STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES
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June 7, 2007

Ms. Nancy Gust
SB-90 Sheriff's Department
County of Sacramento
711 G Street, Room 405
Sacramento, CA 95814

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Adopted Statement of Decision
Training Requirements for Instructors and Academy Staff, 02-TC-03
California Code of Regulations, Title 11, Sections 1001, 1052, 1053, 1055, 1070, 1071, and 1082 (Register 2001, No. 29)
County of Sacramento, Claimant

Dear Ms. Gust:

The Commission on State Mandates adopted the enclosed Statement of Decision to deny this test claim on May 31, 2007.

Please contact Nancy Patton at (916) 323-3562 if you have any questions.

Sincerely,

PAULA HIGASHI
Executive Director

Enclosure

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM:

California Code of Regulations, Title 11, Sections 1001, 1052, 1053, 1055, 1070, 1071, and 1082 (Register 2001, No. 29)

Filed on August 6, 2002, by the County of Sacramento, Claimant.

Case No.: 02-TC-03

Training Requirements for Instructors and Academy Staff

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted on May 31, 2007)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

Paula Higashi

PAULA HIGASHI, Executive Director

June 7, 2007

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM:

California Code of Regulations, Title 11, Sections 1001, 1052, 1053, 1055, 1070, 1071, and 1082 (Register 2001, No. 29)

Filed on August 6, 2002, by the County of Sacramento, Claimant.

Case No.: 02-TC-03
Training Requirements for Instructors and Academy Staff

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted on May 31, 2007)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") held two hearings on this test claim.

The first hearing was held on March 29, 2007, in which the following persons testified: Cheryl MacCoun, Gail Wilczynski, Nancy Gust, and Christine Hess appeared on behalf of claimant County of Sacramento; Allan Burdick and Juliana Gmur appeared on behalf of the California State Association of Counties SB-90 Service; Leonard Kaye appeared on behalf of County of Los Angeles; Bryon Gustafson appeared on behalf of the Commission on Peace Officer Standards and Training; and Carla Castañeda appeared on behalf of the Department of Finance.

The Commission heard and decided this test claim during a regularly scheduled hearing on May 31, 2007. Nancy Gust, Christine Hess, Cheryl MacCoun, and Juliana Gmur appeared on behalf of claimant County of Sacramento; Allan Burdick appeared on behalf of the California State Association of Counties SB-90 Service; Laura Filatoff appeared on behalf of the Los Angeles City Police Department; Bryon Gustafson and Alan Deal appeared on behalf of the Commission on Peace Officer Standards and Training; and Carla Castañeda and Susan Geanacou appeared on behalf of the Department of Finance.

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 the staff analysis by a vote of 7-0 to deny this test claim.

Summary of Findings

This test claim addresses regulations adopted by the Commission on Peace Officer Standards and Training ("POST") that require training of specified POST instructors and key staff of POST training academies. POST training is provided to law enforcement officers by POST-approved institutions or agencies, and POST can certify training courses and curriculum developed by other entities as meeting required minimum standards.

Although the test claim regulations require persons who provide specified POST training to engage in certain activities, the Commission finds that those requirements flow from an initial discretionary decision by the local agency to participate in POST, and another discretionary decision to provide POST-certified training or establish an academy and employ training staff. Because the underlying decisions to participate in POST and provide POST-certified training are discretionary, and local agencies have alternatives to providing POST-certified training or establishing a POST training academy, the test claim regulations are not subject to article XIII B, section 6 of the California Constitution, and therefore do not impose a state-mandated program on local agencies.

BACKGROUND

This test claim addresses POST regulations that require training of specified POST instructors and key staff of POST training academies. This claim *does not* involve the requirement imposed on individual peace officers to receive basic training pursuant to Penal Code section 832.

