Hearing Date: September 28, 2018
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ITEM 4

PROPOSED DECISION

AND

PROPOSED PARAMETERS AND GUIDELINES

Government Code Sections 3505.4(a-d) and 3505.5(a-d)

Statutes 2012, Chapter 314 (AB 1606)

Local Agency Employee Organizations: Impasse Procedures II

16-TC-04

City of Oxnard, Claimant

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STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

Exhibit A

May 30, 2018

Mr. Patrick J. Dyer
MGT Consulting
2251 Harvard Street, Suite 134
Sacramento, CA 95815

Mr. Justyn Howard
Department of Finance
915 L Street
Sacramento, CA 95814

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: **Decision**
Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
Government Code Sections 3505.4, 3505.5, and 3505.7; as added or amended by Statutes 2011, Chapter 680 (AB 646) and Statutes 2012, Chapter 314 (AB 1606)
City of Oxnard, Claimant

Dear Mr. Dyer and Mr. Howard:

On May 25, 2018, the Commission on State Mandates adopted the Decision partially approving the Test Claim on the above-entitled matter.

Sincerely,

Heather Halsey
Executive Director

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Government Code Sections 3505.4, 3505.5, and 3505.7; Statutes 2011, Chapter 680 (AB 646) And Statutes 2012, Chapter 314 (AB 1606) Filed on May 12, 2017 City of Oxnard, Claimant	Case No.: 16-TC-04 *Local Agency Employee Organizations: Impasse Procedures II* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted May 25, 2018*) (*Served May 30, 2018*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on May 25, 2018. Patrick Dyer appeared on behalf of the City of Oxnard. Chris Hill appeared on behalf of the Department of Finance (Finance). Andy Nichols, of Nichols Consulting, appeared as an interested person.

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 sections 17500 et seq., and related case law.

The Commission adopted the Proposed Decision to partially approve the Test Claim by a vote of 4-0, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Ken Alex, Director of the Office of Planning and Research	Yes
Richard Chivaro, Representative of the State Controller	Absent
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	Yes
Sarah Olsen, Public Member	Absent
Carmen Ramirez, City Council Member	Absent
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	Yes

Summary of the Findings

This Test Claim alleges reimbursable state-mandated activities arising from amendments to the Meyers-Milias-Brown Act (MMBA) by Statutes 2011, chapter 680 (AB 646) and Statutes 2012, chapter 314 (AB 1606).[1] The Test Claim statutes added a factfinding procedure after a local agency and an employee organization reach an impasse in their collective bargaining negotiations.

The Test Claim is timely filed pursuant to Government Code section 17551 and section 1183.1 of the Commission's regulations. A test claim must be filed not later than 12 months after the effective date of the statute or executive order, or within 12 months of the date costs are first incurred. At the time of filing, Commission regulations defined "within 12 months" for purposes of filing based on the date costs are first incurred to mean by the end of the fiscal year (June 30) following the fiscal year in which costs were first incurred. This Test Claim was filed May 12, 2017, based on costs first incurred May 12, 2016, and is therefore timely.

The Commission, however, does not have jurisdiction to reconsider its prior decision denying Statutes 2011, chapter 680 (*Local Agency Employee Organizations: Impasse Procedures,* 15-TC-01). Therefore the Commission's jurisdiction in this Test Claim is limited to Statutes 2012, chapter 314, which amended Government Code section 3505.4.

Government Code section 3505.4, as amended by the 2012 test claim statute, authorizes an employee organization to request factfinding whether or not the parties previously engaged in voluntary mediation. The Commission finds that section 3505.4, as amended by the 2012 test claim statute, imposes state-mandated activities and costs when the employee organization requests factfinding. The mandated activities are new, with respect to prior law, because Statutes 2012, chapter 314 is clarifying of existing law and relates back to the January 1, 2012 operative date of the existing regulations. In addition, the statute is uniquely imposed on local government and provides a service to the public and, therefore, constitutes a new program or higher level of service. Finally, claimant has experienced increased costs mandated by the state within the meaning of Government Code section 17514 and no exceptions in Government Code section 17556 apply to deny this Test Claim.

Accordingly, the Commission partially approves this Test Claim, with a reimbursement period beginning July 1, 2015, for local agencies defined in Government Code section 17518 that are eligible to claim reimbursement under article XIII B, section 6 of the California Constitution (other than charter cities or counties with a charter prescribing binding arbitration in the case of an impasse pursuant to Government Code section 3505.5(e)), for the following reimbursable state-mandated activities and costs:

- Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay

[1] The claimant did not plead the Public Employment Relations Board's regulations implementing Statutes 2011, chapter 680, which were effective January 1, 2012.

half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)

- Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
- Furnish the factfinding panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the factfinding panel. (Gov. Code § 3505.4(c-d).)
- Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

All other activities and costs alleged in the Test Claim are denied.

COMMISSION FINDINGS

I. Chronology

10/09/2011	Statutes 2011, chapter 680 was enacted.
01/01/2012	Effective date of Statutes 2011, chapter 680.
01/01/2012	Effective date of PERB emergency regulations.[2]
07/30/2012	OAL approved PERB's timely Certificate of Compliance, making the emergency regulations permanent.[3]
09/14/2012	Statutes 2012, chapter 314 was enacted.
05/12/2016	Date the claimant alleges it first incurred costs under Statutes 2011, chapter 680.[4]
05/12/2017	The claimant filed the Test Claim with the Commission.[5]
10/18/2017	Finance filed comments on the Test Claim.[6]
11/20/2017	The claimant filed late rebuttal comments.[7]

[2] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, pages 99; 106.

[3] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 218.

[4] Exhibit A, Test Claim, page 10.

[5] Exhibit A, Test Claim, page 1. If the Test Claim is approved by the Commission, the period of reimbursement would begin July 1, 2015, pursuant to Government Code section 17557(e).

[6] Exhibit B, Finance's Comments on Test Claim.

[7] Exhibit C, Claimant's Late Rebuttal Comments.

03/23/2018 Commission staff issued the Draft Proposed Decision.[8]

04/13/2018 Finance filed comments on the Draft Proposed Decision.[9]

II. Background

This Test Claim addresses Statutes 2011, chapter 680, and Statutes 2012, chapter 314, which amended the Meyers-Milias-Brown Act to add a factfinding procedure after a local agency and an employee union reach an impasse in negotiations.

A. Prior Law

1. The General Provisions of the Meyers-Milias-Brown Act

The collective bargaining rights of many local agency employees are governed by the Meyers-Milias-Brown Act, which is codified at Government Code sections 3500 to 3511. Specifically, the Meyers-Milias-Brown Act (also referred to herein as the "MMBA" or the "Act") applies to employees of California cities, counties, and certain types of special districts.[10]

The Meyers-Milias-Brown Act obligates each local agency to meet with the relevant "recognized employee organization" — the Act's term for a labor union — and to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment.[11] The relevant provision of the Act, which was added in 1971 and has not been amended since, reads:

> The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
>
> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to

[8] Exhibit D, Draft Proposed Decision.

[9] Exhibit E, Finance's Comments on Draft Proposed Decision.

[10] The Meyers-Milias-Brown Act applies to each "public employee," which is defined as any person employed by a "public agency." (Government Code section 3501(d).) A "public agency" is then defined as "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not." (Government Code section 3501(c).)

[11] Government Code section 3505. See also Government Code section 3501(b) (definition of "recognized employee organization").

> endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.[12]

The courts have interpreted the duty to meet and confer on terms and conditions of employment to include all matters "directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls."[13] "Thus, the duty to bargain extends to matters *beyond what might typically be incorporated into a comprehensive MOU*, including, as here, the implementation and effects of a decision to lay off employees."[14] Accordingly, the scope of the MMBA is held to be very broad, and an impasse may occur on any matter that is subject to the expansive scope of collective bargaining.

Meeting and conferring is intended to result in a tentative agreement which, if adopted, is formalized into a Memorandum of Understanding (MOU).[15] From 1969 to 2013, the relevant provision of the Act, which was not amended by the test claim statutes, read:

> If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination.[16]

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[12] Government Code section 3505. See also Government Code section 3501(b) (definition of "recognized employee organization").

[13] *San Diego Housing Commission v. Public Employment Relations Board* (2016) 246 Cal.App.4th 1, 9 [quoting *International Association of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Board* (2011) 51 Cal.4th 259, 272].

[14] *San Diego Housing Commission v. Public Employment Relations Board* (2016) 246 Cal.App.4th 1, 9.

[15] Government Code section 3505.1.

[16] Government Code section 3505.1. The quoted language was in effect from 1969 to 2013. After the test claim statutes were enacted, Statutes 2013, chapter 785, which was not pled and is not before the Commission, amended Government Code section 3505.1 to read:

> If a tentative agreement is reached by the authorized representatives of the public agency and a recognized employee organization or recognized employee organizations, the governing body shall vote to accept or reject the tentative agreement within 30 days of the date it is first considered at a duly noticed public meeting. A decision by the governing body to reject the tentative agreement shall not bar the filing of a charge of unfair practice for failure to meet and confer in good faith. If the governing body adopts the tentative agreement, the parties shall jointly prepare a written memorandum of understanding.

2. The Impasse Provisions of the Meyers-Milias-Brown Act, Under Prior Law, Were Limited to Voluntary Mediation.

An "impasse" occurs when "despite the parties best efforts to achieve an agreement, neither party is willing to move from its respective position."[17]

The Meyers-Milias-Brown Act contains several provisions regarding what happens when an impasse in negotiations is reached.

As quoted above, the provision of the Act which requires a local agency and a union to meet and confer in good faith also counsels the negotiating parties to allocate time for a potential impasse. Government Code section 3505 reads in relevant part, "The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent."

In addition, the Meyers-Milias-Brown Act recognizes the right of the negotiating parties to engage in voluntary mediation. Government Code section 3505.2 — which has not been amended since it was enacted in 1968 — reads:

> If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations.

The courts have concluded that mediation under the Meyers-Milias-Brown Act is voluntary. "In the event of a failure to reach agreement after good faith efforts over a reasonable time to do so, the parties may agree to place the disputed matters in the hands of a mediator, but are not required to do so."[18] "[S]ection 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator."[19] "We conclude, therefore, that there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."[20]

While other potential impasse procedures exist in the field of labor law (such as, for example, submission of the dispute to a form of binding arbitration named "interest arbitration" or to a factfinding panel), the Meyers-Milias-Brown Act (as it existed prior to enactment of the test claim statutes) did not contain an impasse procedure other than voluntary mediation. Courts have stated: "Several California statutes applicable to different kinds of public employees contain mandatory procedures for identifying and resolving a bargaining impasse, usually requiring mediation. (Citations.) [¶] In contrast with those statutes, the applicable version of

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[17] *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 827.

[18] *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21.

[19] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034.

[20] *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

the MMBA did not mandate an impasse resolution procedure."[21] "Moreover, the Meyers-Milias-Brown Act provides for negotiation and permits the local agency and the employee organization to agree to mediation but not to fact-finding or binding arbitration."[22]

B. Statutes 2011, Chapter 680

1. The Plain Language Statutes 2011, Chapter 680

Statutes 2011, chapter 680, effective January 1, 2012, contains four provisions. In Section One, the statute repeals the pre-existing version of Government Code section 3505.4, which read:[23]

> If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.[24]

In Section Two, the statute replaces Government Code Section 3505.4 to read:

> 3505.4. (a) If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.
>
> (b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.
>
> (c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any

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[21] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.

[22] *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25.

[23] Statutes 2011, chapter 680, section 1.

[24] Statutes 2000, chapter 316, section 1.

board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.[25]

In Section Three, the 2011 test claim statute adds to the Government Code a new Section 3505.5, which reads:

3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees

[25] Government Code section 3505.4 (Stats. 2011, ch. 680 (AB 646)).

shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.[26]

In Section Four, the test claim statute adds to the Government Code a new Section 3505.7, which reads:

3505.7. After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.[27]

2. The Legislative History of Statutes 2011, Chapter 680 (AB 646)

The legislative history of AB 646 includes evidence that the author intended to insert a new factfinding procedure into the Meyers-Milias-Brown Act which would have been made mandatory by the inclusion of mandatory mediation provisions. However, the author removed the mandatory mediation provisions from the bill when it was heard by the Assembly Committee on Public Employees, Retirement, and Social Security.

The Assembly Committee on Public Employees, Retirement, and Social Security bill analysis on the AB 646 quotes the bill's author, Assembly Member Toni G. Atkins, who recognized that the Meyers-Milias-Brown Act, in its then-current form, did not mandate factfinding or any other form of impasse procedure stating: "Currently, there is no requirement that public agency

[26] Government Code section 3505.5 (Stats. 2011, ch. 680 (AB 646)).

[27] Government Code section 3505.7 (Stats. 2011, ch. 680 (AB 646)).

employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed."[28]

However, although Assembly Member Atkins argued in favor of the perceived benefits of *mandatory* impasse procedures stating that "[t]he creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful,"[29] and "[f]act-finding panels can also help facilitate agreement, by making objective, factual determinations that can help the parties engage in productive discussions and reach reasonable decisions,"[30] opponents of AB 646 argued that "requiring mediation and factfinding prior to imposing a last, best and final offer would simply add costs and be unhelpful to both the employer and the employees."[31]

The author agreed to a series of amendments, which the Committee memorialized as follows:

> 1) *Remove all of the provisions related to mediation*, making no changes to existing law.
>
> 2) *Remove the requirements that an employer and employee organization submit their differences to a fact-finding panel* and instead provides employees organizations with the *option* to participate in the fact-finding process established in Government Section 3505.4 which is added by this measure.
>
> 3) Clarify the existing requirement for a public employer to conduct a public impasse hearing prior to imposing its last, best, and final offer.[32]

After the amendments were made, the Senate Floor Analysis stated that AB 646:

> 1. Allows an employee organization to request fact-finding when a mediator has been unsuccessful at effectuating a resolution to a labor dispute within 30 days of appointment. . . . .
>
> 3. Requires the fact-finding panel to meet with the parties within 10 days after appointment, and take other steps it deems appropriate. . . . .
>
> 5. Requires state and local public agencies, if requested by the panel, to furnish the panel with all records, papers and information in their possession relating

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[28] Exhibit F, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2.

