

ITEM 6
INCORRECT REDUCTION CLAIM
PROPOSED DECISION

Government Code Sections 3540-3549.1

Statutes 1975, Chapter 961; Statutes 1991, Chapter 1213

Collective Bargaining and Collective Bargaining Agreement Disclosure

Fiscal Years 1999-2000, 2000-2001, and 2001-2002

05-4425-I-09

San Mateo Community College District, Claimant

EXECUTIVE SUMMARY

Overview

This incorrect reduction claim (IRC) challenges the State Controller's Office (Controller) audit reductions to the San Mateo Community College District's (claimant) reimbursement claims for costs incurred in fiscal years 1999-2000, 2000-2001, and 2001-2002 for the *Collective Bargaining and Collective Bargaining Agreement Disclosure* program. The following issues are in dispute:

- Whether the statutory deadline for the audit of the 1999-2000 reimbursement claim was met.
- Reduction in Finding 1 of the Audit Report of \$631,854 (plus related indirect costs) for salaries and benefits due to the Controller's findings of insufficient documentation supporting the hours claimed.
- Reduction in Finding 1 of the Audit Report of \$6,168 (plus indirect costs) for the claimant's calculation of productive hourly rates, which the Controller states included salary data that conflicts with the claimant's employee earnings reports and that incorrectly deducted break time for some employees.
- Reduction in Finding 2 of the Audit Report of \$5,133 (plus related indirect costs) for materials and supplies due to the Controller's finding of insufficient documentation.

Collective Bargaining and Collective Bargaining Agreement Program

On July 17, 1978, the Board of Control, predecessor to the Commission on State Mandates (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 amended on January 27, 2000.

At the time the reimbursement claims at issue were prepared and submitted to the Controller, the applicable parameters and guidelines were those adopted on January 27, 2000. These parameters and guidelines authorize reimbursement for compliance with sections 3540 through 3549.1 of the Government Code, and "regulations promulgated by the Public Employment Relations Board." The parameters and guidelines divide the reimbursable activities into seven components: (1)

determination of appropriate bargaining units for representation and determining the exclusive representation and representatives; (2) elections and decertification elections of unit representatives if the Public Employment Relations Board determines that a representation question exists and orders an election; (3) negotiations, as specified; (4) impasse proceedings and mediation; (5) collective bargaining agreement disclosure; (6) contract administration and adjudication of contract disputes, including grievances; (7) unfair labor practice adjudication process and public notice complaints.¹

Procedural History

Claimant signed the reimbursement claim for fiscal year 1999-2000 on January 10, 2001,² and the fiscal year 2000-2001 and 2001-2002 claims on January 10, 2002 and January 15, 2003,³ respectively. The Controller contacted the district regarding the audit on April 15, 2003⁴ and held an audit entrance conference on April 28, 2003.⁵ The Controller issued a revised draft audit report on April 21, 2004.⁶ Claimant submitted comments on the draft audit report on May 12, 2004.⁷ The Controller issued the final audit report on August 6, 2004.⁸ Claimant filed this IRC on September 6, 2005.⁹ Commission staff requested that the Controller submit additional information on August 29, 2014. The Controller requested an extension of time to submit additional information on September 18, 2014. The Controller filed a late response to the request for additional information on October 7, 2014.¹⁰

On May 27, 2015, Commission staff issued the draft proposed decision.¹¹ On June 12, 2015, claimant filed comments on the draft proposed decision.¹² On June 15, 2015, the Controller filed

¹ Exhibit A, IRC, pages 29-35.

² Exhibit A, IRC, page 79.

³ Exhibit A, pages 122 and 160.

⁴ Exhibit B, Controller's comments on the IRC, page 25 and tab 18, page 207.

⁵ Exhibit B, Controller's comments on the IRC, pages 6 and 23.

⁶ Exhibit A, IRC, page 57.

⁷ Exhibit A, IRC, pages 57 and 66-70.

⁸ Exhibit A, IRC, page 51.

⁹ Exhibit A, IRC.

¹⁰ Exhibit B, Controller's comments on the IRC. Note that pursuant to Government Code section 17553(d) "the Controller shall have no more than 90 days after the claim is delivered or mailed to file any rebuttal to an incorrect reduction claim. The failure of the Controller to file a rebuttal to an incorrect reduction claim shall not serve to delay the consideration of the claim by the Commission." However, in this instance, due to the backlog of IRCs, these late comments have not delayed consideration of this item and so have been included in the analysis and proposed decision.

¹¹ Exhibit C, draft proposed decision.

¹² Exhibit D, claimant comments on the draft proposed decision.

a request to postpone the hearing from July 24, 2015 to September 25, 2015, and requested an extension of time from June 17, 2015 to July 17, 2015 to file comments on the draft proposed decision which were approved for good cause. On July 17, 2015, the Controller requested another extension, until August 7, 2015, to file comments on the draft proposed decision which was approved for good cause. The Controller filed late comments on the draft proposed decision on August 10, 2015.¹³

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 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 6.¹⁴ 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."¹⁵

With regard to the Controller's audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support.¹⁶ This standard is similar to the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.¹⁷

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 claimant.¹⁸ In addition, sections

¹³ Exhibit E, Controller's comments on the draft proposed decision.

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

¹⁵ *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.

¹⁶ *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

¹⁷ *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.

¹⁸ *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

1185.1(f)(3) and 1185.2(c) of the Commission’s regulations require 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.¹⁹

Claims

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

Issue	Description	Staff Recommendation
Whether the audit of the fiscal year 1999-2000 claim is barred by the deadline in Government Code Section 17558.5.	Claimant asserts that the claim for fiscal year 1999-2000 was beyond the statute of limitations when the Controller issued its final audit report on August 6, 2004. Claimant argues that the 1999-2000 claim was subject to audit no later than December 31, 2003 (based on the claim filing date of January 10, 2001), and that the Controller was required to <i>complete</i> the audit within the two-year deadline for IRCs.	<i>The 1999-2000 audit was timely</i> - The plain language of Government Code section 17558.5 does not require the Controller to “complete” the audit within a specified time, but says that reimbursement claims are “subject to audit” within two years after the end of the calendar year in which the reimbursement claim was filed. The phrase “subject to audit” puts a claimant on notice that an audit may occur, but does not require audit completion. The reimbursement claim was filed in January 2001, so the audit had to be initiated by December 31, 2003. The audit was initiated in April 2003, within the statutory deadline, and was timely. Staff also finds that the audit was completed in a timely manner, on August 6, 2004, within 16 months of initiation.

¹⁹ Government Code section 17559(b): [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.”

<p>Reduction of \$631,854 in salary and benefit costs claimed under G3 and G6 of the parameters and guidelines because claimant did not provide adequate source documentation (Finding 1 of the Audit Report).</p>	<p>Components G3 and G6 of the parameters and guidelines list reimbursable activities in the <i>Collective Bargaining and Collective Bargaining Agreement Disclosure</i> program, e.g., negotiations. Section H3 requires claimants to submit documentation showing the classification of the employees involved, the amount of time spent on the mandated activities, and the employees' hourly rate, and requires the worksheet used to compute the hourly rate to be submitted with the claim.</p>	<p><i>Incorrect</i> - The parameters and guidelines, last amended in January 2000, govern this IRC and, as interpreted by the court in <i>Clovis Unified School Dist.</i>, these parameters and guidelines require claimants to “[s]upply workload data requested ... to support the level of costs claimed” and “[s]how the classification of the employees involved, amount of time spent, and their hourly rate;” <i>nothing is said about “source documents.”</i>²⁰ The claimant complied with these parameters and guidelines requirements by filing what the Controller calls “summary schedules” and a declaration from an employee, but the Controller reduced all costs claimed. Although the Controller has the authority to audit the records of a claimant, the Controller’s source document rule to support the costs claimed, when not adopted through the regulatory process in the parameters and guidelines or the Controller’s regulatory authority, is incorrect as a matter of law pursuant to <i>Clovis Unified School District</i> and <i>Union American Physicians and Dentists v. Kizer (the Director of the Department of Health Services), et al.</i>²¹ Therefore,</p>
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²⁰ *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 807. Emphasis added.

²¹ *Union American Physicians and Dentists v. Kizer (the Director of the Department of Health Services), et al* (1990) 223 Cal.App.3d 490, 506.

		this reduction is incorrect as a matter of law.
Reduction of \$6,168 for the claimant's alleged miscalculation of productive hourly rates based on employee earnings records that conflict with salaries claimed and an alleged deduction of break time from productive hours (Finding 1 of the Audit Report).	<p>The Controller found that claimant had over-reported salary information for one employee for 1999-2000, three employees for 2000-2001, and four employees for 2001-2002. The Controller submitted evidence to support reductions of costs claimed for some employees. In addition, the Controller alleges that the claimant deducted break time from annual productive hours.</p> <p>The parameters and guidelines, in Section H3, require claimants to identify the hourly rate for each employee and to submit a worksheet used to compute the hourly rate with the claim.</p>	<p><i>Partially Correct</i> – The adjustment of productive hourly rates based on the salaries identified in claimant's employee earnings records is supported by evidence in the record for all employees except employee Rivera, and therefore, the adjustment, to the extent supported, is not arbitrary, capricious, or entirely lacking in evidentiary support. However, the salary and benefit reduction for employee J. Rivera is arbitrary, capricious, or entirely lacking in evidentiary support and should be reinstated to the claimant.</p> <p>In addition, the reduction of productive hours based on claimant's alleged deduction of break time is not supported by the evidence in the record and is, therefore, arbitrary, capricious, and entirely lacking in evidentiary support. The Controller should reinstate the reduction for productive hours.</p>
Reduction of \$5,133 for materials and supplies based on lack of supporting documentation (Finding 2 of the Audit Report).	The Controller reduced costs claimed for materials and supplies because the claimant did not provide source documentation to support costs of materials and supplies, printing, and postage in fiscal years 1999-2000 and	<i>Incorrect</i> - There is no language in the parameters and guidelines for this program, as interpreted by the court in <i>Clovis Unified School Dist.</i> , requiring claimants to provide source documentation to support a claim of

	2000-2001.	reimbursement for materials and supplies. ²² The claimant complied with the parameters and guidelines. Although the Controller has the authority to audit the records of a claimant, the Controller's source document rule to support the costs claimed, when such a rule has not been adopted through the regulatory process in the parameters and guidelines or through the Controller's own regulatory authority, is incorrect as a matter of law pursuant to <i>Clovis Unified School District and Union American Physicians and Dentists v. Kizer (the Director of the Department of Health Services), et al.</i> ^{23 24} Therefore, this reduction is incorrect as a matter of law.
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Staff Analysis

A. The Audit of the Fiscal Year 1999-2000 Claim Is Not Barred by the Deadlines in Government Code Section 17558.5.

The claimant alleges that the Controller did not complete the audit of the reimbursement claim filed for fiscal year 1999-2000 within the applicable deadlines so that the audit adjustments for that fiscal year are barred.²⁵ Claimant argues that the phrase "subject to audit" requires the Controller "to complete" the audit no later than two years after the end of the calendar year in which the claim is filed.²⁶ According to claimant, its 1999-2000 claim was mailed to the Controller on January 10, 2001, so the claim was subject to audit no later than December 31,

²² *Clovis Unified School Dist., supra*, 188 Cal.App.4th 794, 807.

²³ *Union American Physicians and Dentists v. Kizer (the Director of the Department of Health Services), et al* (1990) 223 Cal.App.3d 490.

²⁴ *Clovis Unified School Dist., supra*, 188 Cal.App.4th 794, 807.

²⁵ Exhibit A, IRC, pages 15-20.

²⁶ Exhibit A, IRC, pages 17-20.

2003.²⁷ The audit was initiated no later than April 28, 2003, the date of the entrance conference. The Controller's final audit report was issued on August 6, 2004.

At the time the reimbursement claims were filed, they were "subject to audit," pursuant to the 1996 version of section 17558.5, "no later than two years after the end of the calendar year that the reimbursement claim is filed or last amended." The phrase "subject to audit" does not require the completion of the audit, but sets a time during which a claimant is on notice that an audit of a claim may occur. This interpretation is also consistent with the Legislature's 2002 amendment to Government Code section 17558.5, clarifying that "subject to audit" means "subject to the initiation of an audit." In this case, the reimbursement claim filed for 1999-2000 was subject to audit at any time before December 31, 2003. Since the audit began in April 2003, staff finds that it was timely initiated.

Staff further finds that the audit was timely completed. Before Government Code section 17558.5 was amended effective January 1, 2005, there was no statutory deadline for the completion of an audit. Under common law principles, however, the Controller had to complete an audit within a reasonable period of time after it was initiated. In this case, the audit was completed when the final audit report was issued on August 6, 2004, less than 16 months after the audit was initiated. During that 16 month period of time, the record shows that the parties continued to correspond and discuss the audit adjustments. Therefore, there is no evidence of an unreasonable delay in the completion of the audit.

This interpretation of Government Code section 17558.5 was recently upheld by the Sacramento County Superior Court in *Clovis Unified School Dist. v. Commission on State Mandates*, in a case challenging the Commission's decision on an IRC for the *Graduation Requirements* mandate. The court held that the version of Government Code section 17558.5 that is applicable in this case does not require an audit to be completed within two years from the date the claim was filed, as also alleged here, but the Controller does not have an unlimited window to audit a claim. Rather, the Controller is required to "diligently prosecute" the audit. Such a determination must be based on substantial evidence in the record.²⁸ The *Clovis* case was not appealed and, thus, is the final decision addressing the merits of the issue presented here. The Commission, under principles of stare decisis, is required to apply the interpretation of section 17558.5 as set forth by the court.²⁹

B. The Controller's Reduction in Finding 1 of the Audit Report Based on Lack of Documentation for Salaries and Benefits Is Incorrect as a Matter of Law. But the Reduction Based on Claimant's Calculation of Productive Hourly Rates Is, Except for One Employee for Certain Years, Supported by Evidence in the Record.

