RESPONSE TO DEPARTMENT OF FINANCE

On Original Test Claim

Chapter 465, Statutes of 1976; Chapter 1259, Statutes of 1994; Chapter 148, Statutes of 1997; Chapter 786, Statutes of 1998; Chapter 263, Statutes of 1998; Chapter 112, Statutes of 1998; Chapter 338, Statutes of 1999; Chapter 209, Statutes of 2000; Chapter 1156, Statutes of 2002; and Chapter 170, Statutes of 2002

Claim no. CSM-03-TC-18

Peace Officers Procedural Bill of Rights II

The following are comments and responses to the letter of the Department of Finance, dated November 14, 2003, regarding the original test claim as submitted by the City of Newport Beach.

A. Department of Finance's Comments

"As the result of our review, we have the following concerns with the activities asserted by the claimant:

- When a permanent or an at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed, the an administrative appeal would already be required pursuant to the due process clauses of the United States and California Constitutions; and as such, would not constitute a new program or higher level of service. However, in the original test claim, the Commission found that United States and California Constitutions do not require an administrative appeal when dismissal or other disciplinary action is received by at-will employees whose liberty interests are not affected. Therefore, in some situations, the requirement to provide notice, a reason and an opportunity to a hearing may constitutes reimbursable state mandate. The other activities, to draft, review, and establish policies, procedures, forms, protocols and training to provide notices and hearings, exist already; nothing in the amended law requires special rules to apply to at-will (police chief) employees."

The position of the Department of Finance rests on the lesser issue of the activities and their costs rather than the larger issue of whether this is a new state-mandated program or a higher level of service. As this initial issue was left unaddressed, claimant concludes that the Department concedes that there is indeed a new state-mandated program or higher level of service.

As stated in the test claim, claimant does not have complete estimates on the costs of discharging the program. So, the Department's conclusion that there have been no costs is premature. Moreover, although this test claim was brought by the City of Newport Beach, the outcome of the test claim will impact peace officers and agencies in

jurisdictions statewide. To burden those jurisdictions with the conclusions made by the Department is premature.

- "While the 1997 amendments provide that a punitive action may only be pursued when an investigation is completed within one year, the amendments also provide numerous exceptions to this rule, as well as numerous conditions under which closed cases may be reopened. Claimants assert that the requirement will necessitate the drafting, review and establishment of policies, procedures, forms, protocols, file tracking systems and training to implement the practices for officers, investigators, supervisors, employers, clerical, counsel and staff. We note that current law for state peace officers requires completion and prosecution of state police officers within three years. Current law for local police officers has no time limit. Even in the latter case, investigative procedures exist. The establishment of a timeframe, by itself, does not create the need to have procedure for conducting an investigation. In addition, since there is no level of punitive actions prescribed by current law, the one-year timeframe does not, by itself, require more work on the part of the police offices. We also note that a long list of police officer political organizations supported the legislation that enacted this change."

The Department appears to take the position that since there is no punishment for violating the law, the peace officers are free to do so. Further, the Department argues that the one-year time frame was supported by police officer political groups. Both positions are untenable. First, agencies charged with law enforcement would be wont to violate the law, with or without stated consequences. Second, whether police political groups supported the legislation is insufficient to rise to the level of that in Government Code section 17556, subdivision (a), which states, in pertinent part, that the Commission shall not find costs mandated by the state if there is a finding that:

> "The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority."

The mere support of political organizations does not affect the finding of a state-mandated program or higher level of service.

Indeed, the position of the Department that this statute does not affect the speed of the investigation or necessitate changes within local agencies is disingenuous at best. The Department notes that there already exists investigative procedures. To ensure, however, that such investigations are completed in a timely manner, requires adjustments by the local agencies.

- "The 1997 amendment to the law allows, but does not require, an investigation to be reopened against a public safety officer beyond the one-year time period under

certain conditions; therefore, the discretionary authority does not constitute a reimbursable state mandate."

The Department relies on the discretionary nature of the language in the statute regarding the reopening of cases. Although the statute uses the term "may", the discretionary nature of that term seems to dissolve in the next sentence. Government Code section 3304, subdivision (g), reads in pertinent part:

> Notwithstanding the one-year time period specified in subdivision (c), an investigation may be reopened against a public safety officer if both of the following circumstances exist:
> (1) Significant new evidence has been discovered that is likely to affect the outcome of the investigation.

The statute does not call for a reopening of case merely in the light of new evidence but only if that evidence is likely to change the outcome. Looking at that more closely, if the evidence would clear the charges against a peace officer, there is really no choice for the agency than to reopen. Conversely, if the evidence would support charges and discipline against a peace officer, then again, there is no real choice but to reopen. Without a real option, the statute cannot be considered voluntary.

- "Government Code Section 31011, enacted in 1974, and Labor Code Section 1198.5, enacted in 1975, provide personnel review and response procedures for county, city and special district employees, thus the new requirement set forth in section 3306.5 does not constitute a new state program, with the possible exception of the explanation an employer must provide if a requested change is denied. Claimants assert that employers must pay the officer during the time the officer elects to review his or her record; however, the law only provides that there be no loss of compensation to the officer."

The position of the Department is that the new program or higher level of service is only a small portion of the statute. To the extent that this statute requires more of an agency that any pre-existing statute, there is a new program or higher level of service, even if, as the Department argues, there activities are limited or the costs small.

The Department also argues that the statute does not call for the peace officer to be paid while inspecting records, only that there be no loss of compensation. Yet, for inspections that occur during on-duty hours, the concept of "must pay" and "no loss of compensation" are one in the same. The Department is correct, however, if on the off chance that an officer opts to inspect his records off-duty, he will not be compensated.

- "Claimants assert that the requirement to provide notice or adhere to a legal process before searching an officer's locker creates the need to draft, review and establish policies, procedures, forms, protocols and training. We note that since their existing practices have gone unchallenged since 1976 when this statute was enacted, no new procedures are expected or necessary."

The position of the Department is that the age of the statute precludes the establishment of new polices and such. As noted above, although this test claim was brought by the City of Newport Beach, the outcome of the test claim will impact peace officers and agencies in jurisdictions statewide. New procedures may be necessary in those jurisdictions for a variety of reasons. It is premature for the Department to close the door on such claims without the opportunity for those jurisdictions to put forward facts for consideration.

- "Claimants assert that the requirement to provide written notice, and an opportunity to appeal proposed discipline for displaying an American flag is a new state mandated program, The statute was passed in the aftermath of September 11, 2001, to prohibit punitive action against a public safety officer for wearing a pin or displaying any other item containing the American flag. This is an example of a specific reason for disciplinary action. In the unlikely event this authority for disciplinary action was exercised, existing procedures and relief are addressed pursuant to the original POBOR test claim."

The position of the Department is that any claims under this statute will be properly addressed under the prior POBOR test claim. While that may be true, claimants are loath to rely on the prior Parameters and Guidelines as a strict interpretation of them may preclude a claim under this statute. Claimants believe that clarity on this issue will be appreciated by all departments that will have to deal with claims on this statute in the future.

CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 28 day of January, 2004, at Newport Beach, California, by:

Glen Everroad
Revenue Manager
City of Newport Beach

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento, and I am over the age of 18 years and not a party to the within action. My place of employment is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841.

On January 30, 2004, I served:

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by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the Untied States mail at Sacramento, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 30th day of January, 2004, at Sacramento, California.

Declarant

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