32180, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050 and 60070); and
- f. File and respond to written motions in the course of the hearing. (Cal. Code Regs. tit. 8, § 32190)

On January 8, 2007, the claimant submitted proposed parameters and guidelines.

On February 2, 2007, the Department of Finance commented on the claimant's proposed parameters and guidelines.⁴ The Department of Finance's comments will be addressed in the analysis.

Discussion

Non-Substantive, Technical Changes to Sections II, III, V, VI

Staff reviewed the proposed parameters and guidelines and the comments received. Non-substantive, technical changes were made for purposes of clarification, consistency with language in recently adopted parameters and guidelines, and conformity to the Statement of Decision. The technical changes proposed by staff are described below.

II. Eligible Claimants

The claimant proposed that "Any county, city, or city and county, special district or other local agency subject to the Meyers-Milias-Brown Act that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs." Staff added a sentence to clarify that the City of Los Angeles and the County of Los Angeles are not eligible claimants because they are specifically excluded from PERB jurisdiction pursuant to Government Code section 3507.

III. Period of Reimbursement

This section was updated to conform to statutory amendments (2008) which eliminated filing reimbursement claims based on estimated costs.

V. Claim Preparation and Submission

B. Indirect Costs

The current boilerplate language allows claimants to utilize the procedure provided in "Office of Management and Budget (OMB) Circular A-87 Attachments A and B" for the calculation of indirect costs.

Commission staff recently learned that this document is now cited as 2 CFR Part 225, Appendix A and B (OMB Circular A-87). The CFR citation has been verified and staff recommends updating this citation throughout Section V.

⁴ See Exhibit C

Substantive Changes to Section IV, Reimbursable Activities

IV. Reimbursable Activities

The Reimbursable Activities section of the parameters and guidelines includes a description of the specific costs and types of costs that are reimbursable, including one-time costs and on-going costs, and a description of the most reasonable methods of complying with the mandate. "The most reasonable methods of complying with the mandate" are those methods not specified in statute or executive order that are necessary to carry out the mandated program.⁵

Claimant proposes the following reimbursable activities:

One Time Activities

- a. Establish procedures and documentation for deduction from employees' wages the payment of dues, or service fees, charitable organization as appropriate required pursuant to an agency shop agreement.
- b. Develop and provide training for employees charged with responsibility for responding to PERB administrative actions, including attorneys, supervisory and management personnel. (One time per employee).
- c. Establishment of procedures and systems for handling of PERB matters, including calendaring, docketing and file management systems.

On-Going Activities

- a. Deduct from employees' wages the payment of dues or service fees required pursuant to an agency shop arrangement and transmit such fees to the employee organization.
- b. Receive, verify and file proof of in lieu fee payments, received from the employee, made to charitable organizations pursuant to an agency shop arrangement.
- c. When a person or entity other than the public entity files with the PERB an unfair labor practice, unit determination, representation by an employee organization, petition for injunctive relief, recognition of an employee organization, or an election, the following activities are reimbursable:
 1. Filing of documents or requests for extension of time to file documents with PERB.
 2. Preparation for conference and hearings before PERB Board agents and Administrative Law Judges including, but not limited to, preparation of briefs, documentation and evidence, exhibits, witnesses and expert witnesses.
 3. Proof of service, including mailing and service costs.
 4. Responding to subpoenas and investigative subpoenas, including the time spent obtaining the information or documentation requested in the subpoena, and copying and service charges.

⁵ See California Code of Regulations, title 2, section 1183.1, subdivision (a)(4).

5. The conduct of depositions, including service of subpoenas, deposition reporter and transcription fees, expert witness fees, preparation for the deposition and the time of any governmental employee or attorney incurred in the conduct of the deposition.
6. Preparation for and participation in any hearing as required by any PERB agent, PERB Administrative Law Judge, or the five-member PERB, including preparation of witnesses, evidence, exhibits, expert witnesses, witnesses, and briefs.
7. The preparation, research, and filing of motions and responding to written motions in the course of a hearing.

Staff reviewed the claimant's proposed language and DOF's comments, and proposes the following changes (see "strikeout and underline" for staff's proposed changes):

One-Time Activities

Claimant proposed the following one-time activities:

1. Establish procedures and documentation for deduction from employees' wages the payment of dues, or service fees, including transmittal of such payments, and handling proof of 'in lieu' fee payments made to charitable organizations as appropriate required by the agency shop agreement established pursuant to Government Code section 3502.5, subdivisions (b) and (c).
2. Develop and provide training for employees charged with responsibility for responding to PERB administrative actions, including attorneys, supervisory and management personnel. (One-time per employee).
3. Establish procedures and systems for handling of PERB matters, including calendaring, docketing and file management systems.

Staff modified proposed activity A.1 to conform the activity to the test claim statute. No substantive changes were made by staff to proposed activities A.2 and A3.

In rebuttal comments to the Department of Finance's comments on the original test claim filing, claimant asserted that "[i]t is unreasonable for an employer not to be familiar with the more complex processes and procedural requirements of the PERB.⁶ The regulations contain a "plethora of procedural rules and timelines with which compliance must be had." The Public Employment Relations Board, 2000-2001 Annual Report, dated October 15, 2001, contains in an appendix of Board decisions, a summary of cases which were dismissed either for failing to meet the timelines, or for lack of a prima facie case. Without adequate training, employers would needlessly be subject to various proceedings brought by individuals and unions when there was no basis for the action. Claimant also asserts that this is a situation that warrants continual training. From the Annual Report, it is evident that the PERB is continually issuing decisions, and there is further litigation which results in published opinions, all of which can impact an employer. To not be kept current on the latest developments of the PERB could result in a more costly impact to the employer.

⁶ See Exhibit D, Response to Department of Finance.

Staff agrees with claimant that one-time activities 1, 2 and 3 are the most reasonable methods of complying with the mandate and therefore, should be allowed by the Commission.

Ongoing Activities

The claimant proposed the following ongoing activities (normal text), and staff proposes the following clarifying changes (strikeout and underline), as discussed below:

Agency Shop Agreements Established by Signed Petition and Election (Gov. Code, § 3502.5, subd. (b).)

Deduct from employees' wages the payment of dues or service fees required pursuant to an agency shop arrangement and transmit such fees to the employee organization.

On a monthly basis, receive proof of ~~verify and file proof of lieu~~ payments in the sum equal to the dues, initiation fees or agency shop fees, ~~received from the employee,~~ made to a charitable organization pursuant to Government Code section 3502.5, subdivision (c), as required by pursuant to an agency shop arrangement established by signed petition and election pursuant to Government Code section 3502.5, subdivision (b).

Staff reviewed claimant's proposed language and comments filed by the Department of Finance (DOF).⁷ DOF states that the plain language of the test claim legislation only requires that local agencies receive proof that in lieu fee payments have been made; therefore verifying and filing this information should not constitute reimbursable activities. Staff agrees, and strikes "verify and file" and makes other technical changes to conform the proposed activity to the test claim statute.

Scope of Reimbursable State-Mandated PERB Activities

Claimant proposed the following language to define the scope of reimbursable state-mandated PERB activities:

3, When a person or entity other than the public entity files with the PERB an unfair practice charge, unit determination, representation by an employee organization, ~~petition for injunctive relief,~~ recognition of an employee organization, or an election request, or the public agency employer is ordered by PERB to join in a matter, the following activities are reimbursable:

Staff recommends deletion of "petition for injunctive relief" because it is inconsistent with the Commission's Statement of Decision. The claimant sought reimbursement for staffing, preparing for, and representing the local public agency in administrative or court proceedings regarding disputes as to management, supervisory and confidential designations, which are excluded from agency shop arrangements. The Commission found that the plain language of the test claim statutes and regulations do not require the local public agency employer to perform any activities with regard to superior or appellate court appeals of final PERB decisions. Therefore, these costs are not subject to article XIII B, section 6.

⁷ See Exhibits C and D.

Preparation for and Participation in any PERB Hearing

6. Preparation for and participation in any hearing as required by any PERB agent, PERB Administrative Law Judge, or the five-member PERB, including preparation of witnesses, evidence, exhibits, expert witnesses, witnesses, and briefs. (Cal. Code Regs., tit. 8, §§ 32168, 32170, 32175, 32176, 32180, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050 and 60070); and

Claimant requests reimbursement for the activity of “preparation” for PERB hearings ... because “preparation for a hearing” is the most reasonable method of complying with the mandate to participate in a PERB hearing.

DOF commented that preparation for hearings is not a new activity, as local agencies previously prepared similar documentation for court hearings under the process in place for resolution of unfair labor practice cases prior to enactment of the test claim language.⁸

Staff disagrees. The PERB decision-making process is quasi-judicial and is not identical to the procedures for responding to Writs of Mandate. There are specific PERB procedural regulations, which the Commission determined to be reimbursable. These are not the same as local rules of court. These regulations require local agency representatives to be prepared for any hearing as required by any PERB agent, Administrative Law Judge, General Counsel, or the five-member PERB.

Claimant explains that the ease with which unions and employees can file charges with the PERB as compared to filing court petitions results in a substantial increase in the number of filings to which the employers must respond ... the procedures for responding to Writs of Mandate are generally less burdensome and time consuming for employers than the multi-layered administrative procedures required under the PERB’s regulations⁹ Based on claimant’s contentions, staff finds that the activity of “preparation for hearing” is the most reasonable method of complying with the mandate to “participate in a PERB hearing.” Therefore, staff recommends approval of this activity.

For this activity, the Commission’s decision includes the following regulatory citations: California Code of Regulations, title 8; sections 32168, 32170, 32175, 32176, 32180, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050 and 60070 and staff proposes adding these citations to the proposed parameters and guidelines.

All of these regulations were added or amended by Register 2001, Number 49 and were determined to be reimbursable by the Commission. On May 10, 2006, regulation sections 60010, 60030, 60050, and 60070 related to petitions for board review were repealed by Register 2006, Number 15. Because of this repeal, staff proposes to add clarifying language to the parameters and guidelines that will state effective May 11, 2006, activities related to petitions for board review that are based on former sections 60010, 60030, 60050, 60070 are not reimbursable. (See Non-Reimbursable Activities, discussed below.)