[29] Exhibit F, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2.

[30] Exhibit F, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2.

[31] Exhibit F, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 646 as amended March 23, 2011, page 3.

[32] Exhibit F, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 646 as amended March 23, 2011, page 3, emphasis added.

to any matter under investigation by the panel. . . . .

7. Requires the fact-finding panel to make findings of fact and recommend terms of a settlement if the dispute is not settled within 30 days. . . . .

8. Requires the costs of the chairperson of the fact-finding panel to be paid for by both parties whether or not PERB selected the chairperson."[33]

3. Critiques of Statutes 2011, Chapter 680

Almost immediately after enactment, Statutes 2011, Chapter 680 was criticized on the grounds that, while the author's intent had been to make factfinding mandatory under the Meyers-Milias-Brown Act, the statute as enacted merely made factfinding voluntary, not mandatory.

AB 646, as enacted, stated that mediation was a pre-requisite to factfinding. Since mediation under the Meyers-Milias-Brown Act is voluntary, and AB 646 as enacted did not include provisions to make it mandatory, this drafting rendered factfinding voluntary as well.

Specifically, the first sentence of newly added Section 3505.4 was drafted to read, "If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel."

Commentators and practitioners promptly criticized the language. Twelve days after the Governor signed AB 646, the employment law firm of Littler Mendelson P.C. posted the following analysis to its web site:

> It is questionable whether this new law actually fulfills the bill sponsor's apparent intent of requiring an employer to submit to factfinding before implementing its last, best and final offer in *all* cases where the union has requested factfinding. The bill sponsor's comments regarding AB 646 reference "the creation of *mandatory* impasse procedures," giving the impression of an intent to require these impasse procedures (e.g., factfinding and a public hearing) in all cases where a union requests them.
>
> However, the law, as written, arguably does not achieve this goal. AB 646 specifically states that "*[i]f the mediator is unable to effect settlement* of the controversy within 30 days after his or her appointment, the employee organization may request . . . factfinding . . . ." Because mediation is not required under the current version of the MMBA and, importantly, AB 646 did not change the voluntariness of mediation under the statute, it appears the union may not be able to insist on factfinding in the absence of a failed attempt at settling the dispute before a mediator. If true, it is possible that an employer can avoid the costs and delays associated with factfinding by declining to participate in mediation and, thereafter, implementing its last, best and final offer. Indeed, new Government Code section 3505.7, which was added by AB 646 and permits implementation of the last, best and final offer "[a]fter any applicable mediation and factfinding procedures have been exhausted," lends some support to this

[33] Exhibit F, Senate Rules Committee, Floor Analysis of AB 646, as amended on June 22, 2011, pages 2-3.

interpretation of the new law because it opens the door to the possibility that such procedures are permissive, but not necessarily required.[34]

Other commentators shared the concern. "[T]he statute's vague and inconsistent language leaves many questions unanswered as to how this new process will really work. . . . . We believe the legislative history clearly shows that AB 646 does not require mediation. However, without mediation, there is no clear trigger for fact-finding."[35] "Without mediation — voluntary or mandatory — there is no explicit trigger for fact-finding, and opinions as to whether fact-finding is truly mandatory are already split."[36] "Can factfinding be avoided by not agreeing to mediation?"[37] "The question 'Is mediation required before the union can request factfinding?' may be the most obvious point of confusion created by the statute, but others exist."[38]

C. PERB Emergency Regulations, Effective January 1, 2012

1. The Plain Language of PERB Emergency Regulations

After the enactment of Statutes 2011, chapter 680 (AB 646) PERB adopted emergency regulations to address whether the factfinding process was required if the parties had not gone through mediation. As discussed above, the issue of whether factfinding was mandated by the 2011 statute was the subject of some dispute and confusion. PERB filed the emergency rulemaking package with the Office of Administrative Law (OAL) on December 19, 2011.[39]

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[34] Exhibit F, Edward Ellis and Jill Albrecht, "California Governor Signs New Collective Bargaining Law Requiring Factfinding Procedures for Impasse Resolution for Public Sector Employers Covered by the MMBA" dated October 21, 2011 [emphases in original], pages 2-3, http://www.littler.com/california-governor-signs-new-collective-bargaining-law-requiring-factfinding-procedures-impasse, accessed November 9, 2016.

[35] Exhibit F, Renne Sloan Holtzman Sakai LP, Navigating the Mandatory Fact-Finding Process Under AB 646 [November 2011], pages 4, 11, http://www.pccfacultyassociation.org/wp-content/uploads/2012/09/fact_finding.pdf, accessed November 9, 2016.

[36] Exhibit F, Emily Prescott, *Mandatory Fact-Finding Under the Meyers-Milias-Brown Act*, California Labor & Employment Law Review, Vol. 26 No. 1 [January 2012], page 2, http://www.publiclawgroup.com/wp-content/uploads/2012/01/Mandatory-Fact-Finding-Under-Meyers-Milias-Brown-Act-by-Emily-Prescott-Cal-Labor-and-Employment-Law-Review.pdf, accessed November 9, 2016.

[37] Exhibit F, Best Best & Krieger LLP, *AB 646's Impact On Impasse Procedures Under the MMBA (Mandated Factfinding)*, dated December 2011, page 6, http://www.bbklaw.com/88E17A/assets/files/News/MMBA-Impasse%20Procedures%20After%20AB%20646.pdf, accessed November 9, 2016.

[38] Exhibit F, Stefanie Kalmin, *A.B. 646 Raises Many Questions*, U.C. Berkeley Institute for Research on Labor and Employment, page 1, http://cper.berkeley.edu/journal/online/?p=952, accessed November 9, 2016.

[39] Exhibit F, Senate Committee on Public Employment and Retirement, Analysis of AB 1606, as introduced February 7, 2012, page 2.

The emergency regulations became operative on January 1, 2012[40] — the same date that AB 646 became effective.[41] The emergency regulations became permanent after PERB transmitted a Certificate of Compliance to OAL on or about June 22, 2012.[42]

Section 32802 of the regulations makes factfinding available at the option of the employee organization's representative whether or not an impasse has been submitted to mediation. Section 32802 provides:

> 32802. Request for Factfinding Under the MMBA.
>
> (a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
>
> > (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or
> >
> > (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.
>
> (b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.
>
> (c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.
>
> (d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.
>
> (e) The determination as to whether a request is sufficient shall not be appealable

[40] See History at the bottom of Code of California Regulations, title 8, section 32802. See also Register 2011, No. 52.

[41] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 106.

[42] See History at the bottom of Code of California Regulations, title 8, section 32802. See also Register 2012, No. 31; Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 330.

to the Board itself.[43]

Thus, section 32802(a)(1) specifies a timeline for the initiation of factfinding after mediation, and section 32802(a)(2) specifies a timeline for the initiation of factfinding when mediation has not occurred.

2. The Dispute Surrounding the PERB Emergency Regulations

On November 8 and 10, 2011 — about one month after the Governor signed AB 646 — PERB staff members met in Oakland and Glendale with members of the public, including officials of unions representing city and county employees, regarding the draft regulations.[44] PERB also held formal meetings in its Sacramento headquarters about the regulations on December 8, 2011, and April 12, 2012.[45] At these meetings, whether Statutes 2011, chapter 680 mandated factfinding in the absence of mediation was questioned. At one of the meetings, a union official "stated that at the PERB meeting he attended, the unions agreed that factfinding *should be required* even when mediation was not required by law."[46]

PERB member Dowdin Calvillo "commented on concerns expressed by some constituents with regard to staff's recommendation that factfinding would be required in situations where mediation was not required by law."[47] Member Calvillo "said she was not sure if the Board had authority to require factfinding in those situations given that AB 646 was silent in that regard but that she was willing to allow the language to move forward as staff proposed and allow OAL to make that determination."[48] As noted, OAL ultimately approved the regulations.[49]

According to PERB Minutes, Mr. Chisholm, the Division Chief of PERB's Office of General

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[43] Register 2011, No. 52. Subdivision (e) of Regulation 32802 was repealed as of October 1, 2013. (Register 2013, No. 34.)

[44] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, pages 177-181 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 4-8).

[45] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, pages 178-181 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 5-8); Exhibit F, Minutes, Public Employment Relations Board Meeting, April 12, 2012, pages 6-7.

[46] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 180 [emphasis added] (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

[47] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 180 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

[48] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 180 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

[49] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 330.

Counsel, "stated that AB 646 provides, for the first time, a mandatory impasse procedure under the MMBA."[50] Mr. Chisholm stated that AB 646 "established a mandatory factfinding procedure under the MMBA that did not exist previously."[51] "Mr. Chisholm acknowledged the comments and discussions held regarding whether factfinding may be requested where mediation has not occurred. PERB, having considered all aspects, including comments and discussions held, related statutes, and legislative history and intent, drafted a regulatory package that would provide certainty and predictability."[52]

During the period of time when the emergency regulations were being reviewed by OAL, the City of San Diego submitted comments arguing that section 32802(a) was inconsistent with AB 646 and also lacked clarity. "PERB's proposed regulation 32802(a) is not consistent with A.B. 646, nor does it provide clarity to the public agencies subject to it," the City of San Diego wrote, through its City Attorney.[53] "A.B. 646 does not authorize or mandate factfinding when the parties do not engage in mediation of a dispute, nor does A.B. 646 mandate mediation."[54]

In response to the City of San Diego's letter, PERB agreed "that nothing in AB 646 changes the voluntary nature of mediation under the MMBA," but stated that "any attempt to read and harmonize all of the statutory changes made by AB 646 must end in the conclusion that factfinding is mandatory . . . ."[55] PERB argued that its proposed emergency regulations were consistent with legislative intent and that the "majority of interested parties, both employer and labor representatives, also urged a reading of AB 646 that provides for a factfinding request whether mediation occurs or not."[56] PERB also argued that, since the test claim statute repealed

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[50] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 178 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 5).

[51] Exhibit F, Minutes, Public Employment Relations Board Meeting, April 12, 2012, page 6.

[52] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 179 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 6).

[53] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 120 (Letter from Joan F. Dawson, Deputy City Attorney, to Kathleen Eddy, Office of Administrative Law, and Les Chisholm, PERB, dated December 22, 2011, page 1).

[54] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 121 (Letter from Joan F. Dawson, Deputy City Attorney, to Kathleen Eddy, Office of Administrative Law, and Les Chisholm, PERB, dated December 22, 2011, page 2).

[55] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 124 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 1).

[56] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 2).

the prior language regarding when an employer could implement its last, best, and final offer, the replacement language — which references factfinding — implies that factfinding must be a mandatory step in the process which leads to the ability of the employer to implement its last, best, and final offer.[57]

D. Statutes 2012, Chapter 314 (AB 1606), Effective January 1, 2013.[58]

1. The Plain Language of Statutes 2012, Chapter 314

Statutes 2012, chapter 314 (AB 1606), enacted on September 14, 2012, contains two sections. Section One codifies the timelines and language contained in PERB Regulation 32802(a) and provides, as did the PERB Regulation, that an employee organization may demand factfinding whether or not mediation has occurred. Government Code section 3505.4(a) is amended to read (in underline and italic):

> 3505.4(a) ~~If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the~~ *The* employee organization may request that the parties' differences be submitted to a factfinding panel~~.~~ *not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.* Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

Section One also adds to Government Code section 3505.4 a new subdivision (e) which reads:

> (e) The procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived.

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[57] "[I]t also is important to consider that AB 646 *repealed* the prior language of section 3505.4, which set forth the conditions under which an employer could implement its last, best and final offer (LBFO). In new section 3505.7, added by AB 646, the MMBA now provides that implementation of the employer's LBFO may occur only '[a]fter any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5.' (Emphasis added.)" Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, pages 124-125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, pages 1-2).

[58] Statutes 2012, chapter 314 did not state that it was an urgency statute, and therefore its effective date is January 1 of the following calendar year. (California Constitution, article IV, section 8(c).) However, as discussed herein, Section Two of the bill states that it is intended to be clarifying of existing law, which would indicate an intent that the statute operate retrospectively. This issue is discussed further below.

Section Two makes a finding that the legislation is technical and clarifying of existing law, by stating:

> SEC. 2. The Legislature finds and declares that the amendments to Section 3505.4 of the Government Code made by this act are intended to be technical and clarifying of existing law.

2. The Legislative History of Statutes 2012, Chapter 314

The analysis of the Assembly Committee on Public Employees, Retirement, and Social Security, quotes the author of AB 1606 stating, "Ambiguity in the drafting of AB 646 has called into question whether an employer can forgo all impasse procedures, including mediation and fact-finding. In fact, several government employers argue that AB 646 does not require fact-finding if the parties do not engage in mediation."[59]

According to the Assembly committee analysis, the author stated, prior to the PERB regulations being made permanent, "the issue whether AB 646 requires that mediation occur as a precondition to an employee organization's ability to request fact-finding remains unresolved."[60] And, according to the committee analysis, supporters of AB 1606 stated:

> During the PERB rulemaking process, it became apparent that AB 646 was drafted in a manner that called into question whether mediation was a precondition to an employee organization's ability to request factfinding. . . . . AB 1606 seeks to provide a final, statutory clarification of this question, by revising the Government Code to allow factfinding in all circumstances in which a local public employer and its employees have reached an impasse in their negotiations.[61]

Finally, the committee analysis quotes the author stating: "AB 1606 would clarify that fact-finding is available to employee organizations in all situations, regardless of whether the employer and employee have engaged in mediation."[62] This interpretation is consistent with the regulations adopted by PERB.

