

ITEM 4
MANDATE REDETERMINATION
FIRST HEARING: ADEQUATE SHOWING
PROPOSED DECISION

Penal Code Section 13518.1

Statutes 1987, Chapter 1334 (AB 1726)

CPR Pocket Masks (CSM-4291)

As Alleged to be Modified by:

Statutes 2013, Chapter 28 (SB 71)

14-MR-01

Department of Finance, Requester

EXECUTIVE SUMMARY

Overview

On March 23, 1988, the Commission on State Mandates (Commission) adopted a decision approving reimbursement for the *CPR Pocket Masks*, CSM-4291 program.¹ The Commission found that Penal Code section 13518.1 required local law enforcement agencies to provide to each peace officer that it employs a portable manual mask and airway assembly, for use when applying cardiopulmonary resuscitation, to prevent the spread of communicable disease.

Effective June 27, 2013, Statutes 2013, chapter 28 (SB 71), an urgency bill, amended the plain language of Penal Code section 13518.1 as follows in underline and strikeout:

In order to prevent the spread of communicable disease, a law enforcement agency employing peace officers described in subdivision (a) of Section 13518 ~~may shall~~ provide to each of these peace officers an appropriate portable manual mask and airway assembly for use when applying cardiopulmonary resuscitation.²

On August 18, 2014, Department of Finance (Finance) filed a request to adopt a new test claim decision to supersede the previous decision on *CPR Pocket Masks* to end the program's reimbursement period pursuant to Government Code section 17570.³ Finance asserts that Statutes 2013, chapter 28 constitutes a subsequent change in law, as defined in Government Code section

¹ Exhibit B, Test Claim Statement of Decision CSM-4291, adopted March 23, 1988.

² Penal Code section 13518.1, as amended by Statutes 2013, chapter 28 (SB 71), section 46.

³ Based on the filing date of August 18, 2014, the period of reimbursement potentially affected by this request for mandate redetermination would begin July 1, 2013. Pursuant to Government Code section 17570(f), a request "shall be filed on or before June 30 following a fiscal year in order to establish eligibility for reimbursement or loss of reimbursement for that fiscal year."

17570, which modifies the state's liability for reimbursement. Finance concludes that "since the [test claim] statute was amended, no reimbursement is required pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514."⁴

Procedural History

On August 18, 2014, Finance filed a request to adopt a new test claim decision on the *CPR Pocket Masks* program.⁵ On August 27, 2014, a notice of complete filing and schedule of comments was issued. On September 26, 2014, the State Controller's Office (Controller) submitted comments on the request.⁶ On October 30, 2014, Commission staff issued the draft proposed decision for the first hearing on the request.⁷ On November 20, 2014, the Controller filed comments recommending no changes to the draft proposed decision.⁸

Commission Responsibilities

Mandate Redetermination Process under Government Code Section 17570

Government Code section 17570 provides a process whereby a test claim decision may be redetermined and superseded by a new test claim decision, if a subsequent change in law, as defined, has modified the state's liability for reimbursement. The redetermination process calls for two hearings. The Commission's regulations state:

The first hearing shall be limited to the issue of whether the requester has made an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior test claim decision, that may modify the state's liability pursuant to article XIII B, section 6(a) of the California Constitution. The Commission shall find that the requester has made an adequate showing if it finds that the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.⁹

The regulations further state:

If the Commission proceeds to the second hearing, it shall consider whether the state's liability...has been modified based on the subsequent change in law alleged by the requester, thus requiring adoption of a new test claim decision to supersede the previously adopted test claim decision.¹⁰

⁴ Exhibit A, Request for Mandate Redetermination, filed August 18, 2014.

⁵ Exhibit A, Request for Mandate Redetermination, filed August 18, 2014.

⁶ Exhibit D, State Controller's Comments on Finance's Request for Mandate Redetermination, filed September 26, 2014.

⁷ Exhibit E, Draft Proposed Decision, First Hearing issued October 30, 2014.

⁸ Exhibit F, State Controller's Comments on Draft Proposed Decision filed November 20, 2014.

⁹ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

¹⁰ California Code of Regulations, title 2, section 1190.5(b)(1) (Register 2014, No. 21) .