⁸ See Exhibit C.

⁹ See Exhibit D.

Repeal and Renumbering of Regulations

Generally, the same rules of statutory construction apply when interpreting administrative regulations as apply when interpreting statutes. (*Cal. Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 292.) Education Code section 3 provides: “[t]he provisions of this code, insofar as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations, and not as new enactments.” This is in accordance with the California Supreme Court decision, which held that “[w]here there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time.” (*In re Martin’s Estate* (1908) 153 Cal. 225, 229.)

The proposed parameters and guidelines did not include citations to new regulatory sections that were alleged to be the reenactment of sections 60010, 60030, 60050, and 60070 of the PERB regulations. Therefore, staff makes no findings on the potential reenactment of sections 60010, 60030, 60050, and 60070. Claimants and PERB may file comments on this issue and identify relevant sections of regulations that may constitute the reenactment and continuation of these regulations.

Non-Reimbursable Activities

Staff recommends adding a section identifying Non-Reimbursable Activities. The Commission’s decision identifies activities initiated by a public agency that are not state-mandated activities. Staff recommends that this list be included following identification of reimbursable activities. Staff also recommends adding to this list, exclusions for peace officers as defined in Penal Code section 830.1 and activities based on regulations sections 60010, 60030, 60050, and 60070.

C. Non-Reimbursable Activities

1. The following activities initiated by the local public agency are not state-mandated activities:
 - a. File an unfair practice charge (Cal. Code of Regs., tit. 8, §§ 32602, 32604, 32615, 32621, 32625)
 - b. Appeal of a ruling on a motion (Cal. Code of Regs., tit. 8, § 32200);
 - c. Amend complaint (Cal. Code of Regs., tit. 8, §§ 32625, 32648);
 - d. Appeal of an administrative decision, including request for stay of activity and appeal of dismissal (Cal. Code of Regs., tit. 8, §§ 32350, 32360, 32370, 32635, and 60035);
 - e. Statement of exceptions to Board agent decision (Cal. Code of Regs., tit. 8, § 32300);
 - f. Request for reconsideration (Cal. Code of Regs., tit. 8, § 32410); and,
 - g. Request for injunctive relief (Cal. Code of Regs., tit. 8, § 32450).
2. Sections 3501, 3507.1 and 3509 of the Government Code do not apply to persons who are peace officers as defined in section 830.1 of the Penal Code. Therefore, increased costs related to peace officers are ineligible for reimbursement under this program. (Gov. Code, § 3511.)

3. Effective June 11, 2006, activities related to petitions for board review pursuant to former sections 60010, 60030, 60050, and 60070 of California Code of Regulations, title 8, are not reimbursable.

Staff Recommendation:

Staff recommends that the Commission adopt the proposed parameters and guidelines, as modified by staff, beginning on page 11.

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

**PROPOSED PARAMETERS AND GUIDELINES,
AS MODIFIED BY STAFF**

Local Government Employment Relations

01-TC-30

City and County of Sacramento and
County of Sacramento, Claimants

Government Code Sections 3502.5 and 3508.5

Statutes 2000, Chapter 901 (SB 739)

California Code of Regulations, Title 8, Sections ~~31000 to 61630~~ 32132, 32135, 32140, 32149, 32150, 32160, 32168, 32170, 32175, 32176, 32180, 32190, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050, 60070

Register 2001, Number 49

Local Government Employee Relations

01-TC-30

I. SUMMARY OF THE MANDATE

The test claim ~~legislation~~ statute amended the Meyers-Milias-Brown Act (hereinafter the "MMBA") regarding employer-employee relations between local public agencies and their employees. The test claim ~~legislation~~ statute and its attendant regulations created an additional method for creating an agency shop arrangement, and expanded the jurisdiction of the Public Employment Relations Board (hereinafter "PERB") to include resolving disputes and enforcing the statutory duties and rights of those public employers and employees subject to the MMBA.

On December 4, 2006, the Commission on State Mandates found that the test claim statute and regulations impose a above-referenced test claim was a partially reimbursable state-mandated program on local agencies for the following activities:

1. Deduct from an employees' wages the payment of dues or service fees required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5, and transmit such fees to the employee organization. (Gov. Code § 3508.5, subd. (b)).
2. Receive from the employee any proof of in lieu fee payments made to charitable organizations required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5. (Gov. Code, § 3502.5, subd. (c)).

3. Follow PERB procedures in responding to charges and appeals filed with PERB, by an entity other than the local public agency employer, concerning an unfair labor practice, a unit determination, representation by an employee organization, recognition of an employee organization, or election. Mandated activities are:
 - a. Procedures for filing documents or extensions for filing documents with PERB. (Cal.Code Reg., tit. 8, §§ 32132, 32135 (Register 2001, No. 49));
 - b. Proof of service. (Cal. Code Regs., tit. 8, § 32140 (Register 2001, No. 49));
 - c. Responding to subpoenas and investigative subpoenas. (Cal. Code Regs., tit. 8, §§ 32149, 32150 (Register 2001, No. 49));
 - d. Conducting depositions. (Cal. Code Regs., tit. 8, § 32160 (Register 2001, No. 49));
 - e. Participate in hearings and responding as required by PERB agent, PERB Administrative Law Judge, or the five-member PERB. Cal. Code Regs., tit. 8, §§ 32168, 32170, 32175, 32176, 32180, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050 and 60070 (Register 2001, No. 49)); and
 - f. Filing and responding to written motions in the course of the hearing. (Cal. Code Regs. tit. 8, § 32190 (Register 2001, No. 49.))

II. ELIGIBLE CLAIMANTS

Any county, city, or city and county, special district or other local agency subject to the jurisdiction of PERB that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs. However, the City of Los Angeles and the County of Los Angeles are not eligible claimants because they are specifically excluded from PERB jurisdiction pursuant to Government Code section 3507.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557 states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for reimbursement for that fiscal year. The test claim for this mandate was filed by the test claimants, the County of Sacramento and the City of Sacramento, on August 1, 2002. Therefore, the period of reimbursement begins on July 1, 2001.

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

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

IV. REIMBURSABLE ACTIVITIES

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

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

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below.

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Time study usage is subject to the review and audit conducted by the State Controller's Office.

For each eligible claimant, the following activities are eligible for reimbursement:

A. One Time Activities

1. Establish procedures and documentation for deduction from employees' wages the payment of dues, or service fees, including transmittal of such payments, and handling proof of in lieu fee payments made to charitable organizations as required by the agency shop agreement pursuant to Government Code sections 3502.5, subdivisions (b) and (c), as appropriate required pursuant to an agency shop agreement.
2. Develop and provide training for employees charged with responsibility for responding to PERB administrative actions, including attorneys, supervisory and management personnel. (One time per employee).
3. ~~Establishment of~~ Establish procedures and systems for handling of PERB matters, including calendaring, docketing and file management systems.

B. On-Going Activities

1. Deduct from employees' wages the payment of dues or service fees required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5, and transmit such fees to the employee organization. (Gov. Code, §, 3508.5, subd. (b).)
2. On a monthly basis, receive, verify and file from the employee proof of in lieu fee payments, received from the employee, made to charitable organizations pursuant to an

agency shop arrangement that was established by signed petition and election in Government Code section 3502.5, subdivision (b). (Gov. Code, § 3502.5, subd. (c)).

3. When a person or entity other than the public entity files with the PERB an unfair labor practice charge, unit determination, representation by an employee organization, ~~petition for injunctive relief~~, recognition of an employee organization, or an election request, or the public agency employer is ordered by PERB to join in a matter, the following activities are reimbursable:
 - a. Filing documents or requests for extension of time to file documents with PERB. (Cal. Code Regs., tit. 8, §§ 32132, 32135);
 - b. Proof of service, including mailing and service costs. (Cal. Code Regs., tit. 8, § 32140);
 - c. Preparation for conferences and hearings before PERB Board agents and PERB Administrative Law Judges including, but not limited to, preparation of briefs, documentation and evidence, exhibits, witnesses and expert witnesses. (Cal. Code Regs., tit. 8, § 32170)
 - d. Responding to subpoenas and investigative subpoenas, including the time spent obtaining the information or documentation requested in the subpoena, and copying and service charges. (Cal. Code Regs., tit. 8, §§ 32149, 32150);
 - e. The conduct of depositions, including service of subpoenas, deposition reporter and transcription fees, expert witness fees, preparation for the deposition and the time of any governmental employee or attorney incurred in the conduct of the deposition. (Cal. Code Regs., tit. 8, § 32160);
 - f. Preparation for and participation in any hearing as required by any PERB Board agent, PERB Administrative Law Judge, or the five-member PERB, or the General Counsel, including preparation of answer to complaint or answer to amendment, witnesses, evidence, exhibits, expert witnesses, witnesses, statements^{1,2}, stipulated facts³ and informational briefs, oral argument, response to exceptions, response to administrative appeal or compliance matter. Effective July 1, 2001 through May 10, 2006: California Code of Regulations, title 8, §§ 32168, 32170, 32175, 32176, 32180, 32205, 32206, 32207, 32209,⁴ 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050, and 60070. (Register 2001, No. 49). Effective June 11, 2006, responses to petitions for board review pursuant to former sections 60010, 60030, 60050, and 60070 of the California Code of Regulations, title 8, are not reimbursable. (Register 2006, No. 15.)

¹ § 32206.

² § 32455 – preparation of written position statements or other documents filed with the General Counsel.

³ § 32207.

⁴ Correction of the transcript requires filing of a motion; the citation to this motion has been moved to subdivision (g).

- g. The preparation, research, and filing of motions, including correction of transcript and responding to written motions in the course of a hearing and immediately after. (Cal. Code Regs., tit. 8, § 32190, 32209).