POST was established by the Legislature in 1959 to set minimum selection and training standards for California law enforcement.[1] The POST program is funded primarily by persons who violate the laws that peace officers are trained to enforce.[2] Participating agencies agree to abide by the standards established by POST and may apply to POST for state aid.[3]

POST training is provided to law enforcement officers by POST-approved institutions or agencies, and POST can certify training courses and curriculum developed by other entities as meeting required minimum standards.[4] POST states the following:

> To assist the more than 600 law enforcement agencies that voluntarily agree to abide by its minimum training standards, POST certifies hundreds of courses annually. These courses are developed and offered by more than 800 presenters statewide. POST also provides instructional resources and technology, quality leadership training programs, and professional certificates to recognize peace officer achievement.[5]

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[1] Penal Code section 13500 et seq.

[2] *About California POST*, <http://www.POST.ca.gov>.

[3] Penal Code sections 13522 and 13523.

[4] Penal Code sections 13510, 13510.1, 13510.5, and 13511; California Code of Regulations, Title 11, section 1053.

[5] *Training, Certificates & Services: Overview*, <http://www.POST.ca.gov>.

A POST participating agency can offer its own in-house POST-certified training, or send its personnel to POST-certified training institutions operated by other entities, such as community colleges or other law enforcement agencies.[6]

On March 26, 2001, POST issued Bulletin number 01-05 entitled "Proposed Regulatory Action: Training Requirements for Instructors and Academy Staff of Specialized Training Courses." In that bulletin, POST stated:

> For years, the training community has shared an informal expectation that persons who instruct in certain high risk/liability areas should attend a POST-certified instructor development course (or an equivalent one) on the related subject area. The same expectation has been maintained for certain key academy staff, and has, in fact, been formalized in the *POST Basic Course Management Guide*. The pertinent POST-certified instructor development courses are listed in the *POST Catalog of Certified Courses*. The proposed regulations also include provisions for equivalency determinations and exemptions from the training requirements.

Test Claim Regulations

POST subsequently adopted the regulations proposed in Bulletin number 01-05, which are the subject of this test claim.[7] The regulations require that, effective July 1, 2002, primary instructors[8] of designated specialized training courses complete a specified training standard, or its equivalent, prior to instructing in the specialized subject.[9] Instructors of specialized training that are not primary instructors must complete the specified training standard, or its equivalent, if they are appointed on or after July 1, 2002, or if they instruct at a new training institution on or after July 1, 2002.[10] A process was also established to allow presenters of the specialized courses to perform an equivalency evaluation of non-POST-certified training to meet the minimum training standard for the specialized subject.[11] Presenters of the specialized courses are required to maintain documentation demonstrating satisfaction of the minimum training standard by their instructors who teach any of the specialized courses.[12]

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[6] Letter from Kenneth J. O'Brien, Executive Director of POST, submitted October 31, 2002, page 1.

[7] The test claim was filed with the Commission on August 6, 2002, on regulations in effect at that time. The subject regulations have subsequently been modified, however, those modified regulations have not been claimed and, thus, the Commission makes no finding with regard to them.

[8] "Primary instructor" is an individual responsible for the coordination and instruction for a particular topic. The responsibility includes oversight of topic content, logistics, and other instructors. (Cal. Code Regs., tit. 11, § 1001, subd. (aa).)

[9] California Code of Regulations, Title 11, section 1070, subdivision (a).

[10] *Ibid.*

[11] California Code of Regulations, Title 11, section 1070, subdivision (b).

[12] California Code of Regulations, Title 11, section 1070, subdivision (c).

The test claim regulations also require that Academy Directors, Academy Coordinators, and Academy Recruit Training Officers who are appointed to those positions on or after July 1, 2002, shall complete specified minimum training standards within one year from the date of appointment to the position.[13] Academy Directors are required to maintain documentation demonstrating satisfaction of the minimum training standard for the designated staff position.[14]

Three additional requirements are set forth in the test claim regulations with regard to specialized course instructors and Academy instructors. First, qualifications of certain academy staff, in addition to other instructors and coordinators, must now be evaluated by POST in requests for course certification.[15] Second, specified elements of instructor resumes must now be provided for course certification requests.[16] And third, certificates of completion must be issued by presenters to students who successfully complete POST-certified instructor development courses listed in section 1070, the Academy Director/Coordinator Workshop and the Recruit Training Officer Workshop.[17]