According to the Senate Public Employment and Retirement Committee, AB 1606, "clarifies that if the dispute leading to impasse was not submitted to mediation, the employee organization may request factfinding within 30 days after the date that either party provided the other with written

[59] Exhibit F, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1.

[60] Exhibit F, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1.

[61] Exhibit F, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, pages 1-2.

[62] Exhibit F, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1.

notice of the declaration of impasse."[63]

E. The Prior Test Claim Filed on Statutes 2011, Chapter 680 (AB 646) (15-TC-01, adopted January 27, 2017)

On January 27, 2017, the Commission denied the Test Claim filed by the City of Glendora on Government Code sections 3505.4, 3505.5, and 3505.7, as amended by Statutes 2011, chapter 680 (AB 646), (*Local Agency Employee Organizations: Impasse Procedures,* 15-TC-01).[64] The record of that Test Claim indicated that the claimant pled only Statutes 2011, chapter 680 (AB 646), and the Commission took jurisdiction only as to that statute. Though claimant did not plead the PERB regulations or the later enacted 2012 statute, at the hearing on 15-TC-01 the claimant acknowledged the emergency regulations issued by PERB and the subsequent amendments made by AB 1606 (the 2012 statute), but stated "the intent and the effect of AB 646 was always clear that it was mandatory for an employer to go to fact-finding, should it be requested by the employee organization… [a]nd to say not that it's not mandatory or that Glendora has some choice about going to fact-finding or not…it leads to an absurd result."[65] In addition, the claimant focused entirely on the perspective that in 2015, when it experienced an impasse with one of its employee organizations, the claimant engaged in a factfinding process "not because it wanted to, but because it was required to under section 3505.4 of the Government Code."[66] The claimant argued "*that statute,* 3505.4, was pled in our test claim."[67]

The Commission denied the Test Claim on the ground that Government Code section 3505.4, as amended by Statutes 2011, chapter 680, did not impose a state-mandated program. The plain language of Government Code section 3505.4 as amended by that test claim statute made factfinding, and all activities triggered by the factfinding request (as provided in sections 3505.5 and 3505.7), required *only* if an impasse is voluntarily submitted to mediation. Thus, the 2011 statute did not legally compel local agencies to engage in factfinding or any of the activities required in conjunction with the factfinding process. In addition, there was no evidence in the record that the claimant or any other local agency was, as a practical matter, compelled to engage in factfinding. Finally, the requirement to hold a public hearing before the implementation of a last, best, and final offer, as provided in Government Code section 3505.7, does not legally compel local agencies to hold a public hearing because the implementation of a last, best and final offer is a voluntary act.[68]

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[63] Exhibit F, Senate Committee on Public Employment and Retirement, Analysis of AB 1606 as introduced February, 7, 2012 [emphases omitted], page 2.

[64] Exhibit F, Test Claim Decision *Local Agency Employee Organizations: Impasse Procedures,* 15-TC-01, adopted January 27, 2017.

[65] Exhibit F, Excerpt of Transcript of Commission Hearing, January 27, 2017, page 8.

[66] Exhibit F, Excerpt of Transcript of Commission Hearing, January 27, 2017, page 6.

[67] Exhibit F, Excerpt of Transcript of Commission Hearing, January 27, 2017, page 7 [Emphasis added. Claimant's testimony and argument during the hearing may reflect a misunderstanding of the distinction between a code section and a "statute."].

[68] Exhibit F, Test Claim Decision on *Local Agency Employee Organizations: Impasse Procedures,* 15-TC-01, adopted January 27, 2017.

III. Positions of the Parties and Interested Person

A. City of Oxnard

The claimant alleges that Statutes 2011, chapter 680 (AB 646) and Statutes 2012, chapter 314 (AB 1606), read together, "authorized the employee organization, if the mediator is unable to effect settlement of the controversy within 30 days of his or her appointment, to request that the matter be submitted to a factfinding panel."[69] In addition, "[t]hese bills would prohibit a public agency from implementing its last, best, and final offer until at least 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties and the agency has held a public hearing regarding the impasse."[70] In other words, factfinding, and related activities described in the test claim statutes, are mandatory on the local government, at the option of the public employee union.

Claimant alleges specific new activities and costs under Statutes 2011, chapter 680 (AB 646) and Statutes 2012, chapter 314 (AB 1606), including:

- Selecting a member of the factfinding panel and a mutually agreeable chairperson;
- Participating in factfinding hearings, including providing documentation as requested;
- Reviewing and making publicly available the findings of the panel within 10 days of receipt;
- Paying for half the costs of the factfinding;
- Providing notice of an impasse hearing, and holding a public impasse hearing, before implementing the agency's last, best, and final offer;
- Meet and confer with the public employee union and "submit/resubmit last, best offer."[71]
- Train staff on new requirements;
- Revise local agency manuals, policies and guidelines related to new factfinding requirements;
- Update policies and procedures, as well as city codes or resolutions, to comply with AB 1606;
- Train staff on "updated employee organization impasse process/rights/rules updated by [AB] 1606."[72]

The claimant alleges that it first incurred costs for these activities on May 12, 2016, and during fiscal year 2015-2016, the total costs were $327,302.63.[73] During fiscal year 2016-2017, alleged

[69] Exhibit A, Test Claim, page 3.

[70] Exhibit A, Test Claim, page 3.

[71] Exhibit A, Test Claim, pages 8-9.

[72] Exhibit A, Test Claim, pages 9-10.

[73] Exhibit A, Test Claim, page 10.

costs of $46,533.94 were incurred.[74]

Finally, claimant argues that the new activities and costs alleged are uniquely imposed on local government, and are intended to carry out a state policy of requiring uniform impasse procedures for local governments when negotiating with their employee unions.[75]

The claimant did not file comments on the Draft Proposed Decision.

B. Department of Finance

Finance argues that the Test Claim does not allege a new program or higher level of service, because "[w]hen a local agency participates in a fact-finding panel with a public employee organization to resolve disputes concerning employment conditions, the local agency is not providing a service to the public."[76] In addition, Finance argues that the test claim statutes do not create a new program, but instead "add a new fact-finding element to the existing collective bargaining program."[77]

Finance further argues that the one-time costs for training and revising local agency manuals and policies to comply with the test claim statutes are not required by the plain language of the test claim statutes. Finance refers to the Commission's Decision in a prior test claim *Binding Arbitration*, 01-TC-07, in which the Commission found that training agency staff and management was not required.[78]

In comments on the Draft Proposed Decision, Finance agreed that the Commission's jurisdiction in this Test Claim is limited to AB 1606, but disagreed with the recommendation that the Commission partially approve the Test Claim. Finance maintains that the activities identified do not constitute a new program or higher level of service as follows:

> In *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, the court stated that "(a) higher cost to the local government for compensating its employees is not the same as a higher cost of providing services *to the public* (emphasis added)." Thus, to be state-reimbursable, there must be a higher level of service provided to the public.
>
> The activities that Commission staff conclude are reimbursable mandated activities do not constitute a new program or higher level of service. When a local agency participates in a fact-finding panel with a public employee organization to resolve disputes concerning employment conditions, the local agency is not providing a service to the public. The local agency's participation may have the salutary effect of promoting employer-employee relations and thus ensuring government services are delivered in a fair, cost-effective manner. However, the act of participating in the fact-finding panel does not, in itself, represent the

[74] Exhibit A, Test Claim, page 11.

[75] Exhibit A, Test Claim, pages 12-13.

[76] Exhibit B, Finance's Comments on the Test Claim, page 2.

[77] Exhibit B, Finance's Comments on the Test Claim, page 2.

[78] Exhibit B, Finance's Comments on the Test Claim, page 2.

provision of a service to the public. Consequently, none of the City's alleged costs quality for reimbursement.

Furthermore, the statutes merely add a new fact-finding element to the existing collective bargaining program. Because the activities do not represent a new program that provides a higher level of service to the public, none of the activities identified as qualifying for reimbursement are, in fact, state-reimbursable.[79]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service…

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[80] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[81]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[82]
2. The mandated activity either:
   a. Carries out the governmental function of providing a service to the public; or
   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[83]

[79] Exhibit E, Finance's Comments on the Draft Proposed Decision, page 2.

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

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

[82] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 874.

[83] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[84]

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[85]

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 of the California Constitution.[86] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[87] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[88]

A. This Test Claim is Timely Filed Pursuant to Government Code Section 17551 and California Code of Regulations, Title 2, Section 1183.1.

Government Code section 17551(c) provides that test claims "shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."[89] The Commission's regulations effective at the time this claim was filed provided that "[f]or purposes of claiming based on the date of first incurring costs, 'within 12 months' means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant."[90]

This Test Claim was filed on May 12, 2017, more than five years after the effective date of the earlier of the two test claim statutes.[91] However, the claimant alleges costs were first incurred on May 12, 2016.[92] Therefore, the fiscal year in which costs were first incurred, for purposes of the

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[84] *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

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

[86] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[87] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[88] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].

[89] Government Code section 17551(c) (Stats. 2007, ch. 329).

[90] California Code of Regulations, title 2, section 1183.1(c) (Register 2016, No. 38).

[91] Exhibit A, Test Claim, page 1.

[92] Exhibit A, Test Claim, page 10.

Commission's regulations, is fiscal year 2015-2016, and the claimant had until June 30 of fiscal year 2016-2017 to file its claim. A May 12, 2017 filing is therefore timely. Based on the filing date of this test claim, the potential reimbursement period begins July 1, 2015,

B. The Commission Does Not Have Jurisdiction to Reconsider Its Prior Final, Binding Decision on Statutes 2011, Chapter 680; the Commission's Jurisdiction Is Limited to Statutes 2012, Chapter 314, Which Amended Government Code Section 3505.4.

This Test Claim pleads Statutes 2011, chapter 680 (AB 646) and Statutes 2012, chapter 314 (AB 1606).[93]

The Commission, however, does not have jurisdiction to re-hear and decide Statutes 2011, chapter 680. As indicated in the Background, the City of Glendora filed a Test Claim on that statute on June 2, 2016, which the Commission denied on the grounds that Statutes 2011, chapter 680 did not impose any state-mandated activities. (*Local Agency Employee Organizations: Impasse Procedures,* 15-TC-01, adopted January 27, 2017.) Successive test claims on the same statute are not permitted under the Government Code. Government Code section 17521 defines a "test claim" as "the *first claim filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state…*"[94] Accordingly, the Commission may only accept and decide, under the Government Code, the first claim filed alleging state-mandated costs from a particular statute or executive order. Moreover, the Commission's decision in *Local Agency Employee Organizations: Impasse Procedures* (15-TC-01) is a final, binding decision that cannot be reconsidered by the Commission.[95]

Based on the foregoing, the Commission's jurisdiction with respect to this Test Claim is limited to Statutes 2012, chapter 314 (AB 1606), which amended Government Code section 3505.4.

C. Government Code Section 3505.4, as Amended by Statutes 2012, Chapter 314 (AB 1606), Imposes a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution.

As described below, the Commission finds that Government Code section 3505.4, as amended by the 2012 test claim statute, imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

1. Government Code Section 3505.4, as amended by the 2012 test claim statute, mandates local agencies to perform activities related to the factfinding process when the employee organization requests factfinding to resolve an impasse.

As determined by the Commission in *Local Agency Employee Organizations: Impasse Procedures*, 15-TC-01, the plain language of section 3505.4, prior to the 2012 test claim statute, made factfinding contingent on first voluntarily submitting a dispute to mediation. Only if mediation did not result in a settlement, then the factfinding process, when requested by the

[93] Exhibit A, Test Claim, pages 1, 8-10, 18, 24-28.

[94] Government Code section 17521 (Stats. 2007, ch. 329) (Emphasis added.).

[95] Government Code section 17559; *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200.

employee organization, was required to resolve the impasse. Thus, all activities triggered by the voluntary decision to engage in mediation, including factfinding, were not mandated by the state, but were instead triggered by the local agency's discretionary decision to mediate.

The plain language of section 3505.4, as amended by Statutes 2012, chapter 314, now requires local agency employers to submit to factfinding when requested by the employee organization whether or not the dispute has been first submitted to voluntary mediation; either 30 to 45 days after the appointment or selection of a mediator, or if the dispute is not submitted to mediation, 30 days after the impasse in negotiations is noticed by either party:

> 3505.4(a) ~~If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the~~ *The* employee organization may request that the parties' differences be submitted to a factfinding panel~~.~~ *not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse*. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.[96]

Accordingly, the plain language of section 3505.4(a), as amended by the test claim statute, now allows the employee organization to unilaterally request factfinding, whether or not the dispute was submitted to voluntary mediation. The Commission finds that a local agency's participation in the factfinding process, when requested by the employee organization, is required and mandated by the state. Government Code section 3506.5 provides that a public agency shall not "[r]efuse to participate in good faith in an applicable impasse procedure."[97] And the plain language of section 3505.4(a) requires the public agency to select a person to serve on the factfinding panel within five days after receipt of the employee organization's request. Thus, public agencies have no choice but to participate in the factfinding process. However, Government Code section 3505.5(e) expressly exempts charter cities, charter counties, and a charter city and county from the factfinding process *if their charter outlines impasse procedures that include, at a minimum, a process for binding arbitration*.[98]

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[96] Government Code section 3505.4 (as amended by Stats. 2012, ch. 314 (AB 1606)).