C. Non-Reimbursable Activities

1. The following activities initiated by the local public agency are not state-mandated activities:
 - a. File an unfair practice charge (Cal. Code of Regs., tit. 8, §§ 32602, 32604, 32615, 32621, 32625)
 - b. Appeal of a ruling on a motion (Cal. Code of Regs., tit. 8, § 32200);
 - c. Amend complaint (Cal. Code of Regs., tit. 8, §§ 32625, 32648);
 - d. Appeal of an administrative decision, including request for stay of activity and appeal of dismissal (Cal. Code of Regs., tit. 8, §§ 32350, 32360, 32370, 32635, and 60035);
 - e. Statement of exceptions to Board agent decision (Cal. Code of Regs., tit. 8, § 32300);
 - f. Request for reconsideration (Cal. Code of Regs., tit. 8, § 32410); and,
 - g. Request for injunctive relief (Cal. Code of Regs., tit. 8, § 32450).
2. Sections 3501, 3507.1 and 3509 of the Government Code do not apply to persons who are peace officers as defined in section 830.1 of the Penal Code. Therefore, increased costs related to peace officers are ineligible for reimbursement under this program. (Gov. Code, § 3511.)
3. Effective June 11, 2006, activities based on former sections 60010, 60030, 60050, and 60070 of California Code of Regulations, title 8, are not reimbursable.

V. CLAIM PREPARATION AND SUBMISSION

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

A. Direct Cost Reporting

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

1. Salaries and Benefits

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

2. Materials and Supplies

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

3. Contracted Services

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

4. Fixed Assets and Equipment

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

5. Travel

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

B. Indirect Cost Rates

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

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the 2 CFR Part 225 (Office of Management and Budget (OMB) Circular A-87). Claimants have the option of using 10% of labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B)) and the indirect shall exclude capital expenditures and unallowable costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B).) However, unallowable

costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

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

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

1. The allocation of allowable indirect costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B)) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B)) shall be accomplished by (1) separate a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORDS RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter⁵ is subject to the initiation of an audit by the State Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING SAVINGS REVENUES AND REIMBURSEMENTS

Any ~~offsets~~ ~~offsetting savings~~ the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any federal, state or non-local source shall be identified and deducted from this claim.

⁵ This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

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

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

VIII. REMEDIES BEFORE THE COMMISSION

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

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

IX. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

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

NOTE: Authority cited: Section 3563(f); Government Code. Reference: Section 3583.5(c), Government Code.

HISTORY

1. New section filed 1-3-2000 as an emergency; operative 1-3-2000 (Register 2000, No. 1). A Certificate of Compliance must be transmitted to OAL by 5-2-2000 or emergency language will be repealed by operation of law on the following day.
2. Repealed by operation of Government Code section 11346.1(g) (Register 2000, No. 18).
3. New section filed 5-5-2000 as an emergency; operative 5-5-2000 (Register 2000, No. 18). A Certificate of Compliance must be transmitted to OAL by 9-5-2000 or emergency language will be repealed by operation of law on the following day.
4. Certificate of Compliance as to 5-5-2000 order transmitted to OAL 7-26-2000 and filed 9-7-2000 (Register 2000, No. 36).

§ 51740. Bar to Reinstatement Petition.

The Board shall dismiss any petition to reinstate an organizational security provision if the results of an election concerning the organizational security provision in the same unit were certified by the Board within the 12 months immediately preceding the filing of the petition.

NOTE: Authority cited: Section 3563(f), Government Code. Reference: Section 3583.5(c), Government Code.

HISTORY

1. New section filed 1-3-2000 as an emergency; operative 1-3-2000 (Register 2000, No. 1). A Certificate of Compliance must be transmitted to OAL by 5-2-2000 or emergency language will be repealed by operation of law on the following day.
2. Repealed by operation of Government Code section 11346.1(g) (Register 2000, No. 18).
3. New section filed 5-5-2000 as an emergency; operative 5-5-2000 (Register 2000, No. 18). A Certificate of Compliance must be transmitted to OAL by 9-5-2000 or emergency language will be repealed by operation of law on the following day.
4. Certificate of Compliance as to 5-5-2000 order transmitted to OAL 7-26-2000 and filed 9-7-2000 (Register 2000, No. 36).

Chapter 5. Meyers-Millias-Brown Act

Subchapter 1. Enforcement and Application of Local Rules Concerning Unit Determinations, Recognition, Representation and Elections

§ 60000. Petition for Board Review.

NOTE: Authority cited: Sections 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

HISTORY

1. New chapter 5 (subchapters 1-2, sections 60000-61630), subchapter 1 (sections 60000-60070) and section filed 6-11-2001 as an emergency; operative 7-1-2001 (Register 2001, No. 24). A Certificate of Compliance must be transmitted to OAL by 10-29-2001 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-11-2001 order transmitted to OAL 10-18-2001 and filed 12-4-2001 (Register 2001, No. 49).
3. Repealer of subchapter 1 (sections 60000-60070) and section filed 4-11-2006; operative 5-11-2006 (Register 2006, No. 15).

§ 60010. Board Investigation.

NOTE: Authority cited: Sections 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

HISTORY

1. New section filed 6-11-2001 as an emergency; operative 7-1-2001 (Register 2001, No. 24). A Certificate of Compliance must be transmitted to OAL by 10-29-2001 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-11-2001 order, including amendment of subsection (a), transmitted to OAL 10-18-2001 and filed 12-4-2001 (Register 2001, No. 49).
3. Repealer filed 4-11-2006; operative 5-11-2006 (Register 2006, No. 15).

§ 60020. Withdrawal of a Petition.

NOTE: Authority cited: Sections 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

HISTORY

1. New section filed 6-11-2001 as an emergency; operative 7-1-2001 (Register 2001, No. 24). A Certificate of Compliance must be transmitted to OAL by 10-29-2001 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-11-2001 order transmitted to OAL 10-18-2001 and filed 12-4-2001 (Register 2001, No. 49).
3. Repealer filed 4-11-2006; operative 5-11-2006 (Register 2006, No. 15).

§ 60030. Informal Conference.

NOTE: Authority cited: Sections 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

HISTORY

1. New section filed 6-11-2001 as an emergency; operative 7-1-2001 (Register 2001, No. 24). A Certificate of Compliance must be transmitted to OAL by 10-29-2001 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-11-2001 order transmitted to OAL 10-18-2001 and filed 12-4-2001 (Register 2001, No. 49).
3. Repealer filed 4-11-2006; operative 5-11-2006 (Register 2006, No. 15).

§ 60035. Administrative Decision.

NOTE: Authority cited: Sections 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

HISTORY

1. New section filed 6-11-2001 as an emergency; operative 7-1-2001 (Register 2001, No. 24). A Certificate of Compliance must be transmitted to OAL by 10-29-2001 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-11-2001 order transmitted to OAL 10-18-2001 and filed 12-4-2001 (Register 2001, No. 49).
3. Repealer filed 4-11-2006; operative 5-11-2006 (Register 2006, No. 15).

§ 60040. Notice of Hearing.

NOTE: Authority cited: Sections 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

HISTORY

1. New section filed 6-11-2001 as an emergency; operative 7-1-2001 (Register 2001, No. 24). A Certificate of Compliance must be transmitted to OAL by 10-29-2001 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-11-2001 order transmitted to OAL 10-18-2001 and filed 12-4-2001 (Register 2001, No. 49).
3. Repealer filed 4-11-2006; operative 5-11-2006 (Register 2006, No. 15).

§ 60050. Conduct of Hearing; Issuance of Proposed Decision.

NOTE: Authority cited: Sections 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

HISTORY

1. New section filed 6-11-2001 as an emergency; operative 7-1-2001 (Register 2001, No. 24). A Certificate of Compliance must be transmitted to OAL by 10-29-2001 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-11-2001 order transmitted to OAL 10-18-2001 and filed 12-4-2001 (Register 2001, No. 49).
3. Repealer filed 4-11-2006; operative 5-11-2006 (Register 2006, No. 15).

§ 60060. Conduct of Elections.

NOTE: Authority cited: Sections 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

HISTORY

1. New section filed 6-11-2001 as an emergency; operative 7-1-2001 (Register 2001, No. 24). A Certificate of Compliance must be transmitted to OAL by 10-29-2001 or emergency language will be repealed by operation of law on the following day.
2. Repealed by operation of Government Code section 11346.1(g) (Register 2001, No. 49).

§ 60070. Decisions of the Board Itself.

NOTE: Authority cited: Sections 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

HISTORY

1. New section filed 6-11-2001 as an emergency; operative 7-1-2001 (Register 2001, No. 24). A Certificate of Compliance must be transmitted to OAL by 10-29-2001 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-11-2001 order transmitted to OAL 10-18-2001 and filed 12-4-2001 (Register 2001, No. 49).
3. Repealer filed 4-11-2006; operative 5-11-2006 (Register 2006, No. 15).

Article 1. General Provisions

§ 61000. Application of Regulations.

Except as otherwise ordered pursuant to Chapter 1, or as provided for by Public Utilities Code, Division 10, Part 16, Chapter 5 (section 105140 et seq.), the Board will conduct representation proceedings and/or agency fee rescission elections under MMBA in accordance with the applicable provisions of this Chapter only where a public agency has not adopted local rules in accordance with MMBA section 3507.

NOTE: Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code; and Sections 105140, 105152 and 105153, Public Utilities Code.

HISTORY

1. New subchapter 2 (articles 1-8), article 1 (sections 61000-61090) and section filed 6-11-2001 as an emergency; operative 7-1-2001 (Register 2001, No. 24). A Certificate of Compliance must be transmitted to OAL by 10-29-2001 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-11-2001 order, including amendment of section, transmitted to OAL 10-18-2001 and filed 12-4-2001 (Register 2001, No. 49).
3. Amendment of section and NOTE filed 11-13-2003; operative 12-13-2003 (Register 2003, No. 46).
4. Amendment filed 2-2-2004 as an emergency; operative 2-2-2004 (Register 2004, No. 6). A Certificate of Compliance must be transmitted to OAL by 6-1-2004 or emergency language will be repealed by operation of law on the following day.
5. Certificate of Compliance as to 2-2-2004 order transmitted to OAL 5-4-2004 and filed 6-8-2004 (Register 2004, No. 24).
6. Repealer of subchapter 2 heading and amendment of section filed 4-11-2006; operative 5-11-2006 (Register 2006, No. 15).