²⁷ Exhibit A, IRC, page 17.

²⁸ Exhibit F, *Clovis Unified School Dist. v. Commission on State Mandates*, Sacramento County Superior Court, March 24, 2015, No. 34-2014-80001931, page 13; Government Code section 17559.

²⁹ *Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 596.

1. *The Controller's reduction of salary and benefit costs claimed under components G3 and G6 of the parameters and guidelines because it found that claimant did not provide adequate supporting documentation is incorrect as a matter of law.*

- a) The requirements for claiming salaries and benefits under the *Collective Bargaining* program are contained in the parameters and guidelines, which "say nothing about source documents."³⁰ Therefore, the Controller may not reduce reimbursement claims for the *Collective Bargaining* program for fiscal years 1999-2002 because the claimant failed to provide source documents.

The Controller reduced salary and benefit costs claimed during the audit period for collective bargaining negotiations, component G3 of the reimbursable activities, by \$599,399, finding that claimant did not provide adequate supporting documentation to verify the time spent by employees during "at-the table" negotiations and for negotiation planning and preparation sessions, or for American Federation of Teachers (AFT) release time for bargaining unit representatives participating in the negotiation sessions. The Controller also reduced \$32,455 in salary and benefit costs claimed during the audit period under component G6, for grievance resolution and training, because the claimant did not provide supporting documentation.

The parties agree that the parameters and guidelines for the *Collective Bargaining and Collective Bargaining Agreement Disclosure* program, amended by the Commission on January 27, 2000, apply to these reimbursement claims.³¹ This version of the parameters and guidelines lists the reimbursable activities in Section G (Claim Components). Component G3 identifies the costs eligible for reimbursement for negotiations, which include salary and benefit costs for employer representatives participating in negotiations and negotiation planning sessions, and substitutes for release time of bargaining unit representatives during negotiations. Section G3(f) further states that "[a] list showing the dates of all negotiation sessions held during the fiscal year being claimed must be submitted."³² Component G6 identifies the costs eligible for reimbursement for contract administration, adjudication of contract disputes either by arbitration or litigation, including grievance resolution, and a reasonable number of training sessions for supervisory and management personnel on contract administration and interpretation.³³

Claims for employee salary and benefit costs must comply with section H3 of the parameters and guidelines, which requires claimants to show the classification of the employees involved, the amount of time spent on the mandated activities, and the employees' hourly rate and to submit the worksheet used to compute the hourly salary rate with the claim.³⁴ Section H1 also requires claimants to "supply workload data as requested as part of the description to support the level of costs claimed."³⁵

³⁰ *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 807.

³¹ Exhibit A, IRC, pages 7, 26-37; Exhibit B, Controller's comments on IRC, page 10.

³² Exhibit A, IRC, page 31.

³³ Exhibit A, IRC, pages 33-34.

³⁴ Exhibit A, IRC, page 36.

³⁵ Exhibit A, IRC, page 35.

In 2010, the Third District Court of Appeal, in *Clovis Unified School District v. Chiang*, reviewed the documentation requirements for claiming salary and benefit costs under four state-mandated programs, including the *Collective Bargaining* program at issue in this IRC. The case stemmed from a challenge by community college and school districts to the Controller's audit rule contained in claiming instructions, which required claimants to provide contemporaneous source documents to support the costs claimed in fiscal years 1998-2003 (which overlaps the fiscal years of the 1999-2002 reimbursement claims in this IRC). Contemporaneous source documents are created at or near the time the actual cost was incurred and do not include declarations, certifications, or documents supporting average time accountings.³⁶ The court held that the Controller's claiming instructions were "non-regulatory," and that the contemporaneous source document rule contained in the claiming instructions was an invalid underground regulation that was not adopted in accordance with the Administrative Procedures Act (APA); there was no notice or opportunity to comment on the rule; and the rule was not reviewed by the Office of Administrative Law as required by the APA. Thus, the Controller was barred from reducing a claim on the basis that the claimant did not comply with the rule.³⁷

In its analysis, the court compared the parameters and guidelines for the *Collective Bargaining* program at issue in this IRC to the Controller's revised claiming instructions issued in September 2003, which contained the contemporaneous source document rule.³⁸ The court determined that the parameters and guidelines for the *Collective Bargaining* program "least resemble" the claiming instructions because they do not require claimants to provide any "source documents," contemporaneous or otherwise, but simply require claimants to "supply workload data requested to support the level of costs claimed" and "show the classification of the employees involved, amount of time spent, and their hourly rate of pay."³⁹

The claiming instructions for this program, however, do require claimants to provide source documents to show the employee's actual time spent on the mandate. According to the claimant and the Controller, the April 2000 claiming instructions "are believed to be, for purposes and scope of this incorrect reduction claim, substantially similar to the version extant at the time the claims which are the subject of this incorrect reduction claim were filed."⁴⁰ The April 2000 claiming instructions require claimants to provide source documents, which may include employee time records.⁴¹

The claiming instructions issued by the State Controller in September 2000 may also be relevant since they were issued when costs were incurred and before the fiscal year 1999-2000 reimbursement claim was filed in this case. These similarly require the claimant to provide source documents, but identify a longer list of the types of source documents that may be

³⁶ *Clovis, supra*, 188 Cal.App.4th 794, 802-803.

³⁷ *Id.*, page 807.

³⁸ *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 802.

³⁹ *Id.*, page 807 (Emphasis added).

⁴⁰ Exhibit A, IRC, page 9; Exhibit B, Controller's comments on IRC, page 11. The April 2000 claiming instructions are in Exhibit A, IRC, pages 38-48.

⁴¹ Exhibit A, IRC, page 47.

provided. They include “time sheets, payroll records, canceled payroll warrants, organization charts, duty statements, pay rate schedules, and other documents evidencing the expenditure.”⁴²

As stated earlier, however, the court in the *Clovis* case specifically determined that the Controller’s claiming instructions are non-regulatory, and that any source document rule in the claiming instructions that is not in the parameters and guidelines or that did not go through the regulatory process required by the APA, but was used by the Controller in an audit to reduce costs, invalidates the audit to the extent the Controller used the rule to reduce costs.⁴³ The APA requires public notice of the proposed rules with a statement of reasons, an opportunity to comment, the state agency’s response to the comments, and review by OAL for consistency with the law, clarity, and necessity.⁴⁴ The purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation, as well as notice of the law’s requirements so that they can conform their conduct accordingly.⁴⁵

Despite the court’s holding in *Clovis* and the fact that the parameter and guidelines in this case, which are regulatory in nature, do not require source documents to be provided to support a reimbursement claim, the Controller contends that claimants still have the burden of providing “supporting evidence” (in addition to the requirement to provide tables or worksheets that accompanied the reimbursement claim) to verify the costs claimed. The Controller argues that it has the authority to reduce claims if this evidence is not provided.⁴⁶ The Controller states that Government Code section 17561(d)(2)(A)(1), which provides that the Controller may audit the records of any local agency or school district to verify the actual amount of the mandated costs, and the Controller’s constitutional authority to audit claims filed against the Treasury,⁴⁷ support this conclusion. The Controller further argues that the Commission’s parameters and guidelines only deal with the requirements to file a claim, and do not define the scope of a subsequent audit.⁴⁸

Staff disagrees with the Controller’s interpretation of the law. There is no question that the Controller has the constitutional and statutory authority to audit reimbursement claims, and to “look” at the records of the claimant to the extent that records exist. However, the Controller may not require claimants to provide source documents that were never required by either the parameters and guidelines or a duly adopted regulation to be created or kept in the first place and that do not exist.

⁴² Exhibit F, Office of the State Controller, Mandated Cost Manual for School Districts, September 29, 2000, page 53 (claiming instructions for *Collective Bargaining*).

⁴³ *Clovis Unified School District*, *supra*, 188 Cal.App.4th 794, 799, 805.

⁴⁴ Government Code sections 11346, et seq.

⁴⁵ *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 570.

⁴⁶ Exhibit E, Controller’s comments on the draft proposed decision.

⁴⁷ California Constitution, article XVI, section 7, which provides that “[m]oney may be drawn from the Treasury only through an appropriation made by law and upon a Controller’s duly drawn warrant.” See also, 71 Opinions of the California Attorney General 275, 279.

⁴⁸ Exhibit E, Controller’s comments on the draft proposed decision, page 2.

This conclusion is further supported by the Second District Court of Appeal’s decision in *Union American Physicians and Dentists v. Kizer (the Director of the Department of Health Services), et al.*⁴⁹ In that case, an association of health care providers sued the California Department of Health Services challenging the Department’s use of statistical sampling and extrapolation in connection with Medi-Cal audits and its documentation requirements contained in Medi-Cal bulletins and provider manuals, as invalid underground regulations.⁵⁰ The documentation requirements were imposed for six recognized levels of service performed in office visits. The Department used the documentation requirements as part of its “written criteria” for evaluating whether “a provider’s progress notes satisfy the appropriateness and quality of medical services requirements.”⁵¹ Where the provider’s records did not comport with the documentation requirements, the Department invalidated the charges and sought to recover the amounts overpaid.⁵² Like the Controller in this case, the Department argued that it was not required to adopt regulations to codify the documentation requirements “because the Department had authority under state and federal law” to require documents without adopting formal regulations.⁵³ The court disagreed with the Department, and held that the APA prohibits state agencies from utilizing “any rule” which is a regulation, as defined in the Government Code, unless the rule has been duly adopted as a regulation. A regulation is defined in Government Code section 11342(b) as “every rule, regulation, order, or standard of general application ...adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency.”⁵⁴ The court held that the documentation rules imposed by the Department were standards of general application to Medi-Cal providers statewide, which interpreted or made specific the law enforced by the Department.⁵⁵ Accordingly, the court found that the documentation requirements in the bulletins and manuals were invalid underground regulations.⁵⁶

The parameters and guidelines in this case do not contain source documentation requirements, and there is no evidence that such language was proposed for inclusion in them. The parameters and guidelines are final and binding.⁵⁷ In 2010, the Commission amended the parameters and guidelines for the *Collective Bargaining* program at the request of the Controller to require claimants to provide contemporaneous source documentation to support the costs claimed

⁴⁹ (1990) 223 Cal.App.3d 490.

⁵⁰ *Id.*, page 495.

⁵¹ *Id.*, page 501.

⁵² *Id.*, page 495.

⁵³ *Id.*, page 502.

⁵⁴ *Id.*, page 496-497.

⁵⁵ *Id.*, page 501.

⁵⁶ *Id.*, page 506.

⁵⁷ *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

beginning July 1, 2005. Those amended parameters and guidelines, however, cannot be applied retroactively to the 1999-2000, 2000-2001, and 2001-2002 reimbursement claims at issue here because doing so would result in an unlawful retroactive application of the law.⁵⁸

Accordingly, the Controller may not reduce reimbursement claims for the *Collective Bargaining* program in fiscal years 1999-2000, 2000-2001, and 2001-2002, on the ground that the claimant failed to provide source documents (such as activity log sheets, meeting sign-in sheets, time records, and employee declarations or certifications) to support claims for salary and benefits. Claimants need only comply with the parameters and guidelines and “[s]upply workload data requested ... to support the level of costs claimed” and “[s]how the classification of the employees involved, amount of time spent, and their hourly rate”; nothing is said about “source documents.”

b) The reduction of salary and benefit costs claimed under components G3 and G6 of the parameters and guidelines is incorrect as a matter of law.

Claimant, for all fiscal years at issue, sought reimbursement for salary and benefits under components G3 and G6, by submitting what the Controller calls “summary schedules”⁵⁹ with its reimbursement claims. These schedules show that the claimant complied with the documentation requirements in section H3 of the parameters and guidelines that requires showing “the classification of the employees involved, amount of time spent, and their hourly rate.”⁶⁰

In addition, in response to the draft audit report, the claimant explains that three, three-year contracts were negotiated during the claim period, and yet the Controller reduced all costs claimed. The claimant further states that 100 percent of the claimant’s Assistant Chancellor Greg Marvel’s time during the claim period was spent on this program.⁶¹ Mr. Marvel was an “Assistant Chancellor,” in charge of “Employee Relations and Human Resources.” Claimant provides a declaration from the Chancellor and Superintendent of San Mateo County Community College District, Ron Galatolo, who was Mr. Marvel’s supervisor, to certify the duty statement of Mr. Marvel during the claim period, which is attached.⁶² The duty statement states that the Mr. Marvel was “responsible to the Chancellor-Superintendent for collective bargaining, grievance administration, bargaining unit contract interpretation,” and that he served as the District’s chief negotiator responsible “for developing negotiation proposals, strategies, grievance resolutions and related research as liaison to the Board of Trustees.”⁶³ The claimant’s

⁵⁸ *City of Modesto v. National Med, Inc.* (2005) 128 Cal.App.4th 518, 527; *Department of Health Services v. Fontes* (1985) 169 Cal.App.3d 301, 304-305; *Tapia v. Superior Court* (1991) 53 Cal.3d 282; 287-292; *Murphy v. City of Alameda* (1993) 11 Cal.App.4th 906, 911-912.

⁵⁹ Exhibit B, Controller’s comments on the IRC, page 14.

⁶⁰ See Exhibit A, IRC, pages 93-117 for 1999-2000, 134-157 for 2000-2001, and 173-205 for 2001-2002.

⁶¹ Exhibit A, IRC, page 66-67.

⁶² Exhibit A, IRC, pages 68-70.

⁶³ Exhibit A, IRC, page 69.

response to the draft audit report further states that it claimed release time for AFT members as mandated by a Public Employment Relations Board (PERB) ruling.

