ITEM 5

RECONSIDERATION OF PRIOR FINAL DECISION FINAL STAFF ANALYSIS

Code of Civil Procedure Sections 1281.1, 1299, 1299.2, 1299.3, 1299.4, 1299.5, 1299.6, 1299.7, 1299.8, and 1299.9

As Added by Statutes 2000, Chapter 906 (S.B. 402)

Binding Arbitration

01-TC-07

EXECUTIVE SUMMARY

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

Background

Government Code section 17559, subdivision (a) grants the Commission discretion to reconsider, within statutory timeframes, a prior final decision. By regulation, the Commission has provided that any interested party, affected state agency or Commission member may file a petition with the Commission requesting that the Commission reconsider and change a prior final decision to correct an error of law.

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

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

The *Binding Arbitration* statutes, in the context of labor relations between local public agencies and their law enforcement officers and firefighters, provide that, where an impasse in negotiations has been declared, and if the employee organization so requests, the parties would be subject to binding arbitration.

On July 28, 2006, the Commission adopted a Statement of Decision denying the test claim for the activities related to local government participation in binding arbitration, pursuant to Code of Civil Procedure sections 1281.1, and 1299 through 1299.9. The Commission concluded the following:

> [T]he Commission finds that the test claim legislation does not constitute a new program or higher level of service. The test claim legislation requires the local agency to engage in a binding arbitration process that may result in increased costs associated with employee compensation or benefits. The cases have consistently

> held that additional costs alone, in absence of some increase in the actual level or quality of governmental services *provided to the public*, do not constitute an "enhanced service to the public" and therefore do not impose a new program or higher level of service on local governments within the meaning of article XIII B, section 6 of the California Constitution. Since strikes by law enforcement officers and fire services personnel are prohibited by law, no successful argument can be made that the test claim legislation affects law enforcement or firefighting service *to the public.*

At the hearing, however, claimant modified the test claim significantly by withdrawing its request for reimbursement for litigation, employee compensation and compensation enhancement costs. Testimony was also provided at the hearing that, regardless of the legality of strikes by public safety personnel, strikes do still occur in the less obvious form of "blue flu" or via other methods.

The Statement of Decision was mailed to the claimant, interested parties, and affected state agencies on August 7, 2006. On August 16, 2006, the Chairperson of the Commission directed staff to prepare a request for reconsideration of the Statement of Decision in order to apply the relevant case law to the test claim as it was revised at the July 28, 2006 hearing. On October 4, 2006, the Commission granted the request by a vote of 6-0, and staff prepared this analysis on the following issues:

- Is the final decision on the *Binding Arbitration* test claim, adopted on July 28, 2006, contrary to law?
- Are the test claim statutes subject to article XIII B, section 6 of the California Constitution?
- Do the test claim statutes constitute a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?
- Do the test claim statutes impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

Staff Analysis

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

Conclusion

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

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

Recommendation

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

STAFF ANALYSIS

Chronology

07/28/06	Commission adopted Statement of Decision
08/07/06	Commission mailed Statement of Decision to claimant, interested parties, and affected state agencies
08/16/06	Request for reconsideration was filed with the Commission
10/04/06	Commission granted the request for reconsideration
11/06/06	Commission staff issued draft staff analysis
01/11/07	Commission staff issued final staff analysis

Background

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

> The commission may order a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party. The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of the 30-day period, the commission may grant a stay of that expiration for no more than 30 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

By regulation, the Commission has provided that any interested party, affected state agency or Commission member may file a petition with the Commission requesting that the Commission reconsider and change a prior final decision to correct an error of law.[1]

Before the Commission considers the request for reconsideration, Commission staff is required to prepare a written analysis and recommend whether the request for reconsideration should be granted.[2] A supermajority of five affirmative votes is required to grant the request for reconsideration and schedule the matter for a hearing on the merits.[3]

If the Commission grants the request for reconsideration, a second hearing must be conducted to determine if the prior final decision is contrary to law and to correct an error of law.[4] Prior to that hearing, commission staff prepares and issues for public comment a draft staff analysis.[5] Any comments are incorporated into a final staff analysis and presented to the Commission before the

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[1] California Code of Regulations, title 2, section 1188.4, subdivision (b).

[2] California Code of Regulations, title 2, section 1188.4, subdivision (f).

[3] *Ibid.*

[4] California Code of Regulations, title 2, section 1188.4, subdivision (g).

[5] California Code of Regulations, title 2, section 1188.4, subdivision (g)(1)(B).

scheduled meeting.[6] A supermajority of five affirmative votes is required to change a prior final decision.[7]

Binding Arbitration Test Claim

In the context of labor relations between local public agencies and their law enforcement officers and firefighters, the test claim statutes provide that, where an impasse in negotiations has been declared, and if the employee organization so requests, the parties would be subject to binding arbitration.