Therefore, the sole issue before the Commission at this first hearing is whether Finance, as the requester, has made an adequate showing that the state's liability has been modified pursuant to a subsequent change in law, as defined in section 17570.

Staff Analysis

Staff finds that Finance has made an adequate showing that the state's liability for the *CPR Pocket Masks* program has been modified based upon a subsequent change in law, as defined in Government Code section 17570 and within the meaning of article XIII B, section 6(a) of the California Constitution and Government Code section 17514. Specifically, Statutes 2013, chapter 28 amended Penal Code section 13518.1, effective June 27, 2013, by deleting the mandatory language in the statute and replacing it with permissive language. As amended, the statute now authorizes law enforcement agencies to provide the portable manual mask and airway assembly to their peace officer employees.

The courts generally interpret the word "may" as permissive and "shall" as mandatory.¹¹ As determined by the court in the *City of Merced and Kern High School Dist. cases*, the "core point... is that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate."¹² Thus, staff finds that Statutes 2013, chapter 28 constitutes a subsequent change in law pursuant to Government Code section 17570(a)(2), that may require a finding of no costs mandated by the state within the meaning of article XIII B, section 6(a) and Government Code section 17514.

Based on the foregoing, staff finds that Finance has a substantial possibility of prevailing at the second hearing and, thus, has made an adequate showing that the state's liability has been modified based on a subsequent change in law.

Staff Recommendation

Staff recommends that the Commission adopt this decision, and pursuant to Government Code section 17570(d)(4), direct staff to provide notice of the second hearing to determine if a new test claim decision shall be adopted to supersede the previously adopted test claim decision. If the Commission adopts the attached proposed decision, the second hearing for this matter will be set for March 27, 2015.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical changes to the proposed decision following the hearing.

¹¹ See *John Doe v. Albany Unified School District* (2010) 190 Cal.App.4th 668, 676 on statutory construction involving the terms "may" and "shall."

¹² *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 742; *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE MANDATE REDETERMINATION
FIRST HEARING: ADEQUATE SHOWING
ON:

Penal Code Section 13518.1;
Added by Statutes 1987, Chapter 1334
(AB 1726)

CPR Pocket Masks, CSM-4291

As Alleged to be Modified by:
Statutes 2013, Chapter 28 (SB 71)

Filed on August 18, 2014

By Department of Finance, Requester.

Case No.: 14-MR-01

CPR Pocket Masks (CSM-4291)

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

(Adopted January 23, 2015)

DECISION

The Commission on State Mandates (Commission) heard and decided this mandate redetermination during a regularly scheduled hearing on January 23, 2015. [Witness list will be included in the adopted decision.]

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

The Commission [adopted/modified] the proposed decision at the hearing by a vote of [vote count will be included in the adopted decision], and [directed/did not direct] staff to notice a second hearing to determine whether to adopt a new test claim decision to supersede the previously adopted test claim decision.

Summary of Findings

The Commission finds that the Department of Finance (Finance) has made an adequate showing that the state's liability, pursuant to article XIII B, section 6(a) of the California Constitution, for the *CPR Pocket Masks*, CSM-4291 program has been modified based upon a subsequent change in law. Specifically, Statutes 2013, chapter 28 (SB 71) amended Penal Code section 13518.1, effective June 27, 2013, by deleting mandatory language in the statute and replacing it with permissive language. As amended, the statute now authorizes, but does not require, law

enforcement agencies to provide the portable manual mask and airway assembly to their peace officer employees.

Pursuant to Government Code section 17570(d)(4), the Commission will hold a second hearing to determine if a new test claim decision shall be adopted to supersede the previously adopted test claim decision.

