

**ITEM 9**  
**INCORRECT REDUCTION CLAIM**  
**PROPOSED DECISION**

Government Code Sections 3540-3549.9

Statutes 1975, Chapter 961; Statutes 1991, Chapter 1213

*Collective Bargaining and Collective Bargaining Agreement Disclosure*

Fiscal Years 2002-2003 through 2005-2006

09-4425-I-17 and 10-4425-I-18

Sierra Joint Community College District, Claimant

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**EXECUTIVE SUMMARY**

**Overview**

This analysis addresses two consolidated incorrect reduction claims (IRCs) filed by Sierra Joint Community College District (claimant) regarding reductions made by the State Controller's Office (Controller) to reimbursement claims for fiscal years 2002-2003 through 2005-2006 under the *Collective Bargaining and Collective Bargaining Agreement Disclosure* program.

The following issues are in dispute in this IRC:

- The statutory deadlines applicable to audits;
- Unallowable costs related to salaries and benefits;
- Whether underclaimed indirect costs which are supported by the reimbursement claim and other supporting documentation in the record are required to be paid in favor of a local government claimant.

For the reasons outlined below, staff recommends that the Commission on State Mandates (Commission) approve this IRC and direct the Controller to reinstate \$6,944 based on net unallowable salaries and benefits for fiscal years 2002-2003 and 2004-2005 and the full amount of allowable indirect costs based on allowable direct costs claimed: \$20,662 for fiscal year 2003-2004; \$21,611 for fiscal year 2004-2005, and \$54,244 for fiscal year 2005-2006.

**Collective Bargaining and Collective Bargaining Agreement Disclosure Mandates**

On July 17, 1978, the Board of Control, predecessor to the Commission, found that Statutes 1975, chapter 961 imposed a reimbursable state mandate. On March 26, 1998, the Commission adopted a second test claim decision on Statutes 1991, chapter 1213. Parameters and guidelines for the two programs were consolidated on August 20, 1998, and were amended on January 27, 2000.

At the time the reimbursement claims at issue were prepared and submitted to the Controller, the amended parameters and guidelines, adopted on January 27, 2000, were applicable. These

parameters and guidelines authorize reimbursement for costs incurred to comply with sections 3540 through 3549.1 of the Government Code, and “regulations promulgated by the Public Employment Relations Board,” including:

- Determination of appropriate bargaining units for representation and determination of the exclusive representation and determination of the exclusive representatives;
- Elections and decertification elections of unit representatives are reimbursable in the event the Public Employment Relations Board determines that a question of representation exists and orders an election held by secret ballot;
- Negotiations: reimbursable functions include – receipt of exclusive representative’s initial contract proposal, holding of public hearings, providing a reasonable number of copies of the employer’s proposed contract to the public, development and presentation of the initial district contract proposal, negotiation of the contract, reproduction and distribution of the final contract agreement;
- Impasse proceedings, including mediation, fact-finding, and publication of the findings of the fact-finding panel;
- Collective bargaining agreement disclosure before the adoption of the agreement by the governing body;
- Contract administration and adjudication of contract disputes either by arbitration or litigation, including grievances and administration and enforcement of the contract; and
- Unfair labor practice adjudication process and public notice complaints.<sup>1</sup>

### **Procedural History**

On January 15, 2004, claimant filed its 2002-2003 reimbursement claim.<sup>2</sup> On January 10, 2005, claimant filed its 2003-2004 reimbursement claim.<sup>3</sup> On January 17, 2006, claimant filed its 2004-2005 reimbursement claim.<sup>4</sup> On October 30, 2006, the 2002-2003 reimbursement claim was paid by the Controller.<sup>5</sup> On December 21, 2006, claimant filed its 2005-2006 reimbursement claim.<sup>6</sup> On June 9, 2008, the Controller issued its draft audit report for the fiscal years at issue. On July 3, 2008, the claimant notified the Controller that it was disputing some of the proposed adjustments. On April 17, 2009, the Controller issued its final audit report for

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<sup>1</sup> Exhibit A, Incorrect Reduction Claim, page 24 (Exhibit B to the IRC, Parameters and Guidelines amended January 27, 2000).

<sup>2</sup> Exhibit B, IRC 10-4425-I-18, page 11.

<sup>3</sup> Exhibit B, IRC 10-4425-I-18, page 11.

<sup>4</sup> Exhibit B, IRC 10-4425-I-18, page 11.

<sup>5</sup> Exhibit B, IRC 10-4425-I-18, page 43 [Revised Audit Report]; p. 19 [Claim Adjustment Notice].

<sup>6</sup> Exhibit B, IRC 10-4425-I-18, page 11.

fiscal years 2002-2003 through 2005-2006.<sup>7</sup> On August 4, 2009, the claimant filed 09-4425-I-17.<sup>8</sup> On August 25, 2010, the Controller issued a revised final audit report.<sup>9</sup> As of September 9, 2010, no reimbursement claims for 2003-2004 through 2005-2006, had been paid. On February 4, 2011, the claimant filed 10-4425-I-18.<sup>10</sup> On November 14, 2014, Commission staff issued a draft proposed decision on the consolidated IRC.<sup>11</sup> On November 26, 2014, the claimant filed comments on the draft proposed decision.<sup>12</sup> On December 2, 2014, the Controller filed comments on the draft proposed decision.<sup>13</sup>

### **Commission Responsibilities**

Government Code section 17561(b) authorizes the Controller to audit the claims filed by local agencies and school districts and to reduce any claim for reimbursement of state-mandated costs that the Controller determines is excessive or unreasonable.

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.9 of the Commission's regulations requires the Commission to send the statement of decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of parameters and guidelines, de novo, without consideration of conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.<sup>14</sup> The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."<sup>15</sup>

With regard to the Controller's audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support. This standard is similar to

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<sup>7</sup> Exhibit A, Incorrect Reduction Claim 09-4425-I-17, page 8.

<sup>8</sup> Exhibit A, Incorrect Reduction Claim 09-4425-I-17, page 2.

<sup>9</sup> Exhibit B, Incorrect Reduction Claim 10-4425-I-18, page 4.

<sup>10</sup> Exhibit B, Incorrect Reduction Claim 10-4425-I-18, page 1.

<sup>11</sup> Exhibit C, Draft Proposed Decision.

<sup>12</sup> Exhibit D, Claimant Comments.

<sup>13</sup> Exhibit E, Controller's Comments.

<sup>14</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>15</sup> *County of Sonoma*, supra, 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.<sup>16</sup>

The Commission must also review the Controller's audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>17</sup> In addition, section 1185.2(c) of the Commission's regulations requires that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Commission's ultimate findings of fact must be supported by substantial evidence in the record.<sup>18</sup>

### **Claims**

The following chart provides a brief summary of the issues raised and staff's recommendation.

<b>Issue</b>	<b>Description</b>	<b>Staff Recommendation</b>
Statutory deadline to initiate the audit of claimant's 2002-2003 through 2005-2006 reimbursement claims.	At the time the underlying reimbursement claims were filed, Government Code section 17558.5 stated: "A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, <i>the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.</i> " Claimant argues that tolling the deadline in the case of a claim for which no funds are appropriated or no payment is made is void for vagueness. Therefore, claimant asserts that the first sentence, which relies on the filing date of the claim only, controls, and the audit of its fiscal year 2002-2003 claim, filed on January 13, 2004, was therefore not timely, because it was not initiated on or before January 13, 2007.	<i>The audit was timely initiated</i> – Staff presumes that the plain language of section 17558.5 is valid and enforceable, and finds that because the fiscal year 2002-2003 reimbursement claim was not paid until October 30, 2006, the statutory deadline to initiate an audit was tolled until October 30, 2009. The audit was initiated no later than April 17, 2007, and is therefore timely initiated as to all subject fiscal years.