The Controller, however, reduced the costs claimed for “unsupported salaries and benefits” by \$631,854 (plus related indirect costs) because it found that the claimant “*did not provide source documents to validate employees’ hours charged, such as individual activity log sheets, meeting sign-in sheets, and time records.*”⁶⁴

As discussed above, the Controller may not reduce reimbursement claims for the *Collective Bargaining* program in fiscal years 1999-2000, 2000-2001, and 2001-2002 because the claimant failed to provide source documents (such as activity log sheets, meeting sign-in sheets, time records, and employee declarations or certifications) to support claims for salary and benefits without going through a regulatory process.

Accordingly, staff finds that the Controller’s reduction in Finding 1 of the Audit Report of claimed costs under components G3 and G6 of the parameters and guidelines for salaries and benefits because supporting source documentation was not provided is incorrect as a matter of law and the \$631,854 (plus related indirect costs) reduced should be reinstated to the claimant.

2. *The Controller’s reduction of \$6,168 based on the claimant’s alleged miscalculation of productive hourly rates is partially correct to the extent supported by evidence in the record.*

The Controller reduced claimed salaries and benefits by \$6,168 because the claimant was found to have used an incorrect productive hourly rate based on employee earnings records that conflicted with the salaries claimed, and a calculation of productive hours that allegedly deducted break time taken by employees.⁶⁵ Staff finds that these reductions are partially correct, to the extent they are supported by evidence in the record.

- a) The reduction for claimed salaries that conflict with the claimant’s earnings records is supported by evidence in the record for all employees except Rivera for 1999-2000 and 2001-2002.

The Controller traced the salary rates claimed for all of the employees included in the audit sample to claimant’s employee earnings records. Although the court in *Clovis* concluded that the parameters and guidelines do not require the claimant to provide source documents, such as payroll records,⁶⁶ the Controller alleges that the payroll records support a different salary for some of the claimed employees. The Controller found, based on its review of the claimant’s records, that claimant over-reported salaries and then reduced the costs claimed accordingly.

To support these reductions, the Controller submitted what appears to be the claimant’s employee earnings reports (the district name does not appear on the documents) showing different salaries than those claimed for employees for fiscal year 2000-2001 (Harer, Pontacq,

⁶⁴ Exhibit A, IRC, page 60. (Emphasis added.)

⁶⁵ Exhibit A, IRC, page 60.

⁶⁶ *Clovis Unified School District*, *supra*, 188 Cal.App.4th 794, 802-803.

and Rivera),⁶⁷ and for fiscal year 2001-2002 (Thiele and Clinton).⁶⁸ However, the Controller provides no documentary evidence for reductions for employee Rivera claimed for fiscal years 1999-2000 and 2000-2002, totaling \$122.⁶⁹ In comments on the draft staff analysis, the Controller stated that no documents were copied for some small adjustments, and that for “those employees for whom records are not included, the Controller would concur with the reversal of the adjustment made by the audit.”⁷⁰

Accordingly, the Commission finds that the reduction in Finding 1 of the Audit Report of productive hourly rates based on the salaries identified in claimant’s employee earnings records is supported by evidence in the record for all employees except employee Rivera, and therefore the reductions for all employees other than Rivera are supported by evidence in the record and are correct. However, the salary and benefit reductions totaling \$122 for employee Rivera is entirely lacking in evidentiary support and should be reinstated to the claimant.

- b) The Controller’s adjustment to the productive hourly rate claimed based on claimant’s alleged deduction of break time taken by employees from productive hours is arbitrary, capricious, and entirely lacking in evidentiary support.

The Controller reduced the productive hours claimant used to calculate hourly rates because it found that the claimant had deducted 120 hours per year for estimated break time taken by employees. The Controller found that this deduction is not allowable under the applicable claiming instructions and added 120 hours to the productive hours. The Controller limited the revised productive hours to only those few employees whose claimed salary rates conflicted with the claimant’s records of employee earnings.⁷¹

The Commission’s regulations require that all assertions of fact must be supported by documentary evidence.⁷² The reimbursement claims contain a salary and benefits chart that identifies the productive hourly rates,⁷³ but there is no evidence in the record showing the claimant deducted 120 hours for break time. In fact, dividing a few of the annual salaries identified by the claimant in the salary and benefit charts by the productive hourly rates identified in the charts, results in a calculation of 1,750 annual hours - the same number used by the Controller in its calculation.⁷⁴

⁶⁷ Exhibit B, Controller’s comments on the IRC, pages 190 – 194.

⁶⁸ Exhibit B, Controller’s comments on the IRC, pages 200 – 202.

⁶⁹ See Exhibit B, Controller’s comments on the IRC, pages 186 and 196, for the Controller’s worksheet.

⁷⁰ Exhibit E, Controller’s comments on the draft proposed decision, page 4.

⁷¹ Exhibit B, Controller’s comments on the IRC, page 16.

⁷² California Code of Regulations, title 2, sections 1185.2(c), 1187.5; see also Government Code section 17559.

⁷³ Exhibit A, IRC, pages 120-121, 158-159, and 206-207.

⁷⁴ For example, for fiscal year 2000-2001, the annual earnings for employees Acena and Anderson are \$94,176.00 and their productive hourly rates are 53.81. (Exhibit A, IRC, p. 158.)

Accordingly, the Commission finds that the Controller's adjustment to the productive hourly rate claimed based on claimant's alleged deduction of break time taken by employees from productive hours is arbitrary, capricious, and entirely lacking in evidentiary support. Therefore, the Controller should reinstate to the claimant the costs adjusted for productive hours.

C. The Reduction in Finding 2 of the Audit Report of \$5,133 for Materials and Supplies Is Incorrect as a Matter of Law.

The Controller reduced costs claimed for materials and supplies by \$5,133 because the claimant did not provide source documentation to support costs claimed for materials and supplies, printing, and postage for fiscal years 1999-2000 (\$1,431) and 2000-2001 (\$3,702).⁷⁵

Section H4 of the parameters and guidelines state the following for reimbursing services and supplies: "only expenditures which can be identified as a direct cost as a result of the mandate can be claimed."⁷⁶ The parameters and guidelines do not require claimants to provide source documentation (such as invoices, purchase orders, or receipts) to support a claim of reimbursement for materials and supplies. Moreover, at the time the claimant filed these reimbursement claims in 2001 and 2002, Government Code section 17564 stated that "claims for direct and indirect costs filed pursuant to Section 17561 shall be filed in the manner prescribed by the parameters and guidelines" and specifically excluded the claiming instructions. Although the Controller has the authority to audit the records of a claimant, the Controller's source document rule to support the costs claimed, when such a rule has not been adopted through the regulatory process in the parameters and guidelines or through the Controller's own regulatory authority, is incorrect as a matter of law pursuant to *Clovis Unified School District* and *Union American Physicians and Dentists v. Kizer (the Director of the Department of Health Services), et al.*⁷⁷

In this case, the claimant complied with the parameters and guidelines by listing its costs for services and supplies in its 1999-2000 and 2000-2001 claims,⁷⁸ identified as a direct cost as a result of the mandate, and the parameters and guidelines do not require any supporting documentation beyond the summary schedules that the claimant submitted.

Accordingly, staff finds that the reduction of \$5,133 (plus related indirect costs) for materials and supplies is incorrect as a matter of law and should be reinstated to the claimant.

Dividing 94,176 by 53.81, equals 1,750. For fiscal year 2001-2002, the annual earnings for employee Acena is \$100,764, divided by the productive hourly rate of 57.58, equals 1,750. (Exhibit A, IRC, p. 206.) The annual earnings of employee Albanese in fiscal year 2001-2002 is \$154,080, divided by the productive hourly rate for Mr. Albanese of 88.05, equals 1,750. (*Ibid.*)

⁷⁵ Exhibit B, Controller's comments on the IRC, page 20.

⁷⁶ Exhibit A, IRC, page 36.

⁷⁷ *Clovis Unified School Dist.*, *supra*, 188 Cal.App.4th 794, 807; *Union American Physicians and Dentists*, *supra*, 223 Cal.App.3d 490, 506.

⁷⁸ Exhibit A, IRC, pages 87 and 117 (for the 1999-2000 claim). The audit finding was rounded up to \$1,431 (Exhibit A, IRC, p. 62). For its 2000-2001 claim, see pages 130, 139, and 157. The audit finding was rounded up to \$3,702 (Exhibit A, IRC, p. 62).

Conclusion

Pursuant to Government Code section 17551(d), staff finds the following:

- The audit of the fiscal year 1999-2000 claim is not barred by the deadline in Government Code section 17558.5;
- The claimant complied with the documentation requirements in the parameters and guidelines for salary and benefits, so that the Controller's reduction in Finding 1 of the Audit Report of \$631,854 (and related indirect costs) is incorrect as a matter of law.
- The Controller's adjustment of \$6,168 (and related indirect costs) in Finding 1 of the Audit Report for productive hourly rates is partially correct. The reductions based on claimed salaries that conflict with the claimant's employee earnings records are supported by evidence in the record and are correct for all employees *except* Rivera for 1999-2000 and 2001-2002. The adjustment based on an alleged deduction for break time from productive hours is arbitrary, capricious, and entirely lacking in evidentiary support. The incorrect reductions made based on unsupported conclusions of conflicting salaries and benefits for employee Rivera, and any based on unsupported alleged defects in the calculation of productive hours, should be reinstated to the claimant.
- The claimant complied with the documentation requirements in the parameters and guidelines for materials and supplies, so that the Controller's reduction in Finding 2 of the Audit Report of \$5,133 (and related indirect costs) is incorrect as a matter of law.

Therefore, the Controller is requested to reinstate to the claimant all costs incorrectly reduced, plus related indirect costs, consistent with these findings, pursuant to section 1185.9 of the Commission's regulations.

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 3540-3549.1

Statutes 1975, Chapter 961; Statutes 1991,
Chapter 1213

Fiscal Years 1999-2000, 2000-2001, and 2001-
2002

San Mateo Community College District,
Claimant

Case No.: 05-4425-I-09

*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 September 25, 2015)

DECISION

The Commission on State Mandates (Commission) heard and decided this incorrect reduction claim (IRC) during a regularly scheduled hearing on September 25, 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 incorrect reduction claim (IRC) challenges the State Controller's Office (Controller) audit reductions to the San Mateo Community College District's (claimant) reimbursement claims for costs incurred in fiscal years 1999-2000, 2000-2001, and 2001-2002 for the *Collective Bargaining and Collective Bargaining Agreement Disclosure* program.

Pursuant to Government Code section 17551(d), the Commission finds that:

- The audit of the fiscal year 1999-2000 claim is not barred by the deadline in Government Code section 17558.5.
- The claimant complied with the documentation requirements in the parameters and guidelines for salary and benefits, so that the Controller's reduction in Finding 1 of the Audit Report of \$631,854 is incorrect as a matter of law.
- The Controller's adjustment of \$6,168 (plus related indirect costs) in Finding 1 of the Audit Report for productive hourly rates is partially correct. The reductions based on claimed salaries that conflict with the claimant's employee earnings records are supported by evidence in the record for all employees and are correct *except* for the reduction for employee Rivera for 1999-2000 and 2001-2002. The adjustment based on

an alleged deduction for break time from productive hours is arbitrary, capricious, and entirely lacking in evidentiary support. The incorrect reductions made based on unsupported conclusions of conflicting salaries and benefits for employee Rivera, and any based on unsupported alleged defects in the calculation of productive hours, should be reinstated to the claimant.

- The claimant complied with the documentation requirements in the parameters and guidelines for materials and supplies, so that the Controller's reduction in Finding 2 of the Audit Report of \$5,133 is incorrect as a matter of law.

Therefore, pursuant to section 1185.9 of the Commission's regulations, the Controller is requested to reinstate to the claimant all costs incorrectly reduced, plus related indirect costs, consistent with these findings.

COMMISSION FINDINGS

I. Chronology

01/10/01	Claimant signed the reimbursement claim for fiscal year 1999-2000. ⁷⁹
01/10/02	Claimant signed the reimbursement claim for fiscal year 2000-2001. ⁸⁰
01/15/03	Claimant signed the reimbursement claim for fiscal year 2001-2002. ⁸¹
04/15/03	Controller contacted the district regarding the audit. ⁸²
04/28/03	Audit entrance conference held. ⁸³
04/21/04	Controller issued a revised draft audit report. ⁸⁴
05/12/04	Claimant submitted comments on the draft audit report. ⁸⁵
08/06/04	Controller issued the final audit report. ⁸⁶
09/06/05	Claimant filed this IRC. ⁸⁷

⁷⁹ Exhibit A, IRC, page 79.

⁸⁰ Exhibit A, IRC, page 122.

⁸¹ Exhibit A, IRC, page 160.

⁸² Exhibit B, Controller's comments on the IRC, page 25 and tab 18, page 207.

⁸³ Exhibit B, Controller's comments on the IRC, pages 6 and 23.

⁸⁴ Exhibit A, IRC, page 57. In its comments on the draft proposed decision, claimant states: "No revised audit was issued. Instead, on March 22, 2011, the Controller issued a letter ... to the District stating that the audit was reviewed for compliance with the September 21, 2010 Clovis I court decision regarding the contemporaneous source document rule (CSDR)." However, the IRC (exhibit A) states on page 57 "The SCO issued a revised draft audit report on April 21, 2004." The draft audit report is not part of the record.

⁸⁵ Exhibit A, IRC, pages 57 and 66-70.

⁸⁶ Exhibit A, IRC, page 51.

08/29/14 Commission staff requested that the Controller submit information on the audit.

09/18/14 Controller requested an extension of time to submit information on the audit, which was granted for good cause to October 3, 2014.

10/07/14 Controller filed late comments on the IRC.⁸⁸

05/27/15 Commission staff issued the draft proposed decision.⁸⁹

06/12/15 Claimant filed comments on the draft proposed decision.⁹⁰

06/15/15 Controller requested postponement of the hearing from July 24, 2015 to September 25, 2015, and additional time, from June 17, 2015 to July 17, 2015, to file comments on the draft proposed decision, both of which were granted for good cause.