§ 61005. Parties.

"Parties" means the public agency, the employee organization that is the exclusive or majority representative of any employee covered by a petition, any employee organization known to have an interest in representing any employees as demonstrated by having filed a pending petition, and/or any group of public employees which has filed a pending petition pursuant to Government Code Section 3502.5(d) or 3507.

NOTE: Authority cited: Sections 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3501(a), (b), (c) and (d), 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

HISTORY

1. New section filed 6-11-2001 as an emergency; operative 7-1-2001 (Register 2001, No. 24). A Certificate of Compliance must be transmitted to OAL by 10-29-2001 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-11-2001 order transmitted to OAL 10-18-2001 and filed 12-4-2001 (Register 2001, No. 49).

§ 61010. Window Period.

"Window period" means the 29-day period which is less than 120 days but more than 90 days prior to the expiration date of a lawful memorandum of understanding negotiated by the public agency and the exclusive representative. Expiration date means the last effective date of the memorandum. Notwithstanding the provisions of Section 32130, the date on which the memorandum of understanding expires shall not be counted for the purpose of computing the window period.

NOTE: Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3, Government Code.

HISTORY

1. New section filed 6-11-2001 as an emergency; operative 7-1-2001 (Register 2001, No. 24). A Certificate of Compliance must be transmitted to OAL by 10-29-2001 or emergency language will be repealed by operation of law on the following day.

2. Certificate of Compliance as to 6-11-2001 order transmitted to OAL 10-18-2001 and filed 12-4-2001 (Register 2001, No. 49).
3. Amendment filed 4-11-2006; operative 5-11-2006 (Register 2006, No. 15).

§ 61020. Proof of Support.

(a)(1) Proof of employee support for representation petitions, including decertification petitions, petitions for certification, requests for recognition, severance requests or petitions, and unit modification petitions, shall clearly demonstrate that the employee desires to be represented by the petitioning employee organization for the purpose of meeting and conferring on wages, hours and other terms and conditions of employment.

(2) Proof of employee support for a decertification petition filed pursuant to section 61350(b)(1) shall clearly demonstrate that the employee no longer desires to be represented by the exclusive representative.

(3) Proof of employee support for a rescission petition filed pursuant to section 61600 shall clearly demonstrate that the employee desires a vote to rescind the existing organizational security arrangement.

(b) The proof of support shall indicate each employee's printed name, signature, job title or classification and the date on which each individual's signature was obtained. An undated signature or a signature dated more than one calendar year prior to the filing of the petition requiring employee support shall be invalid for the purpose of calculating proof of support. Any signature meeting the requirements of this section shall be considered valid even though the signatory has executed authorizations for more than one employee organization.

(c) Any proof of support validly obtained within one year immediately prior to the date the petition or amendment requiring employee support is filed shall remain valid and may be used as proof of support to qualify for appearance on the ballot in an election, provided the employee's job classification is included in the unit in which the election is to be conducted.

(d) Subject to subsections (a), (b) and (c) of this section, proof of support may consist of any one of the following original documents or a combination thereof:

- (1) Current dues deduction authorization forms;
- (2) Membership applications;
- (3) Authorization cards or petitions signed by employees. The purpose of the petition shall be clearly stated on each page thereof;
- (4) A notarized membership list, provided it is accompanied by the date of each member's signature on an enrollment form, membership application, or designation card or cards, supported by a declaration under penalty of perjury that the employee organization has on file the aforementioned documents which indicate the employee's desire to be represented by the employee organization. A sample of such signed forms shall accompany the list.
- (5) Other evidence as determined by the Board.

(e) Documents submitted to the board as proof of employee support shall remain confidential and not be disclosed by the board to any party other than the petitioner, except to indicate whether the proof of support is sufficient.

(f) Any party which contends that proof of employee support was obtained by fraud or coercion, or that the signatures on such support documents are not genuine, shall file with the regional office evidence in the form of declarations under penalty of perjury supporting such contention within 20 days after the filing of the petition which the proof of support accompanied. The Board shall refuse to consider any evidence not timely submitted, absent a showing of good cause for late submission. When prima facie evidence is submitted to the Board supporting a claim that proof of support was tainted by such misconduct, the Board shall conduct further investigations. If, as a result of such investigation, the Board determines that the proof of support is inadequate because of such misconduct, the petition shall be dismissed.

NOTE: Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

HISTORY

1. New section filed 6-11-2001 as an emergency; operative 7-1-2001 (Register 2001, No. 24). A Certificate of Compliance must be transmitted to OAL by

▷ CALIFORNIA DRIVE-IN RESTAURANT ASSOCIATION, et al., Respondents,

v.

MARGARETE L. CLARK, as Chief of the Division of Industrial Welfare, etc., et al., Appellants.

L. A. No. 18093.

Supreme Court of California

June 16, 1943.

HEADNOTES

(1) Administrative Law--Rules of Administrative Agencies--Interpretation.

Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies.

(2) Statutes § 87, 92--Repeal by Implication--Rule Against Repeal by Inconsistent Statute--Necessity for Clear Repugnancy.

The presumption is against repeals by implication, especially where the prior act has been generally understood and acted upon; and to overcome the presumption the two acts must be irreconcilable, clearly repugnant and so inconsistent that they cannot have concurrent operation.

See 23 Cal.Jur. 694; 25 R.C.L. 918.

(3) Statutes § 124--Construction--Circumstances Indicating Legislative Intent--Object to Be Accomplished.

The purpose and object sought to be accomplished by legislation is an important factor in determining the legislative intent.

(4a, 4b) Labor § 17--Regulation of Tipping--Rules and Statutes.

Section 3 of Order 12-A of the Industrial Welfare Commission and Lab. Code, §§ 350-356, are not irreconcilable, but entirely harmonious, since the basic policy underlying the order is the regulation of wages, hours and working conditions for minors and adult female employees in eating establishments, the subject of tipping being embraced only incidentally in furtherance of that general purpose, and the statute is concerned exclusively with tipping in respect to its

relation to the public, the Legislature having expressly stated that its purpose was to prevent fraud upon the public.

(5) Labor § 17--Regulation of Tipping--Construction of Order.

Conceding that the effect of § 3 of Order 12-A of the Industrial Welfare Commission is to prohibit deduction of tips from employees' wages and that Lab. Code, §§ 350-356, impliedly authorizes their deduction, such prohibition should be strictly limited, and the section will not be violated in instances where the employer retains the entire amount of all tips received above the minimum wage, or deducts the tips from the amount of any wages it has agreed to pay in excess of a specified minimum.

(6) Labor § 17--Regulation of Tipping--Construction of Lab. Code, §§ 350-356.

That Lab. Code, §§ 350-356, authorize tipping is not a necessary conclusion, since the statute does not purport to legalize the retention or deduction of tips received by employees and is nothing more than a comprehensive regulation requiring that the public be informed of an employer's retention of tips.

(7) Labor § 17--Regulation of Tipping--Construction of Order.

Section 3 of Order 12-A of the Industrial Welfare Commission, given a liberal meaning to effectuate the ends in view, prohibits the retention by the employer of any amount of tips received by the employee below the minimum wage.

(8) Labor § 17--Regulation of Tipping--Purpose of Lab. Code, §§ 350-356.

If it be assumed that the Legislature in enacting Lab. Code, §§ 350-356, was endeavoring to avoid the difficulty encountered in reference to Stats. 1917, p. 257, still it did not purport to authorize deduction of tips from the minimum wage but merely regulated the retention of tips by employers regardless of whether such retention was or was not a violation of § 3 of Order 12-A of the Industrial Welfare Commission.

(9) Statutes § 180(2)--Aids to Construction--

Contemporaneous Construction-- Executive or Departmental Construction.

While it is a rule of statutory interpretation that the construction given a statute by the administrative agency charged with its enforcement is a significant factor to be considered by the courts in ascertaining the meaning of the statute, where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction.

(10) Trial § 379--Findings--Conclusiveness.

A finding constituting a conclusion of law is not binding upon the appellate court.

(11) Labor § 17--Regulation of Tipping--Validity of Order.

Section 3 of Order 12-A of the Industrial Welfare Commission is not invalid as an unconstitutional interference with freedom of contract as between employer and employee, since in the field of regulation of wages and hours by legislative authority constitutional guarantees relating to freedom of contract must give way to reasonable police regulations, and the Legislature did not act arbitrarily or capriciously, but reasonable grounds appear for the policy established by § 3 of the order.

See 15 Cal.Jur. 575; 31 Am.Jur. 1080.

(12) Labor § 17--Regulation of Tipping--Validity of Order.

Section 3 of Order 12-A of the Industrial Welfare Commission does not create an improper discrimination in respect to employers or the employees affected. The particular evils at which it is aimed are a part of the minimum wage policy and must be viewed in that light, hence it applies only to situations where such wages are fixed.

See 31 Am.Jur. 1038.

(13) Labor § 17--Regulation of Tipping--Validity of Order--Finding of Commission.

The fact that no finding by the Industrial Welfare Commission as a basis for Order 12-A appears in the order itself is not of importance, since § 6(a) of the minimum wage law (Stats. 1913, p. 632, as amended by Stats. 1921, p. 378) merely requires that the order shall specify "the minimum wage for women and minors in the occupation in question, maximum hours ... and the standard conditions of labor. ..."

(14a, 14b) Labor § 17--Regulation of Tipping--As Implied Power.

The adoption of § 3 of Order 12-A is within the implied power of the Industrial Welfare Commission, flowing from its power to fix minimum wages delegated to the commission.

(15) Administrative Law--Power of Administrative Agency to Adopt Rules and Regulations.

While an administrative agency may not, under the guise of its rule-making power, abridge or enlarge its authority or exceed the powers given to it by statutes, the authority of an administrative board or officer to adopt reasonable rules and regulations deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned, and is implied from the power granted.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Ballard, Judge. Reversed.