<sup>16</sup> *Johnston v. Sonoma County Agricultural* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

<sup>17</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>18</sup> Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

Statutory deadline to complete the audits.	<p>As of January 1, 2005, section 17558.5 also provided: “In any case, an audit shall be completed not later than two years after the date that the audit is commenced.”</p> <p>The claimant argues that based on the initiation date of April 17, 2007, or the date of the entrance conference letter, April 3, 2007, an audit report completed on or after April 17, 2009 is not timely.</p>	<p><i>The original final audit report was timely completed, but the revised audit report was not timely</i> – Staff finds that the audit was initiated on April 17, 2007, and completed on April 17, 2009, exactly two years after the date commenced. However, the revised audit, issued August 25, 2010, was not timely, because it was completed later than two years after the audit was commenced.</p>
Reduction of salaries and benefits claimed based on asserted inaccurate productive hourly rates.	<p>The claimant asserts that the Controller reduced salaries and benefits claimed in fiscal year 2002-2003 based on a determination that the claimant provided inaccurate productive hourly rates, but the Controller did not provide any explanation or evidence to support its determination.</p>	<p><i>This reduction is incorrect because it is entirely lacking in evidentiary support</i> – Staff finds that the Controller failed to provide any evidence in the record of the reasons for the reduction, and its factual assertions that productive hourly rates were “inaccurate” must be supported by evidence in the record.</p>
Recalculation based on asserted flaws in the development of indirect cost rates.	<p>The claimant asserts that the Controller’s recalculation of indirect costs claimed was arbitrary, capricious, or entirely lacking in evidentiary support, because the Controller did not articulate a factually accurate and enforceable reason to recalculate indirect costs. Claimant further argues that upon recalculation, the Controller is required to pay the claimant for the underclaimed amount of indirect costs, and the Controller cannot unilaterally determine that it will not adjust the payment. To do so, the claimant argues, is an incorrect reduction in itself.</p>	<p><i>This reduction is incorrect as a matter of law, and is arbitrary and capricious</i> – Staff finds that whether or not the Controller had a legally supportable reason to recalculate the claimant’s indirect costs, the result of the recalculation was a determination that the claimant had underclaimed its indirect costs based on the Controller’s calculations and methodology as applied to the direct costs claimed in the reimbursement claim, and therefore the Controller is required to adjust the payment in accordance with its findings on indirect costs.</p>

## **Staff Analysis**

### **A. The Controller Met the Statutory Deadlines for the Initiation and Completion of the Final Audit Report but the Revised Audit Report was not Completed Within the Two Year Statutory Deadline.**

Staff finds that the original audit report was timely initiated and timely completed, but that the revised audit report was not timely completed. Government Code section 17558.5 provides that if no funds are appropriated “or no payment is made to a claimant...the time for the Controller to initiate an audit [three years] shall commence to run from the date of initial payment of the claim.”<sup>19</sup> Here, the claimant’s fiscal year 2002-2003 claim was first paid October 30, 2006, while the remaining years were not paid until at least September 9, 2010. Therefore, the time period subject to audit, for the earliest of the relevant claim years, was extended until October 30, 2009, and the audit was initiated April 17, 2007. The claimant asserts that the provision of section 17558.5 that tolls the deadline to initiate an audit in the case no payment is made to a claimant is void because it is vague and ambiguous. Staff finds that the Commission is required to presume the statute is valid and enforceable under article III, section 3.5. Staff therefore concludes that the original audit was timely initiated.

Section 17558.5 also requires that an audit be completed “not later than two years after the date that the audit is commenced.” Based on the April 17, 2007 entrance conference, the April 17, 2009 audit report (the first “final” audit report) was timely completed, but the “revised final audit report” issued August 25, 2010, fell outside the two year completion requirement, and was therefore not timely. Based on the foregoing, staff concludes that the first “final” audit report was timely initiated and timely completed, but the revised audit report was not timely completed, in accordance with section 17558.5. Nevertheless, the Commission may take official notice of the revised audit report to the extent that it resolves any disputed issues, or mitigates the amounts in dispute in the claimant’s favor.

### **B. Reductions of Costs Claimed Based on Unsupported Hours or Productive Hourly Rates are Entirely Lacking in Evidentiary Support, and Must be Reinstated.**

Next, the claimant alleges that the Controller incorrectly reduced costs claimed for salaries and benefits, by \$6,944. The Controller recalculated the productive hourly rates claimed and found that salaries and benefits were overstated in fiscal year 2002-2003 by \$9,186; and understated in fiscal year 2004-2005 by \$2,242. The claimant states that the Controller has not explained this adjustment, but neither has the claimant provided any supporting evidence or rebuttal to the adjustment. Staff concludes that the Controller’s assertion that the calculation of productive hourly rates was inaccurate is not based on any evidence or explanation in the record and, thus, does not comply with section 1185.2(c) of the Commission’s regulations, which requires that all representations of fact shall be supported by documentary evidence. Therefore, staff finds that this adjustment is entirely lacking in evidentiary support and therefore these costs should be reinstated.

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<sup>19</sup> Government Code section 17558.5 (Stats. 2002, ch. 1128, (AB 2834)).

**C. The Controller's Determination not to Reimburse the Full Amount of Indirect Costs Recalculated is Incorrect as a Matter of Law and is Arbitrary and Capricious.**

Finally, the claimant identifies the Controller's findings that the claimant understated its indirect costs during the audit period by \$103,032. The Controller applied the understated amount to offset reductions made to other audit items, but declined to reimburse the claimant in excess of the amount claimed for each fiscal year of the audit. The claimant argues that the Controller's determination not to pay the claimant in excess of its claims is arbitrary and capricious, and constitutes an incorrect reduction in itself. Staff agrees. Section 17561 requires the state to reimburse claimants for all costs mandated by the state, within the meaning of Government Code section 17514. Because indirect costs are calculated based on a formula applied to direct costs claimed, the Controller's determination on the correct amount of indirect costs that should have been claimed constitutes a reimbursable amount. Staff concludes that the Controller should adjust the payment to account for the miscalculated indirect costs.

**Conclusion**

Based on the foregoing, staff recommends that the Commission partially approve this IRC, and request that the Controller reinstate the following reductions:

- Reduction of \$6,944 based on net unallowable salaries and benefits for fiscal years 2002-2003 and 2004-2005.
- Reduction of allowable indirect costs based on direct costs claimed: \$20,662 for fiscal year 2003-2004; \$21,611 for fiscal year 2004-2005, and \$54,244 for fiscal year 2005-2006.

**Staff Recommendation**

Staff recommends that the Commission adopt the proposed decision to partially approve the IRC, and authorize staff to make any technical, non-substantive changes following the hearing.

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE INCORRECT REDUCTION CLAIM  
ON:

Government Code Sections 3540-3549.9

Statutes 1975, Chapter 961 ; Statutes 1991,  
Chapter 1213

Fiscal Years 2002-2003 through 2005-2006

Sierra Joint Community College District,  
Claimant.

Case Nos.: 09-4425-I-17 and 10-4425-I-18

*Collective Bargaining and Collective  
Bargaining Agreement Disclosure*

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 consolidated incorrect reduction claim (IRC) during a regularly scheduled hearing on January 23, 2015. [Witness list will be included in the adopted decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission [adopted/modified] the proposed decision to [approve/partially approve/deny] the IRC at the hearing by a vote of [vote count will be included in the adopted decision].

**Summary of the Findings**

This consolidated IRC was filed by Sierra Joint Community College District (claimant) in response to the Controller's audit of the claimant's annual reimbursement claims for fiscal years 2002-2003 through 2005-2006, which resulted in a total reduction of \$12,116 for unallowable salaries and benefits, of which only \$6,944 is in dispute.<sup>20</sup> The reduction was made on the ground that the claimant did not accurately calculate productive hourly rates. In addition, the Controller found that the claimant incorrectly calculated indirect costs during the audit period resulting in underclaimed costs of \$103,032,<sup>21</sup> a portion of which the Controller has determined it is not required to pay, because it exceeds, in each claim year, the total amount claimed.