Commission Findings

I. Chronology

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|----------|---|
| 03/23/88 | The Commission adopted the test claim statement of decision. ¹³ |
| 07/28/88 | The Commission adopted the parameters and guidelines. ¹⁴ |
| 06/27/13 | The Legislature enacted Statutes 2013, chapter 28 (SB 71), as urgency legislation, amending Penal Code section 13518.1 effective June 27, 2013. |
| 08/18/14 | Finance filed a request to adopt a new test claim decision on <i>CPR Pocket Masks</i> , CSM-4291. ¹⁵ |
| 08/27/14 | Commission staff issued a notice of complete filing and schedule for comments. |
| 09/26/14 | State Controller's Office (Controller) submitted comments on Finance's request for a mandate redetermination. ¹⁶ |
| 10/30/14 | Commission staff issued the draft proposed decision for the first hearing on the request. ¹⁷ |
| 11/20/14 | Controller filed comments on the draft proposed decision. ¹⁸ |

II. Background

The CPR Pocket Masks Program

Penal Code section 13518.1, as added by Statutes 1987, chapter 1334, "required local law enforcement agencies employing peace officers to provide to each of these peace officers an appropriate portable manual mask and airway assembly designed to prevent the spread of communicable disease when applying cardiopulmonary resuscitation."¹⁹ On March 23, 1988,

¹³ Exhibit B, Test Claim Statement of Decision CSM-4291, adopted March 23, 1988.

¹⁴ Exhibit C, Parameters and Guidelines CSM-4291, adopted July 28, 1988.

¹⁵ Exhibit A, Request for Mandate Redetermination, filed August 18, 2014.

¹⁶ Exhibit D, State Controller's Office Comments on Finance's Request for Mandate Redetermination, filed September 26, 2014

¹⁷ Exhibit E, Draft Proposed Decision, First Hearing issued October 30, 2014.

¹⁸ Exhibit F, State Controller's Comments on Draft Proposed Decision, filed November 20, 2014.

¹⁹ Exhibit C, Parameters and Guidelines, adopted July 28, 1988, page 2.

Commission found section 13518.1 to be a reimbursable state mandate.²⁰ Parameters and guidelines were adopted on July 28, 1988, authorizing reimbursement for the increased costs of providing to each officer a portable manual mask and airway assembly.²¹

Mandate Redetermination Process - Government Code Section 17570

Government Code section 17570 provides a process whereby a test claim decision may be redetermined and superseded by a new test claim decision, if a subsequent change in law, as defined, has modified the state's liability for reimbursement. The redetermination process calls for two hearings. For the first hearing, the Commission's regulations state that the requester must make "an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior the claim decision, that may modify the state's liability pursuant to article XIII B, section 6, subdivision (a) of the California Constitution."²²

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

A change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law, except that a "subsequent change in law" does not include the amendments to Section 6 of Article XIII B of the California Constitution that were approved by the voters on November 2, 2004. A "subsequent change in law" also does not include a change in the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of Section 17551.²³

An "adequate showing" is determined in the Commission's regulations as follow:

The Commission shall find that the requester has made an adequate showing if it finds that the request, when considered in light of all of the written responses and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.²⁴

If the Commission finds, at the first hearing, that the requester has made an adequate showing, "when considered in light of all of the written responses, rebuttals and supporting documentation in the record and testimony at the hearing, the Commission shall publish a decision finding that an adequate showing has been made and setting the second hearing on the request to adopt a new test claim decision to supersede the previously adopted test claim decision."²⁵

III. Positions of the Parties

²⁰ Exhibit B, Test Claim Statement of Decision CSM-4291, adopted March 23, 1988, page 2.

²¹ Exhibit C, Parameters and Guidelines, adopted July 28, 1988, page 2.

²² California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

²³ Government Code section 17570(a)(2).

²⁴ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

²⁵ California Code of Regulations, title 2, section 1190.5(a)(5)(B) (Register 2014, No. 21).

Department of Finance, Requester

Finance requests that the Commission adopt a new test claim decision on this program, arguing that Statutes 2013, chapter 28 constitutes a subsequent change in law that ends the state's liability for the *CPR Pocket Masks* program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514.

State Controller's Office

The Controller concurs with Finance's assertion that the reimbursement period of the *CPR Pocket Masks* program ended on June 27, 2013. In accordance, the Controller filed comments recommending no changes to the draft proposed decision on November 20, 2014.

IV. Discussion

Under Government Code section 17570, upon request, the Commission may consider the adoption of a new test claim decision to supersede a prior test claim decision based on a subsequent change in law which modifies the states liability.

The first hearing in the mandate redetermination process is intended, pursuant to the Government Code and the Commission's regulations, to determine only whether the requester has made an adequate showing that the state's liability has been modified based on a subsequent change in law, as defined.