Action for injunction and declaratory relief. Judgment for plaintiffs reversed.

COUNSEL

Robert W. Kenny, Attorney General, Earl Warren, Attorney General, Burdette J. Daniels and Alberta Belford, Deputies *290 Attorney General, Leo L. Schaumer and E. A. Lackmann for Appellants.

Thorpe & Bridges, Gerald Bridges, Frank R. Johnston and E. R. Young for Respondents.

CARTER, J.

Plaintiffs, operators of drive-in restaurants, successfully challenged in the superior court the validity of a regulation of the Industrial Welfare Commission, designated Order 12-A. Defendants, the Chief of the Division of Industrial Welfare of the Department of Industrial Relations and the members of the Industrial Welfare Commission of the Division of Industrial Welfare of the Department of Industrial Relations, appeal from the judgment entered for plaintiffs.

Plaintiffs are independent owners of establishments serving food and beverages. Their patronage consists chiefly of motorists who are served while remaining

in their vehicles, however, service may be obtained in the owner's restaurant buildings. Most of the employees are girls and women commonly referred to as "car hops." The employment arrangement contemplates that the tips received by the employees shall constitute their wages, except that the employers make up the difference if the tips received fall below the minimum wage for minors and adult females fixed by the Industrial Welfare Commission. Plaintiffs posted in their business establishments, the notices required by a statute of 1929, hereinafter set forth. In 1940, plaintiffs were advised by the Chief of the Division of Industrial Welfare that their employment arrangement violated Order 12-A, in that they could not consider the tips received by the minor and female adult employees in computing and paying the minimum wage, and that they would be required to comply with said order.

Order 12-A became effective on June 8, 1923. In section 1 it fixed a minimum wage of \$16 per week to be paid to all female adult or minor employees in restaurants or other places where food and drinks were sold. Section 2 fixed the maximum amount the employer could deduct from the minimum wage for meals and lodging furnished the employee. Section 3, here in question, reads: "No employer may include tips or gratuities received by employees designated in section *291 1 hereof as part of the legal minimum wages fixed by said section of this Order." The remaining nine sections deal with hours of labor, working conditions, the employer's duty to keep records, and the like.

In 1929 (Stats. 1929, p. 1971), a statute was passed by the Legislature, now appearing in sections 350-356 of the Labor Code. Section 351 of the Labor Code reads:

"Every employer or agent who collects, takes, or receives any gratuity or a part thereof, paid, given to, or left for an employee by a patron, or who deducts any amount from wages due an employee on account of such gratuity, or who requires an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer, shall keep posted in a conspicuous place at the location where his business is carried on, in a place where it can easily be seen by the patrons thereof, a notice, in lettering or printing of not less than 48-point black-face type, to the following

effect:

"(a) If not shared by the employees, that any gratuities paid, given to, or left for employees by patrons go to and belong to the business or employer and are not shared by the employees thereof.

"(b) If shared by the employees, the extent to which gratuities are shared between employer and employees."

Section 352 specifies that the notice shall also state the extent to which employees are required to accept gratuities in lieu of wages or permit them to be credited against their wages. The provisions apply to all businesses having one or more persons in service. A gratuity "includes any tip, gratuity, money, or part thereof, which has been paid or given to or left for an employee by a patron of a business over and above the actual amount due such business for services rendered or for goods, food, drink, or articles sold or served to such patron."

A penalty is imposed for violation of the act, and it is declared that:

"The Legislature expressly declares that the purpose of this article is to prevent fraud upon the public in connection with the practice of tipping and declares that this article is passed for a public reason and cannot be contravened by a private agreement. As a part of the social public policy *292 of this State, this article is binding upon all departments of the State." (Lab. Code, sec. 356.)

Whether the 1929 statute impliedly annulled section 3 of said Order 12-A must be determined in the light of the appropriate rules of statutory construction. (1) Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies. (*Miller v. United States*, 294 U.S. 435 [55 St.Ct. 440, 79 L.Ed. 977].) (2) With reference to implied repeals of statutes this court stated in *Penziner v. West American Finance Co.*, 10 Cal.2d 160, 176 [74 P.2d 252]:

"The presumption is against repeals by implication, especially where the prior act has been generally understood and acted upon. To overcome the presump-

tion the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together. Where a modification will suffice, a repeal will not be presumed." (See 23 Cal.Jur. 694, et seq.) (3) The purpose and object sought to be accomplished by legislation is an important factor in determining the legislative intent. (*San Francisco v. San Mateo County*, 17 Cal.2d 814 [112 P.2d 595].)

(4a) Applying those rules to the instant case we find no repugnancy. The statute of 1929 and section 3 of Order 12-A rather than being irreconcilable are entirely harmonious. The basic policy underlying the order is the regulation of wages, hours and working conditions for minors and adult female employees in eating establishments. The subject of tipping is embraced only incidentally in the furtherance of that general purpose. Broadly, it was designed to deal with the industrial welfare of such employees, and the relation of their welfare to the general public interest. On the other hand the statute is concerned exclusively with tipping in respect to its relation to the public which patronizes not only restaurant establishments but many other businesses. The Legislature expressly stated that its purpose is "to prevent fraud upon the public," a policy underlying no part of the order. Section 3 of the order states that tips received by the designated employees may not be included in the minimum wage therein fixed. (5) If it be conceded that the effect *293 of said section is to prohibit the deduction of tips from the employees' wages, and that the statute impliedly authorizes such deduction as asserted by plaintiffs, such prohibition should be strictly limited, and said section would not be violated in instances where the employer retained the entire amount of all tips received above the minimum wage, or deducted the tips from the amount of any wages he agreed to pay in excess of the specified minimum. It does not apply to male employees or persons employed in businesses other than those mentioned.

(6) Further, it is not necessary to conclude that the statute authorizes tipping. It does not purport to authorize or legalize the retention or deduction of the tips received by the employees. It is nothing more than a comprehensive regulation in respect to advising the public of the retention of tips by the employer

whether such retention is legal or not, the essential requirement being that the public be informed of the practice. Fairly interpreted, the posting of the notice is required regardless of whether such retention or deduction is being made from the minimum legal wage fixed by section 3. (7) It may be said that section 3 given a liberal meaning to effectuate the ends in view, prohibits the retention by the employer of any amount of tips received by the employee below the minimum wage, because if the employer could retain such tips he would be, in effect, accomplishing indirectly that which he could not do directly, namely, including the tips in the legal wage. It would be a subterfuge for him to receive all the tips and pay the minimum wage. The end result would be counting the tips as a part of the legal wage. That conclusion does not mean that section 3 and the statute are inconsistent to that extent. (4b) The purpose of the statute and section 3 are entirely different. The statute does not purport to cover the special field of tipping in regard to its effect on the minimum wage law. It is aimed at the protection of the public against fraud.

(8) For the same reasons the historical arguments advanced by plaintiffs are not persuasive. True, a statute was enacted in 1917 (Stats. 1917, p. 257) which made it unlawful for an employer to demand tips received by his employee in consideration of the latter's being hired or retained. That act, like the 1929 act, was broad in its scope and did not purport *294 to affect tipping in relation to minimum wages. It was declared invalid in *In re Farb*, 178 Cal. 592 [174 P. 320, 3 A.L.R. 301], and thereafter the 1929 act was passed. Both of those statutes were aimed at the prevention of a fraud on the public and were not concerned with the effect on the inclusion of tips in minimum wages and the purpose of section 3 of said Order 12-A. If it be assumed that the Legislature in passing the 1929 statute was endeavoring to avoid the difficulty encountered with reference to the 1917 act in *In re Farb*, *supra*, still it did not purport to authorize the deduction of tips from the minimum wage. It was regulating the retention of tips by employers regardless of whether such retention was or was not a violation of section 3 of Order 12-A. The statute and the order were designed for fundamentally different purposes.

(9) Plaintiffs urge that because the predecessors in office of defendants did not enforce section 3 of Order 12-A, they must have considered it annulled by

the 1929 statute, and some of the plaintiffs having been so advised by executive officers of defendants predecessors, the statute should be interpreted to annul said section 3. It is undoubtedly a rule of statutory interpretation that the construction given a statute by the administrative agency charged with the enforcement of it is a significant factor to be considered by the courts in ascertaining the meaning of such statute. (*Los Angeles County v. Superior Court*, 17 Cal.2d 707 [112 P.2d 10]; 23 Cal.Jur. 776-7.) But where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction. The administrative interpretation cannot alter the clear meaning of a statute. (*Los Angeles County v. Superior Court*, *supra*; 23 Cal.Jur. 776.) We have seen that the 1929 statute does not purport to legalize the deduction or retention of tips by an employer, nor does section 3 of Order 12-A prohibit tipping; it merely prohibits the inclusion of tips in the minimum wage for certain employees. The alleged implied nullification which is not favored in the law does not exist.

(10) The trial court found: "... that in adopting section 3 of Order 12A ... defendant ... acted in excess of its jurisdiction." That finding is not, as claimed by plaintiffs, binding upon this court, inasmuch as it is a conclusion of law. In *295 support of it plaintiffs challenge the constitutionality of section 3, and the validity of the adoption of the order.

(11) Plaintiffs contend that section 3 is invalid because it is an unconstitutional interference with the freedom of contract as between employer and employee. (United States Const., Fourteenth Amendment; Cal.Const., art. I, secs. 1, 13; art. XX, sec. 18.) The main premise relied upon by plaintiffs is that section 3 prohibits an employer and his employee from agreeing that the former shall retain all tips received by the latter, citing *In re Farb*, *supra*, declaring unconstitutional the 1917 act (*supra*), and denouncing such practice. It has heretofore been pointed out that the 1917 act was not aimed at and did not involve any restrictions on such contracts directly as a part and in aid of the minimum wage requirements. The 1917 act applied expressly to any and all employees without regard to whether a legal wage was fixed for them. For that reason we do not consider the *Farb* case as necessarily supporting plaintiffs' position. Furthermore, the reasoning of the

Farb case is out of line with the later authorities upholding minimum wage legislation. (See *United States v. Darby*, 312 U.S. 100 [61 S.Ct. 451, 85 L.Ed. 609, 132 A.L.R. 1430]; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 [57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330]; 31 Am.Jur., Labor, sec. 503; 130 A.L.R. 273; 132 A.L.R. 1443.) There is a distinct difference between a comprehensive prohibition of retention of tips by employers, and the prohibition of such practice as a part of an order fixing minimum wages.

