ITEM 11

TEST CLAIM

PROPOSED STATEMENT OF DECISION

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

Statutes 2000, Chapter 906

Binding Arbitration

(01-TC-07)

City of Palos Verdes Estates, Claimant

EXECUTIVE SUMMARY

The sole issue before the Commission on State Mandates ("Commission") is whether the Proposed Statement of Decision accurately reflects the Commission's decision on the *Binding Arbitration* test claim.[1]

Recommendation

Staff recommends that the Commission adopt the Proposed Statement of Decision, beginning on page three, which accurately reflects the staff analysis and recommendation on this test claim. Minor changes, including those that reflect the hearing testimony and vote count, will be included when issuing the final Statement of Decision.

If the Commission's vote on item 10 modifies the staff analysis, staff recommends that the motion to adopt the proposed Statement of Decision reflect those changes, which will be made before issuing the final Statement of Decision. Alternatively, if the changes are significant, staff recommends that adoption of a proposed Statement of Decision be continued to the September 2006 Commission hearing.

[1] California Code of Regulations, title 2, section 1188.1, subdivision (a).

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM: Code of Civil Procedure Sections 1281.1, 1299, 1299.2, 1299.3, 1299.4, 1299.5, 1299.6, 1299.7, 1299.8, and 1299.9; Statutes 2000, Chapter 906 Filed on October 24, 2001 by the City of Palos Verdes Estates, Claimant.	**Case No.: 01-TC-07** ***Binding Arbitration*** PROPOSED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (*Proposed for Adoption on July 28, 2006*)

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 28, 2006. [Witness list will be included in the final Statement of Decision.]

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

The Commission [adopted/modified] the staff analysis at the hearing by a vote of [vote count will be included in the final Statement of Decision] to deny this test claim.

Summary of Findings

This test claim involves legislation regarding labor relations between local agencies and their law enforcement officers and firefighters, and provides that, where an impasse in negotiations has been declared, and if the employee organization so requests, the parties would be subject to binding arbitration.

The test claim legislation was effective on January 1, 2001, but was declared unconstitutional by the California Supreme Court on April 21, 2003, as violating "home rule" provisions of the California Constitution. The claimant requests reimbursement from the effective date of the legislation (January 1, 2001) until the court determined the legislation unconstitutional on April 21, 2003.

Thus, this test claim presents the following issues:

- Can legislation deemed unconstitutional by the court create a reimbursable state-mandated program during the time the legislation was presumed constitutional?
- Does the test claim statute impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

The purpose of article XIII B, section 6, is to prevent the state from forcing programs on local governments without the state paying for them. Applying the court's ruling that the test claim legislation is unconstitutional retroactively to the original effective date of the legislation could have the effect of forcing programs and costs on local governments without the state paying for them during the time the test claim legislation was presumed constitutional (from January 1, 2001, through April 20, 2003). Because binding rights or obligations in the form of reimbursable mandates *could have been created* while the test claim legislation was presumed to be constitutional, an analysis on the merits is conducted in order to determine whether the test claim legislation did in fact mandate a new program or higher level of service and impose costs mandated by the state during that period of time.

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

BACKGROUND

This test claim addresses legislation involving labor relations between local agencies and their law enforcement officers and firefighters, and provides that, where an impasse in negotiations has been declared, and if the employee organization so requests, the parties would be subject to binding arbitration.

Since 1968, local agency labor relations have been governed by the Meyers-Milias-Brown Act.[2] The act requires local agencies to grant employees the right to self-organization, to form, join or assist labor organizations, and to present grievances and recommendations regarding wages, salaries, hours, and working conditions to the governing body. The California Supreme Court has recognized that it is not unlawful for public employees to strike unless it has been determined that the work stoppage poses an imminent threat to public health or safety.[3] Employees of fire departments and fire services, however, are specifically denied the right to strike or to recognize a picket line of a labor organization while in the course of the

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

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

performance of their official duties.[4] Additionally, the Fourth District Court of Appeal has held that police work stoppages are per se illegal.[5]