Since 1968, local public agency labor relations have been governed by the Meyers-Milias-Brown Act.[8] The act requires local agencies to grant employees the right to self-organization, to form, join or assist labor organizations, and to present grievances and recommendations regarding wages, salaries, hours, and working conditions to the governing body. The California Supreme Court has recognized that it is not unlawful for public employees to strike unless it has been determined that the work stoppage poses an imminent threat to public health or safety.[9] Employees of fire departments and fire services, however, are specifically denied the right to strike or to recognize a picket line of a labor organization while in the course of the performance of their official duties.[10] Additionally, the Fourth District Court of Appeal has held that police work stoppages are per se illegal.[11]

Under the Meyers-Milias-Brown Act, the local employer establishes rules and regulations regarding employer-employee relations, in consultation with employee organizations.[12] The local agency employer is obligated to meet and confer in good faith with representatives of employee bargaining units on matters within the scope of representation.[13] If agreement is reached between the employer and the employee representatives, that agreement is memorialized in a memorandum of understanding which becomes binding once the local governing body adopts it.[14]

The test claim statutes[15] added Title 9.5 to the Code of Civil Procedure, providing new procedures that could be invoked by the employee organization in the event an impasse in negotiations has been declared. Section 1299 states the following legislative intent:

> The Legislature hereby finds and declares that strikes taken by firefighters and law enforcement officers against public employers are a matter of

[6] California Code of Regulations, title 2, section 1188.4, subdivision (g)(1)(C).

[7] California Code of Regulations, title 2, section 1188.4, subdivision (g)(2).

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

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

[10] Labor Code section 1962.

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

[12] Government Code section 3507.

[13] Government Code section 3505.

[14] Government Code section 3505.1.

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

> statewide concern, are a predictable consequence of labor strife and poor morale that is often the outgrowth of substandard wages and benefits, and are not in the public interest. The Legislature further finds and declares that the dispute resolution procedures contained in this title provide the appropriate method for resolving public sector labor disputes that could otherwise lead to strikes by firefighters or law enforcement officers.
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> It is the intent of the Legislature to protect the health and welfare of the public by providing impasse remedies necessary to afford public employers the opportunity to safely alleviate the effects of labor strife that would otherwise lead to strikes by firefighters and law enforcement officers. It is further the intent of the Legislature that, in order to effectuate its predominant purpose, this title be construed to apply broadly to all public employers, including, but not limited to, charter cities, counties, and cities and counties in this state.
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> It is not the intent of the Legislature to alter the scope of issues subject to collective bargaining between public employers and employee organizations representing firefighters or law enforcement officers.
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> The provisions of this title are intended by the Legislature to govern the resolution of impasses reached in collective bargaining between public employers and employee organizations representing firefighters and law enforcement officers over economic issues that remain in dispute over their respective interests…

The statutes provide that if an impasse is declared after the parties exhaust their mutual efforts to reach agreement over matters within the scope of the negotiation, and the parties are unable to agree to the appointment of a mediator, or if a mediator agreed to by the parties has been unable to effect settlement of a dispute between the parties, the employee organization can, by written notification to the employer, request that their differences be submitted to an arbitration panel.[16] Within three days after receipt of written notification, each party is required to designate one member of the panel, and those two members, within five days thereafter, are required to designate an additional impartial person with experience in labor and management dispute resolution to act as chairperson of the arbitration panel.[17]

The arbitration panel is required to meet with the parties within ten days after its establishment, or after any additional periods of time mutually agreed upon.[18] The panel is authorized to meet with the parties, make inquiries and investigations, hold hearings, and take any other action, including further mediation, that the panel deems appropriate.[19] The arbitration panel may, for purposes of its hearings, investigations or inquiries, subpoena witnesses, administer oaths, take

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

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

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

[19] *Ibid.*

the testimony of any person, and issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records.[20]

Five days prior to the commencement of the arbitration panel's hearings, each of the parties is required to submit a last best offer of settlement on the disputed issues.[21] The panel decides the disputed issues separately, or if mutually agreed, by selecting the last best offer package that most nearly complies with specified factors.[22] The panel then delivers a copy of its decision to the parties, but the decision may not be publicly disclosed for five days.[23] The decision is not binding during that period, and the parties may meet privately to resolve their differences and, by mutual agreement, modify the panel's decision.[24] At the end of the five-day period, the decision as it may be modified by the parties is publicly disclosed and binding on the parties.[25]

The provisions are not applicable to any employer that is a city, county, or city and county, governed by a charter that was amended prior to January 1, 2001, to incorporate a binding arbitration provision.[26] The provisions also state that, unless otherwise agreed to by the parties, the costs of the arbitration proceeding and the expenses of the arbitration panel, except those of the employer representative, shall be borne by the employee organization.[27]