07/17/15 Controller requested another extension, until August 7, 2015, to file comments on the draft proposed decision, which was granted for good cause.

08/10/15 Controller filed late comments on the draft proposed decision.⁹¹

II. Background

A. *Collective Bargaining and Collective Bargaining Agreement Disclosure Program*

On July 17, 1978, the Board of Control, predecessor to the Commission, found that Statutes 1975, chapter 961 imposed a reimbursable state mandate. On October 22, 1980, parameters and guidelines were adopted, which were amended several times. On March 26, 1998, the Commission adopted a second test claim decision on Statutes 1991, chapter 1213.⁹² Parameters and guidelines for the two programs were consolidated on August 20, 1998, and amended again on January 27, 2000.⁹³

B. Applicable Parameters and Guidelines

The reimbursement claims at issue in this IRC were filed for the 1999-2000, 2000-2001, and 2001-2002 fiscal years, and at the time these claims were prepared and submitted, the last amended version of the 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, and “regulations promulgated by the Public Employment Relations Board.” The parameters and guidelines divide the reimbursable activities into seven groups of activities or “components” (G1 – G7), as follows:

⁸⁷ Exhibit A, IRC.

⁸⁸ Exhibit B, Controller’s comments on the IRC.

⁸⁹ Exhibit C, draft proposed decision.

⁹⁰ Exhibit D, claimant’s comments on the draft proposed decision.

⁹¹ Exhibit E, Controller late comments on the draft proposed decision.

⁹² Commission on State Mandates, Test Claim Statement of Decision, 97-TC-08.

⁹³ Exhibit A, IRC, pages 26-37.

- Determination of appropriate bargaining units for representation and determination of the exclusive representation and exclusive representatives (Component G1);
- 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 (Component G2);
- 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 (Component G3);
- Impasse proceedings, including mediation, fact-finding, and publication of the findings of the fact-finding panel (Component G4);
- Collective bargaining agreement disclosure before the adoption of the agreement by the governing body (Component G5);
- Contract administration and adjudication of contract disputes either by arbitration or litigation, including grievances and administration and enforcement of the contract (Component G6); and
- Unfair labor practice adjudication process and public notice complaints (Component G7).⁹⁴

C. The Audit Findings of the Controller

The Controller reduced direct and related indirect costs claimed in fiscal years 1999-2000, 2000-2001, and 2001-2002 by \$730,450. Direct salary and benefit costs were reduced because, according to the Final Audit Report, the claimant provided summary schedules, but did not provide source documents, such as individual activity log sheets, meeting sign-in sheets, and time records, to validate employee hours charged to the mandated program for negotiations (reimbursable activities, component G3) and contract administration/grievances and training (reimbursable activities, component G6).⁹⁵ In comments on the IRC, the Controller states that the district did not provide any additional supporting documentation to support any of the unallowable salary and benefit costs allocated to the mandated program with employee declarations, certifications, time logs, time studies, or other relevant information that show to what extent the employees performed mandate-related activities.⁹⁶

The Controller specifically found that:

⁹⁴ Exhibit A, IRC, pages 26-37.

⁹⁵ Exhibit A, IRC, page 60 (Final Audit Report).

⁹⁶ Exhibit B, Controller’s comments on the IRC, page 13.

- The claimant did not provide supporting documentation for costs claimed under component G3 for some of its negotiation team members for at-the-table negotiations. The Controller reduced the unallowable hours for these employees by tracing their attendance at certain negotiation sessions to sign-in sheets and/or meeting notes. Unallowable costs amounted to \$128,517 plus related indirect costs for the audit period.
- The claimant did not provide supporting documentation for a portion of its negotiation team on negotiation planning and preparation sessions, which were claimed under component G3. Unallowable costs were \$253,200 plus related indirect costs for the audit period.
- The claimant did not provide supporting documentation for American Federation of Teachers (AFT) release time claimed under component G3 for bargaining unit representatives participating in negotiation sessions. Specifically, no documentation was provided indicating the dates and hours worked. The Controller reduced the unallowable hours for these employees by tracing their attendance at certain negotiation sessions to sign-in sheets and/or meeting notes. Unallowable costs were \$217,682 plus related indirect costs for the audit period.
- The claimant did not provide supporting documentation for all time claimed under component G6 for grievance resolution. Unallowable costs were \$16,612 plus related indirect costs for the audit period.
- The claimant did not provide any supporting documentation for time spent on employee training activities claimed under component G6. No documentation was provided indicating the dates and amount of time spent for training sessions, the names of employees who attended training sessions, or any information indicating whether or not training was limited to administration/interpretation of the negotiated contract. Unallowable costs were \$15,843 plus related indirect costs for the audit period.⁹⁷
- The claimant overstated salaries and benefits claimed for certain employees and improperly calculated the productive hourly rate, resulting in a \$6,168 reduction for the audit period. Specifically, the Controller found that the claimant overstated the annual salaries and related benefits for a few employees when compared to the claimant's payroll records. The Controller also found that the claimant computed productive hours by deducting 120 hours per year for estimated break time even though the Controller's claiming instructions do not identify estimated break time as an allowable deduction for productive hourly rate calculations.⁹⁸
- The claimant did not provide any source documentation to support claimed costs of \$5,133 for materials and supplies during the audit period.⁹⁹

The claimant disputes these reductions, and also alleges that the Controller did not timely audit the fiscal year 1999-2000 reimbursement claim.

⁹⁷ Exhibit A, IRC, pages 60-63. Exhibit B, Controller's comments on the IRC, pages 11-12.

⁹⁸ Exhibit A, IRC, page 60. Exhibit B, Controller's comments on the IRC, page 12.

⁹⁹ Exhibit A, IRC, page 62. Exhibit B, Controller's comments on the IRC, pages 20-21.

III. Positions of the Parties

A. San Mateo Community College District

Claimant argues that the Controller has not provided a reason each employee's costs were disallowed other than stating that the district did not provide documentation supporting the validity of distribution of these employees to the claim. Claimant points out that the parameters and guidelines require showing the classifications of the employees involved, amount of time spent and their hourly rate, all of which were reported in the claims. Claimant argues that the propriety of the adjustments cannot be determined until the Controller states the reason for each change to the employee payroll information. Claimant asserts that the Controller's insistence on time logs and other forms of documentation for both labor and materials are a ministerial preference and an unpublished standard that exceed the parameters and guidelines and are not enforceable absent a rulemaking that would put the claimant on notice.¹⁰⁰

Claimant also maintains that the audit of the 1999-2000 claim was beyond the statute of limitations for an audit when the Controller issued its August 6, 2004 audit report, and raises a discrepancy regarding amounts the state paid to claimant in fiscal years 1999-2001.

Claimant submitted comments on the draft proposed decision, concurring that the audit of fiscal year 1999-2000 was commenced before the statute of limitations to commence an audit had run, but continuing to dispute that it was completed in a timely manner.¹⁰¹ Claimant concurs with the findings in the draft proposed decision regarding reinstatement of claimed costs for staff time and for materials and supplies.¹⁰²

B. State Controller's Office

It is the Controller's position that the audit adjustments are correct and that this IRC should be denied. The Controller states that unallowable salary and benefit costs were claimed because claimant did not adequately support employee hours charged to the mandated program and misstated the productive hourly rate for certain employees based on the claimant's payroll records. The Controller argues that claimant has not complied with the parameters and guidelines by merely providing an amount on the Controller's claim schedule. The Controller further points out that claimant did not comply with its own documentation policies and procedures for this program. As to the reduction for materials and supplies, the Controller states that no documentation was provided to show that claimant's expenditures were related to the mandated program.¹⁰³

The Controller, in comments filed August 10, 2015, agrees that the audit was conducted in a timely manner, but disagrees with the majority of conclusions in the draft proposed decision reversing the Controller's reductions based on a lack of documentation (except, as described below, a portion of those concerning the productive hourly rate). The Controller says that the draft decision implicitly concludes that the Controller has no authority to audit the records of San

¹⁰⁰ Exhibit A, IRC, pages 9-12.

¹⁰¹ Exhibit D, claimant's comments on the IRC, pages 2-4.

¹⁰² Exhibit D, claimant's comments on the IRC, pages 5-6.

¹⁰³ Exhibit B, Controller's comments on the IRC, pages 14-20.

Mateo despite its statutory authority in Government Code section 17561(d)(2)(A)(i), and argues that this position is contrary to the Controller's Constitutional and statutory duties. The Controller also asserts that the draft proposed decision implies that the claim is self-proving, but that the information and tables required by the parameters and guidelines and submitted with the claim are part of the claim and not supporting evidence. According to the Controller, if the claim itself is supporting evidence, it renders moot the requirement for the claimant to provide evidence to support its claim and is contrary to the standard process for filing claims with a government entity. The Controller goes on to state:

The DPD [draft proposed decision] essentially concludes that the SCO may only look at documents identified in the parameters and guidelines. Since no specific documents were identified in the parameters and guidelines (other than the workload tables) they conclude that the Controller is limited to a review of the claim itself. We believe that this erroneous conclusion is reached because the DPD failed to fully consider the relevant constitutional and statutory provisions, conflated the claim filing provisions with the auditing provisions, and applied an overly expansive interpretation of the decision in the Clovis case. In doing so the DPD impermissibly restricted the authority of the Controller to audit, and thus incorrectly concluded that the audit finding reductions were invalid.¹⁰⁴

As for the relevant constitutional and statutory provisions, the Controller asserts that the draft proposed decision gave short shrift to the Controller's audit authority in Government Code section 17561(d)(2)(A)(i), which must be read in conjunction with Article XVI, Section 7, of the California Constitution that says: "[m]oney may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant." The Controller cites the Attorney General's Opinion that the Controller has Constitutional authority to audit claims filed against the treasury which "signifies correctness, propriety, validity, and that which is legally required" and statutory authority in sections 925.6 and 12410, in addition to section 17561(d)(2)(A)(i), to show that the Legislature made sure the Controller's audit obligation is carried out. According to the Controller, "it would be anomalous to conclude that the Constitution and the Legislature intended this narrow subset of claims to be immune from the review of the Controller, given her authority to audit all other disbursements from the State Treasury."¹⁰⁵

The Controller also argues that the parameters and guidelines sections cited in the draft proposed decision "all deal with the requirements to file a claim, not the scope of the subsequent audit" and the "claimant is still required to provide some documentation, other than the claim itself, to support the validity of the claimed costs."¹⁰⁶ The Controller asserts that the claimant provided no supporting documentation to validate the disallowed costs claimed. The claimant's credit card statements were rejected because they did not demonstrate that the charges incurred were related to the mandate, not because of the type of document they were. The Controller insists that the draft proposed decision conflates the claim filing process in section 17564 with the

¹⁰⁴ Exhibit E, Controller's comments on the draft proposed decision, page 2.

¹⁰⁵ *Id.*, pages 2-3.

¹⁰⁶ *Id.*, page 3.

auditing process under section 17561(d)(2)(A)(i), both of which address distinctly separate steps in the mandates process. Section 17564 and the parameters and guidelines cannot alter the audit authority found in section 17561(d)(2)(A)(i).

The Controller also calls into question the draft proposed decision based on what it calls an “overly expansive” interpretation of the *Clovis* case,¹⁰⁷ from which it says the only relevant holding is that the contemporaneous source document rule (CSDR) is an underground regulation and to the extent the audit relied on the CSDR, it is invalid. The costs in this IRC were disallowed because claimant failed to provide any supporting documentation for its costs, not because of the type of document provided. The *Clovis* court noted with concern that under the CSDR, some documents were relegated to the second tier status of corroborating documents and could not, on their own, prove the validity of costs. The audit in this IRC, however, did not discriminate between the types of documents. More importantly, the court did not find the Controller’s audit authority in section 17561(d)(2)(A)(i) to be unconstitutional, invalid or unenforceable, or that supporting documentation was not required. The Controller states that because the audit did not rely on the CSDR, it is not invalidated by the *Clovis* case. Because the claimant did not provide supporting documentation, the disallowances in the audit findings should be upheld.

Finally, the August 10, 2015 comments address the productive hourly rate issue. The draft proposed decision found that the Controller’s \$6,168 reduction was incorrect because it was not supported by evidence. The Controller points to information in the record to justify its finding that the payroll records do not support the salaries claimed for some employees. The Controller concedes, however, that “[f]or those employees for whom records are not included, the Controller would concur with the reversal of the adjustments made by the audit.”¹⁰⁸

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 6.¹⁰⁹ The Commission must also interpret the Government Code and implementing regulations in

¹⁰⁷ *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 807.

¹⁰⁸ Exhibit E, Controller’s comments on the draft proposed decision, page 4.

¹⁰⁹ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

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.”¹¹⁰

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 the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.¹¹¹ 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.]”¹¹²

The Commission must 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.¹¹³ In addition, sections 1185.1(c) and 1185.2(f)(3) of the Commission’s regulations require 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.¹¹⁴

A. The Audit of the Fiscal Year 1999-2000 Claim Is Not Barred by the Deadlines in Government Code Section 17558.5.

The claimant alleges that the Controller did not complete the audit of the reimbursement claim filed for fiscal year 1999-2000 within the applicable deadlines so that the audit adjustments for that fiscal year are barred.¹¹⁵

¹¹⁰ *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.

¹¹¹ *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.

¹¹² *American Bd. of Cosmetic Surgery, Inc, supra*, 162 Cal.App.4th 534, 547-548.

¹¹³ *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

¹¹⁴ 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.

¹¹⁵ Exhibit A, IRC, pages 15-20.