In July 2004, the Commission denied a consolidated test claim, filed by the County of Los Angeles and Santa Monica Community College District, regarding POST Bulletin 98-1 and POST Administrative Manual Procedure D-13, in which POST imposed field training requirements for peace officers that work alone and are assigned to general law enforcement patrol duties (*Mandatory On-The-Job Training For Peace Officers Working Alone*, 00-TC-19/ 02-TC-06). The Commission found that these executive orders do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the following reasons:

- state law does not require school districts and community college districts to employ peace officers and, thus, POST's field training requirements do not impose a state mandate on school districts and community college districts; and
- state law does not require local agencies and school districts to participate in the POST program and, thus, the field training requirements imposed by POST on their members are not mandated by the state.

Claimant's Position

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

Claimant asserts that development costs commencing in fiscal year 2001-2002 for the following activities will be incurred and are reimbursable:

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[13] California Code of Regulations, Title 11, section 1071, subdivision (a). Content for the courses for each staff position is specified in section 1082.

[14] California Code of Regulations, Title 11, section 1071, subdivision (b).

[15] California Code of Regulations, Title 11, section 1052, subdivision (a)(2).

[16] California Code of Regulations, Title 11, section 1053, subdivision (a)(2).

[17] California Code of Regulations, Title 11, section 1055, subdivision (*l*).

1. Staff time to complete or update any necessary general, operations, or special orders as required.
2. Staff time to compile information to be distributed to instructors and key staff informing them of changes in regulations and what information they need to provide such as updated resumes, completed class certificates, etc.
3. Staff time to collect, review for completeness and evaluate contents of current, and any new, instructor and key academy staff information packages turned in.
4. Staff time to review information submitted for equivalency evaluation as instructor or key staff.
5. Staff time to oversee specific parts of the equivalency process such as the Learner's First CD and the POST video.
6. Staff time to observe and evaluate the instructor presentations as part of the equivalency process.
7. Staff time to provide required Basic Instructor Development course to new instructors.
8. Purchase of necessary computer hardware, software and any necessary programming services to set up database or modify existing database to track information on #6 above.
9. Staff time to enter information into database to track class, individual, instructor, academy staff, certificate information and any other data required by POST. Database to be used for annual renewals, to provide POST information as necessary and during any audits of the program.
10. Staff time to fill out required documentation for POST.
11. Staff time to schedule required training for instructors and key staff as necessary.
12. Develop or update training for data entry, report management and required notices in the database.
13. Meet and confer with POST representatives.
14. Costs for printing class material for Basic Instructor Course and necessary office supplies for filing paperwork turned in by instructors and key academy personnel.

For the foregoing activities, estimated costs for staff time are $26,298 and estimated costs for computer hardware, software and programming services are "unknown at this time but could range from $5,000 - $20,000."

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

1. Staff time to collect, review for completeness and evaluate contents of new instructor and key academy staff resumes.
2. Staff time to collect, review for completeness and evaluate contents of annual renewal packages of instructor and key academy staff resumes.
3. Staff time to review information submitted for equivalency evaluation as instructor or key academy staff.

4. Staff time to oversee specific parts of the equivalency process such as the Learner's First CD and the POST video.
5. Staff time to observe and evaluate the instructor presentations as part of the equivalency process.
6. Staff time to provide required Basic Instructor Development course to new instructors.
7. Staff time to compile information to be distributed to instructors and key staff informing them of any changes to these regulations.
8. Staff time to enter information into database to track class, individual, instructor, academy staff and certificate information and any other data required by POST.
9. Staff time to fill out required certificates.
10. Staff time to fill out required documentation for POST.
11. Staff time to schedule required training for instructors and key staff as necessary.
12. Staff time to meet and confer with POST representatives.
13. Costs for printing class material for Basic Instructor Course and necessary office supplies for filing paperwork turned in by instructors and key academy personnel.

For the foregoing activities, claimant estimates ongoing costs of $25,000 per year.

The claimant filed additional comments in response to the staff's recommendation to deny the test claim. These comments are addressed in the analysis.