[97] Government Code section 3506.5 (Stats. 2011, ch. 271 (AB 195)).

[98] Government Code section 3505.5(e) states the following: "A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies."

Thus, except for the charter agencies described in section 3505.5(e), local agencies are mandated by the state to participate in the factfinding process.[99]

Further analysis is required, however, to determine what factfinding activities are mandated by the state. Under the rules of statutory construction, the plain language of the test claim statute must be construed in the context of the statute as a whole and the overall statutory scheme, and the courts give "significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose."[100]

As indicated above, section 3505.4(a) states that

> Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.[101]

Accordingly, the local agency employer must select a person to serve on the factfinding panel, and PERB will select a chairperson.[102] Section 3505.4(b) provides that within five days after PERB selects a chairperson, the parties may mutually agree on an alternate chairperson.[103] There is no express provision governing one party's unilateral disapproval of the chairperson selected by PERB, as implied by the claimant; the section only provides that the parties may mutually agree on an alternate chairperson.[104] Section 3505.5 then addresses the costs of factfinding and provides that the costs of the chairperson, whether selected by PERB[105] or agreed to by the parties,[106] including per diem fees and travel expenses, as well as any other "mutually

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[99] See also, *San Diego Housing Commission v. Public Employment Relations Board* (2016) 256 Cal.App.4th 1, 9, addressed the factfinding process and stated that "if a public agency and a union reach an impasse in their negotiations, the union may now require the public agency to participate in one type of impasse procedure – submission of the parties' differences to a factfinding panel for advisory findings and recommendations – before the public agency may unilaterally impose its last, best, and final offer."

[100] *People v. Canty* (2004) 32 Cal.4th 1266, 1277.

[101] Government Code section 3505.4(a) (Stats. 2011, ch. 680 (AB 646)).

[102] The PERB regulations state that "the Board shall request that each party provide notification of the name and contact information of its panel member within *five working days*."

[103] Government Code section 3505.4(b) (Stats. 2011, ch. 680 (AB 646)).

[104] The claimant alleges a requirement that the agency must select a different chairperson if the PERB-selected chair is "not approved by other party." (Exhibit A, Test Claim, page 9.)

[105] Government Code section 3505.5(b) (Stats. 2011, ch. 680 (AB 646)).

[106] Government Code section 3505.5(c) (Stats. 2011, ch. 680 (AB 646)).

incurred costs,"[107] shall be shared equally by the parties, but the costs of the panel member selected by each party shall be borne by that party only.[108]

Therefore, reading the sections together, the test claim statute requires the local agency employer, upon receiving a written request for factfinding, to select its panel member, whose costs it will bear; and to pay half the costs of the chairperson, including per diem fees, if any, whether the chairperson is selected by PERB or mutually agreed upon by the parties; and half of any other "mutually incurred costs."[109]

Section 3505.4(c) then provides that the factfinding panel shall meet with the parties or their representatives within 10 days, and shall make inquiries and hold investigations, and shall have subpoena power.[110] Although this requirement is directed to the factfinding panel itself, local agencies are also required to meet with the factfinding panel, pursuant to their responsibility under section 3505 to meet and confer in good faith "regarding wages, hours, and other terms and conditions of employment..."[111] Accordingly, the Commission finds that meeting with the factfinding panel within 10 days is a requirement of section 3505.4(c).

Section 3505.4(c) further provides that "[a]ny state agency, as defined in Section 11000, the California State University, or *any political subdivision of the state*, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel."[112] This provision imposes a requirement to "furnish the panel" certain documentation and information, but it is not clear what entities are meant to be subject to this requirement. Counties are generally held to be "political subdivisions" of the state,[113] but cities and special districts are not always viewed the same.[114] Courts have at times considered both cities and counties to be

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[107] Government Code section 3505.5(d) (Stats. 2011, ch. 680 (AB 646)).

[108] Government Code section 3505.5(b-d) (Stats. 2011, ch. 680 (AB 646)).

[109] Government Code section 3505.4(a-b); 3505.5(b-d).

[110] Government Code section 3505.4 (Stats. 2012, ch. 314 (AB 1606)).

[111] Government Code section 3505 (Stats. 1971, ch 1676). See also, *San Diego Housing Commission v. Public Employment Relations Board* (2016) 246 Cal.App.4th 1, 9 [Duty to bargain extends to matters beyond what might typically be incorporated into a comprehensive MOU, including, implementation and effects of a decision to lay off employees.].

[112] Government Code section 3505.4 (Stats. 2012, ch. 314 (AB 1606)).

[113] California Constitution, article XI, section 1 ["The State is divided into counties which are legal subdivisions of the State."]; *Dineen v. City and County of San Francisco* (1940) 38 Cal.App.2d 486.

[114] *Griffin v. Colusa County* (1941) 44 Cal.App.2d 915, 920 ["Counties are state agencies which exercise within their boundaries the sovereignty of the state, and in the absence of a specific statute imposing liability upon them they are no more liable than the state itself. Cities, however, are municipal corporations and not state agencies."]

"political subdivisions of the state" with respect to the operation of specific statutes, when the Legislative intent is apparent.[115]

Here, the Assembly Floor Analysis of AB 646 (which added section 3505.4(c)) stated that the bill would require "state and local public agencies, if requested by the panel, to furnish the panel with all records, papers and information in their possession relating to any matter under investigation by the panel."[116] This is consistent with the broad coverage of the MMBA as a whole: section 3501 defines a "public agency" subject to the Act to include "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not."[117] Therefore, despite the lack of clarity in the statutory language, it appears that the legislative intent was that all state and local agencies would "if requested by the panel, to furnish the panel with all records, papers and information in their possession relating to any matter under investigation by the panel." Moreover, as stated, all local agencies subject to the act are required to meet and confer in good faith.[118] It would be incongruous, and potentially leading to absurd results, to interpret the requirements of section 3505.4(c) to apply to counties, but not cities and special districts. That would mean that counties would be required to furnish documents and information upon request, while cities and other local agencies could withhold information absent the exercise of the panel's subpoena power. Reading the MMBA as a whole, and in light of the legislative history, the more sensible interpretation is that all local agencies subject to the Act and to factfinding in the event of an impasse are subject to the requirement of section 3505.4(c) to provide documentation and information within their control "upon request." Accordingly, the Commission finds that all local agencies, other than charter cities and charter counties exempt from factfinding under section 3505.5(e), must furnish the panel, upon request, with all documents and information in their possession relating to any matter under investigation by the panel.

Section 3505.4(d) outlines some of the criteria that the panel is to consider, including:

> (1) State and federal laws that are applicable to the employer.
>
> (2) Local rules, regulations, or ordinances.
>
> (3) Stipulations of the parties.
>
> (4) The interests and welfare of the public and the financial ability of the public agency.
>
> (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and

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[115] See, e.g., *State ex rel. Harris v. PricewaterhouseCoopers, LLP* (2006) 39 Cal.4th 1220 [noting definition of "political subdivision" in Government Code section 12560 permits a city attorney, on behalf of the city, to bring suit under the California False Claims Act].

[116] Exhibit F, Assembly Floor Analysis of AB 646, as amended June 22, 2011, page 1.

[117] Government Code section 3501 (Stats. 2003, ch. 215).

[118] Government Code section 3505 (Stats. 1971, ch. 1676).

conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.[119]

These criteria are not, themselves, required activities, but help to illuminate the kinds of documents, records, or other evidence that would be requested by the panel, for purposes of the activity to "furnish, upon request."[120]

The claimant asserts that an agency must respond "to inquiries by all parties,"[121] but the plain language of section 3505.4(c) only requires claimant to "furnish the *panel*, upon its request," records and information relating to the panel's investigation. Moreover, the general requirement to participate in good faith is not sufficient in itself to impose a plain language requirement to "respond to inquiries by all parties…" Thus, section 3505.4(d) provides for the scope of the panel's inquiry (though non-inclusive, pursuant to paragraph (8), above), but nothing in section 3505.4(c) or (d) requires the agency to respond to inquiries from "all parties."

Section 3505.5(a) provides that if the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the factfinding panel shall make written advisory findings of fact and recommend terms of settlement, which the agency shall make publicly available within ten days.[122]

Accordingly, Government Code section 3505.4, as amended by the 2012 test claim statute, results in the following state-mandated activities for local agencies eligible to claim reimbursement under article XIII B, section 6 (other than charter cities or counties with a charter prescribing binding arbitration in the case of an impasse pursuant to Government Code section 3505.5(e)):

- Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay

[119] Government Code section 3505.4(d)(1-8) (Stats. 2012, ch. 314).

[120] Government Code section 3505.4(d) ["In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria…"].

[121] Exhibit A, Test Claim, page 9.

[122] Government Code section 3505.5(a) (Stats. 2011, ch. 680 (AB 646)).

half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)

- Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
- Furnish the factfinding panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the factfinding panel. (Gov. Code § 3505.4(c-d).)
- Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

In addition to these activities, the claimant is seeking reimbursement to meet with the union and hold a public impasse hearing, after the factfinding process, *if it chooses* to impose its last, best offer."[123] Government Code section 3505.7, as amended by Statutes 2011, chapter 646, provides that "a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer." As indicated above, the Commission fully addressed this statute in *Local Agency Employee Organizations: Impasse Procedures*, 15-TC-01, and denied the activity on the ground that imposing the last, best, and final offer is a voluntary decision of the local agency and is not mandated by the state. That Decision is a final, binding Decision and cannot be reconsidered by the Commission.[124] Thus, reimbursement is not required for these requested activities.

Furthermore, the claimant alleges that it is required under the test claim statute to "[p]rocess procedural right of an employee organization to request a factfinding panel…"[125] Government Code section 3505.4(e) provides that the "procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived."[126] But this provision is phrased in prohibitive, rather than mandatory language; there is nothing in the plain language that requires the local agency employer to take any affirmative action to safeguard the "procedural right" of an employee organization to request a factfinding panel. Nor is there anything in the plain language that requires the local agency employer to "ensure" that those rights are not waived. Section 3505.4(e) does not impose an activity on the local agency employer. Thus, reimbursement is not required for this requested activity.

Finally, the claimant requests reimbursement for the one-time costs for training and updating policies and procedures.[127] These activities are not mandated by the plain language of the test claim statute. However, such activities may be proposed for inclusion in parameters and

[123] Exhibit A, Test Claim, pages 8-9.

[124] Government Code section 17559; *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200.

[125] Exhibit A, Test Claim, page 9.

[126] Government Code section 3505.4 (Stats. 2012, ch. 314 (AB 1606)).

[127] Exhibit A, Test Claim, page 10.

guidelines, and may be approved by the Commission if they are supported by evidence in the record as reasonably necessary activities.[128]

2. The mandated activities constitute a new program or higher level of service.

A mandated activity must be new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order, and provide a service to the public, in order to be eligible for reimbursement under article XIII B, section 6.[129] Here, PERB promulgated emergency regulations prior to the enactment of Statutes 2012, chapter 314, which Statutes 2012, chapter 314 substantially restated and recodified. Accordingly, the mandatory provisions of Statutes 2012, chapter 314 do not appear, facially, to require anything new. However, the statute also provides that it is intended to be clarifying of existing law, and thus it relates back to the operative date of the regulations, if that provision is given full effect. As described below, the Commission finds that the mandated activities are new, with respect to prior law, and constitute a new program or higher level of service.

a) The mandated activities are new, with respect to prior law, because Statutes 2012, chapter 314 is clarifying of existing law and relates back to January 1, 2012, the operative date of the regulations.

Ordinarily, "a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute and a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed."[130] Accordingly, under this general rule, Statutes 2012, chapter 314, enacted September 14, 2012, would become operative and effective January 1, 2013. Since the PERB regulations became effective a year prior, on January 1, 2012, and required factfinding whether or not the parties went through mediation to resolve their disputes, the factfinding provisions of Statutes 2012, chapter 314, which includes the same language, would not impose any new requirements. Statutes 2012, chapter 314 largely restates and follows the PERB regulations both in the timeframes articulated and in the essential structure of the mandatory requirements. Section 32802 of the PERB regulations states:

> (a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
>
> > (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or
> >
> > (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice

[128] California Code of Regulations, title 2, sections 1183.7(d), 1187.5.

[129] *San Diego Unified School Dist*. (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[130] California Constitution, article IV, section 8(c).

of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.[131]

Section 3505.4 as amended by the 2012 test claim statute provides:

3505.4(a) ~~If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the~~ *The* employee organization may request that the parties' differences be submitted to a factfinding panel~~.~~ *not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.* Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

[¶…¶]

(e) The procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived.[132]

Thus, section 3505.4, as amended by Statutes 2012, chapter 314 substantially restates and codifies the regulation in question, and does not, on its face, impose any new or additional requirements. If Statutes 2012, chapter 314 is operative on January 1, 2013, in accordance with the general rule, the Commission would be compelled to find that the PERB regulations, effective January 1, 2012, impose the mandate, and the test claim statute does not impose

[131] Register 2011, No. 52. Subdivision (e) of Regulation 32802 was repealed as of October 1, 2013. (Register 2013, No. 34.)

[132] Statutes 2012, chapter 314 (AB 1606).

anything new, with respect to prior law. And, since the regulations have not been pled, this Test Claim would then be denied.