The Commission finds that Government Code section 17558.5 does not bar the original "final" audit report issued April 17, 2009. In addition, the Commission finds that the *revised* audit

<sup>20</sup> Exhibit A, IRC 09-4425-I-17, pages 8-9.

<sup>21</sup> Exhibit B, IRC 10-4425-I-18, page 7.



report issued August 25, 2010 falls outside the two year deadline to complete an audit with respect to *all* relevant claim years. April 17, 2007 constitutes “the date that the audit is commenced,” for purposes of Government Code section 17558.5, and therefore the revised final audit report issued August 25, 2010 is not timely. However, even though the revised final audit report is not timely, the Commission takes official notice of the report to the extent that the revised audit report resolves any disputed issues, or mitigates the amounts in dispute in the earlier audit.

The Commission further finds that the Controller incorrectly reduced \$6,944 in costs based on the assertion that the claimant’s calculation of productive hourly rates was inaccurate. There is no evidence in the record demonstrating the Controller’s recalculation of productive hourly rates, or why such recalculation was necessary. The Controller states that the productive hourly rates were “inaccurate,” but does not specify any particular flaw in the calculations, or any particular employee or employees for whom productive hourly rates were disallowed. Section 1185.2(c) of the Commission’s regulations requires that all representations of fact be supported by documentary evidence. With no explanation or evidence in the record to support the Controller’s factual assertion that the productive hourly rates were inaccurate, the Commission finds that audit determination entirely lacking in evidentiary support, and that the full amount reduced, \$6,944, is required to be reinstated to the claimant.

Finally, the Commission finds that the Controller’s determination not to reimburse claimants for the full amount of their indirect costs, as recalculated by the Controller, is incorrect as a matter of law and arbitrary. As explained below, the Controller found underclaimed indirect costs in each claim year, and applied the underclaimed amounts to offset reductions for other audit items up to the total amount of the claim for each relevant fiscal year. In so doing the Controller left the claimant with a net reduction of zero for fiscal years 2003-2004, 2004-2005, and 2005-2006. However, the claimant argues that the determination not to pay the remaining indirect costs calculated by the Controller and allowed by article XIII B, section 6, is itself a reduction, and the Commission agrees.

Accordingly, the Commission partially approves this IRC, and directs the Controller to reinstate the following reductions:

- Reduction of \$6,944 based on net unallowable salaries and benefits for fiscal years 2002-2003 and 2004-2005.
- Reduction of allowable indirect costs based on direct costs claimed: \$20,662 for fiscal year 2003-2004; \$21,611 for fiscal year 2004-2005, and \$54,244 for fiscal year 2005-2006.

## **COMMISSION FINDINGS**

### **I. Chronology**

01/15/2004	Claimant filed its fiscal year 2002-2003 annual reimbursement claim. <sup>22</sup>
01/10/2005	Claimant filed its fiscal year 2003-2004 annual reimbursement claim. <sup>23</sup>

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<sup>22</sup> Exhibit B, IRC 10-4425-I-18, page 11.

<sup>23</sup> Exhibit B, IRC 10-4425-I-18, page 11.

01/17/2006	Claimant filed its fiscal year 2004-2005 annual reimbursement claim. <sup>24</sup>
10/30/2006	Controller paid the 2002-2003 reimbursement claim. <sup>25</sup>
12/21/2006	Claimant filed its fiscal year 2005-2006 annual reimbursement claim. <sup>26</sup>
06/9/2008	Controller issued the draft audit report. <sup>27</sup>
07/03/2008	Claimant notified Controller of disputed adjustments. <sup>28</sup>
04/17/2009	Controller issued the final audit report. <sup>29</sup>
08/04/2009	Claimant filed the first of two consolidated IRCs. <sup>30</sup>
08/10/2009	Commission staff deemed the IRC complete and issued it for comment.
08/25/2010	Controller issued the revised final audit report. <sup>31</sup>
09/09/2010	Controller issued adjustment letters and a “results of review” letter. <sup>32</sup>
02/04/2011	Claimant filed the second of two consolidated IRCs. <sup>33</sup>
02/10/2011	The executive director deemed the second IRC complete, and consolidated the two IRCs and issued them for comments.
11/14/2014	Commission staff issued the draft proposed decision. <sup>34</sup>
11/26/2014	Claimant filed comments on the draft proposed decision. <sup>35</sup>
12/02/2014	Controller filed comments on the draft proposed decision. <sup>36</sup>

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<sup>24</sup> Exhibit B, IRC 10-4425-I-18, page 11.

<sup>25</sup> Exhibit B, IRC 10-4425-I-18, page 43 [Revised Audit Report]; p. 19 [Claim Adjustment Notice].

<sup>26</sup> Exhibit B, IRC 10-4425-I-18, page 11.

<sup>27</sup> Exhibit A, IRC 09-4425-I-17, page 8.

<sup>28</sup> Exhibit A, IRC 09-4425-I-17, page 8.

<sup>29</sup> Exhibit A, IRC 09-4425-I-17, page 8.

<sup>30</sup> Exhibit A, IRC 09-4425-I-17, page 2.

<sup>31</sup> Exhibit B, IRC 10-4425-I-18, page 4.

<sup>32</sup> Exhibit B, IRC 10-4425-I-18, page 4.

<sup>33</sup> Exhibit B, IRC 10-4425-I-18, page 2.

<sup>34</sup> Exhibit C, Draft Proposed Decision.

<sup>35</sup> Exhibit D, Claimant Comments on Draft Proposed Decision.

<sup>36</sup> Exhibit E, Controller’s Comments on Draft Proposed Decision.

## II. Background

### Collective Bargaining and Collective Bargaining Agreement Disclosure Mandates

On July 17, 1978, the Board of Control, predecessor to the Commission, found that Statutes 1975, chapter 961 imposed a reimbursable state mandate. Then, on March 26, 1998, the Commission adopted a second test claim decision finding that Statutes 1991, chapter 1213 imposed a reimbursable state mandate. Parameters and guidelines for the two programs were consolidated on August 20, 1998, and have since been amended again, on January 27, 2000.

At the time the reimbursement claims at issue were prepared and submitted to the Controller, the amended parameters and guidelines, adopted on January 27, 2000, were applicable. These parameters and guidelines authorize reimbursement for costs incurred to comply with sections 3540 through 3549.1 of the Government Code, and “regulations promulgated by the Public Employment Relations Board,” including:

- Determination of appropriate bargaining units for representation and determination of the exclusive representation and determination of the exclusive representatives;
- Elections and decertification elections of unit representatives are reimbursable in the event the Public Employment Relations Board determines that a question of representation exists and orders an election held by secret ballot;
- Negotiations: reimbursable functions include – receipt of exclusive representative’s initial contract proposal, holding of public hearings, providing a reasonable number of copies of the employer’s proposed contract to the public, development and presentation of the initial district contract proposal, negotiation of the contract, reproduction and distribution of the final contract agreement;
- Impasse proceedings, including mediation, fact-finding, and publication of the findings of the fact-finding panel;
- Collective bargaining agreement disclosure before the adoption of the agreement by the governing body;
- Contract administration and adjudication of contract disputes either by arbitration or litigation, including grievances and administration and enforcement of the contract; and
- Unfair labor practice adjudication process and public notice complaints.<sup>37</sup>

### Controller’s Audit and Summary of the Issues

The Controller’s reductions of direct salary and benefit costs are based on an asserted lack or insufficiency of supporting documentation for costs claimed. In addition, the Controller found that the claimant failed to obtain federal approval for its indirect cost rates for at least two of the

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<sup>37</sup> Exhibit A, Incorrect Reduction Claim, page 24 (Exhibit B to the IRC, Parameters and Guidelines amended January 27, 2000).