Under the Meyers-Milias-Brown Act, the local employer establishes rules and regulations regarding employer-employee relations, in consultation with employee organizations.[6] The local agency employer is obligated to meet and confer in good faith with representatives of employee bargaining units on matters within the scope of representation.[7] If agreement is reached between the employer and the employee representatives, that agreement is memorialized in a memorandum of understanding which becomes binding once the local governing body adopts it.[8]

Test Claim Legislation

The test claim legislation[9] added several sections to the Code of Civil Procedure providing new, detailed procedures that could be invoked by the employee organization in the event an impasse in negotiations has been declared. Section 1299 stated the following legislative intent:

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

[4] Labor Code section 1962.

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

[6] Government Code section 3507.

[7] Government Code section 3505.

[8] Government Code section 3505.1.

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

> employers and employee organizations representing firefighters and law enforcement officers over economic issues that remain in dispute over their respective interests…

The legislation provided that if an impasse was declared after the parties exhausted their mutual efforts to reach agreement over matters within the scope of the negotiation, and the parties were unable to agree to the appointment of a mediator, or if a mediator agreed to by the parties was unable to effect settlement of a dispute between the parties, the employee organization could, by written notification to the employer, request that their differences be submitted to an arbitration panel.[10] Within three days after receipt of written notification, each party was required to designate one member of the panel, and those two members, within five days thereafter, were required to designate an additional impartial person with experience in labor and management dispute resolution to act as chairperson of the arbitration panel.[11]

The arbitration panel was required to meet with the parties within ten days after its establishment, or after any additional periods of time mutually agreed upon.[12] The panel was authorized to make inquiries and investigations, hold hearings, and take any other action, including further mediation, that the panel deemed appropriate.[13] Five days prior to the commencement of the arbitration panel's hearings, each of the parties was required to submit a last best offer of settlement on the disputed issues.[14] The panel decided the disputed issues separately, or if mutually agreed, by selecting the last best offer package that most nearly complied with specified factors.[15]

The panel then delivered a copy of its decision to the parties, but the decision could not be publicly disclosed for five days.[16] The decision was not binding during that period, and the parties could meet privately to resolve their differences and, by mutual agreement, modify the panel's decision.[17] At the end of the five-day period, the decision as it may have been modified by the parties was publicly disclosed and binding on the parties.[18]

Code of Civil Procedure section 1299.9, subdivision (b), provided that, unless otherwise agreed to by the parties, the costs of the arbitration proceeding and the expenses of the arbitration panel, except those of the employer representative, would be borne by the employee organization.

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

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

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

[13] *Ibid.*

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

[15] *Ibid.*

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

[17] *Ibid.*

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

Test Claim Legislation Declared Unconstitutional

The test claim legislation in its entirety was declared unconstitutional by the California Supreme Court on April 21, 2003, as violating portions of article XI of the California Constitution.[19] The basis for the decision is that the legislation: 1) deprives the county of its authority to provide for the compensation of its employees as guaranteed in article XI, section 1, subdivision (b); and 2) delegates to a private body the power to interfere with local agency financial affairs and to perform a municipal function, as prohibited in article XI, section 11, subdivision (a).[20]