It must be remembered that in the field of regulation of wages and hours by legislative authority, constitutional guarantees relating to freedom of contract must give way to reasonable police regulations. The Supreme Court of the United States in discussing the regulation of hours and wages of women employees stated in *West Coast Hotel Co. v. Parrish*, *supra*, at 392:

"This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (*296 *Holden v. Hardy*, 169 U.S. 366 [18 S.Ct. 383, 42 L.Ed. 780]; in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (*Knoxville Iron Co. v. Harbison*, 183 U.S. 13 [22 S.Ct. 1, 46 L.Ed. 55]); in forbidding the payment of seamen's wages in advance (*Patterson v. Bark Eudora*, 190 U.S. 169 [23 S.Ct. 821, 47 L.Ed. 1002]); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean v. Arkansas*, 211 U.S. 539 [29 S.Ct. 206, 53 L.Ed. 315]); in prohibiting contracts limiting liability for injuries to employees (*Chicago, B. & O. R. Co. v. McGuire* *supra* [219 U.S. 549 (31 S.Ct. 259, 55 L.Ed. 328)]); in limiting hours of work of employees in manufacturing establishments (*Bunting v. Oregon*, 243 U.S. 426 [37 S.Ct. 435, 61 L.Ed. 830]); and in maintaining workmen's compensation laws (*New York Central R. Co. v. White*, 243 U.S. 188 [37 S.Ct. 247, 61 L.Ed. 667]; *Mountain Timber Co. v. Washington*, 243 U.S. 219 [37 S.Ct. 260, 61 L.Ed. 685]). In dealing with the relation of employer and employee, the Legislature has necessarily a wide field of

discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. *Chicago, B. & O. R. Co. v. McGuire, supra*, p. 570." And at page 399:

"The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. *Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide.* Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment." (Emphasis added.) Many other illustrations could be given. In the recent case of *Williams v. [Jacksonville] Terminal Co.*, 315 U.S. 386 [62 S.Ct. 659, 86 L.Ed. 914], the court had before it the question of whether the tips received by red caps could be counted as a part of the minimum wage under the Fair Labor Standards Act (29 U.S.C.A. 201 et seq.) It was held *297 that they could and that legally speaking such tips were wages under the agreement between the employer and employee. However, the court was careful to point out that the Fair Labor Standards Act did not prohibit the inclusion of tips in the minimum wage, and it recognized that such a prohibition might well be valid. It stated at page 388:

"The Fair Labor Standards Act is not intended to do away with tipping. Nor does it appear that Congress intended by the general minimum wage to give the tipping employments an earnings-preference over the nonservice vocations. The petitioners do not dispute the railroad's contention that, during the entire period, each red cap received as earnings-cash pay plus tips-a sum equal to the required minimum wage. Nor is there denial of increased pay to the red caps on account of the minimum wage guarantee of the challenged plan as compared with the former tipping system. The guarantee also betters the mischief of irregular income from tips and increases wage security. *The desirability of considering tips in setting a minimum wage, that is whether tips from the viewpoint of social welfare should be counted as part of that legal wage, is not for judicial decision. We deal here only with the petitioners' assertion that the wages Act re-*

quires railroads to pay the red caps the minimum wage without regard to their earnings from tips." (Emphasis added.)

The presumption is that the Legislature had adequate and reasonable basis for its police regulations and that a statute providing for such regulations is constitutional (5 Cal.Jur. 628, et seq.), and, as expressed in *West Coast Hotel Co. v. Parrish, supra*, the only question to be decided is whether it acted arbitrarily or capriciously. There may be others, but certain reasonable grounds appear for the policy established by section 3 of Order 12-A. As we have seen from the foregoing quotation from *Williams v. Terminal Co., supra*, that possibility is recognized where the court declared that whether the social welfare required that tips be not counted as part of the minimum wage was not for "judicial decision." It cited for that statement, Anderson, *Tips & Legal Minimum Wages*, XXXI American Labor Legislation Review 11, at page 13, where it was aptly said that if the tips received were to be counted as a part of the minimum *298 wage "... the employee would be required to report to her employer the amount of tips received each week, in order that he in turn could know the amount of wage he must pay to make up the \$16.

"If this practice were followed the purpose of the minimum-wage law would soon be defeated. It would not be long before employers discovered which of their employees were costing them the most money. Obviously, the girls who received the least in tips would have to be paid the highest wages to make up the \$16. Gradually the girls receiving low tips would be dismissed, whether efficient or not, and those with ability to wile larger tips from an irresponsible public would be employed in their places. The workers would be no slower than the employers in discovering the effects of the reporting system on their welfare. The dismissal of one or two workers would be sufficient to warn the others that if they were to retain their jobs their tips must equal those of their more fortunate co-workers. There is always one effective way out of a situation like this for a worker who is desperately in need of a job, and that is to report to the employer a greater amount of tips than actually is received. The whole purpose of the minimum wage law, that of guaranteeing the worker a living wage, would be defeated if this practice were permitted and the State authorities would be almost helpless to correct the situation. To prevent just this

kind of abuse, most State minimum-wage orders for hotels and restaurants contain a provision that under no circumstances shall tips be counted as a part of the legal minimum wage." In order that the welfare of the employees be advanced and the benefits of the minimum wage law be preserved, it may well be said that section 3 has a reasonable basis. If the employees may be induced, and in effect coerced, by fear of dismissal by an employment contract requiring the tips to be counted as a part of the minimum wage, to report their tips as equal to the minimum wage even though they are not, the minimum wage requirement is seriously undermined. By indirect method they would be forced into a position of receiving less than the standard fixed. If the employer is permitted to retain the tips in an amount equal to the minimum wage, which as seen would be a violation of section 3, the same condition would exist. The fear of dismissal might well coerce the employees to turn over as tips *299 a portion of their own funds when the tips received were not equal to the legal wage. The effectiveness of the minimum wage law would be thus impaired. With the employer prevented from retaining tips in the amount of the minimum legal wage, a salutary result would follow. The benefits of the minimum wage law would be preserved, and the dignity of the laborer and his social position would be advanced by relieving him of the necessity of resorting to the undignified conduct encouraged by the tipping practice.

The Legislature clearly sets forth the purpose sought to be obtained by the fixing of minimum wages as that adequate to supply the necessary cost of proper living and to maintain the health and welfare of the employees. (Lab. Code, sec. 1182.) We perceive that that purpose may be thwarted if tips may be included in the minimum wage.

The foregoing discussion does not mean that tips may not be considered wages under certain circumstances such as, computation of compensation under workmen's compensation laws. (*Hartford Acc. & Indem. Co. v. Industrial Acc. Com.*, 41 Cal.App. 543 [183 P. 234]; 29 Cal.L.Rev. 774; 75 A.L.R. 1223, and generally *Williams v. Terminal Co.*, *supra*.) An employer may permit his employee to retain the tips and the arrangement may be that they shall be compensation, but section 3 is aimed at the evils above-mentioned in connection with *minimum wages*, and merely because tips may be termed wages under certain circum-

stances does not mean that they may be counted as part of the minimum wage where to do so would contravene the policy of section 3 and permit the evils there denounced.

(12) In their contention that section 3 is not uniform and is discriminatory (United States Const., Fourteenth Amendment; Cal.Const., art. I, sec. 21; art. IV, sec. 25), plaintiffs suggest that section 3 would not be violated if the employment contract called for all tips to be retained by the employer, citing *Settrie v. Falkner*, Commerce Clearing House Labor Law Service, 3d ed. sec. 60, 779. Apparently that case does not appear in the reporter system nor the Ohio Appellate Reports, but in any event we are not persuaded by its reasoning. Section 3 does present such a situation.

Section 3 creates no improper discrimination in respect to employers or the employees affected. The particular evils *300 at which it is aimed are a part of the minimum wage policy and must be viewed in that light, hence it applies only to situations where such wages are fixed. A reasonable classification has been made. There are many instances where classifications with reference to wages and hours have been upheld. (See *Matter of Application of Martin*, 157 Cal. 51 [106 P. 235, 26 L.R.A. N.S. 242], hours of employment in underground mines; *Matter of Application of Miller*, 162 Cal. 687 [124 P. 427], hours of labor for women but not men.) It is said in 31 Am.Jur., Labor, sec. 414:

"The relation of employer and employee has long been the basis for specific legislation, and statutes applicable only to such relation are not subject to the objection that they constitute class legislation. Moreover, the equal protection of the laws is not denied by the classification of occupations if such classification has a reasonable basis. Such classification may be based upon matters which are personal to the individuals who are acting as employees. For example, statutory regulations with reference to labor of women or children or both may be sustained as against the objection that they constitute an arbitrary discrimination because they do not extend to men. Moreover, the classification may be based not only on the character of the employees but upon the nature of the employer's business, since the character of the work may largely depend upon the nature and the incidents of the business in connection with which the work is done. A statute dealing with employees in

a particular line of business does not create an arbitrary discrimination merely because the operation of the statute is not extended to other lines of business having their own circumstances and conditions, or to domestic service."

(13) It is contended that there was no finding by the Industrial Welfare Commission as a basis for its Order 12-A, and that such finding was necessary to the validity of said order; that is, that the wages fixed were adequate to supply the cost of proper living as specified in the minimum wage law at the time of its adoption. (Stats. 1913, p. 632, as amended.) That contention must necessarily be limited to the claim that such finding must appear in the order itself inasmuch as the appeal is on the judgment roll alone and hence all of the court's findings must be deemed to have been supported by the evidence. Plaintiffs, respondents herein, are bound by those *301 findings. The trial court found that the order was adopted by the commission pursuant to and under the authority of the minimum wage laws; that on "June 8, 1923, the ... Commission promulgated Order 12-A for the hotel and restaurant industries. That *prior to the formulation and adoption* of said Order 12-A, and in the manner and form prescribed by statute, a conference denominated a wage board of the employers and employees of the said hotel and restaurant industries was called by said commission; that thereafter and prior to the adoption of said Order 12-A, and within the time and in the manner prescribed by law a public hearing was called and held upon said proposed Order 12-A, at which said meeting and wage board conference the employers and employees of said restaurant industry of the State of California were regularly represented.