four audited years, and underclaimed its indirect costs by \$103,032.<sup>38</sup> However, despite finding that the claimant underclaimed its indirect costs, the Controller determined that the underclaimed amount cannot be paid in full, because “only the total costs included in the initial or amended claim may be reimbursed within one year of the filing deadline...” and section 17561 “allows the SCO to adjust the payment to correct for any underpayments or overpayments based on allowable costs claimed.”<sup>39</sup>

### **III. Positions of the Parties**

#### Sierra Joint Community College District

The portion of reduced salaries and benefits that the claimant disputes is attributed to “inaccurate productive hourly rates, resulting in costs that were overstated by \$9,186 for [fiscal year] 2002-03 and understated by \$2,242 for [fiscal year] 2004-05, leaving a net audit adjustment of \$6,944.”<sup>40</sup> The claimant states that “[n]o explanation was provided for any of these adjustments, and there is no indication as to why the payroll information reported by the District needed to be adjusted for purposes of the productive hourly rate computation.”<sup>41</sup>

For fiscal years 2003-2004 through 2005-2006, the Controller found *underclaimed* indirect costs, which were offset against all other adjustments for those years, and the net reduction in claimed costs for those years was zero.<sup>42</sup> The claimant disputes the Controller’s findings that “the District improperly determined and applied the indirect cost rate.” The claimant argues that the “difference in the claimed and audited rates is the determination of which of those cost elements are direct costs and which are indirect costs.” The claimant maintains that “federally ‘approved’ rates, which the Controller will accept without further action prior to [fiscal year] 2004-05, are ‘negotiated’ rates calculated by the District and submitted for approval, indicating that the process is not an exact science, but a determination of the relevance and reasonableness of the cost allocation assumptions made for the method used.”<sup>43</sup>

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<sup>38</sup> See Exhibit A, IRC 09-4425-I-17, pages 53-72 [Controller’s Final Audit Report, Issued April 17, 2009]; Exhibit B, IRC 10-4425-I-18, pages 25-44 [Controller’s Revised Final Audit Report, Issued August 25, 2010].

<sup>39</sup> Exhibit B, IRC 10-4425-I-18, page 43 [Revised Final Audit Report].

<sup>40</sup> Exhibit A, IRC 09-4425-I-17, pages 8-9 [The claimant states that the first “final” audit report, issued April 17, 2009, finds overstated costs for unallowable salaries and benefits totaling \$14,489, not including indirect costs. That amount includes \$4,468 in unsupported hours, which the claimant does not dispute; and \$3,077 in ineligible expenses for two District administrators to attend a manager’s conference, which the claimant does not dispute.].

<sup>41</sup> Exhibit A, IRC 09-4425-I-17, page 9.

<sup>42</sup> Exhibit A, IRC 09-4425-I-17, page 5.

<sup>43</sup> Exhibit A, IRC 09-4425-I-17, page 11.

In addition, the claimant argues that the Controller is applying an incorrect auditing standard, in part relying on Government Code 12410, and also failing to make express findings that the claimant's reimbursement claims were unreasonable or excessive.<sup>44</sup>

Finally, the claimant points out that after recalculating the claimed indirect cost rates by the alternative state method "[t]he final audit report concludes that the District failed to claim \$6,515 for [fiscal year] 2002-03, \$20,662 for [fiscal year] 2003-04, \$18,431 for [fiscal year] 2004-05, and \$49,210 for [fiscal year] 2005-06." The claimant concludes that "[t]his results in \$94,818 in total unclaimed costs that are due to the District not applying its indirect cost rate to contract services costs in accordance with the claiming instructions."<sup>45</sup> In the revised audit report, the total underclaimed amount is determined to be \$103,032.<sup>46</sup>

However, the claimant states that "the final audit report concludes that this amount cannot be paid to the District because it exceeds the amount originally claimed."<sup>47</sup> The claimant argues that the Controller "does not have the discretion to unilaterally determine that it will require reimbursement for audit adjustments in favor of the State and simply ignore audit adjustments in favor of the claimants." The claimant cites section 17561, which provides that the Controller may audit and reduce claims that are excessive or unreasonable, and "shall adjust the payment to correct for any underpayment or overpayments that occurred in previous fiscal years." The claimant concludes that the Controller "has the obligation to pay claimants any unclaimed allowable mandate cost it discovers as the result of an audit."<sup>48</sup> Finally, the claimant argues that "the adjustment from Finding 1 was mitigated by \$3,159 attributed to the District's understated productive hourly rate for [fiscal year] 2004-05," and that there is "no practical difference between allowing an understated cost to mitigate one of the Controller's adjustments and reimbursing the District for their total actual costs."<sup>49</sup>

The claimant also raises the statute of limitations for auditing annual reimbursement claims pursuant to Government Code section 17558.5, and argues that the audit of the earliest fiscal year at issue (2002-2003) and the revised audit, are barred.<sup>50</sup> The claimant asserts that the statute of limitations applicable to the Controller's audit of its 2002-2003 claim, filed January 15, 2004, expired January 15, 2007, pursuant to section 17558.5, as amended by Statutes 2002, chapter 1128. The audit entrance conference was held on April 17, 2007, which the claimant argues is not a timely initiation of an audit. In addition, the final audit report was issued on April 17, 2009, which the claimant asserts is two years and one day after the audit was initiated and therefore not timely.<sup>51</sup> And, the claimant asserts that the revised audit report "appear[s] to have

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<sup>44</sup> Exhibit A, IRC 09-4425-I-17, pages 11-13.

<sup>45</sup> Exhibit A, IRC 09-4425-I-17, page 13.

<sup>46</sup> Exhibit B, IRC 10-4425-I-18, page 7.

<sup>47</sup> Exhibit A, IRC 09-4425-I-17, page 14.

<sup>48</sup> Exhibit A, IRC 09-4425-I-17, page 14.

<sup>49</sup> Exhibit A, IRC 09-4425-I-17, pages 14-15.

<sup>50</sup> See Exhibit A, IRC 09-4425-I-17, pages 71; 77; Exhibit B, IRC 10-4425-I-18, pages 13-14.

<sup>51</sup> Exhibit B, IRC 10-4425-I-18, pages 13-14.

been initiated as a result of the original incorrect reduction claim filed on August 3, 2009,” but “was not noticed to the District until the revised audit report was published on August 25, 2010, which is more than three years after the last annual claim was filed...” Finally, the claimant asserts that “the date of the revised audit report is more than two years after the original audit.”<sup>52</sup>

In comments on the draft proposed decision, the claimant now concedes that the audit was timely initiated, but argues that the audit was not timely completed, based on additional documentation and evidence attached to the claimant’s comments.<sup>53</sup> With respect to the remaining findings in the draft proposed decision, the claimant agrees with the reinstatement of \$6,944 in salaries and benefits, but argues that the Controller’s decision to reimburse the full amount of indirect costs, which exceeded the amounts claimed for fiscal years 2003-2004 through 2005-2006, is itself an incorrect reduction.<sup>54</sup>

#### State Controller’s Office

The Controller did not submit comments on the consolidated IRCs.

However, with respect to the statute of limitations, the Controller argues, in both the original and the revised audit report, that section 17558.5 provides that when no funds are appropriated in the claim year, or payment to the claimant is not promptly made, “the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.”<sup>55</sup> The Controller states that “[t]he district filed its initial FY 2002-03 claims on January 15, 2004, and received the initial claim payment on October 30, 2006.”<sup>56</sup> The Controller argues that “[t]herefore, this claim was subject to the initiation of an SCO audit until October 30, 2009.” The Controller asserts that the audit entrance conference conducted on April 17, 2007 was therefore timely.<sup>57</sup>

In comments on the draft proposed decision, the Controller supports the conclusions in the draft and admits that it did not maintain documentation to support the reduction of salaries and benefits totaling \$6,944. The Controller further states that although the draft proposed decision found there was no jurisdiction over the reduction of indirect costs, the Controller believes the reduction is valid, based on the claimant’s failure to obtain federal approval for its indirect cost rates.<sup>58</sup>

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<sup>52</sup> Exhibit B, IRC 10-4425-I-18, page 15.