Claimant's Position

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

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

- Litigation costs until such time as there is a final judgment on the constitutionality of Senate Bill No. (SB) 402, including actions for declaratory relief, opposition petitions to compel arbitration, and resultant appeals.
- Costs for training agency management, counsel, staff and members of governing bodies regarding SB 402 as well as the intricacies thereof.
- Costs incident to restructuring bargaining units that include employees that are covered by S.B. 402 and those which are not covered by SB 402.
- Increased staff time in preparing for negotiations in order to collect and compile comparability data specified in Code of Civil Procedure, section 1299.4.
- Increased time of agency negotiators, including staff, consultants, and attorneys, in handling two track negotiations: those economic issues which are subject to SB 402 arbitration and those issues which are not subject to arbitration.
- Time to prepare for and consult with the governing board regarding the last best and final offer to be submitted to the arbitration panel.
- Time to prepare for and participate in any mediation process.
- Consulting time of negotiators, staff and counsel in selecting the agency panel member.
- Time of the agency negotiators, staff and counsel in vetting and selecting a neutral arbitrator.
- Time of the agency negotiators, staff and counsel in briefing the agency panel member.
- Time of the agency negotiators, staff and counsel in preparing for the arbitration hearing.
- Time of the agency negotiators, staff and counsel in vetting, selecting and preparing expert witnesses.
- Time of the agency panel member and attorney in pre-arbitration meetings of the panel.
- Staff and attorney time involved in discovery pursuant to Code of Civil Procedure, sections 1281.1, 1281.2 and 1299.8.

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

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

- Staff, attorney, witness and agency panel member time for the hearings.
- Attorney time in preparing the closing brief.
- Agency panel member time in consulting in closed sessions with the panel.
- Time of the attorney, negotiators, and staff in consulting with the agency panel member prior to the issuance of the award.
- Time of the attorney, negotiators, staff, agency panel member, and governing board consulting regarding the award and giving directions to agency negotiators.
- Time of the agency negotiators to negotiate with the union's negotiating representatives based on the award.
- Costs of implementing the award above those that would have been incurred under the agency's last best and final offer.
- Costs of inevitable litigation regarding the interpretation of critical provisions of the law which are ambiguous, including the fact that the act covers "all other forms of remuneration," and covers employees performing "any related duties" to firefighting and investigating.
- An additional intangible cost element at the last best offer phase of negotiations, involving "enhancements" to compensation packages that may be added when the local agency perceives possible vulnerabilities in its negotiating position, estimated to be an overall 3% to 5% increase based on the most recent negotiations with the Palos Verdes Estates Police Officers' Association.

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

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

Department of Finance Position

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

1) the test claim legislation does not create a new program or higher level of service in an existing program, and the costs alleged do not stem from the performance of a requirement unique to local government;

2) alleged higher costs for compensating the claimant's employees are not reimbursable, since compensation of employees in general is a cost that all employers must pay; furthermore, allowing reimbursement for any such costs could "undermine an employer's incentive to collectively bargain in good faith;"

3) alleged cost for increased compensation is not unique to local government; even though claimant may argue that compensation of firefighters and law enforcement officers is unique to local government, the "focus must be on the hardly unique function of compensating employees in general;" and

4) Code of Civil Procedure section 1299.9, subdivision (b), provides that costs of the arbitration proceeding and expenses of the arbitration panel, except those of the employer representative, are to be borne by the employee organization; in the test claim legislation, the Legislature specifically found that the duties of the local agency employer representatives are substantially similar to the duties required under the current collective bargaining procedures and therefore the costs incurred in performing those duties are not reimbursable state mandated costs; and thus, during the course of arbitration proceedings, "there are not any net costs that the employers would have to incur that would not have been incurred in good faith bargaining or that are not covered by the employee organizations."

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[21] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[22] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[23] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in

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

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

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

an activity or task.[24] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[25]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[26] To determine if the program is new or imposes a higher level of service, the test claim statute must be compared with the legal requirements in effect immediately before the enactment of the test claim statute.[27] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[28]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[29]

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.[30] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[31]

This test claim presents the following issues:

- Can legislation deemed unconstitutional by the court create a reimbursable state-mandated program during the time the legislation was presumed constitutional?

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

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

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

[27] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[28] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

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

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

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

- Does the test claim statute impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

Issue 1: Can legislation deemed unconstitutional by the court create a reimbursable state-mandated program during the time the legislation was presumed constitutional?