Preexisting general arbitration provisions are applicable to arbitration that is triggered by the test claim statutes, unless otherwise provided in the test claim statutes.[28] Among other things, these general arbitration provisions set forth procedures for the conduct of hearings such as notice of hearings, witness lists, admissible evidence, subpoenas, and depositions.[29]

When a party refuses to arbitrate a controversy as requested under Code of Civil Procedure section 1299.4, subdivision (a), that party may be subject to a court order to engage in arbitration pursuant to section 1281.2.[30]

The test claim statutes in their entirety were declared unconstitutional by the California Supreme Court on April 21, 2003, as violating portions of article XI of the California Constitution.[31] The

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

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

[22] *Ibid.*

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

[24] *Ibid.*

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

[26] Code of Civil Procedure section 1299.9, subdivision (a); this provision was modified by Statutes 2003, chapter 877, to change the date of the amended charter to January 1, 2004, but since that amendment was not pled in the test claim, staff makes no finding with regard to it.

[27] Code of Civil Procedure section 1299.9, subdivision (b).

[28] Code of Civil Procedure section 1299.8.

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

[30] Code of Civil Procedure section 1281.1.

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

basis for the decision is that the statutes: 1) deprive the county of its authority to provide for the compensation of its employees as guaranteed in article XI, section 1, subdivision (b); and 2) delegate to a private body the power to interfere with local agency financial affairs and to perform a municipal function, as prohibited in article XI, section 11, subdivision (a).[32, 33]

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

The Commission's Prior Decision

The Commission denied this test claim, for the activities related to local government participation in binding arbitration, pursuant to Code of Civil Procedure sections 1281.1, and 1299 through 1299.9. The Commission concluded the following:

> [T]he Commission finds that the test claim legislation does not constitute a new program or higher level of service. The test claim legislation requires the local agency to engage in a binding arbitration process that may result in increased costs associated with employee compensation or benefits. The cases have consistently held that additional costs alone, in absence of some increase in the actual level or quality of governmental services *provided to the public*, do not constitute an "enhanced service to the public" and therefore do not impose a new program or higher level of service on local governments within the meaning of article XIII B, section 6 of the California Constitution. Since strikes by law enforcement officers and fire services personnel are prohibited by law, no successful argument can be made that the test claim legislation affects law enforcement or firefighting service *to the public.*

The claimant had initially requested reimbursement for: 1) costs to litigate the constitutionality of the test claim statutes; 2) increased costs for salaries and benefits that could result from the binding arbitration award; 3) increased costs for compensation package "enhancements" that could be offered by the local agency as a result of vulnerabilities in its bargaining position; and 4) other costs related to binding arbitration activities.

At the hearing, however, the claimant withdrew its request for reimbursement for litigation, compensation and compensation enhancement costs.[34] Testimony was also provided at the hearing that regardless of the legality of strikes by public safety personnel, strikes do still occur in the less

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

[33] Section 1299.7, subdivision (c), of the Code of Civil Procedure was subsequently amended to cure the constitutionality issue (Stats. 2003, ch. 877), by adding a provision allowing the local public agency employer to reject the decision of the arbitration panel:

> The employer may by unanimous vote of all the members of the governing body reject the decision of the arbitration panel, except as specifically provided to the contrary in a city, county, or city and county charter with respect to the rejection of an arbitration award.[33]

However, that statute was not pled in the test claim and Commission staff makes no finding with regard to it.

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

obvious form of "blue flu" or in other ways.[35] The claimant also presented exhibits at the hearing consisting of test claims and parameters and guidelines related to collective bargaining, that were previously heard by the Commission.

Removing the costs for litigating the constitutionality of the test claim legislation and employee compensation significantly modified the test claim, causing the need for a reevaluation of activities that are required by the test claim statute (e.g., designating an arbitration panel member and participating in hearings) in light of the relevant case law.

The request for reconsideration alleged the following error of law:

> The statement of decision relied upon cases supporting the concept that no higher level of service to the public is provided when there are increased costs for compensation or benefits *alone*. For example, *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, cited in the statement of decision, held that even though increased employee benefits may generate a higher quality of local safety officers, the test claim legislation did not constitute a new program or higher level of service; the court stated that "[a] higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public." However, *City of Richmond* was based on test claim legislation that increased the cost for death benefits for local safety members, but did not result in actual mandated activities.
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> The statement of decision also relied upon *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, which summarized and reaffirmed several previous cases to illustrate what constitutes a "new program or higher level of service." However, none of the older cases cited [— i.e., *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, and *City of Richmond v. Commission On State Mandates, et al.* (1998) 64 Cal.App.4th 1190, —] denied reimbursement for actual activities imposed on the local agencies. In addition, *San Diego Unified School Dist.* did not address the issue of "new program or higher level of service" in the context of actual activities mandated by test claim legislation which increased the costs of employee compensation or benefits.[36]

Claimant's Position

The claimant contends that the test claim statutes constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Claimant asserts that costs for the following activities will be incurred and are reimbursable:

1. Costs for training agency management, counsel, staff and members of governing bodies regarding SB 402 as well as the intricacies thereof.