Therefore, the analysis will be limited to whether the request, when considered in light of all of the written responses and supporting documentation in the records of this request, "has a substantial possibility of prevailing at the second hearing."²⁶ A thorough mandates analysis to determine whether and to what extent the state's liability has been modified, considering the applicable law, the arguments put forth by the parties and interested parties, and the facts in the record, will be prepared for the second hearing on this matter.

A. Statutes 2013, Chapter 28 Constitutes a Subsequent Change in Law Within the Meaning of Government Code Section 17570.

Government Code section 17570(b) states that the Commission may adopt a new test claim decision to supersede a previously adopted test claim decision only upon a showing that the state's liability pursuant to article XIII B, section 6 has been modified based on a subsequent change in law. A subsequent change in law is defined in Government Code section 17570(a)(2) as follows:

A change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law, except that a "subsequent change in law" does not include the amendments to Section 6 of Article XIII B of the California Constitution that were approved by the voters on November 2, 2004. A "subsequent change in law" also does not include a change in the statutes or

²⁶ See California Code of Regulations, title 2, section 1190.5(a)(1) for a description of the standard for the first hearing.

executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of Section 17551.²⁷

The courts have held that costs to a local entity resulting from an action undertaken at the option of the local entity are not reimbursable as “costs mandated by the state.” In the *City of Merced* and *Kern High School Dist.* cases, “the core point . . . is that activities undertaken at the option or discretion of a local government entity (that is, action undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate”²⁸

Effective June 27, 2013, Statutes 2013, chapter 28 (SB 71) amended Penal Code section 13518.1 as follows:

In order to prevent the spread of communicable disease, a law enforcement agency employing peace officers described in subdivision (a) of Section 13518 may ~~shall~~ provide to each of these peace officers an appropriate portable manual mask and airway assembly for use when applying cardiopulmonary resuscitation.²⁹

The Senate Rules Committee’s analysis of Senate Bill 71 stated that the intent of the bill was to eliminate the mandate by making it optional.³⁰

Finance asserts that the amendment to the plain language of the section 13518.1 made the “requirement of section 13518.1 permissive by substituting the word “may” in place of the word “shall,” resulting in no costs mandated by the state for this program.”³¹

The courts generally interpret the word “may” as permissive and “shall” as mandatory.³² Thus, as amended, Penal Code section 13518.1 deletes the mandatory language that required law enforcement agencies to provide peace officer employees an appropriate portable manual mask and airway assembly for use when applying cardiopulmonary resuscitation and, instead, now authorizes that activity.

Therefore, the Commission finds that Statutes 2013, chapter 28 constitutes subsequent change in law pursuant to Government Code section 17570(a)(2), that may require a finding of no costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514.

²⁷ Government Code section 17570(a)(2).

²⁸ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742; *City of Merced*, *supra*, 153 Cal.App.3d 777, 783.

²⁹ Penal Code section 13518.1, amended by Statutes 2013, chapter 28 (SB 71), section 46, effective June 27, 2013.

³⁰ Exhibit G, Senate Rules Committee, Senate Floor Analysis, Bill Analysis of SB 71, as amended June 19, 2013, page 3.

³¹ Exhibit A, Request for Mandate Redetermination, filed August 18, 2014, page 1.

³² See *John Doe v. Albany Unified School District* (2010) 190 Cal.App.4th 668, 676 on statutory construction involving the terms “may” and “shall.”

B. Finance Has Made an Adequate Showing That the State’s Liability Has Been Modified.

The issue for this first hearing is whether Finance has made an adequate showing that the state’s liability has been modified based on a subsequent change in law. The Commission shall find that the requester has made an adequate showing if it finds “that the request, when considered in light of all of the written responses and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.”³³

For the reasons discussed above, the Commission finds that Finance has a substantial possibility of prevailing at the second hearing and, thus, has made an adequate showing that the state’s liability has been modified pursuant to Statutes 2013, chapter 28.

V. Conclusion

The Commission finds that Finance has made an adequate showing that the state’s liability has been modified pursuant to Statutes 2013, chapter 28. The Commission hereby directs Commission staff to notice the second hearing to determine whether to adopt a new test claim decision to supersede the Commission’s previously adopted test claim decision on CSM-4291.

³³ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).