<sup>53</sup> Exhibit D, Claimant Comments, pages 2-3; 6; 8.

<sup>54</sup> Exhibit D, Claimant Comments, pages 4-5.

<sup>55</sup> Exhibit A, IRC 09-4425-I-17, page 71 [Controller’s Final Audit Report, citing Government Code section 17558.5 (as amended, Stats. 2002, ch. 1128, AB 2834))].

<sup>56</sup> Exhibit A, IRC 09-4425-I-17, page 71; Exhibit B, IRC 10-4425-I-18, page 43.

<sup>57</sup> *Ibid.*

<sup>58</sup> Exhibit E, Controller’s Comments, page 1.

#### IV. Discussion

Government Code section 17561(b) authorizes the Controller to audit the claims filed by local agencies and school districts and to reduce any claim for reimbursement of state mandated costs that the Controller determines is excessive or unreasonable.

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.9 of the Commission's regulations requires the Commission to send the decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of the parameters and guidelines, de novo, without consideration of legal conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.<sup>59</sup> The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."<sup>60</sup>

With regard to the Controller's audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support. This is similar to the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.<sup>61</sup> Under this standard, the courts have found that:

When reviewing the exercise of discretion, "[t]he scope of review is limited, out of deference to the agency's authority and presumed expertise: 'The court may not reweigh the evidence or substitute its judgment for that of the agency. [Citation.]'" ... "In general ... the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. . . ." [Citations.] When making that inquiry, the " "court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." [Citation.]' "<sup>62</sup>

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<sup>59</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>60</sup> *County of Sonoma, supra*, 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>61</sup> *Johnston v. Sonoma County Agricultural* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

<sup>62</sup> *American Bd. of Cosmetic Surgery, Inc, supra*, 162 Cal.App.4th at 547-548.

The Commission must also review the Controller's audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>63</sup> In addition, section 1185.2(c) of the Commission's regulations requires that any assertion of fact by the parties to an IRC must be supported by documentary evidence. The Commission's ultimate findings of fact must be supported by substantial evidence in the record.<sup>64</sup>

**A. The Controller Met the Statutory Deadline for the Initiation and Completion of the Audit, but the Revised Audit Report was not Completed Within the Two Year Statutory Deadline.**

The claimant raises a statute of limitations argument applicable to audits, based on Government Code section 17558.5.<sup>65</sup> Section 17558.5, as applicable to the claim years here at issue, requires a valid audit to be initiated no later than three years after the date that the reimbursement claim is filed or last amended. However, the section also provides that 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."<sup>66</sup> "In any case," section 17558.5 requires the audit to be completed no later than two years after it is commenced.<sup>67</sup>

*1. The Final Audit Report Issued April 17, 2009 was Timely, Pursuant to Government Code Section 17558.5.*

The claimant asserts that the audit of the 2002-2003 claim was not timely, based on the filing date of the 2002-2003 annual claim (January 15, 2004) and the dates that the audit entrance conference took place (April 17, 2007) and the audit report issued (April 17, 2009). However, the Controller asserts that the fiscal year 2002-2003 claim was not paid until October 30, 2006, and that therefore section 17558.5 provides for a timely audit to be initiated as late as October 30, 2009. The fiscal year 2002-2003 reimbursement claim was filed on January 15, 2004, but was not paid, based on the evidence in the record, until October 30, 2006.<sup>68</sup> Pursuant to section 17558.5, a filing date of January 15, 2004, if paid, would mean that the claim was "subject to the

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<sup>63</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>64</sup> Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

<sup>65</sup> The Controller's Final Audit Report, issued April 17, 2009, states that the claimant raised the statute of limitations in its response to the draft audit, but the claimant did not reiterate its allegation in IRC 09-4425-I-17. (See IRC 09-4425-I-17, page 71.) The claimant reiterated and expanded upon its statute of limitations argument in IRC 10-4425-I-18, pages 13-14.

<sup>66</sup> Government Code section 17558.5 (as amended, Stats. 2002, ch. 1128 (AB 2834)).

<sup>67</sup> Government Code section 17558.5 (as amended, Stats. 2004, ch. 313 (AB 2224)).

<sup>68</sup> Exhibit B, IRC 10-4425-I-18, page 43 [Revised Audit Report]; p. 19 [Claim Adjustment Notice].



initiation of an audit by the Controller no later than...” January 15, 2007,<sup>69</sup> and would be required to be completed within two years of the date commenced.<sup>70</sup> The claimant relies on the filing date to argue that the initiation of the audit was not timely. However, section 17558.5 also states that if funds are not appropriated or no payment is made to the claimant for a given year, the “time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.”<sup>71</sup> The claimant argues that this provision “is void because it is impermissibly vague.”<sup>72</sup> However, article III, section 3.5 states that an administrative agency has no power “[t]o declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional...”<sup>73</sup> Therefore, the time to initiate an audit, in this case, commenced to run from October 30, 2006, when the 2002-2003 claim was first paid, and an audit initiated before October 30, 2009 would be timely. Here, the audit was initiated no later than April 17, 2007, the date of the entrance conference, more than two years and six months before the expiration of the limitation period to initiate an audit under section 17558.5. The first audit was therefore timely initiated, with respect to fiscal year 2002-2003.

The Commission further finds that the initiation of the audit with respect to the remaining claim years at issue in this case was also timely. The annual claim for 2003-2004 was filed January 10, 2005, and therefore an audit initiated on or before January 10, 2008 would have been timely, based on the filing date of the claim. Moreover, notices from the Controller dated September 9, 2010, and pertaining to fiscal years 2003-2004 through 2005-2006, indicate that *no claims* had yet been paid for those audit years,<sup>74</sup> and therefore “the time for the Controller to initiate an audit,” pursuant to section 17558.5, had not commenced to run as of that date.<sup>75</sup> Based on the foregoing, the audit was timely initiated with respect to all successive audit years.

The claimant has also advanced the argument that the audit was not timely completed, based on either the audit entrance conference date of April 17, 2007, or the entrance conference letter, dated April 3, 2007, and the issuance of the final audit report on April 17, 2009. The claimant’s argument fails.

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<sup>69</sup> Government Code section 17558.5 (as amended, Statutes 2002, ch. 1128 (AB 2834)).

<sup>70</sup> Government Code section 17558.5 (as amended, Statutes 2002, ch. 1128 (AB 2834)). Neither the filing date of the subject reimbursement claims, nor the date the audit was commenced, controls whether the later-amended version(s) of section 17558.5 are applicable. See *Scheas v. Robertson* (1951) 38 Cal.2d 119, 126 [“It is settled that the Legislature may enact a statute of limitations ‘applicable to existing causes of action or shorten a former limitation period...’”].

<sup>71</sup> Government Code section 17558.5 (as amended, Stats. 2002, ch. 1128 (AB 2834)).

<sup>72</sup> Exhibit B, IRC 10-4425-I-18, page 11.

<sup>73</sup> California Constitution, article III, section 3.5 (added June 6, 1978, by Proposition 5).

<sup>74</sup> Exhibit B, IRC 10-4425-I-18, pages 21-23.

<sup>75</sup> Government Code section 17558.5 (as amended, Stats. 2002, ch. 1128 (AB 2834)).

Section 17558.5 provides that “[i]n any case, an audit shall be completed not later than two years after the date that the audit is commenced.”<sup>76</sup> Webster’s Third New International Dictionary provides that “to commence” and “to initiate” are synonymous.<sup>77</sup> Code of Civil Procedure section 12 prescribes how statutes of limitation shall be calculated, as follows: “[t]he time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded.” The courts have held that “[a]bsent a compelling reason for a departure, this rule governs the calculation of *all* statutorily prescribed time periods.”<sup>78</sup> Here, pursuant to section 17558.5, interpreted in accordance with Code of Civil Procedure section 12, an audit commenced on April 17, 2007 would be required to be completed by April 17, 2009, the date that the final audit report was issued.