The time to audit a reimbursement claim is in Government Code section 17558.5. At the time the reimbursement claim was filed in January 2001,¹¹⁶ Government Code section 17558.5, as amended by Statutes 1995, chapter 945 (eff. July 1, 1996), stated:

A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to audit by the Controller no later than two years after the end of the calendar year in which the reimbursement claim is filed or last amended. However, if no funds are appropriated for the program for the fiscal year for which the claim is made, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.¹¹⁷

Claimant states that funds were provided for this program so that the first sentence of Government Code section 17558.5 applies, requiring the reimbursement claim to be subject to audit “no later than two years after the end of calendar year in which the reimbursement claim is filed or last amended...”¹¹⁸ The claimant argues that the phrase “subject to audit” requires the Controller “to complete” the audit no later than two years after the end of the calendar year in which the claim is filed.¹¹⁹ According to claimant, its 1999-2000 claim was mailed to the Controller on January 10, 2001, so the claim was subject to audit no later than December 31, 2003.¹²⁰ The audit was initiated no later than April 28, 2003, the date of the entrance conference. The Controller’s final audit report was issued on August 6, 2004.

The Controller asserts that the audit of the reimbursement claim is timely and that the phrase “subject to audit” in section 17558.5, as amended in 1995, means subject to the initiation of the audit and does not require the Controller to complete the audit within the two-year deadline. The Controller points out that there is no statutory language that requires the Controller to issue a final audit report before the two-year period expires. Rather, according to the dictionary, “subject to” means in a position or circumstance that places claimant under the power or authority of another. The Controller exercised its authority to audit the claims by contacting the claimant to provide notice well within the statute of limitations.¹²¹

The Controller further asserts that since the reimbursement claim was filed in January 2001, an audit had to be initiated by December 31, 2003, and that the audit was timely initiated “by contacting the district on April 15, 2003, to inform it that we were preparing to conduct an audit

¹¹⁶ Exhibit A, IRC, page 79.

¹¹⁷ Government Code section 17558.5 (Stats. 1995, ch. 945, (SB11)). Former Government Code section 17558.5 was originally added by the Legislature by Statutes 1993, chapter 906, effective January 1, 1994. The 1993 statute became inoperative on July 1, 1996, and was repealed on January 1, 1997 by its own terms.

¹¹⁸ Government Code section 17558.5 (Stats. 1995, ch. 945 (SB 11); Exhibit A, IRC, beginning on page 24.

¹¹⁹ Exhibit A, IRC, pages 17-20.

¹²⁰ Exhibit A, IRC, page 17.

¹²¹ Exhibit B, Controller’s comments on the IRC, page 25.

of its Collective Bargaining claims.”¹²² The audit entrance conference was held on April 28, 2003.¹²³

The Commission finds that the audit of the 1999-2000 reimbursement claim was timely initiated and timely completed.

The plain language of Government Code section 17558.5, as added in 1995, does not require the Controller to “complete” the audit within any specified period of time. Rather, the statute provides that reimbursement claims are “subject to audit” within two years after the end of the calendar year that the reimbursement claim was filed. The phrase “subject to audit” sets a time during which a claimant is on notice that an audit of a claim may occur. This reading is consistent with the plain language of the second sentence, which establishes a longer period of time to initiate the audit when no funds are appropriated for the program as follows:

....However, if no funds are appropriated for the program for the fiscal year for which the claim is made, the time for the Controller to initiate an audit shall commence to run from the date of the initial payment of the claim.

While one rule of statutory construction states that the use of differing language in otherwise parallel statutory provisions (like the use of the word “initiate” in the second sentence, but not in the first sentence) supports an inference that a difference in meaning was intended by the Legislature, the Commission finds that inference is not supportable in this case.¹²⁴ Section 17558.5(a) is not a model of clarity. However, a careful reading of the language of the first and second sentences reveals that the primary difference between them is whether an appropriation has been made for the program. The second sentence clearly refers to situations where funds are *not* appropriated. It can reasonably be inferred from the context that the first sentence, in contrast, refers to situations where funds *are* appropriated. The use of the word “however” to begin the second sentence, signals the distinction between these two situations (when funds are appropriated versus when they are not). There is nothing about the structure or language of the two sentences to suggest that the Legislature intended any other substantive differences between these two parallel sentences. In each situation, the Controller must perform some activity within a two-year period from either the end of the calendar year in which the reimbursement claim is filed or last amended, or from the initial payment of the claim. The use in the second sentence of the phrase “the time for the Controller to initiate an audit” refers back to “the time” defined in the first sentence, namely two years. Similarly, the use of “initiate” in the second sentence refers to what the Controller is required to do within the two-year period. Read in this way, the sentences are parallel. In the first sentence, when there is an appropriation, the time to initiate an audit is two years. In the second sentence, when there is no appropriation, the time to initiate an audit is also within two years of the initial payment of the claim. The only difference between the two situations is the triggering event of an appropriation that determines when the two-year period to initiate an audit begins to run.

¹²² Exhibit B, Controller’s comments on the IRC, page 25 and tab 18, page 207. According to the Controller’s letter of April 15, 2003, the entrance conference was scheduled to be held April 28, 2003.

¹²³ Exhibit B, Controller’s comments on the IRC, pages 6 and 23.

¹²⁴ *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 62.

This interpretation is consistent with the Legislature's 2002 amendment to Government Code section 17558.5, clarifying that "subject to audit" means "subject to the initiation of an audit," as follows in underline and strikeout:

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 ~~two~~ three years after the ~~end of the calendar year in which 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 ~~made~~ filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.¹²⁵

In this case, the reimbursement claim filed for fiscal year 1999-2000, filed in January 2001, was subject to the initiation of an audit at any time before December 31, 2003. Since the audit began no later than the April 28, 2003 entrance conference, it was timely initiated within the meaning of Government Code section 17558.5.

The Commission further finds that the audit was timely completed. Before Government Code section 17558.5 was amended effective January 1, 2005, there was no statutory deadline for the completion of an audit. Under common law principles, however, the Controller had to complete an audit within a reasonable period of time after it was initiated.¹²⁶

In comments on the draft proposed decision, claimant argues:

If, as the Commission asserts, the 1995 version establishes no statutory time limit to complete a timely commenced audit, Section 17558.5 becomes absurd. Once timely commenced, audits could remain unfinished for years either by intent or neglect and the audit findings revised at any time. Thus, the claimant's document retention requirements would become open-ended and eventually punitive. Statutes of limitations are not intended to be open-ended; they are intended to be finite, that is, a period of time measured from an unalterable event, and in the case of the 1995 version of the code, it is the filing date of the annual claim.¹²⁷

The Commission disagrees. The claimant's concern is properly addressed in that the Controller is required to complete an audit within a reasonable period of time after it is initiated. An audit that remained unfinished for many years could be unreasonable and determined untimely based on the facts of the case.

The Commission's interpretation of Government Code section 17558.5 was recently upheld by the Sacramento County Superior Court in *Clovis Unified School Dist. v. Commission on State Mandates*, which struck down a challenge to the Commission's decision on an IRC for the

¹²⁵ Statutes 2002, chapter 1128 (AB 2834).

¹²⁶ Under appropriate circumstances, the defense of laches may operate to bar a claim by a public agency if there is evidence of unreasonable delay by the agency and resulting prejudice to the claimant. (*Cedar-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 985-986.)

¹²⁷ Exhibit D, claimant comments on the draft staff analysis, page 4.

Graduation Requirements mandate. The court held that the version of Government Code section 17558.5 that applies in this case does not require an audit to be completed within two years from the date the claim was filed, as also alleged here, but the Controller does not have an unlimited window to audit a claim. Rather, the Controller is required to “diligently prosecute” the audit, based on substantial evidence in the record.¹²⁸ The *Clovis* case was not appealed and is therefore the final decision addressing the merits of the issue presented here. The Commission, under principles of stare decisis, is required to apply the interpretation of section 17558.5 as set forth by the court.¹²⁹ In addition, the trial court’s decision on this issue is binding on the claimant under principles of collateral estoppel, which applies when (1) the issue necessarily decided in the previous proceeding is identical to the one that is currently being decided; (2) the previous proceeding terminated with a final judgment on the merits; (3) the party against whom collateral estoppel is asserted is a party to or in privity with a party in the previous proceeding; and (4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue.¹³⁰ Although the claimant to this IRC was not a party to the *Clovis* action, the claimant is in privity with the petitioners in that case. “A party is adequately represented for purposes of the privity rule if his or her interests are so similar to a party’s interest that the latter was the former’s virtual representative in the earlier action.”¹³¹

The evidence in this case does not support a finding, and the claimant has not asserted, that the audit was not diligently prosecuted or unreasonably delayed by the Controller once the audit was timely initiated. As indicated above, the audit was timely initiated on April 28, 2003. The exit conference and last day of field work occurred three months later, on July 14, 2003.¹³² After the exit conference, communication continued between the Controller and the claimant concerning the audit findings. A draft audit report was issued, after which a letter dated April 9, 2004, from the claimant to the Controller was sent about the audit findings and discrepancies between the draft audit report and schedules sent by the Controller. The Controller responded by letter dated April 22, 2004, and included additional schedules and details regarding the audit adjustments. A revised draft audit report was issued by the Controller on April 21, 2004. The communication between the parties continued with email exchanges between the claimant and the Controller on April 26 and 27, 2004.¹³³ On May 12, 2004, the claimant responded to the revised draft audit report.¹³⁴ The audit was completed when the final audit report was issued on August 6, 2004, 16 months after the audit was initiated.

¹²⁸ Exhibit F, *Clovis Unified School Dist. v. Commission on State Mandates*, Sacramento County Superior Court, March 24, 2015, No. 34-2014-80001931, page 13; Government Code section 17559.

¹²⁹ *Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 596.

¹³⁰ *Roos v. Red* (2006) 130 Cal.App.4th 870, 879-880.

¹³¹ *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 91.

¹³² Exhibit A, IRC, Final Audit Report, page 55.

¹³³ Exhibit A, IRC, Final Audit Report, page 57; Exhibit B, Controller’s comments on IRC, pages 13, 27-49.

¹³⁴ Exhibit A, IRC, Final Audit Report, page 66.

Although the claimant states that the Commission's reliance on the equitable concept of laches is troublesome,¹³⁵ laches is not applied to this IRC because there is no evidence of unreasonable delay.

Accordingly, the Commission finds that the audit of the fiscal year 1999-2000 claim is not barred by the deadlines in Government Code section 17558.5.

B. The Controller's Reduction in Finding 1 of the Audit Report Based on Lack of Documentation for Salaries and Benefits Is Incorrect as a Matter of Law. But the Reduction Based on Claimant's Calculation of Productive Hourly Rates Is, Except for One Employee for Certain Years, Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.

The Controller reduced salary and benefit costs claimed during the audit period under component G3 of the reimbursable activities, relating to collective bargaining negotiations, by \$599,399.¹³⁶ The Controller found that the claimant provided summary schedules, but did not provide any supporting documentation to verify the time spent by employees during "at-the table" negotiations and for negotiation planning and preparation sessions. The Controller also found that the claimant did not provide any documentation supporting the costs claimed for AFT release time for bargaining unit representatives participating in the negotiation sessions.

The Controller also reduced the salary and benefit costs of \$32,455 claimed during the audit period under component G6, for grievance resolution and training, because the claimant did not provide supporting documentation.¹³⁷ The Controller argues that documentation in support of claimed costs is required to be provided to the Controller, and that the supporting documentation includes the following: "activity log sheets, meeting sign-in sheets, and time records, to validate the employee hours," and "employee declarations or certifications, time logs, time studies, or other relevant information that show to what extent the employees performed the mandate-related activities."¹³⁸

The Controller further reduced salary and benefit costs by \$6,168 because it found that the claimant's earnings records conflicted with salaries claimed and that it used an incorrect productive hourly rate.¹³⁹

For the reasons below, the Commission finds that the claimant complied with the documentation requirements in the parameters and guidelines for salary and benefits, so that the Controller's reduction of \$631,854 (plus related indirect costs) is incorrect as a matter of law. In addition, the Controller's reduction of \$6,168 in salary and benefit costs based on the claimant's alleged miscalculation of productive hourly rates is partially correct to the extent supported by evidence in the record, and not arbitrary, capricious, or entirely lacking in evidentiary support. .

¹³⁵ Exhibit D, claimant's comments on the draft staff analysis, page 3.

¹³⁶ Exhibit A, IRC, page 60.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*; see also, Exhibit B, Controller's Comments on the IRC, page 13.

¹³⁹ *Ibid.*

1. *The Controller's reduction of salary and benefit costs claimed under components G3 and G6 of the parameters and guidelines because claimant did not provide adequate supporting documentation is incorrect as a matter of law.*

a) The Controller may not reduce reimbursement claims for the *Collective Bargaining* program in fiscal years 1999-2002 because the claimant failed to provide source documents.

After a test claim is approved, parameters and guidelines are adopted by the Commission to provide instructions for eligible claimants to prepare reimbursement claims for the direct and indirect costs incurred under a state-mandated program.¹⁴⁰ The adopted parameters and guidelines are sent to the Controller to prepare claiming instructions for each reimbursable mandate to assist local agencies and school districts in claiming costs. The claiming instructions are “non-regulatory” and are derived from the statute or executive order creating the mandate and the parameters and guidelines adopted by the Commission.¹⁴¹ “Issuance of the claiming instructions shall constitute notice of the right of local agencies and school districts to file reimbursement claims, based upon the parameters and guidelines adopted by the commission”¹⁴² At the time the reimbursement claims for this case were filed, the Government Code also stated “[c]laims for direct and indirect costs filed pursuant to Section 17561 shall be filed in the manner prescribed in the parameters and guidelines.”¹⁴³ Unlike the claiming instructions, the parameters and guidelines are regulatory; notice and an opportunity to comment are provided, and a full quasi-judicial hearing is held before parameters and guidelines are adopted.¹⁴⁴ Once adopted, whether after judicial review or without judicial review, the parameters and guidelines are final and binding on the parties.¹⁴⁵ In addition, the Controller may audit the records of the claimant “to verify the actual amount of the mandated costs” claimed in a reimbursement claim, and reduce any claim that the Controller determines is excessive or unreasonable.¹⁴⁶

The parties agree that the parameters and guidelines for the *Collective Bargaining and Collective Bargaining Agreement Disclosure* program, amended by the Commission on January 27, 2000,

¹⁴⁰ Government Code section 17557; California Code of Regulations, title 2, section 1183.7(e).