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

[36] Exhibit B, Request for Reconsideration, page 3.

2. Costs incident to restructuring bargaining units that include employees that are covered by SB 402 and those which are not covered by SB 402.
3. Increased staff time in preparing for negotiations in order to collect and compile comparability data specified in Code of Civil Procedure, section 1299.4.
4. Increased time of agency negotiators, including staff, consultants, and attorneys, in handling two track negotiations: those economic issues which are subject to SB 402 arbitration and those issues which are not subject to arbitration.
5. Time to prepare for and consult with the governing board regarding the last best and final offer to be submitted to the arbitration panel.
6. Time to prepare for and participate in any mediation process.
7. Consulting time of negotiators, staff and counsel in selecting the agency panel member.
8. Time of the agency negotiators, staff and counsel in vetting and selecting a neutral arbitrator.
9. Time of the agency negotiators, staff and counsel in briefing the agency panel member.
10. Time of the agency negotiators, staff and counsel in preparing for the arbitration hearing.
11. Time of the agency negotiators, staff and counsel in vetting, selecting and preparing expert witnesses.
12. Time of the agency panel member and attorney in pre-arbitration meetings of the panel.
13. Staff and attorney time involved in discovery pursuant to Code of Civil Procedure, sections 1281.1, 1281.2 and 1299.8.
14. Staff, attorney, witness and agency panel member time for the hearings.
15. Attorney time in preparing the closing brief.
16. Agency panel member time in consulting in closed sessions with the panel.
17. Time of the attorney, negotiators, and staff consulting with the agency panel member prior to the issuance of the award.
18. Time of the attorney, negotiators, staff, agency panel member, and governing board consulting regarding the award and giving directions to agency negotiators.
19. Time of the agency negotiators to negotiate with the union's negotiating representatives based on the award.
20. Costs of inevitable litigation regarding the interpretation of critical provisions of the law which are ambiguous, including the fact that the act covers "all other forms of remuneration," and covers employees performing "any related duties" to firefighting and investigating.

Claimant argued, in its April 13, 2006 comments on the first draft staff analysis, that "[a]s of January 1, 2001, local government officials had no alternative other than to enforce the provisions of this statute until it was declared unconstitutional, otherwise they would be subject to a writ of mandate to compel binding arbitration." Claimant further states that "[i]n fact, it was because the County of Riverside refused to engage in binding arbitration that the writ of mandate action was commenced against it, resulting in the decision of the Supreme Court which made this test claim statute invalid as being unconstitutional." Claimant believes the cases cited by Commission staff in the analysis are not on point.

Claimant also points out that as legislation goes through the process of being adopted "there are a plethora of committee hearings and analyses performed" and "if there is any risk for a statute being declared unconstitutional, it should be borne by the State, which has the resources for a full and complete analysis of pending legislation prior to enactment." Claimant concludes that "[l]ocal authorities have no alternative than to assume that legislation is valid until such time as it

is declared unconstitutional by the courts of the State of California." Therefore, claimant contends, the Commission should find that Binding Arbitration was a reimbursable, mandated program from its effective date until it was declared unconstitutional.

Claimant also provided testimony that, regardless of the legality of strikes by public safety personnel, strikes do still occur by these personnel in the less obvious form of "blue flu" or via other methods.

Department of Finance Position

Department of Finance submitted comments on the test claim concluding that the administrative and compensation costs claimed in the test claim are not reimbursable costs pursuant to article XIII B, section 6 of the California Constitution, based on various court decisions and the provisions of the test claim statutes. Specifically, the Department asserts that:

1) the test claim statutes do not create a new program or higher level of service in an existing program, and the costs alleged do not stem from the performance of a requirement unique to local government;
2) alleged higher costs for compensating the claimant's employees are not reimbursable, since compensation of employees in general is a cost that all employers must pay; furthermore, allowing reimbursement for any such costs could "undermine an employer's incentive to collectively bargain in good faith;"
3) alleged cost for increased compensation is not unique to local government; even though claimant may argue that compensation of firefighters and law enforcement officers is unique to local government, the "focus must be on the hardly unique function of compensating employees in general;" and
4) Code of Civil Procedure section 1299.9, subdivision (b), provides that costs of the arbitration proceeding and expenses of the arbitration panel, except those of the employer representative, are to be borne by the employee organization; in the test claim statutes, the Legislature specifically found that the duties of the local agency employer representatives are substantially similar to the duties required under the current collective bargaining procedures and therefore the costs incurred in performing those duties are not reimbursable state mandated costs; and thus, during the course of arbitration proceedings, "there are not any net costs that the employers would have to incur that would not have been incurred in good faith bargaining or that are not covered by the employee organizations."