However, in uncodified section 2, Statutes 2012, chapter 314 (AB 1606) also expressly states that the amendments to section 3505.4 are intended to be *technical* and *clarifying* of existing law.[133] If taken at face value, that provision could mean the amendments relate back to the operative date of the *prior law* regarding factfinding (here, the regulations).

The meaning and effect of a statute must be analyzed using the canons of construction. Foremost among them is to ascertain the intent of the Legislature.[134] All other rules of statutory construction "are subject to the controlling principle that the object and purpose of all interpretation is to arrive at the intent of the legislature."[135] In ascertaining intent, "[w]e look first to the words of the statute because they are the most reliable indicator of legislative intent."[136] If the plain language of the statute "answers the question, that answer is binding unless we conclude the language is ambiguous or it does not accurately reflect the Legislature's intent."[137] There is a presumption against the retroactive application of statutes, "rooted in constitutional principles" of due process and the prohibition against *ex post facto* application of penal laws.[138] Statutes therefore "do not operate retrospectively unless the Legislature plainly intended them to do so."[139]

But "when the Legislature clearly intends a statute to operate retrospectively, [the courts] are obliged to carry out that intent unless due process considerations prevent [them]."[140] The courts have found a later enactment clarifying of existing law when there is express legislative intent language or substantial legislative history that the change is clarifying of existing law, rather than a substantive change in law;[141] ambiguity in the prior law or inconsistency in the courts'

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[133] Statutes 2012, chapter 314 (AB 1606), § 2.

[134] *Palmer v. GTE California, Inc*. (2003) 30 Cal.4th 1265, 1271. See also, *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 989. See also *Mannheim v. Superior Court* (1971) 3 Cal.3d 678 [The canon of construction which "counsels that 'statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent'…*expressly subordinates its effect* to the most fundamental rule of construction, namely that a statute must be interpreted so as to effectuate legislative intent."].

[135] *In re Potter's Estate* (1922) 188 Cal. 55, 75.

[136] *Palmer v. GTE California, Inc*. (2003) 30 Cal.4th 1265, 1271 [citing *In re J.W.* (2002) 29 Cal.4th 200, 209].

[137] *Palmer v. GTE California, Inc*. (2003) 30 Cal.4th 1265, 1271

[138] *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 [citing *Landgraf v. USI Film Products (*1994) 511 U.S. 244].

[139] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[140] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[141] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 245-246.

interpretation;[142] an existing interpretation by an agency charged with administering the statute;[143] and prompt legislative action to address either a novel legal question or an undesirable judicial interpretation.[144]

One of the seminal cases is *Western Security Bank v. Superior Court*, where the Legislature amended several provisions of the Code of Civil Procedure and the Civil Code with the express intent of clarifying the law applicable to letters of credit, before the matter reached the Supreme Court on appeal from the Second District Court of Appeal.[145] The Court recounted the Legislative intent language:

> The Legislature made its purpose explicit: "It is the intent of the Legislature in enacting Sections 2 and 4 of this act to confirm the independent nature of the letter of credit engagement and to abrogate the holding [of the Court of Appeal in this case].... [¶] The Legislature also intends to confirm the expectation of the parties to a contract that underlies a letter of credit, that the beneficiary will have available the value of the real estate collateral and the benefit of the letter of credit without regard to the order in which the beneficiary may resort to either." (Stats.1994, ch. 611, § 5.) The same purpose was echoed in the bill's statement of the facts calling for an urgency statute: "In order to confirm and clarify the law applicable to obligations which are secured by real property or an estate for years therein and which also are supported by a letter of credit, it is necessary that this act take effect immediately." (Stats.1994, ch. 611, § 6.)[146]

In considering whether to accept the Legislature's statement of intent, the Court first observed that "statutes do not operate retrospectively unless the Legislature plainly intended them to do so."[147] But "[o]f course, when the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us."[148] The Court continued:

> A corollary to these rules is that a statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. (Cf. *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568.) Our consideration of the

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[142] *In re Marriage of McClellan* (2005) 130 Cal.App.4th 247, 257-258; *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 930; *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318.

[143] *Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 399-400.

[144] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243; *Carter v. Department of Veterans Affairs* (2006) 38 Cal.4th 914, 923.

[145] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 241-242.

[146] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 242.

[147] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 242.

[148] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

> surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. (*Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484; *GTE Sprint Communications Corp. v. State Bd. of Equalization* (1991) 1 Cal.App.4th 827, 833; see *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 828, fn. 8.) […¶]
>
> One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: "'An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute… [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act—a formal change—rebutting the presumption of substantial change.' (1A Singer, Sutherland Statutory Construction (5th ed. 1993) § 22.31, p. *244 279, fns. omitted.)" (*RN Review for Nurses, Inc. v. State of California* (1994) 23 Cal.App.4th 120, 125.)
>
> Even so, a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. (*California Emp. etc. California Employment Stabilization Com'n v. Payne* (1947) 31 Cal.2d 210, 213; *Bodinson Mfg. Co. v. California E.. Com.* (1941) 17 Cal.2d 321, 326; see *Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8.) Indeed, there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies. (Cf. *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 51–52.) Nevertheless, the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them.[149]

The Court went on to discuss the express language of legislative intent in the bill and in the preamble to the bill, and observed that "[t]he Legislature's unmistakable focus was the disruptive effect of the Court of Appeal's decision on the expectations of parties to transactions…"[150] The Court then reiterated that "[i]f the Legislature acts promptly to correct a perceived problem with a judicial construction of a statute, the courts generally give the Legislature's action its intended effect."[151]

Carter v. California Department of Veterans Affairs (*Carter*) and *Salazar v. Diversified Paratransit, Inc.* (*Salazar II*) also addressed a situation in which the Legislature acted to overrule

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[149] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243-244.

[150] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 245.

[151] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 246.

or abrogate an unfavorable court of appeal decision by clarifying the intent of the prior law.[152] Both cases involved a 2003 amendment to the Fair Employment and Housing Act (FEHA), which the Legislature expressly declared to be clarifying of existing law.[153] In October 2002, the Second District Court of Appeal found that FEHA does not protect employees from harassment by an employer's customers or clientele.[154] The Supreme Court granted review, but before the matter was heard, the Legislature amended FEHA to provide:

> An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.[155]

The Supreme Court then transferred the matter back to the Court of Appeal for reconsideration in light of the enactment of Statutes 2003, chapter 671.[156] *Carter v. California Department of Veterans Affairs* was also pending Supreme Court review at the time of the 2003 amendment to the FEHA, and was also remanded to consider that legislation.[157] Both cases observed the inconsistency between the preamble to the 1984 amendments to the FEHA, which referred to protecting employees from harassment by "clientele," and the plain text of the Act, limiting liability to harassment by employers.[158] And both cases ignored the statements of the bill author regarding the limited scope of liability.[159] Ultimately, following *Western Security Bank*,[160] both cases gave substantial weight to the Legislature's expression of intent, and to the Legislature's prompt response to the unresolved legal question.[161]

Here, the evidence of legislative intent with respect the 2012 test claim statute as clarifying of

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[152] *Carter v. California Department of Veterans Affairs* (*Carter*) (2006) 38 Cal.4th 914, 921; *Salazar v. Diversified Paratransit, Inc.* (*Salazar II*) (2004) 117 Cal.App.4th 318, 322

[153] *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 921; *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 322.

[154] *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 323 [citing *Salazar v. Diversified Paratransit, Inc.* (2002) 103 Cal.App.4th 131].

[155] *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 324; Government Code section 12940(j)(1) (Stats. 2003, ch. 671, § 1).

[156] *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 324.

[157] *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 920.

[158] *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 927-929; *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 326-328.

[159] *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 927-929; *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 326-328.

[160] (1997) 15 Cal.4th 232.

[161] *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 922-923; *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 325.

existing law is supported by the statute and the legislative history. As noted, the statute itself provides, in uncodified language in section 2: "The Legislature finds and declares that the amendments to Section 3505.4 of the Government Code made by this act are intended to be technical and clarifying of existing law."[162] This represents an express statement of Legislative intent, appearing on the face of the statute itself, and thus, the Commission is not in a position to ignore it completely: "when the Legislature clearly intends a statute to operate retrospectively, [the courts] are obliged to carry out that intent unless due process considerations prevent [them]."[163] And, according to the Assembly Committee on Public Employees, Retirement, and Social Security analysis of the bill the author of the bill states, "[a]mbiguity in the drafting of [the 2011 statute,] AB 646 has called into question whether an employer can forgo all impasse procedures, including mediation and fact-finding. In fact, several government employers argue that AB 646 does not require fact-finding if the parties do not engage in mediation."[164] The bill author further acknowledged, "the issue whether AB 646 requires that mediation occur as a precondition to an employee organization's ability to request fact-finding remains *unresolved*."[165] "AB 1606 would *clarify* that fact-finding is available to employee organizations in all situations, regardless of whether the employer and employee have engaged in mediation," just as stated in the regulations adopted by PERB.[166]

Furthermore, Statutes 2012, chapter 314 was proposed and adopted just months after the PERB regulations took effect. The timing of the amendment can be one of the circumstances indicating the Legislature intended to clarify existing law: "[o]ne such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation…"[167] As discussed above, after the enactment of AB 646 there was substantial concern and confusion as to whether the bill in fact made factfinding mandatory, or whether that had been the Legislature's intention;[168] PERB's emergency regulations were an attempt to ensure that

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[162] Exhibit A, Test Claim, page 28 [Stats. 2012, ch. 314, § 2 (AB 1606)].

[163] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[164] Exhibit F, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1.

[165] Exhibit F, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1 [emphasis added].

[166] Exhibit F, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1 [emphasis added].

[167] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243. See also, In re Marriage of McClellan (2005) 130 Cal.App.4th 247, 257-258 [Amendment to Family Code held to be clarifying where it was clear from both timing and express language that Legislature intended to correct an inconsistent application of the law among the courts and abrogate a poorly-supported decision by the court of appeal.

[168] See Exhibit F, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 646 as amended March 23, 2011, pages 2-3 [Describing bill author's statements and the amendments made prior to enactment]; Exhibit F, Renne Sloan Holtzman Sakai LP, Navigating the Mandatory Fact-Finding Process Under AB 646 [November 2011], pages 4, 11, http://www.pccfacultyassociation.org/wp-content/uploads/2012/09/fact_finding.pdf, accessed

factfinding would be mandatory in impasse cases.[169] The Legislature's prompt reaction to the confusion, by amending Government Code section 3505.4 only months later (and employing a language and structure similar to the PERB regulations)[170] is a circumstance that militates in favor of a finding that the 2012 statute, AB 1606, was intended to be clarifying, rather than a substantive change and was intended to codify the PERB regulations.

Accordingly, the Commission finds that Statutes 2012, chapter 314 is clarifying of existing law and relates back to January 1, 2012, the operative date of the *prior law* regarding factfinding (here, the regulations). Therefore, the factfinding activities mandated by the state are new.

b) The mandated activities are unique to local government and provide a service to the public.

The Court in *County of Los Angeles I*[171] held that a new "program" or higher level of service means "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."[172] The Court explained:

> The concern which prompted the inclusion of section 6 in article XIIIB was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIIIB explained section 6 to the voters: "Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them." [citation omitted.] In this context the phrase "to force programs on local governments" confirms that the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses

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November 9, 2016; Exhibit F, Emily Prescott, *Mandatory Fact-Finding Under the Meyers-Milias-Brown Act*, California Labor & Employment Law Review, Vol. 26 No. 1 [January 2012], page 2, http://www.publiclawgroup.com/wp-content/uploads/2012/01/Mandatory-Fact-Finding-Under-Meyers-Milias-Brown-Act-by-Emily-Prescott-Cal-Labor-and-Employment-Law-Review.pdf, accessed November 9, 2016.

[169] Exhibit F, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 179 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 6) ["Mr. Chisholm acknowledged the comments and discussions held regarding whether factfinding may be requested where mediation has not occurred. PERB, having considered all aspects, including comments and discussions held, related statutes, and legislative history and intent, drafted a regulatory package that would provide certainty and predictability."].

[170] Compare Government Code section 3505.4(a) (Stats. 2012, ch. 680 (AB 1606) with PERB Regulation 32802(a) (effective January 1, 2012).

[171] *County of Los Angeles v. State of California (County of Los Angeles I)* (1987) 43 Cal.3d 46.

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

> incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not passed by the Legislature to "force" programs on localities.[173]

Accordingly, the Court held that changes to workers' compensation did not result in reimbursable costs: "Workers' compensation is not a program administered by local agencies to provide a service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers."[174]

In 1998, the Third District Court of Appeal decided *City of Richmond v. Commission on State Mandates*,[175] involving legislation requiring local governments to provide death benefits to local safety officers under both the Public Employees Retirement System (PERS) and the workers' compensation system. This resulted in survivors of local safety members of PERS who were killed in the line of duty receiving both a death benefit under worker's compensation and a special death benefit under PERS, instead of the greater of the two as under prior law. The court held that the legislation did not constitute a new program or higher level of service even though the benefits might generate a higher quality of local safety officers and thereby, in a general and indirect sense, provide the public with a higher level of service by its employees.[176] The court in *City of Richmond* stated:

> Increasing the costs of providing services cannot be equated with requiring an increased level of service under [article XIII B,] section 6 … A higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public.[177]

Similarly, in *City of Sacramento v. State*,[178] the Court held that requiring local governments to provide unemployment compensation protection to their employees was not a "service to the public," and did not impose a state policy uniquely on local government:

> Most private employers in the state already were required to provide unemployment protection to their employees. Extension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies "indistinguishable in this respect from private employers."[179]

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[173] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56–57.