Position of Department of Finance

The Department of Finance stated in its comments that:

> As the result of our review, we have concluded that the [test claim regulations] may have resulted in a higher level of service for an existing program. If the Commission reaches the same conclusion at its hearing on the matter, the nature and extent of the specific activities required can be addressed in the parameters and guidelines which will then have to be developed for the program.

The Department submitted subsequent comments agreeing with the staff recommendation to deny the test claim.

Position of POST

POST stated in its comments that it believes the test claim regulations do not impose a new program or higher level of service within an existing program upon local agencies within the meaning of article XIII B, section 6 of the California Constitution and costs mandated by the state pursuant to Government Code section 17514.

First, under Penal Code sections 13503, 13506, and 13510, POST is a voluntary program in which agencies may or may not participate, and any agency choosing not to participate is not subject to POST's requirements. Only when a law enforcement agency commits to participate by local ordinance is it obliged to adhere to program requirements.

Second, any law enforcement agency voluntarily participating in the POST program *may* seek to have its training programs certified by POST. A participating agency can elect to not present training courses in-house and instead send its personnel to POST-certified training institutions operated by other entities, e.g., community colleges or other law enforcement agencies. There is no requirement for a participating agency to have POST-certified training courses. Since the test claim regulations affecting instructor/academy staff training requirements only apply to POST-certified training institutions, there is no requirement for the state to reimburse for such costs under the Government Code or the California Constitution.

Third, the new POST training requirements for instructors and academy staff are worded in such a way that they are directed to the individual instructor and academy staff members, not the training institutions. POST-certified training institutions are free to require applicants to complete this training on their own at their own expense. If POST-certified training institutions voluntarily provide their staff with this training, it is no reason to expect the state to reimburse for these costs.

Since POST has facilitated the ready availability of this instructor/academy staff training by certifying the training to virtually any POST-certified training institution that can demonstrate a need and capability, law enforcement trainers in the POST program can conduct much of this required training within their own facilities without sending their personnel away.

POST provided testimony at the March 29, 2007 hearing, stating the following:

- There are examples of police departments in California that do not participate in the POST program.[18]
- Those agencies that do not participate in POST can have their own standards that parallel POST, the disadvantage being that the travel and per diem for the training is not reimbursed by POST. Those agencies are still law enforcement agencies, and their trainers are still law enforcement trainers.[19]
- 44 of the 58 counties in California do not have their own academy; agencies that do have their own academy have local control and can train their officers to meet the particular needs of their community.[20]

[18] Reporter's Transcript of Proceedings, March 29, 2007 Commission Hearing, page 42, line number 11.

[19] *Id.* page 43, line number 13.

[20] *Id.* page 43, line number 1.

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 an activity or task.[24] In addition, the required activity or task must be new, constituting a "new program," and it must create a "higher level of service" over the previously required level of service.[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 legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[27] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[28]

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[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.

[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 (*Los Angeles I*); *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, 877.

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]

The analysis addresses the following issue:

- Are the test claim regulations subject to article XIII B, section 6 of the California Constitution?

Issue 1: Are the test claim regulations subject to article XIII B, section 6 of the California Constitution?

In order for the test claim regulations to impose a reimbursable state-mandated program under article XIII B, section 6, the language must order or command a local agency to engage in an activity or task. If the language does not do so, then article XIII B, section 6 is not triggered. Moreover, where participation in the *underlying* program is voluntary, courts have held that new requirements imposed within that underlying program do not constitute a reimbursable state mandate.[32]

Do the test claim regulations mandate any activities?

The test claim regulations require the following activities:

1. As of July 1, 2002, primary instructors of designated specialized POST training courses must complete a specified training standard, or its equivalent, prior to instructing in the subject.
2. Instructors of designated specialized POST training courses that are not primary instructors must complete the specified training standard, or its equivalent, if they are appointed on or after July 1, 2002, or if they instruct at a new training institution on or after July 1, 2002.
3. Presenters of specialized courses must maintain documentation demonstrating their instructors who teach any of the specialized courses have satisfied the minimum training standard, and such documentation shall be made available for POST inspection upon request.

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

[32] *Kern High School Dist. supra,* 30 Cal.4th 727, 727.