The Department provided additional comments on the draft staff analysis for reconsideration of the prior decision, concurring in Commission staff's findings recommending the test claim be denied.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[37] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[38] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[39] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[40] In addition, the required activity or task must be new, constituting a "new program," and it must create a "higher level of service" over the previously required level of service.[41]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[42] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[43] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[44]

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[37] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

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

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

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

[41] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist*.); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[42] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*Los Angeles*); *Lucia Mar, supra,* 44 Cal.3d 830, 835).

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

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

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[45]

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.[46] 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."[47]

This reconsideration poses the following issues:

- Is the final decision on the *Binding Arbitration* test claim, adopted on July 28, 2006, contrary to law?
- Are the test claim statutes subject to article XIII B, section 6 of the California Constitution?
- Do the test claim statutes constitute a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?
- Do the test claim statutes impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

Issue 1: Is the prior final decision on the *Binding Arbitration* test claim, adopted on July 28, 2006, contrary to law?

The *Binding Arbitration* test claim was denied based on the finding that it did not impose a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution. The test claim statutes were found to constitute a "program," since they impose unique requirements on local agencies that do not apply generally to all residents and entities in the state. However, since strikes by public safety personnel are illegal, and no other service to the public could be identified, the test claim statutes were not found to constitute an enhanced service to the public.

Because the claimant requested reimbursement for employee compensation costs in the original test claim, the analysis relied upon case law applicable to that situation, i.e., where reimbursement was sought for employee compensation or other benefit-related costs *alone* and no actual activities had been claimed. However, since the test claim was modified at the hearing to withdraw the request for reimbursement for employee compensation costs, the costs and activities that remain must be re-analyzed as a factual situation that can be distinguished from the situations in the case law originally cited.

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[45] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

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

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

The prior final decision relied upon cases supporting the concept that no higher level of service to the public is provided when there are increased costs for compensation or benefits *alone*. For example, *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, cited in the Statement of Decision, held that even though increased employee benefits may generate a higher quality of local safety officers, the test claim statutes did not constitute a new program or higher level of service; the court stated that "[a] higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public." However, *City of Richmond* was based on test claim statutes that increased the cost for death benefits for local safety members, but did not result in actual mandated activities.

The prior final decision also relied upon *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, which summarized and reaffirmed several previous cases to illustrate what constitutes a "new program or higher level of service." However, none of the older cases cited — i.e., *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, and *City of Richmond v. Commission On State Mandates, et al.* (1998) 64 Cal.App.4th 1190, — denied reimbursement for actual activities imposed on the local agencies. In addition, *San Diego Unified School Dist.* did not address the issue of "new program or higher level of service" in the context of actual activities mandated by test claim statutes which increased the costs of employee compensation or benefits.

Although there is no case law directly on point for the situation where the test claim statutes impose activities that are unique to local government but do not clearly provide a service to the public, prior test claims have allowed reimbursement in such circumstances. Furthermore, since testimony was provided at the hearing that strikes by public safety personnel do occur, albeit in the less obvious form of "blue flu" or by other means, the legislative purpose for the test claim statutes must be reevaluated in the analysis to determine whether the provisions result in an increase in the level or quality of governmental services provided.

Staff finds that the prior final decision for this test claim is contrary to law, and the Statement of Decision should be replaced to reflect the following new analysis and the resulting findings.

Issue 2: Are the test claim statutes subject to article XIII B, section 6 of the California Constitution?

Do the Test Claim Statutes Mandate Any Activities?

In order for a test claim statute or regulation to impose a reimbursable state-mandated program under article XIII B, section 6, the language must mandate an activity or task upon local governmental agencies. If the language does not mandate or require local agencies to perform a task, then article XIII B, section 6 is not triggered.[48]

As amended at the hearing on this test claim, claimant is seeking reimbursement for the following activities: 1) costs for training on the test claim statute; 2) costs for restructuring bargaining units; 3) discovery activities pursuant to Code of Civil Procedure sections 1281.1, 1281.2 and 1299.8; 4) selecting the agency panel member and neutral arbitrator, and briefings; 5) preparing for and consulting with governing board regarding the last best and final offer;

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

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

Training Costs

Staff finds that training agency management, counsel, staff and members of governing bodies regarding binding arbitration is *not required* by the plain language of the test claim statutes. Therefore, these costs are not state-mandated or subject to article XIII B, section 6.