[174] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58.

[175] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[176] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1195.

[177] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196.

[178] *City of Sacramento v. State* (1990) 50 Cal.3d 51.

[179] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67 [citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58].

Therefore, the Court held, consistently with *County of Los Angeles I*, that requiring local government employers to participate in unemployment compensation with respect to their employees was not a governmental "program" within the meaning of article XIII B. In both of these cases, the alleged mandate did not provide a service to the public, but rather a benefit to employees of the local government; and in both cases the statute alleged to impose the mandate resulted in the local government as an employer being treated under the law the same as private employer entities.

County of Los Angeles v. Dept. of Industrial Relations (1989) 214 Cal.App.3d 1538 (*County of Los Angeles II*) provides another example. In that case the County sought reimbursement for complying with earthquake and fire safety regulations applicable to elevators in public buildings, but the court concluded that the regulations did not impose a new program or higher level of service under the test articulated in *County of Los Angeles I.*[180] "County acknowledges that the elevator safety regulations apply to all elevators, not just those which are publicly owned."[181] The court concluded that therefore the regulations "do not impose a 'unique requirement' on local government, [and] they do not meet the second definition of 'program' established by [County of Los Angeles I]."[182] Additionally, the court found the deputy county counsel's declaration that passenger elevators in all county buildings are necessary for the performance of peculiarly governmental functions unpersuasive:

> Even if we were to treat the submitted declaration as something more than mere opinion, County has missed the point. The regulations at issue do not mandate elevator service; they simply establish safety measures. In determining whether these regulations are a program, the critical question is whether the mandated program carries out the governmental function of providing services to the public, not whether the elevators can be used to obtain these services. Providing elevators equipped with fire and earthquake safety features simply is not "a governmental function of providing services to the public."[183]

Thus, the elevator safety regulations were held not to constitute a new program or higher level of service *both* because they were not imposed uniquely, or differentially, on local government; *and* because the regulations did not provide a *governmental* service to the public.

Relying on the above cases, and in particular the *City of Richmond* case, Finance argues that the 2012 test claim statute does not impose a new program or higher level of service. Finance argues that the statute merely adds new elements to the existing collective bargaining program. Finance also asserts that local agency participation in the factfinding process "may have the salutary effect of promoting employer-employee relations and thus ensuring government services are

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[180] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[181] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[182] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[183] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1546 [quoting *County of Los Angeles I*, 43 Cal.3d at p. 56].

delivered in a fair, cost-effective manner. However, the act of participating in the fact-finding panel does not, in itself, represent the provision of a service to the public."[184]

The Commission disagrees with Finance, and finds that the test claim statute imposes a new program or higher level of service. First, the MMBA, and specifically the mandatory factfinding provisions and attendant activities imposed by the test claim statute, are not a law of general application resulting in incidental costs to local government. The MMBA and the impasse procedures apply specifically and exclusively to local agencies. Section 3500 of the Government Code provides, in pertinent part provides:

> It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies. Nothing contained herein shall be deemed to supersede the provisions of existing state law …nor is it intended that this chapter be binding upon those public agencies that provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed.[185]

In addition, the test claim statute provides a service to the public: "The overall purpose of Government Code section 3500 et seq., was to establish a procedure for discussion of working conditions, etc., by organizations representing employees who are without the traditional means of enforcing their demands by collective bargaining and striking, thus providing an alternative which would discourage strikes and yet serve the public employees' interests."[186] With respect to AB 1606 specifically, the Assembly Floor Analysis quotes the bill's author stating:

> AB 1606 properly reflects the intent of the Legislature to strengthen collective bargaining by ensuring employers and employees operate in good faith and work collaboratively to deliver government services in a fair, cost-efficient manner.[187]

Therefore the stated purpose of the mandatory factfinding provisions of the MMBA is to promote employer-employee relations and ensure that the parties negotiate in good faith and

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[184] Exhibit E, Finance's Comments on the Draft Proposed Decision.

[185] Government Code section 3500 (Stats. 2000, ch. 901).

[186] *Service Employees' International Union, Local No. 22 v. Roseville Community Hospital* (1972) 24 Cal.App.3d 400, 409.

[187] Exhibit F, Assembly Floor Analysis of AB 1606, Third Reading, page 2.

"work collaboratively to deliver government services in a fair, cost-efficient manner."[188] This represents a clear state policy to promote efficiency in the collective bargaining process between public employers and their employee organizations, such that public services provided by those employees and their employers may be efficiently and continuously provided.

Thus, the test claim statute addresses the mandated *process* for providing good employee-employer relations for the purpose of delivering governmental services to the public, and is no different than other similar test claims approved by the Commission, including *Local Government Employment Relations*,(01-TC-30;[189] *Peace Officers Procedural Bill of Rights,* CSM 4499; *Collective Bargaining,* CSM 4425;[190] and *Collective Bargaining Agreement Disclosure,* 97-TC-08.[191] The test claim statute does not require the payment of any particular employee benefit and is, therefore, distinguishable from the *County of Los Angeles*, *City of Richmond*, and *City of Sacramento* cases cited above, which addressed test claims seeking reimbursement for the cost of the benefits to the employee or the employee's family (worker's compensation, death benefits, and unemployment insurance).

Based on the foregoing, the test claim statute imposes a new program or higher level of service within the meaning of article XIII B, section 6.

3. The mandated activities impose costs mandated by the state.

For the mandated activities to constitute reimbursable state-mandated activities under article XIII B, section 6 of the California Constitution, they must result in local agencies incurring increased costs mandated by the state. Government Code section 17514 defines "costs mandated by the state" as any increased cost that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) requires that no claim shall be made unless the claim exceeds $1,000. And, a finding of costs mandated by the state means that none of the exceptions in Government Code section 17556 apply to deny the claim.

Here, there are new state-mandated activities imposed on local agencies that are required to be performed by staff or contractors. The claimant has alleged costs totaling $327,302.64 for fiscal year 2015-2016 and $46,533.94 for fiscal year 2016-2017 for city staff participating in impasse procedures, including the City Attorney, [Human Resources] Director, and Senior HR

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[188] Exhibit F, Assembly Floor Analysis of AB 1606, Third Reading, page 2.

[189] *Local Government Employment Relations*, 01-TC-30 also involves the MMBA and authorizes reimbursement for local agencies to respond to unfair labor charges before PERB. (https://csm.ca.gov/decisions/doc19.pdf)

[190] *Peace Officers Procedural Bill of Rights*, CSM 4499 authorizes reimbursement to provide procedural protections to peace officers employed by local agencies when a peace officer is subject to an interrogation by the employer, is facing punitive action or receives an adverse comment in his or her personnel file. (https://csm.ca.gov/decisions/doc95.pdf)

[191] *Collective Bargaining*, CSM 4425 and *Collective Bargaining Agreement Disclosures*, 97-TC-08 authorize reimbursement for school districts to perform the activities for collective bargaining, including impasse and factfinding proceedings. (https://csm.ca.gov/decisions/274.pdf)

Coordinator; as well as costs for "Contract Legal."[192] Some of these costs may go beyond the scope of the mandated activities as indicated in this Decision, but clearly exceed the $1,000 minimum requirement for filing a test claim.[193]

Additionally, no law or facts in the record support a finding that the exceptions specified in Government Code section 17556 apply to this claim. There is, for example, no law or evidence in the record that additional funds have been made available for the new state-mandated activities, or that there is any fee authority specifically intended to pay the costs of the alleged mandate.[194]

Based on the foregoing, the Commission finds that the 2012 test claim statute results in increased costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514.

V. Conclusion

Based on the foregoing analysis, the Commission partially approves this Test Claim, with a reimbursement period beginning July 1, 2015, for local agencies defined in Government Code section 17518 that are eligible to claim reimbursement under article XIII B, section 6 of the California Constitution[195] (other than charter cities or counties with a charter prescribing binding arbitration in the case of an impasse pursuant to Government Code section 3505.5(e)), for the following reimbursable state-mandated activities and costs:

- Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)

[192] Exhibit A, Test Claim, pages 10-11.

[193] Exhibit A, Test Claim, page 11.

[194] See Government Code section 17556(d-e).

[195] Government Code section 17518 defines "local agency" to mean "any city, county, special district, authority, or other political subdivision of the state." However, the courts have made it clear that only those local agencies subject to the tax and spend provisions of articles XIII A and XIII B are eligible to claim reimbursement under article XIII B, section 6. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Dept. of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763 [quoting *County of San Diego v. State of California*, *supra*, 15 Cal.4th 68, 81]; *Redevelopment Agency of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282 [Redevelopment agencies cannot assert an entitlement to reimbursement under article XIII B, section 6, while enjoying exemption from article XIII B's spending limits.].)

- Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
- Furnish the factfinding panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the factfinding panel. (Gov. Code § 3505.4(c-d).)
- Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

All other activities and costs alleged in the Test Claim are denied.

RE: **Decision**

Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
Government Code Sections 3505.4, 3505.5, and 3505.7; as added or amended by Statutes 2011, Chapter 680 (AB 646) and Statutes 2012, Chapter 314 (AB 1606)
City of Oxnard, Claimant

On May 25, 2018, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

Dated: May 30, 2018

Heather Halsey, Executive Director

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On May 30, 2018, I served the:

- **Decision adopted May 25, 2018**

  Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
  Government Code Sections 3505.4, 3505.5, and 3505.7; as added or amended by Statutes 2011, Chapter 680 (AB 646) and Statutes 2012, Chapter 314 (AB 1606)
  City of Oxnard, Claimant

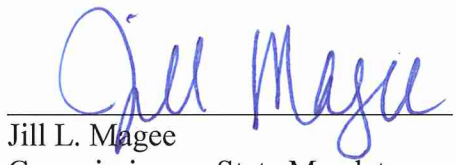
  AND

- **Draft Expedited Parameters and Guidelines, Schedule for Comments, and Notice of Hearing issued May 30, 2018**

  Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
  Government Code Sections 3505.4(a-d) and 3505.5(a-d);
  Statutes 2012, Chapter 314 (AB 1606)
  City of Oxnard, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 30, 2018 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 5/30/18

Claim Number: 16-TC-04

Matter: Local Agency Employee Organizations: Impasse Procedures II

Claimant: City of Oxnard

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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Exhibit B

May 30, 2018

Mr. Patrick J. Dyer
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2251 Harvard Street, Suite 134
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Ms. Jill Kanemasu
Division of Accounting and Reporting
State Controller's Office
3301 C Street, Suite 700
Sacramento, CA 95816

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: **Draft Expedited Parameters and Guidelines, Schedule for Comments, and Notice of Hearing**
Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
Government Code Sections 3505.4(a-d) and 3505.5(a-d);
Statutes 2012, Chapter 314 (AB 1606)
City of Oxnard, Claimant

Dear Mr. Dyer and Ms. Kanemasu:

On May 25, 2018, the Commission on State Mandates (Commission) adopted the Decision partially approving the Test Claim on the above-entitled matter.

State law provides that reimbursement, if any, is subject to Commission approval of parameters and guidelines for reimbursement of the mandated program, approval of a statewide cost estimate, a specific legislative appropriation for such purpose, a timely-filed claim for reimbursement, and subsequent review of the reimbursement claim by the State Controller's Office.

Following is a description of the responsibilities of all parties and of the Commission during the parameters and guidelines phase.

Draft Expedited Parameters and Guidelines

Pursuant to California Code of Regulations, title 2, section 1183.9, Commission staff has expedited the parameters and guidelines process by preparing Draft Expedited Parameters and Guidelines to assist the claimant. The proposed reimbursable activities have been limited to those approved in the Decision by the Commission. Reasonably necessary activities to perform the mandated activities may be proposed by the parties. (Cal. Code Regs., tit. 2, §1183.7(d).) "Reasonably necessary activities" are those activities necessary to comply with the statutes, regulations and other executive orders found to impose a state-mandated program (Cal. Code Regs., tit. 2, §1183.7(d).) Whether an activity is reasonably necessary is a mixed question of law and fact. All representations of fact to support any proposed reasonably necessary activities shall be supported by documentary evidence submitted in accordance with section 1187.5 of the Commission's regulations.

Review of Draft Expedited Parameters and Guidelines

Proposed modifications and comments may be filed on the Draft Expedited Parameters and Guidelines by **June 20, 2018**. (Cal. Code Regs., tit. 2, §1183.9(b).) Please note that all representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief. (Cal. Code Regs., tit. 2, §1187.5.) Hearsay evidence

may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over an objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5.) The Commission's ultimate findings of fact must be supported by substantial evidence in the record.[1]

Rebuttals
Written rebuttals may be filed within 15 days of service of comments. (Cal. Code Regs., tit. 2, § 1183.9(c).)

Draft Proposed Decision and Parameters and Guidelines

After review of the Draft Expedited Parameters and Guidelines, all comments, and all rebuttals, Commission staff will prepare a Draft Proposed Decision and Parameters and Guidelines which will be issued for comment.

Alternative Process: Reasonable Reimbursement Methodology and Statewide Estimate of Costs

Test Claimant and Department of Finance Submission of Letter of Intent
Within 30 days of the Commission's adoption of a decision on a test claim, the test claimant and the Department of Finance may notify the executive director of the Commission in writing of their intent to follow the process described in Government Code sections 17557.1—17557.2 and section 1183.11 of the Commission's regulations to develop a *joint reasonable reimbursement methodology* and *statewide estimate of costs* for the initial claiming period and budget year for reimbursement of costs mandated by the state. The written notification shall provide all information and filing dates as specified in Government Code section 17557.1(a).