¹⁴¹ *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 799; Government Code section 17558, as it existed when these reimbursement claims were filed (last amended by Stats. 1996, ch. 45.) The statute was later amended in 2004 and 2011, and currently provides that “[t]he claiming instructions shall be derived from the test claim decision and the adopted parameters and guidelines, reasonable reimbursement methodology, or statute declaring a legislatively determined mandate.”

¹⁴² Government Code section 17561(d)(1).

¹⁴³ Government Code section 17564, as amended by Statutes 1999, chapter 643.

¹⁴⁴ *Clovis Unified School Dist., supra*, 188 Cal.App.4th 794, 799, 805, and 808.

¹⁴⁵ *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

¹⁴⁶ Government Code section 17561(d)(2)(A)(i) and (B).

apply to these reimbursement claims.¹⁴⁷ This version of the parameters and guidelines lists the reimbursable activities in Section G (Claim Components). Component G3 identifies the costs eligible for reimbursement for negotiations, which include salary and benefit costs for employer representatives participating in negotiations and negotiation planning sessions, and substitutes for release time of bargaining unit representatives during negotiations. Section G3(f) further states that “[a] list showing the dates of all negotiation sessions held during the fiscal year being claimed must be submitted.”¹⁴⁸

Component G6 identifies the costs eligible for reimbursement for contract administration, adjudication of contract disputes either by arbitration or litigation, including grievance resolution, and a reasonable number of training sessions for supervisory and management personnel on contract administration and interpretation.¹⁴⁹

Employee salary and benefit costs must be claimed in accordance with section H3 of the parameters and guidelines, which requires claimants to show the classification of the employees involved, the amount of time spent on the mandated activities, and the employees’ hourly rate and to submit the worksheet used to compute the hourly salary rate with the claim as follows:

Salary and Employees’ Benefits: Show the classification of the employees involved, amount of time spent, and their hourly rate. The worksheet used to compute the hourly salary rate must be submitted with your claim. Benefits are reimbursable. Actual benefit percent must be itemized. If no itemization is submitted, 21 percent must be used for computation of claim costs. Identify the classification of employees committed to functions required under the Winton Act and those required by Chapter 961, Statutes, 1975.¹⁵⁰

Section H1 also requires claimants to “supply workload data as requested as part of the description to support the level of costs claimed.”¹⁵¹

In 2010, the Third District Court of Appeal, in *Clovis Unified School District v. Chiang*,¹⁵² reviewed the documentation requirements for claiming salary and benefit costs under four state-mandated programs, including the *Collective Bargaining* program at issue in this case. The case stemmed from a challenge by community college and school districts to the Controller’s audit rule in its claiming instructions that required claimants to provide contemporaneous source documents to support the costs claimed in fiscal years 1998-2003 (which overlaps the fiscal years of the 1999-2002 reimbursement claims in this IRC). If these documents were not provided, the Controller reduced the costs claimed. Contemporaneous source documents are created at or near the time the actual cost was incurred and do not include declarations,

¹⁴⁷ Exhibit A, IRC, pages 7, 26-37; Exhibit B, Controller’s comments on IRC, page 10.

¹⁴⁸ Exhibit A, IRC, page 31.

¹⁴⁹ Exhibit A, IRC, pages 33-34.

¹⁵⁰ Exhibit A, IRC, page 36.

¹⁵¹ Exhibit A, IRC, page 35.

¹⁵² *Clovis Unified School Dist.*, *supra*, 188 Cal.App.4th 794.

certifications, or documents supporting average time accountings.¹⁵³ The districts argued that the contemporaneous source document rule contained in the claiming instructions was an invalid underground regulation that was not adopted in accordance with the Administrative Procedures Act (APA); there was no notice or opportunity to comment on the rule, and the rule was not reviewed by the Office of Administrative Law as required by the APA. Thus, the districts asserted that the Controller was barred from reducing a claim on the basis that the claimant did not comply with the rule. The court agreed with the districts.¹⁵⁴

In its analysis of the case, the court compared the parameters and guidelines for the *Collective Bargaining* program at issue in this IRC to the Controller's revised claiming instructions issued in September 2003, which contained the contemporaneous source document rule.¹⁵⁵ The court determined that the parameters and guidelines for the *Collective Bargaining* program "least resemble" the claiming instructions because they do not require claimants to provide any "source documents," contemporaneous or otherwise, but simply require claimants to "supply workload data requested to support the level of costs claimed" and "show the classification of the employees involved, amount of time spent, and their hourly rate of pay."

As pertinent, the Collective Bargaining Program P & G's require school districts seeking reimbursement for employee salary and benefit costs to simply "[s]upply workload data requested ... to support the level of costs claimed" and "[s]how the classification of the employees involved, amount of time spent, and their hourly rate"; **nothing is said about "source documents."** The Controller's Collective Bargaining Program-specific Claiming Instructions substantively mirror those of the Intradistrict Attendance Program, stating that source documents include employee time records, that show the employee's actual time spent on the mandated function.¹⁵⁶

The court then concluded that the Controller's contemporaneous source document rule "is an underground, unenforceable regulation as applied to the audits of the School Districts' Collective Bargaining Programs for the applicable periods roughly encompassing the fiscal years 1998-2003 . . . These audits are invalidated to the extent they used this CSDR."¹⁵⁷

Thus, under the instructions of the parameters and guidelines adopted in January 2000 for the *Collective Bargaining* program, claimants need only "[s]upply workload data requested ... to support the level of costs claimed" and "[s]how the classification of the employees involved, amount of time spent, and their hourly rate"; nothing is said about "source documents."

The Controller's claiming instructions for this program, however, do require claimants to provide source documents to show the employee's actual time spent on the mandate. According to the claimant and the Controller, the April 2000 claiming instructions "are believed to be, for

¹⁵³ *Clovis Unified School Dist.*, *supra*, 188 Cal.App.4th 794, 802-803.

¹⁵⁴ *Id.*, page 807.

¹⁵⁵ *Id.*, page 802.

¹⁵⁶ *Id.*, page 807 (Emphasis added).

¹⁵⁷ *Ibid.*

purposes and scope of this incorrect reduction claim, substantially similar to the version extant at the time the claims which are the subject of this incorrect reduction claim were filed.”¹⁵⁸ The April 2000 claiming instructions require claimants to provide source documents, which may include employee time records, as follows:

Source documents required to be maintained by the claimant may include, but are not limited to, employee time records that show the employee’s actual time spent on this mandate. The worksheet used to compute the hourly salary rate must be submitted with your claim. Actual benefit percent must be itemized. If no itemization is submitted, twenty one percent (21%) must be used for computation of claim costs. Identify the classification of employees committed to functions required under the Winton Act and those required by Chapter 961, Statutes of 1975.¹⁵⁹

The claiming instructions issued by the State Controller in September 2000 may also be relevant since they were issued when costs were incurred and before the fiscal year 1999-2000 reimbursement claim was filed in this case. These claiming instructions similarly require the claimant to provide source documents, but identify a longer list of the types of source documents that may be provided. They include “time sheets, payroll records, canceled payroll warrants, organization charts, duty statements, pay rate schedules, and other documents evidencing the expenditure” as follows:

Source documents may include, but are not limited to, time logs evidencing actual costs claimed under Reimbursable Activities, time sheets, payroll records, canceled payroll warrants, organization charts, duty statements, pay rate schedules, and other documents evidencing the expenditure.¹⁶⁰

As stated earlier, however, the Third District Court of Appeal in the *Clovis* case specifically determined that the Controller’s claiming instructions are non-regulatory, and that any rule requiring additional documentation that is contained in the claiming instructions that did not go through the regulatory process required by the APA, but was used by the Controller in an audit to reduce costs, invalidates the audit to the extent the Controller used the rule to reduce costs.¹⁶¹ The APA requires public notice of the proposed rules with a statement of reasons, an opportunity to comment, the state agency’s response to the comments, and review by OAL for consistency with the law, clarity, and necessity.¹⁶² The purpose of the APA is to ensure that those persons or

¹⁵⁸ Exhibit A, IRC, page 9; Exhibit B, Controller’s comments on IRC, page 11. The April 2000 claiming instructions are in Exhibit A, IRC, pages 38-48.

¹⁵⁹ Exhibit A, IRC, page 47.

¹⁶⁰ Exhibit F, Controller’s State Mandated Cost Manual issued September 2000, claiming instructions for Collective Bargaining, page 53.

¹⁶¹ *Clovis Unified School Dist.*, *supra*, 188 Cal.App.4th 794, 799, 805.

¹⁶² Government Code sections 11346, et seq.

entities whom a regulation will affect have a voice in its creation, as well as notice of the law's requirements so that they can conform their conduct accordingly.¹⁶³

Despite the court's holding in *Clovis* and the fact that the parameter and guidelines in this case, which are regulatory in nature, do not require source documents to be provided to support a reimbursement claim, the Controller argues that claimants still have the burden of providing "supporting evidence" (in addition to the requirement to provide tables that accompanied the reimbursement claim) to verify the costs claimed and that the Controller has the authority to reduce claims if such evidence is not provided.¹⁶⁴ The Controller states the Government Code section 17561(d)(2)(A)(1), which provides that the Controller may audit the records of any local agency or school district to verify the actual amount of the mandated costs, and the Controller's constitutional authority to audit claims filed against the Treasury¹⁶⁵ support this conclusion. The Controller further argues that the Commission's parameters and guidelines only deal with the requirements to file a claim, and do not define the scope of a subsequent audit. The Controller's argument is stated, in relevant part, as follows:

The DPD [draft proposed decision] states that "the initial burden of providing evidence for a claim for reimbursement lies with the claimant" [fn. omitted], but in its analysis only cites to the fact that the district properly submitted a claim, implying that the claim is self-proving. [Fn. omitted.] However, the tables accompanying the claim are required by the parameters and guidelines and therefore merely a part of the claim, not supporting evidence. Since the claim is already a part of the record the unstated conclusion that the claim itself constitutes supporting evidence would render the requirement that in pursuing an IRC, the claimant's [sic] bear the initial burden of providing evidence to support their claim, moot. This would be akin to a taxpayer asserting that the IRS must accept their return as proof of all it contained, and then asserting that the burden was not on the IRS to disprove the return. Such an approach is contrary to the standard process for claims filed with a governmental entity. Not only does the DPD conclude that the claim is a self-proving document, but it apparently ultimately concludes that the Controller may not look at the records of the claimant [fn. omitted], contrary to the provisions of Section 17561(d)(2)(A)(i). The DPD essentially concludes that the SCO may only look at documents identified in the parameters and guidelines. Since no specific documents were identified in the parameters and guidelines (other than the workload tables) they conclude that the Controller is limited to a review of the claim itself. We believe that this erroneous conclusion is reached because the DPD failed to fully consider the relevant constitutional and statutory provisions, conflated the claim filing provisions with the auditing provisions, and applied an overly expansive interpretation of the

¹⁶³ *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 570.

¹⁶⁴ Exhibit E, Controller's comments on the draft proposed decision.

¹⁶⁵ California Constitution, article XVI, section 7, which provides that "[m]oney may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant." See also, 71 Opinions of the California Attorney General 275, 279.

decision in the Clovis case. In doing so the DPD impermissibly restricted the authority of the Controller to audit, and thus incorrectly concluded that the audit finding reductions were invalid.¹⁶⁶

The Commission disagrees with the Controller's interpretation of the law. There is no question that the Controller has the constitutional and statutory authority to audit reimbursement claims, and to "look" at the records of the claimant to the extent that records exist. However, the Controller cannot impose an additional rule during an audit requiring claimants to provide source documentation that is not identified in the parameters and guidelines and has not gone through the regulatory process. This conclusion is supported by the court's decision in *Clovis* which invalidated the Controller's 1998-2003 audits of the *Collective Bargaining* reimbursement claims "to the extent they use the CSDR"¹⁶⁷ and specified that "the Controller may re-audit relevant reimbursement claims based on the documentation requirements of the P & G and claiming instructions when the mandate costs were incurred (i.e. not using the CSDR)."¹⁶⁸

This conclusion is further supported by the Second District Court of Appeal's decision in *Union American Physicians and Dentists v. Kizer (the Director of the Department of Health Services), et al.*¹⁶⁹ In that case, an association of health care providers sued the California Department of Health Services challenging the Department's use of statistical sampling and extrapolation in connection with Medi-Cal audits and its documentation requirements contained in Medi-Cal bulletins and provider manuals, as invalid underground regulations.¹⁷⁰ The documentation requirements were imposed for six recognized levels of service performed in office visits. The Department used the documentation requirements as part of its "written criteria" for evaluating whether "a provider's progress notes satisfy the appropriateness and quality of medical services requirements."¹⁷¹ Where the provider's records did not comport with the documentation requirements, the Department invalidated the charges and sought to recover the amounts overpaid.¹⁷² Like the Controller in this case, the Department argued that it was not required to adopt regulations to codify the documentation requirements "because the Department had authority under state and federal law" to require documents without adopting formal regulations.¹⁷³ The court disagreed with the Department, and held that the APA prohibits state agencies from utilizing "any rule" which is a regulation, as defined in the Government Code, unless the rule has been duly adopted as a regulation. A regulation is defined in Government Code section 11342(b) as "every rule, regulation, order, or standard of general application

¹⁶⁶ Exhibit E, Controller's comments on the draft proposed decision, page 2.

¹⁶⁷ *Clovis Unified School Dist., supra*, 188 Cal.App.4th 794, 807.

¹⁶⁸ *Id.*, pages 812-813.

¹⁶⁹ *Union American Physicians and Dentists v. Kizer (the Director of the Department of Health Services), et al* (1990) 223 Cal.App.3d 490.

¹⁷⁰ *Id.*, page 495.