Costs for Restructuring Bargaining Units

Staff finds that the plain language of the test claim statutes *does not require* bargaining units to be restructured. Therefore, any costs associated with such restructuring are not state-mandated or subject to article XIII B, section 6.

Discovery Activities Pursuant to Code of Civil Procedure Sections 1281.1, 1281.2 and 1299.8

When one party refuses to engage in arbitration, section 1281.2 establishes grounds for a court to determine whether there is a legal requirement to engage in arbitration, and to compel arbitration if necessary. Sections 1281.1 and 1299.8 make these provisions applicable to binding arbitration proceedings set forth under the test claim statutes. Staff finds that activities related to discovery, pursuant to these sections, are not required.

Under the test claim statutes, arbitration is compelled when an impasse has been declared and the employee organization initiates arbitration. The only party that would refuse to engage in binding arbitration under this scenario is the local public agency employer, and such a decision to refuse to engage in arbitration is discretionary. Any discovery activities claimed by these provisions would be triggered by that discretionary decision, and thus are not state-mandated or subject to article XIII B, section 6.

Selecting Agency Panel Member and Neutral Arbitrator

Code of Civil Procedure section 1299.4, subdivision (b), states that:

> Within three days after receipt of the written notification [triggering binding arbitration], each party shall designate a person to serve as its member of an arbitration panel. Within five days thereafter, or within additional periods to which they mutually agree, the two members of the arbitration panel appointed by the parties shall designate an impartial person with experience in labor and management dispute resolution to act as chairperson of the arbitration panel.

Subdivision (c) further states:

> In the event that the parties are unable or unwilling to agree upon a third person to serve as chairperson, the two members of the arbitration panel shall jointly request from the American Arbitration Association a list of seven impartial and experienced persons who are familiar with matters of employer-employee relations. The two panel members may as an alternative, jointly request a list of seven names from the California State Mediation and Conciliation Service, or a list from either entity containing more or less than seven names, so long as the number requested is an odd number. If after five days of receipt of the list, the two panel members

> cannot agree on which of the listed persons shall serve as chairperson, they shall, within two days, alternately strike names from the list, with the first panel member to strike names being determined by lot. The last person whose name remains on the list shall be chairperson.

Claimant is seeking reimbursement for: 1) consulting time of negotiators, staff and counsel in selecting the agency panel member; 2) time of the agency negotiators, staff and counsel in vetting and selecting a neutral arbitrator; and 3) time of the agency negotiators, staff and counsel in briefing the agency panel member. Staff finds that the plain language of the test claim statutes requires only that the public agency employer select an agency panel member. The test claim statutes require the arbitration *panel members* selected by the parties, rather than the employer or employee organization, to select the neutral third panel member to act as chairperson. Moreover, nothing in the test claim statutes requires the public agency panel member to be briefed.

Thus the only activity required is the selection of an agency panel member, and, therefore, that activity alone is state-mandated and subject to article XIII B, section 6.

Prepare for and Consult with Governing Board Regarding Last Best Offer of Settlement

Code of Civil Procedure section 1299.6, subdivision (a), requires that, once the arbitration process is triggered, the arbitration panel shall direct that five days prior to the commencement of its hearings the local public agency employer and employee organization shall submit "the last best offer of settlement as to each of the issues within the scope of arbitration … made in bargaining as a proposal or counterproposal and not previously agreed to by the parties prior to any arbitration request …" The test claim statutes *do not*, however, require the local public agency employer to prepare for and consult with the governing board regarding the last best offer of settlement. Thus the only activity required is to *submit* the last best final offer of settlement to the arbitration panel, and, therefore, that activity alone is state-mandated and subject to article XIII B, section 6.

Prepare for and Engage in Negotiations, Mediation and Hearings

The claimant is seeking reimbursement for increased costs associated with collecting and compiling comparability data specified in Code of Civil Procedure section 1299.4, handling two-track negotiations (for economic issues that are subject to arbitration and economic issues that are not subject to arbitration), and preparing for and participating in mediation.

Staff finds that the plain language of the test claim statutes *does not require* the local public agency to collect and compile comparability data in preparation for negotiations, to handle "two-track" negotiations, or to participate in mediation, when such activities occur outside the arbitration process. Therefore, any costs associated with such preparation or negotiations prior to the arbitration process being triggered are not state-mandated or subject to article XIII B, section 6.