Test Claimant and Department of Finance Submission of Draft Reasonable Reimbursement Methodology and Statewide Estimate of Costs
Pursuant to the plan, the test claimant and the Department of Finance shall submit the *Draft Reasonable Reimbursement Methodology and Statewide Estimate of Costs* to the Commission. See Government Code section 17557.1 for guidance in preparing and filing a timely submission.

Review of Proposed Reasonable Reimbursement Methodology and Statewide Estimate of Costs
Upon receipt of the jointly developed proposals, Commission staff shall notify all recipients that they shall have the opportunity to review and provide written comments concerning the draft reasonable reimbursement methodology and proposed statewide estimate of costs within 15 days of service. The test claimant and Department of Finance may submit written rebuttals to Commission staff.

Adoption of Reasonable Reimbursement Methodology and Statewide Estimate of Costs
At least 10 days prior to the next hearing, Commission staff shall review comments and rebuttals and issue a staff recommendation on whether the Commission should approve the draft reasonable reimbursement methodology and adopt the proposed statewide estimate of costs pursuant to Government Code section 17557.2.

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[1] 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.

You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Please see https://www.csm.ca.gov/dropbox.php on the Commission's website for electronic filing instructions. (Cal. Code Regs., tit. 2, § 1181.3.)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

Hearing

The Proposed Decision and Parameters and Guidelines for this matter are tentatively set for hearing on **Friday, September 28, 2018** at 10:00 a.m., State Capitol, Room 447, Sacramento, California.

Sincerely,

Heather Halsey
Executive Director

DRAFT EXPEDITED PARAMETERS AND GUIDELINES

Government Code Sections 3505.4(a-d) and 3505.5(a-d)

Statutes 2012, Chapter 314 (AB 1606)

Local Agency Employee Organizations: Impasse Procedures II

16-TC-04

The period of reimbursement begins July 1, 2015.

I. SUMMARY OF THE MANDATE

These Parameters and Guidelines address the mandated activities arising from amendments to the Meyers-Milias-Brown Act by Statutes 2012, chapter 314 (AB 1606), which imposed a factfinding procedure after a local agency and an employee organization reach an impasse in their collective bargaining negotiations, available at the option of the employee organization.

On May 25, 2018, the Commission on State Mandates (Commission) adopted the Decision finding that the test claim statute imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, (other than charter cities or counties with a charter prescribing binding arbitration in the case of an impasse pursuant to Government Code section 3505.5(e)). The Commission partially approved the Test Claim, finding only the following activities to be reimbursable:

- Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)
- Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
- Furnish the factfinding panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the factfinding panel. (Gov. Code § 3505.4(c-d).)
- Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

II. ELIGIBLE CLAIMANTS

Any city, county, city and county, or special district subject to the taxing restrictions of article XIII A, and the spending limits of article XIII B, of the California Constitution,[1] whose costs for this program are paid from proceeds of taxes that incurs increased costs as a result of this mandate is eligible to claim reimbursement.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557(e) states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for reimbursement for that fiscal year. The claimant filed the Test Claim on May 12, 2017, establishing eligibility for reimbursement for the 2015-2016 fiscal year. Therefore, costs incurred beginning on or after July 1, 2015 are reimbursable.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller (Controller) within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a local agency or school district may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. If revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a local agency or school district filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Gov. Code §17560(b).)
5. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a).
6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

[1] Government Code section 17518 defines "local agency" to mean "any city, county, special district, authority, or other political subdivision of the state." However, the courts have made it clear that only those local agencies subject to the tax and spend provisions of articles XIII A and XIII B are eligible to claim reimbursement under article XIII B, section 6. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 ["[R]ead in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered solely from tax revenues."]; *Dept. of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763 [quoting *County of San Diego v. State of California, supra*, 15 Cal.4th 68, 81]; *Redevelopment Agency of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282 [Redevelopment agencies cannot assert an entitlement to reimbursement under article XIII B, section 6, while enjoying exemption from article XIII B's spending limits.].)

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event, or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant that incurs increased costs, the following activities are reimbursable:

1. Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)
2. Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
3. Furnish the factfinding panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the factfinding panel. (Gov. Code § 3505.4(c-d).)
4. Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV., Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both: (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in 2 Code of Federal Regulations (CFR) part 225 (Office of Management and Budget (OMB) Circular A-87). Claimants have the option of using 10 percent of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10 percent.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in 2 CFR part 225, appendices A and B (OMB Circular A-87 attachments A & B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in 2 CFR part 225, appendices A and B (OMB Circular A-87 attachments A & B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be: (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.); (2) direct salaries and wages; or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 attachments A & B) shall be accomplished by: (1) classifying a department's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage that the total amount of allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 attachments A & B) shall be accomplished by: (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount of allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[2] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV., must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

[2] This refers to title 2, division 4, part 7, chapter 4 of the Government Code.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsetting revenue the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other applicable state funds, shall be identified and deducted from any claim submitted for reimbursement.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from these parameters and guidelines and the decisions on the test claim and parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.17.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The decisions adopted for the Test Claim and Parameters and Guidelines are legally binding on all parties and provide the legal and factual basis for the Parameters and Guidelines. The support for the legal and factual findings is found in the administrative record. The administrative record is on file with the Commission.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On May 30, 2018, I served the:

- **Decision adopted May 25, 2018**

  Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
  Government Code Sections 3505.4, 3505.5, and 3505.7; as added or amended by Statutes 2011, Chapter 680 (AB 646) and Statutes 2012, Chapter 314 (AB 1606)
  City of Oxnard, Claimant

  AND

- **Draft Expedited Parameters and Guidelines, Schedule for Comments, and Notice of Hearing issued May 30, 2018**

  Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
  Government Code Sections 3505.4(a-d) and 3505.5(a-d);
  Statutes 2012, Chapter 314 (AB 1606)
  City of Oxnard, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 30, 2018 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 5/30/18

Claim Number: 16-TC-04

Matter: Local Agency Employee Organizations: Impasse Procedures II

Claimant: City of Oxnard

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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BETTY T. YEE
California State Controller

RECEIVED
June 20, 2018
Commission on State Mandates

June 20, 2018

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

SUBJECT: Draft Expedited Parameters and Guidelines, Schedule for Comments, and Notice of Hearing

Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
Government Code Sections 3505.4(a-d) and 3505.5(a-d);
Statutes 2012, Chapter 314 (AB 1606)
City of Oxnard, Claimant

Dear Ms. Halsey:

The State Controller's Office reviewed the Draft Expedited Parameters and Guidelines for the Local Agency Employee Organizations: Impasse Procedures II program. Please see our comments below which include proposed additions underlined as follows:

II. ELIGIBLE CLAIMANTS

Any city, county, city and county, or special district subject to the taxing restrictions of article XIII A, and the spending limits of article XIII B, of the California Constitution (other than a charter city, charter county, or charter city and county with a charter prescribing binding arbitration in the case of an impasse pursuant to Government Code section 3505.5 (e)), whose costs for this program are paid from proceeds of taxes that incurs increased costs as a result of this mandate is eligible to claim reimbursement.

COMMENT: Please add the relevant charter language for clarity as some charter cities or counties may not be eligible to file a claim for this program.

If you have any questions, please contact Everett Luc, Fiscal Analyst of the Local Reimbursements Section in the Local Government Programs and Services Division, at ELuc@sco.ca.gov or (916) 323-0766.

Sincerely,

ANITA DAGAN, Manager
Local Reimbursements Section

cc: Jim Spano, Assistant Chief, Division of Audits, State Controller's Office

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

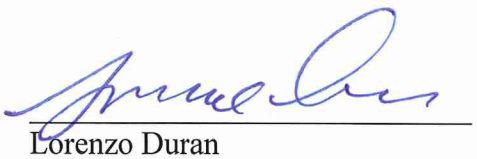
On June 21, 2018, I served the:

- **State Controller's Office (Controller's) Comments on the Draft Expedited Parameters and Guidelines filed June 20, 2018**

  Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
  Government Code Sections 3505.4, 3505.5, and 3505.7; as added or amended by Statutes 2011, Chapter 680 (AB 646) and Statutes 2012, Chapter 314 (AB 1606)
  City of Oxnard, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 21, 2018 at Sacramento, California.



Lorenzo Duran
Commission on State Mandates
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 5/30/18

Claim Number: 16-TC-04

Matter: Local Agency Employee Organizations: Impasse Procedures II

Claimant: City of Oxnard

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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Exhibit D

STATE *of* CALIFORNIA
COMMISSION ON STATE MANDATES

June 29, 2018

Mr. Patrick J. Dyer
MGT Consulting
2251 Harvard Street, Suite 134
Sacramento, CA 95815

Ms. Jill Kanemasu
Division of Accounting and Reporting
State Controller's Office
3301 C Street, Suite 700
Sacramento, CA 95816

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: Draft Proposed Decision and Proposed Parameters and Guidelines, Schedule for Comments, and Notice of Hearing
Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
Government Code Sections 3505.4(a-d) and 3505.5(a-d);
Statutes 2012, Chapter 314 (AB 1606)
City of Oxnard, Claimant

Dear Mr. Dyer and Ms. Kanemasu:

The Draft Proposed Decision and Parameters and Guidelines for the above-captioned matter is enclosed for your review and comment.

Written Comments

Written comments may be filed on the Draft Proposed Decision and Parameters and Guidelines by **July 20, 2018**. Please note that all representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief. (Cal. Code Regs., tit. 2, § 1187.5.) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over an objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5.) The Commission's ultimate findings of fact must be supported by substantial evidence in the record.[1]

You are advised that comments filed with the Commission on State Mandates (Commission) are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Refer to http://www.csm.ca.gov/dropbox_procedures.php on the Commission's website for electronic filing instructions. (Cal. Code Regs., tit. 2, § 1181.3.)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

[1] 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.

Hearing

This matter is set for hearing on **Friday, September 28, 2018** at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The Proposed Decision will be issued on or about September 14, 2018. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Sincerely,

Heather Halsey
Executive Director

ITEM _
DRAFT PROPOSED DECISION
AND
PROPOSED PARAMETERS AND GUIDELINES

Government Code Sections 3505.4(a-d) and 3505.5(a-d)

Statutes 2012, Chapter 314 (AB 1606)

Local Agency Employee Organizations: Impasse Procedures II

16-TC-04

The period of reimbursement begins July 1, 2015.

City of Oxnard, Claimant

EXECUTIVE SUMMARY

I. Summary of the Mandate

These Parameters and Guidelines address the mandated activities arising from amendments to the Meyers-Milias-Brown Act by Statutes 2012, chapter 314 (AB 1606), which imposed a factfinding procedure after a local agency and an employee organization reach an impasse in their collective bargaining negotiations, available at the option of the employee organization.

On May 25, 2018, the Commission on State Mandates (Commission) adopted the Decision approving the test claim and finding that the test claim statute imposes a reimbursable state-mandated program on local agencies[1] within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission partially approved the Test Claim, finding only the following activities to be reimbursable:

- Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)
- Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)

[1] Other than charter cities or counties with a charter prescribing binding arbitration in the case of an impasse pursuant to Government Code section 3505.5(e).

- Furnish the factfinding panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the factfinding panel. (Gov. Code § 3505.4(c-d).)
- Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

II. Procedural History

On May 25, 2018, the Commission adopted the Decision partially approving the Test Claim.[2] On May 30, 2018, Commission staff issued the Test Claim Decision and Draft Expedited Parameters and Guidelines.[3] On June 20, 2018, the State Controller's Office (Controller) filed comments concurring with the Draft Expedited Parameters and Guidelines.[4] Neither the claimant nor the Department of Finance (Finance) filed comments on the Draft Expedited Parameters and Guidelines. On June 29, 2018, Commission staff issued the Draft Proposed Decision and Proposed Parameters and Guidelines.[5]

III. Discussion

The Draft Expedited Parameters and Guidelines were issued based on the activities that were approved and denied in the Test Claim Decision. The Controller filed comments seeking clarification of eligible claimants.[6] The claimant did not file comments.

The period of reimbursement begins July 1, 2015, based on the filing date of the Test Claim on May 12, 2017.

Government Code section 3505.5(e) provides that charter cities or charter counties with a charter prescribing, at a minimum, binding arbitration in the case of an impasse are exempt from the provisions of sections 3505.5 and 3505.4. Accordingly, the Controller requests that exemption be reflected in the Eligible Claimants section of the Parameters and Guidelines.[7]

The reimbursable activities are described below.

1. Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any

[2] Exhibit A, Test Claim Decision.

[3] Exhibit B, Draft Expedited Parameters and Guidelines.

[4] Exhibit C, Controller's Comments on Draft Expedited Parameters and Guidelines.

[5] Exhibit D, Draft Proposed Decision and Proposed Parameters and Guidelines.

[6] Exhibit C, Controller's Comments on Draft Expedited Parameters and Guidelines.

[7] Exhibit C, Controller's Comments on Draft Expedited Parameters and Guidelines.

other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)

2. Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
3. Furnish the factfinding panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the factfinding panel. (Gov. Code § 3505.4(c-d).)
4. Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

IV. Staff Recommendation

Staff recommends that the Commission adopt the Proposed Decision and Parameters and Guidelines in accordance to article XIII B, section 6(a) of California Constitution and Government Code section 17514 to provide for reimbursement beginning July 1, 2015.

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

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE PARAMETERS AND GUIDELINES FOR: Government Code Sections 3505.4(a-d), and 3505.5(a-d); Statutes 2012, Chapter 314 (AB 1606) The period of reimbursement begins July 1, 2015.	Case No.: 16-TC-04 *Local Agency Employee Organizations: Impasse Procedures II* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 28, 2018*)

DECISION

The Commission on State Mandates (Commission) heard and decided the Decision and Parameters and Guidelines during a regularly scheduled hearing on September 28, 2018. [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 sections 17500 et seq., and related case law.