"That at said public hearing and other meetings witnesses were sworn, testimony taken, and evidence received. It is further true that *every act and thing required by statute to be done by said Commission in the promulgation and adoption of said Order 12-A was done by said Commission within the time and in the manner and form required by statute.*" (Emphasis added.) It was also found that the order was in full force and effect except as otherwise found in the findings referring to its constitutionality and implied repeal by the 1929 statute.

There have been decisions by the United States Supreme Court both ways upon the question of the ne-

cessity of findings by an administrative agency as a basis for a rule or regulation issued by it. In Panama Ref. Co. v. Ryan, 293 U.S. 388 [55 S.Ct. 241, 79 L.Ed. 446], findings were declared necessary to support a presidential order. The most recent holding by that court in Pacific States Box & Basket Co. v. White, 296 U.S. 176 [56 S.Ct. 159, 80 L.Ed. 138, 101 A.L.R. 853], is that no findings are necessary where the statute does not require them to support the order of the Department of Agriculture of the State of Oregon fixing the sizes for containers of horticultural products, although a violation of the order is a misdemeanor. That holding is a definite departure from the broad rule announced in Panama Ref. Co. v. Ryan, *supra*. (See 49 Harv.L.Rev. 827.) Other cases have considered the question. (See American Telephone & Telegraph Co. v. United States, 14 F.Supp. 121; Bayley v. Southland Gasoline Co., 131 F.2d 412; *302 Twin City Milk Producers Assn. v. McNutt, 122 F.2d 564.) We have not been referred to and have been unable to find any case in California on the subject, and while some of the federal court cases indicate that the findings must appear in the order, plaintiffs have suffered no prejudice. The findings of the trial court show that if findings were required by the statute the commission made them. The mere fact that they do not appear on the face of the order is not therefore of importance. The statute did not require that the findings appear on the face of the order. Section 6(c) of the act states merely that the order shall specify "the minimum wage for women and minors in the occupation in question, the maximum hours ... and the standard conditions of labor. ..." (Stats. 1913, p. 632, as amended Stats. 1921, p. 378.)

(14a) The adoption of section 3 of Order 12-A was within the power and authority delegated to the Industrial Welfare Commission by the Legislature. The Constitution authorizes the Legislature to provide a minimum wage for women and minors and for the comfort, health, safety and general welfare of employees, and to confer upon a commission the authority it deems necessary to carry out those purposes. (Cal. Const., art. XX, sec. 171/2.) The act under which Order 12-A was promulgated empowers the commission to fix "a minimum wage to be paid to women and minors engaged in any occupation, which shall not be less than a wage adequate to supply such women and minors the necessary cost of proper living and to maintain the health and welfare of such women and minors," and to establish the maximum working hours and the standard conditions of labor.

(Stats. 1913, p. 632, sec. 6, as amended Stats. 1921, p. 378.) In our previous discussion of the constitutionality of section 3 we have shown that it had a direct relation to minimum wages and was a natural and important incident thereof. It is an incident of the establishment of minimum wages similar to the provisions in Order 12-A, which specify to what extent board and lodging furnished by the employer may be considered wages. The power to provide safeguards to insure the receipt of the minimum wage and to prevent evasion and subterfuge, is necessarily an implied power flowing from the power to fix a minimum wage delegated to the commission.

(15) It is true that an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute *303 the source of its power. (*Boone v. Kingsbury*, 206 Cal. 148 [273 P. 797]; *California E. Com. v. Black-Foxe Military Inst.*, 43 Cal.App.2dSupp. 868 [110 P.2d 729]; *Hodge v. McCall*, 185 Cal. 330 [197 P. 86]; *Bank of Italy v. Johnson*, 200 Cal. 1 [251 P. 784].) However, "the authority of an administrative board or officer, ... to adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned. This authority is implied from the power granted." (*Bank of Italy v. Johnson*, *supra*, 20.) (See, also, *Crawford v. Imperial Irrigation Dist.*, 200 Cal. 318 [253 P. 725]; 21 Cal.Jur. 874.) (14b) In the instant case the power to adopt section 3 may be implied as a power to make effective the order fixing the minimum wage. The power to fix that wage does not confine the agency to that single act. It may adopt rules to make it effective. Plaintiffs cite *Adolph Coors Co. v. Corbett*, (Cal.App.) 123 P.2d 74, decided by the District Court of Appeal. A hearing was granted by this court in that case and thereafter it was dismissed. It is not a controlling authority.

The judgment is reversed.

Gibson, C. J., Shenk, J., Curtis, J., and Edmonds, J., concurred.

Traynor, J., and Schauer, J., did not participate herein.

Respondents' petition for a rehearing was denied July 15, 1943. Traynor, J., and Schauer, J., did not participate therein. *304

Cal.

California Drive-In Restaurant Ass'n v. Clark

22 Cal.2d 287, 140 P.2d 657, 147 A.L.R. 1028, 7 Lab.Cas. P 61,672

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▶ In the Matter of the Estate of ELIZABETH HEW-
LETT MARTIN, Deceased. JOHN Q. HEWLINGS
et al., Appellants,
v.
STATE OF CALIFORNIA, Respondent.

Supreme Court of California.
S. F. No. 4596.

March 13, 1908.

ESTATES OF DECEASED PERSONS-
COLLATERAL INHERITANCE TAX-VESTED
RIGHT OF STATE-REPEAL OF LAW INOPERA-
TIVE.

The right of the state to the tax on collateral inher-
itance, bequests, or devises provided for in the act
approved March 25, 1893, and its amendments while
in force, vested immediately upon the death of the
ancestor, or testator, and its vested rights thereunder
to collect or receive any unpaid taxes could not be
affected by the repeal of that act and its amendments
by the Collateral Inheritance Tax Act of March 20,
1905.

ID.-CONSTITUTIONAL LAW-PROTECTION OF
RIGHTS OF STATE.

Under the limitations prescribed by section 31 of
article IV of the constitution, it is not within the
power of the legislature, either by the repeal of the
law in virtue of which the right of the state to the tax
in question vested, or by any other means, to grant or
donate it to the successor in estate, or to any other
person.

ID.-FORMER PROCEDURE INSERTED IN RE-
PEALING ACT NOT REPEALED.

Notwithstanding the express repeal of the act of 1893
and its amendments, the object of the act of 1905 is
merely to establish a different amount of taxation and
to make it applicable to different persons; and, in so
far as provisions of procedure under the former act
are found substantially embodied in the latter, they
must be deemed mere amendments, within the scope
of section 325 of the Political Code, providing that
portions of statutes not altered are to be deemed a law
from the time when they were first enacted, and such
portions apply to taxes previously assessed, the same
as if there were no repealing clause in the new act.

ID.-RE-ENACTMENT NEUTRALIZING REPEAL.

Where there is an express repeal of a statute, and at
the same time a re-enactment of a portion of its pro-
visions, such re-enactment neutralizes the repeal, in
so far as the old law is continued in force; and, in
such case, the part of the old law re-enacted operates
without interruption.

APPEAL from an order of the Superior Court of
Santa Clara County directing payment of a collateral
inheritance tax. M. H. Hyland, Judge.

The facts are stated in the opinion of the court.

*226 S. F. Lieb, for Appellants.

U. S. Webb, Attorney-General, James H. Campbell,
District Attorney, and C. M. Lorigan, for Respon-
dent.

SHAW, J.

Elizabeth Hewlett Martin, a resident of this state,
died in the county of Santa Clara on January 2, 1905,
leaving a valuable estate. By the terms of her will,
which was duly probated, she bequeathed to each of
the appellants a sum of money greater than five hun-
dred dollars, amounting in the aggregate to
\$35,415.21. None of the appellants was related to the
deceased in a degree nearer than that of brother, and,
hence, the legacy came within the terms of the act of
1903 (Stats. 1903, p. 268), amending section 1 of the
act imposing a tax on inheritance devises and lega-
cies. Section 27 of an act approved March 20, 1905,
which took effect July 1, 1905 (Stats. 1905, p. 350),
purports to repeal, unconditionally, the act of 1893
providing for a succession tax and all the subsequent
amendments thereto, including that of 1903 above
mentioned. In due course of administration of the
estate a decree of distribution thereof was rendered
by the superior court of Santa Clara County on Feb-
ruary 2, 1906, declaring that the appellants respec-
tively were the owners of and entitled to receive the
legacies bequeathed to them as aforesaid, subject to
whatever inheritance tax might be due thereon. Sub-
sequently, on March 2, 1906, upon due notice, the

court made an order directing the executor of the estate to deduct from each of said legacies a sum equal to five per cent thereof, as and for a succession tax thereon, and to pay said sums so deducted to the county treasurer. This appeal is taken from that order.

The appellants ask us to overrule the decisions of this court in the *Estate of Stanford*, 126 Cal. 112, [54 Pac. 259, 58 Pac. 462], and *Trippet v. State*, 149 Cal. 521, [86 Pac. 1084], and declare that the repeal of the Collateral Inheritance Tax *227 Law of 1893, and its amendments, by the act of 1905, operated to deprive the state of the right to collect or receive all succession taxes, accrued under the former law, which had not been paid or ordered to be paid to the state at the time the repeal took effect, on July 1, 1905. The briefs filed for the appellants in *Trippet v. State*, 149 Cal. 521, [86 Pac. 1084], are referred to by counsel and made to constitute the argument on behalf of the appellants in this case. No additional points are presented. Even if we were disposed to doubt the soundness of those decisions, and were to concede that vested rights would not be affected by overruling them, we would hesitate to overrule decisions so well and thoroughly considered as those mentioned. But after again considering the arguments presented, we are satisfied that the conclusion reached in those cases is correct.