4. Academy Directors, Academy Coordinators, and Academy Recruit Training Officers who are appointed to those positions on or after July 1, 2002, shall complete the specified minimum training standards for their positions within one year from the date of appointment.
5. Academy Directors shall maintain documentation demonstrating satisfaction of the minimum training standard for each designated staff position, and such documentation shall be made available for POST inspection upon request.
6. Any person or organization desiring to have a course certified by POST shall now provide instructor resumes in addition to other information previously required.
7. Any presenter of a POST-Certified instructor development course, or any presenter of the Academy Director/Coordinator Workshop or Recruit Training Officer Workshop, shall issue certificates to students who successfully complete the training.

Thus, the plain language of the test claim regulations does require specified persons involved in POST training to engage in certain activities. However, based on the following analysis, the Commission finds that the requirements flow from the *initial discretionary decisions* by the local agency to become a member of POST, and to provide POST-certified training or establish a POST training academy. Therefore, the test claim regulations are not subject to article XIII B, section 6 and, thus, do not constitute a state-mandated program.

POST was created in 1959 "[f]or the purpose of raising the level of competence of local law enforcement officers ..."[33] To accomplish this purpose, POST has the authority, pursuant to Penal Code section 13510, to adopt rules establishing minimum standards relating to the physical, mental, and moral fitness of peace officers, and for the training of peace officers. However, these rules apply only to those cities, counties, and school districts that participate in the POST program and apply for state aid.[34] If the local agency decides to file an application for state aid, the agency must adopt an ordinance or regulation agreeing to abide by POST rules and regulations.[35] Not all local agencies have applied for POST membership,[36] nor do all local agencies provide POST-certified training. Nor is there any state statute, or other state law, that requires local agencies to participate in the POST program or provide POST-certified training. Moreover, consistent with POST's long standing interpretation of the Penal Code, POST's regulations state that participation in the POST program is voluntary.[37] POST stated the following in its comments on this test claim:

> [U]nder Penal Code sections 13503, 13506, and 13510, POST is a voluntary program in which agencies may or may not participate, and any agency choosing not to participate is not subject to POST's requirements.

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[33] Penal Code section 13510.

[34] Penal Code section 13520.

[35] Penal Code section 13522.

[36] POST's website at http://www.post.ca.gov/library/other/agency_page.asp lists law enforcement agencies and participation status.

[37] California Code of Regulations, title 11, section 1010, subdivision (c).

> Only when a law enforcement agency commits to participate by local ordinance is it obliged to adhere to program requirements.

With regard to providing training, section 13511, subdivision (a), states that, "[i]n establishing standards for training, [POST] shall, so far as consistent with the purposes of this chapter, permit required training to be obtained at institutions approved by [POST]." On its website at http://www.post.ca.gov/training/default.asp, POST gives an overview of Training, Certificates & Services it provides which states:

> To assist the more than 600 law enforcement agencies that voluntarily agree to abide by its minimum training standards, POST certifies hundreds of courses annually. These courses are developed and offered by more than 800 presenters statewide. POST also provides instructional resources and technology, quality leadership training programs, and professional certificates to recognize peace officer achievement....

In comments on this test claim, POST also stated that:

> [A]ny law enforcement agency voluntarily participating in the POST program may seek to have its training programs certified by POST. A participating agency can elect to not present training courses in-house and instead send its personnel to POST-certified training institutions operated by other entities, e.g., community colleges or other law enforcement agencies. The point here is that there is no requirement for a participating agency to have POST-certified training courses....[38]

Thus, according to the Penal Code, and as the Penal Code provisions are interpreted by POST, participating in the POST program,[39] obtaining POST certification of training courses and providing POST-certified training are discretionary decisions on the part of the training provider. The courts have found it is a well-established principle that "contemporaneous administrative construction of a statute by the agency charged with its enforcement and interpretation, while not necessarily controlling, is of great weight; and courts will not depart from such construction unless it is clearly erroneous or unauthorized."[40] The Commission finds no other provision in statute or regulation to contradict POST's interpretation of the Penal Code.