¹⁷¹ *Id.*, page 501.

¹⁷² *Id.*, page 495.

¹⁷³ *Id.*, page 502.

...adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency.”¹⁷⁴ The court held that the documentation rules imposed by the Department were standards of general application to Medi-Cal providers statewide, which interpreted or made specific the law enforced by the Department.¹⁷⁵ Accordingly, the court found that the documentation requirements in the bulletins and manuals were invalid underground regulations.¹⁷⁶ The courts’ holding in these cases applies to the Controller’s source document rule here.

The Controller’s comments further state that Government Code section 17561(d)(2)(A)(1) authorizes the Controller to “require the production of documentation that demonstrates the validity of the costs claimed.”¹⁷⁷ There is nothing in Government Code section 17561(d)(2)(A)(1) requiring claimants to produce documentation to demonstrate the validity of the costs claimed. Section 17561 simply gives the Controller authority to audit the “[r]ecords of any local agency or school district to verify the actual amount of the mandated costs.” As stated above, there is no dispute that the Controller has that authority. But a rule requiring claimants to provide any particular source documentation is still required to go through the regulatory process. That can be done by either incorporating the rule into the parameters and guidelines, which goes through a public comment and hearing process before it is adopted, or by the Controller adopting its own regulation.

The parameters and guidelines in this case do not contain source documentation requirements, and there is no evidence that any were proposed for inclusion in the parameters and guidelines. Since the parameters and guidelines were never challenged, they are final and binding in this case.¹⁷⁸ In 2010, the Commission amended the parameters and guidelines for the *Collective Bargaining* program at the request of the Controller to require claimants to provide contemporaneous source documentation to support the costs claimed beginning July 1, 2005. Those amended parameters and guidelines, however, cannot be applied retroactively to the 1999-2000, 2000-2001, and 2001-2002 reimbursement claims at issue here because that would result in an unlawful retroactive application of the law. If an amendment affects substantive rights or liabilities of the parties that change the legal consequences of past events, then the application of an amendment may be considered unlawfully retroactive under principles of due process.¹⁷⁹ A statutory change is substantive if it imposes new, additional, or different liabilities based on past conduct.¹⁸⁰ In addition, due process requires that a claimant have reasonable notice of any

¹⁷⁴ *Id.*, page 496-497.

¹⁷⁵ *Id.*, page 501.

¹⁷⁶ *Id.*, page 506.

¹⁷⁷ Exhibit E, Controller’s comments on draft proposed decision, page 3.

¹⁷⁸ *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

¹⁷⁹ *City of Modesto v. National Med, Inc.* (2005) 128 Cal.App.4th 518, 527; *Department of Health Services v. Fontes* (1985) 169 Cal.App.3d 301, 304-305; *Tapia v. Superior Court* (1991) 53 Cal.3d 282; 287-292; *Murphy v. City of Alameda* (1993) 11 Cal.App.4th 906, 911-912.

change that affects the substantive rights and liabilities of the parties.¹⁸¹ When costs were incurred and the 1999-2000, 2000-2001, and 2001-2002 reimbursement claims were filed, claimants did not have notice that they were required to provide additional source documentation.

Accordingly, the Controller may not reduce reimbursement claims for the *Collective Bargaining* program in fiscal years 1999-2000, 2000-2001, and 2001-2002, on the ground that the claimant failed to provide source documents (such as activity log sheets, meeting sign-in sheets, time records, and employee declarations or certifications) to support claims for salary and benefits. Claimants need only comply with the parameters and guidelines and “[s]upply workload data requested ... to support the level of costs claimed” and “[s]how the classification of the employees involved, amount of time spent, and their hourly rate”; nothing is said about “source documents.”

b) The reduction of salary and benefit costs claimed under components G3 and G6 of the parameters and guidelines is incorrect as a matter of law.

Claimant, for all fiscal years at issue, sought reimbursement for salaries and benefits under components G3 and G6, and submitted worksheets or what the Controller calls “summary schedules” to support its reimbursement claims.¹⁸² The worksheets supporting the fiscal year 1999-2000 reimbursement claim are attachments on pages 93 through 117 of the IRC (Exhibit A) and show the claimant complied with section H3 of the parameters and guidelines, which requires showing “the classification of the employees involved, amount of time spent, and their hourly rate.” Specifically, pages 93-94 of the IRC identify the number of at-the-table negotiations (component G3) conducted with the AFSCME, AFT, and CSEA unions in the fiscal year and the employees involved in those negotiations. Page 95 identifies the release time claimed for bargaining unit representatives participating in the negotiation sessions under component G3, the names of the employees, the number of hours spent on the activity, the hourly rate of each employee, and the amount claimed for release time. Pages 96 and 97 identify two training dates under component G6 (March 21, 2000, and December 1, 2000), with a list of employee names and the number of hours spent in training. Pages 98 and 99 identify the employees who participated in negotiation planning and preparation (component G3), and the number of hours spent on these activities. And pages 100-117 identify all the costs claimed for at-the-table negotiations with each union, the planning and preparation sessions for bargaining with each union, grievance resolution, and training sessions, together with a listing of each employee, the employee’s classification, the amount of time spent on the activity, the hourly rate of pay, and the amount claimed for each employee.

Claimant provided the same type of summary schedules to support the fiscal year 2000-2001 reimbursement claim¹⁸³ and 2001-2002 reimbursement claim¹⁸⁴ as it did for the 1999-2000 claim.

¹⁸⁰ *City of Modesto v. National Med, Inc.* (2005) 128 Cal.App.4th 518, 527.

¹⁸¹ *In re Cindy B.* (1987) 192 Cal.App.3d 771, 783-784.

¹⁸² Exhibit B, Controller’s comments on the IRC, page 14.

¹⁸³ Exhibit A, IRC, pages 134-157.

In addition, in response to the draft audit report, the claimant explains that three, three-year contracts were negotiated during the claim period, and yet the Controller reduced all costs claimed. The claimant further states that 100 percent of the claimant's Assistant Chancellor Greg Marvel's time during the claim period was spent on this program.¹⁸⁵ Mr. Marvel was an "Assistant Chancellor," in charge of "Employee Relations and Human Resources." Claimant provides a declaration from the Chancellor and Superintendent of San Mateo County Community College District, Ron Galatolo, who was Mr. Marvel's supervisor, to certify the duty statement of Mr. Marvel during the claim period, which is attached.¹⁸⁶ The duty statement states that the Mr. Marvel was "responsible to the Chancellor-Superintendent for collective bargaining, grievance administration, bargaining unit contract interpretation," and that he served as the District's chief negotiator responsible "for developing negotiation proposals, strategies, grievance resolutions and related research as liaison to the Board of Trustees."¹⁸⁷ The claimant's response to the draft audit report further states that it claimed release time for AFT members as mandated by a Public Employment Relations Board (PERB) ruling. The claimant has not provided the PERB ruling, but states the following:

In addition to claiming actual hours spent on negotiations, the District claimed release time for AFT members as mandated by a PERB ruling. The PERB ruling states that release time is not only reasonable but a requirement for the negotiation and grievance processes and requires the District to negotiate for AFT members. The ruling states that EERA section 3543.5 creates a statutory right to release time. The amount of release time the district was providing was not reasonable and collective bargaining required the district to provide a reasonable amount of release time. The district did negotiate release time as required by the PERB ruling and have listed it as a reasonable cost in the claims. The audit has disregarded this administrative ruling and disallowed all of the release time. We believe that the PERB ruling is sufficient justification for this claim.¹⁸⁸

The Commission finds that the claimant fully complied with the requirements in section H of the parameters and guidelines when claiming costs for salaries and benefits by supplying summary schedules with the claims that include "workload data requested ... to support the level of costs claimed" (section H1) and showing "the classification of the employees involved, amount of time spent, and their hourly rate" (section H3).

In finding 1 of the Final Audit Report, however, the Controller reduced costs claimed for "unsupported salaries and benefits" by \$631,854 (\$599,399 for G3 activities and \$32,455 for G6 activities, plus related indirect costs) because the claimant "*did not provide source documents* to validate employees' hours charged, such as *individual activity log sheets, meeting sign-in sheets,*

¹⁸⁴ Exhibit A, IRC, pages 173-205.

¹⁸⁵ Exhibit A, IRC, page 66-67.

¹⁸⁶ Exhibit A, IRC, pages 68-70.

¹⁸⁷ Exhibit A, IRC, page 69.

¹⁸⁸ Exhibit A, IRC, page 67.

and time records.”¹⁸⁹ The Controller’s comments on the IRC further states that “the claimant did not adequately support employee hours charged to the mandated program,” so the Controller reduced the number of hours in the reimbursement claims by tracing employee attendance to sign-in sheets and meeting notes provided by the claimant.¹⁹⁰

As discussed above, the Controller may not reduce reimbursement claims for the *Collective Bargaining* program in fiscal years 1999-2000, 2000-2001, and 2001-2002, on the ground that the claimant failed to provide source documents (such as activity log sheets, meeting sign-in sheets, time records, and employee declarations or certifications) to support claims for salary and benefits without going through a regulatory process.

Accordingly, the Commission finds that the Controller’s reduction of claimed costs under components G3 and G6 of the parameters and guidelines for salaries and benefits because supporting source documentation was not provided is incorrect as a matter of law and the \$631,854 (plus related indirect costs) reduced should be reinstated to the claimant.

2. *The Controller’s reduction of \$6,168 based on the claimant’s alleged miscalculation of productive hourly rates is partially correct to the extent supported by evidence in the record.*

Section H3 of the parameters and guidelines govern how to claim employee salary and benefits, and require the claimant to identify an employee’s hourly rate of pay as follows:

Show the classification of the employees involved, amount of time spent, and their hourly rate. The worksheet used to compute the hourly salary rate must be submitted with your claim. Benefits are reimbursable. Actual benefit percent must be itemized. If no itemization is submitted, 21 percent must be used for computation of claim costs.¹⁹¹

The parties agree that the calculation of a salaried employee’s hourly rate of pay includes the employee’s annual salary and benefits, and annual productive hours.¹⁹² The Controller adjusted the productive hourly rates used by the claimant, resulting in a reduction of \$6,168 for overstated salaries for a few employees during the audit period. The Controller’s findings are as follows:

- The salary rates claimed for some employees conflicted with the district’s employee earnings reports. The Controller states it “made copies” of the information it obtained from the district’s payroll system to support the “larger” adjustments.¹⁹³
- The Controller found that the claimant deducted 120 hours per year from annual productive hours for estimated break time taken by employees which is not allowed by the claiming instructions.¹⁹⁴

¹⁸⁹ Exhibit A, IRC, page 60. (Emphasis added.)

¹⁹⁰ Exhibit B, Controller’s comments on the IRC, page 11.

¹⁹¹ Exhibit A, IRC, page 35.

¹⁹² The annual salary is added to the benefits, and that sum is divided by the productive hours.

¹⁹³ Exhibit B, Controller’s comments on the IRC, page 16.

The Controller recalculated productive hourly rates as follows:

To compute the audited productive hourly rate for the district's employees, the auditor used the district's Employee Earnings Reports, which were provided to the auditor by the district personnel. These reports came directly from the district's payroll system and reported the "gross earnings" paid to each employee for each fiscal year. The auditor used the gross earnings amount and the district's computation of productive hours in the re-calculation of each employee's productive hourly rate. Adjustments were made for rates that either exceeded or were less than productive hourly rates reported in the district's claims.¹⁹⁵

In addition, the Controller stated that it added the 120 hours deducted by the claimant for employee breaks, resulting in 1,750 productive hours instead of 1,620. Instead of applying this adjustment to the entire population of employees with allowable costs, the Controller limited the application of the revised productive hours to only those employees whose claimed salary rates conflicted with the claimant's payroll records.¹⁹⁶

In its comments on the IRC, the Controller submitted a worksheet¹⁹⁷ that included the following information to support its reductions.

Employee & (Year)	Claimed Rate	Audited Rate	Allowable Hours	Unallowable Salary ¹⁹⁸	Unallowable Benefit (21%)	Total Unallowable
J. Rivera (99-00)	\$32.95	\$32.76	36	\$6.44	\$1.44	\$8
K.Harer (00-01)	\$59.79 ¹⁹⁹	\$42.09 Salary \$73,664 ²⁰⁰ ÷ 1750 hrs	20.75	\$367.28	\$77.13	\$444
L. Pontacq (00-01)	\$59.59 ²⁰¹	\$54.31 (\$95,037 ²⁰² ÷ 1750 hrs)	469.5	\$2,478.96	\$520.58	\$3,000

¹⁹⁴ Exhibit B, Controller's comments on the IRC, page 15.

¹⁹⁵ Exhibit B, Controller's comments on the IRC, page 15.

¹⁹⁶ Exhibit B, Controller's comments on the IRC, page 16.

¹⁹⁷ Exhibit B, Controller's comments on the IRC, pages 186 and 196.

¹⁹⁸ This is the (claimed rate times the allowable hours) minus (the audited rate times the number of hours).

¹⁹⁹ Exhibit A, pages 135 and 146. However, other documentation filed by claimant shows this employee's productive hourly rate at \$37.02 and benefit rate at \$7.77 (Exhibit A, p. 158).

²⁰⁰ Exhibit B, Controller's comments on the IRC, pages 190 – 191: this employee's payroll information.

²⁰¹ Exhibit A, pages 144, 145, 152, and 158.

J. Rivera (00-01)	\$57.84 ²⁰³	\$35.81 \$62,663 ²⁰⁴ ÷ 1750 hrs.	21.75	\$479.15	\$100.62	\$580
J. Rivera (01-02)	\$38.31	\$35.81	37.75	\$94.38	\$19.82	\$114
R. Thiele (01-02)	\$62.83 ²⁰⁵	\$41.78 \$73,113 ²⁰⁶ ÷ 1750 hrs	37.75	\$794.64	\$166.87	\$962
V. Clinton (01-02)	\$62.83 ²⁰⁷	\$22.82 \$39,938 ²⁰⁸ ÷ 1750 hrs	28.75	\$1,150.29	\$241.56	\$1,392

For the reasons below, the Commission finds that these reductions are partially correct.