However, once the arbitration process is triggered ─ by declaration of the negotiation impasse and the employee organization's request for arbitration ─ the arbitration panel can direct the parties to take various actions. The panel may "meet with the parties or their representatives, either jointly or separately, make inquiries and investigations, hold hearings, and take any other action including further mediation, that the arbitration panel deems appropriate."[49] For the

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

purposes of its hearings, investigations or inquiries, the panel may also "subpoena witnesses, administer oaths, take the testimony of any person, and issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any subject matter before the panel."[50]

Additionally, Code of Civil Procedure section 1299.8 states that, unless otherwise provided in the test claim statutes, the general provisions regarding arbitration found in the Code of Civil Procedure[51] are applicable to binding arbitration proceedings under the test claim statutes. The relevant portions of these general arbitration provisions establish procedures for the conduct of hearings such as notice of hearings, witness lists, admissible evidence, subpoenas, and depositions.[52]

Section 1299.9, subdivision (b), states that, unless otherwise agreed to by the parties, the costs of the arbitration proceeding and the expenses of the arbitration panel, *except those of the employer representative*, shall be borne by the employee organization. Thus, the public agency employer is responsible for costs of its agency panel member, but not the cost of the proceeding or the other panel members.

Claimant is seeking reimbursement for the following remaining activities:

1. time of the agency negotiators, staff and counsel in preparing for the arbitration hearing;
2. time of the agency negotiators, staff and counsel in vetting, selecting and preparing expert witnesses;
3. time of the agency panel member and attorney in pre-arbitration meetings of the panel;
4. staff, attorney, witness and agency panel member time for the hearings;
5. agency panel member time in consulting in closed sessions with the panel;
6. attorney time in preparing the closing brief;
7. time of the attorney, negotiators, and staff in consulting with the agency panel member prior to the issuance of the award;
8. time of the attorney, negotiators, staff, agency panel member, and governing board consulting regarding the award and giving directions to agency negotiators; and
9. time of the agency negotiators to negotiate with the union's negotiating representatives based on the award.

Once arbitration is triggered under Code of Civil Procedure section 1299.4, the arbitration panel, within the scope of its authority, may direct the parties to perform specified activities. Since the arbitration proceeding, once triggered, is mandatory, staff finds that the activities directed by the arbitration panel or activities initiated by the local public agency employer to participate in arbitration, are not discretionary. As noted above, the arbitration panel's authority includes meeting with the parties or their representatives, making inquiries and investigations, holding hearings, and taking any other action including further mediation, that the arbitration panel

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

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

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

deems appropriate,[53] as well as subpoenaing witnesses, administering oaths, taking the testimony of any person, and issuing subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any subject matter before the panel.[54]

The plain language of the test claim statutes does not require the local public agency, or its staff or governing board, to prepare for hearings, prepare expert witnesses, prepare a closing brief, consult with its panel member prior to issuance of the award, or negotiate with the employee organization representatives based on the award. Further, the plain language of the test claim statutes does not require the employer's arbitration panel member to participate in pre-arbitration meetings with local agency staff, consult with local agency staff prior to issuance of the award, consult in closed session with the arbitration panel, or consult with local agency staff and the governing board regarding the award. However, to the extent that any of the above activities are directed by the arbitration panel within the scope of its authority, the activity is state-mandated.

Thus, once arbitration is triggered under Code of Civil Procedure section 1299.4, only the following activities*, to participate in the arbitration process or as required by the arbitration panel*, are state-mandated and subject to article XIII B, section 6:

1. Meet with the arbitration panel (Code Civ. Proc. § 1299.5, subd. (a)).
2. Cooperate in inquiries or investigations (Code Civ. Proc. § 1299.5, subd. (a)).
3. Participate in mediation (Code Civ. Proc. § 1299.5, subd. (a)).
4. Participate in hearings (Code Civ. Proc. § 1299.5, subd. (a)).
5. Respond to subpoenas and subpoenas duces tecum (Code Civ. Proc. § 1299.5, subd. (b)).
6. Respond to or make demands for witness lists and/or documents (Code Civ. Proc. § 1282.2, subd. (a)(2)).
7. Make application and respond to deposition requests (Code Civ. Proc. §§ 1283, 1283.05).
8. Conduct discovery or respond to discovery requests (Code Civ. Proc. § 1283.05).

Costs of Litigating Interpretation of the Test Claim Statutes

Claimant is seeking "[c]osts of inevitable litigation regarding the interpretation of critical provisions of the law which are ambiguous," including the fact that the act covers "all other forms of remuneration," and covers employees performing "any related duties" to firefighting and investigating. Staff finds that litigating any aspect of the test claim statutes is *not required* by the plain language of the test claim statutes. Therefore, these costs are not state-mandated or subject to article XIII B, section 6.