Therefore, based on the plain language of the governing statutes and regulations as set forth above, local law enforcement agencies have no legal compulsion to participate in POST or establish a POST training academy. However, where no "legal" compulsion is set forth in the test claim statutes or regulations, the courts have ruled that at times, based on the particular circumstances, "practical" compulsion might be found. The Supreme Court in *Kern High School Dist.* addressed the issue of "practical" compulsion in the context of a school district

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[38] Letter from Kenneth J. O'Brien, Executive Director of POST, submitted October 31, 2002, page 1.

[39] California Code of Regulations, title 11, section 1010, subdivision (c).

[40] *State Compensation Insurance Fund v. Workers' Compensation Appeals Board* (1995) 37 Cal.App.4th 675, 683 (citing *Industrial Indemnity Co. v. Workers' Comp. Appeals Board* (1985) 165 Cal.App.3d 633, 638).

that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the court determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe … penalties" such as "double … taxation" or other "draconian" consequences.[41]

In the case of *San Diego Unified School Dist.*, the test claim statutes required school districts to afford to a student specified hearing procedures whenever an expulsion recommendation was made and before a student could be expelled.[42] The Supreme Court held that hearing costs incurred as a result of statutorily required expulsion recommendations, e.g., where the student allegedly possessed a firearm, constituted a reimbursable state-mandated program.[43] Regarding expulsion recommendations that were discretionary on the part of the district, the court acknowledged the school district's arguments, stating that in the absence of legal compulsion, compulsion *might* nevertheless be found when a school district exercised its discretion in deciding to expel a student for a serious offense to other students or property, in light of the state constitutional requirement to provide safe schools.[44] Ultimately, however, the Supreme Court denied reimbursement for the hearing procedures regarding discretionary expulsions on alternative grounds.[45]

Here, as noted above, participation in the underlying POST program and providing POST-certified training is voluntary, i.e., no legal compulsion exists. Nor does the Commission find any support for the notion that "practical" compulsion is applicable in the instant case. The test claim regulations do not address a situation in any way similar to the circumstances in *San Diego Unified School Dist.*, where the expulsion of a student might be needed to comply with the constitutional requirement for safe schools. In fact, the circumstances here are substantially similar to those in the *Kern High School Dist.* case, where the district was denied reimbursement because its participation in the underlying program was voluntary, and no "certain and severe penalties" would result if local agencies fail to participate in POST or provide their own POST-certified training.

The Supreme Court in *San Diego Unified School Dist.* underscored the fact that a state mandate is found when the state, rather than a local official, has made the decision to require the costs to be incurred.[46] In this case, the state has not required the local public agency to participate in POST or provide POST-certified training; the local agency has made that decision. Moreover, the court in *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805 (*County of Los Angeles II)*, in interpreting the holding in *Lucia Mar,*[47] noted that where local entities have alternatives under the statute other than paying the

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[41] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

[42] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 866.

[43] *Id.* at pages 881-882.

[44] *Id.* at page 887, footnote 22.

[45] *Id.* at page 888.

[46] *Id.* at page 880.

[47] *Lucia Mar, supra,* 44 Cal.3d 830.

costs in question, the costs do not constitute a state mandate.[48] Here, local agencies have alternatives available in that they can: 1) choose not to become members of POST; 2) elect not to present training courses in-house and instead send their law enforcement officers to POST-certified training institutions operated by other entities such as community colleges or other law enforcement agencies; or 3) hire only those individuals who are already POST-certified peace officers.

Claimant argues that this analysis "does not fully address the unique situation of test claimant with regard to its relationship with the [POST]."[49] Claimant asserts that participation in POST is *de facto* compelled, even though there is no state statute requiring participation in POST. Claimant argues that, "[i]n what amounts to statutory double-speak, however, the officers are most certainly bound by the requirements of POST and so are the local agencies to the extent that they can hire such officers."[50] In support of this argument, claimant states that if a law enforcement agency does not wish to be involved in POST, the Penal Code section requiring every *peace officer* to have POST basic training[51] makes that decision impossible. Claimant further notes that "POST has undeniable control of the hiring practices of even non-participating agencies"[52] and "those who are intimately involved in this arena know the pervasive and inescapable control of the POST."[53]