On April 21, 2003, the California Supreme Court issued its decision in the *County of Riverside* case and found that the test claim statutes violated the home rule provisions of article XI of the California Constitution as follows: "It deprives the county of its authority to provide for the compensation of its employees (§ 1, subd. (b)) and delegates to a private body the power to interfere with county financial affairs and to perform a municipal function (§ 11, subd.(a))."[32] Since the test claim statutes were found unconstitutional on April 21, 2003, local agencies are no longer subject to binding arbitration, when requested by law enforcement and firefighter employees, where an impasse in labor negotiations has been declared.

Nevertheless, the claimant requests reimbursement from the effective date of the legislation (January 1, 2001) until the court determined the legislation unconstitutional on April 21, 2003. The claimant argues that reimbursement should be allowed since local agencies are not authorized to declare a statute unconstitutional and generally cannot refuse to enforce a statute on the basis that it is unconstitutional pursuant to article III, section 3.5 of the California Constitution. The claimant states that local agencies had no alternative other than to "enforce the provisions of this legislation, otherwise they would be subject to a writ of mandate to compel binding arbitration."[33] Relying on the case of *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, claimant states:

> The court concluded: "As we shall explain, we conclude that a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional." *Lockyear* (sic), *supra.*[34, 35]

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

[33] Comments on Draft Staff Analysis by City of Palos Verdes Estates, April 13, 2006, page 2.

[34] *Id*., page 4.

[35] Notwithstanding this rule cited in *Lockyer*, the *Lockyer* case also specifically distinguished the *County of Riverside* case — the case in which this test claim statute was declared unconstitutional — as an exception to that general rule.[35] Under the exception, the court cited examples where a local agency refuses to comply with the statute, forcing a lawsuit to challenge the constitutionality of the statute. The County of Riverside, in refusing to comply with the test claim statute, acted in accordance with the exception articulated in *Lockyer*.

In addition, while the *County of Riverside* case was under review, there were two other cases pending review regarding the constitutionality of Chapter 906, the test claim legislation: 1) *Ventura County v. Ventura County Deputy Sheriffs' Association* (Second District Court of Appeal, Case No. B153806); and 2) *City of Redding v. Superior Court Local Union 1934, Real Party in Interest* (Third District Court of Appeal, Case No. C03950). Had claimant found itself

Thus, the question is whether there can be a reimbursable state-mandated program from the effective date of the legislation until the date the legislation was deemed unconstitutional by the court (from January 1, 2001, through April 20, 2003), or whether the court's holding that the legislation is unconstitutional retroactively applies to the original effective date of the legislation. Although courts sometimes clarify whether the decision retroactively applies in the opinion declaring the statute unconstitutional, the Supreme Court did not do so in the *County of Riverside* case. In addition, no court cases regarding the effect of an unconstitutional statute in the context of California mandates law exist. Therefore, this issue is one of first impression for the Commission.

For the reasons below, the Commission finds, based on the purpose of article XIII B, section 6, legislation deemed unconstitutional by the court *may* create a reimbursable state-mandated program during the time the legislation was presumed constitutional.

The effect of an unconstitutional statute is a complex area of law, and no general rule can be cited with regard to the effectiveness of a statute while it was presumed constitutional. Oliver P. Field, in his treatise "The Effect of an Unconstitutional Statute," has stated:

> There are several rules or views, not just one, as to the effect of an unconstitutional statute. All courts have applied them all at various times and in differing situations. Not all courts agree, however, upon the applicability of any particular rule to a specific case. It is this lack of agreement that causes the confusion in the case law on the subject.[36]

The traditional approach was that an unconstitutional statute is "void ab initio," that is, "[a]n unconstitutional statute is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[37] Under the traditional approach, no reimbursement would be required for this test claim. This approach has been criticized in later decisions, however, and the trend nationwide has been toward a more *equity*-oriented view that binding rights and obligations may be based on a statute that is subsequently declared unconstitutional, and that not every declaration of unconstitutionality is retroactive in its effect.[38]

Under California state mandates law, the determination as to whether a mandate exists is a question of law.[39] As stated in *County of Sonoma*, the Commission must strictly construe

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in the position of being forced into binding arbitration as a result of the test claim statute, it could have refused, as the County of Riverside and the other local agencies did, and waited to be sued by the labor union. Presumably, any such lawsuit would have either been consolidated with and/or had the same result as *County of Riverside.* Thus, the *Lockyer* case does not support claimant's contention that it had no alternative but to comply with the test claim statute.