The argument of the appellants is that the decision in *Trippet v. State* is based wholly on the authority and reasoning of the opinion in *Estate of Stanford*, and that the conclusion in the Stanford case was founded solely upon the proposition that the effect of the law of 1893 and its amendments was to provide for the succession to property upon the death of the owner, and not to establish a tax. And this proposition, it is claimed, is false for two reasons: 1. Because the language of the statute does not permit that construction, and, 2. Because, if it did, the title of the act would not include the subject and the act would be void. It is further argued that the law does not in fact provide for a tax, the right of the state thereto does not vest until payment, or until a judicial order has been made for the payment, and that a repeal of the law before either event, as in the present case, extinguishes the inchoate right of the state to the unpaid tax.

The opinion in *Estate of Stanford* does not have the effect claimed. It does not hold that law in question provides that the state shall succeed as an heir in cer-

tain classes of cases to five per cent of the property of the decedent. Some of its phraseology may perhaps be consistent with such an idea, if taken separately from the context, but the real meaning and effect of the decision is that the law establishes a succession tax in certain cases, and that the right of the state to such tax vests immediately upon the death of the ancestor or testator, and, hence, that the repeal of the law does not affect *228 the right of the state to the tax. The law, in effect, created a lien in favor of the state on the property for the amount of the tax thereon. This right to the tax in question here, and the lien therefor, vested in and became the property of the state upon the death of Elizabeth Hewlett Martin, in January, 1905. Under the limitations prescribed by section 31 of article IV of the constitution, it is not within the power of the legislature, either by the repeal of the law in virtue of which the right vested, or by any other means, to grant or donate it to the successor in estate or to any other person.

The law of 1893 and its amendments provided that the executor or administrator of the particular estate should deduct from all money legacies, or money of the intestate, in his hands for distribution, the amount of the succession tax due thereon and that he should in other cases collect from the distributee the amount of the tax due on the share distributed, before delivery thereof to the party entitled, and should pay the said tax to the county treasurer for use of the state (Stats. 1895, sec. 6, p. 35; Stats. 1893, sec. 8, p. 195).

If this law is still in force, no order of the court was required to give the executor authority to deduct from the money legacies distributed to the appellants the succession tax thereon and to pay the same to the county treasurer. In that event the order would be harmless, even if unnecessary. It is claimed that the express repeal, by the act of 1905, of the previous law for succession taxes, if not effective to deprive the state of the right to the tax here involved, is, at least, valid so far as it repeals the provisions of sections 6 and 8 aforesaid, providing for its retention and payment by the executor, and, hence, that the executor had no authority to pay the tax for the legatees, and that the court had no power to make the order giving him such authority.

We do not think that these provisions were repealed. The act of 1905 containing the repealing clause above mentioned is practically a revision of the act of

1893 and its amendments, providing for succession taxes. Certain changes are made in the new law in regard to the persons on whom such tax is imposed, the exemptions therefrom, and in the rate of tax to be imposed upon the different persons. These changes are found, for the most part, in sections 1, 2, 3, and 4 of the new law, which cover the subjects embraced in section 1 of the *229 old law. The other portions of the old law are substantially re-enacted in the act of 1905 with a few alterations and additions which do not affect the question. The aforesaid section 6 of the former law is, word for word, the same as section 9 of the new act, and section 8 of the former law is identical with section 11 of the new act, with the exception of a few words of trifling import. We must presume that the legislature of 1905 was aware of its want of power, under the decision of this court in *Estate of Stanford*, to release, surrender, or discharge the taxes previously accrued and remaining uncollected. The re-enactment of the provisions of the former law respecting the payment and collection of succession taxes is to be considered as having been done with knowledge of the existence of these uncollected taxes and with the intent to continue in force the mode and means for the collection thereof. These re-enactments come within the scope and effect of section 325 of the Political Code, declaring that, when a part of a statute is amended, it is "not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted." The rule particularly applicable to this case is thus stated in Sutherland on Statutory Construction (2d ed., sec. 238): "Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time." Speaking of a similar case, the supreme court of the United States, in *Bear Lake I. Co. v. Garland*, 164 U. S. 11, [17 Sup. Ct. 7], say: "Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act." The following authorities are of similar effect: Endlich on Interpretation, sec. 490; *Pratt v.*

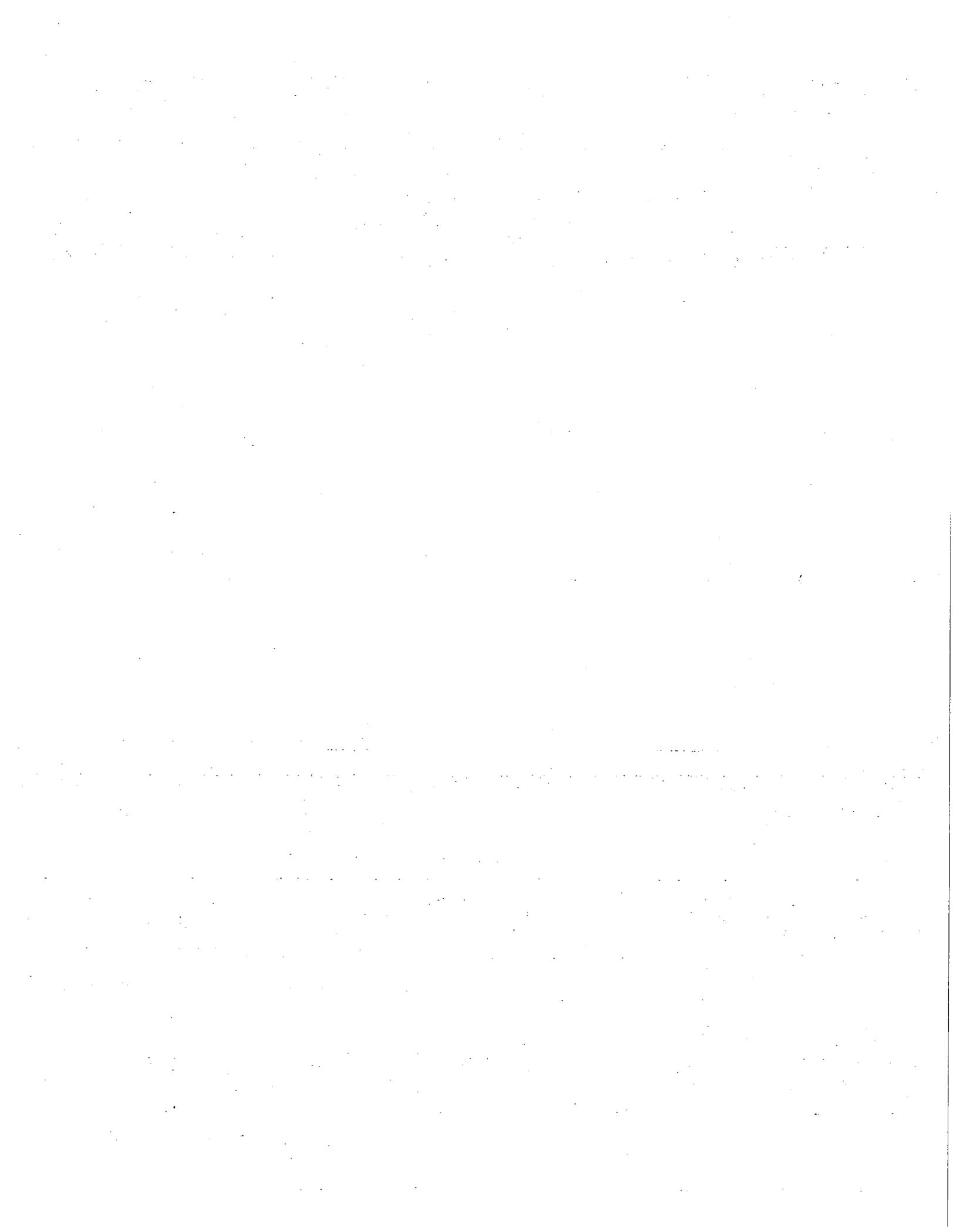
Swan, 16 Utah, 483, [52 Pac. 1094]; *Howlett v. Cheetham*, 17 Wash. 626, [50 Pac. 522]; *230 *Pacific M. S. Co. v. Joliffe*, 2 Wall. 456; *Wright v. Oakley*, 5 Met. 406; *Sabin v. Connor*, 21 Fed. Cas. 125; *United Hebrew Assoc. v. Benshimol*, 130 Mass. 327; *Anding v. Levy*, 57 Miss. 59, [34 Am. Rep. 435]; *Middleton v. New Jersey etc. Co.*, 26 N. J. Eq. 274; *State v. Bemis*, 54 Neb. 733, [64 N. W. 350]. The effect of the act of 1905 was to establish a different rate of taxation and make it applicable to different persons with respect to all succession taxes accruing thereafter, but otherwise the provisions of the previous act incorporated into the new act, relating to the payment and collection of succession taxes, remained in force and applied to taxes previously assessed, the same as if there had been no express repealing clause in the new act. The same session of the legislature amended section 1669 of the Code of Civil Procedure, so as to provide that before any decree of distribution of an estate is made the court must be satisfied that "any inheritance tax which is due and payable has been fully paid." (Stats. 1905, p. 83.) This amendment took effect May 6, 1905, and remained in force, notwithstanding the repeal of the inheritance tax law of 1893. Under its provisions, in connection with the provisions of the former act re-enacted in the Revisory Act, there can be no doubt that the court had authority to make the order appealed from.

The order is affirmed.

Angellotti, J., Sloss, J., Henshaw, J., and Lorigan, J., concurred.

Cal. 1908.
In re Martin's Estate
153 Cal. 225, 94 P. 1053

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Commission on State Mandates

Original List Date: 8/1/2002 Mailing Information: Draft Staff Analysis
Last Updated: 1/11/2007
List Print Date: 04/20/2009 **Mailing List**
Claim Number: 01-TC-30
Issue: Local Government Employment Relations

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