The claimant has provided declarations asserting the following points:

- In order for the Sacramento County Sheriff's Department to have qualified law enforcement employees, pursuant to the requirements of Penal Code section 832, the Department must either hire someone who has already been through a POST certified academy or provide its own academy and training.
- It is not cost effective for the Sacramento County Sheriff's Department or the County of Sacramento as a public entity to send new officers to an outside agency for training.
- Once an officer is hired, continuing education is required by POST. It is not cost effective for an agency as large as Sacramento County or Los Angeles County to send its officers outside for such continuing education, thus these counties must have instructors that meet the new POST standards for instructors and academy staff.
- For most POST courses, travel and per diem costs are reimbursable from POST. However, POST reimbursement does not cover backfill or tuition, nor does it cover the administrative costs associated with maintaining the records to support the new instructor requirements or the cost of completing equivalent training.

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[48] *County of Los Angeles II, supra,* 32 Cal.App. 4th 805, page 818.

[49] Comments on Staff Analysis from County of Sacramento, submitted May 2, 2007, page 1.

[50] Comments on Staff Analysis from County of Sacramento, submitted May 2, 2007, page 3.

[51] Penal Code section 832.

[52] Comments on Staff Analysis from County of Sacramento, submitted May 2, 2007, page 5.

[53] *Ibid.*

- It is true that the counties are not required to have a training academy, nor is any community college required to have one. Thus, while no individual agency is required to have a training academy, some agency or college somewhere has to provide the training so that officers throughout California can get their POST-mandated training.
- Although it has been asserted that law enforcement agencies do not have to participate in POST, POST minimum standards are now an issue of "standard of care." POST sets minimum standards by which officers and instructors are able to engage in their profession, similar to the Medical Board setting standards for doctors.

Claimant is, however, confusing *peace officer* requirements with *local law enforcement agency* requirements. It is true that peace officers are required to meet certain standards set by POST. Penal Code section 832 requires peace officers to complete a POST basic training requirement, as follows:

> (a) Every person described in this chapter as a peace officer shall satisfactorily complete an introductory course of training prescribed by [POST]. On or after July 1, 1989, satisfactory completion of the course shall be demonstrated by passage of an appropriate examination developed or approved by [POST]. Training in the carrying and use of firearms shall not be required of any peace officer whose employing agency prohibits the use of firearms.
>
> (b)(1) Every peace officer described in this chapter, prior to the exercise of the powers of a peace officer, shall have satisfactorily completed the course of training described in subdivision (a).
>
> (2) Every peace officer described in Section 13510 or in subdivision (a) of Section 830.2 may satisfactorily complete the training required by this section as part of the training prescribed pursuant to Section 13510.
>
> (c) Persons described in this chapter as peace officers who have not satisfactorily completed the course described in subdivision (a), as specified in subdivision (b), shall not have the powers of a peace officer until they satisfactorily complete the course.

But there is no state statute or executive order requiring a local law enforcement agency itself to adopt an ordinance to participate in POST or establish its own POST training classes or a POST academy. Claimant argues that because the individual officer is required to be certified by POST under Penal Code section 832, and the "pervasive and inescapable control of the POST," it is impossible for the law enforcement agency to avoid being a member of POST. Yet POST regulations clearly state that participation by the local agency in POST is voluntary.

Moreover, claimant has not demonstrated it is "practically" compelled to participate in POST or establish a training academy. Claimant asserts the "more complete analysis" set forth in *San Diego Unified School Dist.* is applicable in this instance, wherein the Supreme Court cautioned "there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement ... whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[54] In that passage, the court referenced the case of *Carmel*

[54] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 887.