However, in comments on the draft proposed decision, the claimant now asserts in the alternative, that “the audit commenced on April 3, 2007, or perhaps a few days earlier for the initial phone contact, based on the date of the entrance conference letter (Attachment A).”<sup>79</sup> The claimant asserts that the Commission “has not determined as a matter of law whether the date of the first telephone contact to the district, entrance conference letter, or entrance conference date commences the audit and thus [triggers] the two-year clock to complete the audit.”<sup>80</sup> The claimant asserts that “[t]he Controller considers the audit commencement date to be the date of first contact made by Controller to the claimant.”<sup>81</sup> Accordingly, the claimant provides a copy of an email relating to IRCs on another program that was addressed to Nancy Patton, former Assistant Executive Director of the Commission, from Jim Spano, Bureau Chief of the Division of Audits at the Controller’s Office, which states, in pertinent part:

We consider the event that initiates an audit pursuant to Government Code section 17558.5 to be the date of the initial contact by the SCO to the auditee (generally a telephone contact) to inform them and put them on notice of the SCO’s intention to perform the audit. In addition, we consider this same date as the event that commences the two-year period to complete an audit pursuant to Government Code section 17558.5.<sup>82</sup>

The claimant thus concludes, based on the Controller’s interpretation of section 17558.5 provided in the email, that the entrance conference letter, dated April 3, 2007,<sup>83</sup> or “a few days

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<sup>76</sup> Government Code section 17558.5 (as amended, Stats. 2004, ch. 313 (AB 2224)).

<sup>77</sup> The definition of “commence” includes “to begin,” “to initiate,” and “to enter upon,” while the definition of “initiate” provides: “to begin or set going: make a beginning of: perform or facilitate the first actions, steps, or stages of...”

<sup>78</sup> *In re Anthony B.* (2002) 104 Cal.App.4th 677, 681-682 [emphasis in original].

<sup>79</sup> Exhibit D, Claimant Comments, page 3.

<sup>80</sup> Exhibit D, Claimant Comments, page 3.

<sup>81</sup> Exhibit D, Claimant Comments, page 3.

<sup>82</sup> Exhibit D, Claimant Comments, page 8.

<sup>83</sup> Exhibit D, Claimant Comments, page 6.

earlier for the initial phone contact...<sup>84</sup> commences the audit, for purposes of the statutory deadlines of Government Code section 17558.5. Under this interpretation, the final audit report dated April 17, 2009, would not be timely completed.

The claimant's argument is not persuasive. An agency's interpretation of the meaning and effect of a statute "is entitled to consideration and respect by the courts; however unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to 'make law,'...the binding power of an agency's interpretation of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation."<sup>85</sup> The "appropriate degree of judicial scrutiny...lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other."<sup>86</sup> An administrative decision adopted in a quasi-legislative capacity is "properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference."<sup>87</sup> The "ultimate interpretation of a statute is an exercise of the judicial power...conferred upon the courts by the Constitution and, in the absence of a constitutional provision, [it] cannot be exercised by any other body."<sup>88</sup> The Court in *Yamaha Corp., supra*, thus summarized the judicial province as follows:

Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative. To quote the statement of the Law Revision Commission in a recent report, "The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action."<sup>89</sup>

Here, the claimant has provided a copy of an email expressing the opinion of Jim Spano, Bureau Chief of the Division of Audits at the Controller's Office, stating that "[w]e consider the event

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<sup>84</sup> Exhibit D, Claimant Comments, page 3.

<sup>85</sup> *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 7.

<sup>86</sup> *Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559, 575-576 [citing *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 232].

<sup>87</sup> *Ibid.*

<sup>88</sup> *Yamaha Corp., supra*, at p. 7 [citing *Bodinson Mfg. Co. v. California Employment Commission* (1941) 17 Cal.2d 321, 326].

<sup>89</sup> *Id.*, at pp. 7-8 [Citing *Traverso v. People ex rel. Dept. of Transportation* (1996) 46 Cal.App.4th 1197, 1206 as an example of an agency interpretation "of little worth," and quoting Judicial Review of Agency Action (Feb.1997) 27 Cal. Law Revision Com. Rep. (1997) p. 81].

that initiates an audit pursuant to Government Code section 17558.5 to be the date of the initial contact by the SCO to the auditee (generally a telephone contact)..." In addition, the email goes on: "we consider this same date as the event that commences the two-year period to complete an audit..."<sup>90</sup> The claimant argues, essentially, that the Controller should be held to this statement, which in this case would mean that the audit commenced on or before April 3, 2007, and the final audit report of April 17, 2009 was not timely completed. To illustrate the point, claimant provides the April 3, 2007 letter from the Controller to the claimant requesting an entrance conference for this audit. That letter states, in pertinent part:

This letter confirms that Curt Chiesa and Ken Howell of the State Controller's Office have scheduled an audit of Sierra Joint Community College District's legislatively mandated Collective Bargaining Program cost claims filed for fiscal years (FY) 2002-03, FY 2003-04, FY 2004-05 and FY 2005-06. Government Code Sections 12410, 17558.5, and 17561 provide the authority for this audit. The entrance conference is scheduled for Tuesday, April 17th, 2007, at 2 p.m. Audit fieldwork will begin after the entrance conference.<sup>91</sup>

However, based on the Court's discussion of the continuum of deference owed to an agency's interpretation of a statute, and the need for "factors that support the merit of the interpretation",<sup>92</sup> the Commission finds, based on the evidence filed in this case, that the audit was commenced by the Controller on April 17, 2007.

As the Court noted above, "informal actions" do not merit the degree of judicial deference that "quasi-legislative" actions command.<sup>93</sup> While other agencies that conduct audits or other similar procedures have adopted regulations to make clear when the audit begins, the Controller has not adopted a regulation for mandate claim audits, and the email that the claimant cites is not a quasi-legislative statement of policy.<sup>94</sup> Rather, the email proffered by the claimant states, in the words of the audit bureau chief, the Controller's position on initiation or commencement of an audit; that statement is made not in duly adopted agency guidance, or regulations, but an email answering a question for Commission staff.

Therefore, the Commission, in its quasi-judicial capacity, is not required to give this statement significant weight, and need assign only such weight to this statement of the Controller's interpretation as its context supports. This type of informal statement's "power to persuade is

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<sup>90</sup> Exhibit D, Claimant Comments, page 8.

<sup>91</sup> Exhibit D, Claimant Comments, page 6.

<sup>92</sup> *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 7.

<sup>93</sup> *Western States Petroleum, supra*, 9 Cal.4th 559, 575-576 [citing *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 232].

<sup>94</sup> See, e.g., California Board of Equalization Regulations, section 1698.5 [Stating that an "audit engagement letter" is a letter "used by Board staff to confirm the start of an audit or establish contact with the taxpayer"].

both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation.”<sup>95</sup>

First, the email is in reference to a number of outstanding *Health Fee Elimination* IRCs, and does not refer to this or any other *Collective Bargaining* IRC. Secondly, as explained above, the email is not a statement of duly adopted policy, but a statement of the audit bureau chief’s interpretation of the law.

Conversely, the plain language of the “entrance conference letter” on which claimant also relies, suggests that the letter is not intended to commence the audit, which is consistent with the legal definition and purpose of an audit. The letter states that members of the Controller’s audit staff have “scheduled an audit”, and that “[a]udit fieldwork *will begin after* the entrance conference.” Black’s Law Dictionary defines an audit as “[a] formal examination of an individual’s or organization’s accounting records...” The letter that the claimant provides requests that the claimant make available “the necessary records,” and announces a “formal examination.” Therefore, the letter suggests that the entrance conference constitutes the initiation of the audit, rather than the letter itself.

Based on the foregoing analysis, and assigning to the Controller’s email only that weight appropriate to its context in light of the evidence in the record, the Commission finds that in this case, the audit entrance conference constitutes the initiation and commencement of the audit, on April 17, 2007.