- a) The reduction for claimed salaries that conflict with the claimant's earnings records is supported by evidence in the record for all employees except Rivera for 1999-2000 and 2001-2002.

For 1999-2000, the Controller found that claimant had under-reported salaries of \$248 for two employees (Harer \$216 and Yancy \$32) and over-reported a salary for one employee (Rivera \$8). For 2000-2001, the Controller found that claimant had over-reported salary information for three employees (Harer \$444, Pontacq \$3,000, and Rivera \$580). For 2001-2002, the Controller found that claimant had over-reported salary information for three employees (Rivera \$114, Thiele \$962, and Clinton \$1,392) and under-reported a salary for one employee (Harer, \$84). The net finding was \$6,168 in over-reported salary information based on a review of the claimant's records of employee earnings.²⁰⁹

For fiscal year 1999-2000, the Controller stated "because the adjustments were small [-\$240] we did not document the district's payroll reports that we used for these adjustments."²¹⁰

The Controller describes the reductions for fiscal years 2000-2001 and 2001-2002 as follows:

For FY 2000-2001, we made adjustments to the productive hourly rates for three district employees (see Schedule of Unallowable Salaries and Benefits –

²⁰² Exhibit B, Controller's comments on the IRC, pages 192-193.

²⁰³ Exhibit A, IRC, pages 135 and 159.

²⁰⁴ Exhibit B, Controller's comments on the IRC, page 194.

²⁰⁵ Exhibit A, IRC, pages 177, 187-189, 205 and 207.

²⁰⁶ Exhibit B, Controller's comments on the IRC, pages 200-201

²⁰⁷ Exhibit A, IRC, pages 177, 187-189 and 206.

²⁰⁸ Exhibit B, Controller's comments on the IRC, page 202.

²⁰⁹ Exhibit B, Controller's comments on the IRC, pages 16, 181.

²¹⁰ Exhibit B, Controller's comments on the IRC, page 16.

Productive Hourly Rate Differences- FY 2000-01 (Tab 15). The adjustments resulted in a decrease to allowable costs of \$4,024. We traced the salary rates claimed for all of the employees included in our sample and found three instances in which information from the district's payroll system supported a different salary amount. We made copies of the information that we obtained from the district's payroll system supporting our adjustments.

For FY 2001-02, we made adjustments to the productive hourly rates for four district employees (see Schedule of Unallowable Salaries and Benefits – Productive Hourly Rate Differences – FY 2001-02 (Tab 16). The adjustments resulted in a net decrease to allowable costs of \$2,384 (overstatements of \$2,468 and an understatement of \$84). We traced the salary rates claimed for all of the employees included in our sample and found four instances in which information from the district's payroll system supported a different salary amount. We made copies of the information that we obtained from the district's payroll system supporting the two larger overstatements of \$962 and \$1,392. We did not make copies of the district's payroll information that we used to support an overstatement of \$114 and the understatement of \$84.²¹¹

The claimant questions these adjustments, contending that it properly reported the classification of the employees involved, the amount of time spent on the mandate, and each employee's hourly rate in accordance with the parameters and guidelines.²¹²

The Commission finds that that the Controller's adjustment of productive hourly rates based on the salaries identified in employee earnings records for all but one employee is supported by evidence in the record and is therefore not arbitrary, capricious or entirely lacking in evidentiary support.

The parameters and guidelines require claimants, in Section H3, to identify the hourly rate of pay for each employee and to submit a worksheet used to compute the hourly rate with the claim. The claimant complied with these requirements in its summary schedules. The reimbursement claims include worksheets that identify the employees' name, title, annual salary, and hourly rate of pay.²¹³ The Controller, however, traced the salary rates claimed for all of the employees included in the audit sample to claimant's employee earnings records. Although the court in *Clovis* concluded that the parameters and guidelines do not require the claimant to provide source documents, such as payroll records,²¹⁴ the Controller said that claimant in this case provided those records to the auditor. Payroll records are considered public records,²¹⁵ and the Controller found that the payroll records support a different salary for some of the employees claimed.

²¹¹ *Ibid.*

²¹² Exhibit A, IRC, pages 11-12.

²¹³ Exhibit A, IRC, pages 121 and 135-145, 188-189.

²¹⁴ *Clovis Unified School Dist.*, *supra*, 188 Cal.App.4th 794, 807.

²¹⁵ *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 331-332.

To support adjustment, the Controller provides the claimant's employee earnings records for the following employees for fiscal year 2000-2001 (Harer, Pontacq and Rivera)²¹⁶ and for fiscal year 2001-2002 (Thiele and Clinton).²¹⁷

The Controller provides no evidence for salary and benefit reductions for employee Rivera for fiscal years 1999-2000 (\$8.00) and 2001-2002 (\$114).²¹⁸ In comments on the draft staff analysis, the Controller stated that no documents were copied for some small adjustments, and that for "those employees for whom records are not included, the Controller would concur with the reversal of the adjustment made by the audit."²¹⁹

Accordingly, the Commission finds that the reduction of salaries and benefits claimed based on employee earnings reports is supported by evidence in the record and is not arbitrary, capricious, or entirely lacking in evidentiary support for all employees *except* Rivera for 1999-2000 and 2001-2002. However, the salary and benefit reductions totaling \$122 for employee J. Rivera is entirely lacking in evidentiary support and should be reinstated to the claimant.

- b) The Controller's adjustment to the productive hourly rate claimed based on claimant's alleged deduction of break time taken by employees from productive hours is not supported by evidence in the record and is, therefore, arbitrary, capricious, or entirely lacking in evidentiary support.

The Controller reduced the productive hours claimant used in calculating hourly rates because it found that the claimant deducted 120 hours per year for estimated break time taken by employees. The Controller found that a break time deduction is not allowable under the Controller's claiming instructions for these reimbursement claims. Thus, the Controller added 120 hours to the productive hours, resulting in 1,750 productive hours, instead of 1,620. Instead of applying this adjustment to the entire population of employees with allowable costs, the Controller limited the application of the revised productive hours to only those seven employees identified in the section above whose claimed salary rates conflicted with the claimant's records of employee earnings.²²⁰

The Commission finds that the Controller's reduction of costs claimed based on the productive hours is entirely lacking in evidentiary support.

The Commission's regulations require that all assertions of fact must be supported by documentary evidence.²²¹ The claimant's reimbursement claims contain a salary and benefits

²¹⁶ Exhibit B, Controller's comments on the IRC, pages 190-194.

²¹⁷ Exhibit B, Controller's comments on the IRC, pages 200-202.

²¹⁸ See Exhibit B, Controller's comments on the IRC, pages 186 and 196, for the Controller's worksheet.

²¹⁹ Exhibit E, Controller's comments on the draft proposed decision, page 4.

²²⁰ Exhibit B, Controller's comments on the IRC, page 16.

²²¹ California Code of Regulations, title 2, sections 1185.2(c), 1187.5; see also Government Code section 17559.

chart that identifies the productive hourly rates,²²² but there is no evidence in the record showing that the claimant deducted 120 hours for break time. In fact, dividing a few of the annual salaries identified by the claimant in the salary and benefit charts by the productive hourly rates identified in the charts, results in a calculation of 1,750 annual hours - the same number used by the Controller in its calculation.²²³ Claimant asserts that the “District and the Controller [both] used 1,750 annual productive hours for their calculations.”²²⁴ Thus, there is no evidence that the claimant deducted break time from the productive annual hours.²²⁵

Accordingly, the Commission finds that the Controller’s adjustment to the productive hourly rate claimed based on claimant’s alleged deduction of break time taken by employees from productive hours is not supported by evidence in the record and is, therefore, arbitrary, capricious, or entirely lacking in evidentiary support. Therefore, the Controller should reinstate to the claimant the costs adjusted for productive hours.

C. The Reduction of \$5,133 for Materials and Supplies in Finding 2 of the Audit Report Is Incorrect as a Matter of Law.

The Controller reduced costs claimed for materials and supplies for fiscal years 1999-2000 and 2000-2001 by \$5,133. The Controller found that the district did not provide source documentation to support costs claimed for materials and supplies, printing, and postage in FY 1999-2000 (\$1,431) and FY 2000-2001 (\$3,702).²²⁶ According to the Controller, “in the absence of documentation to support costs claimed, it is not possible to determine whether the costs claimed were incurred as a result of the mandate or were even incurred at all.”²²⁷

Claimant argues that this reduction is incorrect and states that the district reported these costs “based on financial accounting information prepared in the usual course of business.” Claimant

²²² Exhibit A, IRC, pages 120-121, 158-159, and 206-207.

²²³ For example, for fiscal year 2000-2001, the annual earnings for employees Acena and Anderson are \$94,176.00 and their productive hourly rates are 53.81. (Exhibit A, IRC, p. 158.) Dividing 94,176 by 53.81, equals 1,750. For fiscal year 2001-2002, the annual earnings for employee Acena is \$100,764, divided by the productive hourly rate of 57.58, equals 1,750. (Exhibit A, IRC, p. 206.) The annual earnings of employee Albanese in fiscal year 2001-2002 is \$154,080, divided by the productive hourly rate for Mr. Albanese of 88.05, equals 1,750. (*Ibid.*)

²²⁴ Exhibit A, IRC, page 12. The claimant also states that “[i]n one case where a different total productive hours was used by the District, for the Chief Negotiator who was under contract for 7.5 hours per day, the Controller insisted on using 8 hours per day.” (*Ibid.*) There is no indication in the final audit report or the Controller’s comments, however, that the reduction resulting from the calculation of productive hourly rates had anything to do with Chief Negotiator’s contracted hours.

²²⁵ In comments on the draft proposed decision, the Controller said that, “reference to the 120 hours deducted for estimated break time does confuse the issues, this reduction is ultimately based on the use of and unsupported salary for the identified employees.” (Exhibit E, page 4.)

²²⁶ Exhibit B, Controller’s comments on the IRC, page 20.

²²⁷ Exhibit B, Controller’s comments on the IRC, page 21.

also mentions that the Controller refused to accept credit card statements as documentation to support these costs.²²⁸

For the reasons below, the Commission finds that the Controller incorrectly reduced these costs.

Section H4 of the parameters and guidelines describes documentation required to support a reimbursement claim for services and supplies: “Services and Supplies: only expenditures which can be identified as a direct cost as a result of the mandate can be claimed.”²²⁹ There is no language in the parameters and guidelines for the *Collective Bargaining* program, however, requiring claimants to provide source documentation (such as invoices, purchase orders, or receipts) to support a claim of reimbursement for materials and supplies.²³⁰

As fully discussed in Issue B above, although there is no dispute that the Controller has the authority to audit the records of a claimant, the Controller’s source document rule to support the costs claimed, when such a rule has not been adopted through the regulatory process in the parameters and guidelines or through the Controller’s own regulatory authority, is incorrect as a matter of law pursuant to *Clovis Unified School District* and *Union American Physicians and Dentists v. Kizer (the Director of the Department of Health Services), et al.*²³¹

In this case, the claimant complied with the parameters and guidelines. For its 1999-2000 claim, claimant listed supplies and materials, postage, and printing, for a total of \$1,430.76.²³² For its 2000-2001 claim, claimant listed supplies and materials, postage, and printing, for a total of \$3,701.88.²³³ Claimant identified these costs as a direct cost as a result of the mandate, and the parameters and guidelines do not require any documentation beyond the summary schedules that were submitted with the reimbursement claims.

Accordingly, the Commission finds that the reduction of \$5,133 (plus related indirect costs) for materials and supplies is incorrect as a matter of law and should be reinstated to the claimant.

V. Conclusion

Pursuant to Government Code section 17551(d), the Commission finds the following:

- The audit of the fiscal year 1999-2000 claim is not barred by the deadline in Government Code section 17558.5;

²²⁸ Exhibit A, IRC, pages 15-16.

²²⁹ Exhibit A, IRC, page 36.

²³⁰ *Clovis Unified School Dist., supra*, 188 Cal.App.4th 794, 807.

²³¹ *Ibid*; *Union American Physicians and Dentists v. Kizer (the Director of the Department of Health Services), et al* (1990) 223 Cal.App.3d 490, 506.

²³² Exhibit A, IRC, pages 87 and 117. The audit finding was rounded up to \$1,431, see Exhibit A, IRC, page 62.

²³³ Exhibit A, IRC, pages 130, 139, and 157. The audit finding was rounded up to \$3,702, see Exhibit A, IRC, page 62.

- The claimant complied with the documentation requirements in the parameters and guidelines for salary and benefits, so that the Controller's reduction in Finding 1 of the Audit Report of \$631,854 (and related indirect costs) is incorrect as a matter of law.
- The Controller's adjustment of \$6,168 in Finding 1 of the Audit Report for productive hourly rates is partially correct. The reductions based on claimed salaries that conflict with the claimant's employee earnings records are supported by evidence in the record and are correct for all employees *except* for Rivera for 1999-2000 and 2001-2002. The adjustment based on an alleged deduction for break time from productive hours is not supported by evidence in the record and is therefore arbitrary, capricious, and entirely lacking in evidentiary support. The incorrect reductions made based on unsupported conclusions of conflicting salaries and benefits for employee Rivera, and any based on unsupported alleged defects in the calculation of productive hours (and related indirect costs), should be reinstated to the claimant.
- The claimant complied with the documentation requirements in the parameters and guidelines for materials and supplies, so that the Controller's reduction in Finding 2 of the Audit Report of \$5,133 (and related indirect costs) is incorrect as a matter of law.

Therefore, pursuant to section 1185.9 of the Commission's regulations, the Controller is requested to reinstate to the claimant all costs incorrectly reduced, plus related indirect costs, consistent with these findings.