Summary of State-Mandated Activities

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

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

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

1. Selecting an arbitration panel member (Code Civ. Proc. § 1299.4, subd. (b)).
2. Submitting the last best final offer of settlement to the arbitration panel (Code Civ. Proc. § 1299.4, subd. (b)).
3. Once arbitration is triggered under Code of Civil Procedure section 1299.4, the following activities required by the arbitration panel or to participate in the arbitration process:
    a. Meet with the arbitration panel (Code Civ. Proc. § 1299.5, subd. (a)).
    b. Participate in inquiries or investigations (Code Civ. Proc. § 1299.5, subd. (a)).
    c. Participate in mediation (Code Civ. Proc. § 1299.5, subd. (a)).
    d. Participate in hearings (Code Civ. Proc. § 1299.5, subd. (a)).
    e. Respond to subpoenas and subpoenas duces tecum (Code Civ. Proc. § 1299.5, subd. (b)).
    f. Respond to or make demands for witness lists and/or documents (Code Civ. Proc. § 1282.2, subd. (a)(2)).
    g. Make application and respond to deposition requests (Code Civ. Proc. §§ 1283, 1283.05).
    h. Conduct discovery or respond to discovery requests (Code Civ. Proc. § 1283.05).

These activities are only state-mandated for the time period in which the test claim statutes were presumed constitutional, January 1, 2001 through April 21, 2003.

Do the Mandated Activities Constitute a Program?

The courts have held that the term "program" within the meaning of article XIII B, section 6 means a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[55] Only one of these tests must be met in order to find that the test claim statutes constitute a "program."

Here, the test claim statutes establish new binding arbitration activities for local public agency employers who employ peace officers and firefighters. The Department of Finance asserts that the costs alleged do not stem from the performance of a requirement unique to local government. Staff disagrees with the Department, since the test claim statutes are *only* applicable to local public agency employers who employ peace officers and firefighters, and there is no other requirement statewide for employers to engage in binding arbitration with employee organizations. Hence the test claim statutes do not apply generally to all residents and entities in the state.

Moreover, based on the plain language of the test claim statutes, the Legislature's intent in enacting the statutes was to "protect the health and welfare of the public by providing impasse remedies necessary to afford public employers the opportunity to safely alleviate the effects of labor strife that would otherwise lead to strikes by firefighters and law enforcement officers."[56]

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

[56] Code of Civil Procedure section 1299.

Although strikes by law enforcement officers and firefighters are illegal, there is evidence in the record indicating that such strikes nevertheless occur.[57] Thus, the intent of these statutes is to prevent strikes by local safety officers thereby providing a service to the public.

Therefore, staff finds that the activities mandated by the test claim statutes constitute a "program," within the meaning of article XIII B, section 6, under either of the tests set forth in *County of Los Angeles.*

Issue 3: Do the test claim statutes constitute a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?

A test claim statute or executive order imposes a "new program or higher level of service" when the mandated activities: a) are new in comparison with the pre-existing scheme; and b) result in an increase in the actual level or quality of governmental services provided by the local public agency.[58] The first step in making this determination is to compare the mandated activities with the legal requirements in effect immediately before the enactment of the test claim statute and regulations.

Prior to the enactment of the test claim statutes, local public agency employers were required to meet and confer in good faith with recognized employee organizations under the Meyers-Milias-Brown Act. The test claim statutes added new state-mandated activities relating to binding arbitration. Thus, the program is new in comparison with the pre-existing scheme.

Because the Legislature's intent in enacting test claim statutes was to prevent strikes by local firefighters and peace officers, and the statutes require local public agencies that employ these local safety officers to engage in new activities to prevent such strikes, the statutes result in an increase in the actual level or quality of services provided by the local public agency.

Therefore, staff finds that the activities mandated by the test claim statutes constitute a "new program or higher level of service" within the meaning of article XIII B, section 6.

Issue 4: Do the test claim statutes impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

For the test claim statutes to impose a reimbursable, state-mandated program, the new activities must impose costs mandated by the state pursuant to Government Code section 17514. Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service.

The claimant stated in the test claim that "[t]he activities necessary to comply with the mandated activities cost well in excess of $200.00 per year …"[59] Thus, the claimant initially provided

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

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

[59] At the time the test claim was filed, Government Code section 17564, subdivision (a), stated that the no test claim or reimbursement claim shall be made unless the claim exceeds $200. That

evidence in the record, signed under penalty of perjury, that there would be increased costs as a result of the test claim statutes. However, new evidence was provided at the Commission hearing for this test claim, under oath, that the claimant did not get to a stage in negotiations where binding arbitration was triggered. [60] Since no activities are reimbursable prior to the point at which binding arbitration is triggered under Code of Civil Procedure section 1299.4, claimant did not in fact incur any costs mandated by the state to comply with the mandated activities during the limited reimbursement period in question (January 1, 2001 through April 21, 2003).

Therefore, staff finds that the activities mandated by the test claim statutes *do not* impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Conclusion

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

Recommendation

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

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section was subsequently modified in Statutes 2002, chapter 1124, to increase the minimum to $1,000. If this test claim is approved, any reimbursement claims must exceed $1,000.

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