[36] Oliver P. Field, The Effect of an Unconstitutional Statute (1935), pages 2-3.

[37] *Norton v. Shelby County* (1886) 118 U.S. 425.

[38] *Chicot County Drainage District v. Baxter State Bank* (1940) 308 U.S. 371.

[39] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1279, citing *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

article XIII B, section 6 and not apply it as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.[40, 41] Nevertheless, the purpose of article XIII B, section 6, as revealed in the ballot measure adopting it, was to prevent the state from forcing programs on local governments without the state paying for them. In 2004, the California Supreme Court in the *San Diego Unified School Dist.* case reaffirmed the purpose of article XIII B, section 6, as follows:

> The concern which prompted the inclusion of section 6 in article XIII B 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 XIII B 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.' (citations omitted) (italics added.)[42]

Applying the court's ruling that the test claim legislation is unconstitutional retroactively to the original effective date of the legislation could have the effect of forcing programs and costs on local governments without the state paying for them. Because binding rights or obligations in the form of reimbursable mandates *could have been created* while the test claim legislation was presumed to be constitutional, an analysis on the merits should proceed in order to determine whether the test claim legislation did in fact mandate a new program or higher level of service and impose costs mandated by the state during that period of time.

Therefore, the Commission finds, based on the purpose of article XIII B, section 6, that legislation deemed unconstitutional by the court *may* create a reimbursable state-mandated program during the time the legislation was presumed constitutional.

Issue 2: Does the test claim statute impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

A. Does the Test Claim Legislation Constitute a State-Mandated Program?

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

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[40] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280; see also *City of San Jose v. State of California (City of San Jose)* (1996) 45 Cal.App.4th 1802, 1816-1817, citing *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.

[41] The doctrine of equity in this sense means the "recourse to principles of justice to correct or supplement the law as applied to particular circumstances…" Equity is based on a system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law when the two conflict. (See Black's Law Dict. (7th ed., 1999) p. 561, col. 1.)

[42] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 875.

a task, then article XIII B, section 6 is not triggered.[43] Further, courts have held that the term "program" within the meaning of article XIII B, section 6 means a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. [44]

The claimant is requesting reimbursement for litigation costs until the time the court determined the test claim legislation unconstitutional, costs to engage in binding arbitration, and a 3% to 5% increase in the benefits provided to the employees as a result of the legislation.

The Commission finds that litigation costs *do not* constitute state-mandated activities or programs. Claimant states in its comments that costs to litigate the test claim legislation were "considerable" for the 27 months between the time the law became effective and the Supreme Court decision finding it to be unconstitutional.[45] Any such costs, however, were not mandated by the test claim statute. Moreover, the Code of Civil Procedure[46] and the California Rules of Court,[47] establish a process for prevailing parties to recover litigation costs and attorneys fees by filing a motion with the court. Thus, litigation costs are not reimbursable pursuant to article XIII B, section 6.

The Commission further finds that the test claim legislation requires local agencies to engage in binding arbitration if, during employer-employee labor negotiations, the parties have reached an impasse and the employee organization notifies the agency it wishes to engage binding arbitration. The test claim legislation specifically requires local agencies to designate an arbitration panel member, submit a "last best settlement offer" on disputed issues, and participate in the arbitration hearings. These activities constitute a "program" subject to article XIII B, section 6 because they mandate a task or activity, and impose unique requirements on local governments that do not "apply generally to all residents and entities in the state." Thus, the analysis must continue to determine if these activities impose a new program or higher level of service.