Based on the foregoing, the Commission finds that the original audit was timely, with respect to both the initiation and the completion of the audit.

2. *The Revised Audit Issued August 25, 2010 was Issued Beyond the Deadlines Imposed by Section 17558.5, But May be Considered by the Commission to the Extent that it Narrows the Issues in Dispute or Makes Concessions to the Claimant.*

Government Code section 17558.5, as amended by Statutes 2002, chapter 1128, provides for an audit to be initiated by the Controller within three years after the date the claim is filed, or three years after the initial payment of the claim. However, section 17558.5 also provides that “[i]n any case, an audit *shall be completed* not later than two years after the date that the audit is commenced.”

Here, the Controller’s audit of the relevant claim years was “commenced,” within the meaning of section 17558.5, on April 17, 2007. Therefore, a timely audit must be completed by April 17, 2009, when the first “final” audit report was issued. The revised audit report is a continuation of the *original* “final” audit report, and was issued on August 25, 2010. It therefore falls outside the statutory two year completion requirement imposed by section 17558.5. To hold otherwise would be to provide to the Controller an “end-run” around a validly enacted statutory deadline for completion of an audit, and to hold claimants subject to open-ended “revision” of audit findings.

However, the claimant maintains that even if the revised audit is barred, “[n]otwithstanding, the changes made by the Controller in the revised audit report are for substantive reasons that are now a matter of record for the original incorrect reduction claim and can be adjudicated by the

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<sup>95</sup> *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 7.

Commission.”<sup>96</sup> The Commission agrees that it may take official notice<sup>97</sup> of the revised audit report, and treat the revised audit as substantive comments from the Controller on the IRC, to the extent that the revised audit report narrows the issues in dispute or mitigates the amount of reductions originally asserted by the Controller.

Based on the foregoing, the Commission finds that the revised final audit report issued August 25, 2010 was not completed within the deadline required by section 17558.5, but may be considered by the Commission to the extent that it narrows the issues in dispute or makes concessions to the claimant with respect to its allegations in the IRC.

**B. Reductions of Costs Claimed Based on Unsupported Hours or Productive Hourly Rates are Entirely Lacking in Evidentiary Support, and Must be Reinstated.**

The disputed reductions for productive hourly rates were determined to be “overstated by \$9,186 for FY 2002-2003 and understated by \$2,242 for FY 2004-2005, leaving a net audit adjustment of \$6,944.”<sup>98</sup> In the final audit report the Controller notes the claimant’s dispute with respect to this reduction, but states that “[t]he district’s response did not provide any specific objection to this issue.”<sup>99</sup>

In its IRC, the claimant asserts that the reason for the Controller’s adjustment is not clear, as follows:

The single difference between the rates calculated by the Controller and the District is the salary component. The Controller altered the salary component for specific employees and then necessarily arrived at productive hourly rates that differed from the rates calculated by the District. No explanation was provided for any of these adjustments, and there is no indication as to why the payroll information reported by the District needed to be adjusted for purposes of the productive hourly rate computation. The propriety of these adjustments cannot be determined until the Controller states the reason for each change to the employee payroll information.<sup>100</sup>

There is no evidence in the record indicating how productive hourly rates were calculated and claimed. The claiming instructions describe a menu of options for claimants to calculate productive hourly rates, but the record does not make clear which option was chosen by the claimant. However, there is a similar lack of evidence in the record demonstrating the Controller’s recalculation of productive hourly rates, or why such recalculation was necessary. The Controller states that the productive hourly rates were “inaccurate,” but does specify any particular flaw in the calculations, or any particular employee or employees for whom productive

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<sup>96</sup> Exhibit B, IRC 10-4425-I-18, page 15.

<sup>97</sup> Code of Regulations, title 2, section 1187.5(c) [“Official notice may be taken in the manner and of the information described in Government Code section 11515.”].

<sup>98</sup> Exhibit A, IRC 09-4425-I-17, pages 8-9.

<sup>99</sup> Exhibit A, IRC 09-4425-I-17, page 65 [Final Audit Report, issued April 17, 2009].

<sup>100</sup> Exhibit A, IRC 09-4425-I-17, page 9.

hourly rates were disallowed. Section 1185.2(c) of the Commission's regulations requires that all representations of fact shall be supported by documentary evidence and submitted with the comments. The Commission finds that there is no explanation or evidence in the record to support the Controller's factual assertion that the productive hourly rates were inaccurate.

Therefore, based on the evidence in the record, the Commission finds that the Controller's audit determination is entirely lacking in evidentiary support, and that the full amount reduced, \$6,944, is required to be reinstated to the claimant.

**C. The Controller's Determination not to Reimburse the Full Amount of Indirect Costs Recalculated is Incorrect as a Matter of Law and is Arbitrary and Capricious.**

The claimant asserts that the Controller incorrectly determined that its indirect cost rates were improperly calculated and applied, resulting in an *underclaimed* amount of \$103,032.<sup>101</sup> The Controller's recalculation of indirect costs resulted in a determination of an underclaimed amount for three of the four audit years, which the Controller offset against other disallowed amounts, resulting in reimbursement of the full amount claimed for each of those three years (2003-2004 through 2005-2006).

Claimant argues that merely offsetting the underclaimed amounts against other disallowances still constitutes a reduction, to the extent that the claimant is not fully reimbursed for its actual indirect costs, as calculated by the Controller based on direct costs claimed. Claimant requests that the Commission direct the Controller to reimburse the full amounts underclaimed and argues that section 17561(d)(2) requires "the adjustment of *both* underpayments and overpayments..."<sup>102</sup> The claimant argues that "the Controller does not have discretion to unilaterally determine that it will require reimbursement for audit adjustments in favor of the State and simply ignore audit adjustments in favor of the claimants."<sup>103</sup> In comments on the draft proposed decision, the claimant characterizes the Controller's decision not to reimburse the claimant in excess of the claimed amount for each of the relevant audit years as a reduction in itself, calling that determination "an incorrect reduction of *total reimbursable costs* and an *underpayment of reimbursable amounts*."<sup>104</sup>

The final audit report issued April 17, 2009 states that "[t]he district developed indirect cost rate proposals (ICRPs) in accordance with Office of Management and Budget (OMB) Circular A-21..." but that "[f]or FY 2004-05 and 2005-06, the parameters and guidelines and SCO's claiming instructions do not provide districts the option of using a federally-approved rate."<sup>105</sup> In addition, the Controller asserts that "[f]or FY 2002-03 and FY 2003-04, the SCO's claiming instructions allow the district to use federally-approved rate prepared in accordance with OMB Circular A-21[.]" but that "the district did not obtain federal approval for the applicable two

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<sup>101</sup> Exhibit B, IRC 10-4425-I-18, page 7.

<sup>102</sup> Exhibit A, Incorrect Reduction Claim, page 77.

<sup>103</sup> Exhibit A, Incorrect Reduction Claim, page 77.

<sup>104</sup> Exhibit D, Claimant Comments, page 4 [emphasis added].