The Commission [adopted/modified/rejected] the Decision and Parameters and Guidelines by a vote of [vote count will be in the adopted Decision], as follows:

Member	**Vote**
Lee Adams, County Supervisor	
Ken Alex, Director of the Office of Planning and Research	
Richard Chivaro, Representative of the State Controller	
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	
Sarah Olsen, Public Member	
Carmen Ramirez, City Council Member	
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	

I. Summary of the Mandate

These Parameters and Guidelines address the state-mandated activities arising from amendments to the Meyers-Milias-Brown Act (MMBA) by Statutes 2012, chapter 314 (AB 1606).[8] The Test Claim statutes added a factfinding procedure after a local agency and an employee organization reach an impasse in their collective bargaining negotiations.

On May 25, 2018, the Commission on State Mandates (Commission) adopted the Test Claim Decision finding that the test claim statute imposes a reimbursable state-mandated program on local government within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities:

- Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)
- Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
- Furnish the factfinding panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the factfinding panel. (Gov. Code § 3505.4(c-d).)Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

II. Procedural History

On May 25, 2018, the Commission adopted the Decision partially approving the Test Claim.[9] On May 30, 2018, Commission staff issued the Test Claim Decision and Draft Expedited Parameters and Guidelines.[10] On June 20, 2018, the Controller filed comments concurring with the Draft Expedited Parameters and Guidelines, but seeking additional clarification with respect to eligible claimants.[11] Neither the claimant nor the Department of Finance filed comments on the Draft Expedited Parameters and Guidelines. On June 29, 2018, Commission staff issued the Draft Proposed Decision and Proposed Parameters and Guidelines.[12]

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[8] The claimant did not plead the Public Employment Relations Board's regulations implementing Statutes 2011, chapter 680, which were effective January 1, 2012.

[9] Exhibit A, Test Claim Decision.

[10] Exhibit B, Draft Expedited Parameters and Guidelines.

[11] Exhibit C, State Controller's Comments on the Draft Expedited Parameters and Guidelines.

[12] Exhibit D, Draft Proposed Decision and Proposed Parameters and Guidelines.

III. Discussion

The Draft Expedited Parameters and Guidelines were issued in accordance with section 1183.9 of the Commission's regulations, based on the findings in the Test Claim Decision. Only one substantive comment, that charter cities or counties with a charter prescribing binding arbitration in the case of an impasse pursuant to Government Code section 3505.5(e) are not eligible claimants, was received on the Draft Expedited Parameters and Guidelines. No "reasonably necessary activities" have been proposed by the parties.

The Parameters and Guidelines for this program include the findings adopted by the Commission in its Test Claim Decision with respect to the period of reimbursement, eligible claimants, and reimbursable activities. The Controller's proposed clarification to eligible claimants is approved and is consistent with the Test Claim Decision. The Commission therefore finds that the Parameters and Guidelines are supported by the findings in the Test Claim Decision and this Decision on the Parameters and Guidelines.

The Parameters and Guidelines contain the following information.

A. Eligible Claimants (Section II. of the Parameters and Guidelines)

Government Code section 3505.5(e) provides an exemption from the mandated activities for charter cities and charter counties, as follows:

> (e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

The Test Claim Decision found that all mandated activities under the MMBA arise from sections 3505.4 and 3505.5. Therefore, section 3505.5(e) effectively exempts charter cities and charter counties, if their charter contains binding arbitration provisions, from the entire mandated program. Accordingly, the Controller requests that the Commission include exemption language in the Parameters and Guidelines, as follows:

> Any city, county, city and county, or special district subject to the taxing restrictions of article XIII A, and the spending limits of article XIII B, of the California Constitution,[13] other than a charter city, charter county, or charter city

[13] Government Code section 17518 defines "local agency" to mean "any city, county, special district, authority, or other political subdivision of the state." However, the courts have made it clear that only those local agencies subject to the tax and spend provisions of articles XIII A and XIII B are eligible to claim reimbursement under article XIII B, section 6. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 ["[R]ead in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered solely from tax revenues."]; *Dept. of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763 [quoting *County of San Diego v. State of California, supra*, 15 Cal.4th 68, 81]; *Redevelopment Agency of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282

and county with a charter prescribing binding arbitration in the case of an impasse, pursuant to Government Code section 3505(e), whose costs for this program are paid from proceeds of taxes that incurs increased costs as a result of this mandate is eligible to claim reimbursement.

The proposed language is consistent with the plain language of the Government Code and the Commission's Test Claim Decision, and is included in the Parameters and Guidelines.

B. Period of Reimbursement (Section III. of the Parameters and Guidelines)

Government Code section 17557(e) states that a test claim shall be submitted on or before June 30 following a fiscal year to establish eligibility for reimbursement for that fiscal year. The claimant filed the Test Claim on May 12, 2017, establishing reimbursement eligibility for the 2015-2016 fiscal year, beginning July 1, 2015.

C. Reimbursable Activities (Section IV. of the Parameters and Guidelines)

The Commission approved the following reimbursable activities:

1. Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)
2. Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
3. Furnish the factfinding panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the factfinding panel. (Gov. Code § 3505.4(c-d).)
4. Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

Neither the claimant nor any other interested parties or persons proposed additional reasonably necessary activities. Accordingly, only these activities approved in the Test Claim Decision are included in the Parameters and Guidelines.

D. The Remaining Sections of the Parameters and Guidelines

Section V. of the Parameters and Guidelines (Claim Preparation and Submission) identifies the following direct costs that are eligible for reimbursement: salaries and benefits, materials and supplies, contracted services, and fixed assets. However, training and travel costs are not included in the Parameters and Guidelines because those activities were not approved in the Test

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[Redevelopment agencies cannot assert an entitlement to reimbursement under article XIII B, section 6, while enjoying exemption from article XIII B's spending limits.].)

Claim Decision, nor has the claimant requested these costs as reasonably necessary to perform the mandated activities or submitted any evidence to support such a request.[14]

The remaining sections of the Parameters and Guidelines contain standard boilerplate language.

IV. Conclusion

Based on the foregoing, the Commission hereby adopts the Decision and Parameters and Guidelines.

[14] California Code of Regulations, title 2, section 1183.6 states: "The parameters and guidelines shall describe the claimable reimbursable costs and contain the following information: [¶] … [¶] (d) Reimbursable Activities. A description of the specific costs and types of costs that are reimbursable, including one-time costs and on-going costs, and reasonably necessary activities required to comply with the mandate. 'Reasonably necessary activities' are those activities necessary to comply with the statutes, regulations and other executive orders found to impose a state-mandated program. Activities required by statutes, regulations and other executive orders that were not pled in the test claim may only be used to define reasonably necessary activities to the extent that compliance with the approved state-mandated activities would not otherwise be possible. Whether an activity is reasonably necessary is a mixed question of law and fact. All representations of fact to support any proposed reasonably necessary activities shall be supported by documentary evidence submitted in accordance with section 1187.5 of these regulations."

PROPOSED PARAMETERS AND GUIDELINES

Government Code Sections 3505.4(a-d) and 3505.5(a-d)

Statutes 2012, Chapter 314 (AB 1606)

Local Agency Employee Organizations: Impasse Procedures II

16-TC-04

The period of reimbursement begins July 1, 2015.

I. SUMMARY OF THE MANDATE

These Parameters and Guidelines address the mandated activities arising from amendments to the Meyers-Milias-Brown Act by Statutes 2012, chapter 314 (AB 1606), which imposed a factfinding procedure after a local agency and an employee organization reach an impasse in their collective bargaining negotiations, available at the option of the employee organization.

On May 25, 2018, the Commission on State Mandates (Commission) adopted the Decision finding that the test claim statute imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, (other than charter cities or counties with a charter prescribing binding arbitration in the case of an impasse pursuant to Government Code section 3505.5(e)). The Commission partially approved the Test Claim, finding only the following activities to be reimbursable:

- Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)
- Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
- Furnish the factfinding panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the factfinding panel. (Gov. Code § 3505.4(c-d).)
- Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

II. ELIGIBLE CLAIMANTS

Any city, county, city and county, or special district subject to the taxing restrictions of article XIII A, and the spending limits of article XIII B, of the California Constitution,[1] other than a charter city, charter county, or charter city and county with a charter prescribing binding arbitration in the case of an impasse, pursuant to Government Code section 3505(e), whose costs for this program are paid from proceeds of taxes that incurs increased costs as a result of this mandate is eligible to claim reimbursement.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557(e) states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for reimbursement for that fiscal year. The claimant filed the Test Claim on May 12, 2017, establishing eligibility for reimbursement for the 2015-2016 fiscal year. Therefore, costs incurred beginning on or after July 1, 2015 are reimbursable.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller (Controller) within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a local agency or school district may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. If revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a local agency or school district filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Gov. Code §17560(b).)
5. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a).

[1] Government Code section 17518 defines "local agency" to mean "any city, county, special district, authority, or other political subdivision of the state." However, the courts have made it clear that only those local agencies subject to the tax and spend provisions of articles XIII A and XIII B are eligible to claim reimbursement under article XIII B, section 6. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 ["[R]ead in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered solely from tax revenues."]; *Dept. of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763 [quoting *County of San Diego v. State of California, supra*, 15 Cal.4th 68, 81]; *Redevelopment Agency of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282 [Redevelopment agencies cannot assert an entitlement to reimbursement under article XIII B, section 6, while enjoying exemption from article XIII B's spending limits.].)

6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event, or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant that incurs increased costs,[2] the following activities are reimbursable:

1. Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)
2. Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
3. Furnish the factfinding panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the factfinding panel. (Gov. Code § 3505.4(c-d).)

[2] Government Code section 3505.5(e) provides that charter cities, charter counties, and charter cities and counties are exempt from sections 3505.5 and 3505.4 if their charter provides a procedure that applies in the case of an impasse with its employee organizations that includes, at a minimum, a process for binding arbitration, therefore they are not eligible claimants for this program.

4. Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV., Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts

disproportionate to the result achieved. Indirect costs may include both: (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in 2 Code of Federal Regulations (CFR) part 225 (Office of Management and Budget (OMB) Circular A-87). Claimants have the option of using 10 percent of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10 percent.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in 2 CFR part 225, appendices A and B (OMB Circular A-87 attachments A & B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in 2 CFR part 225, appendices A and B (OMB Circular A-87 attachments A & B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be: (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.); (2) direct salaries and wages; or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 attachments A & B) shall be accomplished by: (1) classifying a department's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage that the total amount of allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 attachments A & B) shall be accomplished by: (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount of allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[3] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for

[3] This refers to title 2, division 4, part 7, chapter 4 of the Government Code.

the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV., must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsetting revenue the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other applicable state funds, shall be identified and deducted from any claim submitted for reimbursement.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from these parameters and guidelines and the decisions on the test claim and parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.17.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The decisions adopted for the Test Claim and Parameters and Guidelines are legally binding on all parties and provide the legal and factual basis for the Parameters and Guidelines. The support for the legal and factual findings is found in the administrative record. The administrative record is on file with the Commission.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On June 29, 2018, I served the:

- **Draft Proposed Decision and Proposed Parameters and Guidelines, Schedule for Comments, and Notice of Hearing issued June 29, 2018**

  Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
  Government Code Sections 3505.4(a-d) and 3505.5(a-d);
  Statutes 2012, Chapter 314 (AB 1606)
  City of Oxnard, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 29, 2018 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
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(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 5/30/18

Claim Number: 16-TC-04

Matter: Local Agency Employee Organizations: Impasse Procedures II

Claimant: City of Oxnard

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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RECEIVED
July 20, 2018
Commission on State Mandates

BETTY T. YEE
California State Controller

July 20, 2018

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

SUBJECT: Draft Proposed Decision and Proposed Parameters and Guidelines, Schedule for Comments, and Notice of Hearing

Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
Government Code Sections 3505.4(a-d) and 3505.5(a-d);
Statutes 2012, Chapter 314 (AB 1606)
City of Oxnard, Claimant

Dear Ms. Halsey:

The State Controller's Office (SCO) has reviewed the Draft Proposed Decision and Proposed Parameters and Guidelines for the *Local Agency Employee Organizations: Impasse Procedures II* program.

We thank you for incorporating the SCO's recommendation to clarify eligible claimants during the prior comment period and propose no further changes.

If you have any questions, please contact Everett Luc, Fiscal Analyst of the Local Reimbursements Section in the Local Government Programs and Services Division, at ELuc@sco.ca.gov or (916) 323-0766.

Sincerely,

Anita Dagan

ANITA DAGAN, Manager
Local Reimbursements Section

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

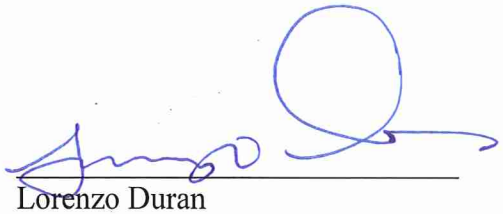
On July 20, 2018, I served the:

- **Controller's Comments on the Draft Proposed Parameters and Guidelines filed July 20, 2018**

  Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
  Government Code Sections 3505.4, 3505.5, and 3505.7; as added or amended by Statutes 2011, Chapter 680 (AB 646) and Statutes 2012, Chapter 314 (AB 1606)
  City of Oxnard, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 20, 2018 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 5/30/18

Claim Number: 16-TC-04

Matter: Local Agency Employee Organizations: Impasse Procedures II

Claimant: City of Oxnard

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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