B. Does the Test Claim Legislation Constitute a "New Program" or "Higher Level of Service?"

The courts have held that even though local agencies can show they have incurred increased costs as a result of test claim legislation, increased costs alone, without a showing that the costs were incurred as a result of a mandated new program or higher level of service, do not require reimbursement under article XIII B, section 6.[48] Test claim legislation imposes a "new program" or "higher level of service" when: a) the requirements are new in comparison with

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

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

[45] Comments on Draft Staff Analysis by City of Palos Verdes Estates, April 13, 2006, page 8.

[46] Code of Civil Procedure, sections 1032, 1033.5, and 1034.

[47] California Rules of Court, rule 870.2.

[48] *County of Los Angeles, supra,* 43 Cal.3d at 56; *Lucia Mar Unified School Dist., supra*, 44 Cal.3d at 835.

the preexisting scheme; *and* b) the requirements were intended to provide an enhanced service to the public.[49]

The test claim legislation requires local agencies to engage in binding arbitration if, during employer-employee labor negotiations, the parties have reached an impasse and the employee organization notifies the agency it wishes to engage binding arbitration. The test claim legislation specifically requires local agencies to designate an arbitration panel member, submit a "last best settlement offer" on disputed issues, and participate in the arbitration hearings. According to the claimant, the test claim legislation has resulted in a 3%-5% increase in costs for the compensation packages to their law enforcement and firefighting employees. The law in effect prior to the enactment of the test claim statute did not require local agencies to engage in binding arbitration, thus the requirement is new in comparison with the preexisting scheme.

The new requirements, however, do not provide an enhanced service to the public as explained in the following analysis.

The cases have consistently held that additional costs for increased employee benefits, in the absence of some increase in the actual level or quality of governmental services provided to the public, do not constitute an "enhanced service to the public" and therefore do not impose a new program or higher level of service on local governments within the meaning of article XIII B, section 6 of the California Constitution. The court in *City of Richmond*, for example, held that even though increased employee benefits may generate a higher quality of local safety officers, the legislation did not constitute a new program or higher level of service.

> Increasing the cost of providing services cannot be equated with requiring an increased level of service under a[n] [article XIII B,] section 6 analysis. 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.[50]

The California Supreme Court reaffirmed and clarified what constitutes an "enhanced service to the public" in the *San Diego Unified School District* case. The court, in reviewing several mandates cases, stated that the cases "illustrate the circumstance that simply because a state law or order may increase the costs borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514" (emphasis in original).[51]

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[49] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[50] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App4th 1190, 1195-1196. See also, *City of Anaheim v. State of California* (1987) 189 Cal.App.3rd 1478, 1484, where the court determined that a temporary increase in PERS benefits to retired employees, resulting in higher contribution rates for local government, did not constitute a new program or higher level of service to the public; and *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67, where the California Supreme Court determined that providing unemployment compensation protection to a city's own employees was not a service to the public.

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

The Supreme Court went on to describe what *would* constitute a new program or higher level of service, as "not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided [to the public]. In *Carmel Valley Fire Protection Dist. v. State of California* [citations omitted], for example, an executive order required that county firefighters be provided with protective clothing and safety equipment. The safety clothing and equipment were new requirements mandated by the state. In addition, the court determined that the protective clothing and safety equipment were designed to result in more effective fire protection and, thus, did provide an enhanced level of service to the public.[52]

The test claim legislation at issue here requires the local agency to engage in a process that may result in increased employee compensation or benefits. Since strikes by law enforcement officers and fire services personnel are prohibited by law,[53] no successful argument can be made that the test claim legislation affects law enforcement or firefighting service to the public.

Therefore, the Commission finds that the test claim legislation does not impose a new program or higher level of service and, thus, reimbursement is not required pursuant to article XIII B, section 6.

CONCLUSION

Based on the purpose of article XIII B, section 6, the Commission concludes that legislation deemed unconstitutional by the court *may* create a reimbursable state-mandated program during the time the legislation was presumed constitutional.

However, the test claim legislation does not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution and, thus reimbursement is not required.

[52] *Ibid.*

[53] See footnotes 3 and 4.