Valley Fire Protection Dist. v. State of California (1987) 190 Cal.App.3d 521, which found a reimbursable state mandate was created by an executive order that required county firefighters to be provided with protective clothing and safety equipment.[55] The *San Diego* court theorized that, because the local agency possessed discretion concerning how many firefighters it would employ and could in that sense control costs, a strict application of the *City of Merced* rule could foreclose reimbursement in such a situation "for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc."[56] The court found it "doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result..."[57]

The Commission finds the court's analysis inapplicable in the instant case. In the context of the Supreme Court's warning regarding an overly-strict application of the *City of Merced* rule, claimant is attempting to liken its discretionary decisions to participate in the POST program and establish a POST training academy, with a local fire agency's exercise of discretion concerning the number of firefighters it needs to employ for a program which, based on the plain language of the executive order, mandates the local agency to provide protective clothing and equipment to its employees. However, the *San Diego* court did not have such a situation before it, nor, more importantly, did it overrule *Kern High School Dist.*, the rule of which is plainly applicable in this instance as set forth above. As noted above, the Supreme Court in *Kern High School Dist.* ruled on a substantially similar set of facts. In that case, the school district had participated in optional funded programs in which new requirements were imposed. Here, new requirements are imposed on local law enforcement agencies that choose to participate in POST and establish POST-certified training or POST academies, and those agencies can receive POST reimbursement for certain program-related costs.

In *Kern,* the court determined there was no practical compulsion to participate in the underlying programs, since a district that elects not to participate or to discontinue participation in a program does not face "certain and severe ... penalties" such as "double ... taxation" or other "draconian" consequences.[58] Claimant concedes that local law enforcement agencies are not subject to draconian consequences but argues this ruling is not on point because a local agency cannot "fully discontinue participation due to the pervasive control of the POST." There is no evidence in the record to support the claim that a local law enforcement agency cannot discontinue participation in POST, other than the assertion that control by POST is "pervasive and inescapable," and establishing POST training programs in house is "cost effective."

However, the relevant holding is from *Kern* wherein the Supreme Court states that school districts that have discretion will make the choices that are ultimately the most beneficial for the district:

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[55] *Ibid.*

[56] *Ibid.*

[57] *Ibid.*

[58] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the [new] requirements or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits. (Emphasis in original.)[59]

The circumstances discussed above are analogous to this case. Claimant states that it is "cost effective" for the Counties of Sacramento and Los Angeles, because of their size, to establish training academies and provide training in house rather than send their peace officers outside for training. Presumably, law enforcement agencies have made and will continue to make discretionary decisions regarding POST training that are the most beneficial to the agency. When those agencies have such discretion, the program is *not* state-mandated.

Therefore, any activities or costs a local agency might incur for participation in POST, establishing a training academy, and, as a result, providing POST training to trainers or ensuring academy staff have appropriate qualifications, are not subject to article XIII B, section 6, and thus do not constitute a state-mandated program.

CONCLUSION

The Commission finds that because the underlying decisions to participate in POST, provide POST-certified training or establish a POST training academy are discretionary, and that local agencies have alternatives to providing POST-certified training or establishing a POST training academy, the test claim regulations are not subject to article XIII B, section 6 of the California Constitution, and therefore do not impose a state-mandated program on local agencies.

[59] *Id.* at 753.

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Claim Number: 02-TC-03
Issue: Training Requirements for Instructors and Academy Staff

Mailing Information: Notice of adopted SOD

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DECLARATION OF SERVICE BY MAIL

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.

April 24, 2007, I served the:

RE: Adopted Statement of Decision
Training Requirements for Instructors and Academy Staff, 02-TC-03
California Code of Regulations, Title 11, Sections 1001, 1052, 1053, 1055, 1070, 1071, and 1082 (Register 2001, No. 29)
County of Sacramento, Claimant

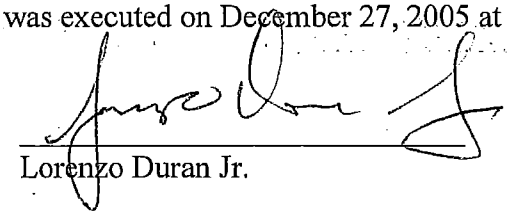
By placing a true copy thereof in an envelope addressed to:

Ms. Nancy Gust
SB-90 Sheriff's Department
County of Sacramento
711 G Street, Room 405
Sacramento, CA 95814

State Agencies and Interested Parties (See attached mailing list);

and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully paid.

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 December 27, 2005 at Sacramento, California.



Lorenzo Duran Jr.