<sup>105</sup> Exhibit A, Incorrect Reduction Claim, page 67 [Final Audit Report, issued April 17, 2009].

years.”<sup>106</sup> The Controller concedes, in its *revised* final audit report issued August 25, 2010, that federally-approved rates were permitted for fiscal years 2004-2005 and 2005-2006, but the Controller asserts that this does not alter its finding that the claimant did not obtain federal approval for its rates, and the rates were required to be recalculated.<sup>107</sup> The revised final audit report found that the total indirect costs underclaimed were \$103,032, pursuant to the state FAM-29C methodology, including depreciation expenses.<sup>108</sup> The claimant states that this amount results in \$20,662 for fiscal year 2003-2004, \$21,611 for fiscal year 2004-2005, and \$54,244 for fiscal year 2005-2006 in excess of the total costs claimed for each of those years.<sup>109</sup> This amount, then, is the amount in dispute that the Controller has determined it will not pay to the claimant. The Controller applied the underclaimed indirect costs to offset other unallowable costs reduced, but declined to pay the claimant any more than its total claim for each fiscal year, stating: “*only the total costs* included in the initial or amended claim may be reimbursed within one year of the filing deadline...” and section 17561 “allows the SCO to adjust the payment to correct for any underpayments or overpayments *based on allowable costs claimed*.”<sup>110</sup>

The Government Code section cited by the Controller does not contain any such limitation. The Controller relies on language not found in section 17561 to assert that “subdivision (d)(2) allows the SCO to adjust the payment to correct for any underpayments or overpayments *based on allowable costs claimed*.”<sup>111</sup> The claimant, on the other hand, relies on the first part of section 17561(d)(2)(C), which requires the Controller to “adjust the payment to correct for any underpayments or overpayments...” while ignoring the remaining few words of the sentence, “...that occurred in previous fiscal years.” The first sentence of section 17561 also states, interpreting article XIII B, section 6, that “[t]he state shall reimburse each local agency and school district for *all ‘costs mandated by the state,’* as defined in Section 17514...” Article XIII B, section 6 requires reimbursement of both direct and indirect costs, and therefore the Commission finds that section 17561, interpreted consistently with the subvention requirement of article XIII B, section 6, supports the claimant’s view that the indirect cost amounts that the Controller determined were legally correct, based on direct costs claimed, are required to be reimbursed to the claimant.

Government Code section 17551 provides that the Commission “shall hear and decide upon a claim by a local agency or school district filed on or after January 1, 1985, *that the Controller has incorrectly reduced payments* to the local agency or school district...” pursuant to an audit.<sup>112</sup> The Controller’s audit authority is detailed in Government Code section 17561, which

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<sup>106</sup> Exhibit A, IRC 09-4425-I-17, page 67 [Final Audit Report, issued April 17, 2009].

<sup>107</sup> Exhibit B, IRC 10-4425-I-18, page 42 [Revised Final Audit Report, issued August 25, 2010].

<sup>108</sup> Exhibit B, IRC 10-4425-I-18, page 42 [Revised Final Audit Report, issued August 25, 2010].

<sup>109</sup> The claimant earlier stated that \$2,242 from fiscal year 2004-2005 was offset against the reduction made in 2002-2003 for productive hourly rates. The underclaimed amount for indirect costs for fiscal year 2004-2005 is stated in the revised final audit report as \$21,611.

<sup>110</sup> Exhibit B, IRC 10-4425-I-18, page 43 [Revised Final Audit Report] [emphasis added].

<sup>111</sup> Exhibit A, IRC 09-4425-I-17, page 71 [emphasis added].

<sup>112</sup> Government Code section 17551 (Stats. 2007, ch. 329 (AB 2224)) [emphasis added].



provides that the Controller may audit the claims of a local agency or school district “to verify the actual amount of the mandated costs...” and “*may reduce any claim that the Controller determines is excessive or unreasonable.*”<sup>113</sup> The claimant focuses on the next sentence of section 17561, which states that the Controller “*shall adjust the payment to correct for any underpayments or overpayments that occurred in previous fiscal years.*”

Indirect costs are calculated in each claim year based on formulas laid out by the Controller (the state FAM-29C methodology) or the OMB (the A-21 methodology). Indirect costs are calculated in relation to direct costs claimed for each mandated program, by applying a rate derived from either the state or the federal methodology to all eligible direct costs. If the formula is not computed correctly, or not applied correctly to all eligible direct costs, then the amounts of indirect costs claimed for a given year will not represent the claimant’s full reimbursement. Alternatively, if the rate is applied too broadly, or calculated incorrectly based on the allocation of direct and indirect costs, it may yield indirect costs that are excessive or unreasonable, and must be reduced by the Controller pursuant to an audit.

Here, as noted above, the Controller recalculated the claimant’s indirect cost rates, and determined that the claimant underclaimed its indirect costs, based on applying the rates to direct costs claimed (and, in the revised audit, including depreciation expenses). However, the Controller determined that it was not required to reimburse the claimant the full amount of indirect costs based on the recalculation, because to do so would exceed the total claimed amount for the relevant audit years, and the Controller believed it was not required to reimburse in excess of total costs claimed. The Controller therefore adjusted the claims, offsetting the underclaimed indirect cost amount against other costs that were disallowed, but only to the extent of the total claim for each year. The claimant argues that the adjustment only to the extent of the total claim is itself a reduction, and the Commission agrees. Because indirect costs are calculated based on a formula applied to direct costs, if the Controller determines that the formula has been incorrectly computed or incorrectly applied, and a corrected amount would be higher than that claimed, then the higher amount is the legally correct amount of reimbursable costs, and is part of “costs mandated by the state,” within the meaning of section 17514, and based on the direct costs actually claimed under penalty of perjury. Section 17561 requires the state to reimburse all costs mandated by the state, and only permits the controller to reduce a claim that it determines is “excessive or unreasonable.” Here, the amount the Controller determined should have been claimed was significantly higher than what was claimed, based upon the claimed direct costs in the reimbursement claim, and therefore the amount cannot have been “excessive or unreasonable.” Moreover, as explained, the amount that the Controller determined constitutes a part of “all costs mandated by the state,” which must be reimbursed as a matter of law.

Finally, the claimant argues, and the Commission agrees, that the Controller’s determination not to fully reimburse indirect costs that should have been claimed is arbitrary and capricious. This is so because the Controller carried over some types of costs over or under-claimed during the relevant audit years, but declined to carry over indirect costs during the audit years and instead limited the total reimbursement for indirect costs to the total costs claimed in each of the three audit years respectively. As discussed above, the Controller found that the claimant overstated

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<sup>113</sup> Government Code section 17561 (Stats. 2009, ch. 4 (SBX3 8)).

its productive hourly rates in 2002-2003 by \$9,186, and understated productive hourly rates in 2004-2005 by \$2,242, and thus applied the 2004-2005 underclaimed amount against the overstated amount for 2002-2003, resulting in a net reduction of \$6,944. However, the Controller declined to carry over the underclaimed amounts for indirect costs from fiscal years 2003-2004 through 2005-2006, to offset the amount adjusted for fiscal year 2002-2003. As the claimant notes, “[t]here is no practical difference between allowing an understated cost to mitigate one of the Controller’s adjustments and reimbursing the District for their total actual costs.” Indeed, by carrying over the understated amounts for productive hourly rates for fiscal year 2004-2005, the Controller is, in effect, reimbursing the claimant for that fiscal year in an amount greater than what was claimed. More importantly, as discussed above, the language of section 17561 does not prohibit the Controller from reducing in excess of the total claim when its audit findings support an adjustment, and indeed only a reduction of “excessive or unreasonable” costs is permitted.

Based on the foregoing, the Commission finds that the Controller’s decision not to reimburse fully the amounts that it recalculated for the claimant’s indirect costs was incorrect as a matter of law, and represents an arbitrary and capricious reduction that must be reinstated. Therefore, the Commission directs the Controller to reinstate \$20,662 in indirect costs for fiscal year 2003-2004; \$21,611 in indirect costs for fiscal year 2004-2005, and \$54,244 in indirect costs for fiscal year 2005-2006.<sup>114</sup>

## **V. Conclusion**

Based on the foregoing, the Commission partially approves this IRC, and requests that the Controller reinstate the following reductions:

- Reduction of \$6,944 based on net unallowable salaries and benefits in fiscal years 2002-2003 and 2004-2005.
- Reduction of allowable indirect costs based on direct costs claimed: \$20,662 for fiscal year 2003-2004; \$21,611 for fiscal year 2004-2005, and \$54,244 for fiscal year 2005-2006.

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<sup>114</sup> See Exhibit B, IRC 10-4425-I-18, page 33 [Revised Final Audit Report Summary